EARNEKA WIGGINS and LYNDA MYERS, as Administratrixes of the estate of APRIL CARDEN, deceased, Plaintiffs-Appellants, v. HACKENSACK MERIDIAN HEALTH, d/b/a JFK UNIVERSITY MEDICAL CENTER, Defendant-Respondent/Cross-Appellant, and ALOK GOYAL, M.D. and SOUTH PLAINFIELD PRIMARY CARE, Defendants-Respondents/Cross-Appellants.	SUPREME COURT OF NEW JERSEY DOCKET NO. 089441 CIVIL ACTION ON MOTION GRANTING LEAVE TO APPEAL FROM A FINAL JUDGMENT OF THE APPELLATE DIVISION DOCKET NOS. BELOW: A-3847-22, UNN-L-5-23 Sat Below: Hon. Heidi W. Currier, P.J.A.D., Hon. Ronald Susswein, J.A.D., Hon. Christine M. Vanek, J.A.D., and Hon. Daniel R. Lindemann, J.S.C.

PROPOSED *AMICUS CURIAE* NEW JERSEY ASSOCIATION FOR JUSTICE'S PROPOSED MERITS BRIEF

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PRELIMINARY STATEMENT

Proposed Amicus Curiae, the New Jersey Association for Justice ("NJAJ"), seeks leave to file this merit brief and to participate in oral argument on this matter. NJAJ is concerned about the implications of this case that impact the rights of those injured while receiving medical treatment throughout this State. NJAJ asks this Court to apply the plain language of the statute to hold that the Affidavit of Merit ("AOM") submitted in this case was sufficient because the defendant-doctor was a board-certified internist as was plaintiffs' affiant. In addition, NJAJ urges this Court to apply its prior precedent to hold that the AOM in this matter met the requirement.

In order to avoid issues that have affected NJAJ's membership of late, NJAJ also urges the Court to adopt a solution consistent with the AOM Statute's legislative purpose and with the framework that has been in place for decades for pre-trial issues, the standard enunciated in Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). Given the AOM is a threshold showing, when there is a genuine dispute of material fact that affects the statute, a plaintiff should not be penalized by having the claim dismissed with prejudice. Stated another way, as long as construction of the evidence in the light most favorable to plaintiff at the initial stage of the litigation demonstrates the AOM complies with the requirement that "the care or treatment at issue involves that specialty or

subspecialty" – or does not involve that specialty, then the case should proceed past the threshold to grant the parties discovery on the claims. This solution is in the best interests of judicial economy as well as limits the parties' costs on voluminous motion and avoids hearings.

Along with adopting a clear-cut framework to give certainty to Plaintiffs, this Court should also explain what must be shown in order to obtain a waiver. The Appellate Division's decision seems to require form over substance by requiring a separate motion for waiver even when plaintiff has presented the proper proofs to demonstrate entitlement to waiver. This Court should explain that a plaintiff may obtain a waiver of the AOM requirement upon a showing of a good faith attempt to comply with the statute.

STATEMENT OF FACTS

NJAJ accepts the recitation of facts set forth in the Appellate Division's decision. In summary, defendant Alok Goyal, M.D. of South Plainfield Primary Care (collectively "Goyal") treated decedent April Carden for many years. Wiggins v. Hackensack Meridian Health, _ N.J. Super. _, No. A-3947-22 (App. Div. 2024) (slip op. at 3-4). Following treatment of a blood clot at JFK Medical Center, Goyal prescribed Carden allopurinol that she took from September 4 to 8, 2020. (Slip op. at 4.) The next day, Carden was admitted to JFK for Stevens-Johnson Syndrome, a condition caused by an adverse drug reaction. (Slip op. at

4.) Twenty days later, she died from cardiopulmonary arrest caused by "multiple organ failure, bacteremia, and Stevens[-]Johnson Syndrome." (Slip op. at 4.) Plaintiffs alleged Goyal's prescription of allopurinol was a substantial factor in Carden's death. (Id.)

PROCEDURAL HISTORY

Carden's administratrices of her estate filed a complaint against Goyal and vicarious liability against JFK. (Slip op. at 4-5.) The Complaint alleged Goyal specialized in internal medicine and gastroenterology. (Id.) Goyal's Answer claimed "these defendants practices the medical specialties of [i]nternal [m]edicine and [g]astroenterology and their treatment of plaintiffs' decedent involved the medical specialties of [i]nternal [m]edicine and [g]astroenterology." (Slip op. at 5.)

Plaintiffs served an AOM against all defendants from Stella Jones Fitzgibbons, M.D., FACP, FHM, a board-certified internal medicine doctor. (Slip op. at 5.) Defendants objected because Fitzgibbons only specialized in internal medicine but not Goyal's subspecialty of gastroenterology. (Slip op. at 5.) Although a Ferreira conference was held, there was no transcript and no order from that conference. (Slip op. at 6.)

In a motion to dismiss, Goyal certified that he treated Carden as both internal medicine and gastroenterology specialists and that he had board

certifications for both. (Slip op. at 6.) JFK filed a cross-motion seeking the same relief. (Slip op. at 7.) Plaintiff opposed the motions with a certification from Dr. Fitzgibbons that explained according to Goyal's records, he prescribed allopurinol to treat Carden's high levels of uric acid. (Slip op. at 7.) Dr. Fitzgibbons further certified that "'[h]igh uric acid levels can cause gout or kidney stones,' but those were not gastrointestinal conditions." (Slip op. at 7.) Dr. Fitzgibbons also explained that she was unaware of any "gastrointestinal condition that is treated by allopurinol." (Slip op. at 7.)

Plaintiffs also opposed the motion with a certification from a gastroenterologist, Todd D. Eisner, M.D. (Slip op. at 7.) Dr. Eisner certified he was familiar with allopurinol, but that he was unaware of any "gastrointestinal condition[] that is treated by allopurinol." (Slip op. at 7.)

At oral argument on the motions, the trial court directed plaintiffs' counsel to obtain a gastroenterology expert. (Slip op. at 7-8.) Rather than provide a new AOM, Plaintiffs' counsel submitted proofs that he had inquired of twelve gastroenterologists to support the case but could not find one. (Slip op. at 8.) He further explained, he asked Stuart I. Finkel, a gastroenterologist, to review the matter, but that Dr. Finkel "could not sign an [AOM] because [he] d[id] not have experience in the diagnosis or management of the conditions at issue, as there did not appear to be any [g]astrointestinal issues for [him] to consider." (Id.)

Plaintiffs' opposition argued that plaintiffs should be entitled to a waiver of the AOM requirement under N.J.S.A. 2A:53A-41(c). (Slip op. at 8.) Plaintiffs contended that they relied on the judge's position stated during the Ferreira conference that Dr. Goyal was not acting as a gastroenterologist at the time of treatment. (Slip op. at 9.)

The trial court denied the motions finding the AOM was sufficient because it was provided by an internal medicine specialist, which was "one of the two fields of Dr. Goyal's expertise." (Slip op. at 10.) The trial court did not reach the waiver issue but noted that plaintiffs' "counsel made 'good faith and honest' efforts to obtain an AOM from a gastroenterologist." (Slip op. at 10.)

Dr. Goyal then moved for reconsideration. (Slip op. at 11.) Dr. Goyal submitted new evidence from a gastroenterologist and internist, Meyer N. Solny, M.D., who certified that "allopurinol was 'not solely prescribed for internal medicine purposes.'" (Slip op. at 11.) Dr. Solny further certified that the use of the medicine was regularly prescribed by gastroenterologists, and that "[a]ll treatment provided by a gastroenterologist necessarily involves knowledge of both [gastroenterology] and internal medicine." (Slip op. at 11.)

The trial court denied reconsideration on the basis on this Court's precedent that an AOM from either of a defendant's two specialties will satisfy the requirement. (Slip op. at 12 (citing Buck v. Henry, 207 N.J. 377 (2011)

(emphasis added).) The Appellate Division then reversed finding the AOM had to be from a doctor with both specialties. (Slip op. at 27.) However, the Appellate Division remanded for consideration of whether Plaintiffs satisfied the waiver provision of N.J.S.A. 2A:53A-41(c). Id. at 30.

Plaintiffs then sought leave to appeal, which this Court granted. Proposed Amicus Curiae the New Jersey Association for Justice now seeks leave to participate in the appeal and to participate in oral argument.

STATEMENT OF INTEREST OF AMICUS CURIAE

NJAJ has been involved in numerous Affidavit of Merit cases before this Court. As a result of both its involvement in cases before this Court but also its memberships' handling of medical negligence matters, it has grave concerns with the Appellate Division's decision. The three points that NJAJ would like to raise are not to be construed as "injecting issues" as NJAJ accepts the issue as framed by the Court. NJAJ's analysis differs from the other parties given the public policy concerns that affect its members. See Keyworth v. CareOne, 258 N.J. 359, 386 n.9 (Aug. 5, 2024).

STANDARD OF REVIEW

Legal issues are reviewed de novo. Meehan v. Antonellis, 226 N.J. 216, 230 (2016) (quoting Mortgage Grader, Inc. v. Ward & Olivo, L.L.P., 225 N.J. 423, 435 (2016) ("An appellate court interprets both statutes and court rules de

novo"). No deference need be given to the lower court's interpretation of a statute. Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 139 (2015).

LEGAL ARGUMENT

POINT ONE

This Court Should Find the AOM Was Sufficient.

This Court granted certification for the following question: "In this medical malpractice matter in which the treating doctor was board certified in internal medicine and gastroenterology, was plaintiffs' affidavit of merit from a doctor board certified in internal medicine sufficient?" NJAJ urges this Court to find that the AOM was sufficient as it is supported by the statute's plain language and this Court's prior analysis in Buck v. Henry, 207 N.J. 377 (2011).

The Legislature enacted the "New Jersey Medical Care Access and Responsibility and Patients First Act" ("Patients First Act") codified at N.J.S.A. 2A:53A-37, et seq. "The Patients First Act, passed by the Legislature in 2004, is a collection of laws that was intended to reform this State's tort-liability and health-care systems." Nicholas v. Mynster, 213 N.J. 463, 479 (2013) (citing N.J.S.A. 2A:53A–38). The Patients First Act "establishes qualifications for expert witnesses in medical malpractice actions." Nicholas v. Mynster, 213 N.J. 463, 479 (2013) (citing N.J.S.A. 2A:53A–41). The Affidavit of Merit Statement codified at N.J.S.A. 2A:53A-26, et seq., refers to and incorporates the

requirements in N.J.S.A. 2A:53A-41 for licensed physicians only. Meehan v. Antonellis, 226 N.J. 216, 221 (2016).

The Affidavit of Merit Statute requires that physicians meet the requirements of the Patients First Act in order to offer an AOM or trial testimony on the standard of care. N.J.S.A. 2A:53A-27 & -41. "The legislative history pertinent to the Affidavit of Merit Statute supports the conclusion that its purpose was to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation." In re Petition of Hall, 147 N.J. 379, 391 (1997) (citing Peter Verniero, Chief Counsel to the Governor, Report to the Governor on the Subject of Tort Reform (Sept. 13, 1994)).

The stated intent of the legislation was to "bring common sense and equity to the state's civil litigation system." Office of the Governor, News Release 1 (June 29, 1995). This Court has recognized the "stated purpose of the AOM statute, N.J.S.A. 2A:53A-26 to -29, is laudatory -- to weed out frivolous claims against licensed professionals early in the litigation process." Meehan v. Antonellis, 226 N.J. 216, 228 (2016) (citing Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 146 (2003)). However, the use of the AOM should not be a sword to fight meritorious cases; it should only be a shield to frivolous ones. Barreiro v. Morais, 318 N.J. Super. 461, 471 (App. Div. 1999).

"It is a fundamental canon of statutory construction that the words of a statute carry out the apparent intent of the Legislature." Hill Intern., Inc. v. Atl. City Bd. of Educ., 438 N.J. Super. 562, 587-88 (App. Div. 2014) (citing Sussex Commons Assocs., L.L.C. v. Rutgers, 210 N.J. 531, 541 (2012)), app. dism., 224 N.J. 523 (2016). A court "must construe the statute sensibly and consistent with the objectives that the Legislature sought to achieve." Nicholas, 213 N.J. at 480 (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)). When the plain language "reveals the Legislature's intent, [the court's] interpretative mission should come to an end." Id. (citing DiProspero, 183 N.J. at 492).

Courts will look to "extrinsic evidence, such as legislative history, only 'if there is ambiguity in the statutory language that leads to more than one plausible interpretation,' or 'if a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language.'" Nicholas, 213 N.J. at 480 (quoting DiPropspero, 183 N.J. at 492–93). This Court has explained that "it is elementary that when the Legislature includes limiting language in one part of a statute, but leaves it out of another section in which the limit could have been included, we infer that the omission was intentional." Ryan v. Renny, 203 N.J. 37, 58 (2010)(citing In re Estate of Santolino, 384 N.J. Super. 567, 581 (Ch. Div. 2005) (applying canon of statutory construction inclusio unius est exclusio alterius); Fiore v. Consol. Freightways, 140 N.J. 452,

466 (1995) (holding we must read all parts of a statute together and not consider separate sections in a vacuum) (citing Norman T. Singer, Sutherland Statutory Construction § 46.05 (5th ed. 1992)).

The case at bar requires this Court to construe the plain language of N.J.S.A. 2A:53A-41(a) that provides:

> a. If the party against whom or on whose behalf the testimony is offered is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association and the care or treatment at issue involves that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association, the person providing the testimony shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty, recognized by the American Board of Medical Specialties or the American Osteopathic Association, as the party against whom or on whose behalf the testimony is offered, and if the person against whom or on whose behalf the testimony is being offered is board certified and the care or treatment at issue involves that board specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association, the expert witness shall be:
> (1) a physician credentialed by a hospital to treat patients for the medical condition, or to perform the procedure, that is the basis for the claim or action; or
> (2) a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association who is board certified in the same specialty or subspecialty, recognized by the American Board of Medical Specialties or the American Osteopathic Association, and during the year immediately preceding the date of

> the occurrence that is the basis for the claim or action, shall have devoted a majority of his professional time to either:
> (a) the active clinical practice of the same health care profession in which the defendant is licensed, and, if the defendant is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association, the active clinical practice of that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association; or
> (b) the instruction of students in an accredited medical school, other accredited health professional school or accredited residency or clinical research program in the same health care profession in which the defendant is licensed, and, if that party is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association, an accredited medical school, health professional school or accredited residency or clinical research program in the same specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association; or
> (c) both.

N.J.S.A. 2A:53A-41(a).

This Court has explained there are three categories for the "kind-for-kind rule" under the Patients First Act:

> (1) those who are specialists in a field recognized by the American Board of Medical Specialties (ABMS) but who are not board certified in that specialty;
> (2) those who are specialists in a field recognized by the ABMS and who are board certified in that specialty; and
> (3) those who are "general practitioners."

Nicholas, 213 N.J. at 483 (citing Buck, 207 N.J. at 389)(citing N.J.S.A. 2A:53A-41). In Nicholas, this Court construed the Patients First Act to require a kind-for-kind matching of board-certified doctors. Id. The Court explained that a hospital credentialing a physician to perform the procedure at issue is not a substitute when the physician is board-certified due to the statute's plain language. Id. at 484. The Court rejected the plaintiff's request that the expert be permitted to testify as long as the expert had been credentialed to perform the procedure at issue because it "would render the same-specialty requirement meaningless." Id. at 485. Unlike here, the case of Nicholas was after the AOM stage and involved an expert providing testimony at trial. Id.

As this Court explained, "The purpose of the Affidavit of Merit statute is to weed out frivolous complaints, not to create hidden pitfalls for meritorious ones." Buck, 207 N.J. at 383. In Buck, this Court noted "[t]he confusion that led plaintiff's attorney to file two allegedly non-conforming medical affidavits should have been addressed and resolved at a Ferreira conference—not on a summary-judgment motion." Ibid. But similar to the procedural history of this case, the Ferreira conference did not resolve the issue. Ibid.

In Buck, a board-certified emergency room physician who listed his specialty with the Board of Medical Examiners as a Family Medicine Practitioner, prescribed Ambien and Zoloft for the plaintiff's sleep issues. Id. at

383-84. Due to side effects with the medications, plaintiff accidentally shot himself suffering permanent injuries. Id. at 384. Plaintiff served an AOM from a psychiatrist, but defense counsel said that the defendant was a family practitioner. Id. at 384-85. Based on the information contained on the Board of Medical Examiner's Office's website, Plaintiff served a second AOM from an emergency room physician. Id. at 386. Without a Ferreira conference, defendant moved for summary judgment arguing the AOMs were not sufficient because defendant contended the care was provided within his specialty of family medicine. Id. at 386-87. The two lower courts found both AOMs were insufficient, but this Court reversed. Id. at 396. The Court explained, "When the treatment 'involves' the physician's specialty the equivalency requirements apply, otherwise the specialist is subject to the same affidavit requirements as if he were a general practitioner." Id. at 391 (citing N.J.S.A. 2A:53A-41).

The Court explained, "[T]here is no legislative interest in barring meritorious claims brought in good faith[.]" Buck, 207 N.J. at 393 (quoting Ferreira, 178 N.J. at 150–51 (quoting Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 359 (2001)). In interpreting the language of the AOM Statute, this Court held "[a] physician may practice in more than one specialty, and the treatment involved may fall within that physician's multiple specialty areas. In that case, an affidavit of merit from a physician specializing in **either area** will suffice."

Buck, 207 N.J. at 391 (emphasis added). Although the Appellate Division cited this language in its decision, it then did the reverse of what this Court said would be acceptable and declared Plaintiff's AOM insufficient. Wiggins, (slip op. at 3.)

Applying this Court's precedent, the Appellate Division erred in rejecting plaintiffs' AOM because Dr. Goyal admitted he was an internal medicine specialist even if he also had a gastroenterology subspecialty. Buck, 207 N.J. at 393. This interpretation is supported by the statute's plain language that uses disjunctive "or" to string together a defendant's specialty or subspecialty: "the person providing the testimony shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty." N.J.S.A. 2A:53A-41(a). This Court has explained that "[t]he word 'or' is a disjunctive term that permits a person to satisfy statutory conditions by meeting one, rather than all, of the identified conditions." Meehan v. Antonellis, 226 N.J. 216, 238 (2016) (citing In re Adoption of Children by G.P.B., 161 N.J. 396, 406 (1999)). Further, the Legislature knew how to use "and" to connect these clauses but chose not to do so. See O'Connell v. State, 171 N.J. 484, 488 (2002) (explaining the court may not "presume that the Legislature intended something other than that expressed by way of the plain language").

The plain language further does not include the word "both" or otherwise require multiple specialties or subspecialties when the defendant has multiple specialties. Addressing the qualification of an affiant under the waiver exception, this Court has noted it is not an automatic disqualifier that the affiant did not perform the medical procedure at issue on the date giving rise to the claim under N.J.S.A. 2A:53A-41(c). Ryan, 203 N.J. at 44-45. The Court explained that the contemporaneous requirement only exists as to N.J.S.A. 2A:53A-41(a) and (b), and not within the waiver provision of (c). Id. at 57-58.

The Court explained, "Given the specific directives by the Legislature in connection with equivalently-qualified experts in subsections (a) and (b) of the Act, we have no reservation in concluding that when it omitted such a requirement from the waiver provision, which it enacted simultaneously, it did so purposely." Ryan, 203 N.J. at 58. Likewise here, the Legislature could have added language to explain that if a defendant has multiple specialties or subspecialties, the affiant must match exactly; the Legislature did not include this requirement. The Appellate Division's construction in this case adds a requirement that does not exist – that the affiant must match "all" of the defendant-doctor's specialties or subspecialties instead of just requiring what the plain language states: "the same specialty or subspecialty." Here, Plaintiffs' affiant met Dr. Goyal's specialty of internal medicine. Wiggins, (slip op. at 5.)

This Court should reject the Appellate Division's interpretation because it exceeds the statute's plain language.

The Appellate Division cited to its decision in Pfannenstein ex rel. Est. of Pfannenstein v. Surrey, 475 N.J. Super. 83, 90-91 (App. Div.), certif. den., 254 N.J. 517 (2023) for the proposition that the credentials must match kind-for-kind. Wiggins, (slip op. at 21.) However, in Pffanenstein, 475 N.J. Super. at 90, the issue was whether a board-certified hematologist could provide an AOM against two physicians board-certified in internal medicine. Finding hematology was a subspeciality within internal medicine but that plaintiff's expert was not an internal medicine specialist, the Appellate Division found the affiant's credentials were not kind-for-kind with the physician. Id. at 91. In fact, unlike here where the affiant and the doctor are board certified in internal medicine, the record in Pffanenstein demonstrated that the affiant was board certified in hematology and "did not indicate that she specialized in internal medicine or was board certified in that specialty." Id. at 91-92.

Here, though, the Plaintiffs' expert met one of Dr. Goyal's two board-certifications – internal medicine. Accepting this Court's holding in Buck, the affiant should have been accepted because it met one of Defendant's board certifications.

POINT TWO

This Court Should Adopt a Clear Cut Framework When A Genuine Dispute of Material Fact Arises at the Threshold AOM Stage.

Even if this Court rejects the position that the plain language of the Patients First Act was met because Plaintiffs' affiant had one of the two board-certifications of the Defendant, this Court should adopt a framework so that meritorious cases are not dismissed at the threshold AOM stage. Like the Legislature that enacted the AOM requirement to bring "common sense and equity to the state's civil litigation system," this Court should adopt a logical framework so that a meritorious Complaint is not dismissed with prejudice at the threshold stage without discovery. See Office of the Governor, News Release 1 (June 29, 1995).

NJAJ urges this position on behalf of its members who deal with the costly repercussions of the use of the AOM requirement as a sword rather than a shield. In the case at bar, plaintiffs sought opinions and consulted with at least four experts even though the language in Buck, 207 N.J. at 391, should have led to the result that plaintiffs only needed a physician board-certified in internal medicine. The cost of medical malpractice cases is so extreme that this Court

should take judicial notice of the extreme drop in filings of medical negligence complaints from before the Patients First Act to now.

This Court has recognized that "dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will erase the prejudice suffered by the non-delinquent party." Castello v. Wohler, 446 N.J. Super. 1, 26 (App. Div. 2016) (quoting Irani v. K–Mart Corp., 281 N.J. Super. 383, 387 (App.Div.1995) (quoting Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 345 (1984))). This Court has held "[t]he legislative purpose was not to 'create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims.'" Ryan v. Renny, 203 N.J. 37, 51 (2010) (quoting Ferreira v. Rancocas Ortho. Assocs., 178, 144, 151 (2003)(quoting Mayfield v. Cmty. Med. Assocs., 335 N.J. Super. 198, 209 (App. Div. 2000)). Given these concerns, NJAJ asks this Court to apply the framework that has been utilized for factual questions over the past thirty years to avoid this ultimate sanction when a party has a good faith basis to doubt the defendant's claim that the malpractice involved his or her specialty or subspecialty. See Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995)

The remedy of R. 4:5-3 was enacted to provide Plaintiff with notice of a doctor's contentions in answering a Complaint to avoid a dismissal with prejudice. See Buck, 207 N.J. at 396. Even still, the remedy does not resolve a

factual dispute like exists in the case at bar. The Rule provides: "A physician defending against a malpractice claim who admits to treating the plaintiff must include in his or her answer the field of medicine in which he or she specialized at that time, if any, and whether his or her treatment of the plaintiff involved that specialty." R. 4:5-3. Neither the Patients First Act, nor the Court Rule, state the Defendant's statement is entitled to controlling weight, particularly here where there is a good faith showing that the practice fell outside the subspecialty of gastroenterology. N.J.S.A. 2A:53A-41; R. 4:5-3.

The problem that arose in this case is that there is a factual dispute over whether Dr. Goyal was practicing within both of his specialties or just internal medicine. But the Legislature did not intend the AOM to create a trial at the initial stage; instead, the requirement was a "threshold" to weed out frivolous matters. NJAJ urges this Court to avoid defense tactics to litigate these issues at the first beginning stages that waste the parties and the court's time and resources. Given the Legislature only intended a simple showing that the matter has merit to proceed to discovery, this Court should adopt the Brill standard to resolve any factual disputes construing the evidence in the light most favorable to the plaintiff.

Breaking down the language into the relevant parts, the requirements in (a) only apply when both these conditions are met: 1) Defendant is a specialist

or subspecialist; and 2) the care or treatment at issue involves that specialty or subspecialty. N.J.S.A. 2A:53A-41(a). Therefore, for the case at bar, assuming this Court does not adopt NJAJ's position in Point One, the factual issue is whether the prescribing of allopurinol falls within the specialty of internal medicine but outside the subspecialty of gastroenterology. The statute provides no basis for resolving a factual dispute like occurred here where defendant disagrees with plaintiffs' contention that prescribing the medicine fell within internal medicine and did not fall within the subspecialty of gastroenterology.

NJAJ suggests a practical remedy that is consistent with the legislative purpose and the safeguards that this Court has put in place. The following explains how this remedy would apply which is different than the waiver provision discussed in Point Three. In the case at bar, defendants' Answer stated he was practicing within a specialty and subspecialty at the time of the alleged malpractice. R. 4:5-3. At the Ferreira conference, plaintiff responded to the doctor's allegations by stating that the alleged malpractice only involved internal medicine and not gastroenterology. Although there is no record, the trial judge seemed to agree at the Ferreira conference with plaintiff. Defendant then filed a motion to dismiss. If this Court adopts the remedy urged by NJAJ, as long as plaintiff opposes the motion with documentation to justify that the alleged malpractice falls within internal medicine, the trial court should find

plaintiff has vaulted the threshold and the case should not be dismissed with prejudice.

Comparing the issue with regard to other licensed professionals who are entitled to AOMs, this Court noted "there may be circumstances when the alleged departure from the professional standard of care is within the particular expertise of two licensed professions." Meehan v. Antonellis, 226 N.J. 216, 238 (2016). The Court explained to analyze whether the AOM is sufficient, the court must focus "on the specific allegations of professional negligence." Id. at 238 (citing Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 597-98 (App. Div.), certif. den., 168 N.J. 294 (2001); cf. Garden Howe Urban Renewal Assocs. v. HACBM Architects Eng'rs Planners, L.L.C., 439 N.J. Super. 446, 458–59 (App.Div.2015) (holding that licensed engineer could be qualified to render expert opinion against architect regarding compliance with construction codes because both types of professionals are responsible for knowledge of and compliance with appropriate codes)). Thus, if there is a factual dispute as to whether the professional was acting within a specialty or outside the specialty, the Court has permitted the claim to go forward as long as there is some basis to find the affiant can provide an opinion as to the appropriate standard of care. See e.g., Berlin, 337 N.J. Super. at 596-98 (hydrogeologist affiant could give AOM against engineering firm when the complaint alleged a

breach in adhering to hydrogeologic guidelines); see also Medeiros v. O'Donnell & Naccarato, Inc., 347 N.J. Super. 536, 542 (App.Div.2002) (holding affidavit of merit submitted by licensed engineer and architect against defendant engineering firm sufficient). These cases fall under N.J.S.A. 2A:53A-27, but their analysis assists in demonstrating when there is a factual issue under N.J.S.A. 2A:53A-41, the claim should still go forward.

Adopting the framework that NJAJ urges would permit meritorious cases to go forward without the need for additional expenditure of judicial resources because as long as there is a showing with citation to the allegations or proofs that defendant breached the standard of care in one of defendant's specialties as stated in defendant's answer, the claim could go forward with an AOM from a professional with sufficient knowledge, training, and experience that satisfies the requirements of N.J.S.A. 2A:53A-41(a).[1] To the extent that plaintiff's position is that defendant is wholly acting outside of a specialty set forth in the Answer, then as long as there is a showing with citation to the allegations or proofs that defendant breached the standard of care in a different specialty or a general practitioner, then the claim could go forward with an AOM meeting the requirements of N.J.S.A. 2A:53A-41(b).

[1] In this specific case, the AOM would be sufficient because Plaintiffs' affiant certified that the negligence at issue fell within the internal medicine specialty, the expert had sufficient qualifications to meet the AOM requirement.

The Appellate Division in this matter sat as a finder of fact at the preliminary stage of this matter to declare that Goyal was practicing within both of his specialties in prescribing allopurinol. But neither the Patients First Act nor this Court's prior precedent permit such a resolution at the initial stages. See Brill, 142 N.J. at 540. For this reason, NJAJ urges the Court to apply Brill to the factual disputes at the AOM stage to find genuine disputes of material fact should be resolved in favor of the Plaintiff in order to avoid dismissal; the claim would go forward reserving what standard of care applies to a jury's hearing of the evidence through expert witnesses. See Model Civil Jury Charge 5.50A. It is manifestly unfair to dismiss a case with prejudice after 120 days where the plaintiff provides proof that defendant deviated from the standard of care in at least one of his or her specialties, or plaintiff makes a good faith effort to obtain such an AOM but cannot do so because the treatment rendered was outside of defendant's specialty, and therefore, plaintiff in good faith seeks a waiver.

The Court's prior remedy adopted in Buck v. Henry, 207 N.J. at 396, creating R. 4:5-3 so that Plaintiff understands Defendant's specialty and whether Defendant contends the negligence alleged fell within that specialty, does not resolve the issue in the case at bar. The present case shows the difficulty because a plaintiff may not be able to find a dual-specialized expert who agrees with defendant's premise that the care at issue involves the subspecialty. It is unfair

to dismiss the claim with prejudice when through the benefit of discovery, either party's position may be correct.

The trial court at the AOM stage should be limited to whether plaintiff met the statutory requirements construing the requirements in the light most favorable to plaintiff. The stage should not require extensive motion practice or testimony as to whether the care fell within the defendant's specialty. The case should go forward as long as any of the following occur: 1) plaintiff provides an AOM from an expert in at least one of defendant's specialties that defendant breached the standard of care; 2) plaintiff provides an AOM with the appropriate proofs that defendant's care at issue in the Complaint does not fall within defendant's stated specialty; or 3) as more fully explained in Point Three, infra, plaintiff provides an AOM meeting the requirements stated in N.J.S.A. 2A:53A-41(c) and moves for a waiver supported by appropriate evidence of a good faith attempt to comply with the statute.

The Patients First Act applies to trial testimony as well. N.J.S.A. 2A:53A-41. NJAJ urges that whenever there is a genuine dispute of material fact, the trial court should not bar an expert because the court would be sitting as a trier of fact in contravention of Brill. Unlike other preliminary questions like whether an expert has the knowledge, training or experience to offer an opinion, whether the alleged negligence fell within the subspecialty is necessarily tied to the

standard of care that this Court has held is uniquely within the province of the jury. Model Civil Charge 5.50A tells the jurors "you must determine the applicable medical standard from the testimony of the expert witness(es) you have heard in this case." As the charge instructs, the jury is able "either accept or reject all or part of a witness's testimony," including an expert's witness' construction of the standard of care. Morlino v. Med. Ctr. of Ocean Cnty., 295 N.J. Super. 113, 130 (App. Div. 1996), aff'd as modified, 152 N.J. 563 (1998).

Similar to this Court's resolution of the factual issue in Pantano v. New York Shipping Association, 254 N.J. 101, 106 (2023), "the court itself should not resolve [a factual issue] unless the evidence concerning the factors is so one-sided that it warrants judgment in a moving party's favor as a matter of law." If there are two competing experts stating the standard of care that applies to the alleged malpractice concerns only one of defendant's specialties, then it should be the jury's decision as to whether to accept or reject that expert's testimony regarding what is the standard of care.

Adopting this framework will permit a jury to hear the merits of a case and decide which standard of care to apply. Defendant-doctor is able to offer evidence why the gastroenterology standard of care is different and binding while plaintiff is able to offer evidence that the care was limited to internal medicine. This remedy is the most just resolution of an inherently factual

question – the breach of the standard of care. To be clear, the requested solution will reduce rather than create pre-discovery substantive practice. This solution furthers the legislative intent: to permit the AOM requirement to be a shield against frivolous claims while limiting a party's use as a sword to meritorious ones.

POINT THREE

This Court Should Find a Plaintiff Meets the Waiver of the AOM When the Plaintiff Makes a Showing of a Good Faith Effort to Find a Like Credentialed Expert.

The Patients First Act permits a waiver when plaintiff makes a showing of a good faith effort to satisfy the expert requirement. N.J.S.A. 2A:53A-41(c). Here, the Appellate Division suggested that Plaintiff had not properly preserved the issue. Accordingly, NJAJ is concerned about the process for raising this issue of waiver.

The Act provides:

> c. A court may waive the same specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association and board certification requirements of this section, upon motion by the party seeking a waiver, if, after the moving party has demonstrated to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty, the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-

> time teaching of, medicine in the applicable area of practice or a related field of medicine.

N.J.S.A. 2A:53A-41(c).

"Courts are granted authority to waive the specialty qualification requirements under specifically defined circumstances, but only 'upon motion by the party seeking a waiver.'" Buck, 207 N.J. at 390 (citing N.J.S.A. 2A:53A–41(c)). This Court reviewed the waiver provision to find that a plaintiff need not provide the reasons for experts to decline to provide an AOM as long as the plaintiff demonstrates a "good faith effort" to comply with the same specialty requirement. Ryan v. Renny, 203 N.J. 37, 44 (2010). In Ryan, the plaintiff cross-moved in response to a motion to dismiss seeking a waiver because he had consulted with three gastroenterologists but none would provide an AOM. Id. at 44. Within sixty days of the answer, though, plaintiff had submitted an AOM from a general surgeon who had experience performing the procedure at issue. Id. at 43.

In the Ryan case involving a claim of a medical negligence during a colonoscopy, plaintiff's counsel sought an opinion from three gastroenterologists. Id. at 43. When none of these experts would provide an AOM, plaintiff's counsel sought an AOM from a general surgeon who had in the past performed colonoscopies but had not performed them at time of the malpractice at issue. Id. at 43. The trial court granted a waiver, but the Appellate

Division reversed because there was an "absence of an explanation of why the three gastroenterologists declined to provide an opinion." Id. at 48.

In reversing the decision of the Appellate Division, this Court noted that the plain language of the waiver provision focuses on the "'effort' the moving party made to obtain a statutorily-authorized expert, and not on the reasons why a particular expert or experts declined to execute an affidavit." Ryan, 203 N.J. at 55. This Court explained that the factors to be considered included

> the number of experts in the field; the number of experts the moving party contacted; whether and where he expanded his search geographically when his efforts were stymied; the persons or organizations to whom he resorted for help in obtaining an appropriate expert; and any case-specific roadblocks (such as the absence of local sub-specialty experts) he encountered. However, the experts' reasons for declining simply do not bear on the robustness of movant's "efforts[.]"

Id. at 55 (alteration in original). The Court described the waiver provision as a safety valve so that a meritorious case could proceed when the plaintiff made a good faith effort to satisfy the statute. Id. at 56. The Court further found that the Legislature's plain language granted discretion for the trial court "to accept an expert with 'sufficient training, experience and knowledge to provide the testimony.'" Id. at 56.

The Appellate Division suggested that because plaintiff did not formally make his own motion instead of providing the basis for waiver in opposition to

the motion for summary judgment, that it could have "end[ed] our discussion." Wiggins, (slip op. at 28.) Citing to another appellate panel, the Appellate Division here noted the statute does not permit a plaintiff to informally request a waiver. Wiggins, (slip op. at 29)(Castello v. Wohler, 446 N.J. Super. 1, 11, 18-19 (App. Div. 2016).

In Castello, 446 N.J. Super. at 11-12, a published Appellate Division decision written by the Honorable Douglas Fasciale, the trial court dismissed a plaintiff's claim with prejudice because shortly before trial it was discovered that the plaintiff's expert was retired as of the date of the malpractice. Although plaintiff did not ask for a waiver to the trial court, on appeal he argued the trial court erred in not applying N.J.S.A. 2A:53A-41. Id. at 13. The Appellate Division held the expert could not give testimony under the Patients First Act because a) he was no longer practicing medicine, and thus did not match defendant-doctor's specialty; and b) he did not have the same board specialty as the defendant-doctor. Id. at 17. In rejecting plaintiffs' waiver argument, the Appellate Division considered the merits of the argument even though it recognized "no motion was filed." Id. at 18-19. The Appellate Division held that plaintiffs were not entitled to waiver because plaintiffs had not set forth a good faith effort to "identify an expert in the same specialty or subspecialty." Id. at 19.

Although the Appellate Division in this case remanded for consideration of the issue, given the decisions in Wiggins and Castello, this Court should provide guidance as to what constitutes a "motion" to satisfy the waiver requirement. See N.J.S.A. 2A:53A-41(c). NJAJ urges this Court to find that as long as the party provided the proofs in a motion or in opposition to a motion to dismiss, that the plaintiff satisfied the pleading requirement under N.J.S.A. 2A:53A-41(c). Essentially, as long as the Court has a pleading complying with R. 1:6-6 and the request is on notice to the parties with an opportunity to be heard, the waiver relief may be granted when there is a proper showing of a "good faith effort" to comply with the same specialty or subspecialty requirement.

Applying this standard to the case at bar, given plaintiffs' counsel provided certifications from medical professionals within both the specialty and subspecialty of the defendant-doctor, plaintiffs should have been entitled to a waiver. These plaintiffs made a good faith effort to find a gastroenterologist but the three consulted advised that the care or treatment did not involve that subspecialty. Given at the AOM stage there is little discovery, it would be unfair to dismiss a claim upon this showing.

CONCLUSION

New Jersey Association for Justice seeks leave to appear as *amicus curiae* in this matter and to participate in oral argument on this matter. NJAJ brings specialized knowledge in the area of the Affidavit of Merit Statute, and thus, leave should be granted. NJAJ urges this Court to find that the affiant had the proper credentials to offer an opinion because the affiant had the same board-certification as the defendant-doctor, even if the affiant did not have the same subspecialty.

Further, to provide greater clarity to the process when there is a factual dispute as to whether the treatment at issue involved defendant's specialty or subspecialty, NJAJ asks this Court to apply the Brill framework to factual disputes at the AOM stage. A meritorious Complaint should not be dismissed when plaintiff presents a genuine dispute of material fact that defendant-doctor treated plaintiff within the scope of only one specialty rather than defendant's contention of two. Lastly, the Court should provide clarification that the waiver exception under Patients Safety Act may be preserved by filing the proofs in opposition to a motion to dismiss or for summary judgment in addition to the filing of a formal motion.

Respectfully submitted,
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