

**To: New Jersey Law Revision Commission**  
**From: Jayne Johnson**  
**Re: Affidavit of Merit Statute**  
**Date: April 11, 2016**

## **MEMORANDUM**

### **Executive Summary**

This memorandum discusses the Affidavit of Merit statute, N.J.S. 2A:53A-26 to -29, which requires a plaintiff to meet procedural requirements in order to maintain a professional malpractice action. Staff was informed of a recent New Jersey Law Journal article concerning this provision and the remarks of a federal judge who called on the State Legislature to update the statute when ruling on a summary judgment motion in a medical malpractice claim. Staff will research the issues concerning the statute, if it is the pleasure of the Commission, to determine the scope of the statutory revisions that may best address the concerns raised.

### **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.’”<sup>1</sup>

The AOM statute was intended to flush out insubstantial and meritless claims that [ ] 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 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.<sup>2</sup>

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 about 900 per year.

The AOM imposes procedural requirements on a plaintiff, requiring that he or she must: (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)

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<sup>1</sup>*Ferreira v. Rancocas Orthopedic Assoc.*, 178 N.J. 144, 151 (2003), citing *Hubbard v. Reed*, 168 N.J. 387, 395 (2001).

<sup>2</sup> *Ferreira*, 178 N.J. at 154.

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.<sup>3</sup>

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."<sup>4</sup>

2004 amendments to the AOM statute tighten the procedural requirements in medical malpractice cases, requiring that the expert providing an AOM practice in the same specialty as the defendant. N.J.S. 2A:53A-41. *Hill Int'l v. Atlantic City Bd. of Educ.* addresses the standards for experts providing AOM in other professions, requiring that the expert hold the same license as the defendant.<sup>5</sup>

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 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."<sup>6</sup> 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] arose out of procedural slip-ups in filing or service or

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<sup>3</sup> N.J. Stat. Ann. 2A:53A-27 (West 2016).

<sup>4</sup> *Ferreira*, 178 N.J. at 150.

<sup>5</sup> 2014 N.J. Super. LEXIS 177 (App. Div. Dec. 30, 2014).

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

out of curable technical deficiencies...[which] do not ‘go to the heart of the cause of action.’”<sup>7</sup>

State case law sought to address the emerging issues involving application of the AOM statute. Seeking to further the legislative intent of the AOM statute and preserve meritorious claims, two equitable remedies were established, permitting exceptions to the requirements of the statute in order to “temper the draconian results of [sic] [the] inflexible application of the statute.”<sup>8</sup> The first exception allowed a claim to remain if the plaintiff could demonstrate substantial compliance with the statute. The second exception allowed dismissal without prejudice, permitting the plaintiff to cure and preserve the claim, if extraordinary circumstances could explain the noncompliance.<sup>9</sup>

The Supreme Court, in *Cornblatt v. Barow*, first applied the doctrine of substantial compliance, addressing those claims with substantive deficiencies. In *Cornblatt*, where an attorney sought to recover legal fees and the former client failed to timely file the AOM in a counterclaim of negligent representation, the Court held that a failure to comply with the affidavit requirements of the AOM statute required dismissal with prejudice, absent extraordinary circumstances.

Thereafter, a line of cases emerged carving out distinctions, allowing meritorious claims “to go forward,” in accord with the legislative goals of the AOM. Most significantly, in *Ferreira v. Rancocoas Orthopedic Assoc.*, the plaintiff filed an AOM in a medical malpractice case eighteen days after the statutory deadline, but before the defendant moved to dismiss with prejudice, and the Court held that the plaintiff’s failure to timely file the AOM did not require dismissal.<sup>10</sup>

The Court also 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.”<sup>11</sup> The Court held that the trial court must conduct a case management conference “within ninety days of the service of the answer.”<sup>12</sup> 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.”<sup>13</sup> 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

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<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at 151.

<sup>9</sup> *Id.*

<sup>10</sup>*Id.* at 146.

<sup>11</sup>*Id.* at 154.

<sup>12</sup>*Id.*

<sup>13</sup> *Id.*

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.”<sup>14</sup>

Justice Long concurred with the result of the majority decision concerning the plaintiff’s claim, but dissented in part, concluding that the majority, by failing to modify the *Cornbalt* mandatory dismissal with prejudice rule, did not adequately address the recurring issues facing trial judges applying the AOM requirements. Justice Long stated that, “Cornbalt’s mandatory dismissal with prejudice rule should be limited to those cases in which a plaintiff cannot or will not produce an affidavit of merit at all”<sup>15</sup> adding that,

trial judges should have available to them a full panoply of discretionary remedies for procedural deficiencies in complying with the Affidavit of Merit statute, including dismissal with or without prejudice and discovery-type sanctions such as reasonable expenses incurred in obtaining the affidavit along with counsel fees. In each case, the trial judge should assess the facts, including the willfulness of the violation, the proximity of trial, and any prejudice that would accrue to the party aggrieved by the filing deviation, and apply the appropriate remedy. The availability of sanctions short of dismissal with prejudice would align the Affidavit of Merit procedure with R. 4:37-2(a) for the first time since the statute was enacted. Moreover, it would provide judges with a response that is proportionate to most procedural violations and also serve to save for trial the meritorious cases of injured victims of malpractice. Nothing in the statute itself precludes such an approach. It is only *Cornblatt* that stands in the way.<sup>16</sup>

Justice Zazzali, joined by Judge Pressler, penned a separate opinion that agreed with the approach of Justice Long, but asserted that the AOM statute is unconstitutional because it violates the separation of powers and conflicts with *Winberry v. Salisbury*.<sup>17</sup> A New Jersey Law Journal editorial, written in 1995 after the enactment of the AOM statute also questioned the constitutionality of the statute.<sup>18</sup>

The recent New Jersey Law Journal article does not raise constitutional issues, but instead,

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<sup>14</sup> *Id.*

<sup>15</sup> *Ferreira*, 178 N.J. at 157 (J. Long, concurring in part, dissenting in part).

<sup>16</sup> *Id.* at 157-58

<sup>17</sup> *Ferreira*, 178 N.J. at 157 (J. Zazzali, concurring in part, dissenting in part) *citing* *Winberry v. Salisbury*, 5 N.J. 240, 247, *cert. denied*, 340 U.S. 877 (1950).

<sup>18</sup> “*A Litigator’s Predicament*,” 142 N.J.L.J. 24 (Dec. 11, 1995).

focuses on the remarks of the Hon. Kevin McNulty, who granted summary judgment 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.<sup>19</sup> 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.” 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 do not apply in federal court.

The New Jersey Supreme Court heard oral arguments on March 15 in *Meehan v. Antonellis*, a case involving this area of law in which the plaintiff is appealing dismissal of a malpractice claim. The anticipated decision gives the Court another opportunity to address the prevailing issues concerning application of the AOM statutes, but may not address the issues facing federal trial judges, enforcing the requirements under the AOM statute.

### **Conclusion**

Several issues persist with the application of the AOM statute for trial judges in state and federal courts. Staff is seeking the Commission’s guidance to determine whether drafting statutory language would best address the issues raised or whether Staff should continue to monitor the developing case law in this area, particularly the pending decision of the New Jersey Supreme Court in *Meehan*.

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<sup>19</sup> “*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>.