

**NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

ADAMA SESAY (individually and as
executor of the estate of Baby Boy Sesay)
and LIMAN TARAWALLY, her
husband;

Plaintiffs,

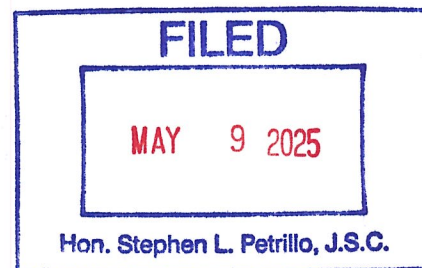
v.

Mohamad Esiely, M.D., Michelle
Burbana, R.N., Katarina Francesca Farina,
R.N., Clara Maas Medical Center, RWJ
Barnabas Health, Health Wise Women
Records, Jersey City Medical Center;
ABC CORPORTATIONS 1-10 (fictitious
names representing an individual or
individuals, corporation, partnership
and/or association and was a doctor,
intern, resident nurse and/or other care
specialist involved in the treatment and/or
care of Adama Sesay and Baby Boy
Sesay);

Defendants.

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION, CIVIL PART

Docket No.: ESX-L-7147-21



Decided: May 9, 2025

Johnathan H. Lomurro, for plaintiffs (Lumurro Munson, LLC, attorneys)

Anelia Dikovytska Brown, for Donna M. Feinblum, R.N., Zaida Victoria, R.N., Qin
Wang, M.D., RWJBH Medical Group (MacNeill, O'Neill, Riveles & Spitzer, LLC,
attorneys)

PETRILLO, J.S.C.

INTRODUCTION

This is plaintiffs' motion to amend their complaint pursuant to R. 4:9-1 to add
Donna M. Feinblum, R.N., Zaida Victoria, R.N., Qin Wang, M.D., RWJBH Medical

Group (hereinafter "the non-parties"). The proposed claims of negligence and vicarious liability as to the non-parties arise out of the same November 2019 occurrence that gave rise to the lawsuit and the claims against the named defendants. Generally, the plaintiffs argue that the non-parties are indispensable parties whose inclusion is required and allowed by R. 4:28-1 and that the discovery rule, among other things, operates to save the claim from any timeliness arguments.

The motion was opposed by the non-parties despite their status as non-parties, with consent ultimately obtained from the movants at oral argument on March 14, 2025. The opposition argues that the amendment is untimely and that the facts relied on by the movants are wholly insufficient to invoke the equitable protection of the discovery rule and that the fictitious party practice rule and the relation back doctrine are inapplicable.

The court reserved its decision following oral argument. For the reasons explained, the motion to amend is denied. A memorializing order will be entered simultaneous with the filing of this opinion.

THE FACTS

The facts of this case are tragic and arise from the birth of Baby Boy Sesay and his immediate post birth care, all of which occurred more than five years ago, in November 2019. Plaintiff Adama Sesay was admitted to Clara Mass Medical Center on November 9, 2019 for induction of labor. Ms. Sesay delivered Baby Boy Sesay

on November 10, 2019 at 3:35 p.m. with an Apgar score of 0¹. Resuscitation attempts were made, including intubation, medications, and chest compressions. Regrettably, Baby Boy Sesay was declared dead at 4:28 p.m. on November 10, 2019.²

The statute of limitations in wrongful death matters is governed by N.J.S.A. 2A:14-2, which sets forth in relevant part:

Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within the state, shall be commenced within two years next after the cause of any such action shall have accrued.

Pursuant to The New Jersey Wrongful Death Act, "[e]very action brought under this chapter shall be commenced within 2 years after the death of the decedent, and not thereafter." N.J.S.A. 2A:31-3.

A complaint naming multiple defendants was timely filed on September 22, 2021. The time to bring all such claims ran on November 10, 2021. This motion to

¹ The Apgar score is a quick assessment of a newborn's health, performed shortly after birth. It evaluates five key areas: heart rate, breathing, muscle tone, reflexes, and skin color. Each area is scored on a scale of 0 to 2, with 2 being the best, and the total score is calculated by adding up the scores for each area. The total Apgar score ranges from 0 to 10. The Apgar score is typically recorded at 1 and 5 minutes after birth. The Apgar score helps healthcare providers quickly assess a newborn's transition to life outside the womb and identify any immediate medical needs. A low score can signal the need for immediate attention. Watterberg, Kristi L.; Aucott, Susan; Benitz, William E. et al., *The Apgar Score*, Johns Hopkins University, Aug. 1, 2015, <https://pure.johnshopkins.edu/en/publications/the-apgar-score-3>.

² This timeline comes from the opposition papers and was not disputed or contradicted in the movants' reply.

amend was filed November 6, 2024, withdrawn and then filed anew on December 4, 2024, more than five years after the sad events of November 10, 2019.

In their complaint, plaintiffs allege that as a direct result of the collective negligence of the medical professionals attending the birth and rendering care thereafter, they suffered the loss of their child. In opposing this motion, the non-parties describe the calamitous and heart-rending events immediately following the birth of Baby Boy Sesay as recounted by Ms. Sesay and her husband, Liman Tarawally, also a plaintiff, at their depositions. This effort entailed a range of seemingly intense interactions with multiple people, some known to them and some not known to them, some seen, and some unseen. Despite all of this, and has already been stated, Baby Boy Sesay did not survive.

Having lost their new baby under these undeniably awful circumstances, plaintiffs were clearly aware of the injury - the infant's death - as well as the supposed fault of the medical providers. In timely fashion the plaintiff's retained counsel, initiated suit, and discovery ensued.

There have been nine discovery extensions and approximately 1300 days of discovery. Nearly all discovery has been completed including the exchange of expert reports and, from what can be discerned from the record, nearly all expert depositions have been completed.

THE MOTION TO AMEND

In their motion, plaintiffs state that “[i]nitial expert opinions and reviews did not address or alert [p]laintiffs to any deviations in neonatal resuscitation by the involved medical staff. In fact, [p]laintiff’s (sic) expert, Dr. Tichenor, had written a report that ‘the event of the birth and neonatal resuscitation are mostly absent and cause the greatest challenge to evaluate.’”³

According to plaintiffs it was not until they were served with a report authored by Jay P. Goldsmith, M.D., an expert for one of the defendants, were they “first informed of potential deviations by the resuscitation team.” The non-parties make up that team. In his report, Dr. Goldsmith noted delays and errors by the resuscitation team which, in his opinion, caused or contributed to the infant’s “poor outcome.”⁴

Following the service of this report, plaintiffs retained another expert, Jonathan Cohen, M.D. According to plaintiff, Dr. Cohen’s affidavit of merit confirms that the deviations cited by Dr. Goldsmith fell below accepted standards for neonatal resuscitation and contributed to or worsened the infant’s condition.⁵ It is this recent opinion by Dr. Cohen, occasioned by, among other things, a defense

³ Dr. Tichenor executed an affidavit of merit on August 5, 2021. The quoted report is dated April 5, 2024.

⁴ Dr. Goldsmith’s report is dated June 17, 2024. The motion record does not indicate the date on which it was served on plaintiffs.

⁵ Dr. Cohen’s affidavit is dated October 28, 2024.

expert opinion by Dr. Goldsmith, that plaintiffs' rely on in support of their claim against the non-parties.

Plaintiffs further maintain that it was not until they received the defense report by Dr. Goldsmith (apparently in the summer of 2024) did they know or, perhaps more importantly, could they have known of the alleged missteps by the resuscitation team. It is this stated inability to have known of the non-parties' potential exposure to liability that plaintiffs argue entitle them to take refuge under the discovery rule, sparing them from the time bar imposed by N.J.S.A. 2A:14-2 and N.J.S.A. 2A:31-3.

The non-parties outright reject these facts as entitling plaintiffs to relief from the statute of limitations. In opposition, they argue that plaintiffs and their counsel would have to have known, based at least on what was testified to at deposition, that after the baby's delivery, resuscitation efforts were undertaken by a different set of providers. The non-parties refer to the modest amount of medical records from Clara Maass Medical Center, which consist of less than 400 pages. In other words, as the non-parties argue, "this matter is not one where the care and treatment provided, and the providers' names, are buried in thousands of pages of records" but one in which these non-parties were readily and easily identified.

Citing Dr. Tichenor's report, the non-parties argue that Dr. Tichenor knew who comprised the resuscitation team, and was critical of the team, but stopped short

of stating that there was a deviation in the standard of care. They further highlight that the opinion of Dr. Tichenor is not so different from the opinion of Dr. Goldsmith and plaintiffs' attempt to use service of the Goldsmith report as the accrual date for the discovery rule is simply unsustainable.

In his report Dr. Tichenor opined:

Following the vacuum delivery, there are no records of the resuscitation efforts of the infant. The events of the birth and neonatal resuscitation are mostly absent and cause the greatest challenge to evaluate. **Only the names of individuals involved**, and that intubation was difficult, are noted. Normally there would be a record of the code with the personnel, medications, and interventions noted on the timeline. Once the infant was transported to the nursery, there would be similar records generated. The Apgars were not assigned in the medical record... All nurses and physicians involved in neonatal resuscitation are required to maintain accreditation in most hospitals, and the organization spells out specific actions and responsibilities. These actions are not recorded and either they were not created or were withheld from counsel. (emphasis added by non-parties in opposition).

It is obvious then that plaintiffs, or their lawyer, or their expert, knew the identities of the members of resuscitation team. It is also clear that Dr. Tichenor was troubled by the lack of documentation and by the lack of clarity in the record as to what exactly was done by whom.

In Dr. Goldsmith's report, he stated that "Despite an apparent stillbirth (1 minute Apgar of 0), this baby would have survived had an appropriate neonatal

resuscitation been performed. The lack of documentation of the resuscitation events hampers a more complete evaluation of this process." In the body of the report, Dr. Goldsmith supports his opinions with the medical records from Clara Maass Medical Center. The same records which plaintiffs have had since long before suit was filed. The same records likely reviewed by Dr. Tichenor in preparing his August 5, 2021 affidavit of merit and the same records relied on by him in the preparing of his April 5, 2025 report. The Goldsmith and Tichenor reports were issued approximately ten weeks apart.

Dr. Goldsmith went the distance in opining as to the deviation by the non-parties, despite the "lack of documentation." Dr. Tichenor, relying on the very same information, or lack thereof, did not offer any such opinion despite clear reservations about the resuscitation team's actions. Despite these reservations, as expressed in his report, plaintiffs saw no need to add the non-parties at the time Tichenor issued his report.⁶ Whether Dr. Goldsmith was simply unphased by the missing documentation, saw missing documentation of this type as itself indicative of a deviation, saw something in the medical records that Dr. Tichenor did not see, or something else, he offered a different opinion, one that went further as to the

⁶ While the date of the Tichenor report also would have put an amendment well outside the two-year period relied on by the non-parties in opposition, it was conceded by counsel for the non-parties at oral argument that a motion to amend at that time, while not impossible to defeat, would have been more challenging.

deviation by the non-parties.

Service of the Goldsmith report, according to plaintiffs, opened their eyes to a hitherto unknown, and essentially unknowable, theory of liability against an additional group of defendants, i.e. the non-parties, something that up until that point was simply not detectable. The court is not persuaded.

ANALYSIS

A. The discovery rule

Statutes of limitations are specifically intended to stimulate litigants to diligently pursue their actions:

[T]hey penalize dilatoriness and serve as measures of repose. When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action.

Mancuso v. Neckles, 163 N.J. 26, 27, (2000) (quoting Farrell v. Votator Div. of Chematron Corp., 62 N.J. 111, 115 (1973)).

That said, it has long been the case in New Jersey that equity may toll the running of a statute of limitations under certain circumstances. In most medical malpractice actions, the timing of the accrual of the cause of action is controlled by the discovery rule. More than fifty years ago, in Lopez v. Swyer, 62 N.J. 267,

272 (1973), our Supreme Court held that the discovery rule "provides that in an appropriate case the cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence, should have discovered that he may have the basis for an actionable claim." Ibid.

In determining when a cause of action accrues, the two key elements of the injured party's knowledge are injury and fault. Lynch v. Rubacky, 85 N.J. 65, 70 (1981). In Savage v. Old Bridge - Sayerville Medical Group, 134 N.J. 241, 248 (1993), the Supreme Court reviewed the element of fault and its role in the accrual of a cause of action:

'Fault' in the context of the discovery rule is simply that it is possible - not provable or even probable - that a third person's conduct that caused the injury was itself unreasonable or lacking in due care. In other words, knowledge of the fault does not mean knowledge of a basis for legal liability or a provable cause of action; knowledge of fault denotes only facts suggesting the possibility of wrongdoing. Thus, knowledge of fault for purposes of the discovery rule has a circumscribed meaning: It requires only the awareness of facts that would alert a reasonable person exercising ordinary diligence that a third party's conduct may have caused or contributed to the cause of the injury and that comment itself might possibly have been unreasonable or lacking in due care.

[Savage, *supra*, 134 N.J. at 248 (emphasis added).]

Plaintiffs have the burden to exercise reasonable diligence to identify who the

potentially culpable parties are once they know that a third party's conduct may have caused or contributed to the injury. Failure to act with dispatch may prove fatal to a late asserted claim. In this case it is impossible to ignore that plaintiffs knew or should have known of the resuscitation team's involvement. The non-parties were identified in the medical records and while there was a lack of clarity as to exactly what they did, that they were involved was obvious and undisputed. This scenario falls within the Savage standard.

Plaintiffs were clearly aware of the injury, the death of Baby Boy Sesay, as well as the perceived fault of the medical providers. Deposition testimony further makes clear that both plaintiffs were aware, in real time, that their baby was receiving care from medical professionals other than the ones who delivered him.

At some point after their terrible loss, plaintiffs retained counsel, who retained an expert, who reviewed medical records, who formed and expressed an opinion (both in the form of an affidavit of merit and in a report) based upon medical records that identified the non-parties, which records were reviewed by other experts including one who discerned a deviation by the non-parties that plaintiff's expert did not.

Against this backdrop, plaintiffs' counsel asserts that plaintiffs had no notice of any deviation regarding the non-parties "aside from improper documentation," but it was the same lack of documentation upon which Dr. Goldsmith relied in

rendering his opinions that are critical of the non-parties. The discovery rule does not contemplate for the plaintiff to be advised by someone that there was a deviation from the standard of care; rather, "[i]t requires only the awareness of facts **that would alert a reasonable person exercising ordinary diligence** that a third party's conduct **may have** caused or contributed to the cause of the injury." Savage, *supra*, 134 N.J. at 248 (emphasis added).

Plaintiffs' expert Dr. Tichenor stated in his report that his "greatest challenge" was the evaluation of the resuscitation efforts. He described how the medical records were wanting in that regard. No doubt he believed this to be true. Prior to filing suit and throughout years of discovery once the suit was underway, plaintiffs had the opportunity to further investigate the resuscitation efforts. Indeed, on reply, plaintiff's counsel certified that pre-litigation he requested that plaintiffs' consulting experts examine birth and resuscitation efforts and that they found insufficient evidence to support a cause of action against the non-parties.

Years were allotted to exchanging written discovery and conducting party and fact witness depositions. Nothing prevented plaintiffs from conducting depositions of the non-parties they are now seeking to name as defendants. There has been no showing on this record that plaintiffs made any sort of effort to fill in the blanks that their own expert believed to be troubling.

Only upon receipt of the Goldsmith report did plaintiffs consider the non-parties as exposed to liability, and for no other reason than because Dr. Goldsmith thought so based on his looking at the same things that Dr. Tichenor did. This point is of especially vital importance. Dr. Goldsmith did not rely on any new information. Dr. Goldsmith relied solely and exclusively on the same medical records. That Dr. Goldsmith opined differently based on the same data is not something “new” for discovery rule purposes. It is a different opinion based on the same record. That cannot possibly be “new” information for discovery rule purposes.

Of further and additional importance is the fact that when comparing what each said, the difference between the two opinions is not what they both saw as lacking but what they thought about the meaning of what was lacking and what could be derived from the medical records overall. Dr. Goldsmith was able to form an opinion on deviation by the non-parties despite what he says was a “lack of documentation of the resuscitation events...” Dr. Goldsmith’s opinion might have been new to plaintiffs but the information necessary to form it was not.

Put more bluntly, Dr. Goldsmith saw something that Dr. Tichenor either missed, did not understand, strategically elected not to say, or simply treated differently. Both doctors have offered subjective opinions based on the same information. In this case plaintiff’s expert Dr. Tichenor had everything in front of him that defense expert Dr. Goldsmith had (and for years longer than did Dr.

Goldsmith). Dr. Goldsmith saw a deviation. Dr. Tichenor did not.

The court agrees with the non-parties that, in this context, the exercise of ordinary diligence should have entailed plaintiffs going further than they did, sooner than they did, to get to the bottom of the supposed holes in the medical record that Dr. Tichenor saw as his “greatest challenge.” The discovery rule is not applicable where a party knew or should have known of the potential claim from the outset but failed to conduct the necessary discovery and investigation to flesh it out. As stated in opposition to the motion “[n]othing new was ‘discovered’ by virtue of Dr. Goldsmith’s report, who, in rendering his opinions, relied on the same medical records that have been in plaintiffs’ possession all along.” The idea that an adverse party’s expert opinion, based on the same information as the plaintiff’s expert opinion, could constitute “new” information allowing plaintiff to evade the statute of limitations and benefit from the discovery rule is not supported by the law.

Even if the court were to conclude that all efforts undertaken by plaintiffs were diligent, the court still could not grant the motion. Unless the plaintiffs are of the opinion (not stated in their motion) that their expert was negligent or incompetent (a suggestion that the court is expressly not making) than all they have as a product of their diligence is what they started with: a different opinion based on the same evidence.

Allowing an opinion by an adverse expert to constitute the type of new information required to toll accrual of a cause of action, when the adverse expert considered the very same information as plaintiffs' own expert, would contort the discovery rule and the equitable principles underpinning it. Allowing the addition of these non-parties at this late date when the only reason why they have not been added all along is because plaintiffs' own expert saw no deviation in the same medical records that the adverse expert reviewed before concluding differently, would turn the adversarial process into a collaboration of a kind not intended by that process. Plaintiffs picked their expert. They gave him all they had (which was all that existed) he opined as he did. Just because someone else saw it otherwise is not new information.

By now, the court is hewing dangerously close to "broken record" territory. The plaintiffs may not avail themselves of the discovery rule to amend their complaint at this late date.

B. The relation back doctrine and the fictitious party pleading rule

On reply, plaintiffs argue that filing of the proposed amended complaint relates back to the timely-filed complaint due to the fictitious names plead in the complaint. The court disagrees. Not only is it obvious that the non-parties' identities were easily identified at the time of the initial filing, it is undisputed. In plaintiff's expert's report, when discussing "neonatal resuscitation" and bemoaning the lack of

detail as to efforts taken in this regard, Dr. Tichenor specifically states that “[o]nly the names of the individuals involved and that intubation was difficult are noted.” As stated earlier in this opinion, the plaintiffs knew the identity of these non-parties well before suit was timely filed.

R. 4:26-4 provides:

In any action, irrespective of the amount in controversy, other than action governed by R. 4:4-5 (effecting specific property or a res), if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion, prior to judgment, amend the complaint to state defendant's true name, such motion to be accompanied by an affidavit stating the manner in which the information was obtained. If, however, defendant acknowledges his or her true name by written appearance or orally in open court, the complaint may be amended without notice and affidavit. No final judgment shall be entered against a person designated by a fictitious name.

[R. 4:26-4.]

To avail themselves of this rule, plaintiffs must: (1) not know the identity of the fictitious defendant; (2) describe the defendant with sufficient detail to allow identification; (3) act diligently in identifying the defendant; and (4) when amending the complaint, demonstrate how the defendant's identity was learned. Greczyn v. Colgate-Palmolive, 183 N.J. 5, 11 (2005). As is evident from the text of this rule, fictitious name practice may only be used when the plaintiff does not know or have

reason to know the identity of an alleged culpable party. Cardona v. Data Systems Corporation, 261 N.J. Super. 232,234 (App. Div. 1992). As stated in Farrell,

When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his actions.

[Farrell v. Votator Division of Chemetron Corp., 62 N.J. 111, 115 (1973).]

"[C]ase law has emphasized the need for plaintiffs and their counsel to act with due diligence in attempting to identify and sue responsive parties within the [Statute of Limitations] period." Baez v. Paulo, 453 N.J. Super. 422, 438 (App. Div. 2018). R. 4:26-4 "will not protect a plaintiff who had ample time to discover the unknown defendant's identity before the running of the [Statute of Limitations]." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:26-4 (2023) (internal citations omitted).

The circumstances of Baez have bearing here. In Baez, the Appellate Division denied application of the fictitious pleading rule when plaintiff did not act with due diligence with respect to identifying defendants whose typed names were included in the medical records and thus known to her before the statute ran. Baez, supra, 453 N.J. Super. at 441-44.

Baez was a medical malpractice and wrongful death case. There, plaintiff

named three defendant-doctors after the expiration of the statute of limitations relying on the fictitious party rule. Id. at 428. The Appellate Division held that plaintiff was not entitled to rely on the fictitious party rule as to two of the three doctors, because those doctors' typewritten or legibly written names were contained in the patient's medical records. Id. at 430-32. The court reasoned that therefore, "[p]laintiff could have reasonably ascertained, before the statute of limitations expired, the respective identities and involvement in decedent's care of those two doctors." Id. at 428. As to the third doctor, the Appellate Division allowed plaintiff to take advantage of the fictitious party rule because his name was "not typed or legibly written on any of the hospital records," unlike the names of the two other doctors. Id. at 432.

The court agrees with the non-parties that "[t]here is no doubt that [p]laintiffs slept on their rights in this matter. Plaintiffs were aware of their infant's tragic death and timely contacted highly skilled counsel specializing in medical malpractice, who timely filed a lawsuit on their behalf. Had [p]laintiffs acted with diligence in identifying the potentially culpable parties, the neonatology team could have been named, as these providers' names and roles are clear from the chart." Little effort was needed to know who was involved in the care of Baby Boy Sesay. Plaintiff's own expert noted that he knew the identities of these non-parties.

Specifically, Dr. Wang's name appears in the chart in the typewritten form

approximately 60 times; Nurse Feinblum's name appears in the chart in the typewritten form approximately 50 times; Nurse Victoria's name appears in the chart in the typewritten form approximately twice. The specifics of their involvement, if not evident from simply reviewing the records, as stated by plaintiffs' expert Dr. Tichenor, could have been further investigated, using the range of discovery mechanisms available during the course of discovery.

Further guidance is provided by Matynska v. Fried, 175 N.J. 51 (2002) where the Supreme Court considered a similar claim. In that case, plaintiff Helena Matynska suffered complications following hip replacement surgery that she attributed to negligent post-operative treatment. Id. at 52. Plaintiff filed a complaint naming Robert Wood Johnson University Hospital, eleven doctors and nurses and several John Does. A Dr. Feierstein was not named as a defendant, but he covered hospital rounds for his partner in the post-operative period. Ibid. Although his name appeared twice in the hospital chart, plaintiff claimed that she did not know that he was in any way responsible for her treatment, because she never met him and was not advised that he would be "covering" for his partner. Further, plaintiff contended that the brief and vague hospital chart references did not disclose his role in her care and treatment. Ibid.

Twenty-eight months after the alleged occurrence, plaintiff filed a motion to amend the complaint to name Dr. Feierstein in place of a John Doe. The trial court

denied the application. The Appellate Division and the Supreme Court affirmed, concluding that if Matynska had undertaken an adequate investigation and preparation, she would have discovered Dr. Feierstein's involvement prior to the expiration of the statute of limitations or within a reasonable time thereafter.

The Supreme Court concluded that the Appellate Division was correct in describing the plaintiff's effort to discover the role of all parties in her injury was inadequate. The defendant's name appeared twice in the hospital chart as a physician who participated in her care. Even a cursory look at the telephone book or a call to Dr. Feierstein at the hospital would have identified his name as a partner of Dr. Fried.

The Court held:

[Plaintiff] had an obligation to investigate all potentially responsible parties in a timely manner but did not do so. In short, Matynska failed to cross the due diligence threshold and that the lower courts properly denied her right to amend the complaint.

[Id. at 53.]

Such is the case at bar. Everyone knew the identities of the medical professionals who made up the resuscitation team. Who they were was not ever in question. What they exactly did, and whether what they did constituted a deviation from the standard of care, weighed heavily on the mind of plaintiffs' expert. Yet, for reasons known only to plaintiffs and their professionals, no effort to sort that out was ever made in the multiple years of discovery. Like Matynska, these plaintiffs

“had an obligation to investigate all potentially responsible parties in a timely manner but did not do so.” Ibid. Thus, like Matynska, these plaintiffs cannot be allowed to amend their complaint.

The fictitious party rule is unavailable under these facts.

C. Standard on a motion to amend

Ultimately, the decision on a motion to amend a complaint rests in the court’s sound discretion, Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998), which discretion is to be exercised "in light of the factual situation existing at the time each motion is made." Notte v. Merchants Mutual Ins. Co., 185 N.J. 490, 501 (2006) (internal citations omitted).

The circumstances which a court may consider include the reason for the late filing and whether the newly-asserted claim would unduly prejudice the opposing party, survive a motion to dismiss on the merits, cause undue delay of the trial, or constitute an effort to avoid another applicable rule of law. Building Materials Corp. of America v. Allstate Ins. Co., 424 N.J. Super. 448, 484-85 (App. Div. 2012). This case, and this proposed amendment, implicate near every single one of these considerations and in a way that does not favor the amendment, but rather weighs against it. Had the claim been timely asserted it no doubt would have survived a motion to dismiss, but it was not timely. The trial delay now would be profound and unavoidable. The prejudice to the newly added parties, a consideration described

more below, is undeniable. And allowing the claim at this late date, under the facts of record, would patently constitute avoidance of the law governing diligence in making one's claim.

This court is satisfied that to grant the amendment despite the obstacles described would not be merely a mistaken exercise of its discretion but an abuse of that power. This is an abjectly dreadful case, and the facts have on more than one occasion during the court's review loomed large. But the law looms larger, as it must.

In their opposition, the non-parties claim prejudice, an assertion that more than five years after the event cannot be sloughed off as mere whining. Even where a plaintiff acts diligently in identifying the parties or the basis for a claim against the parties, which, for the reasons already explained, the court cannot conclude was the case here, an amendment can only be permitted in the absence of prejudice to the defendant that is being impleaded. Farrell, *supra*, 62 N.J. at 122-23. "There cannot be any doubt that a defendant suffers some prejudice merely by the fact that it is exposed to potential liability for a lawsuit after the statute of limitations has run." Mears v. Sandoz Pharms., Inc., 300 N.J. Super. 622, 631 (App. Div. 1997); see also Claypotch v. Heller, Inc., 306 N.J. Super. 472, 480 (App. Div. 2003) (recognizing prejudice to the defendant is a "crucial factor" as to whether plaintiff has acted with due diligence); Baez, *supra*, 453 N.J. Super. at 444 (although the implicit prejudice

to the defendant-physicians caused by their late entry into the case may not have been significant, "they nonetheless had a justifiable expectation to not be sued after the two-year limitations period expired.").

In this case, and only on reply, do plaintiffs offer any explanation as to what occurred that made them unable to identify a deviation by the non- parties and the effort made to try and do so. Only the vaguest of explanations is offered as to the attempt by the retained professionals to get to the bottom of the resuscitation efforts. And no one anywhere even suggests that the identity of those involved in the resuscitation effort were not known.

Plaintiffs are, at best, equivocal on what, if any, investigation was undertaken before the filing of the initial complaint. Plaintiffs are likewise opaque in describing the efforts undertaken throughout the pendency of the case to determine whether there was a viable theory of liability against the non-parties who they now seeking to implead. In Matynska, the Supreme Court affirmed the denial of plaintiff's attempt to amend after just four months past the expiration of the statute of limitations. Under the facts of this case, plaintiffs' attempt to name additional providers five years after the alleged negligence cannot be countenanced.

Once Dr. Goldsmith's report was served, a report critical of the neonatal resuscitation, plaintiffs' counsel quickly obtained an affidavit of merit from Dr. Jonathan Cohen, a neonatologist, which was submitted in support of this motion.

The court has no doubt from this record that Dr. Cohen could have signed the same affidavit of years ago long before the running of the statute of limitations. There is literally no new information in this case beyond what was available years ago. All that is new is the opinion of Dr. Goldsmith as to the deviation he describes.

No new evidence regarding the resuscitation team's care and treatment emerged during the years long discovery process in this case. It is clear that Dr. Cohen, similarly to Dr. Goldsmith and Dr. Tichenor, relied on the medical records, available all along, to render his opinion. Plaintiffs' position seems to be that any time an expert opines to a non-party outside the statute of limitations, a plaintiff can then amend the complaint to add those non-parties as defendants. That is not the law.

CONCLUSION

The plaintiffs' proposed claim against the non-parties, the neonatology resuscitation team, is time-barred, and neither the discovery rule nor the relation back doctrine can salvage these claims. The service of a defense expert report cannot become the new accrual date under the discovery rule. This is especially true where the plaintiffs' expert and the defense expert had all the same information all along and merely diverged as to what that information meant, and what could be determined from it, in terms of an expert opinion as to deviation from the standard of care.

The non-parties whom the plaintiffs seek to now implead have had no

involvement whatsoever in this medical malpractice suit and would now have to litigate a case that is in the final stages, despite the fact that the care and treatment at issue took place more than five years ago. Such an outcome, under the facts of this case, would allow plaintiffs to circumvent the statute of limitations and would cause real prejudice to these medical providers.

The motion to amend is denied. The case shall proceed in all other respects.

Should additional time for discovery be required given the uncertainty surrounding case status while this motion was pending, the parties shall request a case management conference. No discovery extension shall otherwise be considered or granted without a motion.