NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3005-21

JANAN PFANNENSTEIN,
Administrator of the Estate of
JOHN PFANNENSTEIN and
JANAN PFANNENSTEIN,
individually,

Plaintiff-Respondent,

v.

CHRISTINE SURREY, D.O.
and BHAVIKABEN BABARIA,
M.D.,

Defendants-Appellants,

and POWERBACK
REHABILITATION, i/j/s/a,

Defendant.

APPROVED FOR PUBLICATION
March 7, 2023
APPELLATE DIVISION

Argued December 20, 2022 – Decided March 7, 2023

Before Judges Messano, Rose and Paganelli.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-0791-21.

Mark A. Petraske argued the cause for appellants (Dughi, Hewit & Domalewski, attorneys; Mark A. Petraske, of counsel; Ryan A. Notarangelo, on the briefs).

Gary D. Ginsberg argued the cause for respondent (Ginsberg & O'Connor, PC, attorneys; Gary D. Ginsberg, on the brief).

The opinion of the court was delivered by

ROSE, J.A.D.

At issue in this medical negligence matter is the kind-for-kind specialty requirement embodied in the New Jersey Medical Care Access and Responsibility and Patients First Act (PFA), N.J.S.A. 2A:53A-37 to -42. This appeal requires us to determine whether the affidavit of merit (AOM) of a board-certified hematology expert satisfied the PFA's equivalency requirement where neither defendant doctor specialized, nor was board certified, in hematology when they rendered care to the decedent. Instead, both defendants specialized in internal medicine at the time of the alleged treatment, and one was board certified in that specialty, but plaintiff's proffered expert did not specialize in internal medicine. The trial court denied defendants' motion to dismiss plaintiff's complaint for failure to provide a sufficient AOM, essentially concluding the affiant's hematology subspecialty was "subsumed" in defendants' internal medicine specialty and, as such, the affiant was qualified to opine that defendants deviated from the standards of medical care by improperly prescribing heparin to the decedent.

We granted defendants leave to appeal from the April 14, 2022 Law Division order. We now hold the PFA's kind-for-kind specialty requirement embodied in N.J.S.A. 2A:53A-41(a) is not satisfied when the AOM's affiant specialized in a subspecialty of the treating doctor's specialty but did not specialize, nor was board certified, in the physician's specialty when the alleged medical negligence occurred. We therefore conclude plaintiff failed to satisfy the PFA's equivalency requirements and reverse the trial court's order denying defendants' dismissal motion. In doing so, we reject plaintiff's alternate argument that she satisfied the waiver exception to the PFA under N.J.S.A. 2A:53A-41(c), which would have rendered moot defendants' appeal.

I. Factual Background

We summarize the pertinent facts and procedural history from the limited record before the motion judge. On April 14, 2021, plaintiff Janan Pfannenstein filed a complaint, individually and on behalf of her husband John's estate (collectively, plaintiff),[1] generally alleging defendants Christine Surrey, D.O.,

[1] We refer to plaintiff in the singular although we recognize Janan filed a derivative claim for loss of consortium. Because the parties share the same surname, we use first names for clarity. We intend no disrespect in doing so.

Bhavikaben Babaria, M.D., and Powerback Rehabilitation[2] were negligent in providing medical care and treatment to John, thereby causing his death on April 14, 2019.

On July 15, 2021, before defendants answered the complaint and asserted their internal medicine specialty, plaintiff filed the AOM of Biree Andemariam, M.D., who opined that "the skill, care[,] and knowledge exercised by defendants . . . fell outside accepted standards of medical care." Dr. Andemariam stated she was certified by the American Board of Medical Specialties (ABMS) as a specialist in hematology, which she identified as "the subject matter involved in this action." Dr. Andemariam further asserted: "In the year immediately preceding the occurrence that is the basis for this claim, I devoted a majority of my professional time to the active clinical practice of hematology." Dr. Andemariam did not indicate that she specialized in internal medicine or was board certified in that specialty.

[2] At the time of the alleged incident, plaintiff was an inpatient at Powerback Rehabilitation, a subacute rehabilitation facility in Moorestown. The entity was dismissed from the litigation in December 2022, and is not a party to this appeal.

In their September 15, 2021 answer to plaintiff's complaint,[3] defendants asserted they both were specialists in internal medicine. Defendants further disclosed that the treatment they provided John involved the practice of internal medicine. It is undisputed that Drs. Babaria and Surrey were not board certified in hematology, nor did they specialize in that subspecialty of internal medicine.

During the November 18, 2021 Ferreira[4] conference, defendants objected to plaintiff's AOM for failing to meet the kind-for-kind requirements set forth in N.J.S.A. 2A:53A-41(a), as explained by our Supreme Court in Nicholas v. Mynster, 213 N.J. 463 (2013). Defendants asserted Dr. Andemariam neither practiced in their internal medicine specialty nor, like Dr. Babaria, was she board certified in that specialty. The court afforded plaintiff a sixty-day extension to file an amended AOM. It is undisputed that plaintiff did not assert she was entitled to a waiver of the same-specialty requirement under N.J.S.A. 2A:53A-

[3] The parties stipulated to an extension of time to answer the complaint. See R. 4:6-1(a) (requiring the filing of an answer within thirty-five days).

[4] Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 154-55 (2003) (mandating a case management conference "within ninety days of the service of an answer in all malpractice actions," during which "the court will address all discovery issues, including whether an [AOM] has been served on defendant" and "whether [defendant] has any objections to the adequacy of the affidavit"). The transcript of the Ferreira conference was not provided on appeal.

41(c) at the Ferreira conference or any time prior to her response to the present motion.

Instead, plaintiff provided the January 10, 2022 supplemental AOM of Dr. Andemariam, reiterating that the affiant specialized in hematology at the time of the incident, and averred more specifically that the alleged "incident involve[d] the prescribing of [h]eparin[,] which involves hematology a subspecialty of internal medicine." The doctor continued:

> In the year immediately preceding the occurrence that is the basis for this claim, I devoted a majority of my professional time to the active clinical practice of hematology including hospital privileges in which I was permitted to prescribe [h]eparin treatment and participate in the decision making involving the prescribing of [h]eparin.

The parties do not dispute that Dr. Andemariam was previously certified in internal medicine but was not so certified at the time of the alleged malpractice.[5]

Defendants thereafter moved to dismiss plaintiff's complaint. Maintaining they provided treatment to John while "specializing in internal medicine – not the subspecialty of hematology," defendants argued plaintiff's failure to provide an AOM from an expert with their same specialty rendered the AOM insufficient

[5] According to her curriculum vitae (CV), Dr. Andemariam was board certified in internal medicine in 2004.

under the PFA. Defendants noted "Dr. Andemariam's CV d[id] not indicate she practice[d] as a primary care internal medicine physician in any setting, and certainly not as a physician in an acute or subacute care setting." Further, Dr. Andemariam's concentration in sickle cell disease, as reflected in her CV, was unrelated to the medical issues and treatment involved in this case.

Arguing the issue was not whether, "in retrospect" the administration of heparin would have changed the outcome in this case, defense counsel claimed Dr. Andemariam neither made clinical decisions nor rendered the type of medical care defendants provided here. Conversely, defendants "practice[d] in the area" of internal medicine. Accordingly, their treatment involved: facilitating "a patient like [John] into a rehab facility; doing the evaluation an internal medicine physician or an attending physician in that role would do; and deciding on which therapies to administer."

Countering the supplemental AOM was sufficient, plaintiff asserted "the treatment at issue" was "the administration of heparin," which "falls under both the general specialty of internal medicine and its subspecialty of hematology." According to plaintiff: "When you're practicing hematology and you're board certified, you're practicing internal medicine, albeit a particularized portion of

internal medicine" notwithstanding that Dr. Andemariam "ha[d] added qualifications."

Citing Dr. Surrey's LinkedIn profile, – which indicated she was a functional medicine practitioner – plaintiff also challenged Dr. Surrey's averment that she was practicing internal medicine at the time of the alleged incident. Plaintiff claimed, "at best, Dr. Surrey [wa]s a general practitioner." Defendants replied that "in addition to her role at Powerback Rehabilitation as an attending physician," Dr. Surrey also "conduct[ed] an alternative therapy practice," at another facility.

Immediately following oral argument, the court issued a decision from the bench, denying defendants' motion. The court noted Dr. Andemariam specialized in hematology, and the alleged malpractice involved the improper use of heparin, a medication for the treatment of blood disorders. The court ultimately found "the testimony [wa]s being offered as a specialist and/or subspecialist in the field that is being criticized as it is recognized by the [ABMS]." But the court also stated: "While Dr. Surrey is not specialized in internal medicine and she's not board certified in internal medicine, the application may not even apply, but the active implementation of the heparin and its correlation to the field of hematology does." Without expressly ruling

on plaintiff's alternate waiver argument, the court generally cited the "good faith efforts" of plaintiff's counsel and the "training and advanced degree" of Dr. Andemariam.

On appeal, defendants reprise the same arguments raised before the trial court. For the first time in her responding brief on appeal, plaintiff claims that because defendants rendered care to John in a subacute center, they failed to meet the definition of an internist. Plaintiff renews her contention that Dr. Surrey was not practicing internal medicine when she rendered care to John. In the alternative, plaintiff claims defendants' appeal is moot because the trial court found her attorney made a good faith effort to find an equivalent expert and implicitly determined Dr. Andemariam was sufficiently qualified to render an opinion in view of her "active involvement in the applicable area of practice or in a related field."

II. Governing Legal Principles

We review de novo a trial court decision interpreting compliance with the same-specialty requirement of the PFA. Meehan v. Antonellis, 226 N.J. 216, 230 (2016). We likewise conduct a plenary review of the trial court's determination of a dismissal motion under Rule 4:6-2(e). Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019).

"A court's role in statutory interpretation 'is to determine and effectuate the Legislature's intent.'" Ryan v. Renny, 203 N.J. 37, 54 (2010) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009)). Initially, we consider the statute's plain language. Hubbard v. Reed, 168 N.J. 387, 392 (2001). We must "begin[] with the words of the statute and ascribe[] to them their ordinary meaning," reading "disputed language 'in context with related provisions so as to give sense to the legislation as a whole.'" Ryan, 203 N.J. at 54 (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). If the statute is clear on its face, the analysis is complete, and it must be enforced according to its terms. Hubbard, 168 N.J. at 392. If, however, a literal interpretation of a provision would lead to an absurd result or would be inconsistent with the statute's overall purpose, "that interpretation should be rejected" and "the spirit of the law should control." Id. at 392-93 (quoting Turner v. First Union Nat. Bank, 162 N.J. 75, 84 (1999)).

The driving purpose behind the AOM statute, N.J.S.A. 2A:53A-26 to -29, is the reduction of frivolous litigation. See Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 421 (2010). To identify meritless lawsuits "at an early stage of litigation," plaintiffs must "make a threshold showing that their claim is meritorious." In re Petition of Hall, 147 N.J. 379,

391 (1997). "Failure to submit an appropriate affidavit ordinarily requires dismissal of the complaint with prejudice." Meehan, 226 N.J. at 228.

Enacted in 2004, the PFA modified the AOM statute for medical negligence actions, requiring the AOM affiant to be "licensed as a physician or other health care professional in the United States and meet[specific] criteria." N.J.S.A. 2A:53A-41. The statute provides:

> In an action alleging medical malpractice, a person shall not give expert testimony or execute an [AOM] pursuant to [N.J.S.A. 2A:53A-26] 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 [ABMS] or the American Osteopathic Association [(AOA)] and the care or treatment at issue involves that specialty or subspecialty recognized by the [ABMS] or the [AOA], 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 [ABMS] or the [AOA], 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 [ABMS] or the [AOA], 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 [ABMS] or the [AOA] who is board certified in the same specialty or subspecialty, recognized by the [ABMS] or the [AOA], 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 [ABMS] or the [AOA], the active clinical practice of that specialty or subspecialty recognized by the [ABMS] or the [AOA]; 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 [ABMS] or the [AOA], an accredited medical school, health professional school or accredited residency or clinical research program in the same specialty or subspecialty recognized by the [ABMS] or the [AOA]; or

(c) both.

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

The ABMS recognizes internal medicine as a specialty, and hematology as a subspecialty of internal medicine. Am. Bd. of Med. Specialties, ABMS Guide to Medical Specialties 25, 27 (2022) [hereinafter ABMS Guide], https://www.abms.org/wp-content/uploads/2021/12/ABMS-Guide-to-Medical-Specialties-2022.pdf. More particularly, the ABMS defines an "internist" as

> a personal physician who provides long-term, comprehensive care in the office and in the hospital, managing both common and complex illnesses of adolescents, adults[,] and the elderly. Internists are trained in the diagnosis and treatment of cancer, infections and diseases affecting the heart, blood, kidneys, joint and the digestive, respiratory[,] and vascular systems. They are also trained in the essentials of primary care internal medicine, which incorporates an understanding of disease prevention, wellness, substance abuse, mental health[,] and effective treatment of common problems of the eyes, ears, skin, nervous system and reproductive organs.
>
> [Id. at 25.]

Hematology is a subspecialty of internal medicine and, similar to other subspecialties "requires additional training and assessment as specified by the board." Ibid. A "hematologist" is "[a]n internist . . . who specializes in diseases of the blood, spleen and lymph," and "treats conditions such as anemia, clotting disorders, sickle cell disease, hemophilia, leukemia, and lymphoma." Id. at 27.

"The basic principle behind N.J.S.A. 2A:53A-41 is that 'the challenging expert' who executes an [AOM] in a medical malpractice case, generally, should 'be equivalently-qualified to the defendant' physician." Buck v. Henry, 207 N.J. 377, 389 (2011) (quoting Ryan, 203 N.J. at 52). Explaining the statute's framework, the Court in Buck recognized:

> The statute sets forth three distinct categories embodying this kind-for-kind rule: (1) those who are specialists in a field recognized by the [ABMS] but who are not board certified in that specialty; (2) those who are specialists in a field recognized by the ABMS and who are board certified in that specialty; and (3) those who are "general practitioners."
>
> [Ibid. (citing N.J.S.A. 2A:53A-41(a), (b)).]

Accordingly, the first question under the statute is "whether [the treating doctor] is a specialist or general practitioner." Id. at 391. "A 'general practitioner' is defined by what he [or she] is not – he [or she] is not a 'specialist or subspecialist.'" Ibid. (citing N.J.S.A. 2A:53A-41). "If the physician is a specialist, then the second inquiry must be whether the treatment that is the basis of the malpractice action 'involves' the physician's specialty." Ibid. If so, the "equivalency requirements" of N.J.S.A. 2A:53A-41(a) apply. Ibid. Otherwise, the treating physician "is subject to the same affidavit requirements as if he [or she] were a general practitioner." Ibid.

To ensure a plaintiff has sufficient information to obtain an appropriate AOM, the Court in Buck declared that defendant physicians must indicate in their answer to the plaintiff's complaint "the field of medicine in which [they] specialized, if any, and whether [their] treatment of the plaintiff involved that specialty." Id. at 396; see also R. 4:5-3 (codifying the defendant doctor's disclosure requirement). The "evident purpose" of this requirement is to "giv[e the] plaintiff sufficient notice of [the defendant's] specialty," so that the plaintiff can "fulfill the [AOM] requirement." Pressler & Verniero, Current N.J. Court Rules, cmt. R. 4:5-3 (2023).

If the defendant is "board certified" in that specialty, further requirements must be met. N.J.S.A. 2A:53A-41(a). In that event, the AOM's affiant must not only have specialized in the same specialty or subspecialty, but also must 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 . . . who is board certified in the same specialty or subspecialty" and who has, "during the year immediately preceding the date of the occurrence that is the basis for the claim or action . . . devoted a majority of his [or her] professional time to" the "active clinical practice" of that

specialty or subspecialty, the "instruction of students" in that specialty or subspecialty, or both. N.J.S.A. 2A:53A-41(a)(1) and (2).

III. The Same-Specialty Requirement, N.J.S.A. 2A:53A-41(a)

Against that legal backdrop, we turn to the issues presented in this matter. Although on one hand, plaintiff maintains her proffered expert satisfies the same-specialty requirements under the PFA, on the other hand, she attempts to create issues of fact as to whether defendants were engaged in their specialty when the alleged malpractice occurred. Because the initial inquiry under the statute is whether the treating doctors were engaged in their specialty "at the time of the occurrence that is the basis for the action," we first address plaintiff's contentions.

Plaintiff belatedly claims the defendant doctors' care and treatment of John did not involve their internal medicine specialty because they were not John's personal physicians, and they rendered care to the decedent in a subacute center – not in an office or hospital. We will not consider an issue that is raised for the first time on appeal unless the issue pertains to the trial court's jurisdiction or concerns a matter of great public interest. See State v. Alexander, 233 N.J. 132, 148 (2018) (citing DYFS v. M.C. III, 201 N.J. 328, 339 (2010)).

Although plaintiff's claim neither implicates a jurisdictional issue nor is of great public interest, we simply note plaintiff cites no authority to substantiate her claim, nor has our research revealed any such authority. But see N.J.S.A. 2A:53A-26(j) (defining "a health care facility" under the AOM statute by incorporating the definition set forth in N.J.S.A. 26:2H-2(a), which expressly includes "a general hospital, special hospital, mental hospital, public health center, diagnostic center, treatment center, rehabilitation center, extended care facility, skilled nursing home, nursing home, [and] intermediate care facility" in the definition of "health care facility").

In addition, plaintiff seemingly renews her contention that Dr. Surrey's LinkedIn profile undermines the doctor's assertion that she specialized in internal medicine when she rendered the care at issue to John. The court did not expressly decide this issue. To the extent the court rejected Dr. Surrey's averment that she specialized in internal medicine at the time of the incident, we disagree.

Dr. Surrey complied with the Supreme Court's dictates in Buck, as codified in Rule 4:5-3, and her answer to plaintiff's complaint unequivocally stated she specialized in internal medicine when she rendered care to John. The trial court's suggestion otherwise not only ignored Dr. Surrey's answer but failed

to consider plaintiff's allegation that the deviation from the accepted standards of care involved "the continued administration of heparin" at Powerback Rehabilitation and not Dr. Surrey's practice of alternative therapy elsewhere.

We next consider the defendant doctors' asserted specialty in this matter, and their challenge to the court's finding that Dr. Andemariam's AOM satisfied the PFA. Citing the Court's decision in Nicholas, defendants maintain the trial court erroneously determined the subspecialty of plaintiff's proffered expert was "subsumed" in the deviation of the standard of care alleged by plaintiff. In essence, the court concluded because heparin is prescribed by internists and hematologists, Dr. Andemariam met the requirements under N.J.S.A. 2A:53A-41(a).

In Nicholas, the Court interpreted the plain language of N.J.S.A. 2A:53A-41(a) to mean that if a defendant is a specialist, whether board certified or not, the AOM expert "must be a specialist in the same field in which the defendant physician specializes." 213 N.J. at 482. It found that the provision regarding hospital credentialing to perform a particular treatment or procedure, N.J.S.A. 2A:53A-41(a)(1), is not a substitute for this equivalency requirement, but an additional requirement applicable where a defendant is board certified in the specialty in question. Ibid. Stated another way, whether an AOM affiant is

permitted by a hospital to treat the same malady, provide the same care, or perform the same procedure that is at issue in a malpractice case is irrelevant if the affiant is not a specialist in the same area as the defendant. Ibid.; see also Lomando v. United States, 667 F.3d 363, 382-83 (3rd Cir. 2011) (where a defendant is a board-certified specialist, an expert offering testimony against the specialist must share the specialty and also meet the requirements of either N.J.S.A. 2A:53A-41(a)(1) or (2)).

The plaintiff in Nicholas, was treated for carbon monoxide poisoning by the two defendant physicians, one board certified in emergency medicine and the other board certified in family medicine. 213 N.J. at 467-69. The complaint alleged, among other things, that the defendants failed to refer the plaintiff to a facility with a hyperbaric chamber to provide him with oxygen. Id. at 470. The plaintiff filed an AOM from an expert who averred that he was board certified in "Internal Medicine, Pulmonary Diseases, Critical Care, and Undersea & Hyperbaric Medicine," and had "a clinical practice in hyperbaric medicine and critical care" that included evaluating and managing patients with acute carbon monoxide poisoning. Id. at 471-72.

The Court noted practitioners of emergency medicine, family medicine, and internal medicine may all treat carbon monoxide poisoning in the course of

their clinical practice. Id. at 484. However, the Court further recognized these medical practices were "all distinct specialty areas recognized by the [ABMS]." Ibid. The Court concluded the PFA does not permit a physician specializing in internal medicine to serve as an AOM affiant against a physician specializing in emergency or family medicine, "even though each is qualified to treat a patient for carbon monoxide poisoning." Ibid. (emphasis added).

In reaching its decision, the Court reasoned, to conclude otherwise "would lead back to the days before passage of the [PFA] when, in medical-malpractice cases, physician experts of different medical specialties, but who treated similar maladies, could offer testimony even though not equivalently credentialed to defendant physicians," and would "read out of the statute the kind-for-kind specialty requirement" the Legislature intended to impose. Id. at 485. Thus, although the plaintiff's affiant was "unquestionably . . . an expert in the treatment of carbon monoxide poisoning and the use of hyperbaric oxygen as a treatment modality," the Court held that he could not testify "about the standard of care exercised by" the defendants, who were practicing in different specialties. Id. at 487-88; see also Lomando, 667 F.3d at 380-81 (holding the AOM affiant could not testify against the defendant doctors despite his expertise

in the relevant disease, because the proffered expert did not share their specialty as required by N.J.S.A. 2A:53A-41(a)).

Similarly, in the present matter, plaintiff's proffered expert and the defendant doctors were qualified to prescribe heparin. However, because both Drs. Surrey and Babaria were "offered" as specialists in internal medicine, an area of medicine recognized by the ABMS, "and the care or treatment involve[d] that specialty," the PFA mandated that plaintiff's expert "have specialized at the time of the occurrence . . . in the same specialty" as defendants. N.J.S.A. 2A:53A-41(a). It is undisputed that at the time of the alleged malpractice, Dr. Andemariam specialized in hematology. Although hematology is a subspeciality of internal medicine, it is likewise undisputed that Dr. Andemariam did not practice internal medicine at the time of the alleged malpractice. Accordingly, pursuant to the plain terms of the PFA, as explained by the Court in Nicholas, plaintiff's proffered AOM expert failed to satisfy the statute's kind-for-kind mandate for both defendant doctors.

We therefore hold the PFA's requirement is not satisfied where the affiant's practice falls within a subspecialty of a defendant doctor's specialty, when the subspecialist no longer specializes, nor is board certified, in the specialty. In such circumstances, the policy underlying the equivalency

requirement would be undermined if a physician with such specialized training were permitted to opine regarding the standard of care applicable to a physician practicing in the more generalized specialty because the subspecialist no longer practices in the specialty. Indeed, "[t]he apparent objective of N.J.S.A. 2A:53A-41 is to ensure that, when a defendant physician is subject to a medical-malpractice action for treating a patient's condition falling within his [or her] ABMS specialty, a challenging plaintiff's expert, who is expounding on the standard of care, must practice in the same specialty." Nicholas, 213 N.J. at 486 (emphasis added).

Having concluded that Dr. Andemariam's AOM failed to satisfy the same-specialty requirement of the PFA for both defendant doctors, we need not reach the statute's additional requirements regarding Dr. Babaria's ABMS certification in internal medicine. We add only that because Dr. Babaria specialized, and was board certified, in internal medicine, plaintiff's AOM affiant was required to specialize in internal medicine and meet the additional criteria set forth in N.J.S.A. 2A:53A-41(a)(1) or (2). Dr. Andemariam's subspecialty in hematology did not absolve her of those requirements. Because plaintiff's proffered expert did not specialize in internal medicine at the time of the alleged occurrence, she necessarily failed to meet the additional statutory criteria.

IV. The Waiver Exception, N.J.S.A. 2A:53A-41(c)

Lastly, we turn to plaintiff's waiver argument under N.J.S.A. 2A:53A-41(c). For the first time in her responding brief before the trial court, plaintiff argued she was entitled to waiver of the same-specialty requirements pursuant to N.J.S.A. 2A:53A-41(c), and the Court's decision in Ryan. Plaintiff neither cross-moved nor filed a supporting certification to support her argument. Instead, plaintiff summarily argued her attorney: contacted the same expert service that recommended Dr. Andemariam and requested an expert who specialized in internal medicine; and directly contacted an expert in that specialty. Plaintiff generally claimed no such specialist would execute an AOM. Plaintiff also contended that Dr. Andemariam possessed sufficient training and knowledge to testify under the waiver section of the PFA because she was "actively involved in the practice of hematology," which "as a subspecialty of [internal medicine]," must be considered a related field under the statute. Plaintiff thus claimed she made "a good faith effort to find a qualified expert."

During argument before the trial court, defense counsel protested that plaintiff failed to raise waiver of the statutory requirements during the Ferreira conference, and plaintiff's counsel failed to certify to the efforts advanced in plaintiff's responding brief. Referencing the extended deadline to submit a valid

AOM under N.J.S.A. 2A:53A-27, defense counsel argued plaintiff failed to assert waiver "before the expiration of the 120-day mark." Defense counsel challenged plaintiff's efforts, claiming the attempt to locate an equivalent expert via "a single service" was insufficient in view of the number of services available and because "internal medicine is the most . . . ubiquitous area of practice."

N.J.S.A. 2A:53A-41(c) provides:

> A court may waive the same specialty or subspecialty recognized by the [ABMS] or the [AO] 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.
>
> [(emphasis added).]

Thus, a court may waive the same-specialty requirements if the requesting party satisfies two criteria: "a good faith effort has been made to identify an expert in the same specialty or subspecialty," and the proffered 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." Ibid.

As the Court stated in Ryan, the waiver provision "opens the door for a non-equivalently-qualified expert in the same field as defendant to testify," and may "permit[] an expert in one field to opine on the performance of an expert in another related field." 203 N.J. at 53. Indeed, "the very existence of the waiver provision" made it "obvious" that "the Legislature did not intend a malpractice case to stand or fall solely on the presence or absence of a same-specialty expert." Id. at 55. Thus, the waiver provision provides "a safety valve" for cases where a party cannot locate such an expert within the statutory time limit or at all. Id. at 56.

However, relief is only available if the party makes a motion demonstrating "a good faith effort to satisfy the statute." Ibid. Accordingly, the party must show "a legitimate attempt" undertaken to locate such an expert. Id. at 55. Thus, the party should not be relieved of the statutory requirements through "desultory undertakings or half-hearted endeavors." Ibid. The "moving party must show what steps" were undertaken to obtain a kind-for-kind expert. Ibid. Those steps

> include: the number of experts in the field; the number of experts the moving party contacted; whether and

> where he [or she] expanded his [or her] search geographically when his [or her] efforts were stymied; the persons or organizations to whom he [or she] resorted for help in obtaining an appropriate expert; and any case-specific roadblocks (such as the absence of local subspecialty experts) he [or she] encountered.
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> [Ibid.]

The party seeking waiver need not reveal "the reasons why a particular expert or experts declined to execute an affidavit." Ibid. This is because N.J.S.A. 2A:53A-41(c) refers only to "the robustness of [the] movant's 'efforts,'" an inquiry upon which "the experts' reasons for declining simply do not bear on the robustness of movant's 'efforts.'" Ibid.

As a preliminary matter, the plain terms of the PFA require the party seeking waiver to move for such relief. Plaintiff neither moved nor cross-moved for such relief. Nor was her informal application supported by a certification of her efforts to comply with the PFA. Moreover, without expressly ruling on plaintiff's alternate waiver argument, the court tersely addressed the statutory requirements without applying the Ryan factors.

In Castello v. Wohler, 446 N.J. Super. 1, 11 (App. Div. 2016), the plaintiff similarly failed to move for relief under the waiver provision of the PFA, informally raising the argument in her brief opposing the defendant's motion to bar her expert's testimony. Because the plaintiff did not "formally file a motion

seeking waiver from compliance with the PFA," the trial court did not reach the merits of her argument. Ibid. Although we found no error in the court's procedural decision, we reversed and remanded on other grounds. Id. at 27.

Because the rules of statutory construction dictate that we first consider the waiver provision's plain language, Hubbard, 168 N.J. at 392, we conclude plaintiff's waiver argument was procedurally barred. See Buck, 207 N.J. at 390 (recognizing "[c]ourts are granted authority to waive the specialty qualification requirements under specifically defined circumstances, but only 'upon motion by the party seeking a waiver.'" (quoting N.J.S.A. 2A:53A-41(c))); see also Medina v. Pitta, 442 N.J. Super. 1, 23 (App. Div. 2015) (stating the failure to follow the AOM statute's "procedural requirements," may result in dismissal "even if a claim has merit").

We therefore could decline to consider plaintiff's waiver argument on appeal. For the sake of completeness, however, we have considered plaintiff's contentions in view of the PFA's waiver provision and the Ryan factors, and conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11- 3(e)(1)(E). We add only that plaintiff's attempt to satisfy the same-specialty requirement came far short of demonstrating a good faith attempt under Ryan. Placing the lack of certification aside, plaintiff failed to specify

"the number of experts in the field"; "whether and where [s]he expanded h[er] search geographically when h[er] efforts were stymied"; and "any case-specific roadblocks," including the lack of local internal medicine experts. Ryan, 203 N.J. at 55. As defense counsel argued before the trial court, however, the internal medicine specialty is a "ubiquitous area of practice." In any event, the issues raised in defendants' appeal were not moot.

Reversed and remanded for dismissal of plaintiff's complaint with prejudice.