Does the Patients First Act Really Put Patients First?

Recent Case Developments Concerning Medical Affidavits of Merit

by Peter L. MacIsaac

The affidavit of merit (AOM) statute, enacted in 1995, requires plaintiffs in professional negligence actions to file an affidavit from an "appropriate licensed person" attesting that the defendant deviated from the acceptable standards for the profession, or the matter will be dismissed.[1] Initially, the statute was clear that the person executing the AOM shall:

> [B]e licensed in this or any other state; [and] have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or 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.[2]

In 2004, the statute was amended with the passage of the New Jersey Medical Care Access and Responsibility and Patients First Act (PFA),[3] which tightened the requirements for the AOM in medical malpractice cases, mandating that experts practice in the "same specialty" within medical fields. The PFA provides that whenever a defendant is a specialist in a field and the allegation of negligence involves that specialty, the expert must also be a specialist in the same field. Specifically, it added the following requirements:

> 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:53-41)
>
> 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.

The PFA also requires the witness of a party offering or opposing the expert testimony to have specialized in the same specialty at the time of the occurrence of the negligence. The expert only qualifies when he or she:

> [I]s a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association and the care or treatment at issue involves that specialty or subspecialty…the person providing the testimony shall have specialized at the time of the occurrence…in the same specialty or subspecialty.[4]

Many question whether these strict requirements have anything to do with whether an expert is appropriately qualified to testify on the standard of care applicable to a defendant. In reality, standards of care frequently apply with equal force across multiple medical fields, as was long recognized by common law. The statute has led to confusion and criticism. For example, critics have pointed out that any doctor can claim to specialize in a certain specialty or sub-specialty, since there is no restriction on them doing so, nor is there a requirement that they be board certified in the specialty.

This was the case in *Buck v. Henry,*[5] which is an example of the well-known maxim: 'bad facts make bad law.' The case involved a plaintiff treated by the defendant for depression and insomnia. The defendant prescribed an anti-depressant and a sleep aid, Ambien. After taking Ambien one evening, the plaintiff fell asleep while inspecting his gun. He was awakened by what he believed was a phone ringing, but had forgotten he was holding the gun. He reached for the phone, somehow causing the gun to enter his mouth and discharge,

resulting in permanent injuries. The plaintiff alleged the defendant failed to properly treat his conditions.

According to the secretary of state's physician profile website, the defendant was board certified in emergency medicine. Accordingly, the plaintiff supplied an AOM from a doctor who also was board certified in emergency medicine.

Thereafter, the defendant claimed to be specializing in family medicine at the time of the treatment, and that the treatment at issue (prescribing anti-depressant and Ambien) actually involved the practice of family medicine. Putting aside the nebulous, almost non-existent distinction between internal medicine and family medicine, the court agreed with the defendant's certification and dismissed the plaintiff's case. In doing so, the court pointed out that "In the future, a physician defending against a malpractice claim 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."[6] Despite this prospective admonition, the court still dismissed the plaintiff's case, in part based on the questionable idea that the treatment involved family medicine, which has different standards of care then internal or emergency medicine when it comes to prescribing anti-depressants and Ambien.

Therefore, it is critical the plaintiff's attorneys enforce this requirement on the defendants both as a practical matter to protect themselves and their clients, and also to demonstrate substantial compliance with the AOM where procedural and timing issues are implicated.

The critical takeaway for practitioners is to develop a checklist early in the review of a potential medical malpractice case to protect their clients and themselves. A recent string of unpublished appellate decisions addressing the amended AOM generally continue a trend of strictly enforcing the amended statute, often with harsh results. Attorneys handling medical malpractice cases must ask themselves three important questions:

1. Does the defendant claim to be a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association?
2. Does the negligent treatment at issue involve the defendant's specialty?
3. Is the defendant board certified in the specialty *or* credentialed by a hospital to perform the procedure or treat the condition at issue?

Plaintiff's Expert Must Specialize in the Same Specialty

In addition to board certifications and credentials to perform the procedures at issue, experts must specialize in the same field of medicine. This was made clear in *Carr v. Our Lady of Lourdes Medical,*[7] where the Appellate Division found the plaintiff's expert did not meet the requirements of the AOM and was, therefore, not qualified to render an expert opinion in the case. The court reiterated that the AOM was also subject to the PFA, which established qualification requirements for experts who provide testimony or execute AOMs in medical malpractice cases. Although the court ruled in the plaintiff's favor regarding the plaintiff's procedural service of an AOM, "the dispositive issue in the case was whether plaintiff's expert was 'equivalently credentialed in the same specialty or subspecialty as the' defendant doctors, and, therefore, permitted to author an AOM and testify to the applicable standard of care.[8]

In pointing to the equivalent credentials doctrine, the court cited to the important 2013 case, *Nicholas v. Mynster,*[9] which involved an allegation that the defendant doctors negligently failed to place the patient in a hyperbaric chamber for treatment of acute carbon monoxide poisoning. The court there found the plaintiff's expert was not qualified to testify against the defendant physicians. In doing so, the court noted that the defendants were board certified in emergency medicine and family medicine, whereas the plaintiff's expert was board certified in internal and preventative medicine, specializing in hyperbaric medicine. The court rejected the plaintiff's argument that because his expert was qualified to treat the condition at issue, he was qualified to opine on the standards of care applicable to the defendants. The court held that in order to satisfy the AOM requirements, the plaintiff's expert needed to be board certified in the same specialties or sub-specialties as the defendants.

The Appellate Division went a step further in *Carr.* The plaintiff's expert was certified in internal medicine like the defendant doctors and was qualified to treat patients for the medical condition at issue; however, the defendants argued the plaintiff's expert was more specialized than the defendants' credentials and practice. The court agreed with the defendants that the plaintiff's expert did not satisfy the statute's requirement that he devote a majority of his professional time in the preceding year to either clinical practice in the specialty or to teaching at an accredited medical school in that specialty.[10] The expert primarily practiced in oncology, and not internal medicine like the defendants.

The Appellate Division has also held in other recent cases that a testifying expert must specialize in the exact same field as the defendant doctor, notwithstanding his or her knowledge of the defendant's practice area. In the 2014 case of *Meehan v. Antonellis,*[11] the plaintiff was fitted for a dental appliance thought to reduce the symptoms of sleep apnea by the defendant, an orthodontist. The plaintiff claimed his teeth shifted as a result of the treatment, which caused him chronic muscle pain and headaches, and worsened his condition. The plain-

tiff sued for dental malpractice.

As such, the plaintiff was required to file an AOM. He retained a licensed dentist with a specialty certificate in prosthodontics. The defendant contended the AOM was insufficient because the proposed expert did not practice as an orthodontist. Despite the plaintiff's expert's history of treating sleep apnea patients and his recognition by the American Academy of Dental Sleep Medicine, the court found he lacked the necessary statutory qualifications to issue an AOM against the defendant. The court reaffirmed that the PFA provides more stringent and detailed standards for a testifying expert, which requires equivalent qualifications.

Therefore, practitioners should understand the point made above, that board certification and being qualified to perform the procedure are not substitutes for specializing in the field at the time of the occurrence. In addition to identical board certification and qualifications to perform the medical procedures in question, practitioners must add specializing in the field to their AOM expert checklist.

Plaintiff's Expert Must Specialize in the Same Specialty at the Time of the Occurrence: The Element of Contemporaneity

The fact that the plaintiff's expert must specialize in the same field "at the time of the negligence" was further highlighted in *Medina v. Pitta,*[12] which stands for the proposition that a doctor retired at the time of the occurrence, though once a practitioner in a specialized field, does not satisfy the requirements necessary for a testifying expert in a medical malpractice case. Here, the medical malpractice issue arose when the plaintiff was diagnosed and treated for proliferative diabetic retinopathy by an ophthalmologist with a specialty in retinal disease. Approximately four years after the plaintiff's first appointment with the defendant, he was diagnosed with retinal detachment and lost vision in his right eye. The plaintiff sued for medical negligence.

The plaintiff retained an expert to testify on the appropriate standard of care. Though the expert's AOM in Nov. 2011 stated he was board certified in ophthalmology, he had actually retired in Jan. 2007. As such, he was no longer practicing at the time the plaintiff first met the defendant. The central question addressed by the court was whether the plaintiff's expert was qualified to testify as an expert witness pursuant to the requirements of the PFA.

The court acknowledged that a witness must have the same specialty or subspecialty as the defendant at the time of the alleged malpractice. If the defendant is board certified, the expert must be as well, during the year immediately preceding the date of the occur-

rence. Additionally, the element of "contemporaneity" must be present, meaning the proposed expert must actively practice in the specialty at the time of the alleged deviation. The Appellate Division made clear that the above requirements apply to both the affiant for an AOM and the expert witness seeking to testify at trial. Because the plaintiff's expert did not meet the qualification requirements of the PFA, the court held he was unqualified to give expert testimony on the appropriate standard of medical care.

Procedural Concerns

Plaintiffs cannot avoid substantial compliance with the AOM and expect their claims to survive. In *Nunez v. St. Mary's Hospital,*[13] the plaintiffs sued St. Mary's Hospital for medical malpractice resulting in the stillbirth of their child. The plaintiffs served an AOM on the hospital as required. Later, however, the plaintiffs filed an amended complaint, adding defendants. The plaintiffs failed to serve mandatory AOMs on these defendants within the statutory deadline.[14] However, they did eventually comply after the expiration date.

The plaintiffs asserted they substantially complied with the AOM. Further, plaintiffs' counsel argued that his mother's death contributed to his inability to meet the deadlines. The lower court rejected this excuse and dismissed the claims against the added defendants. Because the claim against the hospital was vicarious in nature, the trial court further dismissed that claim as well.

On review, the Appellate Division affirmed the plaintiffs did not substantially comply with the AOM based on the following: 1) plaintiffs' counsel did not show any steps to comply; 2) the plaintiffs did not show any steps at general compliance; and 3) plaintiffs' counsel did not prove a sufficient explanation for failing to strictly comply with the AOM. Thus, the trial court's decision was affirmed and the plaintiffs' complaint was dismissed with prejudice.

Practitioners should take heed that plaintiffs cannot disregard the deadline mandated by the AOM and expect their claims will survive. In *Oh v. Kang,*[15] similar to *Nunez v. St. Mary's Hospital*, the court dismissed the plaintiffs' claims with prejudice for failure to procedurally comply with the AOM.

In *Oh,* the plaintiffs sued the defendant for dental malpractice but did not serve the defendant an AOM until after the statute's 120-day maximum deadline.[16] The defendant moved to dismiss the complaint, which the trial court granted.

On appeal, the plaintiffs argued they substantially complied with the statute and that extraordinary circumstances were present, entitling them to serve the affidavit beyond the time limit. Additionally, they argued that failure to serve a timely AOM should not bar their malpractice claims. The Appellate Division agreed with the lower court that the plaintiffs' situation did not excuse their obligation to timely comply. Here, there was no technical difficulty in serving the affidavit. Nor was the medical field so specialized that it was impossible to find another practitioner. Rather, the court recognized the plaintiffs merely filed their malpractice complaint before they had obtained an expert witness's opinion and then struggled to find an equivalent fit. The plaintiffs used an expert referral service that did not deliver the expected results and the plaintiffs could not retain an expert on their own. As such, there is no demonstration of substantial compliance or extraordinary circumstances. The Appellate Division dismissed the complaint with prejudice.

For an example of the extraordinary circumstances justifying substantial compliance, one can look to the recent case of *Mazur v. Crane*.[17] There, the court ruled that the plaintiff's noncompliance with an AOM, where the defendant provided false evidence about his board certification, amounts to extraordinary circumstances not requiring dismissal with prejudice. In *Mazur*, the plaintiff's mother was admitted to the defendant nursing home to undergo rehabilitation for a fractured pelvis. While there, she suffered a stroke that caused her debilitating injuries. The plaintiff sued, alleging negligence, malpractice, negligent hiring, negligent supervision, and negligent training. Specifically, the plaintiff contended the defendant, an employee of the nursing home, was not qualified for his position.

The plaintiff's AOM was prepared by a doctor who was board certified in emergency and internal medicine. The defendant's answer purported he was board certified in the field of geriatric medicine. The defendant filed a motion to dismiss, arguing the plaintiff's expert was not qualified to render an AOM under the PFA requiring identical specialties. The defendant's counsel submitted a certification, exhibit, and brief in support of dismissal. The lower court granted the motion and dismissed the plaintiff's complaint with prejudice.

On appeal, the defendant conceded the trial court ordered dismissal based on false information. The defendant was not board certified when he treated the plaintiff's mother. Because the lower court relied upon defense counsel's certification, mistakenly verifying the defendant's credentials, the Appellate Division recognized that the complaint was dismissed on incompetent evidence. The court recognized that extraordinary circumstances were present due to the defendant's faulty statements. As such, the court excused the plaintiff's failure to comply with the PFA in regard to his expert's AOM. Thus, the complaint did not warrant dismissal with prejudice.

Conclusion

As stated above, it is now more important than ever that plaintiffs identify early in the litigation process whether the defendant claims to be a specialist in

a certain area, and whether he or she claims the negligence involves that area of medicine. Practitioners must make sure they know the answers to these questions and that they hire experts who specialized in the same field at the time the negligence occurred. Plaintiffs can no longer simply rely on the New Jersey Physician's Profile website with the secretary of state[18] to determine defendants' board certifications, and then find experts with the same certifications.

Plaintiffs should demand in their complaints that defendants comply with the requirement, as stated in *Buck v. Henry*, that they include in their answer "the field of medicine in which they specialized, if any, and whether their treatment of the plaintiff involved that specialty."[19] Plaintiffs must make sure they have equivalently credentialed experts who were actively specializing in the same specialty at the time of the negligence, or risk having their cases dismissed.

If the primary purpose of the AOM is to weed out meritless cases by ensuring they are only brought based upon the testimony of qualified experts, than it seems to the author that the rationale behind the PFA and the court's strict enforcement of it may be flawed. The idea that the standards of care applicable to all medical procedures somehow change based on the qualifications of the doctors performing them appears questionable at best. The needless additional expense associated with this credential matching, as well as the substantial risk of non-compliance, leads one to question whether the Patients First Act is aptly named. ⚖

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ENDNOTES

1. N.J.S.A. 2A:53A -27.
2. *Id.*
3. N.J.S.A. 2A:53A-38, *et seq*.
4. *Id.*
5. *Buck v. Henry,* 207 N.J. 377 (2011).
6. *Id*. at 22.
7. *Carr v. Our Lady of Lourdes Medical, No.* A-0143-13T2, 2014 WL 9910476, *1-2 (App. Div. 2015).
8. *Id.* at *6.
9. *Nicholas v. Mynster*, 213 N.J. 463 (2013).
10. *Carr*, *supra*, 2014 WL 9910476, at *8.
11. *Meehan v. Antonellis*, No. A-0140-13T4, 2014 WL 5800811 (App. Div. Aug. 21, 2014).
12. *Medina v. Pitta*, 442 N.J. Super. 1 (App. Div. 2015).
13. *Nunez v. St. Mary's Hospital,* No. A-0014-13T1, 2014 WL 6634659 (App. Div. Nov. 25, 2014).
14. *See* requirement that AOM be served 60 days from date of filed answer under N.J.S.A. 2A:53A-27 *et seq.*
15. *Oh v. Kang,* No. A-1984-13T1, 2014 WL 8103788 (App. Div. March 12, 2015).
16. N.J.S.A. 2A:53A-27 *et seq.*
17. *Mazur v. Crane's Mill Nursing Home*, 441 N.J. Super. 168 (2015).
18. Available at http://www.njdoctorlist.com.
19. *Id*. at 22.