EARNEKA WIGGINS and LYNDA MYERS, Administratrixes of the Estate of April Carden, dec'd,

Plaintiffs,

v.

HACKENSACK MERIDIAN HEALTH dba JFK UNIVERSITY MEDICAL CENTER, ALOK GOYAL, M.D., SOUTH PLAINFIELD PRIMARY CARE, JOHN/JANE DOES #1-50 (fictitious names of individuals, nurses, physicians, medical personnel, sole practitioners, including employees, contractors, or subcontractors with JFK Medical Center, or other entities who rendered medical care to April Carden) and ABC CORPORATIONS #1-20 (fictitious corporations, partnerships, sole proprietorships and/or other legal entities that rendered medical care to John F. Couts, Jr.);

Defendants.

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 089441

On Motion for Leave to Appeal from an April 18, 2024 Opinion from:

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-3847-22

On Motion for Leave to Appeal from Orders Filed June 29, 2023, Denying Defendants' Motions for Reconsideration of a May 9, 2023 Order Denying Defendants' Motions to Dismiss the Complaint for Failure to Provide an Affidavit of Merit from an Appropriate Licensed Person, from:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO.: UNN-L-0005-23

Sat Below:
Hon. Daniel R. Lindemann, J.S.C.

Civil Action

REVISED BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO APPEAL AND IN SUPPORT OF CROSS MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

Plaintiffs in this suit allege medical negligence claims arising from decedent April Carden's treatment by codefendants Alok Goyal, M.D. and his practice group, South Plainfield Primary Care at JFK University Medical Center, a division of HMH Hospitals Corp. ("JFK"), during September 2020. Specifically, plaintiffs allege that Dr. Goyal negligently prescribed Allopurinol to Ms. Carden in September 2020, resulting in a diagnosis of Stevens-Johnson syndrome and related injuries. Plaintiffs' claims against JFK are premised upon vicarious liability or apparent authority for Dr. Goyal's conduct.

Defendants moved to dismiss the claims against them pursuant to the Affidavit of Merit ("AOM") Statute, N.J.S.A. 2A:53A-26 to -29, and the kind-for-kind specialty requirement set forth in the Patients First Act ("PFA"), N.J.S.A. 53A-37 to -42, because Dr. Goyal practices in the specialties of ***internal medicine and gastroenterology***, and his treatment of plaintiffs' decedent involved those medical specialties, while plaintiffs provided an AOM against all defendants from a physician who was board certified in ***internal medicine only*** and thus was not qualified to give an AOM supporting the claims against the defendants.

Plaintiffs argued that Dr. Goyal's prescription of Allopurinol to Ms. Carden was in his capacity as an internal medicine specialist, submitting

certifications from other physicians to that effect, but did not obtain an AOM from a gastroenterologist. Nor did plaintiffs expressly file a motion to waive the same specialty requirements of the PFA. Instead, they raised the possibility of waiver in their opposition to defendants' motions.

By order filed May 9, 2023, the Honorable Daniel R. Lindemann, J.S.C. denied defendants' motions to dismiss. The court found that plaintiffs reasonably relied on a prior "finding," made by the Honorable Cynthia D. Santomauro, J.S.C. at a prior Ferreira conference, directing Dr. Goyal to provide a certification that he prescribed Allopurinol in his capacity as a gastroenterologist. Defendants failed to provide that "specific certification" because Dr. Goyal certified that the treatment he provided to Ms. Carden was as both an internist and gastroenterologist, but did not address the prescription of Allopurinol specifically. In the alternative, Dr. Fitzgibbons' being certified in internal medicine was sufficient under Buck v. Henry, 207 N.J. 377, 391 (2011), even if she was not certified in gastroenterology, because the prescription of Allopurinol falls within the specialty of an internist. All defendants filed motions for reconsideration, and by orders filed on June 29, 2023, Judge Lindemann denied those motions.

In an April 18, 2024 opinion, the Appellate Division reversed the trial court's orders, holding that the same specialty requirements of the PFA required

an AOM from an expert qualified in both specialties, and remanded for an assessment of the waiver issues raised by plaintiff and briefed by the parties but not assessed by the motion judge.

Plaintiff now seeks leave to appeal to this Court, asserting that the Appellate Division disregarded the Buck opinion and "incentivized defendant physicians to broadly define their specialties" thus "allowing a defendant physician to commandeer a malpractice action". (Pb4.) Defendant JFK submits that there is no risk of irreparable injury to plaintiff requiring an immediate appeal and review of the Appellate Division's opinion, pursuant to R. 2:2-2(a). The Appellate Division applied the AOM Statute and the PFA as the Legislature intended, by directing that the complaint be dismissed ***with prejudice before*** discovery proceeds, unless plaintiff is able to prevail on the request for a waiver of the same specialty requirements on remand. In the alternative, should the Court be inclined to consider plaintiffs' arguments, defendants should be permitted to cross appeal on the issues of whether plaintiffs complied with the statutory procedure to obtain a waiver, and whether they are substantially entitled to such relief.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. Plaintiffs' Complaint

Plaintiffs in this case allege medical negligence claims arising from April Carden's care and treatment by codefendant Alok Goyal, M.D. at JFK during September 2020. The amended complaint[2] alleges "Defendant Goyal was an agent, servant, or employee of JFK University Medical Center," and that "JFK Medical Center was vicariously liable for the acts and omissions of Dr. Goyal. Plaintiffs' claims against JFK thus are premised upon the theory that JFK is vicariously liable for Dr. Goyal's conduct. (Da16 ¶ 10.)[3]

Plaintiffs' amended complaint, codefendants' answer, Dr. Goyal's curriculum vitae, Dr. Goyal's certification provided in support of codefendants' motion to dismiss, an excerpt from codefendants' office records and a license search confirm that Dr. Goyal practices in the medical specialties of internal medicine and gastroenterology, and that his treatment of Ms. Carden involved

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[1] The procedural history and statement of facts are combined for purposes of concision and clarity.

[2] The original complaint incorrectly reflects that the matter was filed in Camden County. (See Da1.) The amended complaint is corrected to indicate that the matter was initially venued in Essex County. (See Da14.) By order filed December 22, 2022, venue was transferred to Union County. (Da138-143.)

[3] JFK's appendix in support of its motion for leave to appeal to the Appellate Division is cited as "Da" in this brief. Plaintiffs' appendix in support of the motion for leave to appeal to this Court is cited as "Ca".

the medical specialties of internal medicine and gastroenterology. (See Da5; Da31; Da69; Da70; Da94-129.)

On November 10, 2022, plaintiffs filed AOMs executed by Stella Jones Fitzgibbons, M.D., against all defendants (See Da57-60.) Dr. Fitzgibbons was board certified in internal medicine and during the year immediately preceding the date of the occurrence that was the basis for the complaint, and devoted the majority of her professional time to the practice of internal medicine. (See Da58.) Dr. Fitzgibbons concludes that there is a reasonable probability that the treatment provided by defendants fell outside of the professional treatment standards based upon "the records which I have reviewed." (See Da58.) Dr. Fitzgibbons' curriculum vitae confirms that she is board certified in internal medicine only. (See Da61.) She has worked part time as a hospitalist from March 2018 to the present time, and worked as a "volunteer in primary care at Interfaith Community Clinic" from 2008 through the present time. (Da63.)

Defendants objected to the AOMs, because Dr. Fitzgibbons is only board certified in internal medicine, not gastroenterology, did not spend sufficient professional time practicing in the same specialties as Dr. Goyal during the year prior to the events giving rise to this litigation, and did not adequately identify the records she reviewed in reaching her conclusions (See Da153-154; Da166-168.)

B. The November 28, 2022 Ferreira Conference

A conference was held pursuant to Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003), on November 28, 2022. Defendants objected to the AOMs of Dr. Fitzgibbons because she was not qualified to execute an affidavit of merit against Dr. Goyal. Plaintiffs did not request an extension of the time to file an AOM at this conference. Dr. Goyal and South Plainfield Primary Care filed a motion to dismiss on December 21, 2022 (see Da47-137), and JFK filed a cross-motion to dismiss on December 29, 2022 (see Da144-154), due to plaintiffs' failure to timely submit a valid AOM.

In opposing the motions to dismiss, plaintiffs explained that Ms. Carden received medical treatment from Dr. Goyal at JFK during August and September 2020. (See Da179.) Ms. Carden's JFK records indicated that she was allergic to tramadol, and Dr. Goyal, several years earlier, had treated Ms. Carden for Stevens Johnson syndrome resulting from tramadol administration. Dr. Goyal nonetheless prescribed Allopurinol, which is also known to cause Stevens Johnson syndrome, to Ms. Carden from September 4 to 8, 2020, for "Uric Acid Kidney Stones, hyperuremia secondary to AKI" according to a discharge medication list, allegedly causing her to develop Stevens Johnson syndrome again, leading to her death. (See Da158.)

According to plaintiffs, the conditions for which Dr. Goyal treated Ms. Carden were not gastrointestinal in nature, and Allopurinol is not used to treat any gastrointestinal conditions. The prescription of Allopurinol thus did not "involve" the "specialty or subspecialty" of gastroenterology, so that an AOM from an internist is sufficient. Plaintiffs provide a supplemental certification from Dr. Fitzgibbons stating that the Allopurinol had to have been prescribed by Dr. Goyal in his capacity as an internist, not a gastroenterologist. (See Da160.) Plaintiffs also provided a certification from gastroenterologist Todd D. Eisner, M.D. stating that "I was asked to review this matter to see if the defendant gastroenterologist was negligent in his practice of gastroenterology" and "I am familiar with the prescribing of Allopurinol and am aware of no known gastrointestinal condition that is treated by Allopurinol." (Da163.)

Plaintiffs' counsel also provides a certification stating that in November 2022, he had the action reviewed by three gastroenterologists, Dr. Eisner, Stuart Finkel, M.D. and Bruce Salzburg, M.D. "with an eye toward obtaining an [AOM] against Defendant Goyal." (Da171.) An affidavit from Dr. Finkel is attached, stating "I could not sign an [AOM] because I do not have experience in the diagnosis or management of the conditions at issue, as there did not appear to be any Gastrointestinal issues for me to consider." (Da174.)

According to plaintiffs' lawyer, Dr. Salzburg similarly advised "I am sorry I do not have experience in the diagnosis or management of this condition. I am a Gastro and there does not appear to be any GI issues." (Da171.) T here is no certification from Dr. Salzburg. Plaintiffs' counsel thus submits "I have made a good faith effort to obtain a gastroenterology expert for this case but have been unable to do so because the case does not involve a matter for gastroenterologists." (Da172.)

C. The May 9, 2023 Order and Opinion

By order filed May 9, 2023, the court denied defendants' motion to dismiss the complaint for failure to comply with the AOM Statute. (See Da200). Judge Lindemann relied on Judge Santomauro's "finding," at the Ferreira conference that Dr. Goyal had to provide a certification that Allopurinol was prescribed by Dr. Goyal in his capacity as a gastroenterologist. The certification by Dr. Goyal dated December 12, 2022, stated that all treatment he rendered "to plaintiff's decedent was provided as both an internist and as a gastroenterologist." (Da71) In Judge Lindemann's view, the certification thus did not comply with Judge Santomauro's "finding". The court also found that plaintiffs had substantially complied with the AOM Statute because plaintiffs had reached out to several gastroenterologists who declined to provide an AOM. (Da214.)

The court further found that a physician specializing in either internal medicine or gastroenterology is sufficient pursuant to Buck v. Henry, 207 N.J. 377 (2011). Thus, the trial court ruled that because Dr. Fitzgibbons specializes in one of the specialty areas—internal medicine—her AOM was sufficient against Dr. Goyal, whose answer set forth that he specialized in both internal medicine and gastroenterology and his care and treatment of plaintiffs' decedent involved those specialties.

The court also relied on the additional certifications provided by Dr. Fitzgibbons and Dr. Eisner, explaining that Allopurinol could not have been prescribed for any gastrointestinal condition, and thus Dr. Goyal could not have been prescribing the medicine in his capacity as a gastroenterologist.

D. Defendants' Motions for Reconsideration

On May 26, 2023, defendants Dr. Goyal and South Plainfield Primary Care filed a motion for reconsideration of the May 9, 2023 order. (See Da216.) In support of the motion for reconsideration, Dr. Goyal submitted a certification from Meyer N. Solny, M.D., an expert in internal medicine and gastroenterology, explaining that Allopurinol is not solely prescribed for internal medicine purposes. Allopurinol is used in gastroenterology and gastroenterologists regularly prescribed allopurinol in their role as gastroenterologists. (See Da232.) Dr. Solny further certified that it is not

possible to bifurcate and separate knowledge of gastroenterology and internal medicine. (Da233.) Moreover, all treatment by Dr. Goyal, including the prescription of Allopurinol, would necessarily involve both of his specialties. As such, the only expert qualified to offer a standard of care opinion as to Dr. Goyal would be an expert board certified in both internal medicine and gastroenterology. (Da233.) Thereafter, on June 15, 2023, defendant JFK filed a cross-motion for reconsideration. (See Da240-246.)

E. The June 29, 2023 Orders and Opinion

By orders filed June 29, 2023, Judge Lindemann denied defendants' motions for reconsideration, stating that there was no appropriate basis to modify or change the May 9, 2023 order. (See Da249.) The court held that its reliance upon Buck v. Henry, 207 N.J. 377 (2011), was not misplaced and reiterated that, since the care at issue in this case involved internal medicine, an affidavit from a gastroenterologist was not needed. (See Da254.)

F. The Appellate Division's April 18, 2023 Opinion

Defendants' motions for leave to appeal were granted. (Ca1-2.) In an April 18, 2024 published opinion, the Appellate Division held that plaintiffs failed to serve an AOM executed by an appropriately qualified expert. (See Ca22-29.) Plaintiffs had failed to meet the kind-for-kind requirements of the PFA by serving the AOM of an expert qualified in internal medicine only. (See ibid.) Plaintiffs were required to provide an AOM by an expert qualified in both

specialties practiced by Dr. Goyal: internal medicine and gastroenterology. (See ibid.) The matter was remanded to so that the trial court could address the waiver issue, which had been deemed moot due to the trial court's finding the AOM to be sufficient. (See Ca27-30.) Plaintiff now has moved for leave to appeal.

LEGAL ARGUMENT

I. PLAINTIFFS' MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED.

New Jersey's AOM Statute provides that in any action for damages for personal injury, wrongful death or property damage, resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, plaintiff shall, within the specified time following the filing of the answer, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint fell outside acceptable professional or occupational standards or treatment practices. See N.J.S.A. 2A:53A-27.

The purpose of the AOM Statute is to "require plaintiffs in malpractice cases to make a threshold showing that their claims are meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation." In re Petition of Hall, 147 N.J. 379, 391 (1997); see A.T. v. Cohen, 231 N.J. 337, 345-46 (2017);

Fink v. Thompson, 167 N.J. 551, 559 (2001). "The statute is designed to ferret out frivolous lawsuits at an early point in the litigation. Requiring a threshold showing of merit balances the goal of reducing frivolous lawsuits and the imperative of permitting injured plaintiffs the opportunity to pursue recovery from culpable defendants." Fink, 167 N.J. at 559; see also A.T., 231 N.J. at 345-46.

An AOM normally must be filed within ***sixty*** days of the filing of the defendant's answer to the plaintiff's complaint. N.J.S.A. 2A:53A-27. The time period can be extended to a maximum of ***120*** days if good cause is established. See ibid.; A.T., 231 N.J. at 345. The courts do not have the discretion to permit any further extension of time. See N.J.S.A. 2A:53A-27; A.T., 231 N.J. at 346. The failure to provide an AOM within the designated period in a professional negligence case is equivalent to a failure to state a cause of action, and will result in the dismissal of the complaint with prejudice. See N.J.S.A. 2A:53A-29; A.T., 231 N.J. at 346.

The AOM Statute provides that "In the case of an action for medical malpractice, the person executing the affidavit" must satisfy the requirements of the PFA, N.J.S.A. 2A:53A-41. See N.J.S.A. 2A:53A-27. N.J.S.A. 2A:53A-41, in turn, provides that "In an action alleging medical malpractice, a person shall not give expert testimony" or execute an affidavit of merit "on the appropriate standard of practice or care unless that person is licensed as a physician or other healthcare professional" and meets the other criteria set forth in N.J.S.A. 2A:53A-41.

N.J.S.A. 2A:53A-41(a) further provides that in a medical malpractice action, if the person against whom an expert opinion is offered practices in a ***specialty or subspecialty*** recognized by the American Board of Medical Specialties ("ABMS") or the American Osteopathic Association ("AOA") ***or*** is board certified in a specialty or subspecialty recognized by the ABMS or AOA ***and*** the care or treatment at issue involves that board specialty or subspecialty, the person offering the opinion must practice in the same specialty or subspecialty. See N.J.S.A. 2A:53A-41(a). N.J.S.A. 2A:53A-41(b) provides alternate standards for ***general practitioners***. "The basic principle behind N.J.S.A. 2A:53A-41 is that the challenging expert' who executes an [AOM] in a medical malpractice case, generally, should 'be equivalently qualified as the defendant' physician." Buck v. Henry, 207 N.J. 377, 389 (2011) (quoting Ryan v. Renny, 203 N.J. 37, 52 (2010)).

> The statue sets forth three distinct categories embodying this kind-for-kind rule: (1) those who are specialists in a field recognized by the [ABMS] but who are not board certified in that specialty, (2) those who are specialists in a field recognized by the ABMS and who are board certified in that specialty; and (3) those who are "general practitioners."

Ibid. (citing N.J.S.A. 2A:53A-41(a)-(b)). If the defendant is a specialist, whether board certified or not, the expert giving an [AOM] "must be a specialist in the same field in which the defendant physician specializes." Nicholas v. Mynster, 213 N.J. 463, 482 (2013). If the defendant also is certified in that specialty, the affiant must also must be credentialed as described in the statute. See N.J.S.A. 2A:53A-41(a).

To ensure that plaintiffs have sufficient information to obtain an appropriate AOM, the Supreme Court in Buck directed that defendant physicians indicate in their answers to plaintiffs' complaints "the field of medicine in which [they] specialized, if any, and whether [their] treatment of the plaintiff involved that specialty." Id. at 396; see also R. 4:5-3 (codifying the defendant doctor's disclosure requirement). The purpose of this requirement is to "giv[e the] plaintiff sufficient notice of [the defendant's specialty," so that the plaintiff can "fulfill the [AOM] requirement." Pressler & Verniero, Current N.J. Court Rules, cmt. R. 4:5-3 (2024).

Plaintiffs submit that the Appellate Division "ignored" Buck in finding the "problems highlighted in Buck leading to the revised Rule 4:5-3 and a remand to the trial court are not present here," given that Dr. Goyal included a specialty statement in his answer and that a Ferreira conference was conducted. (Pb20 (quoting Ca26).) Plaintiffs further view Buck as holding that when a defendant physician has "overlapping specialties" and AOM from a physician specializing in any of those areas is acceptable. (Pb21.)

Plaintiffs' position is incorrect. 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 Supreme Court's direction in Buck that "A physician knows the specialty in which he practices." Buck, 207 N.J. at 396 n.1. Plaintiffs in this case at all

relevant times were on notice that Dr. Goyal specialized in internal medicine and gastroenterology, and that his treatment of Ms. Carden involved the medical specialties of internal medicine and gastroenterology. Plaintiffs thus were fully on notice that they had to provide an AOM from a like-qualified person. (See Ca22.) The Appellate Division correctly rejected plaintiffs' reading of Buck as being based upon dicta in that case (see Ca29), and applied Buck to the facts of the instant case in light of the statutory requirements and associated authority. There is no error requiring this Court's intervention.

The appellate court's opinion also is fully consistent with the subsequent holdings in Nicholas v. Mynster, 213 N.J. 463 (2013), and more recently, Pfannenstein v. Surrey, 475 N.J. Super. 83 (App. Div. 2023), which confirmed the principle that pursuant to N.J.S.A. 2A:53A-41, any expert providing opinions must have the same specialties as the defending physician. Plaintiffs—again incorrectly—contend that Nicholas and Pfannenstein are not relevant because the defendants in those cases did not claim that they rendered treatment in multiple specialties. (See Pb21-22.)

In Nicholas, the New Jersey Supreme Court directed that "when a physician is a specialist and the basis of the malpractice action 'involves' the physician's specialty, the challenging expert must practice in the same specialty." Id. at 481-82. In that case, a proposed expert who was board certified

in internal and preventive medicine was not qualified to testify against defendants who were board certified in emergency medicine and family medicine, despite the proposed expert being hospital credentialed to treat carbon monoxide poisoning, the subject of the litigation. Although emergency medicine, family medicine and internal medicine specialists may all treat carbon monoxide poisoning in the course of their practice, an internist cannot give an AOM against emergency or family medicine doctor. To conclude otherwise "would lead back to the days before passage of the [PFA] when, in medical malpractice cases, physician experts of different medical specialties, but who treated similar maladies, could offer testimony even though not equivalently credentialed to defendant physicians," and would "read out of the statute the kind-for-kind specialty requirement" the Legislature intended to impose. Id. at 485.

In Pfannenstein, the Appellate Division held that a physician who was board certified in hematology was not qualified to give an AOM against the defendant internal medicine specialists, although hematology is a subspecialty of internal medicine. The Pfannenstein court also confirmed that a physician's answer regarding his or her specialty cannot be disregarded. See Pfannanstein, 475 N.J. Super. at 99-100. Consistent with Nicholas, the Pfannenstein court reiterated that the "challenging plaintiff's expert, who is expounding on the standard of care, must

practice in the same specialty" as the defendant. Pfannenstein, 475 N.J. Suepr. at 102-03.)

N.J.S.A. 2A:53A-27 expressly requires that the expert executing an AOM against a defendant physician be properly qualified with the same credentials as that defendant. The statutory language is clear and unambiguous. Allowing plaintiffs to proceed simply because Dr. Fitzgibbons is board certified in internal medicine would directly contravene the statute's purpose as well as its express directions. Again, there is no error in the Appellate Division's opinion applying the AOM Statute and PFA requiring this Court's intervention.

Finally, JFK notes that plaintiffs allege that Dr. Goyal "was acting as the agent, servant, or employee of JFK" when the care at issue was rendered. (Da16 ¶10.) Plaintiffs' claims against JFK thus clearly are premised upon vicarious liability or apparent authority for Dr. Goyal's conduct. The Court in Haviland v. Lourdes Medical Center of Burlington County, 250 N.J. 368 (2022), recently confirmed that when the plaintiff's claim of vicarious liability hinges upon allegations of a deviation from professional standards of care by a licensed individual who was an employee or agent of the named defendant, an AOM and an expert opinion from a person with the same qualifications as the employee must be provided. Therefore, if the AOM is not sufficient as to Dr. Goyal, then the AOM is

not sufficient to support a vicarious liability claim against JFK for Dr. Goyal's actions.

Rule 2:2-2(b) allows the Supreme Court to grant leave to appeal an interlocutory order "Of the Appellate Division when necessary to prevent irreparable injury." The appellate courts have considerable discretion in determining whether the standard has been satisfied and granting a motion for leave to file an interlocutory appeal. Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008); State v. Reldan, 100 N.J. 187, 205 (1985). Piecemeal review of trial-level proceedings, however, ordinarily is strongly disfavored. See, e.g., Brundage, 195 N.J. at 599; Edwards v. McBreen, 369 N.J. Super. 415, 420 (App. Div. 2004).

An interlocutory appeal normally will not be allowed to "correct minor injustices", but should be granted when there is a possibility that "some grave damage or injustice" would otherwise result, Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div.), certif. denied, 22 N.J. 574 (1956), cert. denied, 353 U.S. 923 (1957), if a preliminary error "could infect a trial and would otherwise be irremediable in the ordinary course," State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997); see State v. Reldan, 100 N.J. 187, 205 (1985), or "where the appeal, if sustained will. . . very substantially conserve the time and expense of the litigants and the courts," Romano, 41 N.J. Super. at 568; see Brundage, 195

N.J. at 599. An interlocutory appeal may also be appropriate to allow the appellate court to address a novel issue of law. See, e.g., Brundage, 195 N.J. at 600; Arena v. Saphier, 201 N.J. Super. 79, 81 (App. Div. 1985).

There is no irreparable injury or error requiring this Court's intervention pursuant to R. 2:2-2(a). The Appellate Division correctly applied the AOM Statute and PFA consistent with their terms, the precedent on point, the record in this case and the underlying goal of identifying frivolous claims at the outset while allowing only meritorious claims to proceed, and remanded for an assessment of the waiver issue. The trial court may determine that issue in plaintiff's favor, allowing the suit to proceed, or in defendants' favor, allowing plaintiffs a direct appeal from a final order. There is no risk of irreparable harm to plaintiffs in this case, or to litigants in other matters more generally. Plaintiffs' motion for leave to appeal should be denied, or, should the Court be inclined to hear plaintiffs' arguments, the waiver issues should also be considered.

II. IF THE COURT IS INCLINED TO GRANT PLAINTIFFS' MOTION FOR LEAVE TO APPEAL, THE ISSUE OF WHETHER PLAINTIFFS ARE ENTITLED TO A WAIVER OF THE SAME SPECIALTY REQUIREMENTS SHOULD ALSO BE CONSIDERED (Ca5-34).

Plaintiffs have also suggested that they are entitled to a waiver of the same specialty requirements of the PFA pursuant to N.J.S.A. 2A:53A-41(c), which provides:

> A court may waive the same specialty or subspecialty recognized by the [ABMS] or the [AO] and board certification requirements of this section, upon motion by the party seeking a waiver, if, after the moving party has demonstrated to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty, the court determines that the expert possesses sufficient raining, experience and knowledge or provide the testimony as a result of active involvement in, or full-time teaching of medicine in the applicable area of practice or a related field of medicine.

A court thus may waive the same specialty requirements if the requesting party satisfies two criteria: "a good faith effort has been made to identify an expert in the same specialty or subspecialty' and the proffered expert "possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of medicine in the applicable area of practice or a related field of medicine." Pfannenstein, 475 N.J. Super. at 104.

The waiver provision "opens the door for a non-equivalently-qualified expert in the same field as defendant to testify," and may "permit[ ] an expert in one field to opine on the performance of an expert in another related field." Ryan v. Renny,

203 N.J. 37, 53 (2010). Indeed, "the very existence of the waiver provision" made it "obvious" that "the Legislature did not intend a malpractice case to stand or fall solely on the presence or absence of a same-specialty expert." Id. at 55. Thus, the waiver provision provides "a safety valve" for cases where a party cannot locate such an expert within the statutory time limit or at all. Id. at 56.

A party cannot, however, be relieved of the statutory requirements through "desultory undertakings or half-heated endeavors" but must show what steps were undertaken to obtain a kind-for-kind expert, including

> the number of experts in the field; the number of experts the moving party contacted; whether and where he expanded his search geographically when his efforts were stymied; the persons or organizations to whom he resorted for help in obtaining an appropriate expert; and any case-specific roadblocks (such as the absence of local subspecialty experts) he [or she] encountered.

Ibid. The party seeking waiver need not reveal "the reasons why a particular expert or experts declined to execute an affidavit." Ibid. This is because N.J.S.A. 2A:53A-41(c) refers only to "the robustness of [the] movant's efforts.'" Ryan, 203 N.J. at 56.

The Appellate Division in this case did not dismiss the complaint with prejudice, but instead remanded to the trial court to address the availability of the waiver. (See Ca31.) It remains JFK's position that plaintiffs in this case have not demonstrated that they are entitled to a waiver of the same specialty requirement pursuant to N.J.S.A. 2A:53A-41(c). First, plaintiffs did ***not*** file a

motion or cross-motion for a waiver and thus have not complied with the statutory procedure. See N.J.S.A. 2A:53A-41(c); Pfannenstein, 475 N.J. Super. at 105; Castello v. Wohler, 446 N.J. Super. 1, 11 (App. Div. 2016).

Second, plaintiffs also have not demonstrated that they are substantially entitled to a waiver. Plaintiffs' counsel has advised only that three gastroenterologists reviewed the case and declined to provide an affidavit of merit. (See Da171.) Plaintiffs only submitted a certification from one gastroenterologist after the deadline for the affidavit of merit, and then one additional certification months after that. (See Da174.) The certifications were focused on what area of specialty was involved. Plaintiffs do not describe any efforts to contact physicians who, like Dr. Goyal, specialize in both internal medicine and gastroenterology, or any efforts to expand the search to locate an appropriate expert. The reasons the potential experts declined to provide an AOM are not relevant. Only the plaintiffs' efforts should be considered. Again, there is no authority for plaintiffs' position that they can avoid the application of the AOM Statute and associated same specialty requirements by presenting certifications from other physicians stating that the areas of specialty involved were different from those identified in the defendant's pleading. Such a reading of the applicable statutes is incompatible with the express language of the statutes and their underlying goals and cannot be sustained.

Accordingly, JFK respectfully submits that if and only if the Court grants plaintiffs' motion for leave to appeal, it should also allow defendants to cross appeal on the issue of the application of the waiver, so that the interrelated issues raised in this case can be comprehensively considered and addressed, and in order to provide direction on the statute's application in future matters.

CONCLUSION

Defendant JFK respectfully requests that the Court deny plaintiffs' motion for leave to appeal from the Appellate Division's April 18, 2024 opinion. In the alternative, should the Court be inclined to consider plaintiffs' argument, defendants cross appeal on the waiver issue should also be granted.

Respectfully submitted,

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Dated: June 11, 2024

By: _____
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