

New Jersey Law Journal

VOL. CLXIII – NO. 5 – INDEX 427

JANUARY 29, 2001

ESTABLISHED 1878

OPINION AND COMMENTARY

The Affidavit of Merit Mess

The law has resulted in a tidal wave of contradictory decisions by trial and appeals courts, which has left the bar dazed and confused

By Abbott S. Brown

The New Jersey Supreme Court has twice observed that the affidavit of merit statute was intended to provide a mechanism to identify and dismiss meritless malpractice cases early in the proceedings.

Unfortunately, this statute has evolved into a deathtrap for the unwary and has resulted in a tidal wave of contradictory decisions by the trial and appellate courts. The bar has been left dazed and confused as the courts disagree among themselves as to how to interpret the statute, N.J.S.A. 2A:53A-26 et seq.

Look, for example, at *Hubbard v. Reed*, 331 N.J. Super. 283 (App. Div. 2000), certif. granted, N.J. (2000), where the Appellate Division disagreed with the concurrence in *Levinson v. D'Alfonso & Stein*, 320 N.J. Super. 312 (App. Div. 1999), and overruled the Law Division in *Janelli v. Keeper*, 317 N.J. Super. 309 (Law Div. 1998).

And *Mayfield v. Community Medical Associates*, 335 N.J. Super. 198 (App. Div. 2000), expressly disagreed with the conclusion reached on virtually the same facts in *Ricra v. Barbera*, 328

N.J. Super. 424 (App. Div. 2000).

Today, the state Supreme Court will have a chance to sort out the mess when it hears four consolidated appeals in affidavit of merit cases.

The motion calendar is filled with affidavit of merit motions. I get a telephone call from a frantic attorney regarding an affidavit of merit issue almost every day. All of this has occurred despite the declaration expressed by our Supreme Court in *In re Hall*, 147 N.J. 379 (1997), of its intent "to avoid the risk that even a few meritorious cases may be dismissed for non-compliance with the Statute."

In fact, in *Cornblatt v. Barow*, 153 N.J. 218 (1998), the Court invoked the doctrine of substantial compliance to "avoid technical defeats of valid claims."

Nevertheless, the affidavit of merit statute is being used as a "sword" to defeat valid claims, as was noted in *Barreiro v. Morais*, 318 N.J. Super. 461, 470-472 (App. Div. 1999). In fact, mere technical noncompliance with the statute has resulted in the dismissal of many meritorious claims. For example, in *Ricra*, the plaintiff served an expert report within 60 days of the filing of the

answer and in *Palanque v. Lambert-Woolley*, 327 N.J. Super. 158 (App. Div. 2000), certif. granted, N.J. (2000), the plaintiff had an expert report before filing the complaint, but did not serve an affidavit of merit on a timely basis.

Indeed, even a claim filed on behalf of an infant, where the statute of limitations has not even begun to run, was dismissed with prejudice in *Kubiak v. Robert Wood Johnson Hospital*, 332 N.J. Super. 230 (App. Div. 2000), when the affidavit of merit was not served on a timely basis. It is inconceivable that the Legislature intended such a harsh result.

However, a reasonable solution is at hand. Most recently, in *Mayfield* the Appellate Division examined a medical malpractice case that involved "both an affidavit of merit timely filed but not served, and an expert's report timely served but not sworn."

In a beautifully written opinion construing the affidavit of merit statute, the *Mayfield* panel explained that: "Courts thus do not slavishly limit themselves to the dry words of legislation nor rely on mere abstract logic to determine what interpretation of a statute would fulfill the Legislature's purpose. More is called for than a merely mechanical analysis.

"Machines can perform mechanical tasks, but judgment is necessary to reach a result informed by intelligence. The concept of substantial compliance is as relevant to this statute as to any other. It is a concept that requires a court to go beyond the literal language in order to implement the legislative intent and its policy mandate," the panel found.

With these considerations in mind, the *Mayfield* court explained that it

The author, a partner with Bendit Weinstock in West Orange, is a certified civil trial attorney and a member of the Supreme Court Committee on Model Civil Jury Charges, and was counsel for the State Bar Association as amicus curiae in In Re Hall and for the State Bar, the Association of Trial Lawyers of America-NJ and the Trial Attorneys of New Jersey as amici curiae in Cornblatt v. Barow.

would be contrary to "the remedial purposes of the statute to dismiss this apparently meritorious action based on what would be no more than a merely mechanical application of the dry statutory words."

Indeed, the court recognized that the statute was not intended to "create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims. We decline to interpret the statute in a manner that would be consistent only with these non-existent purposes and that would fail to advance one iota its remedial purposes."

A Proposed Solution to the Mess

Mayfield suggests the proper balance between the moral imperative of deciding cases on the merits, as opposed to dismissing cases based on technical violations by an unwitting attorney, and the rights of the defen-

dants to seek dismissal of meritless cases. The statute itself merely states that, "If the plaintiff fails to provide an affidavit or a statement in lieu thereof ... it shall be deemed a failure to state a cause of action." N.J.S.A. 2A:53A-29.

Significantly, the statute does not state that it is a failure to state a cause of action if the affidavit is provided late, but only if the affidavit is never provided. Therefore, the late service of an affidavit of merit should not be deemed a failure to state a cause of action, but merely a technical violation of the statute justifying appropriate relief, such as an award of the fees and costs associated with the filing of the motion. Where the plaintiff is unable to secure the requisite expert opinion by the return date of the motion to dismiss, he or she has indeed failed to state a cause of action and everyone would agree that the case is meritless and should be dismissed.

This result was first suggested by Judge Isaiah Steinberg in the concurrence in *Palanque*, which states in relevant part: "Under these circumstances, although I do not consider them 'extraordinary', I believe that the sanction of a dismissal without prejudice, thereby necessitating the filing of a new complaint with a new filing fee, is sufficient. Defendant may be entitled to an award of other sanctions such as counsel fees incurred in filing the motion, together with costs. If complaints are repeatedly filed without complying with the statute, the remedy of a dismissal with prejudice is always available."

Steinberg's proposed remedy would satisfy legislative intent by allowing defendants to move after 60 days to dismiss meritless cases, but would not impose the sins of the errant attorney on a family that has already been victimized by professional negligence. ■