

Medical Malpractice

Good-Faith Effort and the Affidavit of Merit

The Supreme Court looks at waiving requirements for experts in medical malpractice cases

By Jane S. Kelsey

The affidavit-of-merit statute was amended in 2004 to provide that experts in medical malpractice matters must be specialists or subspecialists in the same area of medicine as the defendant who rendered the care and treatment at issue. It was also required that the expert must treat patients for the medical condition, or perform the same procedure, that is the basis for the malpractice claim.

The statute contains a waiver provision, however, at N.J.S.A. 2A:53A-41 (c). If upon motion it can be demonstrated that a good-faith effort was made to identify such an expert, and that the party's efforts have been unsuccessful, and if it can be shown that the proposed expert witness nonetheless possesses sufficient training, experience and knowledge to provide the testimony thanks to active involvement in or full-time teaching of

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medicine in the applicable area or a related field of medicine, the court will grant a waiver.

In *Ryan v. Renny*, 203 N.J. 37 (2010), the Supreme Court addressed the issue of the waiver provision, and whether the notion of a "good faith effort" required the moving party to provide a substantive explanation as to why the experts who were contacted in the defendant's field of medicine refused to supply the plaintiff with an affidavit of merit.

The underlying facts of the case are as follows. In January 2007, Dr. Andrew Renny performed a routine colonoscopy on the plaintiff, Abby Ryan, resulting in a perforated colon. Ryan brought suit, claiming that the doctor had deviated from the accepted standards of practice. Dr. Renny was a board-certified gastroenterologist and internist. Plaintiff's counsel contacted three board-certified gastroenterologists but was unable to obtain an affidavit of merit from any of them. He was ultimately able to obtain the affidavit from Dr. David Befeler, a general surgeon. While Befeler was not board certified in gastroenterology, he testified at his deposition that he had performed over 100 colonoscopies, the last one being performed in 2004.

Dr. Renny objected to the affidavit on the ground that it did not issue from a board-certified gastroenterologist. A *Ferreira* conference was held (*Ferreira*

v. Rancocas Orthopedic Assoc., 178 N.J.144 (2003)), during which Ryan conceded that she had not been able to procure an affidavit from a gastroenterologist, but the dispute remained unresolved following the conference. After the 120-day time period for providing an affidavit of merit expired, the defendant moved to dismiss the complaint with prejudice based on the plaintiff's failure to submit an affidavit meeting the specialty criteria of N.J.S.A. 2A:53A-41(a). Ryan filed a cross-motion for a waiver pursuant to N.J.S.A. 2A:53A-41(c). Significantly, while Ryan's counsel certified to his good-faith but unsuccessful efforts to provide an affidavit of merit, he did not provide any reasons for why the experts he contacted declined to provide him with the affidavit.

The defendant contended at oral argument that Ryan had not demonstrated that a good-faith effort had been made, based on the failure to explain why the experts who were contacted declined to take the case, and that, absent an explanation, the court may infer that Ryan's claim lacked merit. The defendant also argued that Dr. Befeler was not qualified to render an opinion on the case since he was not actively performing colonoscopies at the time of the incident in question.

The trial court granted Ryan's motion for a waiver of the specialty requirements, holding that the plaintiff did not have to explain why his efforts to obtain a board-certified gastroenterologist were unsuccessful, and concluding that Ryan's counsel had satisfied the good-faith effort requirement under the

statute. The trial court was also satisfied that Dr. Befeler was “actively involved” even though he no longer performed colonoscopies, because he had performed numerous colonoscopies in the past and because of his current involvement with diagnosis and evaluation of bowel abnormalities and diseases.

The Appellate Division reversed on the ground that Ryan had not made a good-faith effort, pointing to the absence of an explanation as to why the three prior experts had turned down the case. The court’s reasoning centered upon its apparent belief that if a plaintiff could not obtain an affidavit from an equivalently qualified expert, then the case was not meritorious.

The New Jersey Supreme Court granted Ryan’s petition for certification. The case presented the Court with the opportunity to clarify the waiver provision and to address the issue of whether showing a “good faith effort” requires a substantive explanation as to why experts refused to supply an affidavit of merit. Ryan argued that the plain language of the waiver provision does not impose on the moving party the burden of explaining why an expert in the relevant specialty could not be procured. Dr. Renny argued that if the experts turned plaintiff down because they did not find a deviation from accepted standard of care had occurred, plaintiff should not be permitted a substitute expert because that would allow a specious claim to survive. The Supreme Court disagreed with Dr. Renny.

The Court found that Dr. Renny’s position did not accord with the plain language of the waiver provision, which directs judges to focus on the “effort” the moving party made to obtain a statutorily-authorized expert and not on the reasons why a particular expert or experts declined to execute an affidavit. In proving that a good-faith effort was made, the court will look to such things as the number of experts that the party contacted, whether the search was expanded geo-

graphically, and any case-specific roadblocks. However, the expert’s reasons for declining to get involved will not bear on the “robustness” of the party’s efforts.

The Court also rejected Dr. Renny’s argument that the “active involvement” requirement of the statute was not met, because Dr. Befeler was no longer actively performing colonoscopies at the time of the plaintiff’s colonoscopy. The waiver provision prescribes that a proposed expert must possess “sufficient training, expertise 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.” The Court interpreted that language as a broad grant of discretion to the trial judge, which does not include a requirement that the proposed expert be engaged in performing the medical procedure at issue on the date of the occurrence underlying the claim. Other nonwaiver provisions within the statute do set out such temporality requirements in their plain language, and thus the Court concluded that the omission here was intentional on the part of the Legislature. The Court recognized that the waiver may be the last chance for a plaintiff to meet the affidavit of merit requirement and avoid dismissal.

The Court cautioned, however, that this is not to suggest that the passage of time may not bear on a judge’s assessment of an expert’s qualifications under the waiver provision. The trial court may take into account, in its exercise of discretion, the passage of time and its relationship to the expert’s qualifications. For instance, the court may consider if practice in a particular medical field has “undergone a sea-change over time due to developments that have occurred since the expert was trained and actively practiced in the field.”

Here, while recognizing that the trial court qualified Dr. Befeler as an expert under the waiver provision, and while it appeared from the record that the trial

court took into account the foregoing discussion in reaching his conclusions, the Supreme Court remanded the matter back to the trial court for further consideration, in an abundance of caution and in light of its opinion.

The Court recognized that, in the final analysis, it is within the broad discretion of the trial judge to determine whether a particular witness’s knowledge, training and expertise will allow for his service as an expert under the waiver provision of the statute.

As a result of this decision, practitioners should still employ due care to retain experts, whenever possible, in the same area of medical specialty as the defendant and with the same board certifications. Attorneys should also carefully question their proposed experts to ascertain that they actively perform the procedure in question, or actively treat the condition which is the subject of the case, and that there have been no significant “sea-changes” in that particular field of medicine, since they last performed the procedure or treated the condition.

If an attorney is unsure of the particular credentials of the named defendant, she should serve requests for admissions along with the complaint. With today’s technology, however, the Internet can provide a significant amount of background information on a party, and often hospital departments will post detailed CVs of their attending and staff physicians.

Justice Rivera-Soto, in his dissent to the opinion in *Ryan v. Renny*, was particularly troubled by the fact that the subject of the sufficiency of the affidavit of merit was discussed at a *Ferreira* conference, but that plaintiff’s counsel did not cross-move for a waiver of the board certification requirements until well past the 120 days allowed under the affidavit-of-merit statute. If, after “good faith efforts” have been exhausted, it is recognized that a waiver is needed, this motion should be timely made. ■