NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

VALARIE LAMAR, Plaintiff, v. JENNIFER PETRILLO, M.D.; EDNA MAHAN CORRECTION FACILITY; EDNA MAHAN CORRECTIONAL FACILITY; RUTGERS BIOMEDICAL AND HEALTH SCIENCES; JOHN and/or JANE DOES, M.D., A through Z (fictious Names and presently unknown; and ABC CORPORATIONS, A through Z (fictitious Names and presently unknown), Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CIVIL PART ESSEX COUNTY DOCKET NO.: L-006429-17 **OPINION**

Decided: January 27, 2021

The following attorneys are counsel of record:

Robert Donnelly, attorney for defendant Rutgers Biomedical & Health Sciences (Dughi, Hewit & Domalewski, P.C., attorneys)

Francisco Rodriguez, attorney for plaintiff (Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C, attorneys)

VENA, J.S.C.

Preliminary Statement

This matter is before the court on a motion by defendant Rutgers Biomedical & Health Sciences ("Rutgers" or "Defendant") to dismiss plaintiff's complaint with prejudice for failure to comply with the Affidavit of Merit statute. Plaintiff Valarie Lamar ("Plaintiff") opposes the motion. Defendant has filed a brief in reply to plaintiff's opposition. Defendant has also filed a Motion to Extend Discovery, which is unopposed by plaintiff.

Statement of Facts & Procedural History

This is a medical malpractice case in which plaintiff alleges that while she was incarcerated at Defendant Edna Mahan Correctional Facility for Women ("Edna Mahan"), a physician and nurse practitioner employed by Rutgers deviated from the standard of care in failing to timely diagnose and treat what turned out to be a malignant tumor. Counsel for plaintiff timely filed a notice of claim against Edna Mahan, Rutgers, Jennifer Petrillo, M.D., and Sandra Braimbridge, M.D. (identified then as Dr. Baybridge). After plaintiff filed her complaint in this matter, defendant filed an answer, which noted that Dr. Petrillo was a specialist in family medicine and demanding an Affidavit of Merit. In response, counsel for plaintiff filed an Affidavit of Merit on a timely basis less than 60 days from the filing of defendants' Answer by James John Helmer, M.D., a board-certified family medicine physician. The Affidavit of Merit contains no reference to Sandra Braimbridge, M.D., nor nurse practitioner, Mary Joan Doran-Barr.

Dr. Helmer reviewed the medical records that were available pre-suit and determined that it was only Dr. Petrillo that deviated from the standard of care. After counsel for the parties completed the depositions of the parties, counsel for plaintiff forwarded all the discovery, including the medical records, deposition transcripts and interrogatory answers to Dr. Helmer for an expert report. Helmer called plaintiff's counsel and advised that after reviewing all the

materials, he did not believe that Dr. Petrillo deviated from the standard of care and instead suggested that Dr. Braimbridge and Doran-Barr deviated from the standard of care. He also sent counsel for plaintiff two emails supporting his opinion that Dr. Braimbridge deviated from the standard of care. Counsel for plaintiff did not request a formal expert report from Dr. Helmer because he could not offer an opinion against Dr. Braimbridge since she is board-certified in internal medicine, and Dr. Helmer is board-certified in family practice. Thus, in order to comply with the 'like-qualified' statute, discussed infra, counsel for plaintiff sought out and retained a board-certified internal medicine expert, Kevin E. Bell, M.D., to review the matter. Dr. Bell opined that Dr. Braimbridge and Nurse Practitioner Doran-Barr deviated from the standard of care by delaying the diagnosis and treatment of Ms. Lamar's malignant tumor.

On November 30, 2020, counsel for plaintiff spoke with Lori D. Lewis, Esq., counsel for defendants, who advised that they were going to file a motion to dismiss the complaint based on there being no Affidavit of Merit relative to Dr. Braimbridge or Ms. Doran-Barr. As a result, plaintiff's counsel obtained an Affidavit of Merit from Kevin E. Bell, MD and served it on January 13, 2021, less than 60 days from when the objection was made. Defendants subsequently filed this motion to dismiss based on there being no Affidavit of Merit against Dr. Braimbridge and Ms. Doran-Barr.

Defendant's Legal Argument

Defendant makes four (4) key points in favor of its motion: that (a) the claims against Rutgers are vicarious in nature, but plaintiff is still required to supply a valid affidavit of merit; (b) any claims against Nurse Barr must be dismissed because plaintiff did not supply an expert qualified to offer an opinion against Nurse Barr; (c) Dr. Braimbridge is board certified in internal medicine and an affidavit from a physician board certified in family medicine does not satisfy

N.J.S.A. 2A:53A-27; and (d) the only appropriate remedy is to bar plaintiff's claims against Rutgers and to dismiss the complaint with prejudice.

Valarie Lamar's Opposition

In her opposition to the motion, plaintiff argues four points: that (a) a healthcare facility is entitled to an Affidavit of Merit, but not more than one, under any circumstances; (b) the affidavit of merit statute was not intended to foreclose additional theories of liability against the healthcare facility; (c) the single affidavit of merit filed against Rutgers and signed by James John Helmer, M.D., a board-certified family physician, is sufficient and a second affidavit of merit is not required; and (d) in the alternative, the affidavit of merit of Kevin E. Bell, M.D., is sufficient, although not required, against Rutgers and was timely served less than 60 days from when the objection was raised such that defendant's motion should be denied.

Legal Analysis

A. Dismissal under the Affidavit of Merit statute, N.J.S.A. 2A:53A-27

This is a motion to dismiss plaintiff's complaint with prejudice for failure to comply with the Affidavit of Merit statute, N.J.S.A. 2A:53A-27 (the "statute"). The dismissal of a complaint with prejudice is one of, if not the most severe ruling a litigant can receive. This statute requires a plaintiff in a malpractice action to serve on a defendant within 120 days of receipt of the answer an expert's sworn statement attesting that there exists a "reasonable probability" that the professional's conduct fell below acceptable standards. Ferreira v Rancocas Orthopedic Assoc., 178 N.J. 144, 149, 836 A.2d 779, 782 (2003). "The statute does not impose overly burdensome obligations. The plaintiff must keep an eye on the calendar and obtain and serve the expert's report within the statutory timeframe." Id. at 146. The failure to deliver a proper affidavit within the statutory time period requires a dismissal of the complaint with prejudice. Id. at 146-47 (quoting

Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 239-42, 708 A.2d 401, 413 (1998)). A complaint will not be dismissed if the plaintiff can show that he has substantially complied with the statute. Ibid. (citing Palanque v. Lambert-Woolley, 168 N.J. 398, 405-06, 774 A.2d 501, 505-06 (2001); Fink v. Thompson, 167 N.J. 551, 561-65, 772 A.2d 386, 392-95 (2001); Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 351-59, 771 A.2d 1141, 1147-52 (2001).

B. The Statute and the 'like-qualified' Standard

The 'like-qualified' standard prescribed in the Patients First Act, N.J.S.A. 2A:53A-41, applies only in actions for medical malpractice. Meehan v Antonellis, 226 N.J 216, 221, 141 A.3d 1162, 1165 (2016). The core purpose underlying the statute is "to require plaintiffs . . . to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of the litigation." In re Petition of Hall, 147 N.J. 379, 391, 688 A.2d 81, 87 (1997) (quoted in Cornblatt, 153 N.J. at 242; modified in part by Ferreira, 178 N.J. at 154. Importantly, "there is no legislative interest in barring meritorious claims brought in good faith." Id. at 150-51 (quoting Galik, 167 N.J. at 359). "[T]he legislative purpose was not to 'create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims.'" Id. at 151, (quoting Mayfield v. Cmty. Med. Assocs., P.A., 335 N.J. Super. 198, 209 (App.Div.2000)).

The Affidavit of Merit statute, provides in pertinent part:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date

> of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.
>
> In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c.17 (C.2A:53A-41).

Additionally, N.J.S.A. 2A:53A-41(a) (the 'like qualified' standard) provides:

> If the party against whom or on whose behalf the testimony is offered is a specialist or subspecialist . . . the person providing the testimony shall have specialized . . . in the same specialty or subspecialty . . . 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 . . . the expert witness shall be . . . (2) a specialist or subspecialist . . . who is board certified in the same specialty or subspecialty . . . 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 . . . the active clinical practice of that specialty or subspecialty . . . or (b)the instruction of students . . . in the same health care profession in which the defendant is licensed, and, if that party is a specialist or subspecialist . . . in the same specialty or subspecialty . . . .

The Affidavit of Merit Statute "requires that a plaintiff provide an affidavit to each defendant detailing a reasonable probability that at least one claim concerning each defendant has merit." Fink, 167 N.J. 551, 560. Neglecting to provide an affidavit of merit after the expiration of 120 days can have different consequences and may require dismissal with prejudice because the absence of an affidavit of merit strikes at the heart of the cause of action. Cornblatt, 153 N.J. at 247. Numerous courts have struggled with the statute when its application would bar an apparently meritorious claim. See, e.g., Burns v. Belafsky, 166 N.J. 466, 478, 766 A.2d 1095, 1101 (2001) (reasoning that because statute was not intended to bar meritorious claims, lawyer's inadvertent failure to file timely affidavit of merit did not preclude plaintiff from establishing good cause for sixty-day extension); Mayfield, supra, 335 N.J. Super. at 209 (finding, under the circumstances, that "it would be wholly counter to the remedial purpose of the statute to dismiss [an] apparently meritorious action based on what would be no more than a merely mechanical application of the dry statutory words").

In addressing the applicability of the Affidavit of Merit statute, the Supreme Court has noted that the court must analyze the true nature of the particular claim being asserted in the

pleading and consider whether the Legislature intended that it be one to which the statute applies. Diocese of Metuchen v. Prisco & Edwards, AIA, 374 N.J. Super 409, 416 (App. Div. 2005); see also, Couri v. Gardner, 173 N.J. 328, 333-34, 801 A.2d 1134, 1136-38 (2002). The applicability of the Affidavit of Merit statute to any claim relates to the nature of the proofs required by a party in order to prevail on its claim. Id. at 340.

i. Substantial Compliance

Equitable remedies that temper the draconian results of an inflexible application of the Affidavit of Merit statute include the doctrines of extraordinary circumstances and substantial compliance. Where extraordinary circumstances are present, a late affidavit will result in dismissal without prejudice. See, e.g., Tischler v. Watts, 177 N.J. 243, 246-47, 827 A.2d 1036, 1037-38 (2003). The doctrine of substantial compliance is used by courts to "avoid technical defeats of valid claims," Zamel v. Port of New York Auth., 56 N.J. 1, 6, 264 A.2d, 201, 203 (1970), and requires: "(1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim, and (5) a reasonable explanation why there was not a strict compliance with the statute." Galik, 167 N.J. 341, 353. Where a defendant is served with an affidavit that does not name it, but where it was on notice of the claim against it because the plaintiff had provided an expert report that discussed the defendant's role in the alleged malpractice, Courts have found substantial compliance. Fink, 167 N.J. 551, 564.

ii. Ferreira Conference

The failure to hold a Ferreira conference has no effect on the time limits prescribed in the statute. Paragon Contrs., Inc. v. Peachtree Condominium Assn., 202 N.J. 415, 424, 997 A.2d 982,

986-87 (2010). In other words, the absence of a Ferreira conference cannot toll the legislatively prescribed time frames. Id. at 425.

C. Substantive Analysis

Today, the court's opinion aligns with the growing notion that, where necessary, an equitable remedy tempering the draconian results of an inflexible application of the Affidavit of Merit statute should be applied. Here, it is necessary. Although attorney inadvertence is not such a circumstance entitling plaintiff to a remedy of dismissal of a complaint without prejudice[,]" Ferreira, supra, 178 N.J. at 152 (citing Palanque, 168 N.J. at 405 (2001)) (emphasis in original), at issue in this case is more than simple inadvertence.

As the Court in Galik and Fink was satisfied that there had been substantial compliance with the statute, so too is this court satisfied that plaintiff exhibited substantial compliance with the Affidavit of Merit statute. In Galik, the Court found that there had been substantial compliance with the statute where the plaintiff served unsworn expert reports on the defendants eight months prior to litigation. Galik, 167 N.J. at 355. In Fink, the Court found that substantial compliance existed where the defendant was served with an affidavit that did not name him, but where he was on notice of the claim against him because the plaintiff had provided an expert report that discussed the defendant's role in the alleged malpractice. Fink, 167 N.J. 551. In both of these cases, the plaintiffs took a series of steps that resulted in notice to the defendants of the merits of the malpractice claims filed against them. Same was accomplished by plaintiff here.

Plaintiff fully satisfies the factors set forth above regarding substantial compliance. Due to the nature of the claims and the nature of the proofs required to prevail on the claims at bar, there is little, if any, prejudice to defendant. As defendant explains in its motion, Dr. Braimbridge has 43 entries in [the Edna Mahan] records, while [Nurse-Practitioner] Doran-Barr has 23. Their

identities and roles are easy to discern. If this is so, defendant has long been aware of the merits of a claim against it. Such awareness does not have the effect of prejudice against defendant. Furthermore, plaintiff took clear steps to comply with the statute by timely serving the Affidavit of Merit by Dr. Helmer and did so in general compliance with the statute. Moreover, that affidavit gave reasonable notice to defendant of plaintiff's claims. Finally, plaintiff has provided the court with a reasonable explanation why there was not strict compliance with the statute—namely, the change in position by Dr. Helmer regarding Dr. Petrillo's deviation once he had received all the discovery, including the medical records, deposition transcripts and interrogatory answers. Upon reviewing same, Dr. Helmer told plaintiff that he was amending his original conclusion: defendant Petrillo, now dismissed from the case, was not the one who deviated from the standard of care regarding plaintiff's late diagnosis. This sort of change in circumstances rises above mere attorney inadvertence and sufficiently explains why plaintiff was not in strict compliance with the statute.

Furthermore, The Affidavit of Merit by Dr. Helmer, executed and served by plaintiff upon defendant in a timely manner, satisfied the procedural commandments of the statute. Thus, the report of Dr. Kevin E. Bell, M.D.—served with reasonable efficiency upon defendant on January 13, 2021, less than 60 days from when the objection was made—is not required. Rutgers was already on notice of the claims against it by virtue of the Affidavit of Merit by Dr. Helmer. It cannot be said that the filing of a new Affidavit of Merit by an expert in the same specialty or subspecialty as the individual defendant would apprise Rutgers of new meritorious claims against them. Having reached this conclusion, I do not reach the question of whether the report of Dr. Bell is sufficient to comply with the statute.

Thus, this court will not hold the plaintiff strictly liable under the statute for noncompliance, but instead will join the growing number of courts that rely on the equitable

doctrine of substantial compliance to align with the legislative intent behind the statute—that is, to flush out frivolous claims—and avoid the "minefield of hyper-technicalities" that doom innocent litigants possessing meritorious claims.

Conclusion

For the reasons set forth on the record, and given by counsel in oral argument, the Motion to Dismiss by defendant is **DENIED** and the Motion to Extend Discovery by defendant, unopposed by plaintiff, is **GRANTED**.