

Understanding the Affidavit of Merit Statute and the Rare Application of the Common Knowledge Exception

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By: Edward F. Beitz and Susan J. Zingone

On May 4, 2020, in *Linda Cowley v. Virtua Health System*, the Supreme Court of New Jersey reversed the judgement of the Appellate Division and held that when a patient removes a nasogastric tube herself and refuses its replacement, the common knowledge exception of the Affidavit of Merit Statute (the Statute) does not apply. Therefore, because the plaintiff failed to submit an affidavit of merit within 60 days of the filing of defendants' answer, the Supreme Court dismissed the plaintiff's complaint with prejudice.

The Statute requires that in medical malpractice actions, plaintiffs must "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 occupation standards or treatment practices." N.J.S.A. 2A:53A-27. The purpose of the Statute is to require plaintiffs to make a showing that their claim is meritorious and to thereby "weed out" frivolous claims. Failure to provide an affidavit is the equivalent of failing to state a cause of action. N.J.S.A. 2A:53A-29. The Statute is not concerned with whether a plaintiff will in fact be able to prove the allegations set forth in the complaint.

The Statute does however have exceptions to the affidavit submission requirement. The common knowledge exception is one that applies in extremely rare circumstances. For example, where the negligence alleged is so readily apparent to anyone of average intelligence, then a plaintiff is not required to submit an affidavit.

In *Cowley*, the plaintiff was diagnosed with gallstones and other medical conditions that required her to undergo surgery. Post operation, one of the plaintiff's physicians submitted an order directing nursing staff to insert a nasogastric tube into the plaintiff in order to deliver medicine, liquids and/or food. The plaintiff removed the tube and her intravenous lines herself and refused replacement. The plaintiff alleged that the defendants did not comply with the physician's order and failed to reinsert the tube, thereby causing her to suffer from post-operative complications.

The defendants demanded an affidavit of merit. The plaintiff did not submit an affidavit, and instead, argued that an affidavit was not required because the common knowledge exception applied. The trial court held that an affidavit was required because a jury needed to determine the standard of care, including procedures and protocols, for nursing staff when a competent adult refuses medical treatment. The Appellate Division reversed the trial court and held that the case involved "an alleged obvious act of omission." Therefore, a layperson could determine that the nursing staff's failure to contact the physician who ordered the tube insertion was a meritorious claim.

The Supreme Court of New Jersey reversed the judgement of the Appellate Division and highlighted the public policy issues surrounding the Appellate Division's ruling. Primarily, if the Appellate Division ruling was permitted to stand, jurors would be authorized to simply speculate that some sort of action should have been taken by the nursing staff, instead of determining what specific action was required in order to comply with the standard of care.

Because a competent adult, such as the plaintiff, is permitted to refuse treatment, medical professionals are forced to balance patient autonomy and their role in providing adequate care. Therefore, the plaintiff should have submitted an affidavit and subsequent expert testimony to inform the jury of the specific procedures a nurse is required to take when a patient refuses nasogastric tube replacement. As such, the Supreme Court of New Jersey dismissed the complaint with prejudice for noncompliance.

If you have questions or would like additional information, contact Edward F. Beitz (beitze@whiteandwilliams.com; 215.864.6277), Susan J. Zingone (zingones@whiteandwilliams.com; 856.317.3650) or another member of the Healthcare Group.

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