NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4948-04T3

ESTATE OF PHUOC FAZALDIN, a/k/a KATHY FAZALDIN, Deceased, by RICHARD FAZALDIN, Executor of the ESTATE OF PHUOC FAZALDIN and RICHARD FAZALDIN, MEERAFZAL FAZALDIN a/k/a MEER FAZALDIN, STEVEN FAZALDIN, FARIDAN FAZALDIN-WATKINS, a/k/a FARAH FAZALDIN-WITKINS, and ELAINE FAZALDIN, Individually,

Plaintiffs-Appellants,

v.

ENGLEWOOD HOSPITAL & MEDICAL CENTER, ROBERT STENSON, JR., M.D., ESTATE OF ROBERT STENSON, JR., M.D., RICHARD SALZER, M.D., ARNOLD J. FRIEDMAN, M.D., FAITH FRIEDEN, M.D., DANIEL KANE, M.D., and S. HEDLEY, M.D.,

Defendants,

and

BETH ISRAEL MEDICAL CENTER and ALLAN JACOBS, M.D.,

Defendants-Respondents.

Argued November 9, 2006 - Decided July 26, 2007

Before Judges Stern, Collester and Sabatino.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, L-3572-02.

Dennis M. Donnelly argued the cause for appellants (Blume, Goldfaden, Berkowitz, Donnelly, Fried & Forte, attorneys; Mr. Donnelly and Harris S. Feldman, on the brief).

Peter L. Korn argued the cause for respondents (McDonough, Korn & Eichhorn, attorneys; Mr. Korn and Karen M. Lerner, of counsel and on the brief).

PER CURIAM

Phuoc (also known as "Kathy") Fazaldin died as the result of excessive bleeding during the course of a radical hysterectomy performed upon her by a surgeon at Englewood Hospital & Medical Center ("Englewood Hospital" or "Englewood") in May 2000. Her estate and survivors sued the surgeon, Englewood Hospital and various other defendants, including respondents Beth Israel Medical Center ("Beth Israel") and Allan Jacobs, M.D., former chief of obstetrics and gynecology at Beth Israel.[1] Plaintiffs' theory against Beth Israel and Dr. Jacobs was that those defendants had improperly failed to disclose the surgeon's poor performance while he was employed at Beth Israel before he severed that relationship and joined the attending staff at Englewood.

[1] For sake of clarity, we shall refer to Beth Israel and Dr. Jacobs as "respondents" to distinguish them from the settling and dismissed defendants.

After plaintiffs settled with the other defendants before the trial, a jury verdict was rendered, finding that Beth Israel had negligently misrepresented the surgeon's record to Englewood Hospital, but that the misrepresentation had not been a proximate cause of Kathy Fazaldin's death. The jury found no negligence, however, on the part of Beth Israel or Dr. Jacobs.

We remand the matter for an evidentiary hearing, pursuant to N.J.R.E. 104, because of potential errors in the jury instructions that could have had the substantial capacity to produce an unsound result.

I.

On May 22, 2000, Robert Stenson, Jr.,[2] a gynecological oncologist, performed an exploratory laparotomy and radical abdominal hysterectomy at Englewood Hospital on fifty-two-year-old Kathy Fazaldin, who had been diagnosed with cervical cancer. After fifteen hours of surgery, Fazaldin bled to death on the operating table. The parties stipulated that before her fatal operation, Fazaldin had an eighty-five percent or greater chance of attaining a complete cure of cancer and a ninety-nine percent chance of surviving the surgery. They also stipulated that Dr. Stenson was negligent in the manner that he performed the surgery and that his negligence was a cause of Fazaldin's death.

[2] Dr. Stenson died prior to trial.

Beth Israel is a teaching hospital in Manhattan. At the times in question, Dr. Jacobs, a gynecological oncologist, was the chair of its Department of Obstetrics and Gynecology ("ob/gyn"). He also administered the teaching, residency and medical student programs and was a full clinical professor of ob/gyn at Mount Sinai College of Medicine, which was affiliated with Beth Israel. In 1993, Dr. Jacobs recruited Dr. Stenson to work at Beth Israel on clinical and educational assignments.

Meanwhile, Englewood Hospital in 1993 wanted to build its own gynecological oncology department. It consequently entered into an affiliation agreement with Beth Israel. Dr. Stenson thereby became an affiliate member of Englewood Hospital, and he performed surgeries at both Englewood and Beth Israel.

In 1995 Dr. Stenson adopted a new surgical philosophy and started doing "aggressive" surgery in palliative cases, which Dr. Jacobs thought was not necessary. Dr. Stenson started to be very late for surgery and often failed to attend his rounds with residents. By 1996, Dr. Stenson's operating times were getting longer. According to Dr. Jacobs, he was doing "absolutely nothing academically," indicating that he was not attempting any research.

Dr. Jacobs then noticed billing issues with Dr. Stenson that he perceived were the result of either "irresponsibility or

negligence." Their relationship became strained when Dr. Jacobs began to suspect that Dr. Stenson was diverting patients with "lower paying" insurance to Dr. Jacobs and retaining the patients who had better insurance for himself.

In mid-1996 Dr. Jacobs instituted a "four-hour rule" for his department, specifying that if a procedure was not "closing" within four hours, the doctor had to request assistance from another doctor. The new rule applied to all of the ob/gyns, including Dr. Jacobs himself, and continued after Dr. Stenson eventually left Beth Israel.

By the summer of 1996, Dr. Jacobs wanted to terminate Dr. Stenson, regarding him, in Dr. Jacobs's words, as an "administrative nightmare." However, because Dr. Stenson was African-American, Dr. Jacobs feared that he would file a discrimination lawsuit if he were terminated. Therefore, Dr. Jacobs spent the next several months documenting Dr. Stenson's problems. He started that process in August 1996 by writing a critical memorandum to Dr. Stenson's file and then a letter to Dr. Stenson outlining his inadequacies.

In December 1996, Dr. Jacobs consulted with Beth Israel's general counsel about his concerns relating to Dr. Stenson. As a result, Dr. Jacobs wrote a draft letter detailing Dr. Stenson's inadequacies, telling him that if he did not resign,

he would be terminated from his full-time staff position. Dr. Jacobs circulated the draft among members of the hospital administration.

The draft letter to Dr. Stenson documented the following perceived deficiencies: (1) he failed to see patients on time, frequently leaving them waiting for one to two hours past their scheduled appointment time; (2) his productivity in the office was unsatisfactory because he took too much time seeing patients; (3) his operative performance was "questionable," reflecting a lack of skill; (4) he was consistently late by an hour to the operating room and failed to advise anyone of the delay; (5) he exercised "poor judgment" in his "choice of surgical indications," and performed operations without a clear-cut clinical goal; (6) his academic performance was unsatisfactory, given that he twice failed the written examination for the certification in gynecological oncology and he did not write any manuscripts or research proposals; (7) he frequently did not show up to make rounds when he was the gynecology attending physician; (8) his contribution to the administration of the department was negative, as he did not come to meetings; and (9) he engaged in "totally unacceptable" billing practices by submitting multiple bills for one procedure.

Dr. Jacobs's draft letter stipulated that Dr. Stenson's continued employment would be contingent upon his immediate improvement in all of the identified deficient areas. In that vein, the letter detailed various procedures that Dr. Stenson would henceforth have to follow.

After circulating the draft letter within the hospital administration, Dr. Jacobs met with Dr. Stenson on December 23, 1996. In that meeting, Dr. Jacobs told Dr. Stenson that he wanted him to resign, and if he did not, he would be fired. However, the firing would only be from Dr. Stenson's full-time position on the paid staff of Beth Israel, as Dr. Jacobs still intended to allow Dr. Stenson to maintain his clinical privileges. Dr. Stenson asked for time to think about his decision, and Dr. Jacobs gave him until January 2, 1997 to do so.

Dr. Stenson soon got back to Dr. Jacobs and told him that he would not resign. Therefore, Dr. Jacobs sent Dr. Stenson a letter on January 6, 1997, outlining the deficiencies in Stenson's performance, consistent with the items listed in his earlier draft letter. The January 6 letter stated that Dr. Stenson's deficiencies precluded his "continuance on the full-time staff," and declared his employment terminated, effective January 21, 1997. The letter added that the termination did not

affect Dr. Stenson's clinical privileges, but warned that Dr. Stenson had to comply with certain conditions or face termination of those privileges as well. One of the specified conditions was that Dr. Stenson's surgeries thereafter would be authorized "only on cases with appropriate clinical indications," and would be monitored, concurrently and retrospectively, by Dr. Jacobs and by his designees.

After receiving the January 6 letter, Dr. Stenson asked if Dr. Jacobs would rescind it and instead allow him to resign. Dr. Jacobs agreed. Consequently, Dr. Stenson thereafter submitted a letter of resignation from the Beth Israel department of ob/gyn, effective March 15, 1997, relinquishing both his academic and clinical responsibilities.

The terms of Dr. Stenson's resignation were specifically negotiated with Beth Israel. The resulting formal severance agreement included a provision that neither party would "publicly disparage" the other. Also, as part of the agreement, Dr. Jacobs would write a letter of recommendation for Dr. Stenson. Dr. Jacobs was willing to do so as long as the letter was accurate. In that bargained-for recommendation letter, Dr. Jacobs wrote that Dr. Stenson was "an indefatigable worker" who was "extremely conscientious in the care of his patients," and who "provide[d] meticulous attention to the details of their

clinical care." The letter further stated that Dr. Stenson remained "in good standing" through his departure date. Dr. Jacobs avoided making any negative comments in the letter of reference.

Concurrently, Dr. Stenson applied to Englewood Hospital to change his status from an affiliate staff member to an attending staff member. Arnold Friedman, M.D., who was then the chief of the ob/gyn department at Englewood Hospital, had the responsibility of recommending or not recommending doctors for privileges to the hospital's Credentials Committee. Dr. Friedman had known Dr. Stenson and Dr. Jacobs for the previous four years though Beth Israel's affiliation with Englewood Hospital.

Dr. Jacobs recalled that between 1993 and 1997, he had spoken with Dr. Friedman about Dr. Stenson's lateness, surgical speed, operative indications, and his negative impact on the residency program. Dr. Jacobs particularly remembered telling Dr. Friedman of an incident in 1996, in which Dr. Jacobs felt that Dr. Stenson should not have operated on an elderly, malnourished patient.

The proofs reflect that no one from Englewood Hospital contacted Dr. Jacobs or Beth Israel in 1997 for a reference when Dr. Stenson applied to Englewood Hospital for attending status.

However, Dr. Jacobs did recall telling Dr. Friedman around that time that Dr. Stenson's leaving Beth Israel "may not have been entirely voluntary on his part." Even so, Dr. Friedman was never made specifically aware that Beth Israel had threatened to terminate Dr. Stenson. Dr. Friedman further testified that he was not informed of any billing concerns regarding Dr. Stenson at Beth Israel.

Dr. Friedman did admit to knowing that Dr. Stenson's leaving Beth Israel was "not on his own terms" and that he had the "idea that something . . . was going on even without hearing any specifics." However, Dr. Friedman never saw the rescinded January 6, 1997 termination letter. Nor did he see the letter of recommendation that Dr. Jacobs had written pursuant to Dr. Stenson's severance negotiations.

In retrospect, Dr. Friedman testified that even if he had been told that Dr. Stenson had been fired from his faculty position at Beth Israel, he still would have recommended that Dr. Stenson be hired at Englewood. Dr. Friedman claimed that Dr. Jacobs's concerns at Beth Israel with Dr. Stenson's academic deficiencies would have been inconsequential, given that Englewood was not an academic hospital.

Dr. Friedman also was not made aware of any restrictions on Dr. Stenson's surgeries at Beth Israel, including the so-called

"four-hour rule." He testified that if Dr. Jacobs had told him of the concerns with the length of Dr. Stenson's surgeries, which had prompted the rule, Dr. Friedman still would not have been influenced by it in hiring Dr. Stenson. Dr. Friedman noted that he was not convinced that prolonged surgeries were significant factors in increased morbidity. Dr. Friedman was, however, aware prior to Dr. Stenson's hiring at Englewood that Dr. Stenson was a "notoriously slow surgeon." Beyond that reputation, however, Dr. Friedman claimed that he was not aware of any other clinical concerns about Dr. Stenson.

In April 1997, Englewood Hospital inquired about Dr. Stenson with the National Practitioners Data Bank ("NPDB" or the "national data bank"). There was no adverse information about Dr. Stenson on file in the NPDB. This signaled to Englewood Hospital, among other things, that there were no malpractice judgments against Dr. Stenson, no discipline against him by any state board of medical examiners, no adverse professional review actions, and no resignations in the face of investigations by any hospital. According to the testimony of the hospital's general counsel, Englewood Hospital relied on the favorable results of the NPDB inquiry.

After considering Dr. Stenson's application, Dr. Friedman recommended Dr. Stenson for a provisional associate position at

Englewood. Even after eventually learning of the contents of Dr. Jacobs' termination letter and the full circumstances behind Dr. Stenson's departure from Beth Israel, Dr. Friedman insisted in his trial testimony that such adverse information "would not have made a difference because I already knew enough of i[t] that I would have still gone ahead and made the decision on my own experience . . . ."

However, Daniel Kane, M.D., the Chief Executive Officer (CEO) of Englewood Hospital, testified quite differently. Dr. Kane contended that without his own personal support as CEO, the prospect of any physician being appointed to the medical staff was "de minimis." Sharply contradicting the categorical assertions of Dr. Friedman, Dr. Kane testified that had he known about the negative concerns raised in the January 6, 1997 letter and the actual circumstances of Dr. Stenson's leaving Beth Israel, he would not have allowed Dr. Stenson to be hired.

As it turned out, Dr. Stenson became a regular attending staff member at Englewood in the spring of 1997. Thereafter, Dr. Friedman developed his own concerns with Dr. Stenson's performance. He raised those concerns with the Englewood Hospital Ob/Gyn Peer Review Committee (the "Peer Review Committee"). Consequently, in August 1998 the Peer Review Committee requested an outside expert, Jeffery Lin, M.D., of the

George Washington University Medical Center, to review three of Dr. Stenson's cases at Englewood. Dr. Lin concluded from his review that the three cases reflected "overly extensive procedures utilized for symptom palliation [and] unnecessary small procedures performed for little benefit." Dr. Lin noted that one of Dr. Stenson's operations that he reviewed had lasted some twenty-seven hours.

In January 1999, the Peer Review Committee examined a case in which Dr. Stenson's patient had bled to death six hours after surgery. As a result of that examination, the Peer Review Committee recommended an ongoing monitoring of all of Dr. Stenson's proposed cases, as well as a review of a sampling of his actual past cases by a gynecological oncology specialist. Such review was performed by David Schonholz, M.D., of the Mount Sinai School of Medicine.

Dr. Schonholz issued his report to Englewood Hospital in March 1999. The report determined that out of the eleven cases he reviewed, four contained departures of care and management by Dr. Stenson. In a confidential addendum he sent to Dr. Friedman, Dr. Schonholz recommended a review of one hundred of Dr. Stenson's cases. He suggested such a more extensive review in order to set a "departure standard." Such a standard would gauge whether Dr. Stenson had performed excessive procedures

based solely on his personal opinions and not warranted by anticipated surgical results. Despite that recommendation, no such extensive review of Dr. Stenson's cases at Englewood was thereafter undertaken.

Dr. Friedman did, however, convey to Dr. Stenson his ongoing concerns about the poor quality of his work. These concerns echoed concerns which had been raised by Dr. Jacobs at Beth Israel. In April 12, 1999, Dr. Friedman wrote, in response to a letter from Dr. Stenson:

> I told you that many of your surgeries are excessively radical, that many of your patients undergo multiple surgeries, the benefits of which are not clear, and that you have repeatedly demonstrated exceedingly poor judgment in performing prolonged and overly aggressive procedures on patients whose condition[s] clearly warranted only simple palliation. I told you that we cannot allow you to continue this type of practice at this Medical Center. I informed you that you must demonstrate better judgment if you want to continue caring for these patients here. We discussed this in great detail at our two meetings last July, at which time you assured me you would monitor your own practice to eliminate these problem cases. Since July, however, these issues continue to arise.

Nonetheless, no corrective action was subsequently taken against Dr. Stenson at Englewood. However, Dr. Kane, the hospital's CEO, conceded in his testimony that by May 1999, Englewood should have taken corrective action.

Dr. Friedman left Englewood Hospital in September 1999 and, coincidentally, assumed Dr. Jacobs's supervisory position at Beth Israel. He was replaced at Englewood Hospital as ob/gyn department chair by Faith Frieden, M.D. That same month, Dr. Frieden took part in a peer review process in which Dr. Stenson was asked to explain his handling of three more of his cases. That review, however, did not lead to any adverse action.

Dr. Stenson's provisional status at Englewood Hospital was set to expire at the end of June 2000. This meant that Englewood either had to promote him to associate attending physician, or discharge him. Anticipating that deadline, Dr. Frieden sent a letter to Beth Israel on March 27, 2000, specifically directing it to Dr. Friedman, asking for information regarding Dr. Stenson's 1997 departure from Beth Israel. She requested a response by April 7, 2000. Dr. Frieden did not get an immediate response from Beth Israel, which indicated to her that there may have been issues with Dr. Stenson and his former employer. Nevertheless, on May 17, 2000, without having received a response[3] from Beth Israel, Dr. Frieden

[3] In a belated response to her March 27, 2000 letter, Dr. Frieden received a letter dated June 12, 2000 from Beth Israel's counsel. Counsel's letter advised that, under the terms of Beth Israel's agreement with Dr. Stenson, Beth Israel could not supply any more information, except the recommendation letter (continued)

recommended to the Credentials Committee of Englewood that Dr. Stenson be promoted to associate attending staff.

Five days later, Dr. Stenson operated on Kathy Fazaldin. She died on May 22, 2000.

On April 25, 2002, a ten-count wrongful death and survivorship action was filed by Kathy Fazaldin's estate, her husband Meerafzal, her son Richard, her son Steven, and her two daughters, Faridan and Elaine, against Englewood Hospital, Dr. Stenson, Dr. Friedman, Dr. Frieden and Dr. Kane. The initial complaint also named as defendants Richard Salzer, M.D., who was president of the medical staff at Englewood and a Dr. "S. Hedley," a resident who had assisted Dr. Stenson in the decedent's surgery. As originally pleaded, the complaint alleged medical malpractice against Dr. Stenson. It also alleged administrative negligence against Englewood Hospital and its administrators, for failing to supervise and take appropriate actions to oversee or remove Dr. Stenson from its medical staff.

Subsequently, plaintiffs amended the complaint in various respects. First, plaintiffs revised the complaint to name Dr.

(continued)
from Dr. Jacobs. We discuss the implications of that letter in Part III of our analysis.

Stenson's professional corporation, Robert Stenson, Jr., P.C., as a defendant. The complaint was again amended, after Dr. Stenson's death, to include his estate as a defendant.

Most significantly for purpose of this appeal, plaintiffs were granted leave to file a third amended complaint in June 2003, after receiving certain interrogatory answers from Englewood Hospital. The interrogatory answers contended that Beth Israel and Dr. Jacobs had not disclosed to Englewood Hospital Dr. Stenson's poor performance reviews at Beth Israel, and that those co-defendants should not have favorably recommended Dr. Stenson to the Englewood staff. Plaintiffs amended their complaint to include such allegations of negligence and/or misrepresentation against Dr. Jacobs and Beth Israel.

After discovery, Beth Israel and Dr. Jacobs moved for summary judgment. The trial court granted the motion in part, dismissing plaintiffs' specific claims against respondents for consumer fraud and emotional distress. The court denied, however, respondents' motion to dismiss the remaining common-law claims. The court also denied respondents' pretrial application to strike plaintiffs' claims against them for punitive damages.

Shortly before trial began, plaintiffs settled their claims against Dr. Stenson, Englewood Hospital and Dr. Friedman.

Plaintiffs also voluntarily dismissed their claims against Dr. Frieden, Dr. Kane and Dr. Hedley with prejudice. The case was tried against the remaining defendants, respondents Beth Israel and Dr. Jacobs, on the theory that they had wrongfully failed to advise Englewood of problems they had with Dr. Stenson while he worked at Beth Israel, and had not divulged to Englewood that Dr. Stenson had left there not voluntarily, but under the threat of investigation and termination.

The trial began in March 2005 and consumed over three weeks. On the liability issues, plaintiffs presented a host of fact witnesses, including Dr. Kane, Dr. Friedman, Dr. Frieden, and several other persons who had been at either Beth Israel or Englewood Hospital during the events at issue.

Plaintiffs also presented the testimony of a medical expert, Martin D. Merry, M.D. Dr. Merry criticized the actions and inactions of Beth Israel and Dr. Jacobs in numerous respects, particularly as to their failures to alert Englewood Hospital and others of Dr. Stenson's performance deficiencies. Dr. Merry included in his criticisms respondents' failure to report those deficiencies to the New York State medical licensing authorities, citing a New York statute requiring such a report.

In sum, Dr. Merry opined that Kathy Fazaldin's death could have been prevented if respondents had honestly reported Dr. Stenson's long-standing problems. Respondents likewise presented several fact witnesses on the liability issues, principally including Dr. Jacobs himself. However, respondents presented no competing expert testimony.

During the charge conference, counsel and the trial judge devoted considerable efforts to finalizing the instructions to the jury concerning respondents' failure to report Dr. Stenson to medical databanks. The judge ultimately fashioned such a charge, over several objections by plaintiff's counsel, which comprises a key aspect of the present appeal.

Among other things, the instructions precluded the jury from considering whether respondents' failure to report Dr. Stenson's deficiencies, and the circumstances of his separation from Beth Israel, affected issues of proximate causation. Additionally, the charge removed from the jury's consideration any liability predicated upon respondents' failure to report Dr. Stenson to the NPDB, although it allowed the jury to make use of what it had learned concerning the NPDB on other unspecified issues. The charge also prohibited the jury from considering the conduct of Beth Israel and Dr. Jacobs after 1999 in

determining whether they were negligent in failing to communicate negative information about Dr. Stenson.

The case went to the jury in April 2005. While the jury was deliberating, the trial judge granted respondents' renewed motion to dismiss the punitive damages claims against them.

Following deliberations, the jury returned a verdict finding that Beth Israel had not been negligent. However, the jury determined that Beth Israel had "performed a negligent misrepresentation," but that the negligent misrepresentation was not a proximate cause of Kathy Fazaldin's death. The jury found no negligence on the part of Dr. Jacobs. Accordingly, the court entered a judgment in favor of the respondents.

Plaintiffs appeal, and raise the following issues[4]:

> POINT I
>
> THE TRIAL JUDGE'S FAILURE TO: (1) TAKE JUDICIAL NOTICE OF A CONTROLLING FEDERAL STATUTE AND A PARALLEL NEW YORK STATUTE, AND (2) PROPERLY CHARGE THE JURY, ERRONEOUSLY BARRED CASE DETERMINATIVE ISSUES FROM JURY CONSIDERATION.
>
> POINT II
>
> THE TRIAL JUDGE ERRONEOUSLY CHARGED THE JURY TO NOT CONSIDER ACTS BY THE DEFENDANTS AFTER

[4] For the sake of brevity, we have omitted plaintiffs' lengthy point subheadings.

1999 IN DETERMINING IF THE DEFENDANTS WERE NEGLIGENT IN FAILING TO COMMUNICATE NEGATIVE FACTS ABOUT DR. STENSON.

POINT III

THE TRIAL JUDGE IMPROPERLY GRANTED THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE PLAINTIFF[S'] PUNITIVE DAMAGES CLAIMS BASED ON A MISREADING OF THE APPLICABLE LAW.

We discuss these points in turn.

II.

We first consider the jury instructions, and the related issue of whether the trial judge should have taken judicial notice, pursuant to N.J.R.E. 201, that respondents, as alleged by plaintiffs, violated their obligations to report Dr. Stenson's deficiencies to both the national and state medical databanks.

The Health Care Quality Improvement Act of 1986 (the "HCQIA"), 42 U.S.C.A. §§ 11101-11152, federally created the NPDB to address the "national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." 42 U.S.C.A. § 11101(2). The HCQIA requires covered entities to report to the NPDB adverse information about medical practioners such as medical malpractice payments, sanctions by a state board of medical

examiners, and certain professional review actions. 42 U.S.C.A. §§ 11131, 11132, 11133. The information must be reported to either the NPDB or to the state's medical licensing board. 45 C.F.R. § 60.4. Information in the NPDB may be accessed only by a defined set of interested persons and entities, and is not available to the general public. 45 C.F.R. § 60.11.

Hospitals are required to obtain information on file with the NPDB when a physician applies for a position on its medical staff or for clinical privileges at the hospital, and every two years thereafter. See 42 U.S.C.A. § 11135(a); 45 C.F.R. § 60.10(a)(1) and (2). Hospitals that do not request such information, as required, are "presumed to have knowledge of any information reported to the [NPDB] concerning th[e] physician." 45 C.F.R. § 60.10(b); see also 42 U.S.C.A. § 11135(b). A hospital may rely on the information provided to the NPDB, and is not held liable for obtaining false information, unless the hospital actually knew that the information was false. See 42 U.S.C.A. § 11135(c); 45 C.F.R. § 60.10(c).

Likewise, by statute and associated regulations, the State of New York operates its own medical practitioner reporting system. The state system parallels, and in various respects intersects with, the federal databank maintained in the NPDB. See New York Public Health Law §§ 2800 to 2820; N.Y. Comp. Codes

R. & Regs. Tit. 10 § 405.8 (2007). The New York system requires certain adverse information concerning physicians who practice in that State to be filed with the New York Department of Health (the "New York DOH"). See, e.g., Martex v. Brooklyn Hosp. Ctr., 9 A.D.3d 41, 779 N.Y.S.2d 82 (App. Div. 2004) (describing the New York reporting mechanism). The databank information, while generally confidential, must be shared by the reporting hospital upon request of a subsequent hospital that is considering the physician's credentials. See N.Y. Pub. Health Law §2805-k(2) and (4). Such disclosures are privileged, so long as they are made in good faith. Id. at § 2805-k(4). These reporting laws advance important public policies "as a means to maintain a high standard of health care." Rotwein v. Sunharbor Manor Residential Health Care Facility, 181 Misc. 2d 847, 858, 695 N.Y.S.2d 477, 486 (Sup. Ct. 1999).

The pivotal section of New York's reporting statutes for purposes of this case is Section 2803-e. That provision reads, in pertinent part, as follows:

> 1. (a) Hospitals and other facilities approved pursuant to this article shall make a report or cause a report to be made within thirty days of the occurrence of any of the following: the suspension, restriction, termination or curtailment of the training, employment, association or professional privileges or the denial of the certification of completion of training of an individual licensed pursuant to the

> provisions of title eight of the education law or of a medical resident with such facility for reasons related in any way to alleged mental or physical impairment, incompetence, malpractice or misconduct or impairment of patient safety or welfare; the voluntary or involuntary resignation or withdrawal of association or of privileges with such facility to avoid the imposition of disciplinary measures; or the receipt of information which indicates that any professional licensee or medical resident has been convicted of a crime; the denial of staff privileges to a physician if the reasons stated for such denial are related to alleged mental or physical impairment, incompetence, malpractice, misconduct or impairment of patient safety or welfare.
>
> [N.Y. Pub. Health Law § 2803-e(1)(a) (emphasis added).]

Plaintiffs' expert Dr. Merry invoked this section in his expert report, and also in his testimony at trial. Dr. Merry opined that, as a New York hospital, Beth Israel was obligated to have reported Dr. Stenson's deficiencies, and the circumstances surrounding his withdrawal from Beth Israel, under Section 2803-e.

In particular, plaintiffs contend that the January 6, 1997 letter from Dr. Jacobs to Dr. Stenson, as well as Dr. Stenson's subsequent decision to resign rather than adhere to the restrictions on his continued practice specified in that letter, were matters that had to be reported to the New York DOH under Section 2803-e. Plaintiffs also contend that the so-called

"four-hour rule" triggered a statutory duty to report. Respondents argue to the contrary, asserting that those items did not rise to a level that mandated disclosure under New York law.

We agree with plaintiffs that the January 6, 1997 letter and Dr. Stenson's subsequent resignation, as a matter of law, triggered the reporting obligations of Section 2803-e. As noted, the statute requires disclosure of, among other things, the "restriction" or "curtailment" of the "employment" or "professional privileges" of a licensed New York physician, "for reasons related in any way to alleged . . . incompetence, malpractice or misconduct or impairment of patient safety or welfare . . . ." Id. (emphasis added). As reflected in the terms of Dr. Jacobs's January 6, 1997 letter to Dr. Stenson, such "restriction" or "curtailment" of Dr. Stenson was plainly contemplated. It is also readily apparent that those restrictions were motivated by concerns that Dr. Stenson had impaired "patient safety or welfare."

As Dr. Jacobs's January 6, 1997 letter to Dr. Stenson stated, in relevant part:

> I am writing to document my concerns regarding your performance in your position as a gynecologic oncologist employed by Beth Israel Medical Center. I have reluctantly concluded that deficiencies in your performance preclude your continuance on the

> full-time staff of the Division of Gynecologic Oncology and the Department of Obstetrics and Gynecology of Beth Israel Medical Center. Since you have declined my suggestion that you resign, your employment is hereby terminated, effective January 21, 1997.
>
> . . . .
>
> Your dismissal from the full-time staff does not affect your clinical privileges. However, your continuance on the voluntary staff is contingent upon your compliance with the by-laws of the Medical Staff, as well as with Medical Center and Department regulations and requirements. Continued deficiencies in this regard will lead to disciplinary action, including possible termination from the Medical Staff. These areas include:
>
> . . . .
>
> Operative indications. You may operate only on cases with appropriate clinical indications. This will be monitored through the weekly Divisional treatment planning meetings, at which your attendance, as a member of the Division, is required as at present. It will also be monitored through concurrent and retrospective review of your medical records by me and by my designees.
>
> [Emphasis added.]

We are satisfied that the January 6, 1997 letter "curtail[ed]" Dr. Stenson's surgical practice at Beth Israel, by requiring that his individual cases be personally monitored by Dr. Jacobs and his designees. Such monitoring, unlike Dr. Stenson's mere attendance at Divisional planning meetings called

for under the hospital's by-laws, singled out Dr. Stenson. It subjected him to constraints on his practice not imposed upon other physicians. The prospective constraints were undoubtedly the result of concerns for "patient safety or welfare," thereby implicating Section 2803-e.

When Dr. Stenson chose to resign from Beth Israel in lieu of accepting these constraints, his resignation independently triggered the hospital's reporting obligations under Section 2803-e. Although Dr. Stenson and Beth Israel attempted to negotiate the terms of his departure in a manner that shielded his unsatisfactory track record from outside parties, those secrecy arrangements did not emasculate Beth Israel's statutory reporting duties.

Section 2803-e mandates reporting to the New York databank upon the "termination" of a physician for reasons "related in any way" to "incompetence, malpractice or misconduct or impairment of patient safety or welfare." Ibid. The statute further mandates reporting upon "the voluntary or involuntary resignation or withdrawal of association or of privileges with such facility to avoid the imposition of disciplinary measures . . . ." Ibid. (emphasis added). By resigning from Beth Israel's staff, Dr. Stenson avoided the imposition of disciplinary measures that were threatened if he exhibited what

Dr. Jacobs described as "[c]ontinued deficiencies." Consequently, the hospital had a duty to report Dr. Stenson's resignation to the New York DOH as a matter of law.[5]

Plaintiffs argue on appeal that the trial judge should have taken judicial notice of this statute, pursuant to N.J.R.E. 201, and advised the jury that respondents had a legal duty under Section 2803-e to report to New York the performance deficiencies of Dr. Stenson that precipitated his resignation. However, plaintiffs identify no place in the trial record in which their counsel specifically requested that such judicial notice be taken. Given the absence of such a request, we discern no plain error in the trial judge's failure to do so. See R. 1:7-2; Bradford v. Kupper Assoc., 283 N.J. Super. 556, 573-74 (App. Div. 1995), certif. denied, 144 N.J. 586 (1996).[6]

Respondents' alleged obligations to report Dr. Stenson to the NPDB under federal law are murkier. The applicable provision of the HCQIA, 42 U.S.C.A. § 11133, contains somewhat more qualified language than does Section 2803-e of the New York

[5] We are unpersuaded, however, by plaintiffs' claim that the institution of the four-hour rule triggered a duty to report, since that rule applied to all surgeons in the department.

[6] We do, however, take judicial notice of the New York reporting duty for purposes of the appeal. See N.J.R.E. 202(b).

reporting statute. Section 11133 of the HCQIA provides as follows:

> (a) Reporting by health care entities
>
> (1) On physicians
>
> Each health care entity which--
>
> (A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days; [or]
>
> (B) accepts the surrender of clinical privileges of a physician--
>
> (i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or
>
> (ii) in return for not conducting such an investigation or proceeding;
>
> . . . .
>
> shall report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3).
>
> [42 U.S.C.A. § 11133(a)(1) (emphasis added).]

Unlike the New York statute, the federal provision ties the duty to make a report to the national databank to an adverse effect upon the physician's "clinical privileges," rather than simply a curtailment of his or her "employment" with the hospital.

Compare 42 U.S.C.A. § 11133(a)(1)(A) with N.Y. Pub. Health Law § 2803-e (1)(a).

Dr. Jacobs' January 6, 1997 letter to Dr. Stenson literally states that the latter's dismissal from the Beth Israel full-time staff "does not affect [Dr. Stenson's] clinical privileges." However, the letter goes on to note in a succeeding paragraph that Dr. Stenson's clinical work would be "monitored," through "concurrent and retrospective review of [Dr. Stenson's] medical records by [Dr. Jacobs] and by [his] designees." These additional words raise a reasonable inference that, notwithstanding the letter's general statement that his clinical privileges were unaltered Dr. Stenson's privileges would, in reality, have been "adversely affected," thus triggering the hospital's reporting duties under 42 U.S.C.A. § 11133. Respondents, however, offer a reasonable contrary interpretation, arguing that Dr. Stenson's clinical privileges were not adversely affected but that his cases would simply get a closer look by senior staff. The obligation to make a report to the NPDB in this setting is fairly debatable.

Similarly, the fact and the surrounding context of Dr. Stenson's voluntary resignation also raise mixed considerations under 42 U.S.C.A. § 11133. There is no doubt that Beth Israel "accept[ed] the surrender of clinical privileges" of Dr.

Stenson, as contemplated by 42 U.S.C.A. § 11133(a)(1)(B). However, the proofs are far from conclusive as to whether Dr. Stenson was then under an "investigation by the entity relating to possible incompetence or improper professional conduct," see 42 U.S.C.A. § 11133(a)(1)(B)(i), or had resigned "in return for [Beth Israel] not conducting such an investigation or proceeding . . . ." See 42 U.S.C.A. § 11133(a)(1)(B)(ii). Although the case law under this provision is not extensive, at least one federal court has concluded that the provision does not trigger reporting duties in situations of a supervisor's "individual action," but rather the provision requires "formal action by the hospital, as an organization." See Simpkins v. Shalala, 999 F. Supp. 106, 114 (D.D.C. 1998).

With this background in mind, we turn to plaintiffs' separate contention that the trial judge should have taken judicial notice that Beth Israel and Dr. Jacobs were legally obligated under the HCQIA to report Dr. Stenson, not only to New York authorities, but also to the NPDB. We disagree with that assertion for several reasons.

First, plaintiffs did not raise the national databank whatsoever during pretrial proceedings but only brought it up on the first day of trial. Plaintiffs' expert Dr. Merry said nothing about the NPDB or the federal statutes in his expert

report. The trial judge was rightly within his discretion to decline to address this substantive issue at the eleventh-plus hour. See Rivers v L.S.C. Partnership, 378 N.J. Super. 68, 80 (App. Div.) certif. den., 185 N.J. 296 (2005). Second, as we previously noted, plaintiffs' counsel never made a specific request for the judge to take judicial notice of respondents' alleged non-compliance with the federal statute.[7] Third, unlike respondents' non-compliance with the New York reporting statute, we are not convinced that such a legal duty for respondents to report Dr. Stenson to the NPDB was necessarily triggered under the federal statute. Judicial notice is inappropriate for such an issue open to reasonable dispute. See N.J.R.E. 201; see also RWB Newton Assocs. v. Gunn, 224 N.J. Super. 704, 711 (App. Div. 1988).

Plaintiffs advance a more compelling alternative argument: that even if respondents had no direct obligation to report Dr. Stenson to the NPDB, the NPDB would have indirectly received adverse information about Dr. Stenson through New York authorities, if respondents had discharged their obligations to report him under New York law. This argument essentially treats the New York and national databanks as coextensive repositories.

[7] Under N.J.R.E. 202(b), we would decline to take discretionary judicial notice of respondents' alleged reporting duty under the federal statute, even if the duty were free from doubt.

"State disciplinary and licensure boards are required to report disciplinary actions against physicians to the Federally established National Practitioner Data Bank." People v. Kleiner, 174 Misc. 2d 261, 264, 664 N.Y.S.2d 704, 707 (Sup. Ct. 1997). If Beth Israel and Dr. Jacobs had made such a timely report to New York in 1997, plaintiffs assert, the information would have been passed on to the NPDB by New York authorities. Thus, the information would have been available when Englewood Hospital checked with the NPDB about Dr. Stenson in April 1997 before hiring him later that spring.[8]

We are not certain from the record, or from the cited legal authorities, that the New York DOH would have automatically transmitted to the NPDB a hypothetical adverse report from Beth Israel about Dr. Stenson. We are also not sure whether there was a legal obligation for the New York authorities to report to the NPBD information that was reportable under New York law but not necessarily reportable under federal law.[9] There are

[8] Respondents do not argue that plaintiffs lack standing to raise these alleged breaches of disclosure duties.

[9] 45 C.F.R. § 60.5(c) requires that "[a] health care entity must report an adverse action" against a physician to the appropriate State Board, or other State agency that is designated to monitor physician conduct, "within [fifteen] days from the date the adverse action was taken." Id. In turn, "[t]he Board [or agency] must submit [to the NPDB] the information received from a health care entity within [fifteen] days from the date on (continued)

reasonable contentions by the parties on both sides of this issue. Moreover, the trial judge rendered no specific ruling on this issue.

The trial judge did attempt to present issues concerning the databanks to the jury in a fair and thoughtful manner, despite the fact that plaintiffs had not invoked the federal statute or the NPDB until the first day of trial. The judge endeavored to navigate through these choppy waters by fashioning jury instructions that alluded to both the federal and state databanks. As a result of that endeavor, the trial judge instructed the jury that:

> Now during this trial you have heard several references to the National Practitioner Databank. I instruct you that Beth Israel Medical Center's compliance or lack of compliance with the regulations of the Federal Department of Health and Human Services governing reports and reporting to the National Practitioner Databank is not an issue for your determination in this trial.
>
> You should not assess or consider whether Beth Israel Medical Center was negligent or not negligent by referring to or considering

---

(continued)
which it received this information." Ibid. The federal regulation does not make clear if the State agency is obligated to pass onto the NPDB adverse information it receives about physicians mandated under State law but not necessarily under the HCQIA. Nor are the actual practices of the New York DOH in this regard certain, despite plaintiffs' contention that the New York agency would routinely forward such adverse information to the NPDB.

> the federal regulations governing the National Practitioner Databank.
>
> You may, however, use what you have learned about the National Practitioner Databank on other issues in the case, including whether Englewood Hospital and Medical Center's conduct was reasonable or was negligent and a proximate cause of the death of Kathy Fazaldin.
>
> [Emphasis added.]

Later in the charge, the judge referred to the New York reporting law, in connection with his charge about the several standards of negligence:

> In this case in support of the charge of negligence, the plaintiff asserts that Beth Israel Medical Center violated a provision of the New York Public Health law. Beth Israel Medical Center denies that it violated that law.
>
> The provision is known as Public Health Law Section 2803[-e], and it reads as follows, and you've seen it. . . . A copy of this is going to go into the jury room with you[.]

At this point, the judge read aloud to the jury the text of N.Y. Pub. Health Law § 2803-e. He did so without defining or clarifying the provision's key terms such as the "curtailment" or "restriction" of a physician's employment.[10] The judge then explained:

[10] We note that counsel did not, however, suggest any definitions or clarification of the statute's terms, even though such guidance to the jury may have been beneficial.

> This statute sets up a certain standard of conduct for hospitals and other healthcare institutions. If you find that Beth Israel Medical Center has violated that standard of conduct, such violation is evidence to be considered by you in determining whether negligence, as I've defined that term to you, has been established.
>
> You may find that such violation constituted negligence on the part of that defendant or you may find that it did not constitute negligence. Your finding on this issue may be based on such violation alone, but in the event there is other or additional evidence bearing upon that issue, you will consider such violation together with all such additional evidence in arriving at your ultimate decision as to defendant[s'] negligence.
>
> [Emphasis added.]

Notably, the judge went on to forbid the jury from considering the New York reporting statute in connection with issues of proximate causation:

> Although you may consider whether there was compliance with this New York statute or not on the question of negligence, you may not consider such violation, if any, on the issue of proximate cause . . . .
>
> [Emphasis added.]

During the charge conference, plaintiffs' counsel explicitly objected to this instruction on proximate cause. The instruction was predicated upon respondents' claim that the New York statute did not bear upon proximate cause because, as defense counsel then put it, "there is no evidence in the case

that Englewood Hospital ever attempted to access the information [from New York]." In opposition, plaintiffs' counsel argued that "we do know that [if] it was reported to New York, it would have been reported to the National Practitioner Databank, and thus it would have been in the [NPDB] materials . . . Englewood Hospital did request." The judge opted to follow defense counsel's position, despite the proofs that Englewood had requested and relied upon its search of the NPDB when it hired Dr. Stenson full-time in the spring of 1997.

Although we appreciate the trial judge's considerable efforts to fashion a proper charge in this complex case, we perceive that the judge could have erred in barring the jury from considering the New York reporting requirements on issues of proximate cause. At a minimum, there are lingering issues of practice and custom as to whether an unfavorable report about Dr. Stenson to New York authorities would or would not have been accessible in 1997 to Englewood Hospital through the NDPB. Likewise, there are genuine issues as to whether such an adverse report would have impacted Englewood's decision to appoint to its staff, and to continue[11] to employ, Dr. Stenson. Although

[11] Even if Dr. Stenson would have been hired by Englewood Hospital irrespective of negative information about him in the NPDB, there remains the prospect that such adverse background information from Beth Israel would have caused Englewood to act (continued)

Dr. Friedman did not believe so, Englewood's CEO, Dr. Kane, contrarily testified that it would. In this hotly-disputed context, the court's limiting instruction, by taking the New York statute completely out of the picture on issues of proximate cause, had the patent capacity to lead the jury to an unsound result, if indeed the New York DOH would have passed on an unfavorable report about Dr. Stenson from Beth Israel to the NPDB.

A failure to tailor a jury charge to the facts of a case may comprise reversible error where a different outcome might have prevailed had the jury been correctly charged. Patton v. Amblo, 314 N.J. Super. 1, 8 (App. Div. 1998). The unfortunate boundary the judge placed upon the jury's consideration of the New York statute could easily have led the jury to overlook or discount the protective role the databanks could well have played, had Beth Israel appropriately divulged Dr. Stenson's deficiencies to the New York authorities. The judge too readily deemed that alleged statutory violation inconsequential to the causal chain of events. See Ewing v. Burke, 316 N.J. Super. 287, 294 (App. Div. 1998) (wherein the failure to charge a

---

(continued)
more swiftly, post-hiring, once Dr. Stenson's problems resurfaced.

statutory provision properly "may have led [the] jury down a path it might otherwise not have traveled").

On this score, we are mindful that the jury's verdict found that Beth Israel, while not "negligent" in a general sense, had engaged in a specific form of negligence -- negligent misrepresentation -- but concluded that such misrepresentation was not a proximate cause of Kathy Fazaldin's death. Proximate cause thus became the linchpin of the jury's "no-cause" verdict. The assorted verdict responses suggest that the jurors' overall assessment of proximate causation may well have been tainted by the court's instruction limiting their use of the New York statute. See Reynolds v. Gonzalez, 172 N.J. 266, 284-86 (2002) (underscoring the importance of proximate causation, and an accurate jury charge on the issue, in medical negligence matters).[12]

Consequently, we conclude that a remand of this matter is necessary for an evidentiary hearing, pursuant to N.J.R.E. 104, on the pivotal question of whether the New York DOH would have, in the ordinary course, forwarded to the NPDB adverse

[12] As a major theme of their arguments on appeal, respondents emphasize that plaintiffs shifted focus to them after settling with the co-defendants on the brink of trial. Even so, respondents' non-compliance with the New York reporting statutes was an issue in the case from its early stages, as reflected in Dr. Merry's citation to Section 2803-e in his expert report.

information about Dr. Stenson reported by Beth Israel under Section 2803-e, even if such information were not required to be directly reported by the hospital to the NPDB under federal law. That Rule 104 hearing will determine whether or not a new trial is required. See, e.g., State v. Herrara, 385 N.J. Super. 486, 500 (App. Div. 2006) (remanding for an evidentiary hearing on an issue that could have affected the jury's fair consideration of the proofs, in order to determine if a new trial was warranted); see also State v. Kelly, 61 N.J. 283, 294-95 (1972). At such a hearing, the parties are free to marshall, with appropriate reciprocal discovery, supplemental proofs that might shed more light on the customary practices of the New York DOH in forwarding adverse information about physicians to the NPDB. The parties may also furnish any additional legal authorities relevant to the issue.

If, following the Rule 104 hearing, the trial judge determines that the New York DOH would not have forwarded adverse information from Beth Israel about Dr. Stenson to the NPDB, then no new trial is warranted and the judgment for respondents shall remain intact. See State v. Herrara, supra, 385 N.J. Super. at 500 ("[e]rrors and incomplete records in the trial court . . . which might not affect what was presented to . .. the jury do not require reversal of a [judgment] unless the

remand proceedings result in a conclusion that a new trial is warranted"). On the other hand, if the judge concludes from the supplemental presentations that either (1) the New York DOH would routinely forward such adverse information to the NPDB, or (2) that there remains a genuine issue of material fact about such indirect reporting, then the case shall be retried because the preclusionary instruction on proximate causation had the clear capacity to produce an unjust result. In such a retrial, the judge should not instruct the jury that the New York statute is irrelevant to issues of proximate causation.

Although of lesser significance, we also are concerned that jury could have been confused by the charge's mixed signals respecting the federal statute.[13] For one thing, we are unsure that lay jurors would have understood the portion of the judge's instruction permitting them to consider compliance with the NPDB regulations regarding Englewood Hospital, but not as to Beth Israel. We also suspect that jurors would be apt to be unclear about what "other issues in the case" existed, on which the jurors were permitted by the charge to "use what [they had]

[13] We do not find these aspects of the charge so confusing to warrant a new trial, independent of the proximate causation issue that necessitates a Rule 104 hearing. However, if the judge on remand concludes that a new trial is warranted because of error in the proximate cause instruction, then our observations concerning these other facets of the charge should be beneficial to the court and counsel in the second trial.

learned" about the NPDB. This rather vague guidance should be clarified, if the case is retried.

For example, the judge can specifically instruct the jury in a second trial to consider the federal reporting system to the extent that it is a component of plaintiffs' two-step theory that Beth Israel should have reported Dr. Stenson to New York which, in turn, would have reported Dr. Stenson to the NPDB. Although a judge surely has some latitude in how he or she expresses difficult concepts to a jury, this aspect of the charge, as worded in the first trial, was opaque, particularly in its generalized allusion to "other issues" involving the NPDB. "A jury charge 'should set forth an understandable and clear exposition of the issues.'" Mogull v. CB Commercial Real Estate Group, Inc., 162 N.J. 449, 464 (2000) (quoting Campus v. Firestone Tire and Rubber Co., 98 N.J. 198, 210 (1984)). That objective can be better fulfilled with clearer instructions in a second trial if one is otherwise necessary.[14]

[14] If a new trial is indeed ordered after the Rule 104 hearing, the trial judge may take judicial notice that respondents were obligated to report Dr. Stenson to the New York DOH as a consequence of the January 6, 1997 letter and Dr. Stenson's subsequent resignation in the face of that letter. See N.J.R.E. 202(a) (judicial notice in subsequent trial proceedings). The court on remand should not, however, take judicial notice that respondents had a similar duty to report Dr. Stenson directly to the NPDB, given the variations between the federal and New York reporting statutes that we have discussed.

In sum, we remand this matter for an evidentiary hearing under Rule 104 to determine on a fuller and more informed basis whether a new trial is necessary.

III.

Plaintiffs also contend that the trial judge erred when he instructed the jury not to consider acts by respondents occurring after 1999, in determining whether respondents were negligent in failing to communicate negative information about Dr. Stenson. Respondents maintain that the judge correctly refused to charge the jury regarding post-1999 allegations because plaintiffs had never raised a theory about their pertinence until trial.

Plaintiffs specifically argue that, in addition to Beth Israel's failure in 1996 and 1997 to report its actions to curtail Dr. Stenson and Dr. Stenson's subsequent resignation, Beth Israel was also culpable for failing thereafter to correct its prior negligence by revealing to Englewood the circumstances of Dr. Stenson's departure when it was specifically asked about those circumstances in March 2000 by Dr. Frieden.

As we have already noted, Dr. Frieden's March 27, 2000 letter to Dr. Friedman, who had by then taken over Dr. Jacobs's role as ob/gyn department chair at Englewood, advised Beth Israel that Englewood was in the process of reviewing Dr.

Stenson's application for reappointment. The letter requested a response by April 7, 2000. Dr. Frieden did not receive a reply to her inquiry from Beth Israel's in-house counsel, Nina Brodsky, Esq., until June 2000, after Kathy Fazaldin's demise. Brodsky's reply stated that "under the terms of [their] existing agreement with Dr. Stenson," Beth Israel could not give any information, except Dr. Jacobs's recommendation letter, without a release from Dr. Stenson. During trial, evidence was admitted of e-mail communications between Dr. Friedman and Brodsky discussing how to handle Dr. Frieden's request before Beth Israel eventually responded in June 2000.

Plaintiffs maintain that had Dr. Friedman, Beth Israel or Brodsky responded by the April 7, 2000 date requested in Dr. Frieden's letter, and not "dragged their feet and delayed the production of that crucial information," Dr. Frieden would have had the adverse information and would not have recommended Dr. Stenson for a promotion, or at least would have put limits on the length of his surgeries, thus averting Kathy Fazaldin's death. Plaintiffs consequently argue that the judge should have charged the jury: (1) that it could find that Beth Israel's failure to act in 2000 was a breach of its continuing duty to disclose the information, and (2) that Beth Israel's failure to respond in 2000 constituted a new negligent omission on which to

base liability. The judge declined to charge the jury that Beth Israel had such a continuing duty because, as the judge observed, "[t]he facts of the case don't demonstrate a continuing duty on the part of anyone."

Plaintiffs acknowledge that no published cases in our state have addressed this precise issue, but maintain that this situation is analogous to the concept of an ongoing duty in the context of a continuing tort claim. They cite to Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 91 (1996), in which landowners claimed that a poorly-designed and situated public school storm drainage system was a nuisance that resulted in the recurrent flooding of their property. The Supreme Court held in Russo Farms that a nuisance is continuing when it is the result of a condition that can be physically removed or legally abated. In such cases, "it is realistic to impute a continuing duty to the defendant to remove the nuisance, and to conclude that each new injury includes all elements of a nuisance, including a new breach of duty." Id. at 103.

Plaintiffs argue that Beth Israel's negligent omission in 1997, in not revealing the true circumstances surrounding Dr. Stenson's departure, "created a dangerous condition at Englewood Hospital . . . ." The danger was Dr. Stenson's continued poor surgical performance. Hence, Beth Israel's duty to report Dr.

Stenson's problems allegedly was a continuing duty that extended to 2000, and the judge allegedly was obligated to charge the jury on that theory.

We are not so persuaded. First of all, we have some doubt as to whether a physical nuisance, such as the faulty drainage system in Russo Farms, can be readily equated to a failure to disclose documents or information to a subsequent employer after that employer's hiring decision has already been made. Moreover, neither Dr. Friedman nor anyone else at Englewood requested any information from Beth Israel about Dr. Stenson before they credentialed him in 1997. That suggests that Beth Israel's failure to disclose adverse information to Englewood in 2000, after Dr. Stenson had already been hired by Englewood in 1997, was causally inconsequential.

Third, a key procedural reason the judge excluded the claim about the 2000 conduct from the jury charge was that he regarded it as a "newly-minted theory." Plaintiffs contend, however, that the issue was covered by the language of its complaint and therefore the claim was part of the case from the beginning.

Assuming, without granting, that the complaint could be read broadly enough to have included the continuing-duty theory conceptually, the March 17, 2000 letter was not specifically mentioned in the complaint and was never addressed prior to

trial. Plaintiffs' answers to interrogatories did not mention this theory, even though an interrogatory had specifically asked plaintiffs to list what each defendant did that was negligent and when the negligence occurred. Moreover, plaintiffs' expert Dr. Merry did not mention the respondents' lack of response to the March 17, 2000 letter as a basis for liability, either in his report or his testimony.[15]

Considering all of these factors, we discern no reversible error in this aspect of the judge's instruction, insofar as it precluded the jury from considering respondents' post-1999 conduct as germane to their alleged liability. On any second trial, the judge is free to maintain a similar temporal boundary.

IV.

Lastly, we briefly consider plaintiffs' contention that the trial judge improperly dismissed their punitive damages claims. Under N.J.S.A. 2A:15-5.12(a), punitive damages

> may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably

[15] We contrast this omission with Dr. Merry's express reference in his expert's report to respondents' violation of N.Y. Pub. Health Law § 2803-e.

> might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.
>
> [N.J.S.A. 2A:15-5.12(a).]

In reviewing a trial court's decision to dismiss a punitive damages claim, an appellate court must determine "whether 'the evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor' of the party opposing the motion." Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 211 (App. Div. 1996) (quoting Dolson v. Anastasia, 55 N.J. 2, 5 (1969)).

Here, the trial judge concluded that no rational trier of fact could determine that punitive damages were warranted against Beth Israel or Dr. Jacobs because of any actual malice, or wanton and willful disregard of persons who foreseeably might be harmed by the acts or omission of respondents. We concur.

Although the death of Kathy Fazaldin at the hands of the late Dr. Stenson was unquestionably tragic and perhaps avoidable, we share the trial judge's considered assessment that Beth Israel and Dr. Jacobs lacked the willful or wanton state of mind that could qualify for punitive damages under the statute. At worst, respondents' conduct, including their reporting failures we have discussed at length in this opinion, was negligent or grossly negligent. See also Smith v. Whitaker, 160

N.J. 221, 242 (1999) (negligence, no matter how substantial, does not suffice as a basis for punitive liability). We thus affirm the trial judge's determination on this particular issue.

Affirmed in part and remanded for a Rule 104 hearing to determine if a new trial is necessary. Jurisdiction is not retained.