

IN PRACTICE

LEGAL PROFESSION

Affidavit of Merit Statute's Application to Third-Party Indemnification Claims

BY STEPHEN WINKLES

It is quite possible that the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to 29, has or will cause almost as many professional malpractice claims as it has dismissed. Given the current state of New Jersey's courts' differing interpretations of the statute, there will certainly be more unnecessary litigation than the legislature intended. The affidavit of merit statute requires all claimants in "a malpractice action to serve on a defendant within 120 days of receipt of the answer an expert's sworn statement attesting that there exists a 'reasonable probability' that the professional's conduct fell below acceptable standards." The statute is meant to weed out unsubstantiated claims by requiring plaintiffs to prove that the defendant's conduct fell below acceptable standards. *Ferreira v. Rancocas Orthopedic Associates*, 178 N.J. 144 (2003). Absent extraordinary circumstances, failure to comply is deemed a failure to state a cause of action and requires dismissal of the complaint with prejudice.

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In *Ferreira*, a case involving a medical malpractice claim, plaintiff obtained an affidavit of merit 10 days after the answer was filed, but because of a law office filing error, the affidavit of merit was not timely served. After the affidavit of merit was served on defendant's counsel, a motion to dismiss was filed for failure to comply with the affidavit of merit statute. Refusing to dismiss the action, the Supreme Court reasoned that although the affidavit was provided outside the statutory time frame, it was provided before the motion to dismiss was filed. In such a situation, the defendants were precluded from filing the motion.

The *Ferreira* decision also set what many lower courts and attorneys believe to be new guidelines on when motions to dismiss are permitted due to failure to comply with the affidavit of merit statute. The Supreme Court's opinion stated that the statute is "not intended to reward defendants who wait for a default before requesting that the plaintiff turn over the affidavit of merit." Finding that the service and substance of affidavits of merit are essentially discovery-related issues, the court proposed that an accelerated case

management conference be held within 90 days of the service of an answer in all malpractice actions.

As the Appellate Division grapples with the effect of trial courts not holding an accelerated case management conference, or "*Ferreira* Conference," (see the decisions issued in *Saunders v. Capital Health System*, 398 N.J. Super. 500 (App. Div. 2008) and *Paragon Contractors, Inc. v. Peachtree Condominium Association, et al.*, 406 N.J. Super. 568 (App. Div. 2009)), the Supreme Court moved on to other questions posed by the affidavit of merit statute, and attempted to further clarify the statute in the recent case of *Highland Lakes Country Club and Community Association v. Nicastro*, 2009 WL 4573017 (N.J. December 08, 2009).

The *Highland Lakes* case resolves an issue relating to the affidavit of merit statute's application to third-party indemnification claims, and also addresses the entire controversy doctrine as it applies to third-party professional negligence claims. Whether an affidavit of merit is required for indemnification and contribution claims against professionals is a difficult and much litigated issue: an issue where many courts reached different conclusions. After years of debate among jurists, on December 8, 2009, the New Jersey Supreme Court took a nuanced approach in ruling that third-party indemnification claims against professionals may be subject to the act, but only after a professional-negligence claim accrues.

The statute itself appears to require an affidavit of merit for any claim

implicating professional negligence, not excluding claims of indemnification and contribution. But such a requirement can be puzzling when the claims are derivative or are third-party claims.

For instance, a defendant architect who is accused of preparing improper plans and specifications may have relied on information provided to it by a licensed engineer. However, the architect, in defending against plaintiff's claims, asserts that the plans are not deficient. The architect is in a difficult situation: if the architect files an indemnification and contribution claim against the engineer, the affidavit of merit statute appears to require the architect to take a further step and obtain an affidavit of merit stating that a reasonable probability exists that the care, skill or knowledge exercise in the engineer's work provided for the architect's plans and specifications fell outside acceptable professional standards. For the architect defending the lawsuit, providing the affidavit of merit serves only to substantiate plaintiff's claims, which may not yet be established. The architect's provision of the affidavit of merit prior to plaintiff establishing a prima facie case would be premature and potentially damaging to the defense. On the other hand, failing to file the affidavit of merit could lead to a prejudicial dismissal of the indemnification and contribution claims. Failing to file indemnification and contribution claims against the engineer could cause entire controversy arguments to the extent the architect sues

the engineer in a later lawsuit.

Attempting to resolve these types of issues, the Supreme Court's *Highland Lakes* decision embraced the Appellate Division decision from which the case was appealed. The Court evaluated a scenario where neighbors disputed a boundary between the parties' property. The defendant owner filed a third-party complaint against the surveyor for indemnification and contribution. Because the owners' claims against the surveyor were contingent on the neighbor's proof that the boundary line on the survey was incorrect, the Supreme Court ruled that the affidavit of merit statute's application to the third-party claim was premature because third-party plaintiffs could not yet show they were damaged by the professional firm's malpractice. In order to require the defendant to file an affidavit of merit, to support its indemnification and contribution claims, the plaintiff needed to first establish that the boundary line on the survey was incorrect. The ruling delays the need for affidavits of merit on indemnification and contribution claims until the plaintiff itself is able to make an initial showing of liability, taking pressure off of the defendant to involuntarily support a plaintiff's claim.

While this arrangement may resolve some problems for the defendant, it raises other problems relating to the completion of discovery. The third-party defendant in the *Highland Lakes* case contended that the ruling would only prolong discovery, and argued that the third-party

plaintiff should defer its claim against the professional until the conclusion of the litigation with the plaintiff. The Court rejected this idea, finding that it would result in piecemeal litigation running afoul of the entire controversy doctrine, and would require the defendant to participate in at least two litigations over a period of several years. Instead, the Court apparently embraced an idea that a singular case with extended discovery period is better than two cases.

There is no doubt that the *Highland Lakes* ruling will lead to even more complicated issues, such as arguments over whether plaintiff provided evidence sufficient to require defendant to obtain an affidavit of merit on its third-party claims. What makes the *Highland Lakes* ruling both manageable and sustainable is the Court's *Ferreira* decision, which invoked hands-on, active case management for affidavit of merit cases. To the extent case management conferences involve substantive discussions on the causes of action as they relate to the progress of discovery, the complicating factors of the affidavit of merit statute may be effectively avoided. In any situation, the Supreme Court's last words in *Ferreira* should be heeded: "Diligence and attentiveness in the practice of law will spare plaintiffs' attorneys from later seeking an equitable remedy that may not be available. Those members of the plaintiffs' bar who follow the simple dictates of the statute will find no impediment to championing the causes of their clients."■