

JOSE NUNEZ AND ALTAGRACIA  
RODRIGUEZ DE NUNEZ, AS  
ADMINISTRATOR AND  
ADMINISTRATRIX AD PROSEQUENDUM  
OF THE ESTATE OF EMMA NUNEZ,  
THEIR DAUGHTER, AND JOSE NUNEZ  
AND ALTAGRACIA RODRIGUEZ DE  
NUNEZ, INDIVIDUALLY,

Plaintiffs-Appellants,

v.

THE RARITAN BAY MEDICAL CENTER,  
their servants, agents, and employees,  
HACKENSACK MERIDIAN HEALTH, their  
servants, agents and employees, DR. MARY  
M. NATH, JOHN DOES 1-15, fictitious names  
whose present identities are unknown; JANE  
DOES 1-15, fictitious names whose present  
identities are unknown; and ABC  
CORPORATIONS 1-15, fictitious names  
whose present identities are unknown,

Defendants-Respondents.

SUPERIOR COURT OF  
NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-001792-24

CIVIL ACTION

On Appeal From:

Law Division, Middlesex  
County  
Docket No. MID-L-4018-23

Sat Below:

Hon. Bruce J. Kaplan, J.S.C.

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## BRIEF OF PLAINTIFFS-APPELLANTS IN SUPPORT OF THE APPEAL

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## PRELIMINARY STATEMENT

Plaintiffs, Altagracia Rodriguez de Nunez and Jose Nunez, the parents of Emma N., appeal from the dismissal with prejudice of their claim for professional negligence and wrongful death against defendants, The Raritan Bay Medical Center (RBMC), Hackensack Meridian Health (HMH) and Mary M. Nath, M.D. (Dr. Nath), based on a failure to provide a timely Tort Claims Notice.

Prior to the filing of the Motion to Dismiss of defendant, Mary M. Nath, M.D., plaintiffs were unable to find any discoverable affiliation between Dr. Nath, Attending Physician for Obstetrics at RBMC, and Rutgers, The State University of New Jersey. Contrary to the express direction of the Supreme Court of New Jersey, at the time of the events underlying plaintiffs' Complaint, defendants, Dr. Nath, RBMC and HMH failed to disclose any relationship between Dr. Nath, RBMC, HMH, and Rutgers. There is nothing in the record – and defendants have not offered any evidence in discovery – to indicate that there was an oral disclosure of affiliation, a written disclosure of affiliation or insignia on uniforms, documents or posted notices in the facility indicating that any staff serving RBMC patients were public employees.

That was the express direction and requirement of the Supreme Court of New Jersey in Lowe v. Zarghami, 158 N.J. 606 (1999), and Eagan v. Boyarsky, 158 N.J. 632 (1999). Twenty-five years later, defendants wholly failed to comply

with those controlling precedents and should be barred from invoking the New Jersey Tort Claims Act (TCA) as a defense because of their failure to abide the law. Not until November 2024, did defendants produce any documentation that supported their claim that Dr. Nath was acting as a public employee at the time of the failed delivery and death of plaintiffs' daughter. The purpose of the TCA is to ensure prompt disclosure to the State of potential liabilities, the opportunity to investigate the circumstances of a potential liability before a claim is filed, and the opportunity to address and to correct promptly conditions that are dangerous or hazardous. Requiring plaintiffs to file a Tort Claims Notice only after litigation has commenced does not fulfill any of those purposes. Nor does dismissing plaintiffs' meritorious claim because defendants failed to disclose that one or more staff of a private medical facility may be a public employee.

Although plaintiffs contend that defendants' failure to adhere to the directive of Eagan and Lowe should bar them from forcing a pointless notice of claim filing thirteen months after the lawsuit was commenced, plaintiffs, nonetheless, moved for Leave to File a Late Notice of Claim and served a Notice of Claim on Rutgers. Even though the belated notice serves none of the purposes of the TCA, plaintiffs have complied and should be entitled to proceed. As has been noted numerous times, the TCA is not intended to be a trap for the unwary. It is not intended to defeat meritorious claims based on technicalities or to deny the primary judicial

purpose of a full and fair resolution of disputes on the merits. Plaintiffs were not put on actual notice of the alleged public stature of defendant Dr. Nath at the time of her medical negligence until November 2024.

Further, to the extent that this Court feels constrained to require a Notice of Claim, the subject motions and orders still fall under the controlling precedent of Lowe and Eagan. Defendants' failure to heed those holdings and to disclose Dr. Nath's public affiliation clearly, timely and in writing constitute extraordinary circumstances to permit the filing of a late notice of claim.

Even if the Court acknowledges the affiliation of Dr. Nath with Rutgers, defendants are still not entitled to immunity under the TCA because on the record presented, there exists a genuine issue of material fact in dispute regarding whether Dr. Nath was acting within the scope of her alleged employment with Rutgers and whether Dr. Nath's complete disregard of the warning signs being conveyed about plaintiffs' pregnancy constitutes willful and outrageous conduct.

For the foregoing reasons and arguments set forth as follows, the motions to dismiss and for summary judgment should have been denied. This matter should be reinstated and remanded to be considered on the merits.

### **PROCEDURAL HISTORY**

In July 2023, plaintiff, Altagracia Rodriguez de Nunez, and plaintiff, Jose Nunez, the parents of Emma N., individually and as administrators and

administrators ad prosequendum of the Estate of Emma N., filed a lawsuit alleging professional negligence and wrongful death. Pa9. Defendants, Raritan Bay Medical Center and Hackensack Meridian Health, filed an Answer and Crossclaim in August 2023. Pa20. Defendant, Mary M. Nath, M.D., failed to respond and was defaulted on September 22, 2023. On October 25, 2023, the default was vacated and defendant, Dr. Nath, filed an Answer and Crossclaim. Pa28. On November 8, 2023, defendant, Dr. Nath, filed an Amended Answer and Crossclaim. Pa34.

The parties proceeded with discovery. On August 15, 2024, defendant, Dr. Nath, moved to dismiss the Complaint alleging failure to comply with the New Jersey Tort Claims Act. Pa41. On September 5, 20234, plaintiffs opposed the motion and also moved for leave to file an Amended Complaint and for leave to file a Late Notice of Claim. Pa52; Pa69. On September 11, 2024, defendants, Raritan Bay Medical Center and Hackensack Meridian Health, moved for summary judgment, which plaintiffs opposed. Pa101. On October 11, 2024, the court held oral argument on the pending motions. 1T. On October 15, 2024, the court entered an Order denying the motion to dismiss of defendant, Dr. Nath, and permitting limited discovery and supplemental briefing. Pa125. The remaining motions were adjourned. Ibid.

After limited discovery and supplemental briefing, the court held oral argument on January 10, 2025. 2T. On January 14, 2025, the court entered four

Orders: (1) an Order dated January 14, 2025, granting dismissal with prejudice to defendant, Mary M. Nath, M.D.; (2) an Order dated January 14, 2025, granting dismissal with prejudice to defendants, The Raritan Bay Medical Center and Hackensack Meridian Health; (3) an Order dated January 14, 2025, denying leave to file a late Notice of Claim; and (4) an Order dated January 14, 2025, denying leave to file an Amended Complaint. Pa1-8.

Plaintiffs appeal those four Orders.

### **STATEMENT OF FACTS**

In July 2022, plaintiff, Altagracia Rodriguez de Nunez, was pregnant. Ms. Nunez presented to the staff of the emergency department of defendant, The Raritan Bay Medical Center, for treatment and consultation relating to the pregnancy, which was in its third trimester. Ca16. She was treated by defendant, The Raritan Bay Medical Center, its servants, agents and employees, Hackensack Meridian Health, its servants, agents, and employees, and specifically resident Caroline Kwon and attending obstetrician/physician, defendant Mary M. Nath, M.D. Ca16-19. Ms. Nunez was admitted to the maternity department for observation, testing and appropriate care. At that time, Dr. Nath was serving as the attending obstetrician on the labor and delivery floor, i.e., the maternity department. Pa85. While under the care, supervision and treatment of defendants, plaintiff gave birth to a daughter, Emma N., via caesarean section. Pa17. Emma

N. was injured during the course of treatment, suffered and died on July 17, 2022.

Pa11-12. Ms. Nunez was discharged on July 17, 2022. Ca19.

Nothing in the medical records received by plaintiffs at the time of the admission indicated that the treatment provided related to a public entity.

Defendants, RBMC and HMH, are not public entities. According to plaintiffs, no medical providers, staff or translators informed them that the supervising and attending obstetrician, Dr. Nath, was a public employee. Pa77. No written notice was provided, and nothing on Dr. Nath's attire or uniform indicated a Rutgers insignia or affiliation. Ibid.

In April 2024, Dr. Nath served responses to the form interrogatories demanded in July 2023 as part of the Complaint. Pa16; Pa79. Included with the responses was a Curriculum Vitae (CV) for Dr. Nath. Pa90. The CV identifies three distinct employments for Dr. Nath at the relevant time. Dr. Nath maintained a private practice in Perth Amboy, New Jersey, a position of "Clinical Teaching Faculty" at Rutgers University "through RWJ Medical School," and a position as "Attending Physician" at Raritan Bay Medical Center. Pa90. Nothing indicates that the faculty position bears any relation to RBMC. Ibid. The CV identifies two hospital affiliations. One is with RBMC and the other is with Palisades Medical Center, a hospital owned and operated by defendant HMH. Ibid. Neither

affiliation indicates nor suggests that Dr. Nath's work as attending obstetrician at RBMC is related to public employment. Ibid.

After filing of the motions that are the subject of this appeal, and after the motion to dismiss of Dr. Nath was denied without prejudice to allow for limited discovery, Pa125-27, defendant Dr. Nath finally produced in discovery documents relating to a "qualified-title appointment" for Dr. Nath relating to "a per diem, Clinical Instructor, in the Department of Obstetrics, Gynecology and Reproductive Sciences at Robert Wood Johnson Medical School." Pa131. The letter was supplied with a Professional Services Agreement (PSA) and an Amendment to a Professional Services Agreement between RBMC and Rutgers, The State University of New Jersey. Pa134-54. Pursuant to the PSA, Rutgers agreed to provide certain staff for RBMC's Department of Obstetrics and Gynecology. Pa134. Pursuant to the PSA, the physicians who provide services under the PSA "shall obtain and maintain in good standing" "membership on the Hospital's Medical Staff" and "privileges at the Hospital." Pa136. "The selection and assignment of each Physician to render Physician Services shall be at all times subject to the approval of [RBMC]. Pa139. Moreover, RBMC was responsible under the PSA to "provide the Physicians with suitable support staff, office space, equipment, supplies and utilities as shall be necessary and appropriate." Ibid. According to the letter provided by Dr. Nath, her appointment as a Clinical

Instructor was for a limited period, part-time, per diem and did not qualify her for membership in the American Association of University Professors because the employment was less than half time. Pa131.

The PSA states that “All clinicians providing services under this Agreement shall wear a University identification badge, in addition to any other identification badge(s) required by Hospital and shall clearly identify to any and all patients to who clinician provides professional services that clinician is an employee of University.” Pa148. As indicated, plaintiffs certified that no such identification was shown or provided. Pa76-77. Pursuant to an internet search and a private investigation, there was no publicly available evidence that Dr. Nath was engaged as a public employee at the time of providing medical treatment and services to plaintiffs and Emma N. Pa94-95; Pa156-58.

## LEGAL ARGUMENT

### POINT I

#### **THE TRIAL COURT ERRED BY DISMISSING PLAINTIFFS’ CLAIMS BASED ON FAILURE TO COMPLY WITH THE TORT CLAIMS ACT. (PA3-6; 2T83:6)**

##### A. Standard of Review.

In reviewing a trial court's decision to dismiss a claim due to failure to comply with the notice provisions of Title 59, the appellate court applies the well-established principle that “[a]scertaining the timeliness of a [TCA] notice requires

a simple, three-step sequential analysis that never changes." McNellis-Wallace v. Hoffman, 464 N.J. Super. 409, 416 (App. Div. 2020) (citing Beauchamp v. Amedio, 164 N.J. 111, 118 (2000)). "The first step is to determine when the cause of action accrued in accordance with N.J.S.A. 59:8-1." Ibid. "The discovery rule is part and parcel of such an inquiry because it can toll the date of accrual." Ibid. (quoting Beauchamp, 164 N.J. at 118). "Once the date of accrual is ascertained, one can proceed to the second step, which is to determine whether a notice of claim was filed within ninety days' as required by N.J.S.A. 59:8-8." Ibid. "If not, the third task is to decide whether extraordinary circumstances exist justifying a late notice' under N.J.S.A. 59:8-9." Ibid. (quoting Beauchamp, 164 N.J. at 118-19).

An appellate court reviews "a trial court's application of the extraordinary circumstances exception [to the TCA] for abuse of discretion." O'Donnell v. N.J. Tpk. Auth., 236 N.J. 335, 344 (2019). Denials of leave to file a late claim are more carefully scrutinized than grants. Ibid. "[A]ny doubts as to whether extraordinary circumstances exist 'should be resolved in favor of the application.'" Ibid. (quoting Lowe v. Zarghami, 158 N.J. 606, 629 (1999)).

If a claimant seeks to present a late Notice pursuant to the TCA, "the grant or denial of remedial relief is left to the sound discretion of the trial court, and will be sustained on appeal in the absence of a showing of an abuse thereof." McDade

v. Siazon, 208 N.J. 463, 476-77 (2011). “Although the ordinary ‘abuse of discretion’ standard defies precise definition, it arises when a decision is ‘made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis,’” Moraes v. Wesler, 439 N.J. Super. 375, 378 (App. Div. 2015) (quoting Flagg v. Essex Co. Prosecutor, 171 N.J. 561, 571 (2002)), or when “the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.” Ibid. (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)).

Significantly, the goals of the notice provisions of the Tort Claims Act are to allow the public entity time for administrative review and the opportunity to settle meritorious claims prior to the bringing of suit, to provide the public entity with prompt notification of the claim in order to investigate the facts and to prepare a defense, to afford the public entity a chance to correct the conditions or practices that are the subject of the claim, and to inform the State in advance as to any liabilities that it may be expected to meet. O’Donnell, 236 N.J. at 345; Beauchamp, 164 N.J. at 121-22. “The notice provisions of the Tort Claims Act were not intended as ‘a trap for the unwary.’” Lowe, 158 N.J. at 629 (quoting Murray v. Brown, 259 N.J. Super. 360, 365 (Law Div. 1991)). “Generally, we examine ‘more carefully cases in which permission to file a late claim has been

denied than those in which it has been granted, to the end that wherever possible cases may be heard on their merits, and any doubts which may exist should be resolved in favor of the application.’ Feinberg v. State, D.E.P., 137 N.J. 126, 135 (1994) (quoting S.E.W. Friel Co. v. New Jersey Tpk. Auth., 73 N.J. 107, 122 (1977)); Randazzo v. Twp. of Washington, 286 N.J. Super. 215 (App. Div. 1995).” Lowe, 158 N.J. at 629.

B. The Accrual Date for a Notice of Claim Was November 12, 2024.

The Tort Claims Act requires filing of the notice within ninety days of accrual of the claim. N.J.S.A. 59:8-8. Defendant Dr. Nath argued below that the ninety days should have been triggered with the filing of her Amended Answer or at latest service of her Responses to Interrogatories, within which she stated that she "was an employee of a body corporate and politic and an instrumentality of the State of New Jersey, a public entity." Pa83. The trial court held that the accrual date was April 30, 2024, the date of service of the interrogatory responses. 2T86:21-25.

However, Dr. Nath did not identify which public entity she was allegedly employed by at said time. The only identification of a public entity was within defendant's attached CV. The CV set forth that she maintained a private practice in Perth Amboy, New Jersey, which office was adjacent to RBMC. Pa90. Separately, the CV indicated that she was a member of the Clinical Teaching

Faculty of Rutgers University “through RWJ Medical School.” Ibid. Also separately, the CV set forth that Dr. Nath was an Attending Physician at “Raritan Bay Medical Center, Perth Amboy Division.” Ibid.

Plaintiffs relied on the veracity of defendant's interrogatory responses, which indicated three distinct employments. Title 59 notification was not sent to Rutgers University because plaintiffs' lawsuit was based solely on defendant's actions while apparently acting in her self-professed capacity as the Attending Obstetrician at RBMC, identified in her own Answers to Form C(3) Interrogatories, Question #2. Pa85. There was nothing to indicate a relationship back to her teaching position with Rutgers “through RWJ Medical School.” Not until November 12, 2024, did defendant produce a letter indicating that Dr. Nath’s “4-month appointment” in 2022 as “a per diem, Clinical Instructor, in the Department of Obstetrics, Gynecology and Reproductive Sciences at Robert Wood Johnson Medical School” related to her role at RBMC as an Attending Physician. Pa131. By the time that connection was finally revealed, plaintiffs had already served a Notice of Claim on Rutgers and filed and served their Motion for Leave to File an Amended Complaint to add Rutgers as a defendant. Pa52. As an additional precaution, plaintiffs also had filed and served their Motion for Leave to File a Late Notice of Claim. Pa69.

Plaintiffs went so far as to employ the services of a private investigator, who could not find any documentation of Dr. Nath's position with Rutgers. Pa94. The investigation revealed employment in private practice and Dr. Nath's apparent affiliation with defendant, HMH, which owns and operates both RBMC and Palisades Medical Center. Ibid. Because no affiliation with Rutgers relating to the rendering of services at RBMC had been disclosed at any time or discovered by independent investigation, plaintiffs concluded defendant's interrogatory responses and CV were accurate and that she was acting under the authority of RBMC, not Rutgers, when performing the duties of the Attending Obstetrician on the date of plaintiffs' daughter's delivery and death. Pa76.

On November 12, 2024, in response to supplemental discovery served by plaintiffs pursuant to court order, defendants finally provided information indicating that a Professional Services Agreement existed between Rutgers and RBMC, whereby Rutgers was to supply Physician Services, On-Call Services, and Hospital Department Chair Services as described in the agreement. Pa134. That was the first time that there was any documentation that would indicate that Dr. Nath was, despite all outward appearances, acting in a capacity that could be correlated to her position with Rutgers. Up to that time, plaintiffs acted in good faith relying on the veracity of Dr. Nath's Responses to Interrogatories and the absence of any publicly available information indicating Dr. Nath's public

employment included RBMC. According to defendant, she was acting as the Attending Obstetrician at RBMC, not as a Clinical Teaching Faculty member at Rutgers.

Seven months after those interrogatory responses and three months after filing of defendant's motion to dismiss, defendants RBMC, HMH and Dr. Nath asserted that Dr. Nath was not an attending physician, as set forth in her Answers to Interrogatories and CV, and **never** has been an attending physician with HMH. Pa166-71; Pa180-82. Defendants substantively changed their certified responses to interrogatories to assert that Dr. Nath merely had privileges at the hospital. Subsequently, Dr. Nath again changed her story and claimed that her representation as "Attending Physician" at RBMC from 2007 to the present "is unrelated to employment status." Pa181.

Had Dr. Nath and Rutgers complied with Lowe and Eagan and Ventola v. N.J. Veterans Memorial Home, 164 N.J. 74 (2000), none of the motion practice below would have been necessary. Those unanimous Supreme Court precedents from 1999 and 2000 require that clinical professors employed by the State must advise their patients, "both orally and in writing," that they are public employees. Lowe, 158 N.J. at 631; Eagan, 158 N.J. at 34; Ventola, 164 N.J. at 83.

Inexplicably, twenty-five years later, the public status of medical providers remains a closely guarded secret. Unfortunately, the observations of the Ventolo

Court have not been taken to heart. “Finally, we observe that, after Lowe, this should be the last such occasion to apply its principles. Presumably, if State health-care providers wish to rely on the notice provisions of the TCA, they will have made their status clear to patients.” Ventola, 164 N.J. at 83.

The date when defendants finally disclosed that Dr. Nath’s rendering of services to plaintiffs at RBMC related to her role as a per diem, part-time Clinical Instructor with Rutgers should be held the accrual date for purposes of the TCA. That date, November 12, 2024, is the date whereby the need for such notification became known and, for that reason, plaintiffs were within the required 90 days to file a Tort Claim Notice on Rutgers University.

C. Plaintiffs Established Extraordinary Circumstances.

The Tort Claims Act requires filing of the notice within 90 days of accrual of the claim. N.J.S.A. 59:8-8. The time to file a claim may be extended to one year following the accrual if there are "extraordinary circumstances" for the failure to file a claim within 90 days. N.J.S.A. 59:8-9. Similar to Lowe and Eagan decades ago, defendants’ failure to disclose her public status in relation to services provided at RBMC constitutes extraordinary circumstances to permit a late notice.

The accrual language in the Tort Claims Act has been given the same expansive definition found in the statute of limitation cases. In Torres v. Jersey

City Medical Center, 140 N.J. Super. 323 (Law Div. 1976), plaintiff sought leave to file a late notice of tort claim against a public entity pursuant to N.J.S.A. 59:8-9. Plaintiff had received radiation therapy at the Jersey City Medical Center in August of 1973, and was advised in January of 1975 that her ovaries had been damaged as a result of over-exposure to X-rays. Plaintiff sought an attorney, but was not able to retain one until November of 1975, at which time the motion for leave to file a late notice of tort claim was filed. The court noted that the Tort Claims Act provides a trial judge with discretion to permit the filing of a late notice of tort claim within one year "after the accrual of the claim." Torres, 140 N.J. Super. at 326; see N.J.S.A. 59:8-9. The court concluded that the definition of the meaning of "accrual" within the Tort Claims Act was novel and looked to the meaning of accrual in the context of the statute of limitations, N.J.S.A. 2A:14-2, citing Lopez v. Swyer, 62 N.J. 267 (1973), and Fernandi v. Strully, 35 N.J. 434 (1961). The court concluded that the fact that the Legislature used the same term in the tort claims statute that it utilized in the statute of limitations meant "the Legislature intended that it should have the same meaning and be applied in the same fashion as in the Statute of Limitations." Torres, 140 N.J. Super. at 326. The court then applied the holding of Lopez and Fernandi and concluded that the plaintiff's cause of action accrued when she was told that her ovaries had been damaged by radiation.

After reaching that decision, the court engaged in a two-step analysis. First was whether there was sufficient reason for the plaintiff's having failed to file within ninety days of the date of accrual. The second step was to determine whether granting leave to file a late notice of claim would "substantially prejudice the public entity." Id. at 327. The court excused plaintiff's delay, noting that it was due to her inability to obtain an attorney.

Within the limits of her own nonlegal abilities she exercised reasonable care and diligence. Delay in obtaining legal advice due solely to the understandable reluctance of attorneys to handle a complex and difficult case of questionable value is excusable and understandable. Inability to obtain representation can be as incapacitating as a physical disability. . . . It should not bar plaintiff's claim.

[Id. at 327.]

The court also determined that the public entity would not be prejudiced because it had "within its possession a complete record of the treatment." Id. at 328. Therefore, the court granted plaintiff's leave to file a late notice of tort claim. However, Torres was decided prior to the 1994 amendments to the Tort Claims Act, which require "extraordinary circumstances" to permit the extension of time to file a notice of tort claim.

Under the presently controlling ruling of Eagan v. Bovarsky, 158 N.J. 632 (1999), the Supreme Court has held that "The court does not think that the legislature contemplated that the one-year ban would be used to bar a plaintiff-

patient from pursuing his medical malpractice claim against a physician whom he had no reason to believe was a public employee. In such unique circumstances, the court finds that the legislature intended the one-year ban provided under N.J. Stat. Ann. 59:8-9 to be tolled. Accordingly, plaintiff should be entitled to file a notice of late claim.” Id. at 642-43.

Twenty-five years later, that same reasoning applies with equal merit and force to the matter at bar. As in Eagan, there is no evidence to suggest that plaintiffs had knowledge of any affiliation between Dr. Nath and Rutgers, nor was such information communicated to them at any time. Plaintiffs had no reason to suspect that the self-described Attending Obstetrician at Raritan Bay Medical Center was not affiliated with RBMC but rather associated with Robert Wood Johnson Medical Center, i.e., Rutgers. As in Eagan, plaintiffs followed the procedures necessary to pursue a claim of medical negligence against a physician in ordinary circumstances and diligently pursued their claim. As with the plaintiffs in Eagan, and those in Feinberg v. State, D.E.P., 137 N.J. 126 (1994); Zwirn v. County of Hudson, 137 N.J. Super. 99 (Law Div. 1975); and Dambro v. Union Cty. Park Comm., 130 N.J. Super. 450 (Law Div. 1974), cited favorably by the Court in Eagan, 158 N.J. at 642, plaintiffs in the present matter were thwarted in their action because the employment status of their doctor was obscured. As such, plaintiffs had no reason to believe that Title 59's statutory

immunity would come into play and could not be expected to have reasonably known that they must give notice to Rutgers within 90 days after their daughter's death. As stated above, the Court held that **"We do not think the Legislature contemplated that the one-year ban would be used to bar a plaintiff-patient from pursuing his medical malpractice claim against a physician whom he had no reason to believe was a public employee.** In such unique circumstances, we find that the legislature intended the one-year ban provided under N.J.S.A. 59:8-9 to be tolled. Accordingly, plaintiff should be entitled to file a late notice of claim." Eagen, 158 N.J. 642-43.

Lowe v. Zarghami, 158 N.J. 606 (1999), similarly held that the defendant was a public employee despite that the plaintiff's treatments were received at a private hospital, ruling that UMDNJ faculty members practicing in affiliated hospitals are public employees to whom the notice provisions of the Tort Claims Act apply. However, notice was not to be a one-way street.

To resolve patients' doubts surrounding the employment status of their physicians, **UMDNJ must require clinical professors employed by them to advise their patients, both orally and in writing, that they are employees of UMDNJ.** Such notice should be given to a patient as soon as practicable. It also would be helpful if clinical professors wore badges identifying themselves as UMDNJ employees. Those steps, if taken, together with this holding that clinical professors are UMDNJ employees, should make patients more aware that their physicians are public employees entitled to notice under the TCA.

[Id. at 631 (emphasis supplied).]

Failure to provide notice, as here, constituted sufficient extraordinary circumstances to entitle the Lowe plaintiff to file a late notice of claim. That reasoning is equally compelling here.

**POINT II**

**THE TRIAL COURT ERRED BY NOT FINDING DEFENDANT WAS BARRED FROM INVOKING THE REQUIREMENTS OF THE N.J. TORT CLAIMS ACT BY WAIVER, ESTOPPEL AND/OR LACHES. (PA5-6; 2T83:6)**

Given the pronouncement in Lowe and Eagan that disclosure and identifying information such as badges should be worn, the lack of any evidence of such disclosure, particularly in Dr. Nath's certification in response to plaintiffs' certification, which alleged that there had been no disclosure orally or in writing that Ms. Nunez's treaters were public employees or affiliated with public entities, should raise a reasonable inference that no such disclosure took place. That would also lead to the reasonable conclusion that despite the interrogatory response, no notice of claim was required because there was no evidence to support the need, i.e., that Dr. Nath was in fact a public employee entitled to a tort claims notice.

Plaintiffs should not be made to chase their tails in search of information that the Supreme Court ruled decades ago should be provided as a matter of course. Waiver, equitable estoppel and/or laches apply. Intentionally or not, defendant Dr. Nath failed to disclose her claimed role as a public employee at the time of Ms.

Nunez's treatment and should not be permitted to evade a meritorious claim on a technicality. There was no prejudice and no surprise, only a default, which deferred any actual notice of a TCN requirement until coincidentally just over 90 days past the date of service of the complaint, and an untimely motion to dismiss, filed coincidentally less than a month after the statute of limitations had run.

Following the filing of Plaintiffs' Complaint on July 18, 2023, defendant Dr. Nath actively participated in the ongoing litigation. Pa9. After an initial default, Dr. Nath filed an Answer on October 23, 2023, Pa28, with a subsequent Amended Answer on November 8, 2023. Pa34. The Amended Answer made vague reference to Rutgers University, insufficient to notify plaintiffs of a relevant affiliation but tellingly indicative that defendant intended to invoke the TCA to defeat plaintiffs' claim without complying with Lowe or Eagan or basic fairness. Rather than doing so, Dr. Nath continued to participate in the litigation, including demanding and exchanging written discovery, filing of a Motion to Extend Discovery, and taking the deposition of plaintiff Altagracia Rodriguez de Nunez in January 2024.

In New Jersey, "Defendants must act timely too; they cannot sleep on their rights." Burns v. Belafsky, 166 N.J. 466, 470-71 (2001). In the companion case to Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003), the Court held that a defendant who filed a motion to dismiss after receipt of an untimely affidavit of

merit forfeited his right to relief. Knorr v. Smeal, 178 N.J. 169 (2003). The Court concluded that the equities required defendant to file his motion before he possessed the disputed affidavit. In Knorr, the defendant engaged in the exchange of interrogatories, deposed plaintiffs and submitted to a deposition, obtained plaintiff's expert report, and had plaintiff physically examined. In the present matter, Dr. Nath actively participated in the litigation for thirteen (13) months before filing for Dismissal, including engaging in the exchange of interrogatories and deposing Plaintiff.

As in Knorr, the granting of defendant's motion, late in the litigation process, after Defendant is in full possession of fact and expert discovery and has verified the merit of plaintiffs' claim, would work an injustice and pervert the true purpose of the New Jersey Tort Claims Act.

Comparable to Knorr, plaintiffs contend that Dr. Nath waived her right to enforcement of the statute by her inordinate delay in disclosing her affiliation with Rutgers and in filing the dismissal motion. Waiver is the voluntary and intentional relinquishment of a known right. W. Jersey Title Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958). An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. Id. at 153. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference.

Merchants Indem. Corp. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff'd, 37 N.J. 114 (1962). The party waiving a known right must do so clearly, unequivocally, and decisively. Country Chevrolet, Inc. v. Twp. of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983).

Similar to Knorr, defense counsel certainly was aware of his client's right to file a motion to dismiss the complaint because of plaintiffs' alleged failure to comply with the TCA no later than November 2023. Presumably, counsel also was aware that no disclosure had been made at the time of treatment as directed by Lowe and Eagan. Rather than remedy the non-disclosure or promptly move to dismiss, which would have provided the trigger that a notice was implicated, defendant proceeded as if this case was a typical medical negligence case involving a private practice doctor and a non-public medical facility. Inexplicably, defendant, Dr. Nath, did not move to dismiss the complaint until more than a year after receipt of the Complaint, including the Affidavit of Merit in which plaintiffs' expert detailed Dr. Nath's negligence. Pa9; Pa18.

“Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law.” Casamasino v. City of Jersey City, 158 N.J. 333, 354 (1999). The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment. Mattia v. Northern Ins. Co. of N.Y., 35 N.J. Super. 503, 510 (App. Div. 1955).

The doctrine is invoked in "the interests of justice, morality and common fairness." Palatine I v. Planning Bd. of Twp. of Montville, 133 N.J. 546, 560 (1993) (quoting Gruber v. Mayor of Raritan Twp., 39 N.J. 1, 13 (1962)). Estoppel, unlike waiver, requires the reliance of one party on another. Country Chevrolet, 190 N.J. Super. at 380. In short, to establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment. Miller v. Miller, 97 N.J. 154, 163 (1984).

Our courts have invoked the principles of equitable estoppel in cases comparable to the one at bar. In Hernandez v. Stella, 359 N.J. Super. 415, 416-19 (App. Div. 2003), an automobile negligence case, the plaintiff was required to file a physician's certification within "60 days following the date of the answer" to verify that his injuries met the verbal threshold of the New Jersey Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-8. The plaintiff did not file a timely certification. Nevertheless, the defendants proceeded with discovery, exchanging answers to interrogatories and arbitrating the case pursuant to Rule 4:21A. Fourteen months after filing their answer, seven months after the statute of limitations had run on the plaintiff's claim, and three months following the arbitration, the defendants moved for summary judgment on the ground of the plaintiffs failure to provide the physician's certification. Id. at 417.

The Appellate Division held that one of the "primary purposes" of AICRA was "to weed out frivolous claims at an early stage" and that the failure to raise that defense before arbitration was contrary to Rule 4:21A and the goals of AICRA. Id. at 419. The court concluded that the defendants were equitably estopped because of the untimely filing of their motion. Ibid.; see also Konopka v. Foster, 356 N.J. Super. 223 (App. Div. 2002) (holding that plaintiff can raise equitable estoppel to bar dismissal for failure to provide physician's certification where defendant continued with discovery to completion and did not challenge timeliness of service until after statute of limitations had run); cf. Zaccardi v. Becker, 88 N.J. 245 (1982) (refusing to apply statute of limitations to bar subsequent malpractice suit where defendant participated in discovery for seventeen months after plaintiffs initial suit had been dismissed for failure to answer interrogatories).

In Knorr, the defendant did not act on plaintiffs' failure to file an affidavit until more than fourteen months after the filing deadline, despite knowing that his co-defendant, Dr. Lockwood, had filed a timely motion and was granted relief. 178 N.J. 169. The plaintiffs' attorney was under the mistaken impression that his expert's affidavit of merit had been forwarded to the defendant on or about January 6, 2000, shortly after the statutory deadline had passed, but more than a year before the defendant filed his motion to dismiss. The Court reasoned that "defendant's

failure to file a dismissal motion surely induced plaintiffs to believe that the case was on course.” Id. at 180.

Certainly, plaintiffs would not have engaged in extensive discovery if they knew their cause of action was doomed due to their earlier failure to serve a timely affidavit. Plaintiffs, blissfully ignorant that their cause of action was mortally wounded, deposed defendant, submitted to depositions, served their expert's report on defendant, and filed a motion for a protective order. Ms. Knorr also submitted to a physical examination by the defendant's expert.

As a result of defendant's forbearance in filing the dismissal motion, plaintiffs incurred significant expert and deposition costs, as well as emotional stress under the mistaken belief that their cause of action was still viable. It makes no difference that defendant did not intend to mislead or cause plaintiffs to continue with discovery. See Mattia, 35 N.J. Super. at 511. Moreover, if defendant's motion were to be granted, then the attorneys labored needlessly and the judicial system expended its resources on a case that should not have been on the calendar had defendant acted timely. As noted, equitable estoppel is founded on fundamental principles of justice and fair dealing. The grant of defendant's motion to dismiss would work an injustice by ridding the system not of an unmeritorious claim, but a meritorious one. Accordingly, because of defendant's belated filing of the motion, and plaintiffs' reliance on her failure to do so timely, defendant is equitably estopped from gaining a dismissal.

[Ibid.]

The Knorr Court also considered whether defendant's course of conduct was barred by the doctrine of laches. That doctrine is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. Id. at 181 (citing In re Kietur, 332 N.J. Super. 18, 28 (App. Div. 2000)); see County of

Morris v. Fauver, 153 N.J. 80, 105 (1998)). Laches may be enforced only when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned. Knorr, 178 N.J. at 181; Dorchester Manor v. Bor. of New Milford, 287 N.J. Super. 163, 172 (Law Div. 1994), aff'd, 287 N.J. Super. 114 (App. Div. 1996). The time constraints for the application of laches "are not fixed but are characteristically flexible." Knorr, 178 N.J. at 181 (quoting Lavin v. Bd. of Ed., 90 N.J. 145, 151 (1982)). The key factors to be considered in deciding whether to apply the doctrine are the length of the delay, the reasons for the delay, and the "changing conditions of either or both parties during the delay." Lavin, 90 N.J. at 152. The core equitable concern in applying laches is whether a party has been harmed by the delay. Id. at 152-53. The Knorr Court found that the defendant slept on his rights and that the plaintiffs were harmed by the delay such that laches applied to bar the dismissal. Knorr, 178 N.J. at 181.

Notably, the Court found that the invocation of those equitable remedies was consistent with the legislative intent. There, the stated intent of the statute was to screen out meritless malpractice lawsuits at an early stage in the litigation. Here, the purpose of the statute also is to provide prompt notice and to avoid unnecessary litigation or surprise.

The affidavit of merit may have proved useful to defendant early in the case when he needed to know whether there was any validity to

the complaint. With defendant's possession of full discovery and an expert's report establishing the merits of plaintiffs' action, an affidavit of merit would have added nothing to defendant's knowledge of the case. Therefore, defendant has no claim of prejudice. For that reason, **the Legislature could not have intended to allow an otherwise meritorious claim to proceed indefinitely at great expense to both parties only to have defendant obtain a dismissal on procedural grounds that should have been asserted much earlier in the process.** We hold that the doctrines of equitable estoppel and laches bar defendant's late motion to dismiss for failure of plaintiffs to file a timely affidavit of merit.

[Id. at 182 (emphasis supplied).]

Here, defendant, Dr. Nath, failed to comply with the instructions of Lowe and Eagan and disclose her public affiliation orally, in writing and on her uniform. Pa76. Defendant failed to come clean on that non-disclosure on receipt of the Complaint or with sufficient clarity in her Amended Answer or Responses to Interrogatories. Instead, defendant waited until the merit of plaintiffs' claim had been clearly established through written discovery, plaintiff's deposition and expert reports – at significant time, expense and emotional toll to plaintiffs – to move to dismiss based on a notice violation that no longer served any purpose. Coincidentally, that motion was filed less than a month after the statute of limitations expired and more than a year after the lawsuit was commenced. The circumstances are strikingly similar to Knorr and require the same outcome. As the Knorr Court concluded, “[t]he grant of defendant's motion to dismiss would

work an injustice by ridding the system not of an unmeritorious claim, but a meritorious one.” Id. at 180.

Finally, Ventola v. N.J. Veteran's Mem. Home, 164 N.J. 74 (2000), decided shortly after Lowe and Eagen, set forth a highly relevant observation regarding invocation of TCA immunity. “Presumably, if State health care providers wish to rely on the notice provisions of the TCA, they will have made their status clear to patients.” Id. at 83. The Court also re-affirmed the force of its prior decisions. “The Court directed that in future cases and to resolve patients' doubt surrounding the status of their physician health-care providers, the State teaching hospital must require clinical professors employed by it to advise their patients, both orally and in writing, that they are employees of a public entity.” Id. at 75. Dr. Nath and Rutgers failed to do so, despite the dictates of Lowe, Eagen and Ventola. Having failed to do so, they should be estopped from invoking the notice requirement as a sword to defeat a meritorious and just claim.

The motion to dismiss should have been denied, and the motion for leave file an amended complaint should have been granted.

### **POINT III**

**THE TRIAL COURT ERRED BY FINDING THAT DEFENDANT, DR. MARY M. NATH, WAS ACTING AS A PUBLIC EMPLOYEE AT THE TIME OF THE TREATMENT. (PA5-6; 2T83:6)**

Although the New Jersey Tort Claims Act (Title 59) generally provides immunity from civil liability to public entities and employees, that immunity is not absolute. Very clear exceptions are set forth in the TCA. N.J.S.A. 59:3-14(a) clearly and explicitly defines an exception to said public employee immunity, stating, "Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct."

In moving to dismiss, defendant claimed to have been acting as an employee of Rutgers, The State University of New Jersey, at the time of the events underlying plaintiffs' Complaint. To support that assertion, defendant belatedly presented a Professional Services Agreement which existed between Rutgers and RBMC, Pa134, and a Certification of Peggy Defina, identified as the Assistant Director of the Department of Healthcare Risk & Claims Management at Rutgers, which stated that Dr. Nath was an employee. Pa47. Prior to the supplying of the PSA on November 12, 2024, to evaluate Dr. Nath's eligibility for immunity under Title 59, plaintiffs relied on defendant's Curriculum Vitae, supplied with her certified answers to Form C interrogatories. Pa90. In defendant's CV, she identifies herself as part of the "Clinical Teaching Faculty, RUTGERS UNIVERSITY through RWJ Medical School." Ibid. That suggests that she was a teacher at the medical school. It does not indicate that the separate entry for

“Attending Physician, Raritan Bay Medical Center, Perth Amboy Division,” ibid., involves public employment.

At the time of the events underlying plaintiffs' Complaint, defendant was, according to her own Answers to Interrogatories, working as an Attending Physician at RBMC and was the on-call doctor for the OB/GYN Department of RBMC. There is a clear and distinct delineation between the scope of employment of a member of the "Clinical Teaching Faculty" at Rutgers and the duties that Dr. Nath was performing, or, more accurately, failing to perform, in her self-identified capacity as the Attending Obstetrician at RBMC. Rutgers may have placed Dr. Nath at RBMC under the PSA, but she was, based on all outward appearances, acting as the Attending Obstetrician of RBMC, as she identified herself in Responses to Interrogatories. Pa85. There was disclosure, oral, written or otherwise, to the contrary.

In the 2022 letter renewing defendant's per diem position with Rutgers for four months, her duties are identified as "to provide resident and student supervision at Raritan Bay Medical Center for all Ob/Gyn clinical services." Pa131. On the date of treatment, all appearances were that defendant was acting as the Attending Obstetrician, as she herself identified, wearing a RBMC/HMH lab coat, working within the Labor and Delivery floor of RBMC, maintaining her only office within an RBMC facility and requiring that a patient go through HMH's

website to schedule an appointment with her, all indications that she was affiliated with RBMC in the professional capacity that she held out to plaintiffs at the time and in her Responses to Interrogatories. Pa85; Pa156-57.

Prior to November 12, 2024, Defendant had presented absolutely no evidence to support her claim that she was somehow acting within the scope of her 4-month per diem employment as part of the "Clinical Teaching Faculty" at Rutgers while she was the on-call Attending Physician at Raritan Bay Medical Center on the night of the subject events. Title 59 requires that the employee who is seeking immunity must have been operating within the scope of their employment. Lowe, Eagan and Ventolo require that a State-employed healthcare provider must make their status clear to their patients. Dr. Nath was **not** merely providing supervision and was, in fact, acting as the Attending Obstetrician of RBMC. To the extent that her discovery responses are inconsistent, there is a genuine issue of material fact that remains to be decided, precluding resolution on motion supported by affidavits and certifications. All reasonable inferences must be resolved against the movant. Where, as here, movant has provided inconsistent discovery, defendant's credibility becomes an issue of fact and must be assessed by a jury. Defendants' motions to dismiss and for summary judgment should have been denied.

To determine whether Dr. Nath was a private or public physician for purposes of the TCA, the court is required to consider two tests, the "control" test and the "relative nature of the work" test. See Lowe, 158 N.J. at 615-24; Eagen, 158 N.J. at 638-40. In Lowe, the Court held that the appellant was a public employee entitled to protection under the TCA, even though he worked in a private hospital, because he was paid by a public entity and the private hospital did not control his actions, and, therefore, appellant was entitled to notice for malpractice claims, stating "Because Dr. Zarghami was totally economically dependent on UMDNJ and his work constituted an integral part of UMDNJ's business, both aspects of the relative nature of the work test are satisfied. Therefore, we conclude that UMDNJ faculty, like Dr. Zarghami, practicing in affiliated private hospitals are public employees." Id. at 623.

In contrast to Lowe, Dr. Nath was not totally economically dependent on Rutgers. Her work as a part-time member of the Clinical Teaching Faculty did not constitute an integral part of Rutgers' business. She was not a full-time employee; in fact, she was not eligible for the union for university professors because her employment was considered less than fifty percent full-time.

Pa131. Dr. Nath's CV indicates that she was employed by Raritan Bay Medical Center as an attending physician. Pa90. Her answers to interrogatories list her address as 516 Lawrie Street, Perth Amboy, New Jersey, the same address listed

on her CV under “Private Practice.” Pa80; Pa90. Dr. Nath is listed on the HMH find a medical provider website as “Accepting New Patients” and affiliated with “Old Bridge Medical Center – Raritan Bay Medical Center.” Pa157. That immediately differentiates this case from the subject matter from Lowe. Dr. Nath’s primary employment was not with the State. Moreover, under the PSA, RBMC had extensive control over her position, resources and actions. As such, Dr. Nath would not be deemed a public employee or entitled to notice.

The control test assesses four factors in determining a worker's status: (1) the degree of control exercised by the employer over the means of completing the work; (2) the source of the worker's compensation; (3) the source of the worker's equipment and resources; and (4) the employer's termination rights. The greater the degree of control exercised by the employer, the more likely a worker will be considered an employee. The control test is satisfied whenever the employer retains the right of control, even if the employer may not exercise actual control over the worker.

As a professional employee, Rutgers did not have any degree of control over the means of defendant completing her work at RBMC. The equipment and resources utilized as an attending physician were the property of Raritan Bay Medical Center, not Rutgers. Finally, while Rutgers may have held the right to terminate defendant's position on the teaching faculty for Rutgers

University through RWJ Medical School, Raritan Bay held the right to terminate her position as the attending physician. Pa136-37. “The selection and assignment of each Physician to render Physician Services shall be at all times subject to the approval of [RBMC].” Pa139. Under the control test, looking at the totality of the circumstances, defendant does not qualify as a public employee while working as the Attending Obstetrician at RBMC.

The relative nature of the work test requires a court to examine the extent of the economic dependence of the worker on the business she serves and the relationship of the nature of her work to the operation of that business. See Lowe, 158 N.J. at 616-18. That test addresses various situations in which the control test does not emerge as the dispositive factor. For example, where it is not in the nature of the work for the manner of its performance to be within the hiring party's direct control, the factor of control can obviously not be the critical one in the resolution of the case, but takes its place as only one of the various potential indicia of the relationship which must be balanced and weighed in determining what, under the totality of the circumstances, the character of that relationship really is. As to the relationship of the nature of Dr. Nath's work to the operation of that business, the work performed while acting as the attending physician at RBMC has no direct correlation to the operation of Rutgers.

It would seem apparent that under either the “control test” or the “relative nature of the work test,” defendant in the present matter is easily distinguished from the defendant in Lowe and does not even qualify as a public employee for the purposes of Title 59 immunity consideration. The mere existence of any degree of employment with Rutgers does not automatically provide the defendant with blanket immunity for her actions in any aspect of her life or alternate employment where her actions are not within the scope of her employment with Rutgers.

#### **POINT IV**

#### **DEFENDANT IS NOT ENTITLED TO IMMUNITY UNDER THE NEW JERSEY TORT CLAIMS ACT DUE TO THE PUBLIC EMPLOYEE IMMUNITY EXCEPTION (N.J.S.A. 59:3-14) - WILLFUL MISCONDUCT OR OUTRAGEOUS CONDUCT. (PA5-6)**

N.J.S.A. 59:3-14(b) specifies that “Nothing in this act shall exonerate a public employee from the full measure of recovery applicable to a person in the private sector if it is established that his conduct was outside the scope of his employment.” It also delineates an exception when it states that the immunity will not exist if the employee's actions amount to “willful misconduct.” Ibid. That has been interpreted by the Court to include that “in unambiguous and specific terms, N.J.S.A. 59:3-14 creates an exception to the verbal threshold if the public employee's conduct was willful. A public employee guilty of

outrageous conduct cannot avail himself or herself of the limitations as to liability and damages contained in the Act.” Toto v. Ensuar, 196 N.J. 134, 137 (2008).

On the date of Emma N.’s delivery and death, Dr. Nath was contacted repeatedly by the nursing staff at RBMC and advised of the clear and imminent risk to the life of Emma N., as indicated by their ongoing fetal monitoring. Ca4-7; Ca13. Said nurses repeatedly advised defendant Dr. Nath that an immediate, emergency cesarean section appeared to be required but were told to do nothing and to continue monitoring. That persisted for many hours and multiple phone calls, only finally delivering Emma N. when it was already too late. Ca13 (“the failure to deliver Emma [N.] early was a substantial factor and direct cause of her catastrophic condition at birth and ultimately, her passing away”); Ca13 (“earlier delivery followed by appropriate treatment would have prevented the death of Emma [N.]”).

Such wanton disregard for the value of the infant girl's life and the complete lack of any attention or respect to the opinions being expressed by the nursing staff can be described only as willful and outrageous. As such, defendant's actions during those crucial hours, demonstrating blatant disregard to the pleas of plaintiffs and the RBMC nursing staff, not only were willful and outrageous, but were clearly actions which, by the language of N.J.S.A. 59:3-

14(a) and (b), disqualify Dr. Nath from any potential immunity. To the extent that whether Dr. Nath's conduct falls within the exception is debatable, a genuine issue of fact remains to be determined and dismissal was not warranted.

Further, the loss of a fetus satisfies the tort threshold found in the New Jersey Tort Claims Act. In Willis v. Ashby, 353 N.J. Super. 104 (App. Div. 2002), certif. denied, 174 N.J. 547 (2002), the parents appealed from an order dismissing their complaint against the University of Medicine and Dentistry and physicians employed by the State of New Jersey arising out of a stillbirth. The trial court ruled that the claim did not satisfy the TCA threshold for damages for pain and suffering, i.e., "permanent loss of bodily function, permanent disfigurement or dismemberment." N.J.S.A. 59:9-2(d). The Appellate Division reversed, holding that the claim of the loss of a fetus caused by negligent medical care could satisfy the TCA's threshold for pain and suffering damages. The court explained that emotional distress or psychological harm may qualify as a "permanent loss of a bodily function" if the psychological injury is "both permanent and substantial." Willis, 353 N.J. Super. at 110. The Willis court recalled that the Supreme Court has permitted the parents of a stillborn to bring an action for damages, citing Giardina v. Bennett, 111 N.J. 412, 420 (1988), and Carey v. Lovett, 132 N.J. 44, 45 (1993).

The Willis court therefore reversed and directed that on remand the plaintiffs must prove "that they suffered a substantial and permanent loss of a bodily function" and that "permanent psychological harm in the form of post traumatic stress disorder which is substantial may constitute a permanent loss of a bodily function within the meaning of N.J.S.A. 59:9-2(d)." Willis, 353 N.J. Super. at 114, (quoting Collins v. Union County Jail, 150 N.J. 407, 421 (1997) (internal quotes omitted)). As such, defendant's Motion to Dismiss should have been denied.

**POINT V**

**THE TRIAL COURT ERRED BY NOT GRANTING  
LEAVE TO AMEND THE COMPLAINT. (PA1-2)**

A. Standard of Review.

Pursuant to Rule 4:9-1, leave to amend a pleading "shall be freely given in the interest of justice." Under the Rule, motions for leave to amend a complaint must be granted liberally, but the decision is left to the trial court's sound discretion. C.V. v. Waterford Twp. Bd. of Ed., 255 N.J. 289, 306 (2023); Kernan v. One Wash. Park Urb. Renewal Assocs., 154 N.J. 437, 456-57 (1998). A motion for leave to amend should be granted absent undue prejudice to the defendant, or futility. Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006).

B. Futility.

Although there was no specific finding by the trial court on the motion for leave to amend the complaint, the ruling appeared to be based on futility due to the finding that a Notice of Claim was required and was not timely provided. 2T107:5-12. If the Order dismissing the claims against Dr. Nath is vacated or reversed, then the motion for leave to amend should be granted in accordance with Rule 4:9-1.

C. There Is No Prejudice.

There is no prejudice to defendants in permitting the Notice of Claim and Amended Complaint in this matter. Dr. Nath has been represented by able counsel from the outset. Given the procedural history and progress in this matter, there can be no doubt that that counsel was acting to protect the interests of Rutgers throughout. A delay in notice by itself does not constitute prejudice but instead the “public entity must present a factual basis for the claim of substantial prejudice.” Leidy v. County of Ocean, 398 N.J. Super. 449, 463 (App. Div. 2008). Substantial prejudice usually refers to the prejudice in maintaining one’s defense, which generally implies loss of witnesses, loss of evidence, and fading memories. Blank v. City of Elizabeth, 318 N.J. Super. 106, 115 (App. Div. 1999).

In Eagan, in addition to the matter of the tolling of the statutory requirement for Title 59 notice, the Court also added that a late notice of claim

would not cause prejudice "because the doctors are required to keep medical records in the ordinary course." 158 N.J. at 643. The Court did not specify the length of time that the one-year provision of N.J.S.A. 59:8-9 is tolled, but the only fair reading of the opinion is that the notice provision is tolled until the plaintiff knew, or at least should have known, of the public employee status of the doctor. The Court reiterated that "to avoid this problem in the future," UMDNJ must require its employees to give written and oral notice that they are employees of UMDNJ, and the Court suggested that identification badges be worn by the UMDNJ doctors. Ibid. The clear import of that direction was that failure to disclose would render enforcement of the notice requirement unjust and inequitable. That has been the case in New Jersey since 1999.

In the present matter, plaintiffs were not informed of Dr. Nath's affiliation and employment status with Rutgers as directed by Lowe and Eagan. They were not informed, in any manner, that she was affiliated with Rutgers until April 2024, Pa90, and were not informed that her employment with Rutgers may relate to her role as Attending Physician at RBMC until November 2024. Pa131. To the extent that defendant's failure to disclose does not negate invocation of the notice requirement, the one-year provision of N.J.S.A. 59:8-9 should have been tolled, plaintiffs belated notice should have been permitted.

Based on the foregoing, in light of the fact that defendant cannot show any prejudice, plaintiff's motions for leave should have been granted.

**POINT VI**

**THE TRIAL COURT ERRED BY NOT FINDING  
VICARIOUS LIABILITY OF RBMC AND HMH.  
(PA7-8)**

A. Standard of Review.

In reviewing an order granting summary judgment, an appellate court uses the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); see Templo Fuente De Vida Corp. V. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) ("we review the trial court's grant of summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court"). The trial court must not decide issues of fact; it must decide only whether any such issues exist. Brill v. Guardian Life. Ins. Co., 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); R. 4:46-5.

Summary judgment should not be granted where the decision of such a motion would constitute what is in effect a trial by pleadings and affidavits involving issues of fact. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211-12 (App. Div. 1987). Summary judgment is not a substitute for a full plenary

trial. United Advertising Corp. v. Metuchen, 35 N.J. 193, 195-96 (1961).

Accordingly, summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. Sisselman, 215 N.J. Super. at 212.

“[A] determination whether there exists a ‘genuine issue’ of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The ‘judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.’ Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986).” Brill, 142 N.J. at 538. Moreover, courts are “not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.” Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

Whether defendants breached their duty to plaintiffs and whether their negligence was the proximate cause of plaintiffs’ damages are factual questions for a jury to decide. “[W]hether the duty was breached is a question of fact.” Jerkins v. Anderson, 191 N.J. 285, 305 (2007). “[I]ssues of proximate cause are considered to be jury questions.” Perez v. Wyeth Labs. Inc., 161 N.J. 1, 27 (1999). Furthermore, the determination of whether a duty is owed, although generally an

issue of law for the court, is “fact specific” and “must satisfy ‘an abiding sense of basic fairness under all of the circumstances.’” Alloway v. Bradlees, Inc., 157 N.J. 221, 230 (1999) (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). When facts remain in dispute, the determination of whether a duty exists may not be amenable to resolution on motion.

B. Discussion.

The motion of RBMC and HMH is wholly encompassed by the resolution of the issues of Dr. Nath’s employment status and viability of the claim against her. If that claim is reinstated, the order for summary judgment also must be vacated, as defendants RBMC and HMH would be vicariously liable for Dr. Nath’s professional negligence while in the performance of her role as Attending Obstetrician at RBMC. Also, as discussed above at 29-36, there is a genuine issue of material fact as to whether Dr. Nath was a private employee and/or subject to the control of RBMC and HMH at the time of the medical negligence. To the extent that there remains a dispute regarding Dr. Nath’s public versus private role at the time of treatment, summary judgment also must be denied. R. 4:46-5.

**CONCLUSION**

Based on the foregoing, defendant Dr. Nath is not entitled to dismissal based on a failure to serve a timely notice of claim. Plaintiffs’ motions for leave to file a late notice of claim and amended complaint should have been

granted in the interest of justice. Because there remains a material factual dispute regarding Dr. Nath's affiliation with defendants RBMC and HMH and her role at the time of the negligent treatment, the motion for summary judgment of those defendants also should have been denied. Plaintiffs respectfully request that the four orders be vacated, and the matter remanded with instructions to allow plaintiffs to amend their complaint to add Rutgers as a defendant and to proceed with discovery.

Respectfully submitted,

**FOLEY & FOLEY**

/s/ Timothy J. Foley

Timothy J. Foley, Esq.

Co-counsel for Plaintiffs-Appellants

Dated: June 3, 2025

**JOSE NUNEZ AND ALTAGRACIA RODRIGUEZ DE NUNEZ, AS ADMINISTRATOR AND ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF EMMA NUNEZ, THEIR DAUGHTER, AND JOSE NUNEZ AND ALTAGRACIA RODRIGUEZ DE NUNEZ, INDIVIDUALLY,**

**Plaintiffs/Appellants,**

**v.**

**THE RARITAN BAY MEDICAL CENTER, their servants, agents, and employees, HACKENSACK MERIDIAN HEALTH, their servants, agents and employees, DR. MARY M. NATH, JOHN DOES 1-15, fictitious names whose present identities are unknown; JANE DOES 1-15, fictitious names whose present identities are unknown; and ABC CORPORATIONS 1-15, fictitious names whose present identities are unknown,**

**Defendants/Respondents.**

**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**

**DOCKET NO. A-0001792-24**

**CIVIL ACTION**

On Appeal from the Superior Court of New Jersey, Law Division, Middlesex County

Docket No. below:

MID-L-4018-23

SAT BELOW:

Hon. Bruce J. Kaplan, J.S.C.

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**BRIEF ON BEHALF DEFENDANTS/RESPONDENTS, RARITAN BAY MEDICAL CENTER AND HACKENSACK MERIDIAN HEALTH, INC., IN OPPOSITION TO PLAINTFFS' APPEAL**

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HMH Hospitals Corp. improperly pled as  
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**PRELIMINARY STATEMENT**

Defendants/Respondents, Raritan Bay Medical Center, a Division of HMH Hospitals Corp. (hereinafter “Raritan Bay Medical Center” or “the Hospital”), improperly pled as The Raritan Bay Medical Center, and Hackensack Meridian Health, Inc., improperly pled as Hackensack Meridian Health (hereinafter “HMH,” collectively “Defendants”) submit this memorandum of law in opposition to Plaintiffs’ Appeal of the Trial Court’s entry of summary judgment in favor of Defendants based upon the dismissal of the claims against its agent, Dr. Nath.

The Defendants’ underlying Motion for Summary Judgment was premised upon the assumption that Dr. Nath’s pending dispositive motion would be granted. The finding in Dr. Nath’s favor left Plaintiffs with no viable theory of liability against the Defendants. The Defendants did not employ Dr. Nath, therefore the doctrine of *respondeat superior* was inapplicable. The only theory available to the Plaintiffs against the Hospital, given the lack of any direct claims and the lack of the employment relationship with Dr. Nath, was the doctrine of apparent authority. However, the doctrine of apparent authority is inapplicable where the claims against the agent are dismissed with prejudice, as the claims against Nath were in the instant matter. Thus, the Trial Court appropriately granted summary judgment to the Hospital and HMH.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1</sup>

On or about July 18, 2023, the Plaintiffs filed a Complaint in the within action, sounding in medical negligence. **Pa9.**<sup>2</sup> Thereafter, on or about August 7, 2023, an Answer was filed on behalf of Defendants, denying any and all allegations of medical negligence. **Pa20.** This is a medical malpractice and wrongful death lawsuit in which the Plaintiffs alleges that the Defendants were negligent in the treatment and care rendered to Altagracia Rodriguez De Nunez and an infant Emma Nunez in connection with the labor and delivery, resulting in injuries to and the death of Emma Nunez on July 17, 2022. **Pa9.**

Plaintiffs have not asserted direct claims against the Hospital or HMH. Plaintiffs' Complaint did not identify any employee of Defendants, Raritan Bay Medical Center or HMH, as a named defendant. **Pa9.** Plaintiffs contend that Dr. Nath ignored the calls from the "highly trained nursing staff" and delayed the C-section. See Plaintiffs-Appellants' Brief at Page 37. Plaintiffs' expert Richard Luciani, M.D. (hereinafter "Dr. Luciani") did not include any opinions

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<sup>1</sup> In reviewing the underlying facts and the procedural history, it was determined that the two are intrinsically intertwined. It is respectfully submitted that to separate the Statement of Facts from the Procedural History would have been difficult and would have likely led to a lengthier brief. Along these same lines, the Statement of Facts and Procedural History are combined for ease of reading and brevity.

<sup>2</sup> The Defendants/Respondents fully rely upon the Appendix and Confidential Appendix submitted by the Plaintiffs/Appellants and to avoid duplicity are not including a separate Appendix.

on the deviations from the standard of care by anyone other than Dr. Nath in his report. **Ca1.** Plaintiffs' expert Daniel Adler, M.D. (hereinafter "Dr. Adler") did not provide any opinions that any party deviated from the standard of care. **Ca10.** Thus, Plaintiffs' only claims against Defendants were vicarious in nature, based on the alleged negligence of Dr. Nath.

At the time of the events underlying the Plaintiffs' claims, in 2021, Dr. Nath was an employee of Rutgers, The State University of New Jersey, and as such was a state employee. **Pa47, Pa79, Pa90, Pa131, Pa134, Pa 163, Pa166, PA180.** Dr. Nath's designation as an "attending physician" at Raritan Bay Medical Center allowed her to see patients at the hospital through her employment with Rutgers. **Pa181.** Designation of an "attending physician" is unrelated to employment status. **Pa181.** Dr. Nath was not an employee of Raritan Bay Medical Center or HMH at the relevant time when she treated the Plaintiff. **Pa181.**

On August 15, 2024, Dr. Nath filed a dispositive motion based upon the Plaintiffs' failure to comply with the notice requirement of the Tort Claims Act. **Pa41.** On September 11, 2024, Defendants moved for summary judgment, seeking entry of summary judgment in the event that the claims against Dr. Nath are dismissed, as Plaintiffs would be left with no viable theory against Defendants in those circumstances. **Pa101.** The Trial Court entertained oral

argument on October 11, 2024. 1T. At that time, the Trial Court did not feel comfortable ruling on the dispositive motions “until it was determined whether Dr. Nath actually was a state employee under Title 59 . . .” 2T4:20-5:6. The court allowed time for Plaintiffs to conduct additional discovery and permitted additional briefing. Ibid. The additional discovery was conducted on the issue of Dr. Nath’s public employee status. Ibid. Thereafter, a second oral argument was entertained on January 10, 2025. 2T. The Trial Court granted Defendants’ Motion for Summary Judgment on January 14, 2025, finding that dismissal of the claims against Dr. Nath also results in the dismissal of the vicarious claims against the hospital and HMH that were based upon Dr. Nath’s alleged negligence. **Pa7**, 2T101:10-11.

### **STANDARD OF REVIEW**

A trial court’s entry of summary judgment is reviewed in accordance with the standard set forth in Rule 4:46-2(c). State v. Perini Corp., 221 N.J. 412, 425, (2015) (internal citations omitted). That standard compels a court to grant summary judgment “if 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). When there is no issue of fact, and only a question of law remains, an appellate court reviews

that question de novo. Gere v. Louis, 209 N.J. 486, 499 (2012) (citing Raspa v. Office of Sheriff, 191 N.J. 323, 334 (2007); Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 293 (2001); Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995)).

On this record, as will be set forth below, there is no genuine issue of material fact with respect to the Defendants' entitlement to summary judgment. The Trial Court's decisions must be affirmed.

### **LEGAL ARGUMENT**

**THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS/RESPONDENTS, DISMISSING VICARIOUS LIABILITY CLAIMS AGAINST THEM BASED ON THE DISMISSAL WITH PREJUDICE OF THE DEFENDANTS/ RESPONDENTS' ALLEGED AGENT, DR. NATH (Not raised below).**

The summary judgment procedure provides a prompt, businesslike and inexpensive means to dispose of a case where examination of the pleadings, admissions, depositions and affidavits reveals that no genuine issue of material fact exists requiring disposition at trial, and the moving parties are entitled to judgment as a matter of law. R. 4:46-2; Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 57, 74 (1954).

In Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520, 535-40 (1995), our Supreme Court adopted holdings of the U.S. Supreme

Court in Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and determined that the trial judge, when ruling on a motion for summary judgment, must conduct the same type of analysis as required in determining the propriety of a directed verdict under R. 4:37-2(b). The trial court is to “be guided by the evidentiary standard of proof – by a preponderance of the evidence or clear and convincing evidence – that would apply at the trial on the merits...” Id. at 533-34 (internal citations omitted). The judge must analyze and weigh the facts to determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Brill, supra, 142 N.J. at 536 (internal citations omitted).

While the court still must grant all favorable inference to the non-moving party, it may pick and choose inferences from the evidence to the extent that “a miscarriage of justice under the law” is not created. Ibid. Under this standard, to determine whether there exists a “genuine issue” of material fact precluding summary judgment, the motion judge is required to consider whether the competent evidential material presented, viewed in the light most favorable to the non-moving party, is sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Id. at 540.

Quoting an Arizona Supreme Court decision, the Brill court noted that the standard articulated in Celotex and Liberty Lobby, supra, has been adopted by the majority of courts in other jurisdictions:

We live in what is widely perceived as a time of great increase of litigation and one in which many meritless cases are filed, vastly increasing the dockets before our trial judges. As a result, the courts of this country have been urged to liberalize the standards so as to permit summary judgment in a larger number of cases.

[Brill, supra, 142 N.J. at 538-539 (internal citation omitted)].

The Brill ruling encourages courts not to refrain from granting summary judgment when the proper circumstances are present. Id. at 541. While Brill recognized the importance of not precluding trial for a deserving litigant, it stressed that it is just as important that the court not “allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial.” Id. at 540-41 (quoting Johnson, supra, 17 N.J. at 77). To send a case to trial, knowing that a rational jury can reach but one conclusion, would be “worthless” and “will serve no useful purpose.” Id. at 541.

A review of the record will reveal that the Trial Court properly determined that there were no genuine issues of material fact that should preclude granting summary judgment in favor of the Defendants. Plaintiffs/Appellants’ description of the disputed material facts is as follows: “Whether defendants

breached their duty to plaintiffs and whether their negligence was the proximate cause of plaintiffs' damages are factual questions for a jury to decide." See Plaintiffs/ Appellants' Brief at page 43. However, the Trial Court's decision was not based on deciding the elements of a medical negligence claim. Instead, the Trial Court correctly found that since no direct claims against the hospital or HMH were advanced, and since Dr. Nath was dismissed with prejudice from the case, the Plaintiffs could not maintain a vicarious liability claim against the hospital based upon its agent Dr. Nath's negligence, warranting entry of summary judgment.

Plaintiffs/Appellants further contend that "there is a genuine issue of material fact as to whether Dr. Nath was a private employee and/or subject to the control of RBMC and HMH at the time of the medical negligence." See Plaintiffs/Appellants' Brief at page 44. The Trial Court correctly found that there was no issue of material fact regarding Dr. Nath's employment status. 2T90:16-91:3. The Trial Court pointed out that Plaintiffs did not allege that there was an issue of fact with respect to Dr. Nath's public employee status until the defendants filed their dispositive motions. Ibid. When the discovery was provided to Plaintiffs, it was only as a result of the Trial Court essentially ordering that Plaintiffs conduct that discovery. 2T90:16-19. In other words, Plaintiffs only asserted this is a factual dispute when faced with the dispositive

motions, after having been notified of Dr. Nath's public employee status by way of her Answer and Answers to Interrogatories and having done nothing about it for months. Since Plaintiffs now claimed this was an issue of fact, the Court permitted them to conduct discovery to resolve this issue of fact. Once the discovery on the subject was conducted, all of the documents and uncontested certifications revealed that Dr. Nath was, in fact, a public employee. 2T90:19-91:3. There was no longer an issue of material fact on that subject. Ibid. Plaintiffs had the opportunity to depose Dr. Nath but chose not to; and they were able to conduct discovery to their satisfaction, confirming that Dr. Nath was a public employee. Ibid.

That is why the Trial Court, after entertaining the initial oral argument on October 11, 2024, 1T, exercising its discretion, adjourned the motions and allowed the Plaintiffs to conduct additional discovery on the issue of whether Dr. Nath was a state employee at the relevant time. 2T4:20-5:6. The court also permitted additional briefing. Ibid. The adjournment of the motions and the second oral argument were a result of the Trial Court feeling uncomfortable dismissing the claims until it was determined whether Dr. Nath was a state employee under Title 59. 2T4:5:8. The additional discovery was conducted. Ibid. The purported factual dispute was resolved regarding Dr. Nath's state employee status. In addition to her previously available certified Answers to

Interrogatories, her sworn Certification, and a Certification from Peggy DeFina of Rutgers, additional evidence was served, including a Professional Services Agreement, W-2s, and a letter from Rutgers. It was definitely established by way of multiple documents and sworn statements, all of which remain uncontested, that Dr. Nath was, in fact, a state employee at the relevant time. Likewise, upon review of all of the aforementioned, uncontested evidence, this Honorable Court will find that there is no genuine issue of material fact with respect to Dr. Nath's public employment status; that she was a public employee at the relevant time, and no reasonable jury could find otherwise.

The relevant and controlling authorities confirm that the Trial Court appropriately dismissed Plaintiff's claim against Defendants based on Dr. Nath's failure to comply with the provisions of the Tort Claims Act. Generally, a principal is immune from liability for the negligence of "an independent contractor, or that of its employees, in the performance of the contracted services." Basil v. Wolf, 193 N.J. 38, 62 (2007); Restatement (Second) of Torts § 409 (1965). As one of the exceptions to this, the doctrine of apparent authority "imposes liability on the principal not as the result of the reality of a contractual relationship but rather because of the actions of a principal or an employer in somehow misleading the public into believing that the relationship or the authority exists." Estate of Cordero ex rel. Cordero v.

Christ Hosp., 403 N.J. Super. 306, 312 (App. Div. 2008) (quoting Basil, supra, 193 N.J. at 67 (2007)). “[L]iability for a doctor’s negligence should be imputed to a hospital when apparent authority . . . is established.” Id. at 313.

However, the doctrine of apparent authority is inapplicable where the claims against the agent are dismissed with prejudice. Nunez v. St. Mary’s Hosp., 2014 N.J. Super. Unpub. LEXIS 2785 at \*8 (App. Div. Nov. 25, 2014).

**Pa111.** “[A] dismissal with prejudice constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial.” Velasquez v. Franz, 123 N.J. 498, 507 (1991) (citation and internal quotation marks omitted). In Nunez, using the aforementioned case law to conduct its analysis, the Appellate Division affirmed the dismissal with prejudice of the claims against the hospital based on apparent authority where the claims against the doctors (deemed the hospital’s agents) were dismissed with prejudice for failure to comply with the Affidavit of Merit Statute.

Based on the Plaintiffs’ expert reports, a direct claim is only being asserted against Dr. Nath. Neither Dr. Luciani nor Dr. Adler state that the moving Defendant (including Raritan Bay Medical Center where the care and treatment at issue took place) deviated from the standard of care or how any such deviation caused an injury to Plaintiffs. Thus, the dismissal with prejudice of Dr. Nath from this action appropriately resulted in the dismissal with

prejudice of the moving Defendants. Insofar as the Plaintiff/Appellant seeks reinstatement of this entire case, it is respectfully submitted that the Trial Court's ruling should be left undisturbed.

### **CONCLUSION**

For the reasons set forth herein, the January 14, 2025 Order granting summary judgment to Defendants/Respondents, Raritan Bay Medical Center and HMH, should stand.

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Raritan Bay Medical Center, a Division of  
HMH Hospitals Corp. improperly pled as  
The Raritan Bay Medical Center, and  
Hackensack Meridian Health, Inc.,  
improperly pled as Hackensack Meridian  
Health

Dated: July 18, 2025

By: /s/Anelia Dikovytska Brown  
Anelia Dikovytska Brown

JOSE NUNEZ AND ALTAGRACIA  
RODRIGUEZ DE NUNEZ, AS  
ADMINISTRATOR AND  
ADMINISTRATRIX AD  
PROSEQUENDUM OF THE ESTATE OF  
EMMA NUNEZ, THEIR DAUGHTER,  
AND JOSE NUNEZ AND ALTAGRACIA  
RODRIGUEZ DE NUNEZ,  
INDIVIDUALLY

Plaintiffs/Appellants,

vs.

THE RARITAN BAY MEDICAL  
CENTER, their servants, agents, and  
employees, HACKENSACK MERIDIAN  
HEALTH, their servants, agents, and  
employees, DR. MARY M. NATH, JOHN  
DOES 1-15, fictitious names whose present  
identities are unknown; JANE DOES 1-15,  
fictitious names whose present identities are  
unknown; and ABC CORPORATIONS 1-  
15, fictitious names whose present identities  
are unknown,

Defendants/Respondents.

**SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0001792-24  
CIVIL ACTION**

On Appeal from:

Superior Court of New Jersey, Law  
Division, Middlesex County  
Docket No. MID-L-4018-23

SAT BELOW:

Hon. Bruce J. Kaplan, J.S.C.

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**BRIEF ON BEHALF DEFENDANT/RESPONDENT, MARY  
NATH, M.D., IN OPPOSITION TO PLAINTFFS' APPEAL**

---

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On the Brief

Brief filed on 8/18/25

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POINT I

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**PRELIMINARY STATEMENT**

The defendant/respondent, Mary Nath, MD (hereinafter “Dr. Mary Nath” or “Dr. Nath”) submits this memorandum of law in opposition to plaintiff/appellant’s appeal of the trial court’s dismissal of the plaintiff’s complaint against Dr. Nath.

The defendant’s underlying motion to dismiss was based upon the plaintiff’s failure to serve a notice of claim as required by N.J.S.A. 59: 8-1, et. seq. On behalf of Dr. Nath, the notice of motion to dismiss was filed on August 15, 2024. An initial oral argument was held on October 11, 2024, and the court allowed additional time for further discovery on the issue of Dr. Nath’s employment status before issuing a ruling. Further briefing was undertaken by all parties and on January 14, 2025, a second oral argument regarding the motion to dismiss on behalf of Dr. Nath was held. Following oral argument, the trial court ruled that, for purposes of the 90-day requirement to file a notice of claim, the accrual date was April 30, 2024, when Dr. Nath’s certified answers to interrogatories were served on the plaintiff. The interrogatories explicitly identified Dr. Nath as an employee of a public entity. The court further ruled there were no extraordinary circumstances to allow for the additional one-year extension of time following accrual of the action and no equitable remedies, such as waiver, estoppel or laches were present. An order dismissing the plaintiff’s claims against Dr. Nath was entered on January 10, 2025. The plaintiff now appeals the court’s ruling.

The Appellant's preliminary statement infers there was a lack of discovery identifying Dr. Nath as a public employee. This inference is not supported by the record. On November 8, 2023, Dr. Nath filed an Amended Answer including provisions of the New Jersey Tort Claims Act (hereinafter "TCA") as four separate defenses barring the plaintiff's claims against Dr. Nath. These four separate defenses were the only difference between Dr. Nath's Answer and the Amended Answer and were readily apparent to anyone comparing the Answer and the Amended Answer. As already noted, Dr. Nath's certified answers to interrogatories specifically described Dr. Nath as a public employee and Dr. Nath's *curriculum vitae* included Dr. Nath's job with Rutgers as the only job under the "Employment" heading that was held by Dr. Nath during the time she cared for the plaintiff.

The Appellant also argues, in their preliminary statement, that even if the court acknowledges Dr. Nath as a public employee, she is not entitled to the immunities under the TCA because: there exists "a genuine issue of material fact"; Dr. Nath was acting outside of her scope of employment; and her conduct was willful and outrageous. Regarding the presence of a "genuine issue of material fact", as to Dr. Nath, plaintiff is appealing a motion to dismiss based upon the failure to adhere to a statutory requirement, not a motion for summary judgment; there is no evidence in the record to support Dr. Nath's actions were outside the scope of her employment; and no evidence of willful or outrageous conduct.

The trial court appropriately dismissed the plaintiff's complaint against Dr. Mary Nath and the lower court's ruling must stand.

### **PROCEDURAL HISTORY**

This case was initiated with the filing of the plaintiff's Complaint on July 18, 2023. (**Pa9**). The claims arise from the treatment of Altagracia Rodriguez de Nunez and Emma Nunez on July 17, 2022. (**Pa9**). Dr. Nath filed an Amended Answer to the plaintiffs' Complaint on November 8, 2023 asserting as an affirmative defense that plaintiffs' claims are barred or otherwise limited by various provisions of Title 59 of the New Jersey Statutes Annotated, including as Separate Defenses that "*[t]he Complaint is barred for failure to give timely notice of claim or to present a claim in accordance with N.J.S.A. 59:81, et. seq.*", and that "*[t]he complaint and the proceedings resulting therefrom and any recovery resulting therefrom are barred by the New Jersey Tort Claims Act, N.J.S.A. 59:8-1 through -8, for failure to provide a timely written notice of tort claim in the official form promulgated by Rutgers, the State University pursuant to N.J.S.A. 59:8-6.*" (**Pa34**).

Discovery ensued and Dr. Nath provided answers to interrogatories on April 24, 2024. In her answer to Form C interrogatory 13, Dr. Nath stated that "[a]t the time of the relevant events in this case, this defendant was an employee of a body corporate and politic and an instrumentality of the State of New Jersey, a public entity..." (**Pa79**). On August 15, 2024, the Defendant/Respondent filed a motion to

dismiss based upon the plaintiffs' failure to serve Rutgers, The State University of New Jersey, with a notice of claim. **(Pa41)**. Oral argument was held on the motion to dismiss on October 11, 2024. The Honorable Robert Kaplan, J.S.C. denied the motion to allow additional briefing on Dr. Nath's status as a public employee. **(Pa125)**. Supplemental submissions were provided by all parties and oral argument was heard on January 14, 2024, after which the Court dismissed the plaintiffs' claims against Dr. Nath. **(Pa5)**.

### **STATEMENT OF FACTS**

On July 16, 2022 and July 17, 2022 Dr. Nath was a Board Certified obstetrician and one of the healthcare providers involved with the treatment of the plaintiff Altagracia Rodriguez de Nunez at Raritan Bay Medical Center. **(Pa90)**. During the year 2022, including the month of July, Dr. Nath was an employee of Rutgers, The State University of New Jersey, and as such was a state employee. **(Pa90)**. This is so stated on Dr. Nath's *curriculum vitae* which was attached to the interrogatories. **(Pa90)**. Beginning in 2014 and including July 2022, Dr. Nath worked at Raritan Bay Medical Center, through a professional services contract between RBMC and Rutgers, as an attending physician. **(Pa134)**. Dr. Nath along with other healthcare providers, cared for the plaintiff during her labor. The delivery was performed by a non-party physician. The decedent infant-plaintiff, Emma Nunez, passed shortly after delivery on July 17, 22. **(Pa9)**.

As referenced above, plaintiff filed a complaint alleging medical malpractice and wrongful death on July 18, 2023, one year and one day after the relevant delivery (**Pa9**). The defendants denied all allegations in their Answer (**Pa28**). An Amended Answer was filed on November 8, 2023 which also included affirmative defenses that plaintiffs' claims were barred or limited by Title 59 of the New Jersey Statutes Annotated (**Pa34**). Five months later, on April 24, 2024, Dr. Nath's certified answers to interrogatories were provided and Form C interrogatory #13 stated "[a]t the time of the relevant events in this case, this defendant [Dr. Nath] was an employee of a body corporate and politic and an instrumentality of the State of New Jersey, a public entity..." (**Pa79**). Dr. Nath filed a motion to dismiss based on plaintiff's failure to file a Notice of Claim pursuant to New Jersey Tort Claims Act, N.J.S.A. 59:8-1 through -8 (**Pa41**).

### **STANDARD OF REVIEW**

The plaintiff's complaint in this matter was dismissed based upon the trial court's application of N.J.S.A. 59:8-8, which is the statutory requirement that a plaintiff file a notice of claim within 90-days of the accrual date of a claim. The trial court, as part of their analysis in this case, also determined the "accrual date" applicable in this matter. The Appellate Division applies a mixed standard of review under these circumstances. The determination of the legal principles that apply to the finding of the accrual date under the Tort Claims Act is reviewed *de novo*,

without deference to the trial court. Beauchamp v. Amedio, 164 N.J. 111, 118–19 (2000); D.D. v. UMDNJ, 213 N.J. 130, 147 (2013). In contrast, the trial court’s underlying factual findings, such as when a reasonable plaintiff knew or should have known of a defendant’s public employee status, are entitled to deference and upheld so long as they are supported by substantial credible evidence. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974), citing New Jersey Turnpike Authority v. Sisselman, 106 N.J. Super. 358 (App. Div. 1969), certif. den. 54 N.J. 565 (1969).

In this case, the trial court concluded that plaintiff’s claim accrued on April 30, 2024, when the defendant’s certified interrogatory answers were served (2T88:21-25 and 2T90:8-13). The court further considered the comparison that should have taken place between Dr. Nath’s Answer and Amended Answer when the Amended Answer was filed on November 8, 2023 . Had a routine comparison of the two documents been made by plaintiff, the clear addition of four Title 59 separate defenses (the only difference between the Answer and the Amended Answer) would have been noted.

In sum, on appeal the Appellate Division reviews, *de novo*, the legal conclusion that certain documents exchanged in the case trigger accrual and accords deference to the trial court’s factual findings, so long as supported by the record.

**LEGAL ARGUMENT**

**POINT I**

**THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT WITH PREJUDICE BECAUSE THE PLAINTIFF FAILED TO SERVE A NOTICE OF CLAIM AS REQUIRED BY N.J.S.A. 59:8-1, ET SEQ. (Pa5)**

Since July 1, 1972, liability as to all public entities and their agents has been controlled by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1, et seq. (the “TCA”). The TCA permits liability on the part of the State and State entities and employees under certain limited circumstances. Generally, the TCA reflects the response of the legislative and executive branches to the judicial abrogation of the traditional doctrine of sovereign immunity. D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 134 (2013) (citing Velez v. City of Jersey City, 180 N.J. 284, 288 (2004)). The legislative declaration of public policy set forth in the TCA declares:

[I]t is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this Act and in accordance with the fair and uniform principles established herein. All the provisions of this Act should be construed with a view to carry out the above legislative declaration.  
[N.J.S.A. 59:1-2.]

Consistent with this statutory declaration of public policy, the TCA follows the basic approach of providing immunity for public entities and employees unless liability is expressly allowed. As previously stated by our Appellate Division, “we

have recognized that the ‘guiding principle’ of the Tort Claims Act is that ‘immunity from tort liability is the general rule and liability is the exception.’” D.D. v. Univ. of Med. & Dentistry of New Jersey, 213 N.J. 130, 134 (2013) (citations omitted).

Regarding the requirements that must be followed when an individual or entity institutes an action against a public entity or employee, N.J.S.A. 59:8-3 provides that “no claim shall be brought against a public entity or public employee under this act unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter.” N.J.S.A. 59:8-3. The TCA mandates that a public entity or employee be notified of a claim against it within 90 days of the accrual of the claim. N.J.S.A. 59:8-8, and states that:

The claimant shall be forever barred from recovering against a public entity or public employee if:

a. The claimant failed to file the claim with the public entity within 90 days of accrual of the claim except as otherwise provided in N.J.S. 59:8-9; or

b. Two years have elapsed since the accrual of the claim

...

[N.J.S.A. 59:8-8 (emphasis added).]

When a Notice of Claim is not filed within 90 days of the accrual date, a claimant may seek permission to file a late Notice of Claim within one year of the accrual date, pursuant to N.J.S.A. 59:8-9, if “extraordinary circumstances” are demonstrated. However, this section still specifies that “in no event may any suit

against a public entity or public employee arising under this act be filed later than two years from the date of the accrual of the claim.” N.J.S.A. 59:8-9.

Once the one-year period under N.J.S.A. 59:8-9 has elapsed, the trial court lacks jurisdiction to extend the period for filing a late notice of claim. Iaconianni v. NJ Tpk. Authority, 236 N.J. Super. 294, 298 (App. Div. 1989) cert. denied, 121 N.J. 592 (1990) (“Because the late notice of claim was filed well beyond the one-year outer limit, the trial court had no jurisdiction to extend the filing period”); Pilonero v. Twp. of Old Bridge, 236 N.J. Super. 529, 532-33 (App. Div. 1989) (“After the one-year limitation has passed, ‘the court is without authority to relieve a plaintiff from his failure to have filed a notice of claim, and a consequent action at law must fail’”); Hill v. Middletown Board of Ed., 183 N.J. Super. 36, 40 (App. Div.) cert. denied, 91 N.J. 233 (1982) (“judicial discretion to extend the time for filing of the requisite notice does not survive the passage of one year following the accrual date of the claim”).

As our Appellate Division has previously observed, the mere filing of a Complaint does not constitute substantial compliance with the notice requirements of the TCA. Guzman v. City of Perth Amboy, 214 N.J. Super. 167, 171-72 (App. Div. 1986) (“We note also that the filing of a complaint would not be a substitute for the notice required by statute, whether the complaint was filed within the 90-day or the one-year period”).

**A. The Accrual Date was Appropriately Determined to be April 30, 2024**

In this case, the plaintiff was required to file a Notice of Claim within 90 days of the accrual of the claim. “Accrual,” as used in the TCA, means the date on which the alleged negligent act or omission took place. Beauchamp v. Amedio, 164 N.J. 111, 117 (2000) (citing Fuller v. Rutgers, the State Univ., 154 N.J. Super 420, 423 (App. Div. 1977), cert. denied, 75 N.J. 610 (1978); Torres v. Jersey City Medical Ctr., 140 N.J. Super. 323, 326 (Law Div. 1976)). In Beauchamp v. Amedio, *supra*, the New Jersey Supreme Court set forth the sequential analysis of the applicable portions of the TCA that must be conducted in determining the timeliness of the service of a notice of claim:

In determining whether a notice of claim under N.J.S.A. 59:8-8 has been timely filed, a sequential analysis must be undertaken. The first task is to always determine when the claim accrued. The discovery rule is part and parcel of such an inquiry because it can toll the date of accrual. Once the date of accrual is ascertained, the next task is to determine whether a notice of claim was filed within 90 days. If not, the third task is to decide whether extraordinary circumstances exist to justify a late notice

...  
[Beauchamp v. Amedio, 164 N.J. at 118-19.]

In this case, the treatment at issue took place on July 17, 2022. Plaintiffs allege in their Complaint that “[o]n or about July 17, 2022, the plaintiffs ... observed the deterioration of baby Emma N. ...” and that Emma N. died on July 17, 2022

(Pa9). Plaintiffs did not file a notice of claim within ninety (90) days of July 17, 2022.

Plaintiffs/Appellants argue they were unaware of Dr. Nath's status as a state employee until November 12, 2024, and as such, this should be the accrual date for purposes of determining whether plaintiff complied with the TCA. The abundant facts decry an accrual date of November 12, 2024, and support the accrual date of April 30, 2024 as determined by the trial court.

Specifically, Dr. Nath filed an Answer to the plaintiff's complaint dated October 25, 2023 (Pa28). Dr. Nath's Answer did not make reference to the TCA. Dr. Nath filed an Amended Answer 14 days later, dated November 8, 2023 (Pa34). The only difference between Dr. Nath's Answer and her Amended Answer was the addition of 4 separate defenses, all of which related to and clearly enunciated provisions of the TCA. When an amended pleading is received by an attorney, it can be assumed that the attorney will compare the amended pleading to the initial pleading served simply because they want to know why and to what extent the pleading was amended. Had that been done in this case, on November 8, 2023 or shortly after, the plaintiff would have noted that separate defenses fourteen and fifteen asserted that the claims against Dr. Nath were barred by virtue of the TCA:

"The Complaint is barred for failure to give timely notice of claim or to present a claim in accordance with N.J.S.A. 59:8-1, et. seq." and

“The complaint and the proceedings resulting therefrom and any recovery resulting therefrom are barred by the New Jersey Tort Claims Act, N.J.S.A. 59:8-1 through - 8, for failure to provide a timely written notice of tort claim in the official form promulgated by Rutgers, the State University pursuant to N.J.S.A. 59:8-6.” **(Pa28)**.

It is critical to note that the separate defenses evoking the TCA were the only additions to the Amended Answer as compared to the Answer. Plaintiff did not file a notice of claim within 90-days of Dr. Nath’s Amended Answer.

During the ensuing discovery, following the initial pleadings, Dr. Nath stated explicitly in her answers to interrogatories that “[a]t the time of the relevant events in this case, this defendant was an employee of a body corporate and politic and an instrumentality of the State of New Jersey, a public entity...” **(Pa79)**. Dr. Nath’s answers to interrogatories were served on April 30, 2024. There was no notice of claim filed within 90-days of service of Dr. Nath’s interrogatories, which would have been July 30, 2024.

The plaintiff/appellant argues that Dr. Nath did not identify “which public entity she was employed by at said time” **(Appellant Br. Page 11)**. Plaintiff further states that she relied on the answer to interrogatory where Dr. Nath is identified as an attending obstetrician at the time of labor and delivery **(Appellant Br. Page 12)**. To that end, plaintiff either overlooked or ignored the answer in the very same interrogatories that explicitly said Dr. Nath was a public employee.

On November 8, 2023, plaintiff was served with an Amended Answer which included TCA defenses (**Pa34**). As noted, the TCA defenses in the Amended Answer were the only change between the Answer and the Amended Answer. Four months passed with no inquiry by the plaintiff into the amendment. On April 30, 2024, plaintiff is explicitly advised, through a certified interrogatory, that Dr. Nath is a public employee (**Pa79**) and her *curriculum vitae*, attached to the interrogatories, has one listing under the “Employment” heading which encompasses the relevant time period and includes “RUTGERS UNIVERSITY through RWJ Medical School” as her employer from 2007 to present (**Pa90**).

The trial court considered both the Amended Answer and Dr. Nath’s interrogatory answers as “red flags”, putting plaintiff’s counsel on notice that Dr. Nath was a state employee requiring compliance with the TCA (**2T90:14-25**). As a result, the Court further found that the latest point in time that a Tort Claims Notice should have been filed was July 30, 2024, 90-days after service of the interrogatories. The trial court’s conclusion that the accrual date in this case is April 30, 2024 is based on Dr. Nath’s Amended Answer and certified interrogatory answers and is therefore clearly supported by the evidence. The trial court’s conclusion must be given deference and should not be disturbed.

**B. There Is No Evidence to Support Extraordinary Circumstances**

The Appellant's have not set forth any proof of extraordinary circumstances that would justify their failure to file a notice of claim within 90 days of April 30, 2024, or their failure to move for leave to file a late notice of claim **before** they were confronted with Dr. Nath's motion to dismiss. The Appellant's argument is that Dr. Nath failed to provide evidence of her status as a public employee at the time of treatment in July 2022. Assuming this fact to be true, the argument is meritless once notice of Dr. Nath's status was received. As our Supreme Court has held, inattention *does not* equate with extraordinary circumstances for tort claims purposes. D.D. v. Univ. of Med. & Dentistry of New Jersey, 213 N.J. 130, 156 (2013) (citing Zois v. N.J. Sports & Expo. Auth., 286 N.J. Super. 670, 674 (App.Div.1996)); Rogers v. Cape May Cnty. Office of Pub. Def., 208 N.J. at 428 (citing Zois, supra, 286 N.J. Super. at 674). The Appellant also argued that the separate defenses were obscured or hidden and that the interrogatories were misleading. The separate defenses were the only difference between the Answer and Amended Answer and a simple side-by-side comparison of the Answer and Amended Answer would have shown that each page was the same except for the separate defenses including the TCA provisions (**Pa28 and Pa34**). Likewise, the interrogatories told the plaintiff that Dr. Nath was a public employee (**Pa79**). The trial court highlighted this evidence and determined that plaintiff had not provided an alternative explanation, other than

simple inattention, for the failure to file a notice of claim within 90 days of November 8, 2023 or April 30, 2024.

The trial court found that the separate defenses were not “buried” but rather found that the Amended Answer should have raised a “flag” as to why the Answer was being Amended. As noted, the solitary change between the initial Answer (**Pa28**) and the Amended Answer (**Pa34**) was the addition of TCA defenses. In addition, the trial court found that, once the interrogatories were served, the plaintiff had sufficient information to file a notice of claim. (**2T90:14-25**). There is no evidence of extraordinary circumstances presented either on Appeal or at the trial level to support extraordinary circumstances.

The applicable sections of the Tort Claims Act, regarding presentation of claims, do not include any requirement for discovery or proof of a public employee’s status before a notice of claim must be presented. N.J.S.A. 59:8-1 to -11. The statutory requirement to serve a notice of claim precedes litigation and thus precedes any further discovery or documentation of the public employee’s status. While the Supreme Court did say in Eagan v. Boyarsky, 158 N.J. 632 (1999) and in Lowe v. Zarghami, 158 N.J. 606 (1999) that clinical professors at Rutgers (formerly known as UMDNJ) are required to advise their patients of their status as employees, the Court did not require proof in the form of a physician’s contract, or her private payroll or tax records. Where notice was not provided at the time of treatment, in

Eagan and Lowe, the Court provided a remedy, which was to toll the accrual of the plaintiff's claim until they knew the physician was a public employee, but there is no requirement for the physician to produce documentation evidencing their status. In this case, the trial court tolled the accrual date to April 30, 2024 and the plaintiffs still did not file a timely notice of claim within 90 days.

In Lowe v. Zarghami, *supra*, the plaintiff's first notice of Dr. Zhargami's status as a public employee was Dr. Zhargami's motion to dismiss, shortly after the filing of the plaintiff's malpractice complaint. Lowe v. Zarghami, 158 N.J. at 613. Given that the plaintiff in Lowe had otherwise complied with the requirements of a typical malpractice claim, and because Dr. Zhargami's status as a public employee had been obscured, the Supreme Court found that extraordinary circumstances existed, and that a late notice of claim was permitted. *Id.* at 629-31. In this case, by contrast, even if Dr. Nath's public employee status was obscured at the time of treatment, the plaintiffs knew or should have known that Dr. Nath was a public employee, and that a notice of claim was due to the State of New Jersey or to Rutgers specifically, when they received Dr. Nath's Amended Answer or her answers to interrogatories. When these were received, Dr. Nath's status was explicit.

The circumstances here are also distinguishable from those in Eagan v. Boyarsky, *supra*, to the extent that the plaintiff in Eagan "acted promptly to protect his rights" after first learning, via the defendants' answer, that they were public

employees (albeit by amending his complaint to include a malpractice claim against his initial counsel). Eagan v. Boyarsky, 158 N.J. at 637-38, 641. In this case, the plaintiffs did not act promptly after learning, via Dr. Nath's Amended Answer and answers to interrogatories, that she was a public employee. Whether the accrual of the plaintiffs' claim was tolled to November 8, 2023 or to April 30, 2024, the plaintiffs still failed to provide a notice of claim within the 90-day period specified in N.J.S.A. 59:8-8.

In Ventola v. New Jersey Veteran's Mem'l Home, 164 N.J. 74 (2000), the Court held that extraordinary circumstances existed, given the plaintiffs' "understandable confusion concerning the status of the [defendant] veterans' home," *i.e.*, whether it was a federal or state facility. Ventola v. New Jersey Veteran's Mem'l Home, 164 N.J. at 82 (2000). The Court further noted that the plaintiffs had been diligent in the prosecution of their claims. Ibid. The plaintiffs sought permission to file a late notice of claim against the State of New Jersey 15 days after their attorney was advised that the defendant facility was operated by the State of New Jersey. Id. at 78. In this case, there could be no confusion as to Dr. Nath's status as a public employee once her Amended Answer was served, followed by her answers to interrogatories. The plaintiffs neither provided a notice claim, nor sought permission to file a late notice until more than 90 days had passed and they were confronted by Dr. Nath's motion to dismiss.

Likewise, the circumstances in O'Donnell v. New Jersey Tpk. Auth., 236 N.J. 335 (2019), are distinguishable, because that plaintiff had in fact acted diligently and filed a notice of claim within 90 days of the underlying accident. O'Donnell v. New Jersey Tpk. Auth., 236 N.J. at 338-39. While the notice had been filed with the state, rather than the defendant Turnpike Authority, the Court noted that the defendant had received a notice of claim regarding the same accident within the 90 day window. Id. at 539. Here, the plaintiffs clearly did not act with the same diligence as the plaintiff in O'Donnell, because they did not file a notice of claim with any public entity within 90 days of either potential extended accrual date. While the plaintiffs' lack of knowledge of Dr. Nath's status may be a sufficient reason to toll the accrual of their claim until November 8, 2023, or to April 30, 2024, the plaintiffs fail to set forth any reasons or extraordinary circumstances that justify their failure to file a timely notice of claim after those dates.

Finally, the Appellant cites additional cases to support extraordinary circumstances are present. All these cases are distinguishable. In Feinberg v. State, D.E.P., 137 N.J. 126 (1994), the plaintiff filed a timely notice of claim and, similar to O'Donnell, the question was whether service on a particular state agency was sufficient. In Zwirn v. County of Hudson, 137 N.J. Super 99 (Law Div. 1975), a wrongful death, automobile action, the plaintiff served a timely notice of claim on the county where he believed the road of the accident was located. When plaintiff

learned it was a state road, he immediately filed a motion to file a late notice of claim and the motion was granted. Last, in Dambro v. Union Cty Park Comm., 130 N.J. Super 450 (Law Div. 1974), the court found plaintiff's timely notice to various county entities substantially complied with the TCA. In short, none of these cases are the same or similar to the current matter where notice of claim was not filed until after the defense motion to dismiss was filed.

## POINT II

### **THE DOCTRINES OF EQUITABLE ESTOPPEL, LACHES AND/OR WAIVER ARE NOT APPLICABLE TO THIS CASE**

#### **A. Equitable Estoppel**

As previously explained by our Supreme Court, estoppel is an equitable doctrine “designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment.” Knorr v. Smeal, 178 N.J. 169, 178 (2003) (citing Mattia v. Northern Ins. Co. of New York, 35 N.J. Super. 503, 510 (App.Div.1955)). “[T]o establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment. Ibid. (citing Miller v. Miller, 97 N.J. 154, 163 (1984)).

In Knorr, equitable estoppel was applied by the Court to reverse the dismissal of a plaintiff's claims for failure to file an affidavit of merit, where the defendant did

not move for dismissal until fourteen (14) months after the deadline for an affidavit of merit had passed. Knorr v. Smeal, 178 N.J. at 179-80. The defendant in Knorr did not act on the plaintiff's failure to file an affidavit of merit, despite knowing that a codefendant had already filed a timely motion to dismiss on that basis, which had been granted. Id. at 179. The Court concluded that the defendant's failure to file their own dismissal motion "surely induced plaintiffs to believe that the case was on course." Id. at 180. The Court reasoned that the plaintiffs would not have engaged in extensive discovery, including taking and submitting to depositions, submitting to a physical examination by defendant's expert, serving their expert's report, and moving for a protective order, had they known the cause of action was doomed by the failure to provide a timely affidavit of merit. Ibid. The Court also found that, as a result of the defendant's failure to file the dismissal motion earlier, the plaintiffs had incurred significant expert and deposition costs and emotional stress, and if the dismissal were to be granted, the attorneys would have labored needlessly, and the judicial system would have expended its resources on a case that should not been on the calendar. Ibid.

The circumstances in this case are distinguishable. The plaintiff/appellant would like to argue that Dr. Nath had a duty to file a motion to dismiss after the Amended Answer was served. As noted by the trial court, it is the plaintiff who is obliged to act with due diligence upon receipt of documentation to support a TCA

defense. The duty to act was not on the defense. (2T89:1-19). Moreover, if the plaintiffs' first notice of Dr. Nath's status as a public employee was on April 30, 2024, when Dr. Nath's answers to interrogatories were served, and the accrual date of the plaintiff's claim is tolled until that time, then Dr. Nath's motion to dismiss, filed on August 15, 2024, was timely, and not unduly delayed. An earlier motion to dismiss, filed at any point less than ninety (90) days after service of Dr. Nath's answers to interrogatories, would have been premature and ultimately futile because the plaintiffs would have still argued that the accrual of their claim must be tolled until they received what they deemed to be notice of Dr. Nath's status as a public employee. A notice of claim filed within 90 days of April 30, 2024, *i.e.*, by July 29, 2024, would have been timely. Defendant's motion to dismiss was filed on August 15<sup>th</sup>, less than three weeks after the deadline for plaintiffs to file a notice of claim.

Dr. Nath was under no obligation to remind the plaintiffs or their attorneys of the requirement for a notice of claim, or any pending deadline, either directly, or by filing a motion that could be easily rendered moot. The plaintiffs were represented by experienced attorneys who could be presumed to know the applicable law.

Unlike Knorr, there were no other motions to dismiss filed by other parties, such that the lack of a contemporaneous motion by Dr. Nath would create a false impression that she would not be raising the same issue or defense. Furthermore, and unlike Knorr, these plaintiffs did not engage in substantial discovery or incur

significant costs as the result of an alleged delay in the filing of Dr. Nath's motion to dismiss. The report of the plaintiff's standard of care expert, Dr. Luciani, was obtained in April 2023, before the lawsuit was even initiated in July 2023 (Ca1). The report of the plaintiffs' expert Dr. Adler, dated November 16, 2023, was served on December 1, 2023, when the plaintiffs argue they were unaware of Dr. Nath's status because Dr. Nath's TCA defenses were obscured. (Ca10). Only Ms. Rodriguez deposition was taken and the costs of taking Ms. Rodriguez' deposition were borne by the defense. Motion practice in this case before August 2024 had also been minimal. Per the Court's electronic docket, the plaintiffs filed a *pro forma* request for default before Dr. Nath's Answer was filed. Defendant Dr. Nath filed a motion to extend discovery in May 2024, which was unopposed, and thus did not require any expenditure of time, resources, or effort on the part of the plaintiffs or their attorneys. Accordingly, there is no indication in this case that the plaintiffs acted or changed their position to their detriment before Dr. Nath's motion to dismiss was filed. Unlike the plaintiff in Knorr, the plaintiffs in this case were not induced to engage in extensive discovery; they did not take any depositions; they did not submit to any examination by a defendant's expert; they did not engage in extensive motion practice; and they had already invested in expert review in the very early stages of discovery. Unlike the plaintiffs in Knorr, these plaintiffs have neither argued nor demonstrated that they incurred significant costs, or that their attorneys

have labored needlessly, in reliance on any action or inaction by the defendant. There is no indication that significant additional expenses were incurred by plaintiffs between the service of Dr. Nath's answers to interrogatories and defendant's motion to dismiss, because no further depositions were conducted and no further expert reports served.

The defense did not engage in conduct that induced reliance by the plaintiffs, and the plaintiffs did not act nor change their position to their detriment based on the defendant's actions. Therefore, the doctrine of equitable estoppel does not apply.

**B. Laches**

The doctrine of laches "is invoked to deny a party enforcement of a known right when the party engages in *an inexcusable and unexplained delay* in exercising that right to the prejudice of the other party." Knorr v. Smeal, 178 N.J. at 180-81. "Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned." Ibid. (citing Dorchester Manor v. Borough of New Milford, 287 N.J. Super. 163 (Law Div. 1994), aff'd, 287 N.J. Super. 114 (App.Div. 1996)).

We have emphasized that "[t]he key factors to be considered in deciding whether to apply the doctrine are the length of the delay, the reasons for the delay, and the changing conditions of either or both parties during the delay." In the final analysis, "[t]he core equitable concern

in applying laches is whether a party has been harmed by the delay.”

U.S. ex rel. U.S. Dep't of Agric. v. Scurry, 193 N.J. 492, 503–04 (2008) (citations omitted).

The length of delay, reasons for delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs ... The length of the delay alone or in conjunction with the other elements may result in laches ... It is because the central issue is whether it is inequitable to permit the claim to be enforced that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant. That is why some courts have stated that the mere lapse of time is insufficient, though, as indicated above, that is an overstatement of the principle. Inequity, more often than not, will turn on whether a party has been misled to his harm by the delay. Lavin v. Bd. of Educ. of City of Hackensack, 90 N.J. 145, 152–53 (1982) (citations omitted).]

In Knorr, the Supreme Court held that the defendant’s delay of 14 months before filing a motion to dismiss was inexcusable, and had caused the plaintiffs to believe, to their detriment, that he abandoned this dismissal motion. Ibid. Given the Appellant’s argument that the accrual of their claim should be tolled until they were aware of Dr. Nath’s status, Dr. Nath’s motion to dismiss was filed at a reasonable time, less than three weeks after the service of interrogatories explicitly stating she was a public employee.

Also, the plaintiff/appellant cannot now reasonably claim they believed Dr. Nath had previously “abandoned” her TCA defenses or a motion to dismiss. There

had been no prior motions to dismiss in the case, unlike in Knorr; the plaintiff/appellant's have made it clear they were ostensibly unaware of the potential for TCA defenses due to their alleged obscurity in the Amended Answer and the misleading information provided in the interrogatory answers and *curriculum vitae*. Based on these factors, plaintiff/appellant was never aware of the potential for a tort claims defense and therefore, could not have believed this defense had been abandoned.

The timing of Dr. Nath's motion was neither inexcusable nor unexplained. Plaintiffs' defense that they were unaware of Dr. Nath's status was reasonably anticipated by the defendant. Moving to dismiss less than 90 days after the service of Dr. Nath's answers to interrogatories would have been premature, and ultimately futile, had the plaintiffs served a notice of claim before the deadline. Unlike the plaintiff in Knorr, these plaintiffs' condition did not change in the interim. They were not harmed by additional costs or emotional burden of discovery, as no further discovery was provided or conducted between service of Dr. Nath's answers to interrogatories, and when the defendant's motion was filed. Because there was no inexcusable delay by the defendant, because the plaintiffs had no basis to believe that a Tort Claims Act defense had been abandoned, and because the plaintiffs' condition had not changed to their detriment before defendant's motion was filed, the doctrine of laches does not apply to bar the defendant's motion.

C. Waiver

Plaintiff/Appellant argues that Dr. Nath waived her right to rely on the TCA based on the “inordinate delay” in providing information regarding her affiliation with Rutgers. At the time plaintiff received Dr. Nath’s answers to interrogatories, she knew or should have known Dr. Nath was a public employee because it is so stated in the certified answers (**Pa79**). Regarding which public entity employed Dr. Nath, her *curriculum vitae* included only one job under the “Employment” heading which encompassed the relevant time frame: “Clinical Teaching Faculty RUTGERS UNIVERSITY through RWJ Medical School” (**Pa90**). This information was provided five months after Dr. Nath’s Amended Answer was filed. This is not an inordinate delay and there is no evidence to support the application of the waiver doctrine in this matter.

**POINT III**

**DR. NATH WAS A PUBLIC EMPLOYEE AT THE  
TIME OF THE RELEVANT TREATMENT**

The evidence in the record clearly establishes that when Dr. Nath provided care to Ms. Rodriguez, she was an employee of Rutgers, and not an employee of Raritan Bay Medical Center (hereinafter “RBMC”). Dr. Nath was paid by Rutgers for the work she performed at RBMC, and she was not paid by RBMC for work performed in 2022 (**Pa163**). Dr. Nath’s duties as a RWJMS clinical instructor were

to provide resident and student supervision at RBMC for Ob/Gyn clinical services and Dr. Nath's certification confirms that that is what she did (**Pa180**).

Additional details in the record further demonstrate Dr. Nath's employment by Rutgers. The Professional Services Agreement between Rutgers and RBMC (**Pa134**) notes the following: Rutgers was responsible for providing professional liability coverage for Dr. Nath as a faculty member (**Pa134, section 7.1.1**); employees were not construed to be the agents or employees of the hospital (**Pa134, section 9**); Rutgers could select which physicians would provide the services to the hospital (**Pa134, section 5**); termination of a physician's employment with Rutgers would terminate the physician's privileges and staff membership at the hospital (**Pa134, section 1.5.5**); and RBMC agreed not to hire any physician performing services pursuant to the agreement as an employee of the hospital within two years of the termination of the agreement without Rutgers' consent (**Pa134, section 19**).

This evidence further demonstrates that Rutgers, and not RBMC, employed Dr. Nath. Rutgers entered into an agreement with Dr. Nath, compensated her for the work performed, and had the ability to terminate her as an employee. No evidence has been presented to demonstrate "control" by RBMC over Dr. Nath's work, only its general ability to determine whether the physicians provided by Rutgers were reasonably acceptable (**Pa134, sections 1.5.2 and 1.5.9**). Plaintiffs' contentions that

Dr. Nath was not a Rutgers employee, or alternatively that she was not acting within the scope of her employment are accordingly without merit.

The trial court cited Lowe v. Zarghami, 158 N.J. 606 (1999) “as the controlling case for determining whether a doctor is a public employee in situations where their employment status was either concealed or unknown to the plaintiff as of the time of the complaint”. The court emphasized that, while Dr. Nath’s identify might have been unknown at the time of the complaint filing, it was “certainly” not concealed at the time Dr. Nath filed the Amended Answer and served her answers to interrogatories. The trial court further discussed the Lowe court’s use of the “control test” and “the relative nature of the work test” to determine whether a physician was a public or a private employee (2T101:14 to 103:5).

In Lowe, the Court set forth four factors to consider in determining the applicability of the control test:

1)The degree of control exercised by the employer over the means of completing the work; 2) the source of the worker’s compensation; 3)the source of the worker’s equipment and resources; and 4) the employer’s termination rights. [Lowe, 158 N.J. at 616].

The Lowe Court found that the employer had little actual “control” of the doctor’s treatment of patients, but was the source of the doctor’s compensation, provided work resources and maintained termination rights. Id at 618.

The “relative nature of the work” test, rather than the control test, may be more accurate in cases involving professional services. Lowe v. Zarghami, 158 N.J. at 618 (“if the working relationship involves professional services where an employer cannot exercise control over the methods used to provide those services, the relative nature of the work test may provide a more accurate assessment of the working relationship”). In this case, as in Lowe, the defendant physician was a clinical instructor who was expected to:

exercise independent, professional judgment while educating medical students and treating patients. The relative nature of the work test allows the Court to account for that “necessary exercise of independent judgment” ... it would be inconsistent with the nature of a physician's work for his employer to dictate the details of how he performed the practice of medicine ... As with other publicly employed professionals, control is “inimical to the task to be performed,” since the nature of the work depends on the professionals' independent exercise of judgment.

[Id. at 619–20 (citations omitted).]

The “relative nature of the work” test requires a court to examine “the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business.” Id. at 616 (citation omitted). Applying the test here, while Dr. Nath’s appointment with Rutgers was not her only source of income in 2022, Ms. Rodriguez was not a patient of Dr. Nath’s private practice. Therefore, Dr. Nath would only have been

compensated by Rutgers for the care provided in this case. There is no evidence in the record that Dr. Nath had any economic dependence on RBMC whatsoever, because she received no income from RBMC. The nature of Dr. Nath's work in this case was also directly related to the goals of RWJMS' business, *i.e.*, the education and training of medical students and residents. As noted above, Dr. Nath was supervising medical residents who were also providing care to Ms. Rodriguez. Therefore, because Dr. Nath was economically dependent on Rutgers to compensate her for the care provided, and her work as a clinical instructor was an integral part of the medical school's business, both aspects of the "relative nature of the work" test are satisfied.

As stated, plaintiff/appellant has not provided any credible evidence to support that Dr. Nath was not a public employee, employed by Rutgers in July 2022 while she was treating the plaintiff. To the contrary, all of the evidence presented credibly supports Dr. Nath's status as a public employee and the trial court's findings should not be disturbed.

#### **POINT IV**

#### **THERE IS NO EVIDENCE OF WILLFUL OR OUTRAGEOUS CONDUCT ON THE PART OF DR. NATH IN THE RECORD**

Plaintiff/Appellant has not provided any evidence of willful or outrageous conduct on the part of Dr. Nath. The case law cited by the appellant

addresses only that the TCA does not protect a public employee from willful conduct, Toto v. Ensuar, 196 N.J. 134 (2008) and that the loss of a fetus could satisfy the TCA threshold for pain and suffering, Willis v. Ashby, 353 N.J. Super. 104 (App.Div. 2002) certif. denied, 174 N.J. 547 (2002). There is otherwise no indication in plaintiff/appellant's submissions to support that Dr. Nath's conduct was, in any way, willful, wanton or malicious.

The New Jersey Punitive Damage Act, N.J.S.A. 2A:15-5.12, states that:

Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

Plaintiff/Appellant does not recite any actual facts from the record that denote malicious, wanton or willful conduct. The citations in the appellant's brief are statements found in the reports of plaintiffs' experts, Dr. Luciani and Dr. Adler (**Appellant Br. page 37 and Appendix page 9, Ca1 and Ca10**). The experts' reports are not evidence and cannot be considered a basis to conclude that Dr. Nath's conduct was willful, wanton or malicious.

**POINT V**

**THE TRIAL COURT DID NOT ERR IN DENYING  
THE PLAINTIFFS MOTION FOR LEAVE TO FILE  
AN AMENDED COMPLAINT**

The plaintiff/appellant's filed a motion for leave to file an Amended Complaint (**Pa**) which was returnable contemporaneously with Dr. Nath's motion to dismiss the plaintiffs' initial Complaint for failure to file a timely notice of claim. Given those contemporaneous motions, our Supreme Court's discussion in Notte v. Merchants Mut. Ins. Co., 185 N.J. 490 (2006), is especially relevant. The Court stated in Notte that the exercise of a court's discretion regarding a motion to file an amended complaint requires an analysis of whether granting the amendment would nonetheless be futile:

*The analysis is not complete until the requested amendment is examined to determine whether it is futile, that is, whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor. Thus, while motions for leave to amend are to be determined "without consideration of the ultimate merits of the amendment," ... those determinations must be made "in light of the factual situation existing at the time each motion is made." ... More specifically, "courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted."*

[Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501–02 (2006) (citations omitted) (emphasis added).]

The plaintiff moved to add Rutgers, the State University of New Jersey (“Rutgers”) and Palisades Medical Center (“Palisades”), as potentially liable parties under a theory of *respondeat superior* as Dr. Nath’s employer(s). The record does not support any other basis for their liability. The trial court dismissed the plaintiff’s complaint against Dr. Nath, and the motion to amend was denied as futile.

**CONCLUSION**

Based on the foregoing analysis, and pursuant to the plain language of N.J.S.A. 59:8-1, *et seq.*, well-settled New Jersey case law, as well as the legislative intent behind the TCA, the trial court’s order dismissing the plaintiff’s claims against defendant Mary Nath, M.D., must be upheld.

Respectfully Submitted,

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By: /s/ Renee J. Sherman  
rsherman@rhwlawfirm.com

Dated: August 18, 2025

JOSE NUNEZ AND ALTAGRACIA  
RODRIGUEZ DE NUNEZ, AS  
ADMINISTRATOR AND  
ADMINISTRATRIX AD PROSEQUENDUM  
OF THE ESTATE OF EMMA NUNEZ,  
THEIR DAUGHTER, AND JOSE NUNEZ  
AND ALTAGRACIA RODRIGUEZ DE  
NUNEZ, INDIVIDUALLY,

Plaintiffs-Appellants,

v.

THE RARITAN BAY MEDICAL CENTER,  
their servants, agents, and employees,  
HACKENSACK MERIDIAN HEALTH, their  
servants, agents and employees, DR. MARY  
M. NATH, JOHN DOES 1-15, fictitious names  
whose present identities are unknown; JANE  
DOES 1-15, fictitious names whose present  
identities are unknown; and ABC  
CORPORATIONS 1-15, fictitious names  
whose present identities are unknown,

Defendants-Respondents.

SUPERIOR COURT OF  
NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-001792-24

CIVIL ACTION

On Appeal From:

Law Division, Middlesex  
County  
Docket No. MID-L-4018-23

Sat Below:

Hon. Bruce J. Kaplan, J.S.C.

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**REPLY BRIEF OF PLAINTIFFS-APPELLANTS  
IN SUPPORT OF THE APPEAL**

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## LEGAL ARGUMENT

### POINT I

#### **DR. NATH AND RUTGERS WAIVED THEIR RIGHT TO NOTICE UNDER THE TORT CLAIMS ACT.**

Defendants' opposition briefs are most notable for what they do not say. Instead of addressing the elephant in the room, defendants simply choose to ignore plaintiffs' primary argument on appeal and instead focus on a generic discussion of the notice requirements of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:8-1 to -11, and vicarious liability. Contrary to the express direction of our Supreme Court, at the time of the events underlying plaintiffs' Complaint, defendants, Dr. Mary M. Nath, the Raritan Bay Medical Center (RBMC), and Hackensack Meridian Health (HMH), and proposed defendant, Rutgers, The State University of New Jersey (Rutgers), failed to disclose any relationship between Rutgers and Dr. Nath, RBMC, and HMH. There is nothing in the record to indicate defendants followed the express direction and holding of the Supreme Court in Lowe v. Zarghami, 158 N.J. 606 (1999), and Eagan v. Boyarsky, 158 N.J. 632 (1999). There was no oral disclosure of affiliation, no written disclosure of affiliation, no insignia on uniforms, no documents or posted notices in the facility indicating that any staff serving RBMC patients were public employees. Twenty-six years later,

defendants wholly failed to comply with those controlling precedents and thwarted the legislative purpose of the TCA. As a result, their arguments on notice have been waived.

The goals of the notice provisions of the TCA are to allow the public entity time for administrative review and the opportunity to settle meritorious claims prior to bringing suit, to provide the public entity with prompt notification of the claim in order to investigate the facts and to prepare a defense, to afford the public entity a chance to correct the conditions or practices that are the subject of the claim, and to inform the State in advance as to any liabilities that it may be expected to meet. O'Donnell v. N.J. Tpk. Auth., 236 N.J. 335, 345 (2019); Beauchamp v. Amedio, 164 N.J. 111, 121-22 (2000). Defendants focus solely on the procedural history **after** this civil action was filed. The purpose of the TCA is to provide prompt notice to the State **before** a lawsuit is filed. It was not intended to be used as a sword, disclosed after the fact, to defeat meritorious claims. As repeatedly stated, it was not intended to be a “trap for the unwary.” Lowe, 158 N.J. at 629. Its purpose is prompt, **pre-suit** notification. The extraordinary failure of Dr. Nath and her public employer, Rutgers, to comply with the decades-old binding precedent of our Supreme Court prevented such notice and mandates a finding that they have waived their right to assert the TCA as a defense.

Defendants' strategically vague disclosures in an amended answer or interrogatory responses or supplemental discovery **after** plaintiffs filed this civil action cannot satisfy the express requirement of Lowe that notice must be provided **at the time of treatment**. Id. at 631. That requirement has been binding precedent on Rutgers specifically for over twenty-five years. (Notably, Dr. Nath concedes in her brief that her public employer, Rutgers, and UMDNJ, the public employer in both Lowe and Eagan, are one and the same. Nathb15.). It also has been binding precedent generally since 1999. The Lowe Court recognized that the interest of justice and the purpose of the TCA required that notice "must" be given if compliance with the TCA was to be demanded by the State. The reasoning is simple. **For prompt notice of a claim to be demanded, justice required that timely notice of an involved public employee be provided.** Defendants' attempts to use the statute as a sword instead of a shield is an anathema to its legislative intent.

In the twenty-six years since Lowe and Eagan, the Legislature has made no effort to rescind or to modify those holdings, indicating its agreement with the Supreme Court's judgment. There is simply no excuse for the failure to disclose the potential public-employee affiliation at the time of treatment, and defendants don't try to fabricate one. Instead, they attempt to gloss over it, as if the holding of

the Supreme Court was a mere suggestion rather than binding precedent. Dr. Nath asserts in her brief that

While the Supreme Court did say in Eagan v. Boyarsky, 158 N.J. 632 (1999) and Lowe v. Zarghami, 158 N.J. 606 (1999), that **clinical professors at Rutgers (formerly known as UMDNJ) are required to advise their patients of their status as employees**, the Court did not require proof in the form of a physician’s contract, or her private payroll or tax records.

[Nathb15 (emphasis supplied).]

Defendants’ admission is accurate but misleading in suggesting defendants were compliant with their vague disclosures after filing of the lawsuit. The Supreme Court held specifically that

To resolve patients’ doubts surrounding the employment status of their physicians, **UMDNJ must require clinical professors employed by them to advise their patients, both orally and in writing, that they are employees of UMDNJ**. Such notice should be given to a patient as soon as practicable. It also would be helpful if clinical professors wore badges identifying themselves as UMDNJ employees. Those steps, if taken, together with this holding that clinical professors are UMDNJ employees, should make patients more aware that their physicians are public employees entitled to notice under the TCA.

[Id. at 631 (emphasis supplied).]

Defendants assert that failure to provide the required notice should have no consequences. That suggestion must be rejected because it completely disregards the purpose of the TCA and the interest of justice. In New Jersey, “Defendants

must act timely too; they cannot sleep on their rights.” Burns v. Belafsky, 166 N.J. 466, 470-71 (2001). In analogous circumstances, where insurers had long been on notice from our Supreme Court that step-down provisions for loading or unloading of motor vehicles were void, the Court held that the policy should be read without the clause and that the full policy limits should apply. Those clauses were to be abandoned by insurers due to our Supreme Court’s holding in Ryder/P.I.E. Nationwide, Inc. v. Harbor Bay Corp., 119 N.J. 402 (1990) (Ryder), which endorsed this Court’s holding in Bellafronte v. Gen. Motors Corp., 151 N.J. Super. 377 (App. Div.), certif. denied, 75 N.J. 533 (1977), that coverage for loading or unloading injuries arises from statute and cannot be limited by an insurance contract. See Ryder, 119 N.J. at 407. Bellafronte was decided in 1977. Ryder was decided in 1990. In Potenzzone v. Annin Flag Co., 191 N.J. 147 (2007), the Court had had enough. It specifically held an insurer liable to the full extent of its policy because it used a policy provision intended to exclude from coverage injuries due to loading or unloading. The Potenzzone Court said:

Following our decision in Ryder, insureds, insurers, and self-insurers should have reasonably expected that the full policy limit for an accident during a loading or unloading operation was required. As stated earlier, the insurance industry has had ample time to adjust its rates and policy terms. Ryder, supra, 119 N.J. at 413 (“Under the terms of an ordinary liability policy, an insurer would be required to provide coverage in a loading and unloading accident to the limits of its policy — often an amount greater than the statutory minimum.”

(Internal quotation marks omitted)). If the insurer intended to provide the statutory minimum coverage for loading or unloading accidents, it should have amended its policy to expressly provide for such step-down coverage.

[191 N.J. at 156.]

The same is true at bar. Defendants have been on notice for 26 years of their obligations to their patients. They have had ample time to institute policies and procedures for providing the required notice. Their blatant disregard of Supreme Court precedent must not be rewarded. Any right they had to dismiss based on a lack of notice is abrogated by their lack of compliance. A year after Lowe and Eagan, the Supreme Court reaffirmed that its holdings were intended and expected to put an end to the practice of obscuring public affiliation. See Ventola v. N.J. Veterans Memorial Home, 164 N.J. 74, 83 (2000). No disclosure by the public employee equals no right to invoke the TCA notice requirement. Ibid.

Had Dr. Nath and Rutgers complied with Lowe and Eagan and Ventola, none of the motion practice below would have been necessary. Those unanimous Supreme Court precedents from 1999 and 2000 require that clinical professors employed by the State must advise their patients, “both orally and in writing,” that they are public employees. Ventola, 164 N.J. at 83; Lowe, 158 N.J. at 631; Eagan, 158 N.J. at 34. Inexplicably, twenty-six years later, the public status of medical providers at private facilities remains a closely guarded secret. The observations of

the Ventola Court have not been taken to heart. “Finally, we observe that, after Lowe, this should be the last such occasion to apply its principles. Presumably, **if State health-care providers wish to rely on the notice provisions of the TCA, they will have made their status clear to patients.**” Ventola, 164 N.J. at 83 (emphasis supplied). The proper remedy, then, is that State health-care providers who fail to make their status clear to patients in accordance with the Supreme Court’s holdings may not rely on the notice provisions of the TCA. Ventola, 164 N.J. at 83. That remedy fulfills the legislative intent of the TCA.

## POINT II

### **DEFENDANTS’ CLAIM THAT THEY HAD NO OBLIGATION TO PLAINTIFFS IS UNTENABLE.**

Defendant Nath asserts in her brief that “Dr. Nath was under no obligation to remind the plaintiffs or their attorneys of the requirement for a notice of claim, or any pending deadline, either directly, or by filing a motion that could easily be rendered moot. The plaintiffs were represented by experienced attorneys who could be presumed to know the applicable law.” Nathb21. Respectfully, as discussed, defendant Dr. Nath and proposed defendant Rutgers had an absolute obligation under the controlling precedents to inform plaintiffs “orally and in writing” of Dr. Nath’s alleged status as a public employee **at the time of treatment**. See supra 1-6. They failed to do so and, thus, they are not permitted to

invoke the notice requirements of the TCA as a defense. Ventola 164 N.J. at 83.

Any argument about notice after suit is a red herring and should be ignored.

Defense counsel's justification for holding off on a motion to dismiss is clear evidence of attempting to use the TCA improperly as a sword, i.e., a "trap for the unwary," contrary to the legislative intent and caselaw holding that the TCA is **not** intended to be applied in that manner. See, e.g., Lowe, 158 N.J. at 629 ("The notice provisions of the Tort Claims Act were not intended as 'a trap for the unwary.'") (quoting Murray v. Brown, 259 N.J. Super. 360, 365 (Law Div. 1991)). "Generally, we examine 'more carefully cases in which permission to file a late claim has been denied than those in which it has been granted, to the end that wherever possible cases may be heard on their merits, and any doubts which may exist should be resolved in favor of the application.' Feinberg v. State, D.E.P., 137 N.J. 126, 135 (1994) (quoting S.E.W. Friel Co. v. New Jersey Tpk. Auth., 73 N.J. 107, 122 (1977)); Randazzo v. Twp. of Washington, 286 N.J. Super. 215 (App. Div. 1995)." Lowe, 158 N.J. at 629.

Not until November 2024, did defendants produce any documentation that supported their claim that Dr. Nath was acting as a public employee at the time of the failed delivery and death of plaintiffs' daughter. Invocation and notice of Dr. Nath's alleged public-employee status in an amended answer or interrogatory

responses or supplemental discovery cannot overcome the failure of defendants to provide and to demand prompt notice and defeats the purpose of the TCA.

Requiring plaintiffs to file a Tort Claims Notice only after litigation has commenced does not fulfill any of the TCA's purposes. Nor does dismissing plaintiffs' meritorious claim because defendants failed to disclose that one or more staff of a private medical facility may be a public employee.

Notwithstanding defendants' lack of compliance, plaintiffs moved for Leave to File a Late Notice of Claim, served a Notice of Claim on Rutgers and moved for Leave to File an Amended Complaint. Even though the belated notice serves none of the purposes of the TCA, plaintiffs have complied and should be entitled to proceed. To the extent that this Court feels constrained to require a Notice of Claim, the subject motions and orders still fall under the controlling precedent of Lowe and Eagan. Defendants' failure to comply with those holdings constitutes either a waiver of the TCA notice requirement or extraordinary circumstances to permit the filing of a late notice of claim. As in Eagan, there is no evidence to suggest that plaintiffs had knowledge of any affiliation between Dr. Nath and Rutgers, nor was such information communicated to them at the time of treatment. Plaintiffs had no reason to suspect that the self-described Attending Obstetrician at Raritan Bay Medical Center was an employee of Robert Woods

Johnson Medical Center, i.e., Rutgers. As in Eagan, plaintiffs followed the procedures necessary to pursue a claim of medical negligence against a physician in ordinary circumstances and diligently pursued their claim. As with the plaintiffs in Eagan, and those in Feinberg v. State, D.E.P., 137 N.J. 126 (1994); Zwirn v. County of Hudson, 137 N.J. Super. 99 (Law Div. 1975); and Dambro v. Union Cty. Park Comm., 130 N.J. Super. 450 (Law Div. 1974), cited favorably by the Court in Eagan, 158 N.J. at 642, plaintiffs in the present matter were thwarted in their action because the employment status of their doctor was obscured. As such, plaintiffs could not be expected to have reasonably known that they must give notice to Rutgers within 90 days after their daughter's death. As stated above, the Court held that **"We do not think the Legislature contemplated that the one-year ban would be used to bar a plaintiff-patient from pursuing his medical malpractice claim against a physician whom he had no reason to believe was a public employee. \* \* \* . Accordingly, plaintiff should be entitled to file a late notice of claim."** Eagan, 158 N.J. 642-43. That reasoning is equally compelling here.

### **POINT III**

**DEFENDANTS' ATTEMPTS TO DISTINGUISH  
KNORR V. SMEAL SHOULD BE REJECTED.**

Plaintiffs should not be made to chase their tails in search of information that the Supreme Court ruled decades ago should be provided by defendants as a matter of course. Waiver, equitable estoppel and/or laches apply. Intentionally or not, Dr. Nath failed to disclose her claimed role as a public employee at the time of Ms. Nunez's treatment and should not be permitted to evade a meritorious claim on a technicality. Dr. Nath attempts to distinguish Knorr v. Smeal, 178 N.J. 169 (2003), claiming that defendant was diligent in asserting her rights. Nathb21-26. In Knorr, the Court held that a defendant who filed a motion to dismiss after receipt of an untimely affidavit of merit forfeited his right to relief. The Court concluded that the equities required defendant to file his motion before he possessed the disputed affidavit. In Knorr, the defendant engaged in the exchange of interrogatories, deposed plaintiffs and submitted to a deposition, obtained plaintiff's expert report, and had plaintiff physically examined. In the present matter, Dr. Nath actively participated in the litigation for thirteen (13) months before moving to dismiss, including engaging in the exchange of interrogatories and deposing plaintiffs. More significantly, however, Dr. Nath **never** provided the notice required by the Supreme Court in Lowe, Eagan and Ventola. That notice was required at the time of treatment, "orally and in writing." Lowe, 158 N.J. at 629.

Properly viewed, Dr. Nath's conduct here is much worse than the defendant in Knorr. Whether considered under principles of estoppel, waiver or laches, all of which were discussed in detail in plaintiffs' opening brief at 20-29, defendants' invocation of the TCA and motion to dismiss were too little, too late and too prejudicial. See Knorr, 178 N.J. at 182 ("the Legislature could not have intended to allow an otherwise meritorious claim to proceed indefinitely at great expense to both parties only to have defendant obtain a dismissal on procedural grounds that should have been asserted much earlier in the process"). The interest of justice requires that Dr. Nath and Rutgers be barred from dismissing the Complaint and/or objecting to the Amended Complaint based on the TCA.

#### **POINT IV**

#### **THE TRIAL COURT ERRED BY NOT GRANTING LEAVE TO AMEND THE COMPLAINT.**

The ruling appeared to be based on futility due to the finding that a Notice of Claim was required and was not timely provided. 2T107:5-12. If the Order dismissing the claims against Dr. Nath is vacated or reversed, then the motion for leave to amend should be granted in accordance with Rule 4:9-1.

#### **POINT V**

#### **IF THE DISMISSAL OF DR. NATH IS REVERSED, PLAINTIFFS HAVE A VIABLE VICARIOUS LIABILITY CLAIM AGAINST RBMC AND HMH.**

As noted in their opposition, the Order granting dismissal to RBMC and HMH is wholly dependent on the dismissal with prejudice granted to Dr. Nath. RBMCb8 and 10. Under the theory of apparent authority, liability is imposed “on the principal not as a result of the reality of the contractual relationship but rather because of the actions of a principal or an employer in somehow misleading the public into believing that the relationship or the authority exists.” Estate of Cordero ex rel. Cordero v. Christ. Hosp., 403 N.J. Super. 306, 312 (App. Div. 2008) (citing Basil v. Wolf, 193 N.J. 38, 62 (2007)). “[L]iability for a doctor’s negligence should be imputed to a hospital when apparent authority \* \* \* is established.” Cordero, 403 N.J. Super. at 313.

If the Court acknowledges that Dr. Nath is a public employee but not entitled to a dismissal with prejudice, defendants RBMC and HMH are not entitled to summary judgment. Those defendants do not get immunity under the TCA. They may be vicariously liable for Dr. Nath’s medical negligence because she had apparent authority to act on their behalf. As discussed in plaintiffs’ opening brief at 29-36, there is a genuine issue of material fact as to whether Dr. Nath was a private employee and/or subject to the control of RBMC and HMH at the time of the medical negligence. If the claim against Dr. Nath is reinstated, so too must the claims against RBMC and HMH. R. 4:46-5.

## CONCLUSION

For the foregoing reasons and those contained in Plaintiffs' Opening Brief, plaintiffs respectfully request that this matter be remanded with instructions to allow plaintiffs to amend their complaint to add Rutgers as a defendant and to proceed with discovery.

Respectfully submitted,

**FOLEY & FOLEY**

/s/ Timothy J. Foley

Timothy J. Foley, Esq.

Co-counsel for Plaintiffs-Appellants

Dated: August 27, 2025