SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE
LAW DIVISION: CIVIL PART

DOCKET NO.: ESX-L-7147-21

ADAMA SESAY (individually and as administrator of the estate of Baby Boy Sesay) and LIMAN TARAWALLY, her husband;
Plaintiffs,
v.
MOHAMAD ESIELY, M.D.; MICHELLE BURBANA, R.N.; KATARINA F. FARINA, R.N.; CLARA MAASS MEDICAL CENTER; RWJ BARNABAS HEALTH; HEALTH WISE WOMEN; JERSEY CITY MEDICAL CENTER; ABC CORPORATIONS 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.

OPINION

Petrillo, J.S.C.

I. INTRODUCTION

This matter comes before the Court on Plaintiffs' motion for reconsideration pursuant to R. 4:42-2, seeking to vacate this Court's May 9, 2025, Order which denied Plaintiffs' request for leave to amend the Complaint to add Donna M. Feinblum, RN; Zaida Victoria, RN; Qin Wang, MD; and RWJBH Medical Group, (hereinafter "non-parties"), as defendants directly and vicariously liable for alleged negligent neonatal resuscitation. For the reasons set forth below, the motion is **DENIED**.

II. PROCEDURAL HISTORY

Plaintiffs filed this medical malpractice and wrongful death suit on September 22, 2021, arising from the tragic death of Baby Boy Sesay at Clara Maass Medical Center following complicated labor and delivery and unsuccessful neonatal

resuscitation occurring on November 10, 2019. Initially named as defendants were the labor and delivery physician (Mohammed Esiely. M.D.), the labor and delivery nursing staff (Michelle Burbana, RN; Katarina F. Farina, RN), the delivering hospital (Clara Maass Medical Center and RWJ Barnabas Health), and the prenatal office practice (Health Wise Women).

As set forth in the record, Plaintiffs, prior to instituting this lawsuit, obtained a review from an obstetrician-gynecologist, James Tichenor, M.D., who provided an affidavit of merit as to the labor and delivery care and eventually a narrative report dated April 5, 2024 ("Tichenor Report"). Dr. Tichenor did not ascribe any fault to the neonatal resuscitation team, and counsel represents that verbal or written opinions from other consultants similarly did not attribute postnatal misconduct or causation to the resuscitation personnel. Id. Consistent with that, Plaintiffs did not sue or seek expert review in the specialty of neonatology.

During fact and expert discovery, Defendants including Dr. Esiely and Health Wise Women, answered Form C interrogatories and disclosed their defenses in accordance with R. 4:17-7. Plaintiffs also propounded multiple requests for production and supplemental interrogatory responses, and discovery was repeatedly extended and enforced by several court orders.

It was not until Defendants Dr. Esiely and Health Wise Women served the expert report of Jay Goldsmith, MD, on June 17, 2024, approximately two months following Plaintiffs' service of the Tichenor Report, that Plaintiffs claim to have first have had any basis to attribute the infant's death to deviations in the resuscitation efforts by neonatal team members, i.e., the non-parties. Plaintiffs thereafter moved to amend, which this Court denied by written opinion, concluding that the action was time-barred under the statute of limitations and that neither the discovery rule, fictitious party rule, nor relation-back doctrine applied under New Jersey law.

Plaintiffs now move for reconsideration under R. 4:42-2.

III. STANDARD OF REVIEW

As Plaintiffs correctly point out, reconsideration of interlocutory orders is governed by the more liberal and flexible standard of R. 4:42-2, as articulated in Lawson v. Dewar, 468 N.J. Super. 128 (App. Div. 2021). Unlike the rigid standard for final judgments under R. 4:49-2, reconsideration here may be granted by the Court in the interests of justice. Id. at 134. Non-parties are incorrect in suggesting a requirement of palpable error; Lawson explicitly rejects that approach for

interlocutory orders. Id. Nevertheless, the Court, while empowered to revisit its interlocutory rulings, should do so primarily to correct a clear misapprehension of fact or law, or where new information emerges which could not have been reasonably presented before.

IV. PLAINTIFFS' ARGUMENTS AND OPPOSITION POSITIONS

Plaintiffs rest their request for reconsideration on the assertion that they did not and could not have exercising reasonable diligence, discovered that the resuscitation team's alleged negligence caused harm to their child until Dr. Goldsmith's June 2024 report. They invoke the discovery rule (see Lopez v. Swyer, 62 N.J. 267 (1973)) and urge the Court to apply Gallagher v. Burdette-Tomlin Med. Hosp., 318 N.J. Super. 485 (App. Div. 1999), aff'd, 163 N.J. 38 (2000) and Mancuso v. Neckles, 163 N.J. 26 (2000), and among others, to permit amendment.

They further contend that the non-party resuscitation team members' names, although present in the records, did not give notice of negligence, and that the defense's failure to amend its interrogatories to disclose a "neonatal theory" should result in tolling and relation back. According to Plaintiffs, Health Wise Women and Dr. Esiely owed them ongoing disclosure of all expert theories as they were being developed by their expert, Dr. Goldsmith, who had not yet been named or identified.

The non-parties' opposition, as well as the Defendant providers Health Wise Women and Dr. Esiely, forcefully rebut these claims, relying on New Jersey precedent holding that the discovery rule, fictitious party rule, and relation-back mechanism only apply where plaintiffs have exercised adequate diligence in timely investigating, pleading, and seeking to join responsible parties. The non-parties underscore the record as detailed below.

V. ANALYSIS

1. *Discovery Rule, Diligence, and Accrual*

As this Court previously reasoned, and as the non-parties carefully elaborate in both briefs and their sur-reply, the discovery rule does not permit plaintiffs to indefinitely defer suit or amendment based on the conditional prospect that an expert in a different specialty might someday opine as to a newly discovered theory of liability. See Gallagher v. Burdette-Tomlin Med. Hosp., 318 N.J. Super. 485, 496 (App. Div. 1999). The discovery rule requires only that the plaintiff be aware of facts

that would alert a reasonable person exercising ordinary diligence that a third party's conduct may have caused or contributed to the injury and that comment itself might possibly have been unreasonable or lacking in due care. See Savage v. Old Bridge-Sayreville Med. Grp., P.A., 134 N.J. 241, 252 (1993).

Here, the names, roles, and involvement of the resuscitation team members, including Dr. Wang, RN Feinblum, and RN Victoria, appeared repeatedly in both the typed and handwritten records dozens of times. Wang and Feinblum alone appear over 100 times; Victoria's name on two occasions.

Plaintiffs' counsel and their retained obstetrics expert, Dr. Tichenor, had full access to these records before suit and throughout discovery. Dr. Tichenor specifically commented on the lack of detail in the resuscitation documentation but declined to assign fault. See Tichenor Report at 3 ("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.... These actions are not recorded and either they were not created or were withheld from counsel").

Notably, he *did* identify the absent resuscitation record as "the greatest challenge to evaluate." This, as the non-parties contend and Savage compels, constitutes awareness of facts "suggesting the possibility of wrongdoing" such that reasonable diligence required further inquiry—such as consulting or retaining a neonatology expert or propounding more targeted discovery requests.

The non-parties' position is further strengthened by authority directly on point. In Matynska v. Fried, 175 N.J. 51 (2002), the Supreme Court held the fictitious party rule inapplicable where a provider's name appeared even a handful of times in the records and where the plaintiff could have ascertained the party's involvement by "an adequate investigation and preparation" before expiration of limitations. Id. at 53. Here, not only were the names in the records, but Plaintiffs' own expert flagged the resuscitation as a major unresolved area. By Plaintiffs' own account, no steps were taken—despite this awareness—to obtain a neonatology review, a situation rendering the claimed diligence insufficient under Matynska and the cases it follows.

Plaintiff's reliance on Gallagher and similar cases is unavailing. As the non-parties observe, the plaintiff in Gallagher had no knowledge (or even reason to suspect) that after-care physicians could have played a causal role until the

Defendant's expert first identified that theory years later in deposition—and there was "nothing else in the record warranting the conclusion that plaintiff should have made that linkage." 318 N.J. Super. at 496.

To the contrary, in this case, the absence of resuscitation details was crystalized by Plaintiffs' own expert as an area of factual ambiguity, and the Plaintiffs' timeline contains no discernable activity mobilized to address that ambiguity until the defense served Dr. Goldsmith's report years after suit.

As the non-parties note, Gallagher expressly rejected the notion that a limitations period runs only when an expert is found: "[W]here, within the limitations period, a plaintiff knows she has been injured and that her injury is due to the fault of another, she has a duty to act." Id. at 496.

Nor does Mancuso salvage Plaintiffs' position. See Mancuso v. Neckles, 163 N.J. 26. There, the Supreme Court excused belated accrual solely because the plaintiff, having her mammograms reviewed by an expert radiologist, was affirmatively told the films were properly interpreted. Here, however, Dr. Tichenor flagged the neonatal resuscitation as a problematic "challenge," and this information, supplemented by detailed records, was sufficient to spur a reasonably diligent plaintiff to investigate the actions of the resuscitation team. See Tichenor Report at 3.

2. *Non-Application of Relation-Back and Fictitious Party Doctrine*

The Court concludes, as before and as emphasized by non-parties, that neither the fictitious party rule, R. 4:26-4, nor relation back under R. 4:9-3 saves Plaintiffs' claims. These mechanisms require that the plaintiff be "ignorant of the true identity of a defendant" despite diligent inquiry. See Matynska, 175 N.J. at 53; Mears v. Sandoz Pharmaceuticals, Inc., 300 N.J. Super. 622 (App. Div. 1997). By their own admission, Plaintiffs possessed all the records, knew the specific personnel responsible, and, in fact, previously made fictitious party allegations to preserve the right to later name unknown actors. See Am. Compl. at 7.

The identities of the resuscitation team were not "unknown" in the sense the rule contemplates; rather, Plaintiffs made a tactical or strategic choice not to sue these providers or inquire in that direction—an omission that cannot now be remedied.

A. Readily Ascertainable Identities and Record Evidence

The argument by the non-parties, not to mention the facts of record, make clear that, from the inception of this action, the identities of the neonatal resuscitation team were not "unknown" in the sense intended by the fictitious party rule or the discovery rule. Names such as Dr. Wang, Nurse Feinblum, and Nurse Victoria were not buried or obscure. To the contrary, their names appeared in the medical chart repeatedly: Dr. Wang is named approximately 60 times, Feinblum about 50 times, and Victoria at least twice. Given such repeated mention in the medical record, any reasonably diligent review by Plaintiffs or their counsel would have revealed both the presence and the distinct role of these providers during the resuscitation attempt.

Moreover, the record demonstrates that had Plaintiffs undertaken ordinary steps—such as reviewing the medical record, or questioning the hospital or their own consultants—these names and their potential involvement would have readily come to light. This is analogous to the New Jersey Supreme Court's holding in Matynska v. Fried, 175 N.J. 51, which the non-parties repeatedly invoke, noting that failure to discover a party's role by "an adequate investigation and preparation" will bar later reliance on relation back or fictitious party relief.

B. The Consequence of Plaintiffs' Choices

Plaintiffs did not attempt to pursue any claim against the resuscitation team when suit was filed, nor did they conduct discovery about those team members once their own expert, Dr. Tichenor, flagged the missing resuscitation records as "the greatest challenge to evaluate." Whether this course of action was tactical or strategic or erroneous is beside the point. While the non-parties argue that the plain implication is that Plaintiffs made a conscious decision not to name or investigate these now-proposed defendants, despite factual cues demanding further inquiry, the Court need not go that far. What is clear is that the failure cannot be attributed to ignorance or reasonable difficulty.

As the non-parties unambiguously state, "Plaintiffs cannot simultaneously rely upon the fictitious party doctrine and the discovery rule to salvage their time-barred claim." Having made a deliberate choice, to not further investigate the role of known persons, whose conduct was of patent concern to their own expert, Plaintiffs cannot invoke doctrines designed to remedy situations where a diligent plaintiff truly cannot uncover the necessary facts.

C. Diligence Required by the Discovery Rule

The Court agrees with the non-parties that this case falls within the established line of New Jersey authority—including Savage v. Old Bridge-Sayreville Medical Group, 134 N.J. 241 (1993), Matynska v. Fried, and Lopez v. Swyer, 62 N.J. 267 (1973)—which collectively require plaintiffs to exercise "reasonable diligence" in identifying responsible parties.

If the record, the narrative of the events, and the expert's own report, all highlight a gap or problematic area—as Dr. Tichenor did when he stated that the resuscitation documentation was deficient—a diligent plaintiff would be expected to propound additional discovery, demand explanation, or consult an appropriately specialized expert (such as a neonatologist, in this case). Instead, Plaintiffs chose not to press that inquiry, despite their own expert noting the deficit, which forecloses later reliance on the discovery rule.

D. Distinguishing *Gallagher* and *Guichardo*

In response to Plaintiffs' argument that late-discovered expert opinions—such as Dr. Goldsmith's—should "reset" their limitations period pursuant to Gallagher v. Burdette-Tomlin Memorial Hospital, 318 N.J. Super. 485 (App. Div. 1999), and Guichardo v. Rubinfeld, 177 N.J. 45 (2003), the non-parties draw a sharp distinction. In those cases, the plaintiff was not only unaware but had no reason to even suspect the involvement or negligence of certain actors until late-breaking evidence or expert analysis surfaced.

That stands in stark contrast to the present record. Here, Plaintiffs knew their child had undergone resuscitation attempts by different providers, the problem of documentation was specifically flagged by their own OB/GYN consultant, and yet they did not investigate further or retain a neonatology expert. The plaintiffs in Gallagher and Guichardo were rewarded with equitable remedies because of their diligence in seeking answers, not inertia, or inattention, or oversight, or strategic calculation.

E. Incompatibility of Strategic Omission with Doctrinal Relief

The core of the non-parties' position is that the safety nets of the fictitious party rule and the discovery rule exist for plaintiffs who cannot learn the requisite facts despite genuine diligence, not for those who, through tactical or strategic choices, elect not to pursue certain theories or parties. This Court agrees. Plaintiffs'

omission to sue or inquire as to the resuscitation team falls in the latter category. As the non-parties argue, these doctrines cannot operate "simultaneously" to rescue a plaintiff "who was aware, or should have been aware, of a basis to act during the limitations period," but who failed to do so.

3. Defense Discovery Conduct and Timeliness of Dr. Goldsmith's Report

Plaintiffs' further argument that Defendants breached discovery duties by not amending interrogatory answers to anticipate and disclose their neonatal causation theory is entirely without merit. The opposing Defendants meticulously detail the relevant timeline: Plaintiffs' own extension requests led to Orders setting deadlines for defense expert reports as June 17, 2024. See Order of Mar. 1, 2024; Order of June 5, 2024. The Goldsmith report was served via formal cover letter and email to all counsel on June 17, 2024, in full compliance with these Orders. As Defendants accurately state, "Defendants did not commit any 'discovery violation' with regard to non-disclosure of theories or opinions prior to the deadline to produce such reports. Plaintiffs' effort to shift blame is contrary to the Court Rules and this court's Orders."

The Court further finds persuasive the defense position, rooted in R. 4:10-2(d)(1), that trial preparation and consulting expert communications are protected from disclosure and that the identity of non-testifying experts need not be disclosed unless and until a report is timely served pursuant to case management order or court rule. Plaintiff's claim that Defendants "developed a neonatal theory for years" but failed to amend is irrelevant absent an intervening obligation to serve an expert report or supplement responses under R. 4:17-7. On this record, Defendants met all such obligations.

Counsel for Dr. Esiely and Health Wise Women has thoroughly documented in their submissions that they strictly complied with all applicable court-ordered discovery deadlines and requirements with respect to expert disclosures, including the service of Dr. Goldsmith's neonatology report. Plaintiffs' assertion that there was any improper withholding or discovery violation regarding the Goldsmith opinion is unfounded.

First, the record reflects that discovery deadlines for expert reports were set by order of the Court. The March 1, 2024, Order established that "Defense expert reports [were] due on or before June 17, 2024," and the June 5, 2024, Consent Order

set the deadline for "defendants' liability expert reports as June 17, 2024, and the deadline for defendants' causation and damages expert reports as July 24, 2024."

On June 17, 2024, counsel for Dr. Esiely and Health Wise Women served their expert reports, including Dr. Goldsmith's, by both cover letter and email to all counsel of record in accordance with these prescribed deadlines. The letter and email demonstrate timely compliance.

Second, under R. 4:10-2(d)(1), communications between counsel and consulting or retained experts, including draft reports, are not discoverable and are protected as trial preparation materials. Only "facts and data considered by the expert in rendering the report" are subject to discovery, and parties are obligated to provide the actual "report" by the applicable deadline, not internal drafts or early opinions See also Pressler & Verniero, Current N.J. Court Rules, Comment 5.2 to R. 4:10-2(d)(1) (Gann).

Nothing in the rules or orders required earlier disclosure of Dr. Goldsmith's developing opinions. Defense counsel complied with the applicable court orders and timely produced defense expert reports. Defendants did not commit any "discovery violation" with regard to non-disclosure of theories or opinions prior to the deadline to produce such reports.

Accordingly, any suggestion by Plaintiffs that Dr. Esiely or his counsel failed to comply with discovery or are responsible for a delay in disclosing the Goldsmith neonatology opinion is controverted by the documentary record. Defendants met every deadline imposed by the Court, provided the Goldsmith report on the precise date ordered, and were under no obligation to update interrogatories or serve interim expert opinions prior to completion and timely service of their formal expert reports.

4. *Prejudice, the Need for Lopez Hearing, and Equitable Considerations*

The Court recognizes that reconsideration under R. 4:42-2 is "liberal and flexible." However, the underlying rationale for the statute of limitations remains to "stimulate litigants to diligently pursue their actions." Mancuso, 163 N.J. at 27. Here, the resuscitation team, the non-parties not previously in the case, would—if joined—be compelled, years after the events and after the close of party, fact, and expert discovery, to catch up with the entire litigation at an advanced stage, causing substantial prejudice. As the non-parties correctly state, "the prejudice that would befall the non-parties arising from Plaintiff's unconventionally late amendment of

Complaint cannot be cured simply by reopening discovery and granting an extension."

Nor does the present record require a Lopez hearing on discovery-rule application, as there is no genuine factual dispute about Plaintiffs' knowledge: their expert's report, the records, and counsel's certifications conclusively establish that Plaintiffs had all core facts to pursue or rule out claims against the resuscitation team well before the limitations period expired.[1]

VI. CONCLUSION

In sum, while the Court acknowledges the "liberal and flexible" reconsideration standard Plaintiffs cite, and recognizes the hardship of this tragic case, it remains clear that Plaintiffs were or should have been aware, by virtue of the available records and expert input, that the neonatal resuscitation team may have been involved in the infant's death in November 2019 and that an appropriately directed inquiry to a neonatology expert was required well before the belated service of the defense expert report in June of 2024. Both the letter and the spirit of New Jersey law— specifically Savage, Matynska, and Lopez—and the relevant facts, bar any invocation of the discovery rule, relation-back, or fictitious party doctrines here. Defense counsel met all deadlines and discovery obligations; Plaintiffs' decisions cannot now be recast as diligence in the face of unambiguous record evidence.

For the foregoing reasons, Plaintiffs' motion for reconsideration is **DENIED**.

A memorializing order will be filed simultaneously with this opinion. As was discussed at oral argument the case will be stayed to allow plaintiff to seek interlocutory appellate review. If same is not timely sought the parties shall alert this Court so that the balance of pending motions may be heard to the extent same are still viable in light of this order and opinion.

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[1] At oral argument on the denied motion to amend, Plaintiffs' counsel responded in the negative when asked whether a Lopez hearing should be held in light of the opposition to Plaintiff's motion. Only after Plaintiff's motion to amend was denied did the idea of such a hearing suddenly seem of value. The Court was dubious then and today is fully satisfied that no such hearing is required under these facts.