SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0037-15T4

AMY SMOLINSKI and
JASON SMOLINSKI,

Plaintiffs-Appellants,

v.

RICHARD DICKES and MARILYN
GAESSER,

Defendants-Respondents.

Argued December 1, 2016 – Decided May 8, 2017

Before Judges Lihotz, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6614-12.

Arthur L. Raynes argued the cause for appellants (Wiley Malehorn Sirota & Raynes, attorneys; Mr. Raynes, of counsel and on the briefs; Ross V. Carpenter and Carolyn C. Duff, on the briefs).

Jessica J. Mahony argued the cause for respondent Richard Dickes (Ruprecht Hart Weeks & Ricciardulli, LLP, attorneys; Louis A. Ruprecht, of counsel and on the brief; Ms. Mahony, on the brief).

Joseph Carolan argued the cause for respondent Marilyn Gaesser (Law Offices of Joseph

Carolan, attorneys; Suzanne Brodock and George H. Sly, Jr., on the brief).

PER CURIAM

In this medical malpractice case, plaintiffs Amy Smolinski and Jason Smolinski[1] appeal from the December 19, 2014 Law Division order granting the summary judgment dismissal of their claims against defendant Richard Dickes, M.D., a board-certified psychiatrist. The court granted the motion after concluding plaintiffs' psychiatric expert, Eleanor Vo, M.D., lacked the enhanced credentials required by N.J.S.A. 2A:53A-41 to provide expert testimony regarding Dr. Dickes' alleged malpractice. For the reasons that follow, we affirm the order dismissing the complaint against Dr. Dickes.

In addition, plaintiffs appeal from the no cause jury verdict returned in favor of defendant Marilyn Gaesser, an advance practice nurse (APN) who provided psychotherapy and medication management to Amy, under a collaborative arrangement with Dr. Dickes. For more than six years, defendant provided psychiatric treatment, which ended when Amy was hospitalized and diagnosed as suffering from an "untreated" bipolar disorder in June 2011.[2] Plaintiffs

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[1] For ease of reference, we refer to Amy Smolinski individually as plaintiff or Amy, and Jason Smolinski individually as Jason. We refer to the couple, jointly, as plaintiffs. We also refer to Nurse Marilyn Gaesser as defendant.

[2] According to the National Institute of Mental Health,

challenge trial court rulings denying their applications to strike the testimony of defendant's experts and to amend their complaint to seek punitive damages,[3] as well as their motion for a new trial. For the reasons that follow, we vacate the judgment dismissing plaintiffs' complaint and remand for a new trial.

I.

We set forth the factual and procedural history in detail because it frames our analysis of the parties' respective arguments. Defendant started working as a psychiatric nurse in

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> [b]ipolar disorder, also known as manic-depressive illness, is a brain disorder that causes unusual shifts in mood, energy, activity levels, and the ability to carry out day-to-day tasks.
>
> People with bipolar disorder experience periods of unusually intense emotion, changes in sleep patterns and activity levels, and unusual behaviors. These distinct periods are called "mood episodes." Mood episodes are drastically different from the moods and behaviors that are typical for the person. Extreme changes in energy, activity, and sleep go along with mood episodes.
>
> [Mental Health Information: Bipolar Disorder, Nat'l Inst. of Mental Health, https://www.nimh.nih.gov/health/topics/bipolar-disorder/index.shtml (last visited Apr. 17, 2017).]

[3] These applications followed the testimony of defendant, the last witness to testify at trial, after her testimony indicated she illegally altered and destroyed or misplaced some of plaintiff's treatment records.

1991, and became a psychiatric APN in 1997, after receiving her master's degree. Defendant's practice focused on psychiatry. As an APN, she can prescribe medications, diagnose psychiatric illnesses, and provide therapy, pursuant to N.J.S.A. 45:11-49(a); however, this statutory provision requires her to maintain a relationship with a "collaborating physician" who must meet with her to review her patients' files periodically and comment on the care she provides. N.J.S.A. 45:11-49(c).

Beginning in 2005, Dr. Dickes served as defendant's collaborative physician. Defendant proposed an agreement (2005 Agreement), and Dr. Dickes signed it after researching online for "a generally-acceptable agreement." The 2005 Agreement stated, "The [APN] will consult with the collaborating physician regarding patient progress, case review, medications, devices and laboratory tests required. Additionally consultation will occur whenever[,] in the APN's professional opinion, the patient's condition warrants physician consultation or intervention." The 2005 Agreement further stated, "Joint review of 25% of patient records shall occur on at least an annual basis, either by phone, in person, or electronically." It also explicitly stated, "APNs may prescribe and/or dispense without prior physician consultation with the exception of the issuance of a new Controlled Dangerous Substance (CDS) prescription."

The 2006 through 2012 agreements (2006-12 Agreements) were all the same, but they differed from the 2005 Agreement in two ways. First, these later agreements stated, "Joint review of up to 15% of patient records shall occur on at least annual basis." Second, they also stated, "The APN may prescribe and/or dispense medications without prior physician consultation under her prescriptive authority pursuant to New Jersey State law to independently prescribe psychiatric medications, including controlled substances."

Defendant testified she sees forty patients on a weekly basis and has charts for "[a]bout 600" patients. She never discussed plaintiff with Dr. Dickes because she was not "having any problems with her treatment."

Defendant started treating plaintiff in February 2005. Defendant prepared the following handwritten note, undated and unsigned, following Amy's initial office visit:

> Amy
>
> Therapy — M died last Jan.
>
> July — Marital prob.
>
> Wellbrutin XL 150-
> Lexipro 10mg — panic
> attacks
>
> fall — Od — W.B. SAD
>
> 6 mo mar tx

add Wellbrutin 75od
Xanax 0.25

Years later, defendant prepared the following typewritten note regarding the same office visit:

> 2/20/2005
>
> Pt. is a 29 year old married Caucasian female. She has been seeing a therapist because her mother died a year ago in January of cancer and comes for medication management. Last July she started having marital problems and her husband joined her in therapy for couples therapy. According to pt, her husband has a drinking problem. She has been taking Wellbutrin XL 150 mg daily which her PCP has been prescribing. She states she has panic attacks and also depression. States her mom had problems with depression, also. Says depression always gets worse in the fall and believes she has Seasonal Affective Disorder[.] Continues with a lot of anxiety and still grieving over the mother's death[.] Will try adding Lexapro 10 mg., increase Wellbutrin by 75 mg and add Xanax 0.25 BID prn for 10 days.

At her deposition, defendant said she prepared a typed version of her treatment notes "when Amy requested her notes" because "she was going to see another doctor."[4] Defendant explained she typed the notes "so they are legible, because they weren't legible," which lead to the following exchange:

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[4] At trial, defendant provided a different explanation for creating typewritten records, when she testified, "When Amy started to go through her divorce proceedings, she said her lawyer wanted a record of her chart . . . so I typed up the chart so that I could give it to her . . . attorney."

Q: Do you transcribe or add things?

A: I just transcribe. Sometimes my handwritten notes are in shorthand. I might expand on what I said. I am not adding something that's not, basically, there.

Q: Did you make a typewritten notation for all of the handwritten notations.

A: I think so.

Defendant testified her diagnosis, following Amy's initial office visit, was "Major Depression Recurrent with anxiety;" however, no such diagnosis appeared in her office note for the visit. While defendant testified to "watching very carefully to make sure" Amy's "depression was not part of a [b]ipolar diagnosis," she agreed none of her notes indicated she ever "ruled out [b]ipolar." Because Amy already took the antidepressant Wellbutrin, defendant increased her dosage; she also prescribed Xanax[5] and began meeting with Amy on a regular basis. Over the next six years, they periodically met to discuss Amy's mental health and her marriage, and to adjust the dosage of her medications. Defendant changed Amy's prescriptions depending on her reports of psychological issues, including her description of symptoms indicating attention deficit disorder and seasonal affective disorder.

[5] Defendant prescribed the Xanax, a CDS, without consulting Dr. Dickes, contrary to the 2005 Agreement.

In the six years defendant treated Amy, she never provided Amy's chart or records to Dr. Dickes for review, nor did she ever discuss Amy's case with him. Instead, defendant and Dr. Dickes would discuss five to ten patients on a quarterly basis. Defendant did not always have patient charts when she discussed patients with Dr. Dickes; in fact, "[Dr. Dickes] didn't look at the charts, no. I would describe the patients and what I was doing and he would ask questions."

According to Dr. Dickes:

> [Nurse Gaesser] would look at [her records], make a summary presentation, read some of the material and we would discuss the presenting symptoms, the diagnosis, what seemed to be working, whether there were side effects, make suggestions about what might be done if the treatment was struc [sic] — that was the standard procedure.

During the time defendant treated her, Amy gave birth to two children. Defendant never advised her to stop taking her medications during either pregnancy nor did she consult with Amy's obstetrician regarding medication issues.

On March 16, 2011, defendant's records indicate Jason called and expressed concern Amy "has bipolar [disorder]," and reported she "is not taking care of [the] kids and not sleeping." Defendant tried calling Amy initially but received no response. She eventually spoke to Amy, and her March 30, 2011 office note states, "Says she is getting a divorce, has seen a lawyer. [Husband]

[t]ook kids away. She stopped all her meds but says she feels 'great.'"

On April 6, 2011, Amy came in for an office visit. Defendant's typewritten office note states:

> Getting divorce. Jason took the kids and dogs away. He's telling people she's unfit and has bipolar. Discussed [with patient the] possibility of her having [bipolar disorder]. She has been extremely upset but may be due to situation. . . . Not taking any meds. Upset but no signs of severe depression or mania.

By April 19, 2011, Jason returned home; Amy described him as "[v]erbally abusive towards her and still trying to prove she is [b]i-polar." Following their last office visit on May 28, 2011, defendant wrote, "Sadder lately. Feels Jason is pushing her to try and reconcile."

Shortly after this office visit, Amy told Jason she felt hopeless and suicidal. Jason immediately brought her to St. Claire's Hospital, which admitted her into its inpatient psychiatric ward. Dr. Robert Saint-Vil, a psychiatrist, diagnosed Amy with bipolar disorder without psychotic features and prescribed several medications, including lithium.

On September 5, 2012, plaintiffs filed suit against Dr. Dickes and defendant. During discovery, defendant provided notes from her appointments with Amy. In her answers to interrogatories, defendant responded, "Not applicable to this defendant," to the

question whether she "discarded or destroyed any record, note, electronic file or any other type of document relating to [plaintiff]."

On February 3, 2014, Dr. Vo completed her review of the case and issued a twenty-page report setting forth her opinions. Regarding Dr. Dickes's involvement in the care and treatment provided to plaintiff, Dr. Vo stated:

> It is my opinion, with a reasonable degree of psychiatric certainty that [Dr. Dickes], deviated from the standard of care with his collaboration with [Nurse Gaesser]. Dr. Dickes did not review charts as his collaborative agreement indicated. In [Nurse Gaesser's] deposition and Dr. Dickes['] depositions[,] they did not review physical charts, and that she did not bring charts, but instead just discussed cases as if he was in a supervisory role. According to the NJ Division of . . . Consumer Affairs, Board of Nursing Law, under the heading [N.J.S.A.] "45:11-49 permitted duties of advance practice nurse," Dr. Dickes should have reviewed charts and records for patients under [Nurse Gaesser's] care. Had Dr. Dickes reviewed any charts, even not specifically [plaintiff's], he would have been aware of [Nurse Gaesser's] improper documentation, along with her deficits in differential diagnosis for patients. Dr. Dickes and [Nurse Gaesser] deviated from their collaborative agreement specifically in 2005 when [Nurse Gaesser] prescribed Xanax during her first session with [plaintiff] and did not advise Dr. Dickes. Dr. Dickes and [Nurse Gaesser] in their 2005 collaborative agreement were to review 25% of her cases and they did not review the appropriate amount of cases during their first year of working together.

Regarding the care and treatment provided by defendant, Dr. Vo stated:

> It is my opinion, with a reasonable degree of psychiatric certainty, that [Nurse Gaesser], deviated from the standard of care while treating [plaintiff]. She failed to keep appropriate records, changed her medical records when typing her notes from her handwritten notes, by adding more information and not including relevant notes such as [plaintiff] having, at one point, hypomanic symptoms. [Nurse Gaesser's] notes were not timed only dated and did not include her signature with each visit, mental status exam, or thorough assessments of possible differential diagnoses and clear symptoms for her diagnosis. [Nurse Gaesser] also failed to keep accurate documentation about medications she prescribed. She also failed to get appropriate supervision or seek help from her collaborator Dr. Dickes in all of her cases. She started prescribing Adderall to [plaintiff] July 22[], 2008[,] but the first documentation of any stimulant prescription in her documentation is September 10[], 2009. [Nurse Gaesser] did not document any session with [plaintiff] during her pregnancy with her daughter from her session in October 6[], 2006[,] when it was determined to keep the Wellbutrin XL dosage of 150mg throughout the pregnancy, till her follow up after her daughter was born in October of 2007.

Dr. Vo also concluded defendant failed to diagnose Amy's bipolar I disorder.[6]

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[6] The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, states:

> The bipolar I criteria represent the modern understanding of the classic manic-depressive disorder or affective psychosis described in

On September 26, 2014, defendant filed a motion for summary judgment. Dr. Dickes filed his own motion for summary judgment on October 29, 2014, urging the court to find Dr. Vo lacked the qualifications to serve as an expert against him, and thereafter dismiss him from the case. Plaintiffs filed opposition to both motions as well as a cross-motion for a waiver of the specialty requirement, as permitted by N.J.S.A. 2A:53A-41(c), in the event the court found Dr. Vo's qualifications deficient.

Plaintiffs' opposition included Dr. Vo's curriculm vitae, which indicated she received her Doctor of Medicine degree from the University of Southern Florida in May 2006. She started her psychiatric residency in July 2006 and became board certified in April 2013. She received her medical license in 2010. At her deposition, Dr. Vo said she had collaborated with advance practice nurses at St. Francis Medical Center. She explained, "I would review their charts. I would co-sign all their notes and the

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> the nineteenth century, differing from that classic description only to the extent that neither psychosis nor the lifetime experience of a major depressive episode is a requirement. However, the vast majority of individuals whose symptoms meet the criteria for a fully syndromal manic episode also experience major depressive episodes during the course of their lives.
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> [American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 123 (5th ed. 2013).]

prescriptions needed my signature also, but the agreement was collaborative with St. Francis and Dr. David Brush who runs that facility." While she had never collaborated with an independent APN, she had "considered doing it," so she had "reviewed the statute and went through books on it." She said the statute required the physician to "review charts and discuss cases." She explained, "Review charts means look at the charts, look at documentation, reviewing would be her presenting a case to him about what was the symptoms, what her treatment course was, and medication."

Following oral argument, the court granted summary judgment to Dr. Dickes. The court concluded that because Dr. Dickes was a board-certified psychiatrist when he worked with defendant, plaintiffs needed to provide testimony from an expert who was a board-certified psychiatrist at the time of the treatment in question. Additionally, the court concluded the statute's waiver provision did not apply because Dr. Vo lacked "sufficient experience and training to qualify." The court noted that Dr. Dickes became defendant's collaborative physician in 2005, shortly before defendant began treating plaintiff. Dr. Vo received her license to practice medicine in 2010, and became a board-certified psychiatrist after plaintiff stopped treating with defendant. The

court concluded, "[T]hat's too little, too late to qualify under the terms of the statute."

On the same date, the court denied defendant's motion for summary judgment, rejecting her argument that plaintiffs' experts offered only net opinions. The court also rejected her argument that plaintiffs' expert reports were factually unsupported because neither expert examined plaintiff's full medical history. The court concluded that although the experts did not rely upon the entirety of Amy's medical history, their reports were not net opinions.

Trial testimony began on May 12, 2015. Shortly before trial, the court ruled on a number of motions. One of the motions sought to bar Dr. Vo from testifying as to the standard of care applicable to defendant. The court reserved ruling on the issue until May 18, 2015, when it held Dr. Vo could not provide such testimony. The court reasoned, "[I]n New Jersey state court it's been pretty clearly enunciated that you need an expert with the same qualifications."

During trial, plaintiffs called several expert witnesses, including Madeleine Lloyd, an APN engaged in psychiatric care and mental health practice. Nurse Lloyd testified Amy is bipolar, and the disorder likely began during her early twenties. She opined defendant should have discussed Amy's case with Dr. Dickes when

she began treating plaintiff. She further testified defendant should have consulted Dr. Dickes during Amy's pregnancies and after Jason called her.

Plaintiffs also presented the testimony of Dr. Saint-Vil from St. Claire's in-patient program, who testified regarding the care Amy received there. His diagnosis of Amy was "bipolar disorder mix without psychotic features," citing her "past history . . . [of] manic episodes which led to affairs and other inappropriate behaviors." Dr. Saint-Vil "discontinue[d] the Adderall, started her on Seroquel at bedtime, and Lithium;" he explained "with a diagnosis of bipolar disorder, a mood stabilizer is a good option, and lithium is a good mood stabilizer."

Plaintiffs presented the testimony of Dr. Vo. Pursuant to the trial court's prior ruling, Dr. Vo did not provide any standard of care testimony regarding defendant's care. Dr. Vo did testify, however, that she diagnosed Amy with bipolar disorder after performing numerous psychiatric tests. She concluded the tests also showed Amy suffered from mild depression and mild anxiety, but not attention deficit disorder or attention hyperactivity disorder.

Michelle,[7] a former co-worker of Amy, testified plaintiff often failed to come to work or complete her work when she did

[7] We use a pseudonym for this witness to protect her privacy.

come to the office. She recalled Amy spoke rapidly and often refused to let others talk during conversations. While not a mental health professional, Michelle said she had a cousin "who had been acting out in a similar fashion and then was subsequently diagnosed with [b]ipolar disorder." She shared her observations with Jason, prompting him to call defendant.

Jason then testified about his experiences with defendant and their discussion regarding bipolar disorder. Jason further testified that during defendant's treatment, Amy slowly stopped performing housework, abandoned childcare, moved out of their bedroom, stopped sleeping, wrote in her journals obsessively, lost approximately forty pounds, mentioned divorce for the first time, and asked him to initiate divorce proceedings. She also took abrupt vacations to Las Vegas and California, spent late hours in Hoboken without informing him and their children, and posted that she had divorced him on Facebook while they were still married. Amy also told Jason she had used cocaine and engaged in an affair while pregnant with their first child. Amy and Jason reconciled after Dr. Robert Saint-Vil diagnosed Amy with bipolar disorder.

Defendant presented testimony from Charles Dackis, M.D., a psychiatrist. Dr. Dackis concluded that although Amy may have bipolar disorder, he was "certainly not convinced." Instead, he concluded plaintiff most likely suffered from "[m]ajor

[d]epression [r]ecurrent." He also concluded she suffered from addictions to opiates, cocaine, and marijuana. He noted Amy's records lacked any instances of mania before 2011. He also noted that Amy was depressed when she went to St. Claire's Hospital and did not necessarily exhibit symptoms of bipolar disorder while she was there. Rather, Dr. Dackis concluded the bipolar diagnosis was "confounded with cocaine." He noticed no manic episodes and observed that Amy went to St. Claire's shortly after she stopped taking her antidepressants. He also said Amy's possible drug use may have precipitated some of the manic events that plaintiffs' experts discussed.

Defendant also called William Lorman, an APN, who testified regarding the standard of care. He reviewed defendant's treatment notes in detail, including her initial assessment, diagnosis, and treatment plan. He noted Amy told defendant she was not suicidal or manic, as associated with bipolar disorder. Nurse Lorman concluded that each of defendant's interventions occurred during a larger change in Amy's life, all of which led to plaintiff's depression and anxiety. Nurse Lorman further stated defendant met the standard of care for APNs in her diagnosis and treatment of Amy. Nurse Lorman said Amy did not inform defendant of any symptoms indicative of drug abuse or bipolar disorder.

Nurse Lorman also testified defendant met the appropriate standard of care regarding her relationship with Dr. Dickes, including defendant's meetings with Dr. Dickes, which followed national guidelines. On cross-examination, he acknowledged some phrases, such as "hypomania," appeared in the handwritten medical notes but not in defendant's typed notes.

Defendant testified the following day. On direct examination, defense counsel questioned defendant regarding the fact she had "two sets of notes" for Amy:

> Q: [H]ow did you take notes on her visits?
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> A: I[,] for the most part[,] did not take notes while I was with her. . . . But then after she left, then I wrote the notes up.
>
> Q: Okay. So you had handwritten notes. [Did] [t]hey come directly from your meetings with Amy?
>
> A: Yes.
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> Q: Now there's a typed written chart —
>
> A: Yes.
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> Q: — All right, how did that come into existence?
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> A: When Amy was starting to go through her divorce proceedings, she said that her lawyer wanted a record of her chart. And so my written notes were really not legible to anybody else so I typed up the chart so that I could give it to her . . . attorney.

Q: That's not exactly what you said at your deposition though, is it?

A: No.

Defendant further admitted, "[T]here's handwritten notes missing from May of . . . 2005 . . . [until] September of 2006."

On cross-examination, defendant acknowledged she possibly "tossed" several of her handwritten notes from Amy's chart, but then suggested the notes "may have gotten in another patient's chart," before finally admitting, "I don't really know." Contrary to her deposition testimony, defendant admitted she sometimes changed her handwritten notes as she typed them and did not merely transcribe them. She explained,

> The initial request I had was from [plaintiff's] divorce lawyer and I was — First of all[,] I wanted to simplify it. That's why I didn't send in handwritten notes, I just sent up the typed notes. And I also was — If I was making any type of judgment about what [went] into the typed written notes I wanted to reflect well on [plaintiff], because she was going to use it in her divorce proceedings.

This admission prompted plaintiff's counsel to ask, "Do I understand you correctly that depending upon who makes the legal valid requests for records, you tailor those records one way or the other?" Defendant replied, "Yeah."

The trial concluded with defendant's testimony, with the jury to return on Tuesday, May 26, 2015, to hear closing arguments.

Before the trial continued, plaintiffs' counsel wrote to the court advising of additional motions and requests to charge "in light of [defendant's] testimony that she has altered medical records and either destroyed or misplaced other medical records."

> First, [p]laintiffs intend to move to bar any opinion testimony of [d]efendant's experts since their opinions are based upon falsified and incomplete treatment notes. Second, [plaintiffs] will seek to amend their complaint pursuant to Rule 4:9-2 to add a claim for Fraudulent Concealment of Medical Records seeking punitive damages in a bifurcated manner as well as an adverse inference charge for [d]efendant's conduct. As held by our Supreme Court:
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> > [W]here an adversary has intentionally hidden or destroyed (spoliated) evidence necessary to a party's cause of action and that misdeed is uncovered in time for trial, plaintiff is entitled to a spoliation inference that the missing evidence would be unfavorable to the wrongdoer and may also amend his or her complaint to add a claim for fraudulent concealment. . . . [D]iscovery sanctions also may be awarded where appropriate in light of the jury verdict.
> >
> > [Rosenblit v. Zimmerman, 166 N.J. 391, 411 (2001).]
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> Third, [p]laintiffs move for sanctions against [defendant for her] flagrant and admitted discovery violations.

At the charge conference, the trial court considered a charge for alteration of medical records and fraudulent concealment of

medical records. Defense counsel argued defendant did not alter the original records and claimed defendant's alterations adequately reflected plaintiff's history and treatment. The court concluded that some of the handwritten medical notes differed significantly from some of the typed notes, so it included an adverse inference charge for the missing and altered medical records in the jury charge. The court nevertheless declined to allow plaintiffs to amend their complaint to include a punitive spoliation count. The court also rejected plaintiff's request to bar the jury from considering defendant's expert witnesses on the basis their testimony was based on incomplete or inaccurate medical records.

The next day, the jury returned a unanimous verdict in favor of defendant, declining to find defendant's treatment deviated from the standard of care applicable to an APN specializing in psychiatry.

Plaintiff filed a motion for a new trial, which the trial court heard on August 7, 2015. Plaintiff's counsel argued defendant's conduct — namely, not disclosing a material change or omission in her discovery materials — required a new trial because it produced unwarranted surprise at trial.

Defense counsel argued defendant's conduct did not result in a "miscarriage of justice," and asserted the trial evidence refuted

plaintiff's request for a new trial. Defense counsel said plaintiff's counsel asked about some of the discrepancies during defendant's deposition. Defense counsel therefore argued that when defendant said the notes were "out of order," plaintiff's counsel was able to discern differences between the handwritten notes and corresponding typed notes submitted during discovery, so defendant's trial testimony did not come as a surprise. Plaintiff's counsel asserted that although they knew the two sets of notes had discrepancies, they did not know defendant intentionally made the changes to make plaintiff look better during her divorce proceedings.

After considering both parties' arguments, the trial court concluded, "[B]ecause there was no motion for a mistrial[,] I'm going to have to deny the motion for a new trial." Although the judge strongly noted she believed the verdict would be in plaintiff's favor, she declined to override the province of the jury. This appeal followed.

II.

A. Summary judgment in favor of Dr. Dickes

An appellate court reviews an order granting summary judgment using the same standard as the trial court. Qian v. Toll Bros. Inc., 223 N.J. 124, 134-35 (2015). Our review is de novo because the "trial court's interpretation of the law and the legal

consequences that flow from established facts is not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (citations omitted).

In our review, we must construe the facts in the light most favorable to the non-moving party. Robinson v. Vivirito, 217 N.J. 199, 203 (2014). "It [is] not the court's function to weigh the evidence and determine the outcome but only to decide if a material dispute of fact existed." Gilhooley v. Cty. of Union, 164 N.J. 533, 545 (2000) (citation omitted).

Like the trial judge, we review the competent evidential materials to identify whether they support a genuine issue of material fact, keeping in mind "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). A court must grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid.

"With the factual record construed in accordance with Rule 4:46-2(c), 'the court's task is to determine whether a rational

factfinder could resolve the alleged disputed issue in favor of the non-moving party[.]'" Globe Motor Co. v. Iqdalev, 225 N.J. 469, 481 (2016) (citations omitted). Accordingly, if no genuinely disputed fact exists, we "decide whether the trial court's ruling on the law was correct," W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012) (citations omitted), a review which is not deferential. See also Roberts v. Timber Birch-Broadmoore Athletic Ass'n, 371 N.J. Super. 189, 197 (App. Div. 2004).

N.J.S.A. 2A:53A-27 requires that if a plaintiff alleges professional malpractice, the plaintiff must obtain an affidavit of merit (AOM) from a professional in the same specialty as the defendant. If a plaintiff fails to provide an AOM, "it shall be deemed a failure to state a cause of action." N.J.S.A. 2A:53A-29.

In a medical malpractice case, the AOM and trial testimony are subject to the requirements of the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:53A-37 to -42, which states, in pertinent part:

> [A] person shall not give expert testimony or execute an affidavit . . . on the appropriate standard of practice or care unless the person is licensed as a physician or other health care professional in the United States and meets the following criteria:
>
> > 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.

. . . .

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.]

In comparison to N.J.S.A. 2A:53A-41(a) and (b), the waiver provision contained in (c) lacks a temporal limitation. Ryan v. Renny, 203 N.J. 37, 59 (2010). Instead, the provision states the expert must "have sufficient training, experience, and knowledge derived 'as a result of' — that is, as a consequence of or flowing from prior 'active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field[.]'" Ibid. (alteration in original) (quoting N.J.S.A. 2A:53A-41(c)). "Thus it approached the qualifications issue expansively, opening the door for physicians and professors who had actively practiced in the relevant field or a related one, but who had retired or moved into a different area of specialization, to serve as experts under the waiver provision." Ibid. "In the final analysis, it is within the broad discretion of the trial judge to determine

whether a particular witness's knowledge, experience, and training warrant his service as an expert under the waiver provision." Id. at 60.

A plaintiff does not need an AOM if the defendant's negligence is a matter of common knowledge. Palanque v. Lambert-Woolley, 168 N.J. 398, 406 (2001). The common knowledge doctrine applies in circumstances "where 'jurors' common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts.'" Hubbard v. Reed, 168 N.J. 387, 394 (2001) (quoting Estate of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 469 (1999)). Where "defendant's careless acts are quite obvious, a plaintiff need not present expert testimony at trial to establish the standard of care." Palanque, supra, 168 N.J. at 406.

Determining whether a matter alleges professional negligence, ordinary negligence, or otherwise fits within the common knowledge exception, demands scrutiny of the legal claims alleged. Couri v. Gardner, 173 N.J. 328, 340-41 (2002) ("It is not the label placed on the action that is pivotal but the nature of the legal inquiry."). "If jurors, using ordinary understanding and experience and without the assistance of an expert, can determine whether a defendant has been negligent, the threshold of merit

should be readily apparent from a reading of the plaintiff's complaint." Hubbard, supra, 168 N.J. at 395. Accordingly, a court must consider "whether a claim's underlying factual allegations require proof of a deviation from a professional standard of care" or ordinary negligence, as only the former claims are subject to the statutory requirements. Couri, supra, 173 N.J. at 341 (emphasis in original).

Our Supreme Court offered this guidance:

> There are three elements to consider when analyzing whether the statute applies to a particular claim: (1) whether the action is for 'damages for personal injuries, wrongful death or property damage' (nature of injury); (2) whether the action is for 'malpractice or negligence' (cause of action); and (3) whether 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 occupation standards of treatment practices' (standard of care).
>
> [Id. at 334 (alteration in original) (quoting N.J.S.A. 2A:35-27).]

Common knowledge cases involve obvious or extreme error. For example, the defendant dentist in Hubbard pulled the wrong tooth, Hubbard, supra, 168 N.J. at 396, and the defendant doctor in Palanque performed unnecessary surgery because he read the wrong patient's lab report, Palanque, supra, 168 N.J. at 407-08. "The basic postulate for application of the doctrine therefore is that the issue of negligence is not related to technical matters

peculiarly within the knowledge of medical or dental practitioners." Estate of Chin, supra, 160 N.J. at 470 (citation omitted). The nature of the negligence does not trigger the primary goal of requiring an affidavit of merit — "that is, to weed out meritless malpractice lawsuits at an early stage and to prevent frivolous litigation." Palanque, supra, 168 N.J. at 406; see also Bender v. Walgreen E. Co., 399 N.J. Super. 584, 590-91 (App. Div. 2008) (finding pharmacist filling prescription with wrong drug was subject to "common knowledge" exception); Jones v. Stess, 111 N.J. Super. 283, 289-90 (App. Div. 1970) (finding common knowledge exception applicable where podiatrist dropped instrument on patient's leg resulting in amputation).

N.J.S.A. 45:11-49 provides, in pertinent part:

> c. An advanced practice nurse may prescribe medications and devices in all other medically appropriate settings, subject to the following conditions:
>
> (1) the collaborating physician and advanced practice nurse shall address in the joint protocols whether prior consultation with the collaborating physician is required to initiate a prescription for a controlled dangerous substance;
>
> (2) the prescription is written in accordance with standing orders or joint protocols developed in agreement between a collaborating physician and the advanced practice nurse, or pursuant to the specific direction of a physician;

> (3) the advanced practice nurse writes the prescription on a New Jersey Prescription Blank pursuant to P.L. 2003, c. 280 (C. 45:14-40 et seq.), signs the nurse's name to the prescription and prints the nurse's name and certification number;
>
> (4) the prescription is dated and includes the name of the patient and the name, address and telephone number of the collaborating physician;
>
> (5) the physician is present or readily available through electronic communications;
>
> (6) the charts and records of the patients treated by the advanced practice nurse are periodically reviewed by the collaborating physician and the advanced practice nurse;
>
> (7) the joint protocols developed by the collaborating physician and the advanced practice nurse are reviewed, updated and signed at least annually by both parties; and
>
> (8) the advanced practice nurse has completed six contact hours of continuing professional education in pharmacology related to controlled substances, including pharmacologic therapy and addiction prevention and management, in accordance with regulations adopted by the New Jersey Board of Nursing. The six contact hours shall be in addition to New Jersey Board of Nursing pharmacology education requirements for advanced practice nurses related to initial certification and recertification of an advanced practice nurse as set forth in N.J.A.C. 13:37-7.2.

"In this State the violation of a statutory duty of care is not conclusive on the issue of negligence in a civil action but it is a circumstance which the trier of fact should consider in

assessing liability." Braitman v. Overlook Terrace Corp., 68 N.J. 368, 385 (1975). "However, 'this rule is subsumed by the overriding principle that the statutory violation, to be evidential, must be causally related to the happening of the accident, since a permissible inference of causality is indispensable to its relevancy.'" Dubak v. Burdette Tomlin Mem'l Hosp., 233 N.J. Super. 441, 462 (App. Div.) (citing Mattero v. Silverman, 71 N.J. Super. 1, 9 (App. Div. 1961), certif. denied, 36 N.J. 305 (1962)), certif. denied, 117 N.J. 48 (1989).

First, plaintiffs argue N.J.S.A. 2A:53A-41 does not apply to this case because Dr. Dickes' standard of care was "common knowledge." We disagree. Plaintiffs' claim centered on Dr. Dickes' duty as a psychiatrist collaborating with Amy's advance practice nurse. A layperson lacks sufficient knowledge to determine Dr. Dickes' duty of care in this context "without the benefit of the specialized knowledge of experts." Hubbard, supra, 168 N.J. at 394 (quoting Estate of Chin, supra, 160 N.J. at 469). The provisions of N.J.S.A. 45:11-49, without guidance from a qualified expert, would not allow a jury to properly determine Dr. Dickes' duty of care in this case.

Second, plaintiff argues Dr. Dickes' negligence does not involve the specialty of psychiatry. We disagree. In this case, Dr. Dickes was defendant's collaborative psychiatrist. They both

practiced psychiatry, and plaintiffs claimed defendant negligently engaged in psychiatric treatment. Dr. Dickes' duty of care was therefore one of a psychiatrist collaborating with an APN. Dr. Vo was not a board-certified psychiatrist "at the time of the occurrence that is the basis for the action," so she could not testify about Dr. Dickes' duty of care in this case under N.J.S.A. 2A:53A-41(a).

We next address plaintiffs' argument the trial court abused its discretion when it concluded Dr. Vo was not qualified to provide expert testimony against Dr. Dickes under the waiver provision of the affidavit of merit statute. N.J.S.A. 2A:53A-41(c). As a threshold matter, the trial court concluded that plaintiffs "did make a good faith effort" to identify an expert in the same specialty as Dr. Dickes, "particularly in a case that is as unusual and novel as this." The court took issue, however, with Dr. Vo's training, experience, and knowledge. More specifically, the court concluded that Dr. Vo did not have sufficient training with regards to the dynamic between "the supervisory role of the psychiatrist and the nurse;" the court specifically found that Dr. Vo had never engaged in that role.

The essential principle undergirding N.J.S.A. 2A:53A-41 "is that 'the challenging expert' who executes an affidavit of merit in a medical malpractice case, generally, should 'be equivalently-

qualified to the defendant' physician." Buck v. Henry, 207 N.J. 377, 389 (2011) (citing Ryan, supra, 203 N.J. at 52). Our Supreme Court has interpreted this language as "a broad grant of discretion to the trial judge." Ryan, supra, 203 N.J. at 44.

As noted, N.J.S.A. 2A:53A-41(c) does not contain a temporal limitation, in contrast to N.J.S.A. 2A:53A-41(a) and (b). Ryan, supra, 203 N.J. at 58-59.

Plaintiffs' case against Dr. Dickes primarily concerned his relationship with defendant and his alleged negligence in serving as her collaborative physician. Although Dr. Vo stated she did briefly work with APNs during her training, the judge noted she never testified she experienced "the unique situation that was this case." Although plaintiff correctly states Dr. Vo is a board-certified psychiatrist, she did not become board certified until after the treatment at issue. Moreover, Dr. Vo's limited experience in collaborating with APNs is a critical consideration given that plaintiffs' charge of negligence specifically centers around that relationship.

Here, the record supports the motion court's determination that Dr. Vo lacked the "sufficient training, experience, and knowledge derived 'as a result of' — that is, as a consequence of or flowing from prior 'active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related

field[.]'" Ryan, supra, 203 N.J. at 59 (alteration in original) (quoting N.J.S.A. 2A:53A-41(c)). We therefore affirm the denial plaintiffs' application for a specialty waiver for Dr. Vo and entry of summary judgment in favor of Dr. Dickes.

B. Jury verdict in favor of Nurse Gaesser

Plaintiffs argue the trial court committed reversible error when it barred Dr. Vo from testifying as to defendant's standard of care in this case. We agree.

N.J.S.A. 2A:53A-41 clearly "states that the like-qualified standards apply only to physicians." Meehan v. Antonellis, 226 N.J. 216, 233 (2016). The Court explained the enhanced rules for specialist and subspecialist physicians are only applicable to those practicing specialties recognizes by the American Board of Medical Specialties or the American Osteopathic Association, which govern physicians and not nurses. Ibid. The Court stated, "There is no mention made of any other licensed professional in section 41." Id. at 234. Section 41's strict standards therefore "apply only to physicians in medical malpractice actions." Ibid. (citation omitted).

Generally, a court may admit expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.J.R.E. 702. In addition, Rule 702 requires

that "the witness . . . have sufficient expertise to offer the intended testimony." Landrigan v. Celotex Corp., 127 N.J. 404, 413 (1992) (citation omitted).

"The test of an expert witness's competency [to testify] in a malpractice action is whether he or she has sufficient knowledge of professional standards [applicable to the situation under investigation] to justify [his or her] expression of an opinion." Carey v. Lovett, 132 N.J. 44, 64-65 (1993) (citing Sanzari v. Rosenfeld, 34 N.J. 128, 136 (1961)). "The weight of any such testimony, of course, is for the jury." Id. at 65.

Usually, a witness presented as an expert at trial should be licensed as a member of the defendant's profession. Sanzari, supra, 34 N.J. at 136. However, licensed or even unlicensed individuals involved in another profession can testify as an expert depending on "the claim involved, the specific allegations made, and the opinions that the expert proposes to offer at trial." Garden Howe Urban Renewal Assocs., L.L.C. v. HACBM Architects Eng'rs Planners, L.L.C., 439 N.J. Super. 446, 456 (App. Div. 2015). This can occur where there is an overlap between practices or disciplines. Any practitioner who is familiar with the situation in dispute and possesses "the requisite training and knowledge [can] express an opinion as an expert." Rosenberg v. Cahill, 99 N.J. 318, 331-32 (1985). We have therefore recognized, in certain

cases, "a doctor in one field would be qualified to render an opinion as to the performance of a doctor in another with respect to their common areas of practice." Wacht v. Farooqui, 312 N.J. Super. 184, 187-88 (App. Div. 1998); see also Cahill, supra, 99 N.J. at 331-34; Sanzari, supra, 34 N.J. at 136.

For example, our Supreme Court held when the controversy involved the review of x-rays and the diagnosis of physical conditions, a medical doctor was competent as an expert in a malpractice claim against a chiropractor because it recognized that a medical professional can provide an expert opinion where the professional has sufficient knowledge of the professional standard relevant to the situation under scrutiny. Cahill, supra, 99 N.J. at 334; see also Khan v. Singh, 200 N.J. 82, 101 (2009); Sanzari, supra, 34 N.J. at 136-37 (noting overlap between fields of medicine and dentistry). In Garden Howe, a professional negligence action against an architect, we reversed a trial court's determination that an engineer was not qualified to give expert opinions in areas where the two professions overlapped. Garden Howe, supra, 439 N.J. Super. at 457.

Moreover, an expert witness's conclusions can be based on his or her qualifications and personal experience, without citation to academic literature. State v. Townsend, 186 N.J. 473, 495 (2006) (allowing opinion testimony based on the expert's

"education, training, and most importantly, her experience"); Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002) ("Evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience."). "The requirements for expert qualifications are in the disjunctive. The requisite knowledge can be based on either knowledge, training or experience." Bellardini v. Krikorian, 222 N.J. Super. 457, 463 (App. Div. 1988).

As noted, N.J.S.A. 2A:53A-41 applies "only to physicians in medical malpractice actions," not nurses. Meehan, supra, 226 N.J. at 233. We are convinced Dr. Vo had "sufficient knowledge of professional standards [applicable to the situation under investigation] to justify [her] expression of an opinion" regarding plaintiffs' claim against defendant. Carey, supra, 132 N.J. at 64-65 (citing Sanzari, supra, 34 N.J. at 136). Dr. Vo was knowledgeable about the appropriate standard of care because she was a licensed psychiatrist with at least five years of clinical experiences that was relevant to the testimony here. She had worked with APNs in the past, and she had researched how to collaborate with one who worked independently. Dr. Vo's profession clearly overlapped with defendant's. See Garden Howe, supra, 439 N.J. Super. at 457. We therefore reverse the court's decision to

bar Dr. Vo's testimony concerning defendant's duty of care. Because we conclude the error was not harmless, we vacate the order dismissing plaintiffs' complaint against defendant and remand for a new trial.

C. Request for a bifurcated trial and spoliation charge

New Jersey does not recognize a separate tort for spoliation. Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 122 n.6 (2008) (citing Rosenblit v. Zimmerman, 166 N.J. 391, 406 (2001)). Rather, "spoliation claims, as between parties to a particular litigation, are technically claims for fraudulent concealment." Ibid. (citing Rosenblit, supra, 166 N.J. at 406). "Spoliation of evidence . . . occurs when evidence pertinent to the action is destroyed, thereby interfering with the action's proper administration and disposition." Manorcare Health Servs., Inc. v. Osmose Wood Preserving, Inc., 336 N.J. Super. 218, 226 (App. Div. 2001) (quoting Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 364 (App. Div. 1998)).

"[A] duty to preserve evidence is a question of law to be determined by the court . . . ." Ibid.; see also Aetna, supra, 309 N.J. Super. at 366 (outlining a four-part test to determine when a duty to preserve evidence arises). A party asserting a claim of spoliation must establish:

> (1) That defendant in the fraudulent concealment action had a legal obligation to

> disclose evidence in connection with an existing or pending litigation;
>
> (2) That the evidence was material to the litigation;
>
> (3) That plaintiff could not reasonably have obtained access to the evidence from another source;
>
> (4) That defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation;
>
> (5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.
>
> [Tartaglia, supra, 197 N.J. at 118 (citation omitted).]

Our Supreme Court first considered the parameters of potential remedies for spoliation in Rosenblit, supra, 166 N.J. 391. Recognizing the variety of remedies that a court might utilize in civil litigation when one party destroys material evidence, the Court adopted a balanced approach, pointing out that in order to ensure appropriate relief, the choice of remedies would depend in part on the timing of the discovery of the spoliation. See id. at 407.

> A party's access to the remedies we have catalogued will depend upon the point in the litigation process that the concealment or destruction is uncovered. If it is revealed in time for the underlying litigation, the spoliation inference may be invoked. In addition, the injured party may amend his or her complaint to add a count for fraudulent

> concealment . . . . [T]hose counts will require bifurcation because the fraudulent concealment remedy depends on the jury's assessment of the underlying cause of action. In that instance, after the jury has returned a verdict in the bifurcated underlying action, it will be required to determine whether the elements of the tort of fraudulent concealment have been established, and, if so, whether damages are warranted. Further, the plaintiff may be awarded discovery sanctions if the court determines that they are justified in light of the outcome in the fraudulent concealment trial.
>
> If, however, the spoliation is not discovered until after the underlying action has been lost or otherwise seriously inhibited, the plaintiff may file a separate tort action. In such an action, plaintiff will be required to establish the elements of the tort of fraudulent concealment. To do so, the fundamentals of the underlying litigation will also require exposition. Unless such an action is allowed, a belatedly discovered spoliation claim would be without a meaningful remedy. Obviously the plaintiff in such an action also could recover discovery sanctions if the court determines that they are warranted in light of the jury verdict.
>
> [Id. at 407-08.]

Remedies for spoliation of evidence include use of discovery sanctions, an adverse inference, or a separate cause of action for fraudulent concealment. Robertet Flavors, Inc. v. Tri-Form Const., Inc., 203 N.J. 252, 272 (2010); Tartaglia, supra, 197 N.J. at 119-23. Selection of the appropriate remedy, which is at the discretion of the trial court, must focus on the purposes of the spoliation sanctions: "to make whole, as nearly as possible, the

litigant whose cause of action has been impaired by the absence of crucial evidence; to punish the wrongdoer; and to deter others from such conduct." Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 472 (App. Div.) (quoting Rosenblit, supra, 166 N.J. at 401), certif. denied, 212 N.J. 198 (2012).

Plaintiff argues the trial court should have allowed her to pursue a claim for fraudulent concealment. We agree and conclude the trial court's decision to impose only an adverse inference amounted to an abuse of discretion. As plaintiffs argue in their brief, defendant's deliberate distortions in her typed records "meant scrubbing away any signs or inferences of bipolar disorder in order to dispel Jason's allegations." For example, in her handwritten note from her second office visit with Amy, defendant wrote "doing well – very happy" and on the next line wrote, "hypomanic?" In contrast, defendant's typewritten office note for the same office visit presents a different picture, stating, "Feels better. Has not needed to use Xanax regularly," and makes no mention of hypomania. Similarly, defendant's handwritten note for April 6, 2011 concluded, "Upset but no signs of severe depression or mania." No such conclusion appears in defendant's handwritten notes. Moreover, defendant admitted to sixteen months of missing handwritten note, from May 2005 until September 2006.

Because defendant's willful alteration of evidence only came to light at the end of the case, after the completion of all expert testimony, the trial judge's adverse inference charge failed to level the playing field, failed to insure that the burden of the spoliation fell on defendant instead of plaintiffs, and unlikely served to deter defendant from engaging in future acts of spoliation. Bldg. Materials, supra, 424 N.J. Super. at 472 (quoting Rosenblit, supra, 166 N.J. at 401).

In short, plaintiffs did not receive a fair trial in the underlying malpractice action. The altered evidence was relevant to whether defendant breached the appropriate standard of care by failing to diagnose Amy's bipolar disorder. Defendant's expressed desire to make Amy look favorable in her divorce proceeding resulted in the creation of evidence that seriously undermined plaintiffs' ability to prosecute their medical malpractice action successfully. The evidence defendant illegally altered and lost or destroyed, and failed to timely disclose, clearly had the potential to affect the outcome unjustly. R. 2:10-2. Consequently, the error was not harmless. We thus vacate the judgment in the malpractice action and remand for a new trial against defendant. Upon remand, the trial court shall grant plaintiffs leave to file an amended complaint to assert a fraudulent concealment claim.

Affirmed in part, and vacated and remanded in part. We do not retain jurisdiction.