LORI LYNN MARTINOLICH, LORI LYNN MARTINOLICH ADMINISTRATOR AD PROSEQUENDUM FOR THE ESTATE OF PAUL MARTINOLICH,

Plaintiff(s),

vs.

NEW JERSEY STATE POLICE; STATE OF NEW JERSEY; NEW JERSEY STATE BOARD OF SOCIAL WORK EXAMINERS; BOARD OF MARRIAGE AND FAMILY THERAPY EXAMINERS; TROOPER A. ROCK #7535; TROOPER A. BERTUCCI #7970; TROOPER R. SANCHEZ #8085; TROOPER C.O. BONILLA #7973; CAPTAIN HOWARD EVILNESS #454; TROOPER M. TAVARES #7947; TROOPER L. RODRIQUEZ #7536; TROOPER N. OTERO #8057; TROOPER T. PRESTON #5392; TROOPER J.J. DELORENZO #6673; PRIME HEALTHCARE, ST. CLAIRE HOSPITAL; COOPERMAN BARNABAS MEDICAL CENTER; STATE OF NEW JERSEY GREYSTONE PARK PSYCHIATRIC HOSPITAL, CAREWELL HEALTH; TROOPER T. MATTHEWS, 7409, JOHN DOES 1-10, ABC CORPORATION 1-10,

Defendant(s).

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

CIVIL ACTION

DOCKET NO. A-001576-24 T4

ON APPEAL FROM:

ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION:
ESSEX COUNTY
DOCKET NO.: ESX-6582-23

Sat Below: Hon. Robert H. Gardner, J.S.C.

APPELANT/DEFENDANT'S, COOPERMAN BARNABAS MEDICAL CENTER, BRIEF IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

Plaintiff alleges that while her son, Brandon, was a patient at Cooperman Barnabas Medical Center (hereinafter "Cooperman"), he did not receive proper care and that his medical needs were neglected. Despite the underlying claims involving proper care and medical needs, the trial court held that these allegations are not claims of medical malpractice. This decision is wrong as a matter of law, because regardless of how plaintiff chooses to label her claims, all of her allegations implicate the standard of care of licensed professionals.

Notably, Brandon is an adult, he is not a party, and plaintiff is not the guardian of Brandon. Despite these facts, the trial court compelled responses to discovery requests seeking information and documentation related to Brandon's alleged treatment. Neither Brandon nor his guardian have authorized the release of this information. Plaintiff never put Brandon or his guardian on notice of this action or her discovery requests.

Accordingly, Cooperman cannot engage in discovery, or comply with the trial court's order to compel, without violating HIPAA and the ruling of the Morris County Surrogate's Court. Further, once the discovery is provided to plaintiff, who may not have a right to the information, there is no way to reverse the dissemination of the information and/or rectify the damage that may be

suffered by Brandon. Therefore, action is needed by this Court to reverse Order of December 6, 2024.

In addition, Cooperman should not have to engage in discovery, as plaintiff: (1) lacks standing to pursue claims on behalf of her son; (2) failed to produce an Affidavit of Merit; and (3) failed to name an indispensable party. Plaintiff is attempting to circumvent the procedural and statutory requirements of a medical malpractice action by arguing that she entitled to recover damages for witnessing negligent and neglectful treatment of her son. However, without establishing the underlying malpractice claim, plaintiff cannot recover any damages related to witnessing the treatment as to her son, Brandon. This erroneous argument set forth by plaintiff is highlighted by the discovery requests at issue.

The discovery requests of plaintiff clearly establish the procedural and practical difficulties raised by the lack of standing of plaintiff, the lack of involvement of Brandon and the difficulties of defendants in defending medical malpractice claims without the involvement of patient. If this matter were to proceed, a non-party's privacy, security, and rights guaranteed under HIPAA, would be violated. Due to all of the issues raised, the Court should reverse the prior Orders and dismiss the case due to the lack of standing of plaintiff, the lack of a necessary party and the lack of an Affidavit of Merit. If the Court elects not

to dismiss the case, then the Court should reverse the denial of the Motion for Protective Order to protect the rights of a non-party, who has not consented to the release of his medical information.

PROCEDURAL HISTORY

Plaintiff filed the Complaint, *pro se*, on October 5, 2023. Plaintiff filed the Amended Complaint, *pro se,* on October 5, 2023. (DA0001-DA0147). On November 3, 2023, Desha Jackson, Esq., of Desha Jackson Law Group, LLC, filed a notice of appearance on behalf of plaintiff. (DA0148-DA0149). On November 7, 2023, defendant Cooperman Barnabas Medical Center (Cooperman), filed an Answer. (DA0150-DA0172).

On December 11, 2023, Cooperman filed general correspondence requesting a Ferreira Conference and asserting that an Affidavit of Merit is required due to the nature of the claims being alleged. (DA0173-DA0174). Plaintiff responded on the same day contending that "plaintiff is not making a claim of medical malpractice[,]" and that "[t]here is violation of the duty of care, but it is not about a specific doctor or diagnosis." (DA0175). Cooperman responded on December 29, 2023, maintaining that plaintiff is raising allegations that implicate the standard of care for licensed professionals, and Cooperman will be pursuing all remedies under the Affidavit of Merit statute. (DA0176).

A Ferreira Conference was scheduled for February 6, 2024. Plaintiff requested an adjournment of the February 6, 2024 date; that request was granted, and the Ferreira Conference was then re-scheduled for February 14, 2024. Again, plaintiff requested an adjournment of the February 14, 2024 date; that request was granted, and the Ferreira Conference was then re-scheduled for March 6, 2024. On February 13, 2024, Cooperman requested that the Ferreira Conference be held sometime before March 6, 2024, as March 6, 2024 was the 120-day deadline to provide an Affidavit of Merit. (DA0177). The Ferreira Conference was then scheduled for March 5, 2024, but ultimately cancelled on February 29, 2024.

On February 13, 2024, Cooperman filed a Motion to Dismiss for Lack of Standing, Failure to State a Claim, and Failure to Provide an Affidavit of Merit. (DA0178-DA0180). Oral argument was heard on the Motion to Dismiss on April 26, 2024. (T001-T009). On April 29, 2024, an Order was entered denying the Motion to Dismiss. (DA0181-DA0182). On May 17, 2024, Cooperman filed a Motion for Leave to File an Interlocutory Appeal. That Motion for Leave to File an Appeal was denied on June 17, 2024. (DA0183-DA0184).

On December 15, 2023, Plaintiff served seventy-nine (79) interrogatories and eighty-eight (88) document requests upon Cooperman. (DA0185-DA0230). On April 4, 2024, the Morris County Surrogate's Court ruled that Brandon was

mentally incapacitated and appointed Adam Dubeck, Esq., as Brandon's Guardian. (DA0244). On October 28, 2024, Plaintiff filed a Motion to Compel Defendant's responses to these requests. (DA0231-DA0232). On October 30, 2024, Cooperman filed the Motion for Reconsider and Dismissal. (DA0235-DA0237). On October 29, 2024, Cooperman filed a Cross-Motion for Protective Order. (DA0233-DA0234). On December 6, 2024, without having heard oral argument, the Trial Court denied the Motion for Reconsideration and granted in part and denied in part, Plaintiff's Motion to Compel and Defendant's Cross-Motion for a Protective Order. (DA0238-DA0243).

STATEMENT OF FACTS

Plaintiff filed a 147-page Amended Complaint on behalf of herself, as well as Administrator *Ad Prosequendum* for the Estate of Paul Martinolich, against the State of New Jersey, the New Jersey State Police, a dozen individually identified officers, several State agencies, and various hospitals, alleging over a decade's worth of conspiracies arising from domestic violence disputes, real estate fraud, sexual assault, physical assault, wire-tapping, identity theft, cyber-stalking, home break-ins, harassment through employer, improper termination from employment, terroristic threats, fraudulent DCPP investigations, poisonings, theft of swimming pool materials, vandalism, destruction of her home by illegal squatters, false arrests, kidnappings, high-speed chases,

robberies, legal malpractice, forgeries, discrimination, and the wrongful death of her second husband, Paul Martinolich. (DA0001-DA0147). Thereafter, plaintiff retained counsel. (DA0148-DA0149).

While plaintiff names several parties in her Amended Complaint, the majority of her allegations are directed at the Police Department defendants. Mainly, plaintiff asserts that the New Jersey State Police Department and its' officers failed to respond to various calls and police reports, falsified records, and failed to extract her sons from several hospitals throughout the state. (DA0001-DA0147). According to plaintiff, this behavior was motivated by racial, religious, and gender bias. (DA0036). Additionally, plaintiff claims that the Police Department defendants could be retaliating against her for filing several police reports, along with a complaint to Internal Affairs. (DA0036). Plaintiff also hints that this alleged behavior could be to prevent her sons, Brandon and Jared, from obtaining the funds from her first ex-husband, Peter Garfinkel's estate, so that funds could be funneled elsewhere. (DA0051).

In total, plaintiff has three children from her marriage with Peter Garfinkel: Ashley, Jared, and Brandon.(DA0045). According to plaintiff, her son, Brandon, who is not a named party, was attacked a total of fifteen (15) times by the police and each time Brandon was attacked, he was taken to Cooperman Barnabas Medical Center (Cooperman). (DA0046). The Amended Complaint

alleges that rather than receiving proper medical care, presumably at Cooperman, Brandon's medical needs were neglected. (DA0046). Plaintiff also asserts that, based upon information and belief, while Brandon was allegedly a patient at Cooperman, he was illegally injected with antipsychotic narcotics and was physically and sexually assaulted on or about March 18, 2022 and March 23, 2022. (DA0047).

Plaintiff then alleges that Brandon was transferred to "Cooperman Newark Beth Israel location against his will on March 30, 2022 and remained there until May 31, 2022." (DA0047). According to plaintiff, while visiting Brandon at the "Cooperman Newark Beth Israel location," plaintiff had a door slammed on her foot. (DA0047). Cooperman Newark Beth Israel is not an entity. Upon information and belief, the hospital is Newark Beth Israel Medical Center and is a separate and distinct hospital.

In the Amended Complaint, plaintiff lists the following causes of action against Cooperman Barnabas Medical Center: (1) Negligence; (2) Intentional Infliction of Emotional Distress; (3) Negligent Infliction of Emotional Distress; (4) Agency, Vicarious Liability, and Respondeat Superior; and (5) Civil Conspiracy (all defendants). (DA0104-DA0106; DA0107-DA0109; DA0109-DA0113; DA0119-DA0120; DA0143-DA0144).

Following the disposition of Cooperman's Motion to Dismiss, counsel became aware that plaintiff was not the Guardian of Brandon, her adult-aged son. (DA0244). Specifically, on April 4, 2024, the Morris County Surrogate's Court ruled that Brandon was mentally incapacitated and appointed Adam Dubeck, Esq., as Brandon's Guardian.

Based upon this information, defendant moved for Reconsideration of the denial of the Motion to Dismiss. Defendant further filed a Cross-Motion for Protective Order to prohibit the disclosure of the medical information of Brandon without the consent of his legal guardian.

Many discovery demands propounded by plaintiff, which have now been compelled, seek the private health information of Brandon. (DA0185-DA230). For example, the interrogatories of plaintiff request:

> 52. Please explain why Brandon's 72/ hour EEG was removed without consent during the 2.11.22 stay?
>
> 58. Please explain why Robert Walters, MD a consultant, was given access to Brandon Garfinkel in the Cardiac Unit, 2300, between 2.11.22 and 5.30.22? How did you protect the patient from harm?
>
> 74. Please provide the names of each Doctor who treated Brandon Garfinkel for the 2.11.22- 5.30.22 visit.
>
> 75. Please provide the names of each Nurse who treated Brandon Garfinkel for the 2.11.22- 5.30.22 visit.

> 76. Please provide the names of each Provider/Technician/Consultant who treated Brandon Garfinkel for the 2-11-22-5-30-22 visit.

(DA0204; DA0206).These are just a few examples of the seventy-nine (79) interrogatories, not including the eighty-eight (88) document requests served by plaintiff that request similar information regarding the medical treatment of Brandon. Notably, in the Cross-Motion for Protective Order, Cooperman specifically objected to interrogatories: 22-25, 27-29, 38, 39, 41, 43-55, 58, 59, 62-66, 69-79, as well as document requests: 12-14, 20-28, 31, 39-46, 50, 52-59, 65-79, 81-88, on the grounds that plaintiff was seeking the medical information of a non-party. (DA0199-DA206; DA218-DA229).

Cooperman further objected to discovery requests that appear to relate to different matters entirely, including the following Interrogatories and Notice to Produce:

> 42. Please provide the legal basis, as it applies to Patient Rights, Hospital Rights, HIPAA and the Law, as to why Robert Maglio Esq. prepared a letter to Judge DeAngelis in the Estate of Peter Jay Garfinkel MRS-P - 0661- 2020?
>
> 43. Please provide the relevance between Brandon Garfinkel's hospital visit to the Cardiac Unit at Cooperman, and the rationale behind writing to the Estate Judge for the late Peter Jay Garfinkel?
>
> 57. Please explain why Robert Maglio, Esq. a Lawyer in Tinton Falls, NJ, a complete stranger to Lori Garfinkel, a person Lori Garfinkel never met, prepared a letter to the Estate Court,

asking that Lori Garfinkel not be a guardian, and not receive her inheritance?

(DA0203-DA0204).

47. Please provide a copy of the letter Robert Maglio, Esq wrote to Judge DeAngelis, Morris County Surrogate.

48. Please provide a copy of the consent and HIPAA forms signed by Brandon Garfinkel and Lori Garfinkel, giving Robert Maglio the right to speak to Judge DeAngelis, and represent the interests of Lori Garfinkel and Brandon Garfinkel.

49. Please provide the Court Rule that permits a Hospital Attorney, Robert Maglio, to encumber the death benefit of a decedent who is not a patient in the Hospital.

60. Please provide a copy of the response from Cooperman Barnabas to William Ware, Esq, for the complaint letter, of William Ware dated March 18, 2022.

61. Please explain why John Jasieniecki, ESQ was copied, provide the written consent from all of the 4 Beneficiaries in the Peter Jay Garfinkel Estate Matter?

62. Please provide the legal basis to copy Richard Miller, Esq, and provide the written consent from all of the 4 Beneficiaries in the Peter Jay Garfinkel Estate Matter?

63. Please provide the written response from Cooperman Barnabas to the March 12, 2022 letter (attached) prepared by Lori Garfinkel.

64. Please provide the written response from Cooperman to William Ware, Esq, for his March 18, 2022 letter (attached) outlining the abuse and safety concerns.

74. Please provide the Risk Management Records, Responses, and 'release of information' that gave Cooperman Barnabas and Newark Beth Israel the right, and legal authority to speak to

the following people about Lori Garfinkel, Jared Garfinkel or Brandon Garfinkel: John Jasieniecki, Richard Miller, John Vitale, Hon Frank DeAngelis, Chris Luongo, Adam Dratch.

77. Please provide the written consent from Brandon Garfinkel for March 19, 2023, allowing Richard Miller, to enter Brandon's Hospital Room on the Cardiac Floor?

78. Please provide the written consent from Brandon Garfinkel for March 19, 2023, allowing Richard Miller, to enter Brandon's Hospital Room on the Cardiac Floor?

79. Please provide the written consent from Brandon Garfinkel for March 23, 2023, allowing Adam Dratch to enter Brandon's Hospital Room on the Cardiac Floor?

80. Please provide the written consent from Lori Garfinkel, visitor, of Cooperman Barnabas, show proof that Lori gave Cooperman Barnabas the authority to write to the Hon Frank DeAngelis, representing Lori Garfinkel's interests, in the Estate of Peter Jay Garfinkel. MRS-P 0661-2020.

(DA0225-DA0228).

Cooperman similarly objected to the remainder of the discovery demands of plaintiff as overly broad, unduly burdensome, and irrelevant. These requests for interrogatories include:

37. Please provide the name of the Nurse who Assaulted Lori Garfinkel on 5.2.22 at Newark Beth.

67. Please explain the rationale behind closing Lori Garfinkel's body in a steel door, on May 2, 2022, causing injury to Lori's ankle, foot, hand and back, while Lori was visiting her son at Newark Beth.

68. Please provide the remedy that Newark Beth Israel took to address Lori's 5.2.22 Injuries.

(DA0202; DA0205). Additionally, these requests for Notice to Produce include:

> 51. Please provide the Incident Report for the attack against Lori Garfinkel at Newark Beth Israel on 5.2.22.
>
> 52. Please provide the Police and incident reports from Cooperman Security and Newark Beth Security from 2.11.22 - 5.30.22.

(DA0225).

Plaintiff never produced an authorization for the medical records of Brandon or any documentation establishing that plaintiff had any sort of authority to request medical information on behalf of Brandon. Plaintiff never produced any documents that established that Brandon was put on notice of the Complaint, the requests for his medical records or information related to his medical treatment, or any of the subject motions. Despite requesting oral argument for the Motion for Reconsideration and the Protective Order, oral argument was not granted. On December 6, 2024, the Court entered an Order denying the Motion for Reconsideration of defendant cite, granting, in part, the Motion of Plaintiff to Compel Discovery, and denying, in part, the Motion for Protection Order. (DA0238-DA0243). The ruling permitted plaintiff to seek medical information related to Brandon and compels defendant to respond to same.

STANDARD OF REVIEW

Discretionary Rulings:

Trial judges are afforded wide discretion in deciding many of the issues that arise in civil and criminal cases. Appellate courts review those decisions for an abuse of discretion. "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 App. Div. 2007)).

Discovery:

In civil cases, the appellate court reviews a trial judge's discovery rulings under the abuse of discretion standard. State v. Brown, 236 N.J. 497, 521 (2019); Brugaletta v. Garcia, 234 N.J. 225, 240 (2018); Cap. Health Sys., Inc. v. Horizon

Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017); State in Interest of A.B., 219 N.J. 542, 554 (2014); Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011); State v. Wyles, 462 N.J. Super. 115, 122 (App. Div. 2020); Salazar v. MKGC Design, 458 N.J. Super. 551, 558 (App. Div. 2019); Quail v. Shop-Rite Supermarkets, Inc., 455 N.J. Super. 118, 133 (App. Div. 2018).

"[A]ppellate courts 'generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law.'" State v. Brown, 236 N.J. 497, 521 (2019) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)).

Reconsideration:

The Appellate Division reviews a trial judge's decision on whether to grant or deny a motion for rehearing or reconsideration under Rule 4:49-2 (motion to alter or amend a judgment order) for an abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Kornbleuth v. Westover, 241 N.J. 289, 301 (2020); Hoover v. Wetzler, 472 N.J. Super. 230, 235 (App. Div. 2022); Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). "The rule applies when the court's decision represents a clear abuse of discretion based on plainly incorrect reasoning or failure to consider

evidence or a good reason for the court to reconsider new information." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:49-2 (2022).

Failure to State a Claim:

"Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted are reviewed de novo." Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC, 237 N.J. 91, 108 (2019)). In considering a Rule 4:6- 2(e) motion, "[a] reviewing court must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (quoting Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC, 237 N.J. 91, 108 (2019)). The test for determining the adequacy of a pleading is "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING COOPERMAN'S MOTION FOR RECONSIDERATION ON THE ISSUE OF STANDING.

(Raised Below: DA0242; T008)

The trial court erred as a matter of law in denying Cooperman's Motion for Reconsideration on the issue of standing. Plaintiff brought this action on behalf of herself, and as Administrator *Ad Prosequendum* for the Estate of Paul Martinolich. (DA0001). No claims were brought on behalf of Brandon nor could they have been as Plaintiff is not his legal guardian. (DA0244). Notwithstanding, the allegations against Cooperman arise out of the care and treatment of Brandon.

Rule 4:26-1 outlines the scope of a real party in interest. The rule provides:

> Every action must be prosecuted **in the name of the real party in interest**; but an executor, administrator, guardian of a person or property, trustee of an express trust or a party with whom or in whose name a contract has been made for the benefit of another may sue in the fiduciary's own name without joining the person for whose benefit the suit is brought.

See Rule 4:26-1 (emphasis added). The real party in interest rule is determinative of standing to prosecute an action. Standing is a threshold justiciability determination of whether the plaintiff is entitled to initiate and maintain an action on the matter before the court. In re adoption of Baby T., 160 N.J. 332, 340 (1999). Standing requires that a litigant have a sufficient stake in

the matter and real adversaries, with a substantial potential for real harm flowing from the outcome of the case. In re New Jersey Bd. Of Public Utilities, 200 N.J. Super. 544, 556 (App. Div. 1985).

During oral argument on Cooperman's Motion to Dismiss, plaintiff acknowledged that "she has no standing to sue for medical malpractice for her son." (T007). While plaintiff submits that she is not bringing a cause of action for medical malpractice, "[i]t is not the label placed on the action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340 (2002). "Courts should determine if the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession." Ibid.

Given that plaintiff acknowledged that she does not have standing to bring a claim on behalf of her son, most, if not all, claims should have been dismissed. The pivotal issue before the Court is whether plaintiff must establish an underlying malpractice claim as to Brandon, to support the claim that she witnessed negligent and neglectful acts. To support a malpractice claim, plaintiff was required to serve an Affidavit of Merit as argued below.

II. THE TRIAL COURT ERRED IN DENYING COOPERMAN'S MOTION FOR RECONSIDERATION ON THE ISSUE OF THE AFFIDAVIT OF MERIT.

(Raised Below: DA0242; T008)

Plaintiff alleges that her son, Brandon, did not receive proper care, his medical needs were neglected, and he was improperly administered medications. (DA0046-DA0047). Plaintiff cannot simply ignore the statutory and procedural requirements of pursuing a medical malpractice action by labeling her allegations as negligence. As the Supreme Court has stated: "[i]t is not the label placed on the action that is pivotal but the nature of the legal inquiry." Couri, 173 N.J. at 340. In order for plaintiff to establish that Brandon did not receive proper care or that his medical needs were neglected, plaintiff needed to provide an Affidavit of Merit.

Specifically, N.J.S.A. 2A:53A-27 sets forth the requirement of an affidavit of merit in certain actions against licensed persons as follows:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an **alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant**, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed

> 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.
>
> In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c. 17 (C.2A:53A-41). In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

See N.J.S.A. 2A:53A-27 (emphasis added). Notably, a "Health Care Facility" is defined as a licensed person. See N.J.S.A. 2A:53A-26. Despite the fact that Cooperman filed an Answer on November 7, 2023, plaintiff has still not provided an Affidavit of Merit. (DA0169).

Plaintiff also cannot argue that her allegations fall under the "common knowledge" exception. In Cowley v. Virtua Health System, the New Jersey Supreme Court determined whether the "common knowledge" exception would relieve plaintiffs of the obligation to serve an affidavit of merit. 242 N.J. 1, 8 (2020). In that case the Supreme Court reversed the Appellate Division's ruling that a jury could use common knowledge to determine whether a nurse should have taken some action after a food- and medicine-administering tube dislodged. Ibid. Essentially, plaintiff argued in opposition to a motion to dismiss that the

duty to provide an affidavit of merit was relieved because the matter was one of "common knowledge." Id. at 10.

The Supreme Court, however, denied the argument that the nurse's conduct presented "an alleged obvious act of omission," stating that, that approach "allows plaintiffs to circumvent the Affidavit of Merit Statute by disguising complex negligence cases with common knowledge allegations as to acts of omission." Id. at 21. Additionally, the Supreme Court noted that, "determining whether action should or should not have been taken is not enough [,]" and that "jurors cannot be allowed to speculate as to whether a procedure conformed to the required professional standards of care." Ibid.

Here, plaintiff does not even specifically set forth what treatment Brandon allegedly received, only that it was improper. (DA0046). This is similarly an attempt to disguise complex allegations as ones of general negligence. The trial court erred in reaching this conclusion. (T008-T009). In order for plaintiff to establish that Brandon's treatment was improper, that his medical needs were neglected, or that she witnessed a physician's malpractice, plaintiff would have needed to produce an Affidavit of Merit.

The Motion Judge recognized that plaintiff may have an independent claim for witnessing alleged negligent actions, but failed to consider under Gendek that for plaintiff to recover, plaintiff had to establish malpractice. If

plaintiff has an independent claim under Gendek v. Poblete, 139 N.J. 291, 301 (1995) (if a family member witnesses **the physician's malpractice**, observes the effect of the malpractice on the patient, and immediately connects the malpractice with the injury, that may be sufficient to allow recovery for the family member's emotional distress), plaintiff still must prove that the act witnessed was malpractice.

Even giving plaintiff every reasonable inference with regard to her emotional distress claims, those claims cannot be established without proving the underlying medical malpractice. See Portee v. Jaffee, 84 N.J. 88, 101 (1980) (in order to prove Negligent Infliction of Emotional Distress, a plaintiff must prove: (1) the death or serious physical injury of another **caused by defendant's negligence**; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress. See also Gendek v. Poblete, 139 N.J. 291, 301 (1995) (if a family member witnesses **the physician's malpractice**, observes the effect of the malpractice on the patient, and immediately connects the malpractice with the injury, that may be sufficient to allow recovery for the family member's emotional distress) (emphasis added).

Additionally, the Supreme Court held that "[t]he special requirements for establishing an indirect claim for emotional distress that it's based on medical

malpractice are strictly applied." Gendek v. Poblete, 139 N.J. 291, 297 (1995). Accordingly, malpractice would first have to be established for plaintiff to pursue her claims, which plaintiff cannot do because an Affidavit of Merit has not been provided. To reiterate, an Affidavit of Merit would be necessary to establish the probability that a medical provider deviated from standards of care.

Even though plaintiff is alleging that the malpractice occurred to a non-party, her son, the Gendek case makes it clear that plaintiff must prove the underlying claim of malpractice to support her allegations. Given that plaintiff must prove that a medical professional was negligent, plaintiff must produce an Affidavit of Merit as to Cooperman, a licensed person pursuant to the Statute. Because plaintiff failed to provide a timely Affidavit of Merit as to Cooperman, the Amended Complaint must be dismissed with prejudice. See Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 154 (2003) (If defense counsel files a motion to dismiss after the 120–day deadline and before plaintiff has forwarded the affidavit, the plaintiff should expect that the complaint will be dismissed with prejudice…).

III. THE TRIAL COURT ERRED IN DENYING COOPERMAN'S MOTION FOR RECONSIDERATION ON THE ISSUE OF FAILURE TO NAME AN INDISPENSIBLE PARTY.

(Raised Below: DA0242)

Even if plaintiff had standing to pursue the claims raised in the Amended Complaint, plaintiff failed to name an indispensable party. The participation of Brandon and/or his guardian are necessary in all facets of the litigation from written discovery through trial as his medical treatment is the crux of all claims and defenses related to Cooperman. The argument that plaintiff is only pursuing claims for what she witnessed with regard to this treatment is irrelevant. (T007). Plaintiff would still need to prove the underlying malpractice, which she cannot do without Brandon and his Guardian's involvement in this matter at least for the purposes of discovery, in order to establish a necessary element of her claim.

R. 4:6-2(f) contemplates motions to dismiss for "failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1." In turn, R. 4:28-1(a) provides, in relevant part, that a person who is subject to service "shall be joined as a party" if 1) "complete relief cannot be accorded among those already parties" in that person's absence or 2) "the person claims an interest in the subject of the action" and either that person's interest will be impeded by being absent or an existing party may incur multiple obligations as a result of that person's absence. The question of whether a party is or is not

"indispensable" is fact-sensitive. Toll Bros, Inc. v. Twp. of West Windsor, 334 N.J. Super. 77, 90 (App. Div. 2000). "[A] party is not truly indispensable unless he has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Id. at 90–91.

Here, plaintiff's son clearly holds an interest in the subject matter of the litigation, as all the allegations arise out of his care and treatment. Therefore, Brandon is inevitably involved in the case. Brandon's history and personal health information will be part of any discovery, as evidenced by the discovery requests of plaintiff, and will be disclosed to all parties. If this matter proceeds to trial, his medical conditions will be placed before a jury. This would be necessary for plaintiff to establish her claims, as plaintiff would first need to establish that the care and treatment allegedly rendered to her son deviated from accepted medical standard of care. Accordingly, in order for defendants to defend against the allegations of plaintiff, defendants would need to rely upon the treatment records of Brandon.

Notably, several of plaintiff's allegations begin with "based upon information and belief." (DA0047). This is not a matter of inartful pleading as if the allegation is based upon information and belief, then she did not personally witness the alleged negligence. Based upon the pleading, it is unclear where

plaintiff obtained this information, which again, would necessitate all parties to question Brandon regarding various events related to his care and treatment as this is not even information that is within the knowledge of plaintiff.

Without the involvement of Brandon, plaintiff cannot establish a deviation from the standard of care, nor can Cooperman engage in any meaningful discovery. For example, Cooperman has not received any HIPAA authorizations on behalf of Brandon, nor has Cooperman received verification that Brandon is on notice of this matter or that his medical records were requested and ordered to be produced.

Without oral argument and with no notice to Brandon, the Motion Judge ordered defendant to respond to discovery. All of the discovery that defendants would need to rely upon involve the medical treatment of Brandon, a non-party to this action. Accordingly, the Motion Judge erred in compelling this discovery without ever placing Brandon on notice and allowing him the opportunity to object. This ruling of the Court highlights that Brandon is an indispensable party as all of the discovery involves his care and treatment. Therefore, the Court erred in failing to dismiss the claims for failure to name an indispensable party and erred in compelling the discovery as argued below.

IV. THE TRIAL COURT ERRED IN COMPELLING COOPERMAN TO PRODUCE DISCOVERY RELATED TO BRANDON'S MEDICAL TREATMENT

(Raised Below: DA0238; DA0240)

On February 13, 2024, Cooperman filed a Motion to Dismiss in the Trial Court asserting that plaintiff failed to state a claim, lacked standing to pursue her claims, and failed to produce the requisite Affidavit of Merit. Oral argument was held on that Motion to Dismiss on April 26, 2024. (T001-T009). At the conclusion of oral argument, the trial court stated that there are general allegations of negligence, there is no requirement of specificity in the pleadings, and that "counsel can further flesh out the issues with regard to the specific allegations against Cooperman Barnabas Medical Center through interrogatories (inaudible) depositions…". (T009). Plaintiff's first set of discovery demands were served in December of 2023. (DA0185-DA230). In total, plaintiff is seeking responses to seventy-nine (79) interrogatories and eighty-eight (88) document demands. Cooperman cannot respond to these requests without violating HIPAA and the Morris County Surrogate's Court Order.

Notably, plaintiff's sons are not parties to this action, appellant has not received any authorizations on behalf of plaintiff's sons, and plaintiff's son, Brandon, whom plaintiff's allegations relate to, is an adult-aged male who has been found to lack capacity by the Morris County Surrogate's Court. (DA0244).

Significantly, plaintiff is not the guardian of Brandon and therefore, she has no authority to consent to the release of his medical records.

"[A]lthough [parties] are entitled to broad discovery under Rule 3:13–3, they are not entitled to turn the discovery process into a fishing expedition." State v. Broom-Smith, 406 N.J. Super. 228, 239 (App. Div. 2009). In the present matter, plaintiff appears to be seeking information arising out of a separate Estate matter and guardianship matter. Plaintiff's attempt to obtain information related to those matters through the present civil matter is entirely improper and Cooperman has significant concerns in releasing information that was submitted in any other court hearings, especially when those other hearings appear to implicate the interests of non-parties. Those issues should be addressed to the Courts and attorneys that were involved in those matters.

Additionally, in the Amended Complaint, plaintiff alleges:

> While visiting Brandon at **Cooperman Newark Beth Israel location** on May 2, 2022, the Plaintiff was attacked by staff. The Plaintiff was properly checked in to visit. They slammed a door on the Plaintiff's hand and they caught her foot in the door.

(DA0047). While plaintiff appears to combine the names of two hospitals in this allegation, it is clear that it is directed at non-party Newark Beth Israel Medical Center. Given this clarification, these discovery requests are improper as they are seeking information from an entirely different entity. It is unclear why plaintiff is even under the impression that Cooperman Barnabas Medical Center

would have this information given the incident did not occur at Cooperman Barnabas Medical Center.

Following Cooperman's initial motion to dismiss, as well as receipt of the aforementioned discovery requests, appellant discovered that plaintiff was not the Guardian of Brandon. (DA0244). On October 28, 2024, plaintiff's moved to compel responses to these discovery requests. (DA0231-DA0232). On October 30, 2024, appellant filed a cross-motion for a protective order. (DA0233-DA0234). On December 6, 2024, without giving appellant the opportunity to argue these issues, the Trial Court granted in part and denied in part these motions, compelling:

> As to the Interrogatories, the motion is GRANTED in it's entirety;
> As to the Notice to Produce, the motion is GRANTED except as to the following:
> #12 Personell [sic] files are confidential; counsel can submit for an in camera review;
> #15: Overly broad request for 10 years of information [sic];
> #16: Overly broad for all law suits;
> #17: Overly broad for all administrative matters[sic]
> #18: Overly broad as to all grievances;
> #19: Overly broad to all action taken in response [sic] to the grievances;
> #20: Improper as calls for an answer to an interrogatory [sic];
> #52: Limited to Plaintiff [sic] and sons;
> #53: Limited to Plaintiff and sons;
> #61: Improper as calls for an answer to an interrogatory;
> #62: Improper as calls for an answer to an interrogatory;
> #87: Improper [sic] as calls for an answer to an interrogatory.

(DA0238-DA0239). Here, it is respectfully requested that this Order be reversed for the aforementioned reasons as well as more detailed reasons addressed below.

V. COMPLIANCE WITH THE TRIAL COURT'S DECEMBER 6, 2024 ORDER TO COMPEL WOULD VIOLATE THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT.

(Raised Below: DA0238; DA0240)

While the Appellate Division generally offers substantial deference to the Trial Court in matters regarding discovery disputes, decisions may be reversed if there is a showing of an "abuse of discretion or a judge's misunderstanding or misapplication of law." Brugaletta v. Garcia, 234 N.J. 225, 240–41 (2018) (*citing* Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 294 (2017)). Additionally, when an opposing party claims a privilege, the responding party may withhold the privileged information or documents as long as it asserts the claimed privilege and details the nature of the information withheld. Id. at 245. Here, plaintiff is seeking privileged information, protected by HIPAA.

In 1996, Congress established the Health Insurance Portability and Accountability Act (HIPAA) "to combat waste, fraud, and abuse in health insurance and health care delivery…". See Pub. L. 104-191. A primary purpose of HIPAA is to protect the security and privacy of individually identifiable health information, including "[t]he medical records and billing records about

individuals maintained by or for a covered health care provider." See 45 *C.F.R.* § 164.501.

"To this end, Congress mandated the Secretary of Health and Human Services to develop standards to enable electronic exchange of medical information and to insure the privacy of medical information." Michelson v. Wyatt, 379 N.J. Super. 611, 622–23 (App. Div. 2005) (*citing* 42 *U.S.C.A.* § 1320d–2(a)). "These regulations, collectively known as the Privacy Rule, set forth standards and procedures for the collection, maintenance and disclosure of certain health care information. Id. at 623 (*citing* 42 *U.S.C.A.* § 1320d–1; 45 *C.F.R.* § 160.102). Specifically, "[t]he Privacy Rule prohibits covered entities from using or disclosing personal health information except as permitted by regulation. Ibid.

Therefore, a covered entity is only permitted to disclose protected health information as follows: (i) To the individual; (ii) For treatment, payment, or health care operations, as permitted by and in compliance with § 164.506; (iii) Incident to a use or disclosure otherwise permitted or required by this subpart, provided that the covered entity has complied with the applicable requirements of §§ 164.502(b), 164.514(d), and 164.530(c) with respect to such otherwise permitted or required use or disclosure; (iv) Except for uses and disclosures prohibited under § 164.502(a)(5)(i), pursuant to and in compliance with a valid

authorization under § 164.508; (v) Pursuant to an agreement under, or as otherwise permitted by, § 164.510; and (vi) As permitted by and in compliance with any of the following: (A) This section; (B) Section 164.512 and, where applicable, § 164.509; (C) Section 164.514(e), (f), or (g). See 45 *C.F.R.* § 164.502.

With regard to privilege, in Cavallaro v. Jamco Prop. Mgmt., counsel was disqualified from further representation after the Appellate Division found that defendant violated discovery rules by obtaining privileged treatment records. Cavallaro v. Jamco Prop. Mgmt., 334 N.J. Super. 557 (App. Div. 2000). In affirming the Trial Court's sanction, the Appellate Division emphasized that "[t]here is no legitimate argument that the doctors' records were anything other than privileged under … physician-patient privileges." Id. at 565 (citing N.J.S.A. 2A:84A-22; N.J.R.E. 506. Additionally, the Trial Court found that "the purported subpoenas were a willful attempt to gain information in an unpermitted fashion." Id. at 569.

Ultimately, in addressing the sanction of disqualification, the Appellate Division concluded:

> Less severe remedies such as assessments of expenses or counsel fees fail to adequately address both the Rule violation and the attendant harm of access and exposure to privileged documents. This remedy acknowledges not only the nature of the documents and information revealed but also the importance of insuring that abuses of this Rule are dealt with in a meaningful

> fashion. The violation here resulted in defendant and counsel accessing privileged records not otherwise available. Significantly, the accessibility of those records had already been the subject of a prior discovery dispute and motion practice. To suggest that merely barring reference to plaintiff's psychiatric history and information gleaned from the records would be a sufficient remedy is, in reality, no remedy at all. Our concern lies with defendant's ready access to, and now likely familiarity with plaintiff's psychological treatment records.

Id. at 572–73 (emphasis added).

In the present matter, the compelled records relate to an adult-age, non-party, whom plaintiff is not the guardian of. Additionally, no authorizations have been provided. Accordingly, appellant has been placed in the untenable position of choosing whether to violate the Trial Court's December 6, 2024 Order or knowingly violate HIPAA. Reversal of the December 6, 2024 Order is necessary to avoid the inevitable circumstances set forth in the Cavallaro matter. Once plaintiff is in possession of documents that she knows, or should know, that she is not entitled to, the bell cannot be unrung. Also, plaintiff is seeking these records, while simultaneously arguing that she has not raised an allegation of medical malpractice. This admission alone essentially renders these requests moot. Based upon these issues, the Motion Judge erred in compelling defendant to produce discovery without the knowledge and consent of Brandon. Accordingly, the Motion to Compel Discovery should have been denied, and must now be reversed.

VI. COMPLIANCE WITH THE TRIAL COURT'S DECEMBER 6, 2024 ORDER TO COMPEL WOULD VIOLATE THE MORRIS COUNTY SURROGATE'S COURT'S APRIL 10, 2024 ORDER.

(Raised Below: DA0238; DA0240)

On April 10, 2024, Brandon Garfinkel was found to be mentally incapacitated by the Morris County Surrogate's Court, and Adam DuBeck, Esq. was appointed as Brandon's Guardian. (DA0244). Pursuant to N.J.S.A. 3B:1-2, "[i]ncapacitated individual means an individual who is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern himself and manage the individual's affairs." See N.J.S.A. 3B:1-2. Under these circumstances, it is the guardian "who shall exercise all rights and powers of the incapacitated person." N.J.S.A. 3B:12-24.1.

Brandon's Guardian has not authorized the disclosure of Brandon's health information, nor could Brandon's guardian without the approval of Morris County Surrogate's Court. (DA0244). Accordingly, the irreversible disclosure of the compelled medical records and information would also violate the findings and rulings of the Morris County Surrogate's Court. The timing of this order also raises several concerns.

As detailed above, back in December of 2023, plaintiff requested several discovery responses about a pending guardianship matter, including: "Please explain why Robert Maglio, Esq. a Lawyer in Tinton Falls, NJ, a complete

stranger to Lori Garfinkel, a person Lori Garfinkel never met, prepared a letter to the Estate Court, asking that Lori Garfinkel not be a guardian, and not receive her inheritance?". (DA0204). This demonstrates that plaintiff was at least aware of, if not directly involved in, the pending Guardianship matter at the time she was seeking documents related to her son's care. This is not a simple discovery dispute, as plaintiff is using this completely separate civil matter, wherein she did not name her son as a party, to pursue Brandon's medical information. Once the medical information is disclosed, the information is disclosed and cannot be retracted. Therefore, plaintiff may be conducting discovery in this matter to circumvent the proceedings and findings of the Morris County Surrogate's Court. Even if this were not the case, it is still clear that discovery cannot proceed without the involvement of Brandon and his Guardian. Engaging in discovery is also unnecessary for the procedural deficiencies set forth above.

CONCLUSION

For the aforementioned reasons, Appellant respectfully requests that this court reverse the trial court's order denying reconsiderations and dismiss the case with prejudice. In the event that the case is not dismissed or is dismissed without prejudice, plaintiff's motion to compel discovery must be denied as Brandon was never put on notice and his disclosure of his medical records would violate HIPAA.

Respectfully submitted,

Robert M. Pacholski

_____

Dated: March 11, 2025 Robert M. Pacholski, Esq.

Superior Court of New Jersey
Appellate Division
Docket No. A-001576-24

LORI LYNN MARTINOLICH,

Plaintiff/ Respondent

v.

NEW JERSEY STATE POLICE; STATE DIVISION OF NEW JERSEY; NEW JERSEY STATE BOARD OF SOCIAL WORK EXAMINERS; BOARD OF MARRIAGE AND FAMILY THERAPY EXAMINERS; TROOPER A. ROCK #7535; TROOPER A. BERTUCCI #7970; TROOPER R. SANCHEZ #8085; TROOPER C.O. BONILLA #7973; CAPTAIN HOWARD EVILNESS #454; TROOPER M. TAVARES #7947; TROOPER L. RODRIGUEZ #7536; TROOPER N. OTERO #8057; TROOPER T. PRESTON #5392; TROOPER J.J. DELORENZO #6673; PRIME HEALTHCARE; ST. CLAIRE HOSPITAL; COOPERMAN BARNABAS MEDICAL CENTER; STATE OF NEW JERSEY GREYSTONE PARK PSYCHIATRIC HOSPITAL; CAREWELL HEALTH; TROOPER T. MATTHEWS #7409, JOHN DOES 1-10, ABC CORPORATION 1-10

Defendants/ Appelant

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION

ESSEX COUNTY

Case No.: ESX-6582-23
Hon. Robert H. Gardner

PLAINTIFFS/ RESPONDENT APPENDIX AND BRIEF RESPONSE TO DEFENDANT/ APPELLANT, COOPERMAN BARNABAS MEDICAL CENTER'S BRIEF ON APPEAL.

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PRELIMINARY STATEMENT

On December 6, 2024, the trial court rightfully denied Defendant's motion for dismissal and reconsideration and granted Plaintiff's Motion to Compel in part. (Da001 – Da002). The Defendant, Cooperman Barnabas Medical Center (Cooperman) has now filed an appeal of the trial court's December 6th orders.

Specifically, Cooperman argues that this Court must step in and intervene with the discovery order as turning over information to the Plaintiff is a violation of privileged medical information. The trial court heard argument on this and granted the motion to compel as Plaintiff suffered harm and has a right to seek discovery of her claims.

Cooperman continues to ignore the factual allegations of the Complaint and insists on arguing that Plaintiff has brought claims on behalf of an unnamed party. However, as is clear based on the reading of Plaintiff's Complaint, Plaintiff has brought claims due to emotional and physical harm she suffered at the hands of Cooperman. As the trial court found on multiple occasions, dismissal of this matter is not warranted as Plaintiff has not brought claims against unnamed parties, detailed her allegations with specificity, and was not required to produce an Affidavit of Merit. As such, this Court should also find that Defendant's arguments are without merit and deny the relief requested in this appeal.

It is clear based on Cooperman's actions that they plan to delay this matter as long as possible in an effort to try and not answer discovery. They have twisted the allegations of the Amended Complaint on numerous occasions despite the trial court agreeing that this is not a medical malpractice case.

PROCEDURAL HISTORY

On or about October 5, 2023, Plaintiff filed an Amended Complaint against multiple Defendant's. (Da0001 – Da0147). Plaintiff's Amended Complaint alleges multiple causes of action against Defendant, Cooperman Barnabas Medical Center, including Count Twelve for Negligence, Count Thirteen for Intentional Infliction of Emotional Distress, Count Fourteen for Negligent Infliction of Emotional Distress and Count Seventeen for Agency, Vicarious Liability and Respondeat Superior.

On or about February 13, 2024, Defendant, Cooperman Barnabas Medical Center, filed a Motion to Dismiss for failure to state a claim. (Da178 – 180). Defendant argued that Plaintiff's Amended Complaint was a "shotgun pleading" and failed to give the Defendant adequate notice of the claims against them and the grounds upon which each claim rests. Additionally, Defendant claims that Plaintiff's Amended Complaint should be dismissed for failure to name necessary parties to the action.

Plaintiff filed a response to Defendant's motion on March 2, 2024. On March 11, 2024, the Defendant filed a reply brief. Oral argument was heard on the Motion to Dismiss on April 26, 2024 and on April 29, 2024, an order was entered denying the motion to dismiss. (Da0181 – Da0182).

On December 15, 2023, Plaintiff served Cooperman with discovery, including interrogatories and document requests. (Da0185 – Da0230). On October 28, 2024, Plaintiff filed a Motion to Compel Cooperman's responses to these requests. (Da0231 – Da0232). On October 30, 2024, Cooperman filed a Motion for Reconsider and Dismissal (Da.0235 – Da0234). On October 29, 2024, Cooperman filed a Cross-Motion for Protective Order. (Da0233 - DA0234). On December 6, 2024, the Trial Court denied Cooperman's Motion for Reconsideration and granted in part and denied in part, Plaintiff's Motion to Compel and Defendant's Cross-Motion for a Protective Order. (Da0238 - Da0243).

COUNTERSTATEMENT OF FACTS

On or about October 5, 2023, Plaintiff filed an Amended Complaint against multiple Defendant's. (Da00 – Da0147). Plaintiff's Amended Complaint alleges multiple causes of action against Defendant, Cooperman Barnabas Medical Center, including Count Twelve for Negligence, Count Thirteen for Intentional Infliction of Emotional Distress, Count Fourteen for Negligent Infliction of Emotional

Distress and Count Seventeen for Agency, Vicarious Liability and Respondeat Superior.

The Plaintiff was a visitor at Cooperman Barnabas commencing February 11, 2022. The Plaintiff was visiting a relative, who was a patient in the Cardiac Unit, at the Livingston New Jersey Cooperman Barnabas Center. The basis of this complaint, is that during those times, when Plaintiff was visiting her relative the following events occurred:

1. Plaintiff was cornered by 5 large Security Guards

2. Plaintiff's belongings were stolen

3. Plaintiff she was held against her own free will, and not allowed to exit the building.

4. Plaintiff was called names.

5. Plaintiff was forced to watch her son's physical abuse.

6. Plaintiff was forced to watch her son's emotional abuse.

7. Plaintiff was insulted, disparaged and degraded.

Plaintiff was a visitor, there to comfort her sick child. In return for Plaintiff's Visit to Cooperman Barnabas, Plaintiff was blocked, repeatedly, and lied to by various staff members, when she attempted to transfer her son to Cornel Medical Center. Plaintiff endured elaborate costs, because she hired a private ambulance for the transfer of Brandon, to be blocked. When the ambulance arrived, due to

Brandon being in the Cardiac Unit; with life threatening symptoms, the ambulance was turned away by Cooperman. This caused panic and exorbitant Legal and Medical Expenses to address this outrageous conduct.

Plaintiff was smashed in a large steel door on May 2, 2022, during a Visit at Newark Beth Israel Medical Center. As a result of the Defendant's actions, Plaintiff was seriously injured, by the hate and hostility, executed by Cooperman Barnabas. The Plaintiff believes this was a hate crime, not medical malpractice.

Plaintiff is fearful of Cooperman Barnabas, as a result of the torture she watched, when her son, Brandon was tied to the bed, by Cooperman Staff. This is abuse, not medical malpractice for 5 Security Guards to force her son to defecate on himself, because they improperly tied him to a bed, for hours.

Plaintiff was alarmed by Cooperman Barnabas, due to the fact that the lights were turned off in the room, while she was a visitor. The holes in the walls were left for days, and Plaintiff was ridiculed when she contacted risk management to ask for assistance. Plaintiff is financially damaged, because there were legal fees that she endured, when she was simply a visitor at Cooperman Barnabas. The legal fees were caused by Cooperman Barnabas, due to the fear that Plaintiff had when Cooperman Barnabas, locked her son, into the 'Cardiac Unit' for 3.5 months, 105 days, without a legal basis to hold Brandon in the Cardiac Unit.

Plaintiff is physically injured, and is currently involved in medical treatment, for the injuries that she sustained, on May 2, 2022, when a violent Staff member at Cooperman Barnabas, smashed her body in a steel door, causing serious bodily harm. Plaintiff is fearful of Cooperman, especially because during a scheduled visit, her son, Brandon was found laying in a pool of blood, and reported being sexually assaulted. This event was silenced by Cooperman.

Plaintiff is troubled, because her son Jared, was ripped out of Intensive Care on or about December 15, 2022, by an unauthorized third party and transferred to an undisclosed location. Plaintiff is alarmed, because while Jared in in Surgical ICU, he was tied to the bed, and left to urinate and defecate on himself from December 15, 2022, until December 24, 2022. Plaintiff is concerned, because an unauthorized Consultant, entered Jared's Room, without Consent, and scheduled a Transfer to Carewell Health, without notice to the family.

Plaintiff is alarmed, because contraband was found in the Hospital Room of Jared, and Security took no responsibility for this crime. The Plaintiff believes these events are hate crimes, not medical malpractice.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR RECONSIDERATION ON THE BASIS OF STANDING.

Defendant, Cooperman Barnabas Medical Center alleges that the trial court erred in denying both Defendant's Motion to Dismiss and Motion for Reconsideration against Plaintiff's Amended Complaint by arguing that Plaintiff lacks the requisite standing to bring this action. Defendant's claims are that Plaintiff failed to name her son, Brandon, who was the patient at Cooperman, as a party to this action. However, the Defendant is mischaracterizing the claims raised in Plaintiff's Amended Complaint. Plaintiff has not brought claims for injuries or actions suffered by her son. Plaintiff's allegations against the Defendant stem from injuries and suffering she herself has received based on the conduct of the Defendant.

Defendant is correct in that Plaintiff makes reference to injuries her son suffered while admitted at Cooperman. Defendant, in its brief, is trying to make the argument that even if Plaintiff is only bringing claims regarding injuries she herself suffered, she must first prove that her son did in fact suffer injuries. However, the Defendant cites no case law or statute to stand for that proposition.

A party is the real party in interest, and therefore has standing, when the party has "[a] sufficient stake and real adverseness with respect to the subject matter of the litigation, and a substantial likelihood that some harm will fall upon it in the event of an unfavorable decision." In re N.J. Bd. of Pub. Util., 200 N.J. Super. 544, 556, 491 A.2d 1295 (App.Div.1985) (citing N.J. Chamber of

Commerce v. N.J. Election Law Enf't Comm'n, 82 N.J. 57, 67, 411 A.2d 168 (1980)). Here, Plaintiff has brought this lawsuit due to injuries she herself has suffered. She has not brought a claim for injuries suffered to her child, as such, she had standing as she is the real party in interest pursuant to her various claims against the Defendant.

Standing is a threshold justiciability determination of whether the plaintiff is entitled to initiate and maintain an action on the matter before the court. In re adoption of Baby T., 160 N.J. 332, 340 (1999). Standing requires that a litigant have a sufficient stake in the matter and real adversaries, with a substantial potential for real harm flowing from the outcome of the case. In re New Jersey Bd. Of Public Utilities, 200 N.J. Super. 544, 556 (App. Div. 1985). Plaintiff clearly meets this threshold of justiciability and the trial court believed so as well. Defendant has not brought any new argument or shown good cause as to why the trial court's ruling should be overturned.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO RECONSIDERATION FOR FAILURE TO PRODUCE AN AFFIDAVIT OF MERIT.

The Defendant asked the trial court to dismiss Plaintiff's Amended Complaint due to the failure to file and submit an affidavit of merit with the Complaint, which the trial court rightfully denied. Defendant's arguments in the

motion to dismiss, reconsideration, and now appeal, is that the Plaintiff has raised various allegations of medical malpractice on behalf of her son. Again, as in the prior motions, the Defendant is attempting to change the allegations of the Amended Complaint to fit their own narrative. Plaintiff's Amended Complaint does not contain any counts for medical malpractice. Plaintiff's Amended Complaint does not contain any statements and allegations regarding the treatment her son received while located at the Defendant's medical center. The Amended Complaint has not brought any claims for medical malpractice.

The Affidavit of Merit Statute requires:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within [sixty] days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. [N.J.S.A. 2A:53A-27.]

Not every claim against a licensed person requires an affidavit of merit. "[A]n affidavit will only be needed when the underlying harmful conduct involves professional negligence, implicating the standards of care within that profession." McCormick v. State, 446 N.J. Super. 603, 613-14, 144 A.3d 1260 (App. Div. 2016). In deciding whether a plaintiff must submit an affidavit of merit, courts must look deeper than how parties designate their cases. "It is not the label

placed on the action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340, 801 A.2d 1134 (2002). Instead of focusing on a label, "courts should determine if the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession." *Ibid.* If that proof is necessary, "an affidavit of merit is required for that claim, unless some exception applies." *Ibid.*

The purpose of this statute is "to weed out frivolous lawsuits at an early stage and to allow meritorious cases to go forward." Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 350, 771 A.2d 1141 (2001). "It was designed as a tort reform measure and requires a plaintiff in a malpractice case to make a threshold showing that the claims asserted are meritorious." *Ibid.* Here, Plaintiff has not brought a medical malpractice case against the Defendant. Plaintiff is not questioning the standard of care of a physician of the Defendant. As such, an affidavit of merit is not required.

Case law has applied a common knowledge exception to the AOM requirement in discrete situations where expert testimony is not needed to establish whether the defendants' "care, skill or knowledge . . . fell outside acceptable professional or occupational standards or treatment practices." Hubbard, 168 N.J. at 390, 774 A.2d 495 (quoting *N.J.S.A.* 2A:53A-27). "The basic postulate for application of the doctrine therefore is that the issue of negligence is not related to

technical matters peculiarly within the knowledge of medical or dental practitioners." Estate of Chin v. St. Barnabas Med. Ctr., 160 N.J. 454, 470, 734 A.2d 778 (1999) (quoting Sanzari v. Rosenfeld, 34 N.J. 128, 142, 167 A.2d 625 (1961)).

The Plaintiff has made allegations regarding the treatment her son received while located at Defendant's medical center. However, her allegations and claims for damages are a result of the damages she has received, not the damages her son has received. Plaintiff's Amended Complaint does not contain any counts or claims for medical malpractice or claims regarding the standard of care owed by physicians. The Plaintiff is not calling into question the standard of care of a doctor regarding any such diagnosis of her son. Her son will bring his own, separate, medical malpractice case. A majority of Defendant's argument in its brief is centered around the treatment received by Plaintiff's son Brandon. In fact, the Defendant argues that plaintiff must establish that Brandon's treatment was improper. However, as stated many times, Plaintiff has not brought any claims on behalf of her son.

Here, Plaintiff is bringing claims that the medical staff of the Defendant treated her poorly and caused her to be injured and damaged when she visited her son. As such, there was no requirement for Plaintiff to include an affidavit of merit with the amended complaint. As such, the trial court made the correct ruling in

denying Defendant's motions. The Defendant is attempting to shift the narrative and make arguments that are not in-line with the allegations of the Amended Complaint. This Court must upload the trial court's findings.

POINT III
THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO RECONSIDERATION FOR FAILURE TO NAME AN INDISPENSIBLE PARTY

Defendant, Cooperman Barnabas Medical Center's next argument is that Plaintiff has failed to name an indispensable party. Defendant's claims are that Plaintiff failed to name her son, Brandon, who was a patient at Cooperman, as a party to this action. However, the Defendant is mischaracterizing the claims raised in Plaintiff's Amended Complaint. Plaintiff has not brought claims for injuries or actions suffered by her son. Plaintiff's allegations against the Defendant stem from injuries and suffering she herself has received based on the conduct of the Defendant.

Whether a party is indispensable is fact sensitive. "As a general proposition, . . . a party is not truly indispensable unless he has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interests." Toll Bros., Inc. v. Twp. of W. Windsor, 334 N.J. Super. 77, 90-91, 756 A.2d 1056 (App. Div. 2000) (quoting Allen B. DuMont Labs., Inc. v.

Marcalus Mfg. Co., 30 N.J. 290, 298, [*226] 152 A.2d 841 (1959)); see also Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402, 447-48, 246 A.3d 847 (App. Div. 2021).

A party is the real party in interest, and therefore has standing, when the party has "[a] sufficient stake and real adverseness with respect to the subject matter of the litigation, and a substantial likelihood that some harm will fall upon it in the event of an unfavorable decision." In re N.J. Bd. of Pub. Util., 200 N.J. Super. 544, 556, 491 A.2d 1295 (App.Div.1985) (citing N.J. Chamber of Commerce v. N.J. Election Law Enf't Comm'n, 82 N.J. 57, 67, 411 A.2d 168 (1980)).

Here, Plaintiff has brought this lawsuit due to injuries she herself has suffered. She has not brought a claim for injuries suffered to her child. The Defendant fails to state how failure of Plaintiff to name her son as a party would prohibit Plaintiff's claims against the Defendant from proceeding. In fact, in Defendant's brief, the Defendant even states that "plaintiff's sons clearly hold an interest in the subject matter of the litigation." Holding an interest in the subject matter and being an indispensable party are two separate arguments. There is nothing prohibiting the Plaintiff from pursuing her claims of injuries she suffered without including the claims that her sons may have. As such, they are not indispensable parties.

Defendant previously raised this same argument in its initial motion to dismiss and motion for reconsideration, both of which the Court has denied. Defendant previously argued that Plaintiff failed to state a cause of action on behalf of her child. However, as Plaintiff is clearly bringing claims for injuries she suffered, the trial court found that she properly stated a cause of action. The Defendant has not stated any new facts that should force this Court to review the same arguments a third time.

POINT IV

THE TRIAL COURT DID NOT ERR IN COMPELLING COOPERMAN TO PRODUCE DISCOVERY RELATED TO BRANDON'S MEDICAL TREATMENT

Defendant's fourth point is essentially a prelude to the arguments Defendant raises in points five and six of its appellate brief. Basically, Defendant argues that Plaintiff's son is not a party to this action and as such, Plaintiff is not authorized to receive records regarding her son's care. Defendant argues that Plaintiff is seeking discovery regarding a separate matter, which is again a mischaracterization of Plaintiff's claims and requests.

As discussed in greater detail below, "New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery," Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997). "Relevant evidence," although not defined in the discovery rules, is defined elsewhere as "evidence having a tendency in reason to

prove or disprove any fact of consequence to the determination of the action." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1997) (*citing* N.J.R.E. 401). "The relevance standard does not refer only to matters which would necessarily be admissible in evidence but includes information reasonably calculated to lead to admissible evidence." Berrie v. Berrie, 188 N.J. Super. 274, 278 (Ch. Div. 1983).

As the trial court has properly ruled on Plaintiff's discovery requests, this Court should deny Defendant's appeal and require Defendant to respond to Plaintiff's discovery requests.

POINT V

COMPLIANCE WITH THE DECEMBER 6, 2024, ORDER WOULD NOT VIOLATE THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT.

Defendants' appellate brief claims the Plaintiff is seeking medical information that she is not entitled to as her son, an adult male, is not a party to this action, has not authorized the release of the records and that Defendant cannot engage in disclosures pursuant to the Health Insurance Portability and Accountability Act ("HIPAA").

Cooperman is asking this Court to intervene as it claims the records being requested, if produced, would be in the hands of a person that is not entitled to

them. Cooperman already requested a protective order regarding the records, which the trial court denied in granting Plaintiff's motion to compel.

"New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery," Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997). "Relevant evidence," although not defined in the discovery rules, is defined elsewhere as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1997) (*citing* N.J.R.E. 401). "The relevance standard does not refer only to matters which would necessarily be admissible in evidence but includes information reasonably calculated to lead to admissible evidence." Berrie v. Berrie, 188 N.J. Super. 274, 278 (Ch. Div. 1983). Rule 4:10-2(a) reflects this principle:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

"Consequently, to overcome the presumption in favor of discoverability, a party must show 'good cause' for withholding relevant discovery by demonstrating, for example, that the information sought is a trade secret or is otherwise confidential or proprietary." Capital Health, 230 N.J. at 80, 165 A.3d 729.

"[D]ebating and/or modifying the New Jersey Supreme Court ruling providing for informal discovery techniques is not a role for this court. Rather, its task is deciding the narrow issue of whether HIPAA preempts the informal discovery techniques. The answer is plainly "no."'

Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical, 372 N.J. Super. 105, 126 (App. Div. 2003). Here, Cooperman's sole argument that the order to compel should be overturned due to HIPAA is unwarranted. There are other mechanisms in the law, such as a confidentiality order, that could safe guard the documents and information being objected to by the Defendant. Furthermore, the Plaintiff has a Power of Attorney over her son, which includes medical powers. As such, any claim that Plaintiff's discovery would be a violation of HIPAA is unsubstantiated as Plaintiff is entitled to said records anyway. Ra1-Ra86

POINT VI

COMPLIANCE WITH THE DECEMBER 6, 2024, ORDER WOULD NOT VIOLATE THE MORRIS COUNTY SURROGATE'S APRIL 10, 2024, ORDER.

Defendant, Cooperman, next argues that the December 6, 2024, Order would violate an Order dated April 10, 2024, from the Morris County Surrogate Court. Specifically, Cooperman is again arguing that Plaintiff's son has not authorized the disclosure of his health information to plaintiff, as such, Cooperman is not able to provide said information even with a Court Order directing it to do so.

The Morris County Surrogate Court case is an entirely different matter from this matter. Additionally, Cooperman did not raise this issue of the Morris County case with the trial court, as such, they cannot raise it for the first time here. The Morris County case is a guardianship matter that has nothing to do with the causes of action the Plaintiff has against Cooperman in this case. Cooperman is trying to link the cases together in an effort to avoid complying with discovery requests even though the cases are in way related.

Further, pursuant to a certification executed by Plaintiff's son, Brandon Garfinkel, on December 21, 2024, he has appointed his mother, the Plaintiff, in this matter, as his Power of Attorney. Ra1-Ra86 Therefore, any claims that production of documents to the Plaintiff would be a violation of a Court order or of HIPAA have no bearing when the Plaintiff is already the POA for her son. Ra1-Ra86

Plaintiff's discovery requests in this matter, and the Order granting Plaintiff's motion to compel involve valid causes of action that the Plaintiff has against Cooperman. Cooperman has presented no evidence that Plaintiff is simply conducting discovery in this matter to circumvent a Court Order in another pending matter. Each Trial Court has the ability to determine what matters are relevant and discoverable and in this matter, the Court has granted Plaintiff's motion to compel discovery responses.

CONCLUSION

Based on the foregoing reasons, Plaintiff, Lori Lynn Martinolich, by and through the undersigned counsel, respectfully submits this Letter Brief as a Reply to Defendant, Cooperman Barnabas Medical Center's Appellate Brief regarding the December 6, 2024 Orders, and requests that Defendants Appeal be denied in full.

Respectfully Submitted,

/s/ Desha Jackson

_____

Desha Jackson, Esq.
Attorney for Plaintiff, Lori Lynn Martinolich

LORI LYNN MARTINOLICH, LORI LYNN MARTINOLICH ADMINISTRATOR AD PROSEQUENDUM FOR THE ESTATE OF PAUL MARTINOLICH,

Plaintiff(s),

vs.

NEW JERSEY STATE POLICE; STATE OF NEW JERSEY; NEW JERSEY STATE BOARD OF SOCIAL WORK EXAMINERS; BOARD OF MARRIAGE AND FAMILY THERAPY EXAMINERS; TROOPER A. ROCK #7535; TROOPER A. BERTUCCI #7970; TROOPER R. SANCHEZ #8085; TROOPER C.O. BONILLA #7973; CAPTAIN HOWARD EVILNESS #454; TROOPER M. TAVARES #7947; TROOPER L. RODRIQUEZ #7536; TROOPER N. OTERO #8057; TROOPER T. PRESTON #5392; TROOPER J.J. DELORENZO #6673; PRIME HEALTHCARE, ST. CLAIRE HOSPITAL; COOPERMAN BARNABAS MEDICAL CENTER; STATE OF NEW JERSEY GREYSTONE PARK PSYCHIATRIC HOSPITAL, CAREWELL HEALTH; TROOPER T. MATTHEWS, 7409, JOHN DOES 1-10, ABC CORPORATION 1-10,

Defendant(s).

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

CIVIL ACTION

DOCKET NO. A-001576-24 T4

ON APPEAL FROM:

ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-6582-23

Sat Below: Hon. Robert H. Gardner, J.S.C.

APPELANT/DEFENDANT'S, COOPERMAN BARNABAS MEDICAL CENTER, REPLY BRIEF IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

As a threshold matter, Newark Beth Israel Medical Center is not a party to this matter, there are no allegations against Cooperman Barnabas Medical Center regarding Jared Garfinkel, and no oral argument was heard on plaintiff's Motion to Compel. In opposition, plaintiff essentially argues: (1) Cooperman is misinterpreting the allegations of the Amended Complaint; (2) plaintiff has not labeled her allegations as medical malpractice; (3) plaintiff has raised claims for her damages, as opposed to her son's; (4) the fact that Brandon lacks mental capacity to govern his own affairs is irrelevant; and (5) plaintiff's other legal matters have no impact on this case. These arguments are incorrect for several reasons.

Regardless of the label that plaintiff places on her claim and the damages being sought, plaintiff would need to establish the underlying malpractice that she has alleged with regard to her son's treatment. Additionally, several of the documents that plaintiff relies upon in her opposition were not provided in the trial court, and therefore should not be considered here. Even if these documents are considered, they are deficient for reasons set forth below. Ultimately, plaintiff's opposition demonstrates that her allegations arise out of medical malpractice, and fails to demonstrate how this matter can proceed without the involvement of her son.

LEGAL ARGUMENT

POINT I

THE OPPOSITION OF PLAINTIFF DEMONSTRATES THAT PLAINTIFF HAS ALLEGED MEDICAL MALPRACTICE IN THE AMENDED COMPLAINT.

Plaintiff concedes that she has made allegations regarding the treatment her son received while located at Cooperman Barnabas Medical Center. This representation alone demonstrates the necessity of an Affidavit of Merit. Specifically, "[i]t is not the label placed on the action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340 (2002). Instead of focusing on a label, "courts should determine if the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession." Ibid.

While plaintiff argues that Cooperman is mischaracterizing the allegations in the Amended Complaint, appellant specifically references all of the allegations as to Cooperman in the initial brief. Plaintiff does not reference any additional allegations contained in the Amended Complaint because she cannot. Instead, plaintiff attempts to introduce several new allegations. Some of which pertain to facilities that are not parties to this matter. Others, which similarly implicate the standard of the care of licensed professionals. The fact that plaintiff asserts that these allegations are “hate crimes” and not medical

malpractice is irrelevant, as the legal inquiry involves the professional standard of care.

Plaintiff's allegations arise out of alleged care, treatment, hospital admissions, medication administration, and if considered, the use of restraints and refusal of transport/ discharge related to her son, Brandon. Plaintiff also cannot argue that these alleged deviations fall under common knowledge doctrine, by simply failing to elaborate on what her specific claims are. Alternatively, if plaintiff's argument that she is not questioning the standard of care of any physician is accepted, then the Order to Compel records related to Brandon's treatment should be reversed, and the Amended Complaint must be dismissed as moot, as all of plaintiff's allegations against Cooperman arise out of the care and treatment of her son. Plaintiff's contention that her claims survive because she is only seeking damages that she herself has suffered is misguided. Plaintiff's allegations require proof of more than just damages.

For example, a cause of action for negligence requires that a plaintiff establish: (1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages. Jersey Cent. Power & Light Co. v. Melcar Utility Co., 212 N.J. 576, 594 (2013). Additionally, with regard to plaintiff's emotional distress claims, Gendek makes clear that a family member can only recover damages if the physician's malpractice is observed. See Gendek v. Poblete, 139

N.J. 291, 301 (1995) (if a family member witnesses the **physician's malpractice**, observes the effect of the **malpractice** on the patient, and immediately connects **the malpractice** with the injury, that may be sufficient to allow recovery for the family member's emotional distress) (emphasis added). Plaintiff even states that her son will bring his own separate medical malpractice action, presumably for the same facts giving rise to the allegations here. However, plaintiff cannot establish that she witnessed malpractice without first establishing the underlying malpractice, which she cannot do here without the involvement of her son and an Affidavit of Merit.

POINT II

THE OPPOSITION OF PLAINTIFF DOES NOT REMEDY THE ISSUE OF HER SON'S NON-INVOLVEMENT IN THIS MATTER.

While plaintiff asserts that holding an interest in the subject matter of the litigation and being an indispensable party are two separate arguments, plaintiff fails to appreciate that Brandon's medical and health information cannot be disclosed without the authorization of his Guardian. Candidly, the documents plaintiff provides in support of the argument that she is entitled to this information is incredibly concerning. Brandon was found to be mentally incapacitated by the Morris County Surrogate's Court on April 10, 2024. (DA0244). This issue was raised in the trial court, as well as Cooperman's initial appellate brief. Despite being on notice of this, plaintiff attempts to rely on prior

Power of Attorney documents, as well as documents and certifications executed by Brandon after he has been found mentally incapacitated. This is highly inappropriate. Cooperman cannot release private health information based upon these documents, and the suggestion of a confidentiality order completely ignores that fact that it is plaintiff who is not entitled to the information she is seeking.

Plaintiff relies upon Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical, 372 N.J. Super. 105 (App. Div. 2003), wherein the Court noted "[b]y virtue of filing a suit for personal injury, the plaintiff has placed his or her medical condition in issue, and consequently, has waived some of his or her privacy privilege." Id. at 112. Here, plaintiff has not placed her medical conditions at issue, but rather the medical conditions of a non-party whom plaintiff is not the guardian of. These documents were also not submitted in connection with Motions and Orders that are being appealed here, and therefore, should not be considered.

Cooperman does not seek to litigate the issues regarding these documents here, as the Guardianship of Brandon Garfinkel is the subject of a different Court filing. At this time, Cooperman is simply on notice that Brandon has a Guardian and that his Guardian has not authorized the release of his records. Accordingly,

this action cannot proceed without the involvement of Brandon and his Guardian, as Brandon is an indispensable party.

Lastly, plaintiff asserts that Cooperman has not presented any evidence to demonstrate that plaintiff may be seeking to conduct discovery in another matter. This argument misinterprets Cooperman's position. Cooperman simply points out that several of plaintiff's allegations and discovery requests appear to relate to separate facilities, attorneys, and court matters. For example, plaintiff requests information related to Newark Beth Israel Medical Center, which is not a party to this matter. It is unclear why plaintiff continues to treat various hospitals as a single entity. Plaintiff also references incurring attorney fees in her opposition related to a private ambulance, asserts that this matter and the Guardianship matter are related, and requests documents related to the separate Guardianship and Estate matter in her interrogatories. The specific requests Cooperman takes issue with have already been cited in the Statement of Facts of the initial brief, so Cooperman will not belabor the Court with repeating them here. However, it remains unclear why plaintiff is under the impression that Cooperman would even have access to this information.

POINT III

A PROTECTIVE ORDER IS NECESSARY TO PROTECT THE RIGHTS OF A NON-PARTY.

Rule 4:10-3, which governs protective orders, provides: "On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense…." See R. 4:10-3.

In determining whether good cause exists, the Court may consider the following factors:

1. The nature of the lawsuit and the issues raised by the pleadings;
2. The substantive law likely to be applied in the resolution of the issues raised by the pleadings;
3. The kind of evidence which could be introduced at the trial, and the likelihood of it being discovered by the pretrial discovery procedure which is the subject of the application for a protective order;
4. Whether trade secrets, confidential research, or commercial information are sought in the discovery procedure employed, whether they are material and relevant to the lawsuit, and whether a protective order will insure appropriate confidentiality;
5. Whether the pretrial discovery seeks confidential information about persons who are not parties to the lawsuit;
6. Whether the pretrial discovery sought involves privileged material;
7. Whether the pretrial discovery sought relates to matters which are or are not in dispute;
8. Whether the party seeking discovery already has the materials sought;
9. The burden or expense to the party seeking the protective order;

Catalpa Inv. Grp., Inc. v. Franklin Twp. Zoning Bd. of Adjustment, 254 N.J. Super. 270, 273–74, 603 A.2d 178, 179–80 (Law. Div. 1991) (internal citations omitted).

Here, it is clear that the nature of the lawsuit and issues raised in the pleadings implicate the professional standard of care of licensed professionals. Plaintiff alleges that Cooperman failed to properly treat her son, yet attempts to disguise various allegations of medical malpractice as "hate crimes." However, a plain reading of plaintiff's allegations reveal issues taken with admission, discharge, restraints, medication, etc. In order to pursue these claims, plaintiff would first need to establish malpractice on behalf of the hospital, which would require the disclosure of private health information of an adult, non-party, whom plaintiff is not the guardian of.

This information cannot be disclosed, however, as neither Brandon nor his guardian have authorized its disclosure. A patient's medical information is protected under both HIPAA and physician-patient privileges. If this information were to be turned over, the damage cannot be undone. Once plaintiff has access to the discovery she seeks, the information cannot be unseen. Additionally, with regard to element seven (7) it is apparent that Brandon's medical treatment and/or mental capacity has been, or is being, adjudicated in the Morris County Surrogate's Court. We do not seek to litigate that matter here;

however, when plaintiff is blatantly seeking information related to the Guardianship matter and conceding that the matters are related, it creates a cause for concern as to why this information is being requested, especially when plaintiff has not put the Brandon's guardian on notice of this matter.

Lastly, the burden and expense on Cooperman in conducting discovery in accordance with the December 6, 2024 discovery order is immense. Cooperman risks failing to comply with a court order or knowingly violating HIPAA and the findings of the Morris County Surrogate's Court. Regardless of the expense of physically producing all of the information sought in plaintiff's approximately 170 discovery demands, a non-parties privacy is implicated here. It is inappropriate to disregard this non-parties rights because of the lenient pre-trial discovery rule. All of these factors considered in their entirety demonstrate good cause for a protective order.

CONCLUSION

Plaintiff cannot overcome the issues raised on appeal by simply ignoring them or noting that they were unsuccessful in the trial court. Ultimately, all of plaintiff's allegations against Cooperman arise out of the care and treatment that was received by a non-party, adult, who has been ruled mentally incapacitated. Based upon these allegations, plaintiff seeks to recover damages for witnessing malpractice that she cannot prove based upon various deficiencies noted above.

Even more concerning, plaintiff is now attempting to obtain the medical records of this non-party by submitting documentation that she knows to either be moot or executed by someone who lacks mental capacity.

For the aforementioned reasons, as well as reasons set forth in the initial appellant brief, Appellant respectfully requests that this court reverse the trial court's order denying reconsiderations and dismiss the case with prejudice. In the event that the case is not dismissed or is dismissed without prejudice, plaintiff's motion to compel discovery must be reversed.

Respectfully submitted,

Robert M. Pacholski
Robert M. Pacholski, Esq.

Dated: May 8, 2025