

Medical Malpractice

The Affidavit of Merit Madness

By Abbott S. Brown

The affidavit of merit (AOM) was intended to identify “meritless lawsuits ... at an early stage of litigation.” *In re Hall*, 147 N.J. 379, 391 (1997). Unfortunately, the Affidavit of Merit Statute (AMS) as amended in 2004 has resulted in a tidal wave of litigation. In the last year alone, there have been at least three AOM cases in the Supreme Court and 14 in the Appellate Division. Justice Long predicted this would happen in *Ferreira v. Rancocas*, 178 N.J. 144 (2003), observing the so-called “*Ferreira*” conference would simply move “the field of battle to a different location.” We are now seeing the results of these battles, and the cases have yielded inconsistent results on important issues.

For example, one appellate panel has

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recently held that a nurse-midwife is not entitled to an AOM, but another has held that a nurse-anesthetist is entitled to an AOM. Similarly, one panel has recently held that an AOM from a doctor with the same board certification as the defendant is insufficient, and another has held that an AOM from a doctor who has performed the same procedure as the defendant is also inadequate. Several panels have disagreed over whether a case can be dismissed without a *Ferreira* conference. A careful review of the recent cases suggests a prudent course of action is necessary.

The original AMS, N.J.S.A. 2A:53A-26, provided that the “Licensed Person[s]” entitled to an AOM included dentists, physicians, podiatrists, chiropractors, registered nurses and certain health care facilities. In 2001 physical therapists and pharmacists were added. The AMS originally required the expertise of the expert to be “evidenced by board certification or by devotion of the person’s practice substantially to the general area or specialty involved in the action for a period of at least five years.” N.J.S.A. 2A:53A-27.

In 2004, the AMS was amended by the New Jersey Medical Care Access and Responsibility and Patients First Act; N.J.S.A. 2A:53A-37 to 42, which provides that if the defendant is a specialist or subspecialist and the care or treatment at issue involves that specialty or subspe-

cialty, the expert must have specialized in the same specialty or subspecialty. See N.J.S.A. 2A:53A-41. Additionally, if the defendant is board certified and the care at issue involved that specialty or subspecialty, the expert must be board certified in the same specialty or subspecialty or credentialed by a hospital to treat patients for the condition or perform the procedure in question; and during the year before the date of the claim, must have devoted a majority of her professional time to either clinical practice or the instruction of students in the same specialty or subspecialty. If the defendant is a “general practitioner,” the expert witness must have devoted a majority of his professional time in “clinical practice as a general practitioner; or active clinical practice that encompasses the medical condition, or that includes performance of the procedure, that is the basis of the claim” or to teaching same. N.J.S.A. 2A:53A-41(b). Given this language, we can examine the recent controversies.

Who Is Entitled to an Affidavit of Merit?

In *Saunders v. Capital Health*, 398 N.J. Super. 500 (App. Div. 2008), the court held that a nurse-midwife, who was practicing as a midwife and not a nurse, was not entitled to an AOM:

The absence of midwives as “licensed persons” strongly suggests that the list contained in N.J.S.A. 2A:53A-26 is an exclusive one and implies that the omission of other licensed health providers

“was intentional, not an oversight.” Had the Legislature intended N.J.S.A. 2A:53A-26 to apply to other unspecified licensed health care providers, it could easily have prefaced the licensed persons listed with the words “including but not limited to.”

However, *Harbeson v. Underwood Memorial Hospital*, No. A 2151 08T22151 08T2 (App. Div. 2009), came to a contradictory opinion. In *Harbeson*, the plaintiffs alleged that a nurse-anesthetist improperly delayed the administration of a pre-operative antibiotic. The *Harbeson* Court disregarded N.J.S.A. 2A:53A-27 which defines a “licensed person,” but rather utilized the definition of a “health care provider” in N.J.S.A. 2A:53A 40(e). The court then declared that a nurse-anesthetist is a “general practitioner” and therefore the expert must meet the criteria of N.J.S.A. 2A:43A 41(b). A nurse-anesthetist is not a “licensed person” as defined by the AMS, just as a nurse-midwife is not a licensed person. If the nurse-anesthetist was acting as an anesthetist, he was not entitled to an AOM. Nevertheless, until this issue is clarified, it would be prudent to obtain an AOM from a qualified expert in all cases involving health care providers.

Who Is Qualified To Render the Affidavit of Merit?

The qualifications required of the affiant have also been the subject of recent discussion. In *Ryan v. Remy*, 408 N. J. Super. 590 (App. Div. 2009), cert. granted, 200 N.J. 504 (2009), a case arising out of the performance of a colonoscopy by a gastroenterologist, the court held that a surgeon who is not board certified in gastroenterology and who has not performed a colonoscopy in years is not qualified to render the AOM. The plaintiff’s attorney certified that he had contacted three gastroenterologists who would not review the case. The plaintiff’s attorney then secured the services of a general surgeon who had substantial experience with colon surgery and who had performed colonoscopies,

albeit long ago. Thus, experience with the procedure without board certification was insufficient.

However, another panel recently held that same board certification will not necessarily get you over the AOM barrier. In *Buck v. Henry*, A-0362-09T1 (App. Div. 2010), the plaintiff, a depressed insomniac, consulted the defendant, who was board certified in emergency medicine but was practicing family medicine. The defendant prescribed Zoloft to improve the plaintiff’s mood and Ambien to help him sleep. The plaintiff took the Ambien and fell asleep while he was “inspecting his .38 caliber Colt revolver. Thereafter, plaintiff was awakened by what he thought was the sound of a telephone ringing. Forgetting that the handgun was still in his right hand, he reached for the telephone with his left hand. According to plaintiff, this action caused the barrel of the handgun to enter his mouth and discharge.”

The plaintiff served two AOMs, one from a board-certified psychiatrist and the other from a physician who was board certified in emergency medicine. The defendant moved to dismiss because neither affiant practiced family medicine. The court agreed, holding:

[W]e accept Dr. Henry’s certification that he is a family medicine specialist because he has devoted his medical practice to that recognized specialty area. . . Because plaintiff was required to submit an affidavit of merit from a physician who specialized in family medicine, and he failed to do so, the motion judge correctly granted Dr. Henry’s motion to dismiss his complaint.

Unless this issue is clarified, it would be prudent to obtain an AOM from an expert who is board certified in the same area as the defendant and, if the defendant is prac-

ticing out of his field, a second AOM from an expert who actively treats the condition or performs the procedure in question.

May a Case Be Dismissed Without a *Ferreira* Conference?

In *Saunders*, the Appellate Division held that the failure to hold a *Ferreira* conference precluded the dismissal of the case. The Appellate Division observed that the *Ferreira* conference was mandatory, and that since the plaintiff’s inadvertent failure to serve the affidavit would have been discovered if the conference had been held, the case should not have been dismissed. However, in *Paragon Contractors, Inc. v. Peachtree*, 406 N.J. Super. 568 (App. Div.), appeal granted by 200 N.J. 500, (2009), the court explicitly disagreed, explaining that it was “troubled by the consequences of *Saunders*’ implicit holding that the 120-day deadline does not elapse so long as the case management conference is not scheduled. If that is so, then when does the deadline elapse if the conference is never scheduled?” The *Paragon* case was recently argued in the Supreme Court, and it is likely that this issue will be resolved with finality in that decision.

So where does that leave the reasonably prudent malpractice lawyer? One should, if possible, retain experts who not only possess the same board certifications and subcertifications to match each defendant, but also actively treat the condition or perform the procedure in question. Of course, this may require multiple experts and will add expenses to every case. Additionally, this does little to further the expressed goal of the *Hall* Court that the AMS should be construed “to avoid the risk that even a few meritorious cases may be dismissed for non-compliance with the Statute.” Hopefully, the Supreme Court will consider these issues, and put an end to the current Affidavit of Merit madness. ■