Superior Court of New Jersey
Appellate Division
Docket No. A-003356-22T2

THOMAS MAHALCHICK, JR., BOTH INDIVIDUALLY, AS SURVIVING BENEFCIARY, AND ON BEHALF OF THE ESTATE OF ROMAINE MAHALCHICK, AND WILLIAM MAHALCHICK, INDIVIDUALLY AS SURVIVING BENEFICIARY,

PLAINTIFFS-APPELLANTS,

v.

ROBERT WOOD JOHNSON UNIVERSITY HOSPITAL RAHWAY, ROBERT WOOD JOHNSON PHYSICIAN ENTERPRISE, MICHAEL CHEN, M.D., DANIEL WANG, M.D., HAROLD CHUNG-LOY, M.D., VINCENT MOSS, M.D., SCOTT S. CHAE, M.D., MICHAEL BERNSTEIN, M.D., ABHISHEK SHRIVASTAVA, M.D., KRISTEN ELEFTERHIOU, P.A., MICHAEL VOLPE, B.S.N., ROWENA CABRAL, R.N., BIJU RINGLE, R.N., ABIGAIL VERZERIS, B.S.N., ALEXANDER APOSTOL, R.N., MEDICAL GROUP DOES 1-10 (FICTITIOUS NAMES) AND DR. JOHN DOES 1-10 (FICTITIOUS NAMES),

DEFENDANTS-RESPONDENTS.

On appeal from a final order entered in the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. MON-L-2121-18; Owen McCarthy, J.S.C. (pretrial); Kathleen Sheedy, J.S.C. and a jury (on trial)

BRIEF AND APPENDIX (A1-275) OF APPELLANTS

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BRIEF FILED ON OCTOBER 11, 2023

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Table of Appendix (A1-275, attached)

[1] The supporting brief has been omitted from the appendix.

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Procedural History[2]

This wrongful death case arises from defendants' negligent care of Romaine Mahalchick. Plaintiffs filed a Complaint (on June 13, 2018) then Amended Complaint (on September 25, 2019) for Wrongful Death and Survival in Medical Malpractice (and lack of informed consent). A99, 118. Defendants filed Answers denying plaintiff's claims. A35, 164.

Discovery took several years because of the complex medical malpractice issues and the COVID-19 pandemic that struck during the case. The Law Division ultimately entered Case Management Orders extending the discovery end date several times, with the final end date set as December 30, 2021, and trial then not occurring until one and one-years after that (in May 2023). A220.

The issue in this appeal revolves around plaintiffs' claim against defendant, Harold Chung-Loy, M.D., a general surgeon who plaintiffs charged

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[2] References to transcripts are as follows:

1T 8/27/21 (motion)
2T 11/12/21 (reconsideration)
3T 5/3/23 (trial)
4T 5/4/23 (trial)
5T 5/8/23 (trial)
6T 5/9/23 (trial)
7T 5/15/23 (trial)
8T 5/16/23 (trial)
9T 5/11/23 (trial)

was primarily responsible for Mrs. Mahalchick's wrongful death. Plaintiffs originally served an expert report of Paul Collier, M.D., explaining why Dr. Chung-Loy's care was negligent. In 2018, defendant moved to dismiss plaintiffs' Complaint on the ground that Dr. Collier lacked the proper qualifications to opine about Dr. Chung-Loy's care. A176.

Plaintiffs thus obtained a different expert, David Mayer, M.D., and served his expert report on defendant. A40. After defendant deposed Dr. Mayer on June 8, 2021, however, defendant moved (on July 6, 2021) to bar this expert too – again charging lack of sufficient qualification. A20.

Plaintiffs opposed defendant's motion but also cross-moved for permission to designate a new expert witness for trial -- to address the qualification objections that defendant continually raised. A89. Plaintiffs retained the new expert -- Stephen Ferzoco, M.D. – while the motions were pending, and, on July 30, served Dr. Ferzoco's Expert Report on Dr. Chung-Loy's counsel. A235 .

On August 9, while the motions were still pending, Judge Sheedy, who was overseeing the complex case, entered a Case Management Order extending the discovery end date to November 17, 2021 on consent of all parties, and providing that expert depositions should be completed by October 17, 2021. A220.

On August 25, defendant Chung-Loy withdrew his motion to bar Dr. Mayer from testifying as plaintiffs' expert, but objected to Dr. Ferzoco being allowed as plaintiffs' new expert. A217; 1T5:1-25. Oral argument was held before Judge Owen McCarthy two days later, following which Judge McCarthy denied plaintiffs' motion to name Dr. Ferzoco as their expert for trial (noting plaintiffs had Dr. Mayer as an expert, and worrying about delaying trial). A18; 1T10-12.

Discovery, meanwhile, continued. Judge Sheedy held Case Management Conferences about the status of discovery on October 1, and again on October 12, at which time Judge Sheedy agreed to extend the discovery end date to December 30, 2021 on consent of all parties (A218, entering the formal Case Management Order on November 18, 2021, A273).

After Judge Sheedy extended the discovery deadlines again, and with several experts on both sides still remaining to be deposed, plaintiffs filed a motion for reconsideration before Judge McCarthy, asking him to change his August 27 ruling that had denied plaintiffs permission to name Dr. Ferzoco as their expert. A209. Defendant opposed. Judge McCarthy heard argument on November 12, 2021 and denied reconsideration by Order entered that day, noting again that plaintiffs had Dr. Mayer and stressing that Monmouth County was "moving cases" (A16).

Trial, then, did not even take place until one and one-half years later – in May 2023. At trial, Dr. Chung-Loy's counsel eviscerated plaintiffs' expert, Dr. Mayer, before the jury about the same credentialing and qualification issues that defendant had raised pretrial and which plaintiffs had retained Dr. Ferzoco to address. Stuck without the expert they wanted and believed most qualified to explain Dr. Chung-Loy's negligent care of Mrs. Mahalchick, plaintiffs lost their case, with the jury returning a "no cause" verdict in Dr. Chung-Loy's favor. A14.

Plaintiffs now appeal Judge McCarthy's erroneous and unfairly prejudicial pretrial orders and ask the Court to grant them a new trial where they can present to the jury the expert witness they wanted to explain the most critical aspect of their wrongful death claim. A1.

Statement of Facts

The Malpractice Case against Dr. Chung-Loy

Mrs. Mahalchick was a healthy, 81-year old woman. She was a loving mother and grandmother. She was active in her community, working daily at the local elementary school and caring for the children there. 7T74-75, 93-97.

Then, on June 12, while travelling to a casino with her friends, Mrs. Mahalchick fell ill with extreme stomach pain. She rushed to the emergency

room at Robert Wood Johnson University Hospital. She described her severe abdominal pain as "10 out of 10." She was quickly admitted. 7T74-75, 93-97.

Among the providers called upon to assess Mrs. Mahalchick was Dr. Chung-Loy, a general surgeon. "Urgent/Stat" consults were sent to Dr. Chung-Loy. Dr. Chung-Loy spoke only with a physician assistant (Gualano), however, not the admitting Doctor (Chen) or with any other doctor (despite the Hospital's internal policies so requiring). Dr. Chung-Loy did not travel to the Hospital to examine Mrs. Mahalchick either. He told physician assistant Gualano, during their phone call, to start Mrs. Mahalchick on pain medication and that he (Dr. Chung-Loy) would see her the following day. A237-41.

Overnight, meanwhile, Mrs. Mahalchick's condition worsened considerably. By 5:18 a.m., her blood pressure had dropped to 90/57 – far below what Hospital nurses and doctors had established as her baseline. By 9:58 a.m., Dr. Chen put Mrs. Mahalchick into the Hospital's intensive care unit. A237-41.

Dr. Chung-Loy finally arrived at the hospital and saw Mrs. Mahalchick a couple of hours later, sometime in the late morning. In a note he dictated at 1 p.m. that day, Dr. Chung-Loy acknowledged Mrs. Mahalchick's continued decline and the "possibility of ischemic colitis." He continued to defer surgery, however. Only after Mrs. Mahalchick deteriorated even further

during the afternoon did Dr. Chung-Loy finally decide, at 5:26 p.m., that she needed immediate surgical intervention. Dr. Chung-Loy performed the surgery 90 minutes later (at 7 p.m.), and saw that Mrs. Mahalchick's entire colon was "discolored and grossly ischemic." He performed a subtotal colectomy. But it was too late. Mrs. Mahalchick never recovered from the surgery. She died the following day from "severe ischemic colitis and septic shock." A237-41.

The Expert Reports about Dr. Chung-Loy's care

Plaintiffs first retained a general and vascular surgeon, Dr. Collier. A37. Defendant objected and moved to dismiss plaintiffs' claim against Dr. Chung-Loy on grounds that Dr. Collier specialized in vascular and general surgery, while Dr. Chung-Loy was a general surgeon only. A176.

So plaintiff retained Dr. Mayer, who provided an Affidavit of Merit and Expert Report, which plaintiffs served on defendants in September 2020. A40, 147. After defendant deposed Dr. Mayer in June 2021, however, defendant again moved to bar plaintiffs' expert for claimed lack of qualification. A20.

Finally, plaintiffs retained Dr. Ferzoco to address the qualification objections that defendants had continually raised. Dr. Ferzoco was eminently qualified -- a general surgeon and graduate of Yale University's School of Medicine with surgical training associated with Harvard Medical School

(A235-56). He explained in his Expert Report (served on defendants on July 30, 2021) that the care Dr. Chung-Loy provided to Mrs. Mahalchick "did not comply with the acceptable standard of care for a qualified general surgeon:"

> Patients presenting as Ms. Mahalchick did with evidence of pneumatosis and significant lactic acidosis require exploratory surgery to evaluate for ischemic or necrotic bowel. Dr. Chung-Loy failed to come in the night he was called and evaluate Ms. Mahalchick who was severely ill and in need of a surgical consultation. Dr. Chung-Loy failed to review the images of her CT scan once the suspicion of pneumatosis was identified, a serious CT finding. He failed to comprehend the severity of her condition and the need for a exploratory laparotomy the night she was admitted.
>
> The following morning, Dr. Chung-Loy should have appreciated that Ms. Mahalchick's clinical condition had not improved, as evidenced by the developing hypotensive shock, continued pain she was suffering despite multiple doses of pain medication, and distended abdomen and the minimal reduction in her lactic acid. Dr. Chung-Loy failed to accurately diagnose and treat Ms. Mahalchik the next morning and in his 1 PM dictated note he is still considering ischemic colitis as possible as opposed to acting on the surgical emergency in front of him. These failures led to the delay of definitive life-saving treatment. The infectious disease consult later that afternoon reflected continuing and persistent 10/10 abdominal pain and deferred the case back to surgery. A decision to proceed quickly to surgery at the time of his 1PM dictated note, more likely than not, would have resulted in Ms. Mahalchick surviving the emergency surgery.
>
> In summary, it is my opinion to a reasonable degree of medical probability, as a board-certified general surgeon, that the acceptable standard of care was not met in this case. Dr. Chung-Loy failed to appear at the hospital the night of June 12, 2016 for a patient who was suffering from all the hallmarks of an acute abdomen - pain out of proportion, lactic acidosis and a CT scan with possible pneumatosis at the splenic flexure. Dr. Chung-Loy

> failed to take her to the OR that night for an exploratory laparotomy as was needed and then Dr. Chung-Loy continued to delay and deny her the life-saving treatment that she required long into the next day. Dr. Chung-Loy's failure to timely diagnose and surgically treat the emergent situation his patient was in was the proximate cause for Ms. Mahalchick 's death. [A240]

Plaintiffs' Motion to name Dr. Ferzoco as their expert for trial

Plaintiffs stressed in their motion that there was no trial date scheduled and ample time for defendant to depose Dr. Ferzoco. A95-98; 1T7-8. Though the February 16, 2021 Case Management Order had provided a discovery end date of July 20, 2021, overseeing Judge Sheedy then entered an August 9 Case Management Order extending the discovery end date to November 17, 2021, and providing for completion of expert depositions by October 17, 2021. A269. Plaintiffs had served Dr. Ferzoco's expert report on defendant on July 30 (A218) and had complied with all discovery deadlines otherwise (A95-98, A214-219).[3]

[3] In their June 10, 2021 correspondence (A170), plaintiffs' counsel advised Judge McCarthy that "[t]he parties have been diligently coordinating and scheduling plaintiffs' expert depositions. To date, two of five of plaintiffs' experts have been deposed; one is confirmed to go forward on July 8, 2021; one needs to be rescheduled from June 14, 2021, as the doctor is not available; and the last doctor is-coordinating dates with his schedule but has not been confirmed to date. Upon completion of plaintiffs' experts' depositions, plaintiffs will need to coordinate and notice the depositions of defendants' experts, 19 experts in total."

Thus, by the time that Judge McCarthy heard argument on plaintiffs' application on August 27, there were nearly two months left to complete expert depositions, and nearly three months before the discovery end date. A218.

Judge McCarthy nonetheless worried about delaying trial if he permitted Dr. Ferzoco as plaintiffs' trial expert (1T8), and told plaintiffs' counsel they already had Dr. Mayer as their expert since defendant had withdrawn his motion to bar Dr. Mayer from testifying. "I don't see the prejudice by allowing you to continue with the expert by which Mr. Heavey has now withdrawn his objection as to the standard of care as to his client." 1T9. Judge McCarthy stressed that Monmouth County was "moving cases" as well. "[A]ll I'm going to do is unnecessarily delay this case by allowing a new expert to come in at this late of a junction." "[B]alancing the prejudice against" plaintiff with the "2018 docket number" warranted denying plaintiffs' application, Judge McCarthy ruled:

> I have to balance, and I realize it was a cost to your client, but I also have to balance that interest against the court's interest, the case is a 2018 docket number. As I mentioned, we are trying medical malpractice cases here in Monmouth County. That the prejudice to the other parties, and I think the issue towards the Court by allowing this case, you know, indefinitely -- I'm probably would be at a minimum no less than 60 days, probably more than that. And then that's not even talking about getting these depositions done that you indicated that you're going to have a tough time complying with Judge Sheedy's order on.

> So balancing the prejudice against your clients, the other parties, I really think the totality of the circumstances, you have an expert that can testify against Mr. Heavey's client. He will be able, you know, kind of where cross examination may be now based upon his motion, so you have the ability to prepare for that. [1T10-12]

Plaintiffs' Motion for Reconsideration

As noted above, plaintiffs moved for reconsideration after Judge Sheedy extended the discovery deadlines again – pushing the end date to December 30, 2021 and noting to counsel for the parties that trial would not possibly take place until March or April of the following year (2022) at the earliest. Plaintiffs stressed to Judge McCarthy that expert depositions would be continuing through December. A263-68. Defendant had Dr. Ferzoco's Expert Report since July 30, 2021, and it was substantially similar to the prior expert reports. A263-68. It was unfair, plaintiffs stressed, for the court to continue denying plaintiffs their choice of expert on the most critical issue the jury would have to decide – and where plaintiffs had retained Dr. Ferzoco specifically to address the qualification and credentialing issues that defendant had continually raised and would raise again at trial.

During the November 12 argument, however, Judge McCarthy, while acknowledging Judge Sheedy's extension once again of the discovery deadlines, continued complaining about the age of the case, telling plaintiffs' counsel, "Well, you've got a case that's going to be four years old. I don't

know what's happening in other parts of the state, but we are moving cases here in Monmouth. …. these trial dates are real and they have teeth. … I don't know, again, what other vicinages may or may not be doing, but we are moving med mal cases, we're moving employment cases… these are real dates." 2T7-8.

As in his August ruling, Judge McCarthy also told plaintiffs' counsel that plaintiffs "already had" Dr. Mayer: "But you have an expert in this case. You have an expert that is willing, ready to testify against Mr. Heavey's client in this matter. Correct?" 2T10. Plaintiffs' counsel explained again why Dr. Ferzoco had been retained:

> MR. EPSTEIN: It's not -- it's not a better expert report. We found out credentialing issues. And I can point them out to Your Honor, because they were in Mr. Heavey's brief that, again, ten years of no privileges within the hospitals that are during the time period of the -- of the incident. The fact that he had only 20 percent to teaching prior to the -- the year -- the year immediately preceding the incident. These are -- these are death knells and the -- and really it's going to happen at the end of the case as opposed to before the case and it's -- to not to allow the plaintiffs' counsel to have discovered that at the same time as defense counsel would go opposite of the cases actually cited in Mr. Heavey's brief. [2T12]

Defendant's counsel (Mr. Heavey) acknowledged to Judge McCarthy that the defense was not withdrawing or waiving objections to Dr. Mayer's qualification and credentialing problems for trial. 2T14; 2T26-28.

Plaintiffs' counsel stressed the absence of prejudice to the defendant, which had more than sufficient time to depose Dr. Ferzoco "because the discovery had been extended" by overseeing Judge Sheedy. "[W]e have a December 30th end date, and … there's not even a trial date yet, again, so there is a good cause -- you know, there's still a good cause standard for the request to bring a report." 2T24.

But Judge McCarthy affirmed his prior ruling and denied reconsideration. "Dr. Mayer can still testify, the plaintiff is still able to offer the opinion. Whatever weight the jury chooses to give to Dr. Mayer or any of the experts in this case is clearly within the province of the fact finder." Judge McCarthy said there was "potential prejudice to the defendant" by the "11th, at the 10th-and-a-half hour, allowing a new expert report. I don't see any authority -- or persuasive authority, based upon the record here and the evidence submitted that would allow that." Judge McCarthy again stressed the age of the case and his worry that allowing Dr. Ferzoco would delay its resolution. "The case is three years, five months old. Judge Sheedy, in speaking to and looking what's here, you know, she's trying to lock this up and get the expert depositions done so you are in a position where you can try this case. To the extent this Court were to grant this motion, inevitably every

action has a reaction and this would certainly further delay significantly the ability of this case to ultimately be tried," Judge McCarthy said, concluding,

> I think it's a dangerous road for a court to allow. And I agree with Mr. Heavey, whether it be a plaintiff or a defendant, if someone has an expert that may have some problems not rising to the level of the expert to testify, but to allow a new expert in a case now that has had -- I believe I have eCourts, if I haven't been frozen -- 1,220 days' worth of discovery. The case is three years, five months old. Judge Sheedy, in speaking to and looking what's here, you know, she's trying to lock this up and get the expert depositions done so you are in a position where you can try this case. To the extent this Court were to grant this motion, inevitably every action has a reaction and this would certainly further delay significantly the ability of this case to ultimately be tried. [2T31]

ARGUMENT

The pretrial judge abused his discretion – and violated plaintiffs' right to present their wrongful death claim before the jury at trial – by denying plaintiffs' motion to name Dr. Stephen Ferzoco as their expert witness (A18), and by denying reconsideration of the unfairly prejudicial ruling (A16).

The Appellate Division reviews orders regarding discovery for abuse of discretion, including whether a court abused its discretion "in denying plaintiff's motion for an extension of the discovery period[.]" Spinks v. Twp. of Clinton, 402 N.J. Super. 454, 459 (App. Div. 2008). Abuse of discretion occurs when the lower court misapplied governing law, or when its decision "inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002); Customers

Bank v. Reitnour Inv. Properties, LP, 453 N.J. Super. 338, 348 (App. Div. 2018).

A. Judge McCarthy abused his discretion in his August 27 ruling

When plaintiffs moved for permission to name Dr. Ferzoco as their expert, the Case Management Order in effect (the February 16, 2021 Order) noted that plaintiffs' expert reports had been "completed" while providing dates for the completion of other discovery with an overall end date of July 20, 2021. A152.

But by the time Judge McCarthy heard argument and ruled on plaintiffs' motion on August 27, plaintiffs had served Dr. Ferzoco's expert report on defendant on July 30 (A235), and Judge Sheedy had entered her August 9 Order providing for expert depositions to be completed by October 17, and extending the discovery end date to November 17, 2021. A220. Plaintiffs' identification of Dr. Ferzoco was proper under R. 4:17-7 as well, which provides that a party may amend its answers to interrogatories – including experts to be called at trial -- no later than "[twenty] days prior to the end of" discovery. Judge McCarthy erred in denying plaintiffs' motion in light of the August 9 Case Management Order in effect at the time of his ruling and the Court Rule allowing amendment.

Even if naming Dr. Ferzoco was considered a request for extension of discovery (since the prior February 16, 2021 Case Management Order indicated that service of plaintiffs' expert reports was "completed"), Judge McCarthy erred in failing to apply the "good cause" standard that applies to requests for extensions where no trial date has been set, per R. 4:24–1(c). Tynes v. St. Peter's Univ. Med. Ctr., 408 N.J. Super. 159, 168 (App. Div. 2009); Viviano v. CBS, Inc., 101 N.J. 538, 547 (1986); Leitner v. Toms River Reg'l Sch., 392 N.J. Super. 80, 93 (App. Div. 2007); Ponden v. Ponden, 374 N.J. Super. 1, 9–11 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005). As the Rule provides, the extension "shall" be granted on "good cause" shown where there is no trial or arbitration date scheduled. There was no trial or arbitration date scheduled when plaintiffs moved to name Dr. Ferzoco as their expert, when Judge McCarthy issued his August 27, or even when Judge McCarthy denied reconsideration on November 12. Judge McCarthy did not cite or apply this good cause standard.

The record before Judge McCarthy showed there was more than sufficient good cause to grant an extension to permit plaintiffs to name Dr. Ferzoco as their expert. As counsel stressed to Judge McCarthy, plaintiffs retained Dr. Ferzoco to address the qualification and credentialing problems that defendant raised against Dr. Mayer. There was no trial or arbitration date

scheduled, and the discovery deadlines were weeks away, see Leitner v. Toms River Reg'l Sch., 392 N.J. Super. 80 (App. Div. 2007) ("absence of an arbitration or trial date at the time of the trial judge's ruling is of critical significance in a court's exercise of its discretion to extend discovery"); Ponden, 374 N.J. Super. 9 ("raison d'etre" of Best Practices "was to render trial dates meaningful"; "enforcement or relaxation of discovery end dates" thus "chiefly governed by the presence of an existing trial or arbitration date and whether the late discovery can be completed without jeopardizing the arbitration or trial date.") The factors for assessing "good cause" (Leitner, supra, 392 N.J. Super. 87) supported plaintiffs' request:

- With regard to factor (1), the movant's reasons for the requested extension of discovery, plaintiffs named Dr. Ferzoco to address defendant's continued qualification objections;
- With regard to factor (2), the movant's diligence in earlier pursuing discovery, the record showed that plaintiffs diligently worked towards and fulfilled all discovery deadlines in the case;
- With regard to factor (4), any prejudice which would inure to the individual movant if an extension is denied, denying Dr. Ferzoco's entry would saddle plaintiffs with the qualification and

credentialing problems that defendant would raise against Dr. Mayer at trial on the most important issue the jury had to decide;

- With regard to factor (5), granting plaintiffs' request would be "consistent with the goals and aims of 'Best Practices'" since no trial date was set and prejudice and delay was minimal at most;
- With regard to factor (6), the "age of the case" was reasonable given its complexity and the COVID-19 delays that impacted all cases;
- With regard to factor (7), "the type and extent of discovery" that remained "to be completed" included several expert depositions anyway – adding Dr. Ferzoco to the list was not substantially burdensome or delaying;
- With regard to factor (8), "any prejudice which may inure to the non-moving party if an extension is granted," defendant had Dr. Ferzoco's expert report since July 30 and it was substantially similar to Dr. Mayer's report on the same issue.
- With regard to factor (9), there was no substantive motion practice that would have been impacted by permitting Dr. Ferzoco into the case.

Any reasonable balancing of those factors shows that good cause supported plaintiffs' request to name Dr. Ferzoco as their expert for the unscheduled trial.

In Tucci v. Tropicana Casino & Resort, Inc., 364 N.J. Super. 48, 53 (App. Div. 2003), this Court ruled that the motion judge erred by precluding an expert report the party submitted 39 days *after* the discovery deadline passed. If the motion judge in Tucci erred, Judge McCarthy erred, since plaintiffs served Dr. Ferzoco's report and moved for permission to name him as their expert well within the discovery end date and where no trial date was set, cf. Castello v Wohler, 446 NJ Super I, 20, (App. Div. 2016) (though plaintiffs' expert was not qualified and the affidavit of merit was invalid, discovery deadline should have been extended to permit plaintiffs time to obtain another expert).

None of the reasons that Judge McCarthy noted in his ruling provided reasonable and sufficient ground to deny plaintiffs their chosen expert on the most critical issue the jury was to decide. Judge McCarthy said that plaintiffs already had an expert in Dr. Mayer. 1T9. But this was plaintiffs' choice, not the judge's. When Judge McCarthy made his August 27 decision, the discovery end date was nearly three months away, and even expert depositions had almost two months left for completion. The Rules of Court still provided

plaintiffs with a right to amend their answers to interrogatories to identify a new expert. Plaintiffs had a qualified right, at least, to choose the expert witness they wanted to testify at trial, and they chose Dr. Ferzoco specifically to address the problems that defendant had continually raised against Dr. Mayer. Judge McCarthy abused his discretion by overriding plaintiffs' choice, and sticking them with the problematic Dr. Mayer for trial, without a sufficient and compelling reason to do so.

Judge McCarthy said he was denying plaintiffs' motion also because "we are moving the cases here. … I think in light of the challenges associated with everyone involved with this case, trying to get the depositions done in a somewhat timely manner, all I'm going to do is unnecessarily delay this case by allowing a new expert to come in at this late of a junction." 1T10-12. But the deadline to depose experts was nearly two months away, and the discovery deadline nearly three months away, under the August 9 Case Management Order in effect. There was insufficient factual support for Judge McCarthy's worries about delaying a trial which had not even been scheduled.

While caselaw provides that an extension of discovery should not cause prejudice to the opposing party (Leitner, supra, 392 N.J. Super. 93; Ponden, supra, 374 N.J. Super. 9), nothing in the record showed that there would be such prejudice to defendant Chung-Loy that it warranted denying outright

plaintiffs' chosen expert on the most critical issue the jury would have to decide. The expert report of Dr. Ferzoco was substantively similar to Dr. Mayer's report. There was no surprise as to its contents; Dr. Ferzoco's qualifications and credentials simply avoided the problems that Dr. Mayer had. The August 9 Case Management Order provided defendant with nearly two more months to depose Dr. Ferzoco – and this was extended again in Judge Sheedy's later Case Management Order. There was no prejudice to defendant that was demonstrated on the record before Judge McCarthy. This was not a situation, for example, where a party had suddenly identified a new expert just before trial was about to start.

Whatever prejudice defendant claimed, moreover, Judge McCarthy could have and should have addressed it by something less harmful than denying plaintiffs' chosen expert outright -- payment of fees or costs for defendant having had to depose Dr. Mayer, or obtain a supplemental or responsive report, extension of time needed by defendant, etc. -- a lesser "remedy" than completely precluding plaintiffs from calling Dr. Ferzoco as their expert witness on the most critical issue the jury would have to decide, for a trial that wasn't even scheduled and that would be scheduled until March or April the next year at the earliest. Our courts have consistently stressed that trial court orders barring discovery or the like must not work an injustice on

the affected party. While a judge has broad discretion in formulating sanctions for discovery violations, for instance, such as the failure to timely file an expert report, any sanction must be "just and reasonable." Conrad v. Robbi, 341 N.J. Super. 424, 441 (App. Div. 2001). R. 4:23-2(b) provides a number of sanctions a court is empowered to impose, with the choice of sanction informed in part by whether the party acted willfully and the degree of harm suffered harm by the opponent. Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005); cf. Baldyga v. Oldman, 261 N.J. Super. 259, 268 (App. Div. 1993) (error to exclude expert report received after discovery end date but before ruling on summary judgment). Judge McCarthy abused his discretion in this regard as well by failing to consider alternatives than barring outright the expert witness that plaintiffs wanted to call at trial on this critical issue.

B. Judge McCarthy at least abused his discretion by denying reconsideration in his November 12 ruling.

By the time of reconsideration, Judge Sheedy had extended the discovery end date even further to December 30, 2021, and advised that trial would not occur until March or April 2022 at the earliest (and trial did not actually occur until the following year, in May 2023). Expert depositions were expected to continue through the discovery end date -- as reflected in Judge Sheedy's Case Management Order then entered on November 18, 2021 (A273).

Judge McCarthy again placed too much weight on his speculative worries about delaying a trial that wasn't even scheduled: "Well, you've got a case that's going to be four years old. I don't know what's happening in other parts of the state, but we are moving cases here in Monmouth." Judge McCarthy's concerns about delaying the case had been lessened by Judge Sheedy's extension of the deadlines and forecast for when trial might possibly take place. As plaintiffs' counsel said in response to Judge McCarthy asking "what has changed" since his August 27 ruling, "the discovery had been extended"; "we have a December 30th end date, and now we know that trial will not be before … there's not even a trial date yet, again, so there is a good cause -- you know, there's still a good cause standard for the request to bring a report." 2T24.

The "age of the case" was not plaintiffs' fault -- even Judge McCarthy did not find that. This was a complicated medical negligence case involving several potentially responsible parties. The COVID-19 delays exacerbated the time it took for the case to progress through discovery. But the record before Judge McCarthy showed that counsel for all parties, plaintiffs included, had pursued discovery diligently, and the Law Division had extended deadlines as needed to accommodate the discovery that was needed. As plaintiffs' counsel affirmed to Judge McCarthy in support of reconsideration (A214), "The fact

that expert depositions will take at least through December to schedule cannot be viewed as a circumstance caused by the plaintiffs."

> 20. To the contrary, on April 23, 2021, plaintiffs emailed all defendants requesting available dates to depose its experts. A follow up letter was sent on August 18, 2021 as no responses were forthcoming. We received only two responses resulting in five (5) days in October to take the depositions of 15 defendant experts. On September 2, 2021 we again requested available dates from counsel who had not responded. We then received one other response, limiting depositions to 2 days in October. Plaintiffs then circulated dates for November. After receiving only 2 responses, November dates were limited to 5 available dates. Plaintiffs then circulated dates for December. Despite plaintiffs' numerous requests, available dates for expert depositions could not be agreed upon by defendants. See plaintiffs' letters attached hereto as Exhibit E.
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> 21. On October 1, 2021, the parties appeared again before Judge Sheedy for a case management conference. Judge Sheedy requested all parties confer on expert deposition dates in October and reconvene on October 12, 2021.
>
> 22. On October 12, 2021, the parties again appeared before Judge Sheedy. At the time of the conference, plaintiffs had provided October dates for depositions of its experts but defendants had provided mostly November or December dates for its experts. Judge Sheedy extended discovery to December 30, 2021. Trial was not scheduled but counsel were instructed to agree to dates in March or April. [A214-19]

As plaintiffs' counsel stressed, "Dr. Ferzoco's report was served in July. All of the defendant expert depositions remain outstanding and discovery has been extended to December 30, 2021; Trial will not occur before March or April 2022 at the earliest. Based on the above, and in the interest of justice," Judge McCarthy abused his discretion -- at least by his November 12 ruling --

in continuing to deny plaintiffs' their chosen expert on this critical issue. Whatever prejudice defendant possibly might have suffered could have and should have been dealt with by something less than barring this expert entirely. Judge McCarthy did not reasonably balance the rights of the parties, and of the court, in that regard. And predictions of doom were not supported by sufficient evidence in the record before him showing that the catastrophic delays would happen – that "this would certainly further delay significantly the ability of this case to ultimately be tried" (2T31-33). Judge McCarthy did not reasonably exercise his discretion and, ultimately, unfairly prejudiced plaintiffs' presentation of their complex malpractice case at trial.

C. Judge McCarthy's rulings denying plaintiffs their chosen expert on the most critical issue the jury had to decide were – quite predictably – devastating to presentation of their case at trial.

In denying plaintiffs' motions to name Dr. Ferzoco, Judge McCarthy kept telling counsel that plaintiffs "already had" an expert in Dr. Mayer. Plaintiffs' counsel kept telling Judge McCarthy that Dr. Mayer was saddled with glaring qualification and credentialing problems that defendant's counsel, Mr. Heavy, had raised pretrial, that Dr. Ferzoco was retained to address, and which would be a major problem for plaintiffs before the jury if they were not allowed to name the eminently qualified Dr. Ferzoco as their expert witness. Plaintiffs' counsel told Judge McCarthy during reconsideration that "it was

discovered during the dep[osition of Dr. Mayer] that the credentialing was a significant problem with the expert" and that's why Dr. Ferzoco was retained. 2T10-11.

> MR. EPSTEIN: … We found out credentialing issues. And I can point them out to Your Honor, because they were in Mr. Heavey's brief that, again, ten years of no privileges within the hospitals that are during the time period of the -- of the incident. The fact that he had only 20 percent to teaching prior to the -- the year -- the year immediately preceding the incident. These are -- these are death knells and the -- and really it's going to happen at the end of the case as opposed to before the case and it's -- to not to allow the plaintiffs' counsel to have discovered that at the same time as defense counsel would go opposite of the cases actually cited in Mr. Heavey's brief. [2T12]

Plaintiffs' counsel told Judge McCarthy that these "credentialing issues" were "not going away" -- as defendant's counsel acknowledged. 2T27-29.

And when trial arrived, right in opening statement, Mr. Heavey told the jury,

> Let me talk about, you've already heard from me Dr. Chung-Loy has over 35 years of surgical experience. I have three general surgeons, I'm not sure I'm going to call all three of them, but I'll probably call two of them, and combined those general surgeons have about 75 years of experience. You couple that with Dr. Chung-Loy's experience, you have about 110 years of surgical experience.
>
> You're going to hear that the expert from the plaintiff, the general surgeon by the name of Dr. Mayer, at the time of this treatment wasn't even doing abdominal surgery. He wasn't even doing bowel surgery. He didn't have permission at any hospital to do general surgery. He didn't have privileges at any hospital to do general surgery. He hadn't done a consultation in general surgery

> on a patient since 2010. He hadn't done bowel surgery on a patient since 2010.
>
> And for much of that time he -- or for a significant portion of that time, he left medicine and practiced as a lawyer for about three or four years, New York, suing his colleagues. Doctors like Dr. Chung-Loy. And when he came back to practice, he was still working with these firms, still of counsel to these firms, and at the same time he was doing expert work, coming to court, testifying on behalf of plaintiffs against surgeons, and doing a lot of -- you're going to hear in his career, he's done almost a thousand cases as an expert for plaintiffs, all over the country. All over the country.
>
> But for the time involved in this case, 2016, he couldn't do what Dr. Chung-Loy was doing at a hospital, a consultation or a surgery. He couldn't do it for ten years.
>
> So you're going to see a lot of witnesses for the plaintiff. I'm not sure how many. But far more than I'm going to have. As Judge Sheedy has told you and what you will hear at the end is that the burden of proof by the plaintiff is by a preponderance of the credible evidence, by the greater weight of the evidence. Now the greater weight does not mean the number of witnesses, the number of documents that are put in evidence, but it's the quality of that evidence.
>
> Now when you hear Dr. Mayer's testimony and his qualifications, versus the qualifications of my experts and my own client, I'm confident you will find that the believable evidence is that which is put on by the experts for the defense. And that the testimony of Dr. Mayer with respect to deviation of standard of care by Dr. Chung-Loy are not worthy of belief. [3T35-36]

Mr. Heavey then proceeded to eviscerate Dr. Mayer in cross-examination on the very qualification problems that Dr. Ferzoco was retained to address (4T173):

Q Now, it's a fair statement that from 2011 through 2022, you did not do one bowel surgery?

A That's true.

Q And you did not do one major abdominal surgery during that same 10 year period, correct?

A True.

Q And have you done any bowel surgery in the last six months?

A No, I'm privileged for it but I haven't.

Q So you still haven't done bowel surgery since 2010, correct?

A Yes.

Q And for the period 2011 through 2021, you did not do a single surgical consult in any hospital, correct?

A True.

Q Including a consult on a patient with suspected ischemic colitis.

A That's true.

Q And the reason is you did not have permission to do those at any hospital at that time during that period, correct?

A That's true.

Q And the last time you did a surgical consult on a patient with ischemic colitis was in the fall of 2010, correct?

A Yes.

Q So that's almost 13 years ago.

A Yes.

Q And the last time you did surgery for ischemic colitis was in the fall of 2010, again about 13 years ago?

A Yes.

Q So in June of 2016, when Dr. Chung-Loy was treating Ms. Mahalchick, you did not have hospital privileges anywhere to do what Dr. Chung-Loy was doing and that is consulting on a hospital patient and doing surgery.

A Correct.

Q Now, you testified earlier that you had an application to Northwell Hospital in 2014 but withdrew it, correct?

A Yes.

Q And you testified this morning, you testified this morning that you withdrew the application because you were still getting back into surgery and you did not feel you were ready to do a hospital surgical practice, correct?

A That's true.

Q But in your deposition I took in this case under oath before trial, did you not testify that you withdrew the application because you got so busy?

A That's another reason. I withdrew it in 2015 because I got very busy in my outpatient work, my private work.

Q But that's not what you said this morning, correct? This morning you said because you weren't ready.

A Well, it was a combination of factors. I think they're both true.

Q And I want to show you your trial testimony in that case we were referring to earlier, Flowers.

MR. EPSTEIN: Judge, can we see that?

Q And you'll see that this is dated May 23rd, 2016, correct?

THE COURT: Counsel?

A Yes.

THE COURT: They're asking to see it.

(Counsel confer)

BY MR. HEAVEY:

Q Doctor, you testified to the jury that you had an application for privileges in 2014. I'm going to show you your testimony from May 23rd, 2016 in the Flowers case. Then read with me on the bottom, page 86 and you were asked at that time in 2016, May, do you currently have any privileges to practice at any hospital. The answer was no. And you were, and you resigned all your privileges at the end of 2010, correct, and that was correct, right?

A Yeah.

Q Then you were asked and you haven't applied to any, and your answer to that question was no? Was that --

A I think that factually I must have didn't remember because I applied and then withdrew relatively quickly so maybe I didn't consider that a big formal application like I –

Q You said this under --

A -- in 2017.

Q You testified to this under oath, correct?

A There's an inconsistency there. I agree.

Q And then you testified, and you testified that you applied to Northwell again in 2017.

A Yes.

Q But you withdrew that because you had moved.

A Yes.

Q But in your deposition in this case, did you not testify that you withdrew the application again because you were too busy?

A I'm not sure but I moved an hour away from the hospital so that was --

Q Well, let me refresh your recollection, Doctor.

A Again, often it's a combination of factors that go into these decisions.

Q I want you to read, 15 to the bottom of page 16 and then I'm going to ask you a question.

A Sure.

Q And this is your deposition taken in this case.

A Oh, okay. Okay.

Q And you testified in this case, your deposition before this trial, you had an application in 2014 which you withdrew because you were too busy, correct?

A Among other reasons, yes.

Q I'm talking about in your deposition. The only reason you gave was because you were too busy, correct?

A And I wanted to, it's like a professional baseball player, he has a major injury and is out for a year or so, they don't put him right back into a major league game. They send him to Triple A to get his swing back and I was doing that out as an outpatient.

Q I'm not sure you --

A Smaller surgeries.

Q I'm not sure you answered -- simple question, Doctor. This is very simple. You testified in your deposition in this case --

A Yes.

Q -- in June of 2021, so almost a year ago.

A Yeah.

Q That you withdrew the application that you made to Northwell in 2014 because you were too busy, correct?

A Well, that was one of the reasons, correct.

Q But that's what you told me. That's the only time I got to talk to you, correct?

A Yes.

Q Until today. And then you said your application in 2017, you withdrew for the same reasons as you withdrew the one in 2014, true?

A That together with the fact I wasn't near the hospital anymore.

Q Did you say that to me in your deposition on the sole time I got to talk to you?

A I don't see that specifically on this deposition.

Q When you used the baseball analogy, you were hiding the ball from me then, correct?

A I wouldn't say that. [4T173-179]

Defendant's counsel continued further on the qualification problems (4T185):

Q So did you have an application for privileges pending in 2018 when you did the CV or was the CV false?

A Well, the CV is not false. I can't recall what month of the year I withdrew the application and planned my move. I don't recall, it's like five years ago.

Q Can you concede it's rather confusing?

A I don't believe it's confusing.

Q Well --

A I think --

Q -- you've given several different answers as to when your applications were submitted, when they were withdrawn and for what reason, correct?

A Well, they were --

Q You went over the testimony, correct?

A They were my personal reasons for withdrawing.

Q But the reasons you gave under oath in different depositions from different cases, true?

A Well, but they were all valid reasons. I didn't list the entirety of the personal reasons.

Q Doctor, you could have clarified this whole issue by getting your hospital application filed, true?

A I'm not sure … [4T185-86]

Q Doctor, at your deposition of June 8th, 2021 in this case do you recall me asking you. "Is that true, you still have that application for privileges at Northwell pending in October of 2018 represented on your CV?" You recall the answer that you gave?

A I don't recall but I'll accept your representation.

Q You said I can't answer with certainty, correct?

A As I sit here today, I don't remember exactly what month I applied, what month I withdrew it but it was around that time.

Q Did you ever regain your privileges at Northwell?

A Yes, the second application was approved but I withdrew it because I was moving and decided I didn't want to commute.

Q So when did you get that application approved?

A Sometime in late '17 or early '18, I don't remember. [4T189-90]

Mr. Heavey then destroyed Dr. Mayer's credibility either further:

Q And I noticed also on your CV, that you don't mention anywhere on here, and this is your biography, correct?

A It's my medical biography, yes.

Q You don't mention anything on here you're having worked as a lawyer in a medical malpractice firm, correct?

A No, I don't have my law activities on it but I do mention I have a JD degree.

Q So yes, you mentioned your law school degree that you ranked two out of three –

A Yes.

Q But you mentioned nothing about your work for a law firm that primarily was involved with suing doctors, representing clients who are suing doctors, true?

A It's not on my medical CV. [4T189-90]

Mr. Heavey attacked professional expert Mayer's credibility in ways that the eminently qualified Dr. Ferzoco could not have been:

Q You've been doing expert work since the 1980's, correct?

A Yes.

Q 45 years or so?

A Yes.

Q You review on average 25 cases a year?

A Yes.

Q You have reviewed in your expert work over 900 cases by now.

A Yes.

Q You've had your deposition taken, a deposition when your deposition is taken before trial under oath, you had that happened in cases such as this over 150 times?

A Yes.

Q You testified at trial over 100 times?

A Yes.

Q And you received cases from several services whose business it is to match attorneys with experts such as yourself, correct?

A Yes.

Q You got this case through one of those services, correct? [4T160-61]

After objection, the trial court permitted Mr. Heavey to continue:

Q You don't remember, okay. But you've gotten cases from a company called SEAK, S E A K, right?

A Yes.

Q You were getting cases from them for 20 years.

A Yes.

Q You get cases from a company called JurisPro.

A Yes.

Q And you've been getting cases from them for 25 years.

A Yes.

Q You get cases from the American Medical Forensic Specialist Company.

A Yes.

Q You were getting cases from them for 25 years.

A Yes.

Q You get cases from National Medical Consultants.

A Yes.

Q You've been getting cases from them since 2012.

A Yes.

Q You get cases from a company called Medival, M E D I V A L.

A Yes.

Q You get cases from a company called Prime Medical Experts.

A Yes.

Q You get cases from a company called American Medical Experts.

A Yes.

Q You get over half of your cases annually through these expert witness services, correct?

A I would estimate it more like 25 percent but.

Q Well, do you recall in your deposition –

MS. PENNOCK: Can I see a copy of it?

Q Let me put it this way, Doctor. You get the overwhelming majority of your cases, the ones that you get from these organizations are for the plaintiff, correct?

A Yes.

Q And as a matter of fact, the overwhelming majority of the times you review cases in general is for the plaintiff, correct?

A It's about 60/40, plaintiff, defense.

Q Was the overwhelming majority, you've testified to that, correct?

A If you take the entirety of my expert work, the last 15 years it has been 60/40, plaintiff, defense.

Q Have you not testified that the overwhelming majority of the times you review cases is for the plaintiff?

A Maybe in the past I might have.

Q And you testified that the overwhelming majority of the time you testify in court it's for the plaintiff?

A That's true.

Q You also advertise your service as an expert witness, true?

A Yes.

Q You advertise on the SEAK website, that one organization we already spoke about and on the JurisPro website.

A Yes.

Q And you pay for that advertising.

A Yes.

Q And you advertise your services as a medical malpractice expert in the New York Law Journal and in the New York State Trial Lawyers Association publication.

A Yes.

Q You've also done a mass mailing to lawyers soliciting their business for expert work, correct?

A Yes.

Q And you've been involved as an expert witness in over 30 states.

A Yes.

Q And you've not confined yourself to only offer opinions against surgeons which is in your specialty. You've also offered opinions against doctors in other specialties as well, correct?

A If there were surgical issues, correct.

Q You testified against emergency room doctors, correct?

A Yes.

Q You've testified against orthopedic surgeons.

A Yes.

Q You've testified against neurologists.

A Yes.

Q You've testified against anesthesiologists.

A Yes.

Q Gastroenterologists.

A Yes.

Q Internists.

A Yes.

Q And even a neurosurgeon.

A Yes.

Q You testified against podiatrists.

A Yes.

Q You've testified against pediatricians.

A Yes.

Q Obstetricians.

A Yes.

Q Cardiologists.

A Yes.

Q Nephrologists.

A Yes, if there was a surgical issue, yes.

Q Plastic surgeons.

A Yes.

Q Dermatologists.

A Yes.

Q And nurses.

A Yes.

Q Now, you mentioned that, you also testified before the Board of, is it the New York Board of Professional, remind me, the licensing board?

A Oh, it's the Office of Professional Misconduct of the New York Department of Health.

Q And those are physicians who have licensing actions against them, correct?

A Yes. [4T166-169]

Defendant's counsel painted Dr. Mayer as an expert in seeking money damages against other doctors – not in honestly assessing another doctor's care:

Q Doctor, when you were still a practicing surgeon in 2007, you went to law school and graduated in 2010, correct?

A Yes.

Q Then you were a practicing attorney beginning 2011.

A Yes.

Q And when you practiced, you practiced in the specialty of medical malpractice representing only plaintiffs in medical malpractice cases and suing fellow doctors, correct?

A I didn't sue them personally. I worked with law firms that were plaintiffs' firms.

Q I got you. And you helped work up the cases.

A Yes.

Q You helped at trials.

A Yes.

Q You even tried eight cases, correct?

A That's correct.

Q And you still have an active New York license to practice, correct?

A Yes.

Q And you're still part of a law firm that does solely plaintiffs' medical malpractice work, correct?

A Well, I'm no longer practicing law so.

Q Well, aren't you still on the website of the law firm of Landers & Cernigliaro?

A They still list me although I haven't worked with them since 2014.

Q You know that in New York you cannot associate yourself with a firm unless you're actively working with that firm? Did you know that?

A I'm not aware of that.

Q Weren't you, wasn't this issue brought to your attention in the Flowers (phonetic) trial a few years ago?

A Yes.

Q And didn't you say you did not know that you were still on that website?

A At that time, I didn't know.

Q And didn't you say you were going to take steps to correct that?

A I did ask them to take me off but I don't believe they have.

Q They still haven't.

A I'm not sure if they have or not.

Mr. Heavey then synthesized these devastating problems for the jury in his summation to the jury (7T46-50):

> Let's talk about Dr. David Mayer. Nice guy. Right? He's a nice guy. He's everyone's image of what a nice guy would be like. But think about what you heard concerning his qualifications and experience. And I have it listed up here on the board. Now when you read that, compare that to what you heard from the 19 defense experts. First of all, he hasn't performed bowel or major abdominal surgery since 2010. Almost 13 years. He hasn't done a hospital consultation on a patient with suspected ischemic colitis since 2010. He did not have hospital privileges between 2010 and

2022. In other words, he didn't have permission to do a consultation, to see a patient in the 1 hospital, for 12 years.

When Dr. Chung-Loy was evaluating Mrs. Mahalchick, Dr. Mayer could not have done that, because he did not have permission from any hospital to do that. And let's talk about his answer to the questions about why he didn't have that approach. He applied for privileges in 2014, 2015, and 2017. I kind of lost count of the years, the precise years. And each explanation as to why he didn't follow through on the request for hospital privileges with Northwell Medical Center, was different. One was, he was too busy with his other practice to do it. In 2014. 2015, he applies again. Withdraws it again, because he says he was too busy to go back into the hospital again. 2017, he has an application. Okay. Again withdraws it. In his deposition he says it was part that he did it, because again he was too busy. And then at the stand at another point, he says he withdrew it because he had moved. He had moved in late 2017 through the first quarter of 2018. But then on his resume, that he submitted to us as part of discovery before trial, a resume dated October 2018, he puts on that resume that he still had that application pending. When I asked him on the stand why is that the case, he said, I don't know, maybe I didn't update it. There is something that didn't fit there. About why he didn't have hospital privileges.

For three full years, when he stopped practicing medicine, he worked full time as a lawyer, for a law firm that did nothing but sue doctors, and sue surgeons, such as himself. He even tried eight cases as a plaintiff's malpractice attorney. He is still on that website, of that law firm, as a lawyer with that firm. To this day.

And you heard me ask him about was he alerted to the fact that he was still on that website four or five years ago, at a trial, and he still hasn't made any attempts to correct what he claims is an error. But for five years he still has his name on there. Still, to this day. He testified that he overwhelmingly testifies for persons suing doctors. And of the reviews he does of cases, for his expert work, where he reviews cases and writes reports even before going to trial, overwhelmingly, overwhelming, for the people suing doctors.

> He has made approximately two million dollars, two million dollars, doing 1 this expert work. He obtains cases from services that connect lawyers with doctors to be their experts in malpractice cases. And he gets cases from approximately seven of these services.
>
> He advertises on at least two of those service sites as well. He pays for advertising on those sites. And he also pays for advertising in legal publications, in at least New York State. He even sent out a mailer to numerous lawyers. He mass mailed it, seeking their business as an expert. He's reviewed over 900 cases as an expert. He reviews, on average, 25, 25 cases a year. That's over two a month. Here's the killer. He's a general surgeon. Just like Dr. Chung-Loy. That's his area of expertise, or so he says. Yet, he feels that he can testify against specialties that are not in his ambit, or outside general surgery. So, he has testified against doctors who are in the specialties of Obstetrics and Gynecology, Cardiology, Pediatrics, kidney doctors, Nephrologists. Even Neurosurgeons. Nurses. He testified. Hospitals. ER Doctors. You heard the list. So, he doesn't restrict himself to his own specialty when he's doing this work, and soliciting work from lawyers by mass mailing, and soliciting work through these expert services.
>
> So, you put that fund of knowledge in your head when you evaluate his testimony. And particularly his lack of experience for those twelve years. Lack of experience in abdominal surgery, and bowel surgery. And even to this day, to this day, still, no abdominal or bowel surgery, or consultations on abdominal or bowel surgery.

Dr. Mayer's qualification and bias issues contrasted starkly with the experts the defense had called, Mr. Heavy stressed:

> Dr. Herron and Dr. Schuricht are both general surgeons. Between them, between the two of them, they have approximately 60 years of surgical experience, without any interruption like Dr. Mayer. Without any interruption of their practice. Without any interruption of their hospital privileges. This is what they have been doing. Together. For a combined 60 years. Both teach surgery, general surgery, to students and surgical residents.

> Residents who are going to be general surgeons some day. And they do it on a daily basis. And clearly, among what they teach is about ischemic colitis. [7T53-54]

Of course the jury returned a no cause verdict for Dr. Chung-Loy. None of this devastating cross-examination and argument by Dr. Chung-Loy's counsel, of the most critical expert witness in the case, would have happened had plaintiffs been permitted to call the witness they actually wanted. Dr. Ferzoco's Expert Report and accompanying Curriculum Vitae show this: "As a way of background, I graduated with my medical degree from Yale University School of Medicine in 1993. I did my surgical training at Brigham and Women's Hospital in Boston, a training program for Harvard Medical School. I am currently Chief of Surgery at Atrius Health in Boston. I have practiced as a board- certified general surgeon continuously since 2001. A copy of my Curriculum Vitae is attached. All opinions set forth herein are held to a reasonable degree of medical certainty and based on my education, training, experience as a surgical instructor, medical school professor and as a practicing surgeon." A235-56. Plaintiffs ask this Court to grant them a new trial because Judge McCarthy's rulings were not only wrongful but caused such tremendous damage to plaintiffs' presentation of their case. Plaintiffs respectfully ask the Court to grant them a new trial where they can present to a jury the medical expert they wanted to explain their case.

Conclusion

For all these reasons, the Court should vacate the final judgment entered in favor of defendant Chung-Loy and remand for a new trial on plaintiffs' claims.

Respectfully submitted,

/s/ Daniel N. Epstein, Esquire
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Dated: October 3, 2023

THOMAS MAHALCHICK, JR., BOTH INDIVIDUALLY, AS SURVIVING BENEFICIARY, AND ON BEHALF OF THE ESTATE OF ROMAINE MAHALCHICK, AND WILLIAM MAHALCHICK, INDIVIDUALLY AS SURVIVING BENEFICIARY,

Plaintiff(s)-Appellant(s)

vs.

ROBERT WOOD JOHNSON UNIVERSITY HOSPITAL RAHWAY, ROBERT WOOD JOHNSON PHYSICIAN ENTERPRISE, MICHAEL CHEN, M.D., DANIEL WANG, M.D., HAROLD CHUNG-LOY, M.D., VINCENT MOSS, M.D., SCOTT CHAE, M.D., MICHAEL BERNSTEIN, M.D., ABHISHEK SHRIVASTAVA, M.D., KRISTEN ELEFTERHIOU, P.A., MICHAEL VOLPE, B.S.N., ROWENA CABRAL, R.N., BIJU RINGLE, R.N., ABIGAIL VERZERIS, B.S.N., ALEXANDER APOSTOL, R.N., MEDICAL GROUP DOES 1-10 (FICTITIOUS NAMES) AND DR. JOHN DOES 1-10 (FICTITIOUS NAMES)

Defendant(s)-Respondent(s)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET No. A-003356-22T2

On appeal from a final order entered in the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. Mon-L-2121-18; Owen McCarthy, J.S.C. (pretrial); Kathleen Sheedy, J.S.C. and a jury (on trial)

BRIEF AND APPENDIX (DA1-47) OF RESPONDENT, HAROLD CHUNG-LOY, M.D., VINCENT MOSS, M.D. AND SURGICAL PRACTICES ASSOCIATES, P.A.

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BRIEF FILED ON DECEMBER 13, 2023

Table of Contents

DEFENDANT'S APPENDIX

[1] Referred to during oral argument on August 27, 2021 at 1T9-8 to 10-17.
[2] Referred to during oral argument on August 27, 2021 at 1T5-5 to 13 and November 12, 2021 at 2T31-7 to 19.

Table of Authorities

Procedural History

This medical malpractice action arises from the care provided to decedent, Romaine Mahalchick. On June 13, 2018, plaintiffs, the decedent's two surviving sons, filed a complaint (Pa33). Plaintiffs subsequently filed an amended complaint on September 25, 2019. (Pa118)

In addition to defendant, a general surgeon, plaintiffs' amended complaint named thirteen other medical providers of various specialties: Dr. Michael Chen, a cardiologist (Pa129); Dr. Daniel Wang, also a cardiologist (Pa130); Dr. Vincent Moss, a general surgeon (Pa131); Dr. Scott Chae, a gastroenterologist (Pa132); Dr. Michael Bernstein, an emergency medicine physician (Pa133); Dr. Abhishek Shrivastava, a radiologist (Pa134); Dr. Farhad Keliddari, also a radiologist (ibid.); Kristen Elefterhiou, P.A., a physician's assistant (Pa135); Michael Volpe, B.S.N., a nurse specializing in emergency nursing (ibid.); Ringle Biju, R.N., a nurse (Pa136); Rowena Cabral, R.N., a nurse (ibid.); Abigail Vezeris, B.S.N., a nurse (Pa137); Alexander Apostol, R.N., a nurse (ibid.). The amended complaint also named the employers of the various physicians and the hospital where decedent was treated, Robert Wood Johnson University Hospital Rahway (hereafter "RWJUH"). (Pa124-129). In the course of pretrial discovery, several of the defendants obtained dismissals, leaving for trial Dr. Chae, Dr. Bernstein, Dr. Shrivastava, Physician's Assistant Elefterhiou, Nurse Ringle, and defendant.

On the eve of trial, all of the remaining defendants, with the exception of Dr. Chung-Loy, settled with plaintiffs (Da1 [Plaintiffs' motion to enforce settlement as to Dr. Chae]; Da22 [Letter from Thomas Conlon to Appellate Division confirming that Dr. Bernstein, Dr. Shrivastava and Kristen Elefterhiou settled before trial]; Da25 [Letter from Julia A. Klubenspies to Appellate Division confirming that RWJUH, Robert Wood Johnson Physician Enterprise and Ringle Biju, R. N. settled before trial]), and each settling defendant received a separate stipulation of dismissal with prejudice (Da26 to Da 30).

Trial commenced with jury selection on April 25 and April 26, 2023. The presentation of evidence began on May 3, 2023. Following a lengthy trial, the jury returned a no-cause verdict in favor of defendant, concluding that he did not breach a duty to provide informed consent and that he did not deviate from accepted standards of medical practice. 8T79-13 to 80-6.[3] An order for final judgment was entered on May 25, 2023. (Pa14)

[3] References to Transcripts are as follows:

1T	8/27/21 (motion)
2T	11/12/21 (reconsideration)
3T	5/3/23 (trial)
4T	5/4/23 (trial)
5T	5/8/23 (trial)
6T	5/9/23 (trial)
7T	5/15/23 (trial)
8T	5/16/23 (trial)
9T	5/11/23 (trial)

Plaintiff's appeal concerns a discovery motion that occurred in August of 2021. In 2018, plaintiffs served various affidavits of merit against all defendants pursuant to N.J.S.A. 2A:53A-27. With respect to defendant, plaintiffs initially served an affidavit of Dr. Paul Collier. (Pa38). On December 14, 2018, defendant moved to dismiss plaintiffs' complaint on the basis that Dr. Collier specialized in vascular surgery, not in defendant's specialty of general surgery, and was therefore unqualified under N.J.S.A. 2A:53A-27 (Pa177).

On November 21, 2018, plaintiffs served the affidavit of merit of a new expert, David Mayer, M.D., a general surgeon (Pa148-150), and ultimately served Dr. Mayer's expert report, dated August 30, 2020. (Pa41). Dr. Mayer was deposed on June 8, 2021. (Pa57). On July 6, 2021, defendant moved to bar Dr. Mayer's testimony at trial due to his lack of sufficient qualifications under N.J.S.A. 2A:53A-41 to render an expert opinion critical of his care. (Pa20)

Plaintiffs opposed the motion but also filed a cross-motion to designate a new expert witness in Dr. Mayer's stead (A89). Defendant opposed the cross-motion. (Da31) On July 30, 2021, while defendant's motion to bar Dr. Mayer was pending, plaintiffs served the expert report of Dr. Stephen Ferzoco, dated July 29, 2021. (A285) Notably, they served this report after the deadline to do so per the case management order in effect at that time, dated February 16, 2021. (Pa227). On August 25, 2021, defendant withdrew his motion to bar Dr. Mayer and requested

that plaintiffs' cross-motion to substitute a new expert be "denied as moot." (Da34) Plaintiffs' cross-motion was neither withdrawn nor denied as moot; hence, both defendant's motion to bar and plaintiffs' cross-motion were argued on August 27, 2021.

Following oral argument, Judge Owen C. McCarthy denied plaintiffs' cross-motion to designate Dr. Ferzoco as their new trial expert. (Pa16). Judge McCarthy gave multiple reasons. First, he found that plaintiffs did not need a new expert because defendant had withdrawn his motion to bar Dr. Mayer. 1T9-1 to 4; 11-12 to 18. Second, at the time of oral argument, the case was over three years old. 1T10-24 to 11-2. Plaintiffs had already served their expert reports and several expert depositions had been completed but many remained to be scheduled.[4] Permitting plaintiff to replace Dr. Mayer with a new expert would have caused delays in moving forward with expert depositions. 1T11-1 to 25. The latest case management order at the time of the oral argument, signed by the Honorable Kathleen Sheedy, had set a deadline of October 17, 2021 for expert depositions to be completed. (Pa220) Judge McCarthy noted that if plaintiffs were permitted to substitute Dr. Ferzoco, this deadline would not be met. 1T10-18 to 11-18).

[4] To be sure, on August 18, 2021, plaintiffs' attorney wrote two separate letters to counsel for each defendant observing that due to the schedules of the defense attorneys, "it has been nearly impossible to schedule expert depositions . . ." (Pa262, Pa265).

Defendant's motion to bar Dr. Mayer was also denied. (Pa19)

On October, 12, 2021, Judge Sheedy signed an order extending the discovery end date to December 30, 2021, upon the consent of all parties. (Pa218; Pa273). Shortly thereafter, on October 20, 2021, plaintiff filed a motion for reconsideration to permit them to replace their expert Dr. Mayer with Dr. Ferzoco. (Pa209). Defendant filed opposition to the motion on October 26, 2021 (Da36). On November 12, 2021 Judge McCarthy heard oral argument of plaintiffs' motion for reconsideration. He denied plaintiffs' motion due to the fact that the circumstances leading him to deny plaintiffs' initial motion had not changed. 2T31-15 to 33-22.

STATEMENT OF FACTS

Mrs. Mahalchick (hereafter "decedent") was an eighty-one-year-old woman, with a long history of medical issues when she presented to the RWJUH emergency room on June 12, 2016. Her medical history included hypertension, diabetes and arthritis. 5T90-18 to 21. Due to complications of total hip surgery, she also suffered from a foot drop, a neurological problem (5T90-6 to 11) that required her to wear a leg brace which extended to just below her left knee. 5T82-21 to 83-12. According to one of her sons, her physical abilities were so limited that she required care from a podiatrist just to clip her toenails. 5T92-19 to 24.

Defendant was born in Jamaica and immigrated to the United States in 1973. 6T88-11 to 12. He obtained his bachelor's degree in chemistry at Morgan State

University in 1977 and received his medical degree from Howard University College of Medicine in 1980, having finished an accelerated program that saw him complete in three years what would normally be a four-year program. 6T88-22 to 89-6. He completed a residency in general surgery at Mount Sinai Hospital in New York. 6T89-9 to 19. There he had extensive training in inflammatory bowel disease, including ischemic colitis. 6T89-20 to 90-9. As of the time he cared for the decedent in June 2016, defendant had been in practice as a general surgeon since 1985, over 30 years. 6T92-23 to 93-1. As of the time of trial, he estimated that he had performed over thirty thousand surgeries. 6T93-4 to 11. Defendant became board certified in general surgery in 1986 and was recertified on average every ten years thereafter. 6T92-15 to 22. [5]

When decedent sought care at RWJUH. She presented with complaints of abdominal pain and diarrhea. 7T39-20 to 24. She was first treated in the emergency room by Dr. Bernstein, whom she informed that her symptoms had begun roughly six hours prior to her presentation. 7T39-24 to 40-1.

Dr. Bernstein's physician assistant called defendant that evening and informed him of the clinical findings, as well as Dr. Bernstein's impression that the

[5] As Dr. Mayer explained at trial, board certification requires the general surgeon to take an examination given by the American Board of Surgery. Recertification requires the same examination. 4T37-13 to 38-1.

decedent had inflammatory bowel disease and that was also considering ischemic colitis[6]. 6T102-4 to 104-17. At no point during this initial telephone consult was defendant asked to come to the hospital to evaluate decedent that evening. 6T108-21 to 23. He would have had he been asked. 6T108-24 to 109-1. Further, defendant was advised that decedent was being treated with a significant amount of fluids and intravenous antibiotics, all of which defendant deemed appropriate for what he felt was a high probability of ischemic colitis. 6T108-7 to 20.

The following morning at approximately 10:30, defendant saw decedent. 6T119-3 to 5. During his examination he noted that she was hypotensive with abdominal pain and distension. 6T111-5 to 14. Along with the radiologist, Dr. Shrivastava, defendant reviewed a computerized tomography (CT) scan performed the evening of decedent's arrival. Both agreed that there were no signs of issues that warranted surgery at that time. 6T116-15 to 117-22. Decedent was held for observation while non-surgical treatment was done to see if that would resolve her issues. 6T119-9 to 12; 7T42-1 to 2. If medical management did not succeed, surgical intervention would be performed. 7T42-7 to 8.

Defendant reasoned that initially treating plaintiff with fluids was necessary because the root cause of her ischemic colitis was likely dehydration. 6T120-3 to 22.

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[6] Ischemic colitis is a vascular disease of the bowel in which there is an interruption of blood flow to the organ. 3T56-3 to 11.

He also believed that because decedent was severely dehydrated, exposing her to general anesthesia during exploratory surgery posed a risk of causing a heart attack. 6T123-11 to 25.

Not only did defendant believe rehydration to be the decedent's best course of treatment, so too did the two defense experts presented at trial. Dr. Alan Schuricht has been a general and gastroenterology surgeon for thirty-three years. 9T72-18 to 73-2. In addition to his practice, Dr. Schuricht is a professor of medicine at the University of Pennsylvania Medical School, where he teaches medical and surgical students in addition to physician assistants. 9T75-5 to 13. Dr. Schuricht agreed with defendant that the standard of care required that a general surgeon treat decedent's diagnosis of ischemic colitis with fluids and antibiotics instead of immediate surgical intervention. 9T83-24 to 84-9. Further, Dr. Schuricht testified that the correct treatment is to monitor an ischemic colitis patient to determine if fluid management is working or if surgical intervention is needed. 9T84-8 to 9. Dr. Schuricht testified that rushing to surgery a patient who is as sick as decedent was increases the patient's likelihood of death, and that eighty percent of patients with ischemic colitis get better without surgical intervention. 9T84-10 to 17.

Another expert in general surgery, Dr. Daniel Herron, testified that "the standard procedure for treating ischemic colitis is to resuscitate, assess and to take the patient to the operating room if your nonoperative efforts are not effective."

9T65-4 to 7. Dr. Herron has been a general surgeon since 1999. 9T20-15. He went to Harvard College followed by medical school at the University of Pennsylvania. Thereafter, he completed a surgical residency at Tufts University and a fellowship in minimally invasive surgery in Portland, Oregon. 9T20-23 to 21-24. He is board certified in general surgery and a professor of medicine at Mount Sinai School of Medicine in New York City, where he teaches medical students, residents and fellows about the treatment of conditions of the bowel, including ischemic colitis. 9T23-12 to 24-21.

Dr. Herron also testified that even if surgery had been done the evening of June 12 when defendant was called in consultation, the decedent had a less than fifty percent chance of survival because of her various health conditions, her comorbidities, and her age. 9T32-23 to 34-25. Later, during cross-examination by plaintiffs based on a particular medical article he was shown, he testified that due to the risk factors listed therein, the decedent's risk of mortality was as high as seventy-six percent—that is, she only a twenty-four percent chance of survival. 9T55-8 to 56-5.

When decedent ultimately did not respond well to nonsurgical management, defendant decided that surgery was necessary, and he performed an exploratory laparotomy on the evening of June 13. 6T124-18 to 127-2. During surgery defendant discovered diffuse ischemia from the cecum to the sigmoid colon.

6T127-13 to 22. He performed a subtotal colectomy, removing most of her colon but leaving the lower sigmoid. 6T127-23 to 128-2. He also performed an ostomy, whereby the small intestine is brought to the skin so that the contents of the intestine can empty into a bag. 6T128-3 to 15. Defendant found no evidence of an ulceration or perforation of the bowel, nor the presence of bowel contents in the peritoneum. 6T128-20 to 25. Unfortunately, on June 14, 2016, the day after her surgery, decedent died. Pa46.

ARGUMENT

JUDGE McCARTHY DID NOT ABUSE HIS DISCRETION WHEN DENYING PLAINTIFFS' APPLICATION TO REPLACE THEIR EXPERT, DR. MAYER, WITH A NEW EXPERT, DR. FERZOCO, OR IN DENYING RECONSIDERATION OF HIS ORDER

When reviewing discovery orders, the Appellate Division generally will not intervene "but instead will defer to a trial judge's discovery rulings absent an abuse of discretion or a judge's misunderstanding or misapplication of the law." Capital Health System, Inc. v. Horizon Healthcare Services, Inc., 230 N.J. 73, 39-80 (2017) (citing Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 371 (2011)). Whereas the abuse of discretion standard is without a clear definition, abuse has been found where a decision has been "made without rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration and Naturalization Service, 779 F.2d 1260, 1265 (7th Cir. 1985)). "In other words, a functional approach to the abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." Ibid. When reviewing decisions that have been entrusted to the sound discretion of a trial court, "a reviewing court should uphold the…findings undergirding the trial court's decision if they are supported by adequate, substantial and credible evidence

on the record." Estate of Hanges v. Metropolitan Property & Cas. Ins. Co., 202 N.J. 369, 384 (2010) (quoting MacKinnon v. MacKinnon, 191 N.J. 240, 253-54 (2007)).

A. Judge McCarthy did not abuse his discretion in his August 27, 2021, ruling

Judge McCarthy's decision to deny plaintiffs' cross-motion to replace Dr. Mayer as their expert with Dr. Ferzoco was not an abuse of discretion. At the time that plaintiffs filed their cross-motion, the latest case management order, dated February 16, 2021, noted that the production of plaintiffs' expert reports had been completed. (Pa227). It also set a discovery end date of July 20, 2021. (Pa230) On August 9, 2021, Judge Sheedy signed a new case management order setting the deadline to complete expert depositions for October 17, 2021, a new discovery end date of November 17, 2021. (Pa222) The new order did not address deadlines to produce expert reports because that stage of discovery had been completed and the time prescribed to produce reports had passed for all parties.

While plaintiffs' cross-motion was in response to defendant's motion to bar Dr. Mayer's testimony, defendant decided to withdraw his motion with the understanding that plaintiff would not be permitted to designate Dr. Ferzoco as new trial expert. Defendant stated that the withdrawal of his motion would make plaintiffs' cross-motion moot. (Da34) Plaintiffs disagreed; oral argument followed.

At the time that Judge McCarthy heard oral argument, Dr. Mayer's expert report had been served on defendants, he had been deposed, and defendant's experts

were in possession of his expert report and his deposition so that they could analyze and respond to it.

Additionally, the case was already three years old, with numerous discovery deadline extensions. Further, all parties were in the midst of scheduling depositions of experts, mindful of the fast-approaching October 17, 2021, deadline set by Judge Sheedy. (Pa221). Given the complexity of the issues, the number of attorneys involved in the case and the number of experts still to be deposed, adding a completely new expert would have disrupted the recently established deposition schedule. A substitution of plaintiff's expert would also have been costly, as defendant would have had to carefully prepare for and then take the deposition of Dr. Ferzoco. This would have involved considerable time and expense. As defendant's attorney later informed Judge McCarthy on November 12, 2021, he spent approximately forty-five hours preparing for the deposition of Dr. Mayer. 2T21-5 to 8. Given the circumstances surrounding the age of the case, and the complications and delays which would necessarily ensue from permitting Dr. Ferzoco to replace Dr. Mayer as trial expert, Judge McCarthy denied plaintiffs' cross-motion.(Pa16; 1T9-1 to 11-25). [7]

[7] It should not be lost on the court that in opposing defendant's motion to bar Dr. Mayer, plaintiffs filed a brief, twenty pages in length, which took pains to convince Judge McCarthy—successfully, to be sure—that Dr. Mayer was eminently qualified. Indeed, the following exchange took place between Judge McCarthy and plaintiffs' counsel:

The New Jersey Supreme Court in Estate of Hanges, supra, stated that a reviewing court should uphold the findings of the trial court if they are supported by the record. Id., 202 N.J. at 384. During oral argument Judge McCarthy expressed several reasons as to why plaintiffs' cross-motion was denied. These included the age of the case and the complications that would arise if Dr. Ferzoco was admitted as an expert. 1T10-24 to 11-2. The complications included further delays in discovery as well as the near certainty that expert depositions would not be completed by the October 17, 2021, deadline pursuant to the latest case management order. 1T10-18 to 11-18. The October 17, 2021, deadline was roughly a month and a half away from the date of oral argument. If Dr. Ferzoco had been allowed to be substituted, defendant would have had to depose him, send the transcript and his report to his experts for review, and supplemental defense expert reports would have been needed. Such reviews and reports cost money; experts charge for their time. In a case that had been experiencing missed deadlines due to the number of experts involved, as well as the schedules of several attorneys, accomplishing this task

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> Ms. Pennock, there's an extensive brief that you've submitted to this Court [sic] telling me why I should deny Mr. Heavey's motion and why Dr. Mayer is qualified to testify against Mr. Heavey's client. Correct?
>
> MS. PENNOCK: Yes, Your Honor. [1T5-15 to 20]

Oddly, this brief is not part of plaintiffs' appendix; it is submitted as part of defendant's appendix. (Da36)

would have been onerous on both a scheduling and a financial level. Only nine days before oral argument, plaintiffs' attorney himself had twice expressed frustration in scheduling the depositions of all of the defense experts. See footnote 3, supra.

Plaintiffs argue that when Judge McCarthy made his decision on August 27, 2021, "the discovery end date was nearly three months away, and even expert depositions had almost two months left for completion [i.e. October 21, 2021]." Pb 18. This argument is without merit, for it presumes that the schedule of defense expert depositions would have proceeded without disruption had Dr. Ferzoco been allowed to substitute for Dr. Mayer. In fact, and as defendant advised Judge McCarthy on November 12, 2021, the deposition schedule would have been altered once more so that Dr. Ferzoco's deposition could be scheduled to precede the depositions of the defense experts. (Pa19:8-13)

Plaintiffs also contend, without citing authority, that the Rules of Court "still provided plaintiffs with a right to amend answers to interrogatories to identify a new expert." Pb18-19. Presumably, plaintiffs are referring to R. 4:17-7. However, that Rule specifically makes an exception where there is a court order compelling expert reports. See R. 4:17-4(e). Accepting plaintiffs' argument would be to allow R. 4:17-7 to swallow any and all scheduling orders, and thus render R. 4:24-1 a virtual nullity. Even if R. 4:17-7 were deemed to apply, plaintiffs' argument fails. When they served Dr. Ferzoco's July 29, 2021, expert report (Pa236), it was beyond the

discovery end date of July 20, 2021, set by the latest case management order of February 16, 2021 (Pa230). Consequently, plaintiffs would have been required under R. 4:17-7 to certify that the "information requiring the amendment [i.e. the report of Dr. Ferzoco] was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date." Plaintiffs knew, or should have known, on or before November 21, 2018, when they presumably read Dr. Mayer's curriculum vitae before filing it (Pa150), that there would be questions about Dr. Mayer's practice background, questions which would have been answered had they simply spoken to him.

Judge McCarthy had a proper and sufficient basis to deny plaintiffs' cross-motion. His decision was not an abuse of his judicial discretion.

B. There would not have been a legitimate basis for Judge McCarthy to have extended discovery even if the required motion to extend had been made

When plaintiffs filed their cross-motion to designate Dr. Ferzoco as a new expert for trial, they did not file a motion to extend discovery. Thus, it is incorrect for plaintiff to argue that Judge McCarthy should have granted plaintiff an extension of discovery during oral argument of that motion.(Pa15). Rule 4:24-1(c) permits an initial extension of discovery for sixty days by consent of all parties. After the initial extension, if an additional extension is not agreed upon by all parties, then a motion for relief is required. Ibid. The New Jersey Supreme Court has observed that such a

motion is required; a party may not simply assume that "there would not be a problem." Bender v. Adelson, 187 N.J. 411, 430 (2006).

Plaintiffs never filed a formal motion to extend discovery before Judge McCarthy on August 28, 2021, as required by the Court Rules. Furthermore, Judge Sheedy had just signed a new case management order on August 9, 2021, just a few weeks prior to the oral argument. (Pa221). Therefore, because a recent case management order setting new deadlines had just been entered and no formal motion for an extension of discovery had been filed, there would have been no reason for Judge McCarthy to grant an extension of discovery permitting plaintiff to designate a new expert.

Even if the court were to accept that plaintiffs' cross-motion to designate Dr. Ferzoco was effectively a formal motion to extend discovery as required by the Rules, there would have been no legitimate reason for Judge McCarthy to extend discovery. An extension of discovery can be granted when "good cause" is shown. R. 4:24-1(c). "The term 'good cause shown' is flexible and its meaning is not fixed and definite." Leitner v. Toms River Regional Schools, 392 N.J. Super. 80, 87 (App. Div. 2007) (citing Tholander v. Tholander, 34 N.J. Super. 150, 152 (Ch. Div. 1955)). The Appellate Division in Leitner gave nine factors that a trial court should consider when deciding if good cause has been shown. Ibid. Those factors are:

1. the movant's reasons for the requested extension of discovery;

2. the movant's diligence in earlier pursuing discovery;
3. the type and nature of the case, including any unique factual issues which may give rise to discovery problems;
4. any prejudice which would inure to the individual movant if an extension is denied;
5. whether granting the application would be consistent with the goals and aims of "best practices";
6. the age of the case and whether an arbitration date or trial date has been established;
7. the type and extent of discovery that remains to be completed;
8. any prejudice which may inure to the non-moving party if an extension is granted; and
9. what motions have been heard and decided by the court to date. Id. at 87-88.

Beginning with the first factor, plaintiffs did not make a request for an extension of discovery. Plaintiffs merely requested that they be permitted to replace Dr. Mayer with Dr. Ferzoco after the deadline for expert reports had passed, after Dr. Mayer had been deposed, and in the middle of scheduling other expert depositions in the face of a fast-approaching deadline.

As for factor two, while plaintiffs had mainly met deadlines for discovery prior to the cross-motion, they were now seeking to submit a new expert report after the deadline to do so had passed. Furthermore, they had access to the same information about Dr. Mayer's background as an expert and his medical practice history as did defendant. Indeed they would have had more access, for they, unlike defendant, could have spoken directly to Dr. Mayer and inquired about the details of

his career as a surgeon and as a forensic expert—details which his curriculum vitae lacked or did not make entirely clear. They obviously retained him before they filed his affidavit of merit with the trial court on November 21, 2018 (Pa150), twenty-two months before he authored his report of August 30, 2020, and thirty-two months before his June 8, 2021 deposition (Pa58). All that time, plaintiffs had the same October 2018 curriculum vitae of Dr. Mayer (Pa55) that was served on the defendants; yet they did not question him about essential details in his background as a physician or his experience as an expert. This failure in vetting of their expert bespeaks a lack of due diligence.

As for factor three--the type and nature of the case, including any unique factual issues which may give rise to discovery problems--this was a complex medical malpractice case that was already over three years old. The case involved several defendants, and numerous experts on both sides. There had already been several extensions of the discovery end date and all parties were struggling to schedule expert depositions prior to the deadline of October 17, 2021. Thus, permitting plaintiff to replace their existing expert, who had already been deposed, would have only caused further and unnecessary delays.

With respect to factor four, there was no prejudice to plaintiffs in being denied their application to substitute Dr. Ferzoco. Dr. Mayer was not barred from testifying. Plaintiffs simply wanted to switch experts because they believed they had found a

better expert in Dr. Ferzoco. Any issues that came up with Dr. Mayer during his deposition was information that was readily available to plaintiffs at the time they hired him. Plaintiffs did not deserve to further delay moving this case along simply because they found a new expert whom they preferred over the expert they already had.

As for factor five-- whether granting the application would be consistent with the goals of "Best Practices"—as previously noted, no application to extend discovery was made. Even if a formal motion had been made, this case was over three years old. The parties were experiencing difficulties scheduling expert depositions at the time of the August 28, 2021 oral argument, and there was a fast approaching deadline of October 17 to complete the depositions. To permit plaintiff to replace Dr. Mayer would have simply delayed the case further and guaranteed that the parties would not meet the October 17 deadline to depose experts. Furthermore, given the numerous extensions of discovery and the fact that discovery had already proceeded over 1170 days since the filing of the complaint, granting another extension to allow a new expert would render meaningless the "good cause" standard. See Tynes v. St. Peter's Medical Center, 408 N.J. Super. 159, 171-172, 173 (App. Div.), certif. denied, 200 N.J. 502 (2009) (affirming the denial of plaintiff's motion to extend discovery to furnish an expert report under the "good

cause" standard where, among other things, the trial court had extended discovery "numerous times" and "had permitted 1585 days for discovery").

Factor six requires the court to take into consideration the age of the case and whether arbitration or a trial date had been set. While no trial or arbitration was scheduled at the time, the case was over three years old at the time of the oral argument on August 28, 2021. Further, all parties were struggling with getting dates for depositions of experts and had a deadline to do so by October 17. This was an old case and it would have only been further delayed by permitting the replacement of an expert who had already served his report and been deposed. Id. at 172 (observing that "more than a brief period of time would be required to complete the additional discovery" if the extension of discovery had been granted under the "good cause" standard).

Factor seven requires the trial court to take into consideration the type and extent of discovery that remained to be completed. At the time of the motion hearing, the only discovery left to be completed was expert depositions. As noted previously, the process of scheduling all experts had been difficult for all parties. Plaintiffs had already served the expert report of Dr. Mayer, he had already been deposed and the time to serve expert reports had passed. If plaintiffs were permitted to substitute Dr. Ferzoco, this would have caused unnecessary delays, as well as expense, as previously described.

Factor eight requires an examination of the prejudice to the non-moving parties if the extension was granted to permit plaintiff to substitute Dr. Ferzoco. As detailed previously at pages 17-18, supra, such a substitution would have resulted in considerable expense to the defendant. Defendant will not repeat what he has already detailed; in short, a substitution would have rendered the considerable time and expense in preparing for and deposing Dr. Mayer a waste of enormous effort. This court in Tynes, supra, has also noted that the age of a case and a defendant's "strong interest in having [a] matter concluded" are factors to consider in evaluating the prejudice to the defendant opposing a motion to extend discovery to allow a plaintiff to furnish an expert report. Id. at 172.

Factor nine -- what motions had been heard and decided by the court to date—is likely not relevant to these issues. Indeed, it cannot be overlooked that plaintiff never filed a formal motion for an extension of discovery as required by the Court Rules.

Plaintiffs cite two cases as supportive of their argument that Judge McCarthy erred in barring the substitution of Dr. Ferzoco. Those cases, Tucci v. Tropicana Casino & Resort, Inc, 364 N.J. Super. 48 (App. Div. 2003), and Castello v. Wohler, 446 N.J. Super. 1 (App. Div.), certif. denied, 228 N.J. 39 (2016), involved circumstances that are wholly different from the present case. In Tucci, the plaintiffs' complaint was dismissed with prejudice after they failed to timely serve

expert reports due to no fault of their own. The Appellate Division reversed, particularly focusing on the late submission to plaintiffs of relevant records and the plaintiffs' attorney's preoccupation with his mother's terminal illness and subsequent demise during the critical phase of discovery. 364 N.J. Super. At 51-52. The court also observed its own history of having "been particularly indulgent" where, among other things, the report was "critical to the claim or defense. . ." Id. at 52.

The present situation is different. Plaintiffs timely produced the expert report of Dr. Mayer. The inability to use Dr. Ferdoco as an expert did not result in a dismissal of plaintiffs' complaint. At trial plaintiffs established a prima facie case with Dr. Mayer's expert testimony. Defendant did not move to bar Dr. Mayer's testimony at trial following his voir dire or after he testified. Plaintiffs suffered no prejudice whatsoever.

In a similar vein, Castello v. Wohler, supra, is distinguishable from the present matter. In Castello, the plaintiff's surgery expert, Dr. Edoga, provided during discovery three different curricula vitae, each of which misrepresented that he was actively practicing surgery at the time of the alleged malpractice when he had in fact retired in 2005, five years before the surgery at issue. 446 N.J. Super. at 9-11. The plaintiff's attorney was completely unaware of this fact until Dr. Edoga's deposition. Id. at 7. The trial court barred Dr. Edoga from testifying and declined to grant the

plaintiff's request for time to obtain another expert. Id. at 12. The court granted the defendant's subsequent motion for summary judgment. Ibid. The Appellate Division reversed, finding that plaintiff's counsel reasonably relied on Dr. Edoga's curriculum vitae and that without an expert, plaintiff could not proceed. Id. at 25-26.

In this matter, plaintiffs provided a timely expert report from Dr. Mayer, plaintiffs' expert was never found to be unqualified to testify at trial, plaintiff never filed a formal motion to extend discovery, and plaintiffs' case was never dismissed.

In Bender v. Adelson, supra, the Court affirmed a trial court order denying two defendant physicians' motion to submit the untimely reports of three additional experts, finding that there was no prejudice because the defendant already had an expert whose report had been timely served and even though that expert, a cardiac surgeon, admittedly did not have the same expertise as the plaintiff's experts. 87 N.J. at 419, 430. The Court concluded: "As such, defendants were not precluded from presenting their case to the jury despite the exclusion of the three experts. " Id. at 430; see also Zadigan v. Cole, 369 N.J. Super. 123, 133 and n. 10 (Law Div. 2004) (precluding the untimely report of an expert for the defendant dentist where there was no excuse for the delay or lack of diligence, and preclusion of the expert did not place the defendant's defense "in jeopardy" because defendant already had another expert). Here, plaintiffs were likewise not deprived of an expert whose testimony would satisfy the requirements of a prima facie case.

Judge McCarthy did not err in failing to extend discovery for plaintiffs to replace Dr. Mayer simply because they decided that they preferred Dr. Ferzoco over Dr. Mayer. Plaintiffs faced no prejudice by Judge McCarthy's denial of their request to replace Dr. Mayer. They still possessed a qualified expert who could testify at trial. Plaintiffs argue that they needed to switch experts because the issues raised by Dr. Mayer and Dr. Ferzoco were the most important issues at trial. While that is arguably true, it is only true because the other defendants had settled at the time of trial, leaving Dr. Chung-Loy as the only defendant.

C. Judge McCarthy did not err in denying plaintiffs' Motion for Reconsideration

Rule 4:42-2 governs motions for reconsideration of interlocutory orders. "Interlocutory orders 'shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.'" Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021) (citing R. 4:42-2). Until a final judgment has been entered, only "sound discretion" and "the interest of justice" should guide the trial court in addressing a motion for reconsideration. Ibid. Although the rule for reconsidering an interlocutory order is expansive, the power to reconsider should be exercised "only for good cause shown and in the service of the ultimate goal of substantial justice." Lombardi v. Masso, 207 N.J. 517, 536 (2011) (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 263-64 (App. Div. 1987)).

When plaintiffs filed their motion for reconsideration[8], they could not demonstrate good cause for Judge McCarthy to change his prior order barring plaintiff from substituting Dr. Ferzoco for Dr. Mayer. At the time of the November 12, 2021, oral argument, the most recent order had set deadlines to finish expert depositions by December 30, 2021. (Pa273). This was an agreed upon date; however, the case management order was not yet signed by Judge Sheedy at the time of oral argument before Judge McCarthy.

At the time of oral argument, depositions of several defense experts were pending or to be scheduled.[9] A constant theme throughout the matter was the difficulty meeting the expert deposition deadlines set by Judge Sheedy due to the sheer number of experts and attorneys involved. Eventually, on November 18, 2021, Judge Sheedy signed an order extending discovery until December 30, 2021, which was ultimately the final discovery end date. (Pa273). The new deadline of December 30, 2021, was fewer than six weeks after oral argument.

Judge McCarthy denied plaintiffs initial application to designate Dr. Ferzoco as an expert and replace Dr. Mayer for a host of reasons: the age of the case, the fact that plaintiff had a qualified expert who had already been deposed, and the resulting

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[8] Plaintiffs inexplicably waited almost two months before filing the motion for reconsideration on October 20, 2021. (Pa209). This fact was discussed at oral argument. 2T18-19 to 20-13.

[9] There were in fact twelve experts scheduled to be deposed. (Pa274-275)

complications and prejudice that allowing a new expert report would cause at such a late stage in the case when the court was trying to move cases forward. 1T9-1 to 11-25. When plaintiffs filed their motion for reconsideration, the circumstances had not changed. At the time the reconsideration motion was filed, the case had only gotten older, plaintiffs still had their qualified expert, and the discovery end date at the time was just under six weeks away. Judge McCarthy saw no reason to overturn his prior decision, because there was no good cause to do so. 2T31-15 to 33-22.

It was appropriate for Judge McCarthy to deny plaintiffs' motion for reconsideration of his August 27, 2021, order.

D. Plaintiffs do not deserve a new trial for their failure to vet their own expert's background

Plaintiffs do not deserve a new trial simply because they failed to learn of their expert's background prior to the deadline to produce expert reports or prior to his deposition. At the deposition of Dr. Mayer, a number of issues regarding his experience as a surgeon, as well as his experience as an expert witness, were probed during defense counsel's questioning. This knowledge was readily obtainable by plaintiffs' counsel not only prior to Dr. Mayer's deposition, but prior to hiring him. All they needed to do was talk to him and review his curriculum vitae. Plaintiffs' counsel apparently did none of this and defendant should not have to sit through another trial because their expert was not as good as they would have liked.

Plaintiffs have cited no authority for the general proposition they advance --that they should have been able to replace their first expert with another simply because of what they learned about the former at his deposition and when there has been no deception by the expert as to his qualifications. To accept plaintiffs' argument would be to reward one party's lack of due diligence yet punish another's energetic investigation and subsequent, probing deposition.

CONCLUSION

For the foregoing reasons, the Court should reject plaintiffs' argument and affirm the final judgment in favor of defendant.

Respectfully submitted,

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Thomas J. Heavey, Esq.
Grossman, Heavey & Halpin, P.C.
Attorneys for Respondent, Harold Chung-Loy, M.D.

EPSTEIN | OSTROVE

January 4, 2024

Via eCourts
Appellate Clerks Office
Superior Court of New Jersey, Appellate Division
PO Box 006
25 Market Street
Trenton, NJ 08611

Attention: Jill Costigan

Re: Thomas Mahalchick, Jr., Both Individually, as Surviving Benefciary, and on Behalf of The Estate of Romaine Mahalchick, and William Mahalchick, Individually as Surviving Beneficiary, v. Robert Wood Johnson University Hospital Rahway, Robert Wood Johnson Physician Enterprise, Michael Chen, M.D., Daniel, Wang, M.D., Harold Chung-Loy, M.D., Vincent Moss, M.D. Scott S. Chae, M.D., Michael Bernstein, M.D., Abhishek Shrivastava, M.D., Kristen Elefterhiou, P.A., Michael Volpe, B.S.N., Rowena Cabral, R.N., Biju Ringle, R.N., Abigail Verzeris, B.S.N., Alexander Apostol, R.N., Medical Group Does 1-10 (Fictitious Names) And Dr. John Does 1-10 (Fictitious Names).
Docket No.: MON-L-2121-18
Appellate Docket No.: A-003356-22

Dear Sir/Madam:

Plaintiff appellants submit the following in reply to defendant's opposition. Specifically, the instant brief rebuts the five arguments made by the respondent in its opposition.

1. **Respondent argues that Appellants were to blame for not discovering that Dr. Mayer lied on his CV before the deposition.**

There was no finding of fault by the Court in its decision to deny plaintiffs' motion. Respondent argued that Plaintiffs could have discovered Dr. Mayer's misrepresentation, but clearly one who retains an expert is at a disadvantage to an adversary party in its ability to cross-examine an expert. Regardless, the Court's decision was solely based upon the upcoming discovery deadline and trial. ***See 1T10-12, 2T31-33, Appellants' Brief.***

Retained experts are not placed under oath by the parties that retain them and asked whether their curriculum vitae is true. There was no reason for plaintiffs to doubt its expert's

representation until he capitulated to his misrepresentation under cross examination at the deposition.

2. Respondent argues that granting Appellants' motion would have disrupted the discovery process.

Allowing Dr. Ferzoco to testify would have required the review of at most, one or two of the Appellants' experts (as the topic of the report was restricted by law to the specific area of practice of that expert.) There was no dispute that the opinion of Dr. Ferzoco was practically the same or similar to Dr. Mayer's opinion. No defense expert deposition had taken place. The only additional deposition added to the developing deposition schedule would have been for Dr. Ferzoco. There would have been no disruption to the discovery process and the additional one or two reports and one deposition could have been easily achieved within the allotted time prior to trial.

It bears noting that all of the delays in the matter were either COVID delays or the inability to schedule the defendants' counsel at the same time to schedule depositions of their experts.

Trial ultimately occurred in April 2023. Dr. Ferzoco's report was served on July 2021 – almost two years prior to trial. ***See A214-219; 1T7-8, Appellants' Brief.***

3. Respondent argues that Judge Sheedy's Order ended discovery on December 31, 2021, so the refusal to reconsider Judge MacCarthy's original Order was appropriate.

This argument ignores that Judge Sheedy indicated to all counsel that there would be no trial prior to April or May of 2022. ***See 2T24, Appellants' Brief.*** There can be no honest dispute that there was time to conduct the additional modicum of discovery that would be needed to have Dr. Ferzoco act as plaintiffs' expert. Respondent argues that the case was three years old but does not mention that it was that old mostly because of the COVID pandemic delay.

Furthermore, defense counsel admitted that plaintiffs' counsel had been diligent with discovery throughout. ***See 2T18:15-17, Appellants' Brief.***

4. **Respondent claims that Appellants' argument that Dr. Mayer was permitted to testify precludes its request to add Dr. Ferzoco as an expert.**

As plaintiffs explained in its motion, Dr. Mayer was qualified under the letter of the law and rule to testify, but he had not been honest with plaintiffs regarding his credentialing and this dishonesty was exposed at his deposition. As a result, his credibility issues were fatal to plaintiffs' case. There is no rule of law that states that plaintiffs are required to be saddled with an expert that is discovered to have lied to plaintiffs even if that expert is technically qualified to testify. ***See 3T35-36, 4T173-179, 4T185-186, 4T189-190, 4T160-161, 4T166-169, 7T46-50, 7T53-54, Appellants' Brief.***

5. **Respondent argues the Court did not commit reversible error because plaintiffs did not file a motion to extend.**

This argument must fail because there was no reason to extend discovery if Dr. Ferzoco's report was barred and there was no reason to extend discovery further if Dr. Ferzoco's report was permitted. In both circumstances, Judge Sheedy extended discovery to allow more time to have all parties depose the experts. Judge Sheedy had also made the parties aware that there was not going to be a trial until April or May in 2022. (The trial ended up being an entire year later.) ***See 2T24, Appellants' Brief.***

Respectfully submitted,
EPSTEIN OSTROVE, LLC

By: DANIEL N. EPSTEIN, Esq.

DNE/lm
Cc: All counsel of record