

KLINE & SPECTER

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David J. Niedzwiadek, as Administrator
of the Estate of Margaret Mary
Niedzwiadek, deceased,

Plaintiff,

v.

Timothy J. Droney, M.D., et al

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

ATLANTIC COUNTY

DOCKET NO.: L-000094-16

**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO AMEND THE COMPLAINT
TO SEEK PUNITIVE DAMAGES AGAINST DEFENDANTS CRAIG J. ANMUTH,
D.O., BACHARACH INSTITUTE FOR REHABILITATION, ROBERT PERRO, AND
NEUROMONITORING TECHNOLOGIES, INC.**

I. INTRODUCTION

This medical negligence action arises out of the reckless intraoperative neuromonitoring that 59-year-old Margaret Mary Niedzwiadek received during outpatient spinal surgery on October 22, 2013, resulting in a catastrophic hypoxic brain injury that led to her death on December 5, 2013. Plaintiff initiated suit by filing a Complaint on October 20, 2015. An Amended Complaint naming defendant

Neuromonitoring Technologies, Inc. ("NMT") was filed with leave of Court on June 23, 2016. *See* Amended Complaint annexed hereto as Exhibit "A".

During the surgery, Ms. Niedzwiadek was to receive intraoperative neuromonitoring by defendant Craig J. Anmuth, D.O., a specialist in electrodiagnostic medicine and Medical Director of defendant Bacharach Institute for Rehabilitation, and defendant Robert Perro, a neuromonitoring technician employed by NMT. *See* Amended Complaint at Exhibit "A", ¶ 27. Dr. Anmuth was to monitor the neuromonitoring signals remotely from a laptop in his office at Bacharach for the entirety of the surgery. *See* March 1, 2017 Depo. of C. Anmuth, annexed as Exhibit "C", at pp. 31:1-10; 35:11-36-2; and 185:23-186-2.

Throughout the course of discovery and depositions, plaintiff has uncovered an arsenal of evidence proving that Ms. Niedzwiadek suffered a hypoxic brain injury during the surgery because Dr. Anmuth was not watching her monitoring signals and Mr. Perro, who was in the operating room generating the signals that Dr. Anmuth was supposed to monitor, chose not to report her grave signal changes to Dr. Anmuth or the surgery team. *See* March 1, 2017 Depo. of C. Anmuth at Exhibit "C", pp. 142:5-22, 153:25-155:6, 170:9-173:2. It was also recently discovered that while Dr. Anmuth was supposed to be carefully monitoring Ms. Niedzwiadek's neuromonitoring signals from his office at Bacharach (something he testified to under oath at his deposition), he actually was engaged in a number of unrelated activities, such as driving his car to the office, talking

on his cell phone, and reviewing other patients' medical records. *See* Sprint cell tower records annexed as Exhibit "D"; Sprint call record annexed hereto as Exhibit "E"; and Audit trail of Dr. Anmuth's access of Bacharach Electronic Medical Record annexed hereto as Exhibit "F".

Equally damning is the fact that multiple defendants perjured themselves and withheld and destroyed evidence in an effort to hide the egregious conduct associated with the neuromonitoring of this case. As will be more fully set forth below, Dr. Anmuth perjured himself about his location at the start of Ms. Niedzwiadek's surgery, the time he first attempted to login to monitor the case, the unrelated activities he engaged in during her procedure, and the status of his internet connection during the case. Richard Mathabel, President and CEO of NMT, lied about the reason he fired Mr. Perro after this surgery, and withheld evidence showing that he performed his own investigation and determined that Mr. Perro was grossly negligent in not reporting the drastic change in neuromonitoring signals to the physicians. Incredibly, Dr. Anmuth and Bacharach installed anti-forensic software on the laptop that destroyed the evidence regarding Dr. Anmuth's computer activity during the surgery. *See* April 17, 2018 Report of Louis Cinquanto annexed as Exhibit "G" and July 31, 2018 Order and Opinion regarding spoliation of evidence annexed as Exhibit "H". Both NMT and Mr. Perro failed to produce unemployment claim documentation showing that Mr. Perro was fired due to

his grossly negligent neuromonitoring in this case. *See* Production of unemployment claim documentation annexed as Exhibit "I".

At the time plaintiff filed suit, he had no way of knowing that Dr. Anmuth and Mr. Perro totally abdicated their responsibility to provide neuromonitoring for Ms. Niedzwiadek and that there was a cover-up regarding these events. Plaintiff continues to follow the trail of this cover-up and is gathering further evidence of this egregious conduct. The evidence obtained to date, set forth in detail below, establishes that this intentional, wanton, and willful conduct directly caused Ms. Niedzwiadek's death and gives rise to the instant Motion to Amend the Complaint to Seek Punitive Damages Against Defendants Craig J. Anmuth, D.O., Bacharach Institute for Rehabilitation, Robert Perro, and Neuromonitoring Technologies, Inc. *See* Plaintiff's Proposed Second Amended Complaint, annexed hereto as Exhibit "B".

II. LEGAL ARGUMENT

A. New Jersey law liberally permits amending the Complaint in the interest of justice.

Rule 4:9-1 of the New Jersey Rules of Court provides that leave to amend a pleading shall be freely given, stating as follows:

A party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend a pleading only by written consent of the adverse

party or by leave of court which shall be freely given in the interest of justice.

R. 4:9-1 (emphasis added).

“The motion for leave to amend is required by the rule [4:9-1] to be liberally granted without the consideration of the ultimate merits of the amendment.” Pressler, *Rules Governing the Courts of the State of New Jersey*, Comment 2.1 on R. 4:9-1 (2017); *see also* *Notte v. Merchants Mut. Ins. Co.*, 185 N.J. 490, 500-501 (2006); *Kernan v. One Washington Park*, 154 N.J. 437, 456-457 (1998). “The broad power of the amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result or the amendment would be futile.” Pressler, *Rules Governing the Courts of the State of New Jersey*, Comment 2.1 on R. 4:9-1 (2017); *see also* *Bustamante v. Borough of Paramus*, 413 N.J. Super. 276, 298 (App. Div. 2010).

B. Punitive damages are recoverable pursuant to New Jersey’s Punitive Damages Act.

The Punitive Damages Act requires that “[a]n award of punitive damages must be specifically prayed for in the complaint.” N.J.S.A. § 2A:15-5.11. The Act provides that punitive damages may be awarded as follows:

Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

N.J.S.A. § 2A:15-5.12(a). “Wanton and willful disregard” is defined by the Act as “**a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.**”

N.J.S.A. § 2A:15-5.10 (Definitions) (emphasis added).

The purpose of punitive damages is “to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future.” N.J.S.A. § 2A:15-5.10. The Punitive Damages Act requires that the following evidence be considered by the trier of fact in determining whether punitive damages are awarded:

- (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
- (2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;
- (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
- (4) The duration of the conduct or any concealment of it by the defendant.

N.J.S.A. 2A:15-5.12(b). A request for recovery of punitive damages is not an independent cause of action, but rather a form of damages related to an underlying claim. *See Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37 (1984) (punitive damages may lie provided there is a valid underlying cause of action).

C. Punitive damages are appropriate in this action.

Plaintiff is not “recasting merely negligent conduct as willful and wanton” in making this application to the Court. *Edwards v. Our Lady of Lourdes Hosp.*, 217 N.J. Super. 448 at 460 (App. Div. 1987). Quite to the contrary, in this case, a jury could well conclude that Dr. Anmuth and Mr. Perro decided not to do their jobs at all, with full knowledge of the catastrophic consequences that could, and did, result. In a world where technology-driven remote medical care is ascendant, the purpose of punitive damages – to punish aggravated misconduct so as to deter such conduct in the future – is well-served by allowing the jury to consider the recovery of such damages here.

The evidence uncovered to date establishes that both the interest of justice and the purpose of punitive damages would be served by amendment of the Complaint to permit the jury to consider an award of punitive damages against Dr. Anmuth, Bacharach, Mr. Perro, and NMT:

- 1. Dr. Anmuth was driving his car when he was supposed to be monitoring Ms. Niedzwiadek’s surgery and lied about it at his deposition.**

The baseline data for Ms. Niedzwiadek’s intraoperative neuromonitoring was taken at 7:28 a.m. and the surgery began at 7:53 a.m. *See* Event Log annexed as Exhibit “J”. At his deposition, Dr. Anmuth claimed to have monitored Ms. Niedzwiadek’s case from his office at Bacharach. *See* Depo. C. Anmuth at Exhibit “C”, pp. 31:1-10; 35:11-36-2; and 185:23-186-2. He said that he started trying to login to the case at about 7:00 a.m. *Id.* at p. 98:10-20. However, Sprint cell phone tower records obtained via subpoena on

November 14, 2018 demonstrate that at those times, Dr. Anmuth was in his car driving to the office, and that he did not arrive at Bacharach until after Ms. Niedzwiadek's surgery was well underway. Moreover, documentation received in response to a subpoena for Dr. Anmuth's private virtual network connection establishes that he did not start trying to login to Ms. Niedzwiadek's case on his laptop at Bacharach until after 8:03 a.m., well after the surgery started. *See* Records of ANXeBusiness, LLC annexed hereto as Exhibit "P".

It is shocking to learn that Dr. Anmuth, the Medical Director of Bacharach, perjured himself when he gave this testimony and was driving his car when he should have been monitoring a surgery. Dr. Anmuth did not monitor Ms. Niedzwiadek's baseline data or the initial phases of her surgery. He was in his car, talking on his cell phone to people in no way related to the surgery, instead of caring for his patient. Dr. Anmuth was well aware that intraoperative neuromonitoring is a potentially life-saving tool for the protection of a patient exposed to the risk of a change in neurological function. *See* Depo. C. Anmuth at Exhibit "C", pp. 7:15-8:10.¹

Dr. Anmuth's deliberate abdication of his responsibility to monitor Ms. Niedzwiadek's neuromonitoring signals exhibits wanton and willful disregard for her safety and well-being, satisfying the Punitive Damages Act's definition of wanton and

¹ Dr. Anmuth was also responsible for the neuromonitoring oversight of another patient on the morning of October 22, 2013, whose baseline data was taken at 8:13 a.m. *See* Event Log of Patient Doe annexed as Exhibit "T".

willful conduct as “a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.” N.J.S.A. § 2A:15-5.10. By lying about his location during and failure to monitor the initial phases of the surgery at his deposition, Dr. Anmuth also engaged in concealment, which is further evidence that can be considered by the trier of fact in determining whether punitive damages are awarded. *See* N.J.S.A. 2A:15-5.12(b). It also delayed the discovery of this critical evidence.

2. Dr. Anmuth was talking on his cell phone instead of monitoring the surgery and lied about it at his deposition.

Dr. Anmuth testified that he had not used his cell phone at all during the procedure. *See* Depo. C. Anmuth at Exhibit “C”, pp. 37:21-38:15. Specifically, Dr. Anmuth testified as follows:

Q. Did you have a cell phone in the room with you at that time?

A. I did, yes.

Q. Did you send texts to anyone?

A. I did not.

Q. Did you have any phone calls?

A. I did not.

Q. What is your cell phone number that you had with you at the time of the surgery?

A. (609) 412-9927.

Q. And who was the carrier at the time?

A. Sprint.

See Depo. C. Anmuth at Exhibit "C", pp. 37:21-38:12. However, his cell phone records, produced via subpoena by Sprint, demonstrate that he had no less than seven (7) cell phone calls during Ms. Niedzwiadek's procedure. See Sprint call record at Exhibit "E".²

A physician who is on his cell phone while he is supposed to be monitoring a patient's intraoperative neuromonitoring signals exhibits wanton and willful disregard for his patient's safety and well-being, satisfying the Punitive Damages Act's definition of wanton and willful conduct as "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." N.J.S.A. § 2A:15-5.10. By lying about his cell phone usage at his deposition, Dr. Anmuth engaged in concealment, which is further evidence that can be considered by the trier of fact in determining whether punitive damages are awarded. See N.J.S.A. 2A:15-5.12(b). It also delayed discovery of these facts.

3. Dr. Anmuth was reviewing other patient's medical records instead of monitoring the Niedzwiadek surgery.

On January 16, 2018, plaintiff was provided with the audit trail of Dr. Anmuth's activity on the Bacharach electronic medical records system. See Audit trail of Dr. Anmuth's access of Bacharach Electronic Medical Record annexed hereto as Exhibit "F".

² Dr. Anmuth fought Plaintiff's subpoena of the relevant Sprint cell phone records claiming the subpoena raised privacy concerns, and that in light of his deposition testimony denying that he used his cell phone, Plaintiff could not establish a basis for obtaining the records.

The audit trail establishes that during Ms. Niedzwiadek's surgery, Dr. Anmuth repeatedly reviewed unrelated patient records.

The initial incision in the Niedzwiadek surgery was made at 7:53 a.m. *See* Event Log annexed as Exhibit "J". The audit trail documents that at 8:03:48 a.m., Dr. Anmuth accessed another patient's Electronic Medical Record and read orders unrelated to Ms. Niedzwiadek's care. *Id.* Dr. Anmuth continued this conduct, accessing more unrelated patient records at 8:19:08, 8:33:52, 8:42:35, 8:49:32, 8:56:44, 9:23:36, 9:40:55, 9:52:17, 9:52:32, and 10:01:17, while Ms. Niedzwiadek demonstrated admittedly critical neuromonitoring signal changes. *See* Audit trail at Exhibit "F"; Depo. C. Anmuth at Exhibit "C", p. at p. 140:10-21 (changes in Ms. Niedzwiadek's neuromonitoring signals establish that the surgery team should have been notified of the changes as early as 8:32 a.m.). Ms. Niedzwiadek's surgery closed at 10:08 a.m. *See* Event Log annexed as Exhibit "J".

As is the case with Dr. Anmuth's decision to be in his car and on his cell phone instead of monitoring Ms. Niedzwiadek, and combined with those activities, his decision to review other patient's medical records while he was supposed to be providing this potentially life-saving care constitutes willful and wanton conduct sufficient to support the recovery of punitive damages.

4. **Dr. Anmuth made up a story about losing his internet connection and staring at a frozen screen for an hour and a half in an attempt to hide his failure to monitor this case.**

The evidence adduced to date demonstrates that Dr. Anmuth did not perform his neuromonitoring duty at all. He admitted at his deposition that neither he nor Mr. Perro ever reported Ms. Niedzwiadek's concerning neuromonitoring signal changes to the surgery team. *See* Depo. C. Anmuth at Exhibit "C", pp. 139:11-173:2. When asked why he did not report Ms. Niedzwiadek's continuing changes in signals to the surgery team, Dr. Anmuth testified that he must have lost his wifi hotspot internet connection before the signal changes occurred. *Id.* at pp. 139:11-144:16. Remarkably, Dr. Anmuth testified that a static neuromonitoring screen must have remained up on his computer for the next one hour and thirty minutes, without him ever realizing that he was staring at a screen that never changed the entire time. *Id.* at p. 171:1-25. Dr. Anmuth further testified that he reported the difficulty he encountered with his wifi connection to Mr. Mathabel of NMT and Mr. Rees of Bacharach. *Id.* at pp. 175:15-177:14.

Mr. Mathabel and Mr. Rees both contradict Dr. Anmuth's deposition testimony. Mr. Mathabel testified that if the internet connection to Dr. Anmuth's computer was lost, it would be impossible for a static neuromonitoring screen to remain up on his computer. *See* Depo. R. Mathabel at Exhibit "O", pp. 38:16-40:20. Mr. Mathabel also testified that he had no recollection of Dr. Anmuth ever discussing internet connectivity problems with him. *Id.* at pp. 93:24-94:14. Jeff Rees testified that no issue with Dr. Anmuth connecting to the remote neuromonitoring software was brought to his attention. *See* Depo. J. Rees at Exhibit "K", pp. 62:5-63:3.

Not only does Dr. Anmuth's claimed attempt to provide remote neuromonitoring oversight in this case strain the bounds of credibility, it is directly contradicted by the records of ANXeBusiness, LLC. ANXe's records document Dr. Anmuth's connection to the private virtual network, known as PositivePro, used to gain remote access to intraoperative neuromonitoring data. The ANXe records establish that after six unsuccessful attempts to login,³ Dr. Anmuth successfully logged into PositivePro at 8:33:01 a.m. and remained logged in until 4:23:47 p.m. See Records of ANXeBusiness, LLC annexed hereto as Exhibit "P". Louis Moody, the product development manager for PositivePro, testified that the fact that Dr. Anmuth was logged in from 8:33:01 a.m. to 4:23:47 p.m. required him to have a continuous internet connection during that time. See Excerpts from Depo. L. Moody, annexed as Exhibit "Q", at pp. 10:8-21; 49:1-25. As Dr. Anmuth testified, the critical neuromonitoring signals exhibited by Ms. Niedzwiadek started at 8:32 a.m. and continued thereafter. See Depo. C. Anmuth at Exhibit "C", pp. 139:11-173:2. ANXe's records establish that Dr. Anmuth was logged into PositivePro and had a continuous internet connection as those signals developed, yet that life-saving information was not relayed to her surgeons. *Id.* Based on Dr. Anmuth's own testimony that he would have reported to the surgeons the signal changes beginning at 8:32 a.m. and continuing the rest of the surgery, coupled with the new evidence showing that he

³ Dr. Anmuth's unsuccessful attempts to login to PositivePro took place from 8:03:51 a.m. to 8:05:34 a.m., 8:05:34 to 8:06:19, 8:15:30 to 8:27:27, 8:27:27 to 8:28:32, 8:28:32 to 8:31:21, and 8:31:22 AM to 8:33:00. See Records of ANXeBusiness at Exhibit "P".

was connected to PositivePro for the rest of the day, plaintiff has proven that Dr. Anmuth had access to the neuromonitoring but chose not to review it.

Based on the evidence obtained to date, a jury could easily conclude that Dr. Anmuth did not monitor Ms. Niedzwiadek's case and that he made up a story after-the-fact to cover his tracks. This conduct truly demonstrates "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." N.J.S.A. § 2A:15-5.10. Accordingly, the standard for presenting the issue of a punitive damages award to the jury has been established here.

5. Dr. Anmuth prepared an Intraoperative Neuromonitoring Report that disguised the fact that he did not monitor Ms. Niedzwiadek's surgery.

In addition to the conduct set forth above, Dr. Anmuth also tried to cover-up his conduct by writing his Intraoperative Neuromonitoring Report as if he had been present for and involved in the monitoring of Ms. Niedzwiadek's case. His report did not state that he missed the initial phases of the procedure while driving to the office. His report did not state that he lost his internet connection during the procedure and unknowingly stared at a frozen screen for an hour and a half. His report was written as if he had been there and paying attention the whole time. *See* Intraoperative Neuromonitoring Report signed by Dr. Anmuth annexed as Exhibit "R".

Moreover, Dr. Anmuth revised his initial draft of the Intraoperative Neuromonitoring Report and testified that he spoke with Mr. Mathabel of NMT about the report. *See* Unsigned draft Intraoperative Neuromonitoring Report annexed as Exhibit "S"; Depo. C. Anmuth at Exhibit "C", pp. 187:8-190:23; 248:25-250:15. Mr. Mathabel denied that this conversation took place. *See* Depo. R. Mathabel at Exhibit "O", p. 77:2-18.

Dr. Anmuth's final report represented he was contemporaneously involved in Ms. Niedzwiadek's procedure and described the case in a manner inconsistent with critical aspects of her neuromonitoring signals. His report is misleading and demonstrates an effort to conceal his conduct, evidence that can be considered by the trier of fact in determining whether punitive damages are awarded. *See* N.J.S.A. 2A:15-5.12(b).

6. Dr. Anmuth and Bacharach installed anti-forensic software on Dr. Anmuth's laptop to destroy evidence of his activities on the date of the surgery.

Bacharach fought plaintiff's request for inspection of the laptop used by Dr. Anmuth to perform remote neuromonitoring, going so far as to appeal this Court's Order compelling the inspection. The inspection was finally held on January 29, 2018, and plaintiff subsequently produced the April 17, 2018 expert report of Louis Cinquanto, an expert in the digital forensic examination of computer hard drives. *See* April 17, 2018 report of Louis Cinquanto at Exhibit "G". Mr. Cinquanto determined that CCleaner had been installed on the laptop's hard drive. *Id.* at p. 3. CCleaner is an 'anti-forensic' tool

capable of wiping forensic artifacts, consequently impeding the ability of investigators to reconstruct a computer user's activity." *Id.* Consequently, Mr. Cinquanto found that all evidence of use during that time period related to the surgery had been destroyed.

Over Bacharach's further objections, based on Mr. Cinquanto's finding, Plaintiff obtained an Order compelling discovery on the issue of spoliation. *See* July 31, 2018 Order and Opinion at Exhibit "H". A supplemental report by Mr. Cinquanto detailing the results of his expanded examination of the laptop hard drive will be produced in the near future. Astonishingly, plaintiff has determined that Dr. Anmuth used anti-forensic software to destroy evidence on his laptop **after this Court ordered the inspection of his laptop**. The Court also ordered the re-deposition of Dr. Anmuth and Mr. Rees, which were recently canceled and are being rescheduled.

In its July 31, 2018 ruling, this Court concluded that "the fact that all data for the relevant timeframe is missing from the laptop suggests that spoliation of evidence occurred" and that "defendants had a duty to preserve the evidence that has since been destroyed." *See* Memorandum Opinion at Exhibit "H", pp. 5-6. As set forth above, an effort to conceal evidence is a factor that the trier of fact can consider in determining whether punitive damages are awarded. *See* N.J.S.A. 2A:15-5.12(b). More information will be forthcoming on this issue when the Court Ordered spoliation is completed and Mr. Cinquanto's supplemental report is produced. However, the fact that anti-forensic

software was used on Dr. Anmuth's laptop supports a finding that punitive damages should be considered by the jury in this case.

7. Robert Perro did not tell the surgeons about Ms. Niedzwiadek's grave concerning neuromonitoring signals and NMT tried to prevent plaintiff from discovering that this was the reason he was fired.

It is undisputed that neither Dr. Anmuth nor Mr. Perro reported Ms. Niedzwiadek's grave neuromonitoring signal changes to the surgery team. *See* Depo. C. Anmuth at Exhibit "C", pp. 139:11-173:2. Dr. Anmuth testified that he spoke with Mr. Perro within a day or two after the procedure. *Id.* at pp. 153:25-155:15. His phone records indicate that his deposition testimony downplayed the immediacy of his contact with Mr. Perro – he actually spoke to him right after a 2:16 p.m. conversation with Niedzwiadek surgeon Dr. Lowe on the afternoon of the procedure, calling Mr. Perro at 2:23 p.m. and speaking with him at 2:42 p.m. *See* Sprint call record at Exhibit "E".

Dr. Anmuth testified that when he spoke to Mr. Perro after the procedure, Mr. Perro stated that he did not alert Dr. Anmuth or the surgeon to the concerning neuromonitoring signals during the procedure because in the past when he had notified Dr. Anmuth and Dr. Lowe, they did not make any changes in response. *See* Depo. C. Anmuth at Exhibit "C", pp. 153:25-155:15. Mr. Perro's decision not to inform Dr. Anmuth and the surgeons of Ms. Niedzwiadek's concerning signal changes is a basis for the imposition of punitive damages under N.J.S.A. § 2A:15-5.12(a). It demonstrates wanton and willful disregard for her safety and well-being because it was "a deliberate act or

omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.” N.J.S.A. § 2A:15-5.10.

Mr. Perro was fired by NMT shortly after Ms. Niedzwiadek’s procedure. *See* Response of Robert Perro to Plaintiff’s Supplemental Wrongful Death Interrogatory no. 6, annexed hereto as Exhibit “E”; Unemployment Claim Records at Exhibit “I”. NMT assured ARMC on October 29, 2013 that Mr. Perro would never work at ARMC again. *See* October 29, 2013 letter from Richard Mathabel of NMT to Donna Howell of ARMC annexed hereto as Exhibit “N”. However, Mr. Mathabel of NMT tried to prevent plaintiff from discovering that Mr. Perro was fired as a result of his conduct during the Niedzwiadek surgery. He testified falsely at his deposition, repeatedly stating that Mr. Perro was fired because there was not enough work for him. *See* Depo. R. Mathabel at Exhibit “O”, pp. 77:15-78:9; 84:4-86:12.

Moreover, in their discovery responses, NMT and Mr. Perro failed to advise plaintiff of or produce documents related to Mr. Perro’s unemployment claim against NMT. Plaintiff recently found out about the unemployment claim after a declaratory judgment action was filed by NMT’s insurer. The unemployment claim documents were thereafter produced to plaintiff on request in November of 2018. These records establish that, directly contrary to Mr. Mathabel’s deposition testimony that he had not investigated Mr. Perro’s conduct during the Niedzwiadek surgery or fired him because of that case, Mr. Mathabel opposed Mr. Perro’s unemployment application, stating that

Mr. Perro “was terminated for gross negligence” and that “[a]fter reviewing the case, it was determined that Mr. Perro did not inform the surgeon, nor the consulting Neurologist of notable [neuromonitoring] changes.” *See* Unemployment Claim records at Exhibit “I”, pp. NMT000283, NMT000316.

Thus, the evidence establishes that not only did Mr. Perro engage in conduct sufficient to support punitive damages, Mr. Mathabel, the President and CEO of NMT (Mr. Perro’s employer), perjured himself at his deposition regarding the reason for Mr. Perro’s firing and whether an investigation of his conduct was performed. This testimony was just another of the many efforts made to stymie plaintiff’s ability to learn the truth regarding the reason for his mother’s death.

III. Conclusion

Plaintiff could not have imagined, at the inception of this case, that the medical professionals hired to provide this important care (and who billed Ms. Niedzwiadek’s insurance company for providing it) deliberately neglected their duties and then tried to conceal their conduct. The evidence uncovered to date, through a discovery process littered with efforts to prevent plaintiff from finding out what happened, satisfies the standard for recovery of punitive damages against Dr. Anmuth and Mr. Perro, and their respective employers, Bacharach and NMT, as set forth in the Punitive Damages Act.

The facts of this case are compelling and establish that the instant motion to amend should be granted in the interest of justice, pursuant to R. 4:9-1. For all the foregoing

reasons, this Honorable Court should grant Plaintiff's Motion to Amend Complaint to Seek Punitive Damages Against Defendants Craig Anmuth, D.O., Bacharach Institute for Rehabilitation, Robert Perro, and Neuromonitoring Technologies, Inc. A proposed form of Order is annexed hereto, and Plaintiff's Proposed Second Amended Complaint is annexed hereto as Exhibit "B."

KLINE & SPECTER



Dated: January 30, 2019

By: _____
Michael A. Trunk, Esquire
Counsel for Plaintiff