

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5403-14T4

RONALD C. DE LAROCHE,

Plaintiff-Appellant,

v.

ADVANCED LAPAROSCOPIC ASSOCIATES
and DR. HANS J. SCHMIDT,

Defendants-Respondents.

Argued November 10, 2016 – Decided February 28, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-
9381-14.

Louis J. Santore argued the cause for
appellant.

Walter F. Kawalec, III, argued the cause for
respondents (Marshall Dennehey Warner Coleman
& Goggin, attorneys; Mr. Kawalec and Michael
S. Levenson, on the brief).

PER CURIAM

Plaintiff Ronald C. De Laroche appeals from two June 26, 2015
Law Division orders. The first order granted defendants' motion
to dismiss plaintiff's medical malpractice complaint for failure

to comply with the Affidavit of Merit Statute (AMS), N.J.S.A. 2A:53A-26 to -29. The second order denied plaintiff's cross-motion for a waiver of the specialty requirement of N.J.S.A. 2A:53A-41(a).

For the reasons that follow, we affirm the motion court's denial of plaintiff's cross-motion for a waiver of the specialty requirement, based upon its determination that plaintiff's proposed expert lacked active involvement in the area of medicine at issue in the case, as required by N.J.S.A. 2A:53A-41(c). However, in light of the motion court's finding plaintiff made "a good faith effort" to file an affidavit of merit (AOM) from an appropriate expert, and the absence of a timely Ferreira¹ conference, we conclude the motion court mistakenly exercised its discretion when it dismissed plaintiff's complaint with prejudice. We therefore vacate the dismissal order and remand this matter to the Law Division to afford plaintiff a reasonable opportunity to obtain an AOM from a qualified substitute expert.

¹ In Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003), our Supreme Court determined that "a 'case management conference [shall] be held within ninety days of the service of an answer in all malpractice actions' . . . [where] a 'defendant [is] required to advise the court whether he has any objections to the adequacy of the affidavit' that has been served on him." Buck v. Henry, 207 N.J. 377, 394 (2011) (quoting Ferreira, supra, 178 N.J. at 154-55); see also Meehan v. Antonellis, 226 N.J. 216, 221 (2016) (reinforcing the importance of such a conference).

I.

On April 16, 2013, plaintiff underwent an evaluation by neurologist Stuart W. Fox, M.D., who described plaintiff as "a 40-year-old gentleman with a severe peripheral neuropathy[,] which is slowly improving." According to Dr. Fox:

In October 2012, [plaintiff] underwent a gastric sleeve procedure² for treatment of obesity. He was recovering well until the early portion 2013 when he began to experience nausea, vomiting and rapid weight loss. Then in late January/early February[,] he had a rapid development of limb weakness, worse in the lower extremities. He also developed cognitive difficulties. He was admitted to Hackensack University Medical Center. An extensive diagnosis evaluation was undertaken including MRIs of the brain, cervical spine, thoracic spine, lumbar puncture, extensive bloodwork and, as he recalls, nerve conduction velocity/EMG studies.

. . . .

Eventually it was determined that his clinical picture was consistent with acute thiamine deficiency. He was begun on nutritional replacement and was eventually discharged to Holly Manor. He has been making slow but

² According to The Merck Manual, in a sleeve gastrectomy, "[p]art of the stomach is removed, making the stomach into a narrow tube (sleeve). The small intestine is not altered." Adrienne Youdim, Bariatric Surgery, Merck Manual: Consumer Version, <https://www.merckmanuals.com/home/disorders-of-utrition/obesity-and-the-metabolic-syndrome/bariatric-surgery> (last visited Feb. 9, 2017). "Vitamins and minerals (such as vitamins B₁₂ and D, calcium, and iron) may not be absorbed as well after the surgery. Thiamin deficiency can occur if vomiting continues for a long time." Ibid.

steady progress in physical therapy but still has a long way to go.

Dr. Fox made a "diagnosis of severe peripheral neuropathy, likely on a nutritional basis."

On October 7, 2014, plaintiff filed a complaint against defendants alleging he suffered "severe injuries" as the result of "a gastric sleeve or sleeve gastrectomy" performed by defendant Dr. Hans J. Schmidt. The complaint alleged Dr. Schmidt negligently treated plaintiff "in the performance of the surgical procedure" on October 8, 2012, and then negligently provided post-surgical care, including the failure to perform an EMG and failure "to include instructions to treat thiamine³ deficiency and to avoid severe peripheral neuropathy."

Defendants filed their answer on November 7, 2014, stating Dr. Schmidt specialized in "surgery and bariatric surgery." On March 3, 2015, plaintiff filed an AOM from Angelo A. Caprio, M.D. In his AOM, Dr. Caprio stated he was a licensed physician in New Jersey and had been board certified in Medical Quality for more than five years. Dr. Caprio further stated, "Based upon the records which I have reviewed and/or the facts of this matter, there is a reasonable probability that the care, skill and knowledge exercised or exhibited in the treatment of [plaintiff]

³ Thiamine is commonly referred to as vitamin B₁. Webster's New Collegiate Dictionary 1202 (1981).

by Dr. Hans J. Schmidt fell outside professional treatment standards, particularly with post-operative care."

On March 9, 2015, defendants sent a letter objecting to the AOM, asserting "it fails to meet the requirements of the [AMS]." The next week, plaintiff sent the trial court a letter requesting a Ferreira conference to address defendants' objections to the AOM. The court scheduled the conference for April 21, 2015. When plaintiff's counsel failed to appear at the conference,⁴ the court rescheduled the conference for May 19, 2015. On April 24, 2015, notwithstanding the rescheduling, defendants filed a motion to dismiss plaintiff's complaint for failure to file an AOM.

On June 18, 2015, plaintiff filed a motion for waiver under N.J.S.A. 2A:53A-41(c). Plaintiff's counsel certified he made a good-faith effort to obtain an expert in the field, but six doctors "refused to become an expert and testify against this [d]efendant." He related that one doctor refused because she knew Dr. Schmidt, while another said "he was not currently doing any expert legal work." He further certified,

12) Most of the other doctors indicated they did not want to be an expert in this particular case.

. . . .

⁴ Plaintiff's counsel certified his office received no notice of the conference.

16) . . . [T]hat at least seven doctors refused to become experts not only supports the good faith effort[,] it also calls into question why so many would not even review the medicals after learning the name of the [d]efendant.

In a May 27, 2015 certification, Dr. Caprio stated he "began performing bariatric surgery in the mid-1980[is]," and a hospital credentialed him to perform the surgeries. He further asserted, "There were no boards at that time."⁵ Dr. Caprio began "performing bariatrics laparoscopically" in 2002, including the "sleeve procedure." He described himself as "familiar with the instructions given to patients undergoing bariatric surgery" and "fully familiar with the nutritional requirements of the surgery, including the thiamine requirement." In total, he had "performed at least seventy-five (75) bariatric surgeries[,] both open and laparoscopic." He also "taught residents and medical students at St. Mary's Hospital, currently Hoboken University Medical Center, from 1985 up to 2014."

On June 26, 2015, the trial court heard oral argument on the cross-motions. Although defendants' counsel acknowledged the American Board of Medical Specialties did not recognize

⁵ According to the American Board of Surgery, "[s]ince 1976, the [board] has issued time-limited certificates that must be renewed every 10 years." About Us, Am. Bd. of Surgery, <http://www.absurgery.org/default.jsp?abouthome> (last visited Feb. 9, 2017).

laparoscopic surgery as a sub-specialty, he argued plaintiff still needed to provide an AOM from a board certified general surgeon.

And beyond that, the expert that you do proffer has to be qualified to offer an opinion against the defendant. Here, the expert that they have served the [AOM] from is not . . . a practicing general surgeon or a bariatric surgeon, he holds an administrative position, he's held administrative positions for several years.

. . . .

This is a guy who[se] own C.V. boasts I've joined the corporate world, and he's been in the corporate world for several years. He is not a bariatric surgeon, he doesn't have the qualifications to opine against a board certified surgeon who specializes in bariatric surgery in this matter.

Plaintiff's counsel argued that he had made good faith efforts, albeit unsuccessfully, to obtain an AOM from a qualified board certified surgeon. He then argued that the court should find Dr. Caprio qualified under the waiver provision, N.J.S.A. 2A:53A-41(c).

The trial court rejected plaintiff's argument and dismissed his complaint with prejudice. It reasoned,

In Ryan v. Renny, 203 [N.J.] 37 (2010), our Supreme Court interpreted the language "active involvement" as "opening the door for physicians and professors who had actively practiced in the relevant field or a related one, but who had retired or moved into a different area of specialization, to serve as experts under the waiver provision." 203 [N.J.] 59. The trial judge, however, must

still assess an expert's qualifications under the waiver provision, and the passage of time is certainly a proper consideration. Id. at 60.

Although the court concluded plaintiff made "a good faith effort" to identify an expert in the same specialty or subspecialty, the court was not convinced Dr. Caprio was sufficiently qualified to satisfy the requirements of N.J.S.A. 2A:53A-41(c).

With regard to the second prong – whether Dr. Caprio possesses sufficient training, experience and knowledge to provide the testimony – the [c]ourt is convinced that such a showing has not been made. . . . Dr. Caprio's entire curriculum vitae paints the picture of a corporate hospital administrator, not a bariatric surgeon. Dr. Caprio is currently vice president of physician business development at CarePoint Health Systems.

The court also noted Dr. Caprio's two previous positions were administrative. Although he certified he had performed seventy-five bariatric procedures, he did not state he had performed one more recently than 2004 or how many were laparoscopic sleeve gastrectomies. The court therefore concluded, "In sum, while Dr. Caprio appears to be a highly qualified hospital administrator, he has not demonstrated sufficient training and experience to testify against Dr. Schmidt in the field of bariatric surgery."

The court then entered the orders under review. This appeal followed, with plaintiff first arguing the trial court abused its

discretion when it failed to properly consider Dr. Caprio's knowledge of the nutritional necessity regarding post-surgical treatment and the post-operative instructions patients should receive. Alternatively, plaintiff argues the motion court mistakenly exercised its discretion when it dismissed his complaint without affording plaintiff additional time to obtain an AOM from a qualified expert.

II.

This court applies "a plenary standard of review from a trial court's decision to grant a motion to dismiss pursuant to Rule 4:6-2(e)." Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div.) (citation omitted), certif. denied, 208 N.J. 366, 368 (2011). "[A] motion to dismiss pursuant to Rule 4:6-2(e) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." Smerling v. Harrah's Entm't, Inc., 389 N.J. Super. 181, 186 (App. Div. 2006). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

N.J.S.A. 2A:53A-27 states:

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.

In a professional malpractice case, the plaintiff must therefore file an affidavit of merit no later than 120 days after the defendant files his answer. "If the plaintiff fails to provide an affidavit or a statement in lieu thereof, pursuant to section 2 or 3 of this act, it shall be deemed a failure to state a cause of action." N.J.S.A. 2A:53A-29.

"The core purpose underlying the [AMS] is 'to require plaintiffs . . . to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of the litigation.'" Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 426 (2010) (quoting In re Petition of Hall, 147 N.J. 379, 391 (1997)).

Enacted in 2004 pursuant to the Patients First Act, the Legislature directed that in a medical malpractice action:

[A] person shall not give expert testimony or execute an affidavit . . . 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:

a. If the party against whom or on whose behalf the testimony is offered is 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 recognized by the American Board of Medical Specialties or the American Osteopathic Association, the person providing the testimony shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty, recognized by the American Board of Medical Specialties or the American Osteopathic Association, as the party against whom or on whose behalf the testimony is offered, and if the person against whom or on whose behalf the testimony is being offered is board certified and the care or treatment at issue involves that board specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association, the expert witness shall be:

(1) a physician credentialed by a hospital to treat patients for the medical condition, or to perform the procedure, that is the basis for the claim or action; or

(2) a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association who is board certified in the same

specialty or subspecialty, recognized by the American Board of Medical Specialties or the American Osteopathic Association, and during the year immediately preceding the date of the occurrence that is the basis for the claim or action, shall have devoted a majority of his professional time to either:

(a) the active clinical practice of the same health care profession in which the defendant is licensed, and, if the defendant is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association, the active clinical practice of that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association; or

(b) the instruction of students in an accredited medical school, other accredited health professional school or accredited residency or clinical research program in the same health care profession in which the defendant is licensed, and, if that party is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association, an accredited medical school, health professional school or accredited residency or clinical research program in the same specialty or subspecialty recognized by the

American Board of Medical
Specialties or the American
Osteopathic Association; or

(c) both.

[N.J.S.A. 2A:53A-41(a).]

"The basic principle behind N.J.S.A. 2A:53A-41 is that 'the challenging expert' who executes an affidavit of merit in a medical malpractice case, generally should 'be equivalently-qualified to the defendant' physician." Buck, supra, 207 N.J. at 389 (quoting Ryan v. Renny, 203 N.J. 37, 52 (2010)).

To assist plaintiffs with this requirement, "a physician defending against a malpractice claim (who admits to treating the plaintiff) must include in his [or her] answer the field of medicine in which he [or she] specialized, if any, and whether his [or her] treatment of the plaintiff involved that specialty." Id. at 396. "To staunch the flow of dismissal motions based on claims of non-compliance with the [AMS]," the Court "required that 'a case management conference be held within ninety days of the service of an answer' at which the professional defendant would raise 'any objections to the adequacy of the affidavit' served by the plaintiff." Id. at 382 (quoting Ferreira, supra, 178 N.J. at 154-55). "The Ferreira conference is intended to resolve questions concerning the propriety of an affidavit [of merit] before the end

of the statutory time limit so that otherwise worthy causes of action are not needlessly dismissed." Id. at 383.

At issue in the New Jersey Supreme Court's 2013 decision in Nicholas v. Mynster, 213 N.J. 463, 467 (2013), was whether plaintiffs' expert, a board-certified physician in internal and preventive medicine, was authorized to testify to the standard of care applicable to the treatment of carbon monoxide poisoning in a medical malpractice lawsuit against defendant-physicians who were board certified in emergency medicine and family medicine. The Court stated:

No one disputes that physicians practicing in all four of these specialty areas may treat carbon monoxide poisoning. However, there is no statutory exception – other than the waiver provision of N.J.S.A. 2A:53A-41(c) – that permits a physician specializing in internal and preventive medicine to serve as an expert witness against a physician specializing in emergency or family medicine, even though each is qualified to treat a patient for carbon monoxide poisoning.

[Id. at 484.]

The Court held, "Under a plain textual reading of the [Patients First] Act, plaintiffs cannot establish the standard of care through an expert who does not practice in the same medical specialties as defendant physicians." Id. at 468.

The waiver provision of N.J.S.A. 2A:53A-41 states:

A court may waive the same specialty or subspecialty recognized by the American Board

of Medical Specialties or the American Osteopathic Association and board certification requirements of this section, upon motion by the party seeking a waiver, if, after the moving party has demonstrated to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty, the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine.

[N.J.S.A. 2A:53A-41(c) (emphasis added).]

In comparison to N.J.S.A. 2A:53A-41(a) and (b), the waiver provision lacks a temporal limitation. Ryan, supra, 203 N.J. at 58-59. Instead, the provision states the expert must "have sufficient training, experience, and knowledge derived 'as a result of' – that is, as a consequence of or flowing from prior 'active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field[.]'" Id. at 59 (alteration in original) (quoting N.J.S.A. 2A:53A-41(c)). "Thus it approached the qualifications issue expansively, opening the door for physicians and professors who had actively practiced in the relevant field or a related one, but who had retired or moved into a different area of specialization, to serve as experts under the waiver provision." Ibid. Nonetheless, "in the exercise of discretion in a waiver case, the trial court may take into account the passage of time and its relationship to the expert's

qualifications." Id. at 60. For example, if a party shows the defendant's practice area has "undergone a sea-change over time due to developments that have occurred since the expert was trained and actively practiced in the field, the judge may well consider that factor in evaluating the expert's qualifications." Ibid. "In the final analysis, it is within the broad discretion of the trial judge to determine whether a particular witness's knowledge, experience, and training warrant his service as an expert under the waiver provision." Ibid.

In Ryan, the Court inferred the trial court had properly considered these principles. Ibid. It found the expert "had performed colonoscopies in the past, that present performance of colonoscopies is not a requirement of the statute, and, based on his present practice, that [the plaintiff's expert] was 'actively involved' in the 'treatment, diagnosis and evaluation of colon and bowel abnormalities and diseases.'" Ibid. The plaintiff's expert "published in the area of gastroenterology since the 1960s. His deposition testimony indicate[d] that he [had] performed more than 100 colonoscopies, the last one 'several years' prior to 2004. Also, [the plaintiff's expert] certified that he [had] been a board-certified general surgeon since 1966." Id. at 46. He also certified, "I have continually been involved with treatment, diagnosis and evaluation of colon and bowel abnormalities and

diseases. Although I do not perform colonoscopies at the present time, I continually have involvement in injuries, conditions and diseases of the bowel and related areas." Ibid. The trial court therefore concluded the doctor was qualified to execute an affidavit of merit for a medical malpractice claim concerning a "routine colonoscopy." Id. at 43, 60.

We first address plaintiff's argument the trial court abused its discretion when it concluded Dr. Caprio was not qualified to execute an AOM in this case. Although plaintiff correctly states Dr. Caprio is a surgeon and has taught residents, plaintiff overlooks Dr. Caprio's extended period without an active medical practice and his failure to state what he taught residents and medical students.⁶ Dr. Caprio certified he had performed at least seventy-five bariatric surgeries, but he did not state how many were gastric sleeve procedures, and his curriculum vitae suggested he had not performed surgery since 2004. Additionally, his last three professional positions were as a hospital administrator.

Unlike the expert in Ryan, supra, 203 N.J. at 46, Dr. Caprio has not published in defendants' area of practice, and he has never been a board-certified general surgeon. Even more

⁶ In his certification, Dr. Caprio stated, "I taught residents and medical students at St. Mary's Hospital, currently Hoboken University Medical Center, from 1985 up to 2014."

importantly, the record does not show he was treating surgical patients at or near the time of plaintiff's surgery, let alone patients with plaintiff's medical issues. The court properly considered Dr. Caprio's lack of recent experience when it analyzed whether he had the knowledge, experience, and training necessary to execute an affidavit of merit against defendants. Id. at 60.

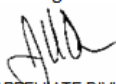
Here, there is a sufficient basis in the record to support the trial court's determination that Dr. Caprio lacked "sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine." N.J.S.A. 2A:53A-41(c). We therefore affirm the order denying plaintiff's application for a specialty waiver for Dr. Caprio.

Notwithstanding our affirmance of the motion court on the waiver issue, given the circumstances here – the motion court finding plaintiff made "a good faith effort" to file an affidavit of merit (AOM) from an appropriate expert, coupled with the absence of a timely Ferriera conference – we conclude it is inequitable not to afford plaintiff an opportunity to obtain a substitute AOM from another expert. See Hill Int'l Inc. v. Atl. City Bd. of Educ., 438 N.J. Super. 562, 594-95 (App. Div. 2014) (affording plaintiff time to obtain a replacement AOM where the pertinent specialty was a reasonable source of confusion), appeal dismissed,

224 N.J. 523 (2016). We therefore vacate the order dismissing plaintiff's complaint with prejudice and remand the case for that purpose. On remand, the Law Division shall hold a case management conference within forty-five days.

Affirmed in part, and vacated and remanded in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION