

# New Jersey Law Journal

VOL. CXCVI – NO. 13 - INDEX 867

JUNE 29, 2009

An incisivemedia publication

## Medical Malpractice

### The Affidavit of Merit Redux

In reality, very little has changed

By Abbott Brown

The Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 et seq., requires the service of an affidavit of merit in certain professional negligence cases. Enacted in 1995, this statute has been the source of endless litigation, motivating the Supreme Court to observe in 2001 that it was “once again called on to consider the Affidavit of Merit Statute.” *Burns v. Belafsky*, 166 N.J. 466, 469 (2001). In fact, by 2003 the New Jersey Supreme Court had discussed the AOM statute 12 times. It was for this reason that in *Ferreira v. Rancocas Orthopedic*, 178 N.J. 144 (2003) the Court, determined to stem what it then characterized as a “tide of litigation,” mandated that an AOM conference be held soon after the filing of the first answer. This conference quickly became known as a “*Ferreira*

conference.”

Many practitioners thought that the problems with the AOM were settled once and for all by *Ferreira*. This belief was reinforced by *Saunders v. Capital Health System at Mercer*, 398 N. J. Super. 500 (App. Div. 2008), which held that a malpractice case should not be dismissed if the plaintiff had substantially complied with the AOM statute and the *Ferreira* conference was not held. However, in *Paragon Contractors, Inc. v. Peachtree Condominium Association*, 2009 WL 1108492 (App. Div. 2009), another panel of the appellate division explicitly disagreed with *Saunders*, and affirmed the dismissal of a case for lack of an AOM.

However, a careful review of these cases reveals that rather than being in disagreement, the cases are actually quite consistent. *Saunders* and *Paragon* agree on the interpretation of the AOM statute and its construction by the Supreme Court in *Ferreira*. The analysis starts with *Ferreira*, where the plaintiff was in possession of an AOM but inadvertently failed to serve it on the defendant. Soon after the expiration of the 120-day limitation in the AOM statute, counsel for the defendant mentioned to counsel for the plaintiff that the AOM had not been served. Counsel for plaintiff immediately faxed the AOM to the defendant. Nevertheless, the defendant moved to dismiss the complaint for failure to serve the AOM. The trial court granted the motion and the Appellate Division

affirmed.

In reversing, the *Ferreira* Court reiterated that the purpose of the AOM statute was to “weed out frivolous lawsuits early in the litigation while, at the same time, ensuring that plaintiffs with meritorious claims will have their day in court.” The Court then noted that the plaintiff possessed an AOM prior to the deadline and had served it on the defendant before the defendant had filed the motion to dismiss. When reversing, the Court explained that the plaintiff had substantially complied with the statute, and that “principles of equity and the essential goal of the statute — to eliminate frivolous lawsuits — are not advanced by dismissing the complaint.”

The Amicus in *Ferreira*, the Association of Trial Lawyers of America New Jersey (now the New Jersey Association for Justice), had suggested that the Court require plaintiffs to either attach the AOM to every complaint, file a certification that the AOM was not needed because the plaintiff relied upon the common knowledge doctrine, or file a certification explaining that the AOM could not be obtained because more information was needed, which would notify the trial court of the need for an early conference. Instead, the *Ferreira* Court instructed the trial courts to hold “an accelerated case management conference within ninety days of the service of an answer in all malpractice cases to resolve any AOM issues and address any other discovery issues.” The *Ferreira* conference worked well, and many counties established telephone *Ferreira* conferences.

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Recently, in another case where the plaintiff possessed but inadvertently failed to serve an AOM, *Saunders v. Capital Health System at Mercer*, 398 N. J. Super. 500 (App. Div. 2008), the Appellate Division issued a ruling which many thought finally ended the misery associated with the AOM. The *Saunders* Court ruled that the failure to hold a *Ferreira* conference precludes the dismissal of a case with facts similar but not identical to that of *Ferreira*. The *Saunders* panel explained that the *Ferreira* conference was mandatory, and that since the plaintiff's failure to serve the AOM would have been discovered if the conference had been held, the case should not have been dismissed. The court added:

Contrary to defendants' contention and the motion judge's decision, *Ferreira* mandates a case management conference within ninety days of the filing of an answer in a professional malpractice case. Counsel's inadvertent failure to serve the Luciani Affidavit of Merit would have been discovered had the required case management conference been conducted.

Significantly, the Court added that "[i]t would be unfair to expose an attorney to potential professional liability where the court did not schedule the required conference within ninety days of the defendant's answer." It appeared that the holding in *Saunders* would end most of the problems associated with the AOM, and return the statute to its purpose, to "require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation," *Cornblatt v. Barow*, 153 N.J. 218, 242 (1998), rather than allow the statute to be used as a trap for the unwary.

However, the AOM statute reared its ugly head again, in a construction case, where such an unwary defendant

property owner filed a third-party complaint against an engineer, one of the professions included within the AOM statute. See *Paragon Contractors, Inc. v. Peachtree Condominium Association*, 2009 WL 1108492 (App. Div. 2009). The *Paragon* panel rejected the argument that the failure to hold a *Ferreira* conference tolled the time to serve an AOM and explicitly disagreed with *Saunders* while allowing meritorious ones to have their day in court. Nevertheless, the *Paragon* panel rejected the plaintiff's reliance on the trial court's failure to hold a *Ferreira* conference to save the case.

The facts of *Paragon* are illuminating, and explain the Court's decision in that case. In *Paragon*, the plaintiff sought damages from the Peachtree Condominium Association for unpaid bills allegedly due for construction work. Peachtree filed a third-party complaint against Key Engineers, claiming that Key negligently performed design work. However, Peachtree did not possess an AOM, and had not taken any steps to obtain one, and after 120 days had expired, Key moved to dismiss. When opposing the motion, Peachtree argued that it had substantially complied with the statute and that exceptional circumstances excused its delay. Peachtree also submitted an AOM three weeks after the motion to dismiss was filed and well after the 120-day deadline.

The motion judge distinguished *Saunders*, supra, and dismissed the case. In affirming the dismissal, the *Paragon* panel first found that "[t]here is nothing in the record to suggest that Peachtree did anything that would warrant application of the doctrine of substantial compliance." Peachtree did not possess an AOM within the 120-day period and the Court found that it had not "taken any steps to advise Key of the nature and substance of the malpractice claim." The *Paragon* panel then turned to the requirement that a *Ferreira* conference be held, and again distinguished *Saunders*:

Here, Peachtree argues that it was under no duty to file an affidavit of merit until the trial court scheduled the case management conference required by *Ferreira*.

We reject Peachtree's attempt to insulate its counsel's carelessness through the trial court's mistake in failing to schedule a case management conference... [T]he record demonstrates that Peachtree's counsel was acutely aware of the obligation to comply with the Affidavit of Merit statute but chose instead to cede its obligation to ascertain the statute's deadline by relying upon a discussion, which occurred sixty days after Key's answer was filed, between a legal assistant and the case manager's office. It would perhaps suffice to say that even under *Saunders*'s approach, counsel's carelessness here should not be excused. But, because we are of the opinion that *Ferreira* did not intend that the conference would be deemed a tolling device — a view that could only further complicate the resolution of future affidavit-of-merit controversies — we find it necessary to express our disagreement with *Saunders*.

The *Paragon* panel buttressed this position by concluding that if the Supreme Court had so intended, it would have clearly stated that intent. The *Paragon* panel therefore rejected any contention "that a trial court's failure to schedule the case management conference required by *Ferreira* tolls the statutory deadline or otherwise excuses a malpractice claimant's noncompliance with the Affidavit of Merit statute." In a footnote, the *Paragon* Court added that taken to its logical extreme, the AOM deadline would never expire if a *Ferreira* conference was not held.

So where do these two facially contradictory cases leave us? *Saunders* and *Paragon* are actually quite easily reconciled, and in reality, very little has changed. Attorneys who have "substantially complied" with the statute, as in *Saunders*, by having an AOM but neglecting to serve it, or who can demonstrate "extraordinary circumstances," will still be able to prosecute their cases.

In those rare cases where an oversight occurs, the plaintiffs will be saved by a *Ferreira* conference or the absence of same. However, if the plaintiff has not taken steps to substantially comply

with the AOM requirement, and there are no extraordinary circumstances, "the plaintiff should expect that the complaint will be dismissed with prejudice." Such plaintiffs, exemplified by the Peachtree

Condominium Association in *Paragon*, ignore the AOM statute at their peril, and cannot expect to be saved at the last moment by a trial court's failure to hold a *Ferreira* conference. ■