ANALYN RIVERA, Individually and as Administratrix Ad Prosequendum for the ESTATE OF ROMEO RIVERA, Plaintiff-Appellant, v. JERSEY CITY MEDICAL CENTER RWJ BARNABAS HEALTH, EMERGENCY MEDICAL ASSOCIATES, ADEFRIS ADAL, MD, LEISTER TALIN, RN, DIANA CAPRA, RN, DANA AMORINO, RN, CECILIA WILSON, RN, ZACHARY BAKHTIN, CIM, JOHN DOE, MD, (*fictitiously named)*, MARY ROE, RN, (*fictitiously named)*, ABC MEDICAL SERVICES (*fictitiously named)* and XYZ EMERGENCY MEDICINE, INC. (*fictitiously named)*, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003099-23 CIVIL ACTION On Appeal From: Law Division, Hudson County Docket No. HUD-L-2382-17 Sat Below: Hon. Anthony V. D'Elia, J.S.C. Hon. Martha D. Lynes, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT IN SUPPORT OF THE APPEAL

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PRELIMINARY STATEMENT

This matter arises from the untimely and avoidable death of Mr. Romeo Rivera. On Saturday evening at 10:13PM on January 14, 2017, Romeo Rivera presented at the Jersey City Medical Center (JCMC) Emergency Department (ED) complaining of sudden onset lower back pain, chills and leg numbness. He was assessed by several ED nurses before being seen by the ED doctor who diagnosed him with sciatica, ordered a shot of pain reliever and sent Mr. Rivera home. No diagnostic testing was ordered. Mr. Rivera was discharged from the ED at 12:43AM on January 15th with prescriptions for Tylenol and Zantac. A few hours later, Mr. Rivera collapsed on his bedroom floor in the presence of his wife and children and was pronounced dead by responding EMS. An autopsy determined that the cause of death was a cardiac tamponade from a rupture of the right coronary artery.

Plaintiff, Analyn Rivera, Administratrix ad Prosequendum for the Estate of Romeo Rivera, promptly sued JCMC, Emergency Medical Associates, LLC (EMA), who had contracted with JCMC to run the ED, the ED nurses and the doctor involved in Romeo Rivera's (lack of) care alleging direct and vicarious claims of administrative, medical, and nursing neglect.

In a series of decisions, the trial court dismantled and defeated each of plaintiff's claims. Direct claims against defendant JCMC were dismissed based on

the alleged failure to provide an Affidavit of Merit (AOM) despite plaintiff having timely filed and served AOMs for **all** defendants and a Ferreira conference at which no issues were raised. Even after a supplemental AOM was promptly served when defendants belatedly complained about the AOM, and with discovery still ongoing, the trial court refused to allow plaintiff to amend her complaint to clear up the issue.

After the close of discovery, the trial court dismissed plaintiff's direct claims against defendant Emergency Medical Associates (EMA), erroneously taking from the jury determinations of breach of duty and proximate cause because of an alleged insufficiency of evidence. Similarly, the trial court dismissed plaintiff's claims against nursing staff that had been named as defendants, again taking presumptive jury determinations of breach of duty and proximate cause from the factfinder because of an alleged insufficiency of evidence.

The final nail in the coffin came via a directed verdict on all remaining claims against defendants JCMC, EMA and Adefris Adal, M.D., during a three-week trial. Once again, the trial court assumed the role of factfinder and held that plaintiff had failed to come forward with sufficient evidence of proximate cause to allow any claim against any defendant to be presented to a jury. A critical part of the alleged lack of evidence on which the court relied was an inability to use decedent's electronic medical records to support expert testimony. Those records

had been denied to plaintiff during discovery, despite federal law that guarantees access to a patient's electronic medical records.

The series of rulings were unjust, contrary to law and denied plaintiff her opportunity to seek recompense for the negligent death of her husband. The court exceeded its authority by evaluating and weighing evidence rather than allowing factual determinations guaranteed by the New Jersey Constitution to be made by a jury. The orders of dismissal should be reversed and remanded with instructions to permit the discovery appropriate and necessary for plaintiff to have a full and fair opportunity to pursue her claims.

PROCEDURAL HISTORY

Analyn Rivera, individually and as Administratrix of the Estate of Romeo Rivera, filed suit on June 7, 2017, on behalf of herself, the Estate and Mr. Rivera's minor children. Pa42. She sued the Jersey City Medical Center (JCMC), several nurse employees, including Talin Leister, R.N., Diana Capra, R.N., Dana Amorino, R.N., Cecilia Wilson, R.N. (collectively the Nurses), Emergency Medical Associates, LLC (EMA), which provided staffing in the JCMC Emergency Department, Adefris Adal, M.D. (Adal), who was an employee of EMA and the ED doctor who treated Mr. Rivera on the evening before his death, Zachary Bakhtin, CIM, and several fictitious persons and entities whose involvement in Mr. Rivera's negligent care remained to be determined. Ibid. Defendants JCMC and

the Nurses filed an Answer on July 18, 2017. Pa57. Defendants EMA, Adal and Mr. Bakhtin filed an Answer on August 4, 2017. Pa64. Defendants EMA and Adal filed another Answer on August 11, 2017. Pa76.

On September 7, 2017, an Initial Case Management Conference, including a Ferreira conference was held via phone. Pursuant to the initial Case Management Order (CMO) filed the same date, plaintiff was required to "serve the required Affidavit(s) of Merit no later than: September 29, 2017." Pa86. The Order also set forth a schedule for discovery with a discovery end date of October 11, 2018. Ibid. Plaintiff served an Affidavit of Merit for each/all defendant(s) on or before September 29, 2017.

In December 2017, plaintiff moved to compel defendants EMA, Adal and Bakhtin to comply with the initial CMO and to produce overdue documents and responses to interrogatories. Pa88. Those defendants cross-moved for a protective order. Pa181. On January 5, 2018, the trial court entered the first of many Orders compelling discovery. Pa1. On January 25, 2018, the trial court held its second Case Management Conference and entered a second CMO. Pa286. The second CMO set deadlines for expert reports and depositions and a new discovery end date of November 25, 2018. Pa287.

During discovery, plaintiff requested, on numerous occasions and in numerous ways, access to the complete Electronic Medical Record (EMR) of Mr.

Rivera. In February 2018, plaintiff moved to compel "the production of the audit trail/audit reports of the decedent's electronic medical records." Pa290. The proposed Order mistakenly included a provision ordering that "counsel for Plaintiffs is permitted to photograph and video tape a live view of the audit reports associated with Mr. Rivera's Electronic Medical Records at a terminal inside of Jersey City Medical Center." Pa7. That relief was not requested at that time by plaintiff's counsel and was not part of the motion. After a hearing on March 16, 2018, the court granted the motion, ordering that EMA produce the audit trail/audit log within ten days of entry of the Order, adding "Defendant EMA to supply data dictionary, User Chart, and identification of the station terminals to Plaintiff." Pa7. The portion regarding a live view was crossed out because it was not discussed at all during the March 16, 2018 hearing and not part of the motion. See 2T. All further efforts to obtain the complete EMR were denied.

In August 2018, plaintiff served an expert report identifying negligent supervision/training by JCMC and EMA. Pa552. In November 2018, JCMC claimed that no claim for negligent supervision/training had been plead and that no AOM had been provided. Plaintiff disagreed but nevertheless, in December 2018, served a supplemental AOM and also moved to amend her complaint. In January 2019, prior to the running of the statute of limitations and with a current discovery end date of May 22, 2019, the court denied leave to amend as too late. Pa19.

Discovery proceeded, with a final discovery end date of August 31, 2019. After the close of discovery, JCMC, EMA and the Nurses moved for summary judgment. In November 2019, the court granted partial summary judgment to JCMC, dismissing any direct claims. Pa24. On January 7, 2020, the court granted summary judgment to EMA and the Nurses, dismissing any direct claims. Pa26. With a trial date scheduled for March 9, 2020, plaintiff moved for leave to appeal that Order, which was denied.

Due to the pandemic, Hudson County facility issues and the expected duration, the trial was adjourned indefinitely and then multiple times. The case finally proceeded to trial on April 2, 2024, against Dr. Adal, JCMC and EMA. (Direct claims against JCMC and EMA were dismissed by the trial Court. JCMC remained in the case based on plaintiff's claim of "apparent authority." EMA remained in the case based on the doctrine of "respondeat superior.") At the close of plaintiff's case, all defendants moved for a directed verdict. On May 1, 2024, the court entered an Order of Disposition indicating, "the above captioned case is hereby dismissed." Pa35. On May 10, 2024, the court entered an Order of dismissal, indicating that plaintiff's claims against all defendants are dismissed with prejudice. Pa36. On May 13, 2024, the court entered 3 orders granting a directed verdict to Dr. Adal, JCMC/RWJ and EMA, respectively, and again granted

a directed verdict to all defendants and dismissed all plaintiff's claims with prejudice. Pa37-41. Plaintiff timely filed her Notice of Appeal. Pa1931.

STATEMENT OF FACTS

In January 2017, Mr. Romeo Rivera was forty-three years of age, married and had three young children. Pa553. He was employed by the United States Postal Service as a mail carrier. Ca46. At approximately 9:30 PM on the evening of January 14, 2017, Mr. Rivera experienced sudden and severe pain in his back that radiated down his legs. Pa553; Ca2. His wife, plaintiff, Analyn Rivera, drove him to the Jersey City Medical Center Emergency Department, arriving at approximately 10:13 PM. Pa553; Ca46. Mr. Rivera was assessed by a registered nurse, defendant Dana Amorino (a/k/a Dana Colon), R.N., who noted a chief complaint of "left leg numbness" and set an acuity level of 3 (urgent). Pa553; Ca53. He was seen at approximately 10:47 PM by a different registered nurse, defendant Talin Leister, R.N., who noted sudden onset of low back discomfort accompanied with left leg numbness and brief episode of chills to both hands. Pa523; Ca54. Nurse Leister testified that based on her assessment Mr. Rivera had potential life-threatening conditions. Pa1396. Nurse Leister assessed his acuity level at 3 (urgent) and determined that Mr. Rivera required further interventions. Pa1396-97. Nurse Leister explained that "urgent" indicates a patient that requires

more than one intervention and also requires an additional assessment 30 minutes after the initial encounter. Pa1403.

After a shift change, at approximately 11:24 PM, Mr. Rivera was seen by defendant Diana Capra, R.N. Ca55. Nurse Capra noted a new complaint of "bilateral flank pain," sudden, aching, constant and a patient comfort goal of "0/10." Ca55.

At approximately 12:16 AM on January 15, 2017, Mr. Rivera was seen by defendant Adefris Adal, M.D., who ordered that Mr. Rivera be discharged. Ca58. Dr. Adal noted that "[a]fter the evaluation in the Emergency Department, my clinical impression is sciatica." Ca64; Pa553. Dr. Adal ordered administration of a muscle relaxant, Toradol 60 mg (ketorolac), prescribed Acetaminophen (Tylenol) for pain and Zantac for heartburn, and decided to send Mr. Rivera home with no further interventions or testing. Ca64; Pa553. At approximately 12:34 AM on January 15, 2017, defendant Cecilia Wilson, R.N., administered the Toradol and noted at that time back pain with a pain scale of "6/10." Ca56; Pa553. Approximately eight minutes later, at 12:42 AM, defendant Diana Capra, R.N., signed off on Mr. Rivera's chart for discharge. Ca59; Pa553.

Plaintiff, Analyn Rivera, drove her husband Romeo home. At approximately 1:00 PM on January 15, 2017, Mr. Rivera collapsed on his bedroom floor, gasping for air and foaming at the mouth. Pa553. Emergency Medical Services arrived at

approximately 1:13 PM but were not able to resuscitate Mr. Rivera. Pa553. Mr. Rivera was pronounced dead at 1:36 PM. Pa553.

Autopsy examination revealed a right coronary artery aneurysm and an aortic dissection to the renal arteries with hemopericardium. Pa677. The cause of death was diagnosed as "cardiac tamponade secondary to bleeding from the small ruptured aneurysm of right coronary artery with blood infiltration of sub-adventitia of the tunica externa, of the aortic arch, mediastinal and abdominal aorta and branching vessels." Ca33. Essentially, blood stopped flowing to his organs, collecting in his chest and abdomen until his heart, starved of oxygen, became unable to function. Pa685.

Plaintiff's nursing expert witness, Kathleen C. Ashton, Ph.D., R.N., concluded that defendant nurses failed to assess Mr. Rivera's complaints, signs, and symptoms correctly or to communicate those findings to the ED physician managing his care when he was admitted to the JCMC Emergency Department. Pa606. Specifically, defendant Nurse Dana Amorino, R.N., the first nurse to see Mr. Rivera at 10:13PM in the Emergency Department on January 14, 2017, deviated from the standard of care as follows:

1. Failed to obtain an appropriate history and to take vital signs.
2. Charted only the chief complaint and did not take a relevant history to include chronic hypertension and smoking (See Dr. Ibrahim's records and deposition).

3. Did not obtain prior admission record from May 10, 2008.

4. Failed to provide triage and prompt access to emergency services for a patient coming in with "sudden onset" of chest complaints and "clamminess" including heartburn.

5. Failed to discuss details of Mr. Rivera's case when handing off care responsibility to Nurse Leister.

6. Failed to assess Mr. Rivera using Beck's triad for cardiac tamponade upon development of chest pain.

[Pa608-09.]

Nurse Ashton concluded based on the deviations noted that the "actions by Nurse Colon fell below accepted standards of nursing care that required her to property evaluate and assess Mr. Rivera's sudden emergency. The above deviations from the nursing standards of care by Nurse Colon contributed to the eventual wrong diagnosis of sciatica that resulted in Mr. Rivera's premature discharge and untimely death." Pa609.

With respect to defendant triage Nurse Talin Leister, R.N., another JCMC-employed nurse who reassessed Mr. Rivera at 10:47PM during his visit to the Emergency Department of defendant JCMC, Nurse Ashton noted the following deviations from the nursing standards of care:

1. Failed to access and review prior admission records.

2. Failed to obtain complete medical history of hypertension and smoking (See Dr. Ibrahim's records and deposition).

3. Failed to initiate proper testing, per JCMC policy and procedure, Patient presenting with chest pain, (i.e., chest e-ray, EKG, and blood work).

4. Failed to act on acuity level 3, requiring multiple interventions.

5. Failed to properly communicate during hand off process with Nurse Capra.

6. Failed to assign triage Level 2 acuity given his presenting symptoms and changing complaints.

7. Failed to utilize any triage algorithm as required by the Policy and Procedure manual.

8. Failed to assess Mr. Rivera using Beck's triad for cardiac tamponade upon development of chest pain.

[Pa609.]

Nurse Ashton concluded that "[t]he above deviations from the nursing standards of care contributed to the eventual wrong diagnosis of sciatica that resulted in Mr. Rivera's premature discharge and untimely death." Pa609.

With respect to defendant Diana Capra, R.N., another nurse employed by JCMC who reassessed Mr. Rivera at 11:27 PM during his visit to the Emergency Department of defendant JCMC, and, in fact, signed off on Mr. Rivera's discharge at 12:46 AM, Nurse Ashton noted the following deviations from the nursing standards of care:

1. Failed to obtain history re: smoking and hypertension; upper chest heartburn (Capra dep. p.48) [Pa1638].

2. Failed to access prior admission records.

3. Failed to appreciate pain scale level change from 3/10 at 10:47PM to 6/10 at 12:46AM.

4. Failed to respond to the change in the quality and the duration of Mr. Rivera's pain noted in the reassessment performed at 11:24PM.

5. Failed to provide head-to-toe assessment.

6. Failed to make the connection between "heartburn" and complaint of chest pain.

7. Failed to appreciate and report worsening pain prior to effectuating discharge.

8. Failed to recommend any tests on reassessment or communicate these changes to the ED physician.

9. Failed to assess Mr. Rivera using Beck's triad for cardiac tamponade upon development of chest pain.

[Pa610.]

Nurse Ashton concluded based on the deviations noted that those failures by Nurse Capra "constitute inadequate nursing care and fell below both the JCMC policies and procedures and the standards of nursing care. Moreover, her actions contributed to the wrong diagnosis of sciatica, his inappropriate discharge, and his untimely death." Pa610.

With respect to defendant Nurse Cecilia Wilson, R.N., another JCMC-employed nurse who assessed Mr. Rivera at 12:27AM during his visit to the

Emergency Department of defendant JCMC, Nurse Ashton noted the following deviations from the nursing standards of care:

1. Failed to provide a pain level reassessment 30 minutes after giving pain injection, (only waited 8 minutes) as required by JCMC policy.

2. Failed to respond to patient's changes in pain level from 2/10 to 6/10.

3. Failed to contact the ED physician about significant changes in Mr. Rivera's condition prior to his discharge.

4. Failed to assess Mr. Rivera using Beck's triad for cardiac tamponade upon presentation of chest pain.

[Pa610.]

Nurse Ashton concluded based on the deviations noted that those failures by Nurse Wilson caused Mr. Rivera to be "discharged into the night, a failure to comply with accepted standards of nursing care that contributed to [Mr. Rivera's] untimely death." Pa610.

Per Nurse Ashton, "In summary, the failures of the nursing staff of the JCMC Emergency Department, caring for Mr. Rivera as outlined above deviated from accepted standards of nursing care, substantially increased the risk of harm, and were direct causes in bringing about the death of Romeo Rivera." Pa611.

Plaintiffs' pathology expert, Evgeny Olenko, M.D., determined that "the immediate cause of Mr. Romeo Rivera's death is cardiac tamponade secondary to the bleeding from the small, ruptured aneurysm of the right coronary artery leading to massive accumulation of blood within the pericardial sac and infiltration of the

blood elements into sub-adventitia of the tunica externa of the Aortic arch and ascending, mediastinal, abdominal Aorta and its branching vessels." Ca33.

Plaintiff retained Timothy F. Hawkins, FACHE, CHSP, MBA, a Board Certified Hospital Administration Executive and Board-Certified Healthcare Safety Professional to review Mr. Rivera's records and the discovery. After reviewing the available information and documentation, Mr. Hawkins rendered a report dated August 20, 2018. Pa552.

With respect to defendant Emergency Medical Associates (EMA), Mr. Hawkins found that as of January 14 to 15, 2017, EMA had a contract with defendant Jersey City Medical Center (JCMC) to run, operate and staff defendant JCMC's emergency department. Pa557. Defendant EMA was the staffing company that supplied emergency medicine doctors to defendant JCMC emergency department. Pa557. The nursing staff was supplied and employed by JCMC. EMA supplied defendant Dr. Adal as the JCMC emergency department doctor at the time of Mr. Rivera's visit.

Mr. Hawkins concluded "it is my opinion that the 'independent contractor' status of Dr. Adal, an employee of St. Barnabas Emergency Physician Services Group, LLC is not relevant and that both Jersey City Medical Center and St. Barnabas Emergency Physician Group LLC (Emergency Medical Associates) are responsible for the clinical negligence of this contracted physician as documented

by plaintiffs' expert Dr. Michael D'Ambrosio, D.O." Pa563-64. Mr. Hawkins found that:

> Based upon the above documentation, the expert report of Kathleen C. Ashton, PhD, RN, ACNS-BC, plaintiffs nursing expert, and to a reasonable degree of administrative certainty, the nursing staff (nurses Roby, Colon, Capra, Wilson and Leister) of the Jersey City Medical Center Emergency Room failed in their responsibility to perform a complete head-to-toe assessment per hospital policy, failed to perform reassessments of patient Rivera every 30 minutes during his stay in the Emergency Room, failed to notify Emergency Room physician Adal that patient Rivera's pain scale had increased to 6/10 immediately prior to discharge following the administration of pain medication, and failed to re-assess patient Rivera 30 minutes after administering an IM injection of Toradol as required under policy. Therefore, Jersey City Medical Center and St. Barnabas Emergency Physician Group LLC (Emergency Medical Associates) fell below the standard of care and are responsible for the negligence of its Emergency Room Department nursing staff (nurses Roby, Colon, Capra, Wilson and Leister) for failure to follow policies and procedures (designed to protect the patient).
>
> [Pa564.]

Having reviewed the JCMC-EMA service agreement, Mr. Hawkins noted that both JCMC and EMA had a responsibility to ensure adequate education and training on the emergency department policies and procedures. Pa632 ("The Group [EMA] and the applicable Hospital [JCMC] shall have the joint authority and responsibility for the professional supervision of Hospital employees who render or assist in rendering services.") Mr. Hawkins concluded that "both Jersey City Medical Center administrative staff and [EMA], to a reasonable degree of administrative certainty, fell below the standard of care and were negligent in their

administrative responsibility to the patients of the Jersey City Medical Center Emergency Department in their failure to educate and train the nursing staff on all of the policies and procedures in the Emergency Department. They also failed to assure the implementation of these policies, specifically the patient triage and pain management policies, and ensure their implementation across the board on all patients entering into the JCMC Emergency Department." Pa564-565. Mr. Hawkins noted that, specifically with Mr. Rivera, Nurse Capra acknowledged that she was not familiar with some of the policies. Pa565; Pa1657-58; Pa1669. Mr. Hawkins also noted that Nurse Ashton stated in her report "that a number of the nurses (nurses Roby, Colon, Capra, Wilson and Leister) failed to implement them properly." Pa565.

> In summary, had the nursing staff been properly in-service trained and instructed by JCMC and EMA administrators to implement the policies and procedures as written, and to notify Dr. Adal that patient Rivera's pain was getting worse (as it was documented to be 6/10 immediately prior to discharge) Dr. Adal stated in his deposition that he would not have discharged patient Rivera. That would have allowed additional time for nursing re-assessment and medical workup and testing to determine the cardiac cause of the increased pain and additional complaints allowing Dr. Adal to uncover the underlying clinical causes for his pain and subsequent referral to specialists that could have saved patient Rivera's life as stated in the report of cardio-vascular expert Dr. Breall.
>
> [Pa565.]

Plaintiff retained and produced Michael D'Ambrosio, D.O., as an expert witness in emergency medicine, including the emergency medicine standard of

care. Pa598. Dr. D'Ambrosio issued a report dated August 20, 2018. In that report, he concluded that the attending emergency medicine physician provided by EMA, defendant Dr. Adal, deviated from the standard of care in his evaluation and management of Mr. Rivera." Pa602. "Dr. Adal's failure to highly suspect and rule out an acute symptomatic dissection of Romeo's abdominal aorta resulted in his incorrect diagnosis and fell below the SOC expected for an emergency medicine physician in evaluating a patient with Mr. Rivera's symptoms and risk factors for that condition. That wrong diagnosis of sciatica and improper discharge most probably caused Mr. Rivera's death." Pa603. The emergency medicine standard of care, given the history and physical exam presented, "mandated" that "Dr. Adal consider and rule-out a diagnosis of dissection of the abdominal aorta." Pa601. Had the appropriate tests been performed, Mr. Rivera would not have been misdiagnosed with sciatica and sent home to die.

Plaintiff also retained Jeffrey Breall, M.D., Ph.D., as a cardiology expert witness. Dr. Breall produced a report dated August 19, 2018. Pa676. Dr. Breall opined that Romeo died "as the result of hemopericardium and cardiac tamponade." Pa677.

> The symptoms he had been having – heartburn, shortness of breath, chest tightness, back pain, bilateral flank pain and leg pain/numbness were all a result of his evolving aortic dissection. No differential diagnosis was ever made. Mr. Rivera's clinical picture in the Emergency Department clearly indicated the high likelihood of a cardiovascular emergency, and such a life-threatening condition was

> never ruled out. Had routine testing been done, including an electrocardiogram, troponin, serum creatinine and a chest x-ray, many of these results would have likely been abnormal. The combination of his clinical complaints plus these abnormal preliminary tests would have led to the performance of either a transthoracic/esophageal echocardiogram or a chest CT with contrast. This would have confirmed the diagnosis of a Type A aortic dissection – a life threatening emergency.
>
> [Pa677.]

Dr. Breall concluded to a reasonable degree of medical certainty that "Mr. Rivera's unfortunate death was caused by ascribing a wrong diagnosis of sciatica and ignoring the signs and symptoms of aortic dissection and evolving cardiac tamponade." Pa677. With "appropriate history, physical examination and adjunctive testing," Mr. Rivera "would in all likelihood be alive today." Pa677.

LEGAL ARGUMENT

POINT I

THE COURT ERRED BY DENYING DIRECT CLAIMS AGAINST JCMC WHERE PLAINTIFF'S AOM SUBSTANTIALLY COMPLIED WITH THE AOM STATUTE AND THERE WAS NO REASON TO DENY AN AMENDED COMPLAINT. (Pa19; 6T67:5)

A. Standard of Review.

Rule 4:9-1 requires that motions for leave to amend be granted liberally. Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456 (1998). Leave to amend the Complaint should be liberally granted without consideration of the ultimate merits of the amendment. Notte v. Merchants Mut. Ins. Co., 185 N.J.

490, 500-501 (2006); see City Check Cashing v. National State Bank, 224 N.J. Super 304 (App. Div. 1990). Motions for leave to amend "should generally be granted even if the ultimate merits of the amendment are uncertain." G & W, Inc. v. Bor. of E. Rutherford, 280 N.J. Super. 507, 516 (App. Div. 1995); see also Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997) (motions for leave to amend should be liberally granted without consideration of the ultimate merits of the amendment). "The broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result." Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:9-1 (2025); see Bustamente v. Bor. of Paramus, 413 N.J. Super. 276, 298 (App. Div. 2010).

Nevertheless, "the granting of a motion to file an amended complaint always rests in the court's sound discretion." Kernan, 154 N.J. at 457. A motion to amend may properly be denied where its merits are marginal, its substance generally irrelevant to the main claim, and allowing the amendment would unduly protract the litigation or cause undue prejudice. Cutler v. Dorn, 196 N.J. 419, 441 (2008). The polestar, however, is substantial justice on the merits. See Fox v. Twp. of West Milford, 357 N.J. Super. 123, 130-31 (App. Div.) (reversing the denial of a "grossly" late motion to amend because complete relief on the merits could not be granted otherwise), certif. denied, 176 N.J. 279 (2003). In the interest of justice, an

appellate court may even direct on remand that a party be permitted to amend its pleadings prior to retrial. MBCC v. Lotito, 328 N.J. Super. 491, 511 (App. Div. 2000).

B. Discussion.

The trial court denied leave to amend, concluding that the initial AOM did not identify a direct claim against JCMC. 6T67:21-22. The court buttressed its decision by reasoning that the motion was too late in the case, 6T71:12, and would require extensive further discovery. 6T70:1-3. That reasoning ignores several significant factors weighing in favor of permitting the claim to be asserted.

First, the Affidavit of Merit prepared by Mr. Hawkins and produced in September 2017 was sufficient. Pa537. The court promptly held an initial Case Management Conference, and plaintiff timely served AOMs for all defendants. Pa86. Included was an affidavit from Timothy F. Hawkins, an expert in hospital administration and healthcare safety. Pa537. The AOM specifically referenced "Hospital Administration standards of emergency medicine." Pa538. The hospital involved was defendant JCMC. To accept that JCMC had no reason to know that there was a claim against it for failure to satisfy "acceptable Hospital Administration standards of emergency medicine" is difficult to fathom.

Moreover, the AOM included a notice in bold type requesting immediate notice if there is any issue with the AOM. Pa538. To the extent that defendant

JCMC had an objection to the AOM, it was incumbent on JCMC to raise the issue. See Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 154-55 (2003); see also Moschella v. Hackensack Meridian Jersey Shore Univ. Med. Ctr., 258 N.J. 110, 124 (2024) (reiterating the value of a timely Ferreira conference and the obligations of the parties to address the adequacy of an AOM promptly). JCMC failed to object to the AOM timely.

Plaintiff also timely served Mr. Hawkins' report in August 2018. Pa552. JCMC waited an additional three months before raising an issue with the scope of Mr. Hawkins' opinions and conclusions. Pa530. When an issue regarding the language and scope of the AOM was belatedly raised, plaintiffs promptly issued a Supplemental AOM to cure any perceived defect. To the extent that there was some sincere misunderstanding regarding the scope of the AOM, there was substantial compliance and no prejudice. (Notably, as will be discussed in Point V, at the same time the trial court was denying leave to amend despite a several months – or yearlong – delay in objection by defendants, the court cited plaintiffs' alleged delay in pursuing EMR as a basis to deny relevant, admissible discovery. Given that the polestar is substantial justice on the merits, the inequity is glaring.)

Second, when the Hawkins AOM was served, the only available evidence for review was the JCMC Emergency Department records. Pa538. Mr. Hawkins reviewed the records "for services rendered **by** the nursing staff at Jersey City

Medical Center and **by** medical staff from Emergency Medical Associates, LLC, on January 14, 2017." Pa538 (emphasis added). Mr. Hawkins concluded: "There exists reasonable probability that the care to Romeo Rivera rendered at the Jersey City Medical Center by Emergency Medical Associates, LLC, fell outside acceptable Hospital Administration standards of emergency medicine." Pa538.

Mr. Hawkins' assessment of the hospital facility and administration that rendered care to decedent Romeo Rivera was correct: JCMC's Emergency Department provided inadequate care. EMA was the agent of JCMC charged with providing appropriate care but that does not relieve JCMC as the "licensed person" under the AOM statute from responsibility. Mr. Hawkins' conclusion regarding hospital administration correctly surmised that the "licensed person" requiring an AOM was Jersey City Medical Center and served to put JCMC on notice of a claim against it. N.J.S.A. 2A:53A-27 requires that in "any action for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person," the plaintiff must provide an affidavit from a licensed professional that there is a "reasonable probability" that the care, skill or knowledge exercised in the treatment of an individual fell outside acceptable professional standards. The definition of "licensed person" includes "a health care facility as defined in section 2 of P.L. 1971, c.136 (C.26:2H-2)." N.J.S.A. 2A:53A-26(j). A "health care facility" is specifically defined as "the

facility or institution...engaged principally in providing services for...diagnosis, or treatment of human disease, pain, injury, deformity, or physical condition, including...a general hospital...." N.J.S.A. 26:2H-2(a). EMA is not a health care facility. It is the managing entity of a physician staffing agency for JCMC's Emergency Department. Therefore, given that EMA is not a "facility" or "institution" of any sort and consistent with the plain reading of the statutory requirements for an AOM, Hawkins' initial AOM was appropriate for JCMC.

Also, the AOM references the nursing staff, clearly indicating a claim against JCMC. That the JCMC Emergency Department nursing staff were JCMC employees is undisputed. Under the JCMC-EMA contract, the facility, equipment and ancillary staff – specifically including nurses – were supplied by JCMC. Pa648. EMA is responsible for management and supervision concurrently with and for JCMC, not instead of JCMC.

Nevertheless, out of an abundance of caution, promptly after the issue was raised, plaintiff supplied a Supplemental Affidavit of Merit from Mr. Hawkins. Pa673. The Supplemental AOM was based on Mr. Hawkins' review of additional information obtained during discovery. Pa674. Mr. Hawkins clarified the prior AOM to ascribe responsibility to each defendant in separate Paragraphs 6 and 7:

> 6) There exists a reasonable probability that the care to Romeo Rivera rendered at the Jersey City Medical Center by Emergency Medical Associates, LLC, fell outside acceptable Hospital Administration Standards of emergency medicine.

> 7) There exists a reasonable probability that the care to Romeo Rivera rendered by the Jersey City Medical Center to Romeo Rivera fell outside acceptable Hospital Administration Standards.
>
> [Pa674.]

Even if there was a genuine issue with respect to plaintiff's Hospital Administrator's AOM, it was corrected less than thirty days from defendants raising an issue. Notably, with separate counsel, both JCMC and EMA vigorously defended this case throughout discovery. (Defendants filed eleven cross-motions for a protective order in response to plaintiff's required motions to compel discovery.) Yet, defendant had Mr. Hawkins' report in hand for three months **and** two extensions of time to file their own expert reports before ever raising the issue of an inadequate AOM or a failure to plead negligent training/supervision. To deny leave to amend based on delay in the proceedings laid the fault on the wrong party. There was no prejudice to any party with the submission of the supplemental AOM or the motion for leave to amend.

Plaintiff promptly filed a Motion to Amend the Complaint. Pa687. Those theories of liability had been fleshed out during the discovery process. Following review of all information obtained from defendants, plaintiffs' Hospital Administration expert Timothy Hawkins opined as to JCMC's and EMA's negligence consistent with the timely served AOM. Those parties failed to provide hospital administration consistent with the standards of the field. They were

negligent directly, not merely vicariously liable for the failures of the emergency department staff on duty that fateful night.

The motion to amend was made well within the discovery period. In fact, at the time, the discovery end date was five months away, and it was extended again after the motion was denied. The motion also was made – and denied – at a time when the statute of limitations had not yet run. Delay was an insufficient basis for the motion judge to deny plaintiff's request for leave to amend the complaint where the caselaw requires it to be liberally granted in the interest of justice.

Most importantly, there was no prejudice and substantial justice on the merits required that the amendment be granted. All defendants had plaintiffs' expert reports in hand for months before the motion was made. They were well aware of the claims and should have been preparing to respond to them since August 24, 2018. Pa552. Just days after plaintiffs served their expert reports, the court held a case management conference. Defendants requested additional time to produce their experts' reports but raised no issue with opinions asserted in the reports or the original AOMs. See Pa517. At a hearing a few days later, defendants failed to raise any issues regarding the pleadings or AOMs. See 4T.

Another case management conference was held on November 14, 2018, two days **after** defendants' expert reports were due and five days before JCMC moved to bar Mr. Hawkins' testimony regarding its negligence. Defendants received

another thirty days to produce their expert reports. Pa529. Defendants had overly abundant time to review plaintiff's reports, retain appropriate expert witnesses and respond to the claims against them. In fact, plaintiff's experts' reports were referenced in defendants' experts' reports. The claims set forth in the proposed Amended Complaint were neither untimely nor a surprise. Pa693. There was no prejudice. The issues were fully disclosed to JCMC and EMA and defense counsel over three months before any issue was raised.

There were no new parties being joined to the litigation. All parties actively participated in discovery. The Statute of Limitations was not even expired. Such amendment should have been "liberally considered by the Court and leave to amend the Complaint should be liberally granted without consideration of the ultimate merits of the amendment." Notte, 185 N.J. at 500-501. Failure to permit the amendment and to allow the claims to proceed was contrary to the interests of justice, the controlling caselaw and an abuse of discretion.

POINT II

THE COURT ERRED BY DISMISSING DIRECT CLAIMS AGAINST EMA WHEN THE EVIDENCE SHOWED THAT EMA-MANAGED NURSES LACKED TRAINING AND SUPERVISION THAT CONTRIBUTED TO ROMEO RIVERA'S DEATH. (Pa26; Pa28)

A. Standard of Review.

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

Summary judgment should not be granted where the adjudication of such a motion would constitute what is in effect a trial by pleadings and affidavits involving issues of fact. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211-12 (App. Div. 1987). Summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, however, it is not a substitute for a full plenary trial. United Advertising Corp. v. Metuchen, 35 N.J. 193, 195-96 (1961). Accordingly, summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. Sisselman, 215 N.J. Super. at 212.

B. Discussion.

Defendant EMA's application of the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:53A-37 to -42 (Patients First Act), to address the qualifications of plaintiff's Hospital Administration Expert, Timothy Hawkins, was plain error. Specifically, N.J.S.A. 2A:53A-41 does not apply to those claims. The New Jersey Supreme Court case of Meehan v. Antonellis, DMD, 226 N.J. 216 (2016), is entirely dispositive on that issue. In Meehan, the Supreme Court unequivocally held that the enhanced credential requirement under the Patients First Act for those submitting affidavits of merit, outlined in N.J.S.A. 2A:53A-41, applied to physicians in medical malpractice actions only. 226 N.J. at 234 ("we conclude that the plain language of sections 27 and 41 lead to the inexorable conclusion that the enhanced credential requirements established under section 41 for those submitting affidavits of merit and expert testimony apply only to physicians in medical malpractice actions").

Accordingly, all matters that are against a "licensed professional" other than a physician are governed by N.J.S.A. 2A:53A-27. That statute requires “no more than” that the expert "have a particular expertise in the general area involved in the action or in the specialty involved in the action.” Meehan, 226 N.J. at 237. “Such particular expertise may be evidenced by board certification or by devotion of his practice substantially to the general area or specialty involved in the action for at least five years." Ibid. Because the plain language of the statute uses the

disjunctive "or," the expert need satisfy only one of the requirements to be qualified. Ibid.

Plaintiff's expert, Timothy Hawkins, FACHE, CHSP, MBA provided an AOM and expert report establishing that he is qualified and certified as a Hospital Administrator. Pa537; Pa552. His opinions pertain to the contractual obligations of EMA as the manager of the JCMC Emergency Department to apply JCMC Policies & Procedures and local, state and federal regulations within the JCMC Emergency Department. Pa563-65. Mr. Hawkins details the applicable standard of care, the deviations from the standard of care and how those deviations impacted Mr. Rivera's care. Pa563-65. The AOM and report were timely provided to defense counsel.

Mr. Hawkins' professional experience, along with the additional vocational experience outlined in his resume, Pa567, demonstrated abundant qualification to serve as plaintiff's Hospital Administration Expert. Mr. Hawkins met the requirements to provide an AOM and to testify, N.J.S.A. 2A:53A-27, and defendant EMA's contention that he was unqualified to serve as a Hospital Administration expert was unsupported by the record.

EMA also claimed that Mr. Hawkins could not rely on the opinions of plaintiff's other experts when formulating his conclusions. It claimed that there were insufficient facts and data to support Mr. Hawkins' opinions. EMA claimed

that because Mr. Hawkins is unable to express an opinion on medical causation, his conclusions with respect to EMA's responsibilities for supervision, oversight, training and enforcement of hospital policies must be barred. None of those arguments justified dismissal.

EMA's assertions regarding permissible expert opinion and testimony are contrary to law. There are abundant facts in this case to demonstrate that EMA violated its contractual responsibility to provide oversight, supervision and training to nursing staff within the JCMC Emergency Department and to enforce JCMC Policies and Procedures within the Emergency Department.

N.J.R.E. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The three "core requirements" imposed by N.J.R.E. 702 for the admission of expert testimony are:

> "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony."
>
> [Townsend v. Pierre, 221 N.J. 36, 53 (2015) (internal citations omitted).]

The foundation for expert testimony is set forth in N.J.R.E. 703. There, it is noted that the "[t]he facts or data in the particular case upon which an expert bases

an opinion or inference may be those perceived by or made known to the expert." Ibid. The commentary following that rule further explains that "[t]he term `perceived' as used in this rule means to have acquired knowledge through one's own senses." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. on N.J.R.E. 703 (2025). N.J.R.E. 703 requires that an "expert opinion be grounded in `facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert, which is not necessarily admissible in evidence, but which is the type of data normally relied upon by experts.'" Townsend, 221 N.J. at 53 (quoting Polzo v. County of Essex, 196 N.J. 569, 583 (2008), and State v. Townsend, 186 N.J. 473, 494 (2006)).

Notably, N.J.R.E. 703 was intended to allow more latitude in the admission of expert opinion testimony. Agha v. Feiner, 198 N.J. 50, 62 (2009). "Thus, the testifying expert is generally permitted to detail for the trier of fact all of the materials, **including . . . other experts' reports**, on which he relied in deriving his opinion, so long as they are of a type reasonably relied upon by experts in his field." Ibid. (emphasis added).

The net opinion rule is a "corollary" of N.J.R.E. 703. It "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Polzo, 196 N.J. at 583. The rule requires that an expert "give the why and wherefore' that supports the opinion, `rather than a mere

conclusion.'" Bor. of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013) (internal quotation and citation omitted). The expert must explain the "facts and assumptions" upon which he bases his conclusions. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). "[A]n expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered." Pomerantz Paper Corp. v. New Comm. Corp., 207 N.J. 344, 372 (2011). Where an expert cannot provide objective support for his opinion "but testifies only to a view about a standard that is 'personal,' it fails because it is a mere net opinion." Ibid. Yet, when an expert opinion is grounded in "knowledge, skill, experience, training, or education," admission of the testimony should be permitted. Koseoglu v. Wry, 431 N.J. Super. 140, 159 (App. Div. 2013) (citing N.J.R.E. 702).

Mr. Hawkins' opinions regarding the administrative negligence of defendant EMA for breaching its obligations to JCMC patients are not net opinions. There are sufficient facts in this case, which include but are not limited to the testimony of defendant nurses working on the night in question, as well as other expert opinions and testimony, for Mr. Hawkins to conclude that the negligent conduct of EMA increased the risk of harm to Romeo Rivera and was a substantial factor in causing his death. This medical malpractice case deals with concurrent negligence by an Emergency Department physician, JCMC nursing staff and EMA. All failed

to provide adequate care for decedent Romeo Rivera while he was a patient at defendant JCMC. Plaintiff offered proofs that Romeo's "cardiac tamponade secondary to the bleeding from the small ruptured aneurysm of the right coronary artery" was proximately caused by the negligence of **all** defendants. Ca35; Pa563-65 (JCMC, EMA, Dr. Adal and nurses); Pa603 (JCMC, EMA and Dr. Adal); Pa611 (nursing staff); Pa677 (Dr. Adal and EMA). The facts and evidence adduced during discovery showed that EMA's failure to supervise, to oversee and to train Emergency Department staff within JCMC Emergency Department was a contributing cause of Romeo Rivera's death. Pa564-65. The nurses testified that they had not been trained, were unfamiliar with the policies and procedures of the Emergency Department and failed to perform to "the standard of emergency nursing practice and … JCMC policies." Pa565; Pa611.

Proximate cause is a factual issue to be decided by a jury. Scafidi v. Seiler, 119 N.J. 93, 101 (1990). Where "a plaintiff has a preexistent injury or disability and is then adversely affected by a defendant's negligence, the standard by which the jury evaluates causation must be expressed in terms consistent with the operative facts." Id. at 102. The Court explained that this "modified standard of proximate cause is limited to that class of cases in which a defendant's negligence combines with a preexistent condition to cause harm – as distinguished from cases in which the deviation alone is the cause of the harm." Id. at 108-109.

Where the negligent care by defendants "increased the risk of harm posed by an individual's pre-existing injury," the jury is "instructed to consider whether the increased risk was a substantial factor in producing the ultimate result." Ptaszynski v. Atlantic Health Sys., 440 N.J. Super. 24, 38-39 (App. Div. 2015); see Scafidi, 119 N.J. at 110; Model Jury Charges (Civil), 5.50E, "Pre-Existing Condition – Increased Risk/Loss of Chance – Proximate Cause" (rev. 03/2021). The substantial factor analysis requires only that where there is a pre-existing condition, the defendant's deviation "was sufficiently significant in relation to the eventual harm [as] to satisfy the requirement of proximate cause." Scafidi, 119 N.J. at 109. As such, the decision whether, as a matter of reasonable hospital administration probability, EMA's failure to supervise, to train or to oversee JCMC Emergency Department personnel and enforce JCMC hospital policies and procedures increased Romeo River's risk of harm flowing from the underlying, untested, undiscovered aneurysm was a question for the factfinder.

Mr. Hawkins explained in his report and at deposition that the "role" of the hospital administrator is "to see that the -- that [hospital] policies exist, and that the appropriate individuals -- in this case the clinical staff, the physicians, and the nurses -- are the ones that have the input into those policies and procedures and use evidence-based medicine to provide accurate policies and procedures; and then as the administrator, it's to see that they're enforced." Pa778. His opinions deal

directly and only with the negligence of EMA for failing to ensure supervision, oversight, training and enforcement of the JCMC Emergency Department policies and procedures. Admittedly, Mr. Hawkins offered no opinion on medical negligence. However, pursuant to N.J.R.E. 703, Mr. Hawkins is permitted to rely on the medical liability and causation medical experts' opinions when formulating his own conclusions because a medical clinician's deviation is necessary to show that policies and procedures were not applied, taught or enforced by EMA.

Mr. Hawkins' deposition testimony was taken out of context by defense counsel when suggesting that he failed to give a proper opinion on causation. During his deposition, Mr. Hawkins explained that his opinions related to the "administrative" standards of care and that he would offer no opinions related to the "clinical" standards vis-a-vis the nurses' or doctor's negligence:

> There's two standards of care: There's a clinical standard of care, which I'm not offering opinions on, which would involve the nursing staff and the medical staff of a hospital providing the standard of care in the care and treatment of patients; and there's the administrative standard of care, which I'm providing the opinions regarding the contractual obligations and the regulatory obligations of physicians, hospitals, and contracted services on a national basis.
>
> [Pa775.]

Mr. Hawkins explained that he would not be providing any clinical standard of care opinions because he is not a doctor or nurse. He relied on the conclusions of the experts in those areas to complete the picture of negligence and proximate cause.

To meet causation for administrative negligence by EMA, Mr. Hawkins permissibly relied on the contract documents, deposition testimony of defendants and fact witnesses, defendants' discovery responses, JCMC Policies and Procedures, Medical Records, Autopsy Report and the plaintiff's expert reports from Drs. Breall, Salgo, D'Ambrosio and Nurse Ashton to conclude that EMA's failure to administer JCMC policies and procedures properly, failure to train and to supervise nursing staff properly, contributed to and caused the death of Romeo Rivera. Pa575.

The Emergency Medicine Services Agreement between JCMC and EMA states, among other things, that EMA has "authority and responsibility for the professional supervision of Hospital employees who render or assist in rendering services in connection with the delivery of professional services by [an EMA Provider], which shall satisfy, but is not limited to, the requirements of applicable regulatory agencies and accrediting organizations." Pa632. Additionally, EMA is required "to provide, through [EMA's] providers, the necessary on-the-job training to qualified Hospital personnel." Pa633. Other pertinent sections of the JCMC-EMA agreement are specified within Mr. Hawkins' expert report. Pa552; Pa556-59. Coupled with the testimony of the EMA personnel, the Emergency Department staff and the opinions expressed by plaintiffs' nursing expert, the deviations from

the administrative standard of care connect with the harm to Mr. Rivera such that a reasonable jury could find proximate cause.

For example, plaintiffs deposed Deven Unadkat, M.D., EMA's Medical Director for and Chairman of the JCMC Emergency Department. Pa838; Pa981. Dr. Unadkat testified that he didn't know any of the JCMC nurses working within the emergency department during Romeo Rivera's admission and recognized only EMA employee, defendant Dr. Adal. Pa928; Pa933-34. He was asked directly whether he was "familiar with the standards of care to be applied to nurses" who work for JCMC and answered, "no." Pa959-60. Dr. Unadkat was asked whether he had "any familiarity with the ENA standards that apply to nursing personnel in the emergency room" and, again, replied "[n]o, I don't." Pa965.

When asked about his familiarity with "ENA standards of care and practice emergency severity index standards and NJDOHSS," Dr. Unadkat stated:

> I mean I know what you are referring to, what those things -- **I'm not completely familiar with those standards, no.**
>
> [Pa978.]

Dr. Unadkat testified that he is "not too familiar" with the Emergency Department staffing guidelines with respect to the nursing staff. Pa982. He stated that he was "not familiar" with the JCMC policy of advanced triage protocol for nurses in the JCMC Emergency Department. Ibid. Dr. Unadkat also stated – incorrectly – that

to determine that the nursing staff was adequate in the JCMC Emergency Department was "not part of my responsibility." Pa1017.

EMA's Associate Medical Director for the JCMC Emergency Department, Dr. Cheng-Tang Wang, had been employed by EMA as Associate Director for the Emergency Department since 2008. Pa1034. He would be at the JCMC Emergency Department "maybe five times a week sometimes, maybe sometimes seven, every day of each week sometimes, and sometimes less." Pa1043. Dr. Wang was asked whether, in his position as the Associate Director of JCMC ED, he interacted with defendant Nurse Amorino. Dr. Wang stated: "**I don't have oversights, administrative oversight over her in that regard.**" Pa1158-59 (emphasis added). Dr. Wang also stated Dr. Unadkat is the person involved with "policy meetings for the emergency department" that involve nursing staff. Pa1159. Dr. Wang, in general, does not have meetings with the JCMC nursing staff. Pa1164.

Significantly, Dr. Wang, one of EMA's primary on-site representatives, was not familiar with nursing standards of care that must be applied and enforced by EMA pursuant to JCMC policies and procedures:

Q Do you know what the ENA standards of care and practice are?

A I do not.

Q Do you know what emergency severity index standards are?

> A I do not know the specifics, but that was what I mentioned before with that triage system based on again nursing, the resources.
>
> [Pa1172 .]

Those admissions by EMA's Emergency Department Medical Director and Associate Medical Director are proof of the serious breaches of EMA's contractual obligations to provide supervision, oversight, training and enforcement of the JCMC Emergency Department policies and procedures. Read alongside the testimony of defendant nurses, they establish that EMA breached its duty to oversee the JCMC Emergency Department, to train nursing staff as required and to enforce the hospital's policies and procedures. In Mr. Hawkins' expert opinion as a Hospital Administrator, EMA was required to oversee all hospital policies in effect regarding the JCMC Emergency Department and, likewise, to supervise and enforce those policies with respect to the ED nursing staff and nursing care of patients. Pa563-65. EMA's failure to do so caused and contributed to the nurses' deviations from the standard of care documented by Nurse Ashton and the harm caused to Mr. Rivera. Pa606.

Relying, in part, on the deposition testimony of defendant nurses, Mr. Hawkins testified at deposition that "the fact that in the nursing depositions they weren't familiar with policies and procedures, didn't know some of them existed, so whoever was in charge of the training, which would have been Dr. Unadkat and Dr. Cheng and the nursing administration, failed in their duties to at least train that

nurse on policies and procedures." Pa785. Mr. Hawkins utilized Dr. Unadkat's and Dr. Wang's conceded lack of knowledge regarding nursing standards of care, policies and procedures related to nursing care to formulate his conclusions.

The testimony of defendant nurses further supports the factual basis for Mr. Hawkins' expert conclusions. The "greeter nurse," Pa1224, defendant Dana Amorino, R.N., testified regarding her training that "[w]hen I was first hired, there is [an] orientation among, along with that, along those lines, after a year of experience actually as an emergency room nurse you get oriented in triage as well." Pa1215. The triage nurse, defendant Talin Leister, R.N., testified that her training consisted of "prior experience from other hospitals" and completing a "triage course here in this hospital." Pa1332. She stated that she was "able" to study JCMC nursing policies and procedures during her orientation when she began working at JCMC ED. Pa1338.

Nurse Leister testified that she neither communicated with the Emergency Department physician, defendant Dr. Adal, nor anyone else regarding her triage assessment of Romeo Rivera that assigned a level 3 (urgent) acuity level. Pa1380. The last time she reviewed the JCMC Emergency Department's triage policy prior to assessing Romeo Rivera was in 2015. Pa1392. Nurse Leister stated that she keeps "current" in her position as a triage nurse on her own, by reviewing Emergency Nursing Association (ENA) articles and studies. Pa1440.

Nurse Leister categorized Romeo Rivera as a "level 3" because he "potentially" presented to the JCMC ED with a life-threatening condition. Pa1396; Pa1496. She could not recall whether she discussed Mr. Rivera's urgent condition with anyone else on the JCMC Emergency Department team but indicated that her assessment was "on the computer where people can see that, people who are assigned to him..." Pa1397. "It's documented in the computer." Pa1442. She also suggested that the patient was properly handed off to the next nurse "based upon reading my record" as entered into the computer system. Pa1399.

Nurse Leister testified that in her position as triage nurse, she had the ability to order a chest x-ray, Pa1406, and blood work. Pa1407. She stated that she could order blood work if the patient had "abdominal pain, vomiting, diarrhea." Pa1408. She can order an ECG. Pa1446. Nurse Leister testified that as a triage nurse she takes a medical history of a JCMC ED patient. Pa1438-39. Inquiring about tobacco use is a part of the medical history. Pa1439. Nurse Leister conceded, however, that Mr. Rivera's smoking history was never documented in the medical record. Pa1566-67. Significantly, Nurse Leister testified that according to JCMC Policies and Procedures, Romeo Rivera required a head-to-toe assessment during triage and never got one. Pa1571. Defendant Leister testified that she performed a head-to-toe assessment only "[i]n certain areas." Pa1569.

Following triage, Romeo Rivera came under the care of defendant Diana Capra, R.N. Nurse Capra testified that she learned the JCMC Emergency Department policies and procedures through a "self-use" program called PolicyTech. Pa1603. Her "understanding" of the JCMC Emergency Department policies and procedures was that she could go into a computer program "to review it if there's something I'm unaware of or unsure of." Pa1603-04. She keeps current on nursing standards by receiving journals from the ENA. Pa1604.

Nurse Capra stated that she also did not perform a head-to-toe assessment of Romeo Rivera as required under JCMC policy. She performed only a "focused assessment." Pa1628; Pa1676-77. Nurse Capra never assessed Romeo Rivera's history of smoking. Pa1633-34. She did not choose to ask. Pa1633.

Nurse Capra stated that a "level 3" or "urgent" acuity did not require any interventions from nursing staff. Pa1629. Contrary to JCMC policies and procedures, as well as the testimony of Nurse Leister, Nurse Capra testified that she could obtain a chest x-ray only "if the doctor feels that it's necessary." Pa1639. She stated that a chest x-ray was not ordered for Romeo Rivera because "[i]t was not ordered by the physician." Pa1677. Nurse Capra testified that "[n]o blood work was done" because "[t]he physician didn't order any." Pa1678. Eventually she conceded that she "could have" performed a CBC blood test and could not explain why she did not do so. Pa1679.

Nurse Capra was "not sure" whether hospital policy required that a patient who receives pain medication be reassessed within a certain period of time. Pa1656. She also was "not sure" whether hospital policy required that nursing staff wait a half hour after administration of pain medication to perform a "reassessment" of the patient. Pa1657. Nurse Capra testified that she was "not familiar" with JCMC Emergency Department policy regarding assessment and reassessment of patients. Pa1657-58. She acknowledged that she assessed Romeo Rivera for an adverse reaction to the intramuscular shot only eight minutes after Nurse Wilson administered the medication, which was a direct violation of JCMC Hospital policy. Pa1690.

Defendant Cecilia Wilson, R.N., administered an intramuscular injection to Romeo Rivera and completed his vital signs. Nurse Wilson stated that it was part of her "general nursing practice for administering medication" to perform a "pain assessment." Pa1757. Nurse Wilson does not remember whether she reviewed Romeo Rivera's medical chart at the time of administering medication. Pa1758. She testified that had she reviewed the chart, she would "look at the chief complaint,… allergies, and...vital signs." Pa1763-64. She may "review parts of the chart." Pa1766.

At 12:34 AM, Nurse Wilson assessed Romeo Rivera's pain level to be 6 out of 10. Pa1822. Although noted in his chart, Nurse Wilson did not know that

Romeo Rivera previously reported 3 out of 10 pain level at the time he reported 6 out of 10 pain level to her. Pa1769. She stated that she "assessed the pain intensity and location of the pain." Pa1837. Nurse Wilson never documented the quality, pattern and radiation of the pain. Ibid. Following the administration of pain medication, Nurse Capra assessed Romeo Rivera's "response to the medication" and discharged him 8 minutes after the medication was administered. Pa1822. She was unaware whether there was a "standard of emergency room nursing practice." Pa1862.

The above facts, on which Mr. Hawkins relied, were appropriately reviewed alongside the standard of care violations reported in the opinions of nursing expert Kathleen C. Ashton, Ph.D., R.N., ACNS-BC. Pa606. Mr. Hawkins referenced Nurse Ashton's standards of care opinions to explain the way the nursing staff's negligent treatment of Romeo Rivera violated JCMC policies and procedures. Based on review of all defendants' testimony, Nurse Ashton noted numerous deviations from appropriate nursing care with respect to greeter nurse, Nurse Amorino, Pa608-09, triage nurse, Nurse Leister, Pa609, Nurse Capra, Pa610, and Nurse Wilson. Pa610. Nurse Ashton concluded:

> Each nurse caring for Mr. Rivera had an opportunity and responsibility to assess his signs and symptoms, obtain and document a complete and accurate history, recommend appropriate diagnostic testing, and communicate their findings to other team members.
>
> [Pa611.]

Mr. Hawkins referenced those various deviations from recognized standards of nursing care to formulate his opinions regarding EMA's failures to supervise, to train, to oversee nursing staff and to enforce JCMC policies and procedures. The nursing staff admitted to limited training and policy recognition, and even patent violations of JCMC Policies and Procedures. The EMA Director and Assistant Director claimed that they had no responsibility for nursing staff despite clear language in the JCMC-EMA agreement to the contrary. Joined with Mr. Hawkins' review of state and federal regulations and the testimony of Dr. Unadkat and Dr. Wang as they relate to the nursing deviations, Mr. Hawkins' expert opinions are sound, presented questions of material fact for a jury, and required that EMA's motion for summary judgment be denied.

POINT III

THE COURT ERRED BY DISMISSING ALL CLAIMS AGAINST THE NURSES. (Pa26; Pa28)

A. Standard of Review.

See *supra* at 26-27.

B. Discussion.

Romeo Rivera arrived at the JCMC Emergency Department with a "pre-existing condition" relating to an evolving aortic aneurysm. The deviations from acceptable standards of nursing care by the emergency department nursing staff by failing to recognize and to treat his underlying cardiac condition were substantial

factors in increasing the risk that Romeo Rivera would die from a ruptured aortic aneurysm. Pa609-11. As detailed *supra* at 40-44, numerous deviations by the nursing staff caused and contributed to the inadequate care provided to Mr. Rivera, the wrong diagnosis of Mr. Rivera, the premature and improper discharge of Mr. Rivera and his untimely and tragic death just a few hours later.

Plaintiffs' expert, Nurse Ashton, described the evaluation by defendant nurses in the order that Mr. Rivera was seen. Pa606. Nurse Amorino "charted Mr. Rivera's chief complaint as `Left Leg Numbness', set an acuity level of 3-Urgent...and looked for a hospital room for him until 10:59 PM." Pa607; Ca4-5. Nurse Amorino was trained and certified as a triage nurse. She testified that she applied the standard of care contained in the ENA triage algorithm. Pa1282. Nurse Amorino did not discuss Romeo Rivera with the triage nurse, Nurse Leister. Pa1237. After speaking with Nurse Amorino, Romeo Rivera and his wife, Analyn returned to the waiting room until they were called into the triage room.

Nurse Leister had been trained as an emergency room nurse and triage. At 10:51 PM, she performed a "rapid" triage assessment of Romeo Rivera and charted, "sudden onset of lower back discomfort' accompanied with left leg numbness since 9:30pm tonight accompanied with brief episode of chills to both hands." Ca54. She set an acuity level of 3-Urgent because she categorized Mr. Rivera with a life-threatening condition and placed him in the main emergency

department. Pa1390; Pa1395-96. She noted his pain level as 3 out of 10 but did not discuss that with anyone else. Pa607; Pa1397; Ca5-6.

At 11:24 PM, Nurse Capra evaluated Romeo Rivera. Pa607; Pa1623-24; Pa1626. At 12:34 AM, Nurse Wilson assessed Romeo Rivera's pain level to be 6 out of 10. Pa1822. She stated that she "assessed the pain intensity and location of the pain." Pa1837. Nurse Wilson never documented the quality, pattern and radiation of the pain. Ibid. Nurse Capra then discharged Mr. Rivera at 12:42 AM although his pain scale had increased from 2/10 to 6/10. Neither Nurse Capra nor Nurse Wilson performed a pain-level reassessment 30 minutes after giving Mr. Rivera medication, as required by JCMC policy. Pa610.

In addition, the following material facts are undisputed. Romeo Rivera, 43, unexpectedly died at home 12 hours after he was discharged from JCMC Emergency Department. An autopsy determined that his death was caused by a ruptured aortic aneurysm. Ca34. The emergency department nurses were employed and trained by JCMC. The doctor was employed by EMA, a medical staffing company that had an exclusive contract with JCMC to supply the doctors in the Emergency Department and a contractual agreement with JCMC to supervise, to train and to oversee the JCMC Emergency Department, including but not limited to the JCMC-supplied nurses. Pa628. Finally, the undisputed cause of death was determined as follows:

> Principal Diagnoses: Cardiac tamponade secondary to bleeding from the small ruptured aneurysm of right coronary artery with blood infiltration of sub-adventitia of the tunica externa, of the aortic arch, mediastinal and abdominal Aorta and branching vessels.
>
> [Ca35.]

Defendant nurses sought to preclude plaintiffs' nursing expert from rendering an opinion that linked their deviations from the standards of nursing care, in particular those for emergency medicine, to the death of Romeo Rivera. They contended that she could not testify that their departures from nursing standards of care were a proximate cause of Mr. Rivera's death because she is "unqualified to give medical causation testimony." Essentially, as with the other dispositive motions filed and granted by defendants, the defense argued that, unless a qualified expert explicitly told the factfinder that defendants' negligence was the proximate cause of Mr. Rivera's damages, the jury had no right to determine the quintessential factual issue of proximate cause. Respectfully, that is not what is required and violates the right to jury trial guaranteed to plaintiffs by the New Jersey Constitution.

Plaintiffs acknowledge that usually, to prove proximate cause in a medical negligence case, a "causal connection must be established through expert testimony." Chin v. St. Barnabas Medical Center, 160 N.J. 454, 469 (1999). There, the Court discussed the doctrine of alternative liability. That doctrine recognizes that where a plaintiff is harmed by two or more defendants, but which

defendant caused the harm is uncertain, each defendant must sustain the entire burden of proof with regard to liability and prove his or her own non-culpability. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Restatement (Second) of Torts § 433B(3) (1965); see Shackil v. Lederle Labs., 116 N.J. 155, 173 (1989); Anderson v. Somberg, 67 N.J. 291, 302 (1975).

The Chin Court adopted the rationale in Anderson. The Court in Anderson analyzed the interplay between the burden of production, the burden of persuasion and the burden of proof. The Court specifically addressed the insufficiency of a "mere shift in the burden of going forward" with the evidence. Anderson, 67 N.J. at 300. Being a medical negligence case does not eliminate the jury's role and ability to determine proximate cause and to make reasonable inferences from the evidence presented regarding deviations from the standard of care and causation.

The admission of expert evidence to establish "proximate cause" is governed by N.J.R.E. 702-705. Pursuant to N.J.R.E. 703, an expert's opinion must be based on "facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002). The facts or data relied on by the expert need not be admissible, so long as of a type reasonably relied on by experts in the field. N.J.R.E. 703.

N.J.R.E. 703 addresses the foundation for expert testimony. Expert opinions must be grounded in "'facts or data derived from (1) the expert's personal

observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence, but which is the type of data normally relied upon by experts.'" Townsend, 221 N.J. at 53 (2015) (quoting Polzo, 196 N.J. at 583); State v. Townsend, 186 N.J. at 494.

"The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Townsend, 221 N.J. at 53-54 (alteration in original) (quoting Polzo, 196 N.J. at 583); see Creanga v. Jardal, 185 N.J. 345, 360 (2005); Buckelew, 87 NJ. at 524. An expert is required to "give the why and wherefore that supports the opinion, 'rather than a mere conclusion.'" Townsend, 221 N.J. at 54 (quoting Bor. of Saddle River, 216 N.J. at 144); Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014) (quoting Pomerantz Paper Corp., 207 N.J. at 372); Creanga, 185 N.J. at 360 (quoting Rosenberg, 352 N.J. Super. at 401).

The net opinion rule directs that experts "'be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.'" Townsend, 221 N.J. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). In short, the net opinion rule is "a prohibition against speculative testimony." Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App.

Div.), certif. denied, 154 N.J. 607 (1997)). It does not, however, render jurors unable to perform their constitutional duties.

The Emergency Department physician, Dr. Adal, diagnosed Mr. Rivera with sciatica and heartburn, performed no diagnostic testing and sent him home with prescriptions for Tylenol and Zantac. The autopsy proved that Romeo Rivera died from "cardiac tamponade secondary to ruptured aneurysm of the right coronary artery." That life-threatening medical condition went undiagnosed during the two and one-half hours that he waited in the JCMC Emergency Department. Ca35. Plaintiff retained Dr. Olenko, the forensic pathologist who did the autopsy, as an expert witness. Dr. Olenko's report was given to defense counsel on August 24, 2018. Ca32. Plaintiffs' and defendants' medical/nursing expert witnesses reviewed both the autopsy record and the forensic expert report to formulate their respective reports. Both were extensively discussed with all medical experts during oral depositions. No one disputed the autopsy methodology or Dr. Olenko's determination as to the cause of Romeo Rivera's death. Defense counsel chose not to retain an opposing forensic pathologist to question the autopsy findings or conclusions, so they were undisputed.

Plaintiffs' nursing expert, Nurse Ashton, reviewed the autopsy record from the forensic pathologist to understand the manner and cause of Romeo Rivera's death prior to submitting the opinions in her report. Pa1917. She also reviewed

the expert reports of the pathologist, Dr. Olenko, the emergency medicine expert, Dr. D'Ambrosio, and the invasive cardiologist, Dr. Breall. In a "supplemental" report provided to defendants in September 2018, long before the end of discovery, Nurse Ashton adopted the findings of plaintiffs' medical experts. Pa1919.

Nurse Ashton analyzed the facts in support of her opinions and concluded that "the nurses failed to accurately assess his complaints, signs, and symptoms and communicate those findings to the physicians managing his care." Pa608. Nurse Ashton then detailed the deviations of each nurse. Pa608-11. Nurse Ashton, based on her experience, facts, data and other experts' opinions, found that "the failures of the nursing staff of the JCMC Emergency Department caring for Mr. Rivera as outlined above deviated from the accepted standards of nursing care, substantially increased the risk of harm, and were direct causes in bringing about the death of Romeo Rivera." Pa611. To the extent defendants wanted to challenge those conclusions, cross-examination at trial before a jury was the proper place, not before a judge on motion and certifications, where all available inferences must be resolved in the non-movant's favor. R. 4:46-2; see Scafidi, 119 N.J. at 101 ("Proximate cause is a factual issue, to be resolved by the jury after appropriate instruction by the trial court.").

The Supreme Court in Scafidi defined the relationship between a pre-existing condition and proximate causation in a malpractice case. Id. at 102. That

"increased risk/substantial factor" test has become the basis for the determination of proximate causation in malpractice cases involving a pre-existing condition. In Scafidi, the Court explained that the application of Restatement (Second) of Torts § 323(a) (1965) to medical malpractice cases meant that the plaintiffs in this case need only prove that (1) the defendant's negligence increased the risk of harm and (2) that the increased risk was a substantial factor in causing Romeo Rivera's death. The Scafidi Court explained:

> Because this modified standard of proximate causation is limited to that class of cases in which a defendant's negligence combines with a preexistent condition to cause harm—as distinguished from cases in which the deviation alone is the cause of harm—the jury is first asked to verify, as a matter of reasonable medical probability, that the deviation is within the class, *i.e.*, that it increased the risk of harm from the preexistent condition. ... Assuming that the jury determines that the deviation increased the risk of harm from the pre-existing condition, we use the `substantial factor' test of causation because of the inapplicability of the `but for' causation to cases where the harm is produced by concurrent causes. ... The `substantial factor' standard requires the jury to determine whether the deviation, in the context of the pre-existent condition, was sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause.
>
> [119 N.J. at 108-09 (internal citations omitted).]

The Court deliberately left it to the jury to determine whether the increase in the risk of harm caused by the negligence was "sufficiently significant." If the increased risk was "sufficiently significant," the plaintiff is entitled to recover.

In a later case, the Court reiterated that:

> "[T]he substantial factor standard requires the jury to determine whether the deviation, in the context of the preexistent condition, was sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause."
>
> [Reynolds v. Gonzales, 172 N.J. 266, 283 (2002) (quoting Scafidi, 119 N.J. at 109.]

The Court specifically held that what is "sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause" remains a question for the jury. Ibid.

The Reynolds Court also instructed that the charge on remand must be consistent with the holding in Gardner v. Pawliw, 150 N.J. 359 (1997), which held that where the prevailing standard of care requires that a diagnostic test be performed, but whether the test would have helped diagnose the condition is uncertain, plaintiff merely has to prove that the failure to perform the test increased the risk of harm from the pre-existing condition. Reynolds, 172 N.J. at 290 ("the failure to perform required tests should not shield the defendant from liability by precluding the plaintiff from presenting his or her proof to the jury"); Gardner, 150 N.J. at 384 (cited favorably in Reynolds). The Reynolds Court added, "We noted that a plaintiff may demonstrate an increased risk even if the test would have been helpful in just a small proportion of cases." 172 N.J. at 290.

Plaintiffs' experts provided "sufficient evidence for the jury to find there was an increased risk" of a burst aortic aneurism resulting from defendants' failure to

assess Mr. Rivera properly and to perform the necessary diagnostic testing. Where the medical negligence increases the risk, and the harm actually occurs, the question of whether the increased risk was a "substantial factor" in causing the harm is always for the jury. When there is evidence that the defendant's negligence increased the risk of harm to the plaintiff and that the harm was, in fact, sustained, it becomes a jury question whether that increased risk constituted a substantial factor in producing the injury. Ibid. ("it was the jury's responsibility, based on all the evidence in the record, to decide whether any increased risk resulting from a failure to test was or was not a substantial factor in causing the ultimate harm sustained").

In Gardner, the plaintiff's high-risk pregnancy was being managed by the defendant. The plaintiff experienced a decrease in fetal movement, and was examined by the defendant and sent home with the reassurance that "the fetus was sleeping." The mother continued to experience decreased fetal movement and returned to the defendant's office one week later, at which point the fetus was dead. Plaintiff asserted that the defendant should have ordered a Non-Stress Test (NST) and BioPhysical Profile (BPP) when she first complained of decreased fetal movement. However, at trial the plaintiff's expert testified that he could not state to a reasonable degree of certainty if the baby would have survived if the tests had been done. 150 N.J. at 368.

The Gardner Court observed that when the malpractice consists of a failure to perform a diagnostic test, the very failure to perform the test may eliminate a source of proof necessary to enable a medical expert to testify to a degree of reasonable medical probability concerning what might have occurred had the test been performed. In such a case, as a matter of public policy, the plaintiffs were entitled to have a jury determine causation. The Court explained:

> When the prevailing standard of care indicates that a diagnostic test should be performed and that it is a deviation not to perform it, but it is unknown whether performing the test would have helped to diagnose or treat a pre-existent condition, the first prong of Scafidi does not require that the plaintiff demonstrate a reasonable medical probability that the test would have resulted in avoiding the harm. Rather, the plaintiff must demonstrate to a reasonable degree of medical probability that the failure to give the test increased the risk of harm from the pre-existent condition.
>
> [Id. at 387.]

The Court reached that conclusion to avoid "the unacceptable result that would accrue if trial courts in such circumstances invariably denied plaintiffs the right to reach the jury, thereby permitting defendants to benefit from the negligent failure to test and the evidentiary uncertainties that the failure to test created." Ibid.

Here, plaintiff's nurse expert, Nurse Ashton, determined that the emergency room nursing staff deviated from acceptable nursing standards by not performing diagnostic tests to determine the cause of Romeo Rivera's pain. Defendants tried to pin the failure to perform diagnostic tests solely on defendant Dr. Adal. In her

narrative report, however, Nurse Ashton concluded as to each of the nurses that the identified deviations from the nursing standards of care contributed to Mr. Rivera's premature discharge and untimely death. Pa609-11. In her deposition, Nurse Ashton specifically rejected the suggestion of defense counsel that only "the doctor is going to decide exactly the things that need to be done for a patient from a medical testing standpoint." She stated, as corroborated by the defendant nurses themselves,

> Nurses in the triage area have the ability to order testing, some basic testing, EKG, lab work, that sort of thing. It's not only a medical responsibility. It's a nursing responsibility based on an accurate ESI.

Model Jury Charge 5.50E recites each element of plaintiff's burden of proof in a substantial-factor case. Model Jury Charges (Civil), 5.50E, "Pre-existing Condition – Increased Risk/Loss of Chance – Proximate Cause" (rev. 03/2021). The Model Charge specifically addresses the situation where diagnostic tests that were not performed supply a proximate cause.

> If you determine that the defendant deviated from accepted standards of medical practice in not having a diagnostic test performed, in this case *[here indicate the test(s)]*, but it is unknown whether performing the test would have helped to diagnose or treat a pre-existent condition, the plaintiff does not have to prove that the test would have resulted in avoiding the harm. In such cases the plaintiff must merely demonstrate that the failure to give the test increased the risk of harm from the pre-existent condition. A plaintiff may demonstrate an increased risk of harm even if such tests are helpful in a small proportion of cases.
>
> [Ibid.]

Plaintiff's medical expert, Dr. Breall, also issued a timely report critical of the failure to perform any diagnostic testing and relating it as a proximate cause of Mr. Rivera's death. Pa676. Dr. Breall stated that the symptoms that Mr. Rivera related to the nursing staff – "heartburn, shortness of breath, chest tightness, back pain, bilateral flank pain and leg pain/numbness" – were indicative of an "evolving aortic dissection." Pa677. "Mr. Rivera's clinical picture in the Emergency Department clearly indicated the high likelihood of a cardiovascular emergency and such a life-threatening condition was never ruled out." Ibid. Had routine testing been done, which could have been ordered by the nurses or Dr. Adal, the aortic dissection would have been promptly diagnosed and treated "with a very good medium and long-term survival rate." Ibid. Dr. Breall concluded that "Mr. Rivera's unfortunate death was caused by ascribing a wrong diagnosis of sciatica and ignoring the signs and symptoms of aortic dissection and evolving cardiac tamponade." Ibid. The reasonable inference that a jury could draw is that **all** the medical staff in the Emergency Department dropped the ball and sent Mr. Rivera home with a shot in the arm and a life-threatening – ultimately lethal – condition.

The Appellate Division case of Piperato v. Lam, 2019 N.J. Super. Unpub. LEXIS 1813, DOCKET NO. A-3569-17T1 (App. Div. Aug. 23, 2019), although not precedential, is instructive on whether plaintiff's expert opinions were sufficient for a jury to consider proximate cause of the defendant nurses. Pa1921.

In Piperato, the trial judge decided that the case against the emergency room nurses could not be sustained because nurses are statutorily prohibited from rendering opinions on the issue of medical causation. The trial judge concluded that the reports and testimony of medical experts could not be used to supplement the nursing deficiency on proximate cause. In Piperato, the plaintiff's counsel requested that the trial judge "chain-link" the expert reports to supply the necessary proximate cause for nursing negligence. The trial judge declined.

The appellate panel disagreed, concluding "[t]o the extent that the trial court's opinions can be read to suggest plaintiffs needed to present a single report as to the alleged negligence of the nurses addressing both deviation and causation, we disagree." Slip op. at 19; Pa1928. This Court noted that summary judgment is meant to be an efficient means of resolving cases that fail to present a genuine issue of material fact but is not intended to "'shut a deserving litigant from his [or her] trial.'" Slip op. at 25 (quoting Brill, 142 N.J. at 540 and Judson, 17 N.J. at 77); Pa1930. Because the nurses' deviations had been related to the ultimate harm by the plaintiff's medical expert, summary judgment was reversed.

Here, Nurse Ashton expressed her opinions referenced above that the deviation from standards of nursing care contributed to cause the death of Romeo Rivera. Defendants did not test those conclusions in her deposition. See McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 172 (App. Div. 1987) (a party may

not eschew discovery and then object to evidence or opinions that "logically flowed from the expert report already provided"). She also reviewed and relied on the expert reports of the emergency room doctor and the invasive cardiologist to support her conclusions. Each of those reports, and, in fact, Nurse Ashton's own report, related the nurses' deviations to the failure to diagnose Mr. Rivera properly, the failure to obtain appropriate diagnostic testing, and the resulting death of Mr. Rivera due to a wholesale failure of treatment. There was sufficient evidence and reasonable inferences from the evidence to support the conclusion that the nursing deviations increased the risk of harm to Romeo Rivera and were a substantial factor in causing his death.

The trial court held incorrectly that plaintiffs had to show overlapping proof rather than sequential proof of negligence and causation. Led by defendants' artful argument, the court looked at the proofs in isolation rather than in their totality. One expert expresses an opinion on standard of care and deviation but not causation. Another expert testifies to proximate cause but is not "qualified" to testify to the standard of care and, therefore, to deviation. Nurse Ashton is not qualified to testify to medical causation because she is not a doctor, and Dr. D'Ambrosio is not qualified to testify that nursing errors caused or contributed to Mr. Rivera's death because he is a doctor not a nurse.

The lower court missed the forest looking at the trees. Each witness, fact

and expert, presented a piece of the puzzle, each one leading into the next such that a reasonable jury could dispel the smoke of defendants' arguments and see clearly how the multiple failures and inexplicable lack of any diagnostic testing or symptom recognition led to Mr. Rivera's premature discharge and death. Defendants would like this Court to require that plaintiff prove that each deviation had to cause Mr. Rivera's damages. That certainty of proof is exactly what Verdicchio v. Ricca, 179 N.J. 1 (2004), holds that plaintiffs do **not** have to do. Summary Judgment in favor of the nurses should have been denied.

POINT IV

THE COURT ERRED BY DIRECTING A VERDICT IN FAVOR OF DR. ADAL, JCMC/RWJ AND EMA, FINDING THAT PLAINTIFF HAD FAILED TO COME FORWARD WITH SUFFICIENT EVIDENCE OF PROXIMATE CAUSE. (Pa35-41)

A. Standard of Review.

Appellate courts apply the same standard of review as the trial court in considering a motion for involuntary dismissal at trial under Rule 4:37-2(b). Frugis v. Bracigliano, 177 N.J. 250, 269 (2003) (discussing R. 4:40-1); Luczak v. Twp. of Evesham, 311 N.J. Super. 103, 108 (App. Div.) (discussing R. 4:37-2(b)), certif. denied, 156 N.J. 407 (1998). The motion under Rule 4:37-2(b) shall be granted only if, after presenting its proofs, plaintiff "has shown no right to relief." It shall be denied "if the evidence, together with the legitimate inferences

therefrom, could sustain a judgment in plaintiff's favor." Ibid.; see also Verdicchio, 179 N.J. at 30 (stating that if reasonable minds could differ after according plaintiff all reasonable and legitimate inferences, the motion should be denied); Baliko v. Int'l Union of Operating Eng'rs, 322 N.J. Super. 261, 273 (App. Div.) (stating that the appellate "court must accept as true all evidence supporting plaintiffs' claims"), certif. denied, 162 N.J. 199 (1999). As a matter of law, defendant was not entitled to a verdict in its favor.

B. Proximate Cause.

"To recover damages for the negligence of another, a plaintiff must prove that the negligence was a proximate cause of the injury sustained." Scafidi, 119 N.J. at 101. "Proximate cause is a factual issue, to be resolved by the jury after appropriate instruction by the trial court." Ibid. Proximate cause has been described as a standard for limiting liability for the consequences of an act based on "mixed considerations of logic, common sense, justice, policy and precedent." Caputzal v. The Lindsay Co., 48 N.J. 69, 77-78 (1966). Proximate cause as an issue, however, "may be removed from the factfinder in the highly extraordinary case in which reasonable minds could not differ on whether that issue has been established." Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999) (citing Vega by Muniz v. Piedilato, 154 N.J. 496, 509 (1998)).

"Proximate cause consists of any cause which in the natural and continuous

sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." Conklin v. Hannoch Weisman, 145 N.J. 395, 418 (1996). "We have been candid in New Jersey to view this doctrine not so much as an expression of the mechanics of causation, but as an expression of line-drawing by courts and juries, an instrument of 'overall fairness and sound public policy.'" Id. at 417 n.5 (quoting Brown v. U.S. Stove Co., 98 N.J. 155, 173 (1984)). There was nothing fair in taking the case from the jury on this record. The decision was contrary to the core notion of our justice system that "the right to trial by jury shall remain inviolate." N.J. Const. art. I, ¶ 9.

"Foreseeability is a constituent part of proximate cause." Komlodi v. Picciano, 217 N.J. 387, 417 (2014). Accordingly, "[i]f an injury is not a foreseeable consequence of a person's act, then a negligence suit cannot prevail." Ibid. Foreseeability is determined by an objective standard, namely, whether "a reasonably prudent, similarly situated person would anticipate a risk that [his or] her conduct would cause injury or harm to another person." Id. at 417-18. Thus, if "the injury or harm suffered was within the realm of reasonable contemplation, the injury or harm is foreseeable." Id. at 418.

"[W]hen there are concurrent causes potentially capable of producing the harm or injury," the law applies the "substantial factor" test to evaluate proximate

cause. Id. at 422. Under that test, "a tortfeasor will be held answerable if its 'negligent conduct was a substantial factor in bringing about the injuries,' even where there are 'other intervening causes which were foreseeable or were normal incidents of the risk created.'" Id. at 423 (quoting Brown, 98 N.J. at 171). Put differently, "[t]he substantial factor test accounts for the fact that there can be any number of intervening causes between the initial wrongful act and the final injurious consequence and **does not require an unsevered connecting link between the negligent conduct and the ultimate harm**." Conklin, 145 N.J. at 420 (emphasis added).

Our Supreme Court has explained that to prove the element of causation, plaintiffs bear the burden to "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." Townsend, 221 N.J. at 60-61 (quoting Davidson v. Slater, 189 N.J. 166, 185 (2007)). "[A]lthough plaintiffs bear the burden of proving causation, 'they are not obliged to establish it by direct, indisputable evidence.' Instead, '[t]he matter may rest upon legitimate inference, so long as the proof will justify a reasonable and logical inference as distinguished from mere speculation.'" Thorn v. Travel Care, Inc., 296 N.J. Super. 341, 347 (App. Div. 1997) (quoting Kulas v. Pub. Serv. Elec. & Gas Co., 41 N.J. 311, 319 (1964)).

C. Discussion.

This was not a "but for" causation case. Plaintiffs tried the case on an "increased risk of harm/substantial factor" causation basis. The analysis of causation according to Scafidi, 119 N.J. 93, and its progeny is appropriate. The "substantial factor" test of causation is utilized in cases involving pre-existing conditions because of the inapplicability of "but for" causation where the harm is produced by concurrent causes. See W. Page Keeton et al., Prosser & Keeton on the Law of Torts, § 41 at 266-268 (5th ed. 1984); Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 88-90 (1956). "The 'substantial factor' standard requires the jury to determine whether the deviation, in the context of the preexistent condition, is sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause." Ginsberg v. St. Michael's Hosp., 292 N.J. Super. 21, 30 (App. Div. 1996).

In granting defendants' request for a directed verdict, the trial court held that plaintiffs had failed to produce any evidence from which a jury could find that defendants' deviation increased the risk of harm to Mr. Rivera from his pre-existing condition. 17T53:4-11. "[P]laintiff has to prove that that negligence actually increased the risk of the injury that later occurred, that was death in this case. I'm finding on the record, there's no expert testimony from the plaintiff to satisfy that addresses in any way whether the defendant's negligence, proven already, quote, increased the risk of dying the following day, end of quotes." Ibid.

The court reasoned that because plaintiff's ED and Cardiology experts were "consistent" that the omitted diagnostic testing would have identified the evolving aortic dissection, the holding in Gardner did not apply. 17T68:9-69:7. (The court failed to consider that defense experts, had they testified, would refute what the omitted diagnostic testing would have disclosed. That would present the necessary disputed facts from opposing experts to enable Gardner to apply.) The court reasoned that the test results would have resulted in prompt referral to a cardiac surgeon but that the outcome with the surgeon was unknown. Mr. Rivera may have died anyway. That exceedingly narrow view guts and defeats the series of Supreme Court cases that adopted and developed the substantial factor test for medical malpractice cases.

Each witness, fact and expert, presented a piece of the puzzle, each one leading into the next such that a reasonable jury could dispel the smoke of defendants' arguments and see clearly how the multiple failures and inexplicable lack of any diagnostic testing or symptom recognition led to Mr. Rivera's premature discharge and death. According to defendants, because the pre-existing condition was life-threatening, Mr. Rivera may have died even if property treated, tested and diagnosed. Defendants would like this Court to require that plaintiffs prove that each deviation had to cause Mr. Rivera's death. That certainty of proof is exactly what Verdicchio, 179 N.J. 1, holds, in analogous circumstances, that

plaintiffs do **not** have to do.

In Verdicchio, our Supreme Court held that, in increased risk of harm cases, plaintiff is required to show only that defendant's failure to perform an examination that would have led to the discovery of the condition complained of increased the risk that plaintiff would lose the opportunity for treatment at an earlier stage. Id. at 24. That is this case. Plaintiff is not required to prove the results of examinations or tests or the outcome of care that defendants' neglect caused never to happen. Under the controlling precedent, plaintiffs are not required to do so. **Where a case involves nonfeasance, no one can say "with absolute certainty what would have occurred if the defendant had acted otherwise."** Francis v. United Jersey Bank, 87 N.J. 15, 45 (1981) (citing W. Prosser, Law of Torts § 41 at 242 (4th ed. 1971)) (emphasis added).

In Gardner, 150 N.J. 359, where the plaintiffs alleged that the failure to perform diagnostic tests that would have revealed an umbilical cord defect increased the risk that their fetus would not survive, our Supreme Court clarified the standard set forth in Scafidi:

> When the prevailing standard of care indicates that a diagnostic test should be performed and that it is a deviation not to perform it, but it is unknown whether performing the test would have helped to diagnose or treat a preexistent condition, the first prong of Scafidi does not require that the plaintiff demonstrate a reasonable medical probability that the test would have resulted in avoiding the harm. Rather, the plaintiff must demonstrate to a reasonable degree of medical probability that the failure to give the test increased the risk of harm

> from the preexistent condition. A plaintiff may demonstrate an increased risk of harm even if such tests are helpful in a small proportion of cases. We reach that conclusion to avoid the unacceptable result that would accrue if trial courts in such circumstances invariably denied plaintiffs the right to reach the jury, thereby permitting defendants to benefit from the negligent failure to test and the evidentiary uncertainties that the failure to test created.
>
> [Gardner, 150 N.J. at 387-89 (citations omitted).]

"When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he had put beyond the possibility of realization. **If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass**." Evers v. Dollinger, 95 N.J. 399, 417 (1984) (citation omitted) (emphasis added).

Here, defendants' deviations resulted in no treatment. No tests, no referral to a cardiac surgeon, no chance. Plaintiff is not required to prove what cannot be proven, i.e., what would have happened if defendants had performed to the standard of care. Contrary to controlling precedents, plaintiff was denied the right to reach the jury on the presumptively factual issue of proximate cause, thereby permitting defendants to benefit from their abject neglect and failure to abide by the standards of care and the evidentiary uncertainties that failure created. "The

most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946). Plaintiff could not unequivocally say what would have happened if defendants had not been negligent **because** defendants were negligent. That does not absolve defendants. The burden created by the lack of definitive evidence is borne by the party whose wrongful conduct caused that lack of definitive evidence. Lanzet, 126 N.J. at 188. Accordingly, that was defendants' burden and was erroneously imposed on plaintiff.

Nonetheless, definitive trial testimony from Dr. D'Ambrosio and Dr. Breall established that the deviations of Dr. Adal and others caused the death of Romeo Rivera. Dr. D'Ambrosio testified that Mr. Rivera died because of the cardiac tamponade. 15T93:4-7. He also acknowledged that there were no symptoms consistent with cardiac tamponade when Mr. Rivera was in the Emergency Department. 15T93:8-11. There was, however, an aortic dissection at the time based on the symptoms presented that could have and should have been diagnosed and treated. 15T105:14-106:10. That testimony established that there was still time to diagnose and to treat Mr. Rivera when he presented to defendants in the ED.

Dr. D'Ambrosio also testified that defendants failed to provide a differential diagnosis and to rule out potential causes of Mr. Rivera's symptoms. 15T54:16-23. Defendants, including Dr. Adal, failed to order any tests or bloodwork. Specifically,

based on the information being provided to Dr. Adal and the nurses, a CTA scan should have been ordered, which would have shown abnormal results and triggered additional testing, an EKG, a chest x-ray and a consult with a cardiac surgeon. 15T53:9-54:3. Instead, Mr. Rivera was given a Toradol shot and discharged before any assessment was made whether the shot helped. 15T56:4-14. Defendants also ignored that Mr. Rivera's pain had increased while waiting for the shot to be administered. All of those failures were deviations from the standard of care. 15T59:8-16.

Ultimately, Dr. D'Ambrosio related all of those deviations as a proximate cause of Mr. Rivera's death. "My opinion is that there was an opportunity if the standard of care was followed to diagnose an aortic dissection by doing a CT scan and labwork. Q. So was it the failure to utilize that opportunity that is the deviation from a standard of care that resulted in Romeo Rivera's death? A. Yes." 15T107:20-108:1.

Dr. Breall also testified that the cardiac tamponade that killed Mr. Rivera was caused by the aortic dissection present when Mr. Rivera presented to the Emergency Department. 12T101:18-23; 12T105:5-11. The sudden onset of pain was caused by the aortic dissection, so the dissection was present at the time. 12T102:22-24. Mr. Rivera's complaints of chest tightness, back pain, nausea, vomiting, diasphoresis and chills were all indicators of a possible aortic dissection. 12T105:1-4. Dr. Adal,

however, without any diagnostic testing, rendered a diagnosis of sciatica and sent Mr. Rivera away. Dr. Breall testified that the aortic dissection set up the cardiac tamponade that caused Mr. Rivera's death. 12T107:14-16. Dr. Breall testified that testing, specifically a CT scan that was indicated based on Mr. Rivera's history and complaints, would have led to a proper diagnosis. 12T108:1-7. A review of the medical record, however, revealed "no evidence of any diagnostic testing." 12T109:3.

That testimony provided a sufficient basis for a jury to determine proximate cause. At the very least, it created the unmistakable reasonable inference that the absence of timely intervention led to the untimely death of Romeo Rivera. No testing was performed, so we cannot say what the tests showed. No consult was sought, so no course of treatment occurred. The evidence of the loss of opportunity, of the increased risk of harm, due to the failure perform to the standard of care was sufficient for the case to go to the jury.

The entire basis for the trial court's opinion that plaintiff did not establish proximate cause is the lack of evidence created by defendants' failure to perform any testing or imaging and its breach of the appropriate standard of care. The lower court failed to appreciate or even to consider that the lack of that highly specific evidence was caused by defendant. The law is clear; it does not reward a defendant for a lack of evidence created by its own negligence. Verdicchio, 179

N.J. 1; Gardner, 150 N.J. 359; Lanzet, 126 N.J. 168; Evers, 95 N.J. 399. The trial court's analysis was incorrect.

Looking at that evidence, a reasonable jury could infer that the failure to do what was required to be done increased the risk of harm and was a substantial factor in the injuries that followed. The failure to perform as required by the standard of care, coupled with the occurrence of **the very harm** that the **standard of care exists to prevent**, gives rise to a reasonable inference that the breach of duty was a **proximate cause of the harm**. Moreover, plaintiff's experts unequivocally stated that it was deviations from the standard of care that combined to cause Mr. Rivera's death. Defendants then had the burden to show that the harm that occurred would have occurred regardless of the breach; not could have but **actually** would have occurred. F or the trial judge to take the case from the jury was error. The Orders below should be reversed, and the case remanded for trial.

POINT V

THE COURT ABUSED ITS DISCRETION BY NOT ALLOWING PLAINTIFF TO INVESTIGATE DECEDENT'S EMR AND BY GRANTING PROTECTIVE ORDERS THAT SEVERELY RESTRICTED DISCOVERY OF ROMEO RIVERA'S EMR/AUDIT TRAIL. (Pa13; Pa15; Pa21; Pa22)

A. Procedural History Relating to the Electronic Medical Records.

On December 27, 2017, Plaintiff noticed depositions of defense witnesses, including the deposition of an EMA or JCMC representative with the most knowledge of Romeo Rivera's Electronic Medical Record (EMR). Pa423-24; Pa43033. That notice requested, among other things, the following: Romeo Rivera's "entire audit trail;" "Equipment to view the EMR through a portal;" "'Live View' access of the Electronic Medical Records;" a "code/symbol ledger" for the medical software system; "all necessary Equipment to view the EMR/HER records through a portal." Pa431-32. An audit trail is "a document that shows the sequence of events related to the use of and access to an individual patient's [EMR]…. [A]ll events related to the access of a patient's [EMR] are permanently documented…." Est. of Lasiw v. Pereira, 475 N.J. Super. 378, 385 n.3 (App. Div. 2023) (Lasiw).

During a January 25, 2018, case management conference, the trial court indicated that it was disinclined to permit EMR "live view" inspection without evidential support that decedent's medical records had been altered. Pa300. On February 13, 2018, plaintiff moved to compel production of the EMR audit trail associated with Romeo Rivera's January 14-15, 2017 JCMC Emergency Department encounter. Pa290. During the pendency of the motion, defense counsel produced a fourteen-page document that was represented to be the "audit log" for Mr. Rivera's EMR. Ca3; Pa309. Plaintiff also requested the "data

dictionary" to interpret audit trail entries, the identification of everyone who entered Romeo Rivera's EMR, and terminal locations where information was entered. Pa314-16; 2T6:8-12; 2T6:20-25; 2T10:25-11:25. On April 3, 2018, EMA was ordered to produce the requested information. Pa6. On that Order, the trial court crossed out a provision permitting plaintiff to "photograph and video tape a live view of the audit reports." Pa6-7.

On May 2, 2018, plaintiff moved to compel fact witness depositions and to set parameters for depositions. Pa317. On May 17, 2018, defendants cross-moved for a protective order limiting testimony of non-defendant witnesses who were allegedly “uninvolved” in the care of Mr. Rivera. Pa350. While the motions were pending, a JCMC-employed nurse, defendant Cecilia Wilson, R.N., was deposed on May 22, 2018. Citing a May 11, 2018, bench decision that "witnesses could only be asked about documents that they are familiar with," Pa1743**,** the scope of discovery was disputed and clarification from the court was requested. Pa1805. The court affirmed that witnesses who were unable to identify the audit trail could not be questioned about the information in it. Pa1813.

On May 30, 2018, the trial court granted in part plaintiff's motion to compel fact witness depositions "for reasons stated on the record on 5/30/18." Pa10. The court also granted defendants' cross motion for a protective order. Pa9. The May 31, 2018, Order specifically provided: "Party and fact witnesses are limited to

being questioned as to documents they are either familiar with or executed." Pa9. Without exception, each defendant and fact witness promptly denied familiarity with the audit trail printout and were instructed by defense counsel not to answer any questions related to that data establishing the care they rendered to Romeo Rivera. Essentially, the Order made the EMR and audit trail unusable.

Plaintiff moved for additional discovery on June 19, 2018, including "production of a person for deposition whom has the most knowledge to authenticate the…audit log and for the revisions audit log." Pa388-89. A deposition was necessary to explore audit trail content. Pa399-400. Plaintiff's proposed order inadvertently did not include a separate line entry for the deposition of a corporate representative. See Pa13-14.

On June 28, 2018, defendants cross-moved for a protective order to bar the corporate representative deposition. Pa421. Defendants argued that, in a prior application, plaintiff requested a corporate representative's deposition as alternative relief to production of the audit trail. Pa425. Because defendants had produced a document that they identified as the audit trail, they argued that the motion must be denied. Pa428. Defendants specifically asserted that plaintiff "should be prohibited from deposing a Corporate Representative" to authenticate the Audit Log or for "exploring its contents." Pa428.

In response, plaintiff submitted the Affidavit of Scot Silverstein, M.D., an information technology expert who stated that (1) "discrepancies exist between the [EMR and the audit log] that is of significant concern regarding an alteration(s) to Mr. Rivera's medical record" and (2) that "the only way to ensure that there was no alteration to Mr. Rivera's medical record is to…conduct the deposition of [EMA's]… representatives who have the most knowledge…." Pa460-61. The corporate representative deposition was necessary because the trial court limited the scope of testimony for other fact witnesses and allowed defendants to evade authentication of the purported "audit trail" for Mr. Rivera's EMR.

On July 17, 2018, the court denied plaintiff's motion to depose a corporate representative. Pa13. On August 14, 2018, Plaintiff moved for reconsideration of the July 17, 2018, Order. Pa467. Plaintiff renewed their request to depose an EMA corporate representative. Pa473. Plaintiff supported the motion with a Supplemental Affidavit from Dr. Silverstein which elaborated further the need for EMR metadata discovery, including all "edits" or changes to Romeo Rivera's EMR. Pa474; Pa491. Defendants opposed, claiming that there was no error by the court, and defendant JCMC contended that it was unable to perform a "live view" inspection. Oral argument was held on August 31, 2018. 4T. Three-and-one-half months later, on December 14, 2018, the Trial Court denied reconsideration. Pa15.

On January 18, 2019, a new trial judge *sua sponte* requested briefs related to a corporate representative deposition. Pa723. Plaintiff's responding submission addressed the need for EMR "live view" inspection. Pa724. Defendants' opposition asserted that EMR inspection was denied on April 3, 2018. Pa742. Plaintiff's request for "live view" inspection was denied on February 15, 2019. 7T29:6. Critical to the court's decision was the conclusion that the issue had been decided in April 2018 and that Plaintiff had been dilatory in pursuing the discovery. 7T29:21-30:5; 7T30:18-31:5. The denial was confirmed by written Order dated February 15, 2019, and filed on February 28, 2019. Pa21.

Plaintiff moved for reconsideration of the February 28, 2019, Order. Pa750. Plaintiff maintained that their February 13, 2018, discovery motion, which resulted in the April 2018 ruling, sought production of decedent's audit trail. Pa290; Pa293. During oral argument on the 2018 application, the parties did not raise, and the trial court did not entertain, a request for EMR inspection. 2T. The topic of "live view" inspection was never discussed. Defendants' opposition claimed that the "live view" inspection had been substantively denied in 2018 and that plaintiff did not seek reconsideration. On April 2, 2019, the court denied plaintiff' request for a "live view" inspection of decedent's EMR because the legal standards to justify reconsideration were not satisfied. Pa22.

Plaintiff correctly anticipated that defendants would seek to block admission of the audit trail at trial. 10T43. Defendants' *in limine* motion to bar introduction of the audit trail at trial was denied. 10T53:18-25. However, once again, plaintiff was not permitted to question any witness about the audit log if they claimed to know nothing about it. 10T54:2-5. Plaintiff issued a pretrial subpoena for a JCMC IT Department Representative to appear in court to identify and to authenticate the audit log. 14T124:15-17; 14T126:8-21. The trial judge ordered JCMC to submit an affidavit, 14T116:1-3, or "something sworn," 14T120:20-21, that its personnel were unable to authenticate the document produced in discovery as the audit trail. Ultimately, the audit trail and any reference to Mr. Rivera's EMR was rendered inadmissible because it was neither identified nor authenticated during discovery. 14T120:13-18; 14T122:25-123:18.

B. Discussion.

The trial court abused its discretion by imposing discovery restrictions that radically limited EMR and audit trail investigation. The multiple protective orders issued in defendants' favor prohibited fact witness testimony, prevented EMR inspection and rendered the audit trail unusable at trial.

The EMR audit trail included undisputed facts related to the deficient medical care Romeo Rivera received at JCMC Emergency Department. It is relevant evidence under N.J.R.E. 402. Lasiw, 475 N.J. Super. at 397. The audit

trail documented each medical provider's entry into decedent's EMR. Ca3. Plaintiff's health information systems expert, a medical doctor, reviewed the audit trail, compared it against the JCMC paper medical record and identified discrepancies in the records. Pa460; Pa491; Pa520. Plaintiff was denied the opportunity to address those discrepancies during discovery and at trial.

Preliminarily, federal regulations require JCMC to maintain audit trails to safeguard patients' protected health information (PHI) and to ensure medical record integrity. See Health Insurance Portability and Accountability Act, 42 U.S.C. §§1320d-2 et seq. ("HIPAA") (enacting regulations at 45 C.F.R. Part 160 and Subparts A and E of Part 164); Health Information Technology for Economic and Clinical Health Act, 42 U.S.C. §§ 300ii et seq., 42 U.S.C. §§ 17901 et seq. ("HITECH Act"). Standards were adopted for the creation, maintenance and exchange of EMR. See 45 C.F.R. §170.210 (2024). The American Society for Testing and Materials (ASTM) created standards for audit trail content that were incorporated into federal law. See 45 C.F.R. §170.210(h) (2024). Those standards preserve EMR and audit trail accuracy, security and PHI. ASTM E2147-18, ¶ 1.2.

The audit trail produced in this matter is a verifiable, self-authenticating record that, alongside the printed medical chart, provided valuable information about Romeo Rivera's JCMC ED treatment course. Tenacious motion practice thwarted audit trail investigation, authentication and EMR inspection. Defense

counsel relied on limitations set by protective orders to block most metadata/EMR/audit trail discovery. Pa8; Pa13; Pa21. Those orders by the trial court denied plaintiff the evidence to which they were entitled under the law even beyond the scope of this case. To deny that discovery was an abuse of discretion and caused a prejudicial dearth of EMR evidence at trial. 14T118:22-120:6.

Generally, discovery rules are "construed liberally in favor of broad pretrial discovery." Capital Health Sys. V. Horizon Healthcare Servs., 230 N.J. 73, 80 (2017). Plaintiff is entitled to non-privileged information relevant to their case including "electronically stored information" (ESI) and the identity of individuals with knowledge of discoverable information. R. 4:10-2(a). Discovery production is required even when the information is not admissible at trial because discovery includes information that, though not admissible, may lead to the discovery of admissible evidence. Brugaletta v. Garcia, 234 N.J. 225, 249 (2018). Rule 4:10-2(f) specifically permits discovery of "metadata in electronic documents."

There are, of course, limits to broad discovery. Lipsky v. N.J. Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 464 (App. Div. 2023). A party may be protected from annoyance, embarrassment, oppression, or undue burden or expense. R. 4:10-3. Requests for ESI may be modified but the party from whom discovery is sought and who is opposing the discovery must **demonstrate** that providing the information "presents undue burden or costs." R. 4:10-2(f)(1),(2);

see Lipsky, 474 N.J. Super. at 464-465. Although afforded substantial deference, a trial judge's disposition on discovery matters may be challenged when there is a "misunderstanding or misapplication of the law." Brugaletta, 234 N.J. at 240. Decisions made without "a rational explanation, inexplicably depart[ing] from established policies, or rest[ing] on an impermissible basis" denote an abuse of discretion and will not be upheld. Kornbleuth v. Westover, 241 N.J. 289, 302 (2020).

Recently, this Court affirmed that a patient's EMR metadata is "clearly discoverable" and relevant. Lasiw, 475 N.J. Super. at 397. Plaintiff is not required to show a "need" to investigate EMR. Id. at 397-398. The "party from whom discovery is sought" bears the burden of proving that the discovery "poses an undue or excessive burden." Id. at 398.

In this case, the trial court misunderstood the nature of ESI discovery and abused its discretion by impeding investigation of Romeo Rivera's EMR and audit trail. The discovery limitations were based on an "incorrect view" of ESI discovery. Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 268 (App. Div. 2009). Additionally, defendants never demonstrated that exploration of Romeo Rivera's EMR and audit trail presented "undue burdens" or "costs" to justify a limit on discovery. Lipsky, 474 N.J. Super. at 464-465; Lasiw, 475 N.J.

Super. at 397. Erroneously, the burden was placed on plaintiff to persuade the court that the discovery was essential to their case.

Not permitting broad examination of Romeo Rivera's EMR and audit trail was unjust. Constraints imposed by the trial court left the EMR and audit trail unscrutinized and inadmissible at trial. Despite expert affidavits establishing discrepancies between the EMR, audit trail and the paper medical records produced by defendants, plaintiff was foreclosed from fully analyzing decedent's medical treatment course with experts and witnesses. That misapplication of the burden of persuasion and denial of relevant discovery of Romeo Rivera's electronically stored information and metadata was an abuse of discretion that requires reversal and remand.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests a reversal of the various pre-trial Orders that categorically denied her claims and a remand of the cause for a new trial. Plaintiff requests that discovery be re-opened allowing access to Romeo Rivera’s Emergency Medical Records as part of the remand.

Plaintiff further requests that the Directed Verdict rendered to defendants at the conclusion of plaintiff’s case in chief be set aside and that all reasonable inferences that may be drawn from evidence produced in a retrial be submitted to the jury for determination consistent with Rule 4:41-1.

Respectfully submitted,

DORRITY LAW OFFICE
Counsel for Plaintiff-Appellant

By: *Francis X. Dorrity*
Francis X. Dorrity, Esq.

DATED: December 13, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-003099-23

Date Filed: March 17, 2025

ANALYN RIVERA, Individually and as Administratrix Ad Prosequendum for the ESTATE OF ROMEO RIVERA, *Plaintiff-Appellant,* v. JERSEY CITY MEDICAL CENTER RWJ BARNABAS HEALTH, EMERGENCY MEDICAL ASSOCIATES, ADEFRIS ADAL, MD, LEISTER TALIN, RN, DIANA CAPRA, RN, DANA AMORINO, RN, CECILIA WILSON, RN, ZACHARY BAKHTIN, CIM, JOHN DOE, MD, (*fictitiously named),* MARY ROE, RN, (*fictitiously named),* ABC MEDICAL SERVICES (*fictitiously named)* and XYZ EMERGENCY MEDICINE, INC. (*fictitiously named)* *Defendant-Respondents.*	On Appeal From: Superior Court of New Jersey, Law Division, Hudson County Docket No.: HUD-L-2382-17 Sat Below: Hon. Anthony V. D'Elia, J.S.C.

BRIEF OF ADEFRIS ADAL, M.D. AND ZACHARY BAKHTIN, CIM

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Preliminary Statement

This is an appeal from the grant of a directed verdict in a medical malpractice action. Romeo Rivera (hereinafter "the decedent") was treated by an emergency department physician, Adefris Adal, M.D. Regrettably, the next day, the decedent suffered a right coronary artery aneurysm, leading to a condition called a cardiac tamponade, which resulted in his death.

At trial, Plaintiff presented the testimony of an emergency medicine expert, Dr. Michael D'Ambrosio, who alleged that Dr. Adal violated the standard of care in the treatment of the decedent. He testified that the decedent demonstrated symptoms of an aortic dissection in his abdomen and that the standard of care required diagnostic testing and a referral to a cardiothoracic surgeon.

Plaintiff also presented a cardiologist, Dr. Jeffery Breall, who testified at length that the decedent suffered from an aortic dissection when he was present in the Emergency Department. However, Plaintiff never asked Dr. Breall to provide an opinion linking any of the deviations identified by Dr. D'Ambrosio to the decedent's death. Consequently, none of his testimony provided an opinion on proximate cause.

At the conclusion of Plaintiff's case in chief, Dr. Adal moved for a directed verdict on the grounds that Plaintiff's medical experts failed to

demonstrate that the breach of the standard of care increased the risk of harm posed by the decedent's preexisting aortic dissection and therefore increased the risk of the decedent's death. Absent medical evidence that the referral to a cardiologist would have had any effect on the decedent's outcome—which Plaintiff's experts did not provide—there was insufficient evidence from which a jury could have found that the alleged violation of the standard of care by Dr. Adal was the proximate cause of the decedent's death, as a matter of law.

Consequently, the trial judge's grant of a directed verdict was proper. Dr. Adal asks this Court to affirm that decision.

Statement of Procedural History

On June 7, 2017, Plaintiff filed her four-count complaint against several Defendants including Dr. Adefris Adal, M.D., and Zachary Bakhtin, CIM[1]. (Pa42-56) The suit sounded in medical negligence and stemmed from the death of Plaintiff's decedent, Romeo Rivera. (Id.) Mr. Bakhtin and Dr. Adal filed their answers on August 3, 2017 and August 11, 2017, respectively. (Pa64-75; 76-75)

[1] The post-nominal letters "CIN" were incorrect, as they should have been "CIM"

The matter proceeded through discovery. On March 29, 2018, Mr. Bakhtin filed a motion for summary judgment. (Da1) The motion was unopposed and Judge Martha D. Lynes granted it on May 11, 2018. (Da3)[2]

Trial in this matter commenced on April 15, 2024 before the Hon. Anthony V. D'Elia and jury (11T-16T)[3]. Among other witnesses, Plaintiff presented her causation expert, cardiologist Dr. Jeffery Breall, on April 18,

[2] Plaintiff does not challenge that dismissal in this appeal. The summary judgment motion was premised on the fact that Bakhtin was incorrectly identified as a "clinical initiatives nurse", i.e., a CIN, when he was a Clinical Information Manager, i.e., a CIM—apparently as a result of a misreading of a grainy medical record—and because he provided no care at all to the decedent, as his only contact with this matter was in transcribing dictation given by Dr. Adal.

[3] 1T –January 5, 2018 Motion Transcript
2T–March 16, 2018 Motion Transcript
3T–May 30, 2018 Motion Transcript
4T–August 31, 2018 Motion Transcript
5T–December 19, 2018 Motion and Conference Transcript
6T–January 11, 2019 Motion Transcript
7T–February 15, 2019 Motion Transcript
8T–November 8, 2019 Motion Transcript
9T–December 3, 2019 Motion Transcript
10T–March 19, 2024 Motion Transcript
11T–April 15, 2024 Trial Transcript
12T–April 18, 2024 Trial Transcript
13T–April 23, 2024 Trial Transcript
14T–April 24, 2024 Trial Transcript
15T–April 29, 2024 Trial Transcript
16T–April 30, 2024 Trial Transcript
17T–May 1, 2024 Motion Transcript

2024 (12T22:1-188:13) and her liability expert, emergency medicine physician Dr. Michael D'Ambrosio, on April 29, 2024 (15T5:4-122:8).

At the conclusion of Plaintiff's case, Dr. Adal moved for directed verdict on the grounds that Plaintiff's experts failed to supply the needed opinion on proximate cause, sufficient for Plaintiff's case to be submitted to the jury. (15T192:6-199:3) Judge D'Elia initially denied the motion based on his recollection of the testimony. (Id.) However, after that initial denial, Judge D'Elia listened to the court recording of the testimony of Drs. Breall and D'Ambrosio and reconsidered his initial decision. (16T177:16-189:18)

On April 30, 2024, he directed the parties to submit briefs on the motion and scheduling a hearing on the motion for May 1, 2024. (Id.) During the extensive argument on May 1, 2024, Judge Breall repeatedly challenged Plaintiff's counsel to identify the testimony that he believed satisfied the proximate causation requirement. (17T4:1-69:11) However, counsel was unable to provide a citation to any testimony by any of Plaintiff's experts that established proximate cause. (Id.)

At the conclusion of the hearing, Judge D'Elia granted the motion, finding that the Plaintiff's experts did not provide testimony that the alleged deviation from the standard of care increased the risk of death caused by decedent's preexisting condition. (Id.) Therefore, Judge D'Elia dismissed

Plaintiff's complaint with prejudice. (Pa40-41)

This appeal followed. (Pa1931-1938)

Statement of Facts

On January 14, 2017, the decedent presented to the Emergency Department of Jersey City Medical Center, complaining of back pain and left leg numbness. (15T62:1-63:3; 16T44:14-23) He was treated by Dr. Adal, who diagnosed him with sciatica. (15T30:17; 16T41:10-18) The decedent was treated appropriately then discharged. (16T46:10-49:8) The next day, the decedent collapsed while at home. (12T16:23-17:5) Regrettably, the decedent did not survive, as he suffered a cardiac tamponade. (11T103:4-104:1) This occurs when blood fills the the membrane surrounding the heart, called the pericardium. (Id.; 11T105:12-106:5) In this case, the cardiac tamponade caused the decedent's heart to stop pumping and he subsequently died. (11T160:1-5)

In the opinion of Plaintiff's cardiology expert, Dr. Breall, the decedent was suffering from an aortic dissection throughout his time in the Emergency Department at Jersey City Medical Center. (12T105:5-11) This was ***not*** an uncontested fact. Even Plaintiff's own expert on anatomic pathology, Dr. Evgeny Olenko, M.D.—who performed the autopsy on the decedent—

repeatedly stated that the decedent did not suffer from a dissected aorta. (11T172:1-173:10; 11T174:5; 11T186:3-21)[4]

The standard-of-care expert, Dr. D'Ambrosio, testified to three deviations from the standard of care. First, he alleged that Dr. Adal failed to order tests to diagnose the aortic dissection that Dr. Breall believed to be present. (15T53:11-15) Specifically, Dr. D'Ambrosio opined that Dr. Adal failed to order a CT with contrast of the decedent's abdomen. (Id.) He testified:

> Q: Failure in this particular case to order that scan, would that in your opinion be a deviation from the emergency medicine standard of care?
>
> A: Yes, it was required that this patient had an imaging, a CT scan with contrast of the abdomen
>
> (Id.)

Dr. D'Ambrosio next asserted that Dr. Adal deviated from the standard of care by failing to form an adequate differential diagnosis:

> Q: Would the failure of the defendant Dr. Adal to provide a differential diagnosis, other than

[4] That dispute of fact is not directly relevant to this appeal, as it must be assumed that the jury would have resolved it in favor of Plaintiff. However, it is worth noting that Plaintiff's cause of action relied upon the existence of a dissected aorta as the source the decedent's pain when he was treated by Dr. Adal. If that pain was merely sciatica, and not a dissected aorta, then there could be no basis upon which to find Dr. Adal liable.

> concluding sciatica, would that be a deviation from emergency medicine's standards of care?
>
> A: Yes. You'd need an adequate differential diagnosis as I discussed of benign things and non-benign things and that does not appear to have been done here.
>
> (15T53:16-23)

Finally, he alleged that Dr. Adal breached the standard of care by releasing the decedent when his reported level of pain had increased:

> Q: If there was a reassessment of Romeo Rivera's pain and if the pain had increased from three out of six to two out of six pain level, objectively described, would it be a deviation from an emergency room standard of care to discharge that patient with that pain level?
>
> A: Yes.
>
> (15T58: 8-14)

Plaintiff also presented the testimony of Dr. Breall, an interventional cardiologist. (12T22:1-188:13) Dr. Breall testified at length that the decedent suffered from an aortic dissection, and that that condition led to the tamponade that caused decedent's death:

> Q: Was it the aortic dissection that set up the tamponade that resulted in Romeo Rivera's death?
>
> A: Yes, sir. That's exactly correct.
>
> (12T107:18-20)

During his testimony, Dr. Breall defined an aortic dissection for the jury. (12T34:4-15) He further explained that an acute aortic dissection could have been diagnosed with a CT scan of the chest. (12T89:21-90:11) Plaintiff's counsel asked him about a number of other topics during direct and redirect examination. For example, Dr. Breall testified about all the following:

- the records he reviewed and the general anatomy of the heart, (12T32:19-47:14);
- his opinion regarding the cause of the decedent's death, (12T47:15-51:25);
- aortic dissections and acute aortic syndrome, (12T52:1-90:6);
- whether he had an opinion to a reasonable degree of medical probability as to the cause of the alleged aortic dissection (12T90:7-90:6);
- whether he believed that his opinion was supported by Dr. Olenko's pathology report, (12T92:7-94:23);
- whether Dr. Olenko's testimony would chance his opinion concerning the origin of the blood found in the aortic wall, (12T95:13-97:21);
- about the complaints by the decedent and whether he complained of pains in his arms and legs, (12T100:6-101:12);
- whether he had an opinion as to whether the cardiac tamponade related to the alleged aortic dissection and the decedent's symptoms, (12T101:13-105:4);
- whether he had an opinion to a reasonable degree of medical probability as to whether decedent had an aortic dissection and whether decedent's pain came from that dissection (12T105:5-107:16);

- whether testing could rule out a dissection and whether that testing was done (12T107:17-109:1);
- the effect of medical reports from years prior to the decedent's death on the witness's opinion, (12T163:4-166:15);
- the effect of the stress test done by a Dr. Ibraham on the opinion (12T166:16-170:25);
- the relevance of decedent's complaint of heartburn, (12T171:2-19);
- whether Dr. Breall's opinions and definition of "dissection" is supported by medical literature, (12T171:20-177:6);
- about the nature of the decedent's complaints in the Emergency Department, (12T177:7-183:24);
- on the pain allegedly caused by the dissection (12T183:25-184:20); and
- whether a bilateral pulse was taken and why that was relevant, (12T184:21-185:18).

Critically, in all of this testimony, Dr. Breall was never asked to provide an opinion on proximate cause, and did not demonstrate whether and how the alleged deviations from the standard of care increased the risk of death from the decedent's preexisting condition. (See, 12T22:1-188:13) He never testified what a cardiothoracic surgeon might have done, nor whether it might have had an effect on the decedent's survival chances.

At the conclusion of the Plaintiff's case, Dr. Adal moved for a directed verdict, as Dr. Adal was entitled to judgment as a matter of law in light of

Plaintiff's failure to present expert testimony on proximate causation. (15T192:6-199:3)

Judge D'Elia initially denied the motion, but after reviewing the experts' testimony, reconsidered that decision and ordered briefing on the issue. At the hearing on the motion that followed, Judge D'Elia explained that he combed the testimony of the experts and found nothing to meet the causation requirement. (Id; 16T177:16-189:18) He stated that the closest any of the Plaintiff's experts came to fulfilling the requirement was a statement by Dr. Breall to the effect that:

> [i]f you have this hematoma in the ascending aorta, it's due to a tear and that is a life threatening condition, a life threatening condition that needs the help of somebody smarter and better than me. It needs a cardiac surgeon because they have to go in and repair the aorta.
>
> (12T50:23-51:3)

However, Judge D'Elia recognized that in order to demonstrate an increased risk of harm, Plaintiff needed to demonstrate more than merely that the condition required a referral to a cardiac surgeon; Plaintiff had to demonstrate that the failure to make that referral increased the risk of harm to the decedent:

> THE COURT: We could say for the record, he never said it would have been repaired. He never said

> what the chances are that it could have been repaired.
>
> MR. DORRITY: And then that goes to another –-
>
> THE COURT: He never said that –- that –- that even, like, one percent chance that it couldn't have been repaired. He never gave any hint of testimony to that regard. That sentence that you just read to me is what I read to all of you yesterday from listening to the transcript. And that to me was the closest thing to causation.
>
> The problem with that is he says they're smarter than me. He's not a cardiac thoracic surgeon. And nobody has said, under the circumstances of this case, with what we know, in all likelihood there would have been a better chance to repair it, a hundred percent chance to repair it, a one percent chance to repair it. You don't have to put a number on it.
>
> MR. DORRITY: I believe no number –-
>
> THE COURT: But, you have to give testimony for what a jury can base it on.
>
> (17T38:22-39:18)

It was on this basis that Judge D'Elia properly decided this matter. (17T53:6-55:17) He determined that Plaintiff's experts did not provide the necessary causation testimony and, consequently, Defendants were entitled to a directed verdict. (Id.) He explained, in significant detail, that Plaintiff was required to offer expert testimony that the alleged breach led to an increased

risk of the decedent dying, but concluded that Plaintiff simply failed to provide that testimony:

> And plaintiff has to prove that that negligence actually increased the risk of the injury that later occurred, that was death in this case. I'm finding on the record, there's no expert testimony from the plaintiff to satisfy that addresses in any way whether the defendant's negligence, proven already, quote, increased the risk of dying the following day, end of quotes....
>
> Now, the need to have an expert explain how negligence actually increases the risk of preexisting injury, I think, requires the need of an expert. It's a medical malpractice case. There are a million different factors going into whether this guy would have even survived with or without the treatment of a cardiac thoracic surgeon.
>
> Again, the burden is on the plaintiff by –- it's possible. It's possible that –- certainly, it's very possible that the failure to treat on the 14th increased the risk of him dying the next day. I'm not disputing that at all. But, possibility isn't enough.
>
> And without an expert to somehow tie it together, I find it very difficult to plaintiff to prove that the defendant, Dr. Adal's negligence, increased the risk of harm from the aortic problem.
>
> * * *
>
> There's no question that Dr. Breall has –- and it's cited in the briefs, said that when you see a problem like this, you got to test for it. I think the test would have been abnormal. The negligence is not considering it, not getting the test. Fine. What happens as a result of that negligence? He doesn't say in any

> way that I can tell you as a doctor that in all probability the results that occurred the next day would not have occurred or there would have been a far less chance of it occurring or anything like that. He actually says the opposite. He says, then I handed off to someone smarter than me, a cardiac surgeon, to go in and repair the aorta.
>
> No testimony from any expert that in this case, a medical malpractice case, guy has many problems going on with the hypertension and smoking and potentially back problems,... and all of the other complaints and medical issues of any normal patient would have under these kind of circumstances, is a very complicated question.
>
> I'm not going to let a jury –- I'm sorry, I'm not going to let a jury,... go in there and determine whether the plaintiff has proven by a preponderance of the evidence that the fact that he had a aortic dissection on the 14th increased the risk of him dying because, to any extent, because they didn't call in a cardiac thoracic surgeon right away. For all we know, he couldn't have been saved.
>
> So, I am going to grant the motion for that reason.
>
> (Id.)

Judge D'Elia further explained that what Plaintiff failed to provide was expert testimony establishing the increased risk of harm by the alleged negligence:

> Every one of plaintiff's experts, both of them were emphatic, of course he had the aortic dissection. If they had done the CAT scan, particularly, it would have shown it. X-rays would have helped show it. It would have been diagnosed, and then we call

> somebody else in. That's a hundred percent given to the plaintiff's expert.
>
> And for the reasons I just explained under Scafidi, the plaintiff who had –- and I'm reading Model Jury Charge, note to judges, quote, Under the sequence of this charge and accompanying interrogatory, the plaintiff has to prove, (1) a deviation from the acceptable standards of medical practice. Proven, here in this case.
>
> Number (2) that that deviation increased the risk of harm posed by the preexisting condition without any expert testimony in any way to help a jury understand to what extent, if any, there was any increased risk of harm. Not a possibility of it, but to a reasonable degree of probability, there would have been an increased risk of harm.
>
> Plaintiff has not met its burden to meet Number 2. For that reason, I'm going to grant the motion, and the case is dismissed.
>
> (17T68:10-69:8)

As a result, Judge D'Elia granted the directed verdict motion and dismissed Plaintiff's complaint. (Pa40-41) This appeal followed. (Pa1931-1938)

Legal Argument

ISSUE I: JUDGE D'ELIA PROPERLY GRANTED A DIRECTED VERDICT IN DEFENDANT'S FAVOR.

Judge D'Elia properly granted a directed verdict at the conclusion of Plaintiff's case, because Plaintiff's expert witnesses did not testify that the alleged violation of the standard of care by Dr. Adal increased the risk of the

decedent's death or otherwise fulfilled the causation requirement. Defendant asks this Court to affirm Judge D'Elia's decision, as it was correct in every respect.[5]

A) The Applicable Legal Standards

Rule 4:40-1 permits a party to move for a judgment "at the close of the evidence offered by an opponent." Rule 4:37-2(b) addresses involuntary dismissals and permits a defendant to move for dismissal, at the conclusion of Plaintiff's case, on the grounds that "upon the facts and upon the law the plaintiff has shown no right to relief." R. 4:37-2(b).

In deciding a motion for directed verdict at the close of a party's evidence, the trial judge must "accept as true all evidence presented ... and the legitimate inferences drawn therefrom, to determine whether the proofs are sufficient to sustain a judgment[.]" Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 569 (App. Div. 2014), aff'd, 223 N.J. 245 (2015). If the evidence is such that one party must prevail as a matter of law, then a directed verdict is appropriate. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003).

[5] Because only Plaintiff's Point IV raises an issue against Dr. Adal, this brief will only address that Point and the other issues raised by Plaintiff will be left to the other Respondents.

This Court's review of the grant of a directed verdict is *de novo* and the same that applied in the trial court applies to that review. Id.; Luczak v. Township of Evesham, 311 N.J. Super. 103, 108 (App. Div.), certif. denied, 156 N.J. 407 (1998).

In this case, even after affording Plaintiff the benefit of all reasonable inferences, Judge D'Elia found that she failed to present adequate expert medical evidence demonstrating proximate cause as part of her case in chief. Consequently, Judge D'Elia's order, dismissing Plaintiff's complaint, was proper and this Court should affirm that decision.

A medical malpractice plaintiff has the burden of proving the relevant standard of care, a deviation from that standard of care, an injury proximately caused by the alleged deviation, and damages suffered as a consequence. Komlodi v. Picciano, 217 N.J. 387, 409 (2014). In all but the rare case involving common knowledge, expert opinion is necessary to establish these elements. Gardner v. Pawliw, 150 N.J. 359, 375 (1997).

Thus, the plaintiff in a medical malpractice action has the affirmative obligation to demonstrate a causal connection between the alleged departure from the applicable standard of care and the injury alleged. Nicholas v. Mynster, 213 N.J. 463, 478 (2013); Gardner, 150 N.J. at 375. The expert opinion establishing causation must be "couched in terms of reasonable

medical certainty or probability." Creanga v. Jardal, 185 N.J. 345, 360 (2005). See, also, 27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co., Ltd., 469 N.J. Super. 200, 221 (App. Div. 2021), cert. denied, 250 N.J. 164 (2022) (noting that "Plaintiff's burden included proof of proximately caused damages," and explaining that plaintiff has the burden of showing "the damages were the natural and probable consequences of the defendant's negligence.")

Further, the plaintiff's burden of demonstrating proximate cause extends to cases, such as the present case, in which the theory of recovery is that the alleged negligence increased the risk of harm posed by a preexisting condition. See, Scafidi v. Seiler, 119 N.J. 93, 108 (1990) ("Evidence demonstrating within a reasonable degree of medical probability that negligent treatment increased the risk of harm posed by a preexistent condition raises a jury question whether the increased risk was a substantial factor in producing the ultimate result."); Gardner, 150 N.J. at 375-76.

Finally, a plaintiff's cause of action is not cognizable in the absence of sufficient evidence linking the alleged breach of the standard of care to the plaintiff's injuries. See, e.g, Germann v. Matriss, 55 N.J. 193, 208 (1970); Rosenberg v. Tavorath, 352 N.J. Super. 385, 399 (App. Div. 2002).

B) The Grant Of A Directed Verdict Was Appropriate

In this case, the law cannot expect lay jurors, using only their common knowledge, to know whether the breaches of the standard of care alleged by Dr. D'Ambrosio constituted a proximate cause of the decedent's death. Consequently, Plaintiff was required to establish the necessary proximate cause element through expert testimony.

In Scafidi, supra, the New Jersey Supreme Court addressed causation in the context of the treatment or diagnosis of a preexisting condition, and established a two-prong test. First, the jury must determine, as a matter of reasonable medical probability, whether the alleged deviation from the standard of care "increased the risk of harm from the preexistent condition." Scafidi, 119 N.J. at 109. Second, the plaintiff must establish, by competent expert testimony, evidence from which a jury might conclude that the deviation was a "substantial factor" in the outcome. Id.

A plaintiff in a Scafidi cases bears the burden of demonstrating that "the deviation, in the context of the preexistent condition, was sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause." Id. Additionally, the plaintiff "necessarily must establish that a chance of avoiding the harm existed." Gardner, 150 N.J. at 379(citing Olah v. Slobodian, 119 N.J. 119, 133 (1990))

Under Scafidi, it is solely the plaintiff's burden to prove proximate cause; the defendant's only burden lies in allocating damages attributable to the underlying condition, but that burden exists only if the plaintiff first establishes proximate cause. Scafidi, at 109.

Thus, to avoid a directed verdict for lack of proximate cause, Plaintiff's expert had to establish not only that Dr. Adal allegedly breached an applicable standard of care, but also that that breach increased the risk of the decedent's death as a consequence of the aortic dissection such that the deviation was a substantial factor in the resulting harm. In other words, Plaintiff's burden was to provide expert evidence sufficient for the jury to conclude that the decedent might not have suffered the same injuries, in the absence of the alleged breach of the standard of care.[6]

---

[6] The standard jury instruction which is applicable to this case, Model Jury Charge (Civil) 5.50E, reads, in relevant part:

> In this case, the Plaintiff had a pre-existing condition which, by itself, had a risk of causing the plaintiff the harm the plaintiff ultimately experienced in this case. However, the plaintiff contends that the plaintiff lost the chance of a better outcome because of the Defendant's deviation from accepted standards of medical practice....
>
> If you determine that the defendant deviated from accepted standards of medical practice you must then consider whether the Plaintiff has proven that the

None of Plaintiff's experts provided the needed causation testimony. First, plaintiff presented the testimony of Dr. Olenko, a pathologist who opined that the decedent suffered a right coronary artery aneurysm and that blood from that aneurysm filled the decedent's pericardium, causing the cardiac tamponade.

Next, Plaintiff presented the testimony of Dr. D'Ambrosio to establish the alleged breach in the standard of care. Dr. D'Ambrosio alleged that Dr. Adal committed three deviations: (1) failing to order a CT with contrast of the decedent's abdomen, (15T53:11-15); (2) failing to form an adequate

---

> deviation increased the risk of harm posed by the Plaintiff's pre-existing condition. You must then consider whether the Plaintiff has proven that the increased risk of harm was a substantial factor in producing the ultimate harm or injury....
>
> If under all of the circumstances here... you find that the plaintiff may have suffered lesser injuries if the defendant did not deviate from accepted standards of medical practice, then the defendant is liable for the plaintiff's increased injuries. On the other hand, if you find that the plaintiff would have suffered the same injuries even if the defendant did not deviate from accepted standards of medical practice, then the defendant is not liable to the plaintiff.

Model Jury Charges (Civil), 5.50E, "Pre-Existing Condition—Increased Risk/Loss Of Chance—Proximate Cause" (Approved 10/2014; Revised 03/2021)

differential diagnosis, (15T53:16-23); and (3) discharging the decedent despite an increase in his reported pain scale. (15T58:8-14).

Dr. D'Ambrosio did not offer any testimony establishing a causal link between these alleged deviations and the decedent's death. Rather, he testified that he believed the standard of care required Dr. Adal to order a CT with contrast. He further opined that had that test been abnormal, the standard of care required, *inter alia*, a referral to a cardiothoracic surgeon for a consult.

> Q: If there were an abnormal CTA scan, what would the emergency doctor have done?
>
> A: Okay. In this case, he hadn't yet ordered lab work. You would order the lab work. You would get an EKG. You would get a chest x-ray. And you would – if the blood pressure was elevated, you would start lowering it to the top number about 100. That protects the aorta from getting worse. And most importantly, you would call the CT -- cardiothoracic surgeon.
>
> Q: Well, that would be to get a consult?
>
> A: He would get an immediate consult with a cardiothoracic surgeon, the people who fix these things.
>
> (15T53:16-54:3)

Dr. D'Ambrosio did not testify as to what the cardiothoracic surgeon would have done—indeed, Judge D'Alia specifically agreed that Dr. D'Ambrosio ***could not testify*** as to what a cardiothoracic surgeon would have

done. (15T51:9-11.) Dr. D'Ambrosio also did not offer any testimony concerning what the decedent's outcome might have been had the referral to the cardiothoracic surgeon had been made, whether the lack of a referral had any effect on the outcome in the decedent's specific case, or whether the decedent's outcome would have been the same even if that referral had occurred.

Finally, the only other relevant expert who testified on Plaintiff's behalf was Dr. Breall. Dr. Breall is an interventional cardiologist. (12T5:20-6:9). Dr. Breall expressed his opinion that the decedent died from an aortic dissection leading to coronary tamponade. However, Dr. Breall ***never*** linked any of the deviations identified by Dr. D'Ambrosio to that outcome. This gap in causation testimony is the reason why a directed verdict was correct.

In his direct testimony, Dr. Breall, address a number of topics, but testified most extensively on whether the decedent had suffered a dissected aorta. The emphasis on that single issue was understandable as Dr. Olenko disagreed with it and the issue was vital to Plaintiff's cause of action, as the existence of a dissected aorta was necessary to find any of the Defendants liable.

So while Dr. Breall's opinion was sufficient *prima facie* evidence that the decedent suffered from the dissected aorta, and that testing would have

resulted in a referral to a cardiothoracic surgeon, he did not explain what that surgeon might have done in the face of that referral, and whether a referral to a cardiac surgeon could have had any ability to prevent the cardiac tamponade that caused the decedent's death. He did not testify whether there were any interventions or treatments possible to address the aortic dissection nor, given the decedent's medical condition, whether any such interventions might have made any difference to the decedent's survival chances.[7]

Thus, Dr. Breall's testimony did not demonstrate that the proffered breaches of the standard of care by Dr. Adal increased the risk of the decedent's death. That lack was crucial because the law would have tasked the jury with deciding whether or not the decedent would have died from the cardiac tamponade anyway, even with the referral to a cardiothoracic surgeon identified by Dr. D'Ambrosio and Dr. Breall. In the absence of an appropriate expert identifying what a cardiac surgeon might have done and whether it might have had any effect on the decedent's outcome, the jury would have been forced to engage in speculation, which is undoubtedly improper. Germann, 55 N.J. at 208-09 (explaining that it is error to allow a jury to decide

[7] This argument assumes that Dr. Breall would have been deemed qualified to provide an opinion on these topics, as he is not a cardiothoracic surgeon. Because he did not offer testimony on this issue, however, his qualifications to do so was not examined in the Law Division.

whether the negligence of the defendant was the proximate cause of plaintiff's injury based on mere conjecture or speculation).

Because none of the Plaintiff's experts provided testimony satisfying the Scafidi test, Plaintiff failed to present a *prima facie* case demonstrating the necessary causation element. Consequently, Judge D'Elia did not err in granting the directed verdict. Dr. Adal asks this Court to affirm that decision.

C) The Arguments Presented By Plaintiff As To The Alleged Error By Judge D'Elia Lack Merit

In her brief, Plaintiff argues that the relaxed showing of causation set out in Gardner, supra, applies in this case and that, therefore, Judge D'Elia's analysis was erroneous. (Pb66-69) Plaintiff advanced the same argument in the hearing before Judge D'Elia. (17T60:9-61:5; 63:3-14) However, Gardner is distinguishable because it addressed a different underlying fact pattern and legal inquiry than exists in this case.

Gardner involved the loss of the plaintiff's baby toward the end of her pregnancy, based on preexisting abnormalities of the placenta and umbilical cord. Gardner, 150 N.J. at 367. The plaintiff's experts could not state to a reasonable degree of medical probability that the defendant would have discovered the preexisting conditions and the baby's death could have been avoided had the doctor done certain diagnostic testing, as the standard of care required. Id., at 369-370. Thus, the Gardner Court sought to describe the

evidence plaintiffs had to provide to fulfil their burden of proof when, as a result of the defendant not performing a test, the "source of proof necessary to enable a medical expert to testify to a degree of reasonable medical probability concerning what might have occurred had the test been performed" was eliminated. Id., at 379-380.

The trial judge and this Court found that the plaintiff had failed to demonstrate proximate cause under the Scafidi standard. Id., at 374. The Supreme Court reversed. Under the fact pattern presented, the Supreme Court held that the plaintiff was required had to demonstrate that the failure to give the diagnostic tests increased the risk of harm from the preexisting condition, but did not have to demonstrate that the tests would have resulted in avoiding the harm, in light of the inability to reach that conclusion due to the non-performance of the test. Id., at 387

Gardner is distinguishable from the present action because this case is not one in which the failure to perform a test made it medically impossible to opine as to what might have occurred. Rather, Plaintiff's experts opined that, had the CT test with contrast been performed, the ruptured aorta would have been discovered. (12T107:17-108:19; 15T41:19-42:13; 15T49:7-14) Judge D'Elia recognized that fact, as well. (17T68:10-16).

Therefore, because the facts in this case do not address the scenario in Gardner, the reduced burden established in that case does not apply, and the failure of Plaintiff to demonstrate the two prongs of the Scafidi test barred her cause of action.

Plaintiff also argues that if the defense experts had testified, those experts would have "refute[d] what the omitted diagnostic testimony would have disclosed" and that would have "present[ed] the necessary disputed facts from opposing experts to enable Gardner to apply." (Pb66) This argument is misguided. The rule in Gardner is solely about what is necessary to establish a plaintiff's *prima facie* case. Id., at 391. The fact that defense experts might differ in their opinion as to what the diagnostic testing may or may not have shown would merely generate an issue of fact for the jury, but that dispute does not, by itself, lessen Plaintiff's *prima facie* burden.

Indeed, this argument assumes that Defendants would have chosen to present their experts to the jury, but they had no obligation to do that. A motion for a directed verdict, however, tests whether a plaintiff has presented sufficient evidence for the court to submit the case to the jury. Therefore, the evidence which a defendant might offer is simply irrelevant to that question.

As such, Plaintiff's arguments that Gardner applies and that Judge D'Elia erred by not waiting for Defendants' experts to testify in order to decide the issue are without merit.

In addition, Plaintiff cites to Verdicchio v. Ricca, 179 N.J. 1 (2004) for the proposition that "in increased risk of harm cases, plaintiff is required to show only that defendant's failure to perform an examination that would have led to the discovery of the condition complained of increased the risk that plaintiff would lose the opportunity for treatment at an earlier stage." (Pb67, citing Verdicchio, 179 N.J. at 24.) This argument is also misguided because Verdicchio is distinguishable.

In Verdicchio, the plaintiff filed suit against their deceased son's primary care physician for failing to timely discover and diagnose the malignant tumor in the decedent's leg. Verdicchio, 179 N.J. at 8. By the time it was discovered, it had metastasized and spread to his lungs and abdomen, eventually causing his death. Id., at 14.

At trial, the plaintiff's medical expert testified that the defendant violated the standard of care at various points between January 1994 and the discovery of the cancer in July 1994, and that, had the cancer been diagnosed earlier, the decedent had a chance of survival. Id., at 18-20. The expert testified that he could not determine based on the medical evidence available

when the cancer spread to the decedent's lungs, but if it had not spread by January 1994 and been diagnosed at that time, the decedent would have had a five-year survival rate of 85%. Id. He further testified on cross-examination that if the cancer had metastasized and been diagnosed in May of 1994, he would only have had a five-year survival rate of 20-30%. Id.

The trial court and this Court held that the plaintiff had the burden of demonstrating, through expert testimony, that the leg tumor had not metastasized by January 25, 1994, as that was their theory in the case, and that the failure of the expert to be able to reach that conclusion with a reasonable degree of medical probability was fatal to the plaintiff's case. Id., at 23. The Supreme Court concluded that this was erroneous, holding that the evidence was sufficient for a jury to conclude the decedent was suffering from a cancer that could have been diagnosed absent a breach of the standard of care, that the five-year survival rate would have been 85% had the cancer not metastasized and 20-30% if it had, and that the alleged malpractice reduced the decedent's chance of survival, whether that chance was 85% or 20-30%. Id., at 31-32.

In light of that evidence, the Supreme Court held that it was erroneous for the lower courts to have required the plaintiff to provide expert testimony demonstrating ***when*** the cancer metastasized, because the existence of the cause of action did not hinge on when the cancer spread. Id. Rather, it was

sufficient that the expert evidence demonstrated that the alleged malpractice reduced the decedent's survival chances by 85% or 20-30%. Id., at 32.

In this case, by contrast, what was missing from Plaintiff's evidence was expert testimony demonstrating what might have resulted if the referral to a cardiothoracic surgeon had been done, and whether that failure reduced the decedent's survival chances. Thus, Verdicchio is irrelevant.

Plaintiff next argues that she was not required to prove "with certainty" what might have occurred had the referral been done. (Pb68-69) However, Defendant's position is not that Plaintiff failure was merely the failure to demonstrate what might have happened *with certainty*. Rather, it is that Plaintiff presented no expert medical opinion evidence that the failure to refer the decedent to a cardiothoracic surgeon increased the risk of him dying.

Finally, Plaintiff argues, citing Evers v. Dollinger, 95 N.J. 399 (1984), that "[i]f there was any substantial possibility of survival and the defendant has destroyed it, he is answerable." (Pb68) In this case, however, it was Plaintiff's burden to provide expert testimony demonstrating that there was, in fact, a substantial possibility of survival, and that the alleged breaches of the standard of care increased the risk of death. Her experts simply never gave that testimony, as Judge D'Elia properly found. In light of that fact, the order granting a directed verdict was appropriate.

Defendant asks this Court to affirm that determination.

Conclusion

For all the foregoing reasons, Defendant requests this Court to find that Judge D'Elia did not err in granting the directed verdict and to affirm that order.

Respectfully Submitted,
MARSHALL DENNEHEY PC

/s/ Walter F. Kawalec, III
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ANALYN RIVERA, Individually and as Administratrix Ad Prosequendum for the ESTATE OF ROMEO RIVERA, Plaintiff-Appellant, v. JERSEY CITY MEDICAL CENTER RWJ BARNABAS HEALTH, EMERGENCY MEDICAL ASSOCIATES, ADEFRIS ADAL, MD, LEISTER TALIN, RN, DIANA CAPRA, RN, DANA AMORINO, RN, CECILIA WILSON, RN, ZACHARY BAKHTIN, CIN, JOHN DOE, MD, (FICTITIOUSLY NAMES), MARY ROE, RN (FICTITIOUSLY NAMED), ABC MEDICAL SERVICES (FICTITIOUSLY NAMED) AND XZY EMERGENCY MEDICINE, INC. (FICTITIOUSLY NAMED) Defendants- Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003099-23 Civil Action On Appeal From: Law Division, Hudson County Docket No.: HUD-L-2382-17 Sat Below: Hon. Anthony V. D'Elia, JSC Hon. Martha D. Lynes, JSC

BRIEF IN OPPOSITION TO APPEAL ON BEHALF OF DEFENDANT, EMERGENCY MEDICAL ASSOCIATES

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PRELIMINARY STATEMENT

In this matter, plaintiff sought and was granted leave to file an over-length brief. Despite filing a brief in excess of 80 pages in length, the plaintiff spends the majority of pages by far discussing issues related to deviations from standard of care, which has no bearing on the central issue on this appeal. The Trial Court was quite clear that the dismissal of plaintiff's Complaint was the result of plaintiff's failure to present any evidence on the issue of causation, either at the time of the pre-trial Motions for Summary Judgment as to defendant, EMA, or at the time of trial at the end of plaintiff's case in chief as to any defendant. The fact that the plaintiff lacked any evidence of any causal link between the alleged deviations from the standard of care and the ultimate outcome of plaintiff/decedent's death, was front and center in both the defense arguments and the Trial Court's decision. There can have been no mistaking the basis for the Court's ruling. Nevertheless, either because plaintiff remains oblivious to this critical issue, or because plaintiff hopes to distract this Court from this fatal omission in plaintiff's case, plaintiff spends very little argument on this dipositive issue.

Plaintiff's entire theory in this case, both before trial and at trial, was that the various alleged negligent acts on the part of multiple defendants resulted in a failure to diagnose the patient's aortic dissection, which in turn led to a fatal cardiac tamponade the day after the treatment in question was rendered. Entirely missing

from the testimony of plaintiff's witnesses is any evidence that if the correct diagnosis had been made, and appropriate surgical intervention had occurred in a timely fashion, that the fatal outcome would have been avoided. There was no evidence presented as to the odds of survival either with or without treatment. No testimony was elicited by the plaintiff to the effect that if the correct diagnosis had been made, the patient's chances of survival would have been increased to any degree, much less substantially.

Even if plaintiff's expert had testified that it is not possible to precisely quantify any patient's percent chance of survival, some testimony as to chances being better or worse was required. For example if there was testimony to the effect that it is well accepted within the field of medicine that a patient presenting as decedent did with an aortic dissection would have a greater chance of survival with diagnosis and treatment with cardiac surgery within a particular timeframe than without it, such testimony would be sufficient. However, no matter how thoroughly and minutely the trial record is searched, no such expert medical testimony will be found. In the absence of such testimony, the Trial Court correctly dismissed plaintiff's case for failure to provide sufficient evidence concerning an essential element of plaintiff's claim upon which a jury could make a reasonable finding of causation.

The same argument essentially applies to plaintiff's appeal from the grant of summary judgment to defendant EMA pre-trial. Plaintiff's opposition to the

Summary Judgment Motion suffered from the same flaw that existed at the time of trial. There was no testimony proffered by any of the admissible expert reports submitted by plaintiff in opposition to the Motion that would establish some increased risk of harm as a result of any alleged negligence on the part of EMA. In addition, even if plaintiff had presented or proffered such evidence at the time of the Summary Judgment Motion, the grant of the Motion to Dismiss at that time would be moot anyway because plaintiff failed to present the required evidence on causation at the time of trial.

Finally, plaintiff asserts that reversal is required because the Trial Court granted a Protective Order with respect to a minor aspect of the audit trail (revision log). This claim is unavailing because the Trial Court's ruling in this regard was well within the ambit of the Court's discretion and should not be disturbed. Additionally, defendant EMA had no access to the software plaintiff sought to view as it was no longer in use at the hospital. But even if it is assumed that the plaintiff could demonstrate that this very limited ruling was an abuse of discretion, plaintiff has made no showing on this appeal that any potential evidence that could have been contained in the live view would have in any way been relevant to the fatal issue in this case (plaintiff's failure to show the required causal relationship between the alleged negligence and the patient's fatal outcome). Therefore, any asserted error in the Trial Court's grant of the Protective Order is entirely harmless.

PROCEDURAL HISTORY

The plaintiff filed a Complaint alleging medical malpractice with respect to the care and treatment of plaintiff's decedent on June 7, 2017. Pa42. Defendant, EMA, filed answers to the Complaint on August 4, 2017, and August 11, 2017. Pa64 and Pa76. Following motion practice, the Trial Court entered an Order on April 3, 2018, requiring defendant, EMA, to produce the audit trail/audit logs within 10 days. Pa6-Pa7. Plaintiff received the logs (Timeline of Events record) prior to February 21, 2018. Ca3-Ca17. The requirement of photographing and making a video recording of a live view of the data was denied (that provision was stricken by the Court from the order that had been prepared and submitted by the plaintiff). Pa6-Pa7. Following additional motion practice, on May 31, 2018, the Court modified that ruling and entered a Protective Order limiting plaintiff's discovery to information "reasonably calculated to lead to admissible discovery (sic; intended to refer to “admissible evidence”)." Pa9.

The final discovery end date in this matter was August 31, 2019. A trial date was initially scheduled for December 2019, but later adjourned to March 2020. Pa29.

After the close of all discovery, defendants (including EMA) filed motions for *partial* summary judgment. In opposition to defendant EMA's Motion for Summary Judgment, plaintiff improperly submitted a new certification and a new expert report

outside the discovery period which was properly disregarded by the Trial Court because it had been offered more than three months after the discovery end date (which end date had already been extended multiple times). Pa29. Plaintiff never sought leave from the Court to reopen discovery or to permit the late service of additional discovery after the discovery end date and after a trial date had been set. On January 7, 2020, the Court granted partial summary judgment to EMA, dismissing only the direct claims against it (but preserving any claims of vicarious liability against EMA for the conduct of its putative agents). Pa26. In making its ruling, the Trial Court clearly stated that the basis of granting summary judgment to EMA as to direct claims of negligence was plaintiff's failure to provide admissible evidence of any causal link between the alleged direct negligence of EMA and the patient's ultimate demise. Pa28.

Due to the pandemic the March 2020 trial date was adjourned and trial did not commence until April 2, 2024. After plaintiff presented all of plaintiff's evidence and rested, all defendants moved for a directed verdict, which was granted on May 1, 2024. Pa36. Again, the explicit basis for this ruling was explained by the Trial Court. The Trial Court found that plaintiff's failure to provide any expert testimony supporting the proposition that any of the alleged deviations from accepted standards of care on the part of any defendant, increased the risk of injury to the patient (in this case, the patient's ultimate death). 17T53:5.

STATEMENT OF FACTS

Plaintiff's decedent presented to Jersey City Medical Center's emergency department on January 14, 2017, complaining of severe back pain, radiating to his legs. Pa553. The patient was seen by defendant, Adefris Adal, MD, in the early-morning hours of January 15, 2017. Ca58. Dr. Adal ultimately discharged the patient with a diagnosis of sciatica. Pa30 and Ca64.

At the time of pretrial summary judgment motions, no admissible expert reports that had been served in discovery indicated that any of the nurses' alleged negligence in failing to record relevant information or to provide any such information to Dr. Adal was a factor or played any role in Dr. Adal's alleged misdiagnosis. Pa31. More specifically, plaintiff could not show any nexus between any alleged failure by EMA to train nurses regarding triage policies, pain management policies, or any other policy and an increased risk of the patient's demise due to a failure to diagnose his condition and obtain cardiac surgery.

Something similar happened at the trial of this matter. The substance of the testimony by plaintiff's experts at trial was that Dr. Adal deviated from accepted standards of care by failing to diagnose the patient's aortic dissection, and further, that the aortic dissection led to a fatal cardiac tamponade. 12T37:6-12T52:7; 12T82:8-12T109:1; 15T30:17-15T59:20. Although this allegation would have been contested had defendants been required to put on a defense, for purposes of the

motion at the close of plaintiff's case, the defendants conceded that plaintiff had presented sufficient evidence of deviations from the standard of care. 17T 21:10-15. Plaintiff also argued that the standard of care required defendants to order or suggest further testing that was not performed, and that, if such tests had been performed, they would have led to the correct diagnosis of an aortic dissection. 17T 23:13. Again, the defendants did not contest this allegation for purposes of the Motion to Dismiss only. Plaintiff also alleged that if the proper testing had been performed, it would have demonstrated the correct diagnosis of aortic dissection, and further, that this would have resulted in a prompt appropriate consultation with other specialists to confirm the diagnosis and recommend and perform appropriate treatment. 15T53:16-15T54:3.

Unfortunately, plaintiff failed to appreciate at the time of trial (and continues to fail to appreciate) that no evidence had been presented at the time of trial to the effect that if the correct diagnosis had been timely made prior to the patient's discharge from the hospital, that any available treatment would have increased the patient's chances of survival to any degree. 12T37:6-12T52:7; 12T82:8-12T109:1; 15T30:17-15T59:20. No medical expert testified in plaintiff's case in chief that if the appropriate consultations had been obtained, and the patient had been provided with every possible treatment, that this would have increased the patient's chances of surviving his potentially-fatal condition to any extent. Id. Specifically, at no time

during the course of trial testimony did any plaintiff expert assert that if a cardiac surgeon had attempted to repair the patient's aortic dissection, that the patient would have had any greater chance of survival than the patient had without treatment. Id. The bare allegation that if the patient had timely received appropriate treatment, his chances of survival would have been better is not an inference that a jury can make without some expert testimony to that effect to base the inference on.

POINT I

THE TRIAL COURT CORRECTLY GRANTED DEFENDANT'S MOTION FOR JUDGMENT AT THE END OF PLAINTIFF'S CASE WHERE PLAINTIFF FAILED TO PRESENT ANY EVIDENCE TO SUPPORT AN ESSENTIAL ELEMENT OF PLAINTIFF'S CLAIM

A. On Appeal, this Court Applies the Same Standard of Review Required of the Trial Court in Determining Whether to Grant a Motion for Judgment at the End of Plaintiff's Case.

The rules of court provide for making (and where appropriate, granting) a motion for judgment at the close of the evidence offered by an opposing party. R.4:40-1. When determining whether a directed verdict was properly granted by the trial court under R.4:40-1, the Appeals Court will apply the same standard that governs the trial court. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). See, Luczak v. DWP. of Evesham, 311 N.J. Super. 103, 108 (App. Div.), certif. denied, 156 N.J. 407 (1998). In fact, it is the same standard that is to be applied to review of a summary judgment motion where the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or

whether it is so one-sided that one party must prevail as a matter of law." Brill v. Guardian Life Ins., Co., 142 N.J. 520, 536 (1995) (citation omitted). Put another way, if the conclusion to be drawn from the undisputed facts is so plain and complete that the rational process of an ordinarily-intelligent mind could not come to a different conclusion, the motion should be granted. Ferdinand v. Agric. Ins. Co., 22 N.J. 482, 494 (1956). Even when credibility may be an issue, "'[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact.' *Brill, supra,* 142 *N.J.* at 540, 666 *A.*2d 146 (citation omitted)." Liberty Surplus Ins. Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436, 450 (2007).

B. Plaintiff Failed to Elicit any Evidence at Trial Proving that any Alleged Deviation from a Standard of Care by any Defendant Increased Plaintiff's Decedent's Risk of Death and Therefore Dismissal of Plaintiff's Complaint Must be Affirmed.

In order to succeed in pursuing a claim of medical malpractice and establish a prima facie case of negligence against a healthcare professional, the Plaintiff must present expert testimony establishing three essential elements: (1) a standard of care applicable to the circumstances; (2) a deviation from that standard of care; and (3) that this specific deviation proximately caused the injury. Koseoglu v. Wry, 331 N.J. Super. 140, 156 (App. Div. 2013). In cases where a patient presents to a medical healthcare professional with a preexisting condition and more than one

cause may contribute to the injury and damages of the patient, the courts have approved a modified test for causation. Scafidi v. Seiler, 119 N.J. 93 (1990). Specifically, instead of the traditional "but for" test of causation, a plaintiff may demonstrate "within a reasonable degree of medical probability, that [a delay in treatment] resulting from defendant's failure to have made an accurate diagnosis and to have rendered proper treatment increased the risk of [the occurrence of the patient's injury], and that such increased risk was a substantial factor in producing [the injury to the patient]…" Id. at 104 (quoting Evers v. Dollinger 95 N.J. 399, 417 (1984)). See, also, Koseoglu, supra, 431 N.J. Super. at 156. "A plaintiff suffering from a pre-existent condition must prove that, as a result of a defendant's negligence, she experienced an increased risk of harm from that condition, and that the increased risk of harm was a substantial factor in causing the injury ultimately sustained." Gardner v. Pawliw, 150 N.J. 359, 375 (1997).

In this case, neither before the Trial Court, nor on this appeal, has Plaintiff been able to point to any trial testimony setting forth an expert opinion that, as a result of any alleged negligence on the part of any defendant, the risk of injury to the patient was increased. Oddly, in Plaintiff's entire Statement of Facts, there is no citation whatsoever to any testimony from any witness at trial.

The substance of the testimony by plaintiff's experts at trial was that

Dr. Adal deviated from accepted standards of care by failing to diagnose the patient's aortic dissection, and further, that the aortic dissection led to a fatal cardiac tamponade. Although this allegation would have been contested had defendants been required to put on a defense, for purposes of the motion at the close of plaintiff's case, the defendants conceded that plaintiff had presented sufficient evidence of deviations from the standard of care. 17T 21:10-15. Plaintiff also argued that the standard of care required defendants to order or suggest further testing that was not performed, and that, if such tests had been performed, they would have led to the correct diagnosis of an aortic dissection. 17T 23:13. Again, the defendants did not contest this allegation for purposes of the Motion to Dismiss only. Plaintiff also alleged that if the proper testing had been performed, it would have demonstrated the correct diagnosis of aortic dissection section, and further, that this would have resulted in a prompt appropriate consultation with other specialists to confirm the diagnosis and recommend and perform appropriate treatment.

Critically for the theory of plaintiff's case, the patient's condition was life threatening and required the intervention of a cardiac surgeon ("somebody smarter and better than" plaintiff's expert Dr. Breall). 12T50:24-12T51:1. What is lacking in plaintiff's case is any testimony from this expert or any other that if a cardiac surgeon was consulted and had intervened in the case, then the patient's chances of

survival would have been improved. Cf. Verdicchio v. Ricca, 179 N.J. 1, 18-20 (2004).

Within the key point on plaintiff's appeal (plaintiff's POINT IV, addressing the Trial Court's directed verdict, Pb61- Pb71) the sum total of references to trial testimony consists of: 15T93, 15T105-15T106, 15T54, 15T53, 15T56, 15T59, 15T107, 12T101, 12T105, 12T102, and 12T107-12T109. Pb69-Pb71. Not one of those pages contains any testimony to the effect that the patient's chances of survival decreased because of the failure to timely diagnosis and treat the patient's aortic aneurism/dissection (and conversely there is no testimony that intervention by a cardiac surgeon increased the patient's risk of survival). Given the specific issue presented in this case one would expect the plaintiff to cite to such testimony if it existed, but it does not. Even a thorough search of the entire trial testimony of both experts fails to disclose that required testimony.

To illustrate the point, if we assume that the patient had no chance of survival even if the correct diagnosis had been made at the time that the patient was evaluated by the defendants, and even if a cardiac surgeon had been consulted at that time, there was no increased risk of death because the patient had no chance of survival in any event. Or, if we assume a different scenario in which the patient had a 50% chance of surviving without timely diagnosis and treatment of the patient's condition, but the patient continued to have only a 50% chance of survival

even if the correct diagnosis had been made and a cardiac surgeon had operated in a timely fashion, then there is still no increased risk of the fatal outcome to the patient. The risk remained the same. The same would be true if the patient presented to the hospital with only a 10% chance of survival, but the chances of survival remained 10% even if the patient had been properly and timely diagnosed and treated. In order to establish causation (even under the modified standard applicable to patients presenting with preexisting conditions), the plaintiff was required to produce testimony from a medical expert indicating (for example) that on presentation, the patient had a 25% chance of survival with no treatment at all, but if the diagnosis had been made and timely surgical intervention had occurred, the patient's chances of survival increased to 26%. Although the increased chance of survival (or conversely, the decreased risk or chance of survival without treatment) would have been minimal in that case, that testimony would be sufficient even though small. No such testimony was presented by the plaintiff. See Koseoglu, supra, 431 N.J. Super. at 149 (in that case plaintiff's expert "Dr. Grossbard reasoned had defendant examined decedent, the chain of events would follow such that 'there [was] a very good chance, significantly greater than 50 percent,' decedent would have survived. Dr. Grossbard concluded defendant's failure to speak to or examine decedent, under the circumstances increased the risk posed by the disease and was a significant contributing factor causing his death.").

Even if plaintiff's expert had testified that it is not possible to precisely quantify any patient's percent chance of survival, some testimony as to odds being better or worse was required. For example if there was testimony to the effect that it is well accepted within the field of medicine that a patient presenting as decedent did with an aortic aneurism/dissection would have a greater chance of survival with diagnosis and treatment with cardiac surgery within a particular timeframe, such testimony would be sufficient. However, no matter how thoroughly and minutely the trial record is searched, no such testimony will be found. With respect to what the possible outcome could have been with timely treatment, plaintiff's expert explicitly deferred to an expert cardiac surgeon. 12T50:24-12T51:1. In the absence of testimony of improved chances, the Trial Court correctly dismissed plaintiff's case for failure to provide any evidence concerning an essential element of plaintiff's claim upon which a jury could make a reasonable finding of causation.

The essential premise of plaintiff's argument (both in the Trial Court and on this appeal) is that the jury should have been permitted to conclude based only on the evidence that the specific treatment that plaintiff's expert testified should have been provided was not given that the patient's chances of survival were decreased. Allowing such an inference in the absence of expert testimony would be to permit speculation and not a permissible inference. What the particular chances of

survival or non-survival would be with or without a particular course of treatment is consummately a matter of expert medical opinion. An expert's conclusion "'is excluded if it is based merely on unfounded speculation and unquantified possibilities.'" Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997) certif. denied, 154 *N.J.* 607 (1998) (quoting Vuocolo v. Diamond Shamrock Chem. Co., 240 N.J. Super. 289, 300 (App. Div.), certif. denied, 122 *N.J.* 333 (1990)). If that is a basis to exclude expert testimony, *a fortiori* it is more than sufficient reason to prevent a lay jury from engaging in such speculation.

Plaintiff's citations to and arguments about the "substantial factor" element are entirely irrelevant to the issue in this case. Before a jury can consider the question of whether any alleged negligence was a substantial factor in the plaintiff's injuries, it must first be presented with evidence of increased risk of harm. "***Once the plaintiff demonstrates that the defendant's negligence actually increased the risk of an injury that later occurs***, that conduct is deemed to be a cause "in fact" of the injury and the jury ***must then*** determine the proximate cause question: whether the increased risk was a ***substantial factor*** in bringing about the harm that occurred." Verdicchio, supra, at 24 (emphasis supplied).

POINT II

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT DISMISSING DIRECT CLAIMS AGAINST DEFENDANT EMA BASED ON THE FAILURE OF PLAINTIFF TO PRODUCE ANY EVIDENCE OF PROXIMATE CAUSE

A. The Standard of Review on Appeal from the Grant of a Motion for Summary Judgment is the Same Standard Applied by the Trial Court.

The New Jersey rules court provide for making motions for summary judgment as to the entire case or a particular issue as part of a case before trial. R.4:46-1. The court deciding such a motion must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill v. Guardian Life Ins., Co., 142 N.J. 520, 536 (1995) (citation omitted). Even where credibility may be an issue, "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact." Id. at 540 (citation omitted). Accord Liberty Surplus Ins. Corp., Inc., supra, 189 N.J. at 450.

B. Plaintiff Failed to Show Any Evidence of a Causal Relationship between the Alleged Failure of EMA to Properly Train Nurses in Policies Respecting Triage and Pain Management and the Defendant Physician's Failure to Correctly Diagnose and Properly Treat Plaintiff's Decedent

On the Motion for Partial Summary Judgment, at most Plaintiff produced evidence that the defendant nurses were unfamiliar with policies relating to triage and pain management. Plaintiff did not demonstrate that Defendant, EMA, failed

to train the nurses in regard to those policies. However, even if it is assumed for purposes of the motion that there was negligence on the part of EMA in failing to train the nurses (as opposed to the independent negligence of the nurses), Plaintiff made no showing that any deficiency in that training and the knowledge of the nurses concerning the relevant policies resulted in any harm to Plaintiff's decedent. As was the case at trial, in opposition to EMA's motion for partial summary judgment the plaintiff proffered no evidence from a qualified medical expert that any failure to train the nurses with respect to any policy increased the risk that the patient would die.

It is undisputed that the treating physician did not rely on either the nursing triage, or pain management policies, or any of the other alleged shortcomings regarding nursing care in making his diagnosis of the patient. No expert on behalf of the Plaintiff alleged that the nurses, themselves, should have either diagnosed or treated the patient for an aortic aneurism or aortic dissection. No expert alleged that any misconduct on the part of the nurses led to the physician's alleged misdiagnosis. No expert alleged that the nurses themselves should have diagnosed the patient's aortic aneurism/aortic dissection. No one alleged that the nurses should have directly treated the patient's aortic aneurism/aortic dissection.

Most importantly, even if it is assumed that EMA negligently failed to train the nurses with respect to any policy or policies, and even assuming that such

failure contributed to the failure to diagnosis the patient's condition, there was no evidence presented that any of those deviations increased the patient's risk of death. As more thoroughly discussed in Point I above, a plaintiff presenting to a medical provider with a pre-existent condition must prove that, as a result of a defendant's alleged negligence, the patient experienced an increased risk of harm from that condition. Gardner, supra,150 N.J. at 375. As far as anyone knows, the patient's risk of death remained the same with or without an earlier diagnosis, and with or without surgery by a cardiac surgeon.

In the absence of any expert testimony linking the alleged failure of EMA to train the treating nurses with respect to triage policies or pain management policies or any other policy to the patient's fatal outcome is fatal to Plaintiff's case on the pre-trial Motion for Summary Judgment. Although Plaintiff argues that the Plaintiff's expert on policies and procedures could rely on the testimony of other experts in formulating opinions, it is clear that this does not give that expert license to import the opinions of other experts wholesale. Plaintiff's expert on deviation with regard to policies (Timothy Hawkins), was not qualified to offer a medical opinion on medical causation. At the time of the Motions for Summary Judgment, Plaintiff's medical experts did not present any opinion to the effect that any negligence with respect to EMA's training of nurses increased the risk of the patient's death due to his aortic aneurism/aortic dissection. Pa563-Pa565. At the

hearing for the Motion for Partial Summary Judgment to dismiss only the direct claims against EMA, Plaintiff could not point to any competent medical evidence in the record which discussed an increased risk of the patient's death as a result of the alleged failure of EMA to properly train any nurses. Pa28-Pa29.

C. Even If Summary Judgment Was Granted in Error it Was Harmless Error as the Plaintiff Failed to Demonstrate at Trial that Any Failure to Timely Diagnose and Treat the Patient's Fatal Condition Was Causally Related to the Patient's Ultimate Death.

Before the court will reverse a judgment below, it must find that the asserted error of the trial court was not harmless. Neno v. Clinton, 167 N.J. 573, 586 (2001). Accord Beasley v. Passaic, 377 N.J. Super. 585, 873 (App. Div. 2005). As demonstrated in POINT I, supra, Plaintiff could not and did not elicit any evidence at the time of trial that the failure to diagnose and treat the patient's aortic aneurism/aortic dissection and obtain a cardiac surgeon to perform surgery on the patient increased the patient's pre-existing risk of death. Regardless of what allegedly negligent act or omission is assumed to have played a role in the failure to timely diagnose and treat the patient's condition, no testimony from any expert at trial stated that an earlier diagnosis and timely treatment with cardiac surgery would have improved the patient's chance of surviving his condition. Without expert testimony asserting that the lack of intervention by a cardiac surgeon increased the patient’s risk of death, plaintiff’s claims were doomed to fail at trial

even if summary judgment dismissing direct claims against EMA had been denied pretrial.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING PLAINTIFF'S DISCOVERY REGARDING A COLLATERAL MATTER WITH NO RELEVANCE TO THE ISSUE WHICH IS THE PRINCIPAL BASIS OF PLAINTIFF'S APPEAL

A. Review of Discovery Orders on Appeal Is Subject To an Abuse of Discretion Standard

A party's discovery rights are not unlimited. Piniero v. N.J. Div. of State Police, 404 NJ Super. 194, 204 (App. Div. 2008). Discovery rulings are reviewed for an abuse of discretion. Brugaletta v. Garcia, 234 NJ 225, 240 (2018). Appellate Courts will not intervene absent an abusive discretion for a judge's misunderstanding or mistaken application of the law. Health Sys., Inc. v. Horizon Healthcare Services, Inc., 230 NJ 73, 79-80 (2017). Mindful of the judiciary's important case management role in the Pretrial process, a reviewing Court will "normally defer to the Trial Court's disposition of discovery matters, including the formulation of Protective Orders, unless the Court has abused its discretion" or the determination is based on an incorrect view of the law. Serrano v. Underground Utilities Corp., 407 NJ Super. 253, 268 (App. Div. 2009) (citations omitted).

B. The Trial Court Properly Declined To Compel EMA to Facilitate A "Live View" Of Records and A Witness for Deposition Where the Record System Was No Longer In Use or Available and EMA Had No Access To It

It is somewhat difficult to discern precisely what portions of Plaintiff's appeal set forth in Point V of Plaintiff's Appellate Brief applies to EMA. Several of the Orders/Rulings referenced in this part of Plaintiff's Appeal apply only to other Defendants and relate to discovery not within the custody of EMA. It appears that Plaintiff is aggrieved because EMA was not required to produce a witness to review a "live view" of the electronic medical record. Whatever the specifics may be deemed to be, it is manifestly evident that EMA was not in a position to provide the discovery demanded. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. Trenton Renewable Power, LLC v. Denali Water Solutions, LLC, 470 NJ Super. 218, 226-227 (App. Div. 2022) (citing R. 4:10-2(f)(2)).

In this case, Defendant EMA clearly represented and certified to the Trial Court and to Plaintiff that the revision log no longer existed. 6T82:16-18. The system on which the medical records were originally kept was no longer in use at the hospital, and therefore not accessible from any terminal by any potential witness. 7T17:12-7T18:5; 7T20:11-19. The software in question was no longer available to accomplish a live view that was requested by the Plaintiff. There can be no greater undue burden than to require a party to do the impossible.

Plaintiff's brief creates the impression that Plaintiff had no access at all to the EMR electronic data or to depose witnesses regarding same. That is a mistaken impression. EMA produced the Events Timeline log of events pertaining to the medical records at issue. Ca3-Ca17. Plaintiff was permitted to depose dozens of witnesses, including every single individual who was identified in the audit log which was provided to plaintiff. 6T89:8-18.

In addition, Plaintiff has made no showing that any possible additional deposition or access to the live system could have any bearing on the outcome of Plaintiff's claims and the central issue in this case. As indicated in the Points above, Plaintiff's claims were dismissed because Plaintiff could not establish proximate cause, even under the more relaxed standard applicable to medical malpractice cases where a patient presents with a preexisting condition. As explained above, the Plaintiff was required to present evidence that any alleged negligence on the part of any Defendant increased the risk of harm to the patient. There is no conceivable information that could have been gleaned from a live view, or any additional metadata beyond that which was provided, or other investigation into the system behind the medical records (beyond the audit logs and events timeline already disclosed), that could in any way influence or affect a decision on whether or not the conduct of any Defendant increased the risk of the patient's death in this case. Therefore, if it is assumed that there was any error on the part of

the Trail Court in denying plaintiff any additional discovery in this category, it was demonstrably harmless error and not a basis to reverse the dismissal of plaintiff's complaint.

CONCLUSION

Based upon all of the foregoing, it is respectfully submitted that Plaintiff's appeal must be denied and the Trial Court's Order entering Judgment in favor of Defendants and dismissing Plaintiff's Complaint for failing to present evidence of proximate cause must be affirmed.

Respectfully submitted,
ORLOVSKY MOODY SCHAAFF
CONLON BEDELL McGANN & GABRYSIAK

BY: ___*Russell J. Malta*_____
RUSSELL J. MALTA

Dated:

ANALYN RIVERA, INDIVIDUALLY AND AS ADMINISTRATRIX AD PROSEQUENDUM FOR THE ESTATE OF ROMEO RIVERA, Plaintiff-Appellant, v. JERSEY CITY MEDICAL CENTER RWJ BARNABAS HEALTH, EMERGENCY MEDICAL ASSOCIATES, ADEFRIS ADAL, MD, LEISTER TALIN, RN, DIANA CAPRA, RN, DANA AMORINO, RN, CECILIA WILSON, RN, ZACHARY BAKHTIN, CIM, JOHN DOE, MD, (FICTITIOUSLY NAMED), MARY ROE, RN, (FICTITIOUSLY NAMED), ABC MEDICAL SERVICES (FICTITIOUSLY NAMED) AND XYZ EMERGENCY MEDICINE, INC. (FICTITIOUSLY NAMED), Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003099-23 CIVIL ACTION On Appeal From: Law Division, Hudson County Docket No. HUD-L-2382-17 Sat Below: Hon. Anthony V. D'Elia, J.S.C. Hon. Martha D. Lynes, J.S.C.

BRIEF SUBMITTED ON BEHALF OF DEFENDANTS-RESPONDENTS JERSEY CITY MEDICAL CENTER, RWJBARNABAS HEALTH, LEISTER TALIN, RN, DIANA CAPRA, RN, DANA AMORINO, RN AND CECILIA WILSON, RN

ON THE BRIEF: JANET GLORE, ESQ. 158302016
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PRELIMINARY STATEMENT

This matter is premised on the medical care rendered to Romeo Rivera, a then 43-year-old male, who presented to Jersey City Medical Center ("JCMC)'s Emergency Department with a chief complaint of back pain and left leg numbness (and no complaints of chest pain). He was evaluated, discharged home, and unfortunately passed away the following day. Plaintiff's theory in this case has been premised on the contention that defendants were negligent in failing to diagnose Mr. Rivera's aortic dissection, which plaintiff alleges led to his fatal cardiac tamponade after discharge.

Plaintiff now files this appeal, seeking reconsideration of a number of decisions through the course of the case, and ultimately, the decision of a directed verdict in favor of defendants at trial, a determination made by the Trial Court based on plaintiff's failure to present any testimony on proximate cause.

Most notably in this case, plaintiff failed to present to the Court any evidence of a causal link. Plaintiff's counsel failed to present witness testimony of any evidence that if the correct diagnosis had been made during Mr. Rivera's presentation to JCMC, and appropriate intervention had occurred, that the fatal outcome would have been avoided. In the absence of such testimony, the Trial Court correctly dismissed plaintiff's case for failure to provide sufficient evidence concerning an essential element of

plaintiff's claim upon which a jury could make a reasonable finding of causation. Defendants-respondents accordingly request the Court affirm that decision, as well as the decisions as set forth below.

PROCEDURAL HISTORY

The plaintiff filed a Complaint alleging medical malpractice with respect to the care and treatment of Mr. Rivera on June 7, 2017. Pa42. An Answer was filed on behalf of Answer of Jersey City Medical Center, RWJBarnabas Health, Leister Talin, RN, Diana Capra, RN, Dana Amorino, RN, and Cecilia Wilson, RN, on July 18, 2017. Pa57. The plaintiff served an Affidavit of Merit by Timothy Hawkins dated September 21, 2017, which did not raise direct claims against JCMC. Pa537. Discovery continued, and upon the close of discovery, a summary judgment motion was filed on behalf of the JCMC and its nurses. In November 2019, the court granted partial summary judgment to JCMC, dismissing any direct claims. Pa24. On January 7, 2020, the court granted summary judgment to the JCMC nurses, dismissing any direct claims. Pa26.

Trial in this matter commenced on April 15, 2024, before the Hon. Anthony V. D'Elia and jury 11T-16T. On May 13, 2024, the court entered 3 orders granting a directed verdict to Dr. Adal, JCMC/RWJ and EMA, respectively, and again granted a directed verdict to all defendants and dismissed all plaintiff's claims with prejudice. Pa37-41.

STATEMENT OF FACTS

Mr. Rivera presented to JCMC's ED on January 14, 2017, complaining of severe back pain and leg pain. Pa553. He was evaluated by JCMC nurses and Dr. Adefris Adal. Mr. Rivera was diagnosed with sciatica, injections were recommended and he was discharged home, where he collapsed and ultimately expired the following day. Pa30 and Ca64.

Plaintiff failed to serve any admissible expert reports which stated that any of the JCMC nurses deviated from accepted standards of care and Dr. Adal's alleged misdiagnosis leading to Mr. Rivera's death. Pa31.

Likewise, at trial, plaintiff failed to present any testimony or evidence that if the correct diagnosis had been timely made prior to Mr. Rivera's discharge from the hospital, that any available treatment would have increased his chances of survival to any degree. Because there was absolutely no medical expert who testified in plaintiff's case in chief that if the appropriate investigation/consultations had been obtained and/or the appropriate diagnosis had been reached, and Mr. Rivera had been provided with every possible treatment, that this would have increased his chances of surviving his fatal condition, defendants succeeded in their motion for a directed verdict. The Trial Judge determined that without expert testimony and evidence of a causal

link, the jury would not be able to infer his chances of survival in this case.

LEGAL ARGUMENT

Trial judges are afforded wide discretion in deciding many of the issues that arise in civil cases. Appellate courts review those decisions for an abuse of discretion. "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 App. Div. 2007)). Defendants maintain that plaintiff has failed to provide any compelling evidence that the decisions of the Trial Courts in this case were 'manifestly unjust', and that plaintiff's appeal must be denied.

POINT I

THE COURT DID NOT ABUSE ITS DISCRETION BY DIRECTING A VERDICT IN FAVOR OF JCMC/RWJ AS PLAINTIFF FAILED TO COME FORWARD WITH SUFFICIENT EVIDENCE OF PROXIMATE CAUSE

A. STANDARD OF REVIEW

R.4:40-1 permits a party to move for judgment at the close of the evidence offered by an opponent. In determining whether a directed verdict was properly granted by the Trial Court under R.4:40-1, the Appellate Court applies the same standard that governs the Trial Court. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). It is the same standard that is to be applied to review of a summary judgment motion where the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill v. Guardian Life Ins., Co., 142 N.J. 520, 536 (1995).

To establish a *prima facie* case of medical/nursing malpractice, a plaintiff must establish three essential elements: (1) a standard of care applicable to the circumstances; (2) a deviation from that standard of care; and (3) that this specific deviation proximately caused the injury. Koseoglu v. Wry, 331 N.J. Super. 140, 156 (App. Div. 2013). Furthermore, with rare exception, evidence of deviation from accepted medical standards must be proved by competent, qualified physicians. Schueler v. Strelinger, 43 N.J. 330, 344-345

(1964); Parker v. Godstein, 78 N.J. Super. 472, 478 (App. Div. 1963). Plaintiff's burden is to provide qualified expert testimony that the negligence of the defendants were substantial factors in causing the injuries claimed by the plaintiff. Conklin v. Hannoch Weisman, 145 N.J. 395, 417 (1996). It is plaintiff's burden to establish the requisite casual connection through testimony and evidence. Chin v. St. Barnabas Med. Ctr.,160 N.J. 454, 469 (1999). In cases where a patient presents to a medical healthcare professional with a preexisting condition and more than one cause may contribute to the injury and damages of the patient, the courts have approved a modified test for causation. Scafidi v. Seiler, 119 N.J. 93 (1990). "A plaintiff suffering from a pre-existent condition must prove that, as a result of a defendant's negligence, she experienced an increased risk of harm from that condition, and that the increased risk of harm was a substantial factor in causing the injury ultimately sustained." Gardner v. Pawliw, 150 N.J. 359, 375 (1997).

B. THE COURT APPROPRIATELY GRANTED A DIRECTED VERDICT IN FAVOR OF JCMC/RWJ

Here, without expert testimony, plaintiff cannot establish that the negligence of the nurses in any way contributed to the misdiagnosis (which allegedly increased the risk of Mr. Rivera's death). Plaintiff failed to provide any expert testimony at trial to attest to this link. Even in his appellate Brief, plaintiff does

not cite any testimony from any witness at trial who provided evidence that there was a causal link between the treatment of Mr. Rivera/alleged misdiagnosis and the injuries he sustained the following day, a crucial factor for jurors to reach an appropriate decision. At the commencement of trial, after affording plaintiff the benefit of all reasonable inferences, the Trial Court found that plaintiff failed to present adequate expert medical evidence demonstrating proximate cause as part of her case in chief. This determination was based on all evidence presented at trial as well as any reasonable inference that could be made thereof. The Court properly determined that what was lacking in plaintiff's case is any testimony from this expert or any other that if a cardiac surgeon was consulted and had intervened in the case, then the patient's chances of survival would have been improved or changed in any way.

As plaintiff has failed to establish the requisite causation, a ruling for directed verdict in favor of defendants was appropriate and the Trial Court did not err in this decision.

POINT II

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DIRECT CLAIMS AGAINST JCMC AS PLAINTIFF'S AOM DID NOT SUBSTANTIALLY COMPLY WITH THE AOM STATUTE AND THE COURT APPROPRIATELY DENIED AN AMENDED COMPLAINT

A. STANDARD OF REVIEW

The Affidavit of Merit statute in New Jersey, N.J.S.A. 2A:53A-26 to -29, requires that a plaintiff in a professional malpractice or professional negligence case submit an Affidavit of Merit ("AOM") from an "appropriate licensed person" that shows a "reasonable probability" that the defendant professional's conduct "fell outside acceptable professional or occupational standards or treatment practices". The plaintiff must provide each defendant with an affidavit from an appropriately licensed person within the field applicable to the case. The affidavit must be served on the defendant within 60 days after they file an answer to the complaint. Courts may grant a single 60-day extension for good cause, giving plaintiffs a maximum of 120 days. Failure to meet this deadline results in dismissal of the case with prejudice, barring the plaintiff from refiling. New Jersey courts have reinforced the importance of adhering to this timeline. The burden remains on the plaintiff to comply, and courts have rejected arguments that a defendant's failure to remind the plaintiff of the deadline justifies late submission. Without an AOM, a direct claim against a defendant cannot survive beyond the 120-day

timeframe. A plaintiff may move to amend his or her complaint beyond the 120-day timeframe to include additional causes of action which would prompt a new AOM, however, this application can be denied under specific circumstances.

While it is well established that New Jersey Court R. 4:9-1 prescribed a liberal standard of review of applications to amend a complaint, the "discretion to deny a motion to amend is not mistakenly exercised when it is clear that the amendment is so meritless that a motion to dismiss under R. 4:6-2 would have to be granted…" See Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006). In reviewing an application to amend, Courts are instructed to consider both the merit of the proposed amendment and whether the defendant would be prejudiced were the amendment permitted. Id. Nevertheless, it is within the Court's discretion to deny an application to amend based upon either futility or prejudice. Id. A motion to amend may properly be denied where its merits are marginal, its substance generally irrelevant to the main claim, and allowing the amendment would unduly protract the litigation or cause undue prejudice. Cutler v. Dorn, 196 N.J. 419, 441 (2008). "There remains a necessary area of judicial discretion in denying such motions where the interests of justice require." Stuchin v. Kasirer, 237 N.J. Super. 604, 609 (1990).

B. THE COURT DID NOT ERR IN DENYING DIRECT CLAIMS AGAINST JCMC

In this case, plaintiff's Affidavit of Merit did not substantially comply with the Affidavit of Merit Statute as to any direct claims against JCMC and the trial Court appropriately denied leave to amend, concluding that the initial Affidavit of Merit did not identify a direct claim against JCMC and that an amended complaint to include direct claims was impermissible. 6T67:21-22.

While the plaintiff did serve an Affidavit of Merit by Mr. Timothy Hawkins in September 2017 (Pa537), it did not indicate there were any direct claims against JCMC specifically, as required by the Affidavit of Merit Statute. Mr. Hawkins did provide that he is an expert in hospital administration and healthcare safety, and the AOM specifically referenced that he is familiar with "Hospital Administration" standards of emergency medicine (Pa538), but it did not state that "there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices" **by** JCMC. The AOM stated that "there exists a reasonable probability that the care to Romeo Rivera rendered **at** the Jersey City Medical Center **by** medical staff from Emergency Medical Associates, LLC, fell outside acceptable Hospital Administration standards of emergency medicine." Pa538. [emphasis added]. There

is no indication in this AOM that there was a claim against it for failure to satisfy acceptable Hospital Administration standards of emergency medicine simply because it did not state so as necessary in accordance with the Statute. It cannot be the burden of the defendant to infer this claim – it must be clearly attested to in the AOM, which it was not. Defendants accordingly believed that there were no direct claims against JCMC and proceeded to defend the case accordingly.

In addition, plaintiff attempts to conclude that JCMC should have known that this AOM applied to direct claims against JCMC because EMA is not a health care facility is not relevant – regardless of what type of entity EMA is, the AOM was not compliant against JCMC and there was no way of placing JCMC on notice of any direct claims.

One year later, the plaintiff attempted to raise a direct claim against JCMC outside the statutory timeframe in his service of an expert report by Timothy Hawkins (Pa552). This was improper as he failed to raise the issue and serve a statutory compliant AOM against JCMC for direct claims. He attempted to serve a supplemental AOM, however, this was well outside the statutory timeframe and without merit. The Court appropriately disregarded any direct claims against JCMC.

Plaintiff then attempted once again to raise a direct claim against JCMC outside the statutory timeframe and circumvent the

AOM statute on her request to file an amended complaint. The court appropriately denied such an amendment, within its discretion. The Court appropriately recognized that the plaintiff had her opportunity to keep JCMC in the case for direct liability, but closed that door after plaintiff, having named JCMC as a direct defendant, failed to serve a timely AOM supporting a direct claim against the hospital. None of the AOMs served by plaintiff during the 120-day timeframe supported any direct claim against JCMC. Accordingly, any direct claim against JCMC was extinguished. JCMC remained in the case as potentially vicariously liable for the defendant nurse employees' actions. The Court appropriately recognized and agreed that the reasoning behind plaintiff's request to file an amended complaint was to add a direct claim against JCMC, which was disguised as a new claim, but was not, it was a claim that was initially contemplated by plaintiff and then abandoned by the time the AOM by Mr. Hawkins was served. The court also appropriately recognized that over a year and a half had elapsed since the complaint was filed and that extensive discovery had been conducted, all with JCMC reasonably believing that plaintiff was not making an administrative claim against it, thereby allowing serving prejudice to JCMC if plaintiff was permitted to pursue this previously abandoned claim.

In this case, plaintiff's Affidavit of Merit did not substantially comply with the Affidavit of Merit Statute as to any

direct claims against JCMC and the trial Court appropriately denied leave to amend, concluding that the initial Affidavit of Merit did not identify a direct claim against JCMC and that an amended complaint to include direct claims was impermissible.

POINT III

THE COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING ALL CLAIMS AGAINST THE NURSES

A. STANDARD OF REVIEW

R.4:40-1 permits a party to move for judgment at the close of the evidence offered by an opponent. In determining whether a directed verdict was properly granted by the Trial Court under R.4:40-1, the Appellate Court applies the same standard that governs the Trial Court. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). It is the same standard that is to be applied to review of a summary judgment motion where the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill v. Guardian Life Ins., Co., 142 N.J. 520, 536 (1995)

To establish a *prima facie* case of medical/nursing malpractice, a plaintiff must establish three essential elements: (1) a standard of care applicable to the circumstances; (2) a deviation from that standard of care; and (3) that this specific deviation proximately caused the injury. Koseoglu v. Wry, 331 N.J. Super. 140, 156 (App.

Div. 2013). Furthermore, with rare exception, evidence of deviation from accepted medical standards must be proved by competent, qualified physicians. Schueler v. Strelinger, 43 N.J. 330, 344-345 (1964); Parker v. Godstein, 78 N.J. Super. 472, 478 (App. Div. 1963). Plaintiff's burden is to provide qualified expert testimony that the negligence of the defendants were substantial factors in causing the injuries claimed by the plaintiff. Conklin v. Hannoch Weisman, 145 N.J. 395, 417 (1996). It is plaintiff's burden to establish the requisite casual connection through testimony and evidence. Chin v. St. Barnabas Med. Ctr.,160 N.J. 454, 469 (1999). In cases where a patient presents to a medical healthcare professional with a preexisting condition and more than one cause may contribute to the injury and damages of the patient, the courts have approved a modified test for causation. Scafidi v. Seiler, 119 N.J. 93 (1990). "A plaintiff suffering from a pre-existent condition must prove that, as a result of a defendant's negligence, she experienced an increased risk of harm from that condition, and that the increased risk of harm was a substantial factor in causing the injury ultimately sustained." Gardner v. Pawliw, 150 N.J. 359, 375 (1997). The law of New Jersey is replete with affirmations of the general requirement of expert testimony in malpractice cases. See Jones v. Stess,, 111 N.J. Super. at 287; Parker v. Godstein, 78 N.J. Super. 472, 480 (App. Div. 1963), cert. denied, 40 N.J. 225 (1963).

B. THE COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING ALL CLAIMS AGAINST THE NURSES

The Trial Court properly granted the Defendant-Respondents' motion for summary judgment, based on Plaintiff-Appellant's failure to serve an expert report prior to the discovery end date, as the failure to do so amounted to a failure to establish a prima facie case, as established and discussed above. The Court entered a detailed Order on January 7, 2020 setting forth its reasoning for dismissing all claims against the JCMC nurses (Pa26) and within it appropriately emphasizes that plaintiff did not present the requisite expert testimony to establish that the JCMC nurses' alleged negligence were proximate causes of the damages asserted in this case. While plaintiff did retain Mr. Hawkins and Ms. Ashton who are qualified and opined that the respective defendants were negligent in this case, the Trial Court appropriately determined that neither possess the requisite qualification in the medical field to testify as to how that negligence constituted substantial contributing factors, or proximate causes, of the damages claimed by the plaintiff here. Plaintiff's expert, Mr. Hawkin, opined that EMA did not properly train or supervise the nurses regarding Emergency Room policies and procedures and that Ms. Ashton opined that the four nurses did not properly follow those policies/procedures and otherwise deviated from the requisite standard of care in communicating with doctors and/or in caring

for Mr. Rivera and recording their observations, and the admissible opinions of Dr. Breall only established that Mr. Rivera's death was caused by Dr. Adal's misdiagnosis of sciatica while ignoring the signs and symptoms of aortic dissection and evolving cardiac tamponade. Plaintiff's experts did not opine that Dr. Adal's alleged misdiagnosis was due, to any extent, to the nurse's failure to record relevant information or otherwise provide information to Dr. Adal. Notably, at the hearing for the Summary Judgment motions, plaintiff could not point to any competent medical evidence in the record which discussed an increased risk of the patient's death as a result of the alleged failure of the JCMC nurses. Pa28-Pa29. Accordingly, the court did not abuse its discretion in dismissing all claims against the nurses on summary judgment.

POINT IV

THE COURT DID NOT ABUSE ITS DESCRETION BY NOT ALLOWING PLAINTIFF TO INVESTIGATE DECEDENT'S EMR AND BY GRANTING PROTECTIVE ORDERS

A. STANDARD OF REVIEW

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

will normally defer to the Trial Court's formulation of Protective Orders. Serrano v. Underground Utilities Corp., 407 NJ Super. 253, 268 (App. Div. 2009).

B. THE COURT DID NOT ABUSE ITS DESCRETION BY GRANTING PROTECTIVE ORDERS AS TO EMR

Plaintiff claims that reversal is required because the Trial Court granted a Protective Order with respect to a minor aspect of the audit trail, which is addressed by defendant EMA. There was extensive motion practice and oral argument on this issue, and it was properly established that certain information no longer existed at the time during this discovery dispute. There were numerous depositions and each defendant and fact witness denied familiarity. Plaintiff cannot now claim that a protective order as to EMR was an abuse of discretion when counsel asked witnessed specifically about the audit trail and he did not elicit the testimony that he wanted. Notably, plaintiff has made no showing on this appeal that any potential evidence that could have been contained in the complete EMR would have in any way been relevant to the fatal issue in this case, which is that plaintiff has failed to show the required causal relationship between the alleged negligence and the patient's fatal outcome in this case.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that plaintiff's appeal must be denied and the Appellate Division should affirm the decisions of the trial court below.

Respectfully Submitted,
ROSENBERG JACOBS HELLER & FLEMING, P.C.

By: *Janet Glore*
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April 21, 2025

VIA ELECTRONIC FILING
Clerk of the Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 006
Trenton, New Jersey 08625-0970

Re: Analyn Rivera v. Jersey City Med. Ctr., et al.
Appellate Division Docket No.: A-003099-23
On Appeal From: Law Division, Hudson County
Docket No. HUD-L-2382-17
Sat Below: Hon. Anthony V. D'Elia, J.S.C.

To the Honorable Judges of the Appellate Division:

Please accept this *revised* letter memorandum, pursuant to R. 2:6-2(b) in lieu of a more formal reply brief submitted on behalf of Plaintiff/Appellant, Analyn Rivera, individually and as Administratrix Ad Prosequendum for the Estate of Romeo Rivera.

TABLE OF CONTENTS

STATEMENT OF PROCEDURAL HISTORY & FACTS

Plaintiff relies upon the PROCEDURAL HISTORY and STATEMENT OF FACTS as set forth in her previously filed Appellate Brief.

LEGAL ARGUMENT

POINT I

PLAINTIFF PRODUCED SUFFICIENT EVIDENCE OF CAUSATION ARISING FROM THE DEVIATIONS FROM THE STANDARD OF CARE BY EACH DEFENDANT TO PROCEED TO A JURY

In her report, Nurse Ashton concluded based on the deviations noted that "[t]he above deviations from the nursing standards of care contributed to the eventual wrong diagnosis of sciatica that resulted in Mr. Rivera's premature discharge and untimely death." [Pa609] Nurse Ashton determined that those failures by Nurse Wilson caused Mr. Rivera to be "discharged into the night, a failure to comply with accepted standards of nursing care that contributed to [Mr. Rivera's] untimely death." [Pa610] Per Nurse Ashton, "the failures of the nursing staff of the JCMC Emergency Department, caring for Mr. Rivera as outlined above deviated from accepted standards of nursing care, substantially increased the risk of harm, and were direct causes in bringing about the death of Romeo Rivera." [Pa611]

Another plaintiff's experts, Mr. Timothy Hawkins, FACHE, CHSP, MBA,

opined that the nursing staff failed to conduct proper pain assessments, document key findings, including Mr. Rivera's escalating pain symptoms, or relay critical information to Dr. Adal that could have triggered appropriate diagnostic testing. [Pa564-65] That evidence was sufficient to establish that the nursing deviations increased the risk that Mr. Rivera would be misdiagnosed and improperly discharged.

In his report, Mr. Hawkins noted that Nurse Ashton stated in her report "that a number of the nurses (nurses Roby, Colon, Capra, Wilson and Leister) failed to implement [JCMC policies and procedures] properly." [Pa565] Had the nursing staff been properly in-service trained and instructed by JCMC and EMA administrators to implement the policies and procedures as written, and to notify Dr. Adal that patient Rivera's pain was getting worse (as it was documented to be 6/10 immediately prior to discharge), Dr. Adal would not have discharged patient Rivera, (as he stated at his deposition). That would have allowed additional time for nursing re-assessment and medical workup and testing to determine the cardiac cause of the increased pain and additional complaints. Dr. Adal would have been able to uncover the underlying clinical causes for Mr. Rivera's pain and he would have **made a referral to specialists that could have saved patient Rivera's life as stated in the report of cardio-vascular expert Dr. Breall**. [Pa565]

Dr. Breall concluded to a reasonable degree of medical certainty that "Mr.

Rivera's unfortunate death was caused by ascribing a wrong diagnosis of sciatica and ignoring the signs and symptoms of aortic dissection and evolving cardiac tamponade." [Pa677] With "appropriate history, physical examination and adjunctive testing," Mr. Rivera "would in all likelihood be alive today." [Pa677]

> There was sufficient time to arrange for surgery by an experienced cardiothoracic team at a level III Emergency Services facility (either on or off site). Such surgery (ascending aorta repair with or without valve replacement or bypass surgery) would most likely have been successful and is associated with a very good medium and long-term survival. The one, 5 and 10 year survival rate after appropriate diagnosis and treatment is in the range of 95%, 90% and 80% respectively. [Ibid.]

The expert opinions clearly establish the negligence of the nurses, EMA and Dr. Adal to a failure to diagnose Mr. Rivera properly, deviations from the standards of care applicable to all defendants **and** a decreased chance of survival from what was a treatable condition. Defendants' arguments seeking to consider evidence in discrete vacuums are not what the law requires and should be rejected. Had routine testing been done, which could have been ordered by the triage nurses or Dr. Adal, the aortic dissection would have been promptly diagnosed and treated "with a very good medium and long-term survival rate." Ibid. The logical and reasonable inference that a factfinder could draw is that the professional staff in the JCMC Emergency Department **all** dropped the ball and sent Mr. Rivera home with a shot in the arm and a life-threatening – ultimately lethal – condition.

In cases of medical malpractice where multiple actors contribute to an

injury, the law does not require proof that each defendant's negligence was the sole cause of harm. Rather, New Jersey law requires evidence only that the deviation of the liable defendant was **a** substantial factor in increasing the risk of harm. Scafidi v. Seiler, 119 N.J. 93, 108 (1990).

Moreover, contrary to defendants' claims and the lower court's decision granting a declaratory judgement, plaintiff produced evidence that proper treatment would have given decedent an excellent chance of survival, including percentages from eighty to ninety-five percent. [Pa677] Dr. Breall did not have to ascribe percentages; nonetheless, he **did**. The logical and reasonable inference is that the failure to treat severely diminished the medium and long-term survival rate – and, in fact, was a substantial factor in causing Romeo Rivera's death. Under controlling precedent, which is sufficient for plaintiff to proceed to trial and to a jury.

"The substantial factor test of causation requires the jury to determine whether the deviation, in the context of the patient's preexistent condition, was sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause." Worthy v. Kennedy Health Sys., 446 N.J. Super. 71, 94 (App. Div.) (internal citations omitted), certif. denied, 228 N.J. 24 (2016). Once there has been any showing of an increased risk of harm from the failure to diagnose, the jury, not the judge, determines whether that increased risk constituted a substantial

factor in producing the injury. Here, the trial court erred by requiring that the jury be told what the jury is actually charged to decide for itself. Flood v. Aluri-Vallabhaneni, 431 N.J. Super. 365, (App. Div.), certif. denied, 216 N.J. 14 (2013)

New Jersey law does not require mathematical precision in causation analysis. In Scafidi v. Seiler, 119 N.J. 93 (1990), the Supreme Court made clear that causation is established where the Plaintiff demonstrates that the defendant's negligence increased the risk of harm and that the increased risk was a substantial factor in producing the outcome. Here, plaintiff's experts, including Nurse Ashton, Dr. D'Ambrosio and Dr. Breall, each opined that had proper testing been ordered, Mr. Rivera's aortic dissection would have been identified, and surgical intervention to repair it would have been initiated. Although precise survival percentages may be unknowable, their expert testimony established that Mr. Rivera was deprived of a reasonable chance of survival — precisely the type of evidence New Jersey courts deemed sufficient in cases involving increased risk of harm. Id. at 109.

Defendants' argument relies on an impermissibly narrow view of the causation standard. By demanding precise probabilities of survival, defendants attempt to impose a burden of proof that New Jersey law does not require. Thus, plaintiff's burden is to demonstrate only that defendants' negligence increased Mr. Rivera's risk of harm — a burden clearly met by expert testimony indicating that timely intervention could have improved his chances of survival.

> When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he had put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require plaintiff to show to a *certainty* that the patient would have lived had she been hospitalized and operated on promptly.
> [Evers v. Dollinger, 95 N.J. at 399, 417 (1984).]

The trial court's failure to recognize that these deviations – individually and collectively – contributed to the diagnostic errors improperly excluded crucial evidence from the jury's consideration. Under Verdicchio v. Ricca, 179 N.J. 1 (2004), a jury is entitled to consider whether a healthcare provider's breach "played a role, no matter how slight," in producing the ultimate harm. By disregarding evidence of nursing negligence, the trial court erroneously deprived the jury of its role as finders of fact.

POINT II

A JURY MUST DECIDE WHETHER A DEFENDANT'S NEGLIGENCE WAS A FORESEEABLE/SUBSTANTIAL FACTOR CONTRIBUTING TO MR. RIVERA'S DEATH

Defendants EMA, JCMC and JCMC Nurses incorrectly assert that ED physician, Dr. Adal's failure to diagnose Mr. Rivera's aortic dissection severs any contributory, causal connection between their negligent conduct and Mr. Rivera's

death. The law does not require that the nurses' negligence or EMA and JCMC's failure to train, supervise and oversee nursing staff be **sole causes** of harm to Mr. Rivera. Rather, it is sufficient that their negligence meaningfully contributed to the chain of events that resulted in the misdiagnosis of Mr. Rivera. Verdicchio v. Ricca, 179 N.J. 1, 32 (2004); Gardner v. Pawliw, 150 N.J. 359, 389-91 (1997)

Defendants suggest that plaintiff's nursing and hospital administration experts are unqualified to testify that each defendant's negligence was **a** proximate cause of the harm. As with the other dispositive motions filed and granted to defendants below, the defense have repeatedly contended that plaintiff's experts must directly link the negligent conduct of each defendant to Mr. Rivera's cause of death. In medical negligence cases, a "causal connection must be established through expert testimony." Chin v. St. Barnabas Medical Center, 160 N.J. 454, 469 (1999). There, the Court discussed the doctrine of alternative liability. That doctrine recognized that where a plaintiff is harmed by two or more defendants, but which defendant caused the harm is uncertain, each defendant must sustain the entire burden of proof with regard to liability and prove his or her own non-culpability. Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Restatement (Second) of Torts § 433B(3) (1965); see Shackil v. Lederle Labs., 116 N.J. 155, 173 (1989); Anderson v. Somberg, 67 N.J. 291, 302 (1975).

Defendants' arguments ignore that "[f]oreseeability is a constituent part of

proximate cause…" Komlodi v. Picciano, 217 N.J. 387, 417 (2014) The question for the jury has always been whether Mr. Rivera's death was "a foreseeable consequence" of each defendant's conduct. Foreseeability need only be "within the realm of reasonable contemplation…." Id. at 418. Whether there existed a foreseeable risk of harm from nursing negligence or from EMA/JCMC's lack of training, supervision & oversight has always remained a jury question.

Each defendant's negligence (as identified in the reports of experts, Nurse Ashton [Pa606] and Mr. Hawkins [Pa552]) "need only be a cause which sets off a foreseeable sequence of consequences, unbroken by any superseding cause, and which is a substantial factor in producing the particular injury." Showalter v. Barilari, Inc., 312 N.J. Super. 494, 503 (App. Div. 1998) It is *foreseeable* that JCMC's and EMA's failure to train, supervise and oversee nursing staff resulted in numerous omissions (i.e., incomplete assessments, documentation errors, and communication failures) by the Nurses. It is also *foreseeable* that the Nurses' lacking assessments, poor documentation and inadequate communications deprived Dr. Adal of the full clinical picture necessary to identify an emerging aortic dissection.

Therefore, it was for the jury, and not the trial court, to determine whether the foreseeable consequences of each defendant's negligent conduct were substantial factors contributing to Mr. Rivera's death.

POINT III

THE DENIAL OF LEAVE TO AMEND WAS ARBITRARY AND UNJUST BECAUSE THE ORIGINAL AFFIDAVIT OF MERIT SHOULD HAVE BEEN DEEMED SUFFICENT

JCMC claims that Mr. Hawkins' original Affidavit of Merit (AOM) failed to identify a claim against it. [JCMCb9] The AOM specifically referenced "Hospital Administration standards of emergency medicine." [Pa538] The only hospital involved was defendant JCMC. The only "licensed person" or "health care facility" involved was JCMC. To accept that JCMC had no reason to know that there was a claim against it for failure to satisfy "acceptable Hospital Administration standards of emergency medicine" is incredible. JCMC did not object at the Ferreira conference and did not move to dismiss at the time because the claim against it was clearly understood.

Although hard to conceive, if JCMC did not believe that the hospital administration claim was against it despite the AOM and accompanying complaint, it was incumbent on JCMC to raise the issue. See Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 154-55 (2003); see also Moschella v. Hackensack Meridian Jersey Shore Univ. Med. Ctr., 258 N.J. 110, 124 (2024) (reiterating the value of a timely Ferreira conference and the obligations of the parties to address the adequacy of an AOM promptly). JCMC failed to do so.

The lower court's determination that **plaintiff** had been dilatory and that the

claim was new and being raised too late in the proceedings is contrary to the facts and procedural history of this tortured litigation. The disparity is glaring as previously set forth and will not be rehashed. Given the liberal standards to be afforded motions for leave to amend, and the interest of justice as the guiding principle for the exercise of judicial discretion, the court's denial of leave was an abuse of discretion. Plaintiff was deprived of presenting her claim against JCMC.

POINT IV

EMA'S CLAIM OF HARMLESS ERROR IS INCORRECT AS A MATTER OF LAW

Defendant EMA suggests that the grant of summary judgment, even if erroneous, was harmless based on the evidence introduced at trial. [EMAb20-21] A review of the Order granting summary judgment must be based on the motion record, not subsequent proceedings. The absence at trial of the claims dismissed by summary judgment materially altered plaintiff's presentation at trial. *A fortiari*, plaintiff could not introduce any evidence to establish liability of a dismissed party or on a cause of action that is severed from the case. The relevance of certain evidence or testimony may no longer exist because what needs to be proven is not the same. Defendant's suggestion that the trial is somehow relevant to the review of the pretrial ruling five years earlier is unsupported by any case law. The two cases miscited by EMA, both deal with the admission of hearsay evidence during

trial, and they are so clearly distinguishable as not to warrant further discussion.

POINT V

PLAINTIFF PROVIDED SUFFICIENT EVIDENCE OF PROXIMATE CAUSE TO SURVIVE A DIRECTED VERDICT

Defendant Dr. Adal argues that plaintiff failed to produce sufficient evidence of proximate cause to support her prima facie case. Plaintiff need not utter magic words or give specific percentages to prove that Dr. Adal deviated from emergency medicine standards of care. Failure to diagnose and treat, to order appropriate testing and to refer Romeo Rivera to a cardiac surgeon, along with reasonable inferences drawn therefrom, supply the factual basis to prove proximate cause.

The trial Judge qualified Dr. Breall to provide expert testimony as an interventional cardiologist. [12T31:20-23] Dr. Breall testified to the appropriate care required and that the failure to provide that care negatively impacted decedent's chances of survival. Notably, plaintiff is not required to prove facts that Dr. Adal's negligence has prevented from being shown. Francis v. United Jersey Bank, 87 N.J. 15, 45 (1981) (citing W. Prosser, Law of Torts § 41 at 242 (4th ed. 1971)). The burden created by the lack of definitive evidence is borne by the party whose wrongful conduct caused that lack of definitive evidence. Lanzet v. Greenberg, 126 N.J. 168, 188 (1991).

The ongoing aortic dissection that existed when Romeo Rivera went to the

JCMC ED was a life-threatening condition that was treatable, as the experts testified. Dr. Breall testified that decedent had a tear in his aorta that "is a life-threatening condition" and requires "a cardiac surgeon because they have to go in and repair the aorta." [12T50:23-51:3] Dr. D'Ambrosio testified that proper diagnosis is "urgent" and "time-sensitive" because 'if there's delays in diagnosis, it could lead to bad outcomes." [15T45:6-12] The logical converse is that a prompt diagnosis could lead to life-saving surgery. A cardiac surgeon was needed because the aorta could be repaired. How could one reasonably argue otherwise? It doesn't need to be stated another way. We will never know if Mr. Rivera would have survived if treated appropriately; however, that lack of evidence is a direct result of Dr. Adal's negligence and cannot be used as a sword to defeat plaintiff's claim.

POINT VI

JCMC'S ARGUMENT TO UPHOLD SUMMARY JUDGMENT FOR THE NURSE DEFENDANTS ON ALL CLAIMS INVOKES THE WRONG STANDARD OF REVIEW AND IGNORES RECORD EVIDENCE

Defendant JCMC asserts that "the court did not abuse its discretion in dismissing all claims against the nurses." [JCMCb12] It then cites Rule 4:40-1 before trying to justify the order four years before trial granting summary judgment to the nurses. [JCMCb12, 14] As this Court will recognize, Rule 4:40-1 has no application to this issue. The relevant rule is Rule 4:46-2. Moreover, the decision

of a motion for summary judgment is not a matter of the trial judge's discretion. Summary judgment is appropriate only if the movant is entitled to judgment as a matter of law, and that determination is subject to independent, *de novo* review in this Court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); see Templo Fuente De Vida Corp. V. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) ("we review the trial court's grant of summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court").

The trial court erred by over-compartmentalizing experts and evidence. Plaintiff's experts laid out extensive deviations from the standard of care by the nurses, among others. Dr. Breall related those deviations to a failure to diagnose and a lost chance of survival, complete with a contrast between the survival rate with proper diagnosis (eighty to ninety-five percent over years) versus the actual harm, i.e., death the next day. Summary judgment is not a substitute for a full plenary trial. United Advertising Corp. v. Metuchen, 35 N.J. 193, 195-96 (1961). Summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 212 (App. Div. 1987). Plaintiff was constitutionally entitled to have her evidence considered by a jury.

POINT VII

DEFENDANTS EMA & JCMC HAVE NOT SHOWN UNDUE BURDENS OR COSTS THAT WOULD PROHIBIT FEASIBLE EMR DISCOVERY

A forensic analysis would identify discrepancies between the printed medical chart and EMR (including embedded changes/revisions). [Pa460; Pa491] It was never "established that certain information no longer existed" or was inaccessible. [JCMC Db16] Undue burdens or costs for inspection of information entered into a prior medical records system (EDIMS) have not been demonstrated. R. 4:10-2(f)(2) The absence of EMR discovery in this matter was not harmless.

Defendants claimed that EMR cannot be inspected *at JCMC* because EDIMS is no longer used. [Pa747; Pa749; Pa1042, T22:13-23] JCMC claimed that decedent's EMR was "signed and closed" and re-opening it would "alter" or "compromise" the record. [Pa747] However, JCMC Assoc. Medical Director, Chen-Teng Wang, M.D. testified that EMR was accessible through an alternate "HPF system". [Pa1118, T98:14-21] JCMC Medical Records Analyst, Margaret Caba affirmed that EMR could be extracted from HPF. [Pa478, T76:1-23] JCMC ED Chair, Deven Undakat, M.D. also stated he was able to "pull up" EDIMS to review EMR after the medical records system was changed. [Pa956, T119:1-12]

EMA exclusively provided ED coverage at JCMC [Pa628; Pa632] and produced the "audit trail" in discovery. [Pa309] **EMA created the EDIMS system.**

[Pa1040, T20:4-14] Should forensic inspection no longer be feasible *at JCMC*, the *management system developer*, EMA must have access to the program.

Therefore, the lower court orders must be reversed to allow complete discovery.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the previously filed brief, plaintiff respectfully requests that the Directed Verdict rendered to defendants at the end of plaintiff's case in chief be set aside, that the pre-trial Orders dismissing claims against defendants be reversed, that EMR discovery be re-opened and that this matter be remanded for a new jury trial.

Respectfully submitted,

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