WILLIAM J. FOCAZIO, M.D.; ARTHUR ST. REALTY, LLC; and ENDO SURGICAL CENTER OF EAST BRUNSWICK, LLC, Plaintiffs, vs. JOSEPH S. ABOYOUN, ESQ.; ABOYOUN & HELLER, LLC; NAGEL RICE, LLP; RANDEE MATLOFF, ESQ.; BRUCE NAGEL, ESQ.; and JOHN DOES, ESQS., 1-10 and JANE DOES, ESQS., 1-10 (a fictitious designation for presently unknown licensed attorneys, professionals and/or unknown persons or entities), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003587-22 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-2643-16 Sat Below: Hon. Vicki A. Citrino, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS WILLIAM J. FOCAZIO, M.D., ARTHUR ST. REALTY, LLC and ENDO SURGICAL CENTER OF EAST BRUNSWICK, LLC

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INTRODUCTORY STATEMENT

This is a legal malpractice case in which the Court erroneously dismissed Plaintiff/Appellants' case *after* Motions in Limine has been decided and a Jury had been impaneled during the Plaintiff's direct testimony. The dismissal of the case was procedurally flawed and disregarded the Court's own Pretrial Order and precedent which held that it was inappropriate to file dispositive motions as an in Limine motion prior to Trial; indeed, this motion was filed during Trial and Plaintiff's counsel was given essentially one (1) day(!) to respond to same while trying the case.

Aggravating the Court's procedural error is the fact that it's ruling was substantially wrong, and the Court held that Plaintiff's pledges to creditors who were at his door due to the negligence of the Defendants of a portion of the proceeds he would recover in this legal malpractice suit constituted an impermissible pre-judgment assignment of a personal chose in action. Neither of the two instruments relied upon the Trial Court to Dismiss Plaintiff's cause of action were assignments. One was an attorneys lien on the portion of the proceeds of this suit and the other was a pledge and security interest to pay a creditor from the proceeds of this suit in the event of a recovery. Neither instrument gave the creditors control over the litigation of the claim. The claim

continued to be brought in Dr. Focazio's own name. Dr. Focazio's damage claim dwarfed the pledges he made in these two instruments. None of the policy implications underlying this State's prohibition of the assignment of personal Tort actions to third parties were implicated by these pledges to creditors and the Courts ruling not only evinces an erroneously understanding of what an assignment versus what a security interest or lien is but also was devoid of the consideration of any alternative other than dismissal of the cause of action such as invalidating the supposed assignments.

Before erroneously dismissing Plaintiff's case, the Court also erred in denying two (2) Motions in Limine by the Plaintiff to exclude the prejudicial and completely lacking any meaningful probative value evidence of a completely unrelated lawsuit against the Plaintiff which had been settled and Plaintiff's subsequent purchase of a luxury home after he decided to abandon his building of his home due to the negligence of Defendants.

This collateral litigation against Dr. Focazio was amicably resolved shortly after it was filed bore no relation whatsoever to the issue namely whether or not Joseph Aboyoun adhered to the standard of care when representing Dr. Focazio in the construction of his home.

These cumulative errors require that the Trial Court's Order be reversed and this matter be remanded for trial where the Jury will consider evidence germore to Plaintff's legal malpractice claim and the Defendants will not be permitted to introduce collateral lawsuits which have miniscule if any probative value or the fact that the Plaintiff subsequently purchased an expensive luxury home.

Dr. Focazio comes before this Court for a second time to ask that he be permitted to try his professional negligence claim against Defendant on the merits. He asks this Court to remand this matter so he can seek a just consideration of his claims by a Jury of his peers.

PROCEDURAL HISTORY

Plaintiff initiated this matter by way of Complaint filed on July 25, 2016 (Pa0001). Defendants Joseph S. Aboyoun, Esq. and Aboyoun & Heller, LLC filed an Answer on November 17, 2016 (Pa0017). Plaintiff served an Affidavit of Merit of Robyne M Hogan, Esq. on November 18, 2016 (Pa0035). Defendants filed an Amended Answer of the Complaint on or about November 21, 2016 (Pa0040). The Complaint was erroneously dismissed by the Trial Court resulting in an Appeal resolved by an Opinion dated June 7, 2021, which revered and

remanded the dismissal (Pa0059). Plaintiffs, Arthur Street Realty, LLC and Endo Surgical Center of East Brunswick, LLC dismissed their claims against the Defendants voluntarily by Partial Stipulation of Dismissal dated February 16, 2023. (Pa0080).

The Court entered a pretrial order on December 13, 2022, which set Trial for February 21, 2023, and indicated that all Motions in Limine are to be filed on or before Friday, February 3, 2023 with oppositions to be filed Tuesday, February 7, 2023 and indicated the Motions were to be argued and decided on Thursday, February 16, 2023. (Pa0331).

Plaintiff filed the Motions in Limine on or about February 7, 2023, seeking to preclude any reference in Trial to any bankruptcies or litigations that did not directly concern the Pines Lake property that Plaintiff sought to construct a home on which was the subject legal malpractice action. Plaintiff later orally expanded this motion to seek to preclude any reference to the home Plaintiff subsequently purchased after the Pine Lakes property could not be timely developed due to the Defendants' malpractice as Plaintiff set before the Trial Court.

After a Jury was selected and after the motions were filed, Nagel Rice Defendants filed a new Motion in Limine contending Plaintiff's granting of an

attorney's lien and a security interest in a portion of the recovery in this matter (Pa0334), which the Court gave Plaintiff limited time to respond to this motion, which Plaintiff did by letter brief dated February 22, 2023, after opening arguments and same was argued after direct testimony of Plaintiff.

Despite the fact that Plaintiff had resolved the claims against the Nagel Rice Defendants and dismissed same with prejudice prior to opening arguments and the motion being heard (Pa0337), the Court heard Nagel Rice's motion and dismissed Plaintiff's case by Order dated February 23, 2023 (Pa0354).

Thereafter, Plaintiff repeatedly requested of the Court entry of an order embodying the denial of the Plaintiff's Motions in Limine. That denial was finally embodied in an Order dated June 27, 2023. (Pa0355).

Plaintiff then filed the Notice of Appeal (Pa0356) in this matter and requested Oral Argument (Pa0367).

FACTS

On December 5, 2007, Plaintiff, William Focazio, purchased a 1.4-acre, Pines Lake lake-front, residential property known as 736 Pines Lake Drive, Wayne, New Jersey. The property contained a well-maintained and historic home. The purchase price was roughly $1.61 million (Pa0203).

Initially, Dr. Focazio planned to expand and renovate the home and property to his requirements and engaged architect, Robert Zaccone (who, in turn engaged engineers, Dresdner Robin) for that purpose. After considering the recommendation of Mr. Zaccone, Dr. Focazio decided to raze the existing home and construct a new home in its place, rather than try to expand the existing home. For that purpose, Dr. Focazio engaged George A. Tsairis Architects, P.C. ("GAT") to design the new home and site and engaged GAT's affiliated construction company, Northeast Modular Homes, Inc. ("Northeast") to perform the installation/construction of a new 10,000 sq. ft. modular home. (Pa0203).

After being introduced to George Tsairis ("Tsairis") and hearing the benefits of modular construction, Focazio discarded the idea of renovating/expanding the existing, aging home. Instead, he decided to demolish it and build a luxury modular home on the site overlooking the lake. In October 2008 Focazio retained Tsairis' architectural firm, George A. Tsairis Architects, P.C. ("GAT") to design the modular home. (Pa0203).

GAT advised Focazio that an engineering firm was needed and proposed two firms as candidates. Focazio knew DR already was familiar with the site and deiced to Continue DR as the project's site engineer. He later signed a professional services contract with DR. To begin preparing architectural plans,

in early December 2008 GAT obtained the boundary and topographical survey that DR had done at Zaccone's direction. By late December 2008 GAT had prepared a schematic design. (Pa0203).

GAT developed a set of architectural plans and worked on pricing the modular units and on-site construction costs. GAT and Northeast were both owned and operated by George A. Tsairis and operated out of a shared office. Dr. Focazio entered into three contracts with Tsairis' two companies. Initially, Dr. Focazio entered into an architectural services contract with GAT dated October 30, 2008 (signature date of December 2, 2008) (price: $66,250.00). Later, after the feasibility studies were conducted, including the "Zoning Study" and the design work was substantially along, Dr. Focazio, upon the recommendation of GAT, entered into two contracts with Northeast for the manufactory and construction of the home and development of the site:

- a Construction Agreement dated May 8, 2009 (price: $2,314,230.00); and
- a Home Purchase Agreement dated May 8, 2008 (price: $1,569,565.00). (Pa0204).

Defendant, Joseph Aboyoun ("Aboyoun"), testified that his firm was the only firm representing Focazio with reference to the agreements. Aboyoun

claims that he advised Focazio about the risks in the agreements, but Focazio disputes this and indicates that he and his wife were present and Aboyoun did not give such advice. He never wrote to Focazio and documented his supposed advice regarding the contract. Aboyoun does not recall any specific advice he gave to Focazio regarding terminating the agreements and he does not recall giving any advice about lost profit or attorneys fees. He does not recall discussing with Focazio escrow management. Aboyoun does not recall discussing security for the payments to GAT. Aboyoun does not recall discussing architectural malpractice with Focazio. Aboyoun does not recall if Tsairis was retained to determine zoning variances. He claims he was unaware of zoning code feasibility study. Aboyoun does not recall discussing Article 2.1 with Focazio. He does not recall any discussion with Focazio other than conversations he claims took place about the risk in the up-front payment. (Pa0204).

Dr. Focazio wanted the project to be completed as soon as possible, and in this case, the timing was of particular importance because Dr. Focazio was soon to be married and the new home was to be his new marital residence. Dr. Focazio sought to have the home completed within 300 days. The contract

provided that the project was supposed to be substantially completed within 300 days of issuance of a demolition permit.

Dr. Focazio, after having received the opinion from the proposed project was Variance-free, and that only a standard type building permit would be needed to build the new home, and that Dr. Focazio could, and should, now proceed with the construction phase of the project, entered into the Construction and Home Purchase Agreements with Northeast, authorized payment of $989,949.00 to Northeast and authorized GAT and Northeast to begin the construction work. That construction work began immediately with the demolition of the existing home and commencement of extensive site work including excavation of the property for the new home's foundation. The foundation was not installed and therefore the property ended up becoming essentially one large hole in the ground. To that end, GAT & Northeast obtained a foundation permit (issued May 7, 2009) and a demolition permit (issued June 9, 2009). No building permit for the building or overall project was submitted at that time (and none, ultimately, was ever submitted). (Pa0205).

GAT and Northeast demolished the existing home and began the site work, which including moving several very large trees which were in conflict with the proposed new home. According to Northeast, it expended some

$382,006.57 for the demolition and site work. Significantly, GAT's architectural contract with Dr. Focazio specifically included services of Administration of the construction contract. During construction, GAT, acting as Dr. Focazio's architect, recommended continued monies be paid to Northeast. Essentially, GAT recommended that "all was ok" and that Dr. Focazio should pay more money into GAT's "other pocket," to wit, Northeast.

Tsairis switched modular home companies. Either Aboyoun never received an explanation for this switch and does not recall discussing same with Focazio. Focazio could have asserted breach of contract because Tsairis changed the manufacturer. He did not discuss this issue with Focazio. (Pa0204).

Under the terms of these agreements, NE agreed to sell and construct the luxury home. Fourteen months later, on July 27, 2010, Aboyoun terminated these agreements on behalf of Focazio.

By July 2010, Dr. Focazio had had enough. He and his new wife, Deborah, were married on September 9, 2009. More than 300 days had passed (actually more than 400 days) since beginning the project and by July 2010, they were still a very long way off from having a marital home to live in. By way of letter of his attorney, Joseph Aboyoun, dated July 27, 2010, Dr. Focazio canceled the project. Aboyoun cited the fact that the project had not been completed within

300 days as a result of Tsairis conduct. Aboyoun cited the failure to make progress in his letter as justifying the termination of the contract. Tsairis responded by his attorney, Michael Soukas, by indicating that the commencement date had not begun. It was only after the contract was terminated that Aboyoun had a memo prepared for the legal justification of termination of the contract. At his deposition, Aboyoun was unable to find a provision in the contract which justifies termination. (Pa0122).

By July 2010, Dr. Focazio had paid to GAT and Northeast well over $1 million and had nothing to show for it but a demolished home (which would be valued today at $2.1 million) and a big hole in the ground. Dr. Focazio sold the now vacant property on June 24, 2011 for $1.9 million, thus suffering a substantial loss. (Pa0189).

GAT and Northeast responded to Dr. Focazio's demand for refund asserting that Dr. Focazio was not entitled to cancel the contract, that none of the monies paid to GAT and/or Northeast was refundable, and that Dr. Focazio was liable for damages to both GAT and Northeast. Aboyoun directed to Karim Kaspar, Esq., of the Lowenstein Sandler firm who represented Focazio in the initial stages of proposed arbitration with Tsairis. Defendant Aboyoun noted that Focazio sustained severe consequential damages of Northeast's default in

relation to his obligations to Oritani Bank. Aboyoun also notes that there should be a claim for attorney's fees because the construction agreement and the home purchase agreement specifically provided for attorney's fees, and most importantly, he writes that the complaint should name George Tsairis personally and George Tsairis Architects, PC, because Tsairis was negligent.

Aboyoun never received an explanation of what was done with the deposit by Tsairis, and he never received any particular order for the modular home. He does not recall anything that was done to secure the $863,000.00 that was paid by Focazio. He does not recall if he proposed a collateral assignment. When the contract was terminated, all that had been done was completion of demolition and dig a hole. No part of the modular home had been delivered to the site. The foundation had not been set. Aboyoun asked for a memo to be prepared after the termination. (Pa0205).

Aboyoun claims that he terminated the contract because of the deadline, which was 300 days. Focazio was informed by subsequent counsel that any judgment against GAT or NE would be uncollectible. (Pa0205).

The termination of these agreements with NE and GAT's claim against Dr. Focazio for monies due under the architectural services contract ("A/K").

Both contracts with NE required Focazio to make initial deposits when he signed the contracts. Both provided for part of the initial deposits to be non-refundable if the customer ("Focazio") "*elects to cancel or discontinue the Agreement.*" To receive the refundable portion of the deposits, the agreements required Focazio to make the election to cancel before paying the second required deposits, and in the case of an alleged breach of the construction contract "*prior to commencement of work.*" The HPA incorporated the CC and said NE would "*commence the work following delivery of the [modular] House and shall utilize its best efforts to complete the work within 8-10 months of delivery, on or about February 2010.*" (Pa0205-0206).

The HPA and CC also provided if either party defaulted in his or its obligations under the agreements, the non-defaulting party had the right to terminate, following the giving of "*not less than fifteen (15) days written notice*" notice setting forth the "*specific nature of the other party's breach*" and providing ten (10) days to cure the breach "*before termination becomes effective.*" (Pa0206).

Focazio's and GAT's claims were heard in Arbitration. The arbitrator considered the parties' claims and awarded Focazio no damages and awarded

GAT $164,470.00 for breaching the architectural agreement by early termination of same on the advice of counsel. (Pa0209).

The arbitrator found the parties intended the following outcomes:

1. Focazio could terminate the HPA without cause before tendering the second deposit, but in doing so, he would give up the non-refundable part of his deposit or $137, 337 (35% of the initial deposit). (Pa0206).
2. Once NE began work, if NE defaulted in the performance of its work under the CC, Focazio could terminate the CC only for good cause. CC Article 14E allowed the Owner to terminate "*in the event the Contractor shall default in any of its obligations hereunder, or shall default in any of its obligations as Supplier under the Home Purchase Agreement.*" In addition, Article 14G required that the default event shall have occurred "*through no fault of the party initiating the termination.*" Further, Article 14G also required the party seeking to terminate to give notice and an opportunity for cure. (Pa0206).
3. CC Article 5.1 sets forth the payment schedule and required Focazio, upon signing the contract, to tender an initial deposit of 25% of the contract price of $578,558 for mobilization and on-site work. It also allowed Focazio to elect to cancel or discontinue the Agreement following the

tender of the initial deposit but before making a second payment and "*prior to commencement of work.*" In that circumstances, on those conditions, Focazio would give up the non-refundable part of the initial deposit or $202,495 (35T of the initial deposit). (Pa0206).

4. CC Article 14E states that if the Owner terminates properly, he Ashall not be obligated to pay any sums other than for work completed and/or supplies and materials delivered to and accepted by Owner. The CC, however, is silent on the consequences if Focazio's termination was without good cause or if the default event giving rise to his termination notice occurred through some fault of his own. Thus, ordinary contract principles and remedies apply to a termination without cause. (Pa0207).
5. With regard to the non-refundable deposit under the HPA, the parties and their counsel included an explanation in Section 3D. It says the Purchaser (Focazio) acknowledges the Supplier and/or Manufacturer "*have incurred valuable time and expense in the preparation of engineering drawings and preparation and ordering of materials required for the production of the House and that any expenses incurred subsequent to the execution of this Agreement would be difficult to accurately estimate.*" A similar explanation is included in Article 5.1 of the CC. (Pa0207).

The arbitrator found the parties' intent under the HPA was clearly expressed. If Focazio cancelled the HPA at any time before making the second payment, the parties understood NE would keep the non-refundable portion of the initial deposit. This remedy is in the nature of liquidated damages. (Pa0207).

The arbitrator noted that on July 27, 2010, Aboyoun sent a termination notice to NE claiming two grounds for terminating the NE contracts: (1) the project was "*significantly beyond the completion date;"* and (2) "*pending change orders indicate the original allowances were substantially deficient,*" explaining "*[t]his particularly concerns the cost for windows.*" As Focazio acknowledged at trial, neither he nor his lawyer gave an opportunity for cure. (Pa0207).

Additionally, at trial Focazio also faulted GAT for misleading him into believing the project would be "variance free," when it required an Environmental Protection ("EP") waiver due to soil disturbance under the site plan. Focazio also argued NE should not have demolished the existing home knowing a possible waiver of the Environmental Protection ordinance might be required. (Pa0208).

As to the time for performance, the construction contract required NE, as contractor, to "*achieve Substantial Completion of the work not later than 300*

days from the Date of Commencement ("Contract Time")". The Commencement is defined as the date the contractor receives a "*demolition permit and all other related, required municipal approvals as soon as practicable upon the execution of this Agreement and receipt of the Mobilization Payment."* (Pa0208) (Emphasis added).

The arbitrator found that the Focazio/NE contracts were extensively negotiated between the parties through their lawyers. The contract negotiations addressed how the time for performance should be determined, including the Commencement Date that started the 300-day clock running for NE to achieve substantial completion. In this respect, NE's counsel noted the terms should "*take into account the possible delay by the Borough Engineer in the review and approval of any site plan regarding drainage, etc. Experience has shown that such review can take time."* (Pa0208).

Focazio was charged by the arbitrator with the knowledge that his lawyer had about possible delay resulting from obtaining Township approvals; and, in retrospect NE's counsel's comment was prescient. DR also informed Focazio that its scope of work included identifying "*possible variances and design waivers that would have to be applied for.*" Earlier, DR had advised Focazio and Zaccone that its site place work would include *"environmental protection*

calculations" and deviations from the Township standards would require a variance. (Pa0208).

Moreover, the termination letter did not attempt to specify which party was responsible for what period of delay. The termination letter referred to the fact that the Focazios had "*become very disappointed with the pace of this project*" and that "*we are now significantly beyond the completion date set forth in the subject agreements. At the same time, the pending change orders indicate that the original allowances were substantially deficient. This particularly concerns the cost for windows.*" The termination letter also failed to provide the required opportunity for cure. (Pa0209).

The arbitrator found that Focazio was on notice as to the possible need for an EP waiver from the outset. DR advised him of that possibility in both professional services agreements. In addition, the CC Article 2.6 says the substantial completion date shall be extended due to "*any delay caused by Lender, Owner, or municipality.*" (Pa0209).

GAT was awarded $164,470 against Focazio under the Architectural Services Contract, plus interest from January 1, 2011 and counsel fees. (Pa0209).

While Focazio eventually sold the house, the damages he sustained as a result of entering into the transaction for the Pines Lake property are documented in the damages report of Paul Gagliano, CPA. In addition to this, there was an award of counsel fees that are embodied in the judgment against Focazio. (Pa0189).

As set forth in the damages report of Mr. Gagliano- has set Plaintiff's damages at $2,613,105.20. The consequences of the Defendant's legal malpractice was financial disastrous to Dr. Focazio. He found himself facing a judgment against him benefiting GAT who received nearly a million dollars' worth of his money to tear down a extant house and leave Dr. Focazio with a hole in the ground. Additionally, he faced an award of counsel fees GAT and he had to pay his own attorneys. Faced with this financial disaster Focazio entered into an agreement with Tsairis. The agreement which the Court found it was an assignment of this lawsuit is dated October 19, 2017 (Pa0339). A review of the agreement reveals that it is not an assignment.

The document is not entitled an assignment but rather is entitled a settlement agreement. The agreement inter alia sets forth that Focazio will make payment to George A. Tsairis Architects, PC of $125,000.00 and that in exchange for GAT's forbearance on the collection of the judgement. Dr. Focazio

provide a security intent in any recovery in this action (Pa0343). The only thing that is provided to Defendants which gives them *any* interest regarding the instant action, is contained in Paragraph 6 of the agreement which provides:

> **Security/collateral**: Simultaneously with the execution and deliver of the Agreement, Focazio shall deliver to GAT a Security Agreement, in the form set forth in Exhibit A hereto, creating and otherwise granting GAT a security interest in any and all of Focazio's right, title and interest, in an to all money, directly or indirectly, recovered (i.e., settlement funds, collections on judgment, etc.), net of Focazio's attorneys fees and litigation costs incurred for that action ("Net Settlement"), in the civil action filed in New Jersey Superior Court entitled Focazio et als. v. Aboyoun, Esq. et als., Dkt No. PAS-L-002643-16, upon the terms and conditions set forth in said Security Agreement in the amount and to the extent necessary to fully pay and satisfy all sums due GAT by Focazio under this agreement. (Pa0342)

A search of the agreement will reveal no assignment of Dr. Focazio's claims, no right to any ownership interest in those claims or any right to make any decision regarding the litigation of these claims.

The second agreement with his own attorneys, an Acknowledgement of Attorney Charging Lien again does not contain the word assignment, does not permit his own attorneys to bring the instant action in their name or in any way control a prosecution of same. (Pa0197). Rather, it provides that Dr. Focazio acknowledges the lien on the amounts he might receive upon the net settlement or other recovery in this action. Nowhere in the agreement does this settlement

agreement is the word "assignment" used and it merely provides that his former attorneys have an attorneys lien as a security interest in the instant litigation. (Pa0197).

Obviously, and on the face of the documents neither of the documents can constitute an assignment of a chose in action. Defendants former lawyer and his adversary in the arbitration are not named parties in this litigation, they had no ability to direct the litigation or Dr. Focazio's Trial counsel, and the amounts they were seeking were dwarfed by the amounts that Dr. Focazio was seeking in the instant action.

Prior to opening arguments, the Court denied two Motions in Limine by the Plaintiff. Plaintiff sought to preclude any reference to collateral litigation involving Dr. Focazio as having little or no probative value to the issues in this matter and by requiring to, Dr. Focazio to essentially relitigate these collateral issues would be a waste of time and would be a result in Jury confusion.

Additionally, Plaintiff sought to exclude any reference to the amount of money Dr. Focazio paid for the house he obtained in Saddle River after the disastrous attempt to build his home on the Pines Lake Property was scuttled due to the Defendant's negligence. What possible relevance would the price of Defendant's subsequent home (assessed at over ten-million dollars) (Pa0329)

have to the issue of whether or not the Defendants adhere to the standard of care and whether or not Dr. Focazio was proximately caused damages if Defendant deviated from the standard of care? Plaintiff is at a loss. The only reason to interduce such evidence would be to prejudice the Jury by disclosing that Dr. Focazio was at the time a wealthy man.

After the Trial had started in this matter while Plaintiff was on the stand, and after the Court had decided extensively briefed motions in limine, the Court dismissed Plaintiff's case.

The Court held that Dr. Focazio's pledging to GAT a security interest up to the amount of his debt and acknowledging an attorney charging lien should he receive a recovery in this matter constituted an impermissible pre-judgment assignment of Dr. Focazio's legal malpractice claims. The Court held that these security interests which together are less than 20% of Focazio's damage claims, nevertheless, that meant that Focazio had no interest in the action. While the Court acknowledge that an assignment typically includes language providing for the transfers of the full rights to litigate the Court ignored this and held that while only two agreements did not indicate any assignment of any claims but only an assignment of future proceeds of the judgment they nevertheless precluded Focazio from litigating his claims in Court. T1, 7:18-10:2. February

23, 2023. The Court then erroneously stated that while the agreement does not state that the third parties have a right to sue in their own name upon Focazio's claim that effectively the language had in the agreement the same result. Id.

In the present matter Focazio is merely seeking a judgment for the benefit of third parties. The Court stated "In effect, the Third Parties would be able to sue upon Focazio's claim based on the fact that they seek to recover an amount now owed to them." The Court then held that Focazio was not a real party in interest. T1 10:9-11:10. These findings are completely at odds with the actual terms of the agreement. This holly erroneous ruling essentially holds that if a litigant pledges a portion of recovery in a tort action to attorney creditors or other creditors such as a letter of protection to a physician that this constitutes an impermissible pre-judgment assignment of a chose in action. Plaintiff now asks this Court to remedy this injustice.

ARGUMENT

I. PLAINTIFF'S' PLEDGE OF A PORTION OF HIS LAWSUITS PROCEEDS WERE NOT AN IMPERMISSIBLE ASSIGNMENT OF A CHOSE IN ACTION (APPEALING ORDER DATED FEBRUARY 23, 2023, FOUND AT Pa0354)

A. PLAINTIFF WAS DEPRIVED OF DUE PROCESS

An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge. W.J.A. v. D.A., 210

N.J. 229, 237–38, 43 A.3d 1148 (2012); Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330, 9 A.3d 882 (2010). Therefore, this Court must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. R. 4:46–2(c). Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)

When no issue of fact exists, and only a question of law remains, this Court affords no special deference to the legal determinations of the trial court. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378, 658 *A.*2d 1230 (1995). Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199, 129 A.3d 1069, 1075 (2016)

This Court's review of legal conclusions reached on summary judgment, is de novo and is "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference, City of Atl. City v. Trupos, 201 N.J. 447, 463, (2010) (citations omitted); Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382–83, (2010).

As set forth in the procedural history above, the Plaintiff was deprived of due process when confronted with the motion concerning his pledge of proceeds from the lawsuit to forestall the collection creditors created by

Defendant's malpractice. Seoung Ouk Cho v. Trinitas Reg'l Med. Ctr., 443 *N.J. Super.* 461, 472 (App. Div. 2015), *certif. denied*, 224 *N.J.* 529 (2016).

This procedural impropriety alone requires the reversal of the Trial Court's grant of Summary Judgement, this disregard of the Court's own order regarding Motions in Limine (Pa0331) and entertaining such a motion after the Jury was impaneled required Plaintiff to respond to same during the Trial when the Defendants had both contracts in their hands well in advance of the dates for filing Motions in Limine (Pa0230 and Pa0331) the Trials Court's disregard of its own Pre-Trial Order perhaps contributed to the Trial Court's misapplication of the law resulting in the erroneously dismissal of Plaintiff's suit.

However, due to the Trial Court's plain error of law the Court need not rest upon these procedural grounds for reversal though that alone would have entitled Plaintiff to a reversal under Cho, *supra*.

B. A PLEDGE OF A SECURITY INTEREST IN A FUTURE RECOVERY FROM A LAWSUIT OR OF AN ATTORNEYS LIEN DO NOT CONSTITUTE A PREJUDGMENT ASSIGNMENT OF A CHOSE IN ACTION.

Neither the pledge to GAT nor the attorneys lien placed upon any recovery in this action by the attorneys who represented the Plaintiff in the

arbitration are assignments. Black's Law Dictionary, (Second Addition) defines "assignment" as:

> The act by which one person transfers to another, or causes to vest in that other, the whole of the right, interest, or property which he has in any realty or personalty, in possession or in action, or any share, interest, or subsidiary estate therein. Seventh Nat. Bank v. Iron Co. (C. C.) 35 Fed. 440; Haug v. Riley, 101 Ga. 372, 29 S. E. 44, 40 L It A. 244.

Neither the Settlement Agreement and security interest provided to GAT nor the acknowledgement of the attorney's charging lien transferred to these creditors the whole of the Plaintiff's interest in this lawsuit. Plaintiff maintained unfettered his right to prosecute this lawsuit through counsel of his choice as he sought fit and he remained the real party in interest seeking a judgment which dwarfed the lien and security interest.

The Plaintiff does not dispute that the pre-judgment assignment of legal malpractice claims are prohibited.

The prohibition against the assignment of tort claims prior to judgment is founded on the principle that "[e]xcept when otherwise provided by statute, nothing is assignable, either at law or in equity, that does not directly or indirectly involve a right to property." Goldfarb v. Reicher, 112 N.J.L. 413, 414 (Sup. Ct.), aff'd, 113 N.J.L. 399 (E. & A. 1934). Thus, a chose in action unrelated to a right involving property may only be assigned if authorized by

statute. In Goldfarb, the Court explained that "[i]t is a firmly established rule that a right of action for personal injuries cannot be made the subject of assignment before judgment, in the absence of a statutory provision to the contrary." Ibid. Applying these principles in East Orange Lumber Co. v. Feiganspan, the court noted that "section 19 of the Practice Act" authorized the assignment of "all choses in action on contract" and held that the absence of any similar statutory authorization for the assignment of a negligence claim for damage to personal business property "is sufficient to indicate that the Legislature did not mean that the same privilege should be had by the assignee of a chose in action arising out of tort." 120 N.J.L. 410, 412 (Sup. Ct.), aff'd, 124 N.J.L. 127 (E. & A. 1940).

N.J.S.A. 2A:25-1 permits the assignment of certain claims but does not authorize the pre-judgment assignment of choses in action arising out of tort. "[I]t has always been held that the right to bring an action in the courts of this state is possessed by the injured person alone, unless the injured person assigns his [or her] right to someone else which cannot be done before judgment when the action sounds in tort." Cherilus, 435 N.J. Super. at 178 (quoting U.S. Cas. Co. v. Hyrne, 117 N.J.L. 547, 552 (E. & A. 1937)). The assignment of tort claims has uniformly been deemed invalid by courts applying New Jersey law.

Alcman Servs. Corp. v. Bullock, 925 F. Supp. 252, 258 (D.N.J. 1996) (finding legal malpractice claim a tort action that could not be assigned prior to judgment under New Jersey law); Conopco, Inc. v. McCreadie, 826 F. Supp. 855, 867 (D.N.J. 1993) (finding that professional malpractice claims are choses in action arising out of tort and are therefore not assignable prior to judgment under New Jersey law). See Vill. of Ridgewood v. Shell Oil Co., 289 N.J. Super. 181, 195-96 (App. Div. 1996) (finding invalid an assignment of tort claims for property damages and clean-up costs); Di Tolvo, 131 N.J. Super. at 79 (finding invalid the assignment of tort claim for personal injuries); Berkowitz v. Haigood, 256 N.J. Super. 342, 346 (Law Div. 1992) (explaining a claim for personal injury damages arising in tort "is not assignable before judgment"); Costanzo v. Costanzo, 248 N.J. Super. 116, 121 (Law Div. 1991) (finding invalid the assignment of a tort claim for personal injuries);

A review of the above cited cases illustrates the Trial Courts error. In Alcman, *supra*, a debtor of the Plaintiff Magek Fire Provention Inc. assigned to Alcman its cause of action its cause of action for attorney malpractice. Alcman then brought that action in Alcam own name and was represented by counsel that represented Alcman not Magek. Magek retained no control of the legal malpractice action nor interest in it -it was entirely assigned to Alcman.

In Conopco, *supra*, Faberge Inc. assigned its professional negligence claims against Ernst & Young to Unilever United States, Inc. parent corporation of Conopco Inc. Conopco Inc. brought Faberge's professional malpractice claims in its own name. Faberge is not listed on the caption and was not represented by any attorney in the action.

In Ridgewood, *supra*, the Ridgewood settled with certain oil company Defendants and as part of said settlement Ridgewood designated the oil company Defendants as its subrogees and assigned to the oil company Defendants all of its legal rights against all parties potentially responsible for the contamination at issue. Under the terms of the agreement, the oil company Defendants were authorized to file a substitution of attorney for Ridgewood, thereby replacing Ridgewood's attorney with their own. The assignment agreement provided that while the litigation would proceed in the name of Ridgewood **all** of the proceeds of any judgement would be going to the oil companies who would represent Ridgewood in the matter, see Village of Ridgewood, *supra* 289 N.J. Super. at 187.

While Alcman and Conopco involves cases in which the assignee brought the litigation in their own name, in the Ridgewood case it was apparent that the oil company Defendants were the real parties in interest and

entirely controlled the litigation even though it was still being brought in Ridgewood's name. The oil company Defendants were entitled to all proceeds from the suit and its attorneys- not Ridgewood's- made the decision on how and whether these claims would be brought.

In Berkowitz v. Haigood, though a Law Division case, is instructive here. Berkowitz was a chiropractor who sued his patient's attorney. Haigood had assigned the proceeds from his personal injury suit to his chiropractor. The Court held that the proceeds from a personal injury action can be assigned, and this did not constitute an impermissible assignment of the cause of action. While the Trial Court below held that there is no difference between a pledge of a security interest or attorneys lien future recovery in a Tort action and a pre-judgment assignment of the entire action that holding is just wrong. Pledge of a portion of future recovery in a Tort action does not divest the Plaintiff from control in the action and in fact he is the real party in interest who is bringing the action and he is being represented by counsel of his choice and he retains the right to make all decisions regarding the action including dismissing it.

The majority of states including New Jersey prohibit the pre-judgment assignment of legal malpractice claims. Mallen Legal Malpractice 97:25

(Thompson Reuters 2017). The rationale for the public policy prohibiting such assignment was well stated by a California Court. In Goodley v Wank & Wank, Inc., 62 CAL. App. 3d. 389 (2d Dist. 1976), the Court held:

> "It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.
>
> Public policy encourages those who believe they have claims to solve their problems in a court of law and secure a judicial adjustment of their differences. The California Supreme Court has emphatically rejected the concept of self help (i.e., *Daluiso v. Boone*, 71 Cal.2d 484, 492 [78 Cal.Rptr. 707, 455 P.2d 811] [policy against self help in land disputes]). However, the ever present threat of assignment and the possibility that ultimately the attorney may be confronted with the necessity of defending himself against the

> assignee of an irresponsible client who, because of dissatisfaction with legal services rendered and out of resentment and/or for monetary gain, has discounted a purported claim for malpractice by assigning the same, would most surely result in a selective process for carefully choosing clients thereby rendering a disservice to the public and the profession.

Here, it is undisputed that the Plaintiff retained control of the instant action and brought same in his own name through attorneys he selected. His pledge of security interests in a portion of the future recoveries should not have resulted in the dismissal of this action. The invalidation of any assignment (even were those security interests held to be an assignment) the should have had no effect in this cause of action. If the assignments were invalid unlike in Alcman, supra that would have no effect on Dr. Focazio's claim against the Defendants-Respondents herein. It would merely invalidate the assignment in a hypothetical action between Dr. Focazio's former attorneys or GAT should Dr. Focazio to contest the validity of assignments in said cause of action. Defendant Aboyoun- who did not make the motion at issue here- is a stranger to these pledges and the validity or invalidity of same provide no basis for the dismissal of claims against him. The real party in interest was before the Court and expected to benefit from the award he sought.

The Trial Court's ruling is a grave injustice and should be reversed. Plaintiff respectfully requests that upon remand this matter be assigned to a different Trial Judge.

II. IT WAS ERROR TO PERMIT THE DEFENDANTS TO INTRODUCE EVIDENCE OF COLLATERAL SETTLED LITIGATION AND THE SUBSEQUENT PURCHASE OF A HOME BY DR. FOCAZIO AS THE ARGUABLY MINUSCULE PROBATIVE VALUE OF SUCH EVIDENCE WAS GREATLY AWAID BY ITS PREJUDICIALLY EFFECT THE DISTRACTION FROM THE ISSUES OF THE CASE AND WAS AN ABUSE IN DISCRETION BY THE TRIAL COURT (APPEALING ORDER DATED JUNE 27, 2023 FOUND IN Pa0355)

The applicable standard when this Court reviews the trial court's evidentiary rulings is that of abuse of discretion. State v. Kemp, 195 N.J. 136, 149 (2008). See also Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008) (citation omitted); Brenman v. Demello, 191 N.J. 18, 31 (2007) (citation omitted). This Court only correct those errors " 'of such a nature as to have been clearly capable of producing an unjust result.' " Kemp, supra, 195 N.J. at 150 (quoting State v. Castagna, 187 N.J. 293, 312 (2006) (citations omitted)).

The Defendants indicated at the time of Trial, they intended to introduce inter alia the Complaint filed on August 9, 2012, in the matter of Allstate Insurance Co. v. Greater Lakes Ambulatory Surgical Center, for claims against

William J. Focazio, M.D. and entities he allegedly owned and/or controlled and the Stipulation of dismissal filed on December 11, 2012, in the Allstate matter dismissing with prejudice all claims against William J. Focazio, M.D. and any entities he allegedly owned and/or controlled in the complaint along with evidence of other litigations and bankruptcy completely unrelated to the Pine Lake Property. (DNR82-97)(Pa0231-Pa0232).

The complaint referenced above contains allegations against William J. Focazio, M.D. personally as well as against entities he allegedly owned and/or controlled for mail fraud, common law fraud, and insurance fraud. All of these claims were dismissed with prejudice some four months later. The complaint contains only allegations of fraudulent conduct; Dr. Focazio did not admit to any of the allegations, nor was there a judicial finding that these allegations were true. Thus, the complaint containing only unsubstantiated allegations does not contain admissible evidence whose probative value outweighs any potential prejudice to Dr. Focazio, and therefore the Defendants should be precluded from admitting the complaint into evidence. *See,* ***N.J.R.E*** 104(a).

"Relevant evidence" is defined as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action". ***N.J.R.E.*** 401. The Court "may exclude relevant evidence if its

probative value is substantially outweighed by the risk of: (a) undue prejudice, confusing the issues, or misleading the jury; or (b) undue delay, wasting time, or needlessly presenting cumulative evidence." ***N.J.R.E***. 403. Unsubstantiated allegations contain no probative value whatsoever. *See*, *Fusco v. Bd. of Ed. of the City of Newark*, 349 ***N.J.Super.*** 455 (App. Div. 2002) (unsubstantiated allegations were not probative or competent). In addition, the unsubstantiated allegations contained in the complaint bear no relevancy as to whether the Defendants deviated from the standard of care of attorneys representing clients in a litigation setting, nor does it have any relevancy to the quantum of damages asserted by Dr. Focazio in the malpractice claim against the Defendants.

Moreover, even if the unsubstantiated allegations were deemed to be "relevant" as defined by the ***N.J.R.E***., the fact that the allegations were denied by Dr. Focazio and ultimately dismissed without any findings of fact render them highly prejudicial, which prejudice substantially outweighs any potential relevancy regarding the allegations. Evidence that is unduly prejudicial is excluded "only when its 'probative value is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation' of the issues in

the case." *State v. Koskovich*, 168 ***N.J.*** 448, 486 (2001). Generally, "[t]he 'more attenuated and the less probative the evidence, the more appropriate it is for a judge to exclude it' under N.J.R.E. 403". *State v. Thompson*, 59 ***N.J.*** 396, 569 (1971). Here, unsubstantiated and disputed allegations bear little if any relevancy to the issues in this case, and their probative value, if any, is clearly outweighed by the undue prejudice that would be suffered by Dr. Focazio if the jury were to hear or read about these mere allegations. Further, not only does the prejudicial value these collateral litigations greatly outweigh any slim probative value – if Defendants are allowed to introduce this evidence, they will also mislead the jury into thinking this is a trial about whether or not the Plaintiff has been involved in a number of litigations and bankruptcies, rather than whether or not the Defendants breached their professional duties to the Plaintiff. See ***N.J.R.E***. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of under prejudice, confusions of issues or misleading the jury or if it risks undue delay or the waste of time.

N.J.R.E. 403(b) also provides that relative evidence may be excluded if its probative value is substantially outweighed by the risk of undue delay or waste of time. Here, the Defendants seek to consume, perhaps days, of court room time litigating lawsuits that have nothing to do with the suit currently

being tried by the Court. In each case where the Defendants bring up a disputed lawsuit or bankruptcy, they will invite the litigation of these collateral lawsuits and bankruptcies, all of which can have no possible purpose other than to attempt to tarnish William Focazio in the jury's eyes. The presentation to the jury of the issues in these collateral lawsuits and Dr. Focazio's perception of the causes of these lawsuits will not in any way result in the presentation of evidence that will assist the jury in determining whether or not the Defendants breached their fiduciary professional duties to Dr. Focazio and whether or not such a breach proximately caused him damages. The Court should exclude this evidence, not only because its slim, hypothetical probative value is greatly outweighed by its risk of substantial prejudice, confusing issues and misleading the jury, but also because any such probative value is dwarfed by the undue delay and waste of time that would be occasioned by its introduction.

Similarly, the evidence of Dr. Focazio's purchase of a subsequent home after abandoning the construction of the Pine Lake's home due to the Defendants malpractice has no probative value. If Dr. Focazio paid ten dollars for his next house or one-hundred-million dollars for his next house, either purchase price is not probative of whether or not Defendants deviated from the standard of care

when representing Dr. Focazio and whether such said deviation proximately caused him damages. The Defendants seek to introduce this evidence presumably to let the jury know that Dr. Focazio was still a man of means after suffering Defendants malpractice. What probative value does that have? The jury is presumably prohibited from hearing evidence of the value of Defendant Aboyoun's home and certainly is prohibited from learning in the amount of insurance that covers this claim. Why Dr. Focazio's purchase of a substantial home after the Pine Lake's property is probative of any issue in this action is a mystery to Plaintiff. It was an abuse of discretion to allow Defendants introduce this evidence and the introduction of this evidence will result in the waste of time, juror confusion of issues, and is clearly capable of producing an unjust result.

CONCLUSION

This matter should be remanded to the Trial Court for a Trial before a jury.

SIMON LAW GROUP, LLC,

Attorneys for Plaintiff

By: /s/ Kenneth S. Thyne

Kenneth S. Thyne

Dated: February 12, 2024

	:SUPERIOR COURT OF NEW JERSEY
WILLIAM J. FOCAZIO, M.D.; ARTHUR ST. REALTY, LLC; and ENDO SURGICAL CENTER OF EAST BRUNSWICK, LLC	:APPELLATE DIVISION :DOCKET NO.: A-003587-22
Plaintiffs,	:ON APPEAL FROM:
v.	:SUPERIOR COURT OF NEW JERSEY :LAW DIVISION: PASSAIC COUNTY :DOCKET NO.: PAS-L-2643-16
JOSEPH S. ABOYOUN, ESQ.; ABOYOUN & HELLER, LLC; NAGEL RICE, LLP; RANDEE MATLOFF, ESQ.; BRUCE NAGEL, ESQ.	: SAT BELOW: :HON.VICKI A. CITRINO, J.S.C.
Defendants.	

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS JOSEPH S. ABOYOUN, ESQ. AND ABOYOUN & HELLER, LLC IN OPPOSITION TO PLAINTIFF-APPELLANT WILLIAM J. FOCAZIO, M.D.'S APPEAL

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Date: May 29, 2024

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PRELIMINARY STATEMENT

Plaintiff-Appellant, William J. Focazio, M.D. (hereinafter, "Plaintiff") filed this legal malpractice matter on July 25, 2016, against Defendants-Respondents, Joseph S. Aboyoun, Esq., Aboyoun & Heller, LLC (hereinafter, collectively, "Aboyoun"), Randee Matloff, Esq. Bruce Nagel, Esq., and Nagel Rice, LLP.

The question presented on this appeal is whether the Trial Court was correct in dismissing this legal malpractice case because; 1) Plaintiff assigned his legal malpractice claim to third parties under two separate contractual agreements, and 2) through the assignment, the Plaintiff lacked standing to maintain this lawsuit. In so holding the Trial Court correctly held that the Plaintiff relinquished his claims through the assignment. The Trial Court also correctly reasoned that the effect of the assignment was to divest the Plaintiff of standing to maintain an action in his own name.

This Appeal must affirm the Trial Court for the same reasons set forth by the Trial Judge. The Trial Court was correct in finding that a party who contractually assigns his rights to a legal malpractice action to third parties, cannot sustain a lawsuit. This Court should also consider additional reasons for affirming the Trial Court. If Plaintiffs are permitted to assign their rights to a legal malpractice case, and still prosecute the claim in their own name, the Courts will be forced to litigate

cases in which the party litigating the case, technically has no interest in the litigation, or the settlement thereof. Therefore, public policy favors having the real party in interest in the Courtroom with a stake in the entire outcome of the litigation.

The Plaintiff's appeal also seeks to reverse evidentiary rulings made by the Trial Judge prior to the dismissal. Those rulings were interlocutory and were correct based upon the facts known to the court at the time of the rulings. These interlocutory evidentiary rulings should not be reviewed by this Appellate Court because the dismissal should be affirmed and because the evidentiary rulings are both interlocutory and correct.

The evidentiary rulings are supported by the facts. Plaintiff's claims against Aboyoun arise from the real-estate development of Plaintiff's personal residence in Wayne, New Jersey. Specifically, Plaintiff alleges that Aboyoun failed to draft, negotiate, and advise him regarding a purchase agreement and a construction agreement Plaintiff entered into with architect, George Tsairis and his construction company, Northeast Modular Homes, Inc. (Collectively, "Tsairis"). The focus of the allegation is that Aboyoun failed to properly advise Plaintiff of risks of terminating the construction contract with Tsairis. Aboyoun terminated the contract at the Plaintiff's insistence because Plaintiff wanted to end the project and move on with his life, and he ultimately did so with the purchase of another

property for $10,000,000. Plaintiff now seeks to reverse the Trial Court's ruling that held that the Plaintiff's purchase of another property, at many times the costs of the subject property, is not evidence of Plaintiff's intent. A jury should be able to consider whether the Plaintiff's decision to terminate was based upon legitimate concerns about the project, or whether Plaintiff wanted to purchase another, better home at an exponentially higher price.

Also, the credibility of the Plaintiff is at issue in this suit. The fact that Allstate Insurance filed a medical billing fraud case against Defendant in 2012, during the course of the underlying litigation, is relevant because that fraud claim was pending at a time when important litigation decisions were being made in the dispute between Plaintiff and Tsairis.

The Plaintiff's argument regarding the untimeliness of the dismissal is also without merit. The assignments, although dated 2017, and March 2022, were not produced to defendants until the December 2022, prior to the February trial. It is the plaintiff that delayed. Also, standing is an issue that can be raised at any time during litigation.

Plaintiff's appeal also asks this Court to reverse The Honorable Vicki Citrino, J.S.C. and remand this matter to a different Trial Judge. Plaintiff has made similar accusations against other Superior Court judges during the pendency of this matter. None of which possessed any merit.

STATEMENT OF THE FACTS

Plaintiff-Appellant, William J. Focazio, M.D. filed this legal malpractice matter on July 25, 2016, against Defendants-Respondents, Joseph S. Aboyoun, Esq., Aboyoun & Heller, LLC, Randee Matloff, Esq. Bruce Nagel, Esq., and Nagel Rice, LLP. (Pa0001; Pa0059). Plaintiff's claims against Aboyoun at issue on appeal arise from the real-estate development of Plaintiff's personal residence in Wayne, New Jersey. (Id.). Plaintiff alleges that Aboyoun failed to draft, negotiate, and advise him properly regarding a purchase agreement and a construction agreement that Plaintiff entered into with architect, George Tsairis and his construction company, Northeast Modular Homes, Inc. (Id.). As a result of the dispute with Tsairis, Plaintiff retained multiple attorneys, including his cousin, George Abdy, Esq. of Abdy & Kane and Matthew Caveliere of Cavaliere & Cavaliere, PA., to litigate a case against Tsairis. (Pa0064). The result of that litigation was that Plaintiff was unsuccessful at arbitration and Plaintiff owed substantial amounts of money to both Tsairis and to his attorneys, Mr. Abdy, and Mr. Cavaliere. (Pa0065).

Specifically, the residential property at issue was located at 736 Pine Lake Drive West in Wayne, New Jersey. (Pa0003). Plaintiff purchased the property in 2007 in order to build his alleged dream home on Pines Lake. (Da81, 235:16-17). Plaintiff had originally planned to live in the historic house that was already

on the property when he bought the property, but later decided to build a new modular home on the property and demolish the historic house. (Pa61).

In furtherance of this plan, Plaintiff retained architect, George Tsairis. (Pa61). Plaintiff retained him directly as an architect without any involvement of Defendant. (Da59, 149:18 – 154:1; Pa203). After retaining and discussing the project with Tsairis, Plaintiff then retained Joseph Aboyoun, Esq., to assist with negotiating future contracts with Tsairis and his two other business entities. (Pa61). William Soukas, Esq., represented Tsairis in those contract negotiations. (Da62, 158:3–6). There were two contracts being negotiated, a modular home Purchase Agreement and a separate Construction Agreement[1]. (Pa204).

Plaintiff was an involved client and was copied on the contract negotiations that were taking place between Aboyoun and Soukas. (Pa0164). On May 5, 2009, Aboyoun sent, via email, a letter to Soukas enclosing revised versions of two agreements. (Da62) Aboyoun also copied Plaintiff on this letter. (Da62). On May 7, 2009, Aboyoun sent another email letter to Soukas via email with revisions to both the Purchase and Construction Agreements. (Da62–63). Again, Aboyoun copied Plaintiff on this letter. (Da62–Da63).

[1] It should be noted that Plaintiff entered into a third agreement with Tsairis solely related to Tsairis' design work, as opposed to the construction and modular home purchase agreements. Aboyoun did not assist Plaintiff with respect to the design contract.

Plaintiff testified that he discussed the Purchase and Construction Agreements negotiations with Aboyoun. (Da62-63). Plaintiff further testified that he discussed his obligations under the Purchase and Construction Agreements before he signed them. (Da65). On May 8, 2009, Plaintiff entered into two separate contracts with Northeast Modular Homes, the Purchase Agreement and the Construction Agreement. (Pa0204).

Plaintiff subsequently retained the Law Office Rubin & Connelly to obtain all the necessary variances for the construction of the house. (Da70). Defendant Aboyoun had nothing to do with the retaining of Rubin Connelly. (Da70). In early 2010, without approval from Plaintiff or Aboyoun, Tsairis changed manufacturers for the modular structure to a company called, Integrity Building Systems, (Inc. Pa0062). In a letter to Plaintiff, dated January 29, 2010, Aboyoun cautioned Plaintiff about depositing more funds with the new company. (Pa 0131 – Pa 0132).

By May 21, 2010, in an email by Aboyoun to Tsairis, copying Plaintiff, Aboyoun told Tsairis that Plaintiff had already paid $392,391 to Tsairis for the modular structure and was about to send him a further $470,870 for the structure. (Da174). He remarked that despite the substantial sums that Plaintiff had already paid, he had yet to see the "benefit of anything concrete from IBS." (Id.). Aboyoun then inquired, "How can we secure these payments?" (Id.).

Around this time, Plaintiff began to lose patience with Tsairis after the construction project was not being completed as quickly as Plaintiff desired. (Da81). Plaintiff discussed the problems with Aboyoun. (Pa0062). Plaintiff ultimately directed Aboyoun to cancel the Construction and Purchase Agreements, and Aboyoun cautioned Plaintiff of the risks of cancellation, including that he would have to sue Tsairis for any chance of recovery of any money paid to Tsairis and his companies. (Pa0062 – Pa0063).

On July 27, 2010, Aboyoun, at the request of Plaintiff, sent Soukas a letter terminating the Purchase and Construction Agreements and requesting that Tsiaris return the advanced payments per the Purchase Agreement. (Pa0063). Mr. Soukas responded on behalf of Tsairis stating that the site engineering firm retained by Plaintiff, Dresdner Robin, was to blame for the delays and that Tsairis had done all he could to facilitate the project. (Pa0063).

On February 11, 2011, Plaintiff closed on a purchase of another home in Saddle River, NJ. (Da144). The property is located at 101 Fox Hedge Road and Plaintiff paid $10,000,000 for the property. (Da144). Subsequently on July 1, 2011, Plaintiff sold the Wayne/Pines Lake property for $1,900,000.

As the dispute between Plaintiff and Tsairis/Northeast continued, Plaintiff retained litigation counsel in anticipation

litigating the dispute. (Pa0063). Initially, Plaintiff retained Karim Kasper, Esq. of the law firm, Lowenstein Sandler, PC, for the purpose of arbitration and then mediation. However, due to differences in strategy Plaintiff replaced Mr. Kasper with the Nagel Rice firm. (Pa0063).

In March of 2013, Plaintiff who had been upset with the pace of co-defendant Nagel Rice in conducting the litigation, indicated he would retain substitute counsel. In late March of 2013, Plaintiff replaced Nagel Rice with George Abdy, Esq. as trial counsel. (Pa0063).

Although the matter was referred to Arbitration on October 28, 2013, the arbitrations hearings did not begin until November 15, 2016. During this roughly three (3) year time period, additional discovery occurred and Plaintiff reached a settlement with Dresdner Robin Environmental, who paid $45,000 to Plaintiff and released $10,000 owed to them by Plaintiff. (Da168-Da169).

The arbitration hearings occurred in November of 2016 and Mr. Meisel issued his decision in December of 2016. Mr. Meisel made a finding against Plaintiff. (Pa0065). Mr. Meisel did note that the failure to obtain the necessary permits for the construction project were partially the fault of Plaintiff.

After the arbitration, Plaintiff entered into separate agreements with both Abdy and Tsairis, in which Plaintiff assigned his rights to the legal malpractice claim that Plaintiff filed

against Aboyoun on July 25, 2016. (Pa0339 – Pa0353). The first agreement is dated October 19, 2017, and it was between Plaintiff and Tsairis. (Pa0339 – Pa349). This agreement (hereinafter Tsairis Assignment) was captioned a "Pledge of Security" which acknowledged a debt by Plaintiff to Tsairis of $289,470. (Id.). The Assignment indicated that it was made pursuant to the terms of a Settlement Agreement which was incorporated by reference. (Id.). Specifically, the Assignment states; "WHEREAS, Pledgor is indebted to Lender in the sum of $289,470(the "Loan"), as evidenced by a certain Settlement Agreement of even date herewith, which is incorporated herein by reference ('Settlement Agreement');

The Tsairis Assignment defined the "Collateral" as follows:

a. The Term "Collateral" means

1. Aboyoun. All of Pledge's rights, title and interest, in and to all money, directly or indirectly, recovered (ie settlement, collections on judgments, et.), net of Pledgor's attorneys fees and litigation costs incurred for that action ("net Settlement"), in the civil action filed or about to be filed in the New Jersey Superior Court e3ntitled Focazio et als v. Aboyoun, Esq. Et als., Dkt NO. pAS-L-002643-16, upon the4 terms and conditions set forth herein (The "Pledged Interest"); upon the receipt of the Net Settlement by Borrower's Law Firm (defined below), so much of the Net Settlement necessary to pay-off the satisfy the Loan shall be forthwith paid to the Lender by the Law Firm;).

[Id.]

The Tsairis Assignment then 'transfers' the Plaintiff's 'right, title and interest" in the Collateral (ie. the Focazio

Legal Malpractice Lawsuit) to Tsairis in full under the following provision,

> 2. Collateral Pledge: PLEDGOR hereby assigns, transfers and pledges to Lender and grants to Lender a continuing security interest in and lien on all of the Pledgor's right, title and interest in and to the Collateral to secure the prompt payment, satisfaction, and discharge of the Liabilities. Nothing in this instrument shall be construed as affecting the Security Agreement; the failure of the Collateral to satisfy the Security Agreement shall not affect the Security Agreement.
>
> [Id.]

The Tsairis Assignment also permits Tsairis to sell the "Collateral" (i.e., "the Focazio Legal Malpractice Lawsuit") in the event that Plaintiff fails to make any payments to Tsairis when 'due'. (Id.). The agreement states,

> 4. Collateral & Default. If PLEDGER fails to make any payment to Lender in reduction of the Liabilities when due, Lender may seize, sell or otherwise dispose of any or all of the Collateral at any time and from time to time at public or private sale, upon issuance of prior written notice to PELEDGOR, which, due to the nature of the Collateral and to the possibility of changes in value of the Collateral, PLEDGOR hereby acknowledge and agrees said notice to be sufficient, commercial reasonable, and proper, with or without advertisement of the sale, and may apply the proceeds of any such sale to the expenses of such sale, and or the liabilities, in such order as Lender shall determine in hits sole and absolute discretion.
>
> [Id.]

The second assignment (Abdy Esq. Assignment) is dated March 8, 2022. (Pa0351 – Pa353). This document is captioned 'Acknowledgement of Attorney Charging Lien'. (Id.). However, it

too is an assignment of the Focazio v. Aboyoun legal malpractice action. The Abdy Assignment purports to assign *all* of Focazio's rights to the proceeds of the Legal Malpractice action to his former attorney, Mr. Abdy who litigated the earlier lawsuit with Tsairis. (Id.). The Abdy Assignment provides in relevant part;

> 3. Client [Focazio] hereby irrevocably acknowledges the creation of an or otherwise crates an Attorney's Charging Lien in favor of the Attorney [Abdy] and upon any and all of the Client's proceeds resulting from the Aboyoun Litigation, and any related claims.
>
> [Id.]

These two agreements were the basis of the motion to dismiss the legal malpractice action between Plaintiff and Aboyoun. On February 23, 2023, the Trial Court dismissed Plaintiff's legal malpractice claim after finding that these were unlawful assignments of the legal malpractice lawsuit and they also resulted in the Plaintiff no longer having standing to bring the lawsuit against Aboyoun. (Pa0354).

In addition to the facts set forth herein, Aboyoun adopts and relies upon the findings of fact made by the Trial Court in its February 23, 2023 oral opinion when it dismissed this matter. (T1 4:15 – 6:19).

PROCEDURAL HISTORY

Plaintiff filed this legal malpractice matter on July 25, 2016, against Aboyoun, Randee Matloff, Esq., Bruce Nagel, Esq., and Nagel Rice, LLP. (Pa0001). On October 19, 2017, Plaintiff assigned his interests in the proceeds of Focazio v. Aboyoun legal malpractice action to George Tsairis, as part of a settlement of a lawsuit between Tsairis and Foczio. (Pa0339).

The Focazio v. Aboyoun lawsuit was dismissed by the Trial court but on June 7, 2021, the Appellate Division reversed and remanded for additional consideration by the Trial Court of substantive rulings that are not at issue on this appeal. (The Trial Judge who reversed in the earlier matter is not the same Trial Judge that entered the order of dismissal that resulted in this appeal) (Pa0059).

On March 8, 2022, Plaintiff assigned his interest to the proceeds of the Focazio v. Aboyoun legal malpractice action to his former lawyer, George Abdy, Esq., who represented him in the litigation between Focazio and Tsairis. (Pa0350).

Both of the assignments were not produced to Defendant in discovery but rather were served in December 2022, shortly before the February 2023, Trial despite being entered into in 2017 and March 2022 respectively. (Pa0335).

On February 21, 2023, co-defendant Nagel Rice filed a motion to dismiss based upon newly discovered information that Focazio

assigned his interest in the legal malpractice action to third parties. Defendant Aboyoun joined and argued the motion orally before the Trial Court. (Pa0335).

On February 23, 2023, the Trial Court, the Honorable Vicki A. Citrino, J.S.C. dismissed the case for reasons set forth on the Record. (T1).

On March 24, 2023 the Plaintiff filed an initial Notice of Appeal. (Pa0356).

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED THIS MATTER AFTER FINDING THAT PLAINTIFF ASSIGNED HIS RIGHTS TO THIS LAWSUIT TO THIRD PARTIES AND IN FINDING THAT PLAINTIFF LACKED STANDING TO BRING THIS LAWSUIT AS A RESULT OF THE ASSIGMENTS.

The Trial Court correctly dismissed this case because the Plaintiff improperly assigned his rights to the lawsuit, and because of the assignments he lacked standing to be a plaintiff in this lawsuit.

A. Plaintiff was never denied due process. Plaintiff's opposition to Aboyoun's motion to dismiss was heard by the Trial Court.

Plaintiff initially appears to argue that he was denied due process by the Trial Court because the Trial Court heard Aboyoun's motion to dismiss based upon lack of standing. Plaintiff acknowledges he was afforded the opportunity to submit written opposition and to be heard orally before the Trial Court rendered a decision. Further, the fact that Defendants Nagel Rice, LLP, Ms. Matloff, and Mr. Nagel filed the motion to dismiss is irrelevant as Aboyoun joined their motion.

Plaintiff incorrectly argues that Aboyoun's motion was one for summary judgment, however, the motion was a motion for lack of standing, which can be raised at any time including trial. R. 4:6-7. Obviously, if a party does not possess requisite standing before

the Trial Court, the Trial Court cannot proceed with conducting a trial because it would have no practical effect.

Furthermore, Plaintiff provided Defendants the agreements he entered into with Tsairis and Abdy for the first time on December 28, 2022, approximately six (6) weeks prior to trial commencing and years after the first assignment was entered into in 2017. Defendant Aboyoun, therefore, was denied an opportunity, by Plaintiff, to obtain discovery regarding the agreements. A motion based upon the agreements was brought shortly after Plaintiff provided same.

Plaintiff's claims regarding procedural impropriety are baseless.

B. The Trial Court was correct that Plaintiff impermissibly assigned his rights to the legal malpractice lawsuit against Aboyoun.

Our Legislature has delineated the types of claims and interests that may be assigned. N.J.S.A. 2A:25-1 declares that,

> All contracts for the sale and conveyance of real estate, all judgments and decrees recovered in any of the courts of this state or of the United States or in any of the courts of any other state of the United States and all choses in action arising on contract shall be assignable, and the assignee may sue thereon in his own name.

As this statute does not expressly mention tort claims, our courts have reached the conclusion that the Legislature intended that, as a matter of public policy, tort claims are not assignable prior to the entry of judgment. See E. Orange Lumber Co. v. Feiganspan,

120 N.J.L. 410, 413 (Sup. Ct. 1938), aff'd, 124 N.J.L. 127 (E. & A. 1940); Vill. of Ridgewood v. Shell Oil Co., 289 N.J. Super. 181, 195 (App. Div. 1996); Di Tolvo v. Di Tolvo, 131 N.J. Super. 72, 79 (App. Div. 1974).

Our courts have also determined that legal malpractice claims are "derive[d] from the tort of negligence," Grunwald v. Bronkesh, 131 N.J. 483, 492 (1993), it is axiomatic that an assignment of a legal malpractice claim is impermissible. In Alcman Servs. Corp. v. Bullock, 925 F. Supp. 252, 258 (D.N.J. 1996), the District Court stated that "[a] simple syllogism" inexorably proves the point: "a tort claim is not assignable; legal malpractice is a tort claim; therefore, a legal malpractice claim is not assignable." Based upon this case law, the Trial Court correctly found that a legal malpractice matter is not assignable.

In so holding, the Trial Court correctly rejected the Plaintiff's argument that the agreements "are simply a pledge to debtor of security in any future recovery in this action." The Trial Court was also correct in not accepting Plaintiff's argument that there is a distinction between a "claim" and an assignment of the "proceeds of a claim". The Trial Court reasoned that "neither the New Jersey Supreme Court or Appellate Division have rendered any decision as to the distinction between claims and proceeds and thus, this Court must follow the general rule that a claim for

damages in tort is not assignable before judgment regardless of whether the language concerns a claim or proceeds." (T1 9:2 – 8).

Plaintiff cited to one case before the Trial Court to make the distinction between the assignment of a "claim" versus the assignment of the "proceeds of a claim." The plaintiff cited to Granata v. Broderick, 4456 N.J. Super. 449 (App. Div. 2016) affirmed, 231 N.J. 135 (2017) for the proposition that a plaintiff may pledge to debtor of a security interest in any future recovery in an action. The Trial Court correctly reasoned that this case does not apply because N.J.S.A. 2A:25-1 was not discussed in that case. Furthermore, the Trial Court noted that Granata involved an assignment under the UCC and there was no evidence in this case that there was compliance with the UCC.

The Trial Court in this matter did thorough research to find additional case law, not cited by the plaintiff, that might support the plaintiff's argument that there is a distinction between an assignment of a 'claim', and the assignment of the 'proceeds of a claim".[2] The two cases were discovered by the Trial Court. Both were trial court cases, neither of which were authoritative decisions by the Appellate Division or the Supreme Court. In the

[2] It is noted that the motion was filed with the Court on February 21, 2023, plaintiff's opposition was filed on February 22, 2023 and the Court heard oral argument and ruled on February 23, 2023. The decision of the Trial Court was fully briefed and researched by the Court prior to the delivery of the well-reasoned decision. Plaintiff's apparent argument that the Trial Court's decision was somehow 'rushed' and offered plaintiff 'limited time to respond,' is inaccurate.

first case, Berkowitz v. Haigood, 256 N.J. Super. 342, 346 (1992), the plaintiff treated with a doctor (Berkowitz) and the plaintiff entered into the agreement with the doctor "purporting to create a lien against the proceeds of the personal injunction action. Although that agreement was found valid by the trial court in Berkowitz, the Trial Court here correctly noted that the Berkowitz case involved a dispute between the plaintiff and the plaintiff doctor. In Berkowitz, there was no conveyance by plaintiff of the right to and title of the action to the doctor. The doctor provided services to the plaintiff and the doctor's agreement only provided for reimbursement for the money owed. Furthermore, Berkowitz ultimately held that a clam for personal injury damages in tort is not assignable before judgement. The Berkowitz case also supports the ruling of the Trial Court.

The second case discovered by the Trial Court was Costanzo v. Costanzo, 248 N.J. Super. 116 (1991). Although the Trial Court did not discuss this case, the court in Costanzo held invalid the assignment of a Tort claim for personal injuries. This case, therefore, also supported the findings of the Trial Court.

Not only is the distinction between a "claim" and "proceeds of a claim" not recognized by binding authority, but the assignments at issue in this case do not support that distinction. Specifically, the Tsairis Assignment defined as "Collateral" as "All of [Focazio's] rights, Title … *and* all money … in the civil

action filed" by Focazio against Aboyoun. The use of the word 'rights', 'title' 'and interest' '*and* all money,' expressly indicates that the claims, as well as 'all of the proceeds' are included in the Collateral.

Specifically, the Tsairis Assignment defined the "Collateral" as follows:

> a. The Term "Collateral" means
>
> i. Aboyoun. **All of Pledge's rights, title *and* interest, in *and* to all money,** directly or indirectly, recovered (ie settlement, collections on judgments, et.), net of Pledgor's attorneys fees and litigation costs incurred for that action ("net Settlement"), **in the civil action filed or about to be filed in the New Jersey Superior Court entitled Focazio et als v. Aboyoun, Esq. Et als., Dkt NO. PAS-L-002643-16,** upon the terms and conditions set forth herein (The "Pledged Interest"); upon the receipt of the Net Settlement by Borrower's Law Firm (defined below), so much of the Net Settlement necessary to pay-off the satisfy the Loan shall be forthwith paid to the Lender by the Law Firm;). (emphasis added).

The Tsairis Assignment then 'transfers' the Plaintiff's 'right, title and interest" in the Collateral (ie. the Focazio Legal Malpractice Lawsuit) to Tsairis in full under the following provision.

> 2. Collateral Pledge: **PLEDGOR hereby assigns, transfers and pledges to Lender and grants to Lender a continuing security interest in and lien on all of the Pledgor's right, title and interest in and to the Collateral** to secure the prompt payment, satisfaction, and discharge of the Liabilities. Nothing in this instrument shall be construed as affecting the Security Agreement; the failure of the Collateral to satisfy the Security Agreement shall not affect the Security Agreement. (emphasis added).

The Tsairis Assignment also permits Tsairis to **sell** the "Collateral" (ie the Focazio Legal Malpractice Lawsuit") in the event that Plaintiff fails to make any payments to Tsairis when 'due'.[3]

> 4. Collateral & Default. If PLEDGER fails to make any payment to Lender in reduction of the Liabilities when due, Lender may seize, sell or otherwise dispose of any or all of the Collateral at any time and from time to time at public or private sale, upon issuance of prior written notice to PELEDGOR, which, due to the nature of the Collateral and to the possibility of changes in value of the Collateral, PLEDGOR hereby acknowledge and agrees said notice to be sufficient, commercial reasonable, and proper, with or without advertisement of the sale, and may apply the proceeds of any such sale to the expenses of such sale, and or the liabilities, in such order as Lender shall determine in hits sole and absolute discretion.

The fact that Tsairis can "sell" the Collateral indicates that it is not just the proceeds but also the "right" and "title" to the lawsuit that Tsairis now possesses.

The second assignment (Abdy Esq. Assignment) that is dated March 8, 2022 is captioned 'Acknowledgement of Attorney Charging Lien'. The Trial Court was correct that this is Agreement is not an "attorney charging lien." Attorney Charging Liens applies when one attorney litigates a case, and then another attorney takes over litigating that same case. "The purpose of the attorney's

[3] In addition to the Tsairis assignment agreement, Tsairis and Plaintiff simultaneously entered into a Settlement Agreement which provided for an extended payments from Plaintiff to Tsairis.

charging lien is to prevent the attorney from being deprived of the fee after having performed legal service which result in the client obtaining something of value." Cole, Shotz, Berstein, Meisel & Forman, P.A. v., Owens, 292 N.J. Super. 453, 461 (App. Div. 1996). In this matter, Abdy never represented Focazio in this legal malpractice matter against Aboyoun, and therefore, his agreement is not an Attorney Charging Lien, but merely an assignment of Focazio's rights to this legal malpractice action.

The current circumstances are similar to the facts in Vill. of Ridgewood, supra. In Ridgewood, a settling defendant acquired the right to the litigation from the plaintiff and sought to continue prosecution of the matter against the remaining defendants under plaintiff's name. Id., at 195. The Court held that this procedural posture was impermissible as a plaintiff cannot assign a tort claim and because the defendants who purchased the claim were not the injured parties. Id., at 196. Similarly here, Abdy contractually possesses all the "rights, title and interest, in and to" Plaintiff's claim in this litigation. The assignments in this case are similar to the Ridgewood matter as the parties who are seeking redress from Aboyoun are Tsairis and Abdy, not Plaintiff.

C. The Trial Court correctly held that Focazio lacked Standing to bring this lawsuit.

The Trial Court held that "in the present matter, Focazio is merely seeking a judgment that is to be paid directly to the third parties and thus, Focazio will receive the benefit of the judgment in name only." (T1 10:9-12). In effect, the third parties would be able to sue upon Focazio's claim based on the fact that they seek to recover an amount now owed to them. Such an arrangement clearly affects Focazio's standing under Rule 4:26-1, which provides that, "every action may be prosecuted in the name of a real party in interest." The Trial Court was correct in its ruling.

To have standing, the Supreme Court has held that, "A party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In Re: Camden County, 170 N.J. 439, 449 (2002). Standing is not automatic and a litigant usually has no standing to assert the rights of a third In Re: Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004).

Once Plaintiff assigned his rights to the proceeds of this matter, Plaintiff's stake became that of receiving a judgment to pay off his creditors. Accordingly, the harm Plaintiff will suffer in the event of an adverse decision is not one stemming from

alleged malpractice of Aboyoun, but of not being able to pay his creditors. As a result, Plaintiff essentially assigned away his standing to prosecute this suit against Defendant.

In Plaintiff's appellate brief, he argues that even if the assignments were unenforceable, the assignments would not divest Plaintiff from an interest in the litigation. Plaintiff argues that the enforceability between the plaintiff and the third parties are between them, and of no concern for the Defendant in this action. This argument was not raised before the Trial Judge and the Trial Judge had no opportunity to address this new argument. Even if this Court were to entertain this new argument on appeal, it lacks merit.

The matter before the Court is a lawsuit by Plaintiff against Defendant. The Trial Court found the assignments impermissible and the Trial Court ultimately found that they divested Plaintiff of standing to bring this action. The enforceability of the Assignments between Plaintiff and the Third Parties were not before the Court, and any such ruling would not have estopped those Third Parties from seeking the enforcement of those assignments. Without being a party to the dispute, the Third Parties would not be estopped from arguing for their enforceability. Collateral estoppel only binds parties to the litigation not third parties who had no opportunity to litigate the issue. What the Trial Court did recognize, is that although the assignments were improper,

they were voluntarily entered into by the Plaintiff and they conveyed Plaintiff's rights to the litigation to Third Parties. The fact that they might ultimately prove unenforceable if there is a dispute between Plaintiff and those third parties, does not change the fact that Plaintiff assigned his rights to Third Parties. The Defendant is entitled to have the real party in interest as an adversary and the Court recognized this through the dismissal of this action.

D. Public policy also favors affirming the Trial Court's dismissal of this action.

Public Policy also supports the decision of the Trial Judge. It is in the public interest for the Court's to preside over litigate cases in which the real party in interest is before the Court. For example, settlement is more likely if the parties with a stake in the outcome are before the Court.

Plaintiff correctly cited to some of the public policy concerns as noted by the Court in Goodley v. Wank & Wank, 62 Cal. App. 3d. 389 (2nd Dist 1976). The Court in Goodley noted that legal malpractice actions should not be open for sale on the "marketplace and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor of his rights." Yet the Assignment Agreement with Tsairis even

provided to him the right to sell the Collateral (ie the Focazio v. Aboyoun lawsuit). The relevant Paragraph provided; "If PLEDGER fails to make any payment to Lender in reduction of the Liabilities when due, Lender may seize, sell or otherwise dispose of any or all of the Collateral at any time and from time to time at public or private sale". This public interest is why litigants must have standing to bring an action in Court. Here the language of the assignments was total in that Plaintiff assigned not only the proceeds but the rights, title and interests to this lawsuit. Here neither Abdy nor Tsairis were before the Court, but yet, they 'owned' the proceeds of the lawsuit that was before the Court.

The argument that Plaintiff has an interest because the Focazio lawsuit might yield a verdict in excess of what he owes to Tsairis or Abdy, does not create standing. Plaintiff might have a subsequent claim against Tsiaris or Abdy for any excess funds, however, given that he has conveyed his entire interests in the lawsuit, his action would be based upon his contractual agreements with Tsiaris and Abdy, not based upon his claims against Aboyoun; because Plaintiff has assigned those rights pursuant to the agreements at issue in this matter.

There is also an implicit bias at issue that would have been highly prejudicial to the defendant. Both Abdy and Tsiaris were going to be essential fact witnesses in the legal malpractice case against Aboyoun. In a legal malpractice case, the plaintiff has to

prove his damages. In this matter, it was alleged that Focazio, due to the malpractice of Aboyoun, was obligated to pay Abdy and Tsairis. They were therefore important fact witnesses in this case. By assigning the interest to the lawsuit to these important facts witnesses resulted in an impermissible and unethical bias, and would have resulted in a denial of due process to this Defendant.

Rule 3.4(b) of the New Jersey Rules of Professional Conduct provides in pertinent part that "[a] lawyer shall not . . . offer an inducement to witness that is prohibited by law[.]" The ABA comment to Rule 3.4(b), upon which NJ's rules were based states that "the common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying…". The Restatement follows essentially the same approach.

A lawyer may not offer or pay to a witness any consideration:

(1) in excess of the reasonable expenses of the witness incurred and the reasonable value of the witness's time spent in providing evidence, except that an expert witness may be offered and paid a noncontingent fee;

(2) contingent on the content of the witness's testimony or the outcome of the litigation . . . .

[Restatement (Third) of Law Governing Lawyers § 117 (2000).]

Typically, lawyers may only compensate fact witnesses for: (1) reasonable expenses incurred by a witness to attend the trial, and (2) reasonable compensation for the loss of the witness's time

in attending the trial to testify. In re PMD Enters., 215 F. Supp. 2d 519, 529-30 (D.N.J. 2002). Congress codified this common law principle at 18 U.S.C. § 201, the criminal statute prohibiting bribery of public officials and witnesses. See 18 U.S.C. § 201(b)(3), (d) (generally prohibiting payment of witnesses, but permitting payment "by the party upon whose behalf a witness is called . . . , of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding").

Courts have reinforced this rule by deeming non-conforming agreements to compensate fact witnesses unenforceable for lack of consideration and being contrary to public policy. See In re PMD Enters., 215 F. Supp. 2d at 530 (citing Hamilton v. Gen. Motors Corp., 490 F.2d 223, 227-29 (7th Cir. 1973); Alexander v. Watson, 128 F.2d 627, 630 (4th Cir. 1942)).

With respect to contingent payments, such as in this case, while there does not appear to be direct precedent found in New Jersey, other state bars have disciplines attorneys who offered a fact witness a contingent fee. See, e.g., Florida Bar v. Wohl, 842 So. 2d 811, 813 (Fla. 2003) (suspending for ninety days a lawyer who entered into an agreement involving testimony by a former employee of the Winston family diamond business, who was prepared to testify in the estate litigation involving Harry Winston's widow; noting that the agreement called for a "bonus" of

up to $1,000,000 depending on the "usefulness of the information provided"); Committee on Legal Ethics of the State Bar v. Sheatsley, 452 S.E.2d 75, 77 (W. Va. 1994) (issuing a public reprimand critical of a lawyer who had agreed to pay his client's former employee $3,250 to prevent the former employee "from changing his story," and an additional $3,250 "upon a favorable completion of the case").

The assignment agreements Focazio entered are de facto continent payments to fact witnesses as they only receive the pledged money if Focazio is successful at trial. What makes these agreements particularly egregious is that they assign the entire case to third parties, third parties who are testifying as fact witnesses in a case in which the third parties are not a named, but possess the entirety of the claim. This is far worse that an "incentive" payment to a fact witness that is so discouraged by the cited law.

Lastly Aboyoun would note that while Plaintiff asserts neither Abdy nor Tsairis is directing this litigation and do not hold any role with respect to same, Aboyoun did not receive any opportunity to investigate these assertions. As indicated previously, Plaintiff provided the agreements with Abdy and Tsairis approximately six (6) weeks before trial in this matter, after discovery was long closed. Accordingly, Defendants were not afforded any opportunity investigate the documents or depose Abdy

and Tsairis regarding same. Plaintiff indicated at his deposition that he and Abdy were cousins, so Plaintiff's allegation that neither Tsairis nor Abdy are controlling this litigation is unsupported by any evidence in the record.

For the foregoing reasons, the Trial Court properly dismissed this case by finding that Plaintiff assigned his rights to a third party and no longer had standing to pursue this action. To hold otherwise would result in litigation among parties who have no interest in the outcome of the litigation, or any settlement, and could lead to fact witness tampering that would result in the impermissible taint of civil due process.

II. PLAINTIFF'S APPEAL AS TO MOOT EVIDENTIARY RULINGS BY THE TRIAL COURT SHOULD NOT BE CONSIDERED.

The second point of Plaintiff's brief asks this Court to overturn correct evidentiary rulings made by the Trial Court prior to this matter being dismissed for Plaintiff's assignment and lack of standing. As a threshold matter, the evidentiary rulings are moot because this matter was dismissed, and the dismissal should be upheld on appeal as discussed herein. "[C]ourts of this state do not resolve issues that have become moot due to the passage of time or intervening events." City of Camden v. Whitman, 325 N.J. Super. 236, 243 (App. Div. 1999). Since this matter was dismissed and should remain dismissed, Plaintiff's appeal regarding evidentiary rulings need not be addressed.

Furthermore, the Plaintiff is improperly requesting that this Court make potentially prospective evidentiary rulings. The Trial Court made certain pretrial evidentiary rulings prior to this matter being dismissed, however, the documents Plaintiff asks this Court to prospectively prohibit were never introduced as evidence during the underlying trial.

In addition to the deference trial Judges are afforded when making evidentiary rulings, Plaintiff is essentially seeking an advisory evidentiary opinion in the event this matter is remanded for trial. This argument is not properly before the Appellate Division and should not be decided prospectively. New Jersey courts have consistently held that they will "not render advisory opinions or function in the abstract." Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 107 (1971). Courts do not render advisory decisions because "[o]rdinarily, our interest in preserving judicial resources dictates that we not attempt to resolve legal issues in the abstract." Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 330 (1996).

Plaintiff is improperly seeking a prospective evidentiary ruling, in regard to evidence that may or may not be introduced at trial, in the event this matter is remanded. For that reason, it is respectfully submitted that the Court should decline to consider or rule upon the evidentiary arguments raised in Point II of Plaintiff's appellate brief.

If the Court wishes to consider the merits of Plaintiff's evidentiary arguments on this Appeal, Aboyoun respectfully submits that the Trial Court's determination of the evidentiary issues was unassailably correct.

N.J.R.E. 401 defines "relevant evidence" as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." To be relevant, the evidence must bear directly upon the issues as set forth in the pleadings. As this Court noted in State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990), "irrelevant evidence is inadmissible. Relevancy is tested by the probative value the evidence has with respect to the points at issue. The true test is the logical connection between the evidence and a fact in issue." Evidence is irrelevant if it does not have a "sufficient relationship to any material fact actually in issue in the case." State v. Jones, 346 N.J. Super. 391, 405 (App. Div. 2002). In Hutchins, supra, the Court stated,

> The rule speaks in terms of a "material" fact which is logically probative evidence . . . .[R]elevancy is really composed of two parts: probative value and materiality. Probative value concerns the tendency of evidence to establish the proposition that it is offered to prove. Materiality concerns the relation between the propositions for which the evidence is offered and the issues in the case. A material fact is one which is really in issue in the case.
> [241 N.J. Super. at 359 (citations omitted).]

Stated differently, "to say that evidence is irrelevant in the sense that it lacks probative value is to say that knowing the circumstantial evidence does not justify any reasonable inference as to the fact in question." State v. Allison, 208 N.J. Super. 9,17 (App. Div. 1985) (quoting McCormick on Evidence, §185 at 544).

Aboyoun respectfully submits that the documents Plaintiff asks this Court to bar at trial are wholly relevant. Plaintiff is seeking to bar the documents at issue solely because they reduce the credibility of Plaintiff's claims. That is not a valid basis to exclude evidence.

With respect to the complaint filed against Plaintiff by Allstate Insurance Co., those documents are relevant to Plaintiff's mindset, thought process, and finances during the relevant time period, when he was making important decisions regarding the underlying litigation. At the time Allstate filed the complaint against Plaintiff, in August of 2012, Plaintiff was in the midst of the underlying litigation against Tsairis. Discovery in the underlying litigation had been going on for over one year. The Allstate Complaint could have affected Plaintiff's decision-making and Aboyoun is entitled to question Plaintiff about that. Furthermore, the Allstate documents alleged medical billing fraud that went directly to plaintiff's credibility.

Regarding the fact that Plaintiff purchased another home for $10 million during the time period of the underling building project is also certainly relevant. At the time Plaintiff decided to cancel the underlying contracts with the architect and builder (Tsairis), Plaintiff was contemplating abandoning the construction project for turn-key home. Ultimately, he purchased another home for $10 Million, far in excess of the home that formed the basis of the underlying action. This strongly suggests that Plaintiff's decision to terminate the Tsairis contract was not based upon the construction project problems or based upon the legal advice of Aboyoun, but rather because Plaintiff was impatient and wanted to buy a home of a different caliber and price than the one at issue. Plaintiff could have allowed the builder more time to obtain the necessary permits and complete the project, but Plaintiff wanted to cancel the contract because he was contemplating buying a much more expensive home to his liking. This is wholly relevant to Plaintiff's motivations and his directions to Aboyoun in the underlying matter.

For those reasons, to the extent the Court wishes to consider the merits of Plaintiff's appeal as to evidentiary rulings, the Trial Court's underlying evidentiary rulings should be affirmed.

CONCLUSION

For the aforementioned reasons, Aboyoun respectfully requests that this Court deny Plaintiff's appeal in its entirety.

Respectfully submitted,

MCELROY, DEUTSCH & MULVANEY & CARPENTER, LLP
Attorneys for Defendants, Joseph S. Aboyoun, Esq., and Aboyoun & Heller, LLC

/s/ Daniel A. Malet

DANIEL A. MALET

Dated: May 29, 2024

WILLIAM J. FOCAZIO, M.D.; ARTHUR ST. REALTY, LLC; and ENDO SURGICAL CENTER OF EAST BRUNSWICK, LLC, Plaintiffs, vs. JOSEPH S. ABOYOUN, ESQ.; ABOYOUN & HELLER, LLC; NAGEL RICE, LLP; RANDEE MATLOFF, ESQ.; BRUCE NAGEL, ESQ.; and JOHN DOES, ESQS., 1-10 and JANE DOES, ESQS., 1-10 (a fictitious designation for presently unknown licensed attorneys, professionals and/or unknown persons or entities), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003587-22 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-2643-16 Sat Below: Hon. Vicki A. Citrino, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS WILLIAM J. FOCAZIO, M.D., ARTHUR ST. REALTY, LLC and ENDO SURGICAL CENTER OF EAST BRUNSWICK, LLC

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INTRODUCTORY STATEMENT

Despite the prolixity of Defendants-Respondent's brief, the Respondents do not dispute that the amounts pledged to Dr. Focazio's creditors are dwarfed by the amount Dr. Focazio is seeking in damages in this matter. Similarly, the creditors make no credible showing– how could they? – that these creditors had any control of the litigation of this legal malpractice case or any compromise or settlement of same. Said control always rested in the hands of the Plaintiff.

Similarly, the Defendant's do not claim that they filed any application attacking Dr. Focazio's standing until **after** the Jury had been empaneled for this matter, and after *in limine* motions had been filed. Nor do Defendants claim to have raised the affirmative defense of lack in standing Plaintiff being the real party in the interest in the twenty-one affirmative defenses set forth in their answer. (Pa0049-52)

Defendants' naked claim that Plaintiff received due process in opposing this motion on effectively one day notice during trial, should be given a little weight to this Court.

Similarly, Defendants' claim that any probative value of evidence of a subsequent purchase of a home by Dr. Focazio or a settled litigation would be worthy of the waste of time such evidence would occasion and/or outweigh its

immense prejudicial effect is likewise not seriously disputed in Respondent's brief.

Therefore, this reply brief will focus on whether or not a litigant in this state who maintains his control of his cause of action is permitted to pledge a portion of the proceeds from that cause of action to creditors should a litigant obtain a judgment or a settlement or whether as the Trial Court held such a pledge should result in a dismissal with prejudice.

The citizens of New Jersey who are placed in a disadvantageous position by a tortfeasor and are required to satisfy judgments or attorney's claims for fees should not be deprived of their right to pacify these creditors by pledging a portion of the proceeds of a lawsuit in which they seek to recover these damages.

ARGUMENT

I. THE PLEDGE OF SECURITY AND ACKNOWLEDGEMENT OF ATTORNEY'S LIEN WERE NOT ASSIGNMENTS IN THAT THEY GAVE NO CONTROL TO THE CREDITORS OF PLAINTIFF'S CAUSE OF ACTION AND PLAINTIFF'S CLAIM FOR DAMAGES DWARFED THE CREDITOR'S CLAIMS; PLAINTIFF IS PERMITTED TO PLEDGE PROCEEDS FROM A TORT ACTION TO CREDITORS

It is apparent from looking at the pledge and the attorney's lien acknowledgement, that neither of these are assignments. Neither of these agreements give the creditors any control over the litigation in question. They

certainly do not assign "all rights, title, and interest" in the litigation to either of them.

According to Black's Law Dictionary (9th ed.2009), "assignment" is a term of art meaning the "transfer of rights or property." The Third Circuit, providing a statement of New Jersey law, held that "[a]n assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires right to such performance." In re Jason Realty, L.P., 59 F.3d 423, 427 (3d Cir.1995) (citing Restatement (Second) of Contracts § 317 (1981) and Aronsohn v. Mandara, 98 N.J. 92, 98 (1984)).

According to the leading treatise on contract law, "the elements of an effective assignment include a sufficient description of the subject matter to render it capable of identification, and delivery of the subject matter, **with the intent to make an immediate and complete transfer of all right, title, and interest in and to the subject matter to the assignee.**" 29 Williston on Contracts § 74:3 (4th ed.2012); see also K. Woodmere Assocs., L.P. v. Menk Corp., 316 N.J.Super. 306, 314 (App.Div.1998) (quoting Williston for the elements of a valid assignment).

A valid assignment "transfers the whole of the interest in the right." Presley's Estate v. Russen, 513 F.Supp. 1339, 1350 (D.N.J.1981). Only an assignment that clearly reflects the assignor's intent to transfer his rights will be effective. Tirgan v. Mega Life & Health Ins., 304 N.J.Super. 385, 390, (App.Div.1997); Restatement (Second) of Contracts § 324 (1981). Plaintiff always and to this day controls this lawsuit. As a result of a valid assignment, the assignor loses all control over the subject matter of the assignment and all interest in the right assigned. Sheeran v. Sitren, 168 N.J.Super. 403, 414, (Law Div. 1979).

The Defendant's tale of horrors regarding compensating witnesses is in this context nonsensical. Plaintiff owes his attorneys the attorney's fees. They are seeking to secure their right to said attorney's fees by a lien and agreed to forgo collection actions pending the outcome of this action and whether or not the Plaintiff recedes any proceeds. The idea that a member of the bar would provide tainted or false testimony in order to recover a preexisting debt is one that the Defendants can explore upon cross-examination, but the idea that they should be precluded from testifying is without precedent.

Similarly, that Defendants might call Tsiaris as a witness and their witness might slant his testimony because Plaintiff owes them a debt which would be

satisfied from the proceeds of the litigation also finds no basis in law or public policy and can be explored through cross-examination and impeachment. The pledge and the attorney's lien are not an agreement to compensate fact witness anymore that it is an assignment of a lawsuit. In the event this Court erroneously agrees with the Trial Court and finds these pledges to be assignments; the remedy is to invalidate the assignments not to dismiss Plaintiff's case denying trial.

In Costanzo v. Costanzo, 248 N.J.Super. 116, 590 A.2d 268 (Law Div.1991), it was held that although a tort claim cannot be assigned under New Jersey law, the claimant can grant a prejudgment assignment of an interest in the proceeds of such claim. That decision was followed in Berkowitz v. Haigood, 256 N.J.Super. 342, 606 A.2d 1157 (Law Div. 1992). Here Plaintiff has pledged proceeds from this lawsuit – nothing more.

The Defendants largely seek to avoid the Trial Court's erroneous rulings on the two evidentiary matters by claiming same are moot. This Court should not subject the Plaintiff to a subsequent erroneous ruling and a third appeal in order to obtain a Trial on the merits that he is entitled to. This Court should correct these erroneous rulings.

This Court should correct the Trial Court's erroneous rulings and remand this matter for trial before a different Judge so that Dr. Focazio can receive a trial on the merits he has so assiduously sought.

CONCLUSION

For the forgoing reasons, the Plaintiff's appeal should be granted in this matter and this matter should be remanded to the Trial Court for trial on the merits.

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