STATE OF NEW HAMPSHIRE
SUPREME COURT

CHERYL C. MOORE, M.D.

v.

CHARLES W. GRAU, ESQUIRE & a.

No. 2017-0035

APPEAL FROM THE MERRIMACK COUNTY
SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 7

REPLY BRIEF OF THE APPELLANT CHERYL C. MOORE, M.D.

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Oral Argument by: Daniel E. Will

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ARGUMENT IN REPLY

I. The appellees and intervenor misconstrue the factual record.

The appellees, Attorney Grau and Upton & Hatfield ("appellees"), as well as the intervenor, Wentworth Douglass Hospital ("WDH"), offer this Court a misleading view of the factual record out of step with the summary judgment standard, which requires citation to any fact be grounded in "the pleadings,[[1]] depositions, answers to interrogatories, and admissions on file" or "affidavits filed." RSA 491:8-a (2010); *see also Super. Ct. R.* 12(g). The Court then considers that evidence, including any inferences properly drawn, "in the light most favorable to the non-movant," meaning Dr. Cheryl Moore. *See Coyle v. Battles*, 147 N.H. 98, 100 (2001).

In their factual assertions, the appellees and WDH stray far afield of these principles.[2] In some instances, the appellees and WDH improperly cite their own memoranda of law (and not evidence in the factual record) for a purported "fact."[3] This includes several gratuitous attempts to smear Dr. Moore as overly litigious. *See* Appellees' Brief at 15 (citing intervenors' memorandum of law).[4] This also includes WDH's objectionable, unverified, and irrelevant recitation of (its view of) proceedings in the federal matter. *See* WDH's Memo. of Law at 4-5.

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[1] The meaning of the term "pleadings" is limited to the case-initiating complaints and answers. *See Super. Ct. R.* 6(a); *see, e.g., Phinney v. Paulshock*, 181 F.R.D. 185, 207 (D.N.H. 1998), *aff'd* 199 F.3d 1 (1st Cir. 1999).

[2] The appellees have also offered this Court an appendix of three Orders in the CFAA action that do not appear in the summary judgment record below. *See* Appellees' Brief at 7 nn. 4, 5, and 6. Not only is it unclear why those Orders are only now submitted, but it is procedurally improper to do so for the first time on appeal. *See Sup. Ct. R.* 13(1); *N. Country Envtl. Servs. v. Town of Bethlehem*, 146 N.H. 348, 358 (2001).

[3] *See* Appellees' Brief at 6 (citing "Defs.' Memo of Law" for assertion that "Attorney Grau never directly communicated with Drs. Moore and Littell about obtaining documents or other materials for potential litigation against WDH."); WDH's Memorandum of Law at 5 (citing appendix "407-408," which is WDH's memorandum of law submitted below).

[4] The appellees also cite WDH's memorandum of law below for disputed facts. *Compare* Appellees' Brief at 7 (citing WDH's memorandum below for assertion that Dr. Moore "provided her husband . . . with her unique user name and password to access WDH's computer system), *with* App. at AA.260 (Moore Aff.) ¶ 20 ("I did not authorize my husband to gain access to my computer at work.").

Bearing no relevance to the issues on appeal, this can only be characterized as an effort to poison the well against Dr. Moore, that should have no place in the briefing.

Separately, the appellees cite the trial court's Orders as the record support for the facts, but Dr. Moore disputes many of the trial court's factual findings. Related to this, the appellees assert several facts that are either inaccurate or disputed (or both), such as the following:

> Dr. Moore retained an independent attorney, Peter Callaghan, Esquire, in or about mid-August 2012 to represent her with respect to whether she should go through with the settlement. . . . After Dr. Moore ceased communicating with Attorney Grau and Upton &Hatfield, Attorney Callaghan, on Dr. Moore's behalf, directly proposed changes to the terms of the settlement to . . . counsel for WDH.

See Appellees' Brief at 8 (emphases added). The underlined portions above, as well as the appellees' later assertion that Attorney Callaghan "negotiated the Settlement Agreement's terms," *see id.* at 13 (emphasis added), lack any support in the summary judgment record. *See* App. at AA.73-AA.74, Grau Affidavit ¶¶ 29-33. Dr. Moore's affidavit actually confirms the opposite: Dr. Moore retained Attorney Callaghan (i) after Attorney Grau, on August 24, 2012, accepted the settlement terms, and (ii) "to explain how [she was] manipulated into this position."[5] In short, the appellees' brief cavalierly misstates both the timing (*i.e.*, erroneously states "mid-August") and the limited purpose of Attorney Callaghan's engagement.

As another example, the appellees now argue, improperly for the first time, that "it is reasonable to conclude from the undisputed facts . . . [that on the date Dr. Moore executed the settlement the appellees'] authority to act for Dr. Moore was severely limited." Appellees' Brief at 21. Putting aside that this assertion cannot be made for the first time on appeal, it urges this Court to draw a (disputed) inference adverse to Dr. Moore (the non-movant) in contravention of

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[5] *See* App. at AA. 264, ¶ 29; *see also* AA.73, ¶ 30 (affidavit of Attorney Grau stating that "[o]n August 24, 2012, the federal claims and counterclaims were tentatively settled"); AA.314 (Beeson report addressing chronology).

well-established summary judgment procedure. The record contains verified evidence disputing this inference: Attorney Grau testified that his "representation of [Dr. Moore] in the WDH suit ended after the terms of the settlement had been accomplished in the fall of 2012." *See* App. at AA. 268, ¶ 43(3) (Moore affidavit); *see also* AA.146 (stipulation of dismissal in federal action dated September 24, 2012 and signed by Attorney Grau on behalf of Dr. Moore); AA.215 (WDH Settlement Agreement signed by Attorney Grau as counsel for Dr. Moore).

II. The appellees failed to timely raise any affirmative defense predicated upon the WDH Settlement Agreement.

The meaning of the WDH Settlement Agreement forms the core issue in this appeal.[6] To rely on the WDH settlement agreement, the appellees must first demonstrate they timely gave notice of the defense (normally accomplished in the answer). They have not: the record reveals that this was a defense to compliance with a subpoena that WDH asserted long after the complaint answer period, which the appellees then, belatedly and prejudicially, adopted.

For their part, the appellees attempt to avoid the notice/timeliness issue by arguing that Dr. Moore waived her waiver argument. But Dr. Moore expressly argued below as follows:

> Indeed it is patently unfair to the plaintiff, (and in a sense to the defendant as well), to have allowed this litigation to continue for over three years, only to dismiss it now based on an interpretation of a sentence that neither the Plaintiff nor the Defendant held at the time of the execution of the WDH settlement agreement. If Atty. Grau had believed Par. 4 to have been a waiver of malpractice, they would have, could have, and should have brought forth such a defense over three years ago in a Motion to Dismiss.

See App. at AA.496, ¶ 6 (emphasis added). Dr. Moore's argument below expressly identified the Settlement Agreement as a defense, asserted it had been waived due to lack of notice until three

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[6] Out of an abundance of caution, Dr. Moore's opening brief addressed other issues the appellees might raise in their responding brief. Given that the appellees have now expressly confirmed that their other summary judgment arguments are not before this Court, Dr. Moore withdraws, for purposes of this appeal, her arguments asserted in Section VII of her opening brief (pages 29 to 34).

years into the litigation, and referenced a motion to dismiss as illustrative of a method of giving timely notice, the other method being the answer to the complaint, each of which (*i.e.*, a dismissal motion and the answer) fall due contemporaneously.[7]

On the merits, the appellees argue that they did in fact give timely notice by referencing the word "waiver" in their answer. Not only is "waiver" a defense distinct from other defenses (including "release"[8]), but the "waiver" referenced in the appellees' answer appeared among a list of other boilerplate defenses and consisted of a vague, one-word "waiver" assertion, giving no notice that it encompassed the WDH Settlement Agreement. *Compare Wilson Grp. v. Quorum Health Res.*, 880 F. Supp. 416, 425 (D.S.C. 1995) ("waiver" defense that referenced the settlement agreement sufficient "to plead release as an affirmative defense" because it fulfilled notice requirement). The failure to give timely notice waived the settlement agreement defense.

III. Dr. Moore's claims do not "arise from" her relationship with WDH.

Dr. Moore's opening brief gave an overview of specific authority analyzing the contract language at issue and underscoring that her claims do not "arise from" her relationship with WDH. *See, e.g., Johnson v. Taylor*, 435 N.W.2d 127, 129 (Minn. Ct. App. 1989) (holding legal malpractice claim "arose from" attorney's negligence and did not arise from the client's existing personal injury); *Gagnon v. Lakes Region Gen. Hosp.*, 123 N.H. 760, 763 (1983) (holding that when an injured patient consults a doctor who then exacerbates the patient's injuries, the doctors' liability "**arises solely from** [the doctors'] alleged negligent conduct" (emphasis added)).

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[7] Significant discovery, including a deposition of Attorney Grau, had already been completed during the three years that elapsed before the Settlement Agreement issue was first joined. *See Skyline Steel, LLC v. Pilepro, LLC*, No. 13-CV-8171 (JMF), 2016 U.S. Dist. LEXIS 102908, at *12-*13 (S.D.N.Y. Aug. 4, 2016) (observing, in the course of declining to consider summary judgment arguments based on settlement agreement and covenant not to sue, that movant "did not allege that the 2011 Settlement Agreement was a bar to Skyline's claims in its Answer — or, for that matter, raise the issue in any submission to the Court until the present motion.").

[8] *See Super. Ct. R.* 9; *see also* Appendix G to Supreme Court Order adopting amendments (April 20, 2017), *available at* https://www.courts.state.nh.us/supreme/orders/04-20-17-order.pdf.

In response, and declining to address virtually all of the authority directly on point cited in Dr. Moore's brief, the appellees advance a three-pronged counterargument: (1) "when she executed the Settlement Agreement, Dr. Moore had independent counsel, Attorney Callaghan, who had negotiated the Settlement Agreement's terms;" (2) "pursuant to paragraph 14 of the Settlement Agreement, Dr. Moore asserted that her act in approving the Settlement Agreement was voluntary, knowing, and without undue influence or duress;" and (3) the term "arising from" must be read in "the factual context in which [it is] used." *See* Appellees' Brief at 13-14. The third, catch-all argument subsumes various contentions, each of which is discussed below.

The appellees' first argument rests on a mistaken factual premise, as discussed above. The record does not support, and in fact contravenes, that Attorney Callaghan "negotiated" the agreement, the terms of which had already been bound by Attorney Grau. At a minimum, Attorney Callaghan's role presents a dispute of fact to be resolved by further proceedings at the trial court. Even assuming otherwise *arguendo*, the fact that Dr. Moore retained Attorney Callaghan sheds no light on the intended meaning of the WDH Settlement Agreement. It is a red herring designed to throw this Court off of the scent of the core issue on appeal.

The appellees' second argument effectively asserts that any client who accepts a settlement thereby releases his or her attorney from malpractice. As a factual matter, it is disputed that Dr. Moore acted voluntarily because Attorney Grau, unbeknownst to Dr. Moore, bound the settlement terms. While Attorney Grau may dispute this fact, that dispute alone renders summary judgment improper. As a legal matter, a settlement does not preclude a legal malpractice claim. *See* 3 R. Mallen, *Legal Malpractice* § 22:72, at 322 (2017 ed.); *Pike v. Mullikin*, 158 N.H. 267, 272 (2009) (client's "decision to settle with Bekaert . . . should not, by itself, bar him from the opportunity" to prove legal malpractice claim).

The appellees' third and final argument (joined in to a large extent by WDH) contends that the prospect of any involvement – even as a non-litigant – in this action erodes WDH's purported contractual expectations. The appellees seize in particular on the prospect of the case within the case. But appellees ignore that Dr. Moore probably does not need to utilize case-within-case method to prove her assertion that, had Attorney Grau properly advised Dr. Moore about the risks, then WDH's CFAA concerns would probably have never manifested and resulted in suit.[9] Moreover, there is no "rigid approach" to proving the causation element in legal malpractice,[10] meaning the particular trial process to be used in this matter remains to be determined. To date, as the trial court recognized in an earlier discovery Order rejecting the appellees' attempts to discover information relating to the CFAA action, the appellees had not "articulate[d] [any] reason why particular records are relevant to the defense of this case." *See* App. at AA.17. And to the extent Dr. Moore might rely upon the case-within-case method, it likely means, at most, a single trial in which WDH might be called as a witness. *See McIntire v. Lee*, 149 N.H. 160, 165 (2003) (using the single trial process).

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[9] The appellees fail to address decisional law establishing that the case-within-case method is not required in all circumstances. *See Glass v. Pitler*, 657 N.E.2d 1075, 1080 (Ill. App. 1995); *Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, 2015 COA 85, ¶ 48 (Colo. App. June 18, 2015).

[10] The trial process in this matter, including the issue of bifurcation, remains in the trial judge's discretion. *See Ibey v. Ibey*, 94 N.H. 425, 427 (1947); 5-41 *New Hampshire Practice, Civil Practice and Procedure* § 41.08 (2017); *see, e.g., Lieberman v. Emp'rs Ins. of Wausau*, 419 A.2d 417, 427 (N.J. 1980). New Hampshire has cited with approval cases rejecting a "rigid approach" to legal malpractice causation. *See Witte v. Desmarais*, 136 N.H. 178, 189 (1992) (favorably citing *Gautam v. De Luca*, 215 N.J. Super. 388, 397-99, *cert. denied* 523 A.2d 1107 (N.J. 1987)). As *Guatam* explains, a rigid approach:

> wholly ignores the possibility of settlement. The simple fact is that many, if not most, legal claims are not tried to conclusion, but rather are amicably adjusted. Second, it is often difficult for the parties to present an accurate evidential reflection or semblance of the original action.

Gautam, 521 A.2d at 1348.

Key to highlighting the fallacy of the appellees' argument is that the burdens of being a witness have nothing to do with WDH's contractual expectations, to the extent the appellees are the proper parties to "defend" WDH's contractual expectations. *See, e.g., Mielcarek v. Knights*, 375 N.Y.S.2d 922, 926 (App. Div. 1975) (observing that settling defendant may be called as witness and, "[a]s to the question of a chill placed on settlements by a rule requiring the settling tort-feasor to appear in court, it is sufficient to say that on many occasions parties settle a suit in order to avoid the continuing pressures, vexations and unpleasantness involved in litigation"). Moreover, WDH itself intervened of its own accord, and did so citing only confidentiality as WDH's sole interest (and not the covenant not to sue). *See* App. at AA.2, ¶ 2.

The "contractual expectations" argument, at bottom, reveals itself as another red herring aiming to distract from the appellees' inability to rely on plain language. WDH wanted to, and did, conclude its disputes with Dr. Moore. Nothing in this matter threatens to undo that result. *See Pike*, 158 N.H. at 272 (legal malpractice plaintiff could pursue claim because doing so "does not now seek to undermine final resolution of his divorce"). If WDH, as a non-litigant, must produce documents or witness(es), then WDH is no different than any other non-litigant who has information necessary to a proceeding. The finality for which WDH bargained remains in place.

As the next component of their "factual context" argument, the appellees contend that Dr. Moore's "pending declaratory judgment action against Y&N's insurance company" is the only action that "would be permissible under the Settlement Agreement." Appellees' Brief at 15. But that assertion misleadingly conflates the separate provisions of the WDH Settlement Agreement addressing pending and future lawsuits (paragraph 4 is the only provision directed toward future lawsuits). It is true that the insurance coverage litigation is the only pending claim that the WDH Settlement Agreement contemplated proceeding (the others having been settled), *see* App. at

AA.207 ¶¶ 1-3, but it is not true to imply that the omission of this action from these "pending" litigation provisions has any interpretive significance. This lawsuit did not appear in those provisions simply because this action was not pending.[11]

In a last ditch effort to advance some tenable plain language on which to affirm the result below, the appellees, unable to point to any "unmistakable" language, resort to arguing that the phrase "arising from" equates with "in relation to." *See* Appellees' Brief at 16-17. Not only does that contravene decisional law,[12] but the appellees' lack of authority underscores that "arising from" is too narrow to encompass Dr. Moore's malpractice claims. If WDH intended to secure a release of this action, then it should have included that in the Settlement Agreement.

IV. The appellees are not "third parties."

With respect to the construction of "third parties," Dr. Moore stands on her opening brief, except to make two additional points. First, the appellees improperly assert an entirely new argument that Attorney Grau no longer acted as Dr. Moore's authorized agent when Attorney Grau signed the WDH Settlement Agreement. *See* Appellees' Brief at 21-22; *but see State v. Lake Winnipesaukee Resort, LLC*, 159 N.H. 42, 50 (2009) (arguments cannot be raised for first time on appeal). In addition, the existence and scope of an agent's authority are questions of fact, *see, e.g., Dent v. Exeter Hosp., Inc.*, 155 N.H. 787, 792 (2007); *Norberg v. Fitzgerald*, 122 N.H. 1080, 1082 (1982) ("Whether an attorney has authority to bind his client is a question of fact . . . ."), and, in this matter, ones of disputed material fact in light of the appellees' new

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[11] For this same reason (*i.e.*, the dissimilarity of pending and not-yet-filed lawsuits), the appellees mistakenly reference the doctrine of "expressio unius est exclusion alterius" in their brief. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("the canon . . . has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice").

[12] *See, e.g., Hansa Consult of N. Am. v. Hansaconsult Ingenieurgesellschaft*, 163 N.H. 46, 57 (2011) ("[T]he phrase 'arising in relation to' is broader than the phrase 'arising out of' because the former clause extends to any action having some 'logical or causal connection' to the agreement, while the latter covers disputes 'growing out of' the agreement." (quotation omitted)).

argument. As already discussed in Section I of this brief, the record below establishes that Attorney Grau continued as Dr. Moore's counsel until, and after, the execution of the WDH Settlement Agreement. Had Dr. Moore been given the proper chance to meet this argument during the summary judgment proceedings, she could have, and stands ready to, submit any number of supportive documentary and other evidence further establishing that Attorney Grau remained her attorney and agent when executing the settlement.

Second, the appellees elevate form over substance in arguing that *ejusdem generis* does not apply in this matter because the term "third party" is not followed "by any enumerated list." *See* Appellees' Brief at 25-26. The presence or lack of technical, bullet-style enumeration is not what determines applicability of *ejusdem generis*. Where a general term is followed by particularized examples, *ejusdem generis* defines the general by way of the particular. Paragraph 4 of the WDH Settlement Agreement does just that in generally precluding future claims against "third parties" and then specifically exemplifying the types of future claims it aims to preclude: healthcare provider misconduct at the hospital, Dr. Moore's earlier reporting of which stood at the root of the dispute with WDH. In this way, paragraph 4 aims to confirm that neither party intends to engage in the type of reporting that caused the original dispute between WDH and Dr. Moore. Dr. Moore's legal malpractice claims against the appellees are qualitatively distinct from the type of healthcare misconduct reporting that paragraph 4 contemplates.

V. In the event this Court finds ambiguity, the appellees have all but conceded disputes of fact concerning the underlying issue of contract intent.

The appellees discount Dr. Moore's factual arguments concerning disputes of material fact over any ambiguous contract provisions with the conclusory statement: "none of the alleged 'genuine issues of material fact' that the Appellant lists actually constitute genuine issues of material fact, regardless of whether they are in dispute or not." Appellees' Brief at 27. In

making the one-sentence, conclusory assertion, the appellees not only fail to explain their reasoning, but tacitly acknowledge the existence of factual disputes.

Respectfully submitted,

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By Her Attorneys,

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CERTIFICATION OF COMPLIANCE

I hereby certify that I have complied with Supreme Court Rules 21 and 26 and that two copies of this brief have been sent by United States mail this 11th day of July 2017, to the following:

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