Steven I Adler, Esq. (Attorney ID# 027881982)
MANDELBAUM BARRETT PC
3 Becker Farm Road, Suite 105
Roseland, New Jersey 07068
Email: sadler@mblawfirm.com
t. 973.736.4600
f. 973.243.7930
Attorneys for Plaintiffs-Appellants

PREVENTIVE MEDICINE OF NEW JERSEY, GEORGE MELLENDICK, M.D. and KRISTEN KENT, M.D.,

Plaintiffs,

vs.

NEW JERSEY TURNPIKE AUTHORITY, DISHANT PATEL, R.N. and KAREN SPOONER, R.N.,

Defendants.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DOCKET NO: A-001805-24T2

Submitted: June 5, 2025

Civil Action

FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY

Sat below: Hon. Alberto Rivas, J.S.C.

Docket No. Below: MID-L-3637-24

PLAINTIFFS-APPELLANTS' AMENDED BRIEF IN SUPPORT OF APPEAL

Of Counsel and On the Brief:

Steven I. Adler, Esq. (Attorney ID# 027881982)
Frank A. Custode, Esq. (Attorney ID# 015662000)

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PRELIMINARY STATEMENT

Plaintiffs-Appellants Preventive Medicine of New Jersey **("PMNJ")**, George Mellendick, M.D. (**"Dr. Mellendick")** and Kristen Kent, M.D. (**"Dr. Kent")** (Dr. Mellendick and Dr. Kent together, the **"Individual Plaintiffs"**) (PMNJ and the Individual Plaintiffs, collectively **"Plaintiffs"**) file this appeal from the trial Court's January 17, 2025 Order denying their cross-motion to disqualify the law firm of Decotiis, Fitzpatrick, Cole & Giblin, LLP (the **"Decotiis Firm")** from representing Defendant New Jersey Turnpike Authority ("**NJTA**") and the individually named Defendants Dishant Patel, R.N. **("Patel")** and Karen Spooner, R.N. **("Spooner")** (together, the **"Individual Defendants"**) (collectively **"Defendants"**) under Rules of Professional Conduct (**"RPC"**) 1.7(a)(1) and (2) as well as 3.7.

This is a case brought by two doctors, the Individual Plaintiffs, who, on behalf of Dr. Mellendick's company PMNJ, and pursuant to PMNJ's contract with Hackensack Meridian Occupational Health (**"HMOH"**), provided healthcare services at NJTA's offices and for its employees. They claim that two NJTA nurses, the Individual Defendants, who worked under them at NJTA, wanted to force them out of those positions. They tried to do so (and ultimately were successful) by filing frivolous grievances with their union and Patel filed an equally frivolous charge of reverse sex discrimination against Dr. Kent with NJTA's Equal Employment

Opportunity (**"EEO"**) office accusing them of wrongdoing. Plaintiffs claim that the Individual Defendants filed these charges to protect themselves from being terminated for poor performance and insubordination for failing to follow the directions of the Individual Plaintiffs. The claims were fully investigated by the DeCotiis Firm on behalf of NJTA and that law firm found they lacked merit.

In response to a R. 4:6-2(e) motion, Plaintiffs cross-moved to disqualify the DeCotiis Firm due to its concurrent conflicts of interest under RPC 1.7(a)(1) and (2) because its representation of NJTA will be directly adverse to its representation of the Individual Defendants and/or there is a significant risk that the representation of the NJTA will be materially limited by the law firm's responsibilities to the Individual Defendants. Moreover, such a concurrent conflict cannot be waived by a public entity such as NJTA. Plaintiffs also cross-moved to disqualify the DeCotiis Firm because its investigation and report clearly make it a necessary witness under RPC 3.7. The trial Court thereafter held oral argument only on the cross-motion.

By Order, dated January 17, 2025, the Court denied Plaintiffs' cross-motion to disqualify without prejudice (the **"Order"**), on the grounds that Plaintiffs' motion was premature. However, for the reasons set forth below, the trial Court erred as the RPCs mandate the disqualification of the DeCotiis Firm at this time. Accordingly, this Court should overturn the trial Court's decision and find that the DeCotiis Firm is disqualified from representing any of the Defendants.

STATEMENT OF FACTS

HMOH contracted with NJTA to provide medical services to NJTA employees at NJTA's offices in Woodbridge, New Jersey. HMOH subcontracted with PMNJ to provide those services. (Pa01, ¶1). PMNJ is owned by Dr. Mellendick, an occupational medicine physician. (Pa02, ¶2). Dr. Mellendick has provided those medical services to NJTA employees since the 1980's. (Pa02, ¶2). PMNJ hired Dr. Kent, an emergency room physician, to assist in providing those services. (Pa02, ¶ 3). In connection with providing the medical services, Dr. Mellendick and Dr. Kent worked with Patel and Spooner, two senior nurses employed directly by NJTA. (Pa02, ¶4).

In September 2023, and as a ploy to protect themselves from being terminated for poor performance and insubordination for failing to perform their jobs as directed by the Individual Plaintiffs, Patel and Spooner filed grievances with their union making all sorts of far-fetched allegations against Plaintiffs. (Pa03, ¶11) Thereafter, on or about September 29, 2023, Patel also filed a baseless charge of reverse sex discrimination and harassment against Dr. Kent with NJTA's EEO Office. (Pa03, ¶11).

In early October 2023, and in response to the grievances and charge, NJTA barred Dr. Kent from the premises, deactivated her badge and indicated that she would be escorted off the premises should she try to work there while the matter was

being investigated. NJTA retained the DeCotiis Firm to investigate the Individual Defendants' claims. (Pa03, ¶12). Reluctantly, Dr. Kent abided by NJTA's wishes. She also cooperated in the investigation and voluntarily agreed to be interviewed by the DeCotiis Firm. (Pa03, ¶ 13). Dr. Kent was interviewed by the DeCotiis Firm on or about December 20, 2023. (Pa03, ¶ 13).

Upon concluding its investigation, NJTA's attorneys sent a letter, dated February 9, 2024, finding that there was no basis for the claims asserted by Patel or Spooner. (Pa03, ¶14). It stated as follows:

> "...Dr. Kent's actions did not amount to discrimination based upon sex nor did it create a hostile work environment based on a protected class. Dr. Kent behaved in a manner consistent with her contract to provide medical services to the Medical Department..."
>
> (Pa03, ¶14).

The letter also notes:

> "their [Patel and Spooner's] behavior was affecting patient care" and "there did not seem to be an understanding of the power dynamic between all individuals working within the Medical Department, which led to problems in the workplace"--it is evident that Patel and Spooner do not understand that intrinsically physicians dictate the plan of care that nurses follow.
>
> (Pa03-04, ¶¶ 14 and 15).

That same day, and based upon these findings, Dr. Mellendick wrote to Daniel McCaffery (**"McCaffery"**), Assistant Director of HR at NJTA, that Dr. Kent had

been out of work for approximately five months and that he intended to have her return to work promptly. (Pa04, ¶16). Dr. Mellendick also spoke to McCaffery that evening by phone, discussing the details of Dr. Kent's return. (Pa04, ¶17). Dr. Mellendick and McCaffery were in agreement that Dr. Kent would return and discussed how to reactivate her badge. (Pa04, ¶17).

This was not the first time a request was made to reinstate Dr. Kent. Dr. Mellendick requested it in an email dated November 8, 2023, and it was requested in a letter from Dr. Kent's former counsel, dated November 10, 2023, indicating that NJTA had no right to remove a physician working on behalf of PMNJ. (Pa04, ¶ 18).

Nevertheless, NJTA ignored its own counsel's findings and continued to bar Dr. Kent from the premises. (Pa04, ¶ 19). In fact, Dr. Mellendick was informed by Mary Elizabeth Garrity, NJTA's HR Director ("**Garrity**"), on or about February 12, 2024, that Dr. Kent was permanently banned and would not be allowed to return to work there, which was inconsistent with what she had previously affirmed would happen. (Pa04, ¶19).

Dr. Mellendick requested a written statement from NJTA as to the reasons for NJTA's action against Dr. Kent but was never provided one even after he wrote to McCaffery on March 6, 2024 that Dr. Kent "continues to be deprived of an income and livelihood…" (Pa04, ¶20). Dr. Kent has not worked at NJTA's office since October 2, 2023, effectively resulting in an unpaid suspension and now termination,

and rewarding the Individual Defendants for having pursued frivolous claims. (Pa05, ¶21). To this day, NJTA has not given any specific reasons to Drs. Mellendick or Kent for barring Dr. Kent from work despite repeated requests. (Pa04-05, ¶¶20-23).

Dr. Kent had not been allowed the opportunity to be heard regarding NJTA's action barring her from the premises. (Pa05, ¶ 23). Moreover, the handling of Dr. Kent's dismissal was contrary to past practices at NJTA. (Pa05, ¶ 23). As to Dr. Mellendick, Patel and Spooner intentionally made things much more difficult for Dr. Mellendick at NJTA both before and after the DeCotiis Firm's findings by, among other things, continuing to challenge him, even with matter-of-fact situations, continuing to not follow his medical directions, inventing conflict, coaching medical staff to increase conflict and portray him in a negative light, and making complaints about him to NJTA's HR department for such alleged things as not working the hours required by PMNJ's contract, not giving enough direction or that his medical direction was incorrect, all of which were totally false. (Pa04-05, ¶¶27-28). The determination relating to the EEO complaint sheds light on some of this harassment of Plaintiffs. (Pa06, ¶29). It states that "there are concerns regarding organization that must be addressed by the Authority," but that never occurred. (Pa06, ¶ 29).

The aforementioned conduct by NJTA and its employees, as condoned by it, caused Dr. Kent and Dr. Mellendick to be in a hostile work environment and caused significant damages to Dr. Mellendick and Dr. Kent. Defendants' actions also caused

emotional distress, damage to their reputations, and probable difficulties with renewing medical licenses, renewing hospital credentials, and obtaining other jobs. (Pa06, ¶30). The aforesaid conduct also tortiously interfered with PMNJ's contractual relationship with the HMOH and with Dr. Kent's contractual relationship with PMNJ. (Pa06, ¶33). In fact, after the PMNJ contract with HMOH expired on September 30, 2024, it was not renewed by HMOH. (See Transcript of January 17 Oral Argument hereafter "January 17 Oral Argument," T4:14-15).

In this litigation, the DeCotiis Firm, representing both NJTA and the Individual Defendants, filed a motion to dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to R. 4:6-2(e). (Pa24). However, based upon its concurrent conflict of interest under RPC 1.7(a)(1) and (2) and that it is a necessary witness, Plaintiffs filed a cross-motion to disqualify the DeCotiis Firm from representing any of the Defendants, which was denied by the trial court. (Pa26-Pa28).

PROCEDURAL HISTORY

On or about June 21, 2024, Plaintiffs filed their Complaint alleging the following counts: (1) tortious interference with PMNJ's contract with HMOH and prospective economic advantage with it and others; (2) tortious interference with contract and prospective economic advantage as to Dr. Kent's relationship with PMNJ; (3) hostile work environment under the New Jersey Law Against Discrimination ("**NJLAD**"); (4) defamation and defamation per se; and (5) intentional and/or negligent infliction of emotional distress. (Pa01-Pa23).

On or about November 18, 2024, the DeCotiis Firm, representing both NJTA and the Individual Defendants, filed a motion to dismiss the Complaint for purported failure to state a claim upon which relief can be granted pursuant to R. 4:6-2(e). (Pa24). In opposition thereto, Plaintiffs filed a cross-motion to disqualify the Decotiis Firm based on conflicts of interest under RPC 1.7(a)(1) and (2) as well as on the ground that the DeCotiis Firm's investigation and report will come under tremendous scrutiny in this case, hence making it a necessary witness under RPC 3.7. (Pa26).

The Court thereafter scheduled only Plaintiffs' cross-motion for oral argument on January 17, 2025; and by Order, dated January 17, 2025, the Court denied Plaintiffs' cross-motion to disqualify without prejudice. (Pa28). By way of Consent

Order, dated January 29, 2025, the parties agreed to stay the action pending the instant appeal. (Pa29-30). By Order dated February 24, 2025, the Appellate Division granted Respondent's motion for leave to appeal. (Pa31-Pa32).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED BY NOT DISQUALIFYING DEFENSE COUNSEL UNDER RPC 1.7

(Order denying cross-motion is located at Pa28)

A. The Legal Standard of Review to Apply to Conflicts of Interest

Appellate assessment of a trial court's decision granting or denying a motion to disqualify counsel presents a question of law subject to plenary de novo review. Trupos, supra, 201 N.J. at 463; Greebel v. Lensak, 467 N.J. Super. 251, 257 (App. Div. 2021); J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 222 (App. Div. 2006). Therefore, a trial court's decision on an attorney's disqualification is not entitled to any special deference on appeal. See e.g., Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995); Dolson v. Anastasia, 55 N.J. 2, 7 (1969); Pearl Assurance Co. v. Watts, 69 N.J. Super. 198, 205 (App. Div. 1961).

While it is true that disqualification of counsel must be used sparingly, Cavallaro v. Jamco Prop. Mgmt, 334 N.J. Super. 557, 572 (App. Div. 2000), a court "must balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose counsel." Twenty-

First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 273-74 (2012) (quoting Dewey, supra, 109 N.J. at 218. "[T]o strike that balance fairly, courts are required to recognize and to consider that 'a person's right to retain counsel of [their] choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement.'" Twenty-First Century Rail Corp., 210 N.J. at 274 (quoting Dewey, 109 N.J. at 218).

Here, as set forth below, the Decotiis Firm has concurrent conflicts of interest under both RPC 1.7(a)(1) and (2) and, therefore, disqualification is required under these circumstances.

B. Defense Counsel Has a Concurrent Conflict Because Its Representation of NJTA Is Directly Adverse to the Representation of the Individual Defendants.

RPC 1.7 is the general rule dealing with an attorney's conflict of interest. RPC 1.7(a)(1) mandates that the DeCotiis Firm must be disqualified because its representation of NJTA is directly adverse to its representation of the Individual Defendants.

RPC 1.7(a)(1) provides as follows:

> (a) Except as provided in paragraph (b),[1] a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

[1] RPC 1.7(b)(1), under certain circumstances, permits clients to waive a conflict. However, as set forth above, the Rule makes clear that a public entity, such as NJTA, cannot consent to any such representation. See also RPC 1.8(1) and 1.9(d).

(1) The representation of one client will be directly adverse to another client.

Here, there can be little doubt that the representation of NJTA will be adverse to the position taken by the Individual Defendants. Therefore, the DeCotiis Firm has an unwaivable conflict. Gray v. Commercial Anim Ins. Co., 191 N.J. Super. 590 (App. Div. 1983).

An attorney does not need to represent one client suing another client for there to be a direct conflict under RPC 1.7(a)(1). The trigger for concern is instead whether there is a manifest particularized divergence between the clients' factual contentions or legal assertions, or the remedies they wish their counsel to advocate. See In re A.S., 447 N.J. Super. 539, 572 (App. Div. 2016). Here, the facts presented demonstrate a clear divergence between NJTA and the Individual Defendants.

The trial judge, who is charged with enforcing the RPCs under R. 1:18, has the duty to both raise a potential conflict, sua sponte, and to consider the issue at an evidentiary hearing if it cannot be raised on the written record. State v. Murray, 162 N.J. 240, 250 (2000). And "[t]he conflicts concerns may be the subject of judicial inquiry even before a "substantial likelihood of prejudice materializes." In re A.S., 447 N.J. Super. 539, 575 (App. Div. 2016).

Significantly, after substantial probing by the trial Court at oral argument, defense counsel conceded that the Individual Defendants did not give informed written consent to the joint representation with NJTA, which is essential under RPC

1.7(b)(1) ("Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: each affected client gives informed consent, confirmed in writing, after full disclosure and consultation...") (See January 17 Oral Argument, T5:15-T14:21). Thus, on its face, there is an undeniable violation of RPC 1.7 as to the Individual Defendants. Furthermore, whether or not the DeCotiis Firm obtained the written consent from the Individual Defendants, the law firm cannot remain in this case, for any of the defendants, because NJTA, a public entity, is barred by the ethics' rules from consenting to any such representation. See RPC 1.7(b)(1).

Nonetheless, the trial Court denied Plaintiffs' cross-motion without prejudice. (See January 17 Oral Argument, T29:3-24). In so holding, the trial Court found that, "[t]here's been nary a document or deposition that's been taken. Maybe when that happens, the issue will crystallize to such a point that your point of view [Plaintiffs] would carry the day." Therefore, the trial Court agreed that conflicts may exist yet denied Plaintiffs' cross-motion. However, for the reasons set forth herein, there are no facts that will be revealed in discovery that cure the conflict issues. It would be a waste of judicial resources for the trial Court to have to case manage this matter while the parties take significant written discovery and depositions, and for the trial Court to hear and decide what is anticipated to be substantial motion practice (including Defendants' pending motion to dismiss) as well as any other work

necessary to advance the case only for the trial Court to ultimately grant Plaintiffs' motion and disqualify the DeCotiis Firm. Accordingly, the DeCotiis Firm should be disqualified now as there is an unmistakable direct, concurrent conflict in violation of RPC 1.7(a)(1).

C. Defense Counsel Also Has A Concurrent Conflict Because Its Representation of One of its Clients Will Be Materially Limited By Its Responsibilities to its Other Clients.

Even if the representation of NJTA is not directly adverse to the representation of the Individual Defendants, because they are not on the opposite sides of the "v", the representation of these parties still is undisputably barred by RPC 1.7(a)(2).

RPC 1.7(a)(2) compels disqualification when representation of one party is "materially limited" due to the representation of another. It provides as follows:

> … a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> . . .
>
> (1) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client …"

Fundamentally, a lawyer owes his or her client the key responsibilities of confidentiality and loyalty. In re Op. No. 653 of the Advisory Comm. On Prof'l Ethics, 132 N.J. 124, 129 (1993). From that duty "issues the prohibition against representing clients with conflicting interests." Id. "The prohibition against lawyer conflicts of interest is intended to assure clients that a lawyer's work will be

characterized by loyalty, vigor, and confidentiality." Restatement (Third" of the Law Governing Lawyers, sec. 122 comment b (2000). The risk in representing clients with conflicting interests is that a lawyer's divided loyalty will result in less vigorous representation of both clients, and that the lawyer will use confidences of one client to benefit the other. A. v. B., 158 N.J. 51, 57 (1999).

Specifically at issue here is the inherent conflict in representing both NJTA, the employer, and the Individual Defendants, two of NJTA's employees, when the DeCotiis Firm was retained by NJTA to investigate those Individual Defendants' claims, found against them, and now, on behalf of the Individual Defendants, must contradict the DeCotiis Firm's own findings to refute Plaintiffs' argument that the Individual Defendants' filing of those same charges was done in bad faith to force Plaintiffs out as medical services providers at NJTA.

What will happen during the trial will further bring home the point that the DeCotiis Firm has a conflict. Plaintiffs will call the attorney at the DeCotiis Firm who conducted the investigation to testify in accordance with its report that the grievances and charge of discrimination filed by the Individual Defendants all lacked merit as part of their proofs that the Individual Defendants intentionally went out of their way to have NJTA terminate Drs. Mellendick and Kent. On the other hand, the Individual Defendants will want the investigator from the DeCotiis Firm to testify that its report is wrong and that the grievances were filed in good faith. Nothing will

be disclosed in discovery to explain away this inherent conflict. While the DeCotiis Firm may argue that at trial it can "thread the needle" and testify that, while no discrimination was found, the claims of the Individual Defendants were filed in good faith, it cannot run away from the language in its report quoted above that cast blame on the Individual Defendants.

RPC 1.7(a) is a provision "rooted in the concept that 'no man can serve two masters.'" State ex. Rel. S.G., 175 N.J. 132, 139 (2003). In short, "if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's … duties to another client, there is a conflict." In re Simon, 206 N.J. 306, 316 (2011).

In re Petition for Review of Opinion 552 of Advisory Comm. On Prof. Ethics, 102 N.J. 194 (1986) involved similar facts to those here and confirms there is a conflict. In that §1983 case, the New Jersey Supreme Court held a government attorney is precluded from representing co-defendant government officers or employees where the facts present an actual conflict of interest or the realistic possibility of such a conflict. Id. at 208. While representing clients on the same side in civil litigation does not always present a conflict, a conflict exists "by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." Id. at 205.

Those situations are all present here. In fact, PMNJ alleges that NJTA and the Individual Defendants tortiously interfered with PMNJ's contract with HMOH and Dr. Kent alleges that NJTA and the Individual Defendants tortiously interfered with her contract with PMNJ. At oral argument, and after repeated questioning from the Court about whether the Individual Defendants signed conflicts' waivers, that defense counsel purposefully was not answering, the DeCotiis Firm finally admitted that it had no such written agreement. Moreover, defense counsel seemed to indicate that informed written consent by the Individual Defendants was not required because the NJTA indemnifies its employees for actions taken within the scope of their employment. (See January 17 Oral Argument, T11:21-T20:15).

However, that does not in any way address the inherent conflict set forth herein. There is no legal authority in support of Defendants' contention that indemnification absolves defense counsel of its duties under the RPC's. Accordingly, disqualification is also warranted here because the DeCotiis Firm's representation of the NJTA materially limits its representation of the Individual Defendants.

POINT II

THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENSE COUNSEL IS A NECESSARY WITNESS

(Order denying cross-motion is located at Pa28)

The DeCotiis Firm also will be a necessary witness in the case and, therefore, should withdraw now as counsel for Defendants. RPC 3.7(a) provides that "[a] lawyer shall not act as an advocate at trial in which the lawyer is a necessary witness …" While there are three limited exceptions, none are applicable here. This RPC authorizes disqualification where the attorney's testimony is "necessary" and "likely". See Michels, New Jersey Attorney Ethics, comment 31:4-1(a) on RPC 3.7 (2012); see also Main Events Prods. V. Lacy, 220 F. Supp. 2d 353, 355 (D.N.J. 2002).

The purpose of RPC 3.7(a) is "to prevent a situation in which at trial a lawyer acts as an attorney and a witness, creating the danger that the factfinder (particularly if it is a jury) may confuse what is testimony and what is argument …" Main Events Prods., 220 F. Supp. 2d at 357. Here, there can be little doubt that the DeCotiis Firm must testify as to the thoroughness of its investigation, the findings in its report as well as information given to it by the Individual Defendants and Dr. Kent, who was interviewed by the DeCotiis Firm.

While the DeCotiis Firm may argue that it is premature to make this determination now, New Jersey courts historically have consistently held that RPC 3.7 begins to operate as soon as the attorney knows or believes that he will be a

witness at trial. In the Matter of Cadillac V8 – 6-4 Class Action, 93 N.J. 412 (1983). That time has already passed.

"The American Bar Association comment 3 to RPC 3.7, the 'advocate-witness rule,' notes that "combining the roles of advocate-witness can prejudice the tribunal and the opposing party." Escobar v. Mazie, 460 N.J. Super. 520. 526-527 (App. Div. 2019). "Because '[a] witness is required to testify on the basis of personal knowledge, while an advocate on evidence given by others', a jury may not understand 'whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." Id. at 527.

At oral argument, Plaintiffs' counsel underscored the inherent ethical conflict on this issue:

> Mr. Abbate was talking about management prerogative and the Turnpike Authority acted appropriately. That's where his bread is buttered. And that's the party he's trying to protect here. But he's ignoring the fact that the two nurses are going to have their lawyers . . . get on the witness stand and say that . . . Nurse Patel's allegations were not supported . . . And they're gonna have their lawyer get up on the witness stand, when they are being accused, especially Nurse Patel, of filing a fraudulent, unsupportable claim against Dr. Kent. And their lawyer [is] gonna get on the stand and say there's no basis for that charge? How – how does that color the position of the two nurses when their own lawyer is getting on the stand and – and essentially burying them in the case?
>
> [See January 17 Oral Argument, T26:19-T27:20].

Therefore, for the reasons set forth above, the DeCotiis Firm is a necessary party to this action and should be disqualified.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant their appeal, find that the DeCotiis Firm has a concurrent conflict, and order that it not represent any defendant in this action.

Respectfully submitted,
MANDELBAUM BARRETT PC
Attorneys for Plaintiffs-Appellants

By: */s/ Steven I. Adler*
Steven I. Adler

Dated: June 5, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PREVENTIVE MEDICINE OF NEW JERSEY, GEORGE MELLENDICK, M.D. and KRISTEN KENT, M.D., Plaintiffs-Appellants, v. NEW JERSEY TURNPIKE AUTHORITY, DISHANT PATEL, R.N. and KAREN SPOONER, R.N. Defendants-Appellees.	DOCKET NO: A-001805-24 CIVIL ACTION **On Interlocutory Appeal from an Order of the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. MID-L-3637-24** Sat Below: Hon. Alberto Rivas, J.S.C.

DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO APPEAL

DECOTIIS, FITZPATRICK, COLE & GIBLIN, LLP
61 S. Paramus Road, Suite 250
Paramus, New Jersey 07652
(201) 928-1100 |
whamilton@decotiislaw.com
Attorneys for Defendants New Jersey Turnpike Authority, Dishant Patel, R.N., and Karen Spooner, R.N.

On the Brief:

Thomas A. Abbate, Esq. (Attorney ID# 015552002)
William J. Hamilton, Esq. (Attorney ID# 355612021)

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PRELIMINARY STATEMENT

Plaintiffs Preventive Medicine of New Jersey ("PMNJ"), Dr. George Mellendick, M.D., and Dr. Kristen Kent, M.D., allege in this interlocutory appeal that the trial court improperly rejected Plaintiffs' argument that DeCotiis, FitzPatrick, Cole & Giblin, LLP's (the "DeCotiis Firm") representation of the New Jersey Turnpike Authority ("NJTA") as an entity conflicts with its representation of two employees, Dishant Patel, R.N. and Karen Spooner, R.N. (the "Nurse Defendants") under RPCs 1.7(a)(1) and 1.7(a)(2), and further that the "DeCotiis Firm" is a "necessary witness" under RPC 3.7 and therefore not permitted to represent any defendants in this lawsuit.

Simply put, these purported conflicts have no basis in fact or law and have been manufactured by Plaintiffs in a retaliatory attempt to stave off dismissal and ultimately frustrate Defendants' ability – through their longtime outside general counsel law firm – to respond to the baseless claims in the Complaint. The lower court judge hearing the motion now under review carefully weighed the arguments of both sides, correctly determined that Plaintiffs failed to demonstrate the existence of a conflict, and denied Plaintiff's motion without prejudice. The same result should obtain here.

First, Plaintiffs' assumptions regarding Defendants' intended defenses in this lawsuit are inaccurate, and the premise upon which Plaintiffs' conflict argument is

based is both speculative and misguided. NJTA's position is *not* that the internal investigation into the Nurse Defendants' complaints exonerated Dr. Kent of any misconduct, but rather that the investigation made the narrower finding that the facts occurred as alleged yet did not demonstrate violations of the LAD. Nevertheless, NJTA, as the employer of the Nurse Defendants, determined that Dr. Kent's behavior was inappropriate, that she was a poor manager, and that she disrupted the administration of health care to NJTA employees, and thus barred her from continuing to work on NJTA premises.

Thus, NJTA *agreed* that the Nurse Defendants' claims were serious and warranted action as a contractual matter, and there is no conflict between the DeCotiis investigative report and the defenses to be asserted at trial. That is, the mere fact that Dr. Kent did not engage in discrimination or create a hostile work environment is not in derogation of the agency's right to advise a subcontractor that its employee is disruptive and no longer welcome on NJTA's premises. That is NJTA's contractual prerogative with respect to the conduct of a vendor, and it is notable that there is no claim or assertion in this matter that NJTA did not have a contractual right to take such action. NJTA's authority to do so as a matter of contractual discretion is undisputed.

Second, Plaintiffs assert that defense counsel did not obtain the necessary written conflict waivers after consulting NJTA and the Nurse Defendants regarding

a joint representation and overall legal strategy, which is: (i) not the case (see Certifications attached hereto), and (ii) immaterial, as no conflict exists under RPC 1.7. Defendants have been duly apprised of the risks and benefits in proceeding with a joint representation, and the litigants here are entitled to their counsel of choice.

Third, even if there were separate law firms representing each defendant, because NJTA is indemnifying its employees as per agency policy, engaging separate counsel for the Nurse Defendants at NJTA's expense would needlessly create additional costs while changing nothing from the standpoint of legal advocacy. The Nurse Defendants are non-supervisory employees, were acting within the scope of their employment, and had a good faith basis to bring their internal concerns about Dr. Kent to light. NJTA has no basis on this record to conclude otherwise and, consequently, NJTA is obligated under its indemnification policy to defend them and thus all of the Defendants have an interest in raising consistent defenses at trial.

Finally, Plaintiffs allege that the "DeCotiis Firm" cannot represent NJTA because two attorneys at the firm are potential fact witnesses, but that argument is contrary to the plain text of RPC 3.7(b). Simply put, a "firm" cannot testify at trial, and, in any event, Defendants' litigation and trial counsel in this matter are not percipient fact witnesses. Plaintiffs' arguments are thus without merit, and the decision below should be affirmed.

PROCEDURAL HISTORY

Plaintiffs filed the instant lawsuit on June 21, 2024, alleging causes of action for tortious interference with contract and prospective economic advantage, defamation, intentional and negligent infliction of emotional distress, and hostile work environment under the LAD. Defendants filed a motion to dismiss Plaintiffs' Complaint in its entirety for failure to state a claim on November 18, 2024. Defendants raised several meritorious arguments in support of their dismissal motion, most notably that Plaintiffs failed to file a notice of tort claim – an unwaivable statutory prerequisite to filing a tort suit against a public entity – and were outside of the one (1) year time period within which a late notice of claim could be filed with judicial approval. (See Da001-002; Plaintiffs' late notice of claim, dated December 2, 2024, after the filing of Defendants' motion to dismiss). Defendants also moved to dismiss Plaintiffs' hostile work environment claim on the basis that Plaintiffs are not and have never been employees of NJTA, and therefore lack standing to assert a claim for employment discrimination.

In response to the dismissal motion, on December 10, 2024, Plaintiffs filed opposition and a cross-motion to disqualify counsel. The lower court subsequently determined to hold the motion to dismiss in abeyance until disposition of the cross-motion to disqualify. Oral argument on the cross-motion to disqualify was held on January 17, 2025, and the court's Order denying Plaintiffs' motion issued the same

day. (Pa24). In his bench ruling explaining his denial of Plaintiffs' cross-motion, the motion judge (Hon. Alberto Rivas, J.S.C.), recognized that "employers representing themselves and employees with the same lawyer happens all the time," and determined that the record was insufficient to support Plaintiff's contention that the DeCotiis Firm's joint representation creates an actual conflict. (T29).

Also at oral argument, for the first time, the motion judge and opposing counsel raised the issue of whether the Nurse Defendants had consented to a joint representation in a signed writing, as is required to waive an existing conflict under RPC 1.7(b)(1). (T5-T15). During the colloquy at argument, Defense counsel stated that because no conflict exists, a conflict waiver was not necessary and it would be superfluous to obtain a formal, written conflict waiver. (T5-T15). Further, Defense counsel expressed the concern that revealing internal discussions amongst Defendants and their counsel in open court would intrude upon the attorney-client privilege. (Id.).

Nevertheless, Defense counsel advised the Court, within the limits of attorney-client privilege, that pursuant to NJTA's employee indemnification policy the Nurse Defendants had duly tendered the claim to NJTA, that NJTA thereafter assigned the defense to the DeCotiis Firm, and that an underlying attorney-client relationship existed pursuant to a professional services agreement between NJTA and the DeCotiis Firm. (T5-T15). Indeed, the DeCotiis Firm is NJTA's long-standing

outside general counsel and has a decades-long relationship with the agency. Counsel further explained that he had discussed the strategic benefits, detriments and risks of a joint representation with Defendants and assured the Court that the Defendants had made a knowing and voluntary election to proceed with joint counsel. (Id.).

Following that discussion, the motion judge accepted Defendants' explanation and rejected Plaintiffs' argument. (T29-T31). Thereafter, the lower court entered an Order denying the cross-motion to disqualify, and the parties agreed via Consent Order to stay the case pending resolution of Plaintiffs' motion for leave to appeal. (Pa25-26). Consequently, NJTA's dismissal motion remains pending, but unheard and unadjudicated below.

After Plaintiffs filed their motion for leave to appeal, in which they re-raised the issue of all Defendants' consent to joint representation (Appellant's Brief in Support of Motion for Leave to Appeal, p. 18), Nurses Patel and Spooner submitted certifications affirming their "consent to DeCotiis's continued representation in connection with this lawsuit" and noting that they "have been fully apprised of the planned defense strategy." (Da004, Da011). Defendants also submitted a Certification from Thomas F. Holl, Esq., the Director of Law at NJTA, confirming that NJTA has likewise been apprised of the joint trial strategy and agreed with the approach. (Da018). The Nurse Defendants are aware that, should circumstances

change during the course of the litigation, they may exercise their right to obtain new counsel and have same appointed by NJTA. (Da005, Da012). As Plaintiffs have again raised the issue of written consent in their moving brief (Pb12-13, 17), Defendants re-attach the above-mentioned certifications here.

The Appellate Division granted Plaintiffs' motion for leave to appeal on February 24, 2025.[1]

STATEMENT OF FACTS

A. The Parties

NJTA is a public transportation agency employing thousands of individuals to maintain, operate, and manage its roadways throughout the State, including the New Jersey Turnpike and Garden State Parkway. To address the many issues that arise with respect to occupational health and safety, NJTA has long operated a medical clinic for its employees from its headquarters in Woodbridge, New Jersey. The clinic is staffed by two registered nurses employed directly by NJTA, Nurse Spooner and Nurse Patel[2]. Additionally, NJTA entered into a contract with a major hospital system, Hackensack Meridian Health ("HMH"), which in turn subcontracted with

[1] Contrary to R. 2:9-1(a), which dictates that the Appellate Division holds exclusive jurisdiction over a matter during the pendency of an appeal, Plaintiffs filed an "amended complaint" on April 21, 2025. Defendants filed a letter objecting to the filing and intend to respond to the pleading following disposition of this appeal.

[2] As of February 21, 2025, Nurse Patel voluntarily resigned from NJTA to pursue another employment opportunity.

PMNJ, to provide a physician to oversee, supervise, and staff the clinic during certain specified hours. (Da024-036).

Plaintiff Dr. George Mellendick, M.D., is the principal of PMNJ. Subsequent to the contract award, Dr. Mellendick hired or contracted with plaintiff Dr. Kristen Kent, M.D., to provide the services due under the subcontract at certain times when Dr. Mellendick was not available or did not wish to work at the NJTA clinic. The relationship between NJTA and PMNJ is governed solely through the contract between NJTA and HMH, and by extension through PMNJ's subcontract with HMH. Neither Dr. Mellendick nor Dr. Kent are employees of NJTA; rather, they are simply the principal in, and an employee or agent of a subcontractor, respectively, to an NJTA vendor, HMH.

B. Plaintiffs' Complaint

Dr. Mellendick, as the principal of PMNJ, is the "lead physician contractually responsible for clinical oversight of all occupational health staff" at the NJTA clinic. (Pa02). For PMNJ's work on behalf of NJTA, Dr. Mellendick is charged with supervising healthcare professionals employed by his own medical practice entity and by NJTA. (Id.). According to Plaintiff's Complaint, two such NJTA employees, Nurses Patel and Spooner, engaged in "inappropriate conduct" under Dr. Mellendick's supervision (id.), of which Dr. Mellendick complained "several times" to NJTA's Director of Human Resources, Mary Elizabeth Garrity. (Pa03). Patel and

Spooner are alleged to have acted "to undermine patient care, physicians' reputations, and relationship with the NJTA, PMNJ and HMOH." (Pa03).

The alleged "disruptive" conduct culminated in September 2023 and, in fact consisted of Patel and Spooner exercising their statutory and contractual rights to file an internal grievance with NJTA through their union about PMNJ's management of the clinics and Patel filing a discrimination charge against Dr. Kent with NJTA's EEO office. (Pa03). In accordance with its EEO policy, in October 2023, NJTA promptly undertook an internal investigation of Nurse Patel's discrimination complaint. Under NJTA's EEO policy, any investigative findings are first submitted to the in-house Director of Law for review and comment and, upon approval, are forwarded to the Executive Director for consideration and implementation of any remedial action. The investigation was undertaken by two labor attorneys at the DeCotiis Firm acting as outside investigators.

While the investigation was being undertaken, because the parties worked in close proximity to each other, to avoid any potential conflict or retaliatory action, NJTA instructed HMH and PMNJ that Dr. Kent would not be permitted to render contractual services at NJTA's facility until the completion of the investigation. (Pa03). During the investigative process, the investigative team considered the documentary record, interviewed, among others, Dr. Mellendick, Dr. Kent, Nurse

Spooner, and Nurse Patel, and then rendered a fact-finding report to NJTA's Director of Law.

At the conclusion of the investigation and upon receipt of the final EEO report, on or about February 9, 2024, NJTA issued a written determination that Dr. Kent's actions "did not amount to discrimination based upon sex nor did [she] create a hostile work environment based on a protected class." (Pa03). Nevertheless, upon review of the EEO report and further consideration by NJTA management, it was determined that there was a personality conflict, non-discriminatory hostility between Dr. Kent and NJTA's employed nurses, and suboptimal management of the clinic by PMNJ that required remediation.

Based upon the finding that the charge of discrimination under the LAD was not sustained, Dr. Mellendick subsequently requested that NJTA reinstate Dr. Kent as a permissible service provider under the contract. (Pa04). However, on or about February 12, 2024, NJTA reiterated that due to the existence of workplace conflict, the best interests of patients dictated that Dr. Kent would no longer be permitted to render services under the PMNJ subcontract and that the agency would be moving in a different direction. NJTA requested that HMH and PMNJ identify and supply a different physician from within their practice in order to continue servicing the subcontract. HMH complied and additional physician coverage was duly provided.

The Complaint then alleges that after resolution of the EEO complaint, Patel and Spooner "have become more audacious" since Dr. Kent was excluded as a contract service provider. (Pa05). In particular, Plaintiffs allege that "Patel and Spooner continue to not follow medical direction, invent conflict, coach HMHOH [sic] medical staff in order to increase conflict and portray Dr. Mellendick in a negative light, make complaints about him to NJTA's HR department for such things allegedly as not working the hours required by PMNJ's contract, not giving enough direction as the Medical Director or that his medical direction is incorrect." (Pa05-06).

Upon receipt of the lawsuit, NJTA considered and ultimately did not credit PMNJ's allegations. Nevertheless, after this suit was filed, HMH made the unilateral decision to terminate its subcontract with Dr. Mellendick and PMNJ. HMH now services the contract directly and provides physician coverage from its own healthcare system to oversee and supervise the onsite medical clinic. There have been no further conflicts or internal complaints from NJTA staff since HMH terminated PMNJ's subcontract.

C. Defendants' Joint Representation

As the employer of the Nurse Defendants, NJTA is obligated by virtue of an internal policy to indemnify the Nurse Defendants in lawsuits against them arising out of their employment. (Da007-009). Further, whether or not the Nurse Defendants

are assigned separate counsel, NJTA remains liable for their actions under common law *respondeat superior* principles. As a matter of practical necessity, NJTA and the Nurse Defendants must be allied in their defense of this lawsuit, as NJTA is funding defense costs and any underlying liability finding.

In support of their argument below for disqualification, Plaintiffs posited the alleged conflict as arising from their perception that "it is in NJTA's best interest to claim that the investigation the DeCotiis Firm performed on its behalf found no discrimination or harassment in its workplace," thus distancing itself from and blaming the nurses for any alleged misconduct towards PMNJ's physicians. (Pb7). On the other hand, Plaintiffs speculated that, in order to defend their tortious conduct, the Nurse Defendants must take the contrary position that the discrimination did take place and thus the EEO charge should have been sustained. (Id.).

In their papers and at oral argument below, Defendants provided assurances to the court and explained that Plaintiffs' speculative conclusions with respect to anticipated defense strategy were incorrect and inapposite. (T21). First of all, there was not a factual conflict amongst the Defendants' positions. (T22). The DeCotiis Firm had determined through the EEO process that the primary facts were undisputed, and in its fact-finding role largely credited the narrative set forth by the Nurse Defendants. (Id.). As to the Defendants' legal positions during the EEO

investigation phase, it was correct that the DeCotiis Firm determined that discrimination within the meaning of the LAD had not occurred, and thus recommended that the charges be closed as unsustained. There was simply no causal nexus between any conduct perpetrated by Dr. Kent and Nurse Patel's membership in a protected class.

However, defense counsel advised the lower court that the decision to close the EEO investigation as unsustained, while crediting the essential facts, was not in conflict with the Nurse Defendants' position. In fact, the Defendants were on the same page and NJTA supported the Nurse Defendants with regard to their underlying concerns about the clinic as well as their entitlement to file internal complaints. Irrespective of the finding as to LAD discrimination, NJTA management determined that Dr. Kent was not a good fit for this clinical setting, did not work well with NJTA staff and thus exercised the agency's contractual prerogative to demand that HMH supply a different service provider. (T24).

NJTA's decision, which is justifiable with sole reference to the governing agreement, is not rationally related to, nor is it in conflict with the ultimate legal disposition of Nurse Patel's EEO complaint. Defense counsel also noted below that the Nurse Defendants accepted the dismissal of the EEO complaint, and did not file suit against NJTA for employment discrimination, thus reflecting a lack of direct adversity with respect to the outcome of the investigation.

To like effect, NJTA argued below that although it did not sustain the EEO charge, it accepted that Nurse Patel brought his complaint in good faith and that both nurses had an entitlement to file grievances and petition their employer for relief. (T23). Similarly, both NJTA and the Nurse Defendants advised the lower court of their intention to take the position that Plaintiffs' reciprocal claims of LAD discrimination brought in this suit were entirely without merit because neither Dr. Mellendick nor Dr. Kent were NJTA employees and such claims are the subject of the pending, but unadjudicated motion to dismiss.

In sum, and contrary to Plaintiffs' argument, NJTA asserted that it did not intend to blame the Nurse Defendants or attempt to shift liability to them for any conduct occurring below. NJTA believed that the Nurse Defendants acted appropriately and had a right to file internal complaints and grievances. Similarly, the Nurse Defendants did not assert any discrimination claim against NJTA and did not dispute the outcome of the EEO investigation. Thus, there was no positional conflict amongst the Defendants.

Plaintiffs also argued below, and before this Court, that the "DeCotiis Firm" was a witness in the case and thus none of the firm's lawyers could represent Defendants in the subsequent litigation. (T27). In this regard, NJTA advised the lower court of factual errors in Plaintiffs' argument and explained how NJTA retains and uses outside counsel. Specifically, in addition to acting as NJTA's longtime

outside general counsel and litigation counsel, the DeCotiis Firm serves as outside labor counsel to NJTA. (T11-T12). Different individuals within the DeCotiis Firm staff these assignments and have distinct areas of responsibility. Here, employment attorneys from the DeCotiis Firm – Arlene Q. Perez and Kimberlin Ruiz – led the investigation arising from the EEO complaint filed by Nurse Patel.

The DeCotiis attorneys who performed the investigation are not the same attorneys representing Defendants in this litigation, and Defendants' litigation and trial counsel were not involved in the investigation or even aware of it until this litigation was filed[3]. Following Plaintiffs' initiation of this suit, and the Nurse Defendants' tender of the lawsuit to NJTA, the Director of Law assigned the defense to litigation counsel at the DeCotiis Firm. In response, the DeCotiis Firm erected an internal wall to prevent the employment attorneys who conducted the investigation from accessing the firm's files concerning this litigation. There was thus no risk that any attorney representing Defendants in the litigation would become a potential trial witness.

The motion judge heard argument, accepted that there was no immediate inconsistency with, or conflict between the positions of NJTA and the Nurse Defendants, and thus denied the motion without prejudice. (Pa24). This interlocutory

[3] Ms. Ruiz has since voluntarily resigned from the DeCotiis Firm to pursue another employment opportunity.

appeal followed. This Court should reach the same conclusion, and the decision below should be affirmed in all respects.

LEGAL ARGUMENT

POINT I

DEFENSE COUNSEL DOES NOT HAVE A CONCURRENT CONFLICT OF INTEREST AND SHOULD NOT BE DISQUALIFIED.

On a motion for disqualification, plaintiffs bear the initial burden of production; if met, the burden shifts to the attorneys sought to be disqualified to demonstrate the lack of a conflict, although plaintiffs retain the burden of proof and must meet all elements of the applicable Rules of Professional Conduct. City of Atl. City v. Trupos, 201 N.J. 447, 462-63 (2010) (citing N.J. Div. of Youth & Family Servs. v. V.J., 386 N.J. Super. 71, 75 (Ch. Div. 2004)). The trial court's decision denying plaintiffs' motion to disqualify counsel is subject to *de novo* review on appeal. Id. at 463. Nevertheless, the lower court judge correctly assessed the available facts and reached the only result sustainable under applicable law. The decision should accordingly be affirmed in all respects.

RPC 1.7(a) bars attorneys from representing a client "if the representation involves a concurrent conflict of interest." The rule further states that a concurrent conflict of interest exists if either "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one

or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." Id. The rule is premised upon the concept that "[n]o man can serve two masters." State ex rel. S.G., 175 N.J. 132, 139 (2003). Therefore, "when [jointly represented parties'] interests become adverse, counsel is required to completely withdraw from the representation of each client." McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 497 (App. Div. 2011).

Our Supreme Court has recognized that the "evaluation of an actual or apparent conflict ... does not take place in a vacuum, but is, instead, highly fact specific." In re State Grand Jury Investigation, 200 N.J. 481, 491 (2009) (quoting State v. Harvey, 176 N.J. 522, 529 (2003)). A conflict must be based on the actual circumstances presented, not on a "fanciful possibility." Ibid. The Supreme Court has also recognized that "disqualification motions are often made for tactical reasons," distinguishing such motions from those "made in the best of faith." Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988). Motions for disqualification are thus "viewed skeptically in light of their potential abuse to secure tactical advantage." Escobar v. Mazie, 460 N.J. Super. 520, 526 (App. Div. 2019).

A motion for disqualification calls for the reviewing court to "balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel." Twenty-First Century

Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 273-74 (2012) (quoting Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988)). While a client's interest in having the counsel of his or her choosing does not trump the importance of professional standards, disqualification of counsel is nonetheless "a harsh discretionary remedy which must be used sparingly." Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC, 471 N.J. Super. 184, 192 (App. Div. 2022). Where joint representation engenders a "significant likelihood of prejudice," a reviewing court may elect to conduct an evidentiary hearing to assess the purported conflict. State v. Murray, 162 N.J. 240, 249–50 (2000). However, that circumstance arises primarily in the criminal context, not in the civil context, see State v. Bell, 90 N.J. 163, 171 (1982), and especially not where civil defendants assert alignment on defense strategy. (See Da004, Da011; the Nurse Defendants "consent to DeCotiis's continued representation in connection with this lawsuit and have been fully apprised of the planned defense strategy").

Plaintiffs' motion to disqualify, filed prior to the interposition of an answer or any exchange of discovery, is premised entirely on speculation and was clearly made without any knowledge of Defendants' actual positions in this litigation. Rather than wait to receive Defendants' responses to the allegations by way of answer – assuming this case survives Defendants' still-pending motion to dismiss – Plaintiffs have elected to choose Defendants' legal positions for them. As a result, Plaintiffs'

motion to disqualify and now this appeal are clearly impermissible tactical maneuvers designed to deprive Defendants of their counsel of choice, a law firm that has a relationship with NJTA which stretches back for decades. The motion to disqualify is based on a "fanciful possibility" concocted by Plaintiffs, rather than the actual defenses to be asserted in this case.

In support of their disqualification argument, Plaintiffs highlight a February 9, 2024 letter addressing the internal discrimination complaint filed by Nurse Patel, and allege that this letter proves that Plaintiffs did nothing wrong.[4] (Pb4). Under Plaintiffs' logic, NJTA is necessarily in conflict with the Nurse Defendants because NJTA determined that the Nurse Defendants' complaints did not demonstrate violations of the LAD. To prove their point, Plaintiffs selectively quote from the aforementioned letter to show: (1) "Dr. Kent's actions did not amount to discrimination based upon sex," nor create a hostile work environment; (2) the Nurse Defendants' "behavior was affecting patient care"; and (3) "Patel and Spooner do not understand that intrinsically physicians dictate the plan of care that nurses follow." (Pb4).

[4] Plaintiffs notably did not attach this letter to the certification of counsel submitted in support of their motion to disqualify, nor have they attached it to this appeal. (See Pa01-28). A copy obtained by Defendants differs in at least one important respect, as it does not include the phrase, "it is evident that Patel and Spooner do not understand that intrinsically physicians dictate the plan of care that nurses follow."

Even assuming Plaintiffs' transcription of the letter is accurate and not lacking important context, the statements do not support Plaintiffs' argument for disqualification. The first statement simply represents NJTA's position as to the Nurse Defendants' internal claim of LAD discrimination, and is not an exoneration of Plaintiffs, while the second statement is a summary of the allegations made by Dr. Kent and does not represent NJTA's opinion on the matter. (See Da004, Da011; the Nurse Defendants recognize NJTA management's legal conclusions with respect to their LAD complaints and NJTA management's agreement with the Nurse Defendants on their factual assertions). The third statement, that the Nurse Defendants misunderstand the nature of the physician-nurse relationship, is somewhat critical of the Nurse Defendants, but completely overlooks the fact that NJTA determined that it was Dr. Kent's behavior that warranted sanction, not the behavior of the Nurse Defendants. It bears noting that NJTA recognized that the criticism of the Nurse Defendants in the context of the physician-nurse relationship was tempered by the fact that the nurses are NJTA employees with a separate line of supervision and reporting than the physicians, who are independent contractors. Sorting out those overlapping lines of authority and devising the best options for staffing the clinic going forward is a matter for internal resolution and was a key, ongoing business issue between NJTA and HMH-PMNJ.

To establish a hostile work environment under the LAD, a claimant must demonstrate that a reasonable person would consider the discriminatory harassment the claimant experienced "sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment." Lehmann v. Toys R Us, Inc., 132 N.J. 587, 603 (1993). A "hostile work environment" is illegal, but an "annoying work environment" is not. Herman v. Coastal Corp., 348 N.J. Super. 1, 23 (App. Div. 2002). However, in an employment at will situation, so long as it is not otherwise unlawful, an employer need not condition its decision to terminate an employee on that individual's conduct having created a hostile work environment. Rather, any conduct that disrupts the workplace may provide grounds to terminate or suspend a working relationship with the offending individual.

Similarly, in the case here, where the relationship between NJTA, PMNJ, and Dr. Kent was governed through a prime contract with HMH and a subcontract with PMNJ, NJTA is free to associate or disassociate itself with a vendor or its employee so long as such decision is consistent with the parties' contractual rights and obligations. There is no contention in this suit that NJTA undertook any action contrary to its contract with HMH, which NJTA can terminate for convenience at any time. Further, there is no plausible basis to assert that Dr. Kent was anything

more than an employee or independent contractor of PMNJ – in turn, a subcontractor of a vendor, HMH – and not an employee of NJTA.

Plaintiffs baldly assert that the "Individual Defendants will claim that they acted appropriately and brought meritorious claims in their grievances and charge of discrimination to NJTA's EEO Office and that the DeCotiis Firm's conclusions in its report are wrong." (Pb8). This assertion assumes that NJTA's conclusion that the Nurse Defendants' claims did not rise to the level of employment discrimination and the Nurse Defendants' assertion that their claims were meritorious are mutually exclusive – which they are not – and further assumes that the Nurse Defendants must challenge the DeCotiis Firm's findings to defend against LAD claims *brought by Plaintiffs*, which are themselves unmeritorious and subject to a pending motion to dismiss. (See Da004, Da011; NJTA management "credited the factual assertions and concerns raised by" the Nurse Defendants).

The Nurse Defendants have not reasserted their LAD claims against Plaintiffs in this litigation, nor do they need to reassert such claims to defend themselves here. The Court can easily infer based upon this action that the Nurse Defendants accepted the report's finding of non-discrimination. NJTA, on the other hand, does not dispute that Dr. Kent engaged in conduct that justified NJTA's decision to exclude her as a service provider as a matter of contract, and therefore *agrees* with the Nurse Defendants that her conduct was inappropriate or disruptive in a manner other than

actionable discrimination contrary to the LAD. That the DeCotiis Firm determined Dr. Kent's behavior did not amount to discrimination does not mean the DeCotiis Firm disagreed with the Nurse Defendants that wrongdoing occurred.

In support of their disqualification argument, Plaintiffs rely heavily on Matter of Petition for Rev. of Opinion 552 of Advisory Comm. on Pro. Ethics, 102 N.J. 194 (1986), a narrow Supreme Court opinion that deals specifically with joint representation of municipalities and municipal employees in civil rights suits brought under 42 U.S.C. § 1983. (Pb16-17). The Court there determined that, in a § 1983 action, "a government attorney is precluded from representing co-defendant government officers or employees only where the allegations or the facts as developed present an actual conflict of interests or the realistic possibility of such a conflict," and recognized there should nonetheless be no *per se* bar against joint representation in such a scenario. Id. at 208. To the extent Rev. of Opinion 552 is applicable to a suit against a state entity and its employees for claims sounding in tort and the LAD, the following passage sets forth the appropriate standard:

> We rule that in situations in which there is no actual conflict of interests, or the likelihood of an actual conflict of interests is remote and poses no realistic threat to the effective representation of such multiple defendants, an attorney should not be prohibited from representing both parties. We rule further that in cases where there is a potential conflict of interests joint representation may be allowed, provided the guidelines of our current Rules of Professional Conduct are followed by the attorney furnishing such joint representation. [Id.].

As the "likelihood of an actual conflict of interests is remote," and, in fact, manufactured by Plaintiffs for purposes of this motion, Rev. of Opinion 552 does not provide a basis to disqualify the DeCotiis Firm from representation. Based upon these principles, the lower court properly concluded that joint representation of an employer and its employees for conduct arising in the course of employment is a routine and, indeed, unremarkable feature of litigation that prevents no cause or basis for disqualification.

Finally, Plaintiffs make much ado about the fact that defense counsel represented to the trial court that the Nurse Defendants "did not give informed written consent to the joint representation with NJTA." (Pb12). This argument is simply a red herring. As RPC 1.7(b)(1) makes clear, written consent waiving a conflict is only required *where a conflict actually exists*. Just a few sentences later, Plaintiffs concede that this provision of the rule does not even apply in the instant case, because a public entity cannot consent to representation involving a concurrent conflict of interest. RPC 1.7(b)(1). As to the law itself, Defendants are in agreement with Plaintiff – NJTA, as a public entity, is unable to waive a concurrent conflict of interest where one exists, even if NJTA and the other conflicted parties give informed consent in writing. However, there is no conflict here, making Plaintiffs' entire argument inapposite. Further, as explained at argument, at least some of the motion judge's questioning of counsel at argument treaded close to the line of

seeking disclosure of attorney-client privileged discussions, which resulted in some amount of verbal sparring that Plaintiffs latch onto to imply that defense counsel was not forthcoming. This assertion is meritless.

As the issue of obtaining a conflict waiver or acknowledgement of joint representation was not raised in Plaintiffs' moving papers in the trial court, Defendants did not have the opportunity to address same until oral argument on the motion. Following the Law Division judge's denial of Plaintiffs' motion, Plaintiffs filed a motion for leave to appeal, in which Plaintiffs affirmatively raised the purported "consent" issue, prompting Defendants to attach the Certifications of Dishant Patel, R.N., Karen Spooner, R.N., and Thomas F. Holl, Esq. to Defendants' opposition to Plaintiffs' motion for leave to appeal. (Da003-023). Defendants re-attach those certifications to this opposition, and note that they dispel once and for all any purported issue with Defendants' joint representation. All of the Defendants have been fully apprised of the risks and benefits of a joint representation and are entirely on board with the intended defense strategy. Further, Defendants note that Nurses Patel and Spooner are aware that they may exercise their right to obtain new counsel at any time. (Da005, Da012).

As the key facts are undisputed as between NJTA and the Nurse Defendants, there is no conflict in the DeCotiis Firm's representation of Defendants, and the lower court's resolution of the motion below should be affirmed.

POINT II

DEFENSE COUNSEL ARE NOT NECESSARY WITNESSES, AND THE TESTIMONY OF CERTAIN DECOTIIS ATTORNEYS AT TRIAL DOES NOT PRECLUDE OTHER ATTORNEYS AT THE FIRM FROM REPRESENTING DEFENDANTS AT TRIAL.

Next, Plaintiffs make the ill-considered argument that the "DeCotiis Firm also will be a necessary witness in the case and, therefore, should withdraw" because it may be called as a witness at trial. (Pb18). However, the "DeCotiis Firm" is an inanimate entity and not a witness, and the mere fact that a labor attorney in the firm was involved in the investigation of the Nurse Defendants' internal complaint does not serve as a basis to disqualify the entire law firm. In this regard, RPC 3.7(a) prevents a lawyer from acting "as advocate at a trial in which the lawyer is likely to be a necessary witness," and sets forth three exceptions to that rule. The rule is specific to trial advocacy: "an attorney who will testify at trial need not be disqualified from participating in pre-trial matters." Main Events Prods., LLC v. Lacy, 220 F. Supp. 2d 353, 356 (D.N.J. 2002). Under RPC 3.7(b), "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9." Plaintiffs, in their motion, do not even address RPC 3.7(b), seemingly because a plain reading of the text demonstrates the frivolousness of Plaintiffs' argument.

Instead, Plaintiffs argue that "the DeCotiis Firm must testify as to the thoroughness of its investigation, the findings in its report as well as information given to it by the Individual Defendants and Dr. Kent, who was interviewed by the DeCotiis Firm, among other things." (Pb18). Obviously "the DeCotiis Firm" cannot testify at trial – only a representative of the firm may. Cf. R. 4:14-2 (stating that a party may name a private corporation or partnership as a deponent, in which case the "named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf"). Plaintiffs' argument on this point is therefore misplaced.

The only possible witnesses from the DeCotiis Firm who *could* be called at trial are the attorneys who undertook the investigation into the Nurse Defendants' complaints, Arlene Quiñones Perez and Kimberlin Ruiz, neither of whom are Defendants' trial counsel, and the latter of which is no longer employed by the firm. Although Defendants recognize that possibility in the hypothetical sense, Ms. Perez and Ms. Ruiz are not actually appropriate fact witnesses. Their investigative report is comprised entirely of legal conclusions and hearsay, neither of which would be admissible at trial. Ms. Perez and Ms. Ruiz do not possess first-hand knowledge of any relevant facts. If Plaintiffs wish to obtain relevant and admissible fact testimony, then they should depose the percipient witnesses to the events at issue and not NJTA's lawyers.

If the Court construes Plaintiffs' motion broadly and interprets their argument as encompassing one of the exceptions to RPC 3.7(b), Defendants refer to the argument set forth in Point I, supra, which demonstrates that no conflict or likely conflict exists under RPC 1.7. As there is no conflict under RPC 1.7, there can be no basis for disqualifying the DeCotiis Firm from representation.

As neither RPC 3.7(a) nor RPC 3.7(b) support Plaintiffs' motion for disqualification, Plaintiffs' motion is without merit and the trial court's ruling should be affirmed in all respects.

CONCLUSION

Plaintiffs have failed to demonstrate that the trial court's Order denying Plaintiffs' motion should be overturned, and the decision below should accordingly be affirmed.

DECOTIIS, FITZPATRICK, COLE & GIBLIN, LLP
Attorneys for Defendants New Jersey Turnpike Authority, Dishant Patel, R.N., and Karen Spooner, R.N.

By: */s/ William J. Hamilton*
William J. Hamilton

Dated: July 17, 2025

Steven I Adler, Esq. (Attorney ID# 027881982)
MANDELBAUM BARRETT PC
3 Becker Farm Road, Suite 105
Roseland, New Jersey 07068
Email: sadler@mblawfirm.com
t. 973.736.4600
f. 973.243.7930
Attorneys for Plaintiffs-Appellants

PREVENTIVE MEDICINE OF NEW JERSEY, GEORGE MELLENDICK, M.D. and KRISTEN KENT, M.D.,

Plaintiffs,

vs.

NEW JERSEY TURNPIKE AUTHORITY, DISHANT PATEL, R.N. and KAREN SPOONER, R.N.,

Defendants.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DOCKET NO: A-001805-24T2

Submitted: July 29, 2025

Civil Action

FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY

Sat below: Hon. Alberto Rivas, J.S.C.

Docket No. Below: MID-L-3637-24

PLAINTIFFS-APPELLANTS' REPLY BRIEF IN FURTHER SUPPORT OF APPEAL

Of Counsel and On the Brief:

Steven I. Adler, Esq. (Attorney ID# 027881982)
Frank A. Custode, Esq. (Attorney ID# 015662000)

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PRELIMINARY STATEMENT

The facts are clear that the joint representation of Defendants/Appellees the New Jersey Turnpike Authority ("**NJTA**") and its employees, Dishant Patel ("**Patel**") and Karen Spooner ("**Spooner**") (together, the "**Nurse Defendants**") (collectively **"Defendants")**, violates Rule of Professional Conduct ("**RPC**") 1.7(a)(1) because the representation by the DeCotiis, Fitzpatrick et al. law firm (the "**DeCotiis Firm**" or the "**Law Firm**") of one of its clients is directly adverse to another client and (a)(2) because its representation of one or more clients will be materially limited by its responsibility to another client. See also RPC 1.8(k) as to conflicts involving a public entity and RPC 1.8(l) concerning the inability of a public entity to waive a conflict..

The Law Firm also will be a necessary witness at trial and should be disqualified pursuant to RPC 3.7. Accordingly, Plaintiffs-Appellants Preventive Medicine of New Jersey ("**PM**"), George Mellendick, M.D. ("**Mellendick**") and Kristin Kent, M.D. ("**Kent**") (collectively, **"Plaintiffs"** or "**Appellants**") respectfully request that their appeal be granted and the DeCotiis Firm be disqualified from representing any party in this litigation.[1]

[1] The law is clear that the finding of a conflict compels the DeCotiis Firm to withdraw from representing all of the Defendants going forward. DeBolt v. Parker, 234 N.J. Super. 471, 484 (Law Div. 1998); In re Petition for Rev. of Op. 552, 102 N.J. 194, 205 (1986). The NJTA does not seem to acknowledge this fact. See Da017-014 submitted as part of this appeal despite it being outside of the record below.

AS TO DEFENDANTS' PROCEDURAL HISTORY

In response to Plaintiffs' cross-motion to disqualify counsel, Defendants filed a brief but no certification from either of the Nurse Defendants or NJTA. Rather, Defendants relied upon a certification of counsel that set forth no facts. It merely attached two unreported decisions for the trial Court's consideration.

Subsequently, Plaintiffs' counsel filed below a recent decision of the Appellate Division confirming that a consent to waive a conflict interest must be in writing. Rather than setting forth the procedural history of this case, defense counsel attempts to distract the Court from their obvious conflict of interest by discussing Defendants' motion to dismiss. Defense counsel suggests that Plaintiffs did not file a notice of tort claim, but Plaintiffs did serve one. (Db4). Defense counsel also fails to note that an LAD claim does not require one. Furthermore, Defendants misleadingly represent that the trial judge accepted defense counsel's explanation that it obtained the consent of the parties to waive the conflict and rejected Plaintiffs' argument. (Db6). The trial Court did nothing of the sort. Instead, it indicated that the motion was denied without prejudice and could be renewed after discovery.

REPLY STATEMENT OF FACTS

At the outset, it should be noted that the "facts" in the Opposition Brief are nowhere to be found in the record below. This is confirmed by the lack of citations to the record in the Opposition Brief's Statement of Facts. (Db7, n.2, Db8, Db9 and Db10). Nowhere below is there a discussion of what NJTA did to investigate the allegations of the Nurse Defendants. (Db9). Nowhere below is there any mention of the determination by NJTA or the Equal Employment Opportunity (**"EEO"**) report. (Db10). Nowhere in the record below is there any proof that Hackensack Meridian Occupational Health (**"HMOH"**) made the unilateral decision to terminate its subcontract, that HMOH now services NJTA directly or that there have been no further conflicts or internal complaints from NJTA staff since HMOH terminated PMNJ's contract. (Db11). Similarly, the Opposition Brief's Statement of Facts is replete with references to Defendants' Appendix, yet the Appendix primarily consists of certifications also not part of the record below. (Db11). Finally, the balance of the Statement of Facts is nothing more than legal arguments unsupported by any evidence in the record below, see Db12-14, and, Defendants' claim, that the court below concluded there was no "inconsistency with, or conflict between the

positions of NJTA and the Nurse Defendants," is untrue. The trial Court was highly skeptical but did not want to make a determination at that time.[2]

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION SHOULD NOT CONSIDER EVIDENCE THAT WAS NOT PART OF THE RECORD BELOW (Order denying cross-motion is located at Pa28)

Pursuant to R. 2:5-4, "[t]he record on appeal shall consist of all papers on file in the court… below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court." "It is, of course, clear that in their review the appellate courts will not ordinarily consider evidentiary material which is not in the record below…." See Comment 1 to R. 2:5-4; see also Townsend v. Pierre, 221 N.J. 36, 45, n. 2 (2015).

For the first time on appeal, Defendants cite to certifications of the Nurse Defendants as well as from the NJTA Director of Law (the **"Certifications"**) in a belated attempt to demonstrate after-the-fact that defendants consented to joint representation by the DeCotiis Firm. Indeed, as set forth herein, those Certifications were never filed with the trial court or made part of the record here. Therefore, the Certifications should not be considered. In any event, even if the Appellate Division

[2] In the interest of brevity, Appellants respectfully refer this Court to the Statement of Facts in Appellants' Brief Seeking Leave to Appeal and in their opening brief in support of this appeal.

considers them, a public entity, such as NJTA, cannot waive the concurrent conflict. RPC 1.7(b)(1); see also RPC 1.8(l) and 1.9(d). Accordingly, the Certifications do not cure, and cannot cure, the undeniable fact that the NJTA cannot waive the concurrent conflict as a matter of law.

POINT II

DEFENSE COUNSEL SHOULD BE DISQUALIFIED BECAUSE OF THEIR CONCURRENT CONFLICT OF INTEREST (Order denying cross-motion is located at Pa28)

In Point I of Defendants' opposition brief, they back-peddle and make a failed attempt at revisionist history to try to mask the DeCotiis Firm's undeniable conflict of interest. (Db16-Db25). The bottom line is that, no matter how Defendants try to spin it, the NJTA and the Nurse Defendants have conflicting positions in this matter.

Indeed, RPC 1.7(a)(1), which provides that there is a concurrent conflict of interest if the representation of one client will be directly adverse to another client, mandates that the DeCotiis Firm must be disqualified. There is an inherent conflict for the DeCotiis Firm to represent both NJTA and the Nurse Defendants when the DeCotiis Firm was retained by NJTA to investigate the Nurse Defendants' claims, found against them and, in defense of this matter on behalf of the Nurse Defendants, must contradict the DeCotiis Firm's own findings. Why? Because the Nurse Defendants will want to refute Plaintiffs' argument that they filed their complaints against Plaintiffs in bad faith to force Plaintiffs out as medical services

providers at NJTA. Therefore, the DeCotiis Firm has a clear, direct unwaivable conflict. Gray v. Commercial Anim Ins. Co., 191 N.J. Super. 590 (App. Div. 1983).

RPC 1.7(a)(2), which compels disqualification when representation of one party is "materially limited" due to the representation of another, also mandates disqualification of the DeCotiis Firm here. The same holds true under RPC 1.8(k) since this case involves a public entity. As set forth in Plaintiffs' moving brief and contrary to Defendants' assertions, Plaintiffs will call the attorneys at the DeCotiis Firm who conducted the investigation to testify at trial in accordance with the Firm's report that the grievances and charge of discrimination filed by the Nurse Defendants all lacked merit as part of their proofs that the Nurse Defendants intentionally went out of their way to have NJTA terminate Drs. Mellendick and Kent. On the other hand, the Nurse Defendants will want the investigators from the DeCotiis Firm to testify that its report is wrong and that the grievances were filed in good faith. See In re Simon, 206 N.J. 306, 316 (2011) ("if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's … duties to another client, there is a conflict").

Notwithstanding the above, Defendants assert there is no concurrent conflict of interest because Plaintiffs' cross-motion to disqualify is "premised entirely on speculation and was clearly made without knowledge of Defendants' actual positions in this litigation." (Db18). In so asserting, Defendants cite to In re State Grand Jury Investigation, 200 N.J. 481, 491 (2009) for the proposition that a conflict cannot be based on a "fanciful possibility." (Db17). However, Plaintiffs

are not speculating here about the "fanciful possibility" of a conflict. Rather, the record demonstrates the obvious reality that the NJTA's and the Nurse Defendants' respective positions are in conflict, which, pursuant to In re State Grand Jury Investigation, mandates disqualification. See id. ("To warrant disqualification in this setting, the asserted conflict must have some reasonable basis").

In addition, Defendants cite to Escobar v. Mazie, 460 N.J. Super. 520 (App. Div. 2019), claiming that courts should be skeptical of motions for disqualifications "to secure tactical advantages." (Db17). In so doing, they overlook that the Escobar court provided a detailed analysis of the perils of violating RPC 3.7 – which, as set forth in Point III infra, also mandates disqualification here. See id. at 526-527 (finding that "The American Bar Association comment 3 to RPC 3.7, the 'advocate-witness rule,' notes that "combining the roles of advocate-witness can prejudice the tribunal and the opposing party. Because '[a] witness is required to testify on the basis of personal knowledge, while an advocate on evidence given by others, a jury may not understand 'whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof'").

Here, Plaintiffs' cross-motion was not filed for any tactical advantage. It was to remedy the DeCotiis Firms' clear violations of RPC 1.7 as Plaintiffs could care less about who ultimately represents Defendants. Indeed, contrary to Defendants' assertions, Plaintiffs' cross-motion was made "in the best of faith." See Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988).[3]

[3] Defendants cite State v. Murray, 162 N.J. 240 (2000) for the proposition that an evidentiary hearing should be conducted to assess the DeCotiis Firm's conflict. (Db18). We disagree as it is self-evident from the within facts. In

Defendants cite Twenty-First Century Rail Corp. v. New Jersey Transit Corp., 210 N.J. 264, 273-74 (2012) for the proposition that, in analyzing disqualification motions, courts have to weigh the need to maintain the highest standards of the profession against the client's right to freely choose counsel. (Db17-18). However, the Twenty-First Century Rail Corp. court also recognized that "[i]n determining how to strike that balance fairly, courts are required to recognize and to consider that 'a person's right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement.'" See id. Such circumstances are present here.

In addition, Defendants cite Dental Health Associates South Jersey, P.A. v. RRI Gibbsboro, LLC, 471 N.J. Super. 184, 192 (App. Div. 2022) for the proposition that motions for disqualification should be used "sparingly". (Db18). However, the Appellate Division also noted in that decision that "[c]ourts must engage in a 'painstaking analysis of the facts'" in determining such motions. See id. Here, such analysis clearly supports disqualification.

Nonetheless, Defendants double down on their back-peddling by attempting to minimize the DeCotiis Firm's investigation findings that "Dr. Kent's actions did not amount to discrimination based upon sex nor did it create a hostile work environment based on a protected class," claiming that the DeCotiis Firm's

addition, Defendants' reliance on State v. Bell, 90 N.J. 163 (1982) for the proposition that such a hearing primarily arises in the criminal context is misplaced. (Db18). That decision does not preclude such a hearing in the civil context. In analyzing a potential conflict in the criminal context, the Court in State v. Bell narrowly held that the representation of co-defendants in the same criminal action by separate attorneys of the Public Defender's office did not give rise to a presumption of prejudice.

findings are not "an exoneration of Plaintiffs." (Pa03, ¶14) (Db19-20). However, Defendants miss the point. Whether the DeCotiis Firm's investigation findings exonerate Plaintiffs is not the issue. The issue is the DeCotiis Firm's investigation findings on behalf of the NJTA directly contradict the Nurse Defendants and their bogus claims, thereby creating an unwaivable conflict. See RPC 1.8(l).

In addition, Defendants' claim that the NJTA could terminate its relationship with Plaintiffs without a finding that Dr. Kent created a hostile work environment in violation of the LAD is a distinction without a difference. (Db21-Db22). The Nurse Defendants will still argue that the conclusions reached in the internal investigation are wrong which will be difficult to do if the DeCotiis Firm is representing them at trial. Indeed, the Law Firm cannot disavow the express language in its report that casts blame on the Nurse Defendants, specifically, that:

> "their [Patel and Spooner's] behavior was affecting patient care" and "there did not seem to be an understanding of the power dynamic between all individuals working within the Medical Department, which led to problems in the workplace"--it is evident that Patel and Spooner do not understand that intrinsically physicians dictate the plan of care that nurses follow.

(Pa03-04, ¶¶ 14 and 15).

Furthermore, Defendants baldly claim that there is no conflict because the Nurse Defendants have not reasserted their LAD claims against Plaintiffs and have accepted the Law Firm's findings (Db22-23). However, said assertions do not disprove the clear conflict. The trigger for concern for conflict analysis is whether

there is a manifest particularized divergence between the clients' factual contentions or legal assertions, or the remedies they wish their counsel to advocate – which is present here. See In re A.S., 447 N.J. Super. 539, 572 (App. Div. 2016).

Moreover, Defendants' attempt to distinguish In re Petition for Review of Opinion 552 of Advisory Comm. On Prof. Ethics, 102 N.J. 194 (1986) is flawed. (Db23). In that case, the New Jersey Supreme Court held a government attorney is precluded from representing co-defendant government officers or employees where the facts present an actual conflict of interest or the realistic possibility of such a conflict. See id. at 208. While representing clients on the same side in civil litigation does not always present a conflict, a conflict exists "by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." See id. at 205. All of those circumstances are present here. Indeed, PMNJ alleges that NJTA and the Individual Defendants tortiously interfered with PMNJ's contract with HMOH and Dr. Kent alleges that NJTA and the Individual Defendants tortiously interfered with her contract with PMNJ.

Nonetheless, Defendants claim that In re Petition for Review of Opinion 552 provides no basis for disqualification here because there is no actual conflict or the likelihood of an actual conflict is remote and poses no realistic threat to the effective representation of Defendants. (Db23-24). However, as set forth herein, that is an inaccurate recitation of the record before this Court, which clearly demonstrates the concurrent conflict of interest.

Lastly, Defendants' attempt to address the DeCotiis Firm's failure to obtain conflicts' waivers from their clients underscores the futility of their claims that there is no conflict here. (Db24-Db25). First, this action was filed on June 21, 2024, yet the written consents from the Nurse Defendants were not obtained until February 18, 2025, well after this case was on appeal. Moreover, as set forth in Point I supra, Defendants' attempt to remedy this issue via the Certifications is flawed because they were not part of the record below. In any event, Defendants concede that the NJTA cannot waive this concurrent conflict yet misread RPC 1.7 by claiming it does not apply to them. (Db24). Surely, that is not the case. RPC 1.7(b)(1) makes clear that, a public entity, such as NJTA, cannot waive the conflict via written consent. Thus, contrary to Defendants' assertions, conflicts involving the representation of public entities are not curable by written waivers. See RPC 1.7(b)(1); see also RPC 1.8(1) and 1.9(d). Accordingly, there is a clear concurrent conflict warranting disqualification here.[4]

[4] NJTA's obligation to defend the Nurse Defendants pursuant to an indemnification policy in no way addresses the inherent conflict at issue in this appeal. (Db3-Db5). Indeed, there is no legal authority in support of Defendants' contention that indemnification absolves defense counsel of its duties under the applicable Rules of Professional Conduct. Nor is Defendants' claim that forcing them to retain separate counsel (thereby allegedly requiring them to incur additional costs) should not be required because additional costs is never a justification to ignore one's ethical obligations. (Db3). Defendants also claim that nothing will change from the standpoint of legal advocacy by retaining separate counsel. (Db3). However, defense counsel makes this statement because it alleges that the Nurse Defendants were acting within the scope of their employment (Db3), yet the Complaint pleads to the contrary, clearly suggesting that the Nurse Defendants acted in a retaliatory and discriminatory way, outside the scope of their employment, to try to protect their jobs.

POINT III

DISQUALIFICATION IS WARRANTED BECAUSE DEFENSE COUNSEL ARE NECESSARY WITNESSES

(Order denying cross-motion is located at Pa28)

RPC 3.7(a) provides that "[a] lawyer shall not act as an advocate at trial in which the lawyer is a necessary witness …" While there are three limited exceptions, none are applicable here. This RPC authorizes disqualification where the attorney's testimony is "necessary" and "likely". See Michels, New Jersey Attorney Ethics, comment 31:4-1(a) on RPC 3.7 (2012); see also Main Events Prods. v. Lacy, 220 F. Supp. 2d 353, 355 (D.N.J. 2002). Here, should this matter proceed to trial, attorneys from the DeCotiis Firm must testify as to the thoroughness of its investigation, the findings in its report as well as information given to it by the Individual Defendants and Dr. Kent, who was interviewed by the DeCotiis Firm.

Nonetheless, in Point II of their opposition brief, Defendants claim that the DeCotiis Firm is an "inanimate entity" and not a witness, hence, RPC 3.7 does not apply to the firm. (Db26). That assertion is nonsensical. The express language of RPC 3.7 applies to lawyers who practice at firms. See RPC 3.7(b) ("A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9") (emphasis added).

In addition, Defendants' claim that the attorneys at the DeCotiis Firm, who conducted the investigation and are not designated as trial counsel here, are not appropriate witnesses at trial (even though they prepared the investigative report at issue in this action and interviewed parties to this action as part of their investigation) is equally nonsensical. (Db27) First, it is well settled that materials related to an employer's internal investigation of claims under the LAD are relevant and discoverable. See Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 539 (1997). Thus, the DeCotiis Firm lawyers are clearly relevant witnesses. In fact, they will be front-and-center as witnesses at trial. Having handled the investigation, in and of itself and considering the particular facts herein, should disqualify the Law Firm from representing NJTA at trial.

Moreover, having different attorneys act as trial counsel does not get the DeCotiis Firm around RPC 3.7. Indeed, RPC 3.7 begins to operate as soon as the attorney knows or believes that the attorney will be a witness at trial – which has already occurred. See In the Matter of Cadillac V8 – 6-4 Class Action, 93 N.J. 412 (1983).

Moreover, Defendants' assertion that Plaintiffs do not address RPC 3.7(b) is a red herring. (Db 26). As set forth supra, RPC 3.7(b) precludes a lawyer to act as an advocate at trial when another lawyer at the firm is likely to be called as a witness when there is a violation of RPC 1.7 or RPC 1.9. (emphasis added). For the reasons

set forth supra, the DeCotiis Firm is in clear violation of RPC 1.7. Hence, RPC 3.7(b) does not provide the DeCotiis Firm with a safe haven.

Accordingly, the DeCotiis Firm should be disqualified as a necessary witness under RPC 3.7.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant their appeal, find that the DeCotiis Firm has a concurrent conflict, and order that it not represent any defendant in this action.

Respectfully submitted,
MANDELBAUM BARRETT PC
Attorneys for *Plaintiffs-Appellants*

By: */s/ Steven I. Adler*
Steven I. Adler

Dated: July 29, 2025