NEW JERSEY DEFENSE

NEW JERSEY DEFENSE ASSOCIATION

FALL 2013

PRESIDENT'S MESSAGE

MICHELE G. HAAS, ESQ.

As 2013 comes quickly to an end, I find myself reflecting on the last six months and all of the accomplishments we, as an organization, have had. NJDA launched the electronic version of our Medical Directory for our members to access directly from our website. In order to continue to improve this feature, we ask for your input regarding those physicians listed and also others that you may wish to have included. Please send your suggestions for additions and/or deletions to our Executive Director, Maryanne Steedle, at njda@comcast.net. We also had another very successful Trial College, which was held on October 14, 2013 at the historic Union County Courthouse. I would like to thank Marie Carey and our member instructors for continuing their dedication to educating our members in trial advocacy. I would also like to thank The Honorable William L'E. Wertheimer, J.S.C. (Ret.) for participating again in this program and offering his insights into trial practice. On November 11, 2013, NJDA held our annual Women and the Law seminar at the Hilton Woodbridge and I am happy to say that the large ballroom was packed with both male

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PRESIDENT'S MESSAGE

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and female attorneys. I would like to thank Marie Carey for organizing this seminar which provided valuable insight into issues concerning ethics, the practice of law and work-life balance. Additionally, I'd like to extend sincere thanks also to our speakers: The Honorable Karen M. Cassidy, Assignment Judge, Superior Court of New Jersey, Union County; The Honorable Mary K. Costello, Superior Court of New Jersey, Hudson County; The Honorable Lisa Perez-Friscia, Superior Court of New Jersey, Bergen County; Jae Lee, Esquire, Fishman McIntyre, P.C.; Martha Lynes, Esquire, Chasan, Leyner & Lamparello; and Jeanne Marino, Esquire, Harwood Lloyd. NJDA also co-sponsored our annual auto liability seminar with the Insurance Council of New Jersey (ICNJ) which was held on November 26, 2013. I would like to thank Chad Moore, Esquire and Rob Luthman, Esquire for arranging such an interesting and cutting edge seminar about the use of modern technology to enhance a trial. Yet another day that the large ballroom of the Hilton Woodbridge was filled, this time with both attorneys and insurance professionals. I would like to thank Veritext for their presentation as well as our speakers, Craig Aranow, Esquire, Rebenack, Aranow & Mascolo and Jodi Anne Hudson, Esquire, Connell Foley. Additional thanks to Thaddeus J. Hubert, III, Hoagland, Longo, Moran, Dunst & Doukas, L.L.P. for his interactive and lively seminar on a difficult topic that affects each of us – ethics. Lastly, we partnered with the Young Lawyers section of the New Jersey State Bar Association and the Middlesex County Bar Association for our Holiday Party, which was held on December 10, 2013 at Mike's Courtside in New Brunswick. Despite the snow, I am told that a good time was had by all. I can't wait for 2014 and what the new year will bring! We hope to continue to offer our members content rich and engaging informative seminars. Many thanks to our loyal and new members for all of your participation in NJDA. Please feel free to contact Mario Delano if you would like to submit an article for our publication. I would also like to invite everyone to come to our 48th Annual Convention, which is being held at the luxurious Hyatt Chesapeake Resort & Spa from June 26-29, 2014. I hope to see you there!

Michele Haas

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A LESSON FOR THE DEFENSE ATTORNEY

BY: MICHAEL J. MCCAFFREY, ESQ.*

Several of my friends who are lawyers, and who represent plaintiffs, have told me how much they learned at the lecture of one or another speaker who has taught techniques of trial for a plaintiff's lawyer. In some instances they seem about to have an attack of the vapors, so effused are they with the belief that now, this time, for sure, they really know techniques with which to persuade a jury to give money, big money, to the plaintiff. Wanting greatly and ever to improve his own skills for trial, and being just plain curious about those teachings, your author has distilled some of the super-double-secret techniques that, in my opinion, have been urged at one time or another upon the practitioner who wants the money, and how a defense-minded lawyer may, or may not, wish to apply those techniques or their corollaries:

Plaintiff's attorney should explain to the jury why the plaintiff deserves money. It may come as no great surprise to an experienced defense attorney that an explanation of why the plaintiff does not deserve money should be expressed for the defense.

Plaintiff's attorney should give jurors key phrases to use during deliberations. Johnny Cochran demonstrated that technique, for the defense, in a small case in California, with great success. Defense attorneys should also use "key phrases."

In opening statement plaintiff's attorney should discuss the rule of law and its applicability. Good defense attorneys do that, often with reference to the proposed verdict sheet.

The plaintiff's attorney should speak with a slow and deliberate cadence, using short, declarative sentences. Most good attorneys do that at trial, as do most good speakers, but not all the time. Variations in tone, speed and volume keep people awake and interested.

The jury should be told it is there to fix, to help, or to make up for injury. Probably most alert defense attorneys would object to such a statement and ask the judge to cure the effect of such an emotional appeal by informing the jury that its task is to find facts and to render a fair and reasonable verdict. If the plaintiff can tell the jury that it is there to fix things and help the plaintiff then the defense may tell the jury that it is there to help the defendant put behind him or her the worry and burden imposed by years of frivolous litigation.

Identify the bad conduct, because juries give more money for bad conduct than for an accident. A corollary for defense attorneys is, obviously, to inform the jury in various ways that the event in question was an accident and is regretted much by the nice, remorseful-victim-of-circumstances defendant.

Show the jury that plaintiff deserves money and is a nice person. Of course, it is old news to all good trial attorneys that the jury's verdict is premised upon how much they like or dislike the parties. It would be obvious to the defense attorney, then, to present facts and argument suggesting that the plaintiff is nice "not so much."

Assist the jury to walk in the plaintiff's shoes without violating the "golden rule." Again, all good defense attorneys know that a case presented as

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A LESSON FOR THE DEFENSE ATTORNEY

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a story, with strong imagery, is more effective and persuasive then a laborious, or even fiery, harangue in which the opinion of the lawyer is waved like the flag of the Republic and conclusions are trumpeted in-lieu-of facts.

Perhaps the best lesson the defense attorney can take away from all this is simply to avoid being "too slick." An anecdote may illustrate what I mean. A few years ago I tried a case with a friend of mine who is a great trial lawyer for plaintiffs, one of the best, in a case the plaintiff should have won. It seemed to me that throughout the trial he did all the things highlighted above, and more. We settled immediately before the jury delivered its verdict. The judge spoke to the jury and then met with the attorneys. He told us that the jury was about to deliver a verdict for the defendant. When he asked them what they thought of the lawyers, they said that the plaintiff's attorney was "too slick."

The lesson was clear. The lawyer who at trial burdens his presentation with a surfeit of dramatic trinkets, obvious calculations, and appeals to sympathy may find that he has lost all credibility in the eyes of the jury.

*** Michael J. McCaffrey has been certified by the Supreme Court of New Jersey as a Civil Trial Attorney since 1982. He specializes in civil litigation, with special emphasis on cases involving catastrophic personal injury, sever cognitive impairment, commercial contract disputes and alleged construction defects. He received his B.A. from Rutgers University in 1978 and a J.D. in 1982 from the Indiana University School of Law, where he served on the Indiana Law Journal.**

THE APPELLATE DIVISION CONTINUES TO UPHOLD THE WORRKERS' COMPENSATION NOTICE PROVISION CODIFIED IN N.J.S.A. 34:15-17

BY: CYNTHIA R. RICHARDS, ESQ.*

We are all familiar with the two-year statute of limitations applicable to Workers' Compensation cases. Upon receiving a new file, an attorney looks at the date of the occurrence and compares it to the date of filing with the Division of Workers' Compensation. Occasionally, the attorney needs to look further as N.J.S.A. 34:2-21 et seq. extends the two-year statute of limitations adding that a claim petition must be filed within two years of the failure of the employee to receive payments in accordance with an agreement between the employer and the employee, or within two years of the last payment of compensation. However, there is an additional question to be asked. When did the petitioner notice the employer of the accident? The notice portion of the statute is often not considered.

N.J.S.A 34:15-17 sets forth the notice requirements. The statute first says the employer shall have notice within 14 days of the occurrence. It further states that compensation may be allowed if notice is given within 90 days unless the employer can show he was prejudiced by the failure to receive notice. The statute then states "**no compensation shall be allowed**" unless notice is given within 90 days after the occurrence of the injury. [Emphasis added.]

The number of cases discussing the notice issue is limited and some of them date from the 1930s and address portions of the Workers' Compensation statute which are no longer operable. However, the law as to the notice issue remains in effect. It remains the employee's burdened to show that timely notice was given to the employer. *See* Goldstein v. Continental Baking Co., *28 NJ Super. 55 (1953)* The case law requires an injured employee to give notice to someone at the workplace whether or not that person is the employee charged with receiving Workers' Compensation notice. The case of Panchek v. Simmons Co., *15 NJ 13 (1954*), involved an employee who felt a sharp pain in his back while lifting. The employee complained of illness to his foreman, the assistant superintendent and the company nurse on March 19, 1951. He sought medical treatment in October 1951. His condition was diagnosed as a herniated disc. He was deemed to have given notice as at the time of his injury as he complained of illness to the foreman, assistant superintendent and nurse. Although the employee did not understand the details of his injury, his notice to the employer was deemed to be sufficient.

Likewise, in the case of Hercules Powder Co. v. Nieratko, *113 N.J.L. 195 (1934),* an employee suffered a hernia at work. Later he filed the petition alleging that a falling barrel had struck him not only causing the hernia, but also causing a brain injury. The court opined that the employer knew of the occurrence of the injury and that no particularization or specification of a nature and extent of the injury was necessary. The case of Gen. Cable Corp. v. Levins, *124 N.J.L. 223 (1939)* involved an employee who

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struck his head on a beam and reported the incident to a plant doctor who removed a foreign body from his eye. The doctor did not inquire as to the blow to the head. The doctor's knowledge relative to the incident was sufficient to bind the employer regarding a head injury.

The case law indicates that notice to a foreman, an assistant superintendent, a company nurse or a plant doctor will be deemed to be notice to the employer. Further, the employee does not need to know the diagnosis or details of his medical condition. The employee merely needs to notice the employer of the incident that caused injury.

The Appellate Division recently addressed the issue of employee notice in the case of Ader v. Lebanon Twp. 2013 WL 869392, cert.den. On November 18, 2008 Mr. Ader squatted and jumped off a flatbed truck landing on both feet. He immediately felt some pain in his back. Approximately 2 weeks after the incident he felt pain in his hips. He saw his primary care physician in December of 2008. He had a second visit with his primary care doctor in January 2009. Mr. Ader testified that on the second visit he told his physician "the only thing that had enough force to cause an injury" was the incident with the truck. He was subsequently diagnosed with bilateral avascular necrosis and underwent bilateral hip replacement surgery. The Judge of Compensation dismissed the case as the petitioner did not notify the Township until approximately one year after the accident. The Appellate Division concurred opining that a "reasonable person facing appellant's circumstances would have been aware that he sustained a work-related compensable injury on November 18, 2008."

Although there are not many cases addressing the issue of notice to the employer, the Appellate Division continues to enforce the notice statute as written. It continues to be a benefit to our defense clients to discuss the notice issue with respondents as well as review the statute of limitations issues.

*** Cynthia R. Richards is Certified by the Supreme Court as a Civil Trial Attorney. She handles both civil trial cases and Workers' Compensation cases at Gebhardt & Kiefer, P.C. She has been an NJDA member for more than 20 years.**

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October 14, 2013 at the Union County Courthouse

Kevin DeCoursey, Michael McCaffrey, Herbert Kruttschnitt, Thomas Hight, Brian O'Toole, Marie Carey, Stephen Foley, Jr., Mario Delano, Arthur Leyden, III, Steven Isaacson.

Not Pictured: Joseph Garvey, William L'E. Wertheimer, J.S.C. (Ret.)

Lifelong Service and Dedication Award to George Meyers
NJDA Convention June 2013

Frances Meyers, George Meyers and Roger Steedle

THE IMPACT OF FEDERAL-STATE "WORKSHARING AGREEMENTS"

KEVIN DONOVAN, ESQ.*

An Example of How They May Provide a Defense in States with Fair Employment Practices Statutes, Such as the New Jersey Law Against Discrimination

A New Jersey decision issued earlier this year highlights the importance of a little known but highly effective employer defense to claims brought under the New Jersey Law Against Discrimination. In *Cornacchiulo v. Alternative Inv. Solutions, Inc.,* 2013 N.J. Super. Unpub. LEXIS 194 (App. Div. Jan. 23, 2013), the Appellate Division upheld dismissal of a discrimination complaint based on the existence of a so-called "Worksharing Agreement" between the federal Equal Employment Opportunity Commission and the New Jersey Division on Civil Rights. Understanding such agreements and their potential legal effect can result in a winning argument for employers and dismissal of claims of discrimination at the very outset of civil litigation, avoiding costly discovery.

The key to understanding how to use Worksharing Agreements as an effective defense first requires familiarity with the significant differences between the structures created by federal and New Jersey state law to process discrimination claims at the administrative (pre-court) level.

Differences in Federal versus State Charge-Filing Requirements and the Effects of Agency Action

The United States Equal Employment Opportunity Commission (EEOC) accepts charges of employment discrimination brought under a variety of federal statutes. After an investigation, the EEOC issues a finding of probable cause or no probable cause, accompanied in either case by a "right to sue" (RTS) letter. [1] The issuance of a RTS letter is a prerequisite to filing a civil action in court under federal anti-discrimination statutes (e.g., Title VII, ADA, ADEA). However, a finding of no probable cause made by the EEOC does not bar that civil action.

The procedure under New Jersey state law is significantly different. In contrast to the federal approach, in New Jersey a claimant seeking relief under the New Jersey Law Against Discrimination (NJLAD) is not required to exhaust administrative remedies prior to commencing an action in court. Thus, the claimant may, but need not, file a charge of discrimination with the New Jersey Division on Civil Rights (DCR, the state counterpart to the EEOC). However, if the claimant chooses to file a charge and the DCR issues a determination of no probable cause, resort to a civil action is *barred.* The claimant must instead appeal the no probable cause determination to the New Jersey Appellate Division. That court will affirm the DCR determination if it is supported by substantial credible evidence. *E.g., L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J. Super. 465, 489-490 (App. Div. 2005) (citations omitted), *modified on other grounds*, 189 N.J. 381 (2007).

Though not required to proceed under the NJLAD, there are benefits to a party filing his or her charge of discrimination administratively with the DCR.

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- There is no filing fee (in either the DCR or EEOC).
- A lawyer is not required. Whether filed with the EEOC or DCR, agency representatives will interview the charging party, assist him or her in drafting the charge (called a Verified Complaint in the DCR), take care of serving the charge upon the employer, and require the employer to answer the charge and produce evidence in support of the challenged employment decision.
- An investigator will be assigned to process the charge, assess the evidence and render a decision as to whether there is sufficient evidence to credit the claim.
- Mediation services are available in each forum.

Moreover, if the DCR finds probable cause to credit the allegations, it will assign a Deputy Attorney General to prosecute the case against the employer before an Administrative Law Judge. Again, the charging party avoids the cost of retaining his or her own attorney while seeking relief.

The Effect of "Dual Filing"

Many charges of alleged discrimination are dual filed, meaning that the charging party wishes his or her charge to be filed with the EEOC *and* the DCR. Regardless of which office (EEOC or DCR) the complaining party first approaches, both agencies will ask the party if he or she wishes to file with its sister agency. The party's choice is registered by checking a box on an intake form.

There are advantages to dual filing arising from the relatively short time limit for filing with the DCR as well as federal law restricting the EEOC's ability to start processing a charge when a state fair employment practices agency (such as the DCR) is available.

First, a party has only 180 days to file a charge with the DCR. Missing that relatively short deadline should result in dismissal of the charge. By contrast, federal law provides that charges may be filed with the EEOC at any time within *300* days after the challenged employment action *if* the EEOC office is located in a state – such as New Jersey – that has an agency (referred to as a "state FEP agency") that also handles discrimination charges, and the charge is dual filed with the state FEP agency. That substantial additional time may save an otherwise stale charge, at least for the purposes of federal law. There is, however, a "catch."

Historically, before the EEOC can formally accept the charge for filing, it must provide the state FEP agency (in New Jersey, the DCR) with an initial opportunity to process the charge. Specifically, the EEOC must defer its own processing for 60 days. Within that time, of course, the 300-day federal charge filing period may expire. In addition, it makes no sense for the state FEP agency to expend its own limited resources exercising its right to process a charge that has already been presented to the EEOC, and which is waiting for word from the state agency on what it intends to do with the charge.

The United States Supreme Court addressed this issue in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). The Court held that if the state FEP agency waives its federal statutory right to process the charge first,

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the EEOC may immediately accept the charge for filing. This is where Worksharing Agreements come into play.

Worksharing Agreements

Worksharing Agreements are commonly entered into by the EEOC and state FEP agencies, such as the DCR. [2] Under the typical agreement, the state FEP automatically waives its right to process a charge first filed with the EEOC. As described, this allows the EEOC immediately to start its investigation, and preserves the 300-day charge filing deadline, to the benefit of the charging party. Worksharing Agreements also promote efficient and expeditious handling of cases, while avoiding the waste of having two different agencies investigating the same charge. EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988) (discussing the benefits of Worksharing Agreements).

Consistent with the goal of avoiding duplication of work, the EEOC-DCR Worksharing Agreement provides that each agency will normally adopt the finding on the charge made by the agency that actually has investigated it. This is where the employer defense highlighted above comes into play.

How an EEOC Finding Can Preclude a Civil Action under NJ State Law

As noted, an EEOC finding of no probable cause does not bar a civil action brought under federal anti-discrimination law. By virtue of the EEOC-DCR Worksharing Agreement, however, the DCR has committed itself to normally accepting the decision made by the EEOC. Thus, once the DCR adopts an EEOC finding of no probable cause determination as its own, the effect is the same as if the DCR had issued the decision. Understanding the result reveals the defense at issue.

As shown above, New Jersey state law precludes the filing of a civil action under the NJLAD once a no probable cause determination has been made. Due to the operation of the Worksharing Agreement, then, a decision by a federal agency (EEOC) that has no preclusive effect under federal law *has* just such a result for the purposes of a claim under state law (the NJLAD). While perhaps surprising at first glance, the result makes perfect sense as a matter of public policy, because to allow a different result would undermine the effectiveness of the Worksharing Agreement by forcing the DCR to ignore the EEOC's investigatory work and conduct its own investigation. [3]

There are of course plaintiffs who would prefer to have a second chance to pursue litigation even after receiving a no probable cause finding that should be binding. The New Jersey Appellate Division recently faced such an effort.

In *Cornacchiulo v. Alternative Inv. Solutions, Inc.*, the Court rejected an effort by the plaintiff to pursue a claim under the NJLAD after the DCR had adopted the EEOC's finding of no probable cause on the plaintiff's administrative charge. In its opinion (the second issued in appeals brought by the same plaintiff), the Court expressly rejected what it correctly saw an effort to undermine Worksharing Agreements.

In *Cornacchiulo*, the plaintiff had chosen to dual-file his alleged disability discrimination charge. The DCR advised him by letter that pursuant to the Worksharing Agreement, the EEOC would take the lead in processing the charge. The DCR further advised:

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> Once the Equal Employment Opportunity Commission has made a determination concerning that charge and closes its file, the Division on Civil Rights ordinarily adopts the EEOC's determination. However, upon application, and for good cause shown, the Division on Civil Rights will review a no reasonable cause determination by the EEOC to ensure that it comports with standards under the Law Against Discrimination.

After investigation, the EEOC issued a letter stating that it had examined plaintiff's claims and was "unable to conclude that the information establishes a violation of federal law …." The EEOC provided a RTS letter, notified the plaintiff of his right to file a claim under federal law within 90 days and closed its file.

The plaintiff decided not to file a federal claim. Instead, on April 8, 2011, he filed a complaint in the state Superior Court, claiming violation by defendant of the NJLAD.

On April 29, 2011, the NJDCR issued a letter that stated: "Please be advised that the Equal Employment Opportunity Commission (EEOC) has informed the Division on Civil Rights of the closing of its file on the above reference[d] charge. Therefore, a determination has been made and the Division on Civil [R]ights is closing its file on the same basis." Based on that determination, the employer filed a motion to dismiss the plaintiff's NJLAD civil action. The trial court granted the motion, which the Appellate Division upheld on appeal. *Cornacchiulo v.Alternative Inv. Solutions, L.L.C.*, 2012 N.J. Super. Unpub. LEXIS 1415 (App. Div. June 19, 2012).

The plaintiff tried again, challenging the DCR's decision as set forth in its April 29, 2011, letter adopting the EEOC's determination pursuant to the Worksharing Agreement. That led to his second appeal.

On that appeal, the plaintiff asserted that he was somehow confused by the arrangement between the EEOC and DCR. He also complained that the NJDCR had never conducted any investigation of his claim of discrimination, as required by state regulations. N.J.A.C. 13:4-1.1, *et seq*. In fact, it was undisputed that the DCR had closed its file without an independent inquiry into the facts underlying the claim. The reason, of course, was the Worksharing Agreement designed precisely to avoid such redundant effort.

The Appellate Division once again turned back the plaintiff's assault on the Worksharing Agreement. The Court held that the DCR was not required to perform its own investigation because the *EEOC had already done so,* pursuant to the Worksharing Agreement. The Court observed that the plaintiff's position "amounts to an attack on the entire worksharing agreement." Having already – in its decision on the first appeal – noted the important beneficial effects of Worksharing Agreements, [4] the Court rejected the plaintiff's latest appeal, upholding dismissal of his NJLAD case based on the EEOC's finding of no probable cause.

Importance of Understanding Worksharing Agreements

Both of the Cornacchiulo opinions highlight the importance to employers of understanding how Worksharing Agreements operate. Well-informed, well-advised employers can take full advantage of such agreements to turn back attempts by plaintiffs to enjoy their benefits without being bound by an adverse

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result, even one issued by the EEOC that normally would have no preclusive effect.

Employers should vigorously defend against EEOC charges, seeking the issuance of a no probable cause determination and then making certain that the DCR is aware of, and thus adopts, the EEOC decision. This will prevent a plaintiff from gaining the unfair advantage of a second chance to litigate a charge that already has been found to be meritless.

While this analysis focuses on New Jersey's FEP statue, employers should be aware of the specifics of the FEP statutes and Worksharing Agreements in any state in which they have employees, as those provisions may well provide similar valuable defenses.

ENDNOTES

1 The exact language currently used by the EEOC is "Based upon its investigation, the EEOC is unstable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes…"

2 Worksharing Agreements are described in EEOC Regulations at 29 CFR §§ 1601.13(a)(4)(ii) and 1626.10©. The FY2012 EEOC/FEPA Model Worksharing Agreement is found at *http://www.eeoc.gov/employees/fepa wsa 2012.cfm*.

3 One also can imagine that the EEOC would not appreciate its own work being routinely ignored by state FEP agencies such as the DCR, and might be reluctant to continue expending its own limited resources on processing charges on behalf of the FEP agency.

4 Comacchiulo, 2012 N.J. Super. Unpub. LEXIS 1415 at 10 ("[T]he exception that plaintiff seeks from application of the statute may have intended negative consequences on the ability of the federal and state governmentsto engage in worksharing agreements for purposes of efficiency and costsavings, and it might potentially affect the viability of dual charges that are filed only before one agency or the other.").

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Christmas Eve

By Brian O'Toole, Esq.

Back in the "good ole days" Christmas didn't begin until after Thanksgiving. Stores didn't start decorating or playing Christmas music and no one considered Christmas shopping before Black Friday. For my brother and me, however, our shopping commenced Christmas Eve morning when we did our one stop shopping for Mom and Dad at Woolworth's in Irvington Center. Our walk to the center took about 20 minutes. We would stop along the way to buy a pretzel from Big Bill and then continue on to Woolworth's to find those perfect gifts. We usually didn't have a problem finding a present for my father because if we had any difficulty, a carton of Lucky Strikes would always put a smile on his face. My mother's gift took a little more time. We would walk up and down the aisles without a clue. One gift that brings back warm memories was a porcelain vase decorated with small roses. Luckily, we had enough money left over to stop at Kless Diner for lunch on the way home. (Did it always snow as we were walking home or is this just my imagination?) Although the Lucky Strikes made it home safely, the vase was not so fortunate. The paper sack was dropped before we got home and both gifts hit the pavement, shattering the vase. One of the problems with shopping on Christmas Eve is there is no time for do-overs. Our attempt to convince Mom that the gift was a porcelain jigsaw puzzle failed, but she laughed all the same. For many years, Joe and I argued about who actually dropped the bag.

Many years later, I continued the tradition of Christmas Eve shopping, driving to the Livingston Mall. I found that all shoppers out there share a common bond of knowing it's now or never. We all seem to commiserate and go out of our way to help one another. The sales staff also seems to react positively if you are armed with a big smile and a melodious "Merry Christmas." I can't tell you how many times I've been offered coupons while waiting to check out. I have also had numerous salesgirls suggest better color combinations or make recommendations on purchases that would save me money. Unfortunately, I never got a salesgirl quite like Clark Griswold's in Christmas Vacation!

One of my favorite gift selections for Sunny was a bean pot. Sunny is a fabulous cook and I always felt it was important for me to give her gifts that would increase her culinary skills. Imagine having a serving dish that was right out of "The Waltons" that could be taken off the stove and placed right on the dinner table. It was extremely large and heavy and could hold four quarts of beans, stew, soup or casseroles. As you might guess, the bean pot has been a centerpiece for all

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O'Toole Christmas tables. I must admit that I was puzzled by the fact that Sunny did not seem to be as excited about the bean pot as I was. Perhaps she's just overwhelmed by the whole thing?

For the last five years, Sunny and I have found an even better alternative to Christmas Eve shopping. We now make a date to go out and we both pick out several gifts for ourselves, which we then exchange on Christmas Eve. We then go out for dinner with our shopping done and a guarantee we won't have to take anything back. I suspect my blood pressure has probably dropped 30 points utilizing our new system.

My other Christmas Eve duties include wrapping Sunny's gifts. Although I'm a pretty lousy wrapper, she appreciates I give it my best shot. I always visit the family gravesite to deliver wreaths and Sunny and I will drop off gifts to family and friends we won't see on Christmas. Since everyone who knows me realizes that I enjoy good Irish whiskey, I can usually count on being treated to a Midleton or two along the way to celebrate the holiday.

When 5:00 p.m. rolls around, Sunny and I get ready for a brief visit to one of our favorite watering holes, Billy's Red Room. It is a tradition that Santa Claus stop at Billy's around 6 p.m. (You should know that Billy stays open until midnight because there are a lot of people who don't have anyone or any other place to go.) Everyone is treated like family and yes, many people think I bear a strong resemblance to Santa. Go figure. Ho Ho Ho!

We close out the day at our friend's home for Christmas Eve dinner with family and friends. Our dog, Shamus, loves this party because he is also invited. By the time we get home we're exhausted, but have memories of a day well spent.

Let me take this opportunity to wish you all a blessed and healthy New Year

from my family and our entire NJDA family.

DEFENDING WORKERS' COMPENSATION DISCRIMINATION CLAIMS

MICHAEL J. NEEDLEMAN, ESQ.*

The purpose of this article is to examine, in some depth, the issues, problems and potential solutions involved in defending a claim of workers' compensation discrimination or retaliation. Simply put, the claim is one for damages based on discharge or termination following the claim, or attempted claim, for workers' benefits. In the ordinary course, the damages that flow from such a claim includes restoration of position, back pay, and potentially compensatory and punitive damages. Though not often utilized, the statute also provides for a civil penalty which may be imposed by the state. Because these claims represent distinct but related areas of employment litigation, they possess distinct but related problems.

The problem

Although indications are that the national economy is improving, conditions in many industries are still lagging behind. Moreover, New Jersey's unemployment rate is 9.7%; (as of October 2012, the last month for which data are available), well above the national average. Economic pressures have, in many industries all over the State, driven productivity, which has caused a business climate in which there is constant pressure to do more with less. This has led to an increased number of workers' compensation claims, across more industries. Additionally, since there is a two-year statute of limitations for filing such claims, see, Labree v. Mobile Oil Corp., 300 N.J. Super. 234 (App. Div. 1997), employers, their workers' compensation insurance carriers and general liability carriers, can expect to see more of these claims in the future.

Typically, such cases arise in one of two scenarios: when there is temporal proximity between a decision to discharge and a work-related injury; or temporal remoteness, but an earlier expressed hostility to work related injuries, or workers' compensation benefits. It is not necessary for the employee to have actually filed a workers' compensation claim, but rather it is enough for the employee to simply have taken some action in furtherance of his or her right to pursue workers' compensation benefits. See, Stewart v. County of Hudson, Morris v. Siemens Components, Inc., 928 F.Supp. 486(D.N.J. 1996). This problem may become particularly acute where an employee's work-related injury may be due to an unintentional failure to follow work rules or other procedures which may, in and of itself, be considered a "last straw." Thus, the employer would otherwise be justified in terminating the employee, but the employee would be protected from discharge by the protection of the New Jersey Law Against Discrimination. In such a situation, how does an employer in New Jersey defend itself?

The elements of the claim.

A claim for retaliation under the workers' compensation statute has been recognized since Lally v. Copygraphics, 85 N.J. 668; 428 A.2d 1317 (1981). The elements of such a claim are: 1) that the employee attempted to, or did in fact, make an application for workers' compensation benefits, and: 2) that he or she was discharged because of same. Although that standard sounds fairly straightforward, the employee must also come forward with "specific evidence" showing that the discharge was in retaliation for filing a claim. See, Morris, 928 F.Supp. at 493; see also

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Mallon v. Prudential Prop. and CAS. Ins. Co., 688 F. Supp. 997 (D.N.J. 1988). However, "specific evidence" has been left largely undefined in the cases, and recent decisions suggest that the standard may be best characterized by paraphrasing Justice O'Connor's famous description of scrutiny: that it is "strict" in theory, but utterly useless in fact.

Pursuant to the Morris decision, proof of an employer's attempt to retaliate on the basis of application for, or receipt of, workers' compensation benefits must be accompanied by some "specific evidence," namely direct evidence of intent. While simple acknowledgement of the ability to claim workers' compensation benefits, or of the claim itself, is theoretically insufficient evidence, see Gallante v. Sandoz, Inc., 192 N.J. Super. 400 (App. Div.), often courts in the Law Division will consider acknowledgement as prove of evidence of intent. This is especially so in cases where temporal proximity to the application for, or receipt of, workers' compensation benefits is at issue. Speculation suggests that Law Division judges may be concerned with being overturned on appeal, or that cases lacking in specific evidence will be confirmed as so lacking by the jury. It might also be assumed that, at least on occasion, the degree of "specific evidence" may have to do with the particular job involved. For example, it follows that an employee who is separated from employment two (2) years after filing a workers' compensation claim may require a greater degree of specificity in his or her "specific evidence" then would an employee discharged within hours after filing.

Potential defenses

A New Jersey employer faced with a retaliatory discharge or discrimination claim under the worker's compensation statute can typically defend the claim by arguing that it had a non-discriminatory reason for the discharge or other adverse employment action. Because New Jersey courts apply a burden shifting framework, Morris v. Siemens, 928 F. Supp. 486 (D.N.J. 1996), the initial burden of production is placed on the plaintiff to establish a prima facie case of retaliatory discharge. Once the plaintiff has established a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action. The burden then shifts back to the plaintiff to show that the defendant's proffered reasons for discharge are not worthy of belief and that the defendant acted with the intent retaliate unlawfully. See, Morris, Id.

Because of the burden shifting framework applicable to retaliatory discharge and retaliation cases, most employers defend against these claims by producing evidence of a legitimate, non-discriminatory basis for the employee's discharge. For example, an employer can argue that an employee was discharged for excessive absences, rather than because of the employee's worker's compensation claim. Employers should be wary of this particular defense, however, since the employee could argue that the absences were a result of the work related injury, i.e. medical appointments.

Insurance

By now, most insurers, and likely most agents, offer employer practice liability insurance ("E.P.L.") policies. While these policies insure employers, as well as alleged individual tortfeasors, against claims arising under either federal or state anti-discrimination laws, E.P.L. policies do not ordinarily cover claims of workers' compensation-related discharge or retaliation. Instead, these claims may be defended by a

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carrier through the employer's workers' compensation insurance policy. Alternatively, there may be a separate rider or endorsement to an employers' E.P.L. policy that may cover these claims, either apart from, or in addition to, the coverage provided by the workers' compensation policy. Where an employer is insured by one carrier for all purposes, these distinctions are, of course, meaningless. However, where different carriers insure the same employer for different claims and where a case may involve both claims of violations of the New Jersey Law Against Discrimination and a claim of workers' compensation retaliation, coordination between defense attorneys, and carriers, may then be required.

What practitioners can do

Practically speaking, practitioners with small to medium size business clients who may be faced with workers' compensation-related litigation would be well served to continually update the employee's file. It is an intuitively obvious suggestion, of course, but not doing so can have real world consequences. For example, during the course of litigation, there may be no dispute that a meeting between the company president and the plaintiff took place. However, the plaintiff alleges his or her workers' compensation benefits were discussed at the meeting, and the president denies this. In such a circumstance, written back up by the president in the employee's file will greatly assist in defending against the employee's claim. Additionally, employers can begin to address this issue in their employee handbooks. The workers' compensation provision of the handbook could be amended to include language that it is the employer's policy not to retaliate against any employee who files or attempts to file for workers' compensation benefits. Furthermore, the handbook should identify the person designated by the company to handle all workers' compensation claims. Finally, employers should be kept apprised by their workers' compensation carriers of any and all developments of the employer's claim. It may be necessary for the employer to ask. By being kept aware on the status of these claims, an employer will hopefully avoid any unnecessary pitfalls.

Conclusion

Because of the current economic environment, worker's compensation claims are on the rise. It follows, then, that we are likely to see an increase in workers' compensation discrimination charges. In order to bring such a claim, an employee is required only to allege that he or she attempted to, or did in fact, make an application for workers' compensation benefits and that he or she was discharged because of same. The employee, however, must have "specific evidence" showing that the discharge was in retaliation for filing a claim. Employers can defend against such a claim by arguing that it had a legitimate non-discriminatory basis for the discharge or other action. To ensure that such a defense will be viable, employers are urged to keep accurate and specific documentation and notes regarding the employers' behavior. Moreover, employers are urged to be proactive in staying updated on the status of all of the employees' worker's compensation claims. By taking a hands-on approach employers can hopefully avoid an influx of worker's compensation discrimination claims and better defend against any claims that do arise.

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Auto Liability Seminar
November 26, 2013

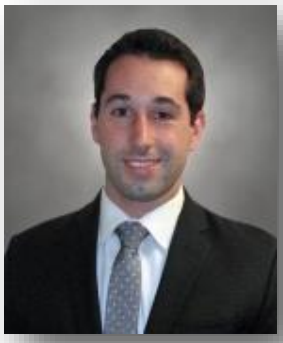
Chad Moore, Jodi Anne Hudson, Craig Aranow, Thaddeus Hubert, III

Women and the Law Seminar
November 11, 2013

Jeanne Marino, Martha Lynes, Jae Lee, Marie Carey

NICHOLAS V. MYNSTER: EXPERT WITNESS REQUIREMENTS FOR MEDICAL MALPRACTICE CASES ARE HEIGHTENED AS SUPREME COURT ENFORCES THE *PATIENTS FIRST ACT'S* SAME-SPECIALTY REQUIREMENTS

MICHAEL G. DALY, ESQ.*



There are a few overly simple yet staggeringly consistent explanations that pop up whenever the issue of increased costs of healthcare in the United States is debated. A certainly non-exhaustive list could include: our general unhealthiness as a nation; medical instrument manufacturers and pharmaceutical companies overcharging hospitals which causes a hike in the costs of treatment; the insured are footing the bill for the uninsured's hospital visits; the insured are demanding excessive testing simply because they can; doctors are ordering unnecessary tests in order to cover themselves against potential lawsuits; and, last but certainly not least, the rise in lawsuits and verdict awards increases the cost of medical malpractice insurance.

While healthcare legislation has most recently featured on a national stage, individual states have also attempted to address the problem by enacting laws to curb the costs of healthcare. In 2004, the New Jersey state legislature cited several of the issues above as specific concerns that must be remedied in order for the state to face the fiscal and medical dilemmas brought on by a rampant healthcare system. In part, the legislature surmised that high medical malpractice insurance premiums and an influx in civil suits were causing good doctors to leave the state for cheaper pastures, drop high-risk patients, and engage in "defensive medicine" in an effort to avoid being sued.

The goal of the "Patients First Act" then was to decrease the number of frivolous, costly suits by heightening the threshold requirements for proving a medical malpractice case, and was accomplished in part by creating the same-specialty standard. This new requirement was finally implemented and enforced in the April 2013 decision, Nicholas v. Mynster, 213 N.J. 463 (2013). As is discussed below, there has been an immediate response from the courts and law offices statewide.

The Patients First Act

On July 7, 2004, in a sweeping piece of legislation that affected insurance companies, medical providers, and malpractice attorneys alike, the state lawmakers enacted the "New Jersey Medical Care Access and Responsibility and Patients First Act," better known as the Patients First Act. What the Patients First Act (hereinafter PFA) meant for malpractice attorneys was the introduction of a more defined set of rules outlining the parameters for expert testimony in malpractice cases. The previous set of guidelines for expert qualifications was the incredibly broad language of New Jersey Rule of Evidence 702 and several interpreting New Jersey opinions, which held in effect that an expert was qualified to

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testify if he or she had "sufficient knowledge of professional standards applicable to the situation under investigation to justify his expression of an opinion relative thereto." See Sanzari v. Rosenfeld, 34 N.J. 128, 136 (1961). This standard allowed for considerable latitude in the threshold qualifications for expert witnesses.

The legislature attempted to tighten up those parameters in the "expert testimony requirements" section of the PFA, codified as N.J.S.A. § 2A:53A-41. In an early draft of the new law, the legislature conveyed that an expert would now need to maintain "the same type of practice and possess the same credentials, as applicable, as the defendant health care provider, unless waived by the court." See Assembly Health & Human Services Committee, Statement to Assembly Bill No. 50 at 20 (March 4, 2004). Or, as a later influential Supreme Court opinion put it: when a physician is a specialist and the basis of the malpractice action *involves* the physician's specialty, the challenging expert must practice in the same specialty. See Buck v. Henry, 207 N.J. 311 (2011) (emphasis added).

Despite the statute's attempt at concise parameters for qualifying an expert, questions remained: in the complex and overlapping world of medicine, what exactly qualifies as practicing "in the same specialty" as the defendant? Two of the most significant cases to first interpret the PFA were Ryan v. Renny and Buck v. Henry, and were not decided until 2010 and 2011, respectively. See 203 N.J. 37 (2010) , 207 N.J. 311 (2011). While both opinions serve as influential precedent, neither scrutinized the same-specialty provisions espoused in § 2A:53A-41 (a), that had the potential to alter expert discovery in malpractice cases.

The Nicholas Opinion

Then came the New Jersey Supreme Court 's April 2013 decision in Nicholas v. Mynster. At issue in Nicholas was that same-specialty provision of § 2A:53A-41(a) which states that a plaintiff's medical expert must "have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty" as the defendant. Nicholas, 213 N.J. at 467. This would be the first appellate level decision to - if it so chose - interpret the PFA's limiting language on very similar, albeit technically different, medical specialties. The Court seemingly took the opportunity to draw a line in the sand, and reversed the lower court's decision to allow expert testimony from a witness who did not "specialize" in the same field of medicine as the defendant-physicians, as set forth by the PFA.

Nicholas involved a malpractice claim against two physicians (among other medical providers) for the alleged negligent treatment of a carbon monoxide patient in a hospital setting. The Supreme Court ruled that under the PFA, an expert who is board-certified in internal medicine and preventative medicine, with subspecialty certifications in critical care medicine, pulmonary disease, and hyperbaric medicine, was *not qualified* to establish the standard of care for either of the two defendant-physicians who were boarded in emergency medicine and family medicine.

Justice Albin explained in his majority opinion that now, under the PFA, if the alleged negligence occurs in the course of a defendant's practice in his or her specialty, the challenging expert must specialize in that same field - not have knowledge of the field, but actively practice in that very specialty. If the defendant is actually *board-certified* in that specialty, and the alleged negligence occurred within that area or specialty, an additional layer is added: the challenging expert must be either credentialed by

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a hospital to perform the procedure or treat the condition, **or** be board-certified in that specialty in the year preceding the occurrence that is the basis of the action. Extremely important is the following proviso: "the hospital-credentialing is not an alternative to the same-specialty requirement . . . only a specialist can testify against a specialist about the treatment of a condition within the specialty area." Id. at 482. So, the hospital-credentialing provision is only a substitute for board certification, not the same-specialty requirement. Id. Additionally, a board-certified expert must have devoted a majority of his professional time in the year preceding the occurrence to either clinical practice in the specialty or teaching the specialty at an accredited medical school.

To recap, assuming the alleged negligence occurred within the defendant's specialty, the challenging expert will *always* have to specialize in that same area. "When a physician is a specialist and the basis of the malpractice action 'involves' the physician's specialty, the challenging expert must practice in the same specialty." Id. at 481-82. Only if the defendant is board-certified will the court need to move on to the next step of determining whether the expert is similarly certified in the specialty, or credentialed by a hospital to specialize in that specific area.

The Nicholas opinion shook up many attorneys' understanding of what qualified as sufficient testimony against a specialist. Justice Albin - along with a unanimous panel - distinguished the specialties at issue in Nicholas, writing that "emergency, family, internal, and preventative medicine are distinct specialty areas recognized by the American Board of Medical Specialties." Id. at 484. It did not matter that the plaintiff's expert, Dr. Weaver, had a certification in internal medicine, which is often understood as overlapping with family medicine. It neither mattered that Dr. Weaver was credentialed by a hospital to treat patients with the illness at issue, carbon monoxide poisoning, because the benefit of that credentialing only comes into play once it has *already* been determined that the expert specializes in the same field as the defendant. The justices weren't required to reach that step in their analysis. The specialties at play were family medicine and emergency medicine, and under Nicholas' interpretation of the PFA, an internal medicine expert was out of his element.

This was a clear departure from the standard-bearer case on expert qualifications, Khan v. Singh, which had been relied upon by the lower court. See 200 N.J. 82 (2009). The lower court ruled that expertise in the treatment of the condition was sufficient even if the expert did not share the same medical specialty as the defendant physicians. To reach that end, the court cited Khan, the then-prevailing precedent on expert witness qualifications, which permitted "an expert to testify despite the fact that the expert had a different specialty than the defendant doctor." Nicholas, 213 N.J. at 474. The trial court went so far as to extrapolate that "Khan could stand for the proposition that an expert who has a different specialty than the alleged negligent doctor but practices similar medicine is sufficient to allow the expert to testify so long as the similar medicine is reasonably related to the patient's treatment." Id. But, the reviewing Court was clear: the Khan analysis was no longer sufficient post-enactment of the PFA. If the events that served as the basis for the action occurred after July 2004, Nicholas and the PFA were to guide.

The evolution from the broader parameters of Khan to the much narrower constraints of the PFA, as interpreted by Nicholas, had a very immediate im-

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pact. Now, medical malpractice attorneys would have to take a look at the experts retained in their own active cases and evaluate whether they would survive under the new PFA scrutiny as endorsed by Nicholas. Similarly, courts would be faced with whether to immediately apply the same-specialty requirement despite the fact that they would be faced mostly with cases where experts had been retained well before the Nicholas opinion was decided, but after the PFA had been enacted.

Quick Impact

There is little doubt of the impact of the Nicholas decision. In the 6 months since the opinion was handed down by New Jersey's highest court, Nicholas has already been cited in at least 5 written opinions, been the subject of law alerts and malpractice blogs alike, and currently features as an annotated case on the Lexis page for N.J.S.A. § 2A:53A-41.

On June 16, 2013, less than 2 months after Nicholas, an Essex County trial court relied heavily on the Nicholas Court's interpretation of the PFA in the matter of Austin v. Deitch, 2013 N.J. Super. Unpub. LEXIS 1524. Judge Vena held that a board-certified internist and cardiologist did not have the requisite credentials under the PFA to testify against a board-certified general surgeon, even when the treatment at issue was post-operative care and monitoring well within the expert's own specialty. The opinion heavily-cited Nicholas and referred specifically to the Supreme Court's differentiation between an expert who was qualified to testify on the subject matter, and an expert who shares the same specialty qualifications as the defendant. Once Judge Vena found that the defendant's post-operative care was within his specialty as a general surgeon, he held that plaintiff was "obligated to find an equivalently-qualified expert." Austin, 2013 N.J. Super. Unpub. LEXIS at 10.

A week later, in Parker v. Batarseh, the Appellate Division used the newly minted Nicholas precedent to support an expert witness who was board certified in internal medicine and infectious disease as qualified to opine against doctors board-certified in internal medicine and infectious disease and practicing within that specialty. See 2013 N.J. Super. Unpub. LEXIS 1551. Here, the plaintiff's expert intelligently identified himself as a specialist in both internal medicine and infectious diseases, and was therefore permitted under the PFA to provide testimony against both the internist-defendant and infectious disease specialist-defendant. The Appellate Division also ruled that the additional qualification of § 2A:53A-41(a)(2)(b) , which permits an expert who is similarly certified and has taught the specialty within the past year, is met when the proposed expert "educates students . . . in both a clinical setting as well as a research environment," even if the instruction is not given in the traditional didactic classroom setting. Parker, 2013 N.J. Super. Unpub. LEXIS at 27.

The publicity tour continued on August 2, 2013 in the Appellate Division's decision in Kim v. Ahn, 2013 N.J. Super. Unpub. LEXIS 1944. Although the court chastised the defendants for waiting five years to object to the plaintiff's expert's credentials - and so invoked the doctrine of equitable estoppel to bar defendant's otherwise credible motion to dismiss the complaint - it precluded the expert report of an internal medicine physician who was attempting to opine against a family practice doctor. Despite the patient having been seen in the defendant's family practice, and the expert having maintained his own clinical internal medicine practice, the Appellate Division ruled that the difference in board-

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certifications amounted to a difference in specialties and the expert was hence precluded pursuant to the PFA and Nicholas. Kim, 2013 N.J. Super. Unpub. LEXIS at 22. The court opined "because Ahn is board-certified in family medicine, only a physician similarly credentialed in family medicine can provide the necessary testimony to establish the standard of care." Id.

Of course, the sweeping Nicholas opinion, like the PFA, applies only to those malpractice cases that involve negligence occurring after July 7, 2004. In Zinn v. Chalom, the Essex County trial court implicitly accepted the tenets of the Nicholas decision, but withheld its application under the particular circumstances as the Zinn defendants' alleged malpractice occurred prior to the enactment of the PFA. See 2013 N.J. Super. Unpub. LEXIS 2065. Because the alleged malpractice in Zinn occurred in February 2004, 5 months prior to the appearance of the PFA, plaintiff was permitted to proceed with his chosen experts as the court deemed them acceptable under N.J.R.E. 702 and the accompanying pre-Nicholas precedent of Khan.

However, the court made it a point to notify prospective readers that the ruling could have gone the defendants' way had the negligence occurred after the enactment of the PFA: "*[w]ithout having to take into account the heightened 'same-specialty' requirements of the Patients First Act and Nicholas v. Mynster* . . . the court is satisfied there is sufficient overlap between the subspecialties at issue that Dr. Silver, a pediatrician with a certification in the subspecialty of pediatric critical care is suitably qualified . . . to express an expert opinion . . . as to the standard of care [for a] pediatrician with a certification in the subspecialty of pediatric emergency medicine . . . ." Id. at 8-9 (emphasis added).

And finally, as recently as September 19, 2013, the Hudson County Superior Court invoked Nicholas to bar plaintiff's expert in Camacho-Gardner v. Rubenstein, 2013 N.J. Super. Unpub. LEXIS 2313. Camacho-Gardner involved specifically the specialty of neonatology, and saw an expert witness board-certified in Neonatal-Perinatal Medicine pitted against two defendants certified in Pediatrics with sub-specialty qualifications in neonatology. Since the case involved board-certified defendants practicing within their sub-specialties, the provisions of § 2A:53A-41(a)(1) and (2) applied.

Plaintiff's expert was ruled unqualified under § 2A:53A-41(a)(1) as he was no longer credentialed by St. Johns hospital to practice in neonatology at the time of the incident; in fact, St. Johns was no longer open. Therefore, "[the expert] is not credentialed, was not at the time of the occurrence, and cannot satisfy this requirement." Camacho-Gardner, 2013 N.J. Super. Unpub. LEXIS at 16. Plaintiffs also found no luck under § 2A:53A-41(a)(2). Despite their expert being board-certified in neonatal medicine, he ceased practicing almost 11 months before the date of the occurrence, and was only teaching physician-assistants around the time of the occurrence, which "does not satisfy the requirement that the expert be instructing students 'in the same health care *profession* in which the defendant is licensed.'" Id. at 17 (citing N.J.S.A. § 2A:53A-41(a)(2)(b)).

Similar to Ahn, however, the court decided that outright dismissal would be prejudicial to the plaintiffs, and extended the discovery deadline and gave them the opportunity to move to vacate and find new a new expert who would qualify under the PFA.

Moving Forward & Effect on The AOM Statute

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Exceptions like the ones made in Ahn and Camacho-Gardner should not be expected for newer litigation, especially those claims that were filed after April 2013, when Nicholas gave definition and clarity to the PFA. For cases that have already exceeded the *Ferreira* stage and are coming up on expert reports and depositions, courts may opt to dole out Nicholas justice on a case-by-case basis, potentially opting for the "preclusion and discovery extension" method so as to not prejudice plaintiffs in the short-term.

Nevertheless, the threshold requirement for expert testimony in medical malpractice cases has been unquestionably heightened. While the cases of the last 6 months dealt mostly with challenges to expert reports and trial testimony, courts will soon be flooded with Nicholas/PFA challenges to a plaintiff's Affidavit of Merit (AOM). As the above cases acknowledged, the AOM Statute, N.J.S.A. § 2A:53A -27 defers to the PFA for AOM requirements in medical malpractice cases. While the AOM Statute was enacted to "weed out frivolous claims" and therefore require only a threshold showing of negligence, plaintiff attorneys will certainly feel a greater burden by having to retain an affiant who can pass Nicholas/PFA muster just to get past a *Ferreira* Conference.

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