

To: New Jersey Law Revision Commission
From: Jayne Johnson
Re: *Meehan v. Antonellis* Decision - Affidavit of Merit Statute
Date: September 6, 2016

MEMORANDUM

Executive Summary

Staff presented, at the April Commission meeting, a New Jersey Law Journal article which discussed the inconsistent rulings generated from the requirements of the Affidavit of Merit (AOM) statute. The article identified a federal district court judge who called on the State Legislature to update the AOM statute, while ruling on a summary judgment motion in a medical malpractice action. In April, the Commission decided to revisit the proposed project after the New Jersey Supreme Court decided *Meehan v. Antonellis*.¹

On August 9, the Supreme Court held, in *Meehan*, that the enhanced requirements provided in section 41 governing an affidavit from a “like-credentialed” professional apply only in medical malpractice actions and do not extend to claims involving other licensed professionals.

Following the *Meehan* decision, Staff seeks guidance from the Commission whether to determine, through research and outreach, if statutory revisions will best address the issues that the AOM statute presents to trial courts, particularly federal courts where the remedies provided by the New Jersey Supreme Court are not applicable.

Background

The Legislature enacted the Affidavit of Merit (AOM) statute, N.J.S. 2A:53A-26 to -29 “to weed out frivolous lawsuits at an early stage,” allowing meritorious cases to go forward. The statute was a part of the 1995 tort reform package, a set of five bills “designed to ‘strike a balance between preserving a person’s right to sue and controlling nuisance suits.’ ”²

The AOM statute was intended to flush out insubstantial and meritless claims that [sic] created a burden on innocent litigants and detracted from the many legitimate claims that require the resources of our civil justice system. The statute was not

¹ *Meehan v. Antonellis*, 2016 WL 4183727 *14 (Aug. 9, 2016).

² *Ferreira v. Rancocas Orthopedic Assoc.*, 178 N.J. 144, 151 (2003), citing *Hubbard v. Reed*, 168 N.J. 387, 395 (2001).

intended to encourage gamesmanship or a slavish adherence to form over substance. The statute was not intended to reward defendants who wait for a default before requesting that the plaintiff turn over the affidavits of merit.³

The AOM requires the plaintiff to: (1) demonstrate that the claim is meritorious by obtaining an affidavit from an “appropriate, licensed” professional attesting to a “reasonable probability” of professional negligence; and (2) provide the affidavit to the defendant within sixty days of filing of the answer or, for good cause shown, one sixty-day extension may be granted. Failing to file the affidavit within 120 days of the filing of the answer subjects the complaint to dismissal with prejudice. N.J.S. 2A:53A-27 reads as follows:

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill, or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The Court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.⁴

N.J.S. 2A:53A-28 requires the defendant to provide the documents necessary for plaintiff’s expert to prepare the affidavit. “In absence of compliance with a document request, the plaintiff may provide a sworn statement, in lieu of affidavit, certifying that the necessary records were not made available.”⁵

The statute is credited with reducing the number of medical malpractice actions, which ranged in the early 1990s from 2,500 to 3,500, to the current number of cases which average around 900 per year. Although the statute reduced the number of malpractice actions filed in the State, the AOM statute generated a significant amount of litigation concerning the nuances of implementation. Increasingly, “two distinct classes of cases” arose under the AOM statute. One

³ *Ferreira*, 178 N.J. at 154.

⁴ N.J. Stat. Ann. 2A:53A-27 (West 2016).

⁵ *Ferreira*, 178 N.J. at 150.

class, in which the plaintiff “is unable to provide an affidavit at all” and the omission is “considered substantive, resulting in a merits-based dismissal with prejudice.”⁶ Another class of cases is “vastly more common,” which does not involve “the inability of the plaintiff to produce an affidavit regarding deviation, but [sic] arouse out of procedural slip-ups in filing or service or out of curable technical deficiencies. . .[which] do not ‘go to the heart of the cause of action.’ ”⁷

The Supreme Court “fashioned two equitable remedies ‘that temper the draconian results of an inflexible application of the statute.’ ”⁸ The first remedy allows a claim to survive, if the plaintiff substantially complied with the AOM requirements.⁹ The second allows a claim to be dismissed without prejudice if “the plaintiff can demonstrate extraordinary circumstances prevented the plaintiff from complying with the AOM statute.”¹⁰

The Supreme Court, later, established a case management conference requirement to “ensure that discovery related issues, such as compliance with the AOM statute, do not become sideshows to the primary purpose of the civil justice system - to shepherd legitimate claims expeditiously to trial.”¹¹ The Court held that the trial court must conduct a case management conference “within ninety days of the service of the answer.”¹² The Court required that the *Ferreira* conference, as it is now referred to, “address[es] all discovery issues, including whether an affidavit of merit has been served on the defendant.”¹³ The Court established that if the AOM was served, the defendant must advise the court “whether [sic] the defendant has any objection to the adequacy of the affidavit. If there is any deficiency in the affidavit, plaintiff will have to the end of the 120-day time period to conform the affidavit to the statutory requirements. If no affidavit has been served, the court will remind the parties of their obligations under the statute and the case law.”¹⁴

In spite of the remedies and procedural safeguards provided by the Court, the AOM requirements continue to generate scores of civil actions. In fact, the New Jersey Supreme Court decided nine cases involving the AOM, “before the Legislature adopted further obligations

⁶*Ferreira* , 178 N.J. at 157 (J. Long, concurring in part, dissenting in part).

⁷*Id.*

⁸ *Meehan*, 2016 WL 4183727 at *6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Ferreira*, 178 N.J. at 154.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

regarding medical malpractice actions in 2004.”¹⁵ *Meehan* was the fourth appeal heard by the Court since the 2004 amendments.¹⁶

The 2004 amendments tightened the procedural requirements in medical malpractice cases, by adding a sentence to section 27 requiring that “[i]n the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in [section 41].”¹⁷ The phrase “in all other cases” was added to describe the credentials required for those submitting an affidavit of merit in negligence actions which did not involve medical malpractice.¹⁸ Section 27, as amended provides:

*In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c. 17 (C.2A:53A-41). **In all other cases**, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as 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. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.*¹⁹

The Court in *Meehan* concluded that only medical malpractice actions are subject to the enhanced requirements of section 41 and in all other matters, including actions involving dentists as in *Meehan*, “section 27 prescribes the qualifications of the person who may submit an affidavit of merit against a licensed professional who is alleged to have acted negligently.”²⁰

¹⁵ *Meehan*, 2016 WL 4183727 at *6.

¹⁶ *Id.* at *7.

¹⁷ *Id.* at *9, see N.J. Stat. Ann. 2A:53A-41 (West 2016) (providing in part:

In an action alleging medical malpractice, a person shall not give expert testimony or execute an affidavit pursuant to the provisions of P.L.1995, c. 139 (C.2A:53A-26 et seq.) on the appropriate standard of practice or care unless the person is licensed as a physician or other health care professional in the United States and meets the following criteria).

¹⁸ *Meehan*, 2016 WL 4183727 at *9.

¹⁹ N.J. Stat. Ann. 2A:53A-27 (West 2016) (emphasis added).

²⁰ *Id.* at *14.

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In *Meehan*, the plaintiff consulted the defendant orthodontist for treatment of sleep apnea. The defendant fitted the plaintiff with a dental appliance, intended to help reduce plaintiff’s sleep apnea symptoms. The “plaintiff asserts that he expressed a concern that the device would cause his teeth to shift and that [the] defendant ‘unequivocally assured’ him that his teeth would not move.”²¹ Two years later, the plaintiff, representing himself, “filed a complaint against the defendant alleging that defendant’s treatment caused chronic muscle pain and headaches, created large gaps between his teeth, and worsened his sleep apnea condition.”²² Following the *Ferreira* conference, where the defendant was not required to identify his dental specialty and the plaintiff was instructed to obtain an affidavit from “a dentist or one who practices dentistry,” the plaintiff obtained an affidavit from a “board-certified prosthodontist” who specialized in the “treatment of sleep apnea for twenty years.”²³

The Court narrowed the scope of its decision to the following issues: (1) whether the like-credential requirements of section 41 apply in professional negligence actions other than medical malpractice actions; and (2) whether the *Ferreira* conference conducted in this matter adequately addressed the sufficiency of the affidavit of merit required for plaintiff’s dental malpractice action to proceed.²⁴

The Court held that in professional negligence actions, other medical malpractice claims, “the affiant must hold an appropriate license and must demonstrate particular expertise in the general area or specialty involved in the action, but he or she is not required to possess credentials equivalent to those of the licensed professional defendant.”²⁵ The Court concluded that “[n]either the plain language nor the purpose and history of the AOM statute or Patients First Act support importation of the like-credential standard governing physicians in medical malpractice actions to professional negligence actions governed by section 27.”²⁶

The Court observed that the appeal also illustrates:

the need for a timely and effective *Ferreira* conference in all professional negligence actions. The conference is designed to identify and resolve issues regarding the affidavit

²¹ *Id.* at *1.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at *7.

²⁵ *Id.* at *14.

²⁶ *Id.*

of merit that has been served or is to be served. To that end, all participants must be prepared to identify at the conference the general area or specialty involved in the action and whether the defendant was providing professional services within that profession or specialty. We request that the Civil Practice Committee consider whether Rule 4:5-3 should be amended to embrace all professional negligence actions subject to the AOM statute²⁷.

The Court did not address some of the issues raised in the New Jersey Law Journal article discussed at the April Commission meeting which focused on the remarks of the Hon. Kevin McNulty, D.N.J. concerning the effect of the AOM requirements in federal practice. Judge McNulty granted summary judgment in a medical malpractice action against three nurse defendants with prejudice for failure to provide an AOM, but dismissed the claims against four doctors *without* prejudice, allowing the plaintiff thirty days to submit an AOM.²⁸ Judge McNulty stated that he is “not in the habit of giving losers of summary judgment motions a second chance to submit affidavits. Here, however, the ramifying alternative under the AOM scheme might make plaintiff’s failure to anticipate every eventuality understandable, if not wholly excusable.” He added, the “New Jersey Supreme Court has twice recognized as much, and relaxed the statutory standards in light of the ‘confusion’ sown by the convoluted statutory scheme.”²⁹ Judge McNulty asserted that the statute is “bafflingly drafted,” and noted that although the Supreme Court has imposed procedural safeguards against forfeiture in AOM cases; they are not available in federal litigation.³⁰

Conclusion

Following the Supreme Court decision in *Meehan*, Staff seeks guidance from the Commission whether to determine, through research and outreach, if statutory revisions will best address the issues that the AOM statute presents to trial courts, particularly federal courts where the remedies provided by the New Jersey Supreme Court are not applicable or whether Staff should continue to monitor the work of the Civil Practice Committee and the developing case law in this area.

²⁷ *Id.*

²⁸ “*Federal Judge: Overhaul ‘Convoluted’ NJ Affidavit of Merit Statute*,” N.J.L.J., Mar. 31, 2016, <http://www.njlawjournal.com/id+1202753784680/Federal-Judge-Overhaul-Convoluted-NJ-Affidavit-of-Merit-Statute#ixzz44yuckh3X>.

²⁹ *Id.*

³⁰ *Id.*