EARNEKA WIGGINS and LYNDA MYERS, Administratrixes of the Estate of April Carden, dec'd,

Plaintiffs,

v.

HACKENSACK MERIDIAN HEALTH dba JFK UNIVERSITY MEDICAL CENTER, ALOK GOYAL, M.D., SOUTH PLAINFIELD PRIMARY CARE, JOHN/JANE DOES #1-50 (fictitious names of individuals, nurses, physicians, medical personnel, sole practitioners, including employees, contractors, or subcontractors with JFK Medical Center, or other entities who rendered medical care to April Carden) and ABC CORPORATIONS #1-20 (fictitious corporations, partnerships, sole proprietorships and/or other legal entities that rendered medical care to John F. Couts, Jr.);

Defendants.

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 089441

On Motion for Leave to Appeal from an April 18, 2024 Opinion from:

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-3847-22

On Motion for Leave to Appeal from Orders Filed June 29, 2023, Denying Defendants' Motions for Reconsideration of a May 9, 2023 Order Denying Defendants' Motions to Dismiss the Complaint for Failure to Provide an Affidavit of Merit from an Appropriate Licensed Person, from:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO.: UNN-L-0005-23

Sat Below:
Hon. Daniel R. Lindemann, J.S.C.

Civil Action

RESPONSE TO THE BRIEF OF AMICUS CURIAE NEW JERSEY ASSOCIATION FOR JUSTICE

On the Brief and of Counsel:
Anthony Cocca, Esq.
N.J. Attorney No. 000821994
acocca@coccalaw.com
Katelyn E. Cutinello, Esq.
N.J. Attorney No. 0034492010
kcutinello@coccalaw.com

COCCA & CUTINELLO, LLP
The Point at Morristown
36 Cattano Ave., Suite 600
Morristown, NJ 07960
(973) 828-9000; Fax (973) 828-9999
Attorneys for Defendant
JFK University Medical Center, a division of HMH Hospitals Corp.

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Statutes and Rules

Other Authorities

PRELIMINARY STATEMENT

The issue under review by this Court in this interlocutory appeal is as follows:

> 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?

Amicus curiae New Jersey Association for Justice ("NJAJ") proposes, ***first***, that when a defendant physician practices in more than one specialty, and the treatment involved may fall within that physician's multiple specialty areas, the plain language of N.J.S.A. 2A:53A-41 and this Court's opinion in Buck v. Henry, 207 N.J. 377 (2011), allow the plaintiff to submit an affidavit of merit from a physician specializing in ***either*** of those areas of specialty, rather than in ***each*** of those areas. ***Second***, NJAJ submits that this Court should "adopt a logical framework so that a meritorious Complaint is not dismissed with prejudice at the threshold stage without discovery," (NJAJb17), by resolving any "factual disputes" as to the sufficiency of the affidavit of merit "in the light most favorable to the plaintiff," consistent with the standard applied on a motion for summary judgment in Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). (NJAJb19). ***Third***, NJAJ asks that the plaintiff be granted a waiver of the same specialty requirements pursuant to N.J.S.A. 2A:53A-41(c) whenever

the plaintiff makes a "showing of a 'good faith effort' to comply," whether or not the plaintiff makes a formal motion for that relief.

Defendant JFK University Medical Center, a division of HMH Hospitals Corp. ("JFK"), agrees with NJAJ that fair and clear standards for application of the Affidavit of Merit ("AOM") Statute, N.J.S.A. 2A:53A-26 to -29, and the kind-for-kind specialty requirements of the Patients First Act ("PFA"), N.J.S.A. 53A-37 to -42, are crucial. As this Court's grant of plaintiffs' motion for leave to appeal in this case demonstrates, the substantive rules and procedures relating to the submission and sufficiency of affidavits of merit continue to require clarification. The "framework" of solutions proposed by NJAJ are not, however, consistent with the clear terms of the applicable statutes, and will not serve their underlying goals.

First, N.J.S.A. 2A:53A-27 and N.J.S.A. 2A:53A-41(a) clearly require that the affiant have the ***same*** qualifications as the defendant physician. The Appellate Division's opinion comprehensively and correctly addressed the language of the applicable statutes and the caselaw applying them. The reading proposed by NJAJ would effectively remove the same specialty requirements out of the PFA. ***Second***, there is no statutory support nor need for the additional procedural and substantive safeguards proposed by NJAJ. To adopt an additional framework to address situations in which the plaintiff disagrees with

the defendant physician's statement as to his or her specialties or subspecialties would create a "sideshow" or "trial within a trial" unnecessarily consuming the resources of both the parties and the courts.

Third, with respect to the waiver issue, NJAJ's argument concerning the waiver of the same specialty requirement should not be considered at this time. The Appellate Division directed that the waiver issues raised by plaintiff and briefed by the parties but not initially assessed by the motion judge be remanded for an assessment by the trial court, and this Court denied defendants' cross motions for leave to appeal on that point. If the Court nonetheless is inclined to consider NJAJ's argument, NJAJ's position that a waiver should be allowed whenever plaintiff makes a "good faith effort to comply" is incorrect. N.J.S.A. 2A:53A-41(c) expressly allows a waiver of the same specialty or subspecialty requirements "***upon motion*** by the party seeking a waiver" and a showing by "***the moving party***" "that a good faith effort has been made to identify an expert" with the requisite credentials. N.J.S.A. 2A:53A-41(c) (emphasis added).

The Appellate Division in this case applied the AOM Statute and the PFA as the Legislature intended, by directing that the complaint be dismissed ***with prejudice before*** discovery proceeds. There is no statutory support or need for the additional procedural and substantive safeguards NJAJ advocates. The Appellate Division's well-reasoned opinion in this case should be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Court is familiar with the factual and procedural history of this case. JFK reiterates the basic circumstances, however, for purposes of convenience and clarity. Plaintiffs in this suit allege medical negligence claims arising from decedent April Carden's treatment by codefendants Alok Goyal, M.D. and his practice group, South Plainfield Primary Care at JFK during September 2020. Specifically, plaintiffs allege that Dr. Goyal negligently prescribed Allopurinol to Ms. Carden in September 2020, resulting in a diagnosis of Stevens-Johnson syndrome and related injuries. Plaintiffs' claims against JFK are premised upon vicarious liability or apparent authority for Dr. Goyal's conduct.

Defendants moved to dismiss the claims against them pursuant to the AOM Statute, and the kind-for-kind specialty requirement set forth in the PFA, because Dr. Goyal practices in the specialties of ***internal medicine and gastroenterology***, and his treatment of plaintiffs' decedent involved those medical specialties, while plaintiffs provided an AOM against all defendants from a physician who was board certified in ***internal medicine only*** and thus was not qualified to give an AOM supporting the claims against the defendants.

Plaintiffs argued that Dr. Goyal's prescription of Allopurinol to Ms. Carden was in his capacity as an internal medicine specialist, submitting certifications from other physicians to that effect, but did not obtain an AOM

from a gastroenterologist. Nor did plaintiffs expressly file a motion to waive the same specialty requirements of the PFA. Instead, they raised the possibility of waiver in their opposition to defendants' motions.

By order filed May 9, 2023, the Honorable Daniel R. Lindemann, J.S.C. denied defendants' motions to dismiss. The court found that plaintiffs reasonably relied on a prior "finding," made by the Honorable Cynthia D. Santomauro, J.S.C. at a prior Ferreira conference, directing Dr. Goyal to provide a certification that he prescribed Allopurinol in his capacity as a gastroenterologist. Defendants failed to provide that "specific certification" because Dr. Goyal certified that the treatment he provided to Ms. Carden was as both an internist and gastroenterologist, but did not address the prescription of Allopurinol specifically. In the alternative, Dr. Fitzgibbons' being certified in internal medicine was sufficient under Buck v. Henry, 207 N.J. 377, 391 (2011), even if she was not certified in gastroenterology, because the prescription of Allopurinol falls within the specialty of an internist. All defendants filed motions for reconsideration, and by orders filed on June 29, 2023, Judge Lindemann denied those motions.

In an April 18, 2024 opinion, the Appellate Division reversed the trial court's orders, holding that the same specialty requirements of the PFA required an AOM from an expert qualified in both specialties, and remanded for an

assessment of the waiver issues raised by plaintiff and briefed by the parties but not assessed by the motion judge.

By way of orders filed July 18, 2024, this Court granted plaintiff's motion for leave to appeal and denied defendants' cross motions for leave to appeal on this issue of whether the same specialty requirements could be waived under the circumstances. The issue under review by this Court is as follows:

> 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?

LEGAL ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY APPLIED N.J.S.A. 2A:53A-27 AND N.J.S.A. 2A:53A-41, REQUIRING THAT THE AFFIANT HAVE THE SAME QUALIFICATIONS AS THE DEFENDANT PHYSICIAN.

New Jersey's AOM Statute provides that in any action for damages for personal injury, wrongful death or property damage, resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, plaintiff shall, within the specified time following the filing of the answer, provide each defendant with an affidavit of an appropriate licensed person 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. See N.J.S.A. 2A:53A-27.

The purpose of the AOM Statute is to "require plaintiffs in malpractice cases to make a threshold showing that their claims are 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); see A.T. v. Cohen, 231 N.J. 337, 345-46 (2017); Fink v. Thompson, 167 N.J. 551, 559 (2001). "The statute is designed to ferret out frivolous lawsuits at an early point in the litigation. Requiring a threshold showing of merit balances the goal of reducing frivolous lawsuits and the imperative of permitting injured plaintiffs the opportunity to pursue recovery from culpable defendants." Fink, 167 N.J. at 559; see also A.T., 231 N.J. at 345-46.

An AOM normally must be filed within ***sixty*** days of the filing of the defendant's answer to the plaintiff's complaint. N.J.S.A. 2A:53A-27. The time period can be extended to a maximum of ***120*** days if good cause is established. See ibid.; A.T., 231 N.J. at 345. The courts do not have the discretion to permit any further extension of time. See N.J.S.A. 2A:53A-27; A.T., 231 N.J. at 346. The failure to provide an AOM within the designated period in a professional negligence case is equivalent to a failure to state a cause of action, and will result in the dismissal of the complaint with prejudice. See N.J.S.A. 2A:53A-29; A.T., 231 N.J. at 346.

The AOM Statute provides that "In the case of an action for medical malpractice, the person executing the affidavit" must satisfy the requirements of the PFA, N.J.S.A. 2A:53A-41. See N.J.S.A. 2A:53A-27. N.J.S.A. 2A:53A-41, in turn, provides that "In an action alleging medical malpractice, a person shall not give expert testimony" or execute an affidavit of merit "on the appropriate standard of practice or care unless that person is licensed as a physician or other healthcare professional" and meets the other criteria set forth in N.J.S.A. 2A:53A-41.

N.J.S.A. 2A:53A-41(a) further provides that in a medical malpractice action, if the person against whom an expert opinion is offered practices in a ***specialty or subspecialty*** recognized by the American Board of Medical Specialties ("ABMS") or the American Osteopathic Association ("AOA") ***or*** is board certified in a specialty or subspecialty recognized by the ABMS or AOA ***and*** the care or treatment at issue involves that board specialty or subspecialty, the person offering the opinion must practice in the same specialty or subspecialty. See N.J.S.A. 2A:53A-41(a). N.J.S.A. 2A:53A-41(b) provides alternate standards for ***general practitioners***. "The basic principle behind N.J.S.A. 2A:53A-41 is that the challenging expert' who executes an [AOM] in a medical malpractice case, generally, should 'be equivalently qualified as the defendant' physician." Buck v. Henry, 207 N.J. 377, 389 (2011) (quoting Ryan v. Renny, 203 N.J. 37, 52 (2010)).

> The statue sets forth three distinct categories embodying this kind-for-kind rule: (1) those who are specialists in a field recognized by the

> [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."

Ibid. (citing N.J.S.A. 2A:53A-41(a)-(b)). (See also NJAJb11-12.) If the defendant is a specialist, whether board certified or not, the expert giving an [AOM] "must be a specialist in the same field in which the defendant physician specializes." Nicholas v. Mynster, 213 N.J. 463, 482 (2013). If the defendant also is certified in that specialty, the affiant must also must be credentialed as described in the statute. See N.J.S.A. 2A:53A-41(a).

To ensure that plaintiffs have sufficient information to obtain an appropriate AOM, the Supreme Court in Buck directed that defendant physicians indicate in their answers to plaintiffs' complaints "the field of medicine in which [they] specialized, if any, and whether [their] treatment of the plaintiff involved that specialty." Id. at 396; see also R. 4:5-3 (codifying the defendant doctor's disclosure requirement). The purpose of this requirement is to "giv[e the] plaintiff sufficient notice of [the defendant's specialty," so that the plaintiff can "fulfill the [AOM] requirement." Pressler & Verniero, Current N.J. Court Rules, cmt. R. 4:5-3 (2024).

NJAJ submits that the Appellate Division disregarded the Buck Court's statement, in dicta, that

> 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.

(NJAJb13-14 (quoting Buck, 207 N.J. at 391).) NJAJ further suggests that the use of the word "or" in the phrase "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" in N.J.S.A. 2A:53A-41(a)(2) means that expert need only share one of multiple specialties or subspecialties with the defendant physician. (See NJAJb13-14.)

NJAJ's position is incorrect. The Appellate Division in this case recognized that "a plaintiff cannot choose the specialty that the defendant physician was practicing when treating the patient." (Ca30.)[1] This is entirely consistent with the Supreme Court's direction in Buck that "A physician knows the specialty in which he practices." Buck, 207 N.J. at 396 n.1. Plaintiffs in this case at all relevant times were on notice that Dr. Goyal specialized in internal medicine and gastroenterology, and that his treatment of Ms. Carden involved the medical specialties of internal medicine and gastroenterology. Plaintiffs thus were fully on notice that they had to provide an AOM from a like-qualified person. (See Ca22.) The Appellate Division correctly rejected NJAJ's reading of Buck as being based upon dicta in that case (see Ca29), and applied

[1] Plaintiffs' appendix in support of their motion for leave to appeal to this Court is cited as "Ca". JFK's appendix in support of its motion for leave to appeal to the Appellate Division is cited as "Da" in this brief.

Buck to the facts of the instant case in light of the statutory requirements and associated authority.

The phrase "the same specialty or subspecialty" is used throughout N.J.S.A. 2A:53A-41(a) and designates that a specialty or subspecialty is equally meaningful. There is no indication that the word "or" allows the plaintiff to provide an affidavit from doctor who practices in only one of multiple specialties or subspecialties of the defendant doctor. Rather, and as NJAJ effectively admits, N.J.S.A. 2A:53A-41(a) requires that the affiant must have "the ***same*** specialty or subspecialty" as the defendant. (See NJAJb15-16 (quoting N.J.S.A. 2A:53A-41(a)) (emphasis added).)

The appellate court's opinion also is fully consistent with the subsequent holdings in Nicholas v. Mynster, 213 N.J. 463 (2013), and more recently, Pfannenstein v. Surrey, 475 N.J. Super. 83 (App. Div. 2023), which confirmed the principle that pursuant to N.J.S.A. 2A:53A-41, any expert providing opinions must have the same specialties as the defending physician. NJAJ—again incorrectly—contends that Pfannenstein are not relevant because the defendants in that case did not claim to have rendered treatment in multiple specialties. (See NJAJb15-16.)

In Nicholas, the New Jersey Supreme Court directed that "when a physician is a specialist and the basis of the malpractice action 'involves' the

physician's specialty, the challenging expert must practice in the same specialty." Id. at 481-82. In that case, a proposed expert who was board certified in internal and preventive medicine was not qualified to testify against defendants who were board certified in emergency medicine and family medicine, despite the proposed expert being hospital credentialed to treat carbon monoxide poisoning, the subject of the litigation. Although emergency medicine, family medicine and internal medicine specialists may all treat carbon monoxide poisoning in the course of their practice, an internist cannot give an AOM against emergency or family medicine doctor. To conclude otherwise "would lead back to the days before passage of the [PFA] when, in medical malpractice cases, physician experts of different medical specialties, but who treated similar maladies, could offer testimony even though not equivalently credentialed to defendant physicians," and would "read out of the statute the kind-for-kind specialty requirement" the Legislature intended to impose. Id. at 485.

In Pfannenstein, the Appellate Division held that a physician who was board certified in hematology was not qualified to give an AOM against the defendant internal medicine specialists, although hematology is a subspecialty of internal medicine. The Pfannenstein court also confirmed that a physician's answer regarding his or her specialty cannot be disregarded. See Pfannanstein, 475 N.J.

Super. at 99-100. Consistent with Nicholas, the Pfannenstein court reiterated that the "challenging plaintiff's expert, who is expounding on the standard of care, must practice in the same specialty" as the defendant. Pfannenstein, 475 N.J. Suepr. at 102-03.)

N.J.S.A. 2A:53A-27 requires that the expert executing an AOM against a defendant physician be properly qualified with the ***same*** credentials as that defendant. N.J.S.A. 2A:53A-41 likewise requires "the same specialty or subspecialty". The statutory language is clear and unambiguous. Allowing plaintiffs to proceed simply because their expert is board certified in internal medicine would directly contravene the statutes' purpose as well as their express directions. Again, there is no error in the Appellate Division's opinion applying the AOM Statute and PFA requiring this Court's intervention.

II. THE FRAMEWORK OF ADDITIONAL PROCEDURAL AND SUBSTANTIVE SAFEGUARDS PROPOSED BY NJAJ IS NOT REQUIRED BY THE APPLICABLE STATUTES AND DOES NOT SERVE THEIR UNDERLYING GOALS.

NJAJ submits that this Court should "adopt a logical framework so that a meritorious Complaint is not dismissed with prejudice at the threshold stage without discovery," (NJAJb17), by resolving any "factual disputes" as to the sufficiency of the affidavit of merit "in the light most favorable to the plaintiff," consistent with the standard applied on a motion for summary judgment in Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). (NJAJb19; see NJAJb1-2).

The application of this rule, in NJAJ's view, would be consistent with the AOM Statute's requirement of an initial "threshold showing" in order to weed out frivolous complaints while allowing meritorious claims to proceed. (See NJAJb1-2, NJAJb8, NJAJb17-18; see also supra at 7.) It also would prevent application of the "ultimate sanction" of a dismissal with prejudice of plaintiff's case before discovery is conducted. (See NJAJb18.)

Defendant JFK agrees with NJAJ that clear standards consistent with the AOM Statute and the kind-for-kind specialty requirements of the PFA are essential for resolution of disputes as to the sufficiency of an affidavit of merit. As this Court's grant of plaintiffs' motion for leave to appeal in this case demonstrates, rules and procedures relating to the submission and sufficiency of affidavits of merit continue to require clarification. The solutions proposed by NJAJ are not, however, consistent with the clear terms of the applicable statutes, nor will serve their underlying goals.

As an initial matter, there is no dispute that plaintiffs in this case at all relevant times were informed of Dr. Goyal's specialties of internal medicine and gastroenterology, in compliance with R. 4:5-3 and this Court's instructions in Buck v. Henry, 207 N.J. 377 (2011). Plaintiffs' amended complaint, codefendants' answer, Dr. Goyal's curriculum vitae, Dr. Goyal's certification provided in support of codefendants' motion to dismiss, an excerpt from

codefendants' office records and a license search confirm that Dr. Goyal practices in the medical specialties of internal medicine and gastroenterology, and that his treatment of Ms. Carden involved the medical specialties of internal medicine and gastroenterology. (See Da5; Da31; Da69; Da70; Da94-129.)

N.J.S.A. 2A:53A-27 and N.J.S.A. 2A:53A-41 require a threshold showing—by the ***plaintiff***—that the lawsuit is meritorious, by way of an affidavit from a licensed person with the same qualifications as the defendant. The plaintiff cannot avoid the application of the AOM Statute or PFA by introducing a "factual dispute" as to whether the "care and treatment" the defendant provided to the plaintiff patient did in fact involve a particular specialty or subspecialty, as NJAJ continues to attempt to imply.

NJAJ also identifies absolutely no support—in the terms of the AOM Statute and PFA, or otherwise—for the proposition that the Brill standard should be applied to determine whether an AOM is sufficient. Brill states the standards for assessing a motion for summary judgment pursuant to R. 4:46-2 upon the completion of discovery, in order to determine whether the case presents an issue of material fact for trial requiring resolution by the jury. See Brill, 142 N.J. at 529. It has nothing to do with the threshold showing to be made by plaintiff ***before*** discovery is conducted.

This Court has cautioned that proceedings regarding compliance with the AOM Statute should not become a "sideshow" or a trial-within-a-trial distracting from the primary issues in the case. See Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 154 (2003). NJAJ essentially seeks to turn a Ferreira conference into a plenary hearing, taking up much of the trial court's time for a resolution to a problem that already has simple procedural solutions, such as the disclosure requirements of R. 4:5-3.

Additional safeguards are unnecessary. In the event that a defendant physician misleads the plaintiff as to the physician's credentials, the extraordinary circumstances exception to the AOM requirement provides a means of relief. See Castello v. Wohler, 446 N.J. Super. 1, 7 (App. Div.), certif. denied, 228 N.J. 39 (2016) (extraordinary circumstances were presented where the AOM and CV of the expert reflected that the witness is actively practicing medicine and the error was discovered after the expiration of the 120-day deadline); Mazur v. Crane's Mill Nursing Home, 441 N.J. Super. 168, 181-82 (App. Div. 2015) (extraordinary circumstances were presented where the answer falsely stated the defendant was board certified, defense counsel repeated that statement in a certification in support of a motion to dismiss the complaint and the court did not timely conduct a Ferreira conference).

It bears repeating that the PFA was enacted in 2004 as part of a tort-reform package in response to the "dramatic escalation in medical malpractice liability insurance premiums, which [was] creating a crisis of affordability in the purchase of necessary liability coverage for our health care providers." N.J.S.A. 2A:53A-38(b). The Legislature, in part, attributed the steep increase in premiums to the State's tort-liability system. N.J.S.A. 2A:53A-38(d). See Nicholas v. Mynster, 213 N.J. 463, 479 (2013). (See also NJAJb7.) NJAJ's unsupported statement 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," (NJAJb17-18), would tend to imply that the PFA is working as intended, rather than malfunctioning. There is no need for a "framework" of additional "safeguards" to ensure that every medical malpractice plaintiff has an opportunity to proceed to discovery as NJAJ appears to suggest.

III. IF THE COURT IS INCLINED TO CONSIDER THE ISSUE OF WHETHER PLAINTIFFS ARE ENTITLED TO A WAIVER OF THE SAME SPECIALTY REQUIREMENTS, A FORMAL MOTION FOR THAT RELIEF AS WELL AS A SHOWING OF GOOD FAITH IS REQUIRED.

As an initial matter, NJAJ's argument concerning the waiver of the same specialty requirement should not be considered at this time. The Appellate Division directed that the waiver issues raised by plaintiff and briefed by the parties but not initially assessed by the motion judge be remanded for an

assessment by the trial court, and this Court denied defendants' cross motions for leave to appeal on that point.

If the Court nonetheless is inclined to consider NJAJ's argument, NJAJ's position that a waiver should be allowed whenever plaintiff makes a "good faith effort to comply" is incorrect. N.J.S.A. 2A:53A-41(c) expressly allows a waiver of the same specialty or subspecialty requirements "***upon motion*** by the party seeking a waiver" and a showing by "***the moving party***" "that a good faith effort has been made to identify an expert" with the requisite credentials. N.J.S.A. 2A:53A-41(c) (emphasis added). If plaintiffs in this case wanted to obtain a waiver of the same specialty requirements, they should have filed a motion or cross motion for that relief, instead of opposing defendants' motions to dismiss by introducing extraneous evidence in an attempt to show that Dr. Goyal had not correctly identified his areas of specialty relating to his treatment of Ms. Carden.

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

> A court may waive the same specialty or subspecialty recognized by the [ABMS] or the [AO] 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 raining, experience and knowledge or 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.

A court thus may waive the same specialty requirement if the moving party satisfies two criteria: "a good faith effort has been made to identify an expert in the same specialty or subspecialty' and the proffered 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." Pfannenstein v. Surrey, 475 N.J. Super. 83, 104 (app. Div. 2023).

The waiver provision "opens the door for a non-equivalently-qualified expert in the same field as defendant to testify," and may "permit[ ] an expert in one field to opine on the performance of an expert in another related field." Ryan v. Renny, 203 N.J. 37, 53 (2010). Indeed, "the very existence of the waiver provision" made it "obvious" that "the Legislature did not intend a malpractice case to stand or fall solely on the presence or absence of a same-specialty expert." Id. at 55. Thus, the waiver provision provides "a safety valve" for cases where a party cannot locate such an expert within the statutory time limit or at all. Id. at 56.

A party cannot, however, be relieved of the statutory requirements through "desultory undertakings or half-heated endeavors" but must show what steps were undertaken to obtain a kind-for-kind expert, including

> 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 subspecialty experts) he [or she] encountered.

Ibid. The party seeking waiver need not reveal "the reasons why a particular expert or experts declined to execute an affidavit." Ibid. This is because N.J.S.A. 2A:53A-41(c) refers only to "the robustness of [the] movant's efforts.'" Ryan, 203 N.J. at 56.

The Appellate Division in this case did not dismiss the complaint with prejudice, but instead remanded to the trial court to address the availability of the waiver. (See Ca31.) It remains JFK's position that plaintiffs in this case have not demonstrated that they are entitled to a waiver of the same specialty requirement pursuant to N.J.S.A. 2A:53A-41(c). First, and as noted above, plaintiffs did ***not*** file a motion or cross-motion for a waiver and thus have not complied with the statutory procedure. See N.J.S.A. 2A:53A-41(c); Pfannenstein, 475 N.J. Super. at 105; Castello v. Wohler, 446 N.J. Super. 1, 11 (App. Div.), certif. denied, 228 N.J. 39 (2016). The fact that N.J.S.A. 2A:53A-41(c) expressly requires a motion renders NJAJ's argument that a motion is not necessary to be incorrect. (See NJAJb29-30.)

Second, plaintiffs also have not demonstrated that they are substantially entitled to a waiver. Plaintiffs' counsel has advised only that three gastroenterologists reviewed the case and declined to provide an affidavit of merit. (See Da171.) Plaintiffs only submitted a certification from one

gastroenterologist after the deadline for the affidavit of merit, and then one additional certification months after that. (See Da174.) The certifications were focused on what area of specialty was involved. Plaintiffs do not describe any efforts to contact physicians who, like Dr. Goyal, specialize in both internal medicine and gastroenterology, or any efforts to expand the search to locate an appropriate expert. The reasons the potential experts declined to provide an AOM are not relevant. Only the plaintiffs' efforts should be considered.

Again, and most crucially, there is no authority for NJAJ and plaintiffs' position that they can avoid the application of the AOM Statute and the associated same specialty requirements by presenting certifications from other physicians stating that the areas of specialty involved were different from those identified in the defendant's pleading. Such a reading of the applicable statutes is incompatible with the express language of the statutes and their underlying goals and cannot be sustained. NJAJ's argument should be rejected and the Appellate Division's decision affirmed.

CONCLUSION

For the reasons set forth above and in its prior submissions in this case, defendant JFK respectfully requests that the Court affirm the Appellate Division's April 18, 2024 opinion, and reject the arguments presented by NJAJ in its amicus brief.

Respectfully submitted,

COCCA & CUTINELLO, LLP
Attorneys for Defendant
JFK University Medical Center, a division of
HMH Hospitals Corp.

Dated: October 25, 2024

By: _____
Katelyn E. Cutinello, Esq.