ESTATE OF NAFIZIA RUGBEER, by CHRISTOPHER RUGBEER, Administrator

Plaintiffs,

-v-

KAMRAN KHAZAEI, M.D., KIEL KELLEY, C.R.NA., NOUVELLE CONFIDENCE, THE CENTER FOR COSMETIC LASER AND REJUVENATION, JOHN DOES 1-10, JANE DOES 1-10 (representing presently unknown health care providers or health care providers with regard to which negligence is not presently suspected, including but not limited to, doctors, surgeons, emergency medicine doctors, anesthesiologists, hospitalists, physician assistants, nurses, nurse practitioners, nurse anesthetists, technicians, and others); and ABC CORPS 1-10 (representing presently unknown facilities or entities who rendered care to the plaintiff who have deviated from the standard of care or facilities or entities with regard to which negligence is not presently suspected),

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-003269-23T4

Civil Action

ON APPEAL FROM THE ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY

Docket No. UNN-L-1600-23
Sat Below:

Hon. John M. Deitch, J.S.C.

BRIEF OF DEFENDANTS/APPELLANTS KAMRAN KHAZAEI, MD AND NOUVELLE CONFIDENCE, LLC

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PRELIMINARY STATEMENT

Defendants Kamran Khazaei, M.D. and Nouvelle Confidence, LLC ("the Khazaei Defendants") appeal a June 20, 2024 order denying their motion for reconsideration of a May 14, 2024 order, which order *sua sponte* reversed an order of a different trial judge; such previous order, dated March 22, 2024, had granted a motion by the Khazaei Defendants to stay plaintiff Estate of Nafizia Rugbeer's survival action (a medical malpractice cause of action) in favor of arbitration. Plaintiff's decedent Nafizia Rugbeer had contracted to have the Khazaei Defendants perform liposuction, an elective cosmetic procedure; such written contract included an arbitration clause that decedent understood and agreed to, and which clause should be enforced according to its terms.

The trial court lacked jurisdiction to "reconsider" and reverse the March 22, 2024 "stay order": such was not an interlocutory order "subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice" (the trial court, in vacating the March 22, 2024 "stay order," relied on this provision of Rule 4:42-2). A trial court's decision to compel or deny enforcement of a contractual arbitration provision constitutes a "final order" that triggers the 45-day appeal period provided under R. 2:4-4. Hayes v. Turnersville Chrysler Jeep, 453 N.J. Super. 309 (App. Div. 2018). Moreover, the Estate had waived its right to appeal the March 22, 2024 "stay order," having failed to file

a notice of appeal within 45 days of its entry. Thus, the trial court's June 20, 2024 order denying the Khazaei Defendants' motion to reverse its May 14, 2024 order "restor[ing]" "this matter…to the trial calendar in its entirety" should be reversed and the May 14, 2024 "reverse and restore" order should be vacated, such that the March 22, 2024 "stay order" will control.

Even were the propriety of the March 22, 2024 "stay order" properly before this court (had the Estate filed a timely notice of appeal), as we argue *infra*, the arbitration agreement at issue is valid and enforceable.

Moreover, even were the March 22, 2024 "stay order" considered an interlocutory order subject to reconsideration, the trial court lacked authority to *sua sponte* "reconsider" and reverse such order, which had been entered by a different trial judge. The trial court's order reversal of the March 22nd "stay order" did not identify or rely on new facts or a change in the law regarding arbitration, such that that was not grounds for reconsideration. The trial court's June 20, 2024 order granting the Khazaei Defendants' motion for reconsideration, but leaving intact its May 14, 2024 "vacation order," relied upon the "interests of justice" provision of Rule 4:42-2 as the jurisdictional basis for reconsideration. However, Rule 4:42-2 requires that such motion be made to the judge who entered the order, to avoid what we respectfully submit happened here: a later-in-time judge second-guessed an earlier judge's rulings. Had the Estate

even moved for reconsideration of the March 22, 2024 "stay order," it would have been required to make such motion ("shall be made") to the trial judge who had entered the order (R. 4:49-2(b)). With all respect due to the trial court, we submit that a judge to whom a pending case is reassigned lacks authority to reverse the decisions of the previous judge only because he or she disagrees with them—the subsequent trial judge cannot appoint him or herself an interim court of appeals.

If this court does not agree that the trial court lacked jurisdiction to "reconsider" the March 22, 2024 "stay order" because such was a final order, it should for these reasons reverse the June 20, 2024 order denying the Khazaei Defendants' reconsideration motion and vacate the May 14, 2024 order reversing the March 22, 2024 "stay order," leaving intact the stay of the Estate's survival action in favor of arbitration.

PROCEDURAL HISTORY

On May 18, 2023, Plaintiff The Estate of Nafizia Rugbeer, by Christopher Rugbeer, its administrator, filed suit against defendants Dr. Kamran Khazaei, M.D., The Center for Cosmetic Laser and Rejuvenation, Kiel Kelley, C.R.N.A. and several "John Doe" defendants (Da005-026). Count One of the Complaint, captioned "Survival Action," purports to assert a cause of action pursuant to NJSA 2A: 15-3

(Da007-Da008). Count Two of the Complaint, captioned "Wrongful Death," purports to assert a cause of action pursuant to NJSA 2A: 31-1 (Da008-Da009).

On July 19, 2023, Defendants Kamran Khazaei, M.D., and Nouvelle Confidence (collectively, "the Khazaei Defendants") filed a motion to stay the Estate's causes of action against them, such causes of action to be submitted to arbitration (Da001-Da026). On September 8, 2023, the Honorable John D. Hudak, J.S.C. entered an order staying the case for 30 days to allows "limited discovery relating to the formation of Arbitration Agreement only. Motion to be relisted at end of 30 day for Court to consider motion" (Da028). Following such limited discovery, additional briefing and oral argument, on March 22, 2024, Judge Hudak entered an order and opinion which dismissed Count Two, "Wrongful Death," without prejudice; and granted the Khazaei Defendants' motion to stay the litigation in favor of arbitration as to Count One, the "Survival Action" (Da070-079).

On March 21, 2024, one day prior to the issuance of the March 22, 2024 Order, the Estate filed a motion to file an amended complaint. (Da083). Such proposed amended complaint sought to assert a cause of action for wrongful death on behalf of Christopher Rugbeer individually, as an heir at law of Nafizia Rugbeer. (Da094-Da102).

On May 14, 2024, the court entered an order titled "Decision and Statement of Reasons" which order granted the Estate's motion to file an amended complaint,

and which also stated, *sua sponte*, that "[t]his matter is restored to the trial calendar **in its entirety**" (Da080; emphasis added). In "restoring" the case "in its entirety" to the trial calendar, the court reversed and vacated the March 22, 2024 order that had dismissed Count Two of the complaint, "Wrongful Death," without prejudice; and which had granted the Khazaei Defendants' motion to stay the litigation in favor of arbitration as to Count One, the "Survival Action."

On June 3, 2024, the Khazaei Defendants filed a motion for reconsideration and reversal of the court's May 14, 2024 order. By order dated June 20, 2024, the court granted such motion for reconsideration and, on reconsideration, left its May 14, 2024 order intact. (Da162-63).

STATEMENT OF FACTS

On October 14, 2021, seventy days before her scheduled liposuction surgery, decedent Nafizia Rugbeer and the Khazaei Defendants entered into a contract captioned, "Patient-Physician Arbitration Agreement" ("the Arbitration Agreement") in connection with liposuction surgery she was to have. (Da055).

The Arbitration Agreement is a "plain language," easily understood one-page document that Dr. Khazaei, on behalf of Nouvelle Confidence and on his own behalf, and the decedent each signed 70 days prior to the liposuction procedure (Da003). The Agreement, in clear and unambiguous terms, states that "any dispute arising from medical services rendered by Kamran Khazaei, M.D.,

Nouvelle Confidence and or any physician nurse or person associated therewith shall be submitted to binding arbitration and shall not be resolved by a court of law" (Da003).

In equally unambiguous terms, the Arbitration Agreement sets forth that its terms apply to "any claim of a spouse, heir, child (born or unborn), or other successor in interest to any such claim" (Da003). The Arbitration Agreement permitted decedent to revoke the Agreement: "This agreement may be revoked and cancelled by written notice delivered to Dr. Khazaei and/or the Nouvelle Confidence within 30 days of the signing of this agreement." (Da003). Decedent did not thereafter revoke the Agreement. (Da038-040).

The Agreement required decedent to acknowledge:

> That I have discussed to my satisfaction any questions I may have had regarding the arbitration agreement with a member of the Kamran Khazaei, MD or Nouvelle Confidence, staff and have been given the opportunity to obtain further counsel if desired. I acknowledge that I have freely negotiated all terms herein set forth.

(Da004). Indeed, Decedent and Dr. Khazaei discussed the Agreement on October 14, 2021 (just prior to its being signed), Dr. Khazaei informing decedent that he would answer any questions she might have (Da039-Da040; Da062).

Decedent signed the Arbitration Agreement in two places (Da004). She signed towards the top of the Agreement, where, immediately adjacent to her signature was the statement, "I have read this agreement in its entirety and

understand and agree to the following" (Da004). Decedent also signed towards the bottom of the Agreement, directly below a "Notice" that states:

> BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OR MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

(Da004).

The Complaint alleges that "[e]ach of the Defendants failed to exercise reasonable care and was negligent in the management of their patient, Nafizia Rugbeer." (Da008). All of the Estate's claims against the Khazaei Defendants "arise from" "medical services rendered by Kamran Khazaei M.D., Nouvelle Confidence and or any physician nurse or person associated therewith" (that is, the precise type of claims that decedent agreed to submit to arbitration)(Da004).

LEGAL ARGUMENT

I. WHETHER THE ARBITRATION AGREEMENT SHOULD BE ENFORCED IS SUBJECT TO A DE NOVO STANDARD OF REVIEW (Da080; Da162-Da163)

"*De novo* review applies when appellate courts review determinations about the enforceability of contracts, including arbitration agreements." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019); *see also* Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 446 (2014) (an appellate court's "approach in construing an arbitration provision of a contract

is governed by the same *de novo* standard of review"). "Whether a contractual arbitration provision is enforceable is a question of law, and [the reviewing court] need not defer to the interpretative analysis of the trial or appellate courts unless we find it persuasive." Kernahan, 236 N.J. at 316. "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

II. THE TRIAL COURT LACKED JURISDICTION TO RECONSIDER AND REVERSE THE MARCH 22, 2024 STAY ORDER (Da080; Da162-Da163; 2T19:16-22:14)

A. The Trial Court Lacked Jurisdiction to Reconsider and Reverse the March 22, 2024 Stay Order Because it was a Final Order Subject to Strict Deadlines for Reconsideration and Appeal (Da080; Da162-Da-163; 1T18:20-19:8; 2T19:16-22:14)

Rule 2:2-3(b) identifies those orders that are deemed final, including "orders compelling or denying arbitration, whether the action is dismissed or stayed." Rule 2:2–3(b)(8); see also Wein v. Morris, 194 N.J. 364, 380 (2008). "Whether the court in compelling arbitration dismisses the action as part of a final order or stays the matter, the order will be deemed final and appealable as of right." Wein 194 N.J. 364, 380 at 944. This is true "regardless of whether such orders dispose of all issues and all parties, and the time for appeal therefrom starts from the date of the entry of that order." GMAC v. Pittella, 205 N.J. 572, 587 (2011). As such, the trial court's March 22, 2024 "stay order" was a final

order subject to review only by a motion for reconsideration under Rule 4:49-2 or an appeal as of right.

Rule 4:49-2 provides that a motion for reconsideration of a judgment or order "shall be served not later than [twenty] days after service of the judgment or order." The Estate never moved for reconsideration of the March 22, 2024 "stay order"; by the time that the trial court *sua sponte* "reconsidered" and reversed such order, the 20 day "window" for reconsideration was closed. As explained in Hayes v. Turnersville Chrysler Jeep, 453 N.J. Super. 309, 313 (App. Div. 2018), "Rule 1:3-4(c) prohibits the parties and the court from 'enlarge[ing] the time specified by ... [Rule] 4:49-2' for the filing of a motion for reconsideration of a judgment or order, and, as a result, a trial court does not have 'legal authority to enlarge the time restrictions of Rule 4:49-2.'"

Moreover, the March 22, 2024 "stay order" was a final judgment that the Estate had not sought to appeal (had not filed a notice of appeal). The trial court incorrectly assumed that it had authority to "reconsider" and vacate the March 22, 2024 "stay order" because it was an interlocutory order, but it was not. See Da092, footnote 6. Because the trial court's March 22, 2024 order staying litigation in favor of arbitration was appealable as of right, R. 2:2–3(a)(3), the only avenue of appeal after the time to file a motion for reconsideration had expired was a direct appeal to this court. Thus, the trial court no longer had

jurisdiction with respect to the March 22, 2024 "stay order," which was a final judgment that the trial court was powerless to "reconsider" and reverse.

Moreover, in order to succeed on a motion for reconsideration of a final order, it must be shown that the prior decision was "based upon a palpably incorrect or irrational basis" or the prior judge "failed to appreciate the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

The March 22, 2024 Order stayed Count One of the Complaint, the "Survival Action," in favor of arbitration. The later in time trial court judge on his own initiative "reconsidered" the March 22, 2024 "stay order" but failed to identify the "palpably incorrect or irrational basis" for such decision. See Lombardi v. Masso, 207 N.J. 517, 537 (2011) ("once the judge has determined to revisit a prior order, he needs to do more than simply state a new conclusion. Rather, he must apply the proper legal standard to the facts and explain his reasons").

B. The Trial Court Lacked Jurisdiction to Reconsider and Reverse the March 22, 2024 Stay Order Because Jurisdiction Was Vested in the Arbitrators (Da080; Da084; Da162-Da163; 2T19:16-22:14)

Once the trial court stayed the Estate's survivor action in favor of to arbitration on March 22, 2024, the court was no longer vested with authority to

reconsider issues of enforceability. Section 2A:23B-6 of the New Jersey Arbitration Act provides:

> a. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
>
> b. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> c. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled **and whether a contract containing a valid agreement to arbitrate is enforceable** [emphasis added].
>
> d. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

The Court in Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 195 (2019) noted that "clear rulings from the United States Supreme Court that bind state and federal courts do not permit threshold issues about overall contract validity to be resolved by the courts when the arbitration agreement itself is not specifically challenged":

> Plaintiffs do not dispute the validity of the arbitration agreement itself nor do they dispute the delegation provision within it that delegates the question of arbitrability to the arbitrator. They have not attacked the language or clarity of the arbitration agreement or its delegation clause.

Ibid.

Such is the case here. As discussed above, when the validity of the contract itself is unchallenged, Paragraph 1 of the Arbitration Agreement specifically delegates authority to decide "any unresolvable disagreement between the parties including disputes over contract terms …" to the Arbitration Panel. (Da004).

As such, the second trial court's analysis of issues related unconscionability go to the enforceability of the contract which is to be determined by the arbitrator pursuant to N.J.S.A. 2A:23B-6.

Accordingly, the Khazaei Defendants submit that the arbitration panel alone had the sole authority to determine issues of enforceability, particularly where, as here, the Estate's survivorship claims had *already* been stayed and referred by the trial court to arbitration.

III. THE ARBITRATION AGREEMENT SHOULD BE ENFORCED (Da027-Da028; Da070-Da079; Da162-Da163)

New Jersey's public policy favors enforcement of valid agreements to arbitrate. See Martindale v. Sandvik, Inc., 173 N.J. 76, 83-86, (citing New Jersey's Arbitration Act, N.J.S.A. 2A:24-1 to -11). N.J.S.A. 2A:23B-6(a) states that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a). A court's analysis is limited to: (1) whether a valid agreement to arbitrate exists and (2) whether the dispute falls within the scope

of the agreement. See Martindale 173 N.J. at 92; Perez v. Sky Zone, LLC, 472 N.J Super. 240, 248 (App. Div. 2002). The scope of what claims are subject to arbitration is to be delegated to the arbitrator. Perez 472 N.J. Super at 248.

The terms of an arbitration provision must be "sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 443 (2014), "No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights." Id. at 444. If "at least in some general and sufficiently broad way" the language of the clause conveys that arbitration is a waiver of the right to bring suit in a judicial forum, the clause will be enforced. Id. at 447, 99 "The key... is clarity." Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 559, 607 (App. Div. 2015).

That the Arbitration Agreement satisfied both requirements is beyond cavil: it states that "any dispute arising from medical services rendered by Kamran Khazaei M.D., Nouvelle Confidence and or any physician nurse or person associated therewith shall be submitted to binding arbitration and shall not be resolved by a court of law. . .", (Da004), and states, in boldface type and in all caps, immediately before the signature line:

NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OR MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

Decedent, when she signed the Arbitration Agreement, acknowledged:

> 7. ACKNOWLEDGEMENT By signing this agreement, I acknowledge that I have discussed to my satisfaction any questions I may have had regarding the arbitration agreement with a member of the Kamran Khazaei, MD or Nouvelle Confidence, staff, and have been given the opportunity to obtain further counsel if desired. I acknowledge that I have freely negotiated all terms herein set forth.

(Da004).

Indeed, the Estate did not oppose the Khazaei Defendants' motion on the ground that the Arbitration Agreement is ambiguous, such decedent could not have understood that she was waiving her right to a jury or judge trial. Instead, the Estate argued that the Arbitration Agreement was unconscionable. However, pursuant to NJSA 2A:23B-6 and Goffe v. Foulke Mgmt. Corp., 238 N.J. 191 (2019), the arbitration panel had the sole authority to determine issues of enforceability following the trial court's order of March 22, 2024.

A. The Arbitration Agreement is Enforceable Even if it is Considered to be a Contract of Adhesion (Da027-Da028; Da070-Da079; Da090-Da092; Da162-Da163)

The Khazaei Defendants do not dispute that the Arbitration Agreement was not negotiable, but if that fact alone allows it to be characterized as a contract of adhesion, that does not make the agreement unenforceable. The medical procedure that decedent sought (liposuction) was an elective, cosmetic procedure that was presented to decedent during her initial consultation, as opposed to, on the day of or soon before the procedure; decedent could have demurred and found a surgeon who did not require disputes to be submitted to arbitration, or decided to forego the procedure all together. The availability of the same services from another provider

without the restrictive condition has been held to militate against "procedural unconscionability." See Stelluti v. Casapenn Enterprises, LLC, 203 N.J. 286, 310 (2010)(health club contract with liability waiver not a "procedurally unconscionable" adhesion contract: plaintiff "could have taken her business to another fitness club, could have found another means of exercise aside from joining a private gym , or could have thought about it and even sought advice before signing up and using the facility's equipment"). The Arbitration Agreement was presented to and signed by decedent on October 14, 2021 (Da054), 70 days before the procedure was to be performed, and gave her the right to change her mind within 30 days. Unlike the health club contract at issue in Stelluti, decedent was not waiving a cause of action, but the forum in which such causes of action could be asserted.

B. The Arbitration Agreement is Not Procedurally Unconscionable (Da027-Da027-Da028); Da070-Da079; Da162-Da163)

As shown by Stelluti, New Jersey Courts routinely reject challenges to arbitration agreements, even when the facts suggest a "high level of procedural unconscionability," Delta Funding Corp. v. Harris, 189 N.J. 28, 40 (2006), and the substantive provisions "form an unconscionable wall of protection" for the defendant. Ruszala v. Brookdale Living, 415 N.J. Super. 272, 299 (App. Div. 2010)(finding restrictions on discovery, limits on compensatory damages, and outright prohibition of punitive damages to be unenforceable but severable); see also Muhammad v. Cnty. Bank of Rehoboth Beach, Delaware, 189 N.J. 1, 26 (2006)

(finding class-arbitration waivers unconscionable and unenforceable. . . . Once the waivers are removed, the remainder of the arbitration agreement is enforceable).

Courts determine whether an otherwise valid contract is "unconscionable" based on the four factors established by our Supreme Court in Rudbart v. Water Supply Com'n, 127 NJ 344 (1992), and applied in Muhammad v. Cnty. Bank of Rehoboth Beach, Delaware. See Ruszala, 415 N.J. Super 272, at 287-88. These factors are: "[1] the subject matter of the contract, [2] the parties' relative bargaining positions, [3] the degree of economic compulsion motivating the 'adhering' party, and [4] the public interests affected by the contract." Id. at 356.

In Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 35 (App. Div. 2010), the court analyzed an arbitration agreement in the context of a medical malpractice action and found:

> Pre-dispute agreement between patient and medical providers requiring patient to arbitrate medical malpractice claims was not *per se* unenforceable, pursuant to section of Arbitration Act providing that agreements to submit to arbitration any existing or subsequent controversy were valid and enforceable; statute encompassed pre-dispute agreements to arbitrate and did not exclude agreements to arbitrate medical malpractice claims.

Following factual discovery, the Appellate Division, analyzed the Rudbart factors and enforced the parties' agreement to arbitrate medical malpractice claims of the plaintiff and her unborn child (Da067). As to the first Rudbart factor, the court found, "we discern no inherent harm to the doctor/patient relationship that flows

from the agreement to substitute one forum for another in the event of future claims." (Da067). While the court in Moore conceded that there may be unequal bargaining power in the context of doctor/patient relationships, that issue was insufficient to defeat the enforceability of the arbitration agreement in light of its findings as to the third and fourth Rudbart factors. (Da067); as is the case here, the third factor, "economic compulsion," does not apply, because there is no economic compulsion in the context of a voluntary medical procedure. (Da067). Regarding the fourth Rudbart factor ("the public interests affected by the contract") the court found that "public policy favors arbitration agreements, **including in health care settings**." (Da067; emphasis added).

There are no substantively unconscionable provisions of the Arbitration Agreement that prevent its enforcement, let alone any term that approached the level of unfairness and one-sidedness in the arbitration agreements Delta Funding and Ruszala, which agreements were enforced after such provisions were stricken.

C. The Term of the Arbitration Agreement Requiring an Arbitration Panel Does Not Shock the Conscience such that it is Substantively Unconscionable (Da027-Da029; Da090-Da092; Da162-Da163)

It is axiomatic that "[w]hen terms of a contract are clear, 'it is the function of the court to enforce it as written and not to make a better contract for either party'" U.S. Pipe & Foundry Co. v. American Arbitration Ass'n., 67 N.J.Super. 384, 393 (App.Div.1961). In order for the Court to invalidate an otherwise valid and

enforceable agreement to arbitrate, the court must find substantive unconscionability. which "simply suggests 'the exchange of obligations so one-sided as to shock the court's conscience.'" Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 565 (Ch. Div. 2002).

While the trial court's May 14, 2024 Decision and Statement of Reasons states that the "terms of the arbitration agreement shock the judicial conscience" (Da092), the decision does not cite any standard or case to support a finding that an agreement to arbitrate before a three person arbitration panel "shocks the conscience."

On the contrary, the Supreme Court of this States has explicitly held that "a pre-injury agreement to arbitrate does not require any party to "forego any substantive rights. Rather, such an agreement specifies only the forum in which those rights are vindicated." Hojnowski v. Vans Skate Park, 187 N.J. 323, 343 (2006).

New Jersey law explicitly allows for contracting parties to select the arbitral forum and the type of procedure to govern the resolution of the dispute. See Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 490 (1992) (in agreeing to arbitrate disputes, "[p]arties can agree to follow ... the usual trial-type format, or they can agree to any other type of procedure to resolve the dispute"); State Farm Guar. Ins. Co. v. Hereford Ins. Co., 454 N.J. Super. 1, 6-7 (App. Div. 2018) ("Parties, of course, can contract for specific procedures to govern their arbitration" and "can

incorporate into their contract by reference rules of arbitration organizations to govern their arbitration proceedings.").

The court here should not interfere with the parties' right to freely contract. There can be no doubt that paragraph 3 of the Arbitration Agreement does not "shock the conscience." Accordingly, the Court must enforce the same along with the rest of the parties' valid and enforceable Arbitration Agreement.

D. Even If the Court Found Portions of the Arbitration Agreement to Be Invalid as a Matter of Law, the Remedy is to Sever Unenforceable Provisions and Enforce the Balance of the Contract (Da090-Da092; Da162-Da163)

Paragraph 8 of the Arbitration Agreement states: [i]f any provision of this arbitration agreement should be held invalid or unenforceable, the remaining provisions shall remain in full force and shall not be affected by the invalidity of any other provision." (Da004).

Severability of the arbitration provision of the Arbitration Agreement is supported both as a matter of federal statutory law and New Jersey common law. In Delta Funding, the New Jersey Supreme Court expressed "no doubt" that unconscionable portions of an arbitration agreement could be severed "and that the remainder of the arbitration agreement would be capable of enforcement." Delta Funding Corp. v. Harris, 189 N.J. 28, 46 (2006). Similarly, the New Jersey Supreme Court enforced an arbitration agreement in Hojnowski v. Vans Skate Park, 187 N.J. 323, 346 (2006), despite the fact that the agreement was against

public policy because it purported to waive a minor child's claim. Likewise, in Muhammad County Bank of Rehoboth Beach, Del., 189 N.J. 1, 26 (2006), the New Jersey Supreme Court severed an arbitration clause, even though an illegal waiver of class arbitration was contained in the same arbitration provision. Similarly, as noted above, the New Jersey Supreme Court enforced an arbitration agreement in Hojnowski, despite the fact that the agreement was against public policy because it purported to waive a minor child's claim. Hojnowski at 346. Likewise, in Muhammad, the New Jersey Supreme Court severed an arbitration clause, even though an illegal waiver of class arbitration was contained *in the same arbitration provision.* See Muhammad, 189 N.J. at 26.

It is beyond dispute that Courts should avoid interpreting contracts in a manner that would render them illusory. See Bryant v. City of Atl. City, 309 N.J. Super. 596, 621 (App. Div. 1998). Arbitration provisions are separate and distinct from other portions of an agreement. Courts have repeatedly held that an arbitration provision is severable from any illegal or unenforceable portion. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006).

Based on the above, even if the court found Paragraph 3 of the Arbitration Agreement to be unenforceable, the remedy is to sever the same rather than void the entire contract.

E. The Arbitration Agreement Need Not Have Been Explained To Plaintiff To Be Enforceable (Da027-Da029; Da162-Da163)

New Jersey law does not require that a copy of an arbitration agreement must be provided or explained to the person who resists arbitration. Courts repeatedly have enforced arbitration agreements that have not been provided or explained. See, Martindale v. Sandvik, Inc., 173 N.J. 76 (2002); Curtis v. Cellco Partnership, 413 N.J. Super. 26, 31 (App. Div. 2010); Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010); Morgan v. Sanford Brown Institute, 225 N.J. 289, 312 (2016).

In Martindale, Justice Stein noted in dissent that the agreement failed to explain the fees required under AAA rules, but the majority rejected this as a basis to invalidate the arbitration clause, affirming the order to compel arbitration. 173 N.J. at 97 (majority opinion), 104 (Stein, J., dissenting). Further, the Supreme Court's recent decision in Flanzman v. Jenny Craig, Inc., 244 N.J. 119 (2020), enforced an arbitration agreement that did not even identify what rules would apply to the arbitration.. Thus, if the arbitration provision need not include reference to the particular rules that will apply, there can be no requirement that a copy of such rules be provided or such rules be explained in order for the provision to be enforceable.

Even in the context of medical malpractice, the fact that a patient does not receive a copy of the arbitration agreement does not defeat the otherwise clear and unmistakably intent of the parties to arbitrate any dispute. See Moore v.

Woman To Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30 (App. Div. 2010). In Moore, it was undisputed that the plaintiff had not received a copy of the signed arbitration agreement. Id. Here, decedent was provided with a copy of the arbitration agreement well in advance of the liposuction procedure (Da039-Da040; Da054)

As detailed above, Dr. Khazaei testified that he met with decedent on October 14, 2022 and went over the arbitration contract with her (Da054). Dr. Khazaei testified that decedent returned to the office on October 28th, two weeks later, and was given a copy of the signed arbitration agreement (Da056; Da060).

IV. EVEN WERE THE MARCH 22, 2024 "STAY ORDER" CONSIDERED AN INTERLOCUTORY ORDER SUBJECT TO RECONSIDERATION, THE TRIAL COURT LACKED AUTHORITY TO *SUA SPONTE* "RECONSIDER" AND REVERSE SUCH ORDER (Da090; Da162-Da163; 2T:21:14-25)

The Khazaei Defendants respectfully submit that the second trial court judge misapplied the standard for reconsideration by failing to utilize the appropriate standard pursuant to R. 4:49-2 and Cummings. However, even under the less stringent standards for review of interlocutory orders, and the law of the case doctrine, the second trial court judge was still not entitled to *sua sponte* reconsider and reverse the March 22, 2024 Stay Order.

A. The Law of the Case Doctrine Prevents the Court from Reversing the prior Trial Court Judge's March 22, 2024 Order (Da080; Da162-Da163; 2T21:21-25)

The "law of the case" doctrine is "triggered when one court is faced with a ruling on the merits by a different and co-equal court on an identical issue." Lombardi v. Masso, 207 N.J. 517, 538–39 (2014). Under the law of the case doctrine, a legal decision made in a particular matter "should be respected by all other lower or equal courts during the pendency of that case." Id. citing Lanzet v. Greenberg, 126 N.J. 168 (1991). It is intended to "prevent relitigation of a previously resolved issue." Id.; *see* Pressler, *Current N.J. Court Rules,* comment 4 to R. 1:36–3 (2008)). "The law of the case concept tends to bar a second judge on the same level, in the absence of additional developments or proofs, from differing with an earlier ruling...". Hart v. City of Jersey City, 308 N.J. Super. 487, 497, (App. Div. 1998). "In any event, when a judge decides not to follow the law of the case doctrine, it is incumbent on the judge to explain the reasons for that departure." L.T. v. F.M., 438 N.J. Super. 76, 88 (App. Div. 2014).

In its Decision and Statement of Reasons vacating the Order and Decision dated March 22, 2024, the Court stated in a footnote:

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[6] The court does not take this step lightly. Nearly forty years ago, Judge Michels said in Ford v. Weisman, 188 N.J. Super. 614, 619 (App. Div. 1983) that, until the suit ends, a trial court "has complete power over its interlocutory orders and may revise them when it would be consonant with the interests of justice to do so." See also Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc., 441 N.J. Super. 198, 248-49 (App. Div. 2015), aff'd o.b., Ginsberg v. Quest Diagnostics, Inc., 227 N.J. 7 (2016); Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399-400 (App. Div. 2015); Johnson v. Benjamin Moore & Co., 347 N.J. Super. 71, 82 (App. Div. 2002); Hart v. City of Jersey City, 308 N.J. Super. 487, 497-98 (App. Div. 1998). The prior order was interlocutory in nature. Further, the prior order lacked analysis of the jurisdictional discovery and an application of the law to that discovery. Without such an analysis, this court was left to determine the issue based upon the facts and law presented in the instant application.

[Da092.]

First, the fact that the prior trial court judge did not set forth an "analysis of the jurisdictional discovery and an application of the law to that discovery" to the satisfaction of the second judge does not mean that the first did not conduct said analysis. Nor was there a basis at law to reverse the well-reasoned decision of the first trial court judge, other than that the second trial judge disfavored compulsory arbitration of a medical malpractice claim.

In addition, it is respectfully submitted that the second trial judge misstated the factual record of the case in its decision overturning the March 22, 2024 order and decision of the first trial court judge. Page 8 of the May 14, 2024 Decision states:

> [1] Plaintiff disputes that decedent received a copy of the arbitration agreement;
>
> [2] Plaintiff contends that the agreement is not sufficiently clear to find a knowing waiver of decedent's right to access the courts; and also
>
> [3] contends that the circumstances of the agreement's formation and the terms of the agreement are unconscionable and unenforceable.

[Da089.]

As to the first point, the Estate did not and could not adduce facts to prove that decedent had not been given a copy of the Arbitration Agreement. The only admissible facts of record are the deposition testimony of Dr. Khazaei and the discovery responses submitted by the Khazaei Defendants that decedent was given a copy of the agreement.

As for the second point, the Court inappropriately suggests that the Estate had argued, or that the Court provided, analysis to find that the Arbitration Agreement "is not sufficiently clear." The Estate, in any of its briefings or arguments, never argued that the contract was ambiguous.

The testimony of Dr. Khazaei is the **only** competent evidence in the record and is therefore controlling. See also, Deutsche Bank Nat. Tr. Co. v. Mitchell, 422 N.J. Super. 214, 216 (App. Div. 2011)(finding attorney's certification in foreclosure action that Plaintiff was holder of a note and mortgage, based on his review of Plaintiff's computerized records, did not meet requirement of personal knowledge and thus provided an insufficient basis to grant bank's motion for summary judgment).

Therefore, it was inappropriate and a basis for reversal for the second trial court judge to credit Plaintiff counsel's argument that "decedent disputes that decedent received a copy of the arbitration agreement." (Da089). There can be no dispute because, as decedent is unable to testify on her own behalf, Dr. Khazaei's testimony regarding the formation of the Arbitration Agreement must be treated as uncontested by the Court.

Next, the second trial court judge's string-cite to a list of cases in a footnote do not support the drastic measure of a *sua sponte* reversal. None of the cases cited provide support for the same. The issue in Ford v. Weisman, 188 N.J. Super. 614

(App. Div. 1983) was distinguishable from the instant matter. In Ford, the court decided that "relief from an interlocutory order may be granted . . . . when a change in the **governing case law** occurs after the time to seek leave for interlocutory appeal has passed, but before litigation has ended."

Here, no change in the facts or law has occurred between the first trial court judge's decision to enforce the Arbitration Agreement and the second trial court judge's Decision of May 14, 2024 which necessitate such reversal. Moreover, Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc., 441 N.J. Super. 198, 249 (App. Div. 2015), aff'd sub nom. Ginsberg v. Quest Diagnostics, Inc., 227 N.J. 7 (2016) specifically applied to the trial court's initial "choice-of-law" ruling *not* arbitrability.

Akhtar is likewise distinguishable because it concerned the credibility of expert testimony determined on summary judgment that further discovery revealed to be less credible. Akhtar, 439 N.J. Super. 391 at 400. In Johnson, "Defendant did come forward with new and additional facts in support of its motion. . . .thus, renewal of the motion was procedurally proper." Johnson v. Benjamin Moore & Co., 347 N.J. Super. 71, 82 (App. Div.), certification granted, cause remanded, 172 N.J. 176 (2002). Finally, in Hart v. City of Jersey City, 308 N.J. Super. 487 (App. Div. 1998), the Appellate Division determined that the trial judgment appropriately dismissed qualified immunity claims prior to trial after the motion judgment had denied

summary judgement on the same issue. See Hart v. City of Jersey City, 308 N.J. Super. at 497.

Unlike any of the cases cited in footnote 6 and discussed above, none of the facts or law in the instant matter changed between March 22, 2024 and May 14, 2024 that would require the Court to revisit an order of an equal trial court judge. Accordingly, the Khazaei Defendants respectfully submit that Judge Deitch is bound under the law of the case doctrine to follow the Court prior Order of March 22, 2024.

Accordingly, even if the second trial court were permitted to review the first trial court judge's Order and Decision under the standard of review applicable to interlocutory orders, which the Khazaei Defendants deny, the Court's analysis is not supported by the case law cited in the Court's footnote or the factual record. As such, at a minimum, the trial court's June 20, 2024 order denying the Khazaei Defendants' motion to reverse its May 14, 2024 order "restor[ing]" "this matter…to the trial calendar in its entirety" should be reversed and the May 14, 2024 "reverse and restore" order should be vacated, such that the March 22, 2024 "stay order" should control.

CONCLUSION

The Khazaei Defendants respectfully request that this honorable court should reverse the trial court's June 20, 2024 order denying their motion to reverse its May 14, 2024 order "restor[ing]" "this matter…to the trial calendar

in its entirety"; and should reverse and vacate the May 14, 2024 "reverse and restore" order, such that the March 22, 2024 "stay order," staying Count I of the Complaint and referring the survival claims that are the subject of such count to arbitration.

Respectfully submitted,

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Attorney for Defendant-Appellant
Kamran Khazaei, MD and Nouvelle Confidence, LLC

BY: David M. Kupfer
DAVID M. KUPFER

Dated: August 19, 2024

ESTATE OF NAFIZIA RUGBEER, by CHRISTOPHER RUGBEER, Administrator, and CHRISTOPHER RUGBEER, Administrator of the ESTATE OF NAFIZIA RUGBEER,

Plaintiffs/Respondents,

-vs-

KAMRAN KHAZAEI, M.D., KIEL KELLEY, C.R.NA. NOUVELLE CONFIDENCE, THE CENTER FOR COSMETIC LASER AND REJUVENATION, JOHN DOES 1-10, JANE DOES 1-10 (representing presently unknown health care providers or health care providers with regard to which negligence is not presently suspected, including but not limited to, doctors, surgeons, emergency medicine doctors, anesthesiologists, hospitalists, physician assistants, nurses, nurse practitioners, nurse anesthetists, technicians, and others); and ABC CORPS 1-10 (representing presently unknown facilities or entities who rendered care to the plaintiff who have deviated from the standard of care or facilities or entities with regard to which negligence is not presently suspected),

Defendants/Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002363-23 T4

ON APPEAL FROM THE ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY

Sat Below:

Honorable John M. Deitch, J.S.C.
Union County Superior Court
Docket No. UNN-L-1600-23

BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF/RESPONDENT, THE ESTATE OF NAFIZIA RUGBEER

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PRELIMINARY STATEMENT

Defendants/Appellants, Kamran Khazaei, MD and Nouvelle Confidence d/b/a the Center for Cosmetic Laser and Rejuvenation (herein "the Khazaei defendants"), have filed an appeal to overturn the Trial Court's decision returning the Estate of Nafizia Rugbeer's survivorship claim into litigation. The Khazaei defendants seek to have the survivorship claim arbitrated according to a form arbitration agreement which was allegedly assented to by the decedent, Nafizia Rugbeer. Respectfully, the Estate of Nafizia Rugbeer avers that the Trial Court's decision was proper, justified, and based in sound law regarding arbitrability. The Khazaei defendants' arbitration agreement was introduced through an unconscionable formation process and its terms are even more unconscionable. Astonishingly, during his deposition testimony, Defendant Khazaei was unable to explain what the agreement meant. Most shockingly, the arbitration form provides the doctor with virtually complete control over the arbitration panel. Thus, the agreement should remain unenforced.

More importantly, the Trial Court did not abuse its discretion in determining to resume litigation of the survivorship claim. Of note, Defendants/Appellants did not appeal the May 14, 2024 Order to resume litigation of the survivorship claim, as they would have been out of time to do so by July 2, 2024 when they filed the notice of appeal. Rather, as expressly stated in the Notice of Appeal, this appeal is of the Trial Court's June 20, 2024 Order regarding Defendants' motion for reconsideration

of the prior May 2024 Order (Da162-164). As such, the standard of review is abuse of discretion. The Trial Court's decision was made with a rational explanation and rested on permissible grounds in the interest of justice. As such, the survivorship claim must remain in litigation.

Additionally, it should be noted that the Estate of Nafizia Rugbeer's wrongful death claim remains in litigation. Defendants/Appellants have not appealed the Trial Court's decision to keep the wrongful death claim in suit. Thus, the only issue on this appeal is whether Plaintiff/Respondent's survivorship claim also remains in suit.

PROCEDURAL HISTORY

On May 18, 2023, Plaintiff, the Estate of Nafizia Rugbeer, filed a Complaint against Defendants, Kamran Khazaei, MD, Keil Kelley, CRNA, and Nouvelle Confidence, for medical negligence and asserting counts under the Survival Act and the Wrongful Death Act (Da006-26). On July 19 2023, the defense filed a motion to stay litigation in favor of arbitration, citing the Defendants' Standard Patient-Physician Arbitration Agreement (Da001-26). Thereafter, on September 8, 2023, the Trial Court granted thirty days for limited discovery related to formation of the agreement (Da027-28). Plaintiff's counsel deposed Defendant Khazaei (Pa01-42) and submitted a supplemental brief in opposition to the defense's motion.

On March 22, 2024, the Honorable John D. Hudak, J.S.C granted Defendants' motion to stay the case in favor of arbitration and submitted a written decision

(Da070-079). In the same decision, Judge Hudak also dismissed Plaintiff's wrongful death count *without prejudice* on the basis that it was improperly pled by the Estate, rather than by the decedent's son as an heir (Da070-079). In anticipation of the latter ruling, as had been discussed during oral argument, Plaintiff had filed a motion to amend the complaint on March 21, 2024 in order to name the heir as a party, in accordance with the Trial Court's interpretation (Da094-102).

Said motion to amend was heard and decided by the Honorable John M. Deitch, J.S.C., who determined that the arbitration agreement was completely unenforceable due to unconscionability and returned the entire case to the trial calendar (Da80). On May 14, 2024, the Trial Court issued a written decision and statement of reasons (Da80-93).

Subsequently, on June 20, 2024, the defense filed a motion for reconsideration of the May 14, 2024 Order and Decision, and the Trial Court determined to let the order stand without amendment or alteration on June 20, 2024 (Da162-63). Finally, on July 2, 2024, Defendants/Appellants filed an appeal of the June 20, 2024 Order regarding their motion for reconsideration (Da164-170). Defendants/Appellants now seek to enforce arbitration over the Estate of Nafizia Rugbeer's survivorship claim. It should be noted that this appeal does not address the arbitrability of the wrongful death claim, which also remains in litigation.

STATEMENT OF FACTS

This is a wrongful death medical malpractice action arising out of a cosmetic liposuction procedure, which resulted in Nafizia Rugbeer's death. On December 23, 2021, Plaintiff's decedent, Nafizia Rugbeer, presented to the Center for Cosmetic Laser and Rejuvenation to undergo a simple cosmetic liposuction procedure, which was performed by Defendant Kamran Khazaei, MD, who is an obstetrician-gynecologist, and Defendant Keil Kelley, CRNA. Ms. Rugbeer was fifty-five years of age. Thirty minutes into her procedure, her vitals became unstable. This was followed by twenty plus minutes of unaccounted time before a code was called and 9-1-1 was contacted. She was transported by ambulance to RWJUH Rahway and was diagnosed with a catastrophic anoxic brain injury. Her condition quickly deteriorated, and she was pronounced dead on December 24, 2021. Plaintiff/Respondent, the Estate of Nafizia Rugbeer, has asserted a wrongful death claim and a survivorship claim.

Defendant Khazaei is an obstetrician-gynecologist who spends roughly 40% of his professional time performing cosmetic operations (Pa17, Pa38). He is not board-certified in surgery but began doing liposuction procedures in 2004 upon attending training and seminars (Pa16). Under these circumstances, since 2005, he has opted, upon recommendation from lecturers at seminars, to have his elective cosmetic surgery patients sign an arbitration agreement form at their initial visit

(Pa4, Pa12, Pa34-35). He only uses arbitration agreements in his cosmetic elective surgical cases, such as for liposuction procedures (Pa8). Defendant Khazaei does not use arbitration agreements with his ob/gyn patients (Pa5, Pa10). He has never been to arbitration (Pa10-11). In or around 2016, after a lawsuit regarding a liposuction with a bad outcome, he chose to switch to the current and subject arbitration form, which was used with Ms. Rugbeer, which he was advised was "stronger," and which he uses today (Pa3-5, Pa15, Pa30). He obtained the form from an unidentified seminar and did not make any changes to the form he was given (Pa34-35).

Defendant Khazaei does not recall discussing the arbitration agreement with Ms. Rugbeer, but his policy was that he would not perform surgery without her signing it (Pa21). The process by which Defendant Khazaei would routinely introduce patients to the arbitration form was to have staff hand it to them on a clipboard at intake, along with numerous other forms (Pa23-25). Defendant Khazaei testified that he was the only person at his office to speak to patients about the arbitration form (Pa20, Pa37). Upon meeting with the patient at that visit, he would routinely tell the patient to read the form and sign it if they understand (Pa23, Pa26). Defendant Khazaei testified that he did not discuss any of the details of the arbitration form with Ms. Rugbeer (Pa36). He was unable to say how he would explain the arbitration form to a questioning patient because he has never had a patient refuse to sign the form (Pa26-27). Numerous times during his deposition,

when Defendant Khazaei was asked to explain how the arbitration panel would be selected, he could not explain but only referred to the form: "whatever it says in the form" (Pa35). When asked whether he knew the form has the patient waive their constitutional right to a jury trial, he repeated: "Whatever is in the form" (Pa39).

At her initial visit on October 14, 2021, after signing, Ms. Rugbeer did not leave Defendants' office with a copy of the arbitration form, as it would have been shredded (Pa39). It is undisputed that, for fourteen days of the thirty-day assent period, she would not have been able to review the document. Further, there is no documented evidence that she received it on her second visit on October 28, 2021 when staff members provided her with a copy of the Tumescent Liposuction Patient Information Booklet, though Defendant Khazaei testifies that it would have been (Pa24-25, Pa29, Pa40-41). Defendant Khazaei claims that Defendant's staff would have provided the arbitration form with the Booklet (Pa29-31, Pa40-41).

Throughout his deposition, Defendant Khazaei was unable to explain what the arbitration agreement meant other than to read directly from it (Pa27, Pa39, etc.). Ultimately, he stipulated under oath that his entire understanding of arbitration was limited to the form agreement itself (Pa28). When asked how he would have explained the form to Ms. Rugbeer, he testified that he would have asked her if she read, understood, and agreed with the form (Pa41).

The arbitration form here is a single page consisting of eight numbered paragraphs (Da122). Paragraph 1 provides (Da122):

> It is understood that any dispute from medical services rendered by Kamran Khazaei, M.D., Nouvelle Confidence and or any physician nurse or person associated therewith shall be submitted to binding arbitrations and shall not be resolved by a court of law except as New Jersey law provides for judicial review or arbitration discussions.
>
> > I understand that a "dispute" means any unresolvable disagreement between the parties, including disputes over contract terms, as well as disputes over rendition of medical services alleged to be unnecessary, unauthorized or improperly, negligently, or incompetently performed. I specifically understand that by entering into this agreement, both parties voluntarily give up their constitutional right to have such a dispute decided by a court of law before a judge and jury.

Paragraph 2 provides (Da122):

> I understand that all claims for damages arising from medical services rendered by Dr. Khazaei and or Nouvelle Confidence, and/or any associate or substitute physicians, nurses or employee must be arbitrated. This includes any claim of a spouse, heir, child (born or unborn), or other successor in interest to any such claim.

Paragraph 3 provides terms for selecting an arbitration panel as follows (Da122):

> I understand that I must submit a demand to arbitrate a dispute as defined by this agreement in writing. I also understand that within 30 days of my demand to arbitrate a dispute, the parties must agree on a panel of three arbitrators, one of which must be a medical doctor. A list of suggested arbitrators shall be supplied by the medical provide upon receipt of the demand to arbitrate. Should the parties be unable to agree upon the arbitration panel within the 30-days allotted, the medical provider shall make the final decision regarding the panel members. It is further understood that each party shall bear their own costs, including the cost of their own legal counsel, as well as any other expenses incurred for their own benefit. Each party shall bear their pro rata share of all other arbitration costs, including, but not limited of [sic] the cost to retain the arbitrators.

Paragraph 5 provides a thirty-day period to review the form after signing, upon which cancellation is deemed waived (Da122):

> This agreement may be revoked and cancelled by written notice delivered to Dr. Khazaei and/or the Nouvelle Confidence within 30 days of the signing of this agreement. If notice of revocation of this of this [sic] agreement is not received within 30 days of the signing, the right to cancel the agreement is forever waived.

Paragraph 7 provides the following acknowledgement (Da122):

> By signing this agreement, I acknowledge that I have discussed to my satisfaction any questions I may have had regarding the arbitration agreement with a member of the [sic] Kamran Khazaei, MD or Nouvelle Confidence, staff, and have been given the opportunity to obtain further counsel if desired. I acknowledge that I have freely negotiated all terms herein set forth.

The "Notice" provision states the following (Da122):

> BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OR MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 [sic] OF THIS CONTRACT.

Finally, but for its procedural history, if this case had undergone ordinary discovery, the record would reflect that Ms. Rugbeer was an immigrant from Guyana who was dyslexic and functionally illiterate. At the time of her passing in December 2021, she was enrolled in the Literacy Volunteers of Somerset County program, which tutored her in reading English. She was a bus driver. She was not trained in law or medicine and not familiar with complex contracts.

LEGAL ARGUMENT

POINT I: THE STANDARD OF REVIEW AS TO A MOTION FOR RECONSIDERATION IS ABUSE OF DISCRETION.

The standard of review for a motion for reconsideration in New Jersey is **abuse of discretion**. *Wiggins v. Hackensack Meridian Health*, 478 N.J. Super. 355, 365 (App. Div. 2024). "An abuse of discretion 'arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis."'" *Id.* (quoting *Flagg v. Essex Cnty. Prosecutor*, 171 N.J. 561, 571 (2002)). The standard of review of an order denying reconsideration is deferential. *Dennehy v. East Windsor Regional Bd. of Educ.*, 469 N.J. Super. 357, 362-363 (App. Div. 2021). "Motions for reconsideration are governed by *Rule* 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court." *Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment*, 440 N.J. Super. 378, 382 (App. Div. 2015). Reconsideration "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion." *Palombi v. Palombi*, 414 N.J. Super. 274, 288 (App. Div. 2010). New Jersey's courts will not disturb a trial judge's denial of a motion for reconsideration absent "a clear abuse of discretion." *Dennehy, supra*, 469 N.J. Super. at 363; *see also Pitney Bowes Bank, Inc.*, 440 N.J. Super. at 382, 113 A.3d 1217 (citing *Hous. Auth. of Morristown v. Little*, 135 N.J. 274, 283, 639 A.2d 286 (1994)).

The decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court. *R.* 4:49-2. Reconsideration is appropriate only in cases where the trial court's decision was based on a palpably incorrect or irrational basis, or where the court failed to consider or appreciate the significance of probative, competent evidence. *Guido v. Duane Morris LLP*, 202 N.J. 79, 87-88 (2010). The magnitude of the error must be significant enough to be considered a "game-changer." *Palombi*, *supra*, at 289. The trial court's decision on a motion for reconsideration will be left undisturbed unless it represents a clear abuse of discretion. This standard ensures that the trial court's decision is given deference unless it is shown to be clearly unreasonable or unjust. *Dennehy*, *supra*.

The Trial Court did not abuse its discretion in choosing to abide by its prior May 14, 2024, which is not on appeal. Defendants/Appellants' application must be denied. However, if this Court, in the alternative, determines that the standard of review should be *de novo* as to the arbitrability of the contract, it should be clear from the following in Point II that the subject arbitration agreement must not be enforced in this case.

POINT II: THE ENTIRE ARBITRATION AGREEMENT SHOULD NOT BE ENFORCED BECAUSE IT IS INVALID.

As the Trial Court correctly determined, the subject arbitration agreement was unenforceable because invalid due to undue influence and unconscionability. Moreover, it is unlikely that there was a meeting of the minds. Since the entire

agreement, from its alleged formation to its extremely one-sided terms, is tainted, it cannot be severed, and the survivorship claim must remain in litigation alongside the wrongful death claim in this case.

Arbitration is "'a creature of contract.'" *Fawzy v. Fawzy*, 199 N.J. 456, 469 (2009) (quoting *Kimm v. Blisset, LLC*, 388 N.J. Super. 14, 25 (App.Div.2006), *certif. denied*, 189 N.J. 428 (2007)). An agreement to arbitrate is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." *N.J.S.A.* 2A:23B-6a. Under the Federal Arbitration Act (FAA), arbitration agreements are considered on an equal footing with other contracts. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017).

"The court shall decide whether an agreement to arbitrate exists . . . ." *N.J.S.A.* 2A:23B-6b. An agreement to arbitrate a claim must be a valid agreement. *See Muhammad v. County Bank of Rehoboth Beach, De.*, 189 N.J. 1, 12 (2006) (noting the existence of "a valid arbitration agreement" is a "gateway" question requiring "judicial resolution" (internal quotations omitted)), *cert. denied*, 549 U.S. 1338 (2007). Moreover, the court must decide whether there is a "ground that exists at law or in equity for the revocation of a contract." *N.J.S.A.* 2A:23B-6a.

Our courts may decline to enforce an arbitration agreement "when well-established principles addressing the absence of a consensual agreement and unfairness in contracting and the agreement warrant relief," including "fraud, duress,

mistake, illegality, imposition, undue influence and unconscionability." *Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C.*, 416 N.J. Super. 30, 38 (2010); *see also, Rudbart v. N. Jersey Dist. Water Supply Comm'n*, 127 N.J. 344, 353 (1990)., *cert. denied*, 506 U.S. 871 (1992).

Undue influence warrants avoidance when "by virtue of the relation between [the parties, the party seeking to avoid enforcement was] justified in assuming that that person will not act in a manner inconsistent with his [or her] welfare." *Restatement (Second) of Contracts* § 177(1) (1981). The relationship between physician and patient is one that the comment indicates is within the purview of Section 177. *Id.* at cmt. a to § 177.

Arbitration agreements, like other contracts, may be invalidated as unconscionable. *Rent-A-Center, W. Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, (1996)). The Federal Arbitration Act's (FAA) purpose is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, (1967). While the FAA favors arbitration, a court may decide arbitrability issues, including whether arbitration is unenforceable because of unconscionability. *First Options, Inc. of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995).

A. THE ENTIRE ARBITRATION AGREEMENT IS INVALID UNDER THE STANDARDS FOR ADHESION CONTRACTS

Defendants/Appellants concede that the arbitration agreement at issue was an adhesion contract. As such, the agreement did not meet the standards for an adhesion contract.

"[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the adhering party to negotiate except perhaps on a few particulars." *Rudbart, supra*, 127 N.J. at 353 (internal quotations omitted). A contract of adhesion is "'[a] contract where one party . . . must accept or reject the contract . . .'" *Ibid.* (quoting *Vasquez v. Glassboro Serv. Ass'n*, 83 N.J. 86, 104 (1980)). "Such a contract 'does not result from the consent of that party.'" *Ibid.* Consequently, a "distinct body of law surrounding contracts of adhesion" has developed "to determine whether and to what extent such nonconsensual terms will be enforced." *Id.* at 353-54.

The Supreme Court of New Jersey addressed unconscionability in the context of adhesion contracts in *Muhammad* and *Rudbart*. *Muhammad, supra*, 189 N.J. at 18; *Rudbart, supra*, 127 N.J. at 353-56. "For the most part, the unconscionability [involves] two factors: (1) unfairness in the formation of the contract, [procedural unconscionability] and (2) excessively disproportionate terms[, substantive unconscionability]." *Sitogum Holdings, Inc. v. Ropes*, 352 N.J. Super. 555, 564 (Ch.Div.2002); *see Muhammad, supra*, 189 N.J. at 15 (discussing *Sitogum* and

employing the terms "procedural" and "substantive" unconscionability). "Because adhesion contracts invariably evidence some characteristics of procedural unconscionability, . . . a careful fact-sensitive examination into substantive unconscionability" is generally required. *Muhammad, supra*, 189 N.J. at 16. While substantive unconscionability is the focus, "overwhelming procedural unconscionability" is considered and the relevant facts are "included and weighed in the overall analysis for unconscionability." *Id.* at 16 n.3; *see Delta Funding Corp. v. Harris*, 189 N.J. 28, 39-40 (2006). Thus, "[w]hen making the determination that a contract of adhesion is unconscionable and unenforceable, we consider, using a sliding scale analysis, the way in which the contract was formed and, further, whether enforcement of the contract implicates matters of public interest." *Stelluti v. Casapenn Enters, LLC*, 203 N.J. 286, 301 & n. 10 (2010).

Relevant factors to unconscionability include characteristics of the party presented with an adhesion contract, "such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process." *Sitogum*, *supra*, 352 N.J. Super. at 564.

In *Rudbart*, the Supreme Court of New Jersey developed a four-factor test to determine whether to enforce the terms of an adhesion contract: "[1] the subject matter of the contract, [2] the parties' relative bargaining positions, [3] the degree of

economic compulsion motivating the 'adhering' party, and [4] the public interests affected by the contract." *Rudbart, supra*, 127 N.J. at 356; *see also*, *Muhammad, supra*, 189 N.J. at 15-16; and *Stelluti, supra*, 203 N.J at 301 at 25-26 (approving consideration of those factors).

Defendant Khazaei is an obstetrician-gynecologist who spent roughly 40% of his professional time performing cosmetic operations outside of his board-certified specialty. He is not board-certified in surgery. Under these circumstances, since 2005, he has opted, upon recommendation from lecturers at seminars, to have his elective cosmetic surgery patients sign an arbitration agreement form at their initial visit. In or around 2016, after a lawsuit regarding a liposuction, he chose to switch to the subject arbitration agreement form, which was used with Plaintiff's decedent Ms. Rugbeer, which he was advised was "stronger," and which he uses today. He did not alter the form that was given to him by the persons at the unidentified seminar where he was introduced to the form. At his deposition, Defendant Khazaei was unable to explain what the agreement meant.

Under the circumstances, Plaintiff/Respondent contends that Ms. Rugbeer was unduly influenced to sign the arbitration form as she was justified in assuming that Defendant Khazaei, as a medical doctor, had her best interest in mind. Plaintiff/Respondent also submits that the arbitration form and its surrounding circumstances are so shocking to the conscience as to be rendered invalid.

First, ***the arbitration agreement is procedurally unconscionable because its alleged formation was excessively unfair***. Plaintiff's decedent Ms. Rugbeer sought specialized services from Defendant Khazaei, a medical doctor, with regard to her cosmetic issues. It was reasonable for her to assume that the doctor would act in her best interest. While the arbitration agreement form provided her with a thirty-day period to review the agreement, it is undisputed that a copy of the agreement was withheld from her for fourteen days of that period, from October 14, 2021 to October 28, 2021. However, on October 28, 2021, Ms. Rugbeer was seen by staff members only, not by the doctor himself. According to his deposition testimony, Defendant Khazaei was the only one to explain the agreement to Ms. Rugbeer and answer her questions during its execution. Throughout the thirty-day period, Ms. Rugbeer would not have had a chance to discuss the form with the doctor. Conversely, it is unlikely that the doctor could have answered her questions meaningfully as he was unable to explain what the agreement meant at his deposition.

Despite the doctor's testimony, it is doubtful that the decedent Ms. Rugbeer received a copy of the arbitration agreement form on October 28, 2021. According to Defendant Khazaei, the arbitration form was part of the Tumescent Liposuction Patient Information Booklet provided on October 28, 2021. Receipt of the Booklet had been documented. However, the Booklet was paginated "1 of 8" through "8 of 8" and marked with a revision ("Rev") footer on all pages, neither of which appear

on the arbitration form (Da105-112). In the Defendant's production of documents, the arbitration form did not appear until ten pages after the Booklet (Da105-122). There is no documentation in any medical record of the patient's receipt of an arbitration form. Unfortunately, the deceased Ms. Rugbeer cannot testify as to whether she received the arbitration form. Under these circumstances, it is highly unlikely that Ms. Rugbeer had a sufficient chance to review the form or to ask the doctor questions about the form before the end of the thirty-day period.

Additionally, if this case had undergone discovery, the record would reflect that Ms. Rugbeer was a dyslexic, functionally illiterate immigrant to the United States from Guyana. At the time of her death, she was enrolled in a tutoring program called Literacy Volunteers of Somerset County to improve her English-language literacy. She was unable to read and comprehend complex contracts. Moreover, she was not sophisticated with law, contracts, or medicine. As such, she would have trusted her doctor to act in her best interest. However, his reasons for adopting the current version of his arbitration form, and his lack of grasp of is contents, suggest that Defendant Khazaei's concern was likely solely to shield himself from liability.

Furthermore, pertinent case law precludes enforcement of the arbitration agreement. In *Morgan v. Raymours Furniture Co., Inc.*, an arbitration agreement was alleged to be included in an employee handbook. 443 N.J. Super. 338 (App. Div. 2016). However, the employee handbook did not mention arbitration, and it

was not itself a contract. *Id.* at 342. As the Appellate Division held, this was not sufficient to find that the plaintiff had assented to the arbitration agreement.

The only time Ms. Rugbeer is alleged to have reviewed the arbitration form would have been after receiving the Booklet from staff members on October 28, 2024. However, there is no indication that the arbitration form was actually included with the Booklet. Defendants cannot prove that the decedent had ample time to review the document because Defendant Khazaei admits that he would not have seen her that day. Thus, it cannot be shown that decedent had a fair chance to review the arbitration form during the thirty-day period. As such, the agreement's alleged formation was procedurally unconscionable.

Second, ***the arbitration agreement is substantively unconscionable because its terms are excessively disproportionate***. Defendant/Appellant makes no effort to justify the unfair and rogue terms of Defendant Khazaei's chosen arbitration agreement form. As a matter of substance, it is clear that the arbitration agreement would only serve the obstetrician-gynecologist Defendant Khazaei at his cosmetic surgery patients' expense. The agreement states that it applies to persons who are not parties to the agreement, using very similar language as was invalidated in *Moore*, *supra*, 416 N.J. Super. at 42. The agreement purports to apply to "any physician or nurse or person associated" with Defendant Khazaei without defining what "associated with" could mean. Accordingly, the agreement bound decedent to

arbitrate her claims against these unidentified persons who were not parties to the agreement and were not bound to arbitrate their claims against her.

Most shockingly, the agreement gives the doctor virtually complete control over the arbitration panel members. Paragraph 3 of the arbitration form provides:

> 3. **ARBITRATION PANEL.** I understand that I must submit a demand to arbitrate a dispute as defined by this agreement in writing. I also understand that within 30 days of my demand to arbitrate a dispute, the parties must agree on a panel of three arbitrators, one of which must be a medical doctor. A list of suggested arbitrators shall be supplied by the medical provider upon receipt of the demand to arbitrate. Should the parties be unable to agree upon the arbitration panel within the 30 days allotted, the medical provider shall make the final decision regarding the panel members. It is further understood that each party shall bear their own costs, including the cost of their own legal counsel, as well as any other expenses incurred for their own benefit. Each party shall bear their pro rata share of all other arbitration costs, including, but not limited of the cost to retain the arbitrators

(Da122, emphasis added). Accordingly, the doctor has complete veto power over the arbitration panel. If he disagrees with a patient's suggested arbitrators, he can simply appoint the entire panel. Such an arrangement is not only uncustomary, but also ripe for manipulation. Arbitration can facilitate judicial efficiency, but it should never undermine victims with biased panels outside the oversight of the State's courts. Any arbitration on these terms is a staggering affront to justice and completely invalidates the notice section which states that the patient agrees to have disputes decided by "neutral arbitration." This provision essentially allows the physician to "do away" with malpractice claims by sending them to a panel of his choosing.

Additionally, the agreement does not provide for the forum, arbitration rules, or for the qualifications of the two non-physician arbitrators. The agreement also sets up an acknowledgement section which cannot possibly be true given Defendant Khazaei's testimony. The acknowledgement states that the patient had discussed any

questions regarding the arbitration agreement with Defendant Khazaei or Nouvelle Confidence staff. However, Defendant Khazaei testified that he was the only person who would discuss the agreement with patients, so the patient could not have discussed the agreement to her satisfaction with staff members.

Third, ***the arbitration agreement is not enforceable based on an analysis the* Rudbart *factors***. With respect to the first *Rudbart* factor, the subject matter of the agreement was a liposuction procedure. Defendant Khazaei's own consent forms indicate that liposuctions carry the risks of grievous bodily injury and death, as tragically occurred here (Da149-50). Under these grave conditions, Defendant should have exhibited scrupulous care in explaining his prerequisite waiver of the patient's constitutional right.

As to the second *Rudbart* factor, there was a gross disparity in the relative bargaining positions of the parties. Defendant Khazaei is a medical doctor who had the benefit of attending seminars which provided him with updated versions of his arbitration form over the years. Meanwhile, Plaintiff's decedent Ms. Rugbeer was functionally illiterate. She would have reasonably assumed that her doctor had her best interest in mind, and she likely would have signed any number of forms provided to her by his office.

As to the fourth *Rudbart* factor, the public has a strong interest in physician-patient communication over the waiver of constitutional rights. In this day, when

patients go to the doctor's office, they are immediately met with a mountain of documents to sign and review. This applies to patients of all educational and linguistic backgrounds. While the courts have accepted a physician's right to arbitrate medical malpractice claims, the Court should also acknowledge the patients' need for clear and honest communication. Most forms which a patient completes at the doctor's office involve their medical care and form of payment for same. Most patients do not suspect that they would be signing their constitutional rights away while waiting for the doctor to examine them. Given the complexity of the insurance system, many patients will sign any form that a physician places in front of them because they believe it is required in order to receive medical care. In this case, we have a patient who did not have a sufficient chance to review and ask her doctor questions regarding an arbitration agreement form, which the doctor himself would not have been able to explain. While no one should expect a lawyer-level understanding of contracts from a physician, it should stand to reason that, given the current volume of paperwork which patients are expected to complete before seeing a doctor, the law should not hold the patient to an even higher standard of legal analysis. In the public interest, physicians should be responsible to clearly explain the general exchange induced by an arbitration agreement and to document same in the medical record. While this may be an additional conversation the doctor should have with his patients, it is the only fair and reasonable way to ensure that

patients are properly informed as to the non-medical consequences of their medical paperwork.

Finally, failure to uphold the Trial Court's ruling would allow this case to be essentially tried twice. In accordance with a well-established principle of New Jersey law, all claims arising related to the same controversy must be joined. *R.* 4:30A. As far as liability is concerned, the survivorship and wrongful death claim are likely to be identical in this case. Only the damages will differ. By allowing one claim to be tried by a jury and the other claim to be arbitrated, the Court would risk inconsistent and contradictory rulings from arising as to the very same facts at the same standard of proof.

B. THE ARBITRATION AGREEMENT SHOULD NOT BE SEVERED

In the Defendants/Appellants' Brief, it is suggested that Paragraph 3 may be severed from or adjusted in the arbitration agreement as the term "requiring an arbitration panel" does not shock the conscience. As noted in the previous section, the entire arbitration agreement is unenforceable due to the suspicious circumstances surrounding its alleged formation as well as many of its terms. Given the shockingly unfair manner in which the agreement was entered, there is no just way to sever the agreement. Moreover, a large number of the terms of the agreement were determined to be substantively unconscionable, and given Ms. Rugbeer's decease, there is no just way to renegotiate the terms of arbitration at this time. In such case, the entire

arbitration agreement must be invalidated, and the right to a trial by jury must be affirmed.

It is further submitted that severing the agreement at this late stage would work a further injustice as the case would already be litigated piecemeal between the survivorship and wrongful death claims. To whittle down the agreement until it merely and vaguely states that a malpractice claim should be arbitrated would render almost the entire agreement moot but for one sentence. If so, that is further proof of the agreement's invalidity.

It is respectfully submitted that the Trial Court properly found that the entire arbitration agreement is invalid and unenforceable by way of undue influence and unconscionability. Thus, it is respectfully submitted that Plaintiff/Respondent's survivorship claim should remain in litigation alongside the wrongful death claim.

POINT III: THE TRIAL COURT'S JURSIDCTION WAS PROPER IN DENYING APPELLANTS' MOTION FOR RECONSIDERATION.

A. THE TRIAL COURT EXERCISED JUST DISCRETION IN DENYING APPELLANTS' MOTION FOR RECONSIDERATION

The Trial Court did not abuse its discretion in denying Defendants' motion for reconsideration, as there was no palpable error, and the Trial Court reasoned its ruling in the interest of justice. It bears repeating that the instant appeal does not address the Trial Court's May 14, 2024 Order reversing the stay order, as the Notice of Appeal addressed the June 20, 2024 Order denying Defendants' motion for

reconsideration. In any event, the appeal ***was filed too late to address the May 14, 2024 Order***. *R.* 2:4-1. The time within which to file the appeal regarding the May 14 Order would have been forty-five days later on June 28, 2024. However, this appeal was filed on July 2, 2024 (Da164). As such, as a matter of procedural law, this Court should only consider whether the Trial Court, in its June 20, 2024 Order, abused its discretion.

It is well-established in precedent that a court may only reconsider a prior decision if: "it has expressed its decision based upon a palpably incorrect or irrational basis, or [. . .] it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence." *Guido v. Duane Morris LLP*, 202 N.J. 79, 87-88 (2010) (emphasis added). A court may exercise its discretion to reconsider such decisions "in the interest of justice." *R.* 4:42-2(b). Moreover, until the end of suit, a trial court "has complete power over its interlocutory orders and may revise them when it would be consonant with the interests of justice to do so." *Ford v. Weisman*, 188 N.J. Super. 614, 619 (App. Div. 1983). In the context of judicial proceedings, a final order is one that disposes of all issues as to all parties. An order that does not resolve all claims or requires further steps to adjudicate the cause on the merits is considered interlocutory and not final. *See, e.g., New Jersey Div. of Youth and Family Services v. L.A.*, 357 N.J. Super. 155

(App. Div. 2003); *Ricci v. Ricci*, 448 N.J. Super. 546 (App. Div. 2017); *Kattoura v. Patel*, 262 N.J. Super. 34. (App. Div. 1993).

By way of its Order dated May 14, 2024, the Trial Court rightly determined not only that it would be unjust to enforce arbitration against the heir, but that the Arbitration Agreement was wholly unenforceable because its substance and surrounding circumstances shocked the conscience (Da80-93). This decision logically followed from the Plaintiff's motion to amend the complaint, which questioned the justice of enforcing the Arbitration Agreement. While the facts had not changed in between the two (2) Court Orders, it was clear that many of the relevant facts and legal standards were not considered by the Trial Court at the time of the initial stay Order of March 2024. As such, Defendants' arguments regarding the law of the case are of no moment. Additionally, a trial court has complete power to revise its interlocutory orders in the interest of justice. The Khazaei defendants' Brief fails to establish any irrationality by the Trial Court, nor does it allege that the Court failed to appreciate important evidence.

The Khazaei defendants do not argue that the Trial Court was blatantly incorrect or irrational in its expressions of fact or law, nor that the Court failed to appreciate the totality of the evidence. Given the facts and law at issue, and as the Trial Court rightly opined, arbitration as to any relevant party in this case would be unconscionable.

The facts clearly show that the unconscionable terms of the Arbitration Agreement were imposed on Ms. Rugbeer in a shockingly unfair manner and thus should not be enforced. As noted in the Trial Court's May 14, 2024 Statement of Reasons, there were many concerning circumstances surrounding the formation and substance of the Arbitration Agreement, which is a contract of adhesion (Da088-92). The Trial Court identified exactly which facts it gleaned from Defendant Khazaei's testimony (Da088-89):

- Dr. Khazaei was not able to explain what arbitration under the agreement meant, other than to read the agreement out loud. 36:8-37:16; 40:10-12.
- Dr. Khazaei was the only person at his office who would have spoken with the Plaintiff regarding the arbitration agreement. 76:13-16.
- Dr. Khazaei did not have specific recollection of reviewing the arbitration agreement with Plaintiff. 78:6-9.
- His practice is to present the arbitration form as a take-it or leave-it proposition. If the patient does not sign the form, he does not perform the procedure. 78:10-21.
- Plaintiff was at the doctor's office on October 14, October 28, December 20 and December 23.
- October 14 was her initial evaluation. 80:14-81:1.
- October 28 was when Plaintiff came to the office to see the surgical coordinator and presented with the tumescent liposuction patient information booklet, which she signed for. 111:19-112:21. Dr. Khazaei testified that Plaintiff would also have been provided with her copy of the arbitration agreement on that date because it was part of the booklet. Ibid.
- While there is a specific acknowledgement of the Plaintiff having received the tumescent liposuction patient information booklet, there is no specific acknowledgement of the Plaintiff having received the arbitration agreement.

> **This is because, according to the doctor, the arbitration agreement is part of the booklet. 115:13-116:12:**
>
> - **The arbitration form is reviewed by the doctor with the patient. The doctor retains the original, which is then scanned into the doctor's office notes. The original is destroyed by the doctor. 150:2-18.**
> - **The doctor does not have a list of arbitrators and does not know who would be on that list. 137:14-22.**
> - **The doctor testified that, as part of his pre-operative evaluation of the Plaintiff on December 20, he would have asked her if she had read the arbitration agreement and if she had any questions. 158:8-159:7.[3]**

The Trial Court noted in detail the shocking circumstances regarding how the agreement was entered into, not least the fact that Defendant Khazaei could not explain what arbitration meant at his deposition, other than to read the agreement. (Da089-90). Clearly, he could not have explained this agreement to Ms. Rugbeer at the time. Moreover, Defendant Khazaei testified that he had no idea why he used an arbitration agreement for cosmetic surgery, only that this specific form was recommended to him at a seminar. (Pa12).

If Defendant Khazaei was allowed to demand, in take-it-or-leave-it fashion, that his patients sign an agreement the very basics of which he cannot explain, it stands to reason that lay patients entering his office should not be held to understand those sophisticated terms, either. The defense cannot prove mutual assent or a meeting of the minds if Defendant Khazaei's only stated understanding of the

agreement was reference to the arbitration form itself. As a matter of substance, it was clear that the arbitration agreement would only serve Defendant Khazaei at his patients' expense, and the Trial Court took issue with its unfair and rogue terms (Da090-91).

In sum, the Court's decision was expressed in a factual, reasonable, and sound manner and in consideration of all of the facts. Defense counsel admitted that no new facts were brought to bear as a part of his motion for reconsideration and instead simply disagreed with the result. Meanwhile, justice clearly demands that this case be heard in court, rather than in arbitration, given the unconscionable facts and circumstances surrounding the Arbitration Agreement.

As stated above, up until the end of suit, the Trial Court was able to revise its interlocutory orders. Determining the validity of an arbitration agreement is the purview of the trial court, not the arbitration panel. The Trial Court's order to stay litigation was an interlocutory order, as it had left Plaintiff/Respondent's wrongful death claim open to litigation, which was the subject of Plaintiff's motion to amend the complaint. As per this issue, the Trial Court determined that the stay order and decision had lacked analysis of the jurisdictional discovery which it had ordered, nor did it evince an application of the law to same (Da092). "Without such an analysis, this court was left to determine the issue based upon the facts and law presented in the application." (Da092).

Ultimately, it should be clear that the Trial Court did not abuse its discretion. However, if this Court should be inclined to review this appeal *de novo*, then the Trial Court's decision or discretion is of no moment, as it would be given no deference.

Moreover, Defendants/Appellants incorrectly accuse the Honorable John Deitch, J.S.C. of "misstat[ing] the factual record" in three areas (*See* Appellant's Brief at 24). First, Plaintiff/Respondent disputes that Ms. Rugbeer reviewed a copy of the arbitration agreement because, as shown in Point II, there is simply no documentary evidence that she did, and the circumstantial evidence regarding the Booklet strongly suggests that she did not. Second, Plaintiff argued that the agreement was ambiguous and should be construed against the drafting party on page 11 of our Supplemental Brief in Defendants' motion to stay the case in favor of arbitration (omitted as tangential). Third, even if Defendant Khazaei's testimony regarding formation were taken alone, this would be sufficient to invalidate the agreement for a multitude of reasons as argued in Point II.

B. THE TRIAL COURT'S DECISION TO REVERSE THE STAY ORDER DID NOT EXCEED ITS AUTHORITY

Defendants/Appellants' argument that "jurisdiction" was vested in the arbitrators fails because authority to find an agreement was invalid is, was, and will be under the authority of the Trial Court. The Trial Court was well within its rights

to nullify the entire arbitration agreement. Our courts have the jurisdiction to determine whether cases are arbitrable. *Moore*, *supra*, 416 N.J. Super. 30.

The New Jersey Arbitration Act provides that courts have the authority to determine whether cases are arbitrable or whether arbitration agreements should be enforced. *N.J.S.A.* 2A:23B-6. An arbitrator's purview is only whether: (a) conditions precedent have been fulfilled, or (b) whether a valid agreement is enforceable. *Id.* Under the statute, the Trial Court had every authority to determine that this agreement was invalid and thus not enforceable. As the Court that rendered the original stay order, it was fully able to render the subsequent Order to resume litigation.

As the Trial Court explained in its Order and Decision, there is serious doubt as to whether there was sufficient meeting of the minds for a valid agreement to have been formed. "Without mutual agreement, there is no contract." *Cottrell v. Holtzberg*, 468 N.J. Super. 59, 71 (App. Div. 2021). "As a general principle of contract law, there must be a meeting of the minds for an agreement to exist before enforcement is considered." *Kernahan v. Home Warranty Adm'r of Florida, Inc.*, 236 N.J. at 319 (2019) (citing *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 538 (1953)).

Moreover, at the time of the Trial Court's reversal of the stay order, no arbitration-related activity had begun. To date, there has been no arbitration-related activity, including as to preparation or consideration of a panel.

As shown by the case law in Point II, the Trial Court clearly does have jurisdiction to determine whether the arbitration agreement can be enforced. The Trial Court was right to invalidate the agreement given the glaring evidence of undue influence and unconscionability. The standard of review for this appeal is abuse of discretion, which has not been met in this case.

CONCLUSION

It is clear that Defendants/Appellants' application must fail because the Trial Court did not abuse its discretion in denying their motion for reconsideration. Rather, the Trial Court's decision was rationally explained and rooted in the evidence found in the record that the arbitration agreement was invalid under New Jersey law. Therefore, it is respectfully requested this Court enter an Order denying the Defendants/Appellants' appeal.

Respectfully Submitted,

s/William O. Crutchlow

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Dated: September 18, 2024

ESTATE OF NAFIZIA RUGBEER, by CHRISTOPHER RUGBEER, Administrator, and CHRISTOPHER RUGBEER, Administrator of the ESTATE OF NAFIZIA RUGBEER,

Plaintiffs/Respondents,

-vs-

KAMRAN KHAZAEI, M.D., KIEL KELLEY, C.R.NA. NOUVELLE CONFIDENCE, THE CENTER FOR COSMETIC LASER AND REJUVENATION, JOHN DOES 1-10, JANE DOES 1-10 (representing presently unknown health care providers or health care providers with regard to which negligence is not presently suspected, including but not limited to, doctors, surgeons, emergency medicine doctors, anesthesiologists, hospitalists, physician assistants, nurses, nurse practitioners, nurse anesthetists, technicians, and others); and ABC CORPS 1-10 (representing presently unknown facilities or entities who rendered care to the plaintiff who have deviated from the standard of care or facilities or entities with regard to which negligence is not presently suspected),

Defendants/Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-003269-23 T4

ON APPEAL FROM THE ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY

Sat Below:

Honorable John M. Deitch, J.S.C.
Union County Superior Court
Docket No. UNN-L-1600-23

BRIEF OF *AMICUS CURIAE* NEW JERSEY ASSOCIATION FOR JUSTICE

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Preliminary Statement

The physician-patient relationship must continue to be protected and simultaneously strengthened by New Jersey courts. Every New Jersey citizen must be able to trust and rely upon their physician, and they should never have any reason to doubt that the physician has anything but their best interests in mind at all times. It is axiomatic that New Jersey courts will not enforce arbitration agreements that violate public policy. Achey v. Cellco P'ship, 475 N.J. Super. 446,454 (App. Div. 2023) (citing Vasquez v. Glassboro Serv. Ass'n, Inc., 83 N.J. 86, 98(1980)). Additionally, an arbitration clause can be invalidated upon grounds that exist at law or equity for the revocation of a contract including generally applicable contract defenses such as unconscionability, fraud, or duress. Id. at 454-55 (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 85(2002); Morgan v. Sanford Brown Inst., 225 N.J. 289, 304(2016)). Accordingly, New Jersey courts must utilize a synergistic blending of public policy analysis and contract interpretation to ensure that pre-suit arbitration agreements do not inherently disrupt the power dynamic between physicians and patients, such that patients are rendered wholly legally disabled.

Procedural History and Statement of Facts

NJAJ incorporates by reference and relies upon the Statement of Facts and Procedural History contained in

Plaintiff's/Respondent's supplemental brief in opposition to the appeal. Pa21, 24-25, 29, 39-41; Da122. Plaintiff/Respondents supplements the facts here in the legal argument as they relate to the *amicus* application. NJAJ refers to Defendants/Appellants, Kamran Khazaei, Nouvelle Confidence, and Center for Cosmetic Laser and Rejuvenation, collectively as "Defendants" herein because the arguments presented are indistinguishable.

Legal Argument

I. PRE-SUIT ARBITRATION AGREEMENTS IN MEDICAL MALPRACTICE CASES INVOLVING THE PERFORMANCE OF SURGICAL PROCEDURES, OR THE DEATH OF A PATIENT, SHOULD BE DEEMED AGAINST PUBLIC POLICY.

Medical malpractice cases involving the performance of surgical procedures, or cases with care and treatment resulting in a patient's death, present unique circumstances in which pre-suit arbitration agreements should not be enforced based on public policy grounds. In 2003, the American Arbitration Association ("AAA") announced a policy consistent with American Arbitration Association/American Bar Association/American Medical Association Due Process Protocol for the Mediation and Arbitration of Health Care Disputes that AAA would no longer arbitrate medical malpractice disputes unless all parties agreed to submit the matter to arbitration after the dispute arose. American Arbitration Association,

https://www.adr.org/sites/default/files/document_repository/AAA_

Healthcare_Policy_Statement.pdf(last visited Sept. 18, 2024). On April 9, 2024, the Fairness in Nursing Home Arbitration Act was introduced. This bill seeks to prohibit nursing homes from using pre-dispute arbitration agreements. Fairness in Nursing Home Arbitration Act, S. 4087, 118th Cong. (2024). The AAA policy statement and Fairness in Nursing Home Arbitration Act reflect a rational public policy approach against the use of pre-suit arbitration agreements in medical and nursing home malpractice claims. Similar to controlling case law in New Jersey on informed consent that holds "a doctor has a duty to explain, in terms understandable to the patient, what the doctor intends to do before subjecting the patient to a course of treatment or an operation[,]" there should be continuity with New Jersey's jurisprudence into the realm of analyzing pre-suit arbitration agreements. Model Jury Charges (Civil), 5.50C, "Informed Consent (Competent Adult and No Emergency)" (rev. Apr. 2002). This approach will allow New Jersey courts to continue pursuing the objective of protecting "each person's right to self-determination in matters of medical treatment." Id. (citing Matter of Farrell, 108 N.J. 335, 347 (1987)).

Neither patients nor the public benefit from pre-suit arbitration agreements in medical malpractice cases. Rather, as the instant matter glaringly illustrates, only physicians benefit by leveraging their dominant role in the relationship. The lopsided

power dynamic is heightened when patients are undergoing surgical procedures, which literally has the patient putting their life in the physician's hands. When a surgical procedure results in a patient's death, the balance of power is forever etched in stone. The deceased patient's heirs should not be burdened with terms of an arbitration agreement that were never known to them. "No contract can be sustained if it is inconsistent with the public interest or detrimental to the common good." Vasquez v. Glassboro Service Asso., 83 N.J. 86, 98 (1980). A pre-suit arbitration agreement is a type of contract that is inconsistent with public interest and detrimental to the public good because, as discussed *infra*, they are inherently unconscionable and have a detrimental effect on the physician-patient relationship.

A. Pre-Suit Arbitration Agreements in Cases Involving Patient Death Must be Deemed Unenforceable Based on Public Policy.

Death is the worst-case scenario in any medical treatment scenario. The safeguards in place for cases involving a death based on the Wrongful Death Act, Survivor's Act, Rules of Evidence, and Court Rules make the courts the best venue for adjudicating claims involving patient death. These safeguards are not available in an arbitration. The type of negligence that forms the basis of a wrongful death case is wholly unknown to the patient at the time they relinquish their rights when signing an arbitration agreement. It is both unjust and impracticable to expect an

individual to comprehend the rights being waived when potential injury and death based on negligence remain so nebulous to all involved.

Arbitration is not the proper forum to adjudicate medical malpractice cases involving death. Courts have determined arbitration to be an appropriate forum to vindicate statutory rights under the Family Leave Act, Civil Rights Act, Consumer Fraud Act, the Racketeer Influenced and Corrupt Organizations Act, the Law Against Discrimination, and Conscientious Employee Protection Act. Curtis v. Cellco P'ship, 413 N.J. Super. 26, 35(App. Div. 2010). This list does not include the Wrongful Death Act or Survivor's Act. Additionally, none of the acts included on this list govern medical malpractice claims. This list is another aspect of New Jersey law that reflects the public policy against arbitration in medical malpractice cases, especially those involving patient death.

There are increased public policy concerns in wrongful death cases where the arbitration agreement binds non-signatory parties. In Bybee v. Abdulla, the plaintiff brought an action against her husband's physician for medical malpractice and wrongful death. Bybee v. Abdulla, 189 P.3d 40, 41 (Utah 2008). The plaintiff's husband had signed a pre-suit arbitration agreement and the defendant physician wanted to compel arbitration. Id. at 42. The Utah Supreme Court found that in wrongful death cases, arbitration

agreements are least likely to be enforceable when the agreement includes "provisions that purport to affect the rights of heirs but do not affect the existence of the decedent's personal injury claim during his lifetime." Id. at 47. The Court refused to extend Utah's Arbitration Act to "future controversies involving strangers to the agreement." Id. at 48. The Court denied the defendant physician's motion to compel arbitration "because a decedent does not have the power to contract away the wrongful death action of his heirs" and public policy favoring arbitration does not mandate that the plaintiff be bound by arbitration. Id. Utah's public policy aligns with New Jersey's. A person who is a "stranger" to an arbitration agreement in a wrongful death medical malpractice case should not be bound by the agreement. This includes other healthcare providers and the patient's family members who are not part of the agreement. Therefore, the court should not enforce pre-suit arbitration agreements when the case involves a patient's death.

B. Pre-Suit Arbitration Agreements in Cases Involving Surgical Procedures Should be Unenforceable Based on Public Policy.

Surgical procedures present unique circumstances to patients in the broader patient-physician relationship dynamic, which should make pre-suit arbitration agreements unenforceable. Surgical procedures are different from a regular visit to a physician for an exam, medication management, or even a cosmetic

procedure not requiring anesthesia. "Few decisions bespeak greater trust and confidence than the decision of a patient to proceed with surgery. Implicit in that decision is a willingness of the patient to put his or her life in the hands of a known and trusted medical doctor." Perna v. Pirozzi, 92 N.J. 446, 464 (1983). Seeing a physician is already anxiety provoking for most patients, but surgeries cause even greater anxiety because of the potential risks of complications. As a result of the patient's anxiety, they are almost always not in the proper mindset to sign an arbitration agreement. Thus, there is not anything close to equilibrium in the patient-physician dynamic because the physician possesses almost all the power. The unique position a patient is placed in during surgery requires that courts be the default venue to protect the patient's interests. Allowing cases to proceed in court would act as a deterrent for physicians who may conduct surgeries that are outside the scope of their training, like an obstetrician-gynecologist performing liposuction.

II. IN MEDICAL MALPRACTICE CASES THE COURT SHOULD REVISE THE EXISTING TESTS FOR DETERMINING THE ENFORCEABILIY OF PRE-SUIT ARBITRATION AGREEMENTS.

If the court finds that it is not against public policy to enforce pre-suit arbitration agreements in medical malpractice cases arising out of surgical procedures and/or a patient's death, the court should adopt a new test to determine enforceability. The court currently uses multiple tests to determine the

enforceability of contracts and arbitration agreements. However, none of these tests consider the unique circumstances presented in medical malpractice cases. As a result, these tests should be revised and combined for medical malpractice cases.

In Atalese v. U.S. Legal Services Group, our Supreme Court established a bright-line rule for the enforceability of arbitration agreements: an arbitration agreement must be sufficiently clear to a reasonable consumer that they are waiving their statutory right to seek relief in court, or it is unenforceable. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 436 (2014). In Gershon v. Regency Diving Center, the Appellate Division applied a four-part test to determine whether an exculpatory agreement would be contrary to public policy: an "exculpatory agreement will be enforced if (1) it does not adversely affect the public interest; (2) the exculpated party is not under a legal duty to perform; (3) it does not involve a public utility or common carrier; or (4) the contract does not grow out of unequal bargaining power or is otherwise unconscionable." Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 303-04 (2010) (citing Gershon, Adm'x Ad Prosequendum for Estate of Pietroluongo v. Regency Diving Ctr., Inc., 368 N.J. Super. 237, 248, (App. Div. 2004)). To determine whether a contract contains unequal bargaining power courts will evaluate four factors: "[1] the subject matter of the contract, [2] the parties' relative

bargaining positions, [3] the degree of economic compulsion motivating the 'adhering' party, and [4] the public interests affected by the contract." Estate of Anna Ruszala, ex rel. Mizerak v. Brookdale Living Communities, Inc., 415 N.J. Super. 272, 288 (App. Div. 2010) (citing Rudbart v. Water Supply Com'n, 127 NJ 344, 356 (1992)).

The "Rugbeer test" would be a modification and combination of these three tests. Under the test, a pre-suit arbitration agreement in a medical malpractice case would only be enforceable if: (1) the agreement clearly and unambiguously states that the party is waiving their right to seek relief in court (Atalese); (2) the agreement does not adversely affect public interest (Gershon); (3) the agreement is not the result of unconscionability or unequal bargaining power (Gershon), based on the subject matter of the contract (Rudbart), the parties' relative bargaining positions (Rudbart), the degree of economic compulsion motivating the adhering party (Rudbart), and the public interests affected by the agreement (Rudbart). The "Rugbeer test" will allow courts to adhere to New Jersey and federal policy in favor of arbitration while ensuring that the agreement is not unjust and inequitable. If the "Rugbeer test" was applied to the present case, the arbitration agreement would be undoubtedly unenforceable because the agreement is contrary to public interest and is unconscionable due to unequal bargaining power. Therefore, the court should adopt the "Rugbeer

test" if it holds that pre-suit medical malpractice arbitration agreements are not per se against public policy.

III. THE ARBITRATION AGREEMENT IN THIS CASE IS UNCONSCIONABLE AND UNENFORCEABLE.

The subject agreement is unenforceable due to unconscionability and undue influence. Procedural unconscionability is unfairness in the formation of the contract, it "can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process." Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 564(Ch. Div. 2002). Substantive unconscionability is excessively disproportionate contract terms so that "the exchange of obligations is so one-sided as to shock the court's conscience." Id. at 564-65. The arbitration agreement in this case is procedurally and substantively unconscionable.

A. The Arbitration Agreement is an Unenforceable Contract of Adhesion.

Pre-suit arbitration agreements, particularly in this case, are contracts of adhesion because they are one sided with unequal bargaining power. This causes a detrimental effect on the physician-patient relationship because it causes the patient to not be able to trust and rely upon their physician. Patients, like the plaintiff, are often not given the opportunity to negotiate arbitration agreements. Additionally, if the patient does not sign

the agreement, the physician will refuse treatment. In this case, Ms. Rugbeer was not given the opportunity to negotiate the terms of the agreement, and the defendant admitted in his deposition that he would have refused to operate on Ms. Rugbeer if she did not sign the agreement (Pa21). Furthermore, the arbitration agreement stated that "[s]hould the parties be unable to agree upon the arbitration panel within the 30 days allotted, the medical provider shall make the final decision regarding the panel members." (Da122). The defendant maintained complete control in choosing the arbitration panel members making the agreement incredibly one-sided to Ms. Rugbeer's detriment.

Patients must maintain the right to believe that they can trust and rely on their physician. When seeking medical services, it is reasonable for a patient to assume that their physician is acting in their best interest. See Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 44-45(App. Div. 2010). Undue influence warrants voiding a contract when by virtue of the party's relationship the party seeking to avoid enforcement is justified in assuming that the other party will not act in a matter inconsistent with the party's welfare like in the case of a physician and patient. See Id. at 38(quoting Restatement (Second) of Contracts § 177(1) (1981)). When a physician presents a patient with an arbitration agreement, the physician is exercising undue influence over the patient and acting contrary to

the patient's best interests because the physician is requiring the patient to waive their right to a jury trial.

B. Pre-Suit Arbitration Agreements Cannot be Enforced Against Nonparties to The Agreement.

It is unconscionable for a pre-suit arbitration agreement to bind a party who has not signed the agreement. In general, a party is only bound to arbitrate disputes they have contractually agreed to arbitrate and not bound to arbitrate disputes the party has not specifically agreed to arbitrate. Dueñas v. Life Care Ctrs. of Am., 236 Ariz. 130, 139(Ct. App. 2014). "New Jersey case law is guided by the principle that unless both parties are signatories to the agreement, one party may not compel the other party to arbitrate unless the benefits of the underlying arbitration agreement have extended to the non-signatory party 'based on the traditional principles of contract and agency law."' In re Estate of Hekemian, 2022 N.J. Super. Unpub. LEXIS 191, *20, aff'd N.J. Super. Unpub. LEXIS 60 (App. Div. 2023) (citing E.I DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187, 200 (3d Cir. 2001); Wasserstein v. Kovatch, 261 N.J. Super. 277, 286, 618 A.2d 886 (App. Div.), certify. Denied, 133 N.J. 440, 627 A.2d 1145 (1993)).

Ms. Rugbeer's family is not bound by the arbitration agreement. In Moore I, there was a dispute regarding an arbitration agreement in a medical malpractice case. The subject arbitration

agreement provided that "[t]his agreement to arbitrate includes waivers of the rights of persons who are not parties to the agreement--the patient's spouse and unborn child... .While the Supreme Court has held that a parent *may* 'bind a minor child to arbitrate future tort claims,' Hojnowski v. Vans Skate Park, 187 N.J. 323, 343 (2006), we are not aware of any legal theory that would permit one spouse to bind another to an agreement waiving the right to trial on his or her claim without securing his consent to the agreement." Moore, 416 N.J. Super. at 45(emphasis added). Hojnowski is not a medical malpractice case but was a case involving injuries sustained by the child at a skate park. Medical malpractice cases involve different dynamics than a typical negligence case, such as life or death decisions, surgical procedures, and medical providers. It should be noted that in the present case, Ms. Rugbeer's son was an adult when she signed the arbitration agreement, so he cannot be bound by an agreement signed by his mother. As a result, a parent cannot bind their child to an arbitration agreement especially when the treatment is for the parent themselves and not the child.

The instant matter involves an unconscionable arbitration agreement binding non-signatory illusionary family members and healthcare providers. The arbitration agreement states "I understand that all claims for damages arising from medical services rendered by Dr. Khazaei and or Nouvelle Confidence, and/or

any associate or substitute physicians, nurses or employee must be arbitrated. This includes any claim of *a spouse, heir, child (born or unborn), or other successor in interest* to any such claim"[1] (emphasis added) (Da122). Like Moore, the subject agreement binds Ms. Rugbeer's spouse and unborn child. Binding any non-signatory party, whether it is the patient's family or another healthcare provider, is unconscionable. The only privity in the arbitration agreement is between the parties who signed it, which in this case are the plaintiff and her physician, Dr. Khazaei. It is against public policy to bind unknown speculative people to an agreement. This is especially true in the surgical context where the anesthesiologist, who often has a different employer than the surgeon, is not known until the day of surgery.

Conclusion

Pre-suit arbitration agreements in medical malpractice cases arising out of the performance of surgical procedures, or that result in a patient's death, must be deemed to be unenforceable. Furthermore, the court should adopt a new test that protects the public's interest when enforcing pre-suit arbitration agreements because of the unique circumstances in medical malpractice cases. The agreement in this case is unenforceable because it is

[1] It should be noted that this is a direct quote from the arbitration agreement including all grammatical errors contained in the agreement.

unconscionable. Therefore, this court should affirm the lower court's holding that the arbitration agreement is unenforceable.

Respectfully submitted,

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NEW JERSEY ASSOCIATION FOR JUSTICE (NJAJ)

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*Counsel is grateful to Alec Mais J.D. for his assistance with this brief.

DATED: November 1, 2024

ESTATE OF NAFIZIA RUGBEER, by CHRISTOPHER RUGBEER, Administrator,

Plaintiffs,

-v-

KAMRAN KHAZAEI, M.D., KIEL KELLEY, C.R.NA., NOUVELLE CONFIDENCE, THE CENTER FOR COSMETIC LASER AND REJUVENATION, JOHN DOES 1-10, JANE DOES 1-10 (representing presently unknown health care providers or health care providers with regard to which negligence is not presently suspected, including but not limited to, doctors, surgeons, emergency medicine doctors, anesthesiologists, hospitalists, physician assistants, nurses, nurse practitioners, nurse anesthetists, technicians, and others); and ABC CORPS 1-10 (representing presently unknown facilities or entities who rendered care to the plaintiff who have deviated from the standard of care or facilities or entities with regard to which negligence is not presently suspected),

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-003269-23T4

Civil Action

Sat Below:
Hon. John M. Deitch, J.S.C.

Trial Docket.: UNN-L-1600-23

BRIEF OF DEFENDANTS/APPELLANTS KAMRAN KHAZAEI, MD AND NOUVELLE CONFIDENCE, LLC IN OPPOSITION TO *AMICUS CURIAE* NEW JERSEY ASSOCIATION FOR JUSTICE'S BRIEF

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PRELIMINARY STATEMENT

In Moore v. Woman To Woman Obstetrics & Gynecology, LLC, 416 N.J. Super. 30 (App. Div. 2010), this court rejected the argument made there, and in the within appeal, by the amicus New Jersey Association for Justice ("the Association"):

> Plaintiffs and the Association urge us to hold that all pre-dispute agreements to submit medical malpractice claims to binding arbitration are unenforceable. Their arguments are fairly summarized as follows: pre-dispute agreements to arbitrate medical malpractice claims are necessarily unconscionable contracts of adhesion; the waiver of rights of access to the court entailed in pre-dispute agreements to arbitrate medical malpractice claims cannot be knowing and voluntary; and the "undemocratic character" of arbitration's flexible rules and its closed proceedings will lead to distrust in the courts [Moore, 416 N.J. Super., at 35].
>
> **********
>
> Considering the breadth of the foregoing principles relevant to enforcement of an agreement to arbitrate, the policies upon which plaintiffs and the Association rely to urge adoption of a per se rule barring pre-dispute agreements to arbitrate claims of medical malpractice are reasonably addressed by the case-by-case approach the Legislature has directed. For that reason, we see no justification for judicial action imposing an absolute bar to enforcement of agreements to arbitrate such claims. The question is best left to the Legislature.
> [Id. at 40.]

The Association further argues that it would offend public policy to compel anyone to arbitrate who had not agreed to do so. See Association brief at p. 12. The subject arbitration agreement binds decedent's heirs and successors in interest (such as the plaintiff Estate); it is well-settled that heirs and successors in interest can be bound to an arbitration agreement. See Jansen v.

Salomon Smith Barney, Inc., 342 N.J. Super. 254, 261 (App. Div. 2001)("[t]he question then is whether the plaintiffs' failure to sign the arbitration agreement justifies their noncompliance with its terms. Examining the precise Client Agreement signed in this case, the Mississippi Supreme Court recently determined that the heirs to financial accounts could be compelled to arbitrate their claims relating to negligent management of the funds…We agree with the conclusion reached by the Mississippi Supreme Court and hold that the plaintiffs must arbitrate their claims against defendants").

The Association cites Moore for the proposition that a person cannot bind his or her spouse to arbitrate the spouse's claims individually; but the appeal here is from the trial court's refusal to stay the Estate's Survivors Act claims against the Khazaei defendants—not the claims asserted by individual heirs. Whether the heirs at law can be compelled to arbitrate their individual claims was not decided by the trial court and in any event, it is for the arbitration panel to determine the arbitrability of such claims.

Next, the so-called "Rugbeer test" proposed by the Association violates federal law because it singles out medical malpractice claims for harsher scrutiny than other types of contractual claims. Here, the Association would invalidate the arbitration agreement on the basis of alleged unequal bargaining power; but by that logic, an arbitration clause in *every* consumer contract would

be unenforceable. Finally, the Association would hold an agreement to arbitrate to the same standard as a liability waiver– even though the former does not, and the latter does, divest a party of its legal claims altogether.

For the reasons that follow, this honorable court must reject – as it did fourteen years ago – the arguments raised by the Association. Public policy favors arbitration as a preferred dispute resolution method as a matter of state and federal law, regardless of the kind of claim asserted. As directed by the court in Moore, any attempt to make an exception for medical malpractice claims should be addressed to the legislature.

LEGAL ARGUMENT

I. AN AGREEMENT TO ARBITRATE A MEDICAL MALPRACTICE CLAIM IS ENFORCEABLE UNDER NEW JERSEY LAW

A. State Law and Public Policy Favor Arbitration

The Association argues that because the New Jersey legislature has not enacted a statute that makes arbitration of a medical malpractice claim enforceable, it "reflects the public policy [of New Jersey] against arbitration in medical malpractice cases." See Association brief at p. 5. However, the case cited by the Association for this proposition states the opposite. Namely, that the *absence* of such legislation reflects public policy in *favor* of arbitration. See Curtis v. Cellco P'ship, 413 N.J. Super. 26, 34 (App. Div. 2010) ("Only 'if a statute or its legislative history evidences an intention to preclude alternate

forms of dispute resolution will arbitration be an unenforceable option'")(internal citations omitted); see also Moore ex rel. Moore v. Woman to Woman Obstetrics & Gynecology, LLC, No. A-0683-11T1, 2013 N.J. Super. Unpub. WL 4080947 (App. Div. 2013) ("no inherent harm to the doctor/patient relationship flows from the agreement to substitute one forum for another in the event of future claims"; "public policy favors arbitration agreements, **including in health care settings**") (Da067) citing Moore 416 N.J. Super. at 45 (App. Div. 2010)(emphasis added).

Additionally, the Association's argument seeking to invalidate every doctor/patient agreement to arbitrate a malpractice claim would violate the Federal Arbitration Act. See Kindred Nursing Centers Ltd. P'ship v. Clark, 581 U.S. 246, 251–52 (2017)("[a] court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue'…The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a "law prohibit[ing] outright the arbitration of a particular type of claim").

"When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the

FAA**.'** " Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012); AT&T Mobility, LLC, v. Concepcion, 563 U.S. 333, 341(2011)(FAA pre-empts a state law invalidating nursing home admission agreement to arbitrate personal injury and wrongful death claims); Estate of Ruszala ex. rel. Mizerak v. Brookdale Living Communities, Inc., 415 N.J. Super. 272 (App. Div. 2010) (New Jersey statute prohibiting arbitration agreement in nursing home contract pre-empted by FAA).

Nor is the Associations citation of *proposed* federal legislation related to nursing home admissions relevant to this matter. See Association brief at p. 3. The instant matter does not concern nursing home malpractice and the *proposed* legislation is not binding and must comply with the FAA in any event.

Accordingly, the Association's proposition – that there should be a *per se* ban on arbitration agreements in the medical malpractice context is not just bad policy, it is also trumped by the state and federal policy favoring arbitration.

II. THE RUGBEER TEST PROPOSED BY THE ASSOCIATION IS UNTENABLE

In contravention of state and federal policy favoring arbitration, the Association proposes the "Rugbeer test" in order to arrive at its desired conclusion: that the subject arbitration agreement is "unconscionable due to unequal bargaining power." See Association brief at p. 9.

However, the so-called "Rugbeer test" proposed by the Association is untenable for several reasons. First, the Rugbeer test violates federal policy by singling out arbitration of a specific kind of claim – medical malpractice cases - for harsher scrutiny. Kindred Nursing, 581 U.S. at 247. This is true at a minimum because the Rudbart test **balances** four factors. The proposed "Rugbeer test" requires that a pre-suit arbitration agreement in medical malpractice cases meet each and every condition in order to be enforceable.

Second, the Association proposes that that "unequal bargaining power" – a feature of nearly every consumer contract - is alone sufficient grounds to set aside a bilateral contract. See Association brief at p. 9 ("[i]f the "Rugbeer test" was applied to the present case, the arbitration agreement would be undoubtedly unenforceable because the agreement is contrary to public interest and is unconscionable due to unequal bargaining power").

Setting aside that the subject arbitration agreement is neither "contrary to public interest," nor "unconscionable," the Association attempts to perform a sleight of hand by claiming that the Rudbart test considers whether an arbitration agreement "is … the result of unconscionability **or** unequal bargaining power" Ibid (emphasis added). In fact, the Rudbart test considers whether a contract is unconscionable and thus unenforceable. "Unequal bargaining power" is merely one of several factor of unconscionability to be weighed under Rudbart.

This distinction is critical because unequal bargaining power alone does not preclude enforcement of an arbitration agreement considered to be a contract of adhesion. See i.e. Young v. Prudential Ins. Co., 297 N.J.Super. 605, 620, certif. denied, 149 N.J. 408 (1997). Nor is unequal bargaining power in and of itself sufficient to invalidate exculpatory agreements. See Stelluti v. Casapenn Enterprises, LLC, 203 N.J. 286, 301-02 (2010)("we assume that Stelluti was a layperson without any specialized knowledge about contracts generally or exculpatory ones specifically. Giving her the benefit of all inferences from the record, including that Powerhouse may not have explained to Stelluti the legal effect of the contract that released Powerhouse from liability, we nevertheless do not regard her in a classic "position of unequal bargaining power" such that the contract must be voided.")

Third, the Rugbeer test as a whole is unnecessarily duplicative and convoluted. The very first proposed Rugbeer factor requires that an arbitration agreement be clear and unambiguous. That an agreement to arbitrate clearly and unambiguously advise a party that they are waiving their right to trial in favor of arbitration (i.e. whether an agreement is "valid") is already subject to judicial review and required for any arbitration contract. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 443 (2014); see also N.J.S.A. 2A:23B-6(b). Additionally, proposed Rugbeer factor 2: "the agreement does not adversely affect the public interest" is wholly duplicative of Rudbart factor 4 "the public interests measured by the

contract." Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 356 (1992). Moreover, while the Association claims that arbitration in the context of medical malpractice is contrary to public interest, the reality is "public policy favors arbitration agreements, **including in health care settings**. (Da067) citing Moore 416 N.J. Super. at 45 (App. Div. 2010)(emphasis added).

Finally, the Rugbeer test is inappropriate because it unnecessarily conflates the factors and weighing of equities found in an exculpatory agreement like those found in Gershon, Adm'x Ad Prosequendum for Est. of Pietroluongo v. Regency Diving Ctr., Inc., 368 N.J. Super. 237 (App. Div. 2004) and Stelluti, with an agreement to arbitrate which merely specifies the forum in which a party's claims may be addressed. See i.e. Hojnowski v. Vans Skate Park, 187 N.J. 323, 327 (2006)(a parent may agree to bind a minor child to an arbitration provision, which in essence constitutes a choice of forum, a parent may not bind a minor child to a pre-injury release of a minor's prospective tort claims resulting from the minor's use of a commercial recreational facility.").

In sum, the Association offers no reason to add confusion to a system that already works as intended. Courts already review arbitration agreements for unconscionability through analysis of the Rudbart factors on a case-by-case basis. Further, courts have rejected a *per se* rule barring pre-dispute agreements to arbitrate claims of medical malpractice Moore 416 N.J. Super. at 36. Accordingly, the

proposed Rugbeer test is not a viable alternative to what is already available for courts to consider.

III. THE ENFORCABILITY OF THE SUBJECT ARBITRATION AGREEMENT AGAINST NON-PARTIES IS NOT BEFORE THE COURT

The Association argues that pre-suit arbitration agreements cannot be enforced against non-parties. In support of this argument, the Association relies on the inapposite unpublished case of Matter of Est. of Hekemian, No. A-1774-21, 2023 N.J. Super. Unpub. WL 176098 (App. Div. 2023). As set forth more fully below, while the Association is wrong on principle, that issue is plainly not before this court because neither party has raised the issue of whether the arbitration agreement is enforceable against non-parties in this appeal. See State v. O'Driscoll, 215 N.J. 461, 479-80 (2013) ("[A]s a general rule, an amicus curiae must accept the case before the court as presented by the parties and cannot raise issues not raised by the parties.")(internal citations omitted).

The only issues specifically before this court are: 1) whether the second trial court judge had jurisdiction and authority to reconsider and reverse the first trial court judge's March 22, 2024 stay order and; 2) whether and to what extent the terms of the arbitration agreement are generally enforceable.

A. Whether the Arbitration Agreement May be Enforced Against Non-parties is for the Arbitration Panel to Decide

As more fully argued in Point IV(A) of The Khazaei Defendants' Reply Brief, pursuant to NJSA 2A:23B-6(b) and Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 195 (2019), the arbitration panel had the sole authority to determine

threshold arbitrability questions such as whether the arbitration agreement is enforceable against non-parties to the arbitration agreement. See Perez v. Sky Zone LLC, 472 N.J. Super. 240, 248 (App. Div. 2022) citing Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 65 (2019); see also N.J.S.A. Section 2A:23B-6(c); see also McGinty v. Zheng, No. A-1368-23, 2024 WL 4248446, at *10 (N.J. Super. Ct. App. Div. Sept. 20, 2024) ("[t]his issue is a threshold arbitrability question…. The arbitrator will therefore decide if John is subject to arbitration as a third-party beneficiary").

The fact that the arbitration panel (and not the court) may decide whether specific claims are arbitrable is likewise mandated by Paragraph 2 of the subject Arbitration Agreement which states in clear and unambiguous terms, that "**all claims** for damages arising from medical services rendered by Kamran Khazaei, M.D., Nouvelle Confidence and or any physician nurse or person associated therewith **shall be submitted to binding arbitration and shall not be resolved by a court of law**" (Da003)(emphasis added). The Arbitration Agreement further states that its terms apply to "any claim of a spouse, heir, child (born or unborn), or other successor in interest to any such claim" (Da003).

Accordingly, not only is the threshold issue of arbitrability of non-parties claims not before this court, the same is specifically an issue to be determined

by the arbitration panel and not any court under the terms of the contract itself, the NJAA and the relevant case law.

B. The Arbitration Agreement is Enforceable Against Ms. Rugbeer's Estate

Even if this court were to entertain the argument raised by the Association that arbitration agreements are not enforceable against non-parties, the Association's blanket proposition is simply incorrect. "As a matter of New Jersey law, courts properly have recognized that arbitration may be compelled by a non-signatory against a signatory to a contract on the basis of agency principles." See, Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 569-70 (App. Div. 2007)(compelling arbitration after finding agency relationship existed between non-signatory and signatory to contract); see also Crystal Point Condo. Inc. v. Kinsale Ins. Co., 466 N.J. Super. 471, 482 (App. Div. 2021), rev'd on other grounds, 251 N.J. 437 (2022) ("Non[-]signatories of a contract ... may compel arbitration or be subject to arbitration if the nonparty is ... a third[-]party beneficiary to the contract.") (internal citations omitted.); see also Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 261 (App. Div. 2001) ("Although plaintiffs did not sign the arbitration provision, they were the intended successors to Jansen's interest in the accounts. They are thus bound by the arbitration clause.").

The unpublished case of Matter of Est. of Hekemian, while not binding on this court in any event, is inapposite. In Hekemian, the court addressed whether an arbitration clause in a will was binding and found that it "was not the product of mutual assent under traditional contract principles." Hekemian at *6. This fact is obvious because "A will ... is a unilateral disposition of property that does not require a 'meeting of the minds' to be effective." Ibid. The same is not true here. Unlike a will, the Arbitration Agreement is a bilateral contract signed by both parties. Hekemian is further distinguishable because here, the Arbitration Agreement specifically refers to wrongful death claims, whereas in that case, the court found that the claim asserted was not a 'dispute' within the scope of the arbitration clause. Id. at *7.

Nor would it be equitable to disturb the agreement of the Khazaei Defendants and Ms. Rugbeer based on the doctrine of equitable estoppel. Courts of this state hold that non-signatory may be compelled to arbitrate based on the doctrine of equitable estoppel upon proof of detrimental reliance by one of the parties to the contract. See Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 189 (2013).

Even if the court were to entertain arguments as to enforceability of the arbitration agreement against third parties, the Estate of Ms. Rugbeer is bound by the Arbitration Agreement as a third-party beneficiary through equitable

estoppel because the Khazaei Defendants detrimentally relied on the fact that Ms. Rugbeer and her heirs would arbitrate and disputes as Dr. Khazaei specifically testified that he would not have performed the procedure if a patient did not sign the agreement. (Pa21,T78:14-21).

CONCLUSION

For the reasons stated herein, and for those stated in the Khazaei Defendants' previous briefing, this honorable court must reject the Association's renewed attempt to upend the role of the legislature. State and federal policy favoring arbitration as a means of dispute resolution is codified in the New Jersey Arbitration Act, the Federal Arbitration Act and is supported by the relevant case law even in the context of medical malpractice claims. Accordingly, this honorable court must compel Plaintiff's claims against the Khazaei Defendants to binding arbitration.

Respectfully submitted,

KENNEDYS CMK LLP
Attorneys for Defendant-Appellant
Kamran Khazaei, MD and Nouvelle
Confidence, LLC

BY: David M. Kupfer
DAVID M. KUPFER

Dated: November 12, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-003269-23 T4

ESTATE OF NAFIZIA RUGBEER, by CHRISTOPHER RUGBEER, Administrator, and CHRISTOPHER RUGBEER, Administrator of the ESTATE OF NAFIZIA RUGBEER, *Plaintiff-Appellant,* vs. KAMRAN KHAZAEI, M.D., KIEL KELLEY, C.R.N.A., NOUVELLE CONFIDENCE, THE CENTER FOR COSMETIC LASER AND REJUVENATION, JOHN DOES 1-10, JANE DOES 1-10 *(For Continuation of Caption See Inside Cover)*	:	CIVIL ACTION ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY Docket No. UNN-L-1600-23 Sat Below: HON. JOHN M. DEITCH, J.S.C.

BRIEF FOR *AMICI CURIAE* THE AMERICAN MEDICAL ASSOCIATION AND THE MEDICAL SOCIETY OF NEW JERSEY

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(representing presently unknown health care providers or health care providers with regard to which negligence is not presently suspected, including but not limited to doctors, surgeons, emergency medicine doctors, anesthesiologists, hospitalists, physician assistants, nurses, nurse practitioners, nurse anesthetists, technicians, and others); and ABC CORPS 1-10 (representing presently unknown facilities or entities who rendered care to the plaintiff who deviated from the standard of care or0 facilities or entities with regard to which negligence is not presently suspected),	:
Defendants-Respondents.	:

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PRELIMINARY STATEMENT

The Medical Society of New Jersey ("MSNJ") and the American Medical Association ("AMA"), as *amicus curiae,* respectfully urge the Court to uphold the Trial Court's initial rulings as set forth in the Court's March 22, 2024 Order, and reverse and vacate the Trial Court's subsequent May 14, 2024 Order and the rulings entered *sua sponte* therein.

STATEMENT OF INTEREST OF AMICI CURIAE

The Amici MSNJ and the AMA file this brief as it is in the interest of physicians and the provision of health care to the public in general, that no exceptions be made to carve out claims asserting medical malpractice with respect to surgical procedures, and/or wrongful death claims when reviewing and ruling upon the enforceability of otherwise valid and enforceable agreements entered into between a physician and a patient.

The MSNJ is organized as a not-for-profit entity existing under the laws of the State of New Jersey. Representing more than 8,000 physicians practicing in New Jersey, MSNJ was founded in 1766 and is the oldest professional society in the United States. In representing all medical disciplines, MSNJ advocates for the rights of patients and physicians alike, seeking the delivery

of the highest quality medical care. The MSNJ's mission is "[t]o promote the betterment of the public health and the science and the art of medicine, to enlighten public opinion in regard to the problems of medicine, and to safeguard the rights of the practitioners of medicine."

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including New Jersey.

The MSNJ and the AMA submit this brief on their own behalf and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The participation of amici curiae is particularly appropriate in cases with "broad implications," Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth

Twp., 80 N.J. 6, 18 (1976), or in cases of "general public interest." Casey v. Male, 63 N.J. Super. 255, 259 (Essex Cnty. 1960).

This case raises important issues concerning the creation of exceptions for procedures in the medical specialty of surgery and wrongful death-based claims when determining whether to enforce a statutorily permissible arbitration agreement between a physician and a patient.

The MSNJ and the AMA take no position on the merits of the specific underlying allegations of professional negligence between the parties that have given rise to this appeal. However, the MSNJ and the AMA believe they can provide this Court with a perspective distinct from either of the parties. The Amici pursue filing this brief as it is in the best interests of physicians and patients, as well as to the provision of health care generally, that the provisions of the New Jersey Arbitration Act as enacted by the State legislature be adhered to and no exceptions thereto be made for surgical or wrongful death-based claims.

PROCEDURAL HISTORY

Plaintiff, the Estate of Nafizia Rugbeer, filed a complaint on May 18, 2023, asserting medical malpractice against the defendants, Kamran Khazaei, MD, Kiel Kelly, CRNA and the Center for Cosmetic Laser and Rejuvenation.

(Da 005-026). Specifically, plaintiff asserted both a survival action pursuant to N.J.S.A. 2A:15–3, and a wrongful death action pursuant to N.J.S.A. 2A:31–1. (Da007-009). In response, the defendants collectively filed a motion on July 19, 2023, to stay the litigation and instead have the case submitted to arbitration pursuant to an agreement previously executed by the parties. (Da001-Da026).

The motion was heard by the Honorable John D. Hudak, J.S.C., who entered an Order on September 8, 2023, staying the case for 30 days to permit the parties to engage in limited discovery relating to the formation of the arbitration agreement only. (Da028). Judge Hudak subsequently entered a second Order on March 22, 2024, which dismissed Count Two of plaintiff's Complaint asserting the wrongful death claim without prejudice and granted the defendants' motion to stay the litigation in favor of arbitration as to the survival claim asserted in Count One of plaintiff's Complaint. (Da070-Da079).

Plaintiff had filed a motion on March 21, 2024, seeking leave to file an amended complaint to correct a pleading deficiency with respect to the wrongful death claim asserted in Count Two of plaintiff's Complaint. (Da094-Da102). That motion was heard by the Honorable John M. Deitch, J.S.C., who issued an Order on May 14, 2024, which granted plaintiff's motion permitting plaintiff leave to file an amended complaint, but also reversed and vacated

Judge Hudak's March 22, 2024 Order and instead ordered, *sua sponte*, that the entire matter be restored to the trial calendar. (Da080).

The defendants filed a Motion for Reconsideration on June 3, 2024. The motion seeking reconsideration was granted by the Court; however upon reconsideration the Court ordered that the May 14, 2024 Order remain intact. (Da162-Da163).

STATEMENT OF FACTS

The MSNJ and the AMA rely upon the Statement of Facts included in the Brief submitted on behalf of the Defendants/ Petitioners.

LEGAL ARGUMENT

The New Jersey Legislature enacted the New Jersey Arbitration Act, ("NJAA" or "Act"), N.J.S.A. 2A:23B-1, et. seq., allowing for the enforcement of valid arbitration agreements in the patient-physician context in furtherance of the civil justice system's goal of resolving parties' disputes fairly and equitably. The Act allows redress for claims by those who enter into patient-physician pre-dispute arbitration agreements and adequately protects the rights of patients and physicians alike. The instant matter falls squarely within the legislative mandates of the Arbitration statute and interpretive case law.

The NJAA applies to matters subject to pre-dispute arbitration agreements. *See* Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., No. A-0683-11T1, 2013 N.J. Super. Unpub. WL 4080947 (App. Div. 2013). Physicians and patients entering into such agreements have a right to rely upon the enforcement of the contractual provisions to resolve issues involving patient care. The court found no inherent harm to the patient-physician relationship that flows from parties agreeing to substitute one forum for another in dealing with future claims. Moore, at 6. The current law adequately provides an appropriate balancing test setting forth the factors to be considered when determining enforceability of a pre-dispute arbitration agreement. Protecting the interest of the contracting parties is of the utmost

concern in resolving questions of enforceability and the test set forth in Rudbart v. New Jersey Water Supply Comm'n., 127 N.J. 344 (1992) provides the mechanism by which such questions are to be resolved, and which was relied upon by the court in Moore. To allow for specific exceptions such as those sought by the respondent here, i.e., for surgical cases and wrongful death matters, would contravene the legislative intent of the NJAA. Such exceptions would resultantly interfere with the provision of patient care within the broader healthcare system.

The patient-physician relationship is of paramount importance to care providers. In addition to providing medical care to patients, physicians are impacted by the influence medical malpractice claims have on their professional behavior and, to an extent, their well-being. Arbitration agreements allow for the fair and adequate redress of patient claims while at the same time serving to address physician concerns that impact the overall provision of patient care. The welfare of the public at large is served by upholding the NJAA without the creation of exceptions. While Petitioner and Amicus Curiae New Jersey Association of Justice assert that circumstances that justify straying from the language and intent of the legislature in enacting the statute, to do so would erode and serve to nullify its purpose. As it applies to the patient-physician relationship, exceptions based on specialty or type of

claim asserted will serve to negatively impact the safe provision of care to the detriment of patients and, by extension, the public's safety.

I. THE COURT SHOULD NOT CREATE EXCEPTIONS TO THE NEW JERSEY ARBITRATION ACT BY EXCLUDING SURGICAL AND WRONGFUL DEATH MEDICAL NEGLIGENCE CLAIMS FROM THE ARBITRATION PROCESS

The New Jersey Arbitration Act was enacted to continue the longstanding policy in the State of favoring arbitration as a means to resolve disputes. EPIX Holding Corp. v. Marsh & McLennan Cos., Inc., 410 N.J. Super 453, 471 n.7 (App. Div. 2009). New Jersey Courts have upheld the use of pre-dispute arbitration agreements in the context of the patient-physician relationship and the provision of patient care. Moore at 6. Per the State legislature's intent in enacting the Act, "[t]he primary purpose of the bill is to advance arbitration as a desirable alternative to litigation and to clarify arbitration procedures in light of developments of the law in this area". N.J.S.A 2A-23B-1 et. seq. Amicus Curiae New Jersey Association for Justice seeks to have this court create exclusions from the mandates of the Act which are specialty/treatment specific and based on a defined cause of action alleged. This would be in contravention of the legislative intent and would serve to

nullify the very benefits provided by the legislation that ensure the proper provision of patient care and protect the safety of the public.

As enacted, the legislature specifically included an exception to the provisions of the Act. Section 2A:23B-2(c) states "[this] act governs an agreement to arbitrate whenever made with the exception of an arbitration between an employer and a duly elected representative of employees under a collective bargaining agreement or a collectively negotiated agreement." This was the only exception included by the legislature in the language of the statute. Most notably, the Act does not set forth any other exceptions nor any language allowing for the creation of same in the future. If the legislature intended to allow other exceptions, they would have been included in the wording of the Act. N.J.S.A.1:1-1 provides that when interpreting statutes, "the 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 the generally accepted meaning, according to the approved usage of the language." Clearly, the language of the Act, when analyzed applying the aforementioned general rule of construction, precludes the creation of exceptions based on professional specialties and types of claims. As such, exceptions from the enforcement of arbitration agreements based on a surgical treatment or a wrongful death cause

of action are impermissible and contrary to public policy in favor of enforcement.

Public policy considerations in favor of enforcement of pre-dispute arbitration agreements include benefits to both the patient and the practice of medicine. Patients may benefit from pre-dispute arbitration agreements in a variety of ways. Arbitration can resolve issues more expeditiously than court proceedings which take years to proceed to trial. The financial burden on the patient is potentially reduced by expedient resolution of claims. Arbitration is cost effective as it is typically less expensive to undertake. Patient confidentiality is preserved which effectuates protection of patient privacy and keeps sensitive medical data out of the public record.

The benefits of claim resolution by way of arbitration agreements are significant to the practice of medicine and contribute to the betterment of quality medical care. Medical malpractice litigation has serious ramifications for physicians both professionally and personally. The time and effort doctors expend participating in professional negligence litigation takes physicians away from the practice of medicine and precludes them from focusing on patient care. Studies have shown the many physicians practice defensive medicine in order to avoid protracted litigation. Not only does this potentially subject individual patients to increased referrals, test and procedures, with

attendant risks, but also has very real cost implications for the provision of healthcare to the public at large.[1] The very purpose of the NJAA is to provide a means to resolve disputes, including all negligence claims resulting from medical treatment in any area of medicine. The statute as enacted affords due process to all parties and provides for the fair resolution of all claims, involving all specialties. Pre-dispute arbitration agreements in the context of medical care are enforceable, without exceptions, and serve the greater public good and the betterment of patient care.

[1] Kass, J. S., & Rose, R. V. (2016); Medical Malpractice Reform—Historical Approaches, Alternative Models, and Communication and Resolution Programs. *American Medical Association Journal of Ethics*, 18(3), 299-310.

CONCLUSION

For the foregoing reasons, Amici respectfully request the Court uphold the Trial Court's initial rulings as set forth in the Court's March 22, 2024 Order, and reverse and vacate the Trial Court's subsequent May 14, 2024 Order and the rulings entered *sua sponte* therein.

Respectfully submitted,

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Dated: November 22, 2024

ESTATE OF NAFIZIA RUGBEER, by CHRISTOPHER RUGBEER, Administrator, and CHRISTOPHER RUGBEER, Administrator of the ESTATE OF NAFIZIA RUGBEER,

Plaintiffs/Respondents,

-vs-

KAMRAN KHAZAEI, M.D., KIEL KELLEY, C.R.NA. NOUVELLE CONFIDENCE, THE CENTER FOR COSMETIC LASER AND REJUVENATION, JOHN DOES 1-10, JANE DOES 1-10 (representing presently unknown health care providers or health care providers with regard to which negligence is not presently suspected, including but not limited to, doctors, surgeons, emergency medicine doctors, anesthesiologists, hospitalists, physician assistants, nurses, nurse practitioners, nurse anesthetists, technicians, and others); and ABC CORPS 1-10 (representing presently unknown facilities or entities who rendered care to the plaintiff who have deviated from the standard of care or facilities or entities with regard to which negligence is not presently suspected),

Defendants/Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002363-23 T4

ON APPEAL FROM THE ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY

Sat Below:

Honorable John M. Deitch, J.S.C.
Union County Superior Court
Docket No. UNN-L-1600-23

REPLY BRIEF ON BEHALF OF PLAINTIFF/RESPONDENT, THE ESTATE OF NAFIZIA RUGBEER

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PRELIMINARY STATEMENT

In response to the Medical Society of New Jersey (MSNJ) and American Medical Association's (AMA) amicus curiae brief, Plaintiffs/Respondents submit this responsive briefing in opposition to their arguments and in furtherance of our submission that the Court must deny Defendants/Appellants' appeal.

LEGAL ARGUMENT

The bulk of the legal argument of the Medical Society of New Jersey (MSNJ) and the American Medical Association (AMA) refers to the New Jersey Association for Justice's (NJAJ) amicus curiae brief. NJAJ has clearly expressed its position for adopting certain exclusions to arbitration in the context of surgical and wrongful death medical malpractice cases in the aforesaid brief, and we find NJAJ's arguments to be satisfactory.

Public Policy Considerations

As a matter of public policy, Plaintiffs/Respondents strongly oppose the MSNJ and AMA's contention that public policy considerations dictate a ruling in favor of arbitration in this matter. In their amicus curiae brief, the MSNJ and AMA argue that arbitration is favorable to patients as it supposedly reduces costs in dispute resolution, as well as in healthcare writ large. Both claims have been disputed and disproven in the course of our national discussion on these issues. In arbitration, a claim is not valued against the fair and impartial assessment of a jury of one's peers,

but rather by the decisions of a panel of professional arbitrators. As far as reduced costs and turnover time for arbitration over litigation, these assumptions were first notably called into question by the findings of Kaiser Permanente's Blue Ribbon Advisory Panel in 1998, which noted that the overall costs of arbitration may be "roughly equal" to litigation, and the arbitration process had proved to be very similar to the court process, especially in not providing any guarantee of more rapid resolution.[1] More recently, other sources have also called into question the idea that arbitration will reduce the costs of dispute resolution, while noting that the denial of a trial by jury in medical malpractice cases, including in surgical and wrongful death cases, can have far-reaching effects.[2] As per this issue, the arbitration of such cases promotes the questionable interest of denying a plaintiff the right to have her case heard by a jury of her peers.

Additionally, in these types of cases, the prospect of a physician not being held accountable to a jury of his or her peers goes against the public policy of ensuring safe medical care to the public. To this end, our juries act as the conscience of our state. While medical malpractice litigation costs typically account for a very

[1] Eugene F. Lynch, et al., Blue Ribbon Advisory Panel on Kaiser Permanente Arbitration, The Kaiser Permanente Arbitration System: A Review and Recommendations for Improvement (1998), available at http://www.oia-kaiserarb.com/pdfs/BRP-Report.pdf.
[2] Stanley A. Leasure & Kent P. Ragan, Arbitration of Medical Malpractice Claims: Patient's Dilemma and Doctor's Delight, 28 Miss. C. L. Rev. 51 (2008-2009).

small fraction of American healthcare costs, such litigation imputes an enormous benefit on the public by way of the deterrence of negligent medical care.

As to privacy concerns, different patients may have varying feelings with regards to the privacy of their case. In fact, many prefer to have their experiences visible to the public eye. In any event, as to physicians' privacy, our system of litigation allows for confidential settlements.

The above issues are all the more cogent in the context of this case where the manner and substance of the arbitration agreement were entirely unconscionable in many ways, as detailed in our Respondent's Brief.

The Wrongful Death Claim

Furthermore, it should be noted that the MSNJ and AMA's Preliminary Statement provides further evidence that the Appellate Brief filed by Defendants/Appellants clearly appeared to seek only to move the survivorship claim into arbitration, and not to affect the litigation of the Plaintiffs/Respondents' wrongful death claim. As the Court is aware, the Trial Court's March 22, 2024 Order stayed litigation for arbitration of the survivorship claim, while allowing Plaintiffs to file an amended complaint to revise the Wrongful Death Count in the Trial Court (Da070-079). As per this issue, Defendants/Appellants should not be permitted to bait and switch the Plaintiffs/Respondents in this fashion. Allowing an appeal on the

issue of the wrongful death claim would seem to suggest there are no time restrictions on filing the requisite appeal.

In any event, Plaintiffs/Respondents' arguments as to the wrongful death claim were set forth expressly on the record in our original briefing on the issue, wherein it was argued that Ms. Rugbeer's heirs are not bound by an arbitration agreement to which they were not a party. At that time, it was also argued that the arbitration agreement at issue was unenforceable because it was unconscionable and the product of undue influence and that the arbitration agreement should not be enforced as a matter of fairness and public policy. These arguments were detailed in our August 24, 2023 opposition to Defendants/Appellants' Motion to Stay Litigation, as well as our subsequent supplemental brief of January 11, 2024 in opposition to same. Such briefs have been omitted from this Reply Brief according to this Court's deficiency notice of December 23, 2024, pursuant to R. 2:6-1(a)(2), but they can be supplied immediately upon the Court's request for proof that such arguments were indeed raised from the beginning of this issue.

As to precedent, these arguments relied in large part on the rulings in Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C., which held that an arbitration agreement is not enforceable as to the rights of persons who are not parties to the agreement. 416 N.J. Super. 30 (2010). In Moore, the Appellate Division ruled that an arbitration agreement in a wrongful death medical malpractice

case was unenforceable as to the spouse and child of the deceased who signed the agreement, as their claims were independent, and they did not accept the terms of the agreement. Id. at 45-46. In New Jersey, an arbitration agreement is not enforceable as to the rights of persons who are not parties to the agreement. Id. Similarly, an arbitration agreement is not enforceable as to the wrongful death claims of an heir that was not party to the agreement. Gershon, Adm'x Ad Prosequendum for Estate of Pietroluongo v. Regency Diving Center, Inc., 368 N.J. Super. 237, 246 (App. Div. 2004).

A wrongful death action can only be brought for the benefit of a decedent's heirs. N.J.S.A. §2A:31-1, et. seq. It is an independent claim, specifically designed to compensate a statutorily recognized class of claimants for the pecuniary losses caused by the death of the decedent, as a result of the tortious conduct of others. Gershon, 368 N.J. Super. at 246. The claims are separate and distinct from "survivorship claims," which are claims that the deceased would have had, had he lived. N.J.S.A. §2A:15-3. Although wrongful death and survivorship claims both arise from the death of the decedent, "they serve different purposes and are designed to provide a remedy to different parties." Smith v. Whitaker, 160 N.J. 221, 231 (1999). Accordingly, the Wrongful Death Act is remedial legislation that must be liberally construed to effectuate its purpose of creating an heir's right of recovery for the economic loss caused by the death of a family member. Gershon, 368 N.J.

Super. at 245 (quoting LaFage v. Jani, 166 N.J. 412, 430 (2001) and Smith v. Whitaker, 160 N.J. 221, 232 (1999)). The public policy underpinning the Wrongful Death Act requires that the court narrowly construe any attempt to contractually limit recovery. Gershon, 368 N.J. Super at 247.

To illustrate the independent nature of wrongful death claims, the New Jersey Supreme Court permitted a decedent's heirs to bring a wrongful death claim even though the survivorship action was barred by the statute of limitations. Miller v. Estate of Sperling, 166 N.J. 370, 382 (2001) (holding that a different result could extinguish a wrongful death action even before it came into existence); see also, Kibble v. Weeks Dredging & Const. Co., 161 N.J. 178, 189 (1999) (holding that the class of litigants in a wrongful death case often includes minor children, dependent upon the decedent for economic support); see also, Miller, supra, 166 N.J. at 383-84 (holding that as a matter of law, a wrongful death action does not accrue to the decedent).

In New Jersey, an arbitration agreement is not enforceable as to the rights of persons who are not parties to the agreement. Moore v. Woman to Woman Obstetrics & Gynecology, LLC, 416 N.J. Super. 30, 45 (App. Div. 2010). In Moore, a medical malpractice case, a husband and wife sued an OB/GYN on the theory that the doctor committed malpractice by failing to advise them of the high-risk nature of the wife's pregnancy, which ultimately resulted in the birth of a disabled child. Id. The

plaintiff-mother signed a pre-dispute arbitration agreement, which the court ruled was unenforceable against the plaintiff-father and/or the unborn child, because they were not parties to the agreement. Id. at 45-46. The court reasoned that the plaintiff-father and the unborn child had independent claims, they were not derivative of the plaintiff-mother's, and that they did not accept the terms of the arbitration agreement (the plaintiff-mother was the only one who was presented with and signed the arbitration agreement). Id. The court further held that it is "not aware of any legal theory that would permit one spouse to bind another to an agreement waiving the right to trial on his or her claim without securing his consent to the agreement. Id. at 45 (emphasis added).

In Gershon, the court held that an exculpatory release agreement that was signed by a decedent – did not legally preclude an independent wrongful death action brought by the decedent's heirs, who had not signed the agreement. Gershon v. Regency Diving Center, Inc., 368 N.J. Super. at 237. Although Gershon deals with an assumption of risk waiver, the analysis is the same because defendant's arbitration agreement in the within case operates to "contractually limit . . . [plaintiff's] right to recovery." Id. This is because the arbitration agreement seeks to waive a constitutional right to a jury trial, effectively limiting plaintiff's right to recovery. This is also because Dr. Khazaei's arbitration agreement affords Dr. Khazaei with the exclusive right to pick the arbitrator (Da122). Ms. Rugbeer and

Defendant Khazaei were the only two people involved with the arbitration agreement (Da122). Ms. Rugbeer's signature on Defendant's arbitration agreement does not and cannot prevent her heirs from prosecuting a separate, independent wrongful death claim.

Additionally, these arguments were fleshed out and reiterated in NJAJ's amicus curiae brief on this appeal. As such, should the Court be inclined to entertain the improperly brought issue of the arbitrability of the wrongful death claim, it should refer to the arguments therein, as well as those herein, as our position on this issue has been clear from the beginning: all claims must remain in the Trial Court for litigation.

Finally, this Court should not accept Defendants/Appellants' claim that we have tried to expand the record by informing the Court of Ms. Rugbeer's difficulties with reading and writing in the English language. The defense never requested additional discovery in the period allotted by the Trial Court which Plaintiffs did not provide. As per this issue, the Trial Court's September 8, 2023 Order provided only for thirty (30) days of "limited discovery" as to the arbitration agreement only (Da027-028). Moreover, the defense cannot argue that any information was withheld from them, as the information about Ms. Rugbeer's literacy issues is public knowledge and available on the Internet at the Literacy Volunteers of Somerset

County website.[3] Ms. Rugbeer experienced significant difficulties with literacy. This fact is highly relevant as to whether Ms. Rubeer would have been able to understand the arbitration agreement in the context of a physician who was unable to explain its contents.

CONCLUSION

For the reasons above and those set forth in our original papers, it is respectfully requested that this Court enter an Order denying the Defendants/Appellants' appeal.

Respectfully Submitted,

s/William O. Crutchlow

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Dated: December 20, 2024

[3] Julie Hicks, Remembering Nafizia "Sonia" Rugbeer, Literacy Volunteers of Somerset County (2022), available at https://www.literacysomerset.org/news/student-spotlights/remembering-nafizia-sonia-rugbeer.