APPENDIX

APPENDIX

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APPENDIX 1

APPEALS COURT OF MASSACHUSETTS, WORCESTER.

No. 22-P-498
102 Mass.App.Ct. 441

[Filed March 28, 2023]

Obaida ABDULKY[1] & another[2])
)
v.)
)
LUBIN & MEYER, P.C., & others.[3])

Argued December 8, 2022

Decided March 28, 2023

CIVIL ACTION commenced in the Superior Court Department on August 14, 2018.

The case was heard by Janet Kenton-Walker, J., on a motion for summary judgment.

A proceeding for interlocutory review was heard in the Appeals Court by Singh, J.

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[1] As parent and next friend of Anthony Abdulky.

[2] Ward Abdulky, as parent and next friend of Anthony Abdulky.

[3] Andrew C. Meyer, Jr., and Krysia Syska.

Attorneys and Law Firms

Joseph D. Lipchitz, Boston, (Bridgitte E. Mott also present) for the defendants.

Peter J. Brockmann for the plaintiffs.

Present: Milkey, Ditkoff, & Englander, JJ.

Opinion

ENGLANDER, J.

This is an action for attorney malpractice. The defendants (defendants or defendant lawyers) represented the plaintiffs, parents of a minor child whose arm was amputated below the elbow at age five, in a medical malpractice action that was settled in 2015 for $6 million. The plaintiffs (parents) thereafter brought this suit, arguing that their lawyers failed to competently develop evidence of damages -- in particular, the lifetime costs of the child's medical treatments and prosthetics -- and that this failure resulted in a lower recovery than should have been obtained. The defendants moved for summary judgment on several grounds, including (1) that the plaintiffs' claims were barred by collateral estoppel, because a Superior Court judge determined that the settlement was reasonable, after a hearing pursuant to G. L. c. 231, § 140C 1/2; (2) that the plaintiffs' claims were barred by the doctrine of judicial estoppel, due to representations that the plaintiffs made to the court during the settlement process; and (3) that the plaintiffs had not elicited competent evidence of damages -- that is, had not shown, by admissible evidence, that proper legal representation would have

resulted in a settlement or verdict greater than $6 million.

A different Superior Court judge (motion judge) denied the motion for summary judgment, and a single justice of this court granted the defendants leave to take this interlocutory appeal. While we agree with the motion judge that the plaintiffs' claims were not barred by either collateral estoppel or judicial estoppel, we conclude that the plaintiffs did not adduce evidence of damages "such ... as would be admissible" at trial. Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974) (rule 56 [e]). Accordingly, the order denying the motion for summary judgment must be reversed.

Background.

1. The medical malpractice lawsuit.

The child, then age five, was admitted to UMass Memorial Medical Center (hospital) for a fractured wrist. Due to complications arising from the child's treatment, the child's right arm was amputated below the elbow. In 2012, the parents (on behalf of the minor child) sued nine physicians associated with the hospital as well as the Commonwealth (hospital defendants), alleging claims of professional negligence. The parents also asserted a loss of consortium claim on their own behalf.

The parties engaged in mediation and settlement negotiations, and in mid-August 2015 the hospital defendants' insurer made a settlement offer of $6 million. After much discussion with their attorneys (the defendants in this case), and after a meeting with the Superior Court session judge (settlement judge),

the parents directed and authorized the defendant lawyers, in writing, to accept the settlement offer. On August 27, 2015, the defendant lawyers advised the hospital defendants, also in writing, that the offer was accepted.

The settlement judge was advised that the parties had settled, and he scheduled a hearing to review the proposed settlement, with the first of (what turned out to be) three hearings occurring on September 17, 2015. The judge opened the first hearing by noting that, although he had expected to approve the settlement at that time, he had been advised that the particulars were not yet finalized and that the parents were attempting to "pull[ ] away from the settlement." The judge then inquired of the parents whether the case was in fact settled. The parents acknowledged that it had been reported to the court that the case had settled, but explained that they had reservations. After the judge had an off-the-record discussion with the parents about those reservations,[4] the judge stated that it was "clear" that the case was settled. The judge also inquired of the father whether he had felt "pressured" into proceeding with the settlement, to which the father responded in the negative. The judge accordingly directed the parties to finalize their settlement, and he scheduled an approval hearing for October 2, 2015. In the interim, on September 23, 2015, the court entered an order of dismissal nisi "after [the] action was

[4] The judge described the plaintiffs' reservations as concerning "various things, including the privacy of this information regarding their son because of him being young and having potential, in the future, access to some funds."

reported settled," directing the parties to file an agreement or stipulation by October 26, 2015.

At the October 2 hearing, the defendant lawyers presented (on behalf of the parents) a petition for approval of the settlement agreement pursuant to G. L. c. 231, § 140C 1/2.[5] Prior to the settlement judge addressing the petition, however, the parents, through the defendant lawyers, requested to be seen at sidebar, where the parents attempted to reverse course on the settlement because they were concerned the settlement amount did not properly account for the costs of the child's future prosthetics. After further discussion, the judge stated that the parents were not in a position to disavow the settlement, noting that "[t]he case is completely settled as of now for six million." Although the parties reported that they had some additional details to work out, the judge approved the settlement structure (and those settlement details already agreed to) and ordered the parties to appear for another approval hearing to address those aspects that remained outstanding.

The parties appeared for a third hearing on October 22, 2015. At that time, however, the parents (in a pleading signed by the defendant lawyers) filed a motion to vacate the September 23 order of dismissal nisi and to void the settlement agreement. The motion to vacate made two arguments: (1) that the settlement

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[5] That statute provides, in part, that "[t]he trial court may review and approve a settlement for damages because of personal injury to a minor ... in any case before the court where any party has filed a petition for settlement approval signed by all parties." G. L. c. 231, § 140C 1/2.

amount failed to properly consider the costs of the child's future prosthetics needs, and (2) that the parents had entered the agreement under duress, due to their fear that a guardian ad litem would be appointed to evaluate the settlement on their child's behalf. The settlement judge held a hearing, but took no sworn testimony or other evidence.[6] He thereafter rejected the parents' arguments, denied their motion, and stated on the record that he believed the settlement amount accounted for the future costs of prosthetics and that the parents were not under duress when they entered into the settlement. The judge then reviewed the remaining aspects of the settlement structure and approved the settlement, stating that the settlement was "favorable" and "just."[7] The parents did not appeal from the approval and, on October 26, 2015, signed the final settlement agreement and release on behalf of themselves and the child. The settlement monies were paid out between October and November 2015.

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[6] The parents' motion, however, did contain a letter from a prosthetist containing a "rough estimate" of purported costs for the child's future prosthetics.

[7] During a sidebar conversation with the parents, the judge explained that, in his experience, similar cases did not result in awards higher than $6 million. He also cautioned that the parents risked a lower recovery due to the limits on the hospital defendants' insurance coverage -- meaning that the parents would need to prove multiple doctors were at fault to collect more than $6 million, which (in the judge's view) was far from a guarantee.

2. The legal malpractice lawsuit.

Just shy of three years later, in August of 2018, the plaintiffs commenced this malpractice lawsuit against the defendant lawyers, alleging (1) that the settlement amount was inadequate in that it did not consider the child's future need for and costs of prosthetics, and (2) that the defendant lawyers had caused them to settle under duress, by informing them that the hospital defendants were considering seeking appointment of a guardian ad litem.

The defendants moved for summary judgment, making three arguments in particular. First, they argued that the plaintiffs were collaterally estopped from attacking the adequacy and voluntariness of the settlement agreement, because the settlement judge had considered and ruled on those issues in approving the settlement. Second, they argued that judicial estoppel barred the parents' claims, where the parents had represented to the judge that they entered the medical malpractice settlement free from duress and considered the settlement to be in their child's best interests. Finally, the defendants argued that the plaintiffs had failed to present competent evidence regarding damages, and in particular, that the proffered opinion of the plaintiffs' damages expert was speculative, and insufficient in law to give rise to an issue of material fact as to whether the plaintiffs should have recovered more than $6 million.

The motion judge denied the motion in a margin endorsement. The judge stated that she was not persuaded that either collateral or judicial estoppel applied under the circumstances. Her ruling, however,

did not specifically address the defendants' arguments concerning the lack of evidence of damages.

Discussion.

Before us the defendants press the same three arguments -- collateral estoppel, judicial estoppel, and the failure to adduce competent evidence of damages.[8] We address each argument in turn, applying the de novo standard of review. See Lynch v. Crawford, 483 Mass. 631, 641, 135 N.E.3d 1037 (2019) ("We review an order granting or denying summary judgment de novo ...").

1. Collateral estoppel.

The thrust of the defendants' collateral estoppel argument is that in ruling on the § 140C 1/2 motion

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[8] The plaintiffs argue that this appeal should be dismissed, because the "the Single Justice did not reference or cite to any serious and/or irreparable consequence(s)" justifying an interlocutory appeal. We are not persuaded that the single justice had such a duty. It is well established that "[t]he single justice 'enjoys broad discretion ... to report the request for relief to the appropriate appellate court.' " Ashford v. Massachusetts Bay Transp. Auth., 421 Mass. 563, 566, 659 N.E.2d 273 (1995), quoting Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 614, 405 N.E.2d 106 (1980). Indeed, the Supreme Judicial Court has held that a single justice of this court has "the authority to allow appellate review of the denial of [a] motion for summary judgment" where the single justice "concluded that an appeal on this single issue would facilitate the administration of justice." Swift v. American Mut. Ins. Co. of Boston, 399 Mass. 373, 375 n.5, 504 N.E.2d 621 (1987). The single justice accordingly had discretion as to whether to allow the appeal, see McHoul v. Commonwealth, 365 Mass. 465, 468, 312 N.E.2d 539 (1974), and here we discern no abuse of discretion.

and approving the settlement, the settlement judge made factual findings that preclude the plaintiffs' legal malpractice claim, to wit, (1) that the settlement amount was reasonable, and (2) that the plaintiffs were not under duress. We do not agree that collateral estoppel applies here.

In general, collateral estoppel applies where the following requisites are met: (1) "there was a final judgment on the merits in the prior adjudication"; (2) "the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication"; (3) "the issue in the prior adjudication was identical to the issue in the current adjudication"; and (4) the issue "was essential to the earlier judgment, and was actually litigated in the prior action" (quotation and citation omitted). DeGiacomo v. Quincy, 476 Mass. 38, 42, 63 N.E.3d 365 (2016). For an issue to be actually litigated and essential to the judgment, "[t]he nonmoving party previously must have had a full and fair opportunity to litigate the issue." Mullins v. Corcoran, 488 Mass. 275, 282, 172 N.E.3d 759 (2021).

While in this case one might question whether any of the above requisites were met, here we will focus on two -- the lack of identity of issues, and the lack of a full and fair opportunity to litigate the issue previously. As to each of these elements, our reasoning is influenced by the unusual nature of the prior proceeding that is claimed to have preclusive effect -- a motion under § 140C 1/2 to approve a medical malpractice settlement. A proceeding under § 140C 1/2 is an ancillary proceeding to a personal injury damages claim, specifically designed for the circumstance where

the plaintiff is a minor and thus represented by a guardian, usually the parents. See Mass. R. Civ. P. 17 (b), as appearing in 454 Mass. 1402 (2009) ("If an infant ... does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem"). See also Sharon v. Newton, 437 Mass. 99, 107, 769 N.E.2d 738 (2002) (minors may disaffirm most contracts before reaching eighteen years of age or within reasonable time thereafter). General Laws c. 231, § 140C 1/2, provides:

> "The trial court may review and approve a settlement for damages because of personal injury to a minor ... in any case before the court where any party has filed a petition for settlement approval signed by all parties. The trial court may make such orders and take such action as it deems necessary to effectuate the disposition of a settlement approval including ... the appointment of a guardian ... or the holding of an evidentiary hearing."

The statute thus provides that the proceeding can be invoked by a "party," after which the judge "may review and approve a settlement." G. L. c. 231, § 140C 1/2. The primary purpose of the statute is to ensure the settlement is fair to the child -- including, significantly, whether the parents have acted in the child's best interests. Thus, the Supreme Judicial Court has cited "the types of conflicts and financial pressures that may arise in the postinjury settlement context," which "can create the potential for parental action contrary to the child's ultimate best interests." Sharon, 437 Mass. at

109 n.10, 769 N.E.2d 738.[9] Secondarily, the statute provides a measure of protection to the parents, who can secure review and approval from a knowledgeable neutral. See id. And, arguably, § 140C 1/2 can benefit the original defendants, by protecting them in "any later action by or on behalf of the child." Cf. Dominique v. Ralph D. Kaiser Co., 479 A.2d 319, 325 n.3 (D.C. 1984) (Terry, J., concurring).

Given its purposes, we think that approval under the statute at most will have preclusive effect as to the settlement parties it was intended to protect -- the child, the parents, and perhaps, the original defendants. But there is nothing in § 140C 1/2 , or in any case law addressing analogous statutes, that indicates that the judicial approval process was intended to protect the child's lawyers. Here, the settlement judge did not make any findings regarding the services the defendant lawyers provided, nor is there any suggestion in the statute that such is

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[9] Although there is not much discussion of § 140C 1/2 in our cases or in the legislative history, courts in other jurisdictions have acknowledged that similar rationales drive their own rules about judicial approval of settlement agreements involving minors. See, e.g., Hojnowski v. Vans Skate Park, 187 N.J. 323, 334, 901 A.2d 381 (2006) ("a minor's parent ... may not dispose of a minor's existing cause of action without statutory or judicial approval" so as "to guard a minor against an improvident compromise [and] to secure the minor against dissipation of the proceeds" [quotation and citation omitted]); Whitcomb v. Dancer, 140 Vt. 580, 586, 443 A.2d 458 (1982) (Vermont's statute "imposes an affirmative obligation on the superior court judge to protect the best interests of the minor" and protect the "minor child ... from the potential improvidence of his or her parents").

required.[10] Moreover, as this case illustrates, the approval procedure may be relatively informal, in which case the settlement judge is dependent, to some extent, on the presentation of the child's lawyers as to the facts that bear on the strength and value of the child's claim. In this case, at least, the issue addressed at the settlement approval hearing was whether the settlement was reasonable in structure and amount as to the child and the parents, based upon what was known of the facts and law, and under an implicit assumption that the defendant lawyers worked the case to professional standards. By definition, that issue is not identical to the issue presented in this legal malpractice case.

For many of the same reasons, we do not believe the issue of the reasonableness of the settlement was "full[y] and fair[ly]" litigated for purposes of this claim against the defendant lawyers. See Mullins, 488 Mass. at 282, 172 N.E.3d 759. As noted above, the settlement judge did not take evidence regarding the plaintiffs'

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[10] Approval under § 140C 1/2 thus differs from approval of class-action settlements under Fed. R. Civ. P. 23 (2018) (rule 23). The defendants argue by analogy that we should apply collateral estoppel here because some Federal courts have held that class-action settlements approved under rule 23 cannot be collaterally attacked through subsequent legal malpractice claims. We do not find the analogy persuasive, however, because approval under rule 23 requires something that § 140C 1/2 does not -- an express determination that counsel adequately represented the interests of the class. See Laskey v. International Union, United Automobile, Aerospace and Agric. Implement Workers, 638 F.2d 954, 957 (6th Cir. 1981) ("finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable").

possible damages. Nor did he take evidence regarding the investigation the defendant lawyers performed, or how or whether the defendant lawyers evaluated the child's potential lifetime prosthetics costs. True, the plaintiffs did argue in their motion to vacate the settlement that they entered the agreement not fully understanding the child's future prosthetics needs. However, it does not follow from the denial of that motion that the judge actually determined that the defendant lawyers properly advised the plaintiffs about those costs, where he took no evidence on the subject.

Our conclusion is consistent with the Supreme Judicial Court's decision in Meyer v. Wagner, 429 Mass. 410, 709 N.E.2d 784 (1999). There, the court addressed a client's legal malpractice claim against her former divorce attorney. See id. at 411, 709 N.E.2d 784. The crux of the client's claim was that the attorney failed to (1) competently prepare and execute a settlement agreement, and (2) institute ancillary proceedings to secure certain assets, causing her to obtain less than her fair share of the marital assets. See id. As here, the settlement agreement at issue had been approved by a judge as "fair" and incorporated into the underlying judgment. Id. at 414, 709 N.E.2d 784. The attorney argued that the client's acceptance of the agreement and its approval barred the subsequent malpractice claim. See id. at 416, 709 N.E.2d 784. The lower court struck the malpractice claim, but the Supreme Judicial Court reversed. See id. at 412, 425, 709 N.E.2d 784. The court declined to depart from "the usual malpractice rule on settlements" just because a judge had approved the agreement. Id. at 419, 709 N.E.2d 784, citing Grayson v. Wofsey, Rosen, Kweskin

& Kuriansky, 231 Conn. 168, 175, 646 A.2d 195 (1994). The court accordingly held that

> "where a client establishes that his or her attorney, in advising on the settlement of a divorce action, has failed to exercise the degree of skill and care of the average qualified lawyer, and that the failure has resulted in loss or damage to the client, the client is entitled to recover even if the settlement has received judicial approval" (emphasis added).

Meyer, supra at 419, 709 N.E.2d 784. Consistent with Meyer, we will not apply collateral estoppel under the circumstances here.[11]

2. Judicial estoppel.

The defendants next argue that the parents are judicially estopped from attacking the settlement, due to the parents' initial representations to the settlement

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[11] Separately, the finding that the plaintiffs were not under duress when they signed the settlement agreement does not preclude the plaintiffs' legal malpractice claim, at least insofar as the claim asserts that the settlement amount was unreasonable because the defendant lawyers failed to properly investigate the costs of future prosthetics. That aspect of the plaintiffs' legal malpractice claim does not turn on whether they were under duress. See Fishman v. Brooks, 396 Mass. 643, 646, 487 N.E.2d 1377 (1986) ("an attorney is liable for negligently causing a client to settle a claim for an amount below what a properly represented client would have accepted"). Insofar as the plaintiffs' legal malpractice claim seeks recovery based upon the alleged duress, rather than a failure to investigate, the collateral estoppel issue presented would be different; however, in light of our decision on damages infra, we need not decide that question.

judge that the amount was adequate and that they had entered the agreement voluntarily. The doctrine of judicial estoppel generally arises where a party makes a representation or advances a contention to a court in one proceeding, achieves success as a result of the representation, and then, in a subsequent proceeding, asserts a contradictory contention. See Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 641, 824 N.E.2d 23 (2005). The doctrine's purpose is to prevent "parties from improperly manipulating the machinery of the judicial system" -- i.e., "playing fast and loose with the courts" (citation omitted). Id. at 642, 824 N.E.2d 23. To that end, there are "two fundamental elements" that warrant judicial estoppel: "[f]irst, the position being asserted in the litigation must be 'directly inconsistent,' meaning 'mutually exclusive' of, the position asserted in a prior proceeding" (citation omitted), and "[s]econd, the party must have succeeded in convincing the court to accept its prior position." Id. at 640-641, 824 N.E.2d 23.

It should be evident that the elements of judicial estoppel are not present here. Although in the § 140C 1/2 proceeding the parents initially represented that they were satisfied with the settlement, they expressed their reservations almost immediately thereafter. Rather than seeking to gain a benefit from their initial representations to the settlement judge, the parents actively sought to withdraw those representations and to undo the settlement. They filed a motion to that effect before the § 140C 1/2 process was complete, arguing specifically that the settlement did not adequately consider the future costs of prosthetics for their child. The parents' ultimate

position in the medical malpractice action therefore was not directly at odds with, but consistent with, their position here. Nor did the parents actually succeed in convincing the judge to accept their positions on the settlement -- that is, final approval of the settlement occurred in spite of the parents' expressed concerns. Put differently, there is no indication that the plaintiffs engaged in the type of "playing fast and loose with the courts" or manipulation of the judicial system that judicial estoppel is designed to prevent. Otis, 443 Mass. at 642, 824 N.E.2d 23.

3. Evidence of damages.

The defendants fare better with their third argument, however, which is that the plaintiffs failed to put forward competent evidence of damages -- that is, the plaintiffs failed to present admissible evidence that they would have obtained a settlement or recovery in excess of $6 million had the defendant lawyers performed to professional standards. Proof of damages, of course, is an essential element of the plaintiffs' malpractice claim. See Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C., 25 Mass. App. Ct. 107, 111, 515 N.E.2d 891 (1987). Here, the only evidence of damages the plaintiffs produced was the purported expert disclosure of David Oliveira, an experienced medical malpractice attorney. The entirety of his purported opinion about the value of the medical malpractice action, and its basis, was as follows:

> "The realistic case value for this matter is in excess of $10 million. This would have included future equipment and medical costs, loss of consortium and, of equal importance, [the

> child's] pain and suffering over many years (past and future). The pain and suffering alone could have been worth $3-$4 million given that the higher number is merely $1000/week for an 80-year life expectancy."

Thereafter, in response to the defendants' summary judgment motion, the plaintiffs submitted a supplemental affidavit from Oliveira, in which he stated that he had since "confirmed" his prior opinion by researching "verdicts and settlements in the Commonwealth for a variety of cases, including medical malpractice cases involving amputations." Notably, the supplemental affidavit did not identify any specific settlements or verdicts, nor provide a methodology for how those settlements and verdicts supported his $10 million opinion.

The defendants are correct that the plaintiffs' damages submissions were insufficient to survive summary judgment. Our conclusion is rooted in rule 56 (e), which provides that affidavits supporting or opposing summary judgment "shall set forth such facts as would be admissible in evidence." Accordingly, if a party moving for summary judgment properly supports their motion, "an adverse party may not rest upon the mere allegations or denials of his pleading"; instead, the adverse party must -- "by affidavits or as otherwise provided" under rule 56 -- "set forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56 (e). See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734 (1991).

Here, the plaintiffs' submission did not "set forth such facts as would be admissible in evidence," not just

as a matter of form, but as a matter of substance. Mass. R. Civ. P. 56 (e). Admissibility of expert testimony at trial is governed by Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994), and its progeny. Under that case law, judges have a "gatekeeping" role in the admission of expert testimony of all types. See Canavan's Case, 432 Mass. 304, 313, 733 N.E.2d 1042 (2000). A proponent of expert testimony must show (among other things) both (1) that the proposed expert testimony is based upon a reliable methodology, and (2) that that methodology has been reliably applied to the facts of the case. See Commonwealth v. Barbosa, 457 Mass. 773, 783, 933 N.E.2d 93 (2010), cert. denied, 563 U.S. 990, 131 S.Ct. 2441, 179 L.Ed.2d 1214 (2011). See also Lanigan, supra at 26, 641 N.E.2d 1342; Smith v. Bell Atl., 63 Mass. App. Ct. 702, 719-720, 829 N.E.2d 228 (2005); Mass. G. Evid. § 702(d) (2022). In the past, this court has applied the Lanigan standard at the summary judgment stage to conclude that a particular expert proffer was, as a matter of law, not admissible. See, e.g., Grassi Design Group, Inc. v. Bank of Am., N.A., 74 Mass. App. Ct. 456, 462-463, 908 N.E.2d 393 (2009); Baptiste v. Sheriff of Bristol County, 35 Mass. App. Ct. 119, 126, 617 N.E.2d 641 (1993). Cf. Molly A. v. Commissioner of the Dep't of Mental Retardation, 69 Mass. App. Ct. 267, 284 n.24, 867 N.E.2d 350 (2007) (noting that, if made, Lanigan challenge to expert evidence at summary judgment "might have succeeded ... because [the expert evidence] largely failed to satisfy the requirements of" rule 56 [e]).

Here Oliveira's expert disclosure and supplemental affidavit failed to meet the basic standard for

admissibility under the case law, because they did not set forth how Oliveira had applied a reliable methodology to the facts of this case.[12] Put differently, Oliveira's disclosure and affidavit seem to be saying that for a medical malpractice claim of this type, with injuries of this type, previous settlements and verdicts demonstrate a likely value of $10 million or more. Assuming that Oliveira described a valid methodology for valuing cases, however -- that is, analyzing verdicts and settlements of cases with comparable facts -- that methodology still must be reliably applied. See Lanigan, 419 Mass. at 26, 641 N.E.2d 1342. See also Commonwealth v. Patterson, 445 Mass. 626, 648, 840 N.E.2d 12 (2005) ("Judges ... need not admit ... every application of a ... method ... merely because another application of the method has been deemed reliable"). And here, nothing in either Oliveira's expert disclosure or his supplemental affidavit describes how his methodology was applied. He does not explain, for example, which verdicts and settlements he reviewed, what the amounts of those verdicts and settlements were, or why those upon which he based his opinion were apt comparators. Cf. Santos v. Chrysler Corp., 430 Mass. 198, 206, 715 N.E.2d 47 (1999) (expert's opinion properly excluded where proponent did not establish that data underlying the opinion "matched the circumstances of the plaintiff's accident"). Simply setting forth an expert's experience, and that he did some research, is not sufficient when the expert's application of his methodology to the facts is not

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[12] We do not here question whether Oliveira had sufficient qualifications to determine the value of the plaintiffs' case.

disclosed.[13] See Commonwealth v. Franceschi, 94 Mass. App. Ct. 602, 610, 116 N.E.3d 1225 (2018) (proponent did not show that expert "reliably applied a reliable method"). In short, how Oliveira arrived at his opinion was "ill described," rendering it "invalid and unreliable." Hicks v. Brox Indus., Inc., 47 Mass. App. Ct. 103, 107, 711 N.E.2d 179 (1999) (expert opinion insufficient to warrant reconsideration of summary judgment).[14]

In their brief, the plaintiffs argue that a Lanigan gatekeeper analysis does not apply to summary judgment motions -- that it applies only when "trial [is] imminent." To the extent the plaintiffs are arguing that at summary judgment judges cannot determine a proffered expert opinion to be without evidentiary value, they are incorrect. As noted, rule 56 (e) requires plaintiffs to proffer facts that would be admissible in evidence. This requirement applies to proffered expert opinions as well, as numerous cases have held, from this court and the Federal courts. See Grassi Design Group, Inc., 74 Mass. App. Ct. at 462-463, 908 N.E.2d

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[13] The disclosure's cursory reference to pain and suffering damages is equally deficient. Oliveira does not cite any factual basis for opining as to the value of the pain and suffering claim.

[14] We do not hold that judges must conduct Lanigan hearings at the summary judgment stage whenever a party challenges an opponent's expert report (although we do not rule out using such a process, in the judge's discretion). We hold no more than when a party seeks to meet their summary judgment burden by relying on expert affidavits, reports, or disclosures, those materials must meet rule 56 (e)'s requirement that they set forth sufficient grounds to establish that the opinion "would be admissible in evidence."

393 (affirming summary judgment to defendants where plaintiff's reports did "not qualify as expert opinions under [Lanigan] and ... [we]re insufficient to create a genuine issue of material fact"); Baptiste, 35 Mass. App. Ct. at 126, 617 N.E.2d 641 (no error in "disregard[ing] the affidavit from the plaintiff's expert" in granting defendants' motion for summary judgment where "many of the expert's statements [we]re based upon assumptions proved faulty by the undisputed facts" and "would not be admissible at any trial").[15] Rule 56 does not contain an exception for expert evidence, nor should it. Because the plaintiffs did not proffer admissible evidence on damages, summary judgment should have entered for the defendants.

Order denying motion for summary judgment reversed.

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[15] See also, e.g., Equal Employment Opportunity Comm'n v. Freeman, 778 F.3d 463, 465-468 (4th Cir. 2015) (affirming summary judgment where plaintiff's expert's opinion was excluded as unreliable, leaving plaintiff without evidence sufficient to establish prima facie case); Nora Beverages, Inc. v. Perrier Group of Am., Inc., 164 F.3d 736, 746 (2d Cir. 1998) (expert evidence correctly excluded because "[o]n a summary judgment motion, the district court properly considers only evidence that would be admissible at trial"); Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992) (reversing denial of defendant's motion for summary judgment, noting that plaintiff's expert's summary judgment affidavit contained "conclusory assertions" that were inadmissible and could not "be relied upon by plaintiffs to prevent summary judgment").

MILKEY, J. (concurring).

I join the majority's opinion in all respects, including its ruling that the plaintiffs did not address the damages issue in a manner sufficient to survive summary judgment. In my view, this is a correct, if strict, application of what Mass. R. Civ. P. 56, 365 Mass. 824 (1974), requires. I write separately merely to highlight my sense that the strictness we apply may be a bit out of step with the somewhat more lenient summary judgment culture prevalent in the trial courts. In this respect, I note that we do not typically review orders denying motions for summary judgment in light of their interlocutory nature, and we performed such review here only because a single justice had allowed it. The bar, especially the plaintiffs' bar, would be wise to view today's opinion as presenting a cautionary tale.

APPENDIX 2

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

Worcester, ss. SJC FAR No. _____
Appeals Court No. 2022-P-0498

[Dated May 18, 2023]

OBAIDA ABDULKY AND WARD ABDULKY, PARENTS and NEXT FRIENDS OF ANTHONY ABDULKY,
Plaintiffs-Appellees

v.

LUBIN & MEYER, P.C., ANDREW C. MEYER, JR. and KRYSIA SYSKA
Defendants-Appellants.

APPLICATION FOR FURTHER APPELLATE REVIEW FOR PLAINTFFS - APPELLEES OBAIDA ABDULKY'S AND WARD ABDULKY, AS PARENTS AND NEXT FRIENDS OF ANTHONY ABDULKY,

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Dated: May 18, 2023

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, Plaintiffs-Appellees Obaida Abdulky and Ward Abdulky, Parents and Next Friends of Anthony Abdulky ("the Abdulkys") respectfully request leave to obtain further appellate review of the Appeals Court decision in *Abdulky* v. *Lubin & Meyer, P.C.*, 102 Mass. App. Ct. 441 (2023).

STATEMENT OF PRIOR PROCEEDINGS

In August of 2018, the Abdulkys commenced this legal malpractice action against the Defendants-Appellants Lubin & Meyer, P.C., Andrew C. Meyer, Jr., and Krysia Syska ("the Defendants"). *Abdulky,* 102 Mass. App. Ct. at 444. In March of 2019 the Abdulkys filed their First Amended Complaint. R.A.I/442.[1] In this action, the Abdulkys allege that, in a prior medical malpractice action in which the Defendants represented the Abdulkys ("the Medical Malpractice Action"), the Defendants obtained a settlement that was inadequate because it did not consider the lifetime costs of prosthetics for the Abdulkys' child (Anthony). *Abdulky*, 102 Mass. App. Ct. at 442; R.A.I/443.

On December 7, 2021, the Defendants filed a Motion for Summary Judgment ("the Defendants' Motion") asserting three arguments: (1) that the Abdulkys were collaterally estopped from attacking the settlement agreement in the Medical Malpractice Action; (2) that

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[1] Citations to the Record Appendix in *Abdulky* v. *Lubin & Meyer, P.C.*, Massachusetts Appeals Court No. 2022-P-0498, are: "R.A.[Volume(s)]/[Page(s)]."

the Abdulkys were judicially estopped; and (3) that the Abdulkys had failed to present competent evidence regarding the element of damages. *Abdulky*, 102 Mass. App. Ct. at 442; R.A.I/33.

The Abdulkys filed an opposition to the Defendants' Motion, attaching the Second Supplemental Answers to the Defendants' First Set of Interrogatories ("the Second Supplemental Answers") as well as the Supplemental Affidavit of David J. Oliveira, Esq. ("the Oliveira Affidavit").[2] R.A.I/182; R.A.II/214. The Second Supplemental Answers identified evidence reviewed by Oliveira and upon which he would base his expert testimony, including, *inter alia*:

- Deposition transcripts of Defendant Krysia Syska, Plaintiff Obaida Abdulky, Plaintiff Ward Abdulky, and their child, Anthony, R.A.I/183;
- Deposition transcript of prosthetist Robert Emerson, R.A.I/183;
- Transcripts of Medical Malpractice Action hearings dated September 17, 2015, October 2, 2015, and October 22, 2015, R.A.I/183:309:322:357;
- Report of prosthetist John Schulte dated February 9, 2021 ("the Schulte Report"), R.A.I/183; R.A.II/221;

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[2] The Abdulkys initial disclosure of attorney David J. Oliveira ("Oliveira") as an expert includes his extensive qualifications. R.A.II/36.

- Report of economist Stan Smith dated March 2, 2021 ("the Smith Report"), R.A.II/221; and
- Various communications between the Defendants and the Abdulkys, R.A.I/183.

Oliveira expected to testify, based upon the evidence that he reviewed and particularly with respect to damages, that the Defendants "never examined the issue of damages at the critical times in their representation of the Abdulkys" and that, as a result, "the Abdulkys accepted the sum of $6 million to settle [the Medical Malpractice Action] which was wholly inadequate in the circumstances." R.A.I/183. Further, per the Second Supplemental Answers,

> Once [the Defendants] received an offer of $5 million at the mediation, … Oliveira will testify that it was incumbent upon them to have a full assessment of damages to demonstrate to the defense why they could not recommend the settlement amount to the Abdulkys. [and that] this also would have served the critical purpose of enlightening the defense to the nature of the damages evidence that [the Defendants] would introduce at trial … This would also have been important to managing the issue of insurance company reserves… Oliveira will testify that, if the carrier had performed its own due diligence and set realistic reserves, this would not be an issue… Oliveira will also testify [that] … [a] proper approach to case valuation would have included the preparation of a life care plan … the future losses must be understood before entering into any settlement discussions…

> Anthony's on-going need for prosthetics over the course of his life was a critical factor to consider as anyone would recognize that would be a large number. [i]t is … Oliveira's opinion that the failures [of the Defendants] caused the Abdulkys to accept an inadequate settlement … The realistic case value for this matter is in excess of $10 million. This would have included future equipment and medical costs, loss of consortium and, of equal importance, Anthony's pain and suffering over many years (past and future). The pain and suffering alone could have been worth $3 - $4 million given that the higher number is merely $1000/week for an 80-year life expectancy… In conclusion, it is … Oliveira's opinion that, in the presence of appropriate and timely advice on the issue of settlement, the Abdulkys would have received in excess of $10 million either by way of settlement, or a jury verdict…

R.A.I/186.

Per his affidavit, Oliveira swore and stated *inter alia* as follows:

- "I have conducted research into verdicts and settlements in the Commonwealth for a variety of cases, including medical malpractice cases involving amputations." R.A.II/215.
- "That research has confirmed my opinions as originally set forth in [the Second Supplemental Answers]. Indeed, this research along with another review of [the Defendants'] website

reveals that [the Defendants'] representations to the Abdulkys that the $6 million settlement offer was one of the largest in the Commonwealth was simply false." R.A.II/215.

- "In connection with my engagement by the Abdulkys in this action, I have reviewed numerous summaries of verdicts rendered in recent years in the Commonwealth of Massachusetts in medical malpractice cases. The summaries include information such as the nature and extent of the injuries, whether any amputation was involved, the extent of insurance coverage (if any), information on the plaintiff(s), the identity and qualifications of any experts engaged, bases for the claims as well as the defenses, the county within the Commonwealth where the case was filed and the amount of the verdicts." R.A.II/217.

- "Also in connection with this engagement, I have reviewed many summaries regarding settlements in medical malpractice cases filed in Massachusetts. These summaries include much of the same detail as that contained in the verdict summaries." R.A.II/217.

- "Among other resources utilized in compiling these summaries, the on-line subscription service "Verdict Search" was used, as it appears to include the most comprehensive and up to date detailed information regarding verdicts and settlements." R.A.II/217.

To date, the Defendants have not filed a motion to strike, in *limine* or similar regarding Oliveira's expert testimony. R.A.I/11.

On December 17, 2021, the Superior Court (Janet Kenton-Walker, J.) denied the Defendants' Motion, stating in her Order ("the Summary Judgment Order"):

> After a comprehensive reading of the Summary Judgment record, the relevant law, and after a hearing, Defendant's motion is DENIED. The Court is not persuaded that the relevant law supports Defendants' interpretation and application of either collateral estoppel or judicial estoppel based on the facts in this case. Keeping in mind that the burden is on the Defendants, the summary judgment record shows there are genuine issues of material fact in dispute as to whether defendants exercised the reasonable degree of care and skill required in the performance of their legal duty to the plaintiffs. In addition, there are issues as to causation and damages that remain in dispute.

R.A.II/461.

Thereafter, a single justice of the Appeals Court (Singh, J.) granted the Defendants leave to take an interlocutory appeal of the Summary Judgment Order. R.A.II/467. In her Order ("the Single Justice Order"), the Single Justice stated: "[a]fter consideration of the defendants' petition, memorandum and appendix, and the plaintiffs' response, I exercise my 'broad discretion,' *Ashford* v. *Massachusetts Bay Transp. Auth.*, 421 Mass.

563, 566 (1995), quoting *Packaging Indus. Group, Inc.* v. *Cheney*, 380 Mass. 609, 614 (1980)." R.A.II/467.

Following oral arguments, on March 28, 2023, the Appeals Court (Milkey, Ditkoff, & Englander, JJ.) reversed the Superior Court in a published decision. *Abdulky*, 102 Mass. App. Ct. at 453-454. The Appeals Court agreed with the Superior Court that the Abdulkys' claims were not barred by either collateral estoppel or judicial estoppel. *Id*. at 449-454. However, the Appeals Court concluded that the Abdulkys did not adduce evidence of damages "such ... as would be admissible" at trial. *Id*. at 449-454.

Justice Milkey concurred:

> I join the majority's opinion in all respects, including its ruling that the plaintiffs did not address the damages issue in a manner sufficient to survive summary judgment. In my view, this is a correct, if strict, application of what Mass. R. Civ. P. 56, 365 Mass. 824 (1974), requires. I write separately merely to highlight my sense that the strictness we apply may be a bit out of step with the somewhat more lenient summary judgment culture prevalent in the trial courts. In this respect, I note that we do not typically review orders denying motions for summary judgment in light of their interlocutory nature, and we performed such review here only because a single justice had allowed it. The bar, especially the plaintiffs' bar, would be wise to view today's opinion as presenting a cautionary tale.

Id. at 454.

This application followed.

STATEMENT OF FACTS

The Appeals Court decision correctly states most of the salient facts. However, some facts contained in the record and relevant to the sole issue regarding damages are not found in the *Abdulky* decision and thus warrant a brief recitation here.

Each of the nine individual defendants in the Medical Malpractice Action was insured for malpractice liability up to $5 million. R.A.II/418. At the time of the Second Supplemental Answers and the Oliveira Affidavit, Oliveira was aware of the extent of liability insurance coverage for those defendants. R.A.I/183; R.A.II/418.

It was not until after the Medical Malpractice Action was mediated and eventually settled (August 27, 2015) that the Defendants obtained any estimate regarding the projected lifetime costs of Anthony's prosthetics. *Abdulky,* 102 Mass. App. Ct. at 443; R.A.I/434. Neither of the Defendants' estimates was from a prosthetist; each estimated Anthony's lifetime costs of prosthetics at approximately $450,000 to $583,500. R.A.I/434; R.A.II/30:33. Meanwhile, on September 11, 2015, the Abdulkys obtained a "rough estimate" from a certified prosthetist (Robert Emerson) that Anthony's lifetime costs will "exceed three million dollars." R.A.II/35. None of the estimates was obtained until after the Medical Malpractice Action was mediated and eventually settled.

In this action, the Abdulkys obtained the Schulte Report, which estimates Anthony's lifetime costs of

prosthetics alone at a range of $5,418,385 to $6,438,684, depending upon his lifespan. R.A.II/221. The Abdulkys also obtained the Smith Report which, based upon the Schulte Report, calculates the present value of the prosthetics costs (assuming Anthony lives to be 78.4 years old) at $5,927,738. R.A.II/221.

Oliveira reviewed and relied upon the Schulte Report and the Smith Report, *inter alia*, in formulating his expert opinion on damages. R.A.I/183. However, during oral arguments before the Appeals Court, Justice Englander stated that he was under the impression—and counsel for the Defendants promptly agreed—that Oliveira did *not* rely upon the Schulte Report in forming his expert opinion regarding damages. Transcript of Oral Argument, dated Dec. 8, 2022, at 17 (Addendum at 88). Justice Englander's comment at oral argument was incorrect on that important point: Oliveira's opinion regarding damages was in fact based, in part, upon the Schulte Report (and the Smith Report). R.A.I/183.

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS APPROPRIATE

As the concurrence observed, the Appeal Court decision is a "strict[] application of what Mass. R. Civ. P. 56 [] requires" that "may be a bit out of step with the somewhat more lenient summary judgment culture prevalent in the trial courts." *Abdulky*, 102 Mass. App. Ct. at 454. This Court should grant further appellate review to scale back this escalation of the summary judgment standard, lest a procedural scalpel become a

chainsaw and an impediment to the right to trial in civil cases.

Further, the Appeals Court Single Justice, in granting permission to the Defendants to bring an extraordinary interlocutory appeal of the denial of a summary judgment motion, without identification of any compelling reason for doing so, deserves further review by this Honorable Court. R.A.II/467.

STATEMENT OF REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

I. The Appeals Court applied a strictness to summary judgment that is inconsistent with the more lenient summary judgment culture long-prevalent in the trial courts and that dramatically elevates the burden upon parties opposing summary judgment.

A. A trial court deciding a motion for summary judgment must view the evidence in the light most favorable to, and decide all reasonable inferences in favor of, the non-moving party.

When determining a motion for summary judgment, a court must view "the evidence in the light most favorable to the nonmoving party." *Lynch* v. *Crawford*, 483 Mass. 631 (Mass. 2019). Likewise, "'[o]n summary judgment the inferences to be drawn from the underlying facts … must be viewed in the light most favorable to the party opposing the motion.'" *Hub Assocs., Inc.* v. *Goode*, 357 Mass. 449, 451 (1970), quoting *U.S.* v. *Diebold*, 369 U.S. 654, 655 (1962).

B. Massachusetts trial courts typically decide motions for summary judgment with leniency toward non-moving parties.

"'Any doubts as to the existence of material fact are to be resolved against the party moving for summary judgment.'" *Lynch*, 483 Mass. at 641, quoting *Lev* v. *Beverly Enters.-Mass., Inc.*, 457 Mass. 234, 237 (2010).

Summary judgment is only appropriate if the defendant can show that the non-moving party "has no reasonable expectation of proving an essential element of [his] case." *Boazova* v. *Safety Ins. Co.*, 462 Mass. 346, 350 (2012). Thus, the non-moving party's burden has been described as a "relatively low bar required to survive summary judgment." *Belanger* v. *Boys in Berries, LLC.*, 89 Mass. App. Ct. 1133 (2016) (unpublished former Rule 1:28 disposition) (attached); see *Donarumo* v. *Phillips*, 34 Mass. L. Rptr. 623 (Mass. Super. Ct. 2018) (same) (attached).

C. The Single Justice improperly applied a "broad discretion" standard in reviewing the G.L. c. 231, § 118, ¶ 1 petition.

The Appeals Court Single Justice invoked "'broad discretion'… and grant[ed] the defendants leave to file an interlocutory appeal of the December 17, 2021 order." R.A.II/467, citing *Ashford* v. *Massachusetts Bay Transp. Auth.*, 421 Mass. at 566, quoting *Packaging Indus. Group, Inc.* v. *Cheney*, 380 Mass. at 614.

The "broad discretion" available to the Single Justice is, however, very limited. *Ashford*, 421 Mass. at 565 (interlocutory review under G.L. c. 231, § 118, ¶ 1 constitutes "special authorization" applicable only "in

a narrow range of cases"). General Laws c. 231, § 118 "creates an exception to the normal rule that only final judgments may be subject to appeals." *Packaging Indus. Group, Inc.*, 380 Mass. at 612. "The exception is a narrow one and is keyed to the 'need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence.'" *Id.*, quoting *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978). The authority conferred by G.L. c. 231, § 118 "should be exercised sparingly and only in the most exceptional circumstances." *Masiello* v. *Perini Corp.*, 394 Mass. 842, 850 (1985). *Masiello* involved an order denying disqualification of counsel; however, just as with the Summary Judgment Order, the order in *Masiello* was also merely interlocutory. *Id.* at 843. As here, "the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merit." *Id.* at 850, quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377 (1981). Denial of the Defendants' Motion did not constitute a final rejection of any claims in this case, and certainly not of any fundamental right that could not be effectively reviewed following a judgment on the merits in this action. The Single Justice's invocation of her authority under G.L. c. 231, § 118 was misplaced.

So narrow and exceptional is appellate review of an interlocutory order denying summary judgment that "[i]n most cases, based on the deference normally accorded determinations by the judge who heard the matter in the first instance, the single justice will decline to act on an application for relief under G.L. c. 231, § 118, first par., that does not disclose clear

error of law or abuse of discretion." *Jet-Line Servs., Inc.* v. *Selectmen of Stoughton*, 25 Mass. App. Ct. 645, 646 (1988). *Cf. Abdulky*, 102 Mass. App. Ct. at 445 n.8 (holding Single Justice did not abuse discretion).

D. The Appeals Court applied an incorrect standard of review to the denial of the motion for summary judgment.

The Appeals Court reversed the trial court on a single basis: the Abdulkys "did not adduce evidence of damages 'such … as would be admissible' at trial…" *Abdulky*, 102 Mass. App. Ct. at 442. The Appeals Court applied a *de novo* standard of review not only to so much of the Summary Judgment Order as concerned collateral estoppel and judicial estoppel, but also to so much of the Summary Judgment Order as concerned evidence of damages. *Id.* at 445. Implicit in the Summary Judgment Order is the Superior Court's conclusion that the Abdulkys' proffer of expert testimony on damages was sufficient to withstand summary judgment. The Appeals Court review of that aspect of the Superior Court's decision by way of a *de novo* standard was improper.

> [A]n abuse of discretion standard on appellate review will allow trial judges the needed discretion to conduct the inherently fact-intensive and flexible … analysis [under *Commonwealth* v. *Lanigan*, 419 Mass. 15 (1994)], while preserving a sufficient degree of appellate review to assure that *Lanigan* determinations are consistent with the law and supported by a sufficient factual basis in the particular case.

Canavan's Case, 432 Mass. 304, 312 (Mass. 2000). "[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire* v. *Carmichael*, 526 U.S. 137, 152 (1999). Without such broad latitude, "the trial judge would lack the discretionary authority needed [] to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted." *Id*. "[A] judge's determination on the reliability of scientific testimony is no different from other evidentiary decisions by a trial judge that are reviewed on appeal under an abuse of discretion standard of review." *Canavan's Case*, 432 Mass. at 311. "The focus of appellate review of an interlocutory matter is 'whether the trial court abused its discretion.'" *Caffyn* v. *Caffyn*, 441 Mass. 487, 490 (Mass. 2004), quoting *Edwin R. Sage Co.* v. *Foley*, 12 Mass. App. Ct. 20, 25 (1981). In *Caffyn*, as here, this Court reviewed the trial court's denial of a dispositive motion - a purely interlocutory order. *Caffyn*, 441 Mass. at 489-490. See *Otis* v. *Arbella Mut. Ins. Co.*, 443 Mass. 634, 640 (2005) (reviewing summary judgment decision based on judicial estoppel for abuse of discretion).

Depending upon which approach ("traditional" versus other) the Abdulkys take at trial, expert testimony from an attorney may not be required to establish the cause and the extent of their damages. *Fishman* v. *Brooks*, 396 Mass. 643, 647 (1986). Summary judgment on the sole basis that a legal malpractice plaintiff has not adduced sufficient expert testimony on causation and/or damages is therefore error.

E. The Appeals Court decision improperly and unnecessarily elevates the burden upon parties opposing summary judgment.

A legal malpractice plaintiff "need only show 'that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause." *McLaughlin* v. *Bernstein*, 356 Mass. 219, 226 (1969). The plaintiff must prove that he or she "probably would have obtained a better result had the [defendant] attorney exercised adequate skill and care." *Poly* v. *Moylan*, 423 Mass. 141, 145 (1996).

The Defendants, as the movants, had the initial burden to demonstrate "that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Kourouvacilis* v. *Gen. Motors Corp.*, 410 Mass. 706, 715 (1991). "[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Id.* at 716.

Moreover, the Appeals Court decision runs afoul of another prevalent approach in the trial courts to allow the fact finder to weigh expert testimony rather than exclude it entirely from the fact finder. In *Aspinall* v. *Philip Morris Cos., Inc.*, 33 Mass. L. Rptr. 198 (Mass. Super. Ct. 2015), the court exercised its "gate keeping" function in the context of a motion to exclude expert

testimony due to its unreliability. *Id*., citing Mass. G. Evid. § 702. The Court denied the motion "without prejudging the question of whether the experts' methodology satisfies the reliability standard for admission into evidence." *Id.* "[M]any of [the movant's] criticisms of the experts' reports go to the weight rather than to the admissibility of the evidence." *Id*.

> [Courts] may not usurp the function of the factfinder by passing on the relative credibility of rival experts, evaluating the comparative weight of their evidence, assessing whether [one party's view] is more valid or plausible than [the other], or concluding that [the plaintiffs] are unlikely to prevail on this issue at trial.

Molly A. v. *Comm'r*, 69 Mass. App. Ct. 267 (2007) (reversing summary judgment).

The Abdulkys' burden—under one of two possible approaches to be used at trial—is to prove that, but for the conduct of the Defendants regarding the settlement of the Medical Malpractice Action, they would have probably received more in the way of settlement or a verdict. *Fishman*, 396 Mass. at 647.

F. A heightened burden upon parties opposing summary judgment is inconsistent with the policy of this Court favoring resolution of cases on their merits.

"[O]ur system favors the substantive resolution of disputes on the merits in most instances." *Grassi Design Group, Inc.* v. *Bank of America, N.A.*, 74 Mass. App. Ct. 456, 461 (2009). "The law strongly favors a trial on the merits of a claim." *Monahan* v. *Washburn*,

400 Mass. 126, 129 (1987). See *Baptiste* v. *Sheriff of Bristol County*, 35 Mass. App. Ct. 119, 125-126 (1993) ("summary judgment is rarely granted in negligence actions").

The Appeals Court has imposed upon the Abdulkys a burden of expert damages testimony inconsistent with long-established precedent. For example, in *LaClair* v. *Silberline Mfg. Co., Inc.*, 379 Mass. 21 (1979), this Court held that "[e]xpert opinion … must be based on either the expert's direct personal knowledge, on evidence already in the record or which the parties represent will be presented during the course of the trial, or on a combination of these sources." *Id.* at 32. While this is true "particularly when addressed to a jury," *id.*, the Appeals Court decision in this case, if left to stand, will forever deprive the Abdulkys of any opportunity to present any expert damages testimony to the fact-finder.

An expert should be permitted "to base an opinion on facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion." *Dep't of Youth Services* v. *A Juvenile*, 398 Mass. 516 (1986).

By contrast, the Appeals Court has insisted upon a level of detail and data in support of Oliveira's expert opinion at summary judgment that places an onerous and unwarranted burden on non-moving parties. Even if some of the facts and data upon which Oliveira relied are not apparent on the record, this Court can reasonably anticipate that there will be an expanded record at trial subject to pre-trial motions, cross-

examination at trial, and presentation of contrary evidence. In short, any fine details not already part of the summary judgment record underlying Olveira's expert testimony will be forthcoming at trial.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant further appellate review.

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Dated: May 18, 2023

[*Certificate of Service and Certificate of Compliance Omitted in Printing of this Appendix.*]

APPENDIX 3

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2022-P-0498

[Dated August 1, 2022]

OBAIDA ABDULKY AND WARD ABDULKY,
PARENTS AND NEXT FRIEND OF ANTHONY
ABDULKY,
Plaintiffs – Appellees,

v.

LUBIN & MEYER, P.C., ANDREW C. MEYER, JR.
and KRYSIA SYSKA,
Defendants – Appellants.

On Appeal From Worcester Superior Court
1885-CV-01247A

BRIEF OF APPELLEES OBAIDA ABDULKY AND WARD ABDULKY, PARENTS AND NEXT FRIEND OF ANTHONY ABDULKY

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[*Table of Contents Omitted in Printing of this Appendix.*]

SUMMARY OF ARGUMENT

The Defendants (Appellants herein) fail to establish that Judge Kenton-Walker, in denying summary judgment, abused her discretion where the Defendants fail to establish that judicial estoppel and/or collateral estoppel apply as a bar, where the Defendants fail to establish they are entitled to judgment as a matter of law and/or where the Defendants fail to establish that the Plaintiffs have no reasonable expectation of proving the essential elements of their case.

[*Table of Authorities Omitted in Printing of this Appendix.*]

STATEMENT OF THE FACTS[1]

In this case, the Plaintiffs/Appellees (hereafter: "the Plaintiffs" or "the Abdulkys") have engaged an experienced prosthetist (different from the one ultimately contacted by the Abdulkys in the Medical Malpractice Action) as well as a seasoned economist; those experts together estimate Anthony's lifetime prosthetics costs *alone* at approximately $6 million (present value). R.A.II 219-225.

ARGUMENT/LEGAL ANALYSIS

I. SUMMARY JUDGMENT STANDARDS - GENERALLY

"In ruling on a summary judgment motion, the judge views the evidence and all reasonable inferences therefrom, 'in the light most favorable to the nonmoving party.'" Jenkins v. Bakst, 95 Mass.App.Ct. 654, 656 (2019), *quoting* Premier Capital, LLC. v. KMZ, Inc., 464 Mass. 467, 475 (2013). It is a "relatively low bar required to survive summary judgment." Belanger v. Boys In Berries, LLC., 89 Mass.App.Ct. 1133 (2016). In moving for summary judgment, the Appellants had the "burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings." Kourouvacilis v. General Motors Corporation, 410 Mass. 706, 707 (1991), *quoting* Mathers v. Midland-Ross Corp., 403 Mass. 688, 690 (1989). "The motion must be supported by one or more of the materials listed in rule 56(c) and, although that

[1] Terms used but not defined herein shall have the meanings ascribed to them in the Appellants' Brief.

supporting material need not negate, that is, disprove, an essential element of the claim …, **it must demonstrate that proof of that element at trial is unlikely to be forthcoming**." Id. at 714 (emphasis added). Put otherwise, "[s]ummary judgment is appropriate if the defendant can show that the plaintiff 'has **no reasonable expectation** of proving an essential element of [his] case." Barron v. Dipiano, 92 Mass.App.Ct. 1124 (2018), *quoting* Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012)(emphasis added).

Negligence cases – such as this legal malpractice case – are very rarely appropriate for disposition by summary judgment. *See e.g.,* Barron v Dipiano, *supra* (the essential elements of legal malpractice are generally factual ones for the jury); Girardi v. Gabriel, 38 Mass.App.Ct. 553, 558 (1995)(the issue of proximate cause is one of fact for the jury); Glidden v. Terranova, 12 Mass.App.Ct. 597, 598 (1981)(the question whether an attorney has exercised sufficient legal care is one of fact for the jury to decide).

II. REVIEW PURSUANT TO G.L. c. 231, § 118, 1ST PAR.

The Appellants seek to appeal Judge Kenton-Walker's Order denying summary judgment, a purely interlocutory order. However, "[a]s a general rule, an aggrieved litigant cannot as a matter of right pursue an immediate appeal from an interlocutory order unless a statute or rule authorizes it." Elles v. Zoning Bd. of Appeals of Quincy, 450 Mass. 671, 673-4 (2008). In Elles, the plaintiffs sought - pursuant to G.L. c. 231, §118 - an appeal of the denial of their summary judgment motion. Id. However, the single justice

denied the petition for review of the interlocutory order (as well as a motion for reconsideration of such denial), and the SJC affirmed the same. Id. at 672-675. As the SJC concluded, there was no reason why the plaintiffs would be unable to obtain effective appellate review of the pertinent issue on appeal after trial. Id. at 674. The very same can be said about the Appellants and, for the same reasoning, the Order denying summary judgment should remain undisturbed.

"The focus of our review under G.L. c. 231, § 118, is 'whether the trial court abused its discretion – that is, whether the court applied proper legal standards and whether the *record* discloses reasonable support for its evaluation of factual questions.'" Galipault v. Wash Rock Investments, LLC. 836 N.E.2d 1123, 1131 (Mass. 2005), *quoting* Caffyn v. Caffyn, 441 Mass. 487, 490 (2004)(emphasis added). The lower court's order – itself – does not necessarily have to disclose the support for the court's decision, so long as *the record* provides such support.

Respectfully, this Court "must exercise special care not to substitute our [its] judgment for that of the trial court where the records disclose reasoned support for its action." Id. at 1132 (citation omitted); Edwin R. Sage Co. v. Foley, 12 Mass.App.Ct. 20, 25-26 (1981). For review of an interlocutory order under G.L. c. 231, §118, the Court must determine "whether the judge abused [her] discretion, that is, whether the judge applied proper legal standards and whether there was reasonable support for [her] evaluation of factual questions." Lieber v. President and Fellows of Harvard College, 179 N.E.3d 19, 24 (Mass. 2022). "[T]he

Superior Court judge's order should ordinarily not be overturned if it is *factually supported* and unaffected by *clear error of law*." Aspinall v. Philip Morris Companies, Inc., 442 Mass. 381, 390 (2004)(emphasis added).

III. THIS APPEAL IS IMPROPER AND SHOULD BE DISMISSED FORTHWITH.

Before addressing the issues presented by this appeal, the Abdulkys reassert and incorporate by reference herein their objection to the Defendants' Petition for Interlocutory Review, which objection was docketed on February 11, 2022, in 2022-J-0020. Docket Paper #7. Although the authority of the single justice regarding a petition brought pursuant to G.L. c.231, §118 (first par.) may be "plenary", the single justice's order "'will be reviewed [by a panel] on appeal as if it were an identical order by the trial judge considering the matter in the first instance.'" Id. at 389, *quoting* Jet-Line Servs., Inc. v. Selectmen of Stoughton, 25 Mass.App.Ct. 645, 646 (1988). Mass.R.App.P. 15(c) specifically authorizes this Court to review the single justice's order ("[t]he action of a single justice may be reviewed by the appellate court.")

The Single Justice exceeded her authority in granting the Defendants' request for extraordinary relief for review of an interlocutory order denying summary judgment.

> The single justice is not a fact finder and must accept any relevant facts found by the judge when those facts have support in the record. **Considerable deference is also required on**

> **the part of the single justice to determinations by the judge, especially where those determinations involve an exercise of discretion**.

Aspinall v. Philip Morris Companies, Inc., 442 Mass. 381, 390 (2004)(emphasis added). Therefore, "[i]n most cases, based on the deference normally accorded determinations by the judge who heard the matter in the first instance, the single justice will decline to act on an application for relief under G.L. c. 231, §118, first par., that does not disclose clear error of law or abuse of discretion." Jet-Line Servs., Inc. v. Selectmen of Stoughton, *supra*.

In granting the Defendants' request for the extraordinary remedy of the review of an interlocutory order – a routine, non-dispositive order simply denying summary judgment - Justice Singh invoked her "broad discretion", relying upon Ashford v. Massachusetts Bay Transp. Auth., 421 Mass. 563, 566 (1995), quoting Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 614 (1980). R.A.II 467. However, the Single Justice's discretion is not "broad" when it comes to granting review of an interlocutory order, namely one denying summary judgment.

G.L. c. 231, §118 "creates an exception to the normal rule that only final judgments may be subject to appeals." Packaging Indus. Group, Inc. v. Cheney, 380 Mass. at 612. "The exception is a narrow one and is keyed to the 'need to permit litigants to effectually challenge interlocutory orders of **serious perhaps irreparable consequence**.'" Id., *quoting* Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480

(1978)(emphasis added). Here, the Single Justice did not reference or cite to any serious and/or irreparable consequence(s) (or similar) that could possibly justify extraordinary review in these circumstances. R.A.I 467. Nothing about the superior court's denial of summary judgment is of serious or irreparable consequence, no matter how personally important the matter may be to these parties. The Defendants did not – and cannot – establish that any issue presented in this case is of such serious or irreparable consequence as to justify the extraordinary relief they now seek. Further, the Single Justice's reliance on the Packaging Indus. Group case seems misplaced, as that case involved a different part of G.L. c. 231, §118 (second paragraph), which only addresses the review of a trial court's handling of a *request for a preliminary injunction* – something that has no applicability in this case. Injunctive relief is not part of this case and was not a matter before Judge Kenton-Walker.

Accordingly, in her Order, the Single Justice erroneously relied upon a case involving an irrelevant provision of c. 231, §118. R.A.II 467. Further, rather than adhering to the well-established "normal rule" that only final judgments may be appealed and only matters of serious if not irreparable consequence justify the extraordinary relief of review of a purely interlocutory, non-dispositive order, the Single Justice went far beyond the scope of her authority in granting the Defendants' petition.

Interlocutory rulings should not be presented piecemeal to this Court for appellate review; "if such were not the rule, a creative party could engage in

numerous opportunities to appeal from adverse rulings, thus significantly and needlessly aging the case." Maxwell v. AIG Domestic Claims, Inc., 950 N.E.2d 40, 60 n. 8 (Mass. 2011). The Defendants are attempting to do just that by presenting a routine interlocutory non-dispositive order to this Court for piecemeal review. Despite the Defendants' creativity, there is no need or justification for the Court to review the denial of summary judgment. This appeal should go no further; the parties will all still have their "day in court" – including any and all rights of appeal therefrom - and suffer no irreparable harm or serious consequences should the order denying summary judgment remain undisturbed.

Should this Court nevertheless find that the Defendants should be allowed to proceed with this piecemeal review of an interlocutory order, for the reasons set forth below, the Defendants fail to establish that Judge Kenton-Walker in any way abused her discretion. The Order denying summary judgment should not be disturbed.

IV. THE DEFENDANTS FAILED TO REQUEST THE REQUISITE AUTHORITY UNDER C. 231, §118 TO INCLUDE THE ISSUE OF JUDICIAL ESTOPPEL IN THEIR APPEAL.

As a further preliminary matter, the Abdulkys once again assert their opposition to the inclusion in this appeal – should this Honorable Court deem it necessary and proper to accept – of the issue of judicial estoppel. The Abdulkys' joint (1) *Objection to Defendants' Notice of Appeal and (2) Motion to Strike*

("the Appeal Notice Objection") filed in the Superior Court action and dated March 4, 2022, is hereby incorporated herein by reference. Docket File Ref. # 45. As more particularly set forth therein, when the Defendants filed their Petition to the Single Justice pursuant to c.231, §118, they identified *only* two aspects of Judge Kenton-Walker's order for which they sought the required permission to appeal. Docket Paper #1. Noticeably absent from the Defendants' Petition was any mention whatsoever of Judge Kenton-Walker's refusal to apply the doctrine of judicial estoppel as a bar. Docket Paper #1. In short, the Defendants waived, or forfeited, any right to pursue an appeal arising out of the lower court' refusal to apply this doctrine. Because that issue was not mentioned in the Defendants' Petition, the Plaintiffs had no reason to – and thus did not – address judicial estoppel in their opposition. In fact, Rule 20.0(a)(1), (4) of the Mass. Appeals Court Rules *required* the Defendants, in their Petition, to, among other things, "state briefly the nature of the order or action of the trial court from which review is sought" and a "statement of the *specific* relief requested" (emphasis added). In their petition, the Defendants never specified as an issue for appeal the doctrine of judicial estoppel; they did not, in their statement of the specific relief requested, include the lower court's refusal to apply judicial estoppel as a bar. After the Single Justice granted their Petition docketed on February 23, 2022, the Defendants then filed a Notice of Appeal. R.A.II 468. In the Notice of Appeal, the Defendants sought - *for the first time* - to include as part of their appeal *all* aspects of Judge Kenton-Walker's December 20, 2021, Order – including the issue of judicial estoppel. R.A.II 468. Because the

Defendants were trying to include in this appeal an issue for which they had not sought or received the requisite authority to appeal under c. 231, §118, the Plaintiffs timely filed the Appeal Notice Objection. Soon thereafter, the Plaintiffs also filed (in 2022-J-0020) a Motion for Clarification/to Amend Order of the Single Justice. Docket Paper #8. On March 16, 2022, Justice Singh denied the Motion for Clarification/to Amend Order, ostensibly authorizing the Defendants to seek review of *every* aspect of Judge Kenton-Walker's Order, including the issue of judicial estoppel. However, that issue - noticeably absent from the Defendants' request for permission to bring this appeal - is not properly part of this appeal.

V. THE DEFENDANTS CANNOT ESTABLISH THAT THE SUPERIOR COURT ABUSED ITS DISCRETION IN REFUSING TO APPLY JUDICIAL ESTOPPEL AS A BAR TO THE PLAINTIFFS' CLAIMS.

Should the Court nonetheless allow the Defendants to proceed with an appeal of the lower court's refusal to apply judicial estoppel as a bar, as with the Court's review of all other issues in this appeal, the review is based on an abuse of discretion standard. Otis v. Arbella Mutual Insurance Co., 443 Mass. 634, 639, 824 N.E.2d 23 (2005).

Judge Kenton-Walker was correct in concluding that the Defendants failed to establish that the doctrine of judicial estoppel acts to bar the Abdulkys' claims. First and foremost: **judicial estoppel is an equitable doctrine**. *See e.g.,* Otis v. Arbella Mutual

Insurance Co., 443 Mass. at 639, *citing* New Hampshire v. Maine, 532 U.S. 742, 750 (2001). It "precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding." Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998). "The purpose of the doctrine is to prevent the manipulation of the judicial process by litigants." Canavan's Case, 432 Mass. 304, 308 (2000). "[T]he doctrine is properly invoked whenever a 'party is seeking to use the judicial process in an inconsistent way that courts should not tolerate.'" Otis, 443 Mass. at 640, *quoting* East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623 (1996).

Application of the doctrine is a matter of discretion. New Hampshire v. Maine, 532 U.S. at 750. The Court should weigh the equities and only apply the doctrine when necessary to serve its over-all purpose. Otis, 443 Mass. at 642. That purpose is "to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system," and the doctrine should therefore only be applied "when a litigant is playing fast and loose with the courts.'" Alternative System Concepts, Inc. v. Synopsis, Inc., 374 F.3d 23, 35 (1st Cir. 2004) *quoting* Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987).[2]

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[2] Reference to federal caselaw on the topic of judicial estoppel is appropriate because state and federal law are "materially the same." Thore v. Howe, 466 F.3d 173, 187 n.1 (1st Cir. 2006).

Where the doctrine of judicial estoppel has been adopted, courts have recognized three fundamental elements as comprising the core of the doctrine. Otis, 443 Mass. at 640-41. One such element is, "the position being asserted in the litigation must be 'directly inconsistent,' meaning 'mutually exclusive' of, the position asserted in a prior proceeding." Otis, at 25-26, *quoting* Alternative System Concepts, Inc. v. Synopsis, Inc., *supra* at 33. In other words, the current position being espoused by a party must be "clearly inconsistent" with a prior position taken by that party. 532 U.S. at 750. The "two positions must be diametrically opposed" Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw.U.L.Rev. 1244, 1263-64 (1986). Accordingly, the SJC rejects the doctrine "where the position being asserted is not directly contrary to the position previously asserted." Otis, 443 Mass. at 641, *citing* Canavan's Case, *supra* at 308-309.[3]

The Defendants did not – and cannot - establish that the positions taken by the Abdulkys in the Medical Malpractice Action and now in this case are inconsistent, let alone *diametrically opposed.*[4] Indeed,

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[3] It is difficult to reconcile this element of the doctrine with Mass.R.Civ.P. Rule 8(e)(2) which expressly permits alternative claims even *in the same pleading*, "regardless of consistency." The rule underscores that something more than mere inconsistency is required for the doctrine of judicial estoppel to apply.

[4] The Defendants bear the burden of convincing this Court that the position(s) taken by the Abdulkys in the Medical Malpractice Action "present the risk of inconsistent court determinations" sufficient to justify applying the doctrine. United States for Use of

the Defendants' summary judgment papers – including the exhibits - are replete with evidence of (1) the Abdulkys' hesitance, reluctance and confoundment regarding the offer in the days leading up to August 27, 2015, and (2) their repeated efforts thereafter to extricate themselves from the Settlement. *See e.g.,* R.A.I 116, 221-260; R.A.II 119-122, 144, 168, 173, 175, 186.

In the Medical Malpractice Action, the Abdulkys repeatedly and consistently expressed their dissatisfaction and confusion regarding the Settlement, not only to their counsel at the time (the Defendants), but also to the Court. R.A. I 068-069; 071 (lines 6-8); 092 – 093; 095 - 096. Likewise, the Abdulkys' dissatisfaction with the mediation process overseen by Judge Lemire was well known to their counsel and the Court; at one point, Judge Lemire even described their prolonged hesitation to accept the Settlement as "flips" R.A.I 71 (lines 6-7). Their often articulated and persistent dissatisfaction throughout the mediation process and its culmination in the Settlement is well documented in the transcripts of the hearings in the Medical Malpractice Action. *See e.g.,* R.A.I 091-098, 116 – 120, 122 - 126.[5] Therefore, the Abdulkys' claims

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American Bank v. C.I.T. Const. Inc., 944 F.2d 253, 259 (5th Cir. 1991).

[5] The Abdulkys' confusion and ignorance regarding the process is understandable; in an email dated August 21, 2015, from their attorneys, the Abdulkys were told "there are no lost earnings for Anthony and no future medical costs which we can predict today." R.A.II 184. Given that Anthony, just several years old at the time, was faced with a lifetime of reliance on prosthetics to try to

certainly should not come as any surprise to the Defendants. Their confusion, ignorance and dissatisfaction with the process leading up to and the Settlement itself are consistent with their current, pending claims against the Defendants.

It is readily apparent in the record below that, in the Medical Malpractice Action, the Abdulkys were quite dissatisfied with and confused about the outcome. Finally armed with an estimate from an actual prosthetist thanks to their own initiative, the Abdulkys were - at the very least - obviously confused by whether and how the proposed settlement related to their actual damages – particularly the lifetime costs of Anthony's prosthetics. The crux of the Abdulkys' confusion and dissatisfaction was simple and obvious: the Defendants failed to provide any *timely* expert support for estimating arguably the single largest component of their clients' damages. Instead, the Defendants abdicated their duties adequately and timely to inform and prepare their clients with a reliable assessment of the anticipated lifetime costs of prosthetics for Anthony. Rather than timely (i.e., before the mediation and before the Abdulkys were backed into a corner and forced to accept a valuation proffered by the Kraus

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compensate for his lost arm, these statements from the Defendants are truly astonishing. Furthermore, when the Abdulkys educated themselves about seeking and obtaining expert support to help quantify their damages, the Defendants boldly proclaimed on September 2, 2015: "I have as you instructed reached out to our economist and vocational experts. Although not officially retained yet …**As you know, I advise against this because after many years of doing this I know what they are going to say**." R.A.II 203 (emphasis added).

Defendants) obtaining a reliable estimate from someone knowledgeable in the specialized field of prosthetics and thereby adequately and timely informing and preparing their clients, the Defendants instead merely relied upon the representations of the Kraus Defendants. As just recently revealed on December 14, 2021, the settlement amount urged upon the Abdulkys by the Kraus Defendants was not based upon an estimate from a prosthetist or anyone in the field of prosthetics. R.A.II 417 (line 18) – 418 (line 8). As it turned out, throughout the mediation process up to the date the Abdulkys were committed to a settlement, none of the parties in the Medical Malpractice Action had any estimate of the lifetime costs of prosthetics.

Despite what should have been to the Defendants a clear and obvious need for a prosthetist – or someone well-versed with prosthetics and Anthony's particular, unique needs - to develop a reliable estimate, the Defendants insisted that the Abdulkys simply take their word for it, apparently as self-proclaimed prosthetics "experts". R.A.II 203. The Defendants simply expected their grandiose characterizations of the settlement to satisfy and appease their clients. When the Abdulkys finally – on their own initiative – obtained on or about September 11, 2015 (R.A. II 036-037) an estimate from a prosthetist, it was too late – the case was settled and the defense was in full attack mode to enforce it. R.A.I 115-116; R.A.II 152-53, 164.

Taken aback (to put it mildly) by the substantial estimate of prosthetics costs finally obtained *after the fact*, the Abdulkys did what they could to extricate

themselves from the Settlement – including some rather unorthodox efforts. *See e.g.,* R.A.II 213. Faced with pressure from their own lawyers and defense counsel as well as threats of the appointment of a guardian *ad litem* ("GAL"), the Abdulkys were left with only one option: to proceed with the Settlement. However, that does not in any way negate or diminish the fact that the record in the Medical Malpractice Action around the time of its disposition is permeated with the Abdulkys' vehement dissatisfaction with the Settlement and their strong, oft-articulated reluctance to accept the same. Ultimately, the Abdulkys capitulated and accepted the settlement foisted upon them by, most remarkably, those charged with duties timely and fully to inform - and zealously advocate for - them. Therefore, it can hardly be said that the Abdulkys' position in this case is inconsistent, let alone *diametrically opposed*, with their position in the Medical Malpractice Action, particularly regarding the settlement of that case. For this reason alone, the doctrine of judicial estoppel does not apply as a bar in this case; the Defendants cannot establish that the lower court abused its discretion in refusing to apply the doctrine of judicial estoppel to bar the Plaintiffs' claims.

This case bears many similarities to Meyer v. Wagner, 429 Mass. 410, 420, 709 N.E.2d 784 (1999), in which the SJC *rejected* judicial estoppel as a bar to the plaintiff' malpractice claim, where the essence of her claim was that the positions taken during the prior proceeding were themselves the product of her attorney' malpractice. The issue in Meyer was "whether a client who agreed to the settlement of … a[n] action

on the advice of her attorney later may properly assert a claim for malpractice against the attorney in the preparation and execution of the settlement agreement." 709 N.E.2d at 786. *Just as the Defendants attempt to do here with respect to Judge Lemire's approval of the Settlement, the defendant in Meyer likewise relied primarily on the judge's approval of the settlement in the earlier proceeding.* Id. Just like the Abdulkys, the client in Meyer as "urged" by her attorney "to enter into the settlement agreement even though she had expressed concerns" about the settlement. Id. at 788. Relying upon the principles stated in Fishman v. Brooks, 396 Mass. 643 (1986), the SJC concluded that, even though the settlement was approved by a Judge, "with appropriate proof, a plaintiff would be entitled to a trial on a claim that his or her attorney had not exercised adequate care and skill in reaching such an agreement." Meyer, *supra* at 790. The SJC adopted "the better rule" established in Grayson v. Wofsey, 646 A.2d 195 (Conn. 1994), namely:

> [W]here a client establishes that his or her attorney, in advising on the settlement of [an] … action, has failed to exercise the degree of skill and care of the average qualified lawyer, and that the failure has resulted in loss or damage to the client, the client is entitled to recover even if the settlement has received judicial approval.

Meyer, *supra* at 791 (emphasis added). The SJC continued: "[t]he principle that a party maintaining a position in one judicial proceeding is not permitted to assume a contrary position in a subsequent judicial proceeding concerning the same subject [internal

citation omitted], cannot be logically applied in … circumstances where the plaintiff is attempting to show that her position in the [prior] action was the result of the defendant's malpractice." Id. Meyer is highly instructive here and – alone - should be dispositive of the judicial estoppel issue.

The Defendants likewise fail to establish a second element necessary for judicial estoppel to apply, namely that the party against whom the doctrine is being asserted (the Abdulkys) "must have succeeded in convincing the court to accept its prior position." Otis, 443 Mass. at 641, *citing* Alternative System Concepts, Inc. v. Synopsys, Inc., *supra*, and cases cited. "Where the court has found in favor of that party's position in the prior proceeding, 'judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" 443 Mass. at 641, *citing* New Hampshire v. Maine, *supra* at 750, *quoting* Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982).[6] Thus, where the party against whom the doctrine is sought to be applied was not successful in the prior proceeding, judicial estoppel should not apply. East Cambridge

[6] For the same reasons the first element of judicial estoppel does not apply to bar their claims, it cannot be said that the Abdulkys are guilty of leading astray Judge Lemire nor of now leading astray the Court in this action. In fact, the Abdulkys have at all times been very transparent – both with Judge Lemire and now in this action – about their reactions and opinions regarding the Defendants' handling of the Medical Malpractice Action, particularly during the final weeks of that case, including, specifically, the insufficiency of the Settlement.

Sav. Bank v. Wheeler, *supra* at 623; *see also* Fay v. Federal Nat'l Mtge. Ass'n., 419 Mass. 782, 788 (1995).

It can hardly be said that the Abdulkys succeeded before Judge Lemire in establishing much other than their strong dissatisfaction with the mediation process – essentially orchestrated by the Kraus Defendants - and the eventual settlement. In fact, their attorneys' perfunctory attempt to have the Court relieve the Abdulkys from the Settlement failed; Judge Lemire denied the Abdulkys' motion seeking relief from the settlement. While it is true that Judge Lemire ultimately approved the Settlement, that was NOT because of the Abdulkys' advocacy to have the Settlement approved. More accurately, the Settlement was approved *despite* the Abdulkys' vehement and repeated protestations (oftentimes to the frustration of their own attorneys and the Court).

"In determining whether the party 'succeeded' in a prior proceeding, we look to whether the prior forum 'accepted the legal or factual assertion alleged to be at odds with the position advanced in the current forum …'" In re Bankvest Corp., 375 F.3d 51, 60 (1st Cir. 2004), *quoting* Gens v. Resolution Trust Corp. (In re Gens), 112 F.3d 569, 572-73 (1st Cir. 1997). In Bankvest, "before any substantive proceedings were scheduled to begin, the action was settled … [and] the … *court approved the settlement*. At no time did the … court accept the legal or factual assertions of the complaint." *Id.* As a result, the court refused to apply the doctrine of judicial estoppel. *Id.* For the same reason the Bankvest court refused to apply the doctrine, Judge Kenton-Walker was justified in failing

to be persuaded by the Defendants' claim to the benefits of the doctrine. The Medical Malpractice Action was settled before any substantive proceedings began – significant discovery had yet to be conducted. Although Judge Lemire approved the Settlement, at no time did he accept the legal or factual assertions of the complaint.[7] The Abdulkys did not succeed in their attempts to extricate themselves from the Settlement; nor were the merits of the Medical Malpractice Action adjudicated so there was no "success" in that regard. Indeed, at the end of that case, the primary issue to be decided by the Court was "simply" whether to enforce the Settlement or not. Thus, the Defendants did not – and cannot - establish that the Abdulkys "succeeded" in the prior proceeding.

There is, however, no denying that the Abdulkys, following a mediation process overseen by Judge Lemire, obtained a sizeable settlement in the Medical Malpractice Action. Undoubtedly, some - perhaps many - medical malpractice victims would be satisfied with the Settlement. However, merely applying labels to the Settlement ("tremendous", "huge", etc.) is simple hyperbole and matters not. What truly mattered in the Medical Malpractice Action - what the Abdulkys so desperately wanted, needed, requested and deserved to understand from their lawyers - was how the

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[7] This second element is not satisfied when an action settles before the jury renders a verdict. Bates v. Long Island R.Co., 997 F.2d 1028, 1038 (2nd Cir. 1993), *quoting* Universal City Studios v. Nintendo Co., 578 F.Supp. 911, 921 (S.D.N.Y. 1983)(a "'settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel.'")

settlement offer compared to their actual, quantifiable damages. In short, was the offer reasonable and, if so, based upon what. Not once before the Settlement was agreed to – the point in time where anything that occurred thereafter was for naught – did the Defendants ever inform or advise their clients that experts can *and should* be engaged to provide support for the mediation and subsequent settlement negotiations. Instead, the Defendants actually counseled the Abdulkys *against* seeking the advice of a prosthetist. R.A. II, 203. Even after agreeing *belatedly* to seek out some input on damages, the Defendants still failed to contact a prosthetist.

It is imperative to analyze the amount of the Settlement within the context of the particular facts and circumstances presented. The Medical Malpractice Action – like the vast majority of such actions – is impacted by many factors, at least some of which are likely to be unique to the Abdulkys' case. Thus, for example, to compare the Abdulkys' claims involving ten defendants with a total of $50 million in available insurance coverage with a similar medical malpractice case but with only one defendant and a total of $1 million in available coverage would be fruitless. It would be inappropriate to rely upon the $1 million case in determining the settlement value of the Abdulkys' case. Certainly, the age of the victim is also a factor, as is how vigorously the parents of a minor child fight for the best possible result, even if it means going to trial and foregoing a quick, but inadequate settlement offer. The point is this: **the mere size alone of the Settlement should not *ipso facto* render such an outcome unassailable**. The fact that the Abdulkys

received $6 million does not preclude a finding that they nonetheless suffered damages as a result of the Defendants' legal malpractice. *See e.g.,* Donarumo v. Phillips (Mass. Super. 2018), p. 16.

Another element required for the application of judicial estoppel is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." New Hampshire v. Maine, *supra* at 751. "[J]udicial estoppel will normally be appropriate whenever 'a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage.'" Otis, 443 Mass. at 641, *quoting* InterGen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003). In this case, as an integral part of the Settlement, the Kraus Defendants obtained a full and complete release from the Abdulkys and the case against them was dismissed. None of the defendants in the Medical Malpractice Action is named in this action. Thus, now going after any of the parties in the Medical Malpractice Action certainly would be seeking an unfair advantage and/or impose an unfair detriment on them, but that is not this case. That is not what the Abdulkys are pursuing in this action. Unlike the Medical Malpractice Action that sought to hold Anthony's medical care providers accountable, this case seeks instead to hold *these* defendants accountable for their negligence resulting in the settlement of the Medical Malpractice Action for considerably less than its true value.

Moreover, "there may arise certain instances here the party's prior position was asserted in good faith,

and where the circumstances provide a legitimate reason – other than sheer tactical gain – for the subsequent change in that party's position." Otis, 443 Mass. at 642. "[I]t may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake,'" New Hampshire v. Maine, *supra* at 753, *quoting* John S. Clarke Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995), or where "the position adopted in the first suit was clearly wrong yet had been advanced in good faith by the party now sought to be estopped," Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1428 (7th Cir. 1993). Further, "[s]trict application of the doctrine might not be called for if 'the new, inconsistent position is the product of information neither known nor readily available to [the party] at the time the initial position was taken.'" Otis, 443 Mass. at 642, *quoting* Alternative System Concepts, Inc. v. Synopsys, Inc., *supra* at 35.

Because the doctrine is equitable and up to the discretion of the court depending upon the specific facts and circumstances presented by each individual case, inevitably there will be situations where a party cannot meet its burden of establishing that the doctrine is applicable. Such is the case here, and the Defendants did not – and cannot - meet their burden to establish that the lower court abused its discretion when it refused to apply the doctrine of judicial estoppel.

However, even if the Defendants were somehow able to establish all of the elements necessary for judicial estoppel to apply, it would nevertheless have been grossly inequitable for the lower court to apply

the doctrine to defeat the Abdulkys' claims. First and foremost, Mr. and Mrs. Abdulky have always sought to recover for their son the greatest sum possible sufficiently to compensate Anthony, including for his significant and permanent disfigurement. The lifetime costs of prosthetics were and remain likely the single largest component of the Abdulkys' damages, but one that certainly can be (and now, finally, has been) estimated with a reasonable degree of certainty. R.A.II 220-225. Notwithstanding that critical fact, before the Defendants led the Abdulkys down the path to mediation, they never once mentioned to their clients that it would be prudent, if not necessary, to obtain a reliable estimate on the lifetime prosthetics costs. In fact, it was only the Abdulkys themselves (neither of whom is a lawyer, has any legal training or education and/or had any prior experience with prosthetics) who suggested to the Defendants that an expert be engaged to help assess such damages. R.A. II 186-87. However, by the time the Defendants finally moved beyond their refusal to engage an appropriate expert, it was too late; the case was settled. The Kraus Defendants promptly sought to enforce the settlement and the Abdulkys were forced onto a purely defensive stance, under intense pressure to accept an amount essentially pulled from thin air. By refusing to obtain a reliable estimate on damages before the Abdulkys were forced to settle the case on August 27, 2015, the Defendants effectively surrendered direction and control of settlement negotiations to the Kraus Defendants. In turn, those defendants promptly took control and direction of the negotiations, even though – like the Abdulkys' attorneys – they had absolutely no estimate from anyone qualified in the field of prosthetics to inform the

negotiations. R.A.II. 417-418. This unsavory truth was revealed only recently in this action.

The SJC has described the judicial estoppel doctrine as having "hazy" contours, and thus far has declined "to construct a categorical list of requirements or to delineate each and every possible exception." Otis, 443 Mass. at 642. Other courts have described the doctrine as having "rather vague" contours, Patriot Cinemas, Inc. v. General Cinema Corp., *supra* at 212, and consisting of a "narrow analytical mold" U.S. v. Levasseur, 846 F.2d 786, 792 (1st Cir. 1988).

Accordingly, the Defendants were – and remain - unable to establish the elements necessary for the judicial estoppel doctrine to act as a bar against the Abdulkys' claims. Thus, the lower court did not abuse its discretion in refusing to apply the doctrine.

VI. THE DEFENDANTS CANNOT ESTABLISH THAT THE SUPERIOR COURT ABUSED ITS DISCRETION IN REFUSING TO APPLY COLLATERAL ESTOPPEL AS A BAR TO THE PLAINTIFFS' CLAIMS.

The Defendants cannot – and failed to - establish that collateral estoppel acts as a legal bar to the Abdulkys' claims in this case. The lower court properly exercised its discretion in refusing to apply collateral estoppel as a bar.

The doctrine provides, "[w]hen an issue of fact or law is **actually litigated and determined by a valid and final judgment**, and the determination is essential to the judgment, the determination is

conclusive in a subsequent action between the parties, whether on the same or a different claim.'" Martin v. Ring, 401 Mass. 59, 61 (1987), *quoting* Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 372 (1985)(emphasis added). "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" Kimbroughtillery v. Commonwealth, 471 Mass. 507, 509, 30 N.E.3d 841, 844 (2015), *quoting* Commonwealth v. Lopez, 383 Mass. 497, 499, 420 N.E.2d 319 (1981).

For the doctrine to apply, a court must answer affirmatively: (1) was there a final judgment on the merits in the prior adjudication, (2) was the issue decided in the prior adjudication identical with the one presented in the action in question; *and* (3) was the issue decided in the prior adjudication essential to the judgment in the prior adjudication? *See* Alba v. Raytheon Co., 809 N.E.2d 516, 441 Mass. 836, 842 (2004), *citing* Martin v. Ring, *supra* at 61-62.

Importantly, **"[w]hether collateral estoppel is available as a bar ... is a mixed question of law and fact** ..." Golden v. Pacific Maritime Ass'n., 786 F.2d 1425, 1427 (9th Cir. 1986)(emphasis added).

The Defendants did not – and cannot - establish each of the necessary elements for the doctrine to apply to bar the Abdulkys' claims.

A. THE DEFENDANTS CANNOT TRANSFORM A MEDIATED SETTLEMENT INTO A FINAL JUDGMENT ON THE MERITS.

"The guiding principle in determining whether to allow defensive use of collateral estoppel is whether the party against whom it is asserted 'lacked full and fair opportunity to litigate the issue in the first action or [whether] other circumstances justify affording him an opportunity to relitigate the issue.'" Martin v. Ring, 401 Mass. at 62, *quoting* Fidler v. E.M. Parker Co., 394 Mass. 534, 541 (1985). The Defendants cannot establish that any issue of fact or law was *actually litigated* in the Medical Malpractice Action. Perhaps more importantly, the Defendants cannot establish that the Abdulkys had a "full and fair opportunity" to litigate the issue of damages in the Medical Malpractice Action.

One thing all parties can agree upon is that the prior action *settled* before trial – even well before discovery was to be completed. A trial date was still months away. The Settlement was not the result of any evidentiary hearing, any expert testimony or, any sworn witness testimony (even the Adbulkys were never sworn in during any of the hearings before Judge Lemire). There were no findings of fact or conclusions of law *on the merits*. Rather, the Medical Malpractice Action met its ignominious end by way of an ill-informed, inadequate settlement – an amount with no reasonable basis imposed upon the Abdulkys despite their repeated protestations and queries. Unfortunately, Judge Lemire also acted on the same

woefully inadequate information regarding the Abdulkys' ascertainable damages – most egregiously regarding Anthony's lifetime prosthetics costs.

An issue is *actually litigated* for preclusion purposes when it has been "subject to an adversary presentation and consequent judgment" that was **not "a product of the parties' consent and is a final decision on the merits."** Keystone Shipping Company v. New England Power Company, 109 F.3d 46, 52 (1st Cir. 1997), *quoting* Jack H. Friedenthal et al., Civil Procedure § 14, 11, at 672, 673 (1985) (emphasis added).

The Settlement was NOT the product of an adversary presentation and consequent judgment; rather, it was the product of the parties' consent – albeit (on the Abdulkys' part) very reluctantly and poisoned by the lack of timely, reliable information regarding their damages. There was never any hearing to address the liability of the Kraus Defendants and/or any testimony regarding the Abdulkys' damages.[8]

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[8] The Defendants reference M.G.L. c.231, §140C 1/2 in an effort to import a much greater dipositive effect of the lower court's approval of the Settlement, going so far as to say "it is incumbent upon the trial court to determine whether the settlement is fair and reasonable to the minor and in the minor's best interests." Appellants' Memo, p. 33. However, that is not how the law reads; instead, it reads, in pertinent part: "[t]he trial court MAY review and approve a settlement for damages because of personal injury to a minor … where any party has filed a petition for settlement approval ... The trial court MAY make such orders and take such action as it deems necessary TO EFFECTUATE the disposition of a settlement approval including but not limited to the appointment of a guardian, … guardian ad litem, or the holding of an evidentiary hearing" (emphasis added). In other words, it was not

Under the complex circumstances presented – involving a very young amputee faced with a lifetime – very likely several decades – of prosthetics needs, the mere "trust me I know what I'm talking about" approach the Defendants foisted upon their clients – and Judge Lemire, for that matter - hardly constitutes "actual litigation" or a final decision *on the merits*. Transmogrifying Judge Lemire's *discretionary* approval of the Settlement – essentially in a vacuum and without any sworn lay or expert testimony – into a

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"incumbent" or obligatory, on the court in the Medical Malpractice Action to "determine whether the settlement is fair and reasonable…" instead, it was merely *discretionary* for the court to get involved at all with the Settlement. *See, e.g.* Sharon v. Newton, 437 Mass. 99, 112 n. 10, 769 N.E.2d 738 (2002)("[o]ur conclusion that parents may execute an enforceable preinjury release on behalf of their minor children is not inconsistent with our policy regarding *discretionary court approval* of settlement releases [under c. 231, §140C ½]")(emphasis added). The court would certainly have been within its rights under §140C 1/2 to decline to render any opinion regarding the Settlement. The law only triggers the court's discretion to get involved if, and only if, a party petitions the court for review. Thus, the Defendants' attempts to compare a purely discretionary function under §140C 1/2 to the absolutely necessary and required judicial approval of a class-action settlement fail to germinate any support for their position. Under §140C ½, the Court in the Medical Malpractice Action could have – but wasn't required to – conduct an evidentiary hearing on the settlement including taking testimony from parties, experts, and perhaps even – due to the critical importance of the lifetime prosthetics costs in the determination of damages – hit the pause button briefly to obtain a reliable and helpful expert's opinion. It did none of the above. Had all, or even some, of these actions been taken, then perhaps the Court's approval *might* have some greater impact in determining whether to apply collateral estoppel as a bar.

decision *on the merits* resulting from *actual litigation* would unreasonably and unjustifiably substantially broaden the doctrine of collateral estoppel. Even the most perfunctory and purely discretionary judicial involvement in the settlement of a case could be grounds to invoke collateral estoppel.

At the end of the Medical Malpractice Action, the Abdulkys never had the opportunity to litigate their damages; no expert witness ever testified about their damages, particularly the lifetime prosthetics' component. Nor did the Abdulkys ever have the chance to obtain a complete and proper estimate of the prosthetics costs, let alone one calculated to present value. At the very end of the case, the Abdulkys – thanks to their own initiative and ingenuity - were able quickly to obtain at least a rough estimate of the lifetime costs of prosthetics for Anthony, but even that expert gave an estimate under extremely tight time constraints, without having reviewed Anthony's medical records, and without the benefit of examining Anthony's residual limb. In short, the Abdulkys lacked a "full and fair opportunity" to litigate the issue of damages in the Medical Malpractice Action, and the case settled. At the very least, the Abdulkys have made a showing in this action to cast doubt on the quality, extensiveness and/or fairness of the disposition by settlement of the Medical Malpractice Action, sufficient to avoid the bar of collateral estoppel and warrant the adjudication of this action before the fact-finder. *See* Martin v. Ring, 401 Mass. at 63, *citing* Montana v. United States, 440 U.S. 147, 164 n. 11 (1979)("[r]edetermination of issues is warranted if

there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.")

B. THE ISSUES IN THE MEDICAL MALPRACTICE ACTION ARE NOT IDENTICAL TO THE ISSUES IN THIS LEGAL MALPRACTICE ACTION.

The Defendants likewise did not – and cannot - establish that the issues *decided* in the Medical Malpractice Action - *if any* - are identical to the issues presented in this legal malpractice action. *See* Alba v. Raytheon Company, 441 Mass. at 842 ("[b]efore applying the doctrine, a court must answer affirmatively … was the issue decided in the prior adjudication identical with the one presented in the action in question.") As belied by the difference in the parties in each of the actions (with the sole exception of the Abdulkys), the issues presented in each of the actions are far from identical. The Medical Malpractice Action arose from the malpractice of the medical providers involved in Anthony's care. The issue in that case centered upon the liability of the Kraus Defendants. By contrast, the issues in this action arise from *these* Defendants' legal malpractice in the handling of the prior action, specifically the events leading up to and culminating in the Settlement. Both actions sound in negligence, but that hardly makes the issues presented in each case identical, a necessary element for collateral estoppel to apply.

In Baldridge v Lacks, 883 S.W.2d 947, 950 (Mo.App. 1994), arising out of a divorce proceeding, the lower court decreed that a settlement agreement was reasonable. The plaintiff then brought a legal

malpractice action seeking damages for her attorneys' allegedly negligent handling of her divorce. Id. Just as in the case at bar, the defendants in Baldridge argued that

> the plaintiff, by entering into a contractual, court-approved settlement … and by giving sworn testimony agreeing to be bound by the settlement, is barred from a collateral attack on the reasonableness of the settlement by means of a malpractice action …

Id. The Court was faced with determining "whether plaintiff's prior action determined the same issues of fact which she litigated in her legal malpractice action." Id. at 951.

> Throughout their argument, defendants mischaracterize plaintiff's malpractice claim as an attempt to attack the reasonableness of the settlement. Plaintiff's claim, however, is that defendants failed to provide competent legal advice to her during the prosecution of her divorce action. She is suing to recover for economic loss allegedly sustained as a result. The issues in the present action are whether defendants were negligent in their representation of plaintiff and whether plaintiff was damaged as a result. Plaintiff claims defendants negligently advised her to enter into the separation agreement without first having fully and adequately assessed the nature and extent of the marital estate. These specific issues were not adjudicated at the settlement hearing in the dissolution proceeding. Therefore,

> defendants' argument of collateral estoppel does not satisfy the threshold requirement that the issues be identical.

Id.

The Baldridge case is on all fours with the case at bar, the sole exception being that case arose from a divorce proceeding, not a medical malpractice action. However, that distinction does not detract from the instructiveness of the decision. Just as in this jurisdiction, in deciding whether to apply collateral estoppel, the Baldridge court had to decide the element of the identity of issues. For the same reasoning in that case, it cannot be said that Judge Kenton-Walker abused her discretion in refusing to apply collateral estoppel, where the identity of issues requirement is not satisfied.

The Court acted properly in denying summary judgment motion by not being persuaded by the Defendants' misplaced reliance upon class action settlement cases. Those cases are distinguishable and of little, if any, usefulness to the issues in this action. Rule 23 – in both the federal rules and the MA Rules of Civil Procedure – set up a fairly elaborate scheme for handling class action lawsuits. Most importantly, and a key distinction from the Superior Court's purely discretionary review of settlements involving minors, under Rule 23(c), "[a] class action shall not be dismissed or compromised without the approval of the court." Review and approval of a settlement in a class action suit is mandatory. Accordingly, cases interpreting settlements in the context of class action lawsuits bear no semblance to the case as bar, where

judicial review is purely discretionary and happens only if a party petitions the court for review.

In short, the doctrine of collateral estoppel does not apply to bar any of the Abdulkys' claims for two compelling reasons. First, Judge Lemire's purely discretionary approval of the Settlement does not constitute a final judgment on the merits. Secondly, the issues raised in the Medical Malpractice Action are not identical to the issues raised in this legal malpractice action. Therefore, the Defendants cannot establish that the lower court abused its discretion in refusing to apply the doctrine.

VII. DENIAL OF SUMMARY JUDGMENT IS BUTTRESSED BY A MYRIAD OF CONTESTED MATERIAL FACTS.

The Defendants assert that there are no genuine issues of material fact and Judge Kenton-Walker abused her discretion in denying summary judgment. However, where there are no genuine issues of material fact, one would not typically expect the proponent of such a claim to have to rely upon and thus proffer voluminous documents and material. Wading through all the materials submitted by the Defendants imposed a herculean task upon Judge Kenton-Walker and, now, imposes upon this Honorable Court. Nonetheless, as Judge Kenton-Walker stated on the record at the outset of the summary judgment hearing, she read everything submitted and was "very familiar with the case". R.A.II 403, lines 22-23. She was uniquely positioned to best assess the materials and, understandably, determine that genuine issues of fact are (and remain) in dispute.

For example, the Defendants' complete dereliction of duty properly and timely to provide their clients with a reasonably informed valuation of the anticipated lifetime costs of prosthetics is certainly a disputed factual issue which can and should only be resolved by the trier of fact. Further, as set forth above in section I, the question of whether the Defendants exercised sufficient legal care in their representation of the Abdulkys in the Medical Malpractice Action is one of fact for the jury to decide. Glidden v. Terranova, 12 Mass.App.Ct. at 598. Likewise, the issue of proximate cause is an issue of fact for the jury to decide. Girardi v. Gabriel, 38 Mass.App.Ct. at 558.

The Defendants cannot establish that Judge Kenton-Walker abused her discretion in determining that genuine issues of material fact exist and can only be resolved by the fact-finder.

VIII. THE DEFENDANTS' ATTACK ON ATTORNEY OLIVEIRA'S EXPERT OPINION IS UNTIMELY AND WITHOUT MERIT.

The irony of the Defendants' inconsistent and self-serving positions regarding testimony of attorneys on the subject of the Plaintiffs' damages should not be lost on the Court. On the one hand, the Abdulkys were expected in the Medical Malpractice Action simply – and blindly - to accept their attorneys' representations regarding the sufficiency of the Settlement, without any expert valuation of damages, especially the lifetime costs of prosthetics. On the other hand, in this case, the Defendants complain that the Plaintiffs' expert – a seasoned medical malpractice lawyer and professor of legal studies with decades of trial experience in

Massachusetts – should not be allowed to give his expert, well-researched opinion in this case.

The Defendants' argument that a motion judge entertaining a motion for summary judgment must somehow act as the gatekeeper of the evidence, as if a trial was imminent and the trial judge was instead deciding a motion in limine, is misplaced and of no import. As the trial date approaches, the Defendants will certainly have an opportunity to present their arguments regarding any of the Plaintiffs' testifying experts. It should be up to the trial justice as the true gatekeeper as to what expert testimony comes into evidence and what the jury does and does not see and hear. It is inappropriate and premature to impose such a gatekeeping function upon a motion justice deciding a summary judgment motion. *See e.g.,* Commonwealth v. Lanigan, 419 Mass. 15, 25 (1994)("[t]he **trial judge** has a significant function to carry out in deciding on the admissibility of" an expert's opinion).[9] It would be inappropriate for a judge *in deciding a motion for summary judgment* to exercise the gatekeeping function reserved – at least typically, if not exclusively - for the trial justice and determine the admissibility of an expert's opinion. The judge hearing a summary judgment motion has a much more limited and discreet function in deciding the motion – as prescribed by Rule 56.

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[9] "Of course, if the judge rules the opinion evidence admissible, that ruling is not final on the reliability of the opinion evidence, and the opponent of that evidence may challenge its validity before the trier of fact." 419 Mass. at 26.

Moreover, Mass. G. Evid. §702 "on its face uses helpfulness to the trier of fact as the test of admissibility of expert testimony" Commonwealth v. Lanigan, 419 Mass. at 25. "The ultimate test … is the reliability of the theory or process underlying the expert's testimony." Id. at 24. "An attorney's testimony may be sufficient to prove lost value caused by another attorney's negligence in settling a tort claim… when the issue is beyond the ken of the ordinary juror." Atlas Tack Corp. v. Donabed, 47 Mass.App.Ct. 221, 227 (1999). Without the aid of expert testimony, a plaintiff is unlikely to demonstrate that "it *could have obtained* a better result absent [the defendant attorney's] negligence." Id. at 225 (emphasis added).

Of particular note, the court has no authority to exclude expert testimony because he or she disagrees with the expert's opinion or finds the testimony unpersuasive. *See e.g.,* Commonwealth v. Roberio, 428 Mass. 278, 281 (1998) (once an expert's qualifications are established and his or her testimony meets the standard of Commonwealth v. Lanigan, [*supra*] the issue of credibility is for the jury).

"A plaintiff who claims that his attorney was negligent in the prosecution of a tort claim will prevail if he proves that he *probably* would have obtained a better result had the attorney exercised adequate skill and care." Fishman v. Brooks, 396 Mass. at 647 (emphasis added); *see also* Baghdady v. Lubin & Meyer, P.C., 55 Mass.App.Ct. 316, 318-321 (2002)(the legal malpractice plaintiff "need not show a perfect claim … [but must show] that, but for the negligence of the defendants … he *probably* would have been

successful …")(emphasis added). In Fishman, the SJC found that the trial judge had properly admitted expert testimony from an experienced tort lawyer as to the reasonable settlement value of the claim when it was settled. Id. at 647-48.

Exactness and precision in an expert's testimony regarding topics such as the reasonable settlement value of a claim is not required; reliance upon probabilities – if based on sound footing from a qualified expert – is permissible and should not render the expert's opinion inadmissible. That is certainly even more applicable and appropriate in the context of a summary judgment motion – well before a trial date. With the expert testimony of attorney Oliveira, it cannot be said that the Plaintiffs have no reasonable expectation of proving the elements of their legal malpractice claims.

In short, even if Judge Kenton-Walker can somehow be charged with a gatekeeping duty with respect to expert testimony in the context of a summary judgment motion, attorney Oliveira's researched, expert opinions which are beyond the ken of an ordinary juror, are appropriate and permissible.

CONCLUSION

The Defendants (Appellants herein) fail to satisfy their burden to establish that Judge Kenton-Walker abused her discretion when she found that the Defendants had not established that the doctrines of judicial estoppel and/or collateral estoppel bar the Plaintiffs' claims. The Defendants also fail to establish that the lower court abused its discretion when it

concluded that genuine issues of material fact prohibited summary judgment. Finally, the Defendants fail to establish that the Plaintiffs have no reasonable expectation of proving the essential elements of their case. Furthermore, the Single Justice improperly and without sufficient basis allowed the Defendants' G.L. c.231 §118 (1st par.) petition for review of a purely interlocutory order where there are no serious or irreparable consequences at stake. Finally, if this Honorable Court is inclined to review the lower court's denial of summary judgment, the issue of judicial estoppel should not be included in any such review because the Defendants did not specify that issue in their petition seeking review under G.L. c.231 §118 (1st par.).

WHEREFORE, the Plaintiffs (Appellees herein) respectfully request that this Honorable Court decline to review and/or in any way disturb the lower court's decision to deny summary judgment.

RESPECTFULLY SUBMITTED:

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August 1, 2022

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX 4

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 1885-CV-01247A

[Filed December 7, 2021]

OBAIDA ABDULKY and WARD ABDULKY, parents and next friend of ANTHONY ABDULKY, Plaintiffs,	)
v.	)
LUBIN & MEYER, P.C., ANDREW C. MEYER, JR. and KRYSIA SYSKA, Defendants.	)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR OBJECTION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In support of their Objection to the Defendants' (collectively also: "L&M" or "the Movants") Motion for Summary Judgment, the Plaintiffs (collectively also: "the Abdulkys") herein state that, for the following reasons detailed hereinbelow, said motion should, respectfully, be denied forthwith.

The gravamen of this case is straightforward. In the Med Mal, Action, L&M failed appropriately and timely to prepare, inform and position their clients, the Abdulkys, as L&M urged them into a mediation and a subsequent settlement that was substantially insufficient. More specifically, L&M failed to obtain in the Med Mal Action on behalf of their clients *any* expert opinion estimating arguably the single largest element of the Abdulkys' damages, namely the lifetime prostheses costs for five-year-old Anthony - *before* that case was settled. L&M's actions and omissions in the Med Mal Action fall far short of (1) the standard of care and duties owed by the firm to the Abdulkys, and (2) the quality of legal counsel the Abdulkys expected from their lawyers and to which they were entitled.

FACTUAL BACKGROUND

The Med Mal Action[1]

At the young age of 5, Anthony Abdulky – an otherwise very healthy, normally developed boy - fractured his wrist. While at UMass Memorial Medical Center ("UMMHC") for treatment of the facture, Anthony developed compartment syndrome. Two months later, Anthony was finally able to go home, but

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[1] The facts are set forth herein in quite some detail for three important reasons. First, to show how prolonged and tortuous was the path of the Abdulkys – urged along at all times by L&M – to the Settlement; secondly, to highlight the resistance and neglect of L&M when it came to the Abdulkys trying desperately to obtain some understanding as to the value of their claims and how the Settlement compared; and thirdly, to underscore that the material facts are anything as simple and one-sided as the Movants would have this court believe.

not before his dominant, right arm had to be amputated just below the elbow. Needless to say, those two months in the Fall of 2011 were extremely traumatic for the family.

Toward the end of that year, the Abdulkys engaged L&M to pursue medical malpractice claims against Anthony's providers. *See* Obaida Abdulky's Affidavit (Exh. 1), ¶ 7.[2] Suit was filed in early 2012 ("the Med Mal Action") and, eventually, L&M identified and named as defendants a total of nine (9) physicians as well as UMMHC for a total of 10 defendants (collectively, "the Med Mal Defendants").

So egregious was the Med Mal Defendants' conduct that two extraordinary events came to pass. First, in April 2012, the Abdulkys received an anonymous letter from "a healthcare practitioner" at UMMHC who knew of Anthony's case "very well", who stated that Anthony "did not receive the appropriate care that he should have..." and encouraged the Abdulkys to bring claims for medical malpractice. (Exh. 2) Secondly, that same month L&M sent a letter to the District Attorney's office and soon followed it up with a letter to the

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[2] Under Rule 9A(b)(5)(v)(A), new exhibits designated by the non-moving party must continue with the identifying designations as used by the moving party. In this case, that means the Abdulkys should start to identify new exhibits with the designation "NN", etc. However, the Plaintiffs have thus far not succeeded in locating such designated tabs so newly designated exhibits herein will be numerical starting with the number 1. (Otherwise, any exhibits referenced herein that are already part of the Joint Appendix will utilize the lettered designations already given by the moving party as per the rule.) Counsel apologizes to the Court for this deviation.

Massachusetts Attorney General's Criminal Bureau relative to possible criminal conduct incurred during Anthony's treatment by the Med Mal Defendants. (Exh. 3). The A.G.'s office, in a letter to Timothy Slowick, "Director Claims Management" at UMMHC ("Slowick"), requested an investigation of the Abdulkys' claims. (Exh. 4)

Well over a year after it filed suit, L&M finally propounded written discovery upon the Med Mal Defendants. (Exh. 5) With not a single motion to compel ever filed by L&M, well over another year passed before any of the Med Mal Defendants finally provided any responses to the discovery requests. Only two of the ten Med Mal Defendants provided answers to interrogatories; remarkably, only one of the doctors ever responded to the document requests, and that came on the very day the Med Mal Action was settled. Of the ten Med Mal Defendants, L&M ended up deposing only two doctors.

Meanwhile, Anthony continued to receive treatment for his residual limb. He continued to have multiple surgeries including in May 2012 – nearly a year after breaking his wrist – to excise ossification and perform other surgery to try to improve the range of motion in what remains of Anthony's right arm. (Exh. 6) In December 2012, Anthony was also seen at Children's Hospital for work on his scarring. (Exh. 7) In May 2013 – almost two years following the wrist break – Anthony was doing well overall, although he very sadly and innocently wondered aloud to his caregivers whether a new arm would come or grow. (Exh. 8)

Around the Spring of 2013, the Abdulkys began working with the Hangar Clinic to prepare for and eventually obtain prostheses for Anthony. (Exh. 1, ¶ 10) In late August 2013, Anthony's residual limb was finally ready to accept a prosthesis; he received his first device, a so-called myoelectric prosthesis, and soon thereafter Anthony began receiving occupational therapy at home. (Exh. 1, ¶ 11). In early 2014, however, Anthony continued to struggle donning, doffing and operating the device; thus, he only made limited use of it initially. (Exh. 1, ¶ 12)

In September 2014, the Medical Malpractice Tribunal found in favor of the Abdulkys as to every one of the Med Mal Defendants.

In January 2015, the Med Mal Defendants informed L&M that they wished to mediate the case. At that point, the Abdulkys started asking L&M about the need for further information in support of their claims – albeit in the nature of fact discovery. (Exh. 9) Despite the Abdulkys' inquiry about securing further information in support of their claims before entering into the mediation, L&M encouraged the Abdulkys to proceed with the mediation on April 3, 2015. (Exh. 9) L&M prompted their clients into the mediation without any expert's estimate of any of the family's damages, especially Anthony's lifetime prosthetics costs. (Exh. 1, ¶¶ 15-17) L&M did not even bother to seek out any kind of estimate from their economist "expert" who, *after the case was settled*, gave a free estimate to L&M within a matter of hours. Thus began L&M's complete surrender to the defense regarding the direction and control of the settlement negotiations. The mediation

did not resolve the case, but it set in motion the chain of events irreversibly leading to a settlement – all without any sound basis whatsoever to estimate the Abdulkys' damages, particularly with respect to Anthony's lifetime prosthetics costs.

Although the mediation had already occurred and a rescheduled pre-trial conference was just days away, L&M's discovery requests propounded more than two years earlier remained outstanding. (Exh. 5) It was not until July 2015, that L&M finally sought the defendants' compliance with the discovery requests propounded over two years earlier. (Exh. 5) As of late that month – just days before the settlement offer was made, there were still many outstanding depositions and the Abdulkys' attorney (Defendant Syska) recognized that the Court's assistance would be needed. (Exh. 10) A status conference was scheduled for, and pretrial memos were due, just four days later. (Exh. I)

On August 4, 2015, the Med Mal Defendants made their fateful offer of $6 million to settle the case. (Exh. 1, ¶ 20) On that very same day, L&M rushed to obtain a hearing date on the settlement, and informed Mr. & Mrs. Abdulky that their attendance at same had been ordered by Judge Lemire. (Exh. 11). The next day in an internal email, L&M identified their roster of experts, consisting solely of Steven Becker, M.D., Daniel Husted, M.D. and Chad Staller.[3] (Exh. 12)

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[3] L&M engaged Dr.s Becker and Husted to provide expert opinions regarding the standard of care and breaches thereof by the Med Mal Defendants. Both are surgeons; Husted is an orthopedic specialist. (Both doctors have likewise been engaged by the Abdulkys in this action for the same purposes (the "trial within the

On August 12, 2015 – a mere eight days after the $6 million offer was made – the Abdulkys appeared for what turned out to be a chambers conference with the Judge. Immediately, and without the benefit of any estimate of damages *obtained on behalf of the Abdulkys*, the Court began urging the family to accept the offer, as confirmed in Defendant Syska's email the following day. (Exh. 13) That email is remarkable for the following noteworthy excerpts:

> ... Lemire felt the offer was very high and very reasonable and even went so far as to say ... it would be foolish not to accept the offer ... He also [said] after speaking with the defense attorneys, he is convinced ... there will be no further increase in the offer *at any time. This is the highest number you will see to settle the claim ... multiple experts in this field have all told you that this settlement offer is the maximum amount available...* (emphasis added).

The "multiple experts" invoked in the email do not include a single economist or, more glaringly, anyone with any expertise in prosthetics. Instead, the so-called "experts" consisted of Defendant Syska, Defendant

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trial"). Those answers to expert interrogatories can be found at Exh. 36.) At the time, Staller worked for an entity in Philadelphia called The Center For Forensic Economic Studies; although he is mentioned in the August 5 email (Exh. 12), L&M had not yet asked him for any kind of estimate regarding the Abdulkys' damages. (Exh.'s 14 (pp. 267-68) & 15). Noticeably absent from L&M's list of experts is a prosthetist or anyone in the specialized industry of prostheses. This is now just 3 weeks before the Med Mal Action settled.

Meyer, Judge Lemire and, most astoundingly, the defense. Without any of their own guidance on whether or not, or how, if at all, the offer compared relative to the Abdulkys' damages (especially the lifetime prosthetics costs), their supposed advocates (L&M) promptly began pressuring the Abdulkys into accepting the defense's valuation of the case. (Exh. 13)

The Abdulkys struggled with accepting the offer because they had absolutely no idea what their damages were – not even roughly – and, thus, how the offer compared to their actual past and future damages. (Exh. 1, ¶21) The greatest unknown to the Abdulkys regarding their damages was the lifetime costs of prosthetics for their young son. (Exh. 1, ¶22) Had the Abdulkys known prior to the offer being made and, preferably before the mediation, an estimate of the lifetime costs of Anthony's prosthetics, they would have been much better informed and equipped to participate meaningfully in the mediation and the subsequent negotiations leading up to August 27, 2015. (Exh. 1, ¶23) Furthermore, had they obtained an estimate of the lifetime costs before the offer was made, they would have been much more informed and knowledgeable about how to respond to the offer; they could have responded much sooner and more definitively than they did. (Exh. 1, ¶24)

Because they did not have any information from any expert regarding any element of their damages, when the offer was made, they were simply asked to accept and rely primarily upon their lawyers' characterization of the settlement amount. (Exh. 1, ¶25) As a result, the parents struggled mightily for many days with how to

respond to the offer, which was manifested by their indecisiveness with L&M and Judge Lemire regarding whether or not to accept the offer. (Exh. 1, ¶26)

Over the next several days, L&M's pressure on the Abdulkys to accept the offer intensified. (Exh. 1, ¶27) On August 17, 2015, L&M acknowledged their clients' "difficulty reaching a decision" regarding the offer but nonetheless continued their full-court press to secure the Abdulkys' acceptance of the offer. (Exh. 1, ¶ 28; Exh. 16) Soon the pressure conveyed and asserted by L&M added a new element – that being the threat of the appointment of a guardian ad litem (GAL). (Exh.1, ¶ 29) Two days later – while the Abdulkys continued to wrestle with the decision whether or not to accept the offer – L&M asserted in a series of emails: "[i]t is highly likely ... if you do not accept the 6 million offer a GAL will be appointed ... Anything other than an acceptance of the offer will likely trigger the GAL motion ..." (Exh. 17)

If somehow it was not yet clear why the Abdulkys were struggling with their decision, it should have been abundantly clear to L&M following Mr. Abdulky's email of August 19, in which he states: "I'm so frustrated that I was left ... at the mercy of [UMMHC] calling the shots of accepting or not accepting an offer on their terms ... I made up my mind on this claim and I'm just trying to comprehend what is happening and how we ever got to the point of the threat of [a GAL] ..." (Exh. 18) After two weeks agonizing over and trying to understand if the offer in fact was in Anthony's best interests, and still *without any estimate whatsoever of Anthony's lifetime prosthetics needs*, the Abdulkys

capitulated. (Exh. 19) For the first time, they informed L&M that the offer – extended just 2 weeks earlier – was acceptable. L&M did not hesitate for a minute to inform the defense and the Court about the Abdulkys' latest acceptance of the offer. (Exh. 19) However, still in the dark about damages and still not completely comfortable with the family's decision, Mr. Abdulky expressed his equivocation about accepting the offer, explaining that he was feeling incredible pressure to settle and had not slept in days. (Exh. 20)

The next day, Mr. Abdulky continued to articulate his concerns and questions about the offer, explaining: "I need to know and understand ... to accept or deny the settlement offer based on educated guess rather than its one of the biggest settlements in Massachusetts ..." (Exh. 21) In short, L&M's total failure to obtain any expert opinion whatsoever regarding Anthony's damages, particularly the lifetime costs of his prosthetics, rendered the Abdulkys utterly uninformed about, arguably, the single largest element of their damages. (Exh. 1, ¶ 30) That element of damages could have been and, after the case was settled, was estimated quite easily and quickly by a competent prosthetist.[4] Instead, L&M's clients felt completely helpless and, therefore, at the total mercy of the defense. (Exh. 1, ¶ 30) Their lawyers' hyperbolic descriptions regarding the size of the offer did nothing to address the Abdulkys' questions or concerns about

[4] The estimate provided by Robert Emerson of A Step Ahead reported that the lifetime prosthetics costs (alone) "would exceed $3 million". (Exh. BB)

the sufficiency of the offer relative to their damages. (Exh. 1, ¶ 31)

Perhaps the most astoundingly misleading statements made to the Abdulkys to induce them into accepting the offer came via an August 21 email from Defendant Syska, on which Defendant Meyer was copied, as follows.

> With respect to a financial statement as you know there is no such thing. There is no statement to submit to the jury as **there are no lost earnings for Anthony and no future medical costs which we can predict today. Any discussion of compensation would come in oral form during closings but in reality the decision is based on the jury's collective wisdom and experience – nothing more.** *** I believe we can win against one of these physicians ... (emphasis added).[5] (Exh. 24)

The Abdulkys continued to struggle with understanding how the offer compared to their damages; Defendant Syska's August 21 email merely served further to complicate the Abdulkys' deliberations and cause them confusion. (Exh. 1, ¶32) Ultimately, the family came to the harsh realization

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[5] Although she waded here into the intricacies of a jury trial, Defendant Syska was definitely not going to try the case. (Exh. 22) Neither attorney Syska nor attorney Meyer ever attempted to clarify and/or correct any of Syska's representations in her August 21 email. Furthermore, at his deposition Defendant Meyer expressed incredulity over the notion of entering evidence into a case and/or calling a witness during closing arguments (Exh. 23).

that they had no good options other than to blindly accept the offer based upon their attorneys' urging. (Exh. 1, ¶33) Faced with the August 27 deadline to accept the offer or suffer the consequences outlined by their lawyers, on that date the Abdulkys, for the final time, capitulated to the pressures and accepted *in writing* the $6 million offer (the "Settlement"). (Exh. U) L&M promptly advised the defense and the Court that the Abdulkys had agreed in writing to settle the case.

Nonetheless, still completely in the dark about the adequacy of the Settlement, the Abdulkys continued to express to L&M their struggles with the Settlement. (Exh. 25) In response to the Abdulkys' query about withdrawing their acceptance of the offer, L&M answered: "from a technical, legal standpoint one cannot reject a settlement which has been accepted." (Exh. 25) The Med Mal Defendants then promptly filed a motion to dismiss the action based upon the Settlement and the initial hearing on the same was scheduled for September 11.

Based upon their own initiatives and due diligence, the Abdulkys learned that experts could be engaged to assist with estimating their damages. (Exh. 1, 34; Exh. 25) For the first time in the Med Mal Action, and due solely to the Abdulkys' diligence, the possibility of engaging such experts to assist in assessing their damages and, therefore to determine whether the offer was in fact in Anthony's best interests finally entered the discourse between L&M and their clients. (Exh. 25) Unfortunately, however, it was too late; by that time, the Abdulkys had accepted the offer in writing, the Court and the defense had been advised that the case

was settled, the defense had filed a motion to approve the Settlement, and a hearing on the same was scheduled.

Days after the case was settled, L&M responded to the Abdulkys' query about engaging experts:

> Although there may be some jobs which Anthony may not be able to do **there is no reduction in his earning capacity** as there are many he can do at very high wages ... would be happy to hire an economist to tell you that but I ... believe I that would be an unwarranted waste of money as he would tell you the same thing ... **you have had a wide variety of expert input on the value of Anthony's claim from experienced lawyers and a well-seasoned judge**[6] ... No

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[6] At their respective depositions, Defendants Syska and Meyer confirmed that neither of them has ever used a prosthesis, has ever been and/or received any training as a prosthetist, has any family members who use a prosthesis or has ever calculated the lifetime costs of prosthetics for anyone. (Exh's. 26 & 27). At an unusual deposition noticed by L&M in this case, Judge Lemire testified that, before joining the bench and while in private practice, he handled only a small amount of personal injury cases ("mostly soft-tissue type injuries") and "never actually had a civil trial on a personal injury case." (Exh. 28) He did not identify medical malpractice as any part of his private practice. (Exh. 28) Judge Lemire had an impressive tenure teaching evening classes at a local college, but none of the classes was in the medical malpractice area. (Exh. 28) Although Judge Lemire testified that he had presided over medical malpractice tribunals, as he confirmed, those are simply "preliminary hearing[s] of a medical malpractice case to establish whether there's sufficient evidence to proceed ..." (Exh. 28) There is no evidence to establish that, as part of his involvement with the tribunals, Judge Lemire was ever

> one can tell you what a jury would award for non-economic damages ... There are no better jury predicting specialists than you have already been exposed to ... happy to hire as many people as you wish to further consult but ... it may truly be useless because if the settlement does not get approved there will be no offer left to decide upon ... (Exh. 29)

Defendant Meyer continued to advise the Abdulkys against engaging any experts, not because the case was settled, but "because after many years of doing this, I know what they are going to say." (Exh. 30) Eventually, nearly two weeks after the Settlement, Defendant Syska reached out for the very first time to two "experts" to obtain estimates on the lifetime costs of Anthony's prosthetics. (Exh's. 14 & 15 re: Staller; Exh's. 31 & 32 re: Bruce) One of those purported experts worked for the financial services giant, UBS, as a "registered client service associate" and the other was an economist; neither was a prosthetist or had any training in the field of prostheses. Those two "experts" were not provided any of Anthony's medical records and were provided only the scantest of information. (Exh's. 15 & 31) Meanwhile, the Abdulkys contacted an actual, experienced prosthetist – someone whose

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involved in the assessment or calculation of damages in a medical malpractice action. With all due respect to Judge Lemire, neither he nor Defendants Syska or Meyer would ever be qualified in a court of law as experts tasked with calculating the cost of several decades worth of sophisticated and ever-evolving prostheses. Yet, L&M insisted to its clients that such persons were experts when it came to estimating damages such as the lifetime costs of prosthetics for a young boy.

livelihood focused entirely on the fitting, maintenance, sale, and costs of prosthetics – and who worked full-time for a leading prosthetic's company, A Step Ahead ("ASA"). On September 11, the Abdulkys – for the very first time from a prosthetist – were given an estimate as to how much Anthony's lifetime of prosthetics would cost. (Exh. 1, ¶ 36) ASA estimated that the costs of prosthetics alone would "exceed $3 million". (Exh. BB) That estimate caused the Abdulkys' ever-greater concerns and questions about the sufficiency of the Settlement. (Exh. 1, ¶¶38-41)

On September 17, a petition to approve the Settlement came on for hearing. (Exh. A) The following comments of the Court are particularly relevant:

> " ... although the settlement has been signed ... that means the case is over, that you are now pulling away from the settlement ... trying to understand if it is settled ... defense counsel are moving to have the case end ... I have the authority to do that if I believe ... this was a settlement ... voluntarily entered into ... And so it's clear it is settled ... have asked Mr. Abdulky to not do any more flips on me ... I have weighed in to help resolve it .." (Exh. A)

At that hearing, the Court explained the procedure regarding a settlement involving a minor child, presumably a reference to Mass.Gen.Laws ch. 231, §140C ½ . As Judge Lemire put it, " ... whenever there is a child who has a civil case ... the Court has to approve a settlement for various reasons: to make sure you are aware of ... the terms of the settlement, to make sure you understand it's the finality of the case,

that the case will be over for all purposes, and to make sure that the money is protected for the benefit of the child." (Exh. A, p. 4)

The next day – in an admittedly unorthodox communication – Mr. Abdulky explained to Judge Lemire that he and his wife had not been sleeping and worry over the decision to settle was consuming them. (Exh. 33) He went on to say that the Settlement

> "was forced on us by the threat of a [GAL], not by economics, logic or detailed life plan expense ... I never feared that ALL of the 10 doctors were not negligent or if they have enough coverage ... each ... including the residents have 5 million coverage for a total of 50 million dollars ... That is why the defense was pushing aggressively for the settlement and threatening with [a GAL] ... we still continue to struggle accepting it (maybe its too late now and it's a fact that we cannot request to overturn ...)" (Exh. 33)

A further hearing in the Med Mal Action was held on October 2 at which, just as with the prior hearing, the Abdulkys explained the stress of the decision and their concerns and uncertainties about the Settlement. (Exh. B) In fact, Judge Lemire even commented at the outset that the parents "look worse than last time". The Court told the Abdulkys, "this is still your case", but then proceeded to say: "there is no question it is settled, that the settlement is for an amount specific." (Exh. B) Mr. Abdulky took the opportunity further to explain the family's continued concerns about the sufficiency of the Settlement:

> " ... it came to a point where there is a big chunk of ... the puzzle that we were not informed about, which was the ... life care plan ... it may not ... exceed the $6 million.[7] But if you compare the take-home money and you compare it to this life care plan, after we went out on our own and looked at it, and found a professional with credentials ... that is a substantial amount ... we are talking between $3 million and $4 million. That is very substantial." (Exh. B)

Nevertheless, the Court confirmed the Settlement, while also acknowledging the tremendous advocacy of Mr. and Mrs. Abdulky in fighting hard on behalf of their son. (Exh. B) The Court made it clear that any attempt to vacate the Settlement was out of the question ("I'm making the decision. It's done ... You are releasing them. That's it. It's over ... You've got to get out of this stage. Look at what it's doing to you ... We are ending this now.") (Exh. B)

At the final hearing in the Med Mal Action on October 22, the defense presented a motion to enforce the Settlement and the Abdulkys presented a request to vacate the same. (Exh. C) In response, Judge Lemire commented that it "has been my practice to enforce settlements that have been acknowledged and reached by the parties ... It would be rare for me to vacate a settlement agreement." (Exh. C, p. 6) Although he rejected the request to vacate the Settlement, Judge Lemire acknowledged that the Abdulkys are "genuinely

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[7] Mr. Abdulky erroneously refers to the prosthetics estimate as a "life care plan".

concerned parents ... torn emotionally over this injury to their child ... there has even been some hospitalization of one of the parties because of the PTSD ... caused by this ... I understand their concerns ..." (Exh. C, pp. 7-8). Due to his deep involvement in settling the case, Judge Lemire stated that he would not hear any motion to have a GAL appointed (although that was a moot issue at that point). (Exh. C, p. 8)

At no point during the Med Mal Action did L&M motion the Court for, let alone even mention as a possibility, the dismissal of any of the ten defendants. Each and every one of them remained a defendant in the case up until the Settlement was finalized. (Exh. I) No dispositive motions were ever filed in the Med Mal Action. (Exh. I)

This Legal Malpractice Action

Following the substandard legal representation provided by L&M in the Med Mal Action resulting in a wholly insufficient settlement, the Abdulkys timely filed this action. In their Amended Complaint, the Abdulkys include claims against L&M for negligent legal malpractice, breach of fiduciary duty, negligent misrepresentations and respondeat superior. Discovery in this case is completed but for an outstanding Subpoena served on UMMHC (Slowick) back on August 17, 2021. The Plaintiffs' attempts to obtain compliance with the Subpoena were completely rebuffed. The Subpoena commands the production of a number of things critical to the Plaintiffs, namely copies of the insurance policies implicated in the Med Mal Action and estimates regarding the Med Mal

Defendants' valuation of the claims in that matter. Following a number of good faith efforts to secure compliance with the Subpoena, a motion to compel was served on all parties on October 26 and the same has now been filed with the Court.[8]

Meanwhile, L&M has filed the instant motion for summary judgment.

LEGAL ANALYSIS

The Summary Judgment Standards

At the risk of detailing the standard well known to this Court, a brief discussion of the same seems appropriate. Per Mass.R.Civ.P. 56(c), summary judgment should be rendered if the pleadings, depositions, answers to interrogatories, and responses to requests for admissions along with any affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "In motion for summary

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[8] The items commanded in the Subpoena are important to the Plaintiffs' claims as well as their within opposition to L&M's pending summary judgment motion. If the Motion to Compel is either (1) not decided before the summary judgment motion is heard (currently scheduled for December 14), or (2) granted, but the commanded documents are not received in time for the hearing on December 14, there may be prejudice to the Abdulkys, and a very brief continuance of the hearing may be necessary and requested. If, on the other hand, the Motion to Compel is entirely denied before December 14, the Abdulkys may need to consider taking an appeal thereof, and the December 14 hearing would need to be put off while an appeal is decided. Accordingly, the Plaintiffs hereby expressly reserve and preserve all of their rights and remedies in this regard.

judgment, the defendants have the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings." Mathers v. Midland-Ross Corp., 403 Mass. 688, 690, 532 N.E.2d 46 (1989). "The burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991), *citing* Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Thus, only a "**complete failure of proof** concerning an essential element of the non-moving party's case renders all other facts immaterial." *Id.* at 323, 106 S.Ct. at 2552 (emphasis added)

"The nonmovant may defeat a summary judgment motion by demonstrating, through submissions of evidentiary quality, that a trialworthy issue persists." Iverson v. City of Bos., 452 F.3d 94, 98 (1st Cir. 2006). Where the non-moving party bears the burden of proof at trial, the moving party will prevail only if it demonstrates that the nonmoving party has "**no reasonable expectation** of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., *supra* at 716 (emphasis added).

The moving party must demonstrate that proof of an essential element of the non-moving party's claim "at trial is **unlikely to be forthcoming**." Kourouvacilis, *supra* at 714, *citing* Celotex Corp. v. Catrett, 477 U.S. at 328 (emphasis added).

In short, if – and only if – L&M satisfies its initial burden does the burden then shift to the Abdulkys, as the non-moving party. The Abdulkys' success in

establishing that proof of each of the essential elements of their claims is likely to be forthcoming at trial and/or that they have a reasonable expectation of proving each of the elements of their claims must doom the motion for summary judgment.

Elements necessary to establish legal malpractice

It goes without saying, and has been long-established, that "[a]n attorney owes his client an obligation to exercise a reasonable degree of care and skill in the performance of his legal duties." Glidden v. Terranova, 427 N.E.2d 1169, 1170, 12 Mass.App.Ct. 597, 598 (1981), *citing* Caverly v. McOwen, 123 Mass. 574 (1878); McLellan v. Fuller, 226 Mass. 374, 115 N.E. 481 (1917). "The standard of reasonable care extends to a lawyer's expressions of opinion to a client regarding the likelihood of success for a plaintiff ..." Donarumo v. Phillips, Mass. Super. 2018, *citing* Coastal Orthopedic Inst., P.C. v. Bongiorno, 61 Mass.App.Ct. 55, 58 (2004).

> "As a predicate to rendering such litigation opinions, the legal engagement by the attorney involves the undertaking of a comprehensive review of these case facts and an analysis of applicable law, in which endeavors that attorney must 'act [ ] with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge."

61 Mass.App.Ct. at 58-59, *quoting* Colucci v. Rosen, et al., 25 Mass.App.Ct. 107, 111 (1987).

Importantly, **"the question whether an attorney has exercised sufficient legal care is one of fact**

for the jury to decide". Glidden v. Terranova, 12 Mass.App.Ct. at 598 (emphasis added), *citing* Nolan, Tort Law §186, at 299 (1979); Barry, Legal Malpractice in Massachusetts, 63 Mass.L.Rev. 15, 17 (1978).

"Where a party who was the plaintiff in a legal action sues his attorney for negligence in the prosecution of that action, he must establish that he **probably** would have succeeded in the underlying litigation were it not for the attorney's negligence." McLellan v. Fuller, 226 Mass. at 378 (emphasis added); *see also* Fishman v. Brooks, 396 Mass. 643, 647, 487 N.E.2d 1377 (1986)(plaintiff must prove "that he probably would have obtained a better result had the attorney exercised adequate skill and care.") Typically, a client in a legal malpractice action "must show that, but for the attorney's failure, the client probably would have been successful in the prosecution of the litigation giving rise to the malpractice claim ... The client need not show a perfect claim ... **the client must show at least that he has lost a probability of success as a result of the attorney's negligence**." Colucci v. Rosen, et al., *supra* at 113 [internal citations omitted](emphasis added). In other words, and an important point warranting repetition, the plaintiff in a legal malpractice action is not required to establish with absolute certainty that he or she would have obtained a better result but for the attorney's negligence.

In deciding whether a plaintiff has sustained any loss from the negligence of another, one must consider "what settlement, if any, might reasonably have been made if the claim had been properly investigated."

Deerfield Plastics Co., Inc. v. The Hartford Insurance Company, 404 Mass. 484, 485, 536 N.E.2d 322, 323 (1989). "The pertinent question is whether the settlement was reasonable, and not what finding" the trier of fact would have made.) Berke Moore Co. v. Lumbermens Mut. Casu Co., 345 Mass. 66, 72, 185 N.E.2d 637 (1962).

To be clear, "an attorney is liable for negligently causing a client to settle a claim for an amount below what a properly represented client would have accepted." Fishman v. Brooks, *supra* at 646. Even when "properly informed of all the relevant law and facts, an attorney may nevertheless cause a client to settle a case for an amount below that which competent counsel would approve." Id. "A plaintiff whose case was settled to low because of his attorney's negligence lost a valuable right, the opportunity to settle the case for a reasonable amount without a trial." Id. at 652, n. 1.

Furthermore, "an attorney defending a malpractice action may not rely on the consequences of his own negligence to bar recovery against him." Jernigan v. Giard, 500 N.E.2d 806, 807, 398 Mass. 721, 723 (1986).

Finally, "an attorney who has not held himself out as a specialist owes his client a duty to exercise the degree of care and skill of the average qualified practitioner." Fishman v. Brooks, *supra* at 646. However, where a practitioner holds himself or herself out as a specialist, the standard that must be met is that of the average qualified practitioner practicing within that specialty. *See, e.g.* Lingis, Executrix v. Waisbren, 20 Mass.L.Rptr. No. 19, 439 (Mass. 2006).

Regardless of whether the L&M attorneys here are held to the standard of the "average qualified practitioner" or, as they should be, to the higher standard of a medical practice attorney, their failures in the Med Mal Action do not satisfy either standard, and especially not the higher standard for their specialty.[9]

Collateral Estoppel Does Not Apply As a Bar

The Movants' argument that collateral estoppel acts as a legal bar to the Abdulkys' claims in this case must fail. The judicial doctrine of collateral estoppel provides, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" Martin v. Ring, 401 Mass. 59, 61 (1987), *quoting* Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 372 (1985). The doctrine, also known as issue preclusion, provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated **between the same parties** in any future lawsuit.'" Kimbroughtillery v. Commonwealth, 471 Mass. 507, 509, 30 N.E.3d 841, 844 (2015), *quoting* Commonwealth v. Lopez, 383 Mass. 497, 499, 420

[9] The Movants' own papers and supporting exhibits are replete with characterizations regarding their specialization and expertise in the medical malpractice field. Furthermore, the Abdulkys specifically engaged L&M because the firm held itself out as experts in the representation of plaintiffs in medical malpractice cases. (Exh. 1, ¶8)

N.E.2d 319 (1981); *see also* Keystone Shipping Company v. New England Power Company, 109 F.3d 46, 51 (1st Cir. 1997), *citing* Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30 (1st Cir. 1994). In order for the doctrine to apply, a court must answer affirmatively: (1) was there a final judgment on the merits in the prior adjudication, (2) was the issue decided in the prior adjudication identical with the one presented in the action in question; and (3) was the issue decided in the prior adjudication essential to the judgment in the prior adjudication? *See* Alba v. Raytheon Co., 809 N.E.2d 516, 441 Mass. 836, 842 (2004), *citing* Martin v. Ring, *supra* at 61-62.

Importantly, "[w]hether collateral estoppel is available as a bar ... it's a mixed question of law and fact ..." Golden v. Pacific Maritime Ass'n., 786 F.2d 1425, 1427 (9th Cir. 1986).

The Movants must – but cannot – establish - the following necessary elements: (1) the issue of fact or law in the Med Mal Action must have been *actually litigated,* (2) there must have been a final judgment *on the merits* in the Med Mal Action, and (3) the *issue* decided in the Med Mal Action *must be identical* with the one presented in this action.

First, the Movants cannot establish that an issue of fact or law was *actually litigated* in the Med Mal Action. One thing all parties can agree upon is that the priori action was *settled* before trial (discovery had not even closed). There was never a trial, any evidentiary hearing, any sworn witness testimony or any expert testimony in the prior case (particularly regarding the Abdulkys' damages). There were no findings of fact or

conclusions of law *on the merits* of the medical malpractice claims in the prior action. The prior action met its ignominious end based upon, and as a direct result of, a woefully ill-informed and seriously deficient settlement – an amount pulled from thin air and imposed upon the Abdulkys despite their repeated protestations. The only issue that was ever resolved in the Med Mal Action was whether to enforce the Settlement. Just as with the Abdulkys, when forced with the looming threat of the appointment of a GAL and blindly compelled into the Settlement, Judge Lemire also acted on the same woefully inadequate information regarding the Abdulkys' actual, quantifiable damages - particularly with respect to Anthony's lifetime prosthetics costs.

An issue is *actually litigated* for preclusion purposes when it has been "subject to an adversary presentation and consequent judgment" that was **not "a product of the parties' consent and is a final decision on the merits**." Keystone Shipping Company v. New England Power Company, *supra* at 52, *quoting* Jack H. Friedenthal et al., Civil Procedure § 14,11, at 672, 673 (1985)(emphasis added). The settlement of the Med Mal Action was NOT the product of an adversary presentation and consequent judgment; rather, it was the product – albeit poisoned by the lack of any timely, complete estimate from an actual prosthetist – of the parties' consent. There was never any hearing even remotely addressing the liability of the Med Mal Defendants and/or any testimony regarding the

Abdulkys' damages.[10] Under the complex circumstances presented – involving a very young amputee faced with a lifetime – very likely several decades – of prosthetics

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[10] The Movants repeatedly reference M.G.L. c.231, §140C 1/2 in an effort to import a much greater dipositive effect of the Court's approval of the Settlement, going so far as to say "it is incumbent on the trial court to determine whether the settlement is fair and favorable to the minor and in the minor's best interests." *Memo*, p. 12. However, that is not how the law reads; instead, it reads, in pertinent part: "[t]he trial court MAY review and approve a settlement for damages because of personal injury to a minor ... in any case before the court where any party has filed a petition for settlement approval ... The trial court MAY make such orders and take such action as it deems necessary TO EFFECTUATE the disposition of a settlement approval including but not limited to the appointment of a guardian, ... guardian ad litem, or the holding of an evidentiary hearing" (emphasis added). In other words, it was not "incumbent", or obligatory, on the court in the Med Mal Action to "determine whether the settlement is fair and favorable ..."; instead, it was merely *discretionary* for the court to get involved at all with the Settlement. *See, e.g.* Sharon v. Newton, 437 Mass. 99, 112 n. 10, 769 N.E.2d 738 (2002). The court would certainly have been within its rights under §140C 1/2 to decline render any opinion regarding the Settlement. In fact, the law only triggers the court's discretion to get involved if and only if all parties to a settlement sign a petition seeking the court's approval. Thus, the Movants' further attempts to compare a purely discretionary function under §140C 1/2 to the absolutely necessary and required judicial approval of a class-action settlement fail to germinate any support. Furthermore, under §140C ½, the Court could have – but wasn't required to – conduct an evidentiary hearing on the settlement including taking testimony from parties, experts, and perhaps even – due to the critical importance of the lifetime prosthetics costs in the determination of damages – hit the pause button briefly to obtain an expert's opinion. It did none of the above. Had all, or even some, of these actions been taken, then perhaps the Court's approval *might* have some greater impact in this action.

needs, the mere "trust me I know what I'm talking about" approach L&M foisted upon the Abdulkys – and Judge Lemire, for that matter - could hardly constitute "actual litigation" or a final decision *on the merits*. Transmogrifying Judge Lemire's approval of the Settlement – without any sworn lay or expert testimony – into a decision *on the merits* resulting from *actual litigation* would completely undermine the doctrine of collateral estoppel. Even the most perfunctory and purely discretionary judicial involvement in the settlement of a case would be grounds to invoke collateral estoppel. Such an absurd result should not be countenanced.

The Movants likewise cannot establish the necessary element that the issue(s) *decided* in the Med Mal Action is identical to the one presented in this legal malpractice action. As belied by the difference in the parties in each of the actions (with the sole exception of the Abdulkys), the issues presented in each of the actions are far from identical. One arose from the malpractice of the medical providers involved in Anthony's care, whereas this action arises from L&M's negligence in the handling of the prior action, specifically the events leading up to and including the Settlement. Both are negligence suits, but that hardly makes the issues presented in each case identical, a necessary element for the doctrine to apply.

A further element that must be present, unless the party against whom the doctrine is sought to be applied "had a full and fair opportunity to litigate the issues it question", is the mutuality of parties. Martin v. Ring, *supra* at 61, *citing* Home Owners Fed. Sav. & Loan

Ass'n v. Northwestern Fire, 354 Mass. 448, 455, 238 N.E.2d 55 (1968). Because the Med Mal Action settled before trial and none of the medical malpractice issues were ever actually litigated, as with the other elements of this doctrine, this element comes into play. However, the Movants cannot – and fail to - establish the identity of parties requirement. The plaintiffs in the Med Mal Action (the Abdulkys) are the same as the plaintiffs herein. However, the mutuality of the parties ends there. The defendants in the two actions are completely different – there is absolutely no overlap. Anthony's medical providers were the defendants at the prior action, whereas not one of them is a defendant in this case. Furthermore, L&M was not – and could not have been – a party in the Med Mal Action.

Accordingly, the doctrine of collateral estoppel does not apply to bar any of the Abdulkys' claims because L&M cannot establish any of the necessary elements.

Judicial Estoppel Does Not Apply as a Bar

Contrary to the asseverations of the Movants, the doctrine of judicial estoppel likewise does not act to bar the Abdulkys' claims in this case. First and foremost – and a fundamental fact of which the Movants fail to mention: **judicial estoppel is an equitable doctrine**. *See e.g.*, Otis v. Arbella Mutual Insurance Co., 443 Mass. 634, 639, 824 N.E.2d 23 (2005); New Hampshire v. Maine, 532 U.S. 742, 750 (2001); Alternative System Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 30 (1st Cir. 2004), *citing* New Hampshire

v. Maine.[11] The doctrine "precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding." Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998). "The purpose of the doctrine is to prevent the manipulation of the judicial process by litigants." Canavan's Case, 432 Mass. 304, 308 (2000). "As an equitable doctrine, judicial estoppel is not to be defined with reference to 'inflexible prerequisites or an exhaustive formula for determining [its] applicability.'" Otis v. Arbella Mutual Insurance Co., 443 Mass. at 640, *quoting* New Hampshire v. Maine, 532 U.S. at 751. "Because of its equitable nature, the 'circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.'" 532 U.S. at 750, *quoting* Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir.1982). "[T]he doctrine is properly invoked whenever a 'party is seeking to use the judicial process in an inconsistent way that courts should not tolerate.'" 443 Mass. at 640, *quoting* East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623 (1996).

Application of the doctrine is a matter of discretion. New Hampshire v. Maine, 532 U.S. at 750. The Court should weigh the equities and only apply the doctrine when necessary to serve its over-all purpose. 443 Mass. at 642. The intent of the doctrine is "to safeguard the integrity of the courts by preventing parties from

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[11] Reference to federal caselaw on the topic of judicial estoppel is appropriate because state and federal law are "materially the same." Thore v. Howe, 466 F.3d 173, 187 n.1 (1st Cir. 2006).

improperly manipulating the machinery of the judicial system," and the doctrine should therefore only be applied "when a litigant is 'playing fast and loose with the courts.'" Alternative System Concepts, Inc. v. Synopsis, Inc., *supra* at 35, *quoting* Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987).

Where the doctrine of judicial estoppel has been adopted, courts have recognized three fundamental elements as comprising the core of the doctrine. 443 Mass. at 640-41. One such element is that "the position being asserted in the litigation must be 'directly inconsistent,' meaning 'mutually exclusive' of, the position asserted in a prior proceeding." *Id., quoting* Alternative System Concepts, Inc. v. Synopsis, Inc., *supra* at 33. This element requires that the current position being espoused must be "clearly inconsistent" with the prior position. 532 U.S. at 750. In other words, the "two positions must be diametrically opposed". Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw.U.L.Rev. 1244, 1263-64 (1986). Accordingly, the SJC has rightfully rejected the doctrine "where the position being asserted is not directly contrary to the position previously asserted." 443 Mass. at 641, *citing* Canavan's Case, *supra* at 308-309; Paixao v. Paixao, 429 Mass. 307, 311 (1999); Blanchette v. School Comm. of Westwood, *supra* at 184-185.[12]

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[12] Indeed, this element of the doctrine seems inconsistent with Mass.R.Civ.P. Rule 8(e)(2) which expressly permits alternative claims even *in the same pleading,* "regardless of consistency."

The Movants have not established that the positions taken by the Abdulkys in the Med Mal Action and now in this case are inconsistent, let alone *diametrically opposed*.[13] In fact, the Movants' summary judgment papers – including the exhibits - are replete with evidence of (1) the Abdulkys' hesitance, reluctance and confoundment regarding the offer in the days leading up to August 27, 2015, and, thereafter, (2) their repeated efforts to extricate themselves from the Settlement. In the prior case, the Abdulkys repeatedly and consistently expressed their dissatisfaction with the Settlement amount, not only to their counsel at the time (the Defendants), but also to the Court. Indeed, the Abdulkys' dissatisfaction with the Settlement amount was well known to their counsel and the Court; at one point, Judge Lemire even described their prolonged, wavering reluctance to accept the Settlement as "flips". Their oft-articulated and persistent dissatisfaction with the Settlement is well documented in the transcripts of the hearings in the prior action. (Exh's. A, B & C) Therefore, the Abdulkys' claims in this case certainly cannot come as a surprise to the Movants as inconsistent or diametrically opposed to their asseverations in the Med Mal Action, particularly those surrounding the Settlement. (Likewise, the Abdulkys' claims of medical malpractice in the prior action are entirely consistent with their

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[13] The Movants bear the burden of convincing this Court that the position(s) taken by the Abdulkys in the Med Mal Action "present the risk of inconsistent court determinations" sufficient to justify applying the doctrine. United States for Use of American Bank v. C.I.T. Const. Inc., 944 F.2d 253, 259 (5th Cir. 1991).

claims in this action against L&M (the "trial within the trial" component).)

Clearly, in the prior action, the Abdulkys were not pleased with the outcome. Indeed, finally armed with an estimate from an actual prosthetist thanks to their own initiative, the Abdulkys were - at the very least - completely confused by how the Settlement amount related to their actual damages. Their lawyers did not provide any timely expert support for estimating arguably the single largest component of their damages - namely the lifetime prosthetics costs for Anthony spanning several decades. There can be no disputing that prosthetics over the past decades have become far more advanced and complicated then they ever have been. Without doubt they will continue to develop and evolve into more realistic, functional and advanced devices and, just as surely, their costs will continue to increase far beyond simple inflationary effects. Despite what should have been a clear and obvious need for a prosthetist – or at least someone well-versed with prosthetics and Anthony's particular, unique needs - to analyze and develop a sound cost estimate for the same, L&M insisted that the Abdulkys simply take their word for it, apparently as self-proclaimed prosthetics "experts". L&M simply expected their grandiose characterizations of the Settlement to satisfy the Abdulkys, and the Court. When the Abdulkys finally – on their own initiative – obtained an estimate from a prothetist, it was too late – the case was settled and the defense was in full attack mode to enforce it.

Taken aback (to put it mildly) by the substantial estimate finally obtained *after the fact,* the Abdulkys

did what they could to extricate themselves from the Settlement – including some rather unorthodox efforts. It was readily apparent to all – including Judge Lemire – that the Abdulkys were extremely displeased with the Settlement – to the point that their strong reluctance and hesitation to accept the Settlement caused issues with the relationship with L&M and even raised concerns with Judge Lemire. Faced with pressure from L&M, from defense counsel, threats of a GAL and even pressure from the Court, the Abdulkys were left with one option, to sign off on the Settlement. However, that does not in any way negate or diminish the fact that the record in the Med Mal Action around the time of its disposition is permeated with the Abdulkys' vehement dissatisfaction with the Settlement and their strong, oft-articulated reluctance to accept the same. Ultimately, the Abdulkys capitulated and accepted the settlement foisted upon them by their own supposed advocates. Therefore, it can hardly be said that the Abdulkys' position in this case is inconsistent, let alone *diametrically opposed*, with their position in the Med Mal Action regarding the Settlement. That is particularly true for the timeframe leading up to the date of the Settlement. For this reason alone, the doctrine of judicial estoppel does not apply as a bar in this case.

Unlike in Otis, the factual premise now advanced by the Abdulkys – that the Movants were negligent in their lack of adequate and timely preparation of the case resulting in the Settlement – is entirely consistent with their asseverations – albeit rejected by Judge Lemire – that the Settlement is insufficient and unacceptable. In Otis, the plaintiff's position in the

second action was that "he should not have recovered anything in the first suit." 443 Mass. at 643. As the Court said, "[t]his is the classic posture in which courts invoke judicial estoppel". *Id.* That is a far cry from the completely consistent positions taken with respect to the resolution of the Med Mal Action, and now being asserted in this action by the Abdulkys. Just as during the settlement of the Med Mal Action, the Abdulkys in this action continue their efforts to recover the balance of the true value of the claims for the benefit of their son based upon an actual estimate from a knowledgeable, experienced prosthetist.[14] Otis is further distinguishable because the suit in that case was actually tried (jury); the Med Mal Action was never tried – it was settled (with discovery far from completed).

This case bears many similarities to Meyer v. Wagner, 429 Mass. 410, 420, 709 N.E.2d 784 (1999), in which the SJC *rejected* judicial estoppel as a bar to the plaintiff's malpractice claim, where the essence of her claim was that the positions taken during the prior proceeding were themselves the product of her attorney's malpractice. Here, as in Meyer, the "essence" of the Abdulkys' claims is that the actions taken and omissions committed resulting in the disposition of the Med Mal Action (based primarily upon L&Ms' failure

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[14] In this case, the Abdulkys have engaged an experienced prosthetist (different from the one ultimately contacted by the Abdulkys in the prior action) as well as a seasoned economist; those experts together estimate Anthony's lifetime prosthetics costs at approximately $6 million (present value). *See* Plaintiffs' Supplemental Answers to L&M's First Set of Interrogatories dated June 30, 2021 (expert disclosures). (Exh. 35)

timely to obtain any estimate of the cost of Anthony's lifetime prosthetics needs) – are themselves the product of L&M's malpractice. The issue in Meyer was "whether a client who agreed to the settlement of ... a[n] action on the advice of her attorney later may properly assert a claim for malpractice against the attorney in the preparation and execution of the settlement agreement." 709 N.E.2d at 786. *Just as L&M does here with respect to Judge Lemire's approval of the Settlement, the legal malpractice defendant in Meyer likewise relied primarily on the fact that the judge in the earlier proceeding approved the settlement.* Id. Also, just like the Abdulkys, the client in Meyer was "urged" by her attorney "to enter into the settlement agreement even though she had expressed concerns" about certain facts and circumstances surrounding the settlement. Id. at 788. Relying upon the principles stated in Fishman v. Brooks, *supra,* the SJC concluded that, even though the settlement was approved by a Judge, "with appropriate proof, a plaintiff would be entitled to a trial on a claim that his or her attorney had not exercised adequate care and skill in reaching such an agreement." Meyer, *supra* at 790. The SJC adopted what it described as "the better rule" established in Grayson v. Wofsey, 646 A.2d 195 (Conn. 1994), namely:

> [W]here a client establishes that his or her attorney, in advising on the settlement of [an] ... action, has failed to exercise the degree of skill and care of the average qualified lawyer, and that the failure has resulted in loss or damage to the client, the client is entitled to recover even if the settlement has received judicial approval.

Meyer, *supra* at 791. The SJC continued: "[t]he principle that a party maintaining a position in one judicial proceeding is not permitted to assume a contrary position in a subsequent judicial proceeding concerning the same subject [internal citation omitted], cannot be logically applied in ... circumstances where the plaintiff is attempting to show that her position in the [prior] action was the result of the defendant's malpractice." Id. Needless to say, Meyer is very highly instructive here, and should be dispositive of the Movants' defense of judicial estoppel. That defense provides them no solace and does not act as a bar to the Abdulkys' claims.

The Movants likewise fail to satisfy a second element necessary to apply judicial estoppel, namely that the party against whom the doctrine is being asserted (the Abdulkys) "must have succeeded in convincing the court to accept its prior position." 443 Mass. at 641, *citing* Alternative System Concepts, Inc. v. Synopsys. Inc., *supra,* and cases cited. "Where the court has found in favor of that party's position in the prior proceeding, 'judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" 443 Mass. at 641, *citing* New Hampshire v. Maine, *supra* at 750, *quoting* Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982).[15] Thus,

[15] For the same reasons the first element does not apply to bar their claims, it cannot be said that the Abdulkys are guilty of leading astray Judge Lemire nor of now leading astray this Court. In fact, the Abdulkys have at all times been very transparent – both with Judge Lemire and now in this action – about their

where the party against whom the doctrine is sought to be applied was not successful in the prior proceeding, judicial estoppel should not apply. East Cambridge Sav. Bank v. Wheeler, *supra* at 623; *see also* Fay v. Federal Nat'l Mtge. Ass'n, 419 Mass. 782, 788 (1995).

It can hardly be said that the Abdulkys succeeded before Judge Lemire in establishing anything other than their strong dissatisfaction with the Settlement. In fact, their attorneys' perfunctory attempt to have the Court relieve the Abdulkys from the Settlement failed; Judge Lemire denied the Abdulkys' motion seeking relief from the settlement. While it is true that Judge Lemire ultimately approved the Settlement, that was NOT because of the Abdulkys' advocacy or desire to have the Settlement approved. In fact, the Settlement was approved *despite* the Abdulkys' vehement and repeated protestations (oftentimes to the frustration of their own attorneys and the Court). Absolutely no one in the Med Mal Action can now feign to be nonplussed at the Abdulkys' action for legal malpractice against their former attorneys in the prior action.

"In determining whether the party 'succeeded' in a prior proceeding, we look to whether the prior forum 'accepted the legal or factual assertion alleged to be at odds with the position advanced in the current forum ...'" In re Bankvest Corp., 375 F.3d 51, 60 (1st Cir. 2004), *quoting* Gens v. Resolution Trust Corp. (In re Gens), 112 F.3d 569, 572-73 (1st Cir. 1997). In

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reactions and opinions regarding the Defendants' handling of the Med Mal Action, particularly during the final weeks of that case, including, specifically, the insufficiency of the Settlement.

Bankvest, "before any substantive proceedings were scheduled to begin, the action was settled ... [and] the ... *court approved the settlement.* At no time did the ... court accept the legal or factual assertions of the complaint." *Id.* Therefore, the court refused to apply the doctrine of judicial estoppel. *Id.* For the same reason the Bankvest court refused to apply the doctrine, this Court should likewise jettison the Movants' claim to the benefits of the doctrine. The Med Mal Action was settled before any substantive proceedings began – significant discovery had yet to be conducted. Although Judge Lemire approved the Settlement, at no time did he accept the legal or factual assertions of the complaint.[16] The Abdulkys did not succeed in their attempts to extricate themselves from the Settlement; nor were any of the merits of the Med Mal Action adjudicated, so there was no "success" in that regard. Indeed, at the end of that case, the primary issue to be decided by the Court was "simply" whether to enforce the Settlement or not. Thus, the Movants cannot establish that the Abdulkys succeeded in the prior proceeding.

There is, however, no denying that the Abdulkys obtained a substantial settlement in the Med Mal Action. Undoubtedly, many medical malpractice victims would be satisfied with the amount obtained.

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[16] This second element is not satisfied when an action settles before the jury renders a verdict. Bates v. Long Island R. Co., 997 F.2d 1028, 1038 (2nd Cir. 1993), *quoting* Universal City Studios v. Nintendo Co., 578 F.Supp. 911, 921 (S.D.N.Y. 1983)(a "'settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel.'")

However, merely applying labels to the Settlement ("tremendous", "huge", etc.) is simply hyperbole and matters not. What truly mattered in the Med Mal Action - what the Abdulkys so desperately wanted, needed, requested and deserved to understand from their lawyers - was how the amount of the Settlement compared to their actual, quantifiable damages. Not once before the Settlement was agreed to – the point in time where anything that occurred thereafter was for naught – did L&M ever inform or advise their clients that experts can and should be engaged to substantiate the largest settlement reasonably attainable under the circumstances. It is imperative to understand that the mere amount of the Settlement must be analyzed within the context of the particular facts and circumstances presented. The Med Mal Action – like the vast majority of such actions – is impacted by many factors, at least some of which are likely to be quite unique to the tragedy that befell young Anthony. Thus, for example, to compare the Abdulkys claims against ten defendants with a total of $50 million in available insurance coverage with a similar medical malpractice case but with only one defendant with a total of $1 million in available coverage would be an exercise in futility. It would be inappropriate to rely upon the $1 million case in determining the settlement value in the other case. Certainly, the age of the victim is also a factor, as is how vigorously the parents of a minor child fight for the best possible result, even if it means going to trial and foregoing a quick, but completely inadequate, settlement offer). The point is this: **the mere size alone of the Settlement should not *ipso facto* render such an outcome unassailable**. The fact that the Abdulkys received $6 million does not

preclude a finding that they were nonetheless victims of legal malpractice. *See e.g.*, Donarumo v. Phillips (Mass. Super. 2018), p. 16.

The third element required for the application of judicial estoppel is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." New Hampshire v. Maine, *supra* at 751. "[J]udicial estoppel will normally be appropriate whenever 'a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage.'" 443 Mass. at 641, *quoting* InterGen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003). In this case, as an integral part of the Settlement, the Med Mal Defendants obtained a full and complete release from the Abdulkys and the case against them was dismissed. None of the defendants in the Med Mal Action is named in this action. The Abdulkys readily acknowledge that none of those defendants could be named in any further suit regarding Anthony's treatment leading up to the amputation of his arm, because of the releases. Thus, going after any of the parties in the Med Mal Action certainly would be seeking an unfair advantage and/or impose an unfair detriment on them, but that is not this case. That is not what the Abdulkys are pursuing in this action, nor do they have any intention of doing so. Unlike the Med Mal Action that sought to hold the medical providers accountable, this case seeks to hold L&M accountable for causing and/or allowing the Med Mal Action to settle for considerably less than its true value.

Moreover, "there may arise certain instances where the party's prior position was asserted in good faith, and where the circumstances provide a legitimate reason – other than sheer tactical gain – for the subsequent change in that party's position." 443 Mass. at 642. Thus, "it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake,'" New Hampshire v. Maine, *supra* at 753, *quoting* John S. Clarke Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995), or where "the position adopted in the first suit was clearly wrong yet had been advanced in good faith by the party now sought to be estopped," Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1428 (7th Cir. 1993). Further, "[s]trict application of the doctrine might not be called for if 'the new, inconsistent position is the product of information neither known nor readily available to [the party] at the time the initial position was taken.'" 443 Mass. at 642, *quoting* Alternative System Concepts, Inc. v. Synopsys, Inc., *supra* at 35. Thus, because the doctrine is equitable and up to the discretion of the court depending upon the specific facts and circumstances presented by each individual case, inevitably there will be situations where a party is unable to meet its burden of establishing that the doctrine is applicable. Such is the case here.

Even if the Movants are somehow deemed to have established all of the elements necessary for judicial estoppel to apply, it would nevertheless be grossly inequitable to apply the doctrine to defeat the Abdulkys' claims. First and foremost, Mr. and Mrs. Abdulky have always sought to recover for their son

the greatest sum possible sufficiently to compensate him for the significant injuries and permanent disfiguration due to the malpractice of the Med Mal Defendants.[17] The lifetime costs of prosthetics were and remain likely single largest component of the Abdulkys' damages, but one that certainly can be (and now, finally, has been) estimated with a reasonable degree of certainty. Notwithstanding that critical fact, before L&M lead the Abdulkys down the path to mediation, they never once mentioned to their clients that it would prudent, if not outright necessary, to obtain any expert's estimate on the lifetime prosthetics costs. In fact, it was only the Abdulkys themselves (neither of whom is a lawyer or has any legal training or education) who first suggested that an expert be engaged to help quantify damages. However, by the time L&M finally moved beyond their outright refusal to engage an appropriate expert, it was too late; the case was settled. The Med Mal Defendants promptly sought to enforce the settlement and the Abdulkys were forced on the defensive, under the gun to accept a settlement they could not understand. By failing and refusing to obtain any estimate on damages before the Abdulkys were forced to settle the case on August 27, 2015, L&M effectively surrendered the direction and control of settlement negotiations to the Med Mal Defendants. They, in turn, promptly and effectively usurped the control and direction of the negotiations.

The SJC has described the judicial estoppel doctrine as having "hazy" contours, and thus far has declined "to construct a categorical list of requirements or to delineate each and every possible exception." 443 Mass. at 642. Other courts have described the doctrine as

having "rather vague" contours, Patriot Cinemas, Inc. v. General Cinema Corp., *supra* at 212, and consisting of a "narrow analytical mold". U.S. v. Levasseur, 846 F.2d 786, 792 (1st Cir. 1988).

Accordingly, the Movants have not established the elements necessary for the judicial estoppel doctrine to apply here to act as a bar against the Abdulkys' claims.

The Abdulkys' Expert, Attorney David J. Oliveira's, Disclosure And Affidavit Are Entirely Sufficient on the Issues of Causation and Damages

The Movants' final attempt to invoke the harsh remedy of summary judgment involves their attack on the relevancy and materiality of the Abdulkys' legal expert, attorney David J. Oliveira.[18] Their laundry list of complaints includes bold allegations that Attorney Oliveira's opinions in this matter are conclusory and speculative, inadmissible, unsupported by facts, etc. The Movants seem to be asking this Court – via a motion for summary judgment – essentially to conduct a voir dire of Attorney Oliveira. That certainly may be appropriate, at a trial of this matter, but it just as certainly is inappropriate for the Movants to attempt such a drastic action in the guise of a summary judgment motion. Moreover, not a single case upon which the Movants rely is from the SJC. The Movants cannot cite to a single SJC decision in support of their

[18] *See* Exh. D for Plaintiffs' Supplemental Answers to L&M's First Set of Interrogatories (Attorney Oliveira's expert disclosure). However, because Ex. D does not include Attorney Oliveira's extensive curriculum vitae, the same is attached hereto as Exh. 36.

argument that summary judgment should enter despite Attorney Oliveira's opinions and anticipated testimony at trial.[19]

Although already mentioned above, the important summary judgment standard bears repeating here.

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[19] The Movants' cases can all be distinguished from this case. For example, in Frullo v. Langenberger, 61 Mass.App.Ct. 814, 819 (2004), the expert affidavit was "carefully crafted to avoid giving an actual opinion as to the effect of [the lawyer's] negligence on the plaintiffs' claims." By contrast, the expert disclosure and, now, the Oliveira Affidavit (Exh. 34) both give actual opinions as to the effect of L&M's negligence on the family's claims. Lavina v. Satin, 2016 WL 2846198, *3-4 (Mass. Super. May 13, 2016) is likewise unavailing to the Movants. In that case, and in stark contrast to the events leading up to the Settlement, the expert "had no knowledge of whether [the doctor (defendant)] even had any interest at all in settling a lawsuit whose liability claim he had consistently derided ..." Here, it was readily apparent at the time, and to this day, that the Med Mal Defendants, who asked for the mediation and pressed for approval of the Settlement, were keenly interested in settling the Med Mal Action. That important fact is readily known to Attorney Oliveira and part of both his disclosure and the Oliveira Affidavit (Exh. 34). Furthermore, in Lavina, the expert opined that the insurer would have settled the claims for in excess of $1 million; however, that amount was the maximum insurance coverage available. The court found that fact to be "damning" to the expert's opinion. However, in this case, the amount Attorney Oliveira asserts minimally as the proper and sufficient value of the Abdulkys' claims is well within the total insurance coverage available to the Med Mal Defendants – even to just two of the ten defendants. Minkina v. Frankl, 2012 WL 3104905, *13 (Mass. Super.June 19, 2012) is also readily distinguishable; in that case, the plaintiff alleged malpractice based upon her lawyer's failure to anticipate that a then-controlling decision of the appeals court would be rejected by the SJC in a later decision. That, obviously, bears no relation to the claims of legal malpractice in this action.

"Where the party opposing the motion bears the burden of proof at trial, the moving party will prevail only if it demonstrates that the nonmoving party has **no reasonable expectation** of proving an essential element of the case." Cabot Corporation v. AVX Corporation, *supra* at 637, *citing* Kourouvacilis v. General Motors Corp., *supra* at 716 (emphasis added). The Abdulkys bear the burden of proof at trial in this action; therefore, the Movants are entitled to summary judgment ONLY IF they can demonstrate that the Abdulkys have *no reasonable expectation* of proving an essential element of their legal malpractice claims. Stated otherwise, the Movants must demonstrate that proof of an essential element of the Abdulkys' claims **"at trial is unlikely to be forthcoming."** Kourouvacilis v. General Motors Corp., *supra* at 714 (emphasis added).

The Movants do not dispute that an attorney-client relationship existed between the Abdulkys and the L&M Defendants throughout the entirety of the Med Mal Action. Thus, they do not dispute that L&M owed the Abdulkys a duty of care throughout the Med Mal Action.

Nor do the Movants assert that the Abdulkys are unable to establish that the L&M Defendants breached the standard of care they owed to their clients in the Med Mal Action. Rather, the Movants argue that, notwithstanding Attorney Oliveira's expert disclosure and anticipated testimony, the Abdulkys cannot establish the elements of loss and causation, only.

As the Supreme Judicial Court has repeatedly made clear, assuming the party moving for summary

judgment has satisfied its burden, the non-moving party need not establish all the elements of its case with *certainty*. That would effectively turn a summary judgment motion into something much greater than what Rule 56 provides, and impose upon the non-moving party an undue burden in coming forward to rebut the motion. Even at a legal malpractice trial, the plaintiff is not required to establish that he or she would *without doubt* have been successful in the litigation giving rise to the claim of legal malpractice. "A client in a malpractice action based on an allegation of attorney negligence must show that, but for the attorney's failure, the client **probably** would have been successful in the prosecution of the litigation giving rise to the malpractice claim." Colucci v. Rosen, Goldberg et al., 25 Mass.App.Ct. 107, 113 (1987)(emphasis added).

Certain excerpts of Attorney Oliveira's expert disclosure – beyond the very short blurb included in the Movants' papers – bear repeating here, as follows:

> Oliveira will testify that the defendants ... determined they had a strong case on the issues of liability and causation and that there was adequate insurance coverage ... However, ... **they never examined the issue of damages at the critical times in their representation of the Abdulkys. As a result of that failure, the Abdulkys accepted ... $6 million to settle ... which was wholly inadequate in the circumstances ...** Prior to any mediation, or other effort at settlement, **it was required that L&M have a full evaluation of case**

value to drive those discussions . ... Attorney Syska's letter of 3/17/15 to the mediator ... was devoid of any analysis of damages .... Once L&M received an offer ... at the mediation, attorney Oliveira will testify that it was incumbent upon them to have a full assessment of damages to demonstrate to the defense why they could not recommend that settlement to the Abdulkys. Attorney Oliveira will further testify that this also would have served the critical purpose of enlightening the defense to the nature of the damages evidence that L&M would introduce at trial which, especially in the face of a strong case on liability and causation, could be expected to cause the defense to reconsider its settlement offer and approach. This would also have been important to managing the issue of insurance company reserves. These can be difficult to increase as senior insurance personnel often want to know why the case was undervalued in the first instance . ... if the carrier had performed its own due diligence and set realistic reserves, this would not be an issue. But, if it did not do so, then an early assessment of value offered by the plaintiffs can help get reserves set realistically early on thus facilitating settlement discussions .... **Anthony's on-going need for prosthetics over the course of his life was a critical factor to consider as anyone would recognize that would be a large number. L&M gave no consideration to this until after ultimately securing and repeatedly and vehemently recommending a $6 million settlement offer in the absence of any way**

to measure its adequacy. Attorney Oliveira will also testify ... [i]rrespective of the amount of a settlement offer, in the face of adequate insurance coverage, the client needs to know three things to make an informed decision: (1) how much of the offer will go to the client after the deduction of fees, expenses, [etc.]; (2) what are the future damages; and (3) what are the prospects of winning at trial. In the absence of any of that information, the client cannot make an informed decision on whether to accept the settlement offer. Here, **despite being asked on more than one occasion by the Abdulkys on what the recommendation to accept $6 million was based, L&M did not provide any response of any substance until after the Abdulkys ... accepted the offer . ... the [L&M] failures ... caused the Abdulkys to accept an inadequate settlement upon the advice of [L&M].** The realistic case value for this matter is in excess of $10 million. This would have included future equipment and medical costs, loss of consortium and, of equal importance, Anthony's pain and suffering over many years (past and future). The pain and suffering alone could have been worth $3 -- $4 million given that the higher number is merely $1000/week for an 80-year life expectancy ... The fact that Judge Lemire approved and even recommended the settlement does not affect [Attorney Oliveira's] opinion .... **Judge Lemire was operating on an inadequate information base just as were the Abdulkys when he began**

> **recommending the settlement.** If the Abdulkys were entitled to reasonable information in deciding whether or not to accept the settlement, the court was equally entitled to such information when being asked to recommend and, ultimately, approve the settlement. (emphasis added)

Furthermore, with respect to Attorney Oliveira, he is prepared and expected to testify as follows, as set forth in his affidavit attached hereto as Exhibit 34:

1) He graduated *magna cum laude* from Boston College Law School in 1980.
2) He has been a member of the Rhode Island *and Massachusetts* bars since 1980.
3) Since 1980, he has actively practiced law in both states and has, at all times, been a member in good standing in both jurisdictions.
4) Throughout his entire 41-year career as a practicing attorney, he has focused his practice on, among other things, serious persona injury and medical malpractice.
5) Since 1990, he has been a member of Medical-Legal Committee of the RI Bar Association.
6) Since 1996, he has been an adjunct professor of law at Roger Williams University School of Law.
7) Since 1989, he has been active in writing presentations and giving seminars to various groups and organizations – legal and

otherwise – regarding risk and liability issues and topics as well as trial advocacy.

8) His presentations and lectures include the topics of medical malpractice and other torts.

9) He has tried before a jury in Massachusetts approximately 4 cases involving medical malpractice including in the counties of Suffolk and Bristol.

10) He has tried before a jury in other jurisdictions numerous cases involving medical malpractice.

11) Throughout his legal career, he has routinely and in numerous instances engaged experts to consult with him on his cases as well as to testify in court.

12) Over his career, he has settled numerous personal injury and medical malpractice cases, including in Massachusetts.

13) In connection with his engagement by the Abdulkys in this action, he has reviewed numerous summaries of verdicts rendered in recent years in the Commonwealth of Massachusetts in medical malpractice cases. The summaries include information such as the nature and extent of the injuries, whether any amputation was involved, the extent of insurance coverage (if any), information on the plaintiff(s), the identity and qualifications of any experts engaged, bases for the claims as well as the defenses, the county within the Commonwealth where the case was filed and the amount of the verdicts.

14) Also, in connection with this engagement, he has reviewed many numerous summaries regarding settlements in medical malpractice cases filed in Massachusetts. These summaries include much of the same detail as that contained in the verdict summaries.

15) Among other resources utilized in compiling these summaries, the on-line subscription service "Verdict Search" was used, as it seems to include the most comprehensive and up to date detailed information regarding verdicts and settlements.

16) Based upon the aforementioned reviews and due diligence, he affirms and verifies as true and accurate all of the information contained in his "expert disclosure" contained within the Plaintiffs' Supplemental Answers to Interrogatories.

Accordingly, under the standards set forth in the authorities cited herein, the expert disclosure and affidavit testimony of Attorney Oliveira thus far are certainly more than sufficient to establish the likelihood or probability that the Abdulkys will be able to establish at trial the elements of causation and damages.

WHEREFORE, the Abdulkys respectfully submit and request that this Honorable Court deny the Motion for Summary Judgment forthwith.

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By their attorney:

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[*Certificate of Service Omitted in Printing of this Appendix.*]