Superior Court of New Jersey

Appellate Division

Docket No. A-003269-23 T4

ESTATE OF NAFIZIA RUGBEER, by CHRISTOPHER RUGBEER, Administrator, and CHRISTOPHER RUGBEER, Administrator of the ESTATE OF NAFIZIA RUGBEER, *Plaintiff-Appellant,* vs. KAMRAN KHAZAEI, M.D., KIEL KELLEY, C.R.N.A., NOUVELLE CONFIDENCE, THE CENTER FOR COSMETIC LASER AND REJUVENATION, JOHN DOES 1-10, JANE DOES 1-10 *(For Continuation of Caption See Inside Cover)*	:	CIVIL ACTION ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY Docket No. UNN-L-1600-23 Sat Below: HON. JOHN M. DEITCH, J.S.C.

BRIEF FOR *AMICI CURIAE* THE AMERICAN MEDICAL ASSOCIATION AND THE MEDICAL SOCIETY OF NEW JERSEY

FLYNN WATTS, LLC
Attorneys for proposed Amicus Curiae the American Medical Association and the Medical Society of New Jersey
One Gatehall Drive, Suite 103
Parsippany, New Jersey 07054
(973) 695-8370
mmoroney@flynnwattslaw.com

On the Brief:
MICHAEL A. MORONEY, ESQ.
ID# 029721986

Date Submitted: November 22, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (334362)

(representing presently unknown health care providers or health care providers with regard to which negligence is not presently suspected, including but not limited to doctors, surgeons, emergency medicine doctors, anesthesiologists, hospitalists, physician assistants, nurses, nurse practitioners, nurse anesthetists, technicians, and others); and ABC CORPS 1-10 (representing presently unknown facilities or entities who rendered care to the plaintiff who deviated from the standard of care or0 facilities or entities with regard to which negligence is not presently suspected),	:
Defendants-Respondents.	:

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PRELIMINARY STATEMENT

The Medical Society of New Jersey ("MSNJ") and the American Medical Association ("AMA"), as *amicus curiae,* respectfully urge the Court to uphold the Trial Court's initial rulings as set forth in the Court's March 22, 2024 Order, and reverse and vacate the Trial Court's subsequent May 14, 2024 Order and the rulings entered *sua sponte* therein.

STATEMENT OF INTEREST OF AMICI CURIAE

The Amici MSNJ and the AMA file this brief as it is in the interest of physicians and the provision of health care to the public in general, that no exceptions be made to carve out claims asserting medical malpractice with respect to surgical procedures, and/or wrongful death claims when reviewing and ruling upon the enforceability of otherwise valid and enforceable agreements entered into between a physician and a patient.

The MSNJ is organized as a not-for-profit entity existing under the laws of the State of New Jersey. Representing more than 8,000 physicians practicing in New Jersey, MSNJ was founded in 1766 and is the oldest professional society in the United States. In representing all medical disciplines, MSNJ advocates for the rights of patients and physicians alike, seeking the delivery

of the highest quality medical care. The MSNJ's mission is "[t]o promote the betterment of the public health and the science and the art of medicine, to enlighten public opinion in regard to the problems of medicine, and to safeguard the rights of the practitioners of medicine."

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including New Jersey.

The MSNJ and the AMA submit this brief on their own behalf and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The participation of amici curiae is particularly appropriate in cases with "broad implications," Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth

Twp., 80 N.J. 6, 18 (1976), or in cases of "general public interest." Casey v. Male, 63 N.J. Super. 255, 259 (Essex Cnty. 1960).

This case raises important issues concerning the creation of exceptions for procedures in the medical specialty of surgery and wrongful death-based claims when determining whether to enforce a statutorily permissible arbitration agreement between a physician and a patient.

The MSNJ and the AMA take no position on the merits of the specific underlying allegations of professional negligence between the parties that have given rise to this appeal. However, the MSNJ and the AMA believe they can provide this Court with a perspective distinct from either of the parties. The Amici pursue filing this brief as it is in the best interests of physicians and patients, as well as to the provision of health care generally, that the provisions of the New Jersey Arbitration Act as enacted by the State legislature be adhered to and no exceptions thereto be made for surgical or wrongful death-based claims.

PROCEDURAL HISTORY

Plaintiff, the Estate of Nafizia Rugbeer, filed a complaint on May 18, 2023, asserting medical malpractice against the defendants, Kamran Khazaei, MD, Kiel Kelly, CRNA and the Center for Cosmetic Laser and Rejuvenation.

(Da 005-026). Specifically, plaintiff asserted both a survival action pursuant to N.J.S.A. 2A:15–3, and a wrongful death action pursuant to N.J.S.A. 2A:31–1. (Da007-009). In response, the defendants collectively filed a motion on July 19, 2023, to stay the litigation and instead have the case submitted to arbitration pursuant to an agreement previously executed by the parties. (Da001-Da026).

The motion was heard by the Honorable John D. Hudak, J.S.C., who entered an Order on September 8, 2023, staying the case for 30 days to permit the parties to engage in limited discovery relating to the formation of the arbitration agreement only. (Da028). Judge Hudak subsequently entered a second Order on March 22, 2024, which dismissed Count Two of plaintiff's Complaint asserting the wrongful death claim without prejudice and granted the defendants' motion to stay the litigation in favor of arbitration as to the survival claim asserted in Count One of plaintiff's Complaint. (Da070-Da079).

Plaintiff had filed a motion on March 21, 2024, seeking leave to file an amended complaint to correct a pleading deficiency with respect to the wrongful death claim asserted in Count Two of plaintiff's Complaint. (Da094-Da102). That motion was heard by the Honorable John M. Deitch, J.S.C., who issued an Order on May 14, 2024, which granted plaintiff's motion permitting plaintiff leave to file an amended complaint, but also reversed and vacated

Judge Hudak's March 22, 2024 Order and instead ordered, *sua sponte*, that the entire matter be restored to the trial calendar. (Da080).

The defendants filed a Motion for Reconsideration on June 3, 2024. The motion seeking reconsideration was granted by the Court; however upon reconsideration the Court ordered that the May 14, 2024 Order remain intact. (Da162-Da163).

STATEMENT OF FACTS

The MSNJ and the AMA rely upon the Statement of Facts included in the Brief submitted on behalf of the Defendants/ Petitioners.

LEGAL ARGUMENT

The New Jersey Legislature enacted the New Jersey Arbitration Act, ("NJAA" or "Act"), N.J.S.A. 2A:23B-1, et. seq., allowing for the enforcement of valid arbitration agreements in the patient-physician context in furtherance of the civil justice system's goal of resolving parties' disputes fairly and equitably. The Act allows redress for claims by those who enter into patient-physician pre-dispute arbitration agreements and adequately protects the rights of patients and physicians alike. The instant matter falls squarely within the legislative mandates of the Arbitration statute and interpretive case law.

The NJAA applies to matters subject to pre-dispute arbitration agreements. *See* Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., No. A-0683-11T1, 2013 N.J. Super. Unpub. WL 4080947 (App. Div. 2013). Physicians and patients entering into such agreements have a right to rely upon the enforcement of the contractual provisions to resolve issues involving patient care. The court found no inherent harm to the patient-physician relationship that flows from parties agreeing to substitute one forum for another in dealing with future claims. Moore, at 6. The current law adequately provides an appropriate balancing test setting forth the factors to be considered when determining enforceability of a pre-dispute arbitration agreement. Protecting the interest of the contracting parties is of the utmost

concern in resolving questions of enforceability and the test set forth in Rudbart v. New Jersey Water Supply Comm'n., 127 N.J. 344 (1992) provides the mechanism by which such questions are to be resolved, and which was relied upon by the court in Moore. To allow for specific exceptions such as those sought by the respondent here, i.e., for surgical cases and wrongful death matters, would contravene the legislative intent of the NJAA. Such exceptions would resultantly interfere with the provision of patient care within the broader healthcare system.

The patient-physician relationship is of paramount importance to care providers. In addition to providing medical care to patients, physicians are impacted by the influence medical malpractice claims have on their professional behavior and, to an extent, their well-being. Arbitration agreements allow for the fair and adequate redress of patient claims while at the same time serving to address physician concerns that impact the overall provision of patient care. The welfare of the public at large is served by upholding the NJAA without the creation of exceptions. While Petitioner and Amicus Curiae New Jersey Association of Justice assert that circumstances that justify straying from the language and intent of the legislature in enacting the statute, to do so would erode and serve to nullify its purpose. As it applies to the patient-physician relationship, exceptions based on specialty or type of

claim asserted will serve to negatively impact the safe provision of care to the detriment of patients and, by extension, the public's safety.

I. THE COURT SHOULD NOT CREATE EXCEPTIONS TO THE NEW JERSEY ARBITRATION ACT BY EXCLUDING SURGICAL AND WRONGFUL DEATH MEDICAL NEGLIGENCE CLAIMS FROM THE ARBITRATION PROCESS

The New Jersey Arbitration Act was enacted to continue the longstanding policy in the State of favoring arbitration as a means to resolve disputes. EPIX Holding Corp. v. Marsh & McLennan Cos., Inc., 410 N.J. Super 453, 471 n.7 (App. Div. 2009). New Jersey Courts have upheld the use of pre-dispute arbitration agreements in the context of the patient-physician relationship and the provision of patient care. Moore at 6. Per the State legislature's intent in enacting the Act, "[t]he primary purpose of the bill is to advance arbitration as a desirable alternative to litigation and to clarify arbitration procedures in light of developments of the law in this area". N.J.S.A 2A-23B-1 et. seq. Amicus Curiae New Jersey Association for Justice seeks to have this court create exclusions from the mandates of the Act which are specialty/treatment specific and based on a defined cause of action alleged. This would be in contravention of the legislative intent and would serve to

nullify the very benefits provided by the legislation that ensure the proper provision of patient care and protect the safety of the public.

As enacted, the legislature specifically included an exception to the provisions of the Act. Section 2A:23B-2(c) states "[this] act governs an agreement to arbitrate whenever made with the exception of an arbitration between an employer and a duly elected representative of employees under a collective bargaining agreement or a collectively negotiated agreement." This was the only exception included by the legislature in the language of the statute. Most notably, the Act does not set forth any other exceptions nor any language allowing for the creation of same in the future. If the legislature intended to allow other exceptions, they would have been included in the wording of the Act. N.J.S.A.1:1-1 provides that when interpreting statutes, "the words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given the generally accepted meaning, according to the approved usage of the language." Clearly, the language of the Act, when analyzed applying the aforementioned general rule of construction, precludes the creation of exceptions based on professional specialties and types of claims. As such, exceptions from the enforcement of arbitration agreements based on a surgical treatment or a wrongful death cause

of action are impermissible and contrary to public policy in favor of enforcement.

Public policy considerations in favor of enforcement of pre-dispute arbitration agreements include benefits to both the patient and the practice of medicine. Patients may benefit from pre-dispute arbitration agreements in a variety of ways. Arbitration can resolve issues more expeditiously than court proceedings which take years to proceed to trial. The financial burden on the patient is potentially reduced by expedient resolution of claims. Arbitration is cost effective as it is typically less expensive to undertake. Patient confidentiality is preserved which effectuates protection of patient privacy and keeps sensitive medical data out of the public record.

The benefits of claim resolution by way of arbitration agreements are significant to the practice of medicine and contribute to the betterment of quality medical care. Medical malpractice litigation has serious ramifications for physicians both professionally and personally. The time and effort doctors expend participating in professional negligence litigation takes physicians away from the practice of medicine and precludes them from focusing on patient care. Studies have shown the many physicians practice defensive medicine in order to avoid protracted litigation. Not only does this potentially subject individual patients to increased referrals, test and procedures, with

attendant risks, but also has very real cost implications for the provision of healthcare to the public at large.[1] The very purpose of the NJAA is to provide a means to resolve disputes, including all negligence claims resulting from medical treatment in any area of medicine. The statute as enacted affords due process to all parties and provides for the fair resolution of all claims, involving all specialties. Pre-dispute arbitration agreements in the context of medical care are enforceable, without exceptions, and serve the greater public good and the betterment of patient care.

[1] Kass, J. S., & Rose, R. V. (2016); Medical Malpractice Reform—Historical Approaches, Alternative Models, and Communication and Resolution Programs. *American Medical Association Journal of Ethics*, 18(3), 299-310.

CONCLUSION

For the foregoing reasons, Amici respectfully request the Court uphold the Trial Court's initial rulings as set forth in the Court's March 22, 2024 Order, and reverse and vacate the Trial Court's subsequent May 14, 2024 Order and the rulings entered *sua sponte* therein.

Respectfully submitted,

/s/ Michael A. Moroney
Michael A. Moroney
FLYNN WATTS, LLC
1 Gatehall Drive, Suite 103
Parsippany, New Jersey 07054
Tel.: (973) 695-8370
mmoroney@flynnwattslaw.com
Attorneys for Amici Curiae Medical Society of New Jersey and American Medical Association

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