

ASSEMBLY, No. 3620

STATE OF NEW JERSEY
217th LEGISLATURE

INTRODUCED APRIL 14, 2016

Sponsored by:

Assemblywoman NANCY J. PINKIN

District 18 (Middlesex)

SYNOPSIS

Revises affidavit of merit requirement in professional malpractice cases.

CURRENT VERSION OF TEXT

As introduced.



1 AN ACT concerning professional malpractice and amending
2 P.L.1995, c.139 and P.L.2004, c.17.

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4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

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7 1. Section 2 of P.L.1995, c.139 (C.2A:53A-27) is amended to
8 read as follows:

9 2. In any action for damages for personal injuries, wrongful
10 death or property damage resulting from an alleged act of
11 malpractice or negligence by a licensed person in his profession or
12 occupation, the plaintiff shall, **[within 60 days following the date]**
13 at the time of filing **[of the answer to]** the complaint **[by the**
14 **defendant]** , provide each defendant, including any business entity
15 named as a defendant, with an affidavit of an appropriate licensed
16 person that there exists a reasonable probability that the care, skill
17 or knowledge exercised or exhibited in the treatment, practice or
18 work that is the subject of the complaint, fell outside acceptable
19 professional or occupational standards or treatment practices. The
20 affidavit shall include a specific articulation of the duty of care
21 allegedly breached and the conduct that constituted that breach, and
22 shall provide the basis for identifying that duty, which shall not
23 limit or preclude supplementation of the areas of alleged deviation
24 in any subsequent formal expert report. The court may grant no
25 more than one additional period, not to exceed 60 days, to file the
26 affidavit pursuant to this section, upon a finding of good cause.

27 In the case of an action for medical malpractice, the person
28 executing the affidavit shall meet the requirements of a person who
29 provides expert testimony or executes an affidavit as set forth in
30 section 7 of P.L.2004, c.17 (C.2A:53A-41). In all other cases, the
31 person executing the affidavit shall be licensed in this or any other
32 state; have particular expertise in the general area or specialty
33 involved in the action, as evidenced by board certification or by
34 devotion of the person's practice substantially to the general area or
35 specialty involved in the action for a period of at least five years.
36 The person shall have no financial interest in the outcome of the
37 case under review, but this prohibition shall not exclude the person
38 from being an expert witness in the case.

39 (cf: P.L.2004, c.17, s.8)

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41 2. Section 7 of P.L.2004, c.17 (C.2A:53A-41) is amended to
42 read as follows:

43 7. In an action alleging medical malpractice, a person shall not
44 give expert testimony or execute an affidavit pursuant to the
45 provisions of P.L.1995, c.139 (C.2A:53A-26 et seq.) on the
46 appropriate standard of practice or care unless the person is licensed

EXPLANATION – Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 as a physician or other health care professional in the United States
2 and meets the following criteria:

3 a. If the party against whom or on whose behalf the testimony
4 is offered is a specialist or subspecialist recognized by the
5 American Board of Medical Specialties or the American
6 Osteopathic Association and the care or treatment at issue involves
7 that specialty or subspecialty recognized by the American Board of
8 Medical Specialties or the American Osteopathic Association, the
9 person providing the testimony shall have specialized at the time of
10 the occurrence that is the basis for the action in the same specialty
11 or subspecialty, recognized by the American Board of Medical
12 Specialties or the American Osteopathic Association, as the party
13 against whom or on whose behalf the testimony is offered, and if
14 the person against whom or on whose behalf the testimony is being
15 offered is board certified and the care or treatment at issue involves
16 that board specialty or subspecialty recognized by the American
17 Board of Medical Specialties or the American Osteopathic
18 Association, the expert witness shall be:

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

22 (2) a specialist or subspecialist recognized by the American
23 Board of Medical Specialties or the American Osteopathic
24 Association who is board certified in the same specialty or
25 subspecialty, recognized by the American Board of Medical
26 Specialties or the American Osteopathic Association, and during the
27 year immediately preceding the date of the occurrence that is the
28 basis for the claim or action, shall have devoted a majority of his
29 professional time to either:

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

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

47 (c) both.

1 b. If the party against whom or on whose behalf the testimony
2 is offered is a general practitioner, the expert witness, during the
3 year immediately preceding the date of the occurrence that is the
4 basis for the claim or action, shall have devoted a majority of his
5 professional time to:

6 (1) active clinical practice as a general practitioner; or active
7 clinical practice that encompasses the medical condition, or that
8 includes performance of the procedure, that is the basis of the claim
9 or action; or

10 (2) the instruction of students in an accredited medical school,
11 health professional school, or accredited residency or clinical
12 research program in the same health care profession in which the
13 party against whom or on whose behalf the testimony is licensed; or

14 (3) both.

15 c. A court may waive the same specialty or subspecialty
16 recognized by the American Board of Medical Specialties or the
17 American Osteopathic Association and board certification
18 requirements of this section, upon motion by the party seeking a
19 waiver, if **],** after the moving party has demonstrated to the
20 satisfaction of the court that a good faith effort has been made to
21 identify an expert in the same specialty or subspecialty, **]** the
22 moving party has demonstrated extraordinary circumstances, the
23 court has determined that an appropriate expert otherwise would not
24 be available, and the court determines that the proposed expert
25 possesses sufficient training, experience and knowledge to provide
26 the testimony as a result of active involvement in, or full-time
27 teaching of, medicine in the applicable area of practice or a related
28 field of medicine.

29 d. Nothing in this section shall limit the power of the trial court
30 to disqualify an expert witness on grounds other than the
31 qualifications set forth in this section.

32 e. In an action alleging medical malpractice, an expert witness
33 shall not testify on a contingency fee basis.

34 f. An individual or entity who threatens to take or takes
35 adverse action against a person in retaliation for that person
36 providing or agreeing to provide expert testimony, or for that
37 person executing an affidavit pursuant to the provisions of
38 P.L.1995, c.139 (C.2A:53A-26 et seq.), which adverse action relates
39 to that person's employment, accreditation, certification,
40 credentialing or licensure, shall be liable to a civil penalty not to
41 exceed \$10,000 and other damages incurred by the person and the
42 party for whom the person was testifying as an expert.

43 (cf: P.L.2004, c.17, s.7)

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45 3. This act shall take effect immediately.

STATEMENT

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Current law requires, 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 to 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. This is commonly referred to as the “affidavit of merit.” This bill revises the affidavit of merit requirement to provide that the affidavit must be filed at the time the plaintiff files the complaint, instead of within 60 days following the date of the filing of the answer to the complaint by the defendant. The bill also requires that the affidavit include a specific articulation of the duty of care allegedly breached and the conduct that constituted that breach, and shall provide the basis for identifying that duty.

The bill also, in medical malpractice cases, revises the circumstances under which a court may waive the same specialty or subspecialty requirements of Section 7 of P.L.2004, c.17 (C.2A:53A-41). That section of law currently provides that, in an action alleging medical malpractice, a person shall not give expert testimony or execute an affidavit of merit 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 certain criteria. One of those criteria is that, if the party against whom or on whose behalf the testimony is offered is a specialist or subspecialist 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 that is the basis for the action in the same specialty or subspecialty as the party against whom or on whose behalf the testimony is offered. This requirement can be waived if the moving party demonstrates to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty and 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.

This bill provides that the specialty or subspecialty requirement can be waived upon motion by the party seeking a waiver, if the moving party has demonstrated extraordinary circumstances, the court has determined that an appropriate expert otherwise would not be available, and the court determines that the proposed expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time

1 teaching of, medicine in the applicable area of practice or a related
2 field of medicine. The bill removes the requirement that the moving
3 party demonstrate to the satisfaction of the court that a good faith
4 effort has been made to identify an expert in the same specialty or
5 subspecialty.

6 The bill also clarifies that, in lawsuits for damages for personal
7 injuries, wrongful death or property damage resulting from an
8 alleged act of malpractice or negligence by a licensed person in his
9 profession or occupation, the affidavit required pursuant to section
10 2 of P.L.1995, c.139 (C.2A:53A-27), in addition to being provided
11 to a defendant that is a "licensed person," must also be provided to
12 a defendant that is a business entity that is also a named defendant
13 in the case.

14 Current law requires that, in professional malpractice cases, an
15 affidavit be filed by an appropriate licensed person that there exists
16 a reasonable probability that the care, skill or knowledge exercised
17 or exhibited in the treatment, practice or work that is the subject of
18 the complaint, fell outside acceptable professional or occupational
19 standards or treatment practices. Various courts have pointed out
20 that the statute is unclear with respect to whether business entities
21 that employ licensed persons also must be provided such an
22 affidavit. These business entities would typically be vicariously
23 liable for the actions of their employees that are licensed persons,
24 but the statute does not explicitly afford these business entities with
25 the protection of the affidavit requirement. While certain courts
26 have decided that the affidavit requirement extends to business
27 entities, this bill would explicitly codify that requirement.