

STACY SOVELOVE, individually and as
Executor of the **ESTATE OF MARC S.
SOVELOVE**, deceased,

Plaintiff,

vs.

**DR. MICHAEL SHIRAZI, M.D.; DR.
AMARPAL K. PUREWAL, M.D.; DR.
SCOTT SUNDICK, M.D.; DR. HERNAN
SANCHEZ-TREJO, M.D.; DR. KEREN
BAKAL, M.D.; DR. ASIM KHAN, M.D.;
DR. SANFORD T. REIKES, M.D.; DR.
JEFFREY R. BLITSTEIN, M.D.;
OVERLOOK MEDICAL CENTER;
ATLANTIC HEALTH SYSTEM and DR.
JOHN DOE 1-5** (being fictitious
designations)

SUPERIOR COURT OF NEW JERSEY-
APPELLATE DIVISION

CIVIL ACTION

APPELLATE DOCKET NO. 1540-23

ON APPEAL FROM THE SUPERIOR
COURT OF NEW JERSEY - LAW
DIVISION- MORRIS COUNTY UNDER
DOCKET NO. MRS-L-1635-19

SAT BELOW: HON. ROSEMARY E.
RAMSEY, J.S.C.

**BRIEF AND APPENDIX OF APPELLANT PLAINTIFF STACY SOVELOVE
INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARC S. SOVELOVE,
DECEASED**

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PRELIMINARY STATEMENT

This appeal is but one piece of a larger medical malpractice wrongful death lawsuit arising out of the death of Marc Sovelove on June 1, 2018. On that day, Mr. Sovelove underwent a right kidney biopsy at Overlook Hospital in Summit New Jersey, which was supposed to be a one day in-and-out procedure, performed by defendant Dr. Michael Shirazi. Shirazi encountered complications after the biopsy, and Sovelove was then seen by a number of different medical specialists during the remainder of the day. Unfortunately, Mr. Sovelove died late in the afternoon of June 1, 2018.

His widow filed this suit against eight different medical physicians who treated Mr. Sovelove and Overlook Hospital, alleging that their malpractice caused his death. As part of this suit, the plaintiff provided an Affidavit of Merit of Dr. Paul Skudder. M.D. against defendant Dr. Keren Bakal.¹ Dr. Bakal then filed a motion to have the lawsuit against him dismissed with prejudice on the basis that Dr. Scudder's Affidavit of Merit was not in compliance with the pertinent statute. The Court agreed and entered an Order dated June 24, 2020, dismissing the complaint against Dr. Bakal with prejudice. The basis of the decision was that Dr. Skudder did not have the same credentials and Dr. Bakal. Thereafter, the lawsuit proceeded against the remaining defendants, and the suit was dismissed as to all

remaining defendants except Dr. Michael Shirazi between July 20, 2020 and October 24, 2023. The last remaining defendant, Dr. Michael Shirazi, settled the case against him, and was finally dismissed from the case by a Stipulation of Dismissal filed on December 12, 2023. On January 26, 2024, the Plaintiff filed a Notice of Appeal limited solely to the issue of whether the dismissal of the case against Defendant Dr. Keren Bakal, M.D. based on the Affidavit of Merit was proper.

PROCEDURAL HISTORY

An Amended Complaint was filed by the Plaintiff Stacy Sovelove, individually and as Executor of the Estate of Mark S. Sovelove, deceased against the Defendants Dr. Michael Shirazi, MD; Dr. Amarpal K. Purewal, MD; Dr. Scott Sundick; M. D., Dr. Hernon Sanchez – Trejo, M.D.; Dr. Keren Bakal, M.D.; Dr. Asim Khan, M.D.; Dr. Sanford T Reikes, M.D.; Dr. Jeffrey R. Blitstein, M.D.; Overlook Medical Center; Atlantic Health System and a number of John Doe Defendants on August 1, 2019. 1A. The suit was filed in the Law Division of the Superior Court of New Jersey in Morris County. The lawsuit was a medical malpractice wrongful death action seeking damages arising out of the death of Marc S. Sovelove on June 1, 2018. Id. The suit claimed that the Defendants deviated from the accepted standards of medical practice in their care and treatment of Marc Sovelove while he was a patient at Overlook Hospital on June 1, 2028 causing his death on that date. Id. The suit sought monetary damages from the Defendants arising from the death of Mr. Sovelove.

Thereafter, Answers to the Amended Complaint were filed by the various Defendants. With respect to this appeal, Dr. Keren Bakal filed an Answer to the Amended Complaint, Separate Defenses, Cross-Claims, Demand for Statement of Damages, on August 30, 2019. 13a. Dr. Paul S. Skudder served an Affidavit of Merit dated August 20, 2019 on behalf of the Plaintiff, alleging that the medical

care given to Marc S. Sovelove by the defendant Keren Bakal as well as other Defendants was not in accord with the accepted standards of medical practice in the community on August 20, 2019. 32a.

Thereafter, the case was litigated by the parties. As part of her case, the Plaintiff served an Affidavit of Merit by Dr. Paul Skudder, which was directed to Defendant Drs. Scott Sundick, Dr. Hernan- Sanchez-Trejo, Dr. Keren Bakal and Dr. Asim Kahn. 32a. On December 30, 2019, Defendant Dr. Keren Bekel filed a Notice of Motion to Dismiss the Complaint for Failure to Supply a Proper Affidavit of Merit. 24a. The Plaintiff filed a Brief in Opposition to this motion. On June 24, 2020, the Hon. Rosemary E. Ramsay, J.S.C. read an oral Opinion in which she granted the motion and dismissed Plaintiff's Complaint against Dr. Bekel alone with prejudice. 41a.

The Plaintiff continued to litigate the case against the remaining Defendants, eventually leading to the voluntary dismissal of the case against defendant Dr. Amarpal Purewal by Order dated July 10, 2020, 59a; against defendant Dr. Sanford Reikes by Order dated January 24, 2020, 73a; against Dr. Jeffrey Blitstein by Order dated January 24, 2020, 75a; against Dr. Scott Sundick by Order dated July 21, 2021, 61a; and against AHS Hospital/Overlook Hospital and Dr. Kahn by Stipulation of Dismissal with Prejudice dated November 3, 2023. 63a.

Thereafter, the case continued against Dr. Michael Shirazi, M.D. until the case was settled between Dr. Shirazi and the Plaintiff. This resulted in a Stipulation of Dismissal with Prejudice against Dr. Michael Shirazi filed on December 12, 2023. 65a. The Plaintiff thereafter filed a Notice of Appeal on January 26, 2024 limited solely to the issue of whether the dismissal of the case against Defendant Dr. Shirazi on the basis of the Affidavit of Merit was proper. 66a.

STATEMENT OF THE FACTS

This case arises out of the events that occurred on Friday, June 1, 2018 at Overlook Hospital in Summit, New Jersey. 1a et seq. On June 1, 2018, Marc Sovelove was a 55-year-old married father of 2 teenage children who lived in Mine Hill, New Jersey. On June 1, 2018, Mr. Sovelove drove to Overlook Hospital in Summit, New Jersey for an elective right CT-guided needle kidney biopsy that had been ordered for him by his nephrologist, defendant Dr. Sanford T. Reikes, M.D. This procedure was performed by Interventional Radiologist defendant Dr. Michael Shirazi, where a CT scan is used to guide a needle into the kidney to obtain small tissue samples.6a This is a minimally invasive procedure, and is an alternative to an open surgical procedure, which also has a faster recovery time, and avoids general anesthesia.

Immediately after the biopsy was completed, Mr. Sovelove complained of right -side lower quadrant abdominal pain, became very pale and was diaphoretic (profusely sweating). Suspecting a bleed, Dr. Shirazi ordered a CT scan of the right kidney, which showed that as a result of the biopsy, the kidney was actively bleeding profusely. 7a. Thus, the medical records reflect that at 12:41 p.m., the CT scan showed a large retroperitoneal bleed caused by this biopsy.

Dr. Shirazi could have and should have immediately repaired the bleeding kidney by taking the patient back into the operating suite and performing an embolization. However, for some reason, he decided to take no action to heal this bleed, and instead he shipped the patient – now actively bleeding internally - over to the Emergency Department at Overlook Hospital. He then simply left the patient in the Emergency Room. Dr. Shirazi never came back and attempted to stop the bleeding. Id.

. During that afternoon, Mr. Sovelove was seen and examined by the defendant physicians, including Defendant Dr. Keren Bakal, a pulmonologist and critical care specialist.

Although all of these physicians examined Mr. Sovelove during that afternoon, and it was clear that Mr. Sovelove was actively bleeding, none of them made any effort to actually intervene to stop the internal bleeding. Moreover, although blood transfusions were ordered, Marc Sovelove received no blood transfusions until hours after the retroperitoneal bleed was diagnosed. Thus, during the afternoon of June 1, 2018, Marc Sovelove was bleeding to death in the emergency department of a 500+ bed hospital while at least 8 physicians were aware of his condition.

Finally, at approximately 5:10 p.m. on June 1, 2018, almost 5 hours after the retroperitoneal bleed was diagnosed by CT scan, another Interventional

Radiologist - who is not a Defendant in this case -finally took Mr. Sovelove to an operating suite to perform an embolization to stop the internal bleeding caused by Dr. Shirazi's biopsy. As he was being prepared for this procedure, Marc Sovelove suddenly became pulseless, went into cardiac arrest and died. Mr. Sovelove was 55 years old.

Thereafter, this wrongful death medical malpractice lawsuit was filed against the above physicians for professional negligence that caused Marc Sovelove's death. 1a.

LEGAL ARGUMENT
POINT 1

THE TRIAL COURT'S DECISION GRANTING THE MOTION TO DISMISS THE COMPLAINT FOR ALLEGED FAILURE TO PROVIDE AN APPROPRIATE AFFIDAVIT OF MERIT PURSUANT TO N.J.S.A. 2A:53A-29 SHOULD BE REVERSED.(THE TRANSCRIPT OF JUNE 24, 2020 FILED SPARATELY FROM THIS BRIEF SETS FORTH THE OPINION AND RULING IN QUESTION IN THIS MATTER at T13 - 13 to T.14 - 13)

In this case, the plaintiff has filed suit against the various medical specialists who treated Mr. Sovelove on June 1, 2018. Thus, suit was filed against Dr. Shirazi, the Interventional Radiologist who performed the fatal biopsy. In addition, Mr. Sovelove was also seen by Defendant Dr. Keren Bakal, a Board-Certified Pulmonologist and Critical Care Specialist.

In this case, the Plaintiff has supplied an Affidavit of Merit of Dr. Paul Skudder, M.D. 32a. -Dr. Skudder is Board Certified in General Surgery, in Vascular Surgery and in Surgical Critical Care. In his motion, Defendant Dr. Keren Bakal challenged the sufficiency of the Affidavit of Merit of Dr. Skudder, claiming that it is insufficient as a matter of law because Dr. Skudder's credentials were not identical to those of Dr. Bekel. Dr. Bekel's Curriculum Vitae is also attached. 28a. As a result, Dr. Bakal claimed that the Complaint should be dismissed as to him. The trial court agreed and dismissed the case against him. As shown below, there is no merit to this argument, and the Court's decision should be reversed.

The Affidavit of Merit statute, N.J.S.A. 2A:53A-26 et seq., requires that an “Affidavit of Merit” be provided by a plaintiff in all professional negligence cases. This includes suits against medical professionals such as physicians, dentists, podiatrists, chiropractors, nurses, etc., as well as against non-medical specialists such as attorneys, accountants, engineers, architects, etc. The Affidavit of Merit serves a gatekeeping function at the beginning of a malpractice case. It requires that, within 60 days of the date of the filing of an Answer to a Complaint alleging malpractice, a plaintiff must serve an Affidavit of Merit which states that “... there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice, or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.” N.J.S.A. 2A:53A-27. Thus, the Affidavit of Merit is a statement of probable cause of malpractice by a professional at the beginning of the case. Failure to provide an Affidavit of Merit requires a dismissal of the case with prejudice. Cornblatt v Barow, 153 N.J. 218 (1998).

The purpose of the Affidavit of Merit statute is “to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious in order that meritless lawsuits readily could be identified at an early stage of litigation.” In re Hall, 147 N.J. 379, 391 (1997). Mayfield v. Community Medical Associates, 335 N.J. Super. 198, 204 (App. Div. 2000). The goal is “...to weed out

frivolous lawsuits early in the litigation while at the same time, ensuring that plaintiffs with meritorious claims will have their day in court.” Ferriera v Rancocas Orthopedic Associates, 178 N.J. 144, 150 (2003) quoting, Ryan v Renny, 203 N.J. 37(2010), Importantly, our courts have emphasized that the Affidavit of Merit statute is not to be mechanically applied, but should be construed “to avoid the risk that even a few meritorious cases may be dismissed for non-compliance with the Statute.” In re Hall, 147 N.J. 379, 392-393 (1997). The Supreme Court reiterated this in Ryan v Renny, 203 N.J. 37(2010), emphasizing that “[i]mportantly, ‘there is no legislative interest in barring meritorious claims brought in good faith. Indeed, ‘[t]he legislative purpose was not to ‘create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims.’” Id. at 203 N.J. 51(2010) (internal citations omitted).

Many of the challenges to Affidavits of Merit in particular cases deal with the required qualifications of the Medical Expert signing the Affidavit of Merit. Indeed, that was the challenge in this motion by Defendant Dr. Bakal. The statute requires that 1.) if a defendant physician is Board-Certified in a medical specialty or subspecialty **and** 2) the medical treatment that the Defendant is being sued over involves that specialty, then the Plaintiff’s Expert must also be Board-Certified in the same specialty and actually practice in that specialty. Thus, the Act provides that “...[i]f the party against whom ... the testimony is offered is a specialist **and**

the care or treatment involves that specialty...the person providing the testimony shall have specialized ... in the same specialty....” N.J.S.A. 2A:53A-41(a) (emphasis added). See, Nicholas v Mynster, 213 N.J. 463, 480-481 (2013).

In the case at bar, Defendant Dr. Bakal is Board-Certified in Internal Medicine, Pulmonary Medicine and Critical Care. However, Dr. Bakal was not practicing Pulmonology or Internal Medicine with Mr. Sovelove. Rather, he was practicing Critical Care is taking care of Sovelove’s internal bleeding after the surgical biopsy while he was in the Emergency Department at Overlook Hospital on June 1, 2018. Dr. Paul Skudder, M.D. is Board Certified in Surgical Critical Care as well as in General Surgery and Vascular Surgery. A copy of his Curriculum Vitae is attached. He signed the Affidavit of Merit against Defendant Dr. Bakal. His specialty of Surgical Critical Care is equivalent to the Critical Care that Dr. Bekel was practicing.

Dr. Bakal challenges the adequacy of Dr. Skudder’s qualifications- arguing essentially that Dr. Skudder’s qualifications were not identical to those of Defendant Dr. Bakal. This argument is simply wrong. It is based on an implicit argument that the Affidavit of Merit Statute requires that a challenging (Plaintiff’s) Medical Expert must have the identical credentials of the Defendant physician. That is simply not the law. If the Legislature wanted to have this requirement of identical credentials, it could have easily stated so. However, it did not. Rather, the

Legislature adopted the simple common-sense requirement that as long as the challenging expert has the same Board-Certification as the Defendant Physician, **and** that the medical treatment involved involves that specialty, the fact that the Defendant Physician has additional Certifications different than the Plaintiff's expert is of no consequence.

In this case, Dr. Skudder's qualifications are more than adequate to support the Affidavit of Merit in this case. The medical specialty involved is Critical Care. As Dr. Skudder has observed:

“Critical Care board certification is offered by three boards in the United States. These are the American Board of Internal Medicine (ABIM), the American Board of Surgery (ABS), and the American Board of Pediatrics (ABP). Each qualifies and certifies full certification in the field of critical care. Of course, there are differences in emphasis between the specialties. For example, problems such as pre- and post-operative care and treatment of trauma might be emphasized a bit more in the ABS examination, and problems associated with heart attacks or lung diseases like Wegener's Dranulmatosis might be more emphasized in the ABIM examination, and of course childhood considerations are emphasized in the ABP examination.

Any statement that critical care certification by the ABS is less valid in any way, then is certification by the ABIM is unsupportable and is patently untrue. Both the ABIM and

the ABS are recognized and have equal footing under the overall governing body of board certification in the U.S. which is the ABMS (American Board of Medical Specialty).

The issue seems to be that Dr. Bakal is a pulmonologist as well as being a Critical Care Specialist. This means he is not a surgeon and his Certification will be through the ABIM, whereby Dr. Scudder's is through the ABS. However, given Mr. Sovelove's clinical issues, there is no distinction in level of expertise between these certifications, as the problems pertinent to the case are those of management of bleeding and hemorrhagic shock. Critical care experience, training and certification are equally pertinent to this patient's clinical picture whether achieved through examination by the ABS or the ABIM.

Given these facts in light of the statute's purpose of ensuring that there is meritorious basis for a medical malpractice case, this dismissal should be reversed.. Dr. Bakal is applying the statute mechanically – comparing his credentials with those of Dr. Skudder. He claims that because the credentials are not identical, Skudder's qualifications are not sufficient. He provides no discussion of the facts of this case, and thus avoids having to admit that his treatment fell within the rubric of critical care, and not pulmonology. Dr. Skudder is clearly qualified to render an opinion as to Defendant Dr. Bakal's treatment – or lack of treatment- of Mr. Sovelove. Dr. Bakal is Board-certified in Critical Care, and his

treatment of Marc Sovelove was limited to Critical Care. Dr. Skudder's qualifications as a Surgical Critical Care specialist are equivalent to the Critical Care practiced by Dr. Bakal.

CONCLUSION

In light of the above, it is respectfully requested that the decision of the trial court below dismissing the Complaint against Dr. Bakal's is incorrect and should be reversed.

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STACY SOVELOVE,

Plaintiff/Appellant

vs.

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BAKAL, M.D., DR. ASIM KHAN, M.D.;
DR. SANFORD T. REIKES, M.D., DR.
JEFFREY R. BILSTEIN, M.D.,
OVERLOOK MEDICAL CENTER; ATLANTIC
HEALTH SYSTEM AND DR. JOHN DOE 1-
5 (BEING FICTITIOUS
DESIGNATIONS),
Defendants/Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-001540-23

CIVIL ACTION

On Appeal from the Superior
Court of New Jersey
Law Division
Morris County

DOCKET NO. BELOW:

MRS-L-1635-19

SAT BELOW:

HONORABLE Rosemary E. Ramsay,
P.J.S.C.

**BRIEF AND APPENDIX (1R - 4R) FILED ON BEHALF OF
DEFENDANT/RESPONDENT KEREN BAKAL, M.D. IN OPPOSITION TO
PLAINTIFF'S APPEAL OF THE TRIAL COURT'S ORDER DATED JUNE 24,
2020 DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE FOR FAILING
TO PROVIDE AN APPROPRIATE AFFIDAVIT OF MERIT AS REQUIRED UNDER
N.J.S.A. § 2A:53A-27, et. seq.**

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PRELIMINARY STATEMENT

Defendant/Respondent Keren Bakal, M.D. submits this memorandum of law in opposition to Plaintiff's Appeal of the Trial Court's June 24, 2020 Order, dismissing Plaintiff's Complaint with prejudice for failure to provide an appropriated Affidavit of Merit as required under N.J.S.A. § 2A:53A-27, *et. seq.*

This is a medical malpractice action wherein Plaintiff claims that Defendant, Dr. Bakal, a licensed physician specializing in and Board Certified in Pulmonary Medicine and Critical Medicine as well as co-Defendants, deviated from accepted standards of care relative to the care and treatment provided at Overlook Hospital on June 1, 2018. It is alleged that as a result of Defendants' professional negligence, relative to the performance of an elective right CT-guided needle kidney biopsy and post-operative care, Plaintiff passed away.

It is undeniable that Dr. Bakal's Answer identified the medical specialties in which she was practicing at the time of the at issue care and treatment was provided in this case, i.e. pulmonology and critical care medicine. Despite Plaintiff being on notice of Dr. Bakal's medical specialties, an Affidavit of Merit was served by a physician who shared neither of Dr. Bakal's specialties, but rather practiced, specialized and was Board Certified in wholly distinct disciplines, i.e. general surgery, vascular surgery and surgical critical care. Following Plaintiff's

failure to serve an appropriate Affidavit of Merit and Ferreira Conference, the trial court entered an Order granting Dr. Bakal's Motion to Dismiss. Prior to entry of the Order of Dismissal, Plaintiff did not move for waiver of the Affidavit of Merit Statute's strict requirements.

On Appeal, Plaintiff does not dispute that Dr. Bakal and Dr. Skudder do not share the same training, Board Certifications or medical specialty. Rather, Plaintiff argues that the statutorily required Affidavit of Merit is simply a "statement of probable cause of malpractice by a professional at the beginning of the case". In support of Plaintiff's argument, he cites to no authority, either binding or otherwise, but relies on Dr. Skudder's "observations" relative to the sufficiency of his AOM. Irrespective of the self-serving position of Plaintiff and his expert, there is simply no legal basis to support this position.

Rather, as will be developed below, New Jersey's Supreme Court, Nicholas v. Mynster, 213 N.J. 463, *infra*, as well as the Appellate Division decisions of Wiggins v. Hackensack Meridian Health, 478 N.J. Super. 355, *infra*, and Pfannenstein ex rel. Est. of Pfannenstein v. Surrey, 475 N.J. Super. 83, *infra* and made clear that the Affidavit of Merit Statute requires an Affiant to "possess the same credentials" and have consistently applied a kind-for-kind requirement. Here, the Plaintiff cannot in good faith argue that Dr. Skudder possesses the same credentials as Dr. Bakal. Not

only do the two physicians practice in wholly different disciplines without any overlapping credentials, their Certifications were issued by different boards. As Plaintiff acknowledges in his moving papers, Dr. Bakal is Certified through the American Board of Internal Medicine and Dr. Skudder is Certified through the American Board of Surgery. Moreover, a review of the doctors' respective *curriculum vitae* highlight the differences in their post-doctoral training.

Quite simply, a review of the relevant and controlling authorities confirm that the Trial Court appropriately dismissed Plaintiff's Complaint as he failed to serve an Affidavit of Merit that complied with New Jersey Statute and case law. Therefore, the defense respectfully submits that as a matter of law and equity, Plaintiff's Appeal be denied in full, with the Trial Court's Order of June 24, 2020 being affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

On August 1, 2019, Plaintiff/Appellant Plaintiff Stacy Sovelove, individually and as Executor of the Estate of Mark S. Sovelove (hereinafter 'Plaintiff') filed an Amended Complaint naming Michael Shirazi, MD (hereinafter 'Dr. Shirazi') Amarpal K. Purewal, MD (hereinafter 'Dr. Purewal'), Scott Sundick, M.D. (hereinafter 'Dr. Sundick'), Hernon Sanchez-Trejo, M.D. (hereinafter 'Sanchez-Trejo'), Keren Bakal, M.D., Asim Khan, M.D. (hereinafter 'Dr. Khan'), Sanford T. Reikes, M.D. (hereinafter 'Dr. Reikes'), Jeffrey R. Blitstein, M.D. (hereinafter 'Blitstein'), Overlook Medical Center, Atlantic Health System and fictitious parties as Defendants. **1A.**

This complex medical malpractice action relates to Plaintiff undergoing an elective right kidney biopsy at Overlook Medical Center on June 1, 2018, post-operative care that day and his passing away on June 1, 2018 allegedly as a result of Defendants' negligence. **1A.** Plaintiff's Complaint identifies Defendant/Respondent, Keren Bakal, M.D. (hereinafter 'Defendant' or 'Dr. Bakal') as a physician specializing in Critical Care and

¹ In reviewing the underlying facts and the procedural history, it was determined that the two are intrinsically intertwined. It is respectfully submitted that to separate the Statement of Facts from the Procedural History would have been difficult and would have likely led to a lengthier brief. Along these same lines, the Statement of Facts and Procedural History are combined for ease of reading and brevity.

Pulmonology. **7A.** As to Defendant, it is alleged that following the right kidney biopsy with resulting puncture, Dr. Bakal was to "properly arrange Mr. Sovelove's care to arrange for appropriate consultations and to perform necessary surgical procedures to ensure that that patient did not bleed to death". **7A - 8A.** Plaintiff claims that Dr. Bakal as well as the other named Defendants were "negligent and deviated from the accepted standards of medical practice in the community in their care and treatment of Plaintiff's Decedent Marc S. Sovelove, which negligence and deviations were the proximate cause of his death at approximately 6 p.m. on June 1, 2018." **9A.**

On August 30, 2019, Defendant filed an Answer to the Amended Complaint. **13A.** Defendant's Answer denied any and all claims of negligence. **13A.** Defendant's Answer advises that she "is a licensed physicians practicing medicine in the specialty of pulmonology and critical care medicine" and that the care and treatment provided to Plaintiff to Defendant was within those specialties. **21A.** Finally, Defendant's Answer demands an Affidavit of Merit pursuant to N.J.S.A. § 2A:53A-27, et. seq. **22A.**

During discovery, Plaintiff served an Affidavit of Merit (hereinafter 'AOM') prepared by Paul S. Skudder, M.D. dated August 20, 2019, which alleges that the care and treatment provided by Defendant, as well as Dr. Sundick, Dr. Sanchez-Trejo and Dr. Khan, fell outside acceptable standards and/or treatment practices. **32a.**

Dr. Skudder holds Board Certifications in General Surgery, Vascular Surgery and Surgical Critical Care, which are the distinct medical disciplines in which he specializes. **32A.** Dr. Skudder's Board Certifications were issued by the American Board of Surgery. **34A.** Following his graduating from Medical School, Dr. Skudder completed a residency in surgery and a vascular fellowship. **34A.**

Defendant holds Board Certifications in Internal Medicine, Pulmonary Medicine and Critical Care Medicine, which were issued by the American Board of Internal Medicine. **28A.** At the time the Defendant provided care and treatment to Plaintiff, Defendant was practicing in the specialties of pulmonology and critical care. **22A.** Following Defendant graduating from Medical School, she completed a residency in internal medicine and a pulmonary and critical care fellowship. **28A.**

Given that Dr. Skudder and Defendant did not share the same medical specialty, held different Board Certifications and otherwise, did not meet same the kind-for-kind requirement, by way of letter dated October 14, 2019, Defendant objected to Dr. Skudder's AOM. **1R.** Thereafter, Plaintiff elected not to serve an appropriate AOM and on December 30, 2019 (more than 120 days after Defendant's Answer was filed), Defendant filed a Motion to Dismiss Plaintiff's Complaint for failure to provide an appropriate AOM (hereinafter 'Motion to Dismiss'). **24A.**

On January 28, 2020, the Court held a *Ferreira* Conference. **2R.** At the conference it was confirmed that Defendant objected to Dr. Skudder's AOM and had filed a Motion challenging its sufficiency. **2R.** Following the *Ferreira* Conference Plaintiff filed opposition to Defendant's Motion to Dismiss, but did not seek a waiver of the AOM requirement and did not request additional time to serve an appropriate AOM. **4R.**

On June 24, 2020, the Honorable Rosemary Ramsay, P.J.S.C. read her oral decision on Defendant's Motion to Dismiss. **1T².** The Trial Court quoted from the Affidavit of Merit Statute, which is codified at N.J.S.A. § 2A:53A-27, et. seq., and the requirements that an expert must meet in order to execute an Affidavit. **1T 8:18 - 9:7; and 9:13 - 11:14.** As noted by the Trial Court, it was undisputed that Dr. Bakal specializes in pulmonology with a subspecialty in critical care. **1T 11:15 - 11:21.** The Trial Court also identified Plaintiff's argument being that "the affidavit of merit statute does not require that the affiant had the identical credentials as the defendant physician. Instead plaintiff asserts that the affiant need only have the same board certifications as the defendant physician and that medical treatment involve[ing] that specialty." **1T 11:22 - 12:24** (emphasis added). Plaintiff further argued that despite Dr. Bakal's Board Certification being

²The reference to 1T is a citation to the Transcript of the Trial Court's decision from June 24, 2020.

in critical care and Dr. Skudder's specialty being in surgical critical care, the doctors practiced within the same specialty. 1T 12:4 - 6. Plaintiff's argument was rejected by the Trial Court. 1T 12:7 - 14:4.

In rejecting Plaintiff's argument, the Court cited to and relied on the seminal case of Nicholas v. Mynster, 213 N.J. 463, 482 - 483 (2013), wherein New Jersey's Supreme Court addressed the credentialing provision of the Affidavit of Merit Statute. 1T 12:7 - 13:2. As the Nicholas Court made clear "'When a physician is a specialist and the basis of the malpractice involves the physician's specialty, the challenging expert must practice in the same specialty.'" 1T 12:18 - 12:22, quoting Nicholas at 481 - 482. The Trial Court then engaged in the necessary analysis of whether (i) Dr. Bakal was a specialist or a general practitioner; and (ii) whether the treatment that is the basis of the malpractice action involves that specialty. 1T 12:23 - 13:2. This analysis confirmed that Dr. Skudder could not serve as a qualified affiant as to Defendant.

As the Trial Court noted, it was undisputed that Defendant is a specialist and that the treatment at issue involved her practice as an internist and her subspecialty of critical care medicine. 1T 13:2 - 13:18. The Trial Court also confirmed that "[a]lthough both Dr. Bakal and Dr. Skudder possess subspecialties relating to critical care, those subspecialties were not the same as the

American Board of Medical Specialties recognizes distinct subspecialties for critical care medicine when it relates to internists and critical care surgery when it relates to the specialty of surgery." 1T 13:18 - 13: 24. Also as noted by the Trial Court, unlike Dr. Skudder, Defendant is not a surgeon. 1T 13:13. Since the American Board of Medical Specialties "draws a distinction between those subspecialties, Dr. Skudder and Dr. Bakal do not practice in the same specialty or subspecialty". 1T 14:2 - 14:4. The Trial Court concluded that based on the record, Affidavit of Merit Statute and Nicholas that Dr. Skudder's AOM was non-compliant and dismissal was appropriate. 41A.

By way of Order dated June 24, 2020, the Trial Court's ruling was memorialized, granting Defendant's application, dismissing Plaintiff's action with prejudice pursuant to N.J.S.A. § 2A:53A-27, et. seq. 41A. Thereafter, the case proceeded with all claims as to all remaining Defendants being resolved. This appeal ensued.

LEGAL ARGUMENT

STANDARD OF REVIEW

This Appeal arises from the Trial Court's dismissal of a claim for failure to serve an appropriate Affidavit of Merit and the standard of review is *de novo*. See, Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021); Natale v. Camden County Corr. Facility, 318 F.3d 575, 579 (3d Cir. 2003); see also Smerling v. Harrah's Entm't, Inc., 389 N.J. Super. 181, 186 (App. Div. 2006) ("review of a trial court's order of dismissal of a complaint pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief may be granted, is plenary"). Any issue as to the Trial Court's interpretation of the Affidavit of Merit Statute, is reviewed *de novo*. "Questions of statutory interpretation are legal ones" that the Appellate Division reviews *de novo*. See State v. Gargano, 476 N.J. Super. 511, 523 (App. Div. 2023); citing State v. Bernardi, 456 N.J. Super. 176, 186 (App. Div. 2018) (quoting State v. S.B., 230 N.J. 61 (2017)).

New Jersey's Supreme Court has also consistently reiterated, "[w]e review questions of statutory interpretation *de novo* as well." C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289 (2023); citing W.S. v. Hildreth, 252 N.J. 506, 518 (2023). In construing statutes, "[t]he overriding goal is to determine as best we can the intent of the Legislature, and to give effect to that intent." State v. Hudson, 209 N.J. 513, 529 (2012). "There is no more

persuasive evidence of legislative intent than the words by which the Legislature undertook to express its purpose," and we thus "first look to the plain language of the statute." Perez v. Zagami, LLC, 218 N.J. 202, 209-10 (2014).

Here, as will be established below, the Trial Court appropriately dismissed Plaintiff's Complaint since failing to comply with the Affidavit of Merit Statute constitutes a failure to state a claim warranting dismissal with prejudice. See, N.J.S.A. § 2A:53A-29; and Cornblatt v. Barow, 153 N.J. 218 (1988). A plenary review of this matter will confirm the appropriateness of the dismissal and this Honorable Appellate Panel should affirm same.

POINT I

THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT WITH PREJUDICE FOR FAILING TO PROVIDE AN APPROPRIATE AFFIDAVIT OF MERIT AS REQUIRED UNDER N.J.S.A. § 2A: 53A-27, *et. seq.*

On appeal Plaintiff does not dispute that Dr. Skudder and Defendant practice within different specialties that are recognized by the American Board of Medical Specialties ('ABMS'), that the care and treatment provided by Defendant arose out of a specialty that Dr. Skudder does not practice or that Nicholas, *supra* is controlling. Rather, Plaintiff contends that Dr. Skudder's "specialty of Surgical Critical Care is equivalent to the Critical Care [specialty] that Dr. Bekel was practicing" and therefore the Affidavit of Merit ('AOM') is compliant. **Pl. Br. at 19.** In support of this argument, Plaintiff relies on Dr. Skudder's self-serving observations and a misplaced argument that ignores the plain language of statutory law and the express rulings of controlling case law. **Pl. Br. at 20 - 21.**

In reality, as will be developed herein, Plaintiff's argument stands in direct contravention to the plain language of N.J.S.A. § 2A: 53A-27, *et. seq.*, which is commonly referred to as the Affidavit of Merit Statute ('AMS'), the seminal case of Nicholas and the recent Appellate Division cases of Pfannenstein ex rel. Est. of Pfannenstein v. Surrey, 475 N.J. Super. 83 (App. Div.), *cert. denied*, 254 N.J. 517 (2023) and Wiggins v. Hackensack

Meridian Health, 478 N.J. Super. 355 (App. Div. 2024). For the reasons set forth herein, the Trial Court's reasoning was consistent with New Jersey case and statutory law and the Order of Dismissal should be affirmed.

N.J.S.A. § 2A:53A-27 of the AMS requires an AOM to be issued in personal injury actions resulting from an alleged act of malpractice by a licensed professional. In setting forth the requisite qualifications that an Affiant must meet under the AMS, the statute directs that:

In an action alleging medical malpractice, a person shall not give expert testimony or execute an affidavit pursuant to the provisions of P.L.1995, c. 139 (C.2A:53A-26 et seq.) 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 American Board of Medical Specialties or the American Osteopathic Association and the care or treatment at issue involves that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association, 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 American Board of Medical Specialties or the American Osteopathic Association, 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 American Board of Medical Specialties or the American Osteopathic Association, 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 American Board of Medical Specialties or the American Osteopathic Association who is board certified in the same specialty or subspecialty, recognized by the American Board of Medical Specialties or the American Osteopathic Association, 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 American Board of Medical Specialties or the American Osteopathic Association, the active clinical practice of that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association; 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 American Board of Medical Specialties or the American Osteopathic Association, an accredited medical school, health professional school or accredited residency or clinical research program in the same specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association; or

(c) both.

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

In the matter at bar, it is undisputed that Defendant is a specialist in a field that is recognized by the American Board of Medical Specialties ('ABMS'), i.e. internal medicine, pulmonology and critical care and it is also undisputed that the care and treatment at issue involved a specialty recognized by the ABMS, i.e. critical care. **21A; 28A; 1T 13:2 – 13:18; and Pl. Br. at 19.** It is undisputed that Dr. Skudder is not a specialist in the field of critical care medicine, but instead, is a purported specialist in surgical critical care, which is a different specialty than the field in which Defendant practices. **32A; 34A; 1T 13:18 – 13: 24; and Pl. Br. at 19.** Reconciling these undisputed facts with controlling authorities can only lead to a ruling rejecting Plaintiff's argument that the two physicians sharing "equivalent" specialties satisfies the AMS and mandates affirming the Trial Court's Order of June 24, 2020.

Preliminarily, a plain reading of the AMS confirms the Trial Court's ruling that Dr. Skudder's AOM was insufficient since he was not engaged in the active clinical practice of that specialty of Defendant, specifically, critical care. See N.J.S.A. § 2A:53A-41. As New Jersey's Appellate Division has explained, "[w]hen interpreting a statute, our overriding goal is to give effect to the Legislature's intent. The best indicator of that intent is the plain statutory language chosen by the Legislature. We

thus read the text of a statute in accordance with its ordinary meaning unless otherwise specified." Watson v. N.J. Dep't of Treasury, 453 N.J. Super. 42, 48 (App. Div. 2017) (internal citations and quotations omitted). Had the Legislature wanted to adopt an "equivalent" standard, it could, but the Legislature has not done that, rather, it requires the affiant being engaged in "that" specialty of a defendant.

The Trial Court correctly found that Dr. Skudder could not qualify under the AMS since the American Board of Medical Specialties "draws a distinction between those subspecialties, Dr. Skudder and Dr. Bakal do not practice in the same specialty or subspecialty". 1T 14:2 - 14:4. New Jersey case law supports the Trial Court's plain reading of the Affidavit of Merit Statute.

In Nicholas v. Mynster, *supra*, New Jersey's Supreme Court addressed the kind-for-kind requirement under the AMS. Ultimately in discussing the AMS and requisite qualifications, the Nicholas Court explicitly re-affirmed that the Legislature "provides that an expert must have the same type of practice and possess the same credentials, as applicable, as the defendant health care provider, unless waived by the court." Nicholas, 213 N.J. at 479 (quoting Assembly Health & Human Services Committee, *Statement to Assembly Bill No. 50* at 20 (Mar. 4, 2004)) (emphasis added). In Nicholas, defendants, Dr. Mynster, board certified in emergency medicine, and the defendant Dr. Sehgal, held board certifications in

emergency medicine and family medicine, respectively, and treated the plaintiff for carbon monoxide poisoning. Id. at 468 - 69. In seeking to pursue his claims, plaintiff served AOMs from (1) a doctor board certified in internal medicine and preventive care with subspecialty certifications in pulmonary disease, critical care, and undersea and hyperbaric medicine; and (2) a doctor who was board certified in internal medicine and was on the staff of a hospital's department of emergency medicine. Id. at 470 - 72. As discovery progressed, plaintiff only served an expert report from the first doctor and defendants moved to bar the expert's testimony because he did not have the requisite credentials under N.J.S.A. § 2A:53A-41 and for summary judgment. Id. at 473 - 74.

In analyzing the AMS, the Nicholas Court noted, "[w]hen 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. Moreover, the Court held that a "medical expert must be a specialist in the same field in which the defendant physician specializes; there are no exceptions to that requirement other than the waiver provision of N.J.S.A. 2A:53A-41(c)" Id. at 482. The Nicholas Court expressly rejected the plaintiff's argument that a doctor credentialed to treat patients for a condition at a hospital did not need to practice that specialty and be board certified in that specialty to meet the necessary kind-for-kind requirement. Id. at

484. The Nicholas Court reiterated and held that "a physician specializing in internal and preventive medicine" could not "serve as an expert witness against a physician specializing in emergency or family medicine, even though each wa[s] qualified to treat a patient for carbon monoxide poisoning." Id.

New Jersey's Supreme Court found that 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 the affiant could not testify "about the standard of care exercised by" the defendants, who were practicing in different specialties. Id. at 487 - 88. Finally, and relevant to this appeal is that the Nicholas Court cautioned that accepting the "plaintiffs' argument would lead back to the days before passage of the . . . Act when . . . physician experts of different medical specialties, but who treated similar maladies, could offer testimony even though not equivalently credentialed to defendant physicians." Id. at 485.

In Pfannenstein ex rel. Est. of Pfannenstein v. Surrey, 475 N.J. Super. 83 (App. Div.), *cert. denied*, 254 N.J. 517 (2023), the Appellate Division examined the requisite qualifications and adequacy of an AOM. Plaintiff in Pfannenstein filed a medical malpractice action against two defendant doctors who specialized in internal medicine at the time of the at issue treatment. Pfannenstein, 475 N.J. Super. at 90. In response Plaintiff served

an AOM from a board certified hematologist, a specialty that neither defendant specialized in at the time of the at issue treatment. Id. The trial court denied defendants' motion for dismiss an appropriate AOM and the Appellate Division reversed, dismissing plaintiff's complaint.

The Appellate Division held that the kind-for-kind requirement was not satisfied when the affiant who executed the AOM specialized in a subspecialty of the defendant physician's specialty, but he was not board certified and did not specialize in the defendant's specialty that represented the care at issue. Id. at 102 - 103. As reasoned in Pfannenstein, Legislature's policy "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." Id. at 102.

Of particular import is that in support of its decision, the Appellate Division cited to the Nicholas decision and the clear mandate that affiants satisfy the "kind-for-kind requirement" and that an affiant "*must practice in the same specialty*". Id. at 103, quoting Nicholas, 213 N.J. at 486 (emphasis in original). The Appellate Division also cited with approval Lomando v. United States, 667 F.3d 363 (3d Cir. 2011) wherein the Third Circuit held that 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)). Lomando 667 F.3d at 380 – 381.

More recently, in Wiggins v. Hackensack Meridian Health, 478 N.J. Super. 355 (App. Div. 2024), the Appellate Division again was tasked with reviewing the adequacy of an AOM. In Wiggins defendant doctor was board certified in internal medicine and gastroenterology and the care at issue involved those specialties. Wiggins, 478 N.J. Super. at 359. Plaintiff served an AOM from an affiant who only specialized in internal medicine, not gastroenterology. The Appellate Division ultimately held that “plaintiffs’ submission of only Dr. Fitzgibbons’s AOM as an internist did not comply with the underlying purpose of the Act and did not suffice to support the continuation of the lawsuit.” Id., at 374.

Similar to Pfannenstein, the Appellate Division reinforced the purpose of the AMS and the Nicholas ruling that “[w]hen 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 369 – 370, quoting Nicholas at 481 – 482. In no uncertain terms, “[a] medical expert must be a specialist in the same field in which the defendant physician specializes”. Id. at 369 – 370, quoting Nicholas at 482. The Appellate Division reversed the trial court’s finding that

plaintiff's AOM was sufficient. Quite simply, dismissal with prejudice is appropriate when "plaintiffs failed to present the statutorily required AOM and did not request an extension of time to do so". Id. at 374.

In the matter at bar, Plaintiff's argument that Dr. Skudder, a critical care surgeon satisfies the AMS and Nicholas since his qualifications are somehow "equivalent" is without any support. Plaintiff relies on Dr. Skudder's self-serving commentary about the similarities in critical care and surgical critical care, but Dr. Skudder acknowledges that there are differences in emphasis between the surgical critical care board and the critical care board. Clearly, these are different specialties, they are separate boards, issued by separate bodies with different requirements. Here, Plaintiff offered a surgeon with companion certification in surgical critical care to serve as an expert against an internist with a companion board certification in critical care. Dr. Skudder and Defendant simply do not have the same type of practice, the same credentials nor the 'kind-for-kind' matching qualifications as required. Any opinions offered by Dr. Scudder are inevitably colored and shaped by his training in general and vascular surgery as well as surgical critical care. **Dr. Skudder is simply and undeniably not "a specialist in the same field" as Defendant.**

The Trial Court engaged in the appropriate analysis as articulated by the Nicholas Court. As noted by the Trial Court, it

was undisputed that Dr. Bakal specializes in pulmonology with a subspecialty in critical care. **1T 11:15 - 11:21.** The Trial Court also identified Plaintiff's argument being that "the affidavit of merit statute does not require that the affiant had the identical credentials as the defendant physician. Instead plaintiff asserts that the affiant need only have the same board certifications as the defendant physician and that medical treatment involve[ing] that specialty." **1T 11:22 - 12:24** (emphasis added). Plaintiff further argued that despite Dr. Bakal's Board Certification being in critical care and Dr. Skudder's specialty being in surgical critical care, the doctors practiced within the same specialty. **1T 12:4 - 6.** Plaintiff's argument was rejected by the Trial Court. **1T 12:7 - 14:4.**

In rejecting Plaintiff's argument, the Court cited to and relied on the seminal case of Nicholas v. Mynster, 213 N.J. 463, 482 - 483 (2013), wherein New Jersey's Supreme Court addressed the credentialing provision of the Affidavit of Merit Statute. **1T 12:7 - 13:2.** As the Nicholas Court made clear "'When a physician is a specialist and the basis of the malpractice involves the physician's specialty, the challenging expert must practice in the same specialty.'" **1T 12:18 - 12:22**, quoting Nicholas at 481 - 482. The Trial Court then engaged in the necessary analysis of whether (i) Dr. Bakal was a specialist or a general practitioner; and (ii) whether the treatment that is the basis of the malpractice action

involves that specialty. **1T 12:23 - 13:2**. This analysis confirmed that Dr. Skudder could not serve as a qualified affiant as to Defendant.

The Trial Court's decision was consistent with a plain reading of the AMS and the Nicholas Court's explicitly holding. Additionally, subsequent to entry of the June 24, 2020 Order, the Appellate Division decided Wiggins and Pfannenstein, both of which reinforce that the Trial Court's ruling should be affirmed.

Dismissal in this matter was appropriate. In Ferreira v. Rancocas Orthopedic Assoc. 178 N.J. 144 (2003), the plaintiff had received an affidavit of merit prior to the expiration of the time frame in which to provide same but have inadvertently failed to serve it on the defendants. Ferreira, 178 N.J. at 148. After the expiration of the 120 days, but before the defendants had filed a motion to dismiss the complaint for failure to provide an affidavit of merit, the affidavit was provided by the plaintiff. Id. On these facts, the Ferreira court announced the following rule:

In a case where the plaintiff has in hand an affidavit within the 120-day statutory period and serves the affidavit on defense counsel outside that time frame but before defense counsel files such a motion based upon the late arrival of the affidavit. If defense counsel files a motion to dismiss after the 120-day deadline and before plaintiff has forwarded the affidavit, the plaintiff should expect that the complaint will be dismissed with prejudice provided the doctrines of substantial compliance and extraordinary circumstances do not apply. That formation

places strong incentives on both plaintiffs' and defense counsel to act diligently.

Id. at 154 (emphasis added).

Prior to entry of the June 24, 2020 Order, Plaintiff had every opportunity to serve a compliant affidavit within the statutory timeframe as prescribed by the Affidavit of Merit Statute, but failed to do so. Here, Plaintiff should have "reasonably expect[ed] that the complaint will be dismissed with prejudice" for failure to comply with Affidavit of Merit Statute. Id. Accordingly, the Trial Court appropriately dismissed Plaintiff's Complaint with entry of the June 24, 2020 Order.

If presented with this matter, it is Defendant's position that the Nicholas Court, as well as Pfannenstein and Wiggins' Appellate Panels would find that Dr. Skudder's AOM does not comply with the Affidavit of Merit Statute and affirm the Trial Court's Order of Dismissal. If accepted, Plaintiff's argument would eviscerate the clear purpose of the AMS and such a result has been expressly admonished by New Jersey's Supreme Court. Nicholas, 213 N.J. at 485.

For these reasons, Defendant respectfully submits that this Honorable Appellate Court should affirm the Trial Court's Order of June 24, 2020.

CONCLUSION

For the reasons set forth herein, the Appellate Division should affirm the June 24, 2020 Order of the Trial Court dismissing Plaintiff's Complaint with prejudice.

**MacNeill, O'Neill, Riveles & Spitzer,
LLC**

Attorneys FOR Defendant/Respondent,
Keren Bakal, M.D.

Dated: September 9, 2024

By: /s/ Robert E. Spitzer
Robert E. Spitzer, Esq.

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October 14, 2019

Gary William Moylen, Esq.
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Morristown, NJ 07960

RE: Sovelove Estate v. Bakal, et al.
Docket No.: MRS-L-1635-19
MOR File No. 9050.05166

Dear Mr. Moylen:

This is to advise that this firm will be representing Defendant, Keren Bakal, M.D. in connection with the above-referenced matter.

Recently, we sent for filing an Answer on behalf of Defendant, Keren Bakal, M.D., in connection with this case. In reviewing your pleadings, I received a copy of an Affidavit of Merit authored by Paul A. Skudder, M.D. Please be advised that our client, Dr. Bakal, is a medical doctor specializing in the field of Internal Medicine/Critical Care/Pulmonary Medicine. In light of the fact that your Affidavit of Merit is offered by a physician in a different specialty than Dr. Bakal, we object to the Affidavit of Merit by Paul A. Skudder, M.D., who specializes in General Surgery/Vascular Surgery/Surgical Critical, as it does not meet the requirements for an Affidavit of Merit set forth in N.J.S.A. 2A:53A-26 et seq. and/or N.J.S.A. 2A:53A-41.

Thank you for your anticipated cooperation.

Very truly yours,

MACNEILL, O'NEILL & RIVELES, LLC



Lauren Koffler O'Neill

LKO/lad
Enclosures

cc: Sam Rosenberg, Esq.
David C. Donohue, Esq.
Robert T. Evers, Esq.

STACY SOVELOVE, individually and as
Executor of the ESTATE OF MARC S.
SOVELOVE, deceased,

Y.

Defendants.

Civil Action



THIS MATTER, having been scheduled for a Ferreira Conference on January 28, 2020;
and the undersigned counsel agree as follows:

ORDERED as follows:

1. Counsel for Defendant Dr. Keren Bakal, MD objects to the Affidavit of Merit and currently has a motion pending challenging the adequacy of the Affidavit of Merit.
2. Counsel for Defendants Dr. Scott Sundick, MD and Dr. Michael Shirazi, MD agree that the Affidavit(s) of Merit served in this matter as to their clients satisfies the requirements of, N.J.S.A. 2A: 53A-26-29.
3. The date on which Plaintiff must file and serve an Affidavit of Merit as to

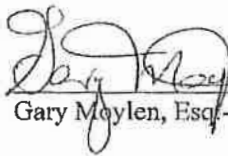
Defendants Dr. Asim Khan, MD and Overlook Medical Center be and hereby is extended pursuant to N.J.S.A. 2A:53A-27 for a period of sixty (60) days up to March 7, 2020;

4. Within seven (7) days of receipt of the Affidavit of Merit, the parties shall meet and confer to address the substance of any alleged inadequacies in the Affidavit of Merit;

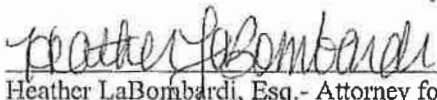
5. Absent resolution of any issues regarding the adequacy of the Affidavit of Merit, Counsel for Defendant shall file a motion regarding the alleged inadequacies of the Affidavit of Merit within fourteen (14) days of receipt of the Affidavit of Merit, or any objections shall be deemed waived.

6. To the extent any party files a pleading that names additional professional(s), that party shall serve a copy of this order on the newly added defendant(s), serve timely the Affidavit(s) of Merit on any such party, and contact the court to schedule the necessary Ferreira Conference(s).


7. A true copy of this Order shall be deemed served upon being upload to eCourts.




Gary Moynen, Esq.- Attorney for Plaintiffs




Heather LaBombardi, Esq.- Attorney for Defendant Dr. Scott Sundick, MD



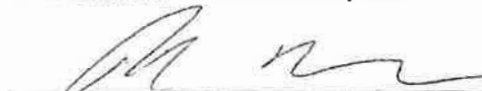
HON. ROSEMARY E. RAMSAY, R.J.Cv.



Anelia D. Brown, Esq.- Attorney for Defendant Dr. Keren Bakal, MD



Russell J. Malta, Esq.- Attorney for Defendant Dr. Michael Shirazi, MD



Peter Marra, Esq.- Attorney for Defendants Overlook Medical Center and Dr. Asim Khan, MD

STACY SOVELOVE, individually and as
Executor of the **ESTATE OF MARC S.**
SOVELOVE, deceased,

Plaintiff,

vs.

DR. MICHAEL SHIRAZI, M.D.; DR.
AMARPAL K. PUREWAL, M.D.; DR.
SCOTT SUNDICK, M.D.; DR. HERNAN
SANCHEZ-TREJO, M.D.; DR. KEREN
BAKAL, M.D.; DR. ASIM KHAN, M.D.;
DR. SANFORD T. REIKES, M.D.; DR.
JEFFREY R. BLITSTEIN, M.D.;
OVERLOOK MEDICAL CENTER;
ATLANTIC HEALTH SYSTEM and DR.
JOHN DOE 1-5 (being fictitious
designations)

SUPERIOR COURT OF NEW JERSEY-
LAW DIVISION - MORRIS COUNTY

CIVIL ACTION

Docket No. MRS-L-001635-19

**PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION OF DEFENDANT DR. KEREN
BAKAL FOR AN ORDER DISMISSING THE COMPLAINT AGAINST HIM BASED
ON THE AFFIDAVIT OF MERIT STATUTE**

Gary Wm. Moylen, Esq.
N.J. Attorney ID. No. 017861978
90 Maple Avenue
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(973) 539-1303
Attorney for Plaintiff

LAW OFFICE OF
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October 4, 2024

Appellate Clerk's Office
P.O. Box 006
Trenton, New Jersey 08625

Re: Stacy Sovelove individually and as Executor of the Estate of Marc S. Sovelove, deceased v Dr. Michael Shirazi, M.D., Dr. Keren Bakal, M.D. et al. et al.

On Appeal from the Superior Court of New Jersey – Law Division – Morris County under Docket No. MRS-L-1635-19 – Sat Below Hon. Rosemary E. Ramsey, J.S.C.
Appellate Docket No. A-001540-23

Dear Sir/Madam,

Kindly accept this Letter Brief in lieu of more formal Brief in reply to the Brief of Defendant-Respondent Keren Bakal submitted in opposition to the Appellant's Appeal.

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- Legal Argument – Point 1 – The Dismissal of this Case on the Basis of
the Affidavit of Merit Was Erroneous and
Should Be Reversed3

Table of Orders Appealed from

Procedural History

The Appellant relies upon the Procedural History set forth in her Brief
In support of this Appeal.

Statement of Facts

The Appellant relies upon the Statement of Facts set forth in her Brief in
support of this Appeal.

Legal Argument

The critical issues before this Court are focused on the Board Certifications
of both the Defendant Dr. Bakal, and the Plaintiff’s expert, Dr. Skudder. Board
Certifications for physicians are governed by the American Board of Medical
Specialties (the “ABMS”). This Board provides both Certifications of recognized
medical specialties as well as subspecialties within certain specialties. Medical
subspecialties do not have a specific Specialty Board, but are issued by the specific
Specialty Board. In this case, for example Defendant Dr. Bakal was Board
Certified by the American Board of Internal Medicine. He also had Subspecialty
Certifications in Pulmonology Medicine and in Critical Care Medicine. There is no

separate Medical Board of Critical Care Medicine. However, Critical Care Medicine is recognized as a subspecialty by the American Board of Anesthesiology, by the American Board of Emergency Medicine, by the American Board of Internal Medicine, by the American Board of Obstetrics and Gynecology, by the American Board of Pediatrics and by the American Board of Surgery. See, American Boards of Medical Specialties, “www.ABMS.org/member-boards/specialty-subspecialty-certificates.”

Defendant Dr. Bakal claims that the complaint against her must be dismissed because the plaintiff’s medical expert who signed the Affidavit of Merit (AOM), Dr. Paul Skudder, did not have credentials identical to those of Dr. Bakal. This argument is erroneous for a number of reasons. Defendant Dr. Bakal is Board-Certified in the subspecialty of Pulmonary Medicine. There is no separate Board of Pulmonary Medicine. Rather, Pulmonary Medicine is a subspecialty of Internal Medicine., Dr. Skudder does not practice Pulmonology. However, this is irrelevant because the subject matter of Dr. Bakal’s treatment of Mr. Sovelove did not involve Pulmonology.

The Plaintiff’s expert Dr. Skudder is Board Certified in General Surgery and Vascular Surgery. He is also certified in the subspecialty of Critical Care Medicine, just as Dr. Bakal is. This case does not involve General Surgery or Vascular surgery, and thus these specialties are also not involved in this lawsuit.

Rather, this case involves Critical Care medicine, and Dr. Skudder is Board Certified in Critical Care medicine just as Dr. Bakal is. The description of Critical Care Medicine given by the American Board of Surgery as a subspecialty is as follows:

For Surgical Critical Care, the physician “ ... has expertise in the diagnosis treatment and support of critically ill and injured patients, particularly trauma victims and patients with serious infections and organ failure. In addition, the ... [physician] coordinate patient care among the patient’s primary physicians, critical care staff and other specialties for critical care.”

Defendant Dr. Bakal had a subspecialty in Critical Care under the rubric, presumably of Internal Medicine, which it defines as follows:

An internist trained in Critical Care Medicine has expertise in the diagnosis, treatment and support of critically ill and injured patients , particularly trauma victims and patients with serious infections and organ failure. In addition, the ... [physician] coordinate patient care among the patient’s primary physicians, critical care staff and other specialties for critical care.”

The language of these two separate subcertifications are practically identical , and they describe precisely the nature of the care needed by and given to Marc Sovelove. Mr. Sovelove was essentially a trauma victim because he sustained an accidental perforation of his kidney during the course of a kidney biopsy performed by Dr. Sovelove. After this perforation, the various physicians, including Dr. Bakal, attempted to diagnose, treat and support a critically injured patient as a result of this perforation which ended up with an organ failure leading to his death. Given the functional identity of credentials between the two, the dismissal of this case against Dr. Bekel is unjust.

Dr. Bakal's argument ignores the practical identity of the qualifications and the practice of Dr. Skudder and Dr. Bakal as they relate to this case. The fact that Dr. Skudder was Board certified in Surgery or that Dr. Bakal had a subspecialty in Pumonology Medicine are irrelevant to this inquiry because this case does not involve those specialties. Where it matters, the credentials of these two physicians are practically identical. The purpose of the Affidavit of Merit statute is to reduce frivolous litigation. Pfannenstein v. Surrey, 475 N.J. Super. 3475(App. Div), certif. den. 254 N.J. 460 (2023). It requires a plaintiff in a medical malpractice suit to "make a threshold showing that their claim is meritorious." In re Petition of Hall, 147 N.J. 379 (1997).

This showing is to be made by an Affidavit of Merit (“AOM”) in which the plaintiff’s medical expert essentially claims that the care rendered to the plaintiff was below the standard of care. In amendments enacted in 2004, the law now requires a “kind for kind” equivalent credentialing of the expert. In relevant part it states that if a defendant physician specializes in a particular area of medicine and “the care or treatment at issue involves that specialty or subspecialty,” then the challenging expert must also specialize in the same area of medicine. If the defendant is Board Certified in that specialty or subspecialty, then the Plaintiff’s expert must likewise be Board Certified in that area of medicine. In this way, a defendant physician avoids the unfairness in which a plaintiff’s expert criticizes his care under standards which should not apply to him or her. Thus, a defendant who practices in an area in which he is not Board Certified, he will not be judged by a physician who has more knowledge and training in that specialty.

Most of the litigation regarding the Affidavit of Merit focuses on whether the challenging expert has credentials equivalent to those of the defendant and who practices the same area of medicine. For example, the early leading case of Nicholas v. Mynster, 213 N.J. 463 (2013) involved the treatment for carbon monoxide poisoning in a construction worker who had inhaled noxious fumes on a jobsite. One of the defendant physicians was Board Certified in Emergency Medicine, and the other defendant was Board Certified in Family Medicine. The

plaintiff's expert was Board Certified in Internal Medicine and Preventive Medicine and specialized in Hyperbaric Medicine. He had no credentials in either Emergency Medicine or Family Medicine. 213 N.J. at 467. All three of these physicians were qualified to treat the plaintiff's condition. The Court held that "... Only an equivalently credentialed specialist would be qualified to testify against another specialist." Id. at 483. Because he had no qualifications in either emergency medicine or family medicine, the plaintiff expert was not qualified to give an opinion and sign an Affidavit of Merit, and the case was dismissed.

In the years since Nicholas v Mynster, supra, the courts have addressed these issues in a variety of factual settings. Thus, in Pfannenstein v. Surrey, 475 N.J. Super. 83, certif den. 254 N.J. 254 (2023), both Defendants specialized in Internal Medicine, with one of them being Board Certified in Internal Medicine. Plaintiff's expert had no credentials in Internal Medicine, but rather was Board Certified in Hematology, which is a subspecialty of Internal Medicine. The Plaintiff argued that hematology was "subsumed" in Internal Medicine, because 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." The court rejected this reasoning, holding that the kind for kind requirement was not satisfied when the expert who executes

the Affidavit of Merit specialized in a subspecialty of the Defendant's specialty, but did not specialize in the specialty that the Defendant actually practiced in.

Later, in Wiggins v. Hackensack Meridian Health, 478 N.J. Super. 355 (App. Div. 2024), the defendant was a physician who was Board Certified in two separate specialties-Internal Medicine and Gastroenterology. Moreover the treatment involved in this case involved both of those specialties. The plaintiff argued that the Plaintiff's expert only needed to specialized in one of those specialties. The Appellate Division held that, under the facts of this case, where the Defendant was actually practicing internal medicine as well as gastroenterology, and the treatment involved both of those specialties, under the statute's kind-for-kind equivalency requirement, the physician executing the AOM must be qualified in both of the specialties practiced by the defendant physician and which were actually the subject of the treatment.

In the cases discussed above, there was no question that the treatment actually given to the patient fell within the defendant's specialty. In the kind for kind analysis set forth in the statute, the first requirement is that the treatment given to the patient fall within the physician specialty. If the medical care given actually falls outside that specialty, there is no requirement that the challenging expert have equivalent credentials. Dr. Bakal is also Board-Certified in "Critical Care Medicine" by the American Board Of Medical Specialties (ABMS). This

involves “... expertise in the diagnosis, treatment and support of critically ill and injured patients, particularly trauma patients and patients with multiple organ dysfunction. This physician also coordinates patient care among the primary physicians, critical staff and other specialties.” The treatment at issue in this case clearly falls within the rubric of Critical Care Medicine. Mr. Sovelove came to the hospital in June 1, 2018 for purposes of a diagnostic surgical kidney biopsy. The plaintiff suffered from a kidney condition that his treating endocrinologist, Dr. Sanford Reikes, was trying to control through certain drug therapies. In order to check whether this therapy was actually working, he had ordered a diagnostic surgical kidney biopsy, which was performed by Dr. Michael Shirazi, an Interventional Radiologist.

In this surgical procedure, Dr. Shirazi inserts essentially a large needle into the kidney and cuts out small portions of the kidney for later examination by a microscope. During the course of this biopsy, Dr. Shirazi either severed or punctured arteries within the kidney, causing serious internal bleeding which needed to be stopped. All the treatment rendered to Mr. Sovelove after that biopsy was directed to stopping the bleeding caused by the trauma of the biopsy. These efforts were inadequate and caused Mr. Sovelove to bleed to death.

In this case, the Plaintiff’s expert has credentials equivalent to that of the defendant for purposes of the Affidavit of Merit. Dr. Skudder is Board

Certified in Surgical Critical Care by the American Board of Surgery (ABS) which is a separate certifying board from the American Board of Medical Specialties (ABMS). It defines Surgical Critical Care as “ ... a specialty with acute life-threatening or potentially life-threatening surgical conditions. Surgical critical care not only incorporates knowledge and skills of nonoperative techniques for supportive care of critically ill patients but also a broad understanding of the relationship between critical surgical illness and surgical procedures. “

In this case, Dr. Skudder has relevant credentials that are functionally equivalent to those of Dr. Bakal. First the fact that there is not an identity of credentials is irrelevant. Thus, the fact that Dr. Bekel is board-certified in pulmonary medicine and Dr. Skudder is not is of no consequence because the treatment involved in this case does not involve Pulmonary Medicine. Likewise, that Dr. Skudder has Board Certifications in surgery and vascular surgery is irrelevant because he is not rendering an opinion involving surgery or vascular surgery.

Where it matters, though, Dr. Skudder’s credentials in treating a patient such as Mr. Sovelove are functionally equivalent to those of the defendant. They are both qualified to treat a patient such as Mr. Sovelove who was critically ill as result of the trauma inflicted by Dr. Shirazi in surgically injuring arteries in his kidney during the course of the surgical biopsy. It would not be unfair to have Dr.

Bakal's medical treatment reviewed by Dr. Skudder. Both physicians have received specialized training in treating a patient who has suffered the trauma of severed or punctured kidney arteries during a surgical biopsy. The fact that the language describing these subspecialties is not identical does not negate the fact that these sub certifications are functionally equivalent.

Given this patient's clinical issues, there is no distinction in level of expertise between these two Certifications, as the problems relevant to this case are the management of bleeding and hemorrhagic shock. Critical care experience, training and certification are critical to this patient's care, whether achieved by the certifications of the ABMS or the ABIM. To dismiss the case against this defendant on the basis of an analysis which ignores this functional equivalence would be unjust. For all of these reasons, it is respectfully requested that the Order of the trial court be reversed.

Thank you for your kind consideration of the above.

Respectfully submitted,

GARY W.M. MOYLEN, ESQ.

Gary Wm. Moynen, Esq.

GWM:bm/reply brief

CC: All counsel via eCourts