LINA M. RAMIREZ, Individually, as Administratrix and Administratrix ad Prosequendum for the ESTATE OF WILLIAM RAMIREZ, Plaintiffs, v. CAREONE, LLC, CAREONE AT TEANECK, LLC, JANE DOE NURSES 1-10, JANE ROE TECHNICIANS, CNAS AND PARAMEDIC EMPLOYEES 1-10, RICHARD ROES 1-10, JOHN DOE PHYSICIANS 1-10, ABC CORPORATIONS 1-10, ABC PARTNERSHIPS 1-10 (the aforesaid names being fictitious and their true names being unknown), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: Motion for Leave to Appeal from an Order Filed April 24, 2024, Denying Defendants' Motion to Dismiss the Complaint for Failure to Provide an Affidavit of Merit from an Appropriately Licensed Person, from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-1239-22 Sat Below: Hon. Anthony R. Suarez, J.S.C. Civil Action

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

In this professional malpractice case, the Honorable Anthony R. Suarez, J.S.C. held that a family medicine physician, Gregg Davis, M.D. was qualified to offer an affidavit of merit ("AOM") against "the facility" or "CareOne" for its "institutional failures" or "administrative negligence" in responding to the COVID-19 pandemic, allegedly leading to the death of plaintiff's decedent. This result is contrary to the considerable authority directing that when the plaintiff's claim of vicarious liability hinges upon allegations of a deviation from professional standards of care by a licensed individual who was an employee of the named defendant, an AOM and an expert opinion from a person with the ***same*** qualifications as the ***employee*** must be provided. Dr. Davis, as a physician, is ***not*** qualified to offer standard of care opinions against the nursing staff at Care One, including registered nurses, licensed practical nurses and certified nursing assistants, who delivered the care at issue that allegedly caused harm. Further, Dr. Davis did ***not*** identify the specific individuals alleged to be negligent.

Significantly, Dr. Davis' AOM confirms that Care One's personnel took many steps to care for Mr. Ramirez and other patients during the early stages of the COVID-19 pandemic, both with respect to limiting the spread of COVID-19 and their health in general. Plaintiff thus clearly cannot maintain

any claims of gross negligence, recklessness or willful misconduct, the ***only*** claims in this action that can potentially proceed pursuant to the COVID-19 response immunity statute, New Jersey Laws of 2020, chapter 18. The trial court nonetheless held that the exceptions to the immunity for "medical services, treatment and procedures that are unrelated to the COVID-19 emergency" and "acts or omissions constituting a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct" allowed the suit to proceed. With respect to the first exception, Mr. Ramirez was admitted to Care One for rehabilitation after hip replacement surgery, not for treatment of COVID-19, and plaintiff alleged that Care One did not provide "basic medical care" to Mr. Ramirez, leading to his death from exposure to COVID-19 while in a deteriorated condition. (Da321.) With respect to the second exception, "CareOne's administrative failures allegedly created an 'unreasonable risk of harm' to their patient and therefore fall within the definition of gross negligence," (Da323), and failure "to follow CDC guidelines, put COVID protocols in place, and provide basic medical care to Mr. Ramirez due to institutional failures. . . caused his condition to deteriorate and made him susceptible to the deadly COVID virus," (Da324).

There is no dispute that this is a medical or professional negligence matter requiring an AOM from an appropriately licensed person. Dr. Davis, a

physician, is ***not*** qualified to give an AOM against any nurse or other person employed by Care One. The trial court's decision, if left in place, allows plaintiff to circumvent the AOM requirement and the COVID-19 immunity statute by recasting the nursing negligence claim—which is premised solely upon allegations that Mr. Ramirez contacted COVID-19 and passed away during the initial stage of the pandemic—as instead involving "administrative" or "institutional" failures to provide "basic medical care" and "gross negligence" or "willful disregard", a narrative that is contradicted by Dr. Davis' own affidavit.

An interlocutory appeal is essential to the interest of justice in order to direct the trial courts to apply the AOM and COVID-19 immunity statutes as the Legislature intended, and to allow this Court to provide additional instruction and clarification in standards for their application, guidance which remains necessary in order to preserve and maintain the statutes' crucial function of eliminating futile claims by dismissing them with prejudice before discovery proceeds. Defendants respectfully request that the Court grant their motion for leave to appeal and direct that the April 28, 2024 order be vacated with instructions that plaintiff's amended complaint is to be dismissed with prejudice in its entirety in accordance with the AOM statute and the COVID-19 immunity statute.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

In the initial complaint, plaintiff Lina Ramirez alleged that her father William Ramirez was admitted to Care One at Teaneck for rehabilitation after a hospitalization and surgery due to his sustaining a hip fracture from a fall at home, from February 27, 2020 through April 18, 2020, when he passed away as a consequence of contracting COVID-19. (Da11-30.)

On December 6, 2022, defendants answered the complaint, enclosing a certification of good cause to change the track assignment from Track II, "Personal Injury" to Track III, Case Type 604 "Medical Malpractice" or Case Type 607 "Professional Malpractice". (Da35-57.) By way of correspondence dated December 6, 2022, plaintiff's counsel requested an extension of time to obtain an AOM. (Da58-59.) On January 17, 2023, a consent order was filed extending the time for plaintiff to serve an AOM to April 5, 2023. (Da60-62.)

By order filed February 3, 2023, the Honorable Robert M. Vinci, J.S.C. granted defendants' motion to dismiss the complaint because plaintiff's claims were barred by the immunity from civil liability for healthcare professionals and facilities providing medical services in response to the outbreak of COVID-19 during the public health emergency afforded by the New Jersey Governor's Executive Orders and New Jersey's Laws of 2020, ch. 18. (Da63-

[1] The procedural history and statement of facts are combined for purposes of concision and clarity.

65.) The dismissal was without prejudice, and directed that "Plaintiffs may seek leave to file an amended complaint within 45 days." (Da65.) The order also granted defendants' motion to change the discovery track from Track II, personal injury, to Track III, medical malpractice or professional responsibility, as unopposed. (See ibid.; Da92.)

By orders filed April 28, 2023, Judge Suarez granted plaintiff's motion for leave to file an amended complaint and denied defendants' cross motion to dismiss the suit with prejudice, "as discovery still needs to be conducted with regard to the allegations. . . of medical malpractice, gross negligence, recklessness and/or willful misconduct." (Da97; see Da111.) The amended complaint repeated the core allegation that Mr. Ramirez developed COVID-19 and passed away in April 2020 as a consequence. Plaintiff also provided additional detail regarding the allegations that communications with Mr. Ramirez and his family regarding COVID-19 facility restrictions were unclear (see Da123-126 ¶¶68-95), failure to provide adequate food and water (see Da127-128 ¶¶110-121), and Mr. Ramirez's family's difficulties contacting his physician so that an IV could be started (see Da126-127 ¶¶102-109), and included new allegations that Care One facilities statewide, acting at the direction of state officials, took in additional COVID-19 positive patients who

could not be cared for at other facilities, resulting in higher rates of infection at Care One facilities. (See Da128-129 ¶¶124-125).

Defendants answered the amended complaint on September 13, 2023, and requested that the court schedule a Ferreira[2] conference, observing that plaintiff still had not filed an AOM. (Da167-169.) A Ferreira conference was conducted on September 26, 2023. (Da170-175.) On October 6, 2023, the Court entered an order directing "that Plaintiffs will serve an AOM within sixty days from the filing of the amended answer" and "that CareOne is permitted to file a motion to dismiss for failure to state a claim pursuant to N.J.S.A. 2A:53A-26, et seq., the Affidavit of Merit Statute." (Da172.) On October 20, 2023, Judge Suarez denied defendants' motion to dismiss the complaint for failure to timely submit an AOM, and granted plaintiff's cross motion to extend the time to file an AOM, thereby denying plaintiff's request for an additional sixty days from the date the amended answer was filed. (Da173-204.)

On November 9, 2023, plaintiff filed and served the AOM of Gregg Davis, M.D. (Da207-224.) Dr. Davis reviewed the amended complaint, Mr. Ramirez's death certificate, the Care One records, and the contract tracing report prepared by Rapid Trace that was attached to the amended complaint

[2] Ferreira v. Rancocas Orthopedics Associates, 178 N.J. 144 (2003)

(see Da210 ¶5), and set forth his factual findings as detail (see Da210-213 ¶6). Dr. Davis then gives the opinion that Mr. Ramirez had COVID as of March 18, 2020 and that, in light of his symptoms, the progress of the pandemic, multiple comorbidities, his roommates' symptoms and his own, and his family's request for a COVID test, failure to provide one until March 24, 2020, was a breach of the standard of care "by the facility and staff of Care One". (Da215.) The failure on the part of "CareOne" or "the facility" to transfer to Mr. Ramirez to a higher level of care when his condition worsened was a direct and proximate contributor to his death. (Ibid.) "CareOne" or "the facility" also failed to comply with the CDC guidance for monitoring residents' respiratory illness symptoms and avoiding group activities, and allowed "a resident to ambulate ad-lib within the facility until March 19, 2020." (Da217.) "CareOne" or "the facility" also, in Dr. Davis' opinion, did not develop a care plan to comply with the CDC guidance in monitoring respiratory symptoms and fever, avoiding group activities, avoiding communal dining, restricting ambulation and encouraging hand hygiene and promoting social distancing. (See ibid.)

Dr. Davis notes that the complaint further alleged failure to provide adequate care to Mr. Ramirez, including proper nutrition and hydration, and a delay in treatment because a doctor was on vacation. (See Da217-218.) Although there was a report of no COVID cases, there were at least five, and

Care One accepted new COVID positive patients. If those allegations were proven, Care One and its staff violated the standard of care. (See ibid.) Dr. Davis thus concludes that there was "a reasonable probability that the care, skill, or knowledge exercised or exhibited by CareOne and its staff fell outside acceptable standards of care." (Da218.) Dr. Davis' affidavit and curriculum vitae indicate that he is board certified in family medicine and has served as a medical director and attending physician in skilled nursing facilities. (See Da218-219.)

By letter dated December 21, 2023, defendants objected to Dr. Davis' AOM. (Da225-228.) Defendants then submitted a motion to dismiss as directed. (Da1-280.) By order and rider filed April 24, 2024, Judge Suarez denied defendants' motion to dismiss the complaint due to plaintiff's failure to submit an AOM from an appropriate licensed person. (Da306-325.) The court held that Dr. Davis was qualified to offer an AOM against "the facility" or "CareOne" for its "institutional failures" or "administrative negligence" in responding to the COVID-19 pandemic, including failure to transfer Mr. Ramirez to a higher level of care when he developed COVID pneumonia and failure to comply with CDC guidelines to limit the transfer of COVID-19. (See Da320-321.)

The trial court further held that the immunity afforded by New Jersey Laws of 2020, chapter 18 did not bar the suit because the exceptions to the immunity for "medical services, treatment and procedures that are unrelated to the COVID-19 emergency" and "acts or omissions constituting a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct" applied. With respect to the first exception, Mr. Ramirez was admitted to Care One for rehabilitation after hip replacement surgery, not for treatment of COVID-19, and plaintiff alleged that Care One did not provide "basic medical care" to Mr. Ramirez, leading to his death from exposure to COVID-19 while in a deteriorated condition. (Da321.) With respect to the second exception, "CareOne's administrative failures allegedly created an 'unreasonable risk of harm' to their patient and therefore fall within the definition of gross negligence," (Da323), and failure "to follow CDC guidelines, put COVID protocols in place, and provide basic medical care to Mr. Ramirez due to institutional failures. . . caused his condition to deteriorate and made him susceptible to the deadly COVID virus," (Da324).

LEGAL ARGUMENT

I. THIS LAWSUIT MUST BE DISMISSED WITH PREJUDICE BECAUSE PLAINTIFF FAILED TO SUBMIT AN AOM FROM AN APPROPRIATE LICENSED PERSON (Da306-325).

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged action 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.

N.J.S.A. 2A:53A-27. The failure to provide an AOM within the maximum 120 day period in a professional negligence case is equivalent to a failure to state a cause of action, and will result in the dismissal of the complaint with prejudice. See N.J.S.A. 2A:53A-29; A.T. v. Cohen, 231 N.J. 337, 346 (2017).

The purpose of the AOM statute is to "require plaintiffs in malpractice cases to make a threshold showing that their claims are meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation." In re Petition of Hall, 147 N.J. 379, 391 (1997); see A.T., 231 N.J. at 345-46. "The statute is designed to ferret out frivolous lawsuits at an early point in the litigation. Requiring a threshold showing of merit balances the goal of reducing frivolous lawsuits and the imperative of permitting injured plaintiffs the opportunity to pursue recovery from culpable defendants." Fink v. Thompson, 167 N.J. 551, 559 (2001); see also A.T., 231 N.J. at 345-46.

The AOM statute lists sixteen types of "licensed persons" to whom the AOM requirement applies, including "a physician in the practice of medicine or surgery pursuant to R.S. 45:9-1" and "a registered professional nurse pursuant to P.L. 1947, c.262 (C.45:11-23 et seq.)." N.J.S.A. 2A:53A-26(f), (i). A "licensed person" to whom the AOM requirement extends also includes "a health care facility" as defined in N.J.S.A. 26:2H-2." N.J.S.A. 2A:53A-26(j).

It is well-established that a hospital or other healthcare facility "can ***only*** act through its agents, servants and employees" and therefore "can ***only*** be vicariously liable" for the conduct of its agents, employees and staff. See Weiss v. Goldfarb, 154 N.J. 468, 482 (1998) (emphasis added); see also Schultz v. Roman Catholic Archdiocese, 95 N.J. 530, 538 (1984). Each member of the staff is subject to the standard of care in his or her ***own*** profession. The Supreme Court in Haviland v. Lourdes Medical Center of Burlington County, 250 N.J. 368 (2022), recently confirmed that when the plaintiff's claim of vicarious liability hinges upon allegations of a deviation from professional standards of care by a licensed individual who was an employee of the named defendant, an AOM and an expert opinion from a person qualified in the same profession as the ***employee*** must be provided. On

the other hand, when the employee is ***not*** a licensed person, an AOM is not necessary.[3]

An "appropriate licensed person" qualified to offer an AOM must be licensed in the ***same*** profession as the person against whom the opinion is offered. In Hill International, Inc. v. Atlantic City Board of Education, 438 N.J. Super. 562 (App. Div. 2014), appeal dismissed, 224 N.J. 523 (2016), the Appellate Division held that a licensed engineer could not offer an AOM against a licensed architect and his licensed architectural firm. See id. at 569-70. Although the professional licensure laws overlapped to some degree, "***the AOM must be issued by an affiant who is licensed within the same profession as the defendant***." Id. at 570 (emphasis added). The Hill court observed:

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[3] See also Haviland, 250 N.J. at 378-81 (reviewing prior caselaw); McCormick v. State, 446 N.J. Super. 603 (App. Div. 2016) (an affidavit of merit is required when the claims of vicarious liability hinge upon allegations of a deviation from the professional standards of care by licensed individuals who work for the named defendant); Albrecht v. Correctional Med. Servs., 422 N.J. Super. 265, 273 (App. Div. 2011) ("when a firm's shareholders are licensed persons under the statute, a plaintiff is required to provide an AOM in order to pursue litigation against the firm alone"); Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J. Super. 1, 26 (App. Div. 2010) ("it would be 'entirely anomalous' to allow a plaintiff to circumvent the affidavit requirement by naming only law firms as defendants in a legal malpractice complaint and not the individual attorneys who performed the services"); Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 598-99 (App. Div.), (when an engineering firm is sued for the alleged negligence of its hydrogeologist, plaintiff properly supplied the firm with an affidavit of merit from a geologist, because "[t]he liability pressed against the engineering firm is solely vicarious"), certif. denied, 168 N.J. 294 (2001).

> For instance, it would be contrary to the text and purposes of the AOM statute to allow a licensed nurse to serve as a qualified affiant against a licensed physician who, for example, negligently took and recorded a patient's blood pressure. Although nurses and physicians are both trained and authorized to take blood pressure readings, they are each still held professionally accountable under the standards of care of their own individual professions. It would thwart the screening of objectives of the AOM statute to allow a nurse to vouch for a medical malpractice claim asserted against a physician, and vice-versa.

Id. at 586.[4]

In Fink v. Thompson, 167 N.J. 551 (2001), the Supreme Court observed that the AOM statute requires the plaintiff to provide "***each defendant***" with an affidavit that indicates the plaintiff's claim has merit. See id. at 559-60 (quoting N.J.S.A. 2A:53A-27 (emphasis added)). The Fink Court held that an AOM that did not refer to the defendant physician by name in a listing of hospitals and physicians who allegedly deviated from the standard of care was equivalent to "failure to file an AOM concerning a specific defendant" and "constitutes a failure to state a cause of action against that defendant." Id. at 560 (quoting In re Petition of Hall, 147 N.J. at 390).)

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[4] The Hill court reached this conclusion independent of additional requirements of the Medical Care Access and Responsibility and Patient's First Act, N.J.S.A. 2A:53A-37 to -42, which requires that, when a physician is a defendant in a medical malpractice case, the expert providing an Affidavit of Merit or testifying as to the standard of care must possesses the same credentials in the same specialty or subspeciality as the defendant doctor. See Hill, 438 N.J. Super. at 586 n. 10; see also N.J.S.A. 2A:53A-27; N.J.S.A. 2A:53A-41; Nicholas v. Mynster, 213 N.J. 463 (2013).

The December 11, 2023 opinion in Hargett v. Hamilton Park OPCO, LLC, 477 N.J. Super. 390 (App. Div. 2023), certif. denied, 256 N.J. 453 (2024), confirmed that in a suit against a nursing facility alleging the decedent developed pressure ulcers, an AOM from a registered nurse "alleging collective negligence by multiple unidentifiable nurses was inadequate." Id. at 393. The Hargett court explained:

> Generally, an AOM should identify the licensed person who allegedly deviated from the acceptable standard of care. Medeiros v. O'Donnell & Naccarto, Inc., 347 N.J. Super. 536, 542, 790 A.2d 969 (App. Div. 2002). That is not to say an AOM must always name the licensed person who is the subject of a vicarious liability claim. A number of decisions considered and accepted an AOM that did not identify the licensed person by name. In each case, however, it was possible to identify the by description within the AOM the licensed person or entity alleged to have deviated from the applicable standard of care. See, e.g., ibid. (AOM referred to engineers and there was only one engineering firm); Fink, 167 N.J. at 551 (doctor who discontinued certain medication was identifiable); Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 771 A.2d 1141 (2001) (unnamed radiologist was identifiable).
>
> Here, it is not possible to identify any Alaris Health nurse who Kotz asserts were negligent because the AOM refers generally to the entire Alaris Health nursing staff over an extended period and indiscriminately combines the nursing staffs of two separate facilities. Appellant did not satisfy her obligation as to Alaris Health by serving an AOM that opines collectively as to the care provided by its nurses and the nurses at Jersey City Medical Center. Appellant was required to "provide each defendant" with an appropriate AOM and failed to do so.

Hargett, 477 N.J. Super. at 397-98. Additionally, plaintiff was prohibited from recasting the vicarious liability claim against Alaris as an "administrative

negligence" claim against Alaris itself or its "nursing staff as a whole". See id. at 399-400.

It is undisputed that this is a professional or medical malpractice matter requiring an AOM at the outset and, at trial, competent expert testimony to establish that a deviation from the applicable standard of care proximately caused harm to the decedent. Plaintiffs' original and amended complaints allege that, during an admission to Care One at Teaneck for rehabilitation after a hip fracture, plaintiff's decedent William Ramirez contacted COVID-19 and passed away on April 18, 2020, as a consequence. (Da11-30; Da114-142.) The complaint specifically alleges that defendants employed "nurses" and "medical personnel" (Da117-118 ¶11; Da129 ¶128) who provided "nursing care" and "medical care" to plaintiffs' decedent (Da116 ¶5, Da129 ¶128), at defendants' "nursing home", "long term-care facility", "comprehensive rehabilitation facility" or "skilled nursing facility", (Da116 ¶¶5-6) in a "wanton, willful reckless and/or negligent manner constituting professional negligence," (Da129 ¶128).[5]

[5] Plaintiff's complaint clearly alleges a professional or medical malpractice matter under the three-part test set forth in Couri v. Gardner, 173 N.J. 328, 334 (2002). Plaintiff seeks damages for personal injuries to Mr. Ramirez. Defendant Care One at Teaneck, and many of its employees, are "licensed persons" and "a health care facility" as defined in the AOM statute. Plaintiffs' claims require proof that defendant, or its employees, deviated from the relevant professional standards. The complaint alleges that defendants and

Dr. Davis, as a ***physician***, is not qualified to offer standard of care opinions against the ***nursing*** staff at Care One, including registered nurses, licensed practical nurses and certified nursing assistants. Notably, plaintiff had ***not*** identified the specific individuals alleged to be negligent and provided an AOM against them, as required by N.J.S.A. 2A:53A-27, Fink and Hargett. Instead, plaintiff has merely claimed that "CareOne and its staff" deviated from the standard of care. (Da215; Da217-218.)

The case law, including Haviland, makes it quite clear that the type of licensed professional issuing the AOM and presenting an opinion as to deviation from the standard of care must be licensed in the ***same*** profession as the licensed staff persons or employees who are alleged to have been negligent. Dr. Davis, as a physician, cannot offer standard of care opinions against the nursing or other medical professional staff at Care One, for example for failure to provide a COVID test to Mr. Ramirez until March 24, 2020, failure to transfer Mr. Ramirez to a higher level of care, any purported

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their professional employees were negligent in allowing Mr. Ramirez to contract COVID-19. (Da11-30; Da114-142.) Regardless of the label plaintiff attempts to place on the action, it is a professional malpractice matter brought vicariously against Care One at Teaneck for the alleged actions or inactions of its agents, servants and employees—licensed medical professional staff—providing care in response to COVID-19. Judge Suarez thus on October 20, confirmed that "I don't think there is any question that an affidavit of merit is required in this case." (Da202 at 23:4-5.)

failure to comply with CDC guidance regarding social distancing and other protective measures and document that compliance in the care plan, and the generalized allegations contained in the complaint of failure to provide adequate care to Mr. Ramirez, including proper nutrition and hydration and a delay in treatment because a doctor was on vacation. (See Da215; Da217-218.) As described in Hargett, plaintiff cannot be permitted to avoid the requirements of the AOM statute by asserting an "administrative" or "facility" claim against Care One instead of a vicarious liability claim against specific members of its nursing or other staff members.[6] Plaintiff cannot correct or serve a new AOM at this time.

The trial court in its April 24, 2024 opinion, while reciting the law verbatim as set forth in defendants' brief and this one, above (see Da311-319), nonetheless rejected defendants' explanation that this is a nursing negligence case (see Da308-311), and held that Dr. Davis was qualified to offer an AOM against "the facility" or "CareOne" for its "institutional failures" or "administrative negligence" in responding to the COVID-19 pandemic,

[6] It also should be noted that the affidavit of merit discusses the conduct of several physicians and physician extenders who were ***not*** employed by Care One, including a pulmonary medicine physician, a nurse practitioner, and an attending physician, Michael Hernandez, M.D. who is board certified in internal medicine. Dr. Davis, a family medicine physician, is not qualified to give standard of care opinions against those persons, under the AOM statute and Patients First Act. (See Da218.)

including failure to transfer Mr. Ramirez to a higher level of care when he developed COVID pneumonia and failure to comply with CDC guidelines to limit the transfer of COVID-19. (See Da320-321.)

II. DR. DAVIS' AOM DEMONSTRATES THAT THIS LAWSUIT SHOULD BE DISMISSED WITH PREJUDICE PURSUANT TO NEW JERSEY'S COVID-19 IMMUNITY STATUTE (Da306-325).

On March 9, 2020, in Executive Order No. 103, New Jersey Governor Philip D. Murphy declared a Public Health Emergency and a State of Emergency for the entire State of New Jersey due to the public health hazard created by COVID-19. (Da229-237.) On April 1, 2020, in Executive Order No. 112, Governor Murphy declared that health care professionals and healthcare facilities "shall be immune from civil liability" for any damages alleged to have been sustained as a result of acts or omissions taken in good faith "in the course of providing healthcare services in support of the State's COVID-19 response." (Da238-250.)

On April 14, 2020, New Jersey's Laws of 2020, ch. 18, was adopted, confirming that healthcare professionals and facilities are immune from civil liability for medical services, treatment and procedures relating to the COVID-19 emergency. (Da251-255.) The statute is retroactively effective beginning on March 9, 2020, and mandates that health care professionals and health care facilities "shall not be liable for civil damages for injury or death

alleged to have been sustained as a result of an act or omissions by the health care professional in the course of providing medical services in support of the State's response to the outbreak of coronavirus disease during the public health emergency and state of emergency declared by the Governor in Executive Order 103 of 2020." L. 2020, c. 18 § 1(c). The immunities provided by the statute and Executive Order No. 112 remain in effect until and terminate on September 1, 2021. See N.J.S.A. 26:13-33.

The immunity extends to all "efforts to treat COVID-19 patients and to prevent the spread of COVID-19 during the public health emergency and state of emergency declared by the Governor in Executive Order 103 of 2020." L. 2020, c. 18 § 1(c). The stated purpose is to "ensure that there are no impediments to providing medical treatment related to the COVID-19 emergency and that all medical personnel supporting the COVID-19 response are granted immunity." L. 2020, c. 18 §1(a). The immunity does not, however, apply to the provision of medical care rendered in the ordinary course of business, for example, orthopedic procedures, OB/GYN services and necessary cardiology procedures performed during the emergency. See ibid.

In this case, plaintiff's allegations that her father Mr. Ramirez, during an admission to Care One at Teaneck for rehabilitation for a hip fracture, developed COVID-19 and passed away on April 18, 2020 as a consequence of

defendants' alleged negligence in responding the COVID-19 pandemic during its early stage, and at the direction of New Jersey personnel and in order to assist patients who were not receiving adequate care and treatment at other healthcare facilities, fall squarely within the immunity from civil liability for claims against medical personnel for claims of injury and death during the public health emergency afforded by the New Jersey Governor's executive orders and New Jersey Laws of 2020, Chapter 18, as Judge Vinci recognized in entering his February 3, 2023 opinion and order. (Da63-93.) The subsequent April 28, 2023 orders nonetheless allowed plaintiff to proceed on ***all*** counts of the amended complaint, even the ordinary negligence claims that are categorically and clearly barred by the statute, because "discovery still needs to be conducted with regard to the allegations. . . of medical malpractice, gross negligence, recklessness and/or willful misconduct." (Da100.)

Although gross negligence is excepted from the statutory immunity, the caselaw does not contemplate the application of a gross negligence theory in the nursing or medical malpractice context. Gross negligence is the failure to exercise even slight care or diligence and "refers to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise slight care or diligence." Model Civil Jury Charge 5.12. Gross negligence includes the "fail[ure] to exercise even scant

care," "undoubtedly denotes 'the upper reaches of negligent conduct,'" "is commonly associated with egregious conduct," is "an extreme departure from ordinary care or the want of even scant care," and is "the failure to exercise slight care or diligence." Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 364-66 (2016) (quoting Parks v. Pep Boys, 282 N.J. Super. 1, 17 n. 6 (App. Div. 1995)).

Moreover, absent a specific factual allegation of intentional misconduct implicating the statute's exception, plaintiff certainly cannot overcome the COVID-19 immunity statute or ever satisfy the standards mandated by the Punitive Damages Act, N.J.S.A. 2A:l5-5.9 to -5.17, and associated caselaw. See, e.g., Rivera v. Valley Hospital, Inc., 252 N.J. 1, 22 (2022) (prohibiting plaintiff in a medical malpractice case from "recasting" ordinary negligence as "actual malice" or "wanton and willful disregard" and directing that summary judgment be entered on the punitive damages claims); Edwards v. Our Lady of Lourdes Hospital, 217 N.J. Super. 448 (App. Div. 1987) (reversing punitive damages verdict in a medical malpractice case absent evidence of knowing or intentional wrongdoing).

Dr. Davis' AOM demonstrates that it is ***not*** possible for plaintiff in this case to overcome the COVID-19 immunity statute by way of a gross

negligence or punitive damages claim. The AOM confirms that Mr. Ramirez received extensive care and treatment at Care One, including the following:

> A pulmonary medicine consultation on March 3, 2020, for a cough, to be followed by consultation with a speech pathologist
>
> A March 5, 2020 follow-up visit with pulmonary medicine, with speech evaluation planned
>
> On March 8, 2020, a nurse recorded Mr. Ramirez's complaint of a sore throat.
>
> On March 9, 2020, a chest x-ray was performed
>
> A pulmonary medicine follow-up occurred on March 10, 2020, to evaluate pneumonia, a cerebral vascular accident and dysphagia. A registered nurse and speech pathologist saw no signs of aspiration, and the physician recommended BREO (a combination of two medicines, an inhaled corticosteroid and a long-acting beta 2-adrenergic agonist), singular, IV fluids, and a feeding study. The registered nurse recorded a sore throat.
>
> On March 12, 2020, there was a pulmonary medicine follow-up finding of dyspnea on exertion. Physical therapy was recommended due to weakness and he was to continue the nebulizer for asthma.
>
> On March 14, 2020, an order for guaifenesin, an expectorant, was placed.
>
> On March 17, 2020, Mr. Ramirez was transported to the surgeon's office
>
> On March 18, 2020, a nurse practitioner noted that Mr. Ramirez had a harsh cough and started a misty nebulizer.
>
> On March 20, 2020, Mr. Ramirez was prescribed a Z-Pack and promethazine, and a chest x-ray was performed.
>
> On March 24, 2020, Dr. Gallo ordered a COVID test.

> On April 7, 2020, Mr. Ramirez was transferred to the COVID wing and started on Plaquenil and azithromycin.
>
> On April 15, 2020, a chest x-ray was performed.

(See Da210-213 ¶6.) The AOM also indicates that efforts to contain the spread of COVID-19 and to treat patients for the disease were taken, including testing, isolation of COVID-19 positive patients, other social distancing measures, and the administration of medication to plaintiff's decedent. (See ibid.; Da215-218.) The facts set forth in the AOM, based upon Dr. Davis' review of the medical records, confirm that there is ***no*** possibility that facts can be established in this case that would support a claim of ***gross negligence***, let alone ***intentional*** wrongdoing in the sense of an evil minded act or wanton and willful disregard of the rights of another beyond the scope of the statutory immunity. Taken as a whole, these facts demonstrate that the facility staff took action to care for and protect Mr. Ramirez and other patients.

Similarly, plaintiff's allegations that Mr. Ramirez was entirely denied "basic medical care" allowing his condition to deteriorate and making him more susceptible to COVID-19 are incorrect. Again, the AOM confirms that Mr. Ramirez was seen multiple times by pulmonary medicine specialists, a nurse practitioner, and an attending physician. (See Da207-221.) Plaintiff's complaints and the AOM only serve to confirm the reasoning underlying the COVID-19 healthcare response immunity statute in the first instance: The

healthcare providers and facilities that supported the response to the COVID-19 healthcare emergency were immunized from liability because there was no effective way to prevent the spread of or to treat the novel coronavirus. No indicia of gross negligence or punitive damages are present, and plaintiff's claims are fully barred by the immunity statute.

CONCLUSION

The trial court's decision, if left in place, allows plaintiff to circumvent the AOM requirement and the COVID-19 immunity statute by recasting the nursing negligence claim—which is premised solely upon allegations that Mr. Ramirez contacted COVID-19 and passed away during the initial stage of the pandemic—as instead involving "administrative" or "institutional" failures to provide "basic medical care" and "gross negligence" or "willful disregard", a narrative that is contradicted by Dr. Davis' own affidavit.

An interlocutory appeal is essential to the interest of justice in order to direct the trial courts to apply the AOM and COVID-19 immunity statutes as the Legislature intended, and to allow this Court to provide additional instruction and clarification in standards for their application, guidance which remains necessary in order to preserve and maintain the statutes' crucial function of eliminating futile claims at the outset before discovery proceeds. Defendants respectfully request that the Court grant their motion for leave to

appeal and direct that the April 28, 2024 order be vacated with instructions that the amended complaint be dismissed with prejudice in its entirety.

Respectfully submitted,

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Attorneys for Defendants/Movants
Care One at Teaneck, LLC d/b/a Care One at Teaneck and Care One, LLC

Dated: May 14, 2024 By: _____
Anthony Cocca, Esq.

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June 24, 2024

Joseph H. Orlando, Clerk
Superior Court of New Jersey-Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625

Re: Ramirez v. Care One, LLC, *et al.*
Docket Nos. A-003103-23
Civil Action: Motion for Leave to Supplement the Record Pursuant to R.2:5-5
Letter Brief in Support of Plaintiffs'/Respondents' Motion for Leave to Supplement the Record

HONORABLE JUDGES:

This firm represents the Plaintiffs/Respondents in the above-captioned matter. Please accept this letter brief in lieu of a more formal brief in support of Plaintiffs'/Respondents; motion for leave to supplement the record pursuant to R. 2:5-5.

In Defendants'/Appellants' first Leave of Court for Motion to Dismiss the Complaint with Prejudice, Defendants/Appellants argued, in part and in sum, the Complaint and/or the Amended Complaint should be dismissed with prejudice because

> Allowing plaintiff to proceed on the amended complaint—which like the original complaint contains no specific allegations placing plaintiff's claims outside the scope of the statutory immunity—would contravene the law's stated purpose as well as its express direction that health care professionals and health care facilities "shall not be liable for civil damages for injury or death alleged to have been sustained as a result of an act or omission by the health care professional in the course of providing medical services in support of the State's response to the outbreak of coronavirus disease during the public health emergency and state of emergency." L. 2020, c. 18 §1(c). Allowing plaintiff to proceed with discovery on all claims—even those of ordinary negligence, which are categorically barred by the statute—would also effectively eviscerate the COVID-19 immunity statute's stated purpose, to "ensure that there are no impediments to providing medical treatment related to COVID-19 emergency and that all medical personnel supporting the COVID-19 response are granted immunity," L. 2020, c. 18 §1(a).

(Defendants'/Appellants brief filed on July 3, 2023 at pp. 2-3). (Pa1).

This Motion for Leave of Appeal was denied by the Court. (Da143).

On November 9, 2023, Defendants/Appellants again filed Leave of Court for Motion to Dismiss the Complaint with Prejudice. (Pa65). In that Motion, Defendants'/Appellants' arguments focused on the pretextual context that the

trial court erred by extending the time Plaintiffs/Respondents could submit their Affidavit of Merit. (Da176).

The court again denied the Defendants'/Appellants' Leave of Court for Motion to Dismiss the Complaint with Prejudice. (Da205).

In this matter, Defendants/Appellants for a third time, filed a Leave of Court for Motion to Dismiss the Complaint with Prejudice.

Defendants'/Appellants' arguments appear to substantively mirror their previous arguments of their prior Leaves of Court for Motion to Dismiss the Complaint with Prejudice.

It is a well-established principle that an appellate court's review is almost always limited to the record below. *R.* 2:5-4(a) ("The record on appeal shall consist of all papers on file in the court or courts or agencies below".) The appellate court "should not, and almost without exception do[es] not, consider matter not in the record below." *Drake v. Dep't of Human Servs., Div. of Youth & Family Services*, 186 N.J. Super. 532, 537 (App. Div. 1982). If, however, evidence not covered in the proceedings below might be material to the issues on appeal, a party may make a motion to supplement the record. *R.* 2:5-5.

In this case, Defendants/Appellants are making similar motions couched under different pretexts. The Court should consider Defendants'/Appellants' prior two motions so that the Court could note their extreme similarities,

including requesting the same relief that had earlier been denied to them by this Honorable Court.

Plaintiffs/Respondents wish to have a complete record which would include the briefs considered in Defendants'/Appellants' previously filed motions for leave to appeal, both of which were denied.

Based upon the foregoing, Plaintiffs/Respondents respectfully ask that this Court grant their motion for leave to supplement the record.

Dated: June 24, 2024

Respectfully submitted,

/s/ *Juan C. Fernandez*

Juan C. Fernandez

JCF:scf

cc: Anthony Cocca, Esq.
Katelyn E. Cutinello, Esq.