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JUDY WOODY	:	SUPERIOR COURT OF NEW
	:	JERSEY
Appellant/Plaintiff	:	APPELLATE DIVISION
	:	
v.	:	CIVIL ACTION
	:	
	:	
	:	On Appeal From:
HORATIO DAUB, MD,	:	Superior Court of New Jersey
VIRTUA FAMILY	:	Burlington County
MEDICINE CENTER	:	Docket No. BUR-L-1078-18
John Doe 1-10 individually,	:	Sat Below: Hon. Richard Hertzberg,
jointly and severally	:	J.S.C.
	:	
	:	
Respondent/Defendant	:	

PLAINTIFF-APPELLANT'S BRIEF

Brief Prepared By:
Mark J. Molz, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES:

Statutes

New Jersey Model Civil Jury Charges

Table of Orders

Preliminary Statement

Defendants Dr. Horatio Daub and Virtua Family Medicine lost this case when the Defense expert Dr. Borkan admitted on cross-examination that Dr. Daub never told the Plaintiff she was diabetic and that he should have diagnosed her as diabetic in 2012 based upon the records in Dr. Daub's chart. (3T, 91:11-19 and 104:4-10).

It was after this testimony that the Defense Rule 4:37-b(2) Motion was heard.

The jury was never allowed to deliberate.

It is respectfully submitted that to dismiss Plaintiff's case, the Trial Court impermissibly ruled upon a fact issue without granting all inferences in favor of the Plaintiff as it was required to do and in violation of the "Law of the Case" doctrine.

Procedural History[1]

Plaintiff filed a Complaint alleging medical malpractice against the Defendants on or about May 24, 2018. (Pa018). The Complaint alleges that the Defendants failed to diagnose the Plaintiff as a diabetic and a failure to comply with the duty of informed consent.

[1] 1T March 8, 2023; 2T March 9, 2023; 3T March 13, 2023

Defendants filed an Answer to the Complaint on or about June 22, 2018. (Pa035). Plaintiff filed an Affidavit of Merit authored by Dr. Shilpa H. Amin, MD dated June 29, 2018. (Pa044).

A Motion for Summary Judgment was filed by the Defendants on or about July 6, 2018 that addressed the Statute of Limitations defense. (Pa046). Plaintiff opposed this Motion (Pa053) which was eventually denied by Judge Covert on or about September 20, 2018. (Pa056). Judge Covert issued a written statement of reasons. (Pa057).

Both the Plaintiff Judy Woody and the Defendant Dr. Horatio Daub were deposed. Plaintiff supplied the expert report first of Dr. Shilpa H. Amin and second of Dr. David Libert. (Pa118, 125). The defense supplied the expert report of Dr. Jeffrey Borkan, MD.

Jury selection began in this matter on March 6, 2023 and after jury selection, the trial began on March 8, 2023. (1T). Trial continued on March 9, 2023. (2T).

During Plaintiff's testimony, defense counsel indicated at sidebar that he intended to file a motion to dismiss. (2T, 202:19-21). The Trial Court indicated to defense counsel that he must make the Motion in writing:

> "THE COURT: I think it's a fair question, but any motion you're going to make, it has to be a written motion --

MR. RIGDEN: Understood.

THE COURT: -- that he has an opportunity to --

MR. RIGDEN: I'll do it this weekend.

THE COURT: Okay. Because I'm not sure what case law you're talking about, but I'm pretty sure you can't go through a whole trial and then raise the statute of limitations." (2T 203:3-13).

Mr. Rigden presented the Court and Plaintiff's counsel a written Motion to Dismiss on Monday morning, March 13, 2023. (3T4:24-5:11).

Plaintiff rested on March 13, 2023. (3T). Defendants' expert had already testified out of turn. (3T, pages 26 through page 150). On March 13, 2023, after the close of the Plaintiff's case, the Trial Court granted the Defendants' Motion to Dismiss based upon the Statute of Limitations. (3T, page 151-171).

Thereafter, Plaintiff filed a Motion for Reconsideration which was opposed by the Defendants and denied by the Trial Court. (Pa008).

This appeal follows. (Pa001).

Statement of Relevant Facts

Plaintiff Judy Woody began treating with the Defendant Dr. Horatio Daub in or about 2001. (1T, 45:23-46:1). Dr. Horatio Daub was the Plaintiff's primary care physician. (1T, 47:22-24).

Dr. Daub admitted throughout his testimony that he never diagnosed the Plaintiff as a diabetic. He testified as follows:

> "Question: And did you ever diagnose Judy Woody as a diabetic?
>
> Answer: No. As I recall, she didn't really meet the criteria as a diabetic." (1T, 48:23-49:1).

Nevertheless, the Defendants own expert Dr. Jeffrey Borkan testified that based upon Dr. Daub's chart, Ms. Woody should have been diagnosed as a diabetic on 3-21-2012:

> "Question: Okay. So are you able to tell us when she was -- would've been diagnosed as Diabetic? It's a yes or no?
>
> Answer: Yes.
>
> Question: Okay. When would she be diagnosed as a diabetic?
>
> Answer: Okay, according to the A1C that would be 3-21-12." (3T, 104:4-10).

Plaintiff's expert Dr. David Libert agreed:

> "Question: All right. And based upon just those records, do you have an opinion as to whether Ms. Judy would have -- Woody Daniels was a diabetic at any point?
>
> Answer: Yes, I do.
>
> Question: And what is that?
>
> Answer: That she was a diabetic.

Question:	When?
Answer:	The earliest -- and this is being -- I'm basing this on the hemoglobin A1C. That would be on March 21, 2012.
Question:	I'm going to ask you to assume that Dr. Daub testified earlier that he never told Judy that she was a diabetic. Does that meet the standard of care?
Answer:	No." (1T, 139:4-18).

Ms. Woody testified that she never had access to her chart maintained by Dr. Daub. (2T, 184:24-185:6). She further testified that she never had access to her lab reports. Id. She also testified that Dr. Daub never told her she was a diabetic. Id.

On May 2, 2016, Plaintiff presented to Dr. Daub with severe headaches. (2T, 208:20-209:19). Ms. Woody stated at trial, "It was like my head was going to burst." (2T, 209:19). This was not reflected in P-1 in evidence. (Pa129).

Dr. Daub testified that he did not take her blood sugar on May 2, 2016 because the technician had already left for the day. (1T, 86:8-14).

Unfortunately, on May 3, 2016, Plaintiff went into ketoacidosis and was hospitalized. (1T, 198:16-20). Ms. Woody described the event as feeling as if

she "was going to die". (2T, 189:20-21). She testified that she spent about 6 days in the ICU after she was admitted on May 3, 2016. (2T, 191:2-3).

Defendants' Motion to Dismiss, was based upon Ms. Woody's testimony at trial that she learned she was a diabetic in the hospital in May of 2016. The allegation of negligence in this matter, supported by both experts' testimony, is that Dr. Daub failed to diagnose diabetes in the Plaintiff from 2012-2016 based upon his own chart. These are separate issues.

These causes of action, set forth in the Complaint, relate back to the years from 2012 up until 2016. The Complaint states at paragraph 5 that Plaintiff was seen regularly by Dr. Daub for general check up and health issues. In paragraph 6 it states that Dr. Daub ordered blood tests on 7/25/13 which resulted in an A1C reading of 7.0 and with a range of 4.2-6.3 and a high flag. In paragraph 7 is states that on 1/9/15 Dr. Daub ordered another blood test with a high A1C of 7.2. Paragraphs 13, 14, and 15 suggest that Dr. Daub was negligent all along the way from his care of Ms. Woody from at least 7/25/13 up to 5/2/16.

The issue presented by Plaintiff's complaint is not whether Ms. Woody knew on 5/3/16-5/8/16 that Dr. Daub mistreated her on 5/2/16, but instead was based upon years of failure to advise Ms. Woody that she was a diabetic and that she needed the right of self-determination, that is she needed to be

treated with a discussion of all possible courses of treatment as well as the choice of no treatment.

It is undisputed that Ms. Woody did not receive her medical records until August of 2016 as she certified. (Pa053). She had no lab reports. There was no testimony at trial to the contrary.

When the Defendants first filed a Motion for Summary Judgment in or about July of 2018 (Pa046), Judge Covert correctly found as follows:

> "Here, the main issue is whether or not the injury occurred on the date of diagnosis, May 3, 2016, or the date that Plaintiff discovered Defendant had failed to diagnose her, August of 2016….
>
> …Further, despite Defense Counsel's argument to the contrary, the Court finds that a reasonable person may not discover that a cause of action exists regarding ongoing, untreated medical condition until actually, the medical records are obtained by said person. The Court finds that Plaintiff's injury is the failure of diagnosis, which Plaintiff learned existed only in August of 2016." (Pa058-059).

This ruling in response to Defendants' Motion for Summary Judgment became the law of the case.

Ms. Woody did testify at trial on direct at trial as follows:

> "Question: When did you first learn you were diabetic?
>
> Answer: 2016.
>
> Question: And where did you learn that?
>
> Answer: The day I went to the hospital.

Question: Okay. Before that, did Dr. Daub say to you, you have diabetes?

Answer: No, sir.

Question: Did he say to you you're a prediabetic?

Answer: No, he didn't" (2T, 185:12-20).

This line of questioning had nothing to do with whether or not Dr. Daub failed to diagnose Ms. Woody for years as a diabetic, rather it simply asked when Ms. Woody first received knowledge of her diabetic condition. It has nothing to do with Plaintiff's perception that she was not treated right at Dr. Daub's office. As Judge Covert correctly recognized, these are separate issues. (Pa059).

On cross-examination, Ms. Woody testified as follows:

"Question: Okay. All right. In looking back -- now that you're, you know, in this lawsuit here and looking back -- I know we're going back over ten years, but it's your memory and it's your view that not once did you ever talk about your blood sugar levels with Dr. Daub?

Answer: No, I did not." (2T 199:24-200:5)

At Pa159, in support of the written Motion to Dismiss, Defense Counsel quoted the Plaintiff as follows:

"Question: When did you first know you were a diabetic?

Answer: 2016.

Question: And when did you learn that?

Answer: The day I went into the hospital.

Question: Okay and before that did Dr. Daub say to you, you have diabetes?

Answer: No, Sir." (2T, 185:12-18).

It is admitted that Plaintiff learned that she was diabetic in the hospital. This alone does not provide Ms. Woody with knowledge that Dr. Daub ignored blood tests and should have diagnosed and treated her as a diabetic in 2012, as admitted by Defendant's expert on cross-examination and as found by Judge Covert in her September 20, 2018 Order. (Pa056).

This is because Ms. Woody did not receive her blood tests or informed consent relating to her treatment for diabetes at the hospital. (2T, 184:24-185:6). This fact is also undisputed. There is no evidence that Plaintiff knew any of this information or that her chart contained high blood glucose readings for many years, prior to August of 2016. (Pa053).

There is no way that Ms. Woody would have been able to obtain Dr. Daub's chart while she was in the hospital to learn that he had taken blood tests and had not reported to her that she was diabetic. This is because Ms. Woody never had access to her hospital chart in the hospital and never had access to Dr. Daub's records in the hospital. (2T, 184:24-185:6). This is what the complaint alleges in Count One.

Dr. Daub's expert Dr. Borkan admitted on cross-examination that Dr. Daub never told the Plaintiff she was diabetic and that he should have diagnosed her as diabetic in 2012 based upon the records in Dr. Daub's chart. (3T, 91:11-19 and 104:4-10).

The defense argued that Plaintiff knew she was mad at Dr. Daub when she was in the hospital and that she knew he had "done her wrong". Plaintiff was referring to the fact that she was in her office the day before and he didn't test or treat her at that time or send her to the hospital. The fact that she learned she was a diabetic in the hospital doesn't answer the question presented in the complaint, which alleges a failure to diagnose diabetes over an extended period of time. This cause of action could not have become known until the Plaintiff obtained her records.

The Certification from the Plaintiff was accurate. She stated:

> "It was not until I obtained my records and consulted with a new doctor that I discovered Dr. Daub had failed for years to diagnose/treat diabetes"

In fact, Plaintiff testified that Dr. Daub never showed her the lab work or explained it to her. (2T, 184:24-185:6).

Defense counsel asked unclear questions of the Plaintiff at trial on 3/9/23:

> "Question: Right. In the hospital, before you were discharged home when you were told you had diabetes, was this when you first thought that Dr. Daub may have made a mistake in treating you?

Answer: If you went - - can I say something? If you went to the doctor and you was really sick - - I felt terrible. I told him how I was feeling. That's the purpose of me going to his office but he sent me home and not to hospital.

Mr. Rigen: Your Honor, can I have an answer to my question?

The Court: Well yeah I think she is trying to explain the whole story but I think the question Mr. Rigden is asking is just - - well why don't you reframe it. Yeah.

Question: Ms. Woody, when you came to in the hospital when you were finally getting your wits about you a little bit more - - are you with me?

Answer: Yes.

Question: Before you were discharged home.

Answer: Mhm.

Question: You learned that a physician was diagnosing you with diabetes right?

Answer: Mhm.

Question: Is that a yes?

Answer: The hospital did.

Question: Right. Was that the first time that you thought maybe Dr. Daub didn't treat you appropriately?

Answer: He didn't.

Question: And was that the first time you thought that?

Answer: Yes." (2T, 207:9-208:16).

Mr. Rigden's question doesn't clarify whether he is asking about Dr. Daub's treatment of Ms. Woody on 5/2/16 or for all of the years prior. This is a fact issue that should have been left for the jury to decide.

Ms. Woody was speaking about her frustration that Dr. Daub did not send her to the hospital on 5/2/16 based upon the following:

> "Ms. Woody: If you went - - can I say something? If you went to the doctor and you was really sick - - I felt terrible. I told him how I was feeling. That's the purpose of me going to his office but he sent me home and not to hospital." (2T 207:13-17).

This issue of whether Dr. Daub acted properly on 5/2/16 is separate from Ms. Woody's claim that Dr. Daub failed to diagnose diabetes from at least 2012-2016. This is a reasonable inference that should have been given to the Plaintiff on a Rule 4:37-2(b) motion.

This is a much more complex breach of the standard of care, as recognized by the Order of Judge Covert dated 9-20-18, that could not have been known to a reasonable person and wasn't known to Ms. Woody until she obtained her chart in August 2016. The chart revealed blood tests with high glucose readings that were never disclosed to Ms. Woody.

Nevertheless, all of the testimony of Ms. Woody addresses when she learned she was at present a diabetic and <u>not</u> when she learned that Dr. Daub failed to diagnose her ongoing diabetes dating back to 2012. There is no way

Ms. Woody could have known of this failure to diagnose for so many years until she received her medical records in August 2016 which started the running of the statute of limitations, which fact remains undisputed.

Plaintiff's Complaint was timely filed and Defendant's Motion should have been denied.

Standard of Review

The New Jersey Supreme Court has stated, "In reviewing a motion for involuntary dismissal under Rule 4:37-2(b) or a motion for judgment under Rule 4:40-1, we apply the same standard that governs the trial courts." Smith v. Millville Rescue Squad, 225 N.J. 373 (2016) (citing ADS Assocs. Grp. v. Oritani Sav. Bank, 219 N.J. 496, 511, 99 A.3d 345 (2014); Frugis v. Bracigliano, 177 N.J. 250, 269, 827 A.2d 1040 (2003)).

"The motion should only 'be granted where no rational juror could conclude that the plaintiff marshaled sufficient evidence to satisfy each prima facie element of a cause of action.'" Id. (citing Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 197, 952 A.2d 1034 (2008)).

Legal Argument

POINT I DEFENDANTS FAILED TO MEET THE RULE 4:37-2(b) STANDARD (3T 153:12-15)

In Bell v. Eastern Beef Co., 42 N.J. 126 (1964), the Supreme Court addressed Rule 4:37-2(b) Motions and stated, "In ruling on these motions the court must look at the evidence and the inferences which may reasonably be deduced therefrom in a light most favorable to the plaintiff, and if reasonable minds could differ as to whether any negligence had been shown, the motions should be denied." Id. at 129, see also Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 536 (1995).

The Court in Brill addressed both motions for a directed verdict and motions for summary judgment and stated:

> "Under our holding today, the essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, *supra*, at 536 (internal citations omitted).

When the Defendants first filed a Motion for Summary Judgment in or about July of 2018, Judge Covert correctly recognized the distinction between Ms. Woody's diagnosis of diabetes and her learning of Dr. Daub's failure to diagnose for years as follows:

> "Here, the main issue is whether or not the injury occurred on the date of diagnosis, May 3, 2016, or the date that Plaintiff

> discovered Defendant had failed to diagnose her, August of 2016….
>
> …Further, despite Defense Counsel's argument to the contrary, the Court finds that a reasonable person may not discover that a cause of action exists regarding ongoing, untreated medical condition until actually, the medical records are obtained by said person. The Court finds that Plaintiff's injury is the failure of diagnosis, which Plaintiff learned existed only in August of 2016." (Pa057).

Ms. Woody did testify at trial on direct at trial as follows:

> "Question: When did you first learn you were diabetic?
>
> Answer: 2016.
>
> Question: And where did you learn that?
>
> Answer: The day I went to the hospital.
>
> Question: Okay. Before that, did Dr. Daub say to you, you have diabetes?
>
> Answer: No, sir.
>
> Question: Did he say to you you're a prediabetic?
>
> Answer: No, he didn't" (2T, 185:12-20).

This line of questioning had nothing to do with whether or not Dr. Daub failed to diagnose Ms. Woody for years as a diabetic, rather it simply asked when Ms. Woody learned for the first time that she was a diabetic. As Judge Covert correctly recognized, these are separate issues.

On cross-examination, Ms. Woody testified as follows:

"Question: Okay. All right. In looking back -- now that you're, you know, in this lawsuit here and looking back -- I know we're going back over ten years, but it's your memory and it's your view that not once did you ever talk about your blood sugar levels with Dr. Daub?

Answer: No, I did not." (2T 199:24-200:5)

It is admitted that Plaintiff learned that she was diabetic in the hospital. This alone does not provide Ms. Woody with knowledge that Dr. Daub ignored blood tests and should have diagnosed her as a diabetic in 2012, as admitted by Defendant's expert on cross-examination and as found by Judge Covert in her September 20, 2018 Order. (Pa056).

Defense counsel asked unclear questions of the Plaintiff at trial on 3/9/23:

"Question: Right. In the hospital, before you were discharged home when you were told you had diabetes, was this when you first thought that Dr. Daub may have made a mistake in treating you?

Answer: If you went - - can I say something? If you went to the doctor and you was really sick - - I felt terrible. I told him how I was feeling. That's the purpose of me going to his office but he sent me home and not to hospital.

Mr. Rigen: Your Honor, can I have an answer to my question?

The Court: Well yeah I think she is trying to explain the whole story but I think the question Mr. Rigden is asking is just - - well why don't you reframe it. Yeah.

Question: Ms. Woody, when you came to in the hospital when you were finally getting your wits about you a little bit more - - are you with me?

Answer: Yes.

Question: Before you were discharged home.

Answer: Mhm.

Question: You learned that a physician was diagnosing you with diabetes right?

Answer: Mhm.

Question: Is that a yes?

Answer: The hospital did.

Question: Right. Was that the first time that you thought maybe Dr. Daub didn't treat you appropriately?

Answer: He didn't.

Question: And was that the first time you thought that?

Answer: Yes." (2T, 207:9-208:16).

Mr. Rigden's question doesn't clarify whether he is asking about Dr. Daub's treatment of Ms. Woody on 5/2/16 or for all of the years prior. This is a fact issue that should have been left for the jury to decide.

Ms. Woody was speaking about her frustration that Dr. Daub did not send her to the hospital on 5/2/16 based upon the following:

"Ms. Woody: If you went - - can I say something? If you went to the doctor and you was really sick - - I felt terrible. I told him how I was feeling. That's the purpose of me going to his office but he sent me home and not to hospital." (207:13-16)

This issue of whether Dr. Daub acted properly on 5/2/16 is separate from Ms. Woody's claim that Dr. Daub failed to diagnose diabetes from at least 2012-2016.

This is a much more complex breach of the standard of care, as recognized by the Order of Judge Covert dated 9-20-18, (Pa056, 057) that could not have been known to a reasonable person and wasn't known to Ms. Woody until she obtained her chart in August 2016. The chart revealed blood tests with high glucose readings that were never disclosed to Ms. Woody. This is a reasonable inference that should have been given to the Plaintiff on a Rule 4:37-2(b) motion and it defeats the Defense Motion under Rule 4:37-2(b).

Nevertheless, all of the testimony by Ms. Woody confirms when she learned she was a diabetic but not when she learned that Dr. Daub failed to diagnose her as a diabetic for years dating back to 2012.

There is no way she could have known of this failure to diagnose for so many years until she received her medical records in August 2016, which fact remains undisputed.

POINT II PLAINTIFF'S CLAIMS OF DR. DAUB'S FAILURE TO DIAGNOSE DIABETES OVER MANY YEARS ARE SEPARATE THAN HER CLAIMS RELATED TO SPECIFIC TREATMENT ON 5/2/16 (3T, 152:7).

Attached as Pa18 to this Motion is a true copy of Plaintiff's complaint which alleges in Count I, a failure to diagnose diabetes and Count II which was a failure to supply informed consent. These separate causes of action relate back to the years from 2012 up until 2016.

The Complaint states at paragraph 5 that Plaintiff was seen regularly by Dr. Daub for general check-up and health issues. In paragraph 6 it states that Dr. Daub ordered blood tests on 7/25/13 which resulted in an A1C reading of 7.0 and with a range of 4.2-6.3 and a high flag. In paragraph 7 is states that on 1/9/15 Dr. Daub ordered another blood test with a high A1C of 7.2.

Paragraphs 13, 14, and 15 suggest that Dr. Daub was negligent all along the way from his care of Ms. Woody from at least 7/25/13 up to 5/2/16.

Count II sounds in failure to provide informed consent. At 3T, 20:2-10, Mr. Rigden suggested that informed consent was not pleaded in the Complaint when in fact it was, at Pa020.

The issues presented by Plaintiff's complaint are not whether Ms. Woody knew on 5/3/16-5/8/16 that Dr. Daub breached the standard of care on 5/2/16, but instead was based upon years of negligent failure to diagnose and

advise Ms. Woody that she was a diabetic and needed to be treated. The lack of informed consent is also implicated. (See below).

It is true at paragraph 16 of Mr. Ridgen's certification that Plaintiff testified at deposition that during her hospitalization of 5/3/16 – 5/8/16 that a Virtua physician told her daughter that she had been diabetic since 2010. This information was never given to Ms. Woody.

It is undisputed that Ms. Woody did not receive her medical records until August of 2016. (Pa053). There is no evidence that while she was in the hospital 5/3/16 – 5/8/16 that Ms. Woody had knowledge of Dr. Daub's negligence for years and years since she was not able to obtain her medical records until August of 2016 and never saw her chart from Dr. Daub or the hospital until then.

When the Defendants first filed a Motion for Summary Judgment in or about July of 2018, Judge Covert correctly found as follows:

> "Here, the main issue is whether or not the injury occurred on the date of diagnosis, May 3, 2016, or the date that Plaintiff discovered Defendant had failed to diagnose her, August of 2016….
>
> …Further, despite Defense Counsel's argument to the contrary, the Court finds that a reasonable person may not discover that a cause of action exists regarding ongoing, untreated medical condition until actually, the medical records are obtained by said person. The Court finds that Plaintiff's injury is the failure of diagnosis, which Plaintiff learned existed only in August of 2016." (Pa057).

This ruling is the law of the case. "Under the law-of-the-case doctrine, where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit." Bahrle v. Exxon Corp., 279 N.J.Super. 5, 21 (App.Div.1995), aff'd, 145 N.J. 144 (1996). The law-of-the-case doctrine "is based upon the sound policy that when an issue is once litigated and decided during the course of a particular case, that decision should be the end of the matter." State v. Hale, 127 N.J.Super. 407, 410-411 (App.Div.1974).

"The law of the case doctrine directs courts to refrain from re-deciding issues that were resolved earlier in the litigation." Public Interest Research Group v. Magnesium Elektron, Inc., 123 F.3d 111, 116 (3d Cir.1997). "Because it prevents courts from entertaining endless appeals on the same issue, the doctrine promotes finality and judicial economy." Public Interest Research Group v. Magnesium Elektron, Inc., 123 F.3d 111, 116 (3d Cir.1997). Cf. D'Atria v. D'Atria, 242 N.J.Super. 392, 401 (Ch.Div.1990) ("motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour").

Mr. Rigden asked Ms. Woody questions lacking clarity at trial on 3/9/23.

"Question:	Right. In the hospital, before you were discharged home when you were told you had diabetes, was this when you first thought that Dr. Daub may have made a mistake in treating you?
Answer:	If you went - - can I say something? If you went to the doctor and you was really sick - - I felt terrible. I told him how I was feeling. That's the purpose of me going to his office but he sent me home and not to hospital.
Mr. Rigen:	Your Honor, can I have an answer to my question?
The Court:	Well yeah I think she is trying to explain the whole story but I think the question Mr. Rigden is asking is just - - well why don't you reframe it. Yeah.
Question:	Ms. Woody, when you came to in the hospital when you were finally getting your wits about you a little bit more - - are you with me?
Answer:	Yes.
Question:	Before you were discharged home.
Answer:	Mhm.
Question:	You learned that a physician was diagnosing you with diabetes right?
Answer:	Mhm.
Question:	Is that a yes?
Answer:	The hospital did.

Question: Right. Was that the first time that you thought maybe Dr. Daub didn't treat you appropriately?

Answer: He didn't.

Question: And was that the first time you thought that?

Answer: Yes." (2T, 207:9-208:16).

Ms. Woody is clearly speaking about her frustration that Dr. Daub did not send her to the hospital on 5/2/16 based upon the following:

"Ms. Woody: If you went - - can I say something? If you went to the doctor and you was really sick - - I felt terrible. I told him how I was feeling. That's the purpose of me going to his office but he sent me home and not to hospital." (3T, 207:13-16).

This is a much more complex breach of the standard of care, as recognized by Judge Covert, that could not have been known to a reasonable person and wasn't known to Ms. Woody until she obtained her chart in August 2016. The chart revealed blood tests with high glucose readings that were never disclosed to Ms. Woody.

Accordingly, there was no way for Ms. Woody to know that Dr. Daub knew she was diabetic and failed to diagnose her as diabetic while she was in the hospital from 5/3/16-5/8/16.

Judge Covert made a finding to this effect in her Order dated September 20, 2018.

Granting the Defendant's Motion to Dismiss at Trial was harmful error capable of causing an unjust result and the order of March 13, 2023 should be vacated and Plaintiff's claims reinstated.

POINT III THE PLAINTIFF'S CLAIMS RELATING TO A FAILURE OF INFORMED CONSENT SHOULD NEVER HAVE BEEN DISMISSED IN DEFENDANT'S DISPOSITIVE MOTION SINCE THESE CLAIMS WEREN'T EVEN ADDRESSED (3T 20:2-10, Pa020, Pa157)

Evidence at Trial was adduced regarding Dr. Daub's failure to obtain informed consent for treatment in accordance with Model Civil Jury Charge 5.50C. Plaintiff was never told she was a diabetic and as a result never got to make a choice as to her treatment alternatives including non-treatment.

At 3T, 20:2-10, Mr. Rigden suggested that informed consent was not pleaded in the Complaint when in fact it was, at Pa020.

Model Jury Charge 5.50C reads as follows:

> "5.50C INFORMED CONSENT (Competent Adult and No Emergency)1 , 2 (Approved 10/00; revised 3/02) A doctor must obtain the patient's informed consent before the doctor may treat or operate on the patient.3 The doctor has a duty to explain, in terms understandable to the patient, what the doctor intends to do before subjecting the patient to a course of treatment or an operation. The purpose of this legal requirement is to protect each person's right to self-determination in matters of medical treatment4 . A doctor has a duty to evaluate the relevant

information and disclose all courses of treatment that are medically reasonable under the circumstances.5 In order to obtain the patient's informed consent, the doctor must tell the patient not only about the alternatives that the doctor recommends, but also about all medically reasonable alternatives that the doctor does not recommend. A doctor does not comply with the duty of informed consent by disclosing only the treatment alternatives that the doctor recommends.6 Accordingly, the doctor must discuss all medically reasonable courses of treatment, including non-treatment, and the probable risks and outcomes of each alternative.7. By not discussing these alternatives, the doctor breaches the patient's right to make an informed choice and effectively makes the choice for the patient.8 The doctor has a duty to explain, in words the patient can understand, all material medical information and risks. Medical information or a risk of a medical procedure is material when a reasonable patient in the plaintiff's position would be likely to attach significance to it in deciding whether or not to submit to the treatment.9 A doctor is responsible for any injuries suffered by the patient, if the doctor did not adequately explain all medically reasonable courses of treatment, including non-treatment, in what the doctor knows or should know to be the patient's medical position or condition. The doctor is not required to disclose to the patient all the details of a proposed operation or treatment or all the possible risks, no matter how small or remote.10 The doctor is not required to communicate those dangers known to the average person or those dangers the patient has already discovered. Taking into account what the doctor knows or should know to be the patient's need for information, the doctor must disclose the medical information and risks which a reasonably prudent patient would consider material or significant in making the decision about what course of treatment, if any, to accept. Such information would generally include a description of the patient's physical condition, the purposes and advantages of the proposed surgery or treatment, the material risks of the proposed treatment and the material risks if such surgery or treatment is not provided, as well as the available options or alternatives that are medically reasonable under the circumstances and the advantages and risks of each alternative."

This cause of action is separate from Count One and the statute of limitations could not have run until Plaintiff Judy Woody obtained her medical records in August of 2016 as a matter of undisputed fact.

Dismissal at Trial constitutes plain error capable of causing manifest injustice in dismissing this Count and it should be reinstated.

POINT IV THE DISCOVERY RULE APPLIES AND PLAINTIFF'S COMPLAINT SHOULD BE REINSTATED (3T 152:5-7)

"The 'discovery rule' is an equitable principle by which the accrual of a cause of action is delayed until the injured party discovers, or by the exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an actionable claim." Vispisiano v. Ashland Chem. Co., 107 N.J. 416, 419 (1987) (citing Viviano v. CBS, Inc., 101 N.J. 538, 546 (1986)).

Under the discovery rule, the statute of limitations does not run until plaintiff has the knowledge of both injury and fault. "The discovery rule focuses on an injured party's knowledge concerning the origin and existence of his injuries as related to the conduct of another person. Such knowledge involves two key elements, injury and fault." Grunwald v. Bronkesh, 131 N.J. 483, 492-493 (1993).

"…there are medical malpractice cases where fault is not implicit in injury." Lynch v. Rubacky, 85 N.J. 65 (1981) (internal citations omitted).

In Lynch, the Supreme Court stated, “The fact that plaintiff here sensed that something was "wrong" with her ankle and was "dissatisfied" with her treatment is not incompatible with a belief that her doctor was treating her fully in accordance with proper medical standards.” Id. at 75. (emphasis added).

The Plaintiff in Lynch broke her ankle on 12/30/72. She was treated by Defendant Rubacky who performed a surgery and inserted pins on 1/4/73. The Plaintiff in Lynch continued to have pain and sought a second opinion in February 1974. She underwent another surgery on 2/21/74. In May 1974 that surgeon advised Plaintiff that on 2/21/74 he removed a pin that was misplaced by Dr. Rubacky and that the surgeries performed by Dr. Rubacky were not done correctly.

The Supreme Court reversed the Appellate Division holding which found that the Plaintiff should have known there was an actionable claim in February 1974 when she sought a second opinion. The Supreme Court found that instead, “a plaintiff must have an awareness of "material facts" relating to the existence and origin of his injury rather than comprehension of the legal significance of such facts” Id. citing (Burd v. New Jersey Telephone Company, 76 N.J. 284 (1978)).

The Court in Lynch further stated, "Moreover, as in this case, a doctor's repeated assurances of progress may reinforce the reluctance of an average patient to find medical fault. Hence, it is extremely unlikely that Mrs. Lynch, who was consistently encouraged by Dr. Rubacky's optimistic prognoses of healing, sensed the real possibility of malpractice." Id.

In Alfone v. Sarno, 139 N.J. Super. 518 (1976), certif. den. 71 N.J. 498 (1976), it was "…alleged that defendant negligently performed a surgical operation upon her thyroid on March 11, 1965. It is undisputed that in the course of that operation defendant removed a parathyroid gland, as a result of which Miss Alfone suffered serious medical consequences. Since the suit was filed more than two years after the operation, defendant claimed it was barred by the statute of limitations." Id. at 520-21.

Ms. Alfone, "…also testified at trial that, 'I became very much aware, you know, after the surgery that there was something desperately wrong.'" Id. at 522. The Appellate Division held:

"Although in the instant case plaintiff knew that she was suffering and that something was "desperately wrong" we do not believe that she was cognizant of facts which would put her on notice that her condition might be attributable to the fault or neglect of defendant until Dr. Rueda told her so in 1967." Id. at 524.

The same situation is present here. Ms. Woody indicated that she was upset with Dr. Daub when she was in the hospital because he failed to send her to the hospital on 5/2/16, but she had no idea that blood tests supporting a diagnosis for diabetes dating back to 2012 were present in her chart until she received her chart in August of 2016. Ms. Woody testified that she was never provided with a copy of her medical chart by Dr. Daub.

"An injured party, who is compelled though no fault of his own to invoke the discovery rule, should not lose his statutory entitlement under N.J.S.A. 2A:14-2 to a two-year period within which to initiate a personal injury suit. A claimant should not be penalized because he has had the complicating misfortune of not realizing that he has in fact been victimized by a tortfeasor in the sense either that he was hurt at all or that the injury he has suffered was caused by a wrongdoer." Id. At 78.

POINT V THERE IS NO PREJUDICE TO THE DEFENDANT SINCE HE WAS ABLE TO PARTICIPATE IN A FULL TRIAL, OBTAIN AN EXPERT AND DEFEND THE CASE FOR 1,561 DAYS OF DISCOVERY (2T 203:3-13)

In Alfone, the Court addressed prejudice to the Defendant. "Finally, we find no evidence that defendant suffered any prejudice by the delay since all records and witnesses were available at the trial." Alfone v. Sarno, 139 N.J. Super. 518, 525 (App. Div. 1976).

In Lynch, the Court also addressed prejudice to the Defendant. "Defendant has not in this case made any claim that he has suffered peculiar or unusual prejudice as a result of plaintiff's commencement of her present action almost two years after the accrual of her cause of action on May 24, 1974." Lynch v. Rubacky, 85 N.J. 65, 77 (1981).

Dr. Daub has not set forth any prejudice to his defense of Ms. Woody's claims.

POINT VI THE ISSUE OF WHEN THE DISCOVERY RULE TIMEFRAME BEGAN WAS NOT EXPLORED AT THE DEPOSITION OF PLAINTIFF (3T 13:7-14:3)

Defendant argues that he first learned at Trial facts that support a statute of limitations defense. The case was filed on 5/24/18 and discovery ran for 1,561 days until 9/30/22. Defendant did not pursue the statute of limitations defense at deposition of Plaintiff Judy Woody on January 24, 2020 (Pa 060) despite his ability to do so.

Defendant filed a Motion for Summary Judgment on 7/6/18. (Pa046). The motion was argued and denied based upon the fact that Plaintiff did not receive medical records showing her blood sugar readings until August of 2016. The Complaint was filed on May 24, 2018.

Judge Covert correctly found as follows:

> "Here, the main issue is whether or not the injury occurred on the date of diagnosis, May 3, 2016, or the date that Plaintiff

> discovered Defendant had failed to diagnose her, August of 2016….
>
> …Further, despite Defense Counsel's argument to the contrary, the Court finds that a reasonable person may not discover that a cause of action exists regarding ongoing, untreated medical condition until actually, the medical records are obtained by said person. The Court finds that Plaintiff's injury is the failure of diagnosis, which Plaintiff learned existed only in August of 2016." (Pa057-058).

The Defendants did not appeal this Order or move for reconsideration of this Order.

In White v. Karlsson, 354 N. J. Super. 284, the defense of expiration of the Statute of Limitations was discussed. There the Court reasoned:

> "Nothing occurred in the litigation to inhibit defendant's timely pursuit of a limitations defense and as a result of defendant's inaction, both parties expended substantial time, energy and money preparing for trial. … To read Williams as Defendant would have us do, namely as holding that a motion based on the statute of limitations is timely whenever it is made before trial, would be inconsistent with Zaccardi. For in that case, the application was made before Trial and the court had no difficulty in barring reliance on the limitations statute. Zaccardi, 88 N.J. at 255-258."
>
> "The primary purpose behind statutes of limitation is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair right to defend; another is to stimulate litigants to prsue their causes of action diligently and to prevent stale claims." Kaczmarek v. N.J. Tpk. Auth., 77 N.J. 329, (1978). Here Defendant had a fair opportunity to defend, which she exercised through her insurance company, beginning within a few months of the accident, and through her attorney, following the filing of the complaint which was a mere twenty-nine days late. It would be absurd to call this claim stale under these

> circumstances. We may infer that the plaintiffs were ignorant of their attorney's failure to file the complaint in a timely fashion and in Lopez v. Swyer, the Court said, "it seems inequitable that an injured person… should be denied his day in court solely because of his ignorance, if he is otherwise blameless."62 N.J. 267, 274 (1973). Moreover, a court should not "apply strictly and uncritically a statutory period of limitations without considering conscientioiusly the circumstances of the individual case…" Kaczmarek, 77 N.J. at 338. A limitations defense should not be permitted when its "mechanistic" application… would… inflict obvious and unnecessary harm upon individual plaintiffs without advancing [the] legislative purposes." Galligan, Supra 82 N.J. at 192. Since that is precisely what occurred in the trial court, and since the equities clearly weigh in plaintiff's favor, id. At 193, we reverse and remand for a trial on the merits."

In Knorr v. Smeal, 178 N.J. 169, 180 (N.J. 2003), the Supreme Court in regards to a defendants' late filing of a motion to dismiss based upon a failure to supply an affidavit of merit stated:

> "Moreover, if defendant's motion were to be granted, then the attorneys labored needlessly and the judicial system expended its resources on a case that should not have been on the calendar had defendant acted timely. As noted, equitable estoppel is founded on fundamental principles of justice and fair dealing. The grant of defendant's motion to dismiss would work an injustice by ridding the system not of an unmeritorious claim, but a meritorious one."

Here, the instant case was litigated all the way through Plaintiff's case at Trial. Both Plaintiff and Defendants' experts had been paid for and testified. It was error for the Trial Court to decide factual issues at all but clearly this should not have occurred once the jury was empaneled.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the Dismissal Order of March 13, 2023 be vacated and that Plaintiff's Complaint be reinstated.

Respectfully Submitted,

Dated: 11-29-23

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Judy Woody,

Appellant/Plaintiff,

v.

HORATIO DAUB, MD, VIRTUA FAMILY MEDICINE CENTER, John Doe 1-10 individually, jointly and severally,

Respondents/Defendants.

Superior Court of New Jersey
Appellate Division

Docket No. A-3564-22

On Appeal from:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BURLINGTON COUNTY
DOCKET NO.: BUR-L-1078-18

CIVIL ACTION

Sat below: Hon. Richard Hertzberg, J.S.C.

DEFENDANTS-RESPONDENTS' BRIEF

Brief Prepared By:

John R. Rigden, Esq.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

Publications

Statutes

TABLE OF ORDERS

Preliminary Statement

At the outset of this case, Plaintiff certified that she had no knowledge of her doctor's failure to diagnosis diabetes at the time of her May 2016 hospitalization, in order to defeat a Motion for Summary Judgment on statute of limitations grounds. The case proceeded to trial, at which point Plaintiff admitted on the stand that she, in fact, was aware that her doctor had failed to diagnosis her diabetes during her May 2016 hospitalization. In light of this heel turn, the Court correctly entered a directed verdict dismissing as time-barred all claims against Defendants.

Statement of Facts and Procedural History[1]

On May 24, 2018, Plaintiff filed her Complaint, which alleged that Defendants deviated from the standard of care for failing to diagnose diabetic ketoacidosis during an outpatient office visit to Dr. Horatio Daub on May 2, 2016, allegedly leading to Plaintiff's hospitalization at Virtua Hospital from May 3-8, 2016. (Pa018). On June 22, 2018, Defendants filed their Answer, which denied negligence and asserted a statute of limitations defense. (Pa035).

Prior to discovery, on July 6, 2018, Defendants moved for summary judgment, arguing that Plaintiff's Complaint violated the two-year statute of limitations. (Pa046). Plaintiff's counsel opposed this Motion, relying on a certification from Plaintiff, which stated: "It was not until I obtained my medical records [in August 2016] and consulted with a new doctor that I discovered Dr. Daub had failed for years to diagnose/treat diabetes." (Pa054). Citing Plaintiff's certification, the Court denied Defendants' Motion for Summary Judgment on September 20, 2018. (Pa057). Notably, the Court's standard of review required it to view evidence in the light most favorable to the non-moving party, which in that case was the Plaintiff. (Pa058). Discovery thereafter commenced.

[1] Given the intertwined nature of this case's facts and procedural history, the two sections are combined.

On January 24, 2020, Defendants took Plaintiff's deposition. (Pa060). At her deposition, Plaintiff testified that during her May 3-8, 2016 hospitalization, a Virtua physician told her daughter that Plaintiff had been diabetic since 2010. (Pa082-083). Plaintiff's deposition testimony, however, contained no indication that she had become aware during her hospitalization that she had been diabetic since 2010. Ibid.

At trial, counsel for Defendants addressed Plaintiff's deposition testimony with the trial court. (Pa159). Specifically, counsel for Defendants requested that the Court bar as hearsay any of Plaintiff's testimony regarding what her daughter was told by the doctor during Plaintiff's hospitalization. Ibid. Alternatively, counsel for Defendants' arguments anticipated that Plaintiff may give testimony that would actually implicate the 2-year statute of limitations. Ibid. The latter is precisely what happened.

On March 9, 2023, at trial, Plaintiff testified as follows:

> Q: When did you first learn you were diabetic?
> A: 2016.
> Q: And where did you learn that?
> A: The day I went to the hospital.
> Q: Okay. Before that, did Dr. Daub say to you, you have diabetes?
> A: No, sir.
>
> [2T, 185:12-20].

Plaintiff further testified that she was aware not only that she had diabetes while in the hospital, but that a physician in the hospital said she had been "diabetic since 2010" and that this "surprised her":

> Q: All right. Let's go back a little bit. Did you ever read your chart before this lawsuit? In other words, your medical records.
> A: I read them, but – when I was in the hospital. I mean, I was out of it and the doctor – my daughter said the doctor looked at her – your mom's been a diabetic since 2010.
> Q: And did that surprise you?

A: ***Once I came to myself.***
Q: Okay.
A: They took me in the ICU.

[T2, 185:21-186:6].

On cross-examination, Plaintiff again raised this issue:

Q. Okay. All right. In looking back – now that you're, you know, in this lawsuit here and looking back – I know we're going back over ten years, but it's your memory and it's your view that not once did you ever talk about your blood sugar levels with Dr. Daub?
A. No I did not.
Q. Not once did you ever talk about - -
A He didn't know I was - - I had blood pressure because I went - - when I got sick, I went to the hospital that morning. ***That's when I found out I was a diabetic, when I - - once I came to myself.***

[T2, 199:24-200:11]

Upon being prompted to clarify what she meant by this testimony, Plaintiff testified further:

Q: Ms. Woody, when you came to in the hospital, when you were finally getting your wits about you a little bit more – are you with me?
A: Um-hum.
Q. You learned that a physician was now diagnosing you with diabetes, right?
A. Um-hum.
Q. Is that a yes?
A. The hospital did.
Q. Right, Was that the first time that you thought maybe Dr. Daub didn't treat you appropriately?
A. He didn't.
Q. And was that the first time you thought that?
A. Yes.

[2T, 207:25-208:16].

In response to this testimony, counsel for Defendants submitted a written Motion to Dismiss on statute of limitations grounds on March 13, 2023. (3T, 4:24-5:11). The

Court in turn granted this Motion. (3T, 169:8-9). Specifically, Judge Hertzberg noted the following:

> And you know, there's no need that the plaintiff understand at that point exactly the cause of action that arises or that should arise… And in this case, the testimony that I found compelling and what I could not frankly get away from is the testimony… "Q: Was that the first time that you thought maybe Dr. Daub didn't treat you appropriately? A: He didn't. Q: Was that the first time you thought that? A: Yes."
>
> And you know, there's no need that the plaintiff understand at that point exactly the cause of the injury. Plaintiff's testimony was definitive… The issue is not so much when she understood precisely what Diabetes was or wasn't, she was on notice when she believed that Dr. Daub had treated her negligently and put her in the hospital essentially because he didn't take her blood sugar. But unfortunately for the plaintiff, it causes the -- it caused the limitations period to start running. So, with some reluctance, quite frankly, I'm granting the motion.
>
> [3T, 164:4-169:9].

Plaintiff's Motion for Reconsideration was thereafter denied by the Court. (Pa008). This appeal follows.

Legal Argument

I. Defendants Satisfied the Rule 4:37-2(b) Standard, Which Was the Basis for the Directed Verdict Entered by the Trial Court.

Rule 4:37-2(b) provides that a defendant may move for dismissal at the close of plaintiff's case if plaintiff has shown no right to relief. Interpreting this standard, our precedents recognize that the Court may accept a key witnesses' testimony, and grant the dismissal motion, if the trial testimony is "clear and convincing, not incredible in the light of general knowledge and common experience, not extraordinary, and not contradicted in any way by witnesses or circumstances, and so plain and complete that disbelief of the

story could not reasonably arise in the rational process of an ordinarily intelligent mind." Caliguire v. City of Union City, 104 N.J. Super. 210, 217 (App. Div. 1967).

This case hinges on the proper application of the statute of limitations. The limitations period for personal injury actions is governed by N.J.S.A. 2A:14-2, which provides that "[e]very action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this statute shall be commenced within 2 years next after the cause of any action shall have accrued." Statutes of limitations seek to prevent the injustice of "compel[ling] a person to defend a law suit long after the alleged injury has occurred, when memories have faded, witnesses have died[,] and evidence has been lost." Lopez v. Swyer, 62 N.J. 267, 274 (1973) (citing Developments in the Law-Statutes of Limitations, 63 HARV. L. REV. 1177, 1185 (1950)). The principal consideration underlying the enactment and enforcement of statutes of limitations is one of fairness to defendants. Ibid.

The two-year statute of limitations applies to medical malpractice claims. Knutsen v. Brown, 93 N.J. Super. 522 (Law Div.), aff'd 96 N.J. Super. 229 (App. Div. 1967). It is not always strictly applied. Instead, the "discovery rule" was adopted to avoid unfair results when injuries are hidden. Martinez v. Cooper Hospital-University Med. Ctr., 163 N.J. 45, 52 (2000) (citing Vispisiano v. Ashland Chem. Co., 107 N.J. 416, 426 (1987)). The discovery rule is a rule of equity, which recognizes that a cause of action "will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an actionable claim." Ibid.

The discovery rule is an objective matter of proof, i.e., whether the plaintiff "knew or should have known" of sufficient facts to start running the statute. Baird v. American Med. Optics, 155 N.J. 54, 72 (1998) (emphasis added). The Supreme Court has explained that this objective standard requires only awareness of the *facts* that would reasonably alert someone to the possibility of a claim; it does not require a medical diagnosis or certainty. The Court explained:

> Plaintiffs suggest that the discovery rule delays accrual of an action until a claimant acquires an exact medical diagnosis of an asserted condition. We disagree. **We impute discovery if the plaintiff is aware of facts that would alert a reasonable person to the possibility of an actionable claim; medical or legal certainty is not required.**
>
> [Lapka v. Porter Hayden Co., 162 N.J. 545, 555-56 (2000) (emphasis added)].

In this case, Plaintiff is attempting to improperly reframe the issue by manufacturing an irrelevant distinction as an end-run around the statute of limitations. Attempting to draw a distinction, as Plaintiff does here, between 1) when the Plaintiff found out about her diabetes diagnoses in May 2016 and 2) when the Plaintiff reviewed her medical record in August 2016, alerting her to the full extent of Dr. Daub's failure to diagnose, completely confuses the issue. Based on the discovery rule, the actual issue is whether the Plaintiff was aware of facts that would have alerted a reasonable person to the *possibility* of an actionable claim during her May 2016 hospitalization. Lapka, 162 N.J. at 555-56. The answer to that question in this case is an unequivocal "yes." As Judge Hertzberg correctly put it at trial, "[t]he issue is not so much when she understood precisely what diabetes was or wasn't, she was on notice when she believed that Dr. Daub had treated her negligently and put her in the hospital essentially because he didn't take her blood sugar." (T3, 168:24-169:3).

Plaintiff's trial testimony is replete with confirmation that she was aware of both her diagnosis, and the fact that Dr. Daub may have not been treating her properly all along. Ms. Woody testified that she learned she was first diabetic at the hospital in 2016. (2T, 185:12-15). She additionally testified that she was surprised upon coming to herself and learning from her daughter that she has been diabetic since 2010. (T2, 185:22-186:5). She further testified that she was in the hospital, in May of 2016, when she first realized that Dr. Daub may not have treated her appropriately. See (T2, 207:25-208:16). Based on this testimony, Judge Hertzberg concluded that "it caused the limitations period to start running [in May 2016]. So, with some reluctance, quite frankly, I'm granting the motion." (T3, 169:7-9). In making his determination, Judge Hertzberg accepted the "clear and convincing" evidence, "not contradicted in any way by witnesses or circumstances…" (see Caliguire, 104 N.J. Super. at 217) that Ms. Woody was made "aware of facts that would alert a reasonable person to the possibility of an actionable claim." Lapka, 162 N.J. at 555-56.

Plaintiff supports her argument by pointing out that Judge Covert "recognized the distinction between Ms. Woody's diagnosis of diabetes and her learning of Dr. Daub's failure to diagnose for years…" Pl.'s App. Br. At 14. However, at the time Judge Covert entered the September 20, 2018 Order denying Defendants' initial Motion for Summary Judgment on the issue of the discovery rule, her determination was based in part on Plaintiff's certification that accompanied Plaintiff's Opposition to Defendants' Motion for Summary Judgment. Plaintiff's Certification represented that she did not realize that Dr. Daub had failed to diagnose/treat diabetes until obtaining her medical records in August of 2016. (Pa054). Notably, the certification omitted any mention of whether or

not she knew about her actual diabetes diagnosis at the time of her hospitalization. Ibid. Thus, it is unsurprising that Judge Covert denied the initial Motion for Summary Judgment, given that the Motion was reviewed in a light most favorable to the Plaintiff.

As the case progressed, it became clear that Plaintiff knew more than the initial Certification suggested. As discussed supra, by the time the trial was underway, Plaintiff testified several times regarding her awareness at the hospital in May 2016 of her diabetes diagnosis and Dr. Daub's failure to diagnose. Had Judge Covert had access to this testimony, this case very well could have ended back in September of 2018.

Despite omitting this information from the 2018 Certification, Plaintiff now concedes that she learned that she was diabetic in the hospital. Pl.'s App. Br. at 16. However, to sustain her claim, Plaintiff attempts to reframe the issue by asserting that this claim actually began tolling when Plaintiff obtained her medical records in August of 2016. In essence, Plaintiff zeroes in on a granular feature of the overall diagnosis as a means to preserving the cause of action. Notwithstanding, this contention is unconvincing. Again, medical or legal certainty is not required, contrary to Plaintiff's assertion. Lapka, 162 N.J. at 555-56. As Judge Hertzberg correctly noted, from the view of a reasonable person, Ms. Woody became aware of the possibility of an actionable claim when she realized Dr. Daub may not have treated her appropriately.

In support of her argument that this case did not begin tolling until August 2016, Plaintiff further cites to Lynch v. Rubacky, 85 N.J. 65 (1981). Contrary to Plaintiff's argument, however, Lynch is easily distinguishable. In Lynch, the Plaintiff underwent surgery by the Defendant surgeon in January of 1973. Id. at 67. Plaintiff continued to have pain and obtained a second opinion from a different surgeon in February of 1974.

Id. at 68. That same month, the second surgeon performed another surgery on the Plaintiff. Ibid. In May of 1974, the second surgeon informed Plaintiff for the first time that the initial surgeon's procedures had not been performed correctly. Id. at 69. Plaintiff thereafter filed her Complaint in May of 1976. Ibid. The trial court dismissed based on the statute of limitations, and the Appellate Division affirmed. Id. at 70.

The Supreme Court reversed, basing its decision, in part, on the defendant surgeon's consistent reassurances to the plaintiff "that her condition was the result of the healing process" following the initial January 1973 procedure. Id. at 74. (internal quotations omitted). In finding that the cause of action began tolling in May of 1974 as opposed to February of 1974, the Supreme Court noted that "plaintiff's decision to seek the advice of another physician cannot be regarded as conclusive evidence that, by that time, she not only disbelieved [defendant surgeon] but she also fully suspected that he was guilty of medical malpractice." Id. at 76. The Court acknowledged that in many statute of limitations cases, "knowledge of fault is acquired simultaneously with knowledge of injury." Id. at 71. The Lynch Court, however, determined that knowledge of fault had not coincided with knowledge of the injury in that particular case, in light of the defendant surgeon's repeated counseling that plaintiff's pain was normal and eventually would go away. Id. at 68.

Thus, in Lynch, the Court recognized that the slow nature of the plaintiff's healing process obfuscated the fact that the physician had committed malpractice. Moreover, Plaintiff had been repeatedly assured by her surgeon that her lingering pain was a natural part of her recovery, before finally being informed by the second surgeon of the first surgeon's misconduct, narrowly within the limitations period. Based on the

foregoing, Lynch is inapposite to the facts of this case. Here, unlike in Lynch, knowledge of fault was "acquired simultaneously with knowledge of injury." See id. at 71. In the wake of Ms. Woody's diabetic ketoacidosis, it was immediately clear what the problem was: Ms. Woody was diabetic. In fact, Ms. Woody testified at trial that the first time she realized Dr. Daub did not treat her appropriately was during her hospitalization. See (2T, 207:25-208:16). To be sure, Plaintiff is likely to assert that just like in Lynch, Ms. Woody's doctor provided her with false reassurances regarding her condition, which resulted in her subsequent hospitalization. The key difference, however, is that the doctor's reassurances in Lynch led the plaintiff to believe that the lingering pain might be normal. Here, however, Plaintiff's testimony shows that upon hospitalization, she immediately recognized that her doctor's care had fallen short. Had Ms. Woody continued to treat with Dr. Daub following her hospitalization for ketoacidosis and Dr. Daub continued to tell her that her hospitalization was normal and not related to diabetes, the Lynch comparison would be far more apt.

Plaintiff's reliance on Alfone v. Sarno is similarly misguided. In Alfone v. Sarno, the plaintiff underwent surgery on her thyroid gland in March of 1965. 139 N.J. Super. 518, 520-21 (App. Div. 1976). The defendant surgeon explained to plaintiff that during the procedure, one of the instruments "touched" the parathyroid glands and "they fell asleep." Id. at 524. By June of 1966, plaintiff came to believe that she had suffered a permanent injury. Id. at 522. Plaintiff, in turn, filed suit, but the court dismissed plaintiff's claim since it was not brought until September 1968. Id. at 521. Thereafter, the Appellate Division reversed, finding that plaintiff did not have the requisite knowledge until August or July of 1967 when she was actually told by a doctor friend who was present at the

surgery that the gland had not just been brushed, but *removed* during the surgery. Id. at 522-23. In support of its determination, the Appellate Division noted that the surgeon's misrepresentation of what had taken place during the operation "conveyed the impression that [plaintiff's] was not an abnormal reaction to a second operation on her thyroid… It is normal to expect that such explanation would subtlely induce her to concentrate on recovery rather than cause or fault." Id. at 524.

Accordingly, this case is completely distinct from Alfone: Alfone is about a surgeon who intentionally misled the Plaintiff, thereby assuaging the plaintiff's concerns about her injury, which contributed to a delay in plaintiff's recognition of the fault behind the injury. This case, meanwhile, is about a failure to diagnose. Here, again, the fault coincided with the injury: based on her testimony, Plaintiff immediately recognized that Dr. Daub may not have been treating her correctly upon her hospitalization.

II. Law of the Case Doctrine Does Not Apply, Because the Court's 2018 Order was Interlocutory, and Interlocutory Orders Are Always Subject to Revision.

In further support of her view of the issue, Plaintiff submits that the law of the case doctrine, in effect, turns back the clock to 2018 and binds the parties to the Court's incomplete picture of the case at the time the initial Motion for Summary Judgment was decided. In the context of "whether or not a decision made by a trial court during one stage of the litigation is binding throughout the course of the action[,]" the law of the case doctrine generally "operates as a discretionary rule of practice and not one of law." State v. Hale, 127 N.J. Super. 407, 410-11 (App. Div. 1974). As such, it "is merely a non-binding decisional guide addressed to the good sense of the court in the form of a cautionary admonition against relitigation when the occasion demands it." Id. at 411.

Crucially, the law of the case doctrine cannot even apply here, because "a denial of summary judgment is always interlocutory, and never precludes the entry of judgment for the moving party later in the case." Hart v. City of Jersey City, 308 N.J. Super. 487, 498 (App. Div. 1998). "Interlocutory orders are always subject to revision in the interests of justice." Lombardi v. Masso, 207 N.J. 517, 536 (2011). Accordingly, Plaintiff's assertion that the denial of summary judgment from 2018 now binds the Court is baseless. Not only is the law of the case doctrine not binding, it does not even apply. Even if it were to apply, the interests of justice would not be advanced by binding the parties to a pre-discovery 2018 Order denying summary judgment.

III. The Claim for Informed Consent was Properly Dismissed Pursuant to the Court's Entry of a Directed Verdict.

Plaintiff next argues that her claim for informed consent should have never been dismissed pursuant to the Court's entry of directed verdict. This argument, too, has not basis, given the inherent logical inconsistency of simultaneously maintaining claims for failure to diagnose and informed consent. Defendants do not dispute that Plaintiff's Complaint contains a count for informed consent. However, we maintain that where the primary claim is a failure to diagnose diabetes, an additional claim that Defendants failed to apprise the Plaintiff of alternative treatments for the same condition that they failed to diagnose in the first place, cannot be sustained. The case law supports this view.

As a general matter, "[i]nformed consent is a negligence concept predicated on the duty of a physician to disclose to a patient information that will enable him to evaluate knowledgeably the options available and the risks attendant upon each before subjecting that patient to a course of treatment." Eagel v. Newman, 325 N.J. Super. 467, 474-75 (App. Div. 1999) (quoting Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.),

cert. denied, 409 U.S. 1064 (1972)) (internal quotations omitted). In this context, the Appellate Division has "previously held that… informed consent… does not apply where the patient's claim is that the physician erred in diagnosing the patient's condition, either through an alleged failure to obtain an adequate medical history or through an alleged failure to perform a sufficient number or type of diagnostic tests." Linquito v. Siegel, 370 N.J. Super. 21, 34-35 (App. Div. 2004). See Farina v. Kraus, 333 N.J. Super. 165, 178 (App. Div. 1999) (siding with Defendant that the doctrine of informed consent has no place where the crux of plaintiff's argument was that the doctor should have performed diagnostic testing).

In this case, throughout the entirety of her brief, Plaintiff plainly characterizes the first count of the Complaint as a failure to diagnose. See generally Pl.'s App. Br. at 1, 4, 6, 9. See id. at 6 ("The allegation of negligence in this matter, supported by both experts' testimony, is that Dr. Daub failed to diagnose diabetes in the Plaintiff from 2012-2016 based upon his chart.") Given that the primary motivation for Plaintiff's Complaint is a failure to diagnose, therefore, it was completely appropriate for the Court's directed verdict to dismiss the count for informed consent.

IV. Plaintiff's Argument that Defendants Have Not Suffered Prejudice is Incorrect.

Plaintiff's claim that there has been no prejudice to Defendants is mistaken. Defendants' prejudice directly relates back to Plaintiff's misleading 2018 certification suggesting she was unaware of Dr. Daub's failure to diagnose until August of 2016. This was the basis for Defendants' assertion of judicial estoppel at trial.

Judicial estoppel precludes a party from asserting self-serving conflicting positions. Tamburelli Prop. Ass'n v. Borough of Cresskill, 308 N.J. Super. 326, 335

(App. Div. 1998). This doctrine protects the integrity of the judicial system. Ibid. It holds that, if a litigant's position in one matter is true, then the contrary position in another matter cannot be. Kimball Int'l v. Northfield Metal Prods., 334 N.J. Super. 596, 606-7 (App. Div. 2000). Courts apply judicial estoppel when a party's inconsistency creates a miscarriage of justice. Id. at 608. We continue to submit that if this doctrine means anything, it must be exemplified by Plaintiff asserting "no knowledge" to defeat a summary judgment motion in 2018 and then at trial in 2023 claiming knowledge and "surprise" as part of direct testimony at trial.

Due to Plaintiff's self-serving representation of her knowledge in 2018 during motion practice, Defendants have endured what now appears to be years of unnecessary defense and trial costs. And, by the time trial occurred, Dr. Daub appeared at trial advanced in age, long past his retirement. Dr. Daub faced criticism for care he rendered over 10 years prior, beginning in 2012. He faced criticism about his lack of familiarity and recall with his medical record system and his 2016 office practices. Plaintiff's counsel also cross-examined Dr. Daub about his "lack of memory" of his visits with Plaintiff and his purported lack of accuracy regarding recall of diabetes diagnostic criteria approaches as of 2012. Based on the foregoing, the prejudice is clear.

V. Plaintiff's Assertion That the Issue of Tolling Wasn't Explored at Plaintiff's Deposition Is Really an Effort to Repackage Her Waiver Argument That Was Already Rejected by the Trial Court

Plaintiff's final argument, in essence, repackages her previously-rejected argument that Defendants somehow waived the statute of limitations defense, asserting it is waived this time because the issue was not explored at Defendants' deposition of the

Plaintiff. However, there is no legal waiver of the statute of limitations defense. In Baez v. Paolo, a panel led by Judge Sabatino concluded as such:

> Defendants pled the statute of limitations as an affirmative defense with their answer. Unlike certain other specified defenses—such as defective service of process and lack of personal jurisdiction—which must be raised by motion within ninety days after service of an answer, see Rule 4:6–3, the Rules of Court impose no deadline on the filing of a dismissal motion based on the statute of limitations. Although the Supreme Court has observed that such a dismissal motion ought to be filed before trial, see Knorr v. Smeal, 178 N.J. 169, 176, 836 A.2d 794 (2003), there is no case law or Court Rule that sets forth a filing deadline.
>
> Undoubtedly, the trial court could have specified in a case management order a reasonable deadline for the filing of any dismissal motion invoking the statute of limitations. But we are advised that no case management conference was conducted in this medical malpractice case during the discovery period. In the absence of a known deadline, defendants had reason to presume they could wait to file such a motion until the end of the discovery period. As far as we can tell from the record, defendants did not make any overt representations designed to lull or mislead plaintiff into a false sense of security that the statute of limitations defense they had pled with their answer was mere boilerplate. See W.V. Pangborne & Co., 116 N.J. at 555, (focusing on whether misleading conduct occurred that could justify the application of equitable estoppel to a litigant).
>
> . . .
>
> We appreciate that in some cases continued discovery can reveal facts that may bear upon whether a plaintiff was justified by tolling principles in delaying suit against or naming a particular defendant. See Lopez, 62 N.J. at 274–76, 300 A.2d 563 (analogously discussing the fact-dependent aspects of equitable tolling). But we concur here with the motion judge that, in retrospect, the discovery conducted after plaintiff's deposition was completed in March 2016 does not seem to have been germane to the statute of limitations issues. Even so, no motion filing deadline was specified and none was violated.
>
> We share the concerns of the motion judge and plaintiff that some time and expense was expended improvidently in the

> case as the result of defendants' delay in not moving for dismissal sooner. Even so, we are not convinced defendants should be equitably estopped or otherwise barred from bringing that motion, as they did, near the end of the discovery period. We reach that conclusion despite the fact that defendants themselves had procured a discovery extension from the court.
>
> [Baez v. Paolo, 453 N.J. Super. 422, 446-449 (App. Div. 2018)].

The same principles in Baez apply here, and even more so. Defendants never misrepresented our view and have maintained throughout the course of the litigation that this matter should be time barred. We asserted the defense immediately by motion back in 2018, before discovery occurred. And when defense counsel saw the potential for Plaintiff's deposition testimony to raise the issue at trial during jury selection, he alerted counsel and the Court, before the jury was picked. And based upon prevailing summary judgment motion standards, viewing the issue in light most favorable to the Plaintiff as the Court did previously in 2018, a pre-trial motion for summary judgment based upon Plaintiff's January 2020 deposition transcript never would have prevailed. Plaintiff's deposition testimony described her daughter's knowledge only, not her own. (Pa082-083). Good faith grounds for dismissal did not arise until March 9, 2023, when Plaintiff herself testified at trial that she had this knowledge *when* she was hospitalized from May 3-8, 2016. In turn, defense counsel filed this motion immediately.

In support of her argument, Plaintiff cites to White v. Karlsson, 354 N.J. Super. 284 (App. Div. 2002) and Knorr v. Smeal, 178 N.J. 169, 180 (2003). Neither case is applicable here. In White, Defendant included in her initial Answer a litany of boilerplate, inapplicable affirmative defenses, in addition to a statute of limitations defense. Id. at 287. Despite the pleadings, it was not "until shortly before trial" that

Defendants recognized "the possibility of a statute-of-limitations defense." Id. at 290. Here, Plaintiff was immediately put on notice as to Defendants' reliance on this defense via Defendants' initial Motion for Summary Judgment in 2018. Plaintiff further was alerted, just prior to trial, of defense counsel's anticipation that the same issue could arise at trial. Knorr, meanwhile, dealt with an affidavit of merit, not a statute of limitations defense, and is therefore inapplicable. 178 N.J. at 180.

Conclusion

Facing no contrary trial evidence to Plaintiff's unequivocal statements about her knowledge more than two years before she filed this lawsuit, and having no reason to believe that those beliefs were anything but an ordinary reaction to her course of care, we submit that the March 13, 2023 Order be affirmed.

Respectfully submitted,
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By: _____
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Dated: January 30, 2024