

EARNEKA WIGGINS and LYNDA
MYERS,
Administratrixes of the estate of APRIL
CARDEN, dec'd,

Plaintiffs - Appellants,
v.

HACKENSACK MERIDIAN HEALTH dba
JFK UNIVERSITY MEDICAL CENTER

and

Alok Goyal, M.D. and South Plainfield
Primary Care

Defendants - Respondents.

NEW JERSEY
SUPREME COURT
DOCKET NO.: 089441

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003847-22

**DEFENDANTS-RESPONDENTS ALOK GOYAL, M.D. AND
SOUTH PLAINFIELD PRIMARY CARE'S AMENDED BRIEF IN
OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO APPEAL THE
APPELLATE DIVISION'S ORDER AND OPINION OF APRIL 18, 2024
AND IN SUPPORT OF CROSS-MOTION FOR LEAVE TO APPEAL
REGARDING REMANDER TO TRIAL COURT REGARDING WAIVER
ISSUE**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF JUDGMENTS, ORDERS, AND RULINGS	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	3
STATEMENT OF FACTS	8
LEGAL ARGUMENT	8
I. Plaintiffs’ Motion for Leave to Appeal Should Be Denied Because Plaintiffs Cannot Demonstrate Irreparable Injury and this Matter is not Ripe for Appeal.....	8
II. The Appellate Division was Correct in its Holding.....	10
A. The Appellate Division Thoroughly Analyzed <u>Buck</u> In Reaching Its Decision.....	11
B. The Holdings in <u>Nicholas</u> and <u>Pfannenstein</u> Provided Guidance as to the Application of the Kind-for-Kind Requirement of the Patients First Act and the Applicability of <u>Buck</u> in Addressing Overlapping Specialties.....	13
C. The Appellate Division’s Decision is Consistent with the Affidavit of Merit Statute’s Purpose, Imposes No New Requirements and is Consistent with Long-Standing Tort Law Principles.....	16
D. The Appellate Division Erred in Remanding the Statutory Waiver Issue as it Acknowledged that Plaintiffs Failed to File a Motion for Relief.....	19
CONCLUSION	22

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

Document

Appendix Page

Order of the Appellate Division granting defendants’ Motion for Leave for Appeal dated August 16, 2024.....Ca1

Order and Opinion of the Appellate Division dated April 18, 2024.....Ca5

Trial Court’s May 9, 2023 Order Denying Defendants’ Motion to Dismiss and Statement of Reasons.....Da105¹

Trial Court’s June 29, 2023 Order Denying Defendants’ Motion for Reconsideration and Statement of ReasonsDa140

¹ Da: Defendants’ appendix in the Appellate Division, as also relied upon and cited by plaintiffs in their Motion.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Buck v. Henry</u> , 207 N.J. 377(2011).....	11,12,13,14,18
<u>Castello v. Wohler</u> , 446 N.J. Super 1 (App. Div. 2016).....	20
<u>Crowe v. De Gioia</u> , 90 N.J. 126 (1982).....	9
<u>Ferreira v. Rancocas Orthopedic Associates</u> , 178 N.J. 144 (2003).....	4,19
<u>Green v. Piper</u> , 80 N.J. Eq. 288, 293 (Ch. 1912).....	9
<u>In re Petition of Hall</u> , 147 N.J. 379(1997).....	17
<u>Meehan v. Antonellis</u> , 226 N.J. 216(2016).....	20
<u>Nicholas v. Mynster</u> , 213 N.J. 463 (2013).....	11,13,14,15,16,17
<u>Paragon Contractors, Inc. v. Peachtree Condo. Ass'n</u> , 202 N.J. 415 (2010).....	17
<u>Pfannenstein v. Surrey</u> , 475 N.J. Super. 83 (App. Div. 2023).....	11,13,14,15,16,20
<u>Ryan v. Renny</u> , 203 N.J. 37(2010).....	20
<u>Subcarrier Communications, Inc. v. Day</u> , 299 N.J. Super. 634 (App. Div. 1997).....	8,9
 <u>Statutes</u>	
<u>N.J.S.A. 2A:53A-26</u>	4,5
<u>N.J.S.A. 2A:53A-27</u>	1,4
<u>N.J.S.A. 2A:53A-41</u>	1,19
 <u>Rules</u>	
Rule 2:2-2.....	8,9
Rule 4:5-3.....	3,11,12

PRELIMINARY STATEMENT

Plaintiffs-appellants (“plaintiffs”) seek leave to appeal the Appellate Division’s April 18 Order and Opinion (the “Appellate Division’s Opinion”) reversing the trial court’s denial of defendants Alok Goyal, M.D. and South Plainfield Primary Care’s (“Defendants”) Motion for Reconsideration and holding that plaintiffs failed to serve an Affidavit of Merit against defendants from an appropriately qualify expert.

The Affidavit of Merit (“AOM”) Statute expressly requires that the expert executing an affidavit against a defendant physician in a medical malpractice matter be properly qualified with the same credentials as that defendant, in the manner directed by the Patients First Act (the “PFA”) N.J.S.A. 2A:53A-41. N.J.S.A. 2A:53A-27. Specifically, the PFA requires kind-for-kind specialization between a defendant physician and a challenging expert executing an AOM. N.J.S.A. 2A:53A-41.

At all times, defendant Dr. Goyal has maintained that he specializes in both internal medicine and gastroenterology. The specialty Statement in defendants Dr. Goyal and South Plainfield Primary Care’s Answer and Jury Demand identified defendant Dr. Goyal as practicing both the medical specialties of internal medicine and gastroenterology and that his treatment of plaintiffs’ decedent also involved both

the medical specialties of internal medicine and gastroenterology. (Da33.)¹ Plaintiffs' Amended Complaint identified defendant Dr. Goyal as specializing in the fields of internal medicine and gastroenterology. (Da20.)

Dr. Goyal further executed a Certification representing that his practice and treatment of plaintiffs' decedent involved both the medical specialties of internal medicine and gastroenterology. (Da55.) Moreover, defendants also submitted a Certification from gastroenterology expert Meyer N. Solny, M.D. explaining that because of the advanced training involved in completing the subcertification of gastroenterology, the practice of internal medicine and gastroenterology cannot simply be bifurcated. (Da134.)

In response, plaintiffs only served the AOM of internist Stella Jones Fitzgibbons, M.D. (Da38.) It is undisputed that Dr. Fitzgibbons is not qualified in gastroenterology. It also is undisputed that at no point did plaintiffs file a formal motion seeking a waiver of the PFA's kind-for-kind requirements. Instead, plaintiffs argued that the alleged prescription of Allopurinol by Dr. Goyal only involved the practice of internal medicine and did not involve gastroenterology.

¹ Da: Defendants' appendix in the Appellate Division, as also relied upon and cited by plaintiffs in their Motion.

The trial court misapplied the kind-for-kind specialty requirement of the PFA and denied defendants' Motion to Dismiss. On appeal, the Appellate Division recognized that the PFA's kind-for-kind requirement obligated a challenging expert to be qualified in both specialties and that plaintiffs failed to serve an AOM from a properly qualified expert.

As such, plaintiffs' Motion for Leave to Appeal the Appellate Division's Order and Opinion of April 18, 2024 ("plaintiffs' Motion") should be denied.

PROCEDURAL HISTORY

On August 23, 2022, plaintiffs filed a Complaint alleging that defendants deviated from the accepted standard of medical care. (Da1.) On August 23, 2022, plaintiffs filed an Amended Complaint. (Da16.)

On September 21, 2022, defendants filed their Answer and Jury Demand denying all claims of negligence against them. (Da29.) The Specialty Statement within Defendants' Answer and Jury Demand made as required by R. 4:5-3 identified defendant Dr. Goyal as practicing the medical specialties of internal medicine and gastroenterology and that his treatment of plaintiffs' decedent involved the medical specialties of internal medicine and gastroenterology. (Da33.)

On November 10, 2022, plaintiffs filed Affidavits of Merit executed by internist Stella Jones Fitzgibbons, M.D. against all defendants. (Da38.) By way of letter to plaintiffs' counsel dated November 15, 2022, we objected to Dr. Fitzgibbons' Affidavit of Merit because Dr. Fitzgibbons was not qualified to execute an Affidavit of Merit as to defendants Dr. Goyal and South Plainfield Primary Care. (Da53.)

On November 28, 2022, the Honorable Cynthia Santomauro, J.S.C. conducted a conference pursuant to Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003) regarding plaintiffs' fulfillment of the requirement to furnish an Affidavit of Merit pursuant to N.J.S.A. 2A:53A-26, et seq. At the November 28, 2022 Ferreira Conference defendants advised the Court that Dr. Fitzgibbons was not qualified to execute an Affidavit of Merit as to defendants because she was only board certified in internal medicine and not both internal medicine and gastroenterology like defendant Dr. Goyal. At the November 28, 2022 Ferreira Conference, plaintiffs' counsel did not request a one-time 60 day statutory extension of time to file an Affidavit of Merit for good cause shown pursuant to N.J.S.A. 2A:53A-27. The Court directed defendants to file a Motion to dismiss concerning plaintiffs' expert Dr. Fitzgibbons. The Court also indicated that it wished to see a Certification from defendant Dr. Goyal that his treatment involved the practice of gastroenterology.

On December 21, 2022, defendants filed a Motion to Dismiss the Complaint as to Defendants Alok Goyal, M.D. and South Plainfield Primary Care with Prejudice for Failure to Comply with N.J.S.A. 2A:53A-26, et. seq. (Da41.) In support of defendants' motion, Dr. Goyal executed a Certification representing that he was Board Certified by the American Board of Medical Specialities in both internal medicine and gastroenterology. (Da55.) His Certification further represented that all treatment rendered to plaintiffs' decedent was provided as both an internist and as a gastroenterologist. (Da55.)

On December 22, 2022, the Honorable Sheila Venable, A.J.S.C. entered an Order changing the venue from Essex County to Union County. (Da99.) Plaintiffs filed their Opposition on January 4, 2023 and included a Certification from gastroenterology expert Todd D. Eisner, M.D., who asserted that he was unaware of any known gastrointestinal condition treated by Allopurinol.

Oral argument initially was heard before the Honorable Daniel R. Lindemann, J.S.C. on March 3, 2023. At oral argument, plaintiffs raised the issue of pursuing the PFA's statutory waiver of the same specialty requirement despite never filing a formal application for relief. In response, the Court directed plaintiffs' counsel to supplement the record with efforts to retain a gastroenterology expert.

On March 17, 2023, plaintiffs' counsel submitted a Certification in support of his efforts to retain a gastroenterology expert, identifying three gastroenterology experts he had contacted in an effort to obtain an AOM. Our office filed a response to plaintiffs' Certification on April 19, 2023.

Judge Lindemann conducted oral argument again on April 28, 2023. On May 9, 2023, Judge Lindemann entered an Order denying defendants' motion along with his statement of reasons. (Da105.)

Defendants filed a Motion for Reconsideration on May 26, 2023. Da121. In support of the Motion for Reconsideration, defendants submitted the certification of gastroenterology expert Meyer N. Solny, M.D. (Da134.) Dr. Solny's Certification indicated that Allopurinol is not prescribed solely for internal medicine purposes and there is a use in gastroenterology. (Da134.) Dr. Solny's Certification further indicated that it is not possible to bifurcate and separate knowledge of gastroenterology and internal medicine. (Da134.) Accordingly, all treatment rendered by a gastroenterologist necessarily involves knowledge of both gastroenterology and internal medicine. (Da134.)

Oral argument was held by Judge Lindemann on June 28, 2023. On May 9, 2023, Judge Lindemann entered an Order denying defendants' motion along with his statement of reasons. (Da140.) Specifically, the trial court held that the care at issue

“was one that involved internal medicine such that a Certification from a gastroenterologist is not needed.” Id.

Defendants moved for leave to appeal on July 19, 2023, which was granted on August 16, 2023. (Ca1.) In a published decision on April 18, 2024, the Appellate Division entered an Order and Opinion granting defendants’ Appeal. (Ca5-30.) The Appellate Division held that plaintiffs failed to serve an AOM executed by an appropriately qualified expert. (Ca22-29.) Specifically, plaintiffs failed to meet the kind-for-kind requirements of the PFA by serving the AOM of an expert only qualified in internal medicine. Id. The Appellate Division held that plaintiffs were required to serve an AOM by an expert qualified in the specialties practiced by defendant Dr. Goyal: internal medicine and gastroenterology.² Id. Nevertheless, the Appellate Division also held that the waiver issue had not been addressed by the trial court because it was deemed moot based upon the trial court’s erroneous decision in finding the AOM sufficient. (Ca27-30.)

On May 8, 2024, plaintiffs filed the instant Motion.

² Plaintiffs erroneously claims that the Appellate Division’s Opinion would require an AOM from both an internist and a gastroenterologist. There is no support this proposition in the Appellate Division’s Opinion.

STATEMENT OF FACTS

Contrary to plaintiffs' Motion, other than defendant Dr. Goyal specializing in internal medicine and gastroenterology, and having treated plaintiffs' decedent in the past, the facts plaintiffs relied upon have not been established. There has been no exchange of discovery or medical records, other than defendants' office chart, due to the ongoing motion practice concerning plaintiffs' failure to serve an AOM from a qualified expert. In fact, the subject hospital chart, which is not within these defendants' possession, has not been produced. Defendants, therefore, incorporate by reference the above Procedural History into their Statement of Facts.

LEGAL ARGUMENT

I. PLAINTIFFS' MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED BECAUSE PLAINTIFFS CANNOT DEMONSTRATE IRREPARABLE INJURY AND THIS MATTER IS NOT YET RIPE FOR APPEAL

Plaintiffs' Motion fails to meet the criteria set forth by R. 2:2-2 required to bring an appeal from an interlocutory order to the New Jersey Supreme Court. Pursuant to the plain language of R. 2:2-2, an appeal to the New Jersey Supreme Court may be permitted "when necessary to prevent irreparable injury[.]" Our decisional authority has long held that an injury "is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Subcarrier

Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997)(citing Crowe v. De Gioia, 90 N.J. 126, 132-133 (1982.))“In other words, plaintiff must have no adequate remedy at law.” Id. (citing Green v. Piper, 80 N.J. Eq. 288, 293 (Ch. 1912.))

Plaintiffs have not set forward any facts or legal authority supporting the proposition that an “irreparable injury” would occur absent granting plaintiffs’ motion. In support of their Motion, plaintiffs have merely made a vague reference to the impact on their case and hypothetical pending/future medical malpractice matters involving unrelated litigants. This is insufficient.

Simply stated, there is no risk of an irreparable injury to plaintiffs. By its very nature, in bringing a medical malpractice lawsuit, plaintiffs implicitly acknowledge that their injury can be redressed at law through monetary damages. There is no time-sensitive issue which would be lost if their Motion is not heard and that monetary damages could not redress, such as where an injunction is necessary or a pending application of the death penalty (prior to its abolishment in 2007.) Moreover, plaintiffs’ concerns regarding other, unrelated medical malpractice matters are entirely inapplicable to the R. 2:2-2 standard for bringing an interlocutory appeals to the New Jersey Supreme Court. There cannot be any irreparable harm to the parties

stemming from the impact of an Appellate Division decision on the cases of unrelated litigants.

Moreover, plaintiffs' Motion is not yet ripe. As noted in both the April 18, 2024 Order and in plaintiffs' Motion, the matter was remanded back to the trial court to determine the waiver issue. The trial court has yet to resolve this issue. Although unlikely, the trial court may in fact resolve the issue in plaintiffs' favor and grant the statutory waiver, in which case plaintiffs' Motion would be moot. Conversely, should the trial court rule against plaintiffs and dismiss the Complaint with prejudice, they would be able to bring an appeal based upon the entry of a final order.

As such, plaintiffs' Motion should be denied.

II. THE APPELLATE DIVISION WAS CORRECT IN ITS HOLDING (Ca5-34.)

The Appellate Division's Opinion did not introduce any new requirements to the AOM statute and PFA. Rather, the Appellate Division's decision merely reiterated the requirement that a challenging expert in a medical malpractice matter must be equivalently credentialed to the defendant physician. The Appellate Division's decision likewise reiterated that this kind-for-kind requirement applied when the defendant physician practiced in multiple specialties. As such, its decision was entirely consistent with the AOM statute, the PFA, and our decisional authority,

including Buck v. Henry, 207 N.J. 377 (2011), Nicholas v. Mynster, 213 N.J. 463 (2013) and Pfannenstein v. Surrey, 475 N.J. Super. 83 (App. Div. 2023.)

Accordingly, plaintiffs' Motion should be denied.

A. THE APPELLATE DIVISION THOROUGHLY ANALYZED BUCK IN REACHING ITS DECISION.

Plaintiffs argue that the Appellate Division erroneously ignored the New Jersey Supreme Court's holding in Buck in reaching its decision. Specifically, plaintiffs argue that the Appellate Division ignored Buck's holding that where a defendant physician has "overlapping specialties," an Affidavit of Merit from a physician specializing in either area will be sufficient.

However, a cursory reading of the Appellate Division's Opinion demonstrates that plaintiffs' assertion that the Appellate Division ignored Buck has no basis. Rather, it is clear that plaintiffs merely disagree with the Appellate Division's application of Buck.

The Appellate Division appropriately recognized the "problems highlighted in Buck leading to the revised Rule 4:5-3 and remand to the trial court are not present here." (Ca26.) The Buck matter involved a significantly different set of circumstances in which the practice of the defendant physician was unclear. (Ca20-21.) The Appellate Division explained that this confusion resulted in a new procedural

requirement, now embodied in R. 4:5-3, in which a defendant physician must include a specialty statement identifying their practice and whether the their treatment involved that specialty in order to put the plaintiffs on notice as to the appropriate qualifications required of the challenging expert submitting an AOM. (Ca23.)

The Appellate Division recognized that “a plaintiff cannot chose the specialty that the defendant physician was practicing when treating the patient.” (Ca30.) This is entirely consistent with the New Jersey Supreme Court’s holding in Buck, as now embodied in R. 4:5-3, that “[a] physician knows the specialty in which he practices.” Buck, 207 N.J. at 396 n.1

Here, the Appellate Division recognized that, unlike the plaintiffs in Buck, plaintiffs were immediately aware of Dr. Goyal’s specialties. (Ca22.) The Appellate Division observed that the Complaint described Dr. Goyal as specializing in the fields of internal medicine and gastroenterology. Id. Dr. Goyal complied with R. 4:5-3 in providing a specialty statement advising that he practiced both medical specialties of internal medicine and gastroenterology. Id. Consistent with Buck and R. 4:5-3, the Appellate Division thus recognized that it was incumbent upon plaintiffs to respond to the information provided by defendant Dr. Goyal in his Answer. (Ca26.)

Importantly, the Appellate Division’s Opinion further noted that plaintiffs’ reliance upon the language in Buck that plaintiffs only needed to provide an AOM

from a challenging expert in one specialty, even if the defendant physician had specialized in multiple practices, was misplaced. (Ca29.) The Appellate Division noted that Buck and its progeny made clear that this language was dicta and was not controlling as to the circumstances presented here. Id. The Appellate Division recognized that unlike the instant matter, the central issue in Buck did not involve the specialty of the challenging expert needed where a defendant physician specialized in two practice areas and treated the plaintiff in both capacities. Id. The prospect of a lesser-qualified physician, such as plaintiff's internist Dr. Fitzgibbons, criticizing a higher-qualified physician's actions is contrary to the kind-for-kind credentialing requirements of the PFA.

In sum, the Appellate Division's Opinion correctly interpreted and applied Buck to the facts of this case, while being mindful of the statutory requirements of the PFA and subsequent decisional authority. As such, plaintiff's Motion should be denied.

B. THE HOLDINGS IN NICHOLAS AND PFANNENSTEIN PROVIDED GUIDANCE AS TO THE APPLICATION OF THE KIND-FOR-KIND REQUIREMENT OF THE PATIENTS FIRST ACT AND THE APPLICABILITY OF BUCK IN ADDRESSING OVERLAPPING SPECIALTIES

Plaintiffs argue that neither the New Jersey Supreme Court's holding in Nicholas or the Appellate Division's published decision in the Pfannenstein matter

provide a basis to address Buck's holding regarding overlapping specialties. Specifically, plaintiffs argue that neither case is applicable because they did not involve circumstances in which the defendant physician practiced multiple specialties.

As an initial note, as discussed above, the Appellate Division's Opinion made clear that plaintiffs' understanding of Buck was erroneous and based merely on dicta relating to circumstances wholly different than presented in the instant matter. The Appellate Division's reliance on Nicholas and Pfannenstein cases in reaching its decision was proper because both cases merely restated and emphasized the legislative intent that a challenging expert be equivalently credentialed to the defendant physician.

The Appellate Division's Opinion explained at length the applicability of the New Jersey Supreme Court's decision in Nicholas. (Ca23-25.) In short, the Appellate Division's Opinion explained that Nicholas reiterated the importance of the kind-for-kind requirement of the PFA by requiring a challenging expert to have the same credentials as the defendant physician, even if their treatment overlapped. Id.

Importantly, the Appellate Division's holding in Pfannenstein was particularly instructive in demonstrating the application of the kind-for-kind requirement of the PFA.

In Pfannenstein, the plaintiffs claimed that the internist defendants negligently prescribed heparin (a medication utilized to prevent blood clots) to the plaintiffs' decedent. Pfannenstein, 475 N.J. Super at 93. Prior to the defendants answering the complaint, the plaintiffs served the AOM of a hematologist not practicing internal medicine, who asserted that the subject matter treatment involved in the action was hematology. Id. at 91-92.

In answering the complaint, the defendants identified their specialty as internal medicine. Id. at 92. The defendants objected to the plaintiffs' AOM for failing to meet the kind-for-kind requirement set forth in the PFA and in Nicholas v. Mynster, 213 N.J. 463 (2013) because the plaintiffs' expert did not practice internal medicine. Id. In response, the plaintiffs argued that the treatment at issue, the prescription of heparin, involved hematology, a subspecialty of internal medicine, and therefore that the AOM from a hematologist was sufficient. Id. at 92-93.

The Appellate Division soundly rejected the plaintiffs' argument. Id. at 102-103. Consistent with the New Jersey Supreme Court's holding in Nicholas, it reiterated that the "challenging plaintiff's expert, who is expounding on the standard of care, must practice in the same specialty." Id. In short, the Appellate Division held that the plaintiff cannot dictate the specialty in which a defendant physician's treatment involved. Likewise, the Appellate Division's decision confirmed that the

court cannot disregard a defendant physician's answer in which they identify their practice and the specialty involved in the subject treatment. *Id.* at 100.

In sum, Nicholas and Pfannenstein both stand for the same proposition: a challenging expert must have the same credentials and practice as the defendant physician to meet the kind-for-kind requirements of the PFA. Plaintiffs' cannot dictate the specialty of the defendant physician. The challenging expert must view the case through the same conceptual lens as the defending physician by having the same credentials and practice.

Plaintiffs' service of an AOM executed by an internist Dr. Fitzgibbons failed to accomplish this legislative goal as she would have no basis to comment on the practice of gastroenterology.

Accordingly, plaintiffs' Motion should be denied.

C. THE APPELLATE DIVISION'S DECISION IS CONSISTENT WITH THE AFFIDAVIT OF MERIT STATUTE'S PURPOSE, IMPOSES NO NEW REQUIREMENTS AND IS CONSISTENT WITH LONG-STANDING TORT LAW PRINCIPLES

Plaintiffs' convoluted argument concerning "well-established" tort principles is both nonsensical and inapplicable. In short, plaintiffs argue that the Affidavit of Merit statute is not meant to dismiss meritorious cases brought in good faith. Plaintiffs' further argue that internist Dr. Fitzgibbons' AOM opining that there was

a reasonable probability that Dr. Goyal deviated from the standard of care should have sufficed because if the fact-finder accepted their expert's testimony, and if plaintiffs were to be able to establish causation, they would have established a meritorious case.

Respectfully, plaintiffs' argument concerning whether the fact-finder accepts an expert's trial testimony is entirely irrelevant. The purpose of the AOM is "to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of the litigation." Paragon Contractors, Inc. v. Peachtree Condominium as, 202 N.J. 415, 421-22 (2010)(citing In re: Petition of Hall, 147 N.J. 379, 391 (1997.)) It is not an expert report. It is a bare-minimum statutory requirement that a plaintiff must fulfill at the early stages of medical malpractice litigation. Plaintiffs' assertion that if the fact-finder accepted the testimony of an expert then the case must have merit is a meaningless statement that puts the cart before the proverbial horse. This argument has no bearing on the kind-for-kind requirement at issue here and can be applied to any specialty. Similar to the circumstances presented in Nicholas, this argument "would lead back to the days before passage of the" PFA in which physician experts would offer testimony "even though not equivalently credentialed to defendant physicians." Nicholas, 213 N.J. 485.

Plaintiffs' argument that somehow the Appellate Division's Opinion created a type of "immunity" and that plaintiffs would be somehow required to prove that a physician "deviated from the standard of care as to each and every specialty in which he claims to practice" at best indicates a fundamental misunderstanding of the Appellate Division's holding.

The Appellate Division's Opinion did not create any type of "immunity." Rather, it merely clarified the kind-for-kind credentials required of the challenging expert by the Patients First Act for the purpose of fulfilling the requirements of the Affidavit of Merit statute. Likewise, plaintiffs' notion that there somehow are multiple standards of care applicable to any given defendant physician and that multiple experts would be required is contrary to the plain language of the Appellate Division's Opinion.

The Appellate Division made this clear in its analysis of Buck, stating that "the statute referred to a 'person' or 'witness' executing an affidavit in the singular." (Ca22.) Plainly stated, the Appellate Division's Opinion reflects the purpose of the PFA by again reiterating that the a challenging expert must practice the same specialties as the defendant physician.

Finally, plaintiffs' argument that this somehow would increase the cost of litigation also is speculative. Moreover, any increases in litigation costs that would

be incurred in retaining equivalently qualified experts would not be an expense solely borne by plaintiffs. In defending a malpractice matter, the defendant physician also would need to retain an equivalently qualified expert.

As such, plaintiffs' Motion should be denied.

D. THE APPELLATE DIVISION ERRED IN REMANDING THE STATUTORY WAIVER AS IT ACKNOWLEDGED THAT PLAINTIFFS FAILED TO FILE A MOTION FOR RELIEF

As noted in plaintiffs' Motion, the Appellate Division did not entirely dismiss the Complaint with prejudice. Rather, the Appellate Division remanded the matter to the trial court to address the issue of the statutory waiver embodied in N.J.S.A. 2A:53A-41(c.)(Ca31.)

If, and only if, the New Jersey Supreme Court grants plaintiffs' Motion and permits leave to file an appeal, we respectfully request that leave be granted to appeal the Appellate Division's remand of the waiver issue. The Appellate Division acknowledged that to obtain a waiver, the statute requires the plaintiff to file a motion to seek relief. (Ca32.) The Appellate Division also acknowledged that plaintiffs neither requested a waiver during the Ferreira Conference, nor did plaintiffs file a formal motion. Id. In fact, the Appellate Division further acknowledged that this

typically would be the end of the analysis Id. However, the Appellate Division noted that the issue was raised during several proceedings and in parties' submissions. Id.

In reaching its decision, the Appellate Division noted that the trial court did not rule on the waiver issue on its merits because it determined the issue was moot as a result of its erroneous ruling regarding the sufficiency of plaintiffs' expert's AOM. (Ca32-33.) Accordingly, the Appellate Division ultimately remanded the instant matter to the trial court because the trial court had not ruled on the waiver's applicability on its merits.(Ca33.)

Nevertheless, the Appellate Division advised that the requirement of a formal motion was in no way abrogated, citing its holding in Castello v. Wohler, 446 N.J. Super 1 (App. Div. 2016) in which it was found that the request for a waiver in opposition to a motion to disqualify an expert did not satisfy the formal motion requirements of the statutory waiver. Likewise, the Appellate Division directed the trial court that in considering the statutory waiver, it also was to consider the applicable decisional authority, including Ryan v. Renny, 203 N.J. 37 (2010) and Pfannenstein. (Ca34.)

The Appellate Division's review of a trial court's order interpreting compliance with the Patients First Act is *de novo*. Meehan v. Antonellis, 226 N.J. 216, 230 (2016.) Accordingly, the Appellate Division was in no way beholden to the trial

court's proceedings concerning the waiver issue. The Appellate Division's findings make obvious that plaintiffs did not satisfy the provisions of the statutory waiver provision. The Appellate Division itself held that the formal motion requirements were not abrogated. (Ca33.) The decisional authority referenced by the Appellate Division itself makes clear that the statute requires the filing of a formal motion by a party seeking the waiver's relief. The waiver itself is a form of relief and as such does not offer additional relief for non-compliance with the statute. As such, the Appellate Division should not have remanded the issue to the trial court as it creates the possibility of a ruling inconsistent with the statute and directions of the Appellate Division. The Appellate Division had sufficient information and the authority to fully dismiss the Complaint with Prejudice.

Again, we stress that we do not feel that plaintiffs' Motion should be granted for the aforementioned reasons. However, should plaintiffs' Motion be granted, we respectfully request that defendants' Cross-Motion for Leave regarding the applicability of the statutory waiver be granted as well.

CONCLUSION

For the reasons discussed above, it is respectfully requested that this Court deny plaintiffs' Motion for Leave to Appeal the Appellate Division's Order and Opinion of April 18, 2024. It is further respectfully requested that if, and only if, this Court grant plaintiffs' Motion, that this Court also grant defendants' Cross-Motion with regard to the Appellate Division's remand to the trial court concerning the statutory waiver issue.

Respectfully submitted,

/s/ Richard J. Tamn
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(Attorney ID#: 01361-2005)

Dated: June 7, 2024