

## THE NEW JERSEY SUPREME COURT PLACES ANOTHER REQUIREMENT UPON LITIGANTS UNDER THE AFFIDAVIT OF MERIT STATUTE

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In *Buck v. Henry*, 207 N.J. 311 (2011), plaintiff Robert Buck was diagnosed with mild depression and insomnia by the defendant, physician James Henry, M.D. Dr. Henry prescribed Zoloft and Ambien. Weeks later, plaintiff took an Ambien and fell asleep while inspecting his gun. He awoke in the middle of the night to what he thought was a ringing phone. With his gun in his right hand, plaintiff allegedly reached for the phone with his left and somehow discharged gun into his mouth, resulting in serious and permanent injuries.

Plaintiff filed suit against Dr. Henry, a board certified emergency medicine physician, alleging medical malpractice. Plaintiff also sued sanofi aventis, alleging product liability. Plaintiff served two affidavits of merit, one from a psychiatrist and another from a specialist in emergency medicine. Counsel for Dr. Henry timely objected via letter to the emergency room physician's affidavit, stating his client was providing care and treatment in the field of family medicine when treating plaintiff.

The trial court did not conduct a Ferreira case management conference despite Dr. Henry's request. Instead, the Court issued an order that all affidavit of merit issues had been addressed.

Dr. Henry filed a summary judgment motion attacking the sufficiency of the affidavits of merit and through his certification that he specialized in family practice medicine when providing care and treatment. Plaintiff opposed, arguing the psychiatry affidavit of merit was sufficient because treating a patient with insomnia fell within the "general practice" of medicine. Plaintiff further argued that one cannot be a specialist in family medicine absent board certification. Relying heavily upon Dr. Henry's certification, the trial court granted his motion and the Appellate Division affirmed in an unpublished opinion.

The Supreme Court reversed and remanded. The Court relied on the fact that plaintiff did not have Dr. Henry's certification – which proved he was a family-medicine practitioner when treating plaintiff – until the motion for summary judgment was filed. The Court was critical of the trial court's failure to conduct a Ferreira conference, surmising that had it done so, the "conference likely would have led to the filing of a judicially acceptable affidavit and obviated the need for the summary-judgment motion that led to the dismissal of plaintiff's cause of action." The reliance placed on the Ferreira conference issue was surprising in light of the fact that the very same Supreme Court, in another recent affidavit of merit case, explicitly held that the failure of a trial court to conduct a Ferreira conference cannot be used to toll the timelines in the statute. See *Paragon Contractors, Inc. v. Peachtree Condo. Ass'n*, 202 N.J. 415, 425-26 (2010).

Ultimately, the Court carved out a requirement that, moving forward, "a physician defending against a malpractice claim (who admits treating the plaintiff) must include in his answer the field of medicine in which he specialized, if any, and whether his treatment of the plaintiff involved that specialty." As the Court noted, "[t]here are no villains here, but we have a record that bespeaks confusion" and found this was not the type of meritless lawsuit the affidavit of merit was intended to "weed out."

The unique set of facts underlying the Court's ruling illustrates the age old axiom that bad cases make bad law. So much so, the Court even went so far as to say "[t]his case presents a perfect example of the pitfalls facing a plaintiff's attorney."



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## AFFIDAVIT OF MERIT

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As in other opinions, the Supreme Court confirmed that the Affidavit of Merit statute was intended to “flush out insubstantial and meritless claims.” Buck concerned a severely injured plaintiff with what appeared to be a facially meritorious case as suggested by the two physicians willing to subscribe to affidavits of merit. Thus, the Supreme Court appeared to brush aside plaintiff’s failure to strictly comply with the Affidavit of Merit statute, instead chalking plaintiff’s errors up to some mere technicality and then worked backwards to make its decision work. In doing so, however, the Court created another obligation for defendants in professional malpractice cases – under a statute originally intended to create requirements for plaintiffs to satisfy before bringing suit.

The Court’s new directive, which is not based upon any statute or reported decision, appears to make at least one issue crystal clear: more reported decisions in the quest for clarity and guidance con-

cerning the Affidavit of Merit statute will be forthcoming in the future.

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# ONE FOR THE GOOD GUYS



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