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| EARNEKA WIGGINS and LYNDA MYERS, as administratixes of the estate of APRIL CARDEN,<br>deceased,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>HACKENSACK MERIDIAN HEALTH, d/b/a JFK UNIVERSITY MEDICAL CENTER,<br><br>Defendants-Respondents,<br><br>and<br><br>ALOK GOYAL, M.D., and SOUTH PLAINFIELD PRIMARY CARE,<br><br>Defendants-Respondents. | SUPREME COURT OF NEW JERSEY<br>DOCKET NO.:<br><br>Civil Action<br><br>On Motion for Leave to Appeal From an Interlocutory Decision Of the Superior Court of New Jersey, Appellate Division<br><br>Docket No.: AM-592-22<br><br>Sat Below:<br><br>Hon. Heidi Currier, P.J.A.D.<br>Hon. Ronald Susswein, J.A.D.<br>Hon. Christine M. Vanek, J.A.D. |

# PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL THE APPELLATE DIVISION'S INTERLOCUTORY OPINION AND ORDER OF APRIL 18, 2024 AND APPENDIX (Ca1-34)

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## PRELIMINARY STATEMENT

This case presents the Court with an opportunity to reaffirm its holding in *Buck v. Henry*, 207 N.J. 377 (2011), which has guided litigants and lower courts for over a decade when dealing with the overlapping specialties problem under the Affidavit of Merit statute, § 2A:53A-26, *et seq*. Under N.J.S.A. § 2A:53A-41, plaintiffs must provide an affidavit of merit from a challenging expert who practices in the same specialty as the defendant physician—provided that the care or treatment at issue involves that specialty. But when a defendant physician practices in multiple specialties, and claims the care he rendered overlaps within those several specialties, a question arises: does the plaintiff need to serve an affidavit of merit from a challenging expert as to each and every specialty? *Buck* answered that question unequivocally: where a physician "practice[s] in more than one specialty," and their treatment of plaintiff "fall[s] within that physician's multiple specialty areas," then "an affidavit of merit from a physician specializing in either area will suffice." *Buck*, 207 N.J. at 391. Unfortunately, the Appellate Division's decision ignores *Buck* and ushers in a new era that will bar meritorious malpractice claims, drive up the costs of litigation, and effectively weaponize the Affidavit of Merit statute.

The facts here are tragic but straight-forward: in September 2020, defendant Dr. Alok Goyal, M.D., a board certified internist and gastroenterologist, prescribed Allopurinol (under the brand name Zyloprim) to decedent April Carden to treat her

for uric acid kidney stones. Zyloprim's FDA-approved label includes a contraindication for patients who have previously suffered severe allergic reactions to Allopurinol. Just five years earlier, Ms. Carden had contracted Stevens-Johnson syndrome, a rare and severe skin disorder, when she was prescribed Allopurinol. Dr. Goyal, though not the prescriber, was Ms. Carden's primary care physician at that time. Shortly after ingesting Zyloprim in September 2020, Ms. Carden once again developed Stevens-Johnson syndrome, this time passing away. Ms. Carden's estate filed a medical malpractice suit against Dr. Goyal, as well as against his employer, South Plainfield Primary Care, and the hospital where Ms. Carden received certain emergency medical care in September 2020, Hackensack Meridian Health ("JFK University Medical Center"). The Complaint alleged, among other things, that Dr. Goyal improperly prescribed Allopurinol to Ms. Carden.

Plaintiffs served a timely affidavit of merit from Dr. Stella Fitzgibbons, M.D., who is board certified in internal medicine, stating that Dr. Goyal's treatment deviated from the applicable standard of care. Plaintiffs' counsel also contacted gastroenterologists, who advised that the medical records did not reveal any gastrointestinal-related treatment and, thus, they could not offer an affidavit of merit.

Defendants moved to dismiss the Complaint because Dr. Fitzgibbons was not board certified in gastroenterology. The trial court denied the motion based, in part, on *Buck*. On leave to appeal, the Appellate Division reversed, holding that plaintiffs

needed to serve an affidavit of merit from both an internist and gastroenterologist. The court placed great weight on Dr. Goyal's self-serving Specialty Statement in his Answer, where he claimed that his "treatment of plaintiffs' decedent involved the medical specialties of Internal Medicine and Gastroenterology." (Da33). The court held that a "plaintiff must respond to the information provided by the doctor in the answer" and, thus, plaintiffs here needed an affidavit from a gastroenterologist to comply with the statute.

Respectfully, the Appellate Division erred. *Buck* is clear about how to deal with a defendant physician specializing in multiple areas and claiming the care at issue falls within those several specialties: "an affidavit of merit from a physician specializing in either area will suffice." *Buck*, 207 N.J. at 391. This approach has common sense appeal grounded in well-established tort principles: a physician who commits malpractice in one specialty must answer for it, regardless of whether his conduct falls below the standard of care in another specialty.

The Appellate Division ignored *Buck* and incentivized defendant physicians to broadly define their specialties, which will unnecessarily drive up the costs of litigation. There is no statutory support for the Appellate Division allowing a defendant physician to commandeer a malpractice action in this way. For these reasons, and as more fully explained below, this Court should grant leave to appeal.

## PROCEDURAL AND FACTUAL BACKGROUND

A. Dr. Goyal's Medical Background.

Dr. Goyal received his medical degree from Columbia University in New York in 1984, and then completed an internship (1984-85), residency (1985-87), and a fellowship (1987-89). He practices internal medicine and gastroenterology at a private medical office, South Plainfield Primary Care, in South Plainfield, NJ. (Da54). Dr. Goyal also has admitting privileges at JFK University Medical Center in Edison, NJ. (*Id.*). Dr. Goyal is certified by the American Board of Medical Specialties (ABMS) in internal medicine and gastroenterology. (*Id.*).

B. Dr. Goyal's Treatment of Ms. Carden.

Ms. Carden was a 57-year-old female at the time of her death on September 29, 2020. (Da20). For several years prior to her death, Ms. Carden visited Dr. Goyal for primary care services. (See Da146-65). For example, based on her medical records, Ms. Carden visited Dr. Goyal on November 14, 2016, December 4, 2018, November 20, 2019, and February 19, 2020, for her annual exam (Da146-58). Dr. Goyal would treat Ms. Carden for various issues, including hypertension, shortness of breath, panic attacks, and shoulder pain. (Da146, Da151, Da153-54, Da157). From time to time, Dr. Goyal would also treat Ms. Carden for gastrointestinal issues, including a colon screening. (Da147; Da165).

On December 29, 2015, approximately five years prior to her death, Dr. Goyal prescribed Tramadol for Ms. Carden. (Da19). One week later, Dr. Anil Khandelwal prescribed Allopurinol to Ms. Carden. (*Id.*). Ms. Carden suffered a severe allergic reaction, which resulted in her developing Stevens-Johnson syndrome. (*Id.*). Stevens-Johnson Syndrome is a "rare disorder most commonly caused by an adverse drug reaction"; it "causes painful blisters and lesions on the skin and mucous membranes and can cause severe eye problems." (Ca6[2]). Ms. Carden was successfully treated for the condition at JFK University Medical Center. (Da19).

In the summer of 2020, Ms. Carden began experiencing unexpected falls, decreased mobility, and an inability to care for herself (Pa43). On August 24, 2020, Ms. Carden was admitted to JFK University Medical Center for treatment. (*Id.*). She was diagnosed with a blood clot, treated, and discharged on September 3, 2020. (Da19-20). Ms. Carden's JFK University Medical Center records failed to properly document her allergy to Allopurinol. (*Id.*).

The day after being released from JFK University Medical Center, Ms. Carden was treated by Dr. Goyal for uric acid kidney stones, hyperuremia secondary to [Acute Kidney Infection]. (Pa46). On September 4, 2020, Dr. Goyal prescribed Allopurinol to Ms. Carden—the same medication that she received in January 2016 just before experiencing Stevens-Johnson Syndrome. (Pa46; Da4).

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[2] "Ca" refers to the appendix submitted with the instant motion and attached to this brief.

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Allopurinol is an anti-gout medication and was prescribed to Ms. Carden under the brand name Zyloprim. (Pa46). Zyloprim is an FDA-approved drug. *Zyloprim Product Information*, Food & Drug Admin., *1.[3] Its warning label specifically warns against skin rashes and Stevens-Johnson Syndrome. *Id*. at *4. Just as importantly, the label also sets forth contraindications—*i.e.*, "situations in which the drug should not be used because the risk of use (e.g., certain potentially fatal adverse reactions) clearly outweighs any possible therapeutic benefit," 21 C.F.R. § 201.57. Zyloprim's contraindication section states: "[p]atients who have developed a severe reaction to ZYLOPRIM should not be restarted on the drug." *Id*.

A mere five days later, Ms. Carden was admitted back to JFK University Medical Center with Stevens-Johnson Syndrome. (Da20). Hospital medical staff believed the condition was due to Allopurinol, which was immediately discontinued. (*Id*.). Ms. Carden's condition became progressively worse, and she was transferred to Saint Barnabas Medical Center for sloughing skin on her torso, arms and upper legs. (*Id.*). Tragically, 12 days later, Ms. Carden died due to multiple organ failure, bacteremia, and Stevens-Johnson Syndrome. (*Id.*).

[3] www.accessdata.fda.gov/drugsatfda_docs/label/2018/016084s044lbl.pdf (last visited May 8, 2024).

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C. The Complaint, Answer, Affidavit Of Merit And Motions.

On August 24, 2022, Earneka Wiggins and Lynda Myers, in their capacity as administratrixes of Ms. Carden's estate, filed the instant suit in Essex County Superior Court. (Da16). The suit named as defendants Dr. Goyal, South Plainfield Primary Care, and JFK University Medical Center. (Da17-18). Plaintiffs asserted claims for medical malpractice and vicarious liability. (Da20). The suit asserted that the defendants breached the standard of care by, among other things, prescribing Allopurinol and failing to take a proper medical history. (Da22).

On September 21, 2022, Dr. Goyal and South Plainfield Primary Care filed their Answer and Affirmative Defenses. (Da29). In their responsive pleading, both defendants included a Specialty Statement under Rule 4:5-3 that provided as follows: "At all relevant times, these defendants practiced the medical specialties of [i]nternal [m]edicine and [g]astroenterology and their treatment of plaintiffs' decedent involved the medical specialties of [i]nternal [m]edicine and [g]astroenterology." (Da33). On October 4, 2023, JFK University Medical Center filed its Answer and Affirmative Defenses (JFK34[4]).

On November 10, 2022, plaintiffs served three affidavits of merit—one for each defendant—from Dr. Fitzgibbons. (JFK59). Dr. Fitzgibbons is a licensed

[4] "JFK" refers to the appendix submitted by Defendant JFK University Medical Center in the Appellate Division.

physician in the State of Texas who is board certified in internal medicine and actively practiced in that field during the year prior to Ms. Carden's death. (JFK58-60). Dr. Fitzgibbons opined that, based upon her review of the records, there is a reasonable probability that all three defendants' care of Ms. Carden "fell outside professional treatment standards." (JFK58; accord JFK59-60). Dr. Fitzgibbons does not specialize in gastroenterology.

On November 15, 2022, counsel for Dr. Goyal sent a letter to plaintiffs' counsel objecting to Dr. Fitzgibbons's affidavit of merit on the basis that she was not properly qualified. (JFK67). On November 28, 2022, the Hon. Cynthia Santomauro, J.S.C., conducted a *Ferreira*[5] conference. (Da46). At that conference, defense counsel spelled out their objections to the affidavit of merit, specifically, that Dr. Fitzgibbons was not board certified in gastroenterology and did not practice in that field. (Da47). Judge Santomauro then stated that Dr. Goyal would have to sign a certification declaring that he prescribed Allopurinol in his capacity as a gastroenterologist (as opposed to internist). (JFK165). Dr. Goyal's counsel disputes this version of events and there is no transcript. (JFK236).

All three defendants moved to dismiss based on the lack of an affidavit of merit from a gastroenterologist. (Da41[6]). Instead of the certification required by

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[5] *Ferreira v. Rancocas Orthopedic Assocs.*, 178 N.J. 144 (2003)
[6] "Da" refers to the appendix submitted by Dr. Goyal in the Appellate Division.

Judge Santomauro, Dr. Goyal provided a certification blandly stating "[a]ll treatment that I rendered to plaintiffs' decedent was provided as both an internist and as a gastroenterologist." (JFK71). He then went on to cite examples of his treatment as a gastroenterologist: "For example, my care and treatment of plaintiffs' decedent included discussing, recommending and performing colonoscopies and esophagogastroduodenoscopy, as well as evaluating plaintiffs' decedent for concerns such as rectal bleeding and black stool." (JFK71-72). Absent from the certification is anything stating that prescribing Allopurinol to treat uric acid kidney stones was somehow related to any gastroenterology-related issue or concern. (*See Id.*).

While the defendants' motion to dismiss was pending, on December 22, 2022, the Hon. Sheila Venable, A.J.S.C., granted JFK University Medical Center's motion to change venue and entered an order transferring the matter from Essex County to Union County. (JFK138-39). Once in Union County Superior Court, the Hon. Daniel R. Lindemann, J.S.C., heard oral argument on the pending motions to dismiss on March 3, 2023. (JFK202). During that argument, the court advised plaintiffs' counsel to supplement the record and demonstrate any efforts taken to obtain opinions from gastroenterologists. (*Id.*). Plaintiffs' counsel obliged.

On March 17, 2023, plaintiffs' counsel submitted a certification from Dr. Stuart Finkel, M.D., a gastroenterologist, who opined that he had been asked to review Ms. Carden's medical records to determine if an affidavit of merit was

appropriate. (JFK174). Dr. Finkel certified he could not provide any such affidavit because "there did not appear to be any Gastrointestinal issues" to consider. (*Id.*). Plaintiffs' counsel also relayed a statement from Bruce Salzburg, M.D., another gastroenterologist, who informed him that "there does not appear to be any GI issues" to opine on. (JFK171). This evidence was in addition to the certification from Dr. Todd Eisner, M.D., another gastroenterologist, which plaintiffs had provided with their initial opposition papers. Dr. Eisner reviewed Ms. Carden's medical records and certified that he wasn't aware of any gastrointestinal condition that is treated by Allopurinol. (JFK163). Thus, there was nothing for Dr. Eisner to opine on from the standpoint of gastroenterology.[7]

On May 9, 2023, Judge Lindemann denied the motions to dismiss. (JFK201-15). In the Statement of Reasons, the court noted N.J.S.A. § 2A:53A-41 requires that, where a defendant physician "is a specialist or subspecialist recognized by [ABMS] . . . and the care or treatment at issue involves that specialty or subspecialty," then the challenging physician must have "specialized in the same specialty or subspecialty" at the time of the incident giving rise to suit. (JFK206 (citing N.J.S.A. § 2A:53A-41)). The court found significant that Judge Santomauro had instructed defense counsel to have Dr. Goyal sign a certification stating he

[7] In all, plaintiffs' counsel had the case reviewed by 12 gastroenterologists, none of whom could identify any gastrointestinal-related treatment and, thus, could not supply an Affidavit of Merit. (Pa34-35).

treated Ms. Carden solely in his capacity as a gastroenterologist and that Dr. Goyal failed to do so. (JFK214). Thus, the trial court found that Dr. Goyal's prescription of Allopurinol was the "treatment at issue" and it involved Dr. Goyal's specialty in internal medicine, not gastroenterology. (*Id.*).

Alternatively, the trial court relied on *Buck*'s holding that, where a physician practices in more than one specialty and provided treatment within those multiple specialties, then "an affidavit of merit from a physician specializing in either area will suffice." (*Id.* (citing *Buck*, 207 N.J. at 391)). Because Dr. Goyal's certification stated all treatment he rendered Ms. Carden was in his capacity as "both an internist and as a gastroenterologist," the trial court found that Dr. Fitzgibbons's affidavit of merit sufficed under *Buck*.

On May 26, 2023, Dr. Goyal moved for reconsideration, this time attaching new evidence in the form of a certification from Meyer N. Solny, M.D., a board certified gastroenterologist and internist. (JFK216-34). Dr. Solny certified that the use of Allopurinol is "well-known" in gastroenterology and has been described in "gastroenterology textbooks for years." Dr. Solny's certification doesn't specifically identify these textbooks or otherwise cite to them, nor does he list a single gastrointestinal use for Allopurinol. Dr. Solny also certified that a gastroenterologist "can prescribe Allopurinol within the standard of care while acting in their role as a gastroenterologist." (JFK233). However, Dr. Solny did not mention whether

prescribing Allopurinol for treating uric acid kidney stones—which was the reason Dr. Goyal prescribed Allopurinol to Ms. Carden (JFK232-34)—fell within the domain of gastroenterology. Defendant JFK University Medical Center cross-moved for reconsideration. (JFK240).

On June 29, 2023, the trial court denied the motion for reconsideration. (JFK251-52). The trial court also denied defendants' motion to stay discovery pending an application for leave to appeal. (*Id.*).

D. The Appellate Division Reverses The Trial Court's Decision.

On July 19, 2023, the defendants moved for leave to appeal, which was granted on August 16, 2024. (Ca1; Ca3). On April 18, 2024, in a published decision, the Appellate Division reversed the trial court's decision denying reconsideration and, instead, found that plaintiffs had failed to meet N.J.S.A. § 2A:53A–41's "kind-for-kind" credentialing requirement. (Ca5). In its opinion, the Appellate Division found that Dr. Fitzgibbons, an internist, could not criticize the actions of Dr. Goyal, a "higher-qualified physician[]" because she was not board certified in gastroenterology. (Ca30). While plaintiffs had submitted affidavits from experts—such as, for example, Dr. Eisner and Dr. Finkel—stating that Dr. Goyal's treatment did not involve gastroenterology, the Appellate Division rejected that evidence. Instead, the court held that "a plaintiff cannot choose the specialty that the defendant physician was practicing when treating the patient; the plaintiff must respond to the

information provided by the doctor in the answer." (*Id.*). Because Dr. Goyal's Answer stated he provided care to Ms. Carden in both internal medicine and gastroenterology, the court held plaintiffs needed an affidavit of merit from both an internist and gastroenterologist. (Ca30-31).

However, instead of dismissing the Complaint with prejudice, the court remanded the matter for the purpose of determining whether plaintiffs had met the requirements for a waiver of the affidavit of merit requirement under N.J.S.A. § 2A:53A-41(c). (Ca34). If the trial court finds that plaintiffs did not meet those requirements, then the Complaint will be dismissed with prejudice. Plaintiffs now seek leave to appeal the Appellate Division's decision under Rule 2:5-6.

## ARGUMENT

### I. This Court Should Grant Leave To Appeal, As the Appellate Division's Decision Ignores *Buck* And Construes The Affidavit Of Merit Statute Inconsistent With Its Purpose And Traditional Tort Principles. (Ca5-34).

Rule 2:2-2 permits appeals to this Court from interlocutory orders of the Appellate Division "when necessary to prevent irreparable injury[.]" The instant case meets that standard. Understanding the specific errors and their serious impact not only on this case, but in pending and future medical malpractice cases, requires an overview of the Affidavit of Merit statute.

On June 29, 1995, Governor Christine Todd Whitman signed into law the Affidavit of Merit statute, *L.* 1995, *c.* 139, which is now codified at N.J.S.A.

§ 2A:53A-26, *et seq.* "The statute applies to all actions for damages based on professional malpractice," including medical malpractice. *Ryan v. Renny*, 203 N.J. 37, 50 (2010). The Affidavit of Merit statute "was enacted as part of a tort reform package designed to 'strike [ ] a fair balance between preserving a person's right to sue and controlling nuisance suits.'" *Palanque v. Lambert-Woolley*, 168 N.J. 398, 404 (2001)(citing Office of the Governor, *News Release* 1 (June 29, 1995)). This Court has repeatedly reminded lower courts that "there is no legislative interest in barring meritorious claims brought in good faith." *Galik v. Clara Maass Med. Ctr.*, 167 N.J. 341, 359 (2001); *accord Ferreira*, 178 N.J. at 150. Rather, the statute seeks "to weed out frivolous lawsuits early in the litigation while, at the same time, ensuring that plaintiffs with meritorious claims will have their day in court." *Hubbard ex rel. Hubbard v. Reed*, 168 N.J. 387, 395 (2001).

To achieve this end, the law requires a plaintiff bringing a malpractice action to obtain an affidavit "from an appropriate, licensed expert attesting to the 'reasonable probability' of professional negligence." *Ferreira*, 178 N.J. at 150 (citing N.J.S.A. § 2A:53A–27). The affidavit must be served within 60 days of the defendant filing an answer; for good cause shown, the court may extend the time period by another 60 days. N.J.S.A. § 2A:53A–27. A plaintiff's failure to file a timely affidavit of merit constitutes a failure to state a claim, resulting in dismissal with prejudice. *Ferreira*, 178 N.J. at 150.

In 2004, New Jersey enacted the New Jersey Medical Care Access and Responsibility and Patients First Act (the "Patients First Act"), *L.* 2004, *c.* 17, part of a "comprehensive package of tort reforms" aimed at "address[ing] the 'dramatic escalation in medical malpractice liability insurance premiums[.]'" *Ryan*, 203 N.J. at 51–52 (citing *N.J. State Bar Ass'n v. State,* 387 N.J. Super. 24, 36 (App. Div.), *certif. denied,* 188 N.J. 491 (2006)). The Patients First Act imposed more exacting standards for testifying experts and those who submit affidavits of merit, including most notably the kind-for-kind credentialing requirement. *Ryan*, 203 N.J. at 52 (citing N.J.S.A. § 2A:53A–41).

"The basic principle behind N.J.S.A. § 2A:53A–41 is that the challenging expert who executes an affidavit of merit in a medical malpractice case, generally, should be equivalently-qualified to the defendant physician." *Buck*, 207 N.J. at 389 (citations omitted). The statute recognizes three distinct categories of credentialed physicians: "(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." *Id.* (citations omitted).

Under the statute's kind-for-kind scheme, where a defendant physician practices in a specialty or subspecialty recognized by ABMS, "and the care or treatment at issue involves that specialty or subspecialty," then the challenging

expert must also have been practicing in that same specialty or subspecialty at the time the claim accrued. N.J.S.A. § 2A:53A–41(a). Similarly, where a defendant physician is board certified in an ABMS-recognized specialty or subspecialty, "and the care or treatment at issue involves that board specialty or subspecialty," then the challenging expert must "either be credentialed by a hospital to treat the condition at issue . . . or be board certified in the same specialty in the year preceding 'the occurrence that is the basis for the claim or action[.]'" *Nicholas v. Mynster*, 213 N.J. 463, 482 (2013)(citing N.J.S.A. § 2A:53A–41(a)).

Of course, many physicians practice in, or are board certified in, multiple specialties and their treatment does not always fit neatly within one specialty or the other. That raises multiple questions. How does plaintiff identify the relevant specialty for the "care or treatment at issue," N.J.S.A. § 2A:53A–41(a), so he can serve the appropriate affidavit of merit or expert report? Does plaintiff have to serve multiple affidavits of merit or expert reports when the treatment overlaps multiple specialties? *Buck* answered those questions.

In *Buck*, plaintiff Robert Buck filed a malpractice action against Dr. James Henry, alleging the doctor failed to properly diagnose him and incorrectly prescribed him Ambien. 207 N.J. at 383-84. Buck called upon Dr. Henry, a physician board certified in emergency medicine, to help him with "bad sleep." *Id.* at 383. Three weeks after taking Ambien, plaintiff fell asleep while inspecting his gun, awakened

to a phone call, and accidentally put the gun into his mouth and pulled the trigger. *Id.* at 384. Plaintiff suffered serious and permanent injuries. *Id.*

After Dr. Henry filed his Answer and Affirmative Defenses, plaintiff served a timely affidavit of merit from a psychiatrist, Dr. Larry Kirstein, M.D. *Id.* Defense counsel objected, claiming that Dr. Henry was acting as a family practitioner at the time he prescribed Ambien *Id.* at 385. Plaintiff's counsel subsequently learned that Dr. Henry was board certified in emergency medicine and served a second affidavit of merit, this one from Dr. Joshua Kosowsky, M.D., a specialist in emergency medicine. *Id.* at 386. The trial court never held a *Ferreira* conference. *Id.* at 385.

Dr. Henry moved for summary judgment, arguing plaintiff had failed to serve a sufficient affidavit of merit. *Id.* at 387. With his motion, Dr. Henry served a certification stating he was practicing as a "family-medicine specialist" at the time he treated Buck. *Id.* The trial court granted the motion and the Appellate Division affirmed. *Id.* at 387-88.

The New Jersey Supreme Court reversed and reinstated the complaint. *Id.* at 383. Consistent with N.J.S.A. § 2A:53A–41's plain text, the Court noted that the first inquiry when determining if plaintiff satisfied the statute's kind-for-kind requirement is "whether a physician is a specialist or general practitioner." *Id.* at 391. "If the physician is a specialist, then the second inquiry must be whether the treatment that

is the basis of the malpractice action 'involves' the physician's specialty." *Id.* (citing N.J.S.A. § 2A:53A–41).

Of critical significance here, the Court recognized that "[a] physician may practice in more than one specialty, and the treatment involved may fall within that physician's multiple specialty areas." *Id.* In those cases, "an affidavit of merit from a physician specializing in either area will suffice. *Id.* (citing N.J.S.A. § 2A:53A–41's requirement that a "singular 'person' or 'witness' must provide [the] affidavit").

Applying those principles, the Court found the lack of a *Ferreira* conference, and the resulting inability of plaintiff's counsel to determine what specialty area Dr. Henry practiced in at the time he prescribed Ambien, required a remand. *Id.* at 395. The Court noted "plaintiff acted in good faith in filing two affidavits of merit from different specialists," and this was "not a case of a desperate plaintiff unable to find a physician willing to aver to a claim of malpractice." *Id.* at 395.

In closing, the Court also imposed a new directive on defendant physicians: "a physician defending against a malpractice claim (who admits to treating the plaintiff) must include in his answer the field of medicine in which he specialized, if any, and whether his treatment of the plaintiff involved that specialty." *Id.* at 396. This exact language is now expressly incorporated in Rule 4:5-3. *See R.* 4:5-3.

This legal backdrop should have resulted in the Appellate Division here affirming the trial court's decision denying defendants' motions to dismiss and for

reconsideration. In his Specialty Statement included with his responsive pleading, Dr. Goyal explicitly admitted: "[a]t all relevant times, these defendants practiced the medical specialties of Internal Medicine and Gastroenterology and their treatment of plaintiffs' decedent involved the medical specialties of Internal Medicine and Gastroenterology." (Da33). His certification, included with his motion to dismiss, expressed an identical sentiment. (JFK71). Moreover, on the motion for reconsideration, Dr. Goyal presented a certification from Dr. Solny, a retained expert, who stated "it is not possible to bifurcate and segregate" the knowledge of a gastroenterologist from that of an internist. (JFK233). These statements—indeed, admissions—repeatedly expressing that Ms. Carden's care fell within Dr. Goyal's multiple specialty areas should have resulted in the Appellate Division applying *Buck*'s holding that, where a physician "practice[s] in more than one specialty," and their treatment of plaintiff "fall[s] within that physician's multiple specialty areas," then "an affidavit of merit from a physician specializing in either area will suffice. *Buck*, 207 N.J. at 391.

Unfortunately, the Appellate Division did not do so. Instead, the court made three errors that, we respectfully submit, warrant reversal. The Appellate Division's decision: 1) ignored *Buck*'s holding that only one affidavit of merit is required when the treatment involves a defendant physician's multiple specialty areas; 2) incorrectly reasoned that *Nicholas* and *Pfannenstein v. Surrey*, 475 N.J. Super. 83,

97 (App. Div.), *certif. denied*, 254 N.J. 512 (2023), support its holding; and 3) imposed superfluous requirements on plaintiffs that serve no purpose and are inconsistent with long-standing principles of tort law.

A. The Appellate Division Ignored *Buck*.

In its decision, the Appellate Division distinguished *Buck* on the basis that the "problems highlighted in *Buck* leading to the revised Rule 4:5-3 and a remand to the trial court are not present here." (Ca26). The court placed great emphasis on the fact that Dr. Goyal included a Specialty Statement in his responsive pleading and, thus, "informed plaintiff[] he practiced in the medical specialties of internal medicine and gastroenterology and his treatment of Carden involved both specialties." (*Id.*). The court also found significant that the trial court held a *Ferreira* conference, unlike in *Buck*. (*Id.*). Because "plaintiffs only served an AOM from a board certified internal medicine physician," the court found they failed to comply with the Affidavit of Merit statute. (Ca26-27*)*. But this reasoning only acknowledges half of *Buck*'s significance.

*Buck* is certainly important because it led to amending Rule 4:5-3 to require a Specialty Statement from a defendant physician. This Court noted this was an "important caveat" that "should make more likely the filing of a timely affidavit of merit" in the future. *Buck*, 207 N.J. at 396. But this isn't *Buck*'s only significance—

indeed, if it was, it's unlikely that the Court would have waited until the opinion's closing paragraph to espouse it.

Rather, *Buck* also addressed the overlapping specialties problem. The Court could not have been clearer in stating that, where a physician "practice[s] in more than one specialty," and their treatment of plaintiff "fall[s] within that physician's multiple specialty areas," then "an affidavit of merit from a physician specializing in *either area* will suffice." *Buck*, 207 N.J. at 391 (emphasis added). The Court based this rule on the plain text of the statute, which states that a "singular 'person' or 'witness' must provide [the] affidavit." *Id.* (citing N.J.S.A. § 2A:53A–41). That language should have led the Appellate Division to find that the affidavit from Dr. Fitzgibbons—who, like Dr. Goyal, is board certified in internal medicine—sufficed, especially in a case where the defendant physician openly advances the claim that he cannot distinguish between when he is treating patients as an internist versus a gastroenterologist. The fact that Rule 4:5-3 now requires a Specialty Statement doesn't alter or otherwise impact *Buck*'s holding on the overlapping specialties issue. The Appellate Division erred in ignoring *Buck*.

B. Nothing in *Nicholas* Or *Pfannenstein* Alter *Buck*'s Holding For How To Address Overlapping Specialties.

The Appellate Division relied upon *Nicholas* and *Pfannenstein* to "conclude the trial court erred in finding plaintiffs met the kind-for-kind specialty requirement when they only served an AOM from an internal medicine physician as to

Dr. Goyal—a board certified physician in two specialties." (Ca26). But nothing in *Nicholas* or *Pfannenstein* alters this Court's holding in *Buck* and how plaintiffs should deal with physicians claiming they rendered treatment in multiple specialties.

Simply put, the affidavits of merit offered in those cases came from physicians who didn't share any of the specialties with the defendant. In *Nicholas*, the defendant physicians, who had treated plaintiff for carbon monoxide poisoning, were board certified in emergency medicine (Dr. Mynster) and family medicine (Dr. Sehgal). *Nicholas*, 213 N.J. at 469. The plaintiff served an expert report from Dr. Weaver, M.D., who was board certified in internal medicine and preventive medicine, along with certain subspecialties in those fields. *Id.* at 472. Dr. Weaver did not specialize in emergency medicine or family medicine. *Id.* at 487. This Court, therefore, found Dr. Weaver could not testify about the standards of care in those practice areas. *Id.* at 487-88. Accordingly, the Court vacated the trial court's order and entered judgment in favor of the defendant physicians. *Id.* at 488.

Similarly, in *Pfannenstein*, both defendant physicians specialized in internal medicine. 475 N.J. Super. at 91. The plaintiff served an affidavit of merit from a board certified hematologist, Dr. Andemariam. *Id.* at 91-92. The defendants moved to dismiss, arguing that the affidavit of merit was insufficient because it violated the kind-for-kind requirement. *Id.* at 90. The trial court denied the motion. *Id.* After

granting leave to appeal, the Appellate Division reversed, holding that Dr. Andemariam "failed to satisfy the same-specialty requirement." *Id.* at 103.

As is evident, the challenging experts in *Nicholas* and *Pfannenstein* were not credentialed in *any* of the same specialties as the defendant physicians. Nothing in *Nicholas* or *Pfannenstein*—not even in *dicta*—addressed or otherwise impacted *Buck*'s holding about how plaintiffs should deal with defendant physicians who claim the care they provided fell into their multiple specialties—*i.e.*, by serving "an affidavit of merit from a physician specializing in either area," *Buck*, 207 N.J. at 391. The Appellate Division erred in finding otherwise.

C. The Appellate Division's Decision Imposes Requirements That Are Inconsistent With The Affidavit Of Merit Statute's Purpose And Long-Standing Principles Of Tort Law.

The "core purpose" underlying the Affidavit of Merit statute is to require plaintiffs "to make a threshold showing that their claim is meritorious," so that "meritless lawsuits readily could be identified at an early stage of litigation." *Ryan*, 203 N.J. at 51 (citations omitted). This Court has made clear that nothing in the statute should be construed as seeking to bar "meritorious claims brought in good faith." *Galik*, 167 N.J. at 359. Nothing in the statute, or its legislative history, seeks to impose hurdles that bear no relationship or a superfluous one to the claim's merits. Yet that's exactly how the Appellate Division's decision construes the statute. Juxtaposing its decision against established tort principles demonstrates this.

"A medical malpractice case is a kind of tort action in which the traditional negligence elements are refined to reflect the professional setting of a physician-patient relationship." *Verdicchio v. Ricca*, 179 N.J. 1, 23 (2004). A plaintiff seeking to prove a medical malpractice claim must show: 1) "the applicable standard of care; 2) "that a deviation has occurred"; and 3) "the deviation proximately caused the injury." *Id.* Generally, an expert is required to establish these elements. *Nicholas*, 213 N.J. at 478-79. The kind-for-kind requirement embodied in N.J.S.A. § 2A:53A–41 "effectively raise[s] admissible expert testimony in medical malpractice cases above a minimum floor provided by N.J.R.E. 702" by limiting "who may serve as an expert[.]" *N.J. State Bar's Ass'n v. State*, 382 N.J. Super. 284, 345 (Ch. Div. 2005).

Applying these well-established tort principles within the framework of N.J.S.A. § 2A:53A–41, makes clear that Dr. Fitzgibbons's affidavit of merit should have sufficed. As a board certified internist, Dr. Fitzgibbons opined that there is a reasonable probability that Dr. Goyal breached the standard of care for an internist. (JFK60). If a fact-finder were to agree after expert testimony at trial, and if plaintiffs also establish causation, then plaintiffs would have established a meritorious medical malpractice claim—the exact type of claim this Court has repeatedly recognized as one that the Legislature never intended to bar, *see Galik*, 167 N.J. at 359.

The sheer fact that plaintiffs don't also establish Dr. Goyal deviated from the standard of care as a gastroenterologist is irrelevant. If Dr. Goyal is treating patients

in his capacity as an internist (even in part) and deviates from the standard of care, resulting in a patient's injury or death, he shouldn't be allowed to claim immunity by arguing the treatment at issue also involved gastroenterology and there's no expert evidence that he deviated from the standard of care in *that* specialty. There's no right to deviate from the standard of care in one medical specialty simply because the alleged act or omission would not fall below the standard of care in another.[8] Allowing as much would essentially require plaintiffs to prove that a physician deviated from the standard of care as to *each and every* specialty in which he claims to practice. Such a requirement departs from well-established tort jurisprudence, which only requires showing the injury flowed from the defendant's breach of the standard of care owed, *see Verdicchio*, 179 N.J. at 23—not a deviation from every potentially applicable standard. The Legislature never intended such a result.

## CONCLUSION

For these reasons, the Court should grant plaintiffs' motion for leave to appeal.

Respectfully submitted,

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Dated: May 8, 2024

By: */s/Roshan D. Shah*
ROSHAN D. SHAH, ESQ.

[8] To be clear, plaintiffs don't believe gastroenterologists are permitted to prescribe contraindicated medications either.