On 20th Anniversary, Affidavit of Merit Statute Gets New Direction

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In 1995, the New Jersey Legislature enacted N.J.S.A. 2A:53A-27, more affectionately known as the Affidavit of Merit Statute. This well-intentioned piece of legislation was passed in an effort to weed out frivolous malpractice claims against professionals—including design professionals—early in the litigation process.

The Affidavit of Merit Statute requires that a plaintiff alleging professional malpractice against a "licensed person," as defined by N.J.S.A. §2A:53A-26, serve an affidavit of merit within 60 days of the date a defendant professional files his or her answer. Only once may the plaintiff extend the deadline to serve an affidavit of merit for an additional 60 days upon filing a motion showing good cause. However, upon expiration of the 120-day deadline without an appropriate affidavit, the plaintiff shall be deemed to have failed to state a cause of action, and the complaint shall be dismissed with prejudice. N.J.S.A. 2A:53A-29; see also Cornblatt v. Barow, 153 N.J. 218 (1998).

Initially, the professionals protected by the statute were accountants, architects, attorneys, dentists, engineers, physicians, podiatrists, chiropractors, registered professional nurses and health-care facilities. The statute was amended in 2002 to include physical therapists, land surveyors, registered pharmacists, veterinarians, insurance providers, and certified midwives, certified professional midwives or certified nurse midwives.

Notwithstanding its expressed legislative intent, a number of cases challenged the Affidavit of Merit Statute, resulting in several conflicting decisions. The New Jersey Supreme Court's decision in Ferreira v. Rancocas Orthopedic Assoc., 178 N.J. 144 (2003), began a period of systematic weakening of the statute. In *Ferreira*, the Supreme Court carved out the exceptions of "extraordinary circumstances" and "substantial compliance" so that "technical defects will not defeat a valid claim." The Supreme Court stated that these exceptions are to be invoked in an effort to "temper the draconian results of an inflexible application of the statute." Despite straightforward legislative intent and clear procedural prerequisites to suit, a dismissal with prejudice for such failures was deemed "draconian." Thus, an apparent distaste for otherwise meritorious claims being dismissed as the result of technicalities (and, perhaps, resulting attorney malpractice actions) swayed the courts towards such weakening opinions.

Another such example of the weakening of the statute is the court's decision in Galik v. Clara Maass Medical Center, 167 N.J. 341 (2001), in which the court set the standard for "substantial compliance." The plaintiff served two *unsworn* and *uncertified* expert reports on the defendant professionals' insurance

carrier prior to filing a complaint. Although the plaintiff never filed an affidavit of merit as defined by the statute, the New Jersey Supreme Court ruled that service of the expert reports and the lack of prejudice to the defendant professionals constituted sufficient "substantial compliance." Thus, the plaintiff avoided the "draconian results" of the Affidavit of Merit Statute, despite failing to satisfy a single requirement.

Further weakening of the statute is evident in the Appellate Division's decision in Carr v. Our Lady of Lourdes Medical Center, 2015 N.J. Super. Unpub. LEXIS 1484 (2015). The Appellate Division again lowered the bar for compliance when it ruled that a plaintiff need only demonstrate it took steps that were in "general compliance with the purpose of the statute," rather than substantial compliance. The plaintiff was held to have "generally" complied with the statute when it failed to timely serve an affidavit of merit due to a clerical error. The court stated that the "all too human error appears to be a 'reasonable explanation' that should not doom plaintiff's claim." The court further held that the defendant professionals were not prejudiced because they ultimately received affidavits of merit a mere month after the deadline expired and the allegations in the complaint were sufficiently detailed to put them on notice of the nature of the claims against each one individually.

Such a result places more discretion within the power of the trial courts to allow cases to proceed when the plaintiff wholly fails to satisfy the Affidavit of Merit Statute but generally complies with its purpose. Additionally, this opinion paves the way for trial courts to look to the complaint, in the absence of an affidavit of merit, to assess the prejudice to the defendant professional in permitting a malpractice claim to proceed.

However, recent case law is shaping the future application of the Affidavit of Merit Statute and putting some strength back into the statute. In Hill International v. Atlantic City Board of Education, 438 N.J. Super. 562 (App. Div. 2014), the Appellate Division created the "like-licensed" standard in design professional matters. In its opinion, the Appellate Division ruled that, despite some professions possessing overlapping job duties (i.e., architects and engineers may possess overlapping duties within a construction project), an affiant serving an affidavit of merit must be licensed in the same field as the licensed defendant. Consequently, the licensure of each profession was deemed different as each profession is governed by its own regulatory body, as well as different subsections within the Affidavit of Merit Statute.

Supplemental support for the "like-licensed" professional standard can be found in *Carr,* which enigmatically adds and subtracts support for the statute. In *Carr*, while the court lowered the substantial compliance standard to general compliance, the court raised the standard as to who qualifies as a "like-licensed" professional. Accordingly, the court went a step further than *Hill International*, requiring that the affiant must not only be "like-licensed," but he or she must also actively practice in the same field as the defendant. The court held that, while the affiant and defendant were licensed in the same field, the affiant rarely actually practiced in the defendant's professional field, thereby disqualifying the affiant as an appropriately licensed professional.

In early 2016, additional support for the statute was provided in the Appellate Division's decision in Lang v. Morristown Mem. Hosp., 2016 N.J. Super. Unpub. LEXIS 216 (App. Div. 2016), where the court upheld the strict language of the statute by rejecting

a so-called "blanket affidavit." The plaintiff served a single, generic affidavit of merit, despite naming 10 individually licensed defendants. The Appellate Division held that the plaintiff did not satisfy the statute as it did not serve an appropriate Affidavit of Merit against *each* defendant. The court's decision reinforces the legislative language of the statute and reaffirms that compliance with the statute is still a prerequisite to suit.

The path toward diluting the statute of its effectiveness—which began with *Ferreira*—might not be reversed, despite the recent spate of opinions. The qualifications of an affiant have been scrutinized more heavily; however, the rigor previously required of a plaintiff to comply with the statute has been drastically reduced. As such, it is not inconceivable to envision a scenario where the decision to dismiss a case for failing to timely serve an affidavit of merit is not based on an inflexible application of the statute but, rather, is a weighing of the prejudices to the litigant. (See Kamery v. Trombadore, 2015 N.J. Super. Unpub. LEXIS 2983 (App. Div. 2015), wherein the court reinstated the plaintiff's complaint as "there has been no showing of prejudice to defendant that would outweigh the strong preference for adjudication on the merits rather than final disposition for procedural reasons, or would warrant visiting on the innocent client an error of her attorney.")

The 120-day deadline set forth in N.J.S.A. 2A:53A-27 is no longer the sword and shield it used to be. However, in order to protect their cases, plaintiffs can ensure their day in court by promptly serving discovery demands on professional defendants. In doing so, plaintiffs can avail themselves of N.J.S.A. §2A:53A-28 and serve a certification in lieu of an affidavit of merit (thus, never needing to serve an affidavit of merit). Similarly, defendant professionals should satisfy all discovery obligations prior to the expiration of the 120-day deadline to reduce any prejudice arguments and keep the balances tipped in their favor.

Despite the varied interpretations and paths the courts have taken during the past 20 years, the Affidavit of Merit Statute remains valid, with clear direction for maintaining a cause of action against a licensed person. Accordingly, both plaintiffs and defendants must be aware of the consequences of noncompliance as they venture down the path the courts have created.

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