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## Medical Malpractice

### The End of the Affidavit of Merit Misery

Flood of cases has continued unabated

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The Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 et seq., requires the service of an "affidavit of merit" in many professional negligence and some other cases. This statute has been the source of seemingly endless litigation, leading the Supreme Court to complain in 2001 that it was "once again called on to consider the Affidavit of Merit Statute enacted by the Legislature in 1995." See *Burns v. Belafsky*, 166 N.J. 466, 469 (2001). The flood of AOM cases has continued unabated.

However, in *Saunders v. Capital Health System at Mercer*, 398 N. J. Super. 500 (App. Div. 2008), the Appellate Division may have finally put an end to the misery associated with the AOM. In a holding that will apply to all malpractice cases, the *Saunders* court ruled that the failure to hold an AOM conference as required by *Ferreira v. Rancocas Orthopedic*, 178 N.J. 144 (2003) precludes the dismissal of the case. This holding should finally end the continual problems associated with the affidavit

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of merit. However, a recent unpublished appellate division case counsels continued caution when dealing with this statute.

In *Saunders*, the plaintiff's daughter was delivered by Marietta Cahill, a licensed nurse and midwife, at the Capital Health System's Trenton hospital. The plaintiff sued Cahill and the Capital Health System, claiming that Cahill's negligence caused a brachial plexis injury and that the infant now suffers from decreased movement and flaccidity of the left arm. The plaintiff's counsel had obtained an AOM well within the time provided by the AOM statute, but failed to serve it on time, and the trial court dismissed the case with prejudice.

*Saunders* presented two issues to the court: [1] whether an Affidavit of Merit is required in a malpractice case brought against a midwife, and [2] whether a malpractice case may be dismissed for failure to serve an AOM if the trial court did not hold a *Ferreira* conference. The *Saunders* court held that a midwife is not a "licensed person" under the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26. The court also held that where plaintiff possessed but failed to serve the AOM, the case should not be dismissed if a *Ferreira* conference was not held.

The relevant facts were simple and undisputed. The complaint was filed on April 28, 2006. The answer was filed on June 19, 2006. On September 21, 2006, plaintiff's counsel wrote a letter to defendants' counsel, inquiring about the status

of defendants' answers to interrogatories. On October 13, 2006, the plaintiff's counsel discussed the case at length with defense counsel, but defense counsel did not mention the failure to serve an AOM. On November 1, 2006, the defendant moved to dismiss the complaint for failure to file an AOM. The Appellate Division observed that "Upon receipt of defendant's motion, plaintiff's counsel realized that he had neglected to provide defendant with the Affidavit of Merit in his file. . . [and] immediately faxed defendants' counsel a copy of Luciani's affidavit."

The trial court nevertheless dismissed the complaint with prejudice, rejecting the plaintiff's argument that she had substantially complied with the AOM statute. The trial court also rejected the contention that had an AOM conference been held as required by *Ferreira*, the inadvertent failure to serve the AOM would have been cured. Finally, the trial court also rejected the plaintiff's argument that a midwife was not entitled to an AOM pursuant to the terms of the statute, deeming the AOM statute to apply to medical professionals not listed in the statute.

In reversing, the Appellate Division first observed that the AOM Statute specifies fifteen "licensed persons," who are entitled to an AOM, but that "Midwives were not included" in the statute.

The court then added:

The absence of midwives as "licensed persons" strongly suggests that the list contained in N.J.S.A. 2A:53A-26 is an exclu-

sive one and implies that the omission of other licensed health providers "was intentional, not an oversight."

The *Saunders* Court also reversed the dismissal as to the hospital. The Appellate Division explained that in *Ferreira, supra*, the Supreme Court held that "This case brings to mind the adage that an ounce of prevention is worth a pound of cure. Therefore, going forward, we will require case management conferences in the early stage of malpractice actions to ensure compliance with the discovery process, including the Affidavit of Merit statute, and to remind the parties of the sanctions that will be imposed if they do not fulfill their obligations." The Appellate Division explained that the *Ferreira* conference was mandatory, and that since the plaintiff's inadvertent failure to serve the AOM would have been discovered if the conference had been held, the case should not have been dismissed.

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.

Judge Lintner added that "It 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."

The Appellate Division therefore reversed and remanded the case. The holding in *Saunders* should bring an end to most of the problems associated with the AOM. This holding will return the statute

to its purpose, that is 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," *In re Hall*, 147 N.J. 379, 391 (1997), rather than allow the statute to be used as a trap for the unwary.

However, despite the above, every lawyer handling medical malpractice cases must still be concerned about one final issue regarding the AOM statute, *i.e.*, the requirement that the expert possess the same credentials as the defendant. In a recent unpublished case, *Short v. Atlanticare Regional Medical Center*, A-5015-06T2 (App. Div. 2008); the court affirmed the dismissal of a medical malpractice suit against defendants for failure to satisfy the AOM Statute. In *Short*, the plaintiff claimed that two board-certified orthopedic surgeons negligently performed hip surgery, resulting in injuries. The plaintiff filed an affidavit of merit prepared by a general practitioner, Dr. Papa, who specializes in family practice and cardiovascular disease. Nevertheless, Dr. Papa certified that he had "particular knowledge and/or expertise in the general area of orthopedic surgery, including hip replacement surgery" and opined there existed "a reasonable probability that the care, skill and/or knowledge exercised or exhibited in the treatment, practice or work rendered to Mr. Short" by the defendants deviated from the standard of care.

The defense notified plaintiff that Dr. Papa's affidavit was insufficient. The trial court in *Short* held a *Ferreira* conference and extended the time for the plaintiff to file a supplemental affidavit of merit. The plaintiff declined this opportunity, and chose "to rely solely on Dr. Papa's affidavit as submitted." The defendants then moved to dismiss, contending that Dr. Papa did not possess the credentials mandated by the 2004 amendment to the AMS, found in a section of the New Jersey Medical Care Access

and Responsibility and Patient's First Act, N.J.S.A. 2A:53A-41. The trial court dismissed the complaint with prejudice, concluding that Dr. Papa "did not meet the heightened requirements of the 2004 amendment to the AMS because he did not specialize in orthopedics and was not credentialed by a hospital to perform hip replacement surgery or board-certified as an orthopedic surgeon as mandated by N.J.S.A. 2A:53A-41a(1) and (2)."

On appeal, the Appellate Division affirmed, observing that the 2004 amendment to the AMS, known as the New Jersey Medical Care Access and Responsibility and Patient's First Act, heightened the requirements for the AMS by mandating that if the defendant is a specialist and the care or treatment at issue involves that specialty, the expert providing the affidavit must practice in that same specialty. N.J.S.A. 2A:53A-41a. Dr. Papa, a general practitioner who specializes in family practice and cardiovascular disease, is not statutorily competent to opine on whether Dr. Naame, a board-certified orthopedic surgeon, deviated from accepted standards of practice under the heightened requirements of the existing AMS. Thus, as plaintiff failed to produce an affidavit of merit as required by N.J.S.A. 2A:53A-27, even within the time extended by the court, he is not entitled as a matter of law to proceed with his malpractice claims against defendants.

Although this case may be something of an aberration, the Appellate Division observed that pursuant to the Patient's First Act, N.J.S.A. 2A:53A-41, "Requirements for person giving expert testimony, executing affidavit," the person executing the AOM and the expert witness must generally have the same board certifications as the defendant. Any lawyer who does not pay careful attention to the N.J.S.A. 2A:53A-41 does so at great peril. Let us all hope that this does not become the new AOM battleground. ■