NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0890-12T2

PEDRO A. HERNANDEZ and
NILDA NEGRON (HERNANDEZ),

Plaintiffs-Respondents,

v.

NORTH JERSEY NEUROSURGICAL
ASSOCIATES, WILLIAM L. KLEMPNER,
M.D., HAMILTON C. GOULART, M.D.,
DUNCAN B. CARPENTER, M.D., TAREK
A. ALSHAFIE, M.D.,

Defendants,

and

GANEPOLA A. GANEPOLA, M.D.,

Defendant-Appellant.

Argued February 4, 2013 – Decided May 14, 2013

Before Judges Graves, Ashrafi and Espinosa.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1826-08.

Gary L. Riveles argued the cause for appellant (Dughi, Hewit & Domalewski, attorneys; Mr. Riveles, on the brief).

Christian R. Mastondrea argued the cause for respondents (Eichen Crutchlow Zaslow & McElroy, attorneys; Mr. Mastondrea, on the brief).

PER CURIAM

In this medical malpractice case, the trial court entered default against defendant Ganepola A. Ganepola, M.D., because his designated trial attorney was not available to begin trial on the seventh scheduled trial date. We granted defendant leave to appeal, Rule 2:2-4, from the trial court's interlocutory order of July 30, 2012, denying his motion to vacate the default. We must consider a provision of Rule 4:25-4 that permits a trial court to "disregard" trial attorney designation and to proceed to trial in the absence of a party's designated trial attorney.

We are cognizant of the trial court's plight in managing effectively its calendar of older civil cases. Nevertheless, we reverse and remand this case for trial because there was insufficient notice to counsel that the seventh trial date was inflexible and would not be subject to the availability of counsel.

I.

Rule 4:25-4 permits a party in a civil case to specify a named attorney as the party's designated trial counsel. The rule states in part:

> Counsel shall, either in the first pleading or in a writing filed no later than ten days after the expiration of the discovery period, notify the court that designated

> counsel is to try the case, and set forth the name specifically. If there has been no such notification to the court, the right to designate trial counsel shall be deemed waived. . . . If the name of trial counsel is not specifically set forth, the court and opposing counsel shall have the right to expect any partner or associate to proceed with the trial of the case, when reached on the calendar.

Although the rule does not explicitly say so, designation of trial counsel provides valid ground for an adjournment of a scheduled trial date because the named attorney has a superseding commitment in another court. See Harmon Cove II Condo Ass'n, Inc. v. Hartz Mountain Indus., 258 N.J. Super. 519 (App. Div. 1992). In fact, in Harmon Cove, a panel of this court implied that the trial court had no choice but to adjourn a trial where the designated trial attorney was committed to another trial. Id. at 522-23.

The Supreme Court adopted the trial counsel designation rule in 1964. R.R. 4:29-3A (1966) (rule "to be effective September 9, 1964"). The rule's purpose was to protect attorneys and their clients from being compelled by trial courts to substitute a partner or an associate for an unavailable attorney and to proceed to trial even if the partner or associate was unfamiliar with the file or inexperienced in the area of practice. Cf. Heinz v. Atl. Stages, Inc., 113 N.J.L. 321, 322-24, 325 (E. & A. 1934) ("If a fixed rule were adopted,

that whenever counsel had conflicting trial engagements, a continuance should be granted, it would render possible such delays as would interfere with the administration of justice."). While the rule solved one problem, it created another by causing many adjournments of trial dates and unacceptable aging of civil cases.

In 1985, the Supreme Court's Civil Case Management and Procedures Committee proposed amendments to remedy dissatisfaction with the rule. See Civil Case Management and Procedures Report at 18, reproduced in 115 N.J.L.J. 349 (Mar. 28, 1985) (referring to abuses of the rule and proposing amendments, including a limitation of fifty cases in which any attorney could be designated trial counsel). The proposed amendments were rejected by the Supreme Court. See Supreme Court Response to Civil Case Management and Procedures Committee Report, 116 N.J.L.J. 505, 522 (Oct. 17, 1985) (referring to objections to the proposed amendments and favoring a case-by-case or attorney-by-attorney quelling of abuses).

Delays persisted in the courts in scheduling certain types of cases, especially medical malpractice trials. Two years after our strict reading of the rule in Harmon Cove, supra, 258 N.J. Super. 519, the Supreme Court relaxed its application to older cases. By the Court's order dated October 24, 1994, trial

courts were authorized to waive the designation of a trial attorney in cases that were more than three years old and delayed by the unavailability of designated trial counsel. See Report of the Supreme Court Committee on Civil Practice, 151 N.J.L.J. 689, 696 (Feb. 16, 1998).

In 1998, similar provisions were adopted as a formal amendment of the rule. The 1998 amendment added the following language to the rule we previously quoted:

> In Track I or II tort cases pending for more than two years, and in Track III or IV tort cases pending for more than three years, the court, on such notice to the parties as it deems adequate in the circumstances, may disregard the designation if the unavailability of designated counsel will delay trial.

Medical malpractice cases are assigned to Track III pursuant to our civil court rules, thus providing for at least 450 days of discovery before they can be scheduled for trial. R. 4:5A-1; Pressler & Verniero, Current N.J. Court Rules, Appendix XII-B1 to R. 4:5-1 (2013). The 1998 amendment permits a court to disregard trial attorney designation in a medical malpractice case after it has been pending for more than three years.

II.

The facts pertinent to this appeal are not in dispute. We recite them in detail because they illustrate the scope of the court's scheduling problem.

On April 10, 2008, plaintiffs Pedro A. Hernandez and his wife commenced this action for medical malpractice in Hudson County against defendant Ganepola and others. Hernandez had undergone surgery in 2006 on his leg. Plaintiffs alleged that Ganepola, who was the primary vascular surgeon, and the other defendant doctors had been negligent in their preparation to perform the surgery and in the performance of the surgery itself.

Defendant Ganepola filed an answer to the complaint in July 2008, which included designation of his trial counsel.[1] After pleadings were filed by the other defendants and discovery was completed, the civil case management office in Hudson County listed the case for trial to begin on December 7, 2010, that is, two years and eight months after plaintiffs filed their complaint. At the request of one of the defendants, not Ganepola, the civil case management office adjourned the first trial date pursuant to Rule 4:36-3(b), and it set a new trial date of February 22, 2011. Shortly thereafter, another adjournment was granted, apparently at the request of defendant Ganepola, and a third trial date was scheduled for May 23, 2011. The new trial date was beyond three years from the date

[1] Ganepola's designated trial counsel is not the same attorney representing him on this appeal.

plaintiffs' complaint was filed. The Presiding Judge of the Civil Division in Hudson County issued a letter dated January 11, 2011, notifying counsel of the new trial date and stating that "the designation of trial counsel is waived" and that the case "is not subject to further adjournment."

Nevertheless, the trial date was adjourned again, this time because plaintiff's attorney reported ill health and intended to wind down his practice, which required that he obtain substitute representation for plaintiff. A letter of the Presiding Judge dated May 12, 2011 set a fourth trial date for September 6, 2011. The letter contained similar declarations as quoted in the previous letter waiving designation of trial counsel and stating that the case was not subject to further adjournment.

On June 21, 2011, Ganepola's attorney sought another adjournment because he had an older case scheduled in Monmouth County and was unavailable for the September 6, 2011 trial date. The court initially denied the request, but the Presiding Judge in Hudson County conferred with the Monmouth County trial judge and eventually granted the adjournment sought by Ganepola's attorney.

The court set a fifth trial date for November 28, 2011. Less than two weeks before the newest trial date, the attorney for one of the other defendants wrote to the court stating that

he was scheduled to try an older case at the same time. The court granted another adjournment.

The court then set a sixth trial date of March 19, 2012. In January 2012, counsel for plaintiffs asked for a conference to discuss substitution of a new attorney in his place. New counsel for plaintiffs sought adjournment of the March trial date. The court did not grant an adjournment at that time. On March 5, 2012, however, plaintiffs' original attorney wrote to the court stating that plaintiff Pedro Hernandez had recently been hospitalized and his health prevented him from attending trial in March. He requested that trial be rescheduled for early June. One of the defendants, not Ganepola, joined in plaintiffs' request for another adjournment and concurred in requesting an early-June trial date. The court again adjourned the trial, and a seventh trial date was set for June 4, 2012.

On May 1, 2012, Ganepola's attorney wrote to the Presiding Judge stating that Ganepola would be out of the country from June 10 to 22, and would be "available for trial any time after" the latter date. We have no record of a formal response from the court to Ganepola's May 1st request for another adjournment. Another letter then followed from Ganepola's attorney on Wednesday, May 30, 2012, less than a week before the scheduled Monday trial date. This time, the attorney indicated he was in

the middle of a lengthy trial in Monmouth County, which he expected to finish in mid-June. He said he would be prepared to begin trial in plaintiffs' case in Hudson County immediately after completing the Monmouth County trial. He also repeated that Ganepola would not return from overseas until June 25.

Although no party objected to Ganepola's request for yet another adjournment, the court in Hudson County did not adjourn the seventh trial date. Anticipating that Ganepola's designated trial attorney would not appear for the June 4, 2012 trial date, the Presiding Judge requested that another attorney from his firm appear on Ganepola's behalf to begin trial.

On the trial date, an associate from the firm appeared before the Presiding Judge in Hudson County. The associate told the Presiding Judge that her field of practice was family law, not medical malpractice, and that she had neither authority to try the case nor the competence to do so. She requested that the case be marked "ready hold" until the designated trial counsel finished his Monmouth County trial and became available to try this case in mid-June.[2] The Presiding Judge denied the

[2] "Ready hold" indicates that counsel is ready to proceed with trial in terms of completion of discovery and preparation for trial, but that another commitment prevents the presence of counsel or another necessary person in the courtroom immediately. Similar to the phrase "subject to," the court's marking of a case "ready hold" indicates that the court will

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request and assigned the case to another judge to begin the trial.

In the meantime, on June 4, 2012, the trial judge in the Monmouth County case signed an order confirming that Ganepola's attorney was in the middle of a multi-week trial before him that started on April 18, 2012, and refusing to release the attorney to appear in Hudson County at that time.

Before the Hudson County judge to whom this case was assigned, the associate attorney again stated that she was not competent to try the case because she did not practice law as a civil litigator and she was not sufficiently familiar with Ganepola's defense to represent him at trial. She also stated that both Ganepola and his malpractice insurance carrier wished to have the designated trial counsel represent Ganepola at trial, and they had not authorized her to select a jury or to proceed to trial. She politely asked that she be permitted to leave.

Plaintiffs' counsel indicated that he "continue[d] to consent to [defendant's] request for an adjournment under the circumstances," stating that he and his clients would much prefer a short adjournment of the trial rather than a long and

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await the availability of the attorney before actually starting the trial, presumably within a matter of days.

costly appellate process on the issue of whether an adjournment could be denied under these circumstances. At the same time, plaintiffs' counsel stated that the Presiding Judge had already denied the request for an adjournment, and he felt compelled to ask for entry of default. The trial judge denied Ganepola's request for a "ready hold" marking of the case and entered default against him because he and his attorneys were not prepared to go forward with the trial.

Plaintiffs' counsel then reached agreement with the other defendants to dismiss the claims against them, with the explicit understanding that those claims could be reinstated if, and only if, the default against Ganepola was later vacated. Plaintiffs' counsel explained that his clients' most significant claims of malpractice were those against Ganepola and that it would be strategically inexpedient for his clients to proceed to trial against the other defendants, who could point to an "empty chair" representing Ganepola as the responsible defendant.

After the other parties were dismissed from the case, the trial judge scheduled a proof hearing against Ganepola. Counsel for Ganepola promptly moved to vacate the default, which the trial judge denied, along with Ganepola's motion for a stay.

On August 22, 2012, we granted Ganepola's emergent motion for leave to appeal and for a stay. To protect plaintiffs'

interests, since we were advised that the primary plaintiff was suffering ill health, our order remanded the case to the trial court for the limited purpose of conducting a proof hearing so that his testimony could be preserved if plaintiffs wished. Plaintiffs elected not to proceed with a proof hearing, and instead, to pursue resolution of this appeal first.

In December 2012, after appellate briefs had been filed on our accelerated schedule, the Presiding Judge who had denied an adjournment of the June 4, 2012 trial date belatedly filed with us a written amplification of her oral decision pursuant to Rule 2:5-1(b).[3]

III.

The granting or denial of an adjournment is committed to the discretion of the trial judge. Kosmowski v. Atl. City Med. Ctr., 175 N.J. 568, 575 (2003); Heinz, supra, 113 N.J.L. at 326. Our courts have long and consistently held to the general standard of review that an appellate court will reverse for failure to grant an adjournment only if the trial court abused

[3] We are assisted in understanding the procedural history of the case by the Presiding Judge's recitation of the prior adjournments and their reasons, but we find no support in the record for the judge's statement that counsel in this case appear to have colluded to delay the June trial date. Plaintiffs' attorney had every reason to move the trial to conclusion in June 2012 and was only seeking the best alternative for his clients under the circumstances.

its discretion, causing a party a "manifest wrong or injury." State v. Hayes, 205 N.J. 522, 537 (2011); accord Allegro v. Afton Village Corp., 9 N.J. 156, 161 (1952); State v. Doro, 103 N.J.L. 88, 93 (E. & A. 1926). "Calendars must be controlled by the court, not unilaterally by [counsel], if civil cases are to be processed in an orderly and expeditious manner." Vargas v. Camilo, 354 N.J. Super. 422, 431 (App. Div. 2002), certif. denied, 175 N.J. 546 (2003).

In exercising discretion when counsel is not available or is not prepared to proceed, the trial court must navigate a course between "'the salutary principle that the sins of the advocate should not be visited on the blameless litigant,' and, . . . 'the court's strong interest that management of litigation, if it is to be effective, must lie ultimately with the trial court and not counsel trying the case.'" Kosmowski, supra, 175 N.J. at 574 (citation omitted) (quoting Aujero v. Cirelli, 110 N.J. 566, 573 (1988); Rabboh v. Lamattina, 312 N.J. Super. 487, 492 (App. Div. 1998), certif. denied, 160 N.J. 88 (1999)). The court must remain mindful of its overriding objective that "[c]ases should be won or lost on their merits and not because litigants have failed to comply with particular court schedules, unless such noncompliance was purposeful and no lesser remedy was available." Connors v. Sexton Studios, Inc.,

270 N.J. Super. 390, 395 (App. Div. 1994); see also Jimenez v. Baglieri, 295 N.J. Super. 162, 165 (App. Div. 1996) (abuse of discretion found where trial court denied a one-day adjournment because of unavailability of expert), rev'd on other grounds, 152 N.J. 337 (1998).

Here, Ganepola argues that he is a blameless litigant whose chosen attorney could not be in two places at once. He contends he relied on the experience and knowledge of his designated trial counsel to prepare his defense in this important malpractice case and, reasonably, he could not authorize another attorney to represent him at trial through a last-minute substitution.

Ganepola argues further that his designated attorney is in effect a sole practitioner, without partners or associates in his small firm who practice in the field of medical malpractice and who can substitute for him in defending a case such as this. The designated attorney was committed to try a similar and older Monmouth County case and could not very well abandon that trial mid-stream and appear in Hudson County on the assigned trial date for this case. Ganepola urges us to find an abuse of discretion in the trial court's denying the short delay his attorney sought because it was merely a request for a "ready hold" or "subject to" designation, and the attorney would have

been available in eight to ten days to begin trial in this case. Plaintiffs do not disagree essentially with the substance of Ganepola's argument.

Contrary to the positions taken by both parties, marking this case "ready hold" or "subject to" pending the availability of an attorney would likely have been the same as an adjournment of several weeks or months. The Presiding Judge explained that, as a practical matter, a "ready hold" or "subject to" status remains in effect only for three days, after which jurors are no longer available that week to begin a trial. Under the Court Rules, the other attorneys in the case are released from their commitment to the trial date after the three days so that they can attend to other matters. See R. 4:36-3(a) ("If a case is not reached during the week in which the trial date falls, it shall be forthwith scheduled for a date certain after consultation with counsel provided, however, that no case shall be relisted for trial sooner than four weeks from the initial trial date without agreement by all counsel."). Also, the court has other cases that are scheduled for ensuing weeks and that it must move to trial. It cannot simply substitute this case and displace the others.

The question before us is broader than granting or denying a "ready hold" marking and a short adjournment. The trial court

had already granted six prior requests to adjourn the trial, two at the request of Ganepola's attorney to accommodate his conflicting trial schedule. The question, as framed by the Presiding Judge in her amplification letter, concerns the authority of trial courts to control their calendars in light of the trial attorney designation rule and its "disregard" provision.

Trial judges face substantial obstacles in accommodating the schedules of several attorneys, expert witnesses, and the parties. They must strive to find a mutually acceptable trial date for all those involved in a case, while they must also do the same for other cases on the docket. Medical malpractice cases are notorious in our courts for delays caused by scheduling problems outside the control of judges, as our recitation of the procedural history in this case illustrates.

Failure to move a case to trial is often detrimental to the interests of a plaintiff who alleges injuries and entitlement to compensatory damages. Defendant doctors and other health care professionals have a strong interest, too, in concluding a case rather than allowing a pending malpractice claim to remain unresolved. Repeated adjournments inconvenience the other attorneys, the parties, and the witnesses. Those who set their schedules for dates assigned by the court and anticipate

fulfilling those commitments must repeatedly revise their schedules to accommodate the ones who make too many commitments and cannot meet all of them.

In 2000, the Supreme Court embraced a goal of "trial date certainty" when it adopted the "Best Practices" policies and rules for efficiency and fairness in litigation.[4] Especially in multi-party cases, and those with expert witnesses, maintaining the certainty of a scheduled trial date can seem virtually impossible. Here, after granting six adjournments, some to each side, the frustration of the Presiding Judge is palpable in the record.

The trial attorney designation rule and its "disregard" amendment have not been previously interpreted and applied in an appellate decision to authorize entry of a default judgment against a party whose attorney is committed to another trial. To their credit, trial courts and attorneys have apparently managed their calendars without the need to litigate scheduling disputes as in this case. While the rule and the amendment must

[4] "Best practices is the term used to describe the comprehensive rule changes, effective September 2000, designed to improve the efficiency and expedition of the civil litigation process and to restore state-wide uniformity in implementing and enforcing discovery and trial practices." Vargas, supra, 354 N.J. Super. at 425 n.1. A historical overview of the Best Practices rule-making process can be found in Pressler, N.J. Court Rules, comment 5 on R. 1:1-2 (2001).

be enforceable if trial dates are to have some measure of certainty, fair notice to counsel of the inflexibility of a trial date must precede a drastic remedy such as a default judgment, or dismissal of a plaintiff's case.

We hold that, once trial attorney designation has been waived by the parties or disregarded by the court, formally and with notice, the parties and the attorneys may not rely upon designation of trial counsel to adjourn a trial date. In representing the interests of their clients, designated trial attorneys must anticipate and make arrangements to hand the matter over to a substituted, competent, and prepared attorney to try the case when they cannot attend the trial themselves. Nor can clients' or carriers' preferences interfere with the ability of the trial court to move its older cases.

Despite our holding confirming the trial court's authority to disregard trial attorney designation and counsel's obligations when the court has done so, we are troubled in this case that four prior adjournments were granted to one or more parties after the Presiding Judge's scheduling letters stated that further adjournments would not be granted. We do not fault the court for accommodating the needs of the attorneys and their clients. We assume the bar would not favor a judicial determination that the granting of one or more adjournment

requests precludes the court's denial of future ones. Such a holding might foster unwelcome rigidity in addressing unavoidable adjournment requests. Indeed, some of the adjournments in this case were granted because of attorney and client ill health and not because of designation of trial counsel. We think the court's prompt response to any adjournment requests will sufficiently alert counsel about the inflexibility of a particular trial date and the necessity of preparing substitute counsel because trial attorney designation will be disregarded.

A conference with the attorneys, as referenced in Rule 4:36-3(b), or a prior order or specific written response to an adjournment request copied to all counsel, should serve the purpose of notifying counsel of the court's intention to enforce the "disregard" option and to maintain a trial date in the face of adjournment requests. Normally, an inflexible trial date should be fixed with the participation of all counsel. Whether or not prior notification that a trial date will not be adjusted for trial attorney designation occurs at the time the trial date is set, counsel should be put on notice with sufficient time to arrange for substitute representation of the client.

Missing in the record of this appeal is an indication by the court after it set the June 4, 2012 trial date that, unlike

the prior trial dates, this one was inflexible and that an adjournment based on trial counsel designation would not be entertained, as it had been previously. We have no record of a conference being conducted or other notification before the June 4, 2012 trial date that the disregard provision of the rule would be enforced and a designated attorney's conflicting schedule would not be considered this time. Nor did the court provide a formal response until the trial date to the two written requests of Ganepola's attorney for yet another adjournment.

While we conclude that the court should have been more explicit at an earlier time in stating its intention to proceed to trial on June 4, 2012, without regard to trial attorney designation, we also note that Ganepola's attorney was not prompt in notifying the court about his conflict. The Monmouth County trial began on April 18, but our record contains no indication that Ganepola's attorney notified Hudson County before May 30 that he was committed to that trial. He also failed to consult with other counsel and to propose a new trial date agreeable to all, as required by Rule 4:36-3(b).

In sum, we acknowledge the Hudson County court's exasperation at yet another request to adjourn the trial, but we conclude that earlier notice regarding the inflexibility of the

seventh trial date may have avoided the dispute. The court generally had the authority to deny another adjournment, but it mistakenly exercised its discretion to have done so in the circumstances presented on this record.

If the court's intent was to make an example of this case and its delays as guidance to attorneys and litigants, it should have taken that step as a prospective ruling. It strikes us as unfair to deprive an individual litigant of his day in court without adequate prior notice of the court's intention to deviate from its prior manner of addressing adjournment requests in the case. In the absence of a determination of the merits of the case, a default judgment with substantial negative consequences is too high a price to impose upon this defendant.[5]

The Civil Practice Committee may wish to consider the circumstances of this case, especially as they may be relevant to the manner and timing of enforcing the "disregard" provision of the attorney designation rule and giving notice to counsel of an inflexible trial date. Ganepola argues on appeal that the court did not issue a letter for the June 4, 2012 trial date, similar to the Presiding Judge's earlier letters, stating that

[5] Counsel informs us that a malpractice judgment must be reported to the Board of Medical Examiners, will be posted on the internet, and may hinder defendant's ability to obtain malpractice insurance.

trial counsel designation was "waived" for the newest trial date. Although we are inclined to reject defendant's implication that the protections of trial counsel designation were therefore reinstated, we ultimately need not make a determination regarding that issue. We leave it for the consideration of the Civil Practice Committee and the Supreme Court as to what notice will suffice and whether it must be repeated with every succeeding trial date. We also do not decide here whether the Presiding Judge of the Civil Division may disregard trial counsel designation automatically in all cases that reach the threshold age or whether that determination must be made on a case-by-case basis.

With our admonition to designated trial counsel to plan for disregard of that status by having a competent and prepared substitute counsel available to try the case, we reverse the order of the trial court in this case denying Ganepola's motion to vacate default. We remand for the scheduling of a reasonable trial date, which Ganepola and his attorney, or a substituted attorney, must honor.

Reversed and remanded. We do not retain jurisdiction.