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CARLOS VERAS and MAYRA VERAS, husband and wife, Plaintiffs/Appellants, -vs- ROBERT J. ADINOLFI, ESQ., an attorney at law of the State of New Jersey; GILL & CHAMAS, LLC,attorneys at law of the State of New Jersey; PLANNED LIFETIME ASSISTANCE NETWORK OF NEW JERSEY, INC., as Trustee of the Carlos Veras Special Needs Trust; and DOES 1 through 10, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-001326-24T2 Civil Action On Appeal From: Superior Court of New Jersey Law Division: Passaic County DOCKET NO: PAS -L-3217-21 Sat Below: Hon. Vicki A. Citrino, J.S.C.

AMENDED BRIEF FOR PLAINTIFFS/APPELLANTS CARLOS VERAS AND MAYRA VERAS

Batya G. Wernick, Esq.
On the Brief

May 28, 2025

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PRELIMINARY STATEMENT

This is a legal malpractice case concerning the negligent handling of Plaintiffs' medical malpractice matter. Husband and wife Carlos and Mayra Veras (collectively "Plaintiffs") claim that their medical malpractice attorney Defendant Robert J. Adinolfi, Esq. and his law firm Defendant Gill & Chamas, LLC (collectively "Defendants") were negligent when Mr. Adinolfi urged them to settle their case for just $500,000. Mr. Veras's negligence claim against his abdominal surgeon and the hospital, and Mrs. Veras's claim for loss of consortium, were worth much more because Mr. Veras's injuries were catastrophic and life-altering. The injuries also negatively affected Mrs. Veras and the entire family very severely.

Mr. Adinolfi urged the Verases to settle for this deficient amount misadvising them regarding a statement Mr. Verases' treating physician had made about Mr. Veras's condition and because Mr. Adinolfi never retained an independent medical expert to support their case. Ultimately, the Verases walked away with just $240,000 which Mr. Adinolfi also misadvised them to put in an unnecessary Special Needs Trust thereby tying up their access to the funds and costing them further unnecessary fees. He also failed to advise about the fact that another Medicare lien had not been resolved and later had to be paid from the

settlement funds, further reducing their funds.

According to the Verases' legal malpractice expert in this case, Mr. Adinolfi's handling of the medical malpractice lawsuit was below industry standards and the Verases should have been advised to go to trial or settle for a higher amount. The medical expert retained by the Verases for this case verified the strength of their medical malpractice claim.

In this case, the trial court granted the Defendants' Motion to Bar Plaintiffs' legal malpractice expert and denied the Plaintiffs' Motion to Bar both of Defendants' experts. The trial court ruled that Defendants' experts had not issued net opinions even though as a matter of law, they had. The trial court also ruled, on the other hand, that Plaintiffs' legal malpractice expert was not qualified to opine on the matter and that he had issued a net opinion. As a matter of both fact and law these decisions were incorrect.

As a result of the decisions on the experts, Defendants moved for summary judgment on the ground that Plaintiffs could not proceed without a legal malpractice expert. Plaintiffs cross-moved for reconsideration of the two decisions on the grounds that the trial court was mistaken as to the facts and the law. The trial court denied Plaintiffs' cross-motion and granted the Defendants' motion for summary judgment dismissing the case with prejudice.

Because the trial court's rulings were incorrect as a matter of fact and law, Plaintiffs ask this Court to reverse the trial court's decisions and remand this matter back to the trial court for a full trial. Alternatively, should the court uphold the ruling on the experts, Plaintiffs ask this Court to reverse the trial court's decision to dismiss the case and direct the trial court to open discovery for a brief period just to allow Plaintiffs to proffer a new legal malpractice expert who Defendants can depose, so that the matter may go to trial.

PROCEDURAL HISTORY

Plaintiffs filed their complaint with an Affidavit of Merit against Defendants on October 11, 2021 (Ja1 - Ja10).[1] Defendants filed their answer to the complaint on November 15, 2021 (Ja11-Ja16). On February 22, 2022, the Court entered a Consent Order waiving the Feirrara Conference concerning the adequacy of the Affidavit of Merit (Ja17-Ja18). On October 20, 2023, the trial court extended the discovery deadline for the third and final time to allow for expert depositions. The deadline was set as December 29, 2023 (Ja19-Ja20).

After completion of all discovery including the depositions of the Parties' experts, on July 31, 2024, Plaintiffs filed a Motion to Bar the testimony of the

[1] Ja = Joint Appendix.

Defendants' legal malpractice expert and medical malpractice expert on the ground that both had issued net opinions by failing to establish the standard of care for their respective industries (Ja21-Ja243). On August 23, 2024, the Defendants filed opposition papers to Plaintiffs' Motion to Bar their experts (Ja244-Ja415). Days later, on August 28, 2024, the Defendants filed their own Motion to Bar Plaintiffs' legal malpractice expert arguing that he was not qualified to opine on the matter and that he had issued a net opinion (Ja416-Ja450).

Thereafter, on September 5, 2024, Plaintiffs' filed their opposition to the Defendants' Motion to Bar their legal malpractice expert (Ja451-Ja493) and on September 9, 2024 filed their Reply in support of their Motion to Bar Defendants' experts (Ja494-Ja505). The Defendants filed their Reply Brief in support of their Motion to Bar Plaintiffs' legal malpractice expert the same day (reply brief not included in Joint Appendix).

On September 27, 2024, the Court heard oral argument on both Motions simultaneously (1T)[2]. That very day, the Court issued its Decisions and Orders together on both Motions. (Ja506-Ja519). The Court denied Plaintiff's Motion to Bar the Defendants' experts and granted the Defendants' Motion to Bar the Plaintiffs' legal malpractice expert.

[2] 1T = transcript of September 27, 2024 hearing on both Motions to Bar Experts

After these Decisions, on October 4, 2024, the Defendants moved for summary judgment on the ground that Plaintiffs had no legal malpractice expert and therefore, could not prove their case. (Ja520-Ja539). In response, Plaintiffs filed opposition to the motion with a cross-motion for reconsideration of the Court's Decisions on both Motions to Bar Experts (Ja540-Ja553). Defendants filed opposition papers to the cross motion on November 4, 2024 (Ja554-Ja585), and Plaintiffs filed reply papers in support of their cross-motion for reconsideration (reply letter brief not included in Joint Appendix).

On December 19, 2024, the trial court heard both Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Reconsideration (2T)[3]. That same day, the Court issued its Decision and Order denying Plaintiffs' Cross-Motion for Reconsideration and also issued its Decision and Order granting Defendants' Motion for Summary Judgment.(Ja586-Ja599). On January 12, 2025, Plaintiffs filed a Notice of Appeal of the Decisions and Orders on the Motions to Bar Experts and the Decisions and Orders denying the Cross-Motion for Reconsideration and granting Defendants' Motion for Summary Judgment (Ja600-Ja604).

[3] 2T = transcript of December 19, 2024 hearing on both the Motion for Summary Judgment and the Cross-Motion for Reconsideration.

STATEMENT OF FACTS

1. Background:

In July 2011, Mr. Veras underwent what was supposed to be a minimally invasive, elective laparoscopic surgery on his large intestine to treat a diverticulitis diagnosis. Unfortunately, due to the negligence of his surgeon and the hospital, what had been described to Mr. Veras as a "routine procedure," turned into major open surgery resulting in the need for extended hospital and rehabilitation stays over the course of more than a year and half, and ultimately painful, serious and permanent injury to Mr. Veras (Ja2, Ja233-Ja234, Ja424).

As a result of the medical malpractice, the Verases' lives were severely and permanently altered to their detriment. Mr. Veras must now live with a colostomy bag. In addition to the colostomy bag, he has severe scaring of his entire abdomen due to numerous skin grafts. Moreover, Mr. Veras is permanently unable to work. He cannot bend down fully, lift heavy things or take care of his daily needs without the assistance of another person; usually his wife, Mrs. Veras. Further, Mr. Veras must sleep only on his back (Ja2 and Ja424). The Verases have three children and Mrs. Veras works full-time supporting the entire family and running the household. The situation has also caused Mr. Veras to suffer from severe depression (Ja2 and Ja424).

In early 2013, the Verases retained Mr. Adinolfi and his firm Defendant Gill & Chamas, LLC to sue the surgeon (Dr. Valenziano) and the hospital for medical malpractice (Ja2 and Ja3). It took Mr. Adinolfi a year to finally file the Complaint in early 2014. The case was entitled, *Carlos Veras and Mayra Veras v. Carl Valenziano, M.D., et al.,* Docket No: ESX-L-719-14 ("the underlying litigation")(Ja425). The matter dragged on for over four (4) years. The discovery end date was extended *eight* (8) times. The entire time the Verases believed they had a strong case. It was not until years into the matter that Mr. Adinolfi advised them of any problem/issue with their case (Ja3 and Ja425 with internal citations to documents produced in the underlying litigation therein).

It was not until around the end of 2017 that Mr. Adinolfi presented the Verases with a one-paragraph letter written by one of Mr. Veras's treating physicians claiming Mr. Veras had a pre-existing condition which prevented Mr. Veras from healing. Mr. Adinolfi used this specious letter to pressure the Verases into settling their case for much, much less than what it was worth (Ja3, Ja425 and Ja426).

Ultimately, in March 2018, upon Mr. Adinolfi's mis-advice, the Verases settled their case, which was worth millions of dollars (according to their legal malpractice expert and other verdicts and settlements for similar injuries) for just

$500,000. Moreover, more than half of the settlement funds were used to pay the Verases' legal fees and costs ($173,902) as well as a Medicaid lien of over $91,000. In the end, the Verases received less than $240,000 (Ja3 and Ja426). This amount was reduced further to pay another Medicare lien that was not settled before. This pittance is a far cry from what the Verases should have received for a claim arising from a serious, life-altering permanent injury as well as for Mrs. Veras's significant loss of consortium claim (Ja3 and Ja425).

Not only that, also on the mis-advice of Mr. Adinolfi, the Verases' settlement proceeds were deposited into a special needs trust entitled Carlos Veras Special Needs Trust ("the Trust.") The Trust is administered by Defendant PLANNJ[4]. Not only was the Trust unnecessary and not in the Verases' best interest, the Verases are not actually receiving sufficient funds from the Trust to assist with their expenses in any meaningful way (Ja3, Ja427 and Ja428).

According to their legal malpractice expert in this case, Mr. Veras's negligence claim against his surgeon and the hospital, and Mrs. Veras's claim for loss of consortium, were worth much more. Relying the medical records which showed the injury was iotragenic (meaning caused by surgery) according to the

[4]PLANNJ was dismissed from this case at the outset after providing an accounting. It is not participating in this appeal.

surgeon's own report, as well as the report of the Verases' medical malpractice expert in this case, the Verases' legal malpractice expert opined that they had a strong negligence claim against the surgeon. Then relying on his experience, other outside sources and case law, their legal malpractice expert opined that the Verases should have settled their claim for much more or should be permitted to go to trial for the jury to decide the damages amount(Ja422-Ja435).

2. The Defendants' Experts in This Case:

During the course of *this* lawsuit, the Defendants proffered the expert opinions of Mr. E. Drew Britcher, Esq. ("Mr. Britcher") as a legal malpractice expert and Dr. William Louis Diehl, M.D. ("Dr. Diehl") as a medical malpractice expert (Ja42-Ja61 and Ja133-Ja163 respectively). However, both gentlemen provided reports and testimony that amounted to net opinions because both failed to establish the standard of care for their respective industry. Neither expert cited any law, treatise or studies to support their respective opinions that Mr. Adinolfi complied with the standard of care for litigation attorneys and that Dr. Valenziano (Mr. Veras's surgeon) complied with the standard of care for abdominal surgeons (Ja42-Ja48 and Ja133-Ja155, respectively).

A. <u>Mr. Britcher's Defective Report (Ja42-Ja48):</u>

In his report, Mr. Britcher opined that Mr. Adinolfi complied with the

standard of care for medical malpractice attorneys. However, he completely failed to explain what the standard of care is. He failed to cite any case law, statute or treatise that explains what obligations a medical malpractice attorney, such as Mr. Adinolfi, has when representing a client. Instead, Mr. Britcher simply states that in his opinion, Mr. Adinolfi complied with the standard of care that medical malpractice attorneys are obligated to adhere to.

The only law that Mr. Britcher cited was one case discussed on page six (6) of his report(Ja47). There Mr. Britcher cited Stigliano v. Connaught Labs, 140 N.J. 305 (1995) in support of the notion that a jury could find a treating physician's opinion more credible than that of a retained expert. Mr. Britcher avered that Mr. Adinolfi was therefore correct to be concerned about Dr. Livingston's letter stating Mr. Veras had a pre-existing condition (Ja47). This position ignores the fact that Dr. Livingston had never expressed that the surgeon was not negligent. Dr. Livingston only wrote a note that Mr. Veras was not recovering well because of a healing condition. And in fact, this was refuted by both Parties' medical malpractice experts in this case. Both expert doctors stated that there was no evidence that Mr. Veras has/had a "healing condition" (Ja234 and Ja196). Mr. Britcher's position also ignored the fact that Mr. Adinolfi well knew that the Verases were considering suing Dr. Livingston as well since his treatment of Mr.

Veras was questionable (Ja425). Mr. Adinolfi knew that Dr. Livingston's opinion would not carry much weight. And Mr. Britcher's comment on this issue still does not establish a standard of care applicable to Mr. Adinolfi.

B. Mr. Britcher's Deposition Testimony (Ja63-Ja131):

Even when specifically asked to identify which law, treatise or other legal authority Mr. Britcher relied upon to reach his opinion that Mr. Adinolfi acted within the standard of care for medical malpractice attorneys, he was not able to cite any.

i. Plaintiffs' counsel asked Mr. Britcher what was the source of his information concerning the statistics of plaintiffs prevailing in medical malpractice cases.

The testimony was as follows:

> Q: Going down to page 5 of your report. I'm just going to read this sentence here. The top of the page. "It should be noted that medical malpractice cases are not only complex, they are often difficult to win, and if not settled, statistics have shown that roughly three quarters of the cases that are tried are won by defendants."
> So I asked you this earlier, what documents or reports do you have to support this claim about statistics? You answered that earlier or is there something else?
>
> A: I, you know, I can only say to you that that is a statistic that I knew with precision in the mid 2000s. It is a statistic that has tended to be something I've been aware of throughout my career. It is a statistic that has been reinforced at time to time by articles that I can't cite to

> you, but I'm familiar with in medical journals. It's a statistic I'm familiar with from people who have, you know, done work on the opposite side from me. It is a statistic that is quite prevalent in our field and one that, again, I don't know the current AOC numbers, but I know that they, you know, would potentially be able to produce those pre-pandemic. I don't think any of us can rely on anything that's happened during --
>
> Q Well, the period we're concerned about with is when the underlying litigation occurred. So that was pre-pandemic. Can you provide any reports or supporting documentation you have for this statement to Mr. Sharp to give to me, if you can come up with that?
>
> A I can probably come up with the old AOC, you know, number because it's probably still in my materials from when I was spending a lot of time in the State House.

(Ja109-Ja110; Britcher Transcript 47:4 to 48:11)

ii. When discussing Mr. Adinolfi's settling of the Medicaid Lien against the Verases, Mr. Britcher opined that Mr. Adinolfi "did a good job," without legal or statistical support for that opinion. Indeed, he simply stated, "So **in my experience**, with a $600,000 lien and a $500,000 settlement, Medicaid would normally have sought roughly $300,000 on a negotiated basis . . . So I was commenting that Mr. Adinolfi did a good job in reducing that lien amount." (Ja114; Britcher Transcript at 52:12 to 52:20) (Emphasis added.)

iii. And of note, is the fact that Mr. Britcher has acted as a legal malpractice expert on just five (5) occasions (Ja76-Ja77; Britcher Transcript at

14:24-15:2). This may be why he issued a net opinion.

The above examples of Mr. Britcher's testimony show that he only relied on anecdotal information to formulate his opinion. As argued below, this is insufficient to support an expert opinion and constitutes a textbook net opinion.

C. Dr. Diehl's Expert Report (Ja133-Ja163):

Dr. Diehl provided an initial report, a second report providing a correction to his initial report, and a third "reply" report (Ja133-Ja163). Nowhere in any of his reports does Dr. Diehl set forth the standard of care for abdominal surgeons. All of the reports fail to cite any treatise, manual or other publication that supports his position that Dr. Valenziano (the surgeon who was being sued in the medical malpractice case) acted within the standard of care for abdominal surgeons when he operated on Mr. Veras. Dr. Diehl simply concluded that Dr. Valenziano did comply with the standard of care based on Dr. Diehl's own personal experience.

For instance, in the middle of page 6, the last five lines of the first full paragraph of his initial report, Dr. Diehl states, "However, in my opinion, the most likely cause of the perforation and the only one that makes any sense is that there was a diverticulum in the segment of colon that remained in place that suddenly blew out 4 days after the initial operation. Regardless of the exact cause of the perforation, **we know** this is a known complication of colonic resection

and does not in and of itself constitute a deviation from accepted standards of care." (Ja138)(Emphais added.) Dr. Diehl never explains how "we know this is a known complication of colonic resection." He does not cite to any studies, reports or statistics on this subject.

Dr. Diehl opined that the perforation was caused by Mr. Veras's diverticulitis condition and not a surgical error. He insisted this was the cause even though the surgical records state that an "iatrogenic perforation" was found. The word iatrogenic means caused by surgery. Engaging in pure speculation, at his deposition, Dr. Diehl was unable to provide a credible reason for why the operative report would state the perforation was iatrogenic if it was caused by Mr. Veras's diverticulitis. (Ja205-Ja206; Diehl Deposition Transcript 41:17-42:1)

Ultimately, Dr. Diehl's report was purely anecdotal and as described further, he failed to correct this at his deposition.

D. Dr. Diehl's Deposition Testimony (Ja165-Ja231):

During his deposition, Dr. Diehl was asked which treatises or other materials he relied upon to conclude that Dr. Valenziano operated within the standard of care applicable to abdominal surgeons. Just like in his report, he failed to point to any instruction manuals or other supportive documents. For instance, the following testimony was given:

> Q Okay. So here you write, "When he found a perforation", talking about Dr. Valenziano, "When he found a perforation in the bowel proximal to the anastomosis his choice of surgery which was to resect that portion of bowel and perform an end colostomy was also within the standard of care."
> Do you have any treatises or manuals that establish that this was within the standard of care?
>
> A No, but . . .
>
> (Ja191; Diehl Deposition Transcript at 27:14 - 27:22)

And later in the deposition, the following was stated:

> Q And on what basis do you opine that he did the procedure within the standard of care? Do you have any manuals you would cite to or treatises that you could cite to that would support your opinion that the way Dr. Valenziano performed the surgery was within the standard of care? Do you have any source material you relied on?
>
> A Well, his operative report is not the most detailed operative report. However, what he describes, and I know that this is semantics, but what he describes in his operative report is the way that a sigmoid colectomy is performed.
>
> Q Would you point to any instruction manuals that doctors review to support that statement?
>
> A I would not, no.
>
> (Ja197; Diehl Deposition Transcript at 33:8-33:21)

In contrast to Dr. Diehl, Plaintiffs' medical expert, Dr. Daniel J. Stephens, M.D., (whose opinion the Defendants did not seek to bar) did

cite to manuals and treatises in his reports; specifically, *Schwartz's Principles of Surgery* and *Cameron Current Surgical Therapy*[5] (Ja233*)*. On the first page of his report, Dr. Stephens refers to two manuals that describe the proper procedure for the type of surgery that is at issue here (Ja233).

3. Plaintiffs' Legal Malpractice Expert:

Unlike Defendants' experts, Plaintiffs' legal malpractice expert, Mr. Anthony P. Ambrosio, Esq. ("Mr. Ambrosio") issued an opinion that relied on significant outside, reliable evidence and not mere anecdotal evidence. And contrary to the trial court's incorrect finding, Mr. Ambrosio is also significantly qualified to testify not only about legal malpractice matters but medical malpractice litigation as well (see his CV at Ja436-Ja449, the last page of which indicates that he has litigated medical malpractice cases). Mr. Ambrosio has been a civil litigator since 1966. He has also been a forensic legal malpractice expert since 1976 (Ja436-Ja449 and see Ja251; the Ambrosio Deposition Transcript at 8:1-8:12).

A. Mr. Ambrosio's Expert Report (Ja422-Ja445):

Basing his opinion on actual facts established by the record, Mr. Ambrosio

[5]Dr. Stephens' two additional reports/supplements are not included in the record as they were not necessary for the pleadings related to this appeal.

cites to particular documents in the very extensive documentary record to prove that Mr. Adinolfi failed to obtain an independent medical expert and that Mr. Adinolfi relied on a mere note from Dr. Livingston to misadvise the Verases they could not prove causation. This was negligent on Mr. Adinolfi's part. Mr. Ambrosio's report explains, meticulously pointing to the documents in the record as well as deposition testimony, that Mr. Adinolfi knew at the time that Dr. Livingston's opinion about Mr. Veras's health condition was highly questionable and that the Verases were even considering suing Dr. Livingston. Mr. Ambrosio notes this on page 5 of his report (Ja426). He explains:

> "Mr. Adinolfi's secretary, Donna French, testified that she was not aware of Mr. Adinolfi consulting other medical experts for the Verases after Dr. Livingston's letter. (French Dep. 26:25-27:5 and 58:18-58:20) And Mrs. Veras testified that Mr. Adinolfi never tried to get a second opinion about what caused Mr. Veras's injuries. Mrs. Veras did not agree with what Dr. Livingston was saying about her husband's condition. (Mayra Veras's 1st Dep. Transcript in this case 33:2-33:14 and 66:10-67:21) Mr. Veras and Mrs. Veras testified in this case that they believed they had no choice but to settle their case as they did because of what Mr. Adinolfi was telling them. They claim they were confused and devastated. (Mayra Veras's 1st Dep. Transcript in this case 59:17-60:19; Carlos Veras's Dep. Transcript in this case 32:1-36:8) Notably, Mr. Adinolfi's counsel stated at depositions that Dr. Livingston said Mr. Veras's condition was not caused by the surgeon. That is not what Dr. Livingston's letter says. The letter only claims Mr. Veras has a healing condition (which remains disputed). See Dr. Stephen's Report, bottom of second page.
>
> Also notable is the fact that at one point, the Verases were

considering whether or not to sue Dr. Livingston because Mr. Veras was not improving under his care. Mr. Adinolfi advised them not to bring Dr. Livingston into their lawsuit because they would appear too litigious and because Dr. Livingston was treating Mr. Veras at the time. (Mayra Veras's 1st Dep. Transcript in this case 28:1 - 28:14 and Adinolfi 0125) Apparently, Mr. Adinolfi even consulted another expert to consider whether or not to sue Dr. Livingston and the only reservation about that was because there were not yet permanent damages caused by Dr. Livingston. (Adinolfi 00125) It is certainly quite curious why Mr. Adinolfi would put so much stock in Dr. Livingston's "opinion" to urge the Verases to settle their case for a pittance when Dr. Livingston's care and competence were being questioned by Mr. Adinolfi and the Verases at the time.

Mr. Adinolfi claimed in his answers to interrogatories that he consulted with other doctors. One was Dr. Befeler who provided the Affidavit of Merit in the medical malpractice case. The others were Dr. Livingston, Dr. Mandell and Dr. Bagnell. Mr. Adinolfi did not provide any information about what these other doctors had to say. (Adinolfi Rog. Resp. No. 29.) There was no information in any document I reviewed which showed any other medical opinion concerning what caused Mr. Veras's injuries other than Dr. Stephen's report and the medical records, all of which definitively show an incident occurred during the first surgery by Dr. Valenziano; that Mr. Veras's bowel was perforated during the surgery and that the first surgery was not performed properly. (See Dr. Stephens' report)

In the underlying lawsuit, Mr. Adinolfi used the letter from Dr. Livingston to pressure the Verases into settling their case for much, much less than what it was worth. The Veras's did not want to settle the case for the amounts Mr. Adinolfi was recommending, but they felt they had no choice because of what he was telling them. Mr. Adinolfi advised them that if the defendants in their case heard Dr. Livingston's opinion, the defendants would not agree to settle the case. (Mayra Veras's first dep. Transcript in this case 49:14-49:21; 50:1-50:15) (See also Mr. Veras's Dep. Transcript in this case 32:1-36:8 where he describes that he was pressured to accept the

settlement, that he had no choice.)"

In his report, Mr. Ambrosio details all of the records and facts he relied upon to reach his conclusion of negligence. On pages 2-3, he writes that he relied on the following records to issue his opinion (Ja423-Ja424):

> "Documents From the Underlying Medical Malpractice Case:
> I reviewed all of the documents labeled Adinolfi 00001 through 02311. These include, but are not limited to, the following:
>
> 1. The Retainer Agreement between Plaintiffs and Defendants;
> 2. The Complaints and Answers (and other pleadings) in the underlying medical malpractice case;
> 3. Answers to Interrogatories from all of the parties in the underlying medical malpractice case;
> 4. All of the deposition transcripts in the underlying medical malpractice case;
> 5. Various emails and correspondence between Mr. Adinolfi and the Plaintiffs;
> 6. Memos to the file by Mr. Adinolfi in the underlying medical malpractice case;
> 7. Other correspondence between Mr. Adinolfi and opposing counsel in the underlying medical malpractice case;
> 8. Correspondence from Dr. Livingston to Mr. Adinolfi dated November 29, 2017;
> 9 I cursorily reviewed some of the medical records produced by Defendants. (Adinolfi 02313 through 16244) I did not focus on these documents as they are more appropriately assessed by a medical expert. However, despite the fact that I am not a medical expert, the medical records did seem to show, even to a layman, that the defendant doctor was negligent during his initial surgery on Mr. Veras causing severe injury; and
> 10. I also reviewed documents labeled Adinolfi 16245 through 16373, which are email exchanges between the Verases and

> Defendants, photographs of Mr. Veras after his failed surgery, and the Verases' tax returns.
>
> Documents From This Case:
> In addition to the above listed documents, I reviewed the following documents arising from this litigation:
>
> 1. The Complaint and Answer;
> 2. The Answers to Interrogatories from all Parties;
> 3. Plaintiffs' Supplemental Response to Defendants' Supplemental Notice to Produce;
> 4. The Medical Expert Report of Dr. Daniel Stephens produced by Plaintiffs in this case;
> 5. All of the Plaintiffs' deposition transcripts;
> 6. The Certification of Ms. Veras regarding her first deposition testimony;
> 7. The deposition transcript of Donna French;
> 8. All of the documents labeled Plaintiffs 1 through 491.
> 9. Updated Medicaid Claim Report.
>
> In addition to all of the above, I have seen photographs of Mr. Veras's injuries and have personally observed his current physical condition. I have also met with the Verases in person and have spoken with them about the facts of this case."

Moreover, Mr. Ambrosio furnished supplemental reports further supporting his opinion (Ja478-Ja480).

It is undeniable that Mr. Ambrosio's extensive initial report carefully lays out the facts of the underlying medical malpractice matter pointing to the documents produced and the deposition testimony in the legal malpractice case.

As can be seen in his initial report, he writes approximately four pages of facts carefully citing to the record for each of his findings. Unlike Defendants' experts, Mr. Ambrosio then goes on to cite numerous cases and rules of professional conduct that establish the standard of care, how it was breached by Mr. Adinolfi and the resultant damages (Ja422-Ja445 and Ja47-Ja480). This will be detailed further below.

Mr. Ambrosio also cited case law to show that damages may be shown by an expert analysis such as his own or by allowing the jury to decide pursuant to the "suite within a suite" doctrine applicable to legal malpractice matters (Ja433). He also attached sample verdicts and settlements for cases similar to the Verases in terms of the injury, year of litigation and jurisdiction (Ja436-Ja445).

B. Mr. Ambrosio's Deposition Testimony (Ja249-Ja303):

Mr. Ambrosio testified at his deposition in this case to the following regarding his experience as an expert and as a litigator:

a. He has been retained as a forensic expert in legal malpractice cases hundreds of times since the year 2000, mostly for the plaintiff (Ja251; Ambrosio Deposition Transcript at 8:13-8:25).

b. He has represented a few medical malpractice plaintiffs himself. He has also reviewed such cases to determine if he wished to accept them, and other attorneys have referred medical malpractice plaintiffs to him (Ja252; Ambrosio Deposition Transcript at 10:12-11:21).

c. Over the course of his entire career, Mr. Ambrosio has represented medical malpractice plaintiffs half a dozen times or more(Ja252; Ambrosio Deposition Transcript at 13:8-17).

d. He described his legal malpractice expertise at length (Ja255-Ja256; Ambrosio Deposition Transcript at 25:11-27:1) and then testified that he has assessed many medical malpractice cases and has represented plaintiffs in complex medical malpractice cases himself explaining the efforts required by the attorney representing the plaintiff (Ja256; Ambrosio Deposition Transcript at 27:2-29:21).

e. He explained at length why and how his experience as a litigator qualifies him to testify as an expert in this case, and that even though his experience litigating medical malpractice cases is limited in comparison to his other areas of practice, he has sufficient experience with medical malpractice matters in order to opine about the actions of a medical malpractice litigator (Ja258-Ja259; Ambrosio Deposition Transcript at 37:13-40:3).

f. He has acted as a legal malpractice expert in many cases where the underlying action was a medical malpractice action (Ja259; Ambrosio Deposition Transcript at 40:18-41:2 and 41:24-42:1).

g. In one particular case at trial as an expert, Mr. Ambrosio has been permitted to testify concerning his opinion of what a jury would have awarded a plaintiff (Ja269; Ambrosio Deposition Transcript at 80:14-81:5).

As further argued below, Mr. Ambrosio is clearly qualified to opine in this matter and unlike Defendants' experts, he certainly did not provide a net opinion.

LEGAL ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

De Novo Review Applies Here.

(Not raised below)

An appellate court's review of rulings of law and issues regarding the

applicability, validity or interpretation of laws, statutes, or rules is *de novo*. (See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020), agency's interpretation of a statute; State v. Courtney, 243 N.J. 77, 85 (2020), interpretation of sentencing provisions in the Criminal Code; State v. G.E.P., 243 N.J. 362, 382 (2020), retroactivity of statute; State v. Hemenway, 239 N.J. 111, 125 24 (2019), constitutionality of a statute; State v. Hyland, 238 N.J. 135, 143 (2019), appealability of a sentence; Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9 (2019), statutory interpretation; Green v. Monmouth Univ., 237 N.J. 516, 529 (2019), applicability of charitable immunity; State v. Dickerson, 232 N.J. 2, 17 (2018), interpretation of court rules.)

Moreover, "[A] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." (Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).)

De Novo review also applies if a judge makes a discretionary decision, but acts under a misconception of the applicable law or misapplies it. If the exercise of legal discretion lacks a foundation or misapplies the law, it then becomes an arbitrary act that is not subject to the usual deference. (Summit Plaza Assocs. v. Kolta, 462 N.J. Super. 401, 409 (App. Div. 2020); Alves v. Rosenberg, 400 N.J.

Super. 553, 563 (App. Div. 2008).) In such a case, the reviewing court must instead adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided. (State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010); State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966); Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960).)

Indeed an evidentiary decision is reviewed *de novo* if the trial court applies the wrong legal standard in deciding to admit or exclude the evidence. (State v. Trinidad, 241 N.J. 425, 448 (2020); State v. Williams, 240 N.J. 225, 234 (2019); Hassan v. Williams, 467 N.J. Super. 190, 214 (App. Div. 2021).)

That is exactly what happened in the case at bar. Here the trial court made what appears to be a discretionary decision in ruling that Plaintiffs' legal malpractice expert was not qualified as well as with regard to whether the three experts' had issued net opinions or not. However, as explained further below, the trial court misinterpreted and misapplied the law related to what constitutes a net opinion as well as the extent of experience required by a legal malpractice expert, thereby reaching the incorrect conclusions. Therefore, the trial court's decision to include the Defendants' experts and bar Plaintiffs' legal malpractice expert should be reviewed *de novo.*

Should the court determine that the trial court's rulings were entitled to

discretionary review, they should still be reversed pursuant to that standard. The trial court abused its discretion. An abuse of discretion occurs when a trial judge's decision "was not premised upon consideration of all relevant facts, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." (Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).) As detailed further below, the trial court's decision was just so flawed requiring reversal.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO BAR PLAINTIFFS' LEGAL MALPRACTICE EXPERT BECAUSE HE HAD NOT ISSUE A NET OPINION AND HE WAS IN FACT QUALIFIED TO OPINE. (Raised below: Ja416-Ja488 and Ja540-Ja553; 1T15-21 and 2T4-5)

A. Mr. Ambrosio's Report With The Supplement and Amendment Is Not A Net Opinion.

The trial court determined that Plaintiff's expert Mr. Ambrosio engaged in mere conjecture when he opined that the underlying lawsuit was a "sure win," even though Mr. Ambrosio never used such language in his report or testimony. The trial court also incorrectly determined that Mr. Ambrosio was only speculating about the Verases' damages and that he had no factual basis for his opinion. The trial court also inexplicable and irrelevantly noted that the medical malpractice case had been long settled. It was for these reasons the trial court

determined that Mr. Ambrosio had issued a net opinion (Ja519). This decision was wrong on the facts and the law.

As set forth in pages 17 to 21 above, Mr. Ambrosio's report was replete with factual and legal support. In Stoeckel v. Township of Knowlton, 387 N.J. Super. 1, 15-16 (App. Div. 2006), the Court held an opinion like Mr. Ambrosio's (citing RPCs and case law to establish the standard of care) is ***not*** a net opinion. The Stoeckel Court explained that in a legal malpractice case, "To be admissible as evidence, the expert's opinion must be based on standards accepted by the legal community and not merely on the expert's personal opinion." (Id.) (Internal citations omitted.) Here, Mr. Ambrosio clearly explained the standards accepted by the legal community using objective sources to show the standard of care.

And in Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 79–80 (App. Div. 2007), the Court held that the legal malpractice expert's opinion in its case was also not a mere net opinion. Just like Mr. Ambrosio's report here, in that case, the legal malpractice expert specifically referenced extensive case law, as well as the Rules of Professional Conduct to set the industry standard. Just like Mr. Ambrosio opined here, the expert attorney in Carbis went on to identify the deficiencies he perceived in the defendant attorney's ***preparation of the case*** and the resulting ill-informed judgments the defendant attorney made. Such deviations,

he opined, constitute a violation of the tenets of the Rules of Professional Responsibility and of the general duty to exercise that degree of care, knowledge, judgment and skill that a reasonably prudent lawyer of ordinary ability would have exercised in the same or similar circumstances.

The Carbis Court was satisfied that the legal malpractice expert's opinion was clearly based on factual evidence of record, to which he applied generally accepted standards of care as reflected in both our case law and Rules of Professional Conduct. (Carbis citing St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 588 (1982).) The Court held that the expert opinion as to the defendants' violation of these rules was competent evidence of legal malpractice, sufficient to support the jury's verdict. (Carbis Sales, Inc. v. Eisenberg, supra, N.J. Super. 64, 79–80 (App. Div. 2007).) Mr. Ambrosio's report and opinion, virtually identical in content to the Carbis expert's report, is thus, competent evidence to support a jury verdict against Mr. Adinolfi.

Moreover, the Appellate Division in Bunkers v. Snyder, No. A-3390-09T4, 2011 WL 5082225 (N.J. Super. Ct. App. Div. Oct. 27, 2011)(See the case at Ja482) reversed the trial court's decision that deemed the legal malpractice expert's report a net opinion. The expert's opinion/report in that case also used virtually the same approach as Mr. Ambrosio's report here. Mr. Ambrosio's report

(including his Supplement and Amendment) cites various documents and testimony in the very substantial record which includes Plaintiffs' medical expert's report, case law, and Rules of Professional Conduct. Unlike Defendants' experts in this case, Mr. Ambrosio's initial and supplemental reports establish the standard of care applicable to Mr. Adinolfi. His reports then (also citing to the records) detail Mr. Adinolfi's breach of the standard, explain how this breach caused the Verases' damages and then explain the calculation of damages based on settled law and the outcome of comparable lawsuits. There is no speculation or conjecture on his part, just fact-based assessment.

Mr. Ambrosio detailed exactly where the record shows that Mr. Adinolfi failed to obtain an independent medical expert needed to opine that Dr. Velenziano had been negligent in the surgery (Ja426). Notably, in this case, the Verases themselves easily retained a highly qualified medical expert who opined that Dr. Valenziano's surgical method was below the standard of care. (See the Wernick Certification at Paragraph 6 (Ja452).)

Mr. Ambrosio also explained with legal support that it is standard for the practice, in fact required, that the attorney obtain a medical malpractice expert to support the client's claim. Mr. Ambrosio then explained in detail, citing to the established record, that the negligence caused the Verases' damages. In other

words, he established causation. He also cited case law holding that a client can sue for legal malpractice when the client is forced to take a lower settlement **due to the attorney's failure to properly prepare the case**. He writes on pages 7-8 of his report(Ja428-Ja429):

> "In *Ziegelheim v. Appollo*, *supra* 128 N.J. 250 (1992*)*, the New Jersey State Supreme Court held that a client can sue his attorney for malpractice when the attorney urges a settlement based on wrong advice about the likelihood of success. The Supreme Court stated,
>
> "New Jersey, too, has a longstanding policy that encourages settlements, but we reject the rule espoused by the Pennsylvania Supreme Court. Although we encourage settlements, we recognize that litigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks. Attorneys are supposed to know the likelihood of success for the types of cases they handle and they are supposed to know the range of possible awards in those cases." *(Ziegelheim v. Apollo*, 128 N.J. 250, 263 (N.J. 1992).)
>
> In the *Ziegelheim* case, the plaintiff had actually consented to the settlement. Nevertheless, she was allowed to sue her attorney because her settlement agreement had been based on the wrong advice. Like here, the attorney in that case discouraged the plaintiff from going to trial and urged her to accept a very low divorce settlement. Likewise, in the underlying case here, Defendant Mr. Aldinolfi gave the wrong advice to the Verases when he advised them to settle their claims simply because Dr. Livingston's testimony would supposedly be very damaging. Mr. Adinolfi's unreasonable failure (and breach of the standard of care) to obtain an independent medical opinion resulted in very bad advice to the Verases causing them to walk away from a much higher settlement or windfall judgment.

> Further, the Court in *Ressler v. Hoyt*, No. A-4351-15T1 (App. Div. Apr. 18, 2017) held that even if a plaintiff agrees on the record to the settlement, the plaintiff can claim negligence by his/her counsel if the counsel's negligent advice caused the plaintiff to settle the case. In *Ressler*, the plaintiff settled a medical malpractice case for $1.5 million because his attorney failed to retain a new medical malpractice expert (the initial one later failed to cooperate just prior to trial) who agreed with plaintiff's theory of negligence and urged a settlement that the plaintiff was not really satisfied with. (The plaintiff in *Ressler* also had a pre-existing condition that contributed to the cause of his injury according to the medical expert.)"

Mr. Ambrosio also attached to his report information about various cases involving comparable injuries and their awards or settlement amounts (Ja436-Ja445). The sample cases substantiate his contention that the Verases likely would have received a much greater settlement or jury award, and as a matter of law should have been permitted to pursue their claim to trial. It was negligent for their attorney, Mr. Adinolfi, to thwart their efforts with bad advice. Just like what happened to the plaintiff in the Ziegelheim case.

On page 12 of his report (Ja433), Mr. Ambrosio also describes at length with substantial legal support, that there are two approaches to resolving the calculation of damages. Where there is a settlement that is complained of, as in this case, the Court may allow the jury to decide what the settlement or jury award should be. In other words, a trial on damages. On page 13 (Ja434), he writes:

> "The case law is split on whether it goes to the legal malpractice jury to decide the damages amount or if expert testimony should determine the fair settlement value of plaintiff's medical malpractice claim had Mr. Adinolfi handled the matter within the standard of care. The difference between the amount Plaintiffs actually received in their settlement and the amount they would have received had they not been misadvised about Dr. Livingston's opinion (the treating physician) prior to their accepting the settlement, is the damages amount. (*See Kelly v. Berlin*, 300 N.J. Super. 256, 269 (App. Div. 1997).) If a jury decides the award, they will determine the fair and reasonable compensation to make Mr. Veras whole for any permanent or temporary injury and the consequences of that injury (or injuries) caused by the defendant's negligence (or other fault). They may also consider loss of enjoyment of life. (*Evoma v. Falco,* 247 *N.J. Super.* 435, 452 (App. Div. 1991).)"

Importantly, Mr. Ambrosio's later amendment to his report (Ja479) also provides the case law holding that a legal malpractice expert can opine on the basis for his opinion that a settlement amount is negligently insufficient. In it, Mr. Ambrosio states:

> "First, in *Kelly v. Berlin*, 300 N.J. Super. 256, 269-70 (App. Div. 1997), the Court explained that: "The many factors that go into a settlement are not within the knowledge of the average juror. An expert in the settlement of claims, such as an experienced torts attorney or an experienced claims adjuster, is necessary to explain the various factors which are taken into consideration in the settlement of a case of this kind. Such an expert could explain which factors are relevant and how they affected this matter to enable the jury to determine whether the defendant doctors' negligence caused plaintiff to settle for a lower amount than he otherwise would have, and, if so, the amount of damages plaintiff sustained as a result. For example, such expert testimony could render a comparison of similar claims in the area, an

> analysis of how plaintiff's other injuries would have affected the settlement of his lower back injury, an opinion as to the value of plaintiff's lower back injury in light of its projected severity when the case settled, and an analysis of how legal issues would have affected the settlement amount." (*Kelly at 269-270, internal citations omitted*.)
>
> Later, the Court in *Kapuscenski v. Hess Corp*., No. A-2202-12T3, at *16 (App. Div. Mar. 24, 2014) stated that "In *Kelly v. Berlin*, 300 N.J. Super. (App. Div. 1997), we held that an expert was required to determine the reasonableness of a settlement of litigation. Id. at 268-69. We stated that "[t]he many factors that go into a settlement are not within the knowledge of the average juror." Id. at 269. We noted that an expert in the settlement of claims, such as an experienced torts attorney or claims adjuster, was necessary to explain the various factors that are taken into consideration when a case is settled. Ibid. **We observed that the expert's testimony could include a comparison of similar claims in the area, an assessment of the strengths and weaknesses of the claim, and an analysis of how legal issues might affect the settlement amount.** Ibid." (*Kapuscenski v. Hess Corp*., No. A-2202-12T3, at *16 (App. Div. Mar. 24, 2014).) (Emphasis added.)
>
> Another more recent case agreed stating, "It is permissible for a jury, with the aid of expert testimony, to determine whether a settlement recommended to a client was outside the range of awards she could have expected to receive had she been provided with sound legal advice. It is also permissible for a jury to determine that a client would have secured a more favorable settlement had she not been provided inadequate advice from counsel." (*Dillman v. Petrie*, No. A-5250-15T3, at *14-15 (App. Div. Aug. 30, 2018) citing *Ziegelheim v. Apollo*, 128 N.J. 250 (N.J. 1992).)"

Mr. Ambrosio also explained that in addition to misadvising the Verases about the negative ramifications of the Special Needs Trust for their situation (Ja432), it was also unreasonable for Mr. Adinolfi to be so concerned about the

treating physician's "statement" that Mr. Veras had a healing condition.

Mr. Ambosio explained the legal doctrine that holds that this should not have been such a concern, that the surgeon would be responsible for Mr. Veras's injuries regardless of whether he had an underlying healing condition due to the Eggshell Plaintiff Doctrine (Ja431). Mr. Ambrosio also claimed that Mr. Adinolfi was unreasonable in weighing Dr. Livingston's opinion heavily because the doctor's statement was patently unreliable even if he was Mr. Verases' treating physician at the time (Ja431). Moreover, Mr. Adinolfi's failure to obtain an outside medical expert was the chief and obvious negligence that precipitated his bad advice to the Verases. Such bad advice is actionable. (Ziegelheim v. Apollo, supra 128 N.J. 250, 263 (N.J. 1992).)

He also explains with legal support that, where a settlement is disputed in a legal malpractice case which involves proving a "case within a case," as here, the jury may decide what the value of the underlying case would have been. He writes on page 12 of his report (Ja433):

> "As for the damages caused by Mr. Adinolfi's negligence, "[W]hen plaintiff has settled the underlying action, the measure of damages is the difference between the settlement and the amount of money that would have been obtained by judgment." (*Kranz v. Tiger*, 390 N.J. Super. 135, 146 (App. Div. 2007) (citing *Spaulding v. Hussain*, 229 N.J. Super. 430, 444-45 (App. Div. 1988)). A plaintiff may establish the measure of damages in such cases by proceeding by way of a

> "suit-within-a-suit," that is, by presenting to the jury the proofs that would have been presented had no malpractice occurred. (*Id. internal citations omitted.)* In fact, the suit-within-a-suit method is the most common way to prove such a damage claim. That said, it is now settled "that a legal malpractice case may proceed in any number of ways depending on the issues." Id. at 346. Other methods include reasonable modifications of the suit-within-a-suit strategy and expert testimony. Ibid. The method best suited to a particular case "will depend upon the facts, the legal theories, the impediments to one or more modes of trial, and, where two or more approaches are legitimate, to plaintiff's preference." (*Lopez v. Ginarte, O'Dwyer, Gonzalez, Gallardo & Winograd, LLP*, No. A-1691-17T3, at *11-12 (App. Div. July 8, 2019).)

Therefore, it was inappropriate for the trial court to determine that Mr. Ambrosio was just speculating about damages when the case law provides that the amount of damages in a legal malpractice case should go to a jury.

In Lieberman v. Employers Ins. of Wausau, 84 N.J. 325 (1980), the Supreme Court held that the plaintiff's attorney was negligent for failing to inform him about settlement. The Supreme Court remanded the matter back to the trial court specifically for a trial on damages. Likewise, the jury here may accept Mr. Ambrosio's opinion about the parameters of an acceptable settlement amount, or the amount of a judgment award. The jury here will ultimately decide the appropriate award.

Based on the above, it was incorrect as a matter of fact and law for the trial court to determine that Mr. Ambrosio issued a net opinion on the basis that he

"speculated" on the strength of the case and the damages. That is just not true as borne out by the record.

B. Mr. Ambrosio Is Qualified To Issue An Opinion In This Case.

The trial court also incorrectly found that Mr. Ambrosio was not qualified to opine on medical malpractice cases. The trial court abused its discretion in so finding because it was patently false factually and as a matter of law. Mr. Ambrosio is more than sufficiently qualified. The details of his qualifications have already been set forth above in the Statement of Facts section of this brief at pages 21-22 above.

Not only do the facts show he is qualified to opine on this matter, but as a matter of law, the extent of Mr. Ambrosio's specific experience, at most, only goes to the weight the jury may give his opinion and is in no way grounds for excluding his opinion altogether. In Yerman v. Morris, No. A-3791-18T3, 2020 WL 6285327, at *5 (N.J. Super. Ct. App. Div. Oct. 27, 2020) (See the case at Ja489) the Appellate Division addressed the trial court's decision to allow the testimony of the defendant's legal malpractice expert. The plaintiff asserted that the expert was not qualified because he had not represented a client in a real estate closing (the issue of the case) for many years. The trial court found, and the Appellate Division agreed, that the expert was still qualified given his many years of experience including even

just his review of similar cases. The Court noted that the plaintiffs' concerns went to the weight given to his testimony **and not its admissibility**. The Court also stated that the overlap in specialty of the area of practice at issue in the underlying matter/transaction, although required in medical-malpractice cases, **is not required in legal-malpractice cases**. (Yerman v. Morris, supra, No. A-3791-18T3, 2020 WL 6285327, at *5 (N.J. Super. Ct. App. Div. Oct. 27, 2020).)

Importantly, the negligent act complained of was Mr. Adinolfi's failure to obtain an independent medical expert for the case and then as a result of such failure, urging a deficient settlement. Such negligence is not unique to medical malpractice litigation, but is true of *any* area of litigation practice and so, Mr. Ambrosio should not be required to have an enormous amount of experience specific only to medical malpractice litigation in order to opine on Mr. Adinolfi's negligence in this case. Mr. Ambrosio's extensive general litigation experience (which again, does in fact include medical malpractice litigation) is more than sufficient to allow him to opine here.

III. THE TRIAL COURT ERRED IN FAILING TO CONDUCT A RULE 104 HEARING REGARDING MR. AMBROSIO'S QUALIFICATIONS AS AN EXPERT. (Raised below: 1T21 and 2T5)

In pertinent part, N.J.R.E. 104(a)(1) provides that a judge "shall decide any

preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible." The judge "may hear and determine such matters out of the presence or hearing of the jury." N.J.R.E. 104(a)(2). While, the decision to conduct a Rule 104 hearing rests within the sound discretion of the trial court, when "the court's ruling on admissibility may be dispositive of the merits, the sounder practice is to afford the proponent of the expert's opinion an opportunity to prove its admissibility at a Rule 104 hearing." (Kemp ex rel. Wright v. State, 174 N.J. 412, 432 (2002).) "The Rule 104 hearing allows the court to assess whether the expert's opinion is based on ... sound reasoning or unsubstantiated personal beliefs ...." (Id. at 427, internal citation omitted.) (See also Focazio v. Aboyoun, No. A-1249-19, 2021 WL 2309618 (App. Div. 2021) wherein the Court reversed the trial court's exclusion of an expert because it did not conduct a Rule 104 hearing and so failed to establish a complete record for appeal.)

In this case the trial court improperly excluded Mr. Ambrosio without a Rule 104 hearing. This was an abuse of discretion amounting to reversible error.

IV. THE TRIAL COURT SHOULD HAVE ALLOWED PLAINTIFFS TO PROFFER A NEW EXPERT IF MR. AMBROSIO WAS UNACCEPTABLE. (Not raised below)

Defendants never objected to the Affidavit of Merit provided by Mr.

Ambrosio nor Mr. Ambrosio's qualifications. Indeed they did not even file their Motion to Bar Mr. Ambrosio until *after* Plaintiffs filed their Motion to Bar Defendants' Experts indicating it did not occur to Defendants to challenge Mr. Ambrosio's opinion until Plaintiffs challenged their expert.

Plaintiffs were caught off guard by the trial court's ruling on Mr. Ambrosio's credentials and opinion. The *curriculum vitae* provided to the Plaintiffs stated he had medical malpractice litigation experience. Moreover, his deposition testimony while showing he does have the relevant experience, was not taken until the end of discovery. And so, there was no way Plaintiffs could understand that there was any deficiency in Mr. Ambrosio's qualifications. Plaintiffs, therefore, should have been allowed to retain a new expert. It is unjust to throw out Plaintiffs case after they proceeded all along under the impression that their legal malpractice expert was qualified to opine on the matter. Their claim is meritorious and their injuries (including Mrs. Veras's loss of consortium) are catastrophic and life altering.

If the court does not accept Mr. Ambrosio's report and testimony, Plaintiffs should be afforded the opportunity to quickly retain a different expert who can issue a report within a reasonable time and then be deposed by Defendants. This would not delay the case to an unreasonable degree. Should this matter be remanded for this purpose, it likely could proceed to trial in just three (3) months time.

Because this request was mistakenly not raised in the trial court, per Rule 2:10-2, the standard of review for this court is plain error. Rule 2:10-2 reads, in full:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.
> [R. 2:10-2.]

Should the Court not reverse the trial court's decisions on Mr. Ambrosio's opinion and qualifications, it is respectfully requested that Plaintiffs be permitted to retain a new legal malpractice expert. This will not prejudice Defendants as they can easily depose the expert and then the matter can proceed to trial thereafter. Certainly this would be a just result.

V. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION TO BAR THE DEFENDANTS' EXPERTS BECAUSE AS A MATTER OF LAW, BOTH EXPERTS HAD ISSUED NET OPINIONS.

(Raised Below: Ja21-Ja243; Ja494-Ja512; 1T4-6)

It is well settled that an expert may not provide an opinion at trial that constitutes a "mere net opinion." (Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011).) In Pomerantz, the New Jersey Supreme Court found that the expert testimony proffered by the defendant's expert was inadmissible because although "the witness opined at some length about his experiences and his

impressions," there was no objective basis, such as "handbooks, manuals, treatises, articles or trade publications" to support the opinion. The Supreme Court held that therefore, the defendants' expert's testimony should not have been admitted at trial. The defendants' expert did not establish the standard of care for the industry he was opining about. The Pomerantz Court explained the net opinion rule at length:

> "[A] court must ensure that the proffered expert does not offer a mere net opinion. See *Polzo v. Cnty. of Essex*, 196 N.J. 569, 583, 960 A.2d 375 (2008); *Buckelew v. Grossbard*, 87 N.J. 512, 524, 435 A.2d 1150 (1981). That is, an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered. See *Polzo*, supra, 196 N.J. at 583, 960 A.2d 375; *Buckelew*, supra, 87 N.J. at 524, 435 A.2d 1150; see also *State v. Townsend*, 186 N.J. 473, 494, 897 A.2d 316 (2006); *In re Yaccarino*, 117 N.J. 175, 196, 564 A.2d 1184 (1989). The admissibility rule has been aptly described as requiring that the expert "give the why and wherefore" that supports the opinion, "rather than a mere conclusion." See *Polzo*, supra, 196 N.J. at 583, 960 A.2d 375 (quoting *Townsend*, supra, 186 N.J. at 494, 897 A.2d 316); *Rosenberg v. Tavorath*, 352 N.J.Super. 385, 401, 800 A.2d 216 (App. Div. 2002); *Jimenez v. GNOC, Corp.*, 286 N.J.Super. 533, 540, 670 A.2d 24 (App. Div.), certif. denied 145 N.J. 374, 678 A.2d 714 (1996).
>
> As an example, our Appellate Division has rejected a trial court's reliance on an expert's personal "rule of thumb" regarding fair market valuation as violating Rule 703. *Alpine Country Club v. Borough of Demarest*, 354 N.J.Super. 387, 395-96, 807 A.2d 257 (App. Div. 2002) (concluding that expert's "rule of thumb" approach was neither based on any accepted methodology used by other appraisers nor referenced or adopted by authoritative texts or case law). Applying these standards, our Appellate Division has concluded that a trial court may not rely on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about

> which the expert testified. *Dawsow v. Bunker Hill Plaza Assocs.*, 289 N.J. Super. 309, 323-25, 673 A.2d 847 (App. Div.) (concluding that expert opinion lacked basis in facts sufficient to be more than guess or conjecture), certif. denied, 146 N.J. 569, 683 A.2d 1164 (1996); see, e.g., *Suanez v. Egeland*, 353 N.J.Super. 191, 203, 801 A.2d 1186 (App.Div. 2002) (concluding that trial court erred because expert demonstrated no foundation established by scholarly literature or persuasive judicial decisions).
>
> Similarly, if an expert cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is "personal," it fails because it is a mere net opinion. As the Appellate Division has held:
>
> **It is insufficient for . . . [an] expert simply to follow slavishly an "accepted practice" formula; there must be some evidential support offered by the expert establishing the existence of the standard. A standard which is personal to the expert is equivalent to a net opinion.**
> [*Taylor v. DeLosso*, 319 N.J.Super. 174, 180, 725 A.2d 51 (App.Div. 1999) (citations omitted).]" (Emphasis added.)
>
> (Pomerantz Paper v. New Comm. Corp., 207 N.J. 344, 372-73 (N.J. 2011).)

And when an expert is required to establish a standard of care as here, he must establish what the standard is with support from authority **other than his personal opinion**. The opinion of the standard of care for the industry must be supported by sufficient objective authority. (Davis v. Brickman Landscaping, Ltd., 98 A.3d 1173, 1176 (N.J. 2014).)

In the case at bench, both of Defendants' experts, Mr. Britcher and Dr. Diehl, gave net opinions. Both gentlemen failed to establish the standard of care for their

respective industry. As detailed in the Statement of Facts above, Mr. Britcher did not cite to any treatise or study that supported his contention that Mr. Adinolfi's representation of the Verases was within the standard of care. The same is true for Dr. Diehl. He failed to point to any manual or other authority to support his contention that the surgeon's conduct in Mr. Verases' case was within the standard of care for abdominal surgeons or to even establish what the standard is. Both gentlemen did not establish the standard for the industry with objective authority. At best they used their own personal "rule of thumb" to opine that Mr. Adinolfi acted properly and that Dr. Valenziano acted properly. This is not appropriate and should not be allowed.

Moreover, not only did Dr. Diehl fail to support his view of the applicable standard of care, he also completely speculated as to why the operative report prepared by the negligent surgeon stated that the perforation was iatrogenic (caused by the surgery). Dr. Diehl claimed, without any support whatsoever, that the perforation causing Mr. Veras extreme injury was caused by Mr. Veras's diverticulitis and not a surgical error. Not only was there no support for this opinion. The operating surgeon himself admitted that the perforation was caused by the surgery. Dr. Diehl speculated out of thin air that the perforation was caused by the diverticulitis. This opinion should not be presented to a jury as there is no basis for it

at all and the evidence (including the surgeon's own admission in the operative report) shows otherwise.

The trial court erred in finding that the Defendants' experts should be allowed to testify in this case. Like the Supreme Court ruled in Pomerantz, it is reversible error to rely on their testimony to reach a decision in this case because both gentlemen can only testify about their net opinions that are based entirely on anecdotal information rather than any objective authority.

VI. THE MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED AND PLAINTIFFS' CROSS-MOTION FOR RECONSIDERATION SHOULD HAVE BEEN GRANTED. (Raised below: Ja540-Ja553; 2T4-5)

A. THE PLAINTIFFS' CROSS-MOTION FOR RECONSIDERATION:

In holding that Mr. Ambrosio is not qualified to opine as Plaintiffs' legal malpractice expert and that he had provided an inadmissible net opinion and in also holding that the Defendants' experts had *not* issued net opinions, the trial court overlooked certain controlling law and misapprehended certain material facts. The trial court should have reconsidered and reversed its Decision and Orders.

In addition to the errors by the trial court detailed on pages 25 through 37 above, Plaintiffs apprised the trial court of errors it had made when Plaintiffs Cross-Moved for Reconsideration. Plaintiffs explained to the trial court for one, that in its

September 27, 2024 Decision, the trial court commented that the underlying medical malpractice case was "long settled" and even suggested that this "fact" was one of the reasons the Decision was based on. However, the underlying medical malpractice case was settled well within the applicable statute of limitations. In fact, the underlying medical malpractice case was settled in April 2018 and this legal malpractice action was filed just three and a half years later in November 2021, well within the six-year statute of limitations period applicable to a legal malpractice claim. (Ja5546 and Ja1). The trial court incorrectly relied on the fact that case had settled years ago as a basis for granting the Defendants' Motion to Bar Mr. Ambrosio even though this fact is entirely irrelevant to the admissibility of his testimony. The last page of the Decision states, "There is no factual basis for Ambrosio's opinions **and the medical malpractice matter has long been settled**." (Ja519). This is an incorrect basis for the Decision to bar Mr. Ambrosio and an abuse of the trial court's discretion.

In their cross-motion, Plaintiffs also pointed out that the trial court's September 27, 2024 Decision also incorrectly states on the first page, that the underlying medical malpractice case settled around 2017 and cites Mr. Ambrosio's report as the source for this information. Mr. Ambrosio's report, however, correctly stated that the case settled in April of 2018 (Ja515 and Ja426, last paragraph).

Moreover, the trial Court's September 27, 2024 Decision at first, correctly notes that Plaintiffs were not challenging Mr. Britcher's qualifications (Ja516). Indeed, Plaintiffs only argued that Britcher had issued a net opinion, not that he was not qualified to opine. However, later, on the last page of the Court's Decision, the Court determine that Mr. Britcher is qualified based on his experience as a medical malpractice attorney and therefore, his opinion is not a net opinion (Ja519, middle of page). The Court seems to have completely ignored/misunderstood Plaintiffs' argument that while Mr. Britcher was qualified to opine, he utterly failed to establish the standard of care as is required by the law. His qualifications/personal experience are not what set the standard for the industry; law, treatises and objective authority do.

The Court went on to incorrectly state that, "Mr. Britcher's report relied on case law to support Mr. Britcher's conclusion." (Ja519 at last full paragraph). There was virtually no case law, rules or treatises cited in Mr. Britcher's report(Ja42). That is the critical problem with it, rendering it an inadmissible net opinion. In fact, Mr. Britcher cited just one case and absolutely no other outside materials. That case had nothing to do with the standard of care for a litigation/medical malpractice attorney.

Respectfully, the trial court's Decision was reliant on a numerous factual errors.

As for Mr. Ambrosio's qualifications to opine on this matter, the trial court's decision to bar Mr. Ambrosio as unqualified relied only on Defendants' assertion about his qualifications and experience (Ja518), completely ignoring Plaintiffs' evidence shown in his resume and deposition testimony proving that he is eminently qualified to opine on medical malpractice litigation, or any other professional negligence for that matter (argued above at pages 21-22 and 34-36).

The trial court's Decision also inaccurately states that "While the Ambrosio report relied on the opinion of Plaintiff's medical expert, Dr. Stephens, as to the cause of Plaintiff's injury in the underlying medical malpractice matter, Ambrosio's conclusion that the underlying medical malpractice lawsuit was a "sure win" on the issue of liability was mere conjecture and inadmissible in front of a jury" (Ja519). This statement/finding is wrong in two respects. First, while Mr. Ambrosio did rely on Dr. Stephen's opinion that the defendant surgeon was negligent, he also pointed to the medical records which stated that the injury/perforation of Mr. Veras's bowel occurred during the surgery and the fact that another doctor, who provided the Affidavit of Merit in the underlying medical malpractice case, also believed there was negligence by the surgeon (Ja426, page 5 of Mr. Ambrosio's report, second full paragraph, and page 10 of his report at Ja431.)

And second, Mr. Ambrosio never said the case was a "sure win." He opined that based on the records, it was a strong case that should have settled for more than it did, according to empirical evidence or should have gone to trial for a jury verdict(entire report at Ja422 and see Ja432). The data Mr. Ambrosio relied upon (other similar cases) as well as the case law he cited, is perfectly appropriate according to the case law that he relied upon and as further argued below.

The trial court's Decision also incorrectly states that, "Ambrosio failed to present a cognizable value for Plaintiffs['] damages beyond a speculative amount." (Ja519) However, Mr. Ambrosio did present a cognizable amount of damages by attaching to his report cases which showed the amounts that patients with similarly egregious injuries were awarded by a jury or obtained in settlement. In his report, Mr. Ambrosio explained that as a matter of law, an expert attorney can use this method to tell the jury what a reasonable settlement would have been. He cited case law to support this contention (Ja433).

Mr. Ambrosio also explained that, as a matter of law, the jury may decide what the Verases should have received using the "case-within-the-case" method of litigating a legal malpractice claim. (Ja433). The range of settlement and verdict amounts Mr. Ambrosio provided established a cognizable value of damages. Moreover, the case law also holds that he is not required to provide an exact amount

but instead, a jury may provide the amount Kranz v. Tiger, 390 N.J. Super. 135, 146 (App. Div. 2007)(Ja433).

The trial court may reconsider its Decision pursuant to Rule 4:42-2. As the New Jersey Supreme Court in Lombardi v. Masso, 207 N.J. 517, at 534 (2011) explained:

> "It is well established that '"the trial court has the inherent power to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders **at any time** prior to the entry of final judgment."' Johnson v. Cyklop Strapping Corp., 220 N.J.Super. 250, 257, 531 A.2d 1078 (App.Div.1987), certif. denied, 110 N.J. 196, 540 A.2d 189 (1988) (emphasis added). See also Marconi Wireless Telegraph Co. of Am. v. United States, 320 U.S. 1, 47, 63 S.Ct. 1393, 1415, 87 L.Ed. 1731, 1757 (1943) (finding trial court has "power at any time prior to entry of its final judgment ... to reconsider any portion of its decision and reopen any part of the case"). That power, which is rooted in the common law, see, e.g., Lyle v. Staten Island Terra–Cotta Lumber Co., 62 N.J. Eq. 797, 805, 48 A. 783 (E & A 1901), is broadly codified in Rule 4:42–2, which provides **expansively** that "any order ... which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment **in the sound discretion of the court in the interest of justice**." (Emphasis added); see also R. 1:7–4(b) ("Motions for reconsideration of interlocutory orders shall be determined pursuant to R. 4:42–2."). That Rule, like the jurisprudence on which it is based, sets forth **no restrictions** on the exercise of the power to revise an interlocutory order."

Lombardi v. Masso, 207 N.J. 517, 534, 25 A.3d 1080, 1089 (2011) (Emphasis added.)

In their Cross-Motion for Reconsideration, Plaintiffs pointed to the above-noted substantive errors in the trial court's decision. The trial court should have

reconsidered and reversed its decision and order. Plaintiffs contend that the trial court misunderstood important facts and also overlooked the law and/or misapprehended Plaintiffs' arguments in support of their motion to bar and in opposition to the Defendants' motion to bar.

Another error in the trial court's decision is that it seems to have determined that Mr. Ambrosio must be a Certified Civil Trial Attorney (a "CTA") in order to opine in this matter (Ja518). It is unclear if the Court is merely reciting Defendants' contention or if the Court is using this fact as a basis for its ultimate decision to bar Mr. Ambrosio. Regardless, it is incorrect basis to disqualify Mr. Ambrosio because there is absolutely no such requirement for a legal malpractice expert. This is demonstrated by the fact that Mr. Ambrosio has testified hundreds of times as a legal malpractice expert without ever being a CTA (Ja448 and Ja251).

B. THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT:

Defendants sought summary judgment based on the trial court's decision to bar Mr. Ambrosio (Ja593; 2T4). If this decision is reversed, then the Motion for Summary Judgment must also be reversed.

Additionally, some acts of negligence are so obvious that an expert is not needed to opine on a standard of care. The jury can easily ascertain that the defendant was negligent. (Sanzari v. Rosenfeld, 34 N.J. 128, 141 (1961).) Arguably,

that is true for this case. Mr. Adinolfi's urged the Verases to accept an obviously deficient settlement. He did so because he failed to retain a medical malpractice expert. Given that Dr. Stephens (the Verases' medical malpractice expert in this case) had opined that the surgeon was negligent and that Mr. Veras was so severely injured by the negligence, any jury is likely to find that Mr. Adinolfi was negligent in his representation of the Verases even without the opinion of a legal malpractice expert.

Defendants' motion for summary judgment should have been denied as Plaintiffs could have still put on their case.

CONCLUSION

Plaintiffs therefore respectfully ask that this court reverse the trial court's orders barring Plaintiffs' legal malpractice expert from testifying at trial and allowing Defendants' experts to testify, and remand this matter for a trial.

Alternatively, Plaintiffs respectfully request that this court remand this matter back to the trial court to conduct a Rule 104 hearing on Mr. Ambrosio's qualifications to testify and if found to be unqualified, allowing Plaintiffs to retain a new legal malpractice expert who may be deposed by the Defendants before trial.

Respectfully submitted,

May 28, 2025

/s/ *Batya G. Wernick*

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File No.: 12311.00397

CARLOS VERAS and MAYRA VERAS, Plaintiffs/Appellants, v. ROBERT J. ADINOLFI, ESQ., an attorney at law of the State of New Jersey; GILL & CHAMAS, LLC, attorneys at law of the State of New Jersey; PLANNED LIFETIME ASSISTANCE NETWORK OF NEW JERSEY, INC., as Trustee of the Carlos Veras Special Needs Trust; and DOES 1 through 10, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001326-24T2 Civil Action On Appeal From: Superior Court of New Jersey Law Division: Passaic County Docket No.: PAS-L-3217-21 Sat Below: Hon. Vicki A. Citrino, J.S.C.

BRIEF FOR DEFENDANTS/RESPONDENTS ROBERT J. ADINOLFI, ESQ. AND GILL & CHAMAS, LLC

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Of Counsel & On the Brief

Melissa L. Buterbaugh, Esq.
On the Brief

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PRELIMINARY STATEMENT

This matter comes before the Appellate Division by way of Plaintiffs Carlos and Mayra Veras's ("Plaintiffs") request to reverse the trial court's decisions to: (1) Grant Defendants Robert Adinolfi, Esq. ("Mr. Adinolfi") and Gill & Chamas, LLC's (collectively, "Defendants") Motion to Bar Plaintiffs' Legal Malpractice Expert, Anthony Ambrosio, Esq. ("Ambrosio"); (2) Deny Plaintiffs' Motion to Bar Defendants' Legal Malpractice Expert E. Drew Britcher ("Britcher") and Medical Malpractice Expert William Diehl, M.D. ("Dr. Diehl" or "Diehl"); (3) Grant Defendants' Motion for Summary Judgment; (4) Deny Plaintiffs' Cross-Motion for Reconsideration; and (5) Deny Plaintiffs' request for a Rule 104 Hearing.

Plaintiffs seek to reinstate their case on appeal via either reversal of the trial court's evidentiary decisions barring Plaintiffs' legal malpractice expert and permitting Defendants' legal malpractice and medical experts, positioning Plaintiffs to prevail in their suit on remand; or by obtaining an opportunity to revisit the entirety of expert discovery. Either outcome would be an improper result.

First, the underlying trial court's evidentiary decisions to bar Plaintiffs' expert Mr. Ambrosio, and correspondingly to refuse to bar Defense experts E. Drew Britcher, Esq. and Dr. William Diehl, are entitled to deference by the Appellate Division; not the blanket *de novo* review which Plaintiffs incorrectly assert applies to all five (5) separate underlying decisions for which Plaintiffs seek Appellate

Division intervention. Second, detailed examination makes clear there was no error or abuse of discretion in the trial court's decisions, which were appropriately rooted in analysis of the facts and careful application of the law.

Plaintiffs' expert Ambrosio was not qualified to render an opinion as to Defendant Mr. Adinolfi. Ambrosio's years of experience as a legal malpractice expert did not make him appropriately versed in Plaintiffs' medical malpractice litigation. Ambrosio further failed to opine as to the applicable standard of care; nowhere in his reports, testimony, or in any of Plaintiffs' papers presented to the underlying trial court or this Appellate Division, has the standard of care applicable to Mr. Adinolfi been stated. Moreover, Ambrosio's opinions on deviation were net opinions, as were his opinions on causation, and damages. Barring his opinions, refusing reconsideration and a Rule 104 Hearing, and granting summary judgment as a result of that evidentiary decision, were the only appropriate results. In addition, the trial court appropriately rejected the premise of Plaintiffs' Motion to Bar Defendants' experts Britcher and Diehl, clear evidence of Plaintiffs' desire for the trial court to ignore binding laws from the New Jersey Supreme Court and Appellate Division, *i.e.*, that an expert may rely upon his or her professional experience when rendering an expert opinion.

In addition, Plaintiffs' position with respect to the underlying medical malpractice lawsuit proved the final nail in the coffin of their legal malpractice suit.

Plaintiffs and their expert, Ambrosio, never allowed for the possibility of an outcome other than their desired result of an improbable multi-million-dollar verdict in their favor for the underlying medical malpractice suit. At all times, Plaintiffs and their expert, Ambrosio, presented – and continue in this appeal to present – the underlying medical malpractice lawsuit as if the outcome was a foregone conclusion of certain victory for Plaintiffs. Further, Plaintiffs and their expert, Ambrosio, at all times acted as if Plaintiffs' former counsel in the medical malpractice suit, current Defendant/Respondent Mr. Adinolfi, should also have always proceeded as if the Plaintiffs were guaranteed to win millions at trial. The reality of unfavorable facts which arose during discovery in the underlying medical malpractice suit, coupled with the legal framework which encompasses medical malpractice litigation in New Jersey, do not in actuality support that which Plaintiffs now unreasonably contends: that Mr. Adinolfi should never have considered the possibility of defeat at trial, and never counseled the Plaintiffs regarding the potential impact of facts unfavorable to their medical malpractice suit.

The Appellate Division, applying the appropriate standard of review to each of the five (5) underlying decisions at issue, will find that the trial court correctly applied the law within the factual framework available, and that it must uphold the trial court's determinations in every instance.

PROCEDURAL HISTORY

Plaintiffs Carlos and Mayra Veras's Complaint in this legal malpractice action against Defendant attorney Robert Adinolfi, Esq. and his firm, Gill & Chamas, LLC, was filed on October 11, 2021. (Ja1). Plaintiffs' Complaint lists direct claims against Defendant Mr. Adinolfi. (Ja1). As to Defendant Gill & Chamas, LLC, all of Plaintiffs' claims exist via a theory of vicarious liability flowing from the direct claims alleged against Mr. Adinolfi. (Ja1).

Defendant Mr. Adinolfi's Answer was filed on November 15, 2021. (Ja11). During expert discovery, Plaintiffs served the report of their legal malpractice expert, Ambrosio, dated June 27, 2023. (Confidential Ja421). Subsequently, Plaintiffs served a supplemental report from Ambrosio dated July 5, 2023 (Ja477); and a letter dated December 12, 2023, containing a belated response from Ambrosio to a question that had been asked in his deposition (Ja477). Plaintiffs also served Ambrosio's curriculum vitae. Defendants timely served the reports and curriculum vitae of their legal malpractice expert Britcher (Confidential Ja41) and medical expert Dr. Diehl (Confidential Ja123). In their turn, Plaintiffs' expert Ambrosio and Defendants' experts Britcher and Diehl were deposed. (Confidential Ja 248, Confidential Ja62, Confidential Ja164).

Following completion of the above-listed discovery, Plaintiffs moved to bar Defendants' legal malpractice expert, Britcher, and medical expert Dr. Diehl, on July

31, 2024. (Ja21). Defendants opposed on August 23, 2024. (Ja244). On August 28, 2024, Defendants moved to bar Ambrosio's report as a net opinion. (Ja416). Plaintiffs opposed on September 5, 2024. (Ja451). Oral argument on both motions occurred on September 27, 2024. (1T). On September 27, 2024, the trial court granted Defendants' motion barring Plaintiffs from introducing the opinions, reports, and testimony of Ambrosio at trial. (Ja513). Simultaneously, the trial court denied Plaintiffs' motion to bar Defendants' legal malpractice expert Britcher and medical expert Dr. Diehl. (Ja506).

Discovery closed on December 29, 2023. (Ja534). Plaintiffs served no other report(s) from any other legal malpractice experts during the course of discovery. (Ja522). Defendants moved for summary judgment on October 4, 2024. (Ja520). In response, Plaintiffs cross-moved for reconsideration and also requested a Rule 104 Hearing on October 29, 2024. (Ja540). Defendants opposed Plaintiffs' Cross-Motion on November 4, 2025. (Ja554). On December 19, 2024, the trial court held oral argument and granted Defendants' Summary Judgment motion, denying Plaintiffs' Motion for Reconsideration and request for a Rule 104 Hearing. (2T, Ja586, Ja593). Plaintiffs then filed for Appeal. (Ja600).

STATEMENT OF FACTS

Defendants do not concede to or adopt Plaintiffs' Statement of Facts as contained in Plaintiffs' Amended Appellate Brief, as same is riddled with

impermissible legal conclusions regarding the root issues before the Appellate Division: namely, whether or not the Plaintiffs' or Defendants' respective experts were qualified and/or issued net opinions. Defendants instead rely upon the contents of this Respondent Brief and Defendants' underlying papers contained in the Joint Appendix; specifically, all of Defendants' papers filed before the trial court on the motions leading to the decisions currently before the Appellate Division, and the full and complete reports, curriculum vitae, and deposition testimony of the Plaintiffs' expert Ambrosio, and Defendants' experts Britcher and Dr. Diehl.

The legal malpractice suit on appeal arises from a 2012 medical malpractice matter filed by the Plaintiffs, Carlos and Maya Veras, under the representation of Defendant Robert Adinolfi, Esq., a member of the firm of the Defendant, Gill & Chamas, LLC. (Ja245). That underlying medical malpractice matter involved a July 19, 2011, elective sigmoid colectomy performed on Plaintiff Carlos Veras ("Mr. Veras") by Dr. Carl Valenziano ("Dr. Valenziano") at St. Joseph's Medical Center. (Confidential Ja134). This procedure began as a laparoscopic surgery to remove Mr. Veras's sigmoid colon and converted to an open procedure during the surgery. (Confidential Ja134). Mr. Veras had an unremarkable post-operative course until July 23, 2011, about four days following the procedure, when he developed fever and increasing heart rate. (Confidential Ja134). Following a CAT scan that day he was suspected to have an anastomotic leak (*i.e.*, a leak at the surgery

site where the two disconnected ends of his remaining colon were attached to each other); he returned to surgery immediately and was found to have a perforation in his colon located 10 cm proximal to the anastomosis (*i.e.*, *not* at the surgery site). (Confidential Ja 134). Mr. Veras subsequently underwent multiple medical procedures in 2011 and 2012 (Confidential Ja 134-35) and proceeded to retain Mr. Adinolfi of Gill & Chamas, LLC to file the underlying medical malpractice lawsuit, which occurred in approximately 2014. (Confidential Ja1). As may be reasonably anticipated by any medical malpractice attorney, this involved lawsuit implicating complex details of Carlos Veras's medical care with multiple sequelae and ongoing treatment, was afforded multiple discovery extensions and proceeded for several years. (Confidential Ja45). Ultimately, this medical malpractice matter settled for $500,000 USD in 2018. (Ja245). Plaintiffs were referred by Mr. Adinolfi to another firm and made the choice to proceed with that firm and its advice to place the settlement funds into a Special Needs Trust. (Confidential Ja46).

The individual defendant, Robert J. Adinolfi, a Certified Civil Trial Attorney, passed away from pancreatic cancer during the pendency of the legal malpractice lawsuit. (Ja245). Due to his illness, Mr. Adinolfi was not able to be deposed in this matter, nor able to participate fully in the preparation of his defense. (Ja245). Mr. Adinolfi's specialized area of practice at the law firm of the Defendant, Gill & Chamas, LLC, where he was the head of the medical malpractice department, was

the representation of Plaintiffs in medical negligence matters. (Ja245). To the extent Plaintiffs describe Mr. Adinolfi's actions or knowledge during the underlying litigation (*i.e.*, "pressuring" the Verases into settling (Amended Appellant Brief, pg. 7); "misadvising" the Plaintiffs (Id.); etc.), *none* of Plaintiffs' claims are substantiated in the record, as Mr. Adinolfi was not deposed. (Ja245). Plaintiffs' assumptions amount to mere conjecture that should be disregarded.

Dr. Valenziano, the surgeon against whom Plaintiffs asserted a claim of medical negligence in the underlying medical malpractice matter, is also deceased and was not able to be deposed in this matter. (Ja245). Dr. Valenziano authored a note in Plaintiff Carlos Veras's chart using the word "iatrogenic," a medical term which simply means "related to" a medical process. As Dr. Valenziano was not able to be deposed, there is no authorization of this note in the record, nor an explanation in the record as to what Dr. Valenziano meant by his use of "iatrogenic."

The treating physician in the underlying medical malpractice matter, Dr. Lawrence Livingston ("Dr. Livingston"), is no longer practicing medicine, is thought to no longer be resident in New Jersey, and has not been able to be located by either counsel for the Plaintiffs or counsel for the Co-defendants. (Ja245). Mr. Adinolfi's file contains an opinion letter from Dr. Livingston which opines that Plaintiff Carlos Veras had a "healing disorder" which negatively affected his ability to recover following the initial July 19, 2011 surgery. (Confidential Ja45).

Dr. Livingston was not able to be located or deposed regarding Plaintiff Carlos Veras's "healing condition." (Ja245).

Plaintiffs' legal malpractice expert, Ambrosio, has never been a certified civil trial attorney. (Confidential Ja253, T14:L3-18). Mr. Ambrosio has handled perhaps six (6) to eight (8) medical negligence cases in the course of his fifty-seven (57) years of practice, but has not, on even a single occasion, ever tried a medical malpractice case to verdict. (Confidential Ja253-54, T16:L7 – T18:L19.) Mr. Ambrosio has, by his own admission, never been held to the higher standard of practice required of an attorney specializing in the representation of plaintiffs in medical negligence cases. (Confidential Ja268, T75:L9 – T76:L18.)

Defendants' expert, E. Drew Britcher, Esq., is a Certified Civil Trial Attorney, has specialized in the representation of plaintiffs in medical malpractice cases since 1984, has handled approximately 2,500 medical negligence cases in that time frame, and has tried approximately 100 medical malpractice cases to verdict. (Confidential Ja80, Confidential Ja82, Confidential Ja83-84). Mr. Britcher has been President of the New Jersey Trial Bar and has taught a class in Medical Malpractice Law at Seton Hall Law School from 2010 through his deposition. (Confidential Ja82, Confidential Ja49-61).

There is no written law, statute, treatise or study that sets forth the standard of practice for the representation of a plaintiff by an attorney specializing in the representation of plaintiffs in medical negligence matters. (Ja 245).

LEGAL ARGUMENT

I. THE APPELLATE DIVISION MUST GIVE DEFERENCE TO THE TRIAL COURT'S CORRECT EVIDENTIARY DETERMINATIONS TO BAR PLAINTIFFS' LEGAL MALPRACTICE EXPERT AMBROSIO AND PERMIT DEFENDANTS' LEGAL MALPRACTICE EXPERT BRITCHER AND MEDICAL EXPERT DIEHL (Raised below: at Ja21, Ja416, Ja244, Ja451, Ja494)

A. Standard of Review

Appellate review of a trial court's evidentiary determination precedent to a ruling on summary judgment, must similarly proceed in the same sequence: resolving the evidentiary issue first, followed by the summary judgment determination of the trial court. Townsend v. Pierre, 221 N.J. 36, 53 (2015) (citing Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010)). The evidentiary decision to exclude an expert's opinion is entitled to deference on appellate review. Id. at 52 (citing Bender v. Adelson, 187 N.J. 411, 428 (2006)).

To eliminate the deference which the Appellate Division is required to give the trial court's evidentiary decisions regarding the sufficiency of expert qualifications, Plaintiffs must somehow argue that the trial court misapplied the law regarding these basic principles or abused its discretion. "An abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably depart[s]

from established policies, or rest[s] on an impermissible basis.'" Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2014) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

As the trial court carefully considered all arguments and materials presented by counsel, applied the law in accordance with binding precedent, and detailed its reasoning in an eminently rational Statement of Reasons for each determination (Ja506-12, Ja513-19), no abuse of discretion occurred. The Appellate Division must therefore defer to the trial court's evidentiary decisions to bar Plaintiffs' legal malpractice expert Ambrosio, and to refuse to bar Defendants' legal malpractice expert Britcher and medical expert Dr. Diehl.

B. The Trial Court Correctly Found That Plaintiff's Legal Malpractice Expert Ambrosio Was Not Qualified And Issued Net Opinions on Liability, Causation, and Damages

On August 28, 2024, Respondents/Defendants Robert J. Adinolfi, Esq. and Gill & Chamas, LLC, moved to bar the opinions, reports, and testimony of Plaintiffs' legal malpractice expert Ambrosio. (Ja416). Defendants argued that pursuant to the New Jersey Rule of Evidence 703, Ambrosio's opinions are not supported by the requisite knowledge or experience and are not based on an applicable standard of care. Thus, as presented to and understood by the trial court, the conclusions reached by Ambrosio are "net opinions."

An expert may not provide an opinion at trial that constitutes "mere net opinion." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011). The rule prohibiting net opinions is a "a corollary of N.J.R.E. 703 which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence." Townsend v. Pierre, 221 N.J. 36, 42, 110 A.3d 52, 55 (2015), citing Borough of Saddle River v. 66 E Allendale, LLC, 216 N.J. 115, 144 (2013); see also Buckelew v. Grossbard, 87 N.J. 512, 524 (1981) (expert's bare conclusion unsupported by factual evidence, is inadmissible).

N.J.R.E. 703, Bases of Opinion Testimony by Experts, states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The Net Opinion Rule provides that an expert's testimony "may be based on facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject". Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. (2014).

Further, the Net Opinion Rule "requir[es] that the expert 'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Pomerantz, supra, 207 N.J. at 372 (quoting Polzo v. Cnty. Of Essex, 196 N.J. 569, 583 (2008)). An expert opinion is not a net opinion when it is based on factual knowledge that the expert gained in his or her experience in his or her field. State v. Townsend, 186 N.J. 473, 495 (2006) (finding that expert opinion is not net opinion where the foundation for that opinion is the expert's education, training, "and most importantly," experience). See also Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002) (explaining that "evidential support for an expert opinion is not limited to treatises or any type of documentary support but rather may include what the witness has learned from personal experience."). An expert's opinion is not a net opinion where it is based on references to "records *and* the expert's own experience." Creanga v. Jardal, 185 N.J. 345, 361 (2005); see also Nguyen v. Tama, 298 N.J. Super. 41, 49 (App. Div. 1997) (emphasis added). If the expert fails to give the "specific underlying reasons" for the opinion, that expert "ceases to aid the trier of fact and becomes nothing more than an additional juror." Jimenez v. GNOC Corp., 286 N.J. Super. 533, 540 (App. Div. 1996), abrogated on other grounds, in Jerista v. Murray, 185 N.J. 175 (2005).

The Varases' claims against Mr. Adinolfi concern the legal advice they received from him during the underlying medical malpractice lawsuit. During the

typical course of lengthy discovery for a factually complex medical malpractice matter, Mr. Adinolfi became aware that Mr. Veras's then-treating physician, Dr. Livingston, would testify that Mr. Veras had a condition that hindered his ability to heal from his original surgery. (Confidential Ja45). Mr. Adinolfi subsequently advised the Verases to settle their suit, which settlement was achieved for $500,000.00 USD in 2018. (Confidential Ja45-46). The settlement was subject to attorney's fees, and Mr. Adinolfi advised the Verases to obtain the legal services of another firm for appropriate management of the remaining settlement amount. (Confidential Ja46). The Verases did so, and that firm set up a Special Needs Trust for the Verases' settlement funds. (Confidential Ja46).

In support of their claim for legal malpractice against Mr. Adinolfi, Plaintiffs served the report of their expert Ambrosio. (Confidential JA422-49). Ambrosio purports that Mr. Adinolfi was negligent by: (1) obtaining a $500,000 settlement rather than speculative, unspecified, "millions" at trial or a similarly unspecified larger settlement; (2) referring the Verases to another firm to create a Special Needs Trust for the settlement funds; and (3) that the foregoing alleged malpractice caused the Verases' damages. (Confidential Ja432).

i) Ambrosio Lacks Necessary Qualifications & Experience To Opine As to The Underlying Medical Malpractice Suit And His Opinions Must Remain Barred

As presented to the trial court, Plaintiffs' legal expert Ambrosio lacks any significantly substantive experience in the field of medical malpractice within New

Jersey. (Confidential Ja25-73, Confidential Ja446-49). He has never been a certified civil trial attorney. (Ex. B, T14:L3-18). He only handled a mere six (6) to eight (8) medical negligence cases in his fifty-seven (57) years in practice, which amounts to approximately one (1) case per each decade of practice; and he has never tried even a single medical malpractice case to verdict. (Confidential Ja253-54, T16:L7 – T18:L19). Ambrosio has, by his own admission, never been held to the higher standard of practice required of an attorney specializing in the representation of plaintiffs in medical negligence cases. (Confidential Ja268, T75:L9 – T76:L18.) Moreover, his area of specialization as an attorney is not as an attorney at all – it is instead as a forensic expert witness who happens to be a lawyer, and thus provides expert witness services in legal malpractice cases. (Confidential Ja251, T7:L9 – T9:L1.) His lack of experience in the field of medical malpractice precludes any ability to provide accurate factual knowledge from his own personal observations, as he has none. Moreover, this lack of knowledge impacts all the opinions rendered as to the Defendant Mr. Adinolfi, a plaintiff's medical malpractice attorney.

Ambrosio's report on the issue of liability in the underlying medical malpractice matter shows his lack of personal observations. Ambrosio has no significant experience as a New Jersey medical malpractice attorney, rendering the conclusion woven throughout his report – that the Verases' underlying medical malpractice lawsuit was essentially a foregone conclusion on the issue of liability –

mere conjecture. On that basis, Ambrosio's report and all the conclusions dependent upon his assessment of liability for the underlying medical malpractice matter, should never be presented to a jury.

Ambrosio is a professional expert far more than he is a practicing attorney. Ambrosio has negligible experience with and corresponding understanding of New Jersey medical malpractice litigation. The trial court recognized and understood the absence of any factual or legal basis for the presentation of Ambrosio's unqualified opinions to a jury and made the appropriate decision to grant Defendants' Motion to Bar Ambrosio.

ii) Ambrosio Fails to Supply A Cognizable Standard of Care, Rendering his Report and Testimony Impermissible Net Opinions

In his report, Ambrosio provides legal argument citing to the duties of an attorney and the Rules of Professional Conduct, without articulating any recognizable standard of care. (Confidential Ja429-30). Nowhere in his report or in his deposition testimony does Ambrosio at any time set forth in plain language the standard of care beyond concluding that the unspecified standard was breached by Mr. Adinolfi's purported "failures." (Confidential Ja422-35). Notably, nowhere do any of Plaintiffs' motions to the underlying trial court, or indeed Plaintiffs' current appeal, clearly state the standard of care which is applicable to Mr. Adinolfi.

Moreover, Ambrosio opines, without support other than his own inexperienced judgment, that application of the Procanik case in this circumstance

means that Mr. Adinolfi had a "greater responsibility … to have obtained an independent medical opinion concerning the negligence of the operating doctor," ignoring that Mr. Adinolfi did in fact obtain sufficient independent medical opinion concerning the operating doctor's negligence, in order to submit an Affidavit of Merit to the Court and proceed with litigation.

iii) Ambrosio's Opinions Are Flawed Because He Simply Created The Factual Basis For His Opinions Without Support Of Any Documents Or Case Law

"The mere qualifying of a witness as an expert does not permit him to give unsupported opinions." Glenn Wall Associates v. Wall Township, 6 N.J. Tax. 24 (1983). An expert has rendered a net opinion when he fails to "explain the facts and assumptions on which his conclusion was based". Bucklew v. Grossbard, 87 N.J. 512, 524 (1981). The rule prohibiting net opinion precludes expert testimony "if it is based merely on unfounded speculation and unquantified possibilities". Grazanka v. Pfeifer, 301 N.J. Super. 563,580 (App.Div. 1997), cert. denied, 152 N.J. 189 (1998) quoting Vuocolo v. Diamond Shamrock Chemical Co., 240 N.J. Super. 289, 300 (App. Div. 1990), cert. denied, 122 N.J. 333 (1990). "The net opinion rule requires an expert to give the why and wherefore of his expert opinion, not just a mere conclusion." Jimenez v. GNOC Corp., 286 N.J. Super. 533 (App.Div. 1996), cert. denied, 145 N.J. 374 (1996). Our courts have refused to allow experts to reach conclusions without a factual basis (net opinion) lest they become "nothing more than an additional juror." Id. At 540. The unsupported hypothesis of an expert does

not equate with an expert opinion. The following conclusion of the Appellate Division in Jimenez applies in the instant case:

> "In offering his opinion [the expert] demonstrated no expertise; he merely stated what any layperson without expert knowledge might guess was a potential cause. His testimony is nothing more than an effort to shift the burden of proof to defendants by suggesting that the mere fact of an incident is indicative of [defendant's] negligence."
>
> Id at 543.

Here, Ambrosio adopts the practice specifically prohibited by Jimenez, *i.e.*, providing an opinion, without any factual basis, stating that Plaintiffs' underlying medical malpractice complaint was worth in excess of $5,000,000 USD and thus that the Verases' $500,000 settlement was a result of Mr. Adinolfi's negligence.

In addition, Ambrosio lacks a factual basis for his conclusions that Mr. Adinolfi deviated from the standard of care. He fails to articulate any written standard of care to which he makes vague reference, in either his report or testimony. Ambrosio's statements that the Verases' underlying medical malpractice case would have won "millions" at trial is factually unsupportable and not upheld by New Jersey law.

Ambrosio's flawed conclusions that Mr. Adinolfi somehow did not know of the Eggshell Plaintiff rule, that he accepted Dr. Livingston's potential testimony about the Plaintiff's healing condition as a commentary on the underlying surgeon's liability, and that it was "negligent" for him not to obtain another independent medical opinion, are likewise, without any evidentiary or legal support. Ambrosio

fails to cite a single case in support of these specific conclusions; instead drawing from broad-sweeping, non-specific caselaw and then making unsupported leaps of logic to end up at the bare conclusion that Mr. Adinolfi rendered "bad" advice. Ambrosio admittedly does not practice in the field of medical malpractice in New Jersey and has no knowledge or experience upon which to draw.

Similarly, without any factual support, Ambrosio opines that Mr. Adinolfi is solely responsible for the actions of the outside firm which constructed the Verases' Special Needs Trust, and the Verases' decision to assent to that firm's guidance.

Ultimately, Plaintiffs cannot prove that, had Dr. Livingston testified at trial that Mr. Veras had a healing condition which impacted his recovery from his original surgery, that Plaintiffs nonetheless would have prevailed on all elements requisite to prove their claims and won "millions" in damages. There is no evidence that Mr. Adinolfi's legal judgment was not competent. Likewise, there is no evidence that if the Plaintiffs were able to overcome the detrimental impact of Dr. Livingston's testimony as to their damages, they would have been meritorious at trial and awarded in excess of five (5) million dollars.

Simply put, Ambrosio's opinions utterly fail to set forth a factual or legal basis to support the claim that Mr. Adinolfi breached any duty of care owed to Plaintiffs. Ambrosio further admits that he has no experience in New Jersey medical malpractice. That complete lack of experience, coupled with the baseless

assumptions he uses to breach the gap between the law he cites and the opinions he issues, renders Ambrosio's opinions as mere unsupported, bare, and inadmissible conclusions. Neither in his report nor in his deposition testimony does Ambrosio provide the "whys and wherefores" as to his specific opinions. Instead, he simply declares that Mr. Adinolfi was negligent in obtaining a $500,000 settlement for the Plaintiffs because their underlying suit was, per his speculation, guaranteed to obtain "millions" from a jury at trial. Mr. Ambrosio's opinions are not based in fact, but rather on conjecture, and therefore must be excluded as inadmissible net opinions.

iv) The Trial Court Appropriately Reviewed Ambrosio's Report and Barred His Net Opinions on Damages as Mere Speculation

Plaintiffs did not articulate, much less prove, that they suffered any quantifiable damages beyond speculative "millions" exceeding $5,000,000 (Confidential Ja435). Ambrosio completely disregards the significant reality of settlement in medical malpractice litigation, the possibility of a defense verdict, and the vagaries of juries. Ambrosio's unsupported conjecture for the value of the Plaintiffs' underlying medical malpractice case is not based upon Ambrosio's own experience in medical malpractice – as he has none – but upon a single case reference of a 2012 "botched abdominal surgery" which he does not cite (Confidential Ja433); the only other case mentioned in his report in any detail is a thyroid surgery – a neck surgery, not an abdominal surgery – with completely unrelated physical damages. (Confidential Ja433, Confidential Ja437-39). Ambrosio's attachments of cases that

are worth "millions" comprises a sample size of a mere six (6) cases to support his estimation of the value of the Verases' underlying medical malpractice suit. (Confidential Ja436-45). Ambrosio's exemplars are sourced from law firm websites and clearly constitute the respective law firms' advertising, in itself mere hearsay. (Confidential Ja436-45). Such cherry-picked, selective data, with a miniscule sample size, is not the kind of information relied upon by any competent practicing attorney seeking to place a value on a plaintiff's injury. A medical malpractice attorney with years of experience, such as Mr. Adinolfi, would value a client's injury based on his experience with varied outcomes in cases analogous to that client's injury, or upon a wide range of case outcomes available via legal research on a platform such as Lexis or Westlaw; *not* other law firms' self-promoting websites. As Ambrosio's conclusion for the worth of the Verases' underlying medical malpractice case is neither supported by evidence in the record, nor Ambrosio's own experience, it provides no aid to the trier of fact whatsoever and was appropriately barred by the trial court.

Ambrosio's attempts to dismiss the opinion of Dr. Livingston that the Plaintiff had a "healing condition" impeding his recovery, misses the import of such an opinion in a medical malpractice context. Dr. Livingston, as Plaintiff's treating physician, could have been called as a witness by any party – including the defendants. Plaintiffs could not have prevented defendants from doing so.

Dr. Livingston would then have testified truthfully to his belief that Mr. Veras's healing condition impeded his recovery. Then and now, the truth of whether any such "healing condition" existed is irrelevant, as is the dispute over whether Mr. Veras had or has such a condition. The material point is that the effect of Dr. Livingston's testimony, in a medical malpractice context, would have been to diminish Plaintiffs' damages claims, reducing any potential recovery. Unsurprisingly, Ambrosio missed this key point and misattributed the import of Dr. Livingston's testimony to the issue of liability, likely due to Ambrosio's complete lack of experience in New Jersey medical malpractice litigation.

Ultimately, Ambrosio's unsupported conjecture that the Verases' case would have won "millions" or settled for an unspecified value greater than the $500,000 settlement that Mr. Adinolfi obtained, amounts to pure speculation. Similarly, his baseless conclusion that Mr. Adinolfi's legal judgment caused the Verases' to settle for "less" than their case was worth, is unsupported by either specific caselaw or the experience in New Jersey medical malpractice necessary to understand the nuance and import of the facts available to Mr. Adinolfi at the time he was representing the Verases. Without this experience, Ambrosio cannot make a competent determination as to the reasonableness of Mr. Adinolfi's professional advice, or even a credible showing as to the purported damages the Plaintiffs claim to have suffered.

v) Appellants' Brief Fails to Explain the Alleged 'Abuse of Discretion' by the Trial Court

Plaintiffs/Appellants in their current briefing fail to articulate any abuse of discretion by the trial court in granting Defendants' Motion to Bar Plaintiffs' legal malpractice expert Ambrosio. An undesired outcome on a party's motion does not automatically equate to an abuse of discretion by the court.

Defendants explain to this Court that the phrase "sure win" was a stylistic writing choice made by Defendants' counsel in the course of the underlying motion practice, to succinctly describe the manner in which Plaintiffs' expert Ambrosio's unsupported legal conclusion (that the Plaintiffs were guaranteed certain victory at trial) was woven throughout Ambrosio's report. The trial court understood that the phrase "sure win" was a stylistic choice by Defendants in their briefing, because Defendants explicitly explained the choice to do so in briefing. When re-using this phrase in its Statement of Reasons, the trial court clearly quoted Defendants' briefing, signaling agreement with Defendants' argument that Plaintiffs' expert Ambrosio embedded an improper legal conclusion throughout his report.

Plaintiffs ineffectually argue that Ambrosio's report is loaded with factual and legal support and that reports "like" Ambrosio's are not net opinions. Determining whether a specific expert's report contains net opinions cannot be done by analogizing the suspect report to other permissible reports. In addition, an expert is not immunized in any way from issuing a net opinion in one case, by their reports in

other cases where they did not issue net opinions. Clear reading of Ambrosio's report supports Defendants' argument: there is a legal conclusion regarding the outcome of the underlying medical malpractice case persistently interwoven throughout the report and every opinion therein relies upon that improper and unsupported legal conclusion. Specifically, Ambrosio assumes throughout that Plaintiffs were going to win at trial no matter what.

Ambrosio misapplies various legal principles and flat out ignores others in aid of this conclusion. Ambrosio ignores the reality that the defendants could have called Dr. Livingston, Plaintiff Carlos Veras's treating physician, as a witness at trial. Ambrosio misattributes the importance of Dr. Livingston's testimony, which likely would have detrimentally impacted Plaintiffs' causation and damages arguments regardless of the Eggshell Plaintiff rule, to liability. (Confidential Ja431-32). Instead, Ambrosio attempts to distract from these factors first by failing to mention them at all; and second, by irrelevantly claiming that the Verases were going to sue Dr. Livingston anyway (which they never did) and as a result Dr. Livingston's opinions were unreliable, which two factors are in themselves unconnected. (Confidential Ja426).

Ultimately, all the arguments raised by the Plaintiffs in this appeal were previously presented to the trial court. Plaintiffs do not articulate any basis upon which to predicate a theory that the trial court abused its discretion in finding against

the Plaintiffs. Plaintiffs point to irrelevant details in the facts and attempt to spin a tapestry of abuse of discretion from thin threads (*e.g.*, that commentary on the date of settlement and length of time the case was settled in the court's Statement of Reasons was somehow material to the holding). This is a transparent excuse to present the same arguments which failed at the trial court to the Appellate Division under an incorrect standard of review in order to obtain reversal.

C. The Trial Court Did Not Err In Following the New Jersey Supreme Court's Ruling Allowing an Expert to Rely Upon His Professional Experience, and Permitting the Opinions of Defense Legal Malpractice Expert Britcher and Medical Malpractice Expert Diehl

The trial court's evidence determination to refuse to bar the defense legal malpractice expert E. Drew Britcher, Esq. and, implicitly, the defense medical expert Dr. William Diehl, is entitled to deference upon this review by the Appellate Division.

i) Defendants' Expert Britcher's Opinions, Based on Records, Experience, and Factual Knowledge, Do Not Constitute Net Opinions And Should Not Be Barred

Contrary to Plaintiffs' assertions that the opinions issued by Britcher are premised entirely on his own personal standard rather than any articulated written standard, Britcher's opinions are premised upon the nature, scope, and breadth of his experience as a medical malpractice plaintiff's attorney over approximately forty (40) years. (Confidential Ja83, T21:L22-23.) Second, as set forth in Britcher's report, he states that his opinion is derived from his review of the record developed

in the case (Confidential Ja42-44) as well as review of "the medical information… the legal file… [and] Mr. Veras's conditions." (Confidential Ja128, T66:L6-12.) Despite Plaintiffs' argument, Britcher's opinion may be based on knowledge he gained in his experience in his field – specifically, his experience as a plaintiff's medical malpractice attorney in New Jersey. It is not required that Britcher's opinion be limited to treatises or any type of documentary support. See Townsend, supra; Rosenberg, supra.

In his deposition, Britcher testified that the vast majority of his nearly forty years of experience as a lawyer has been spent specifically as a medical malpractice plaintiff's attorney, inclusive of nearly one hundred (100) trials in that capacity. (Confidential Ja80, T18:L8-17). While he testified to roughly seventy (70) percent of his firm's medical malpractice cases going to trial either resulting in a favorable verdict for his client or a "settlement that was achieved after the close of plaintiff's case that could not have been achieved beforehand," Britcher was clear that "the statistics are vastly in favor of the defendants." (Confidential Ja80-82). Moreover, over the course of his career he has had a prominent role in the legislative arena of New Jersey medical malpractice laws and thus has knowledge and awareness of the Administrative Office of the Courts statistics pertaining to medical malpractice, which per his testimony, indicate generally that 76% of the medical malpractice

cases tried to verdict are decided in favor of medical defendants. (Confidential Ja80-82, T18:L22 – T20:L1).

Specifically, Britcher testified to experience with suits against a defendant doctor and hospital relating to abdominal surgery, estimating about 40 or 50 cases within the approximate 2,500 to 3,000 medical malpractice cases which he has handled over the course of his career. (Confidential Ja83-84, T21:L14 – T22:L4). He has also handled cases similar to the underlying medical malpractice suit at issue here, which deal with temporary and permanent colostomies, and generally speaking these matters were resolved by settlement; with, in fact, somewhere over "90 plus percent" of Britcher's cases overall resolving via settlement. (Confidential Ja86, T24:L3-19). In Britcher's opinion, the underlying medical malpractice case at issue here would absolutely be subject to a Scafidi reduction, putting the value of the underlying matter in the "hundreds of thousands", with reference to a similar matter of abdominal surgery in a young woman settling for approximately $600,000. (Confidential Ja86-89, T24:L21-T27:19). He also opined that whether or not Mr. Veras had a "healing condition" would "certainly" be an issue on which the parties disagree, but that the opinion of the treating physician, Dr. Livingston, would have been admissible in the underlying case (with Britcher citing to the Stigliano decision), regardless of whether the Verases had sued Dr. Livingston or not. (Confidential Ja95, T33:L17-23; Confidential Ja97-99, T35:L24 – T37:L7).

Britcher opined also that a legal expert cannot say whether a specific settlement amount is reasonable, as that is a jury determination. (Confidential Ja102, T40:L9-18). Per Britcher, Defendant Mr. Adinolfi met his duty in that he hired an expert and obtained his affidavit of merit; he did not have a duty to have a formalized expert report before the date set forth in any discovery schedule deadline. (Confidential Ja103-06, T41:L23 – T44:L8). Further, Britcher testified that resolution of a medical malpractice case is a matter of overall judgment which needs to account for many factors, including, specifically in this case, Dr. Livingston's opinion as to Mr. Veras's "healing condition", the nature of Mr. Veras's injury, and the potential for a Scafidi reduction. (Confidential Ja106-08, T44:L9-23 – T46:L25). Based on his experience and assessment of the factors affecting the Verases' underlying medical malpractice suit, Britcher opined that it was "a reasonable judgment on [Defendant Mr. Adinolfi's] part to advise [the Verases] that resolution at that time was reasonable," (Confidential Ja108, T46:L14-25) and, in addition, that it was reasonable for Mr. Adinolfi, a plaintiff's medical malpractice attorney, to send clients such as the Verases to someone to provide asset protection trust work and further advice. (Confidential Ja110-13, T48:L14-T51:L12.) Britcher opined that because of the nature of Medicaid liens, Mr. Adinolfi had done well in reducing Mr. Veras's Medicaid lien. (Confidential Ja113-14, T51:L13-T52:L20.) Overall, Britcher opined that the settlement outcome the Verases received, taking into

consideration all factors, was reasonable under the circumstances. (Confidential Ja123-24, T61:L14-T62:L5.) Therefore, Plaintiffs' first argument fails, and the trial court's decision to deny their motion should be upheld.

Second, Plaintiffs essentially argue that their own expert report is better than Britcher's report, and therefore, Britcher's report constitutes a net opinion. In making this argument, Plaintiffs state that Plaintiffs' legal expert, Anthony Ambrosio, Esq. (hereinafter "Ambrosio"), (1) details the facts of the representation of the Plaintiffs by the Defendant, (2) cites law and documents to support his opinions and (3) is a good example of a report that would "withstand any challenge." Plaintiffs go on to claim that Britcher's opinions are net opinions because of Britcher's lack of experience as a legal expert, conceding to his wealth of experience as a medical malpractice attorney.

Plaintiffs' argument, however, that Ambrosio's report is somehow proper when Britcher's report is not, is based on the false premise that an expert is required to cite standards or treatises. Plaintiffs' own expert, Ambrosio, fails to cite to standards or treatises. As noted above, Britcher's opinions may be, and are, based on factual knowledge that he gained in his experience in his field – medical malpractice. It is not required that the basis of Britcher's opinions be limited to treatises or any type of documentary support. See Townsend, supra; Rosenberg, supra. Significantly, Plaintiffs' expert, Ambrosio, fails to articulate any written

standard of care applicable to the nature and scope of the representation of the Plaintiffs by the deceased Defendant Mr. Adinolfi. Ambrosio merely references general legal citations to mask the lack of support for his own legal conclusions, which he is unable to buttress given his near total absence of training and experience in medical malpractice litigation.

Plaintiffs further argue that Britcher failed to supply the "why and wherefore" that support his opinion and offered a mere "net opinion." As noted above, Britcher did provide the "why and wherefore" in his report and testimony that supports his opinions and conclusions. Specifically, Britcher's conclusions and opinions in his report are based on his review of the record developed in this case, which he lists on the first pages of his report. Britcher further stated, in testimony cited by Plaintiffs in the motion papers before the underlying trial court, that his opinions are based on his knowledge, training, experience and skill; specifically, information he has been made aware of throughout his career, where he is prevalent as counsel for the party plaintiff in his field of medical malpractice. Contrary to Plaintiffs' argument, Britcher's conclusions are not drawn from his "personal opinion", but from the facts in the record, and from his knowledge that he gained in his professional experience in his field of medical malpractice litigation, which is proper. Therefore, Plaintiffs' argument failed, and the trial court denied their Motion to Bar Britcher. Now, Plaintiffs fail to demonstrate how this evidentiary decision by the trial court was an

abuse of its discretion, and thus the Appellate Division must not disturb the trial court's decision to refuse to bar Britcher's report.

Fourth, Plaintiffs seek to discount Britcher's opinion that Mr. Adinolfi was correct to be concerned that a jury in the underlying medical malpractice suit would be impacted by testimony from the Plaintiffs' treating physician Dr. Livingston – by misdirecting the potential importance of Dr. Livingston's testimony. Specifically, Plaintiffs attempt to claim that Dr. Livingston's potential testimony in the underlying medical malpractice suit (that Carlos Veras had a "healing condition") did not constitute an opinion as to the treating surgeon's negligence; that this "healing condition" was refuted by experts retained in the current legal malpractice suit; and that the Verases wanted to sue Dr. Livingston; therefore, Dr. Livingston's opinion as a treating physician would not carry much weight.

There are several significant discrepancies in Plaintiffs' logic, as Defendants argued to the trial court. First, there is no dispute that Dr. Livingston's statement as to a healing condition was not a claim in any way related to the potential negligence of the original surgeon. The significance of Dr. Livingston's belief that the Plaintiff had a "healing condition," was that any such testimony would have a serious chance of affecting the Plaintiffs' causation argument, and thus diminishing the Plaintiffs' damages claims in the underlying medical malpractice matter. Second, what is known now by experts in the current legal malpractice case about Mr. Veras's

"healing condition" is also irrelevant; the only information that is relevant is what Mr. Adinolfi knew at the time he was making his assessment of the Verases' case. While there is no evidence of Mr. Adinolfi's knowledge via testimony in this case, it is reasonable to assume he would know the basic workings of his profession – that defendants could call Dr. Livingston as a witness and elicit information that Mr. Veras may have, in the treating physician's opinion, a "healing condition." Third, Mr. Adinolfi's knowledge that the Verases were considering suing Dr. Livingston is also irrelevant. The Verases never filed a complaint against Dr. Livingston or added him to the suit against Dr. Valenziano, so whether they were contemplating suing Dr. Livingston is meaningless.

Plaintiffs' demands for citations to treatises and objective authority do not comport with Townsend and are essentially an attempt by the Plaintiffs to have the Court disregard any expert's experience in their field as "anecdotal." Britcher's opinions are firmly based on the facts in the record and his extensive experience as a plaintiff's medical malpractice attorney. Thus, his opinions are not net opinions, and the trial court appropriately held that his opinions should not be barred.

ii) The Trial Court Appropriately Held that Dr. William Diehl's Opinion as to the Standard of Care Does Not Constitute a Net Opinion

The trial court examined Plaintiffs' unsupported argument that Mr. Adinolfi's medical expert Dr. Diehl supplied a net opinion, and appropriately denied Plaintiffs' application upon review of the facts against the law, without any abuse of discretion.

As argued at length to the trial court, Plaintiffs' insistence that all expert opinions must be sourced from treatises, and refusal to acknowledge that experience, education, and training may inform an expert's opinion, is unsupported by the caselaw defining acceptable sources for an expert's opinion. Plaintiffs' argument directly contradicts binding precedent from the New Jersey Supreme Court and the Appellate Division. See Townsend, supra, 186 N.J. at 495 (finding that expert opinion is not net opinion where the foundation for that opinion is the expert's education, training, "and most importantly," experience). See also Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002).

The trial court agreed that Dr. Diehl, in his report and deposition, repeatedly makes clear that his opinions are sourced from his experience, knowledge, training, and review of the records in this matter. (Confidential Ja133-63, Confidential Ja165-231). His deposition contains lengthy testimony as to his prior experience with abdominal surgeries such as the one Mr. Veras underwent, and his experience with patients who had complications with surgeries including leaks at the anastomosis or elsewhere, where the abdominal wall couldn't be closed, where patients have had multiple surgeries, where colostomies are performed to be temporary or permanent. (Confidential Ja178-89, T14:L17 – T25:L22). Contrary to Plaintiffs' claims that Dr. Diehl's entire practice comprises primarily breast surgery, his testimony is incredibly clear: prior to the COVID-19 pandemic, Dr. Diehl estimated performing

surgery on approximately forty to fifty colon cases for diverticulitis every year, including both laparoscopic and open colon surgeries. (Confidential Ja177, T13:L7-12; Confidential Ja178-79, T14:L17-T15:L10). His specialization in surgical breast oncology is recent (as of the COVID-19 pandemic) and does not obviate his prior years of experience where the "bulk of [his] practice [he] did general surgical oncology and general surgery." (Confidential Ja176-77, T12:L13-T13:L12). Moreover, Dr. Diehl clearly sets out the standard of care (*i.e.*, where doing anything other than resecting the bowel around a discovered perforation would be outside the standard of care). (Confidential Ja191, T27:L14-25; Confidential Ja136-41). Plaintiffs unreasonably rejected the standard of care articulated by Dr. Diehl, demanding instead a citation to a "treatise or manual," and truncated Dr. Diehl's testimony in their brief to the trial court in an attempt to omit the scope of his experience. (Confidential Ja191, T27:L20-25).

Plaintiffs also clearly misunderstood the nature of an iatrogenic injury, which can be broadly defined as "related to" a medical process (rather than "caused by surgery", as Plaintiffs misstate). Iatrogenesis may be understood by the lay person to be the "causation of a disease, a harmful complication, or other ill effect by any medical activity, including diagnosis, intervention, error, or negligence," can result from a variety of sources including known risks and side effects of procedures or medications, and does not automatically equate to medical negligence. (Ja305-12).

According to the Abstract of "When Is Iatrogenic Harm Negligent?" a peer-reviewed article in the August 2022 publication of the American Medical Association's Journal of Ethics, "Iatrogenesis refers to harm experienced by patients resulting from medical care, whereas negligence is more narrowly conceived as deviation from standard care. While all harm resulting from negligence is iatrogenic, not all iatrogenic injury is negligent." (Ja334). Even an admission of an iatrogenic injury does *not* constitute, for the purposes of litigation, a causation opinion for an injury alleged to be the result of medical malpractice. Moreover, Plaintiffs' attempt to interpret this "admission" as the "cause" of Mr. Veras's injury cannot be imposed upon the medical records here, given the demise of the surgeon who authored that note as to the "iatrogenic" injury, and the inability to obtain his testimony on the nature and meaning of that note.

In this case, Plaintiff Carlos Veras had an uneventful post-operative course for the first four days following his surgery. It was only on the fourth post-operative day that the patient's clinical condition deteriorated, such that any contention of a perforation of the bowel having occurred at the time of the surgery is medically illogical.

Finally, Plaintiffs' own determination of the "credibility" of Dr. Diehl's opinions or reasoning, which naturally would be biased in support of Plaintiffs' own experts and against any defense experts, does not substitute for a jury's determination of any

expert's credibility. Dr. Diehl's report and testimony should not be barred on that factually and legally insufficient basis. While the trial court's Statement of Reasons refusing to bar Defendants' experts does not detail the decision not to bar Dr. Diehl, the reasoning clearly set out for the trial court's decision as to Britcher is implicitly the standard applicable to Dr. Diehl as well. Moreover, it is most appropriate for the trial court to focus on whether or not to bar the primary expert – the legal malpractice expert – in a legal malpractice case, as subsequent summary judgment turns on whether each side has admissible expert opinion in support of their position.

Plaintiffs' motion to bar Defense experts Britcher and Dr. Diehl was premised upon a myopic view of the caselaw surrounding net opinions, specifically excluding the value of an expert's training and experience in favor of an unreasonable demand that all expert assertions on standard of care be followed by a pinpoint citation to a treatise or manual (which even Plaintiffs' own experts cannot uphold). These arguments ignore the full body of law on this issue and sought to induce the trial court to rule in opposition to binding precedent. The trial court did not abuse its discretion by following clear rulings from the Appellate Division and Supreme Court, and denying Plaintiffs' motion.

iii) Plaintiffs' Appellate Brief Fails to Demonstrate an Abuse of Discretion by the Trial Court in Denying Plaintiffs' Motion to Bar Defendants' Experts Britcher and Diehl

Ultimately, the Plaintiffs' Motion to Bar both of Defendants' experts rested upon a single premise, contrary to binding law from the higher courts, which the trial court

appropriately rejected: that no expert may ever rely upon his or her professional experience in rendering an expert opinion. Plaintiffs want treatise and manual citations and refuse to accept the validity of an expert's professional experience. This stance contradicts both the Appellate Division and New Jersey Supreme Court's previous determinations, that an expert may rely upon his professional experience in rendering his opinion. This is the crux Plaintiffs' underlying arguments against both Britcher and Diehl.

In addition, as to Dr. Diehl, Plaintiffs seized upon use of the word "iatrogenic" in a medical note by the operating surgeon Dr. Valenziano in reference to Carlos Veras's bowel perforation discovered four days after his original surgery. "Iatrogenic" is a medical term, which Plaintiffs improperly attempt to imbue with legal meaning to shortcut their requisite burden of proof in the underlying medical malpractice case, as seen by Plaintiffs' argument that "The operating surgeon himself admitted that the perforation was caused by the surgery." (Amended Appellant Brief, pg. 42). Dr. Valenziano died and could not be deposed regarding what he meant by this note, his use of the word iatrogenic, and what he understood that word to mean in the context of Carlos Veras's surgery, treatment, and injury. Plaintiffs cannot impose their preferred interpretation of the note on these facts, coupled with a dogged refusal to acknowledge the validity of an expert bringing their professional experience to bear when issuing an expert opinion, to claim that Dr.

Diehl's opinion was a net opinion. In consideration of these arguments, the trial court did not abuse its discretion and thus the Appellate Division must not disturb the evidentiary decision not to bar Britcher or Dr. Diehl.

II. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' CASE WITH PREJUDICE AS REQUIRED BY THE EVIDENTIARY DETERMINATION TO BAR PLAINTIFFS' LEGAL MALPRACTICE EXPERT AMBROSIO (Raised below: Ja520, Ja540, Confidential Ja550, Ja554, Ja593)

A. Standard of Review

The legal consequences of the exclusion of an expert's opinion and its effect on a plaintiff's ability to establish the causation necessary to maintain a malpractice claim, is reviewed *de novo*. Townsend v. Pierre, 221 N.J. 36, 53 (2015) (citing Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014)).

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Our Supreme Court has recognized that "[t]o send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed "worthless" and will "serve no useful purpose." Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520, 541 (1995).

Summary judgment should be granted after the motion judge considers the competent evidential materials presented in the light most favorable to the non-moving

party and determines under the applicable evidentiary standard, that the evidence is insufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party. Brill, 142 N.J. at 523 (citing, Dairy Stores Inc. v. Sentinel Publishing Co. Inc., 104 N.J. 125, 135 (1986); and Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954).

As a general rule, all professional malpractice cases require expert testimony to establish a professional's negligent deviation from the applicable standards of care. Garcia v. Kozlov, 179 N.J. 343, 362 (2004); see also N.J.S.A. 2A:53A-27. Expert testimony is required to evaluate sophisticated professional judgments requiring the application of knowledge or practice experience beyond the understanding of lay jurors. Spaulding v. Hussain, 229 N.J. Super. 430, 443 (App. Div. 1988). Expert testimony is required in a legal malpractice case. Kranz v. Tiger, 390 N.J. Super. 135, 147 (App. Div. 2007); see also Garcia, 179 N.J. at 362 ("as in nearly all malpractice cases, plaintiff needed to produce an expert regarding deviation from the appropriate standard.")

In addition, the Third Restatement, when considering the concept of vicarious liability of a law firm, states:

> (1) A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.
> (2) Each of the principals of a law firm organized as a general partnership without limited liability is liable jointly and severally with the firm.

(3) A principal of a law firm organized other than as a general partnership without limited liability as authorized by law is vicariously liable for the acts of another principal or employee of the firm to the extent provided by law.

Restat. 3d of the Law Governing Lawyers, §58 (3rd 2000).

B. Absent A Legal Malpractice Expert, the Trial Court Correctly Held that the Law Requires Dismissal with Prejudice of Plaintiffs' Suit

As presented to the trial court, Plaintiffs' case without question requires a legal malpractice expert to articulate to a jury the standard of care, any breach thereof, causation, and damages. Without an expert, Plaintiffs' claims must fail as a matter of law. Plaintiffs already implicitly conceded the necessity of an expert and inapplicability of the common knowledge exception, with their retention of Ambrosio and service of his (inadmissible) report, supplemental report, and letter response to a deposition inquiry.

On September 27, 2024, following full briefing and oral argument, the trial court barred the opinions, reports, and testimony of Plaintiffs' expert Ambrosio as net opinions. Specifically, Ambrosio's "experience does not qualify him to be an expert witness regarding the analysis of settling a medical malpractice case such as this with the issues involved." (Ja511). His opinions were found by the trial court to amount to "conjecture" that would be "inadmissible in front of a jury"; and he failed to supply a cognizable damages value beyond a speculative amount. Ultimately, the trial court found no factual basis for Ambrosio's opinions. (Ja512).

Plaintiffs' legal malpractice expert was appropriately disqualified, and his opinions barred from presentation to a jury in any form.

As discovery had closed and a trial date was set, Plaintiffs could not prevail at trial as a matter of law without the requisite expert opinion to support their malpractice allegations against Mr. Adinolfi. The trial court held that the most appropriate course was summary judgment in Mr. Adinolfi's favor, dismissing Plaintiffs' Complaint with prejudice. Further, Plaintiffs' Complaint against Gill & Chamas, LLC was dismissed as Plaintiffs' allegations against the LLC were vicarious and flowed from the direct claims against Mr. Adinolfi. Even review of the trial court's decision through a *de novo* standard would not result in reversal of the trial court's decision to dismiss Plaintiffs' Complaint with prejudice.

III. PLAINTIFFS' MOTION FOR RECONSIDERATION WAS APPROPRIATEY DENIED AS PLAINTIFFS FAILED TO DEMONSTRATE THAT THE TRIAL COURT'S DECISION WAS PALPABLY INCORRECT (Raised Below: Ja540, Ja554, Ja586)

A. Standard of Review

The Appellate Division's standard of review on a motion for reconsideration is deferential. Hoover v. Wetzler, 472 N.J. Super. 230, 235 (Super. Ct. App. Div. 2022) (see Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021)). The Appellate Division will not disturb a trial court's determination on a motion for reconsideration unless it represents a clear abuse of discretion. Kornbleuth v. Westover, 241 N.J. 289, 302 (2020) (citing Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283

(1994); accord Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2014)). "An abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis.'" Kornbleuth v. Westover, 241 N.J. 289, 302 (2020); Pitney Bowes Bank, 440 N.J. Super. at 382, 113 A.3d 1217 (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

Where Plaintiffs seek reconsideration but "offer[] no new evidence, citations, or explanation with any tendency to show that the [trial] court's decision … was palpably incorrect or irrational, or that the [trial] court failed to appreciate the significance of probative, competent evidence," and are denied by a trial court rationally explaining its decision based on existing legal principles, the Appellate Division will find no abuse of discretion. Kornbleuth v. Westover, 241 N.J. 289, 308-09 (2020).

B. Plaintiffs' Motion for Reconsideration Was A Second Bite at the Apple and Failed to Offer New Evidence, Law, or Explanation that the Trial Court was Palpably Incorrect

By Order dated September 27, 2024 (Ja513), the trial court properly granted Defendants' Motion to Bar Plaintiffs' expert Ambrosio, after assessing all reports, deposition testimony, and with full briefing from all parties. Ultimately, Plaintiffs failed to demonstrate good cause to disturb the order barring Ambrosio and their

request for reconsideration presented a quintessentially "frivolous, vexatious … repetitious" application to the court.

Plaintiffs' Cross-Motion For Reconsideration sought to re-argue their position, counter to binding precedent, that no expert should be permitted to rely upon professional experience when issuing an opinion. All arguments presented to the trial court were repetitious and continue to be repeated here without a demonstration of an abuse of discretion by the trial court in denying Plaintiffs' Motion For Reconsideration. There was no substantive error by the trial court in any of the points with which Plaintiffs took issue regarding the Court's original decision to bar Ambrosio.

Plaintiffs' argument that the Court "confused" the two simultaneously opposing motions from Plaintiffs and Defendants amounted to no more than a thin attempt to argue an error in logic that is, at its root, entirely without basis or merit. The Court's Statement of Reasons clearly delineated the two warring sets of motions by each side and demonstrated full understanding of the requests issued by each party in their motions, and the reports and affiliations of each expert.

Clearly, in granting Defendants' Motion to Bar Ambrosio via the Order and Statement of Reasons of September 27, 2024, the trial court assessed all reports, resume materials, and deposition testimony from Ambrosio. The trial court properly concluded in its detailed Statement of Reasons that Plaintiffs' legal malpractice

expert issued Plaintiffs' cross-motion presented no good cause to disturb the September 27, 2024 Order barring Ambrosio, and was correctly denied. In this appeal, Plaintiffs repeat their tired arguments yet again but present no evidence of an abuse of discretion by the trial court, and thus no justification for the Appellate Division to reverse the lower court's ruling.

C. The Trial Court Did Not Abuse Its Discretion and had No Other Choice But to Deny Plaintiff's Motion for Reconsideration

Clear review of the trial court's two Statements of Reasons demonstrates that no abuse of discretion occurred. Plaintiffs' Motion For Reconsideration conjured baseless arguments and repeated arguments already considered and rejected by the trial court.

For example, the Statute of Limitations has never been at issue in either the medical or legal malpractice cases. The trial court's reliance upon Defendants' Certification of Counsel which carried a mistake in the year the underlying medical malpractice case was settled (i.e. 2017 rather than the accurate 2018) is also a non-issue with no bearing on the fitness of the respective parties' experts' opinions.

The trial court assessed all experts to the fullest, reviewing their qualifications and opinions via reports and deposition testimony. The trial court was not confused as to whose expert to bar. The trial court also included assessment on Britcher's qualifications, showing that it fully understood the law regarding the qualifications of experts, and fulfilled its obligation by fully assessing in every particular of all the

experts at issue, within the framework of the law and the trial court's responsibilities regarding what may be presented to a jury.

The volume of caselaw cited by Britcher does not amount to an abuse of discretion by the trial court, which noted that Britcher did cite to some caselaw in forming his opinion.

It is Plaintiffs' attempt to impose a legal definition on a medical term (*i.e.* use of the word "iatrogenic" as a medical term by the deceased Dr. Valenziano, interpreted by Plaintiffs as a legal admission on causation for Plaintiffs' injury) where a serious problem lies, as discussed in more detail above and presented to the trial court. Plaintiffs argue that Ambrosio, a lawyer, may review medical records and convert the medical term "iatrogenic" into a legal admission by the key defendant physician Dr. Valenziano (conveniently deceased and unable to contest Plaintiffs' misinterpretation of medical terminology) that the surgery he performed caused Carlos Veras's injury. By mischaracterizing this term out of its proper medical context, Plaintiffs seek to improperly shortcut the legal requirement that they actually prove causation in the underlying medical malpractice case.

Plaintiffs cannot rely on the existence of an Affidavit of Merit as some kind of proof of negligence. Affidavits of Merit do not serve that purpose, or discovery would be pointless.

As Defendants have already explained to both the trial court and this Appellate Division the germination of the phrase "sure win" in the briefing and the trial court's Statement of Reasons, no further words should be wasted on this subject here.

Finally, Plaintiffs' confusion on whether the trial court was basing any part of its opinion on Ambrosio on his status (*i.e.*, not a Certified Civil Trial Attorney) is not worth the Appellate Division's attention. The trial court did not determine that Ambrosio was required to be a CTA – or the it would have said so. Since the court did not, this determination was not made, and thus is not a reason to cry abuse of discretion.

The trial court correctly followed binding precedent from higher courts in its assessment of the Plaintiffs' and Defendants' experts, their opinions, and the arguments put before it. As demonstrated herein, there is no basis for a claim that the trial court abused its discretion in denying Plaintiffs' Motion for Reconsideration. Therefore, that denial is entitled to deference by the Appellate Division and should not be disturbed.

IV. THE TRIAL COURT CORRECTLY FOUND THAT A RULE 104 HEARING WAS UNNECESSARY (Raised below: 1T21, 2T5)

A. Standard of Review

Pursuant to the New Jersey Rules of Evidence 104(a)(1), "The court shall decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible." As the Plaintiffs requested, and were denied, a Rule 104

Hearing before the trial court in both their papers and in oral argument, the Appellate Division has held that a trial court's decision on whether or not to hold a Rule 104 Hearing is subject to the abuse of discretion standard.

B. As the Trial Court Examined All of Ambrosio's Testimony and Reports, A Rule 104 Hearing Would Serve No Purpose and was Appropriately Denied

As argued before the trial court, a Rule 104 Hearing on Ambrosio's qualifications and opinions would serve no purpose, as the trial court already reviewed all the evidence necessary for a determination on Ambrosio's qualifications and the admissibility of his opinions. Ambrosio's complete reports, full deposition transcript, and resume were provided to the trial court in duplicate by both Plaintiffs and Defendants in the course of the underlying motions.

The trial court did not abuse its discretion by refusing Plaintiffs' request for a Rule 104 Hearing after reviewing these materials. Such a hearing on Ambrosio's qualifications would be pointless: he was already deposed, wherein the Defense probed the scope and nature of Ambrosio's qualifications, and Plaintiffs had every opportunity if they so chose to question him in order to supplement his testimony. Nor is a Rule 104 Hearing necessary to address the validity of Ambrosio's opinions, as the problems with his opinions, and Plaintiffs' counter-arguments in support of admissibility, were already briefed in full in the papers submitted to the trial court, appending Ambrosio's deposition transcript, reports, and resume. Plaintiffs'

underlying motion and this appeal both fail to specify exactly what questions and information should be the topic of the requested Rule 104 Hearing beyond the information already submitted to and reviewed by the trial court.

Ultimately, a Rule 104 Hearing would add nothing to the body of evidence already presented to the trial court, and would not result in a different outcome than that already reached. The trial court considered the arguments made herein, and did not abuse its discretion in denying Plaintiffs' request for a Rule 104 Hearing. That decision is entitled to deference by the Appellate Division.

V. PLAINTIFFS SHOULD NOT BE PERMITTED TO RE-DO THE ENTIRETY OF EXPERT DISCOVERY (Not Raised Below)

The New Jersey Appellate Division "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such presentation is available[,] unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). While the Appellate Division may address "plain error" if it is in the "interests of justice" to do so, in this instance, consideration of Plaintiffs' request to re-do expert discovery does not implicate plain error or serve the interests of justice. Id.

Plaintiffs seek for the Appellate Division to grant them new relief never requested of the trial court, applying a mix of new and previously presented arguments. Ultimately, Plaintiffs seek to repeat the entirety of expert discovery to allow

Plaintiffs to have a new expert. The Appellate Division should not now entertain a request Plaintiffs had every opportunity but failed to bring to the lower court. Plaintiffs' request to re-do expert discovery does not implicate the jurisdiction of the trial court, or a matter of great public interest, and should not be considered.

CONCLUSION

For the reasons herein, Defendants Robert J. Adinolfi, Esq. and Gill & Chamas, LLC respectfully request that the Appellate Division deny Plaintiffs' appeal and uphold the trial court's decisions to: refuse to bar Defendants' legal malpractice and medical experts; bar Plaintiffs' expert Ambrosio; grant summary judgment in favor of Defendants; deny Plaintiffs' Motion for Reconsideration and a Rule 104 Hearing; and to deny Plaintiffs' request in the alternative to re-do the entire course of expert discovery.

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Attorneys for Defendants, Robert J. Adinolfi, Esq. and Gill & Chamas, LLC

s/ James Sharp
James B. Sharp, Esq.

Dated: September 23, 2025

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CARLOS VERAS and MAYRA VERAS, husband and wife, Plaintiffs/Appellants, -vs- ROBERT J. ADINOLFI, ESQ., an attorney at law of the State of New Jersey; GILL & CHAMAS, LLC,attorneys at law of the State of New Jersey; PLANNED LIFETIME ASSISTANCE NETWORK OF NEW JERSEY, INC., as Trustee of the Carlos Veras Special Needs Trust; and DOES 1 through 10, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-001326-24T2 Civil Action On Appeal From: Superior Court of New Jersey Law Division: Passaic County DOCKET NO: PAS -L-3217-21 Sat Below: Hon. Vicki A. Citrino, J.S.C.

REPLY BRIEF FOR PLAINTIFFS/APPELLANTS CARLOS VERAS AND MAYRA VERAS

Batya G. Wernick, Esq.
On the Brief

October 30, 2025

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I.
INTRODUCTION

This appeal concerns the trial court's dismissal of Plaintiffs/Appellants' Carlos and Mayra Veras's legal malpractice case for lack of a legal malpractice expert. The Verases sued their former attorney Defendant/Respondent Robert J. Adinolfi, Esq. and his law firm Gill & Chamas, L.L.C. for the negligent handling of their medical malpractice case.[1] The trial court found that the Veras's legal malpractice expert, Mr. Anthony P. Ambrosio, Esq. was not qualified to opine on the matter even though he is a decades-long, and Court-approved, legal malpractice expert and has himself represented clients and advised attorneys and clients in medical malpractice cases. The trial court also found that Mr. Ambrosio had issued a net opinion even though provided the "why and wherefore" in reaching his conclusion about Mr. Adinolfi's negligence. Mr. Ambrosio relied on significant evidence, ample case law and the Rules of Professional Conduct to reach his conclusion. The trial court should have denied the Defendants' Motion to Bar his report and testimony and should have later reconsidered its decision to bar Mr. Ambrosio.

[1]The medical malpractice case was brought against a surgeon and the hospital for the negligent handling of Mr. Veras's abdominal surgery which left Mr. Veras severely and permanently injured.

Unlike Mr. Ambrosio, both Defendants' legal malpractice expert and medical malpractice expert each issued net opinions that were purely anecdotal in nature relying exclusively on their own personal experiences rather than objective outside sources both failing to establish the standard of care for the respective industry each gentlemen was opining about. While the trial court should have denied Defendants' Motion to Bar Mr. Ambrosio, the trial court should have granted Plaintiffs' Motion to Bar Defendants' experts.

Moreover, the trial should have held a hearing on Mr. Ambrosio's qualifications and if then needed, should have allowed Plaintiffs' to obtain a new expert. Plaintiffs were completely blindsided by the eleventh hour attack on their legal malpractice expert's qualifications. Mr. Ambrosio's deposition was taken at least half a year before Defendants moved to bar him on qualification grounds. Plaintiffs had no warning that there was any problem with Mr. Ambrosio opining in this case since he represented that he had medical malpractice litigation experience, which he does in fact have.

It was unfair to Plaintiffs and unjust for the trial court to simply discard this highly meritorious matter with a surprise ruling shortly before trial. Plaintiffs should have at least been given the opportunity to obtain a new expert. This would have added only two or three months to the litigation process.

Defendants claim Mr. Ambrosio failed to state the applicable standard of care in his reports. This is not true. In fact he discusses the standard of care for litigation attorneys at length as can be seen on pages JA33-JA35 of the Confidential Joint Appendix. Mr. Ambrosio cites significant case law that sets forth the requirements of a litigation attorney. Defendants and the trial court ignored the fact that Mr. Ambrosio has specific experience litigating medical malpractice cases. If his medical malpractice litigation experience is less than other medical malpractice experts, as a matter of case law, that is for a jury to consider in weighing his testimony. It is not a basis for excluding his testimony altogether.

Defendants also incorrectly argue that it was sheer speculation on Mr. Ambrosio's and Plaintiffs' part that the Verases would have prevailed in their medical malpractice case or would have received a higher settlement amount but for Mr. Adinolfi's failure to retain a medical malpractice expert in their case. It was not just speculation. The Verases presented a highly qualified medical expert in this case. Mr. Ambrosio properly relied upon Plaintiff's medical expert's report to conclude the Verases had a very strong medical malpractice case. Mr. Ambrosio also relied on the ample case law for legal malpractice cases which holds that when a plaintiff complains that an inadequate settlement was accepted because of

the misadvice of their attorney, the plaintiff is entitled to try to prove his/her case to a jury. This is called the case-within-the case format of adjudication.

Contrary to Defendants' argument, as a matter of law, the Verases and Mr. Ambrosio are not required to guarantee a win of their medical malpractice case in order to establish their legal malpractice claim against Mr. Adinolfi. Mr. Ambrosio can opine about what the standard of care is, what Mr. Adinolfi should have done to meet that standard, and how his breach of the standard harmed the Verases in that it prevented them from going to trial on a clearly valuable case or from seeking a much higher settlement. His opinion lays all of this out.

Indeed the amount that the Verases walked away with (less than $250,000), given Mr. Veras's very serious permanent disabilities caused by the surgeon is borderline *res ipsa* negligence by Defendants, particularly since the medical records point to an admission by the surgeon that the injury Mr. Veras suffered was caused by the surgery, among other facts revealed in the record.

II.
REPLY TO DEFENDANTS' STATEMENT OF FACTS

Defendants' brief at page 6 states that this matter arises from a 2012 medical malpractice case likely due to a typo in Plaintiff's legal malpractice complaint. The medical malpractice case that Plaintiffs are suing about actually was filed in

2014 (Defendants later state the correct year on page 7 of their brief. Also see the second paragraph of page 4 of Mr. Ambrosio's report at the Confidential Joint Appendix Ja30 and Ja 547.) The year is important because the trial court specifically mentioned that the case was very old when in fact it was not as old as the trial court seems to have believed. (Ja 511, middle of page) The medical malpractice case was settled in **2018** and then this legal malpractice case was filed just three years later in 2021 (See Ja 547 and Ja 11)

In the second line of page 7 of their brief, Defendants state that, after the initial surgery, Mr. Veras was found to have a perforation in his colon. They omit that the medical records stated the perforation was iatrogenic, meaning it was caused by the surgery. (Ja 234 of the Confidential Joint Appendix, the short paragraph in the middle of the page which is from Plaintiffs' medical expert's report. And see Defendants' medical expert's testimony Confidential Joint Appendix Ja205, wherein he also understands the term to mean caused by the surgery at lines 41:17-23.

Also notable, and ignored by Defendants in their Statement of Facts, is that the Verases consulted Mr. Adinolfi in early 2013 but he did not file their case for an entire year until early 2014. (Confidential Joint Appendix Ja 30.) On page 7 of Defendants' brief, they refer to their legal malpractice expert's report to state that

> "As may be reasonably anticipated by any medical malpractice attorney, this involved lawsuit implicating complex details of Carlos Veras's medical care with multiple sequelae and ongoing treatment, was afforded multiple discovery extensions and proceeded for several years. (Confidential Ja45)."

Not only does this fact statement improperly include an argumentative point at the outset, but an examination of that page of the record (Ja 45) which is the report of Defendant's legal malpractice expert, E. Drew Britcher, Esq., shows that Mr. Britcher misstated the history of the underlying case and also failed to point to evidence for his statements, unlike what Mr. Ambrosio did in his report. Mr. Britcher incorrectly stated that the Verases went to Mr. Adinolfi in 2012. However, the record shows they first met with him in 2013. And Mr. Britcher's report on page Ja 45 does not state what Defendants claim.

Importantly, a review of Ja 45 shows an entire page of Mr. Britcher's report that discusses Mr. Veras's condition without citing to any record whatsoever. This just highlights the problems with Defendants' legal malpractice expert report that Plaintiffs were complaining about to the trial court.

Additionally, Defendants, citing their expert's report, incorrectly state on page 7 of their brief that it was another law firm that advised the Plaintiffs to put their share of the settlement proceeds into a special needs trust. Their expert, however, said no such thing and it was in fact done at Mr. Adinolfi's

recommendation. The other firm (Bagely Law Group) merely set up the trust at Mr. Adinolfi's recommendation. Mr. Ambrosio opines that this was not good advice as the trust was unnecessary and tied up the funds preventing the Verases from being able to use them as they wanted. It also created significant fees for the Verases. (Confidential Joint Appendix Ja 31, Mr. Ambrosio's report which points to documents in the record for support of the facts he details.)

On page 8 of their brief, Defendants state:

> "To the extent Plaintiffs describe Mr. Adinolfi's actions or knowledge during the underlying litigation (*i.e.*, "pressuring" the Verases into settling (Amended Appellant Brief, pg. 7); "misadvising" the Plaintiffs (Id.); etc.), *none* of Plaintiffs' claims are substantiated in the record, as Mr. Adinolfi was not deposed. (Ja245). Plaintiffs' assumptions amount to mere conjecture that should be disregarded."

Defendants are wrong. The claim that Mr. Adinolfi pressured the Verases into settling their case was substantiated by their sworn testimony at depositions in this matter. Mr. Ambrosio properly relied on their testimony transcripts to reach his conclusion. (See the Confidential Joint Appendix at Ja 31, wherein Mr. Ambrosio cites to specific portions of the Plaintiffs' deposition transcripts as evidence that Mr. Adinolfi pressured them to settle the case.) So the claim f undue pressure to settle is substantiated even if Mr. Adinolfi was not deposed in this matter. And as for "misadvising" the Verases, this was also substantiated, with

facts and law, in Mr. Ambrosio's expert report.

Plaintiff's medical expert in this case issued a report wherein he noted that the negligent surgeon's own operative report, produced by the hospital in the medical malpractice case and turned over in this case, states that the injury/perforation in Mr. Veras's colon was "iatrogenic," meaning caused by the surgery. (Confidential Joint Appendix Ja 234, middle of the page.) On page 8 of their brief, Defendants try to diminish this admission by arguing, without any legal or clinical support, that this is not what is meant by "iatrogenic," even though Plaintiff's Harvard educated medical expert says it is. This is important because it is one of the reasons Mr. Ambrosio, very understandably, opines that the Verases had a strong medical malpractice case. (Confidential Joint Appendix Ja 31, the middle of the page wherein Mr. Ambrosio discusses Plaintiff's medical expert's, Dr. Stephen's, report.)

Further down on page 8 of Defendants' brief, Defendants incorrectly describe Mr. Verases' treating physician at the time of the medical malpractice case as "the treating physician in the underlying medical malpractice matter, Dr. Lawrence Livingston ("Dr. Livingston")." Dr. Livingston was not the medical expert in the medical malpractice case. He was just Mr. Veras's treating physician at the time, who, as it happens, the Verases were considering suing as well due to

his poor treatment of Mr. Veras after the botched surgery. Mr. Adinolfi knew this and should not have given significant weight to this doctor's opinion even if he was a treating physician. And especially notable was the fact that Dr. Livingston, did not even address whether there was any negligence by the surgeon. Dr. Livingston only stated that Mr. Veras had a healing condition, likely to excuse his own poor treatment of Mr. Veras. Mr. Ambrosio explains this in his report with citations to specific documents in the records he reviewed. (Confidential Joint Appendix, bottom of page Ja 30 - Ja 31.)

The point is, the record reflects that Mr. Adinolfi pressured the Verases to accept a low settlement amount by inflating the negative impact of Dr. Livingston's opinion. Indeed both Plaintiffs' and Defendants' medical experts in this case stated that, contrary to Dr. Livingston's letter, there was no evidence that Mr. Veras had a healing problem. And Mr. Ambrosio points to case law to show that Dr. Livingston's opinion was not as significant as Mr. Adinolfi claimed.

On page 9 of Defendants' brief, Mr. Ambrosio's credentials compared to Mr. Britcher's. But the comparison of their credentials only goes to the weight the jury may decide to give the testimony of each gentleman. As argued in Plaintiffs' first appellate brief, as a matter of law, this is not a reason to disqualify Mr. Ambrosio from opining on the matter. Moreover, the negligent act by Mr. Adinolfi

that is complained of (the failure to retain a medical expert to opine in the case) may be verified by any type of civil litigation attorney. As also discussed in Plaintiff's opening brief and below, significant experience specifically in the area of medical malpractice is not required to opine on the standard of care in this case.

Finally, the last sentence in Defendants' Statement of Facts portion of their brief (at the top of page 10 therein) is a legal conclusion/opinion/argument stated by Defendants' counsel and not an actual fact of this case.

III.
REPLY TO DEFENDANTS' LEGAL ARGUMENTS

A. The Standard of Review:

With all due respect, the trial judge in this case misinterpreted and misapplied the law on what constitutes a net opinion as well as the extent of experience required by a legal malpractice expert, thereby reaching the incorrect conclusions. Therefore, according to the case law detailed in Plaintiff's initial appellate brief, the trial court's decision to include the Defendants' experts and bar Plaintiffs' legal malpractice expert should be reviewed *de novo.* Even Defendants' on page 38 of their brief admit,

> "The legal consequences of the exclusion of an expert's opinion and its effect on a plaintiff's ability to establish the causation necessary to maintain a malpractice claim, is reviewed *de novo*. Townsend v. Pierre, 221 N.J. 36, 53 (2015) (citing Davis v. Brickman

Landscaping, Ltd., 219 N.J. 395, 405 (2014)).”

However, should this court determine that the trial court’s rulings were entitled to discretionary review, they should still be reversed because the trial judge abused her discretion. Plaintiff’s first brief details at length just how the trial judge’s decision to exclude Mr. Ambrosio surely “was not premised upon consideration of all relevant facts, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.” (Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).)

Rulings to improperly exclude expert testimony, such as here, are reversible error. (McKinney v. East Orange Municipal Corp. Eyeglasses, 284 N.J.Super. 639 at 654 (App. Div. 1995) finding trial judge erred in not permitting plaintiffs' expert on police procedure to testify and that the ruling was harmful error.)

B. Mr. Ambrosio is qualified to testify and did not issue a net opinion.

Defendants argue, without any legal support, that because Mr. Ambrosio is not a certified civil trial attorney, he is not qualified to opine about whether or not Mr. Adinolfi negligently handled the Veras’s case. However, a legal malpractice expert is not required to be a certified civil trial attorney in order to opine on another litigator’s negligence. Indeed, numerous Courts have deemed Mr. Ambrosio to be a legal malpractice expert in cases involving litigation

malpractice. And Defendants ignore that Mr. Ambrosio has himself litigated countless matters over the course of decades. His resume reveals that, among other legal practice experience, Mr. Ambrosio has: a) represented plaintiffs in many legal malpractice actions from 1975 through the present[2]; b) testified in court as a legal malpractice expert on behalf of both plaintiffs and defendants from 1976 through present; c) litigated through trial and appeal many complicated commercial cases including cases involving construction defects; d) represented both plaintiffs and defendants in many divorce matters; e) represented lawyers accused of unethical conduct before local Ethics Committees and the Disciplinary Review Board; and f) represented plaintiffs in medical malpractice cases. (Confidential Joint Appendix Ja 448-449.) In fact, Mr. Ambrosio has been retained as a legal malpractice expert *hundreds* of times. (Confidential Joint Appendix Ja 251, page 8 of the transcript.)

Defendants downplay Mr. Ambrosio's experience in the area of medical malpractice, but at his deposition in this case, he testified that:

> As far as medical malpractice, I haven't had a great deal of -- wide breadth of experience, but I've had significant experience evaluating medical malpractice claims . . . I recall one case involving a surgery due to a nasal condition where the surgeon undertook to sever a part

[2]It must be noted that legal malpractice cases have the same procedural requirements as medical malpractice cases in terms of the need to retain expert opinions to prove negligence and damages. That was the mistake complained of in the Verases' medical malpractice case.

> of the client or patient's tongue to make a wider breath canal. . . And I recall the difficulty in dealing with that case. But I did manage to get an expert witness after a great deal of effort. And I understand the burden of what a lawyer has to do to establish a successful legal malpractice case. I understand the duty that he has to do -- to make a sufficient effort to get that done. And another case that was very instructive for me was a case involving a medical malpractice at the birth of a child. . . And I was the ninth lawyer to come into the case. And I was brought -- it was brought to me 20 years after the case, about 20 years after the case was filed, and there was a succession of various lawyers who substituted in this case. And it was a very complicated medical issue as to what happened at the birth of the child where apparently the issue was presented to the doctor . . . And I went into a great deal of research, energy to understand the difficulty in proving the connection between the ultimate damage, was the fact that the child was rendered infertile as a result of the doctors. And there was certain follow-up care that was indicated that wasn't done. That case went to trial. And before the verdict came in, I was approached about settling the case. . . So those kinds of experiences, although not very much in terms of volume but in terms of quality, is what creates -- what created in me the knowledge, experience that I draw upon when I judge the competence and effectiveness of lawyers doing very difficult work. And I don't take my duty lightly. I don't -- I think that legal malpractice cases have to be very demonstrable. In this case, the -- I think it's a very strong case because the lawyer, however experienced, didn't do the job he should have to find the expert that was available, the that present plaintiffs' counsel found. And I know how difficult it is to find the right expert. And in the case involving the surgery on the throat, I spent a tremendous amount of time and money, and finally located a Harvard -- Harvard doctor who was absolutely spot-on in terms of giving me the expertise that made my case viable. (Confidential Joint Appendix Ja 256-257)

Mr. Ambrosio is certainly qualified to opine on whether or not Mr. Adinolfi negligently handled the Veras's lawsuit.

C. At a minimum, the trial judge should have conducted a Rule 104 hearing.

At a Rule 104(a) hearing, the trial judge could have explored Mr. Ambrosio's qualifications more in depth. At his deposition, he was never asked how many courts deemed him to be an expert in the field of litigation. The trial judge should have questioned him herself to ascertain his qualifications before rejecting him out of hand thereby unfairly destroying Plaintiffs' case. The New Jersey Supreme Court has held that where the decision to exclude an expert will be dispositive of a case, as here, the trial judge should conduct a Rule 104(a) hearing, not just on the expert's qualifications, but also on the soundness and reasoning in his opinion. (Kemp ex rel. Wright v. State, 174 N.J. 412, 432 (2002).)

D. Mr. Ambrosio did not issue a net opinion but Defendants' experts did.

Plaintiffs' initial appellate brief sets forth in detail all of the case law applicable to the case at bench that supports their position that Mr. Ambrosio's opinion was not a net opinion and the Defendants' legal malpractice expert and medical expert both issued net opinions.

Mr. Ambrosio laid out, in painstaking detail the "why and wherefore" in reaching his conclusion that Mr. Adinolfi negligently handled the Veras's case. Defendants' experts, on the other hand, did not. There is not one citation to the record in either of the Defendants' experts' reports.

Mr. Ambrosio did not speculate in any way. He rightly cited caselaw supporting why the Veras's should have been advised to settle for a higher amount or to go to trial. He also pointed to similar cases to support his opinion on the Verases' damages. And he explained, citing case law, why this is a permissible way of showing a legal malpractice plaintiff's damages when such a plaintiff is seeking redress for a too low settlement based upon the lawyer's failed preparation of case or other mis-advice.

Defendants' contention on page 17 of their brief, that Mr. Ambrosio simply created the factual basis for his opinions without support of any documents or case law is patently false. Even a cursory review of his report shows that it is replete with citations to the underlying record, deposition testimony, medical records and other documents produced by Defendants. His report is also fully supported by ample caselaw throughout. The Defendants' experts' reports are the complete opposite, devoid of any legal support or citations to the record to show the "why and wherefore" of their respective conclusions.

III.
CONCLUSION

Plaintiffs therefore respectfully ask that this court reverse the trial court's orders barring Plaintiffs' legal malpractice expert from testifying at trial and

allowing Defendants' experts to testify, and remand this matter for a trial.

Alternatively, Plaintiffs respectfully request that this court remand this matter back to the trial court to conduct a Rule 104(a) hearing on Mr. Ambrosio's qualifications to testify and if found to be unqualified, allowing Plaintiffs to retain a new legal malpractice expert.

Respectfully submitted,

October 30, 2025 /s/ *Batya G. Wernick*

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