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TYRONE NOCK, Administrator of the Estate of ADRIENNE NOCK, Deceased, on behalf of said decedent's Heirs-at-Law and Next-of-Kin, and in his own right 204 Foxcroft Drive Franklinville, NJ 08322,

Respondent,

vs.

KENNEDY MEMORIAL HOSPITAL - WASHINGTON TOWNSHIP
435 Hurffville Cross Keys Road Turnersville, NJ 08012

and

KENNEDY UNIVERSITY HOSPITAL WASHINGTON TOWNSHIP 435 Hurffville Cross Keys Road Turnersville, NJ 08012

and

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO.: **A-002564-23**

CIVIL ACTION
ON APPEAL FROM HON. JUDITH S. CHARNY'S FEBRUARY 23, 2024 JUDGMENT

CAM-L-002856-18

KENNEDY HEALTH ALLIANCE
333 Laurel Oak Road Voorhees, NJ 08043

and

ROWAN UNIVERSITY SCHOOL OF OSTEOPATHIC MEDICINE 1 Medical Center Drive Stratford, NJ 08084

and

THOMAS WETJEN, D.O. 435 Hurffville Cross Keys Road Turnersville, NJ 08012

and

KATHLEEN RICHTER, PA-C 435 Hurffville Cross Keys Road Turnersville, NJ 08012

and

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and

EMERGENCY PHYSICIAN ASSOCIATES OF SOUTH JERSEY, PC 101 Carney Boulevard Voorhees, NJ 08043

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Appellant(s).

APPELLANT JEFFREY P. KOVACS, D.O. AND RECONSTRUCTIVE ORTHOPEDICS, P.A.'S SECOND AMENDED BRIEF

DATE SUBMITTED: January 10, 2025

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PRELIMINARY STATEMENT

This appeal is brought on behalf of Defendants-Appellants, Jeffrey P. Kovacs, D.O. ("Dr. Kovacs"), and Reconstructive Orthopedics, P.A. (collectively referred to as "Defendants"), who seek relief from a jury verdict rendered in the Superior Court of New Jersey, Law Division – Camden County, in favor of Respondent-Plaintiff, Tyrone Nock, Administrator of the Estate of Adrienne Nock ("Plaintiff"). The trial resulted in a judgment of $2,364,117.09 against Defendants following a series of legal errors that severely prejudiced the defense, resulting in an unjust and unsupported verdict.

Defendants contend that the trial court committed a reversible error by allowing Plaintiff's expert, Dr. David Lent ("Dr. Lent"), to introduce a new and undisclosed standard of care opinion during trial, which was not raised in discovery or disclosed in Dr. Lent's expert report. Specifically, Dr. Lent asserted for the first time that Dr. Kovacs was obligated to respond to any signs of severe infection, even if necrotizing fasciitis was not confirmed. This surprise opinion, introduced without prior disclosure, deprived Defendants of a fair opportunity to prepare an effective defense and unjustly influenced the jury's determination of liability.

Further, Plaintiff's counsel improperly invoked the discredited "captain of the ship" doctrine during trial, arguing that Dr. Kovacs was vicariously responsible for

the actions of other physicians present at Kennedy University Hospital on March 2, 2017, despite Dr. Kovacs not being physically present at the time. This argument misapplied New Jersey law, which clearly rejects the "captain of the ship" doctrine, misleading the jury into attributing fault to Dr. Kovacs for actions beyond his control. The improper reliance on this legal theory tainted the jury's findings, unfairly placing liability only on Dr. Kovacs.

Moreover, Defendants should have been entitled to a reduction of the jury's verdict by $250,000.00, reflecting Plaintiff's settlement with Kennedy University Hospital, which was based on a theory of apparent authority over Dr. Kovacs. Without such a reduction, Plaintiff has received an improper double recovery for the same alleged negligence, an outcome that is both legally unsound and fundamentally inequitable.

For these reasons, Defendants respectfully submit that the trial court's judgment should be reversed, and a new trial granted on all issues.

PROCEDURAL HISTORY

The Amended Complaint was filed on December 23, 2019, wherein a theory of apparent authority against Kennedy University Hospital for Dr. Kovacs'

negligence is alleged. (Da005-Da006, at ¶ 13; Da009, at ¶ 29).[1] Defendants filed a timely answer. (Da064).[2] The trial in this matter took place over sixteen days, beginning January 8, 2024, and concluded on February 16, 2024, with a jury verdict in favor of Plaintiff.[3] Defendants filed a statement of verdict on February 21, 2024, in which they addressed the necessity of reducing the jury verdict by $250,000.00 to account for the settlement payment made by Kennedy University Hospital. (Da044).

The Court uploaded the Order For Judgment on February 23, 2024. (Da049). Following the verdict, Defendants filed a motion for a new trial on March 7, 2024, citing multiple errors, including improper introduction of undisclosed expert testimony, reliance on the disfavored "captain of the ship" doctrine, and failure to

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[1] The term "Da" refers to Volume I of Defendant-Appellant's Amended Appendix in Support of Appeal.

[2] Several answers were filed, however, reference is only made to Defendant-Appellant's Answer.

[3] Transcripts of the trial are designated as follows:

- "1T" refers to the January 9, 2024 Trial Transcript.
- "2T" refers to the January 10, 2024 Trial Transcript.
- "3T" refers to the January 16, 2024 Trial Transcript.
- "4T" refers to the January 17, 2024 Trial Transcript.
- "5T" refers to the January 18, 2024 Trial Transcript.
- "6T" refers to the January 31, 2024 Trial Transcript.
- "7T" refers to the February 6, 2024 Trial Transcript.
- "8T" refers to the February 7, 2024 Trial Transcript.
- "9T" refers to the February 8, 2024 Trial Transcript.
- "10T" refers to the February 9, 2024 Trial Transcript.
- "11T" refers to the February 14, 2024 Trial Transcript.

reduce the verdict by $250,000.00 based on Plaintiff's settlement with Kennedy University Hospital. The trial court denied this motion on March 28, 2024. However, the Defendants are now appealing the judgment entered following the trial, arguing that the errors cumulatively prejudiced the defense and led to a miscarriage of justice.

STATEMENT OF FACTS

This case involves a medical malpractice claim brought by Plaintiff against multiple defendants, including Dr. Kovacs and Reconstructive Orthopedics, P.A. (Da003-Da013). On March 2, 2017, Adrienne Nock presented to Kennedy University Hospital with worsening pain in her left upper extremity, where she received a presumptive diagnosis of necrotizing fasciitis. (Da015-Da017). Dr. Kovacs, the attending orthopedic surgeon, was not made aware of this diagnosis until later in the day, at which point he proceeded to Kennedy University Hospital to perform surgery on the Decedent. Despite his intervention, Adrienne Nock's condition continued to deteriorate, resulting in her death on March 3, 2017. (Da030).

During the trial, Plaintiff's expert, Dr. Lent, unexpectedly introduced new standard of care opinions against Dr. Kovacs that had not been previously disclosed. Dr. Lent argued that Dr. Kovacs was required to present to the

emergency room, regardless of whether necrotizing fasciitis was mentioned during an alleged phone call with the resident on March 2, 2017. (3T, Pages 121, Lines 16-25 and Page 122, Lines 1-11). These new opinions, presented for the first time during trial, represented a deviation from pre-trial disclosures.

Plaintiff's counsel further exacerbated the trial's improprieties by invoking the discredited "captain of the ship" doctrine. Despite clear precedent rejecting this theory under New Jersey law, Plaintiff's counsel suggested that Dr. Kovacs was vicariously liable for the actions of other physicians at Kennedy University Hospital on March 2, 2017. Specifically, Plaintiff's counsel argued that Dr. Kovacs bore "ultimate responsibility" for the conduct of the residents involved in Ms. Nock's care. (7T, Page 203, Lines 5-22). This argument misled the jury into attributing liability to Dr. Kovacs for actions outside his control, necessitating curative measures that the court failed to adequately implement. (7T, Page 207, Lines 16-25).

Finally, Plaintiff reached a settlement with Kennedy University Hospital during trial, based on allegations of apparent authority over Dr. Kovacs. Despite this settlement, the trial court failed to reduce the jury's verdict by $250,000.00 to reflect the Plaintiff's prior recovery. (Da044). As a result, Plaintiff received an improper double recovery for the same alleged negligence.

STANDARD OF REVIEW

The Appellate Division reviews a motion for a new trial under the abuse of discretion standard. State v. Fortin, 464 N.J. Super. 193, 216 (App. Div. 2020). Questions of law are reviewed de novo. Id. (citing State v. Miles, 229 N.J. 83, 90 (2017)). Further, the Appellate Division reviews the trial court's decision on a motion for a new trial under the same standard governing the trial judge—whether "it clearly and convincingly appears that there was a miscarriage of justice under the law." Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting R. 4:49-1(a)). A jury verdict will not be reversed "unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. In reviewing a trial judge's decision on a motion for a new trial, the Appellate Division views the evidence in the light most favorable to the party opposing the new trial motion. Caldwell v. Haynes, 136 N.J. 422, 432 (1994). "[W]hen evaluating the decision to grant or deny a new trial, 'an appellate court must give "due deference" to the trial court's "feel of the case."'" Hayes, 231 N.J. at 386 (quoting Risko v. Thompson Muller Auto. Grp. Inc., 206 N.J. 506, 522 (2011)).

The "weight of the evidence" standard is used for jury trials. Fanarjian v. Moskowitz, 237 N.J. Super. 395, 406 (App. Div. 1989). When a party alleges that a jury verdict is against the weight of evidence, a Motion for a New Trial

must be made otherwise the appellate court will not consider the argument. R. 3:20-1; R. 4:49. R. 2:10-1; Fiore v. Riverview Medical Center, 311 N.J. Super. 361, 362-63 (App. Div. 1998); State v. Perry, 128 N.J. Super. 188, 190 (App. Div. 1973), aff'd, 65 N.J. 45 (1974).

A trial judge abuses his or her discretion when the stated findings were mistaken, or that determination could not reasonably have been reached on sufficient credible evidence preset in the record…" Slutzky v. Slutzky, 451 N.J. Super 332, 356 (app. Div. 2017) (quoting Gonzalez-Posse v. Ricciardulli, 410 N.J. Super 340, 354 (App. Div. 2009). When findings are inconsistent with testimony, reversal is required. Id. "[R]eversal is required when the results could not reasonably have been reached by the trial judge on the evidence or whether it is clearly unfair or unjustly distorted by a misconception of the law or findings of fact that are contrary to the evidence." Id. (quoting Perkins v. Perkins, 159 N.J. Super. 243, 247 (App. Div. 1978).

Moreover, the standard on appeal for review of the trial court's decision is whether a miscarriage of justice under the law occurred. Rule 4:49-1(a). See also Risko, 206 N.J. 506 at 522. While a jury verdict is entitled to deference, a jury verdict should not be interfered with unless the verdict "is clearly against the weight of the evidence. To overturn a jury verdict, the verdict "must shock

the judicial conscience." Dutton v. Rando, 458 N.J. Super 213, 224 (2019) (quoting Caldwell v. Haynes, 136 N.J. 422, 432 (1994).

To determine whether a miscarriage of justice occurred, the appellate court makes its own independent determination. Carrino v. Novotny, 78 N.J. 355, 360 (1979); Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977); Dolson v. Anastasia, 55 N.J. 2, 6-8 (1969). The appellate court does defer to the trial court in regard to intangible items that cannot be found in the record, such as credibility and demeanor of a witness. Id.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN PERMITTING PLAINTIFF'S EXPERT, DR. LENT, TO TESTIFY TO NEW STANDARD OF CARE OPINIONS NOT DISCLOSED IN HIS EXPERT REPORT, WARRANTING A NEW TRIAL. (3T, Pages 121, Lines 16-25 and Page 122, Line 1)

The trial court abused its discretion by allowing Plaintiff's expert, Dr. David Lent, to introduce new standard of care opinions that were not disclosed in his September 25, 2020 expert report. This decision unfairly expanded the scope of Dr. Lent's testimony, prejudicing Defendants and depriving them of the opportunity to adequately respond. It is well-settled that an expert's testimony "'may be confined to the matters of opinion reflected in that report[.]'" Congiusti v. Ingersoll-Rand Co., Inc., 306 N.J. Super. 126, 131 (App. Div. 1997) (quoting McCalla v. Harnischfeger

Corp., 215 N.J. Super. 160, 171 (App. Div.), certif. denied, 108 N.J. 219 (1987)). A trial judge may "preclude expert testimony on a subject not covered in the written reports furnished by an adversary[.]" Id.

Dr. Lent's original expert report focused specifically on Defendants' obligation to respond promptly to a presumptive diagnosis of necrotizing fasciitis, citing the delay in surgical intervention as a deviation from the standard of care. (Ca001).[4] However, during the January 16, 2024 trial, Dr. Lent unexpectedly broadened his standard of care opinion. He asserted that Dr. Kovacs was obligated to respond to any signs of severe infection, regardless of whether necrotizing fasciitis was confirmed. (3T, Pages 121, Lines 16-25 and Page 122, Line 1). This new opinion was not part of his disclosed report, which focused solely on the management of necrotizing fasciitis, not general infection. Dr. Lent testified at trial:

> Q -- and I want you to assume that he was told that there was an infection that may require some sort of surgical procedure at some point in the future. All right. If that was the totality of what he was told, did he fall below the standard of care in not coming to the hospital?
> A Yes. (3T Page 121, Lines 16-22).

[4] The term "Ca" refers to Volume II of Defendant-Appellant's Confidential Appendix in Support of Appeal.

Defense counsel objected to this testimony, arguing that it introduced a new opinion not found in Dr. Lent's report and that it unfairly broadened the claims against Dr. Kovacs, creating surprise and prejudice:

> MR. HERON: ***This is a completely new opinion***, Your Honor, and I will show you the expert report offered by Dr. Lent from September 25th of 2020 as to his opinions regarding Dr. Kovacs. There's six items here. None of them discuss what the attending should do based upon on a phone call with regard to just an infection. Nowhere is it in his report.
> THE COURT: I thought that was the testimony.
> MR. HERON: Yeah, ***the question is what – if he was told necrotizing fasciitis, what would he do? Not if there's just an infection. It's a completely different issue***. (3T, Page 122, Lines 8-21 (emphasis added)).

Despite this objection, the trial court allowed Dr. Lent to continue presenting this new theory, resulting in substantial prejudice against Defendants, who had no opportunity to prepare for this broader claim. (3T, Page 127, Lines 17-18).

The trial court's decision to allow these new standard of care opinions violated established procedures for expert testimony, resulting in a miscarriage of justice. By permitting Plaintiff to expand Dr. Lent's testimony without prior disclosure, the court deprived Defendants of a fair trial. A new trial, limited to the opinions disclosed in Dr. Lent's original expert report, is necessary to ensure compliance with New Jersey's procedural rules and restore fairness to the proceedings.

II. THE TRIAL COURT ALLOWED PLAINTIFF'S COUNSEL TO IMPROPERLY INVOKE THE DISCREDITED "CAPTAIN OF THE SHIP" DOCTRINE, MISLEADING THE JURY. (7T, Page 203, Lines 13-22)

It is undisputed that New Jersey does not follow the captain of the ship doctrine. See Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335, 346 (1994). The doctrine remains in disfavor. C.W. v. Cooper Health Sys., 388 N.J. Super. 42, 65-66 (App. Div. 2006); Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 34-36 (App. Div. 1998) (holding that it was improper for medical malpractice plaintiffs' counsel to refer to a doctor as the captain of the ship in the context of an administrative mistake); Johnson v. Mountainside Hosp., 239 N.J. Super. 312, 321-22 (App. Div. 1990) (affirming court's refusal to give captain of the ship charge, where plaintiffs sought to hold physicians liable for failure to take steps to protect patient against consequences of negligence arising from someone turning off respirator). The New Jersey Appellate Division notes that:

> The doctrine suggests imposing vicarious liability on a doctor because of the negligence of others not under the doctor's control or supervision. Where a litigant improperly seeks to utilize this doctrine, we have imposed an affirmative obligation on the trial judge to make certain that the jury [is] not misled by

> legal doctrines not urged as a proper basis for liability. Diakamopoulos, 312 N.J. Super. 20 at 35 (internal citations omitted).

Consequently, New Jersey Courts must reject the disfavored "captain of the ship" argument as a theory of liability in a medical malpractice case. Grubbs v. Knoll, 376 N.J. Super. 420, 438 (App. Div. 2005).

Despite New Jersey's clear rejection of the "captain of the ship" doctrine, *Pro Hac Vice* counsel, Jason S. Weiss, Esq., improperly invoked this legal theory during his recross-examination of Bruce Farber, M.D. ("Dr. Farber"), a defense expert. By framing his questions in terms of Dr. Kovacs's "ultimate responsibility" for the actions of residents, counsel sought to improperly shift the jury's focus from an individualized assessment of negligence to a broad and inapplicable theory of vicarious liability.

In the recross-examination of Dr. Farber, *Pro Hac Vice* counsel asked:

> Q ***You also testified that Dr. Kovacs has ultimate responsibility for the residents, is that correct***?
> MR. HERON: Just -- objection, Your Honor. I don't know -- again, we're talking legal terms --ultimate. There is no captain of the ship in New Jersey. So I don't – we've heard that term a lot of times and I don't know if it's accurate law. I'll be heard at sidebar on that. (7T, Page 203, Lines 13-22 (emphasis added)).

This line of questioning improperly introduced a discredited legal doctrine, misleading the jury into believing that Dr. Kovacs could be held liable solely because

of his role as an attending physician. The resulting prejudice is clear, as this line of questioning shifted the jury's focus away from evaluating Dr. Kovacs's actual conduct to holding him liable for the actions of others without regard to individual fault.

The prejudice was exacerbated when the Court failed to properly address defense counsel's request for a curative instruction as to the improper inference, stating:

> **MR. HERON**: But if he's testifying to something that may not be true and not the law in New Jersey, he can't testify to that. I need a jury instruction on that, Your Honor, because that's what the jurors think the law is.
> **THE COURT**: No, they don't.
> **MR. HERON**: Yes, they do.
> **THE COURT**: They'll hear the law when I give them the law.
> 7T, Page 207, Lines 16-25.

The Court failed to address the "captain of the ship" issue during the jury charge. (11T, Pages 170-217).

Jurors depend heavily on the arguments and evidence presented throughout the trial to navigate complex legal issues. By failing to provide any clarification, the court left the jury with an unresolved and improper inference that New Jersey law imposes vicarious liability on attending physicians for the actions of residents. This

misunderstanding negatively influenced the jury's perception of Dr. Kovacs's role and responsibility.

The introduction of the "captain of the ship" doctrine, despite its explicit rejection under New Jersey law, compromised the integrity of the trial. The lack of an immediate instruction allowed the improper inference to persist, contaminating the jury's deliberations and diverting their attention from the legally required individualized assessment of negligence. Consequently, the jury's focus shifted away from whether Dr. Kovacs breached the standard of care and instead toward an irrelevant and prejudicial theory of supervisory liability.

To ensure that liability is assessed in accordance with the correct legal framework, a new trial is essential. The court's failure to correct the mischaracterization of New Jersey law, coupled with Plaintiff's counsel's improper invocation of the "captain of the ship" doctrine, irreparably prejudiced the defense. Accordingly, reversal of the judgment and a remand for a new trial is warranted.

III. THE TRIAL COURT FAILED TO REDUCE THE VERDICT BY $250,000.00 TO REFLECT PLAINTIFF'S SETTLEMENT WITH KENNEDY UNIVERSITY HOSPITAL, RESULTING IN AN IMPERMISSIBLE DOUBLE RECOVERY. (Da044)

The trial court's failure to reduce the jury's verdict by $250,000.00 to account for the Plaintiff's settlement with Kennedy University Hospital amounts to reversible error. As the Supreme Court held in Carter v. Reynolds:

> [u]nder respondeat superior, an employer can be found liable for the negligence of an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of his or her employment. To establish a master's liability for the acts of his servant, a plaintiff must prove (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment. Carter v. Reynolds, 175 N.J. 402, 408-09, 815 (2003) (internal citation omitted).

While a principal is generally "immune from liability for the negligence of an independent contractor, or that of its employees, in the performance of the contracted services," see Estate of Cordero v. Christ Hosp., 403 N.J. Super. 306, 312 (App. Div. 2008) (internal quotation and citation omitted), a recognized exception exists when the employee is acting with "apparent authority." Id. In this context, the term apparent authority:

> imposes liability on the principal not as the result of the reality of a contractual relationship but rather because of the actions of a principal or an employer in somehow misleading the public into believing that the relationship or the authority exists. ... [A] principal is vicariously liable for its agent's tortious conduct when actions taken by [an] agent with apparent authority constitute the tort. Id. (citation and quotations omitted).

Further, in situations involving a patient receiving medical treatment at a hospital, "apparent authority is demonstrated when the hospital, by its actions, has held out a particular physician as its agent and/or employee and... a patient has accepted treatment from that physician in the reasonable belief that it is being rendered in behalf of the hospital." Id. at 313 (quotation and citations omitted).

Additionally, "it is fundamental that no matter under what theories liability may be established, there cannot be any duplication of damages." P. v. Portadin, 179 N.J. Super. 465, 472 (App. Div. 1981). The common law does not allow a plaintiff to receive compensation twice for the same injury. Buccheri v. Montgomery Ward & Co., 19 N.J. 594, 605 (1955). Moreover, requiring a tortfeasor to pay twice for the same damages arising from a single act of wrongdoing would contradict established legal principles. Alfone v. Sarno, 87 N.J. 99, 115 (1981).

The trial court's refusal to reduce the jury's verdict by $250,000.00 to reflect the Plaintiff's settlement with Kennedy University Hospital constitutes reversible error. The settlement was based on a theory of liability of apparent authority over Dr. Kovacs, the same negligence attributed to the Defendants in this case. As such, without an appropriate molding of the verdict, the Plaintiff has received an improper double recovery for the same alleged negligence, which is both legally unsound and fundamentally inequitable.

New Jersey law establishes that a plaintiff cannot recover twice for the same injury. The doctrine of apparent authority holds a hospital vicariously liable for the negligence of its agents, including physicians like Dr. Kovacs. Consequently, Plaintiff's settlement with Kennedy University Hospital is directly tied to the allegations against Dr. Kovacs. Allowing the jury's full award to stand without accounting for this settlement unjustly enriches the Plaintiff and imposes duplicative liability on the Defendants.

The trial court's failure to apply a molding of the verdict not only undermines fairness but also conflicts with established precedent, which aims to prevent double recoveries in tort actions. Therefore, Defendants respectfully request that this Court reverse and remand for an appropriate reduction of the verdict to reflect the $250,000.00 already received by Plaintiff from Kennedy University Hospital.

CONCLUSION

The trial court's errors collectively undermined the fairness of the proceedings and resulted in a miscarriage of justice, warranting a reversal of the judgment and a remand for a new trial. First, the court improperly permitted Plaintiff's expert, Dr. Lent, to present undisclosed standard of care opinions at trial, which unfairly expanded the claims against Dr. Kovacs and deprived

Defendants of the opportunity to adequately prepare a defense. This error significantly prejudiced the Defendants and tainted the jury's deliberations.

Second, Plaintiff's counsel improperly invoked the discredited "captain of the ship" doctrine, misleading the jury into believing that Dr. Kovacs could be held liable under an inapplicable theory of vicarious liability. Despite defense counsel's objections, the trial court failed to issue a curative instruction, allowing this improper inference to persist throughout the trial and irreparably prejudice the defense.

Finally, the trial court erred in failing to reduce the jury's verdict to account for Plaintiff's $250,000.00 settlement with Kennedy University Hospital based on a claim of apparent authority for Dr. Kovacs' negligence. This failure resulted in an impermissible double recovery for the same alleged negligence and violated fundamental principles of fairness and equity.

The cumulative impact of these errors deprived Defendants of a fair trial. Accordingly, Defendants respectfully request that this Court reverse the judgment and remand the matter for a new trial, ensuring that liability is determined in accordance with the proper legal standards and that the integrity of the judicial process is upheld.

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s/ Michael J. Heron

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DATED: January 10, 2025

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	:	CIVIL ACTION
v.	:	ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY
KENNEDY MEMORIAL HOSPITAL - WASHINGTON TOWNSHIP 435 Hurffville Cross Keys Road Turnersville, NJ 08012 and KENNEDY UNIVERSITY HOSPITAL WASHINGTON TOWNSHIP 435 Hurffville Cross Keys Road Turnersville, NJ 08012 and	:	DOCKET NO. BELOW: CAM-L-002856-18 Sat Below: Hon. Judith S. Charny, J.S.C.

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Turnersville, NJ 08012 :
and :
JOHN DOE CORP. (HOSPITAL) :
435 Hurffville Cross Keys Road :
Turnersville, NJ 08012 :
and :
JOHN DOE CORP. (EMERGENCY :
MEDICINE) :
101 Carney Blvd. :
Voorhees, NJ 08043 :
and :
JOHN DOE CORP. (ORTHOPEDICS) :
570 Egg Harbor Road, Suite C4 :
Sewell, NJ 08080 :
and :
JOHN DOE CORP. (INTENSIVE CARE) :

435 Hurffville Cross Keys Road :
Turnersville, NJ 08012 :
Defendants-Appellants. :

SECOND AMENDED BRIEF OF PLAINTIFF-RESPONDENT

Date Submitted: March 12, 2025

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PRELIMINARY STATEMENT

This is a medical malpractice and wrongful death case. After a lengthy trial, a jury found that Adrienne Nock died as a result of the negligence of Jeffrey P. Kovacs, D.O. The jury found that Dr. Kovacs failed to respond timely to advice he received from residents at Kennedy Hospital that Ms. Nock had necrotizing fasciitis, a condition that multiple doctors on both sides agreed was fast-acting and fatal if not promptly addressed.

A medical resident testified that he had expressly and repeatedly told Dr. Kovacs by telephone in the early afternoon of March 2, 2017, that Ms. Nock had necrotizing fasciitis and required immediate surgery. Another resident who heard one of the calls to Dr. Kovacs confirmed that in his own testimony. And documentary evidence supported the evidence given by those residents. Dr. Kovacs, in contrast, testified that he had been told only that Ms. Nock had an infection. According to him, he was not told until about 5:30 PM that Ms. Nock had necrotizing fasciitis. Only then did he cross the street from his office to the hospital to belatedly perform surgery. Ms. Nock died the next day.

The jury plainly believed the testimony of the residents and the supporting documentary evidence and rejected Dr. Kovacs's contrary version of events. The proofs were so ample that defendants do not argue that the jury's verdict was against the weight of the evidence. Instead, defendants claim error arising from two

questions that plaintiff's counsel asked expert witnesses in response to their own or Dr. Kovacs's prior testimony. Plaintiff was unquestionably allowed to do that. Points I and II, infra.

Defendants also demand a credit against the verdict for the full amount of a settlement that plaintiff and Kennedy Hospital entered into during trial. But defendants waived that argument below, and even if they had not, their position ignores New Jersey law regarding when, how, and in what amount a judgment defendant can obtain a credit for another defendant's settlement. Point III, infra.

Defendants' arguments are entirely without merit. This Court should affirm the jury's verdict.

COUNTERSTATEMENT OF RELEVANT PROCEDURAL HISTORY

A. Background Procedural History

Plaintiff Tyrone Nock, as Administrator of the Estate of Adrienne Nock, in his own right and on behalf of Ms. Nock's heirs-at-law and next-of-kin, initiated this case by filing a Complaint on August 2, 2018. That Complaint named nearly twenty defendants, including doctors, medical practices, and hospital defendants. An Amended Complaint was filed on December 23, 2019. Da1.[1]

[1] Abbreviations follow R. 2:6-8. Trial transcript references are as follows: "1T"- January 9, 2024; "2T"- January 10, 2024; "3T"- January 16, 2024; "4T"- January 17, 2024; "5T"- January 18, 2024; "6T"- January 31, 2024; "7T"- February 6, 2024; "8T"- February 7, 2024; "9T"- February 8, 2024; "10T"- February 9, 2024; "11T"- February 14, 2024.

By the time trial began before Hon. Judith S. Charny, J.S.C., and a jury on January 9, 2024, three defendants remained in the case: Dr. Kovacs and his practice, Reconstructive Orthopedics, P.A. (together, "Dr. Kovacs" or "defendants"), and Neelesh Parikh, D.O. Dr. Kovacs was the attending orthopedic surgeon and Dr. Parikh was the attending Emergency Department physician.

Jury selection took nearly one month, and the trial itself consumed over two months. The jury deliberated for about two and one-half days before reaching its verdict. The verdict was a mixed one. The jury found that Dr. Parikh had been negligent, and that his negligence increased the risk of harm to Adrienne Nock, but that Dr. Parikh's negligence was not a substantial factor in her death. The jury found Dr. Kovacs 65% responsible for Ms. Nock's death, attributing the other 35% to Ms. Nock's preexisting condition of necrotizing fasciitis. Pa1. The jury assessed damages against Dr. Kovacs that, after reducing the jury's award by 35% and adding prejudgment interest, totaled $2,364,117.09. The Law Division entered judgment for plaintiff on February 23, 2024. Da49.

Defendants filed a motion for a new trial on March 7, 2024. Db3. That motion raised several arguments. First, defendants contended that the jury verdict was against the weight of the evidence, an argument they have abandoned on appeal. Second, they argued that Judge Charny had erred in admitting certain testimony by one of plaintiff's experts, Dr. David Lent. Ibid. Third, defendants argued that plaintiff

had wrongly invoked the "captain of the ship" doctrine in pursuing his claim against Dr. Kovacs. Ibid. As discussed infra, however, the "captain of the ship" contention that defendants offer to this Court was not made in their new trial motion and that part of their motion was, in any event, unsupported by the record. Compare Db11-14 with Pa3-4 (relevant pages of defendants' new trial brief). Finally, defendants demanded a $250,000 credit for a settlement that defendant Kennedy Hospital had entered into prior to trial. Db3-4. Defendants raised the last of those arguments for the first time in a February 21, 2024 post-trial letter. Da44.

Judge Charny denied the new trial motion in its entirety and entered an Order embodying that ruling on March 28, 2024. Db4. Defendants filed a notice of appeal on April 25, 2024.

B. Procedural History Specific to Defendants' Arguments to This Court

1. Defendants' Attack on Testimony of Plaintiff's Expert, Dr. David Lent

On direct examination at trial, Dr. Kovacs testified that at about 2:00 PM on March 2, 2017, he had received a telephone call from Dr. Sergio Pulido, a senior orthopedic resident, in which Dr. Pulido advised that the team was "evaluating a patient in the emergency room that had an infection." 1T 240:11-241:15:

> Q. Do you have any recollection of the substance of that conversation?
>
> A. It was in regards to letting me know that they were -- they, being the orthopedic resident team, was evaluating a patient in the emergency room that had an infection. He gave me background story in regards to what had happened two days prior to that in the

> emergency room. She had an injection by that shoulder, and they were concerned of infection at that level, possible abscessed formation, and that was about the extent of it, other than, you know, be prepared that somebody's here that may need you surgically.
>
> Q. Okay. And what were the circumstances that were communicated to you that might indicate that there would be a need for a surgical intervention?
>
> A. Just what I said, they were evaluating somebody for an infection around the extremity. [Id. at 242:11-243:3].

Dr. Kovacs went on to deny that Dr. Pulido said anything about necrotizing fasciitis in that telephone call. Id. at 243:4-12 ("that was not conveyed …. I don't think it was even mentioned").

When Dr. Lent testified thereafter, plaintiff's counsel asked him this question, which arose directly from Dr. Kovacs's own trial testimony that Dr. Pulido's telephone call advised Dr. Kovacs only about an infection:

> Q. -- and I want you to assume that he [Dr. Kovacs] was told that there was an infection that may require some sort of surgical procedure at some point in the future. All right. If that was the totality of what he was told, did he fall below the standard of care in not coming to the hospital?
>
> A. Yes. [3T 121:16-23].

After plaintiff began to pose another question, defense counsel objected, asserting that Dr. Lent's answer represented "a completely new opinion." Id. at 122:2-8. During the colloquy that followed, Judge Charny said "[she] thought that was the testimony" of Dr. Kovacs. Id. at 122:16-17. When defense counsel persisted,

the judge reiterated her recollection about Dr. Kovacs's testimony, and defense counsel ultimately agreed:

> [Defense counsel] But [plaintiff's counsel's] questioning of him was based upon if the conversation happened and it was just an infection, not the necrotizing –
>
> THE COURT: That's because that's what Dr. Kovacs testified to. If it was just -- that it was just an infection.
>
> [Defense counsel]: I agree with that.
>
> THE COURT: So he's allowed to ask that question. [1T 123:16-24].

In their motion for a new trial, defendants raised this same issue. See Db3. Judge Charny rejected it. See Db4.

2. Defendants' Claim That Plaintiff's Counsel Invoked "Captain of the Ship"

On re-cross-examination, plaintiff's counsel asked Dr. Bruce Farber, a defense expert for Dr. Parikh: "Q. You also testified that Dr. Kovacs has ultimate responsibility for the residents, is that correct?" 7T 203:13. That lone question is the sole basis for defendants' repeated claim that plaintiff "invoked" the "captain of the ship" doctrine. Db1, 5, 11 (Point heading), 12, 14. But the question was posed only after Dr. Farber stated, in response to a question on re-direct examination to which Dr. Kovacs did not object, that residents are "always told to over-call, not to under-call [attending physicians], because the attending has the ultimate responsibility." 7T 195:8-9 (emphasis added).

During a lengthy colloquy on defendants' counsel's objection, id. at 203:19-208:8, Judge Charny rightly observed that the question to Dr. Farber did not purport to state the law but rather was merely responding to Dr. Farber's prior testimony. Regardless, immediately afterward, at defense counsel's request, Judge Charny cautioned the jury that "I'm not going to instruct you as to the law of the case at this juncture. Suffice it to say, at the end of this case, I will be giving you the law that applies and that will be the law that you follow, not what anybody else says the law is. It's what I say the law is." Id. at 208:2-17.

Defendants included a "captain of the ship" argument in their motion for a new trial. But the argument that defendants now make about "captain of the ship" was not raised below. Rather, their contention there was that "throughout trial" plaintiff had argued "captain of the ship." Pa3-4.[2] Defendants did not specify any occasion when plaintiff had made such an argument and, in particular, did not cite the question to Dr. Farber that they present to this Court. Judge Charny rejected this aspect of the new trial motion as well. See Db4.

[2] Pursuant to R. 2:6-1(a)(2), plaintiff properly includes that portion of defendants' new trial motion brief that addresses "captain of the ship" because "the question of whether [that] issue was raised in the trial court is germane to the appeal."

3. Defendants' Belated Demand for a $250,000 Credit for the Settlement With Kennedy Hospital

During trial, plaintiff settled with defendant Kennedy Hospital. 5T 8:10-11. Though Dr. Kovacs had preserved in his Answer the right to seek a credit for any settlement that plaintiff might reach, Da97, he did not seek a jury charge regarding a credit, in any amount, for that settlement, which was for $250,000. Nor did Dr. Kovacs offer proofs or argue to the jury that there should be a credit for the Kennedy Hospital settlement.

Instead, the first time that Dr. Kovacs sought such a credit was in a February 21, 2024 letter to the Law Division judge, after the jury verdict. Da44. Dr. Kovacs also made that demand part of his subsequent motion for a new trial. Judge Charny denied that relief as well. See Db4.

COUNTERSTATEMENT OF FACTS

Plaintiff Tyrone Nock is the husband of Adrienne Nock. At the time of Ms. Nock's death, they had been married for 34 years and knew each other for 41 years, since high school. 1T 117:24-119:13. Mr. and Mrs. Nock have three children and four grandchildren. Id. at 115:5-116:15. At the time of her death, Ms. Nock was employed by the Camden County Board of Social Services, where she focused on ensuring that the elderly and the blind had medical coverage. Id. at 124:6-16. Her salary there exceeded $81,000 per year. 5T 19:8-11 (plaintiff's expert economist,

Andrew Verzilli, testifying that Ms. Nock earned $81,628 in 2014, $81,620 in 2015, and $87,700 in 2016).

On February 28, 2017, Ms. Nock was complaining of bad pain in her left arm and Mr. Nock took her to Kennedy Hospital in Washington Township, Camden County. 1T 138:17-139:6. Some tests were run, id. at 139:25-140:13, and Ms. Nock was diagnosed with sciatic pain, id. at 141:9-12. Ms. Nock was given a pill for her pain and an injection in her left arm. Id. at 140:20-141:1. Following the injection, Ms. Nock remained in the hospital for a time, fell asleep in a hallway, and woke up still complaining of the pain. Id. at 141:2-8. A doctor evaluated her, ran more tests, and released her. Id. at 141:9-10.

Ms. Nock did not go to work the next day. Id. at 141:15-16. That night, she told Mr. Nock that her arm "really hurt [her]" and showed him a red mark on her arm that was the size of a quarter. Id. at 142:15-22.

The next morning, March 2, 2017, the Nocks went back to the hospital. Id. at 143:12-144:8. When they arrived there, Ms. Nock complained of the pain in her arm. Id. at 145:4-23. After a delay in being able to take her temperature, Ms. Nock was examined by Dr. Parikh, the attending Emergency Department doctor, at about 10:30 AM. Id. at 145:24-148:10, 149:10-14.[3] Mr. Nock testified that:

[3] Dr. Parikh's counsel represented that the Nocks's first meeting with Dr. Parikh that day was "documented at 11:52 [AM] or approximately that time." 1T 180:12-14. Other evidence showed that Ms. Nock was admitted to the hospital at 10:36 AM. 2T

> "[T]hey gave her a needle and look at her arm and he [Dr. Parikh] turned to me and said -- well, he was looking at her and he turned to me and said that's a problem. He said she needs surgery right away, like now. She's on fire -- whatever that meant. He just scared the mess out of me and scared the mess out of her."

[Id. at 147:22-148:3; see also id. at 149:1-7]. As Mr. Nock testified, her arm "was real colorful. I mean, it's red, gray, green. It just -- it looked disgusting" and was far worse than relatively small red spot that Mr. Nock had seen on her arm the night before. Id. at 152:3-11. Dr. Parikh, the emergency room doctor, confirmed that Ms. Nock "had an obvious discoloration of her upper extremity that was worrisome." 4T 34:16-35:8.

Dr. Parikh testified that he made a "presumptive diagnosis" of necrotizing fasciitis and then "got the orthopedic team involved to assist in clarifying that yes, this is the diagnosis." Id. at 20:20-21:17. He made that diagnosis clear to the residents. Id. at 74:25-75:13, 78:13-18. At 12:14 PM, Dr. Parikh put in an order "for an orthopedic surgery consult, stat." Id. at 38:17-39:11. He emphasized in his trial testimony that necrotizing fasciitis is "a surgical emergency" and that a risk of necrotizing fasciitis "is death." Id. at 55:19-56:2. Dr. Parikh's "opinion was the patient should go directly to the operating[ ] room." Id. at 109:1-3.

69:2-6. Regardless, it is undisputed that many hours passed between the initial meeting with Dr. Parikh and the time that Ms. Nock was finally brought in for surgery.

But Ms. Nock was not taken for surgery then. She and Mr. Nock were placed in a room within the emergency department that had three glass walls, through which they saw "the doctors were just standing looking at us for hours and nothing was really being done." 1T 149:15-24. Ms. Nock was not taken in for surgery until about 6:00 PM that day. Id. at 149:8-10; see also 5T 105:16-106:1 (Dr. David Cypel testifying that he administered anesthesia at 5:56 PM).

At 2:45 PM, Mr. Nock was asked to and did sign a consent form for surgery on Ms. Nock's arm that was intended to "cut in and remove the bacteria or whatever that was in her arm." 1T 159:2-17 (describing the form as showing military time, "14:45"); id. at 193:5-22. An operating room booking form, which is used "to schedule add-on or unexpected or emergency cases that have to be added on to the surgical schedule for the day," 5T 85:7-12, was generated at 3:00 PM, stating that "surgeon, Kovacs" would operate on Ms. Nock," id. at 91:19-92:17.

Dr. David Cypel was the anesthesiologist who administered anesthesia to Ms. Nock in surgery. Id. at 105:22-106:1. He testified, based on the operating room booking form, that anesthesiology was aware as of 3:00 PM that Dr. Kovacs was scheduled to operate on Ms. Nock. Id. at 89:3-13. Though the booking form is normally discarded after surgery, Dr. Cypel personally removed that document and kept it for over two years, until producing it for the first time at his deposition,

because he "thought someday someone may want to know when the operating room was available." Id. at 111:19-112:12.

After the surgery, Mr. Nock was told that his wife had had a heart attack on her way to the surgery and had to be revived. 1T 160:17-22. When he saw Ms. Nock after that surgery, she was in "an induced coma" and did not look to him like his wife as she was "on ice…. dark, nonresponsive." Id. at 160:23-161:19. She died the next morning, March 3, 2017. Id. at 161:20-24. Plaintiff's expert in anatomic, forensic, and neuropathology, Dr. Wayne Ross, testified that the cause of death was "hemodynamic collapse and that was due to septic shock, which was due to necrotizing fasciitis." 5T 148:5-7, 153:3-5, 156:7-158:21.

The reason for the delay in Ms. Nock's surgery was Dr. Kovacs. He is an orthopedic surgeon employed by defendant Reconstructive Orthopedics, P.A. 1T 208:18-25. Dr. Kovacs testified that in March 2017, he performed orthopedic surgeries at Kennedy Hospital in Washington Township and that he supervised residents there. Id. at 211:17-212:3.

A handwritten note by Dr. Kovacs, written on the date of Ms. Nock's surgery, stated "Necrotizing fasciitis, left-upper arm." Id. at 212:6-23. Dr. Kovacs testified that necrotizing fasciitis is "a disease process from a very aggressive bacteria that produces toxins. As they get in the blood, they can lead to failure of other organ systems because of that and it can be something that progresses very quickly, almost

in front of your eyes. It's usually not a long, drawn out scenario." Id. at 216:6-13. He agreed that once a diagnosis of necrotizing fasciitis is established, it "should be addressed urgently from a surgical standpoint." Id. at 221:18-23.

Plaintiff's expert in orthopedic surgery was Dr. David Lent. 3T 88:10-96:6 (qualifying Dr. Lent as an expert). He concurred that necrotizing fasciitis presents "a surgical emergency." Id. at 98:2-6. He went on to emphasize the importance of prompt surgery. Id. at 99:2-13 ("These bacteria are giving poison. The longer you leave poison in, the more poison it makes, the more it's killing the patient.").

Dr. Kovacs confirmed that he performed the surgery "right after 6:00 … in the evening," with the first incision occurring at "approximately 6:30 PM." 1T 215:15-23, 228:9-14. As discussed supra at 4-5, he first learned of Ms. Nock from a telephone call from Dr. Pulido, the senior orthopedic resident, at about 2:00 PM. 1T 240:10-241:12. Dr. Kovacs made no written notes of that conversation, but he testified that Dr. Pulido said only that Ms. Nock had an infection, and that Dr. Pulido did not mention necrotizing fasciitis. Id. at 242:2-243:12.

Dr. Pulido testified to the contrary. He said that he had telephoned Dr. Kovacs "about three or four times" on March 2, 2017 to keep Dr. Kovacs apprised as to all significant developments regarding Ms. Nock, and that Dr. Pulido "used it [the term 'necrotizing fasciitis'] every time." 2T 14:15-15:16; 8T 66:24-67:17. That was

because Drs. Parikh and Pulido had made a presumption of necrotizing fasciitis before Dr. Pulido called Dr. Kovacs for the first time. 2T 23:20-24:5.

Dr. Pulido was not the only one to testify that he told Dr. Kovacs at 2:00 PM that Ms. Nock had been diagnosed with necrotizing fasciitis. Dr. Alexander Kreines, another resident, 6T 78:21-79:8, 80:9-11, testified that he was within five feet of Dr. Pulido when he made his call to Dr. Kovacs at 2:00 PM, and that Dr. Kreines heard Dr. Pulido tell Dr. Kovacs that "he was concerned about obviously necrotizing fasciitis and that he felt that the patient, you know, was a little bit more urgent and the patient probably needed to go to the operating room." Id. at 96:18-97:19, 98:23-99:13, 135:19-23. Dr. Pulido told Dr. Kreines that Dr. Kovacs responded that he "didn't feel that this was such an urgent matter" because he "doesn't think that this is necrotizing fasciitis." Id. at 98:15-22, 99:14-23.

Dr. Pulido called Dr. Kovacs again at about 2:30 PM and told him "that we had a patient diagnosed with necrotizing fasciitis" who "needed to go to the operating room." 8T 74:2-20. As a resident, Dr. Pulido could not perform surgery; only Dr. Kovacs, the attending physician, 2T 19:3-6, could do that, id. at 10:1-22, 21:6-11. In response to Dr. Pulido, Dr. Kovacs "sound[ed] like he was not truly believing" the diagnosis of necrotizing fasciitis made by Drs. Parikh, Pulido, and a third doctor, said that he would be "finishing with office hours," and asked to be kept posted. 8T 74:21-75:22.

Dr. Pulido called Dr. Kovacs a third time between 3:00 and 4:00 PM. In that call, too, Dr. Pulido used the phrase "necrotizing fasciitis" because, he testified, "that's the diagnosis we had." Id. at 76:8-77:20.

Dr. Kovacs's office was across the street from Kennedy Hospital's emergency room, a five-minute walk (and a slightly longer drive, due to the need to find a parking space) for him. 1T 232:7-21. According to Dr. Pulido, despite his several phone calls to Dr. Kovacs about Ms. Nock, all of which mentioned necrotizing fasciitis expressly, Dr. Kovacs did not cross the street to the hospital to do Ms. Nock's surgery until 5:30 PM. 2T 21:12-14. That followed a call that Dr. Kovacs testified he received at or about 5:00 PM in which he said he was first told that the presumptive diagnosis was necrotizing fasciitis. Id. at 50:19-52:3.

When Dr. Kovacs finally arrived at the operating room at about 5:30 PM and examined Ms. Nock, he agreed that she had necrotizing fasciitis. Id. at 104:21-105:3. The surgery itself took just about 30 minutes or so. Id. at 111:17-21. But it came too late. Ms. Nock died the next morning.

Dr. Lent testified that Dr. Kovacs's failure to operate sooner fell below the standard of care, increased the risk of harm to Ms. Nock, and was a substantial factor in her death. 3T 101:1-20, 146:15-147:7. He explained that the diagnosis of necrotizing fasciitis made at 12:15 PM was correct, in light of numerous factors that Dr. Lent identified, and that Ms. Nock's death was "preventable" had "the patient

been taken to the operating room in a timely fashion and debrided the tissue, washed out the bacteria, got rid of the toxins, and then allowed the antibiotics to work." Id. at 101:24-103:18, 124:12-23 (Dr. Lent stating that Dr. Kovacs should have "stop[ped] whatever he's doing in his office" and crossed the street to operate immediately).

Dr. Lent's attention was then directed to the 2:00 PM telephone call that Dr. Pulido made to Dr. Kovacs, a call that both of those doctors agreed had occurred. Dr. Lent could not say what either Dr. Pulido or Dr. Kovacs had said on that call because neither doctor made notes of the call. Id. at 120:11-121:12.

At that point, as discussed supra at 5-6, Dr. Lent was asked to assume that, in that 2:00 PM call, Dr. Kovacs was advised, as he had testified, only "that there was an infection that may require some sort of surgical procedure at some point in the future." Id. at 121:16-23. He testified that, in that scenario, Dr. Kovacs "f[e]ll below the standard of care in not coming to the hospital" Id. Judge Charny overruled the objection of Dr. Kovacs's counsel to that testimony, since it was responsive to Dr. Kovacs's own testimony. Id. at 122:2-123:24.

As discussed supra, Dr. Pulido called Dr. Kovacs again at about 2:30 PM. In response to questions asking about scenarios regarding that call in which Dr. Pulido (a) mentioned necrotizing fasciitis, or (b) did not do so, Dr. Lent gave the same testimony as to the standard of care and Dr. Kovacs's failure to meet that standard in

either scenario. Id. at 130:20-132:3. A few minutes later, at 2:38 PM, the critical care team put in a written order for Dr. Kovacs to see Ms. Nock "for possible necrotizing fasciitis." Id. at 132:4-135:22.

As stated supra, defendants have not argued in this Court that the jury verdict was against the weight of the evidence. Reading the foregoing facts most favorably to plaintiff, the jury had ample evidence to support its verdict against Dr. Kovacs. As a result, defendants make only the limited arguments addressed in the next section of this brief.

ARGUMENT

COUNTERSTATEMENT OF THE STANDARD OF REVIEW

"A jury verdict is entitled to considerable deference and 'should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.'" Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 521 (2011) (quoting Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977)).

"The standard of review from decisions on motions for a new trial is the same as that governing the trial judge—whether there was a miscarriage of justice under the law." Hayes v. Delamotte, 231 N.J. 373, 386 (2018) (quoting Risko, 206 N.J. at 522). The Supreme Court has stated that a "miscarriage of justice" can arise when

there is "a manifest lack of inherently credible evidence to support the finding," when there has been an "obvious overlooking or under-valuation of crucial evidence," or when the case culminates in "a clearly unjust result." Id. at 386 (quoting Risko, 206 N.J. at 521).

Though defendants refer to the standard of review applicable to arguments that a jury verdict was against the weight of the evidence, Db6-7, and defendants pressed such a claim in their unsuccessful motion for a new trial, they have abandoned that issue before this Court. Instead, defendants rely on three other arguments.

Judge Charny's decision to allow expert testimony by Dr. Lent about which defendants complain, Db Point I, is reviewed for abuse of discretion. See Townsend v. Pierre, 221 N.J. 36, 52 (2015) ("The admission or exclusion of expert testimony is committed to the sound discretion of the trial court."). Defendants concede that. Db8 (arguing "[t]he trial court abused its discretion" in this regard).

As a matter of fact, Dr. Lent's testimony did not constitute a new opinion and merely addressed trial testimony that Dr. Kovacs had already given, as explained in Points I-A and B, infra. Thus, it was properly admitted. But even if it were a "new" opinion, trial courts have substantial discretion to admit expert opinions that go beyond the expert's report. Judge Charny did not abuse her discretion in admitting Dr. Lent's testimony. Point I-C, infra.

Defendants' Point II is based on the mistaken assertion that plaintiff made a "captain of the ship" argument. The one question to Dr. Farber that forms the sole basis of this contention did no such thing, as Judge Charny correctly found in overruling defense counsel's objection in that regard. 7T 203:16-207:15. That finding is reviewed for abuse of discretion. Point II, infra.

Finally, the question of whether defendants are entitled to a credit for the amount of plaintiff's settlement with Kennedy Hospital, Db Point III, is a legal issue to which de novo review applies. Under the applicable law, defendants waived this issue, but even if they did not, Judge Charny's rejection of their argument was legally correct. See Point III, infra.

POINT I

JUDGE CHARNY DID NOT ABUSE HER DISCRETION IN ADMITTING THE TESTIMONY OF DR. LENT AS TO DR. KOVACS'S FAILURE TO ACT AFTER BEING WARNED THAT MS. NOCK HAD AN INFECTION (Responding to defendants' Point I)

For three reasons, Judge Charny did not abuse her discretion in admitting Dr. Lent's testimony that Dr. Kovacs "was obligated to respond to any signs of severe infection, regardless of whether necrotizing fasciitis was confirmed." See Db9. First, as defense counsel eventually conceded, Dr. Kovacs himself had testified that he was told only that Ms. Nock had an infection. Dr. Lent was thus entitled to respond to that testimony. Point I-A, infra.

Second, contrary to defendants' contention, there was no "new opinion." Both Dr. Lent's report and his trial testimony showed that necrotizing fasciitis is a type of severe infection, so his testimony about the scenario to which Dr. Kovacs testified (in which he was told that Ms. Nock had an infection but that did not lead him to cross the street immediately to perform surgery) was essentially the same as his report. Point I-B, infra. Third, even if Dr. Lent were found to be offering a "new opinion" at trial, Judge Charny had the discretion to admit that testimony, and she did not abuse that discretion. Point I-C, infra.

A. Dr. Lent's Testimony Was Responding to Testimony of Dr. Kovacs Himself and Was Therefore Proper, as Judge Charny Rightly Ruled

Defendants' Point I relies entirely on a single question that plaintiff posed to Dr. Lent, and his answer:

> Q. -- and I want you to assume that he [Dr. Kovacs] was told that there was an infection that may require some sort of surgical procedure at some point in the future. All right. If that was the totality of what he was told, did he fall below the standard of care in not coming to the hospital?
>
> A. Yes. [1T 121:16-23].

Defense counsel objected that that answer represented "a completely new opinion." 1T 122:2-8. Judge Charny responded that "[she] thought that was the testimony" of Dr. Kovacs. 1T 122:16-17. This colloquy followed, in which defense counsel ultimately agreed with Judge Charny:

> [Defense counsel] But [plaintiff's counsel's] questioning of him was

> based upon if the conversation happened and it was just an infection, not the necrotizing –
>
> THE COURT: That's because that's what Dr. Kovacs testified to. If it was just -- that it was just an infection.
>
> [Defense counsel]: I agree with that.
>
> THE COURT: So he's allowed to ask that question. [1T 123:16-24].

Judge Charny was correct. As discussed supra at 4-5, on direct examination at trial, Dr. Kovacs testified that at about 2:00 PM on March 2, 2017, he had received a telephone call from Dr. Pulido, the senior orthopedic resident, in which Dr. Pulido advised that the team was "evaluating a patient in the emergency room that had an infection," and Dr. Kovacs denied that there was any mention of necrotizing fasciitis. 1T 240:11-241:15:

> Q. Do you have any recollection of the substance of that conversation?
>
> A. It was in regards to letting me know that they were -- they, being the orthopedic resident team, was evaluating a patient in the emergency room that had an infection. He gave me background story in regards to what had happened two days prior to that in the emergency room. She had an injection by that shoulder, and they were concerned of infection at that level, possible abscessed formation, and that was about the extent of it, other than, you know, be prepared that somebody's here that may need you surgically.
>
> Q. Okay. And what were the circumstances that were communicated to you that might indicate that there would be a need for a surgical intervention?
>
> A. Just what I said, they were evaluating somebody for an infection around the extremity. [Id. at 242:11-243:3].

Dr. Kovacs then claimed that necrotizing fasciitis "was not conveyed …. I don't think it was even mentioned" in that phone call. Id. at 243:4-12.

Given Dr. Kovacs's own testimony, the question to and answer by Dr. Lent were perfectly proper. See Amaru v. Stratton, 209 N.J. Super. 1, 12-13 (App. Div. 1985) (finding no abuse of discretion in trial court's decision to allow expert to opine on re-direct examination about shifting of plaintiff's spine where opposing counsel had questioned about that issue on cross-examination); Biunno, Weissbard & Zegas, New Jersey Rules of Evidence, Comment 6 to Evid. R. 703, at 822 (Gann 2023-2024 ed.) (stating that expert may be allowed to base an opinion that goes beyond his written report "on what he learns at trial") (citing Amaru and State v. Labrutto, 114 N.J. 187, 205-06 (1989)). Judge Charny did not abuse her discretion in rebuffing defendants' objection to that testimony.

B. Dr. Lent's Testimony That Necrotizing Fasciitis is a Type of Infection Shows That the Testimony Attacked by Defendants is the Same Opinion That Dr. Lent Reached in His Written Report

Even if Dr. Kovacs had not previously testified as he did, Judge Charny's ruling was correct. That is because Dr. Lent's trial testimony did not offer anything new. In both his written expert report and his testimony, Dr. Lent consistently made clear that necrotizing fasciitis is a species of infection and used those terms interchangeably. Thus, his report stated that:

[redacted]

[redacted]

[redacted]

[redacted] [Ca9 (emphases added)].

[redacted]

[redacted] [Ca11 (emphases added)].

Dr. Lent's written report thus put responsibility on Dr. Kovacs for "removing the chance of adequate treatment of the necrotizing fasciitis," which "directly increased the risks of the infection going unchecked," leading to her death.

In his trial testimony, Dr. Lent similarly treated necrotizing fasciitis as a type of infection:

> Q. Okay. And as an attending, have you encountered soft tissue infections including necrotizing fasciitis?

A. Yes.

Q. All right. And have you debrided soft tissue infections like necrotizing fasciitis?

A. Yes. [1T 90:11-17].

….

Q. How do you treat that kind of infection, sir?

A. The number one treatment for necrotizing fasciitis is operation. Is you need to give fluid, you need to give antibiotics, just like any other infection, but necrotizing fasciitis is treated surgically. It's a surgical emergency. [1T 97:25-98:6].

The premise of defendants' objection—that Dr. Lent had offered a "new" opinion at trial that was not contained in his written report—is simply in error. At worst, as explained in this sub-Point, Dr. Lent's trial testimony was merely "a natural extension" of his written report that was properly admitted at trial. Mongiello v. Gallagher, 2019 N.J. Super. Unpub. LEXIS 446, *18 (App. Div. Feb. 26, 2019) (Pa6, 11) (finding no merit in attack on medical expert's trial testimony about plaintiff's need for future surgery because that testimony "was a natural extension from the opinion, even though outside the four corners of the expert report"). For that reason, too, this Court should reject defendants' Point I.

C. Even if Dr. Lent's Testimony Were a New Opinion (And It Was Not), Judge Charny Had Discretion to Admit That Testimony, and She Did Not Abuse That Discretion

Defendants cite two cases, Congiusti v. Ingersoll-Rand Co., Inc., 306 N.J. Super. 126, 131 (App. Div. 1997), and McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 171 (App. Div. 1987), for the idea that an expert "may" be confined to opinions contained in his written report. But both of those cases say that "the logical predicates for and conclusions from statements made in the report are not foreclosed." Ibid.

Here, as discussed in Point I-B, the "logical predicates" for applying Dr. Lent's opinion in the context of explicit advice to Dr. Kovacs about necrotizing fasciitis, which indisputably is an infection, apply to advice that Ms. Nock had an infection. Defendants' Point I fails for that reason alone.

But those same cases, and others, state that a trial judge has discretion to allow an expert to go beyond his written report at trial if there is "(1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which would result from the admission of the evidence." Congiusti, 306 N.J. Super. at 131-32 (citing Ratner v. General Motors Corp., 241 N.J. Super. 197, 202 (App. Div. 1990), and quoting Westphal v. Guarino,

163 N.J. Super. 139, 145-46 (App. Div.), aff'd o.b., 78 N.J. 308 (1978)); see also, e.g., Labrutto, 114 N.J. at 205; Amaru, 209 N.J. Super. at 11.

Judge Charny did not abuse her discretion on this issue. There was no design to mislead, as Dr. Lent's testimony came in response to Dr. Kovacs's own testimony. For that same reason, there was no surprise, as defendants knew full well what Dr. Kovacs had said. Finally, there was no prejudice to defendants, both because of Dr. Kovacs's own testimony, to which Dr. Lent responded, and because (as shown supra, Point I-B) there was no "new" opinion in any event. This Court should affirm Judge Charny's ruling.

POINT II
PLAINTIFF NEVER MADE A "CAPTAIN OF THE SHIP" ARGUMENT
(Responding to defendants' Point II)

As noted supra at 7, defendants made a generalized "captain of the ship" argument in their motion for a new trial. Pa3-4. They did not, however, raise the particular question posed to defendants' expert, Dr. Farber, that is the sole basis for the "captain of the ship" argument they present in this Court. Given that, this Court should not consider it. Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973) ("our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest") (citation omitted). If the Court does review

the issue, the "plain error" standard should apply. R. 2:10-2. Regardless, under any standard of review, defendants' claim has no merit, as the question to Dr. Farber did not make a "captain of the ship" argument.

Defendants cite cases regarding the impropriety of a "captain of the ship" argument. Db11. But all those cases say that the doctrine "suggests imposing vicarious liability on a doctor because of the negligence of others not under the doctor's control or supervision." Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 35 (App. Div. 1998) (quoted at Db11-12).[4] That was not the case here.

The lone question posed by plaintiff to Dr. Farber, which forms the sole basis for defendants' "captain of the ship" argument was: "Q. You also testified that Dr. Kovacs has ultimate responsibility for the residents, is that correct?" 7T 203:13. That question did not invoke the "captain of the ship doctrine" or purport to state the law in any way. Rather, that question was posed only after Dr. Farber stated, in response

[4] Defendants' other cited cases are similar. Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335, 346 (1994) (stating that the Court was "not resurrecting" the "captain of the ship" doctrine because "[w]e are not allowing liability to be imposed on the doctors merely because they were attending physicians on duty at the time of plaintiff's injury, but rather because the jury could find they had specific duties to train and to supervise the other employees on duty"); C.W. v. Cooper Health Sys., 388 N.J. Super. 42, 65 (App. Div. 2006) (describing the doctrine as "a concept that makes a physician vicariously liable for the negligence of others who were involved in caring for the same patient but were not under the doctor's control or supervision"); Grubbs v. Knoll, 376 N.J. Super. 420, 438-39 (App. Div. 2005) (quoting Diakamopoulos); Johnson v. Mountainside Hosp., 239 N.J. Super. 312, 321-22 (App. Div. 1990) (rejecting "captain of the ship" jury charge that would have made defendant physicians liable for someone else's negligence).

to a question from counsel for another defendant on re-direct examination and without objection by Dr. Kovacs, that residents are "always told to over-call, not to under-call [attending physicians], because the attending has the ultimate responsibility." Id. at 195:8-9 (emphasis added). Since that issue was injected by another defendant, not plaintiff, with no objection by Dr. Kovacs, it was perfectly proper for plaintiff to ask the question that defendants now cite.

Moreover, though overruling defense counsel's objection, id. at 203:16-207:15, Judge Charny immediately cautioned the jury that "at the end of this case, I will be giving you the law that applies and that will be the law that you follow, not what anybody else says the law is. It's what I say the law is." Id. at 208:2-17. Defense counsel requested that instruction and said he "appreciate[d] that" once it was given. Id.

In any event, plaintiff did not seek to hold Dr. Kovacs liable for the negligence of others. Rather, plaintiff contended that Dr. Kovacs's own failure to promptly cross the street to perform surgery on Ms. Nock increased the risk of harm to her. See, e.g., 11T 173:15-174:4, 182:17-21, 192:13-20 (jury charge); Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335, 346 (1994) (liability was imposed on doctors not "merely because they were attending physicians on duty at the time of plaintiff's injury, but rather because the jury could find they had specific duties to train and to supervise the other employees on duty").

Plaintiff never invoked the "captain of the ship" doctrine but focused instead on Dr. Kovacs's own misconduct as the basis for liability. Defendants offer no basis for reversal.

POINT III
DEFENDANTS ARE NOT ENTITLED TO A CREDIT FOR THE SETTLEMENT WITH KENNEDY HOSPITAL
(Responding to defendants' Point III)

As noted supra, Kennedy Hospital settled with plaintiff before trial for $250,000. For the first time on February 21, 2024 (and thereafter in their motion for a new trial), defendants demanded a credit in that amount against the judgment. Da44. But that is not how credits work, as our Supreme Court made clear in a series of cases culminating in Glassman v. Friedel, 249 N.J. 199 (2021). See, e.g., Rowe v. Bell & Gossett Co., 239 N.J. 531 (2019); Town of Kearny v. Brandt, 214 N.J. 76 (2013); Young v. Latta, 123 N.J. 524 (1991).

When the Legislature enacted the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 et seq. ("the CNA"), that statute, together with the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-3, replaced the prior procedures for a defendant against whom a judgment is entered at trial to seek a credit for a pre-verdict settlement with another defendant. See generally Glassman, 249 N.J. at 216-23 (describing the evolution of credit for amounts paid by settling tortfeasors).

The question of credit no longer "afford[s] to the remaining tortfeasors a pro rata credit premised on the number of defendants or a pro tanto credit based on the

amount of the settlement," as was the case before the CNA. Glassman, 249 N.J. at 222 (citing N.J.S.A. 2A;15-5.2, 5.3; N.J.S.A. 2A:53A-1). "The credit, instead, is based on the factfinder's allocation of fault to the settling defendant at trial, with the non-settling defendant bearing the burden of proving the settling defendant's fault." Id. at 221 (citing Rowe, 239 N.J. at 552-55; Town of Kearny, 214 N.J. at 100-01; Young, 123 N.J. at 591-92).

"Indeed, unless the non-settling joint tortfeasor provides fair and timely notice and proves the settling defendant's fault at trial, 'there is simply no right in the adjudicated tortfeasors to a reduction of their own separately-allocated responsibility for the verdict,' and the settlement has no effect on the damages imposed on the non-settling parties." Id. at 221-22 (quoting Johnson v. Am. Homestead Mortg. Corp., 306 N.J. Super. 429, 436 (App. Div. 1997)) (emphasis added).

The jury did not allocate any fault to Kennedy Hospital because defendants never sought to have the jury do so. Defendants did not submit any jury charge about apparent authority or seek in any way to have the jury consider Kennedy Hospital in its deliberations. Dr. Kovacs thus waived this issue and is barred from presenting it now. State v. Vigorito, 1 N.J. Super. 151, 156-57 (App. Div. 1948) (having failed to seek a jury charge on an issue, "the defendant is barred from raising the question on appeal").

But even absent a finding of a formal waiver, Dr. Kovacs did not carry his "burden of proving [Kennedy Hospital's] fault" to the jury. Glassman, 249 N.J. at 221. He did not even try to do so. As defendants concede, Db3, their only effort in this regard was, for the first time after trial had ended, to belatedly demand a $250,000 credit because that was the amount of the Kennedy Hospital settlement. But as the cases cited supra say, any credit that defendants might have been able to seek was to be calculated based only on the percentage of fault the jury attributed to Kennedy Hospital, "without regard to the amount of the settlement." Glassman, 249 N.J. at 222-23 ("the Court construes the 'statutory scheme to authorize an allocation of fault to a settling defendant in appropriate settings, without regard to the amount of the settlement'") (quoting Rowe, 239 N.J. at 554). And, post-trial, defendants could not and did not offer any proofs as to Kennedy Hospital's percentage of fault. In this Court, defendants merely argue, again belatedly and without proof of or a jury determination as to the hospital's percentage of fault, that defendants are entitled to a $250,000 credit against the judgment based on an apparent authority argument. Defendants do not even try to confront the Glassman line of Supreme Court cases that explain how credits actually work.

Rather, defendants cite cases that say nothing about credits for pretrial settlements but focus instead on the concepts of respondeat superior and apparent authority in the context of summary judgment. Carter v. Reynolds, 175 N.J. 402

(2003); Estate of Cordero ex rel. Cordero v. Christ Hosp., 403 N.J. Super. 306 (App. Div. 2008). The Court should reject defendants' demand for a credit as without merit. R. 2:11-3(e)(1)(e).

CONCLUSION

For the reasons set forth above, plaintiff Tyrone Nock respectfully requests that this Court reject all of defendants' arguments and affirm the judgment below.

Respectfully submitted,

SALTZ MONGELUZZI BENDESKY P.C.

Date: March 12, 2025 By: */s/ Jason Weiss*

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TYRONE NOCK, Administrator of the Estate of ADRIENNE NOCK, Deceased, on behalf of said decedent's Heirs-at-Law and Next-of-Kin, and in his own right 204 Foxcroft Drive Franklinville, NJ 08322,

Respondent,

vs.

KENNEDY MEMORIAL HOSPITAL - WASHINGTON TOWNSHIP
435 Hurffville Cross Keys Road Turnersville, NJ 08012

and

KENNEDY UNIVERSITY HOSPITAL WASHINGTON TOWNSHIP 435 Hurffville Cross Keys Road Turnersville, NJ 08012

and

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO.: **A-002564-23**

CIVIL ACTION
ON APPEAL FROM HON. JUDITH S. CHARNY'S FEBRUARY 23, 2024 JUDGMENT

CAM-L-002856-18

KENNEDY HEALTH ALLIANCE
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and

ROWAN UNIVERSITY SCHOOL OF OSTEOPATHIC MEDICINE 1 Medical Center Drive Stratford, NJ 08084

and

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and

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and

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and

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Appellant(s).

APPELLANT JEFFREY P. KOVACS, D.O. AND RECONSTRUCTIVE ORTHOPEDICS, P.A.'S REPLY

DATE SUBMITTED: April 2, 2025

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PRELIMINARY STATEMENT

Defendants-Appellants, Jeffrey P. Kovacs, D.O. ("Dr. Kovacs"), and Reconstructive Orthopedics, P.A. (collectively referred to as "Defendants") submit this Reply Brief to clarify the record and address Respondent-Plaintiff, Tyrone Nock, Administrator of the Estate of Adrienne Nock ("Plaintiff")'s mischaracterization of the record and to highlight the fundamental errors that deprived Defendants of a fair trial. Plaintiff seeks to justify the trial court's rulings, yet the arguments presented fail to mitigate the significant prejudice resulting from these errors, each of which independently warrants reversal and remand for a new trial.

First, Plaintiff attempts to minimize the improper admission of Plaintiff's expert Dr. David Lent's trial testimony, which introduced a previously undisclosed standard of care opinion. Contrary to Plaintiff's assertions, Dr. Lent's testimony went beyond the opinions set forth in his expert report, depriving Defendants of the opportunity to meaningfully challenge this expanded theory of liability. Established legal principles require expert testimony to be confined to the opinions disclosed during discovery to prevent unfair surprise and ensure fairness in adversarial proceedings. The trial court's failure to enforce this rule materially prejudiced Defendants and requires

corrective action.

Second, Plaintiff's contention that it did not invoke the discredited "captain of the ship" doctrine is contradicted by the trial record. Through improper questioning and argument, Plaintiff's counsel suggested that Dr. Kovacs bore ultimate responsibility for the actions of others, improperly shifting the jury's focus from an individualized negligence analysis to a theory of supervisory liability. The trial court's failure to issue a curative instruction compounded this prejudice, further undermining the integrity of the proceedings.

Third, Plaintiff's assertion that Defendants are not entitled to a settlement credit disregards the fundamental prohibition against double recovery. Plaintiff received a settlement from Kennedy University Hospital based on the same underlying allegations pursued against Defendants, yet the trial court declined to offset the jury's award accordingly. This failure to account for the settlement results in an impermissible windfall for Plaintiff and contravenes well-established principles of damages law.

For these reasons, and as set forth in greater detail herein, Defendants respectfully request that this Court reverse the judgment and remand the matter for a new trial, ensuring that liability is adjudicated under the proper legal

framework and that the integrity of the judicial process is preserved.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN PERMITTING DR. LENT TO TESTIFY TO A NEW STANDARD OF CARE OPINION NOT DISCLOSED IN HIS EXPERT REPORT, RESULTING IN UNFAIR PREJUDICE TO DEFENDANTS AND WARRANTING A NEW TRIAL. (1T, Pages 121, Lines 16-25 and Page 122, Line 1)

The trial court's admission of Dr. Lent's trial testimony significantly altered the standard of care at issue and deprived Defendants of a fair trial. Plaintiff contends that Dr. Lent's testimony was properly admitted because it was consistent with his expert report and merely responded to Dr. Kovacs's trial testimony. However, the record establishes that Dr. Lent's trial testimony went beyond the opinions disclosed in his September 25, 2020 expert report, introducing a new standard of care theory that Defendants had no opportunity to rebut. Plaintiff further asserts that, even if Dr. Lent's testimony expanded upon his prior opinions, the trial court had discretion to admit it. This argument, however, fails to recognize the fundamental principle that expert testimony must be confined to the opinions disclosed during discovery to prevent unfair surprise and to afford the opposing party a meaningful opportunity to respond. By allowing Plaintiff to introduce an undisclosed standard of care theory at trial, the court improperly expanded the scope of liability, necessitating a new trial.

It is firmly established that an expert's testimony "'may be confined to the matters of opinion reflected in that report[.]'" Congiusti v. Ingersoll-Rand Co., Inc., 306 N.J. Super. 126, 131 (App. Div. 1997) (quoting McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 171 (App. Div.), certif. denied, 108 N.J. 219 (1987)). A trial judge may "preclude expert testimony on a subject not covered in the written reports furnished by an adversary[.]" Id.

Plaintiff asserts that Dr. Lent's trial testimony was consistent with his expert report and merely responded to Dr. Kovacs's trial testimony. This assertion is without merit. The record demonstrates that Dr. Lent's testimony exceeded the opinions disclosed in his September 25, 2020 expert report, introducing a new standard of care theory that Defendants had no opportunity to rebut. See Ca001-Ca012. The trial court's decision to permit this previously undisclosed testimony was erroneous and deprived Defendants of a fair trial.

Plaintiff further contends that Dr. Lent's testimony was properly admitted as a direct response to Dr. Kovacs's trial testimony and did not introduce a new standard of care opinion. Plaintiff also argues that, even if Dr. Lent's testimony expanded upon his prior opinions, its admission was within the trial court's discretion. This characterization is inaccurate. Dr. Lent's expert report expressly confined his standard of care opinions to the management of necrotizing fasciitis and

did not impose an affirmative obligation on Dr. Kovacs to diagnose or initiate treatment for a general infection absent sufficient clinical findings. Dr. Lent's report concludes by stating:

> After a review of all relevant testimony and records, it cannot be stated with any certainty which member of the orthopedic team ordered the MRI. This is because no physician has accepted ownership for ordering the study. However, given the presumptive diagnosis of ***necrotizing fasciitis***, the physical appearance of the upper left extremity, the fact that Adrienne Nock was septic, and her lab results, the ordering of the MRI was a ***significant departure from the standard of care*** and markedly increased the risk of harm to Adrienne Nock. No matter which physician - Drs. Stenson, Pulido, or Kovacs - is ultimately found to have ordered the MRI - that physician's conduct represents a significant departure from the standard of care applicable to an orthopedic surgeon that is presented with an obvious surgical emergency which required immediate irrigation and debridement. (Ca012) (emphasis added).

Dr. Lent's report clearly frames his opinions within the context of necrotizing fasciitis and the alleged failure to treat it in a timely manner. Nowhere does his report establish a broader standard of care requiring an attending physician to act based solely on the mention of a general infection. Plaintiff's attempt to portray Dr. Lent's trial testimony as consistent with his report disregards the distinction between a duty to act in response to a presumptive case of necrotizing fasciitis and an entirely new theory of liability predicated on the need to intervene at the first indication of any

infection. The latter constitutes a previously undisclosed standard of care opinion, which was improperly admitted at trial.

At trial, however, Dr. Lent testified for the first time that Dr. Kovacs had an independent duty to recognize and act upon any signs of infection, regardless of whether necrotizing fasciitis was suspected or confirmed. (3T, Page 121, Lines 16-25; Page 122, Line 1). This newly articulated opinion, which was absent from Dr. Lent's written report, substantially altered the standard of care at issue and was improperly admitted over Defendants' objection.

Plaintiff attempts to justify this expansion of opinion by asserting that trial courts retain broad discretion in admitting expert testimony, even where such testimony extends beyond the scope of a written report. This argument, however, fails to acknowledge the well-established principle that expert testimony must be confined to the opinions disclosed during discovery to prevent unfair surprise and to afford the opposing party a meaningful opportunity to respond. The introduction of a previously undisclosed standard of care opinion at trial precluded Defendants from properly challenging Dr. Lent's expanded assertions, whether at a deposition or rebuttal expert testimony.

Defendants prepared their case in reliance on the standard of care opinions disclosed in Dr. Lent's expert report. By allowing Plaintiff to expand those opinions

at trial, the court fundamentally altered the scope of the case to the prejudice of Defendants. The improper admission of this testimony deprived Defendants of a fair opportunity to respond to an expanded theory of liability that had not been disclosed before trial. The cumulative effect of these errors necessitates a new trial.

Accordingly, the trial court's decision to admit Dr. Lent's new standard of care opinion was improper, and this Court should reverse the judgment and remand for a new trial.

II. PLAINTIFF'S ARGUMENT THAT IT DID NOT INVOKE A "CAPTAIN OF THE SHIP" THEORY IS CONTRADICTED BY THE RECORD. (2T, Page 203, Lines 13-22)

Plaintiff contends that it never advanced a "captain of the ship" theory at trial and that Defendants' appeal on this issue is unfounded. This assertion is contradicted by the trial record, which unequivocally demonstrates that Plaintiff's counsel improperly invoked the discredited "captain of the ship" argument, misleading the jury and prejudicing Defendants' case. Through improper questioning and argument, Plaintiff's counsel suggested that Dr. Kovacs bore ultimate responsibility for the actions of residents, thereby improperly shifting the jury's focus from an individualized negligence assessment to an impermissible theory of vicarious liability. Despite Plaintiff's *post hoc* attempt to reframe its trial strategy, the

substance and effect of counsel's questioning and argument align squarely with the rejected "captain of the ship" theory.

It is undisputed that New Jersey does not follow the captain of the ship doctrine. See Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335, 346 (1994). The doctrine remains in disfavor. C.W. v. Cooper Health Sys., 388 N.J. Super. 42, 65-66 (App. Div. 2006); Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 34-36 (App. Div. 1998) (holding that it was improper for medical malpractice plaintiffs' counsel to refer to a doctor as the captain of the ship in the context of an administrative mistake); Johnson v. Mountainside Hosp., 239 N.J. Super. 312, 321-22 (App. Div. 1990) (affirming court's refusal to give captain of the ship charge, where plaintiffs sought to hold physicians liable for failure to take steps to protect patient against consequences of negligence arising from someone turning off respirator). The New Jersey Appellate Division notes that:

> The doctrine suggests imposing vicarious liability on a doctor because of the negligence of others not under the doctor's control or supervision. Where a litigant improperly seeks to utilize this doctrine, we have imposed an affirmative obligation on the trial judge to make certain that the jury [is] not misled by legal doctrines not urged as a proper basis for liability. Diakamopoulos, 312 N.J. Super. 20 at 35 (internal citations omitted).

Consequently, New Jersey Courts must reject the disfavored "captain of the ship" argument as a theory of liability in a medical malpractice case. Grubbs v. Knoll, 376 N.J. Super. 420, 438 (App. Div. 2005).

In this case, Plaintiff argues that the sole basis for Defendants' argument is the question posed to Dr. Bruce Farber:

> Q ***You also testified that Dr. Kovacs has ultimate responsibility for the residents, is that correct***?
> MR. HERON: Just -- objection, Your Honor. I don't know -- again, we're talking legal terms --ultimate. ***There is no captain of the ship in New Jersey***. So I don't – we've heard that term a lot of times and I don't know if it's accurate law. I'll be heard at sidebar on that. (7T, Page 203, Lines 13-22) (emphasis added).

Plaintiff attempts to downplay the significance of this question by asserting that it did not invoke the "captain of the ship" doctrine, nor did it suggest that Dr. Kovacs was liable for the negligence of others. This assertion is contradicted by the trial record.

First, the phrase "ultimate responsibility" directly aligns with the core principle underlying the discredited "captain of the ship" doctrine, which improperly imposes liability on an attending physician for the acts of others, regardless of individual negligence. As New Jersey courts have consistently recognized, this doctrine remains in disfavor and should not serve as a basis for liability. While

Plaintiff now seeks to frame this question as innocuous, its improper legal implication cannot be ignored.

Second, Plaintiff argues that this question was justified because Dr. Farber himself previously testified that residents were "always told to over-call, not to under-call [attending physicians], because the attending has the ultimate responsibility." (7T, Page 195, Lines 8-9). However, this reasoning is flawed. Plaintiff's counsel did not merely elicit a neutral clarification regarding the hierarchy of medical decision-making; rather, counsel used pointed, legally charged language to improperly suggest that Dr. Kovacs should be held responsible for the actions of others. This was not an innocent factual inquiry but an attempt to plant an improper legal inference in the jury's mind.

Third, Plaintiff contends that the trial court's jury instruction negated any potential prejudice caused by this improper questioning. However, this argument ignores that jurors rely heavily on the arguments and evidence presented throughout the trial when making their determinations. Here, the court failed to issue a specific curative instruction addressing the improper implication of Plaintiff's line of questioning. Instead, the court merely stated that it would provide the jury with the applicable law at the end of the case. (7T, Page 208, Lines 10-17). This general statement was insufficient to correct the improper inference that Dr. Kovacs could

be held liable based on a legally erroneous standard of responsibility. The lack of an explicit corrective instruction allowed the prejudicial impact to persist, reinforcing an incorrect standard for the jury's evaluation of liability. Further, the Court failed to address the "captain of the ship" issue during the jury charge. (11T, Pages 170-217). The absence of a direct instruction allowed the jury to deliberate without guidance on a central legal issue, increasing the likelihood that the verdict was influenced by an improper standard.

Additionally, Plaintiff argues that Defendants' motion for a new trial was properly denied, asserting that Defendants failed to raise the specific question posed to Dr. Farber in their motion. However, at the time the motion was made, Defendants did not yet have the benefit of the trial transcripts, which prevented them from fully identifying and citing the specific points in the record where Plaintiff's counsel had improperly invoked the "captain of the ship" argument. Plaintiff now attempts to diminish the issue by characterizing Defendants' argument as generalized. However, the transcripts confirm that Plaintiff's counsel's reference to "ultimate responsibility" was legally improper and created a misleading inference.

Finally, Plaintiff asserts that it never sought to impose liability on Dr. Kovacs for the negligence of others but instead based its claim on Dr. Kovacs's own failure to timely perform surgery. This assertion, however, does not negate the improper

trial tactics employed. By framing Dr. Kovacs's responsibility in terms of ultimate responsibility, Plaintiff's counsel introduced a misleading legal inference that suggested supervisory liability. This approach improperly shifted the jury's focus away from an individualized assessment of Dr. Kovacs's alleged negligence. The prejudicial impact of this argument was significant and contributed to an unfair trial, warranting reversal.

In sum, the record contradicts Plaintiff's claim that he never invoked a "captain of the ship" argument. Plaintiff's counsel improperly suggested a legally erroneous theory of liability, misleading the jury and prejudicing Defendants. The trial court's failure to issue a curative instruction allowed this inference to persist, compounding the prejudice. Furthermore, at the time Defendants moved for a new trial, they did not yet have the trial transcripts, which now reveal the full extent of Plaintiff's improper reference. Given the substantial impact these errors had on the jury's verdict, a new trial is warranted.

III. PLAINTIFF INCORRECTLY ASSERTS THAT DEFENDANTS ARE NOT ENTITLED TO A CREDIT FOR PLAINTIFF'S SETTLEMENT WITH KENNEDY UNIVERSITY HOSPITAL, RESULTING IN AN IMPERMISSIBLE DOUBLE RECOVERY. (Da044)

Plaintiff argues that Defendants are not entitled to a credit for Plaintiff's settlement with Kennedy University Hospital because Defendants did not request a

jury allocation of fault to Kennedy and failed to introduce evidence of Kennedy's fault at trial. This argument mischaracterizes the nature of the settlement and the fundamental principle that damages must reflect actual compensation rather than permit a windfall.

The settlement between Plaintiff and Kennedy University Hospital was based on apparent authority, meaning Plaintiff sought to hold Kennedy responsible for the same alleged negligence attributed to Defendants at trial. Now, Plaintiff takes the inconsistent position that Kennedy's liability was sufficient to warrant a settlement yet insufficient to warrant a credit against the jury award. This contradiction effectively allows Plaintiff to recover twice for the same claim, resulting in an unjustified double recovery.

Plaintiff further contends that Defendants waived this issue by failing to request a jury instruction on Kennedy's fault. However, Defendants were not required to seek a jury allocation of fault to prevent an impermissible duplication of damages. The issue here is not comparative fault but the basic principle that a plaintiff cannot recover twice for the same alleged harm. The trial court had the opportunity to correct this error post-trial but failed to do so.

Additionally, Plaintiff's emphasis on Defendants' timing in raising this issue is misplaced. While Defendants formally raised the credit issue post-trial, the fact

remains that Plaintiff has already been compensated for the same alleged negligence by another party. The failure to adjust the verdict accordingly grants Plaintiff an unwarranted windfall at Defendants' expense.

The trial court's refusal to apply a credit reflecting the settlement with Kennedy University Hospital resulted in an impermissible double recovery. Accordingly, this Court should reverse and remand with instructions to reduce the verdict by $250,000.00.

CONCLUSION

For the forging reasons, Defendants respectfully request that this Court overturn the judgment and remand the case for a new trial, ensuring that liability is assessed under the correct legal standards and preserving the integrity of the judicial process.

LENOX, SOCEY, FORMIDONI, GIORDANO, LANG, CARRIGG & CASEY, LLC

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