NEEDED; A PROCEDURAL ANTIBIOTIC TO CURE THE OPPORTUNISTIC, PERVASIVE INFECTION PLAGUING THE MEDICAL MALPRACTICE DOCKET: SUBSTANTIVE MOTIONS TO DISMISS CHALLENGING THE AFFIDAVIT OF MERIT

> "Our Rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip." State v. Williams, 184 N.J. 432, 442 (2005) (quoting Stone v. Township of Old Bridge, 11 N.J. 110, 125 (Clifford, J., dissenting)).

In 2015, in a letter to the Civil Practice Committee, citing fifteen (15) trial and appellate court decisions that year alone, I asked them to stop the needless slaughter, mayhem, and waste of judicial resources caused by an endless stream of motions to dismiss premised on alleged procedural defaults in Affidavits of Merit (hereinafter "AOM") in medical malpractice cases. In 2016, our Supreme Court has now also recognized the "procedural minefield" which the AOM requirements have spawned in a "veritable avalanche of litigation" which has "created a "new subset. . . of motion practice in professional liability litigation." Meehan v. Antonellis, 226 N.J. 216, 228 (2016) (citing nine (9) Supreme Court cases on the original statute and Supreme Court decisions since the legislature added enhanced requirements for AOM's in medical negligence cases). After reviewing the spread of this case-killing and judicial time wasting virus, let me suggest a simple procedural cure.

In 2015 alone, fourteen (14) Appellate Courts added thousands of hours of finite Appellate Judge time to the tens of thousands of judicial man and woman work hours already "spent" considering an epidemic of

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motions to dismiss, alleging fatal affidavit of merit missteps. Thus, ironically, a statute whose raison d'être was to save both judicial time and bottom line expense to malpractice carriers by screening out non-meritorious cases, wound up costing the system a huge unanticipated expense.

By 2014 two (2) perceptive, experienced Appellate Judges, Judge Sabatino and Judge Ashrafi, who endured repeated appellate reviews of successful, trial level attempts to use the dead letter of the law from the AOM statute as a scalpel, to kill, not cure, allegedly procedurally inadequate medical malpractice cases in their infancy, or even as late as trial, diagnosed the disease and suggested some cures. It's critical to note that in both opinions where they employed equitable relief to resuscitate valid cases, both defense lawyers had exercised their right to wait until after the expiration of the 120 day period allowed to cure errors in AOMs.[1]

As early as 2012, in a Concurring Opinion, Judge Ashrafi had already gone further and invited the Supreme Court to adopt a system wide solution that would inoculate the justice system against this pesky virus in all cases, rather than just apply an equitable Band-Aid on a case by case basis. Cornejo v. Kansagra, No. A-1572-09T2, 2012 N.J. Super. Unpub. LEXIS 1195, at *10 (App. Div. May 30, 2012) (justly criticizing the "'sideshows' of litigation in professional malpractice cases" concerning alleged failures in complying with the AOM requirements and suggesting that the Supreme Court reconsider its discretionary decision in Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 154 (2003), and adopt Justice Long's Concurring Opinion approach, now proven more prudent by cruel experience, and make AOM dismissals without prejudice, rather than with prejudice.

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[1] See Hill International Inc. v. Atlantic City Bd. of Educ., 438 N.J. Super. 562, 570 (App. Div. 2014), appeal dismissed, 224 N.J. 523 (2016) where defendant's Motion to Dismiss was filed not coincidentally, "(f)ourteen days after the 120-day maximum period for an AOM had passed," and no Ferreira Conference was held, and Williams v. Atlanticare Reg'l Med. Ctr., No. A-1093-13T2, 2014 N.J. Super. Unpub. LEXIS 2157, at *1 (App. Div. Sep. 3, 2014), where defense counsel answered after the Ferreira Conference and then waited five (5) months, just to be sure, before filing an objection to the AOM.

Although the Supreme Court has not taken up that challenge, in her Meehan Opinion, Judge Cuff did put a hard stop to the additional chaos and confusion caused by some Appellate Courts applying the enhanced requirements for an AOM in medical malpractice cases, under Section 41(a) of N.J.S.A. 2A:53A (hereinafter "Section 41(a)"), to all non-physician professional malpractice cases while other Appellate Courts only applied the most general requirements found in Section 27 of N.J.S.A. 2A:53A (hereinafter "Section 27").

Bactericidal vs Bacteriostatic

Bacteriostatic antibiotics inhibit the further growth of bacteria whereas bactericidal antibiotics kill the bacteria. There are at least two (2) bactericidal cures for this disease. One system-wide solution, or cure, would be, as Judge Ashrafi properly suggested, a more radical Supreme Court about- face from Ferreira. However, a more conservative yet equally effective rule-making approach can be achieved, which complies with Judge Cuff's directive to the civil practice committee to ensure that Ferreira conferences actually do "identify and resolve (AOM) issues." Meehan, supra, 226 N.J. At 241.

> THE SUPREME COURT CLEARLY HAS THE RIGHT AND THE RESPONSIBILITY TO ADOPT PROCEDURAL RULES RECOMMENDED BY THE CIVIL PRACTICE COMMITTEE GOVERNING THE APPLICATION OF N.J.S.A. 2A:53A-27 AND N.J.S.A. 2A:53A-41, TO INSURE THE ORDERLY PROCEDURAL RESOLUTION OF AOM CHALLENGES TO EXPERT WITNESS QUALIFICATIONS AT EARLY FERREIRA CONFERENCES, LATER MOTIONS TO DISMISS, AND STILL LATER, TRIAL MOTIONS TO BAR PARTICULAR EXPERTS.

Article VI, section 2, paragraph 3 of the New Jersey Constitution clearly gives the Supreme Court the power and responsibility of "making] rules governing the administration of all courts in the state. . . ." Ferreira v. Rancocas Assoc., 178 N.J. 144, 161 (2003). Since Winberry v. Salisbury, 5 N.J. 240 (1950) and previously in the new procedural rules after its decisions in Ferreira v. Rancocas Orthopedic Assoc., 178 N.J. 144 (2003) and Buck v. Henry, 207 N.J. 377 (2011), our Supreme Court and Civil Practice Committee has used that inherent power to try to serve the twin

legislative goals of early elimination of non- meritorious cases which does not "create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims." Ryan v. Renny, 203 N.J. 37 (2010).

In N.J.S.A. 2A:53A-41, Legislators who cannot know the ways and wherefores of civil procedure, wrote a rule which blended 2 different procedural functions which can be served by expert witnesses. They required some specialty qualifications in an Affidavit of Merit at the start of the case, but also envisioned potential testamentary exclusion or restriction of expert testimony on the standard of care as late as trial or perhaps as early as the time when expert reports are required, and a motion to bar or limit expert testimony can be filed. Those procedural station stops are fundamental to lawyers and judges civil practice, and can and should be regulated and controlled in ways which promote rather than impair a just civil procedure. Doing so serves rather than questions the legislative goals in the statute but does so in a way which also serves the administrative responsibilities of the judiciary.

I respectfully submit the following procedural rules as a fair and efficient procedural way for the Civil Practice committee to ensure that Ferreira Conferences fulfill the Supreme Court's mandate to identify and resolve most, if not all, AOM disputes once and for all, at the start of the case. In adopting such rules the Committee would of course also be serving the overriding purpose of all our Court Rules by providing "a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits." Ragusa v Lau, 119 N.J. 276, 283-284 (1990).

For easy reference, I paste the current section of Rule 4:5-3 dealing with answers in medical malpractice cases.

> **Rule 4:5-3. Answer; Defenses; Form of Denials**
>
> . . . [a] physician defending against a malpractice claim who admits to treating the plaintiff must include in his or her answer the field of medicine in which he or she specialized at that time, if any, and whether his or her treatment of the plaintiff involved that specialty.... (Emphasis added).

I propose the following separate rule on this issue, since our Supreme Court made it clear that it will no longer tolerate anyone playing "hide and seek" with the information necessary to "identify and resolve" true AOM issues at the start of the case.

Rule 4:5-3A. Answer in All Professional Malpractice cases

A physician defending against a malpractice claim who admits to treating the plaintiff must also include in his or her answer three (3) *SPECIFIC REPLIES UPON WHICH COURT AND COUNSEL WILL RELY AS BINDING ADMISSIONS*, subject to modification and relief under Section 3 below or Rule 4:5b-2 below:

1. What American Board of Medicine (ABOM) specialty or specialties or American Board of Osteopathic Medicine (ABOA) specialty or specialties he or she specialized in at that time, or whether he or she was instead a general practitioner, and;

2. What specialty or specialties Board Certification(s) if any, they held at that time, and;

3. Whether his or her treatment of the plaintiff involved that specialty or specialties, *AND IF NOT, WHAT SPECIALTY OR SPECIALTIES HE OR SHE MAINTAINS THE TREATMENT IN DISPUTE INVOLVED*

All other professionals who are defendants in any professional malpractice claim must also identify whatever specialty license of Board Certification they held at the time of the incident which forms the basis for the suit.

Failure to identify that information in the Answer will be a waiver of all AOM objections thereafter, unless good cause can be shown why such information was unable to be supplied, and counsel certifies he or she has just discovered such information and promptly disclosed it.

(Escape clause number one (1) for defense counsel in special circumstances such as Judge Ashrafi foresaw in Cornejo.)

I also propose the following new rule to "identify and resolve" the Court and Counsel's responsibilities for productive Ferreira Conferences:

NEW RULE- 4:5b-2 (Case Management; Conferences).

Affidavit of merit conferences for all Professional Malpractice cases:

A. Within ninety (90) days of the filing of the first answer a conference will be scheduled in all professional malpractice cases. For all affidavits of merit which have been served prior to that time, no less than 30 days prior to that conference, Plaintiff's counsel will supply defense counsel with a CV as of the approximate year of the disputed treatment. No less than fifteen (15) days prior to said conference, a defendant who has complied with Rule 4:5-3 must serve Court and Counsel with specific written objections, if any, to a served Affidavit of Merit. Failure to submit objections or waiver of an Affidavit of Merit conference will waive any Affidavit of Merit objections.

B. For Defendants joined after the Affidavit of Merit conference, Plaintiff(s)' counsel must also serve a copy of that affiants' CV contemporaneous to the dates of the disputed treatment, within fifteen (15) days of service of the Affidavit of Merit, followed by written objections or waiver by defense counsel within fifteen (15) days thereafter.

C. In the event a defendant claims that later discovery uncovers a deficiency in an expert's qualifications to give an Affidavit of Merit, or some other deficiency with the Affidavit of Merit, the opposing party may file a motion after the time frames imposed by this rule. However, they must make a showing that the basis for that motion could not have been known to them with good faith efforts

during the required time frames prior to the Affidavit of Merit conference. If the court makes that finding and finds the expert unqualified to give an Affidavit of Merit, the Judge deciding the motion may grant equitable relief from dismissal in the form of discovery extensions or whatever other means the court deems necessary to permit the proponent of the Affidavit of Merit a thirty (30) day extension to secure a replacement expert to supply an adequate affidavit. (Escape clause number two (2) for special circumstances).

D. All motions under Subsection C herein must be filed no later than sixty (60) days before the first discovery end date, or they are thereafter waived.

Section 41's enhanced requirements for expert qualifications are Janus like. They not only set the standard for the AOM, but also require the same qualifications for all expert standard of care witnesses, failing which such experts can be barred from testifying at trial. That has led to cases where motions to bar experts have been filed and granted as late as trial, or where trials were delayed to allow replacement experts. See Camacho-Gardner v. Rubenstein, HUD-L-6541-10, 2013 N.J. Super. Unpub. LEXIS 2013, *29 (Law Div. Sept. 19, 2013) (equitably resolving a later challenge to a patient's experts qualifications just before trial pursuant to Section 41).

While the waiver rules in Rule 4:5-3 and Rule 4:5-2b would eliminate such stale attacks against experts who already provided an AOM and were not challenged, it would not cure such attacks on other experts, nor attacks by Plaintiff's counsel on defense experts. So, as an addition to Rule 4:24-2, Motions Required to be Made During Discovery Period, I propose a similar clear rule which will apply to both plaintiffs and defense counsel advancing, or defending, against what are often case dispositive attacks on expert testimony in professional malpractice actions where expert testimony is so dispositive. The new section to Rule 4:24-2 would read:

"For all medical malpractice cases, the Rules for the Affidavit of Merit equally set requirements for all expert testimony. Along with their report, the proponents of all expert witnesses must serve a CV for each expert

which is approximately contemporaneous with the date of the care at issue. Any objection to experts based on Section 41 grounds shall be made by formal motion no later than sixty (60) days prior to the first discovery end date or are thereafter waived.

Confronted with an avalanche of harmful human error in medical practice, medical literature over the last ten (10) years has emphasized that systems remedies are often far better than the fiction that professionals will always perform reasonably and correctly. E.g. Mark R. Chassin and Jerod M. Loeb, *High Reliability Health Care: Getting There from Here*, 91 Milbank Quarterly 419, reprinted by The Joint Commission at http://www.jointcommission.org/high-reliability_health_care_getting_there_from_here.

The rules I propose are a type of system remedy which would preserve meritorious cases as New Jersey has always done. At the same time, in an age when we never have enough Judges, these simple and straightforward procedural rules avoid endless and repetitive disputes over years of litigation that could instead be resolved at the beginning of the case, or for testimonial scope objections while discovery was still ongoing and before they were thrust upon trial judges as nasty surprises. Both approaches would save thousands of hours of judicial time that we can't afford to waste and would instead allow more complex medical malpractice cases to be tried, when that is necessary to do justice.

To paraphrase Andrew Marvell, "were there but world enough and time" the current default which wastes judicial resources "would be no crime." However, as it is, when all this "expense of spirit in a waste of shame" could be avoided by these fair, definitive, and self-executing rules, there is no reason not to adopt them. See also Holmes, J. on "interstitial" legislation by Judges – "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." See Southern Pacific v. Jensen, 244 U.S. 205, 221(1917) (Holmes, J., dissenting) and The Common Law, p.32,36,269. Interstitial is a scientific medical term: interstitial fluids surround tissue cells and bathe them in a solution of nutrients and other chemicals . Such fluid is not static, but is continually being refreshed by the blood capillaries and re-collected by lymphatic capillaries. It's time for the Civil Practice Committee and the Supreme Court following them, to refresh and revive

the original, essential intent of the Affidavit of Merit statute. The simplest, least intrusive way to do that would be by adopting the procedural safeguards outlined here. Doing so would best serve our legislature's intent to eliminate burdensome costs and time to the judiciary, as well as to malpractice insurers from truly non- meritorious cases, while at the same time neither drowning our Courts with unnecessary, time consuming motions nor throwing out the baby (the just case) with the bathwater (the unjust malpractice case.)

I, DENNIS M. DONNELLY, of full age, hereby certify that:

1. I am the attorney for the plaintiff in the within cause of action and am familiar with the facts and circumstances.
2. I am the attorney who represented Harry Bell from the filing of the original Complaint on September 7, 2012 through his death on October 6, 2015, and then filed an Amended Complaint in the name of his estate through a court appointed administrator on September 12, 2016. I make this motion in opposition to defendant, Arsalan Malik's motion to bar Plaintiff's expert Dr. John Stern as an expert at trial.
3. As set forth in more detail below, now, nineteen(19) days before trial, defense counsel for defendant, Arsalan Malik seeks to reverse his stipulation to the Court and myself in 2012 that Dr. Stern was qualified to give an Affidavit of Merit against Dr. Malik.
4. As also set forth in more detail below, defense counsel also seeks to reverse four (4) years of him telling me and the Court by his inaction that he continued to accept my expert, Dr. John Stern, as qualified to testify against Dr. Malik, because for four (4) years he gave no notice of any objection to his qualifications to do so.

5. As also explained in more detail below, such an eve of trial reversal can only be explained by either changed circumstances in the case or changed circumstances because of a last minute change of understanding by defense counsel.
6. This complex medical negligence case has been pending for four (4) years, however, due to a recent settlement, 2 of the three (3) groups of defendants (a neurosurgeon, and infectious disease defendants (ID defendants) have been dismissed leaving Dr. Arsalan Malik and his employer, Advance Hospital Care. (both hereinafter referred to as Defendant Malik) as the sole remaining defendants.
7. The case was fixed for trial on November 7, 2016 and had several prior trial dates but Defense counsel for Dr. Malik requested and received an adjournment of trial until December 5, 2016.
8. Last Wednesday, on November 9, 2016 I appeared for a settlement conference at which time the neurosurgeon and infectious disease defendants, both insured by the same carrier, settled the claims as to them, but defendant Malik continued a no-pay position. Part of the terms of that settlement were that the ID defendants were released as well without any additional payment and that the neurosurgeon understood that he might well be needed to

testify at trial and would be available and that the neurosurgeon's internal medicine expert, Dr. Mark Graham, would also be willing and available to give the same opinions against Dr. Malik he had already given in his report and defended in cross examination by defendant Malik's counsel, accept that now based on the changed circumstances Plaintiff would be calling him.

9. Prior to that settlement conference, on November 8th, I supplied all counsel with my witness list for trial which based on the changed circumstances of the settlement with the neurosurgeon, included Dr. Mark Graham, an expert in internal medicine named by the neurosurgeon defendant, Dr. Chimenti, who had rendered a report finding deviations by Dr. Malik and appeared for deposition by all parties including Dr. Malik.

10. A few days ago on November 15, 2016, Mr. Smith of Mr. Combs's firm advised me that defendant Malik's carrier maintained a no-pay position.

11. Two days later, and 19 days before the adjourned trial, defense counsel faxed me this motion to bar plaintiff's expert, Dr. John Stern, who is board certified both in internal medicine and in the internal medicine sub-specialty of infectious diseases.

Defense counsel’s binding representations to the Court and counsel over 4 years that he had accepted and had no objections to Dr. Stern’s qualifications to testify against Dr. Malik

12. More than four (4) years ago, Dr. Stern had supplied a certified Affidavit of likely Merit against Dr. Malik as well as the ID defendants dated September 6, 2012. **Exhibit 1**

13. That affidavit had notified all Defendants that Dr Stern’s practice was limited to “internal medicine and infectious disease.”

14. Defense counsel and his entire firm have been leading medical malpractice defense lawyers for over 40 years and in November of 2012, he was advised that the Court was scheduling a Ferreira Conference, which is a procedural safeguard to allow all sides to tell the Court and counsel if there are alleged Affidavit of Merit problems or deficiencies.

15. In reply, defense counsel for Dr. Malik, along with all other defense counsel advised that they had no Affidavit of Merit objections and a Ferreira conference was not required. See **Exhibit 2**, my confirming letter of

January 2, 2013, memorializing all counsel's waiver of the conference.

16. Relying on Mr. Combs as well as all counsel's waiver, Judge Happas entered a Case Management Order noting that Affidavit of Merit issues such as objections had already been resolved by counsel. **Exhibit 3**

If, after receiving Dr. Stern's Affidavit, defense counsel knew that as of September, 2012 their existed a valid objection to Dr. Stern's qualifications, he would have made it.

17. Defense counsel has been a leading malpractice defense attorney for over 40 years and would know that Ferreira conferences are designed to allow counsel to lodge any valid objections to the sufficiency of an affiant's qualifications at the inception of the case, when a Court and Counsel may deal with them.

18. Mr. Combs then spent four (4) years defending this case and reviewed Dr. Sterns original report supplied with his CV as well on 09/22/2014, (**Exhibit 4**), then reviewed his supplemental report of May 12, 2015 (**Exhibit 5)** and then personally took his deposition on August 03, 2015 (Deposition is not attached) and thereafter appeared for multiple trial calls; and during all that time never advised the Court or Counsel that he had a later epiphany

or vision of the qualification defense against Dr Sterns his associate only now claims.

19. Therefore, he, like me and even like the two (2)experienced Appellate Court Judges who decided the unreported Appellate Parker decision of 2013, must have been unaware until November of 2016 that anyone could validly take the position that a Board certified internal medicine doctor who also had sub-specialty certification in infectious disease, also given by the American Board of Internal Medicine, could be barred from doing an affidavit and /or testifying against a Board certified doctor of internal medicine. See the unpublished Parker opinion which Mr. Combs less experienced associate omitted from his moving papers attached as **Exhibit 6**.

20. Dr. Malik's moving papers failed to comply with R1:36-3 and cited one unpublished opinion in the Carr case to support his motion but failed to certify that he was unaware of any contrary opinion.

21. Complying with that Rule, I have supplied the Court with Judge Sabatino and Fasciale's opinion in the Parker case in 2013 which expressly found that a board certified infectious disease doctor is permitted to testify and supply an Affidavit of Merit against a Board certified internal medicine defendant and thus is directly contrary

to the later 2015 Carr decision. I further certify that there are no other unreported decisions on this precise issue that I am aware of, and that prior to Mr. Smith's brief, I was unaware of the unreported Carr decision which was decided in June of 2015.

22. The only likely conclusion from the facts above where even two (2) Appellate Courts could totally disagree on applying the Affidavit of Merit statute on this exact issue is that Mr. Combs, as I did, sincerely and in good faith believed there was no issue or objection to Dr. Stern testifying and only recently, perhaps came across the Carr decision. That is the only logical explanation for his inaction all these years during which his inaction represented to Counsel and the Court and his carrier and client that he was unaware of this purported defense.

23. If that is the case, then he can have no objection to the Court equitably resolving his objection in a way which is clearly just, given defense counsel's likely changed circumstances or awareness and complete reversal of four (4) years of representation just some 19 days before trial accompanying a motion which is in essence to dismiss.

24. Judge Sabatino, who also authored the Parker case had an extensive discussion in a leading reported case *Hill Intern . , Inc* . v . *Atlantic City Bd* . of *Educ* ., 438 N. J

. Super . 562 lApp . Div . 2014) **leave to appeal granted , 221 N. J . 283 (2015)** on what equitable steps to take, even where a defendant makes a timely as opposed to eve of trial "same- specialty" objection and does not waive a Ferriera conference:

> *We remand to allow Cobra a reasonable opportunity to procure a suitable AOM from a qualified architect to substitute for the AOMs that it improvidently secured from Beach. We provide that opportunity for two equitable reasons. For one thing, our precedential opinion today might not have been readily predicted by counsel, given the unsettled nature of the "like-licensed" issue. See, e.g., Shamrock Lacrosse, supra, 416 N.J. Super. at 28-29 (similarly affording relief to a plaintiff where the law had been murky about the need for an AOM). In addition, the lack of a Ferreira conference may well have contributed to Cobra's failure to supply a substitute AOM in a timely fashion.*

25. Here, we have empirical proof of the unsettled, not to be predicted nature of defense counsel's "same-specialty" objection since they did not make it for four (4) years and two (2) Appellate Courts that considered the exact issue raised here reached completely different results.

26. Here also, we have a much more egregious unfairness in allowing this objection and barring all deviation testimony because the defendant seeking that relief waived a Ferreira conference which is when he should have raised this issue, and then continued to not raise the issue with Court and Counsel for four (4) years.

27. We also have a much more eloquent resolution as follows: accepting the fact that the defendant Malik can make this motion based on changed circumstances or awareness then his counsel can then have no objection to me and the Court eliminating any appeal ground and proceeding with trial as scheduled with the following remedy.

28. The defendant neurosurgeon had also produced an expert report blaming Dr. Malik and asserting that he deviated and caused this injury from a Board Certified, card carrying doctor of internal medicine, Mark Graham. Dr. Graham's report (**Exhibit 7**) and full deposition testimony **Exhibit 8**, are attached.

29. As Your Honor can see, Dr. Malik's counsel fully and aggressively cross-examined Dr. Graham at deposition, and yet Dr. Graham gave a strong critique of Dr. Malik and all sides were aware of that.

30. If Mr. Combs had moved earlier and realized earlier that he wanted to try to bar Dr. Stern, then my simple

response would have been to name Dr. Graham as a testifying expert for me as well just to be safe.

31. Under our Supreme Court's decision in **Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286** 895 A.2d 405 (2006), no party to litigation has "anything resembling a proprietary right" to any witness… and absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance."

32. Defense counsel is not only charged with knowledge of the Fitzgerald case but also can claim no true prejudice or surprise since Dr. Graham testified at deposition about what his opinion was, was subjected to vigorous cross-examination, and told all sides that his opinion would be the same whatever side called him as a witness. **Exhibit 8-Deposition, page 8, line 21 to page 9, line 13.**

33. Here, where Mr. Combs's only persuasive argument is that there are later changed circumstances, e.g., a last minute change in his awareness of some possible objection to Dr. Stern's testimony, which support his motion to bar; he has no standing to oppose a Court's ruling that similar changed circumstances must likewise support Plaintiff's right to substitute Dr. Graham for Dr. Stern as Plaintiff's testifying liability witness.

34. Put another way, having failed to advise Court and Counsel for four (4) years of any objection to Dr. Stern, and thus depriving plaintiff of an earlier opportunity to replace him, he has no fair basis to object to the Court resolving not only any possible trial dispute but any appeal issue with this elegant and justified substitution, which also allows trial to proceed.

35. Defendant Malik has filed a dispositive motion 19 days before a trial date and there is substantial doubt that he has the right to have it heard. However, I have addressed its merits and an Appellate Court might say they should have been addressed. Therefore, I respectfully submit it should be resolved on its merits by my proposed form of Order.

36. Nineteen (19) days before trial, defense counsel has insisted that only another Board Certified internal medicine doctor can testify against Dr. Malik. It just so happens, Dr Mark Graham has already given an expert report and been deposed in this case and is willing and able to appear, and the plaintiff is willing to limit his liability testimony to Dr. Graham so as not to delay the trial of this ancient case. Therefore, the Court can and should give defense counsel a ruling he asked for, even if not in the exact package he wanted.

I certify that the foregoing statements made by me are true. I am aware that if any are willfully false, I am subject to punishment.

Date: November 21, 2016

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November 21, 2016

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RE: BELL vs. SOMERSET MEDICAL CENTER, et al.
Docket No.: MID-L-6100-12
Our File No.: C120043

Dear Your Honor:

Please accept this letter in lieu of a more formal brief in opposition to defendant's motion to bar plaintiff's expert, Dr. John Stern and in support of plaintiff's cross-motion to limit plaintiff's expert testimony to Dr. Mark Graham at trial of the above within matter.

Defendant Malik, the sole remaining defendant whose carrier has advised me that they take a "no-pay" position, moves to bar Plaintiff's expert nineteen (19) days prior to a fixed trial date of December 5, 2016. Although his motion is procedurally infirm, because NJ law favors decisions on the merits over procedural "gotchas," I reply to the merits and waive any procedural technicalities. *State v. Emmett,* 108 N.J.Super. 322, 325 (App. Div. 1970)"The rules are to be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. They are *a means to justice, and not an end in themselves;* their purpose is to provide for a just determination of every proceeding." (Emphasis supplied) I do so

because whether this motion is heard before trial or at trial, I respectfully submit that the circumstances here support a simple and fair "merits" resolution of Defendant's last minute motion of the type that New Jersey law always favors in a way that is fair and will allow trial to proceed without any delay.

As set forth in greater detail in my certification, after four (4) years of not objecting to his testimony, defense counsel for Dr. Malik now submits that a change in circumstances requires the Court to bar Dr. John Stern, the sole liability expert Plaintiff had previously named against Dr. Malik from testifying. He bases that motion on the fact that Dr. Stern is board certified in both internal medicine and infectious diseases and therefore does not have board certification completely identical to Dr. Malik, who is only board certified in internal medicine. If that motion were granted, Plaintiff's case against Dr, Malik would be dismissed since expert testimony is required to establish malpractice. However, circumstances have also changed for the Plaintiff's case in the following three (3) regards:

1. Another co-defendant who also named and supplied expert liability report from Dr. Mark Graham against Dr. Malik has now settled with the Plaintiff.
2. As part of that settlement, Plaintiff has already determined that Dr. Graham, who is Board Certified only in internal medicine is willing to provide the same testimony for the Plaintiff at trial.
3. For those reasons, Plaintiff has already provided Dr. Malik's counsel with a witness list that includes Dr. Graham, who having supplied a report and giving deposition is free to testify for any side in the dispute testimony under our Supreme Court's Fitzgerald case.

   Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 895 A.2d 405 (2006),

In order to eliminate defense counsel's objection, and prevent any delay of the trial and any future issue over the sufficiency of Plaintiff's expert liability testimony, Plaintiff agrees to not call Dr. Stern and further substitutes Dr. Graham as his sole testifying liability expert at trial. I would have taken the same practical approach anyway if defense counsel had objected earlier, so having delayed doing so till now, defense counsel can have no real or meritorious objection to that any possible trial or later appeal dispute over this issue.

Respectfully Submitted,

DENNIS M. DONNELLY

DMD/tc
cc: Middlesex County-Motion Clerk- Via Lawyers Service
Michael J. Smith, Esq.-Via Email & Via Lawyers Service
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HARRY BELL, Plaintiff, vs. SOMERSET MEDICAL CENTER, SMC MEDICAL GROUP, JAMES M. CHIMENTI, M.D., ROBERT SEGAL, M.,D., DAVID J. HERMAN, M.,D., ARSALAN MALIK, M.D., NEUROLOGICAL ASSOCIATES OF CENTRAL JERSEY, P.A., NEUROSURGICAL ASSOCIATES AT PARK AVENUE, P.A., I.D. ASSOCIATES, P.A., I.D. CARE, P.A. INFECTIOUS DISEASE ASSOCIATES OF CENTRAL N.J., P.A., ADVANCE HOSPITAL CARE AT SOMERSET MEDICAL CENTER, ADVANCE HOSPITAL CARE, LLC., et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO. MID L 6100-12 Civil Action O R D E R BARRING PLAINTIFF'S EXPERT JOHN J. STERN, M.D.

THIS MATTER having been opened to the Court on the application of Giblin Combs & Schwartz, attorneys for the defendants, Arsalan Malik, M.D. and Advance Hospital Care, LLC, upon notice to the attorney for the plaintiff and all counsel of record, for entry of an Order barring John J. Stern, M.D. from testifying at the time of trial and the Court having considered

the moving papers and any papers submitted in opposition, and good cause having been shown;

IT IS ON this 1st day of December, 2016,

ORDERED that plaintiff's expert, John J. Stern, M.D. be and is hereby barred from offering testimony at the time of trial of this matter; and, it is further,

ORDERED that a copy of this Order shall be served upon all counsel within seven (7) days of the date hereof.

J.S.C.

DOUGLAS K. WOLFSON, J.S.C.

X Answering papers have been filed.

____No answering papers have been filed.

* Defendant's Motion to bar Plaintiff's expert, John J. Stern, M.D. is DENIED. Plaintiff's Cross-motion to permit Dr. Mark Graham to testify is GRANTED. Plaintiff may call either Dr. Stern or Dr. Graham, in accordance with Plaintiff's own litigation strategy, consistent with the Rules of Evidence and Court Rules, as determined in the discretion of the trial judge

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WE HAVE MOVED INTO OUR NEWLY CONSTRUCTED OFFICES.
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November 30, 2016

Douglas Wolfson, JSC
Middlesex County Superior court
56 Paterson Street
New Brunswick, NJ 08902

Re: Bell vs. Somerset Medical Center, et al.
Docket No.: MID-L-6100-12
Motion Returnable: December 2, 2016
Our File No.: C120043

Dear Judge Wolfson:

Moving counsel poses 2 objections to my cross motion to be permitted to substitute Dr. Graham as my liability expert that can each be answered in one sentence, as follows:

1. There is no uncertainty whether Dr. Graham would appear: he has agreed to appear and give the same testimony he would have given if called by the defendant neurosurgeon, and he has been sent his required non-refundable fee to insure his availability for trial testimony.

2. The issue of Dr. Graham testifying can't be postponed until trial because if defense counsel's motion to bar the infectious disease expert which counsel did not object to for 4 years is granted, then Plaintiff's case will be dismissed for lack of expert testimony and there will be no trial.

Since counsel also raises issues which spill over into my cross motion, I will also briefly answer them here.

Despite my prior certification's cautionary advice that he failed to comply with R.1:36-3 regarding unpublished decisions, defense counsel now triples down on that error:

1. He again fails to certify that there are not contrary unpublished opinions.

2. He fails to perceive or if he did perceive it, fails to disclose that the *Palmer* Appellate panel reviewed the case of a pro-se plaintiff convict who sued multiple dental providers with 2 unqualified experts and offered a nurse expert as qualified to testify against a dentist on an informed consent theory, so there was no uncertainty and no possible claim that the dentist's failure to object earlier mislead counsel or the court. *Palmer* page 4-6.

3. Defense counsel fails, as he is required to do, to point out additional unreported cases which are analogous to this case and distinguishable and at odds with the unreported *Palmer* decision and thus support Plaintiff's cross motion. See, e.g., *Kim v. Ahn*, No. A-2285-11T1, 2013 WL 3956346 (App. Div. Aug. 2, 2013), *certif. denied*, 216 N.J. 366 (2013); *Williams v. AtlantiCare Reg'l Med. Ctr.*, No. A-1093-13T2, 2014 WL 4328205 (App. Div. Sept. 3, 2014); *Camacho-Gardner v. Rubenstein*, No. HUD-L-6541-10, 2013 WL 5385067 (Law Div. Sept. 19, 2).

Although defense counsel does not wish the Court to see them, excerpts from those 3 other cases are all in accord with the *Hill* decision already cited and fully support Plaintiff's cross motion here. I hereby certify I am unaware of any truly contrary Appellate rulings, and respectfully submit that all these cases fully support the relief Plaintiff seeks here:

> *Kim v Ahn* at page 7-8:
>
> We cannot determine whether the fatal deficiency in plaintiff's evidence can be cured but there exists a substantial probability that the opportunity to timely cure such deficiency was lost in reliance upon Ahn's apparent acceptance of Ackley's qualifications. As we have noted, the court was also deprived of the opportunity to address this issue at any time prior to trial, let alone early in the process.
>
> We are satisfied that application of the doctrine of equitable estoppel is appropriate to bar Ahn's motion to dismiss the complaint against him.
>
> *Williams v. AtlantiCare Reg'l Med. Ctr.*, No. A-1093-13T2, 2014 WL 4328205 (App. Div. Sept. 3, 2014)
> The true issue here is whether plaintiff has a qualified expert to proceed to trial against Zerbo. Like those cases where an expert had to be replaced at the eleventh hour because of unforeseen developments in the case, *see, e.g., Klimko v. Rose*, 84 N.J. 496,

> 502 (1980); *Brun v. Cardoso*, 390 N.J. Super. 409, 419-20 (App. Div. 2006); *Nadel v. Bergamo*, 160 N.J. Super. 213, 217-18 (App. Div. 1978), the ruling favorable to Zerbo just before trial was unforeseen by plaintiff and should not also deprive her of a witness and undercut her case at the last minute. Plaintiff should have the opportunity to seek a new expert. The trial court was correct in granting such a right by its initial written decision and order. Indeed, we adopt the reasoning of the trial court's thoughtful decision issued on August 9, 2013. 352

Defense counsel also misconstrues or fails to understand what happened here. I make no claim that the senior partner who handled this case deceived me or the Court. Instead, his inaction for 4 years is empirical evidence that the objection his associate raises 19 days before trial was not clear to Mr. Combs nor to me, and further support for resolving this unclear issue with the relief Plaintiff seeks. Of course, here equitable relief is already present in the case and does not delay the trial.

For all those reasons, Plaintiff respectfully submits that his cross motion should be granted, and in doing so, the Court will also fairly resolve defense counsel's tardy objections to Dr. Stern's testifying on standard of care.

Respectfully,

DENNIS M. DONNELLY
DMD@njciviljustice.com

DMD/jw
Via Fax and Lawyers Service
cc: Michael J. Smith, Esq. (Via Fax and Lawyers Service)