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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0756-16T4

ESTATE OF PATRICIA GRIECO, by its administrator VINCENT GRIECO, and VINCENT GRIECO, individually,

Plaintiffs-Appellants,

v.

HANS J. SCHMIDT, M.D., and ADVANCED LAPAROSCOPIC ASSOCIATES,

Defendants-Respondents.

Submitted January 17, 2018 – Decided January 29, 2018

Before Judges Fisher and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-10061-09.

Brazza Law, LLC, attorneys for appellants (Caesar D. Brazza, on the brief).

Marshall Dennehey Warner Coleman & Goggin, attorneys for respondents (Robert T. Evers, of counsel; Walter F. Kawalec, III, on the brief).

PER CURIAM

In this medical malpractice action, plaintiffs – the estate and husband of the late Patricia Grieco – alleged the negligence of defendant Hans J. Schmidt, M.D., and his practice, defendant Advanced Laparoscopic Associates, in performing laparoscopic gastric banding surgery and in their subsequent treatment of Patricia. We previously reversed an interlocutory order that barred certain witnesses from recounting what Patricia said defendants' staff told her in response to her complaints of chest pains following surgery. Estate of Grieco v. Schmidt, 440 N.J. Super. 557, 561 (App. Div. 2015). We now consider the unusual proceedings that followed our decision.

A few weeks prior to the September 28, 2015 trial date, plaintiffs' counsel was advised by plaintiffs' liability expert – Dr. Lael Forbes of Rochester, New York – that she had married and relocated to the New York City area; she also advised she had sought employment with defendant Advanced Laparoscopic Associates and could no longer act as plaintiffs' expert.[1] Because of this event – which undoubtedly disqualified Dr. Forbes from acting as plaintiffs' expert – plaintiffs sought an adjournment of the trial

[1] On September 16, 2015, a New York attorney wrote to plaintiffs' former attorney to advise that Dr. Forbes "will not testify as an expert" because "she feels that there is a definite conflict of interest testifying in the case against a surgical group where she has applied for a job."

date so a new expert might be retained. That application was denied and, as a result, plaintiffs' action was dismissed on September 30, 2015.

Plaintiffs did not file a direct appeal. Instead, plaintiffs waited nearly a year before moving for relief pursuant to Rule 4:50-1.[2] The motion was denied, and plaintiffs filed this timely appeal, arguing Dr. Forbes's act of seeking employment with the defendant medical practice triggered a right to relief pursuant to Rule 4:50-1(f). We disagree.

We initially reinforce, as plaintiffs recognize by their invocation of subsection (f), that subsections (a) through (e) offer no ground upon which Rule 4:50-1 relief might be granted; the subsections are mutually exclusive. Plaintiffs instead rely solely on subsection (f), the so-called "catch-all" subsection, which authorizes relief for "any other reason justifying relief from the operation of the judgment or order." In invoking this subsection in the trial court, plaintiffs relied on their certification, which claimed plaintiffs did not appeal the action's dismissal because their attorney at the time asserted their retainer agreement did not obligate their involvement in

[2] In the interim, plaintiffs sued Dr. Forbes in federal district court; we are told that action is still pending.

such an appeal and because plaintiffs could not otherwise afford to pursue an appeal.

Although its boundaries are "as expansive as the need to achieve equity and justice," Court Inv. Co. v. Perillo, 48 N.J. 334, 341 (1966); see also US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 484 (2012); Hous. Auth. of Morristown v. Little, 135 N.J. 274, 286 (1994), subsection (f) of Rule 4:50-1 has never been viewed as a substitute for a direct appeal when the motion addresses trial errors or the erroneous disposition of the suit. As explained by Justice Proctor in Hodgson v. Applegate, 31 N.J. 29, 36 (1959), the court rules "make specific provision for attack, before the trial court itself, and before the appellate courts, on erroneous factual findings and trial errors." Consequently, we have found it "well established" that a Rule 4:50 motion "may not be used as a substitute for a timely appeal." Wausau Ins. Co. v. Prudential Prop. & Cas. Ins. Co., 312 N.J. Super. 516, 519 (App. Div. 1998); see also In re Estate of Schifftner, 385 N.J. Super. 37, 43 (App. Div. 2006); DiPietro v. DiPietro, 193 N.J. Super. 533, 539 (App. Div. 1984). Were it otherwise, the time for a Rule 4:50 motion would essentially swallow the forty-five-day time-bar for the filing of an appeal. See R. 2:4-1(a); see also R. 2:4-4(a) (allowing one thirty-day extension "on a showing of good cause and

the absence of prejudice").[3] We thus reject plaintiffs' argument that Rule 4:50-1 offers a path for an examination of the trial judge's refusal to adjourn the trial or the action's dismissal.[4]

Plaintiffs also claim Rule 4:50-1 may be invoked because they could not afford to pursue a timely direct appeal. A litigant's impecunity, however, is not so extraordinary a circumstance as to justify application of Rule 4:50-1(f). Schifftner, 385 N.J. Super. at 44. Even if plaintiffs' financial status was a determinative

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[3] The medical malpractice action was dismissed on September 30, 2015, and the Rule 4:50-1(f) motion was filed a few days short of a year later. To permit a review of the action's dismissal through this process would essentially expand the time for an appeal far beyond what the rules intend. We add that plaintiffs mistakenly assume a Rule 4:50-1(f) motion is timely so long as filed within one year of the order or judgment under attack. To the contrary, Rule 4:50-2 expressly requires that all Rule 4:50-1 motions be filed "within a reasonable time" – a time-bar that may be invoked to bar a motion filed well less than one year later. See Orner v. Liu, 419 N.J. Super. 431, 436-38 (App. Div. 2011). The Rule's reference to a one-year time-bar only sets forth the outermost limit for motions based on subsections (a), (b), and (c).

[4] In denying the adjournment, the trial judge viewed the application as one seeking a mistrial, since N.J.R.E. 104 hearings regarding the admissibility of evidence – we assume the proceedings required by our earlier decision – had already commenced. In either event, and if plaintiffs' allegations regarding Dr. Forbes's inability to proceed as their expert were to be substantiated, plaintiffs' contention that the adjournment denial constituted an abuse of discretion is certainly colorable. We note, however, that the merits of the underlying determination are not necessarily germane to Rule 4:50-1's applicability. See In re Guardianship of J.N.H., 172 N.J. 440, 476 (2002) (recognizing that "[t]he issue is not the rightness or wrongness of the original determination at the time it was made but what has since transpired or been learned to render its enforcement inequitable").

factor, plaintiffs have not explained what occurred (or when it occurred) to alter their ability to prosecute an appeal.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION