JARI ALMONTE and YAHAIRA ALMANZAR, individually and as parents and natural guardians of Jeremy Almonte, an infant

Plaintiffs-Appellants,

v.

TOWNSHIP OF UNION;
TOWNSHIP OF UNION FIRE DEPARTMENT;
TOWNSHIP OF UNION VOLUNTEER AMBULANCE SQUAD;
ATLANTIC AMBULANCE CORPORATION;
UNION EMERGENCY MEDICAL UNIT; DANIEL PERNELL;
DENYEL CUSIMANO;
R. IUNGERMAN;
"JOHN" BIEDRZYCKI;
NITI SHARMA, M.D.;
OVERLOOK MEDICAL CENTER;
"JOHN DOE" Nos. 1-20 (said names being fictitious) and "ABC COMPANY" Nos. 1-20 (said names being fictitious),

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 090169

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO.: A-2968-22

CIVIL ACTION

ON PETITION FROM THE FINAL DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION,
ARGUED: OCTOBER 22, 2024
DECIDED: NOVEMBER 18, 2024

SAT BELOW:
HON. MORRIS SMITH, J.A.D.
HON. CHRISTINE VANEK, J.A.D.

PLAINTIFFS – APPELLANTS REPLY BRIEF

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PRELIMINARY STATEMENT

This brief is submitted in reply to the opposition filed by defendants to Plaintiff's Petition for Certification wherein defendants assert

1. Plaintiffs' petition does not meet the requirements of Rule 2:12-4 for granting certification;

2. The lower court and the Appellate Division were correct on each point of law raised.

Because neither of these contentions is correct, Plaintiffs' Petition should be granted.

POINT I

THE REQUIREMENTS OF RULE 2:12-4 HAVE CLEARLY BEEN MET AS THIS IS A CASE OF GENERAL PUBLIC IMPORTANCE.

Under R. 2:12-4, certification may be granted if the appeal presents a question of general public importance which has not yet but should be settled by the Supreme Court. This case involves the scope of immunity from liability for civil damages available to certain medical providers, including paramedics, under N.J.S.A. 26:2k-14. It is hard to imagine a question of greater general public importance than one involving the abridgement of a citizen's common law right to redress through the courts for civil wrongs, an issue that applies not only to the parties to this action, but to ***every*** person who calls 911 for remote medical assistance, submits to the kind of care authorized by the legislature to be provided in such situations, and is then injured by the acts or omissions of the remote medical provider. When the legislature created

this program in 1973, it recognized that providing medical care in the field is not in the same providing care in a hospital setting, so it saw fit to grant those medical providers immunity from damages for civil liability *so long as* they acted in good faith while performing an authorized service, of which there were only six. A 1984 amendment 1) expanded the range of services paramedics could provide but 2) limited the availability of immunity: after that amendment, immunity was available *only* if the paramedics could establish they rendered their services "in good faith" and "in accordance with this act".

To date, this Court has not defined the kind of conduct that constitutes "good faith" as used in this statute, nor has it decided what the legislature sought to accomplish when it added the phrase "in accordance with this act" as a pre-condition to immunity. The Court has provided guidance on "good faith" in the context of the immunity available to police officers under N.J.S.A. 59:3-3, the Tort Claims Act, which contains similar "good faith" language. But the lower courts here did not appreciate that because the usual rules of statutory interpretation did not apply to the TCA, the immunity sections should be applied differently. Rather than allow this error to be further embedded in our jurisprudence, this Court should take this opportunity to clarify whether the definition of "good faith" used to determine immunity under the Tort Claims Act (*either* objective *or* subjective good faith) also applies to cases involving EMS immunity statutes. For these reasons, this case more

than meets the standard for certification under R. 2:12-4.

POINT II

ADDRESSING THE ARGUMENTS IN THE OPPOSITION BRIEF

On August 18, 2012, the defendants' task was to transport Jeremy Almonte to University Hospital ASAP. They left his house at 2123, called Medical Command at 2130, and arrived at University Hospital at 2137, but did not bring Jeremy into the ER until 2145, eight minutes later. During that time, his condition deteriorated and he suffered an arrest and irreversible brain damage, which would have been avoided, had the paramedics promptly brought him into the ER on arrival.

Plaintiffs' complaint is that the paramedics' uninformed and unilateral conclusion at 2137 that it was better for Jeremy to be intubated before they brought him from the ambulance into the ER, led to their unauthorized medical decision to change his treatment plan which had been to get him into the hospital ASAP. After making that decision, the paramedics lost critical minutes trying unsuccessfully to intubate Jeremy while his condition deteriorated further, as described above. Their actual attempts to intubate after 2130 were "advanced life support services" as defined by the statute, but their decision to change the course of his treatment - to delay his delivery in order to give themselves time to make two more attempts to intubate -- was not. That decision was uninformed simply because they were paramedics, not doctors, and did not have the knowledge or experience to know whether intubation

should or should not have been the priority It was unilateral, because it was made by the paramedics without any input from their Medical Command physician, whom they ignored for over 15 minutes after their last contact at 2130, contrary to the requirements of N.J.S.A. 26:2k-10. It was unauthorized because, as we have argued at every stage of this litigation, paramedics are not permitted to make medical treatment decisions under the New Jersey statutory and regulatory scheme for the administration of remote medical care: that authority belongs solely to licensed physicians acting as Medical Command. Finally, plaintiffs' expert opined that, under the circumstances, it was negligent for *anyone* to delay his delivery into the ER. See page 32 of expert report of Kevin Brown, M.D. (Pca (AD) 37).

A) As to the Appellate Division decision that acting in subjective good faith was sufficient for immunity under N.J.S.A. 26:2k-14.

To date, the Supreme Court has not interpreted the meaning of "good faith" in the context of paramedic immunity. This case presents the Court with an opportunity to do so and insure that our lower courts are applying those and similar immunity laws consistent with their legislative goals.

One of the fundamental purposes of tort law is to deter conduct that creates an unreasonable risk of injury to others. *Hopkin v. Fox & Lazo Realtors, et al,* 132 *N.J.* 426, 625 *A.*2d 1110 (1993); *People Express Airlines, Inc. v. Consolidated Rail Corp.,* 100 *N.J.* 246, 495 *A.*2d 107 (1985). "[F]orcing tortfeasors to pay for the harm they have wrought provides a proper incentive for

reasonable conduct." *Weinberg v. Dinger,* 106 *N.J.* 469, 487, 524 *A.*2d 366 (1987). The legislative program here was set up so that paramedics could only carry out the orders of remotely located physicians or follow the Standing Orders in the state regulations. While paramedics should not be inhibited from performing those tasks out of fear of civil liability, that freedom should not be so unfettered that paramedics come to believe they are empowered to ignore the statutes and regulations governing their practice. For example, paramedics who engage in conduct clearly beyond the scope of their practice such as unilaterally deciding to change a dosage, or administer a medication different from one prescribed by Medical Command, or alter the course of treatment ordered by Medical Command, could avoid civil liability simply by saying because they acted with subjective good faith, because they believed their decisions were better for the patient. The legislature has not gone that far. Simply put, paramedics **should** be inhibited from performing their tasks in a manner that goes beyond ordinary negligence. Subjective good faith simply remove all objective restrictions on what paramedics may do.

On the other hand, restricting paramedic immunity to situations where their conduct may be negligent, but is found to have been objectively reasonable is less offensive to the common law and achieves the statutory goals of 1) not penalizing paramedics for inadvertence or honest mistakes while rendering care in the field where conditions are suboptimal, and 2) not inhibiting them from performing their

work *as it should be performed*, out of fear of civil liability.

B) As to the differences between the TCA and N.J.S.A. 26:2k-14, and similar immunity statutes.

The immunity provisions of N.J.S.A. 26:2k-14 and NJSA 59:3-3 in the TCA are both in derogation of common law. Defendants do not dispute that, in general, such statutes are construed as narrowly as possible.-However, the TCA contains a specific legislative directive that it be construed so as to make immunity the rule and liability the exception. See N.J.S.A. 59:1-2 which states:

> Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.

This unambiguous statement mandates a departure from the usual rules of construction for courts considering immunity under the TCA. No such language is found in N.J.S.A. 26:2k-14 and, as a result, the usual rule of narrow construction must be applied. Furthermore, as we have pointed out, the statute's history indicates a legislative desire to make immunity under N.J.S.A. 26:2k-14 *harder* to obtain.

Defendants argue at pages 15-16 of their brief that this Court should simply ignore that essential difference, citing *Marshall v. Klebanov* 188 N.J. 23, 902 A. 2d 873 (2006) for the proposition that the two statutes should be interpreted the same way. In *Marshall*, this Court limited the immunity available under a mental health care provider immunity statute because it did not include any legislative intention to

the contrary. The TCA, on the other hand, specifically mandates a broad application of its immunities.

Any confusion over how to interpret a non-TCA medical immunity issue can be resolved by reference to this Court's opinion in *Velazquez v. Jiminez*, 1 N.J. 240, 257, 798 A. 2d 51 (2002) where the Court, dealing with immunity under the Good Samaritan Act, wrote.

> Primary regard must be given to the fundamental purposes for which the legislation was enacted. " 'When all is said and done, the matter of statutory construction ... will not justly turn on literalisms, technisms, or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation.' " *LaFage v. Jani*, 166 *N.J.* 412, 431, 766 *A.*2d 1066 (2001) (alteration in original) (quoting *Jersey City Chap. Prop. Owner's Protective Ass'n v. City Council*, 55 *N.J.* 86, 100, 259 *A.*2d 698 (1969)).
>
> Further, a statute enacted in derogation of the common law must be construed narrowly. *Oswin v. Shaw*, 129 *N.J.* 290, 310, 609 *A.*2d 415 (1992). **Where a statute alters the common law, the most circumscribed reading of it that achieves its purpose is the one that should be adopted. Doubt about its meaning should be resolved in favor of the effect which makes the least rather than the most change in the common law.** (emphasis supplied)
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> * * *
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> Coincident with that interpretive canon is our tradition of giving "narrow range" to statutes granting immunity from tort liability because they leave "unredressed injury and loss resulting from wrongful conduct." (Citations omitted.)

Defendants cannot dispute that the primary purpose of this act is create a program for the safe delivery of medical care remotely, with medical decisions being made by doctors and those orders carried out by paramedics. As we have shown, the

New Jersey legislature has not given its paramedics authority or discretion to make independent medical decisions, unlike its neighboring states of Pennsylvania and New York. (Pa (AD) 223-236) Instead, the state retains control over paramedic care through a detailed set of regulations outlining the limits of paramedicine practice. Allowing subjective good faith to decide whether the paramedics acted appropriately effectively negates that legislative scheme.

C) As to the Appellate Division decision that the Paramedics acted "in Accordance with the Act".

Even without reference to the New Jersey regulations governing their practice, these paramedics should have been disqualified from immunity because they were not rendering their services "in accordance with this act", specifically, N.J.S.A. 26:2k-10(a) which requires a paramedic to maintain direct voice communication with and be taking orders from a licensed physician when rendering service.

As their own records show, defendants last contact with their Medical Command was at 2130 when they were halfway to the hospital, and then they were "radio silent". After arriving at the hospital at 2137, they were "radio silent" for 14 minutes while the crisis escalated. There was divergent expert testimony on whether it was acceptable practice to continue to try to intubate Jeremy after 2137 without contacting Medical Command, but there is no doubt that there was a total absence of physician input after 2130. Reasonable minds could find that 14-15 minutes of silence at that critical time to be a violation of the statute. For that reason, it was error

to grant the defendants immunity and summary judgment.

D) As to Defendants' claim that their subsequent conduct was authorized by the 2130 order from Medical Command:

Defendants also assert again, without basis in logic or law, that the intubation order they got that night at 2130 was effectively open-ended or "good until cancelled" and gave them cover for everything they did after 2130. That argument ignores the fact that the order at 2130 was based on the facts as they existed at that time. Dr. Sharma never knew any more about the situation than what the paramedics told her. At 2117, in response to their first call, she authorized intubation if necessary and at 213, again, based solely on what they were telling her, ordered the administration of medications needed to effectuate intubation. Because Sharma's 2130 order was based solely on the situation made known to her at that time, it was clear error to consider that order as valid after the situation changed, particularly after the ambulance arrived at the hospital, and there was a clear and better alternative to paramedic care. Because they never called back, Dr. Sharma never knew they had arrived at the hospital, or that Jeremy was deteriorating or that they were keeping him in the ambulance so they could make the second or third attempt to intubate (Pa(AD) 440, p. 104, l. 1-4) She was not asked at her deposition what she would have ordered at 2137 or thereafter, *had* she known they were at the hospital, but plaintiff's expert Dr. Brown opined that, if she had known they were *already* in the hospital parking lot, the standard of care required her to tell them to bring him inside *immediately.* The

defense experts say otherwise. That was a question for a jury to decide and summary judgment should not have been granted.

CONCLUSION

For the reasons set forth herein as well as in their opening brief, plaintiffs submit that their Petition for Certification should be granted.

SULLIVAN, PAPAIN, BLOCK
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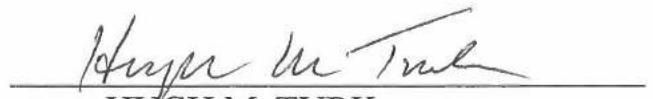
By: 
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