

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2688-20

NICOLE HOOVER,

Plaintiff-Appellant,

v.

MERRICK WETZLER, M.D.,
NICOLE BAUGHMAN, RNFA,
ADVOCARE SOUTH JERSEY
ORTHOPEDIC ASSOCIATES,
VIRTUA MARLTON HOSPITAL,
and VIRTUA HEALTH SYSTEM,

Defendants-Respondents.

APPROVED FOR PUBLICATION

May 16, 2022

APPELLATE DIVISION

Argued January 6, 2022 – Decided May 16, 2022

Before Judges Mawla, Mitterhoff and Alvarez.¹

On appeal from the Superior Court of New Jersey,
Law Division, Camden County, Docket No. L-2395-
20.

Evangelos Theodosopoulos argued the cause for
appellant (Messa & Associates, PC, attorneys;
Evangelos Theodosopoulos, on the briefs).

¹ Judge Alvarez did not participate in oral argument but joins in the opinion with the consent of counsel. R. 2:13-2(b).

Herbert Kruttschnitt, III, argued the cause for respondent Nicole Baughman (Dughi, Hewit & Domalewski, PC, attorneys; Herbert Kruttschnitt, III, of counsel and on the brief; Jeffrey J. Niesz, on the brief).

The opinion of the court was delivered by

MITTERHOFF, J.A.D.

In this nursing malpractice case, plaintiff Nicole Hoover appeals from an April 1, 2021 order denying reconsideration of a February 19, 2021 order that dismissed her claims with prejudice for failure to provide an appropriate Affidavit of Merit (AOM) against nurse/defendant Nicole Baughman. After careful review of the record and the governing legal principles, we reverse.

The facts for the purposes of this appeal are straightforward and largely undisputed. Plaintiff, a woman in her thirties, treated with co-defendant, Dr. Merrick Wetzler, for problems with her left knee beginning in December 2014. After attempts to resolve plaintiff's left-knee complaints with conservative treatment failed, Wetzler recommended a total knee replacement. Defendant, a Registered Nurse First Assistant (RNFA)² assisted Wetzler at the July 20, 2018

² A RNFA is a "perioperative registered nurse that functions as a first assistant during surgical operations." Career Guide Series: Registered Nurse First Assistant, Nurse (Jan. 3, 2022), <https://nurse.org/resources/rnfa-career-guide/>. A RNFA's duties will vary based on the surgical institution and the nature of the procedure, but the RNFA may, at the direction of the surgeon, use instruments and medical

surgery. Plaintiff alleges that, during the surgery, Wetzler and/or defendant injured her popliteal artery³ and vein, which caused blood to pool. A vascular surgeon was called in and determined that the injury to the artery and vein required a left femoral to popliteal bypass surgery. After defendants completed the knee replacement, the vascular surgeon performed the bypass. Plaintiff alleges that she has permanent injuries including a deformity of her leg as a result of the surgery.

Plaintiff sued Wetzler, defendant, and others alleging negligence in the performance of the knee-replacement surgery. Shortly after filing suit, plaintiff filed and served a single AOM applicable to all defendants. The AOM was executed by Dr. Robert Tonks, M.D., a board-certified orthopedic surgeon who has experience performing total knee replacement surgery.

On October 26, 2020, the trial court conducted a Ferreira⁴ Conference.⁵ At the conference, defendant objected to the AOM by Tonks arguing that it

devices; provide surgical site exposure; handle and/or cut tissue; provide hemostasis; suture; and wound management. Ibid.

³ The popliteal artery branches off from the femoral artery (a large artery in the thigh and the main arterial supply of blood to the thigh and leg) and is located in the knee and the back of the leg. Popliteal Artery, Healthline (Jan. 22, 2018), <https://www.healthline.com/human-body-maps/popliteal-artery#1>.

⁴ Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003).

was not sufficient against a registered nurse. The court gave plaintiff sixty days to file a new AOM "with respect to the profession of the nurse[.]"

On January 11, 2021, defendant moved to dismiss the claims against her for failure to serve an AOM authored by an equivalently qualified nurse or physician. At a hearing on February 19, 2021, the court determined that the AOM statute required plaintiff to submit an AOM from either a registered nurse or a physician who is familiar with the nursing standard of care and protocols of nurses. Accordingly, the court granted defendant's motion to dismiss with prejudice. On March 11, 2021, plaintiff filed a motion to reconsider, which the court denied in an order dated April 1, 2021. This appeal followed.

On appeal, plaintiff presents the following arguments for our consideration:

POINT I

THE APPELLATE DIVISION OWES NO DEFERENCE TO THE TRIAL COURT'S LEGAL CONCLUSIONS.

POINT II

⁵ The purpose of a Ferreira conference is "to identify and resolve issues regarding the [AOM] that has been served or is to be served." Meehan v. Antonellis, 226 N.J. 216, 241 (2016).

THE TRIAL COURT ERRED IN UPHOLDING THE DISMISSAL OF PLAINTIFF'S COMPLAINT AGAINST DEFENDANT . . . FOR WANT OF A SUFFICIENT [AOM] BECAUSE ITS DISMISSAL WAS BASED ON A MISINTERPRETATION OF THE [AOM] STATUTE.

A. [The AOM Statute Does Not Require That a Nurse Author an AOM Against a Nurse.]

B. [Plaintiff's Expert was Sufficiently Qualified to Author An AOM Against Defendant, . . . – a "General Practitioner" – as a Result of His Experience in Active Clinical Practice Performing the Surgery that Gives Rise to Plaintiff's Claims.]

POINT III

THE TRIAL COURT'S DISMISSAL OF PLAINTIFF'S COMPLAINT AGAINST [DEFENDANT] FOR AN ALLEGED INSUFFICIENCY OF PLAINTIFF'S [AOM] VIOLATES THE PURPOSE AND SPIRIT BEHIND THE [AOM] STATUTE.

This court's standard of review on a motion for reconsideration is deferential. See Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). "Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015).

The determination whether plaintiff satisfied the AOM statute is a matter of statutory interpretation for which our standard of review is de novo. See Triarsi v. BSC Grp. Servs., LLC, 422 N.J. Super. 104, 113 (App. Div. 2011). The first step in interpreting the statute is to look "to the plain language of the statute[,] and "ascribe to the statutory language its ordinary meaning[.]" D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119 (2007). This court's "goal in the interpretation of a statute is always to determine the Legislature's intent." Ibid. "Where a statute is clear and unambiguous on its face and admits of only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning." O'Connell v. State, 171 N.J. 484, 488 (2002). When a statute's plain language lends to only one interpretation, a court should not consider "extrinsic interpretative aids." DiProspero v. Penn., 183 N.J. 477, 492 (2005) (quoting Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522 (2004)). "On the other hand, if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'" Id. at 492-93 (quoting Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004)).

The AOM Statute, N.J.S.A. 2A:53A-26 to -29, requires that a plaintiff who files a malpractice or negligence action against "a licensed person in his

profession or occupation" submit an affidavit of "an appropriate licensed person" attesting to that malpractice or negligence. N.J.S.A. 2A:53A-27. "Licensed persons" include accountants, architects, attorneys, dentists, engineers, physicians, podiatrists, chiropractors, registered professional nurses, and health care facilities. N.J.S.A. 2A:53A-26(a)-(j).

N.J.S.A. 2A:53A-27 was amended by the Patients First Act to add a specific requirement for medical malpractice actions: "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 . . . [N.J.S.A. 2A:53A-41]." "In all other cases, the person executing the affidavit" is required to be licensed and "have particular expertise in the general area or specialty involved in the action[.]" Ibid.

Section 41 established a like-credentialed standard of qualification governing AOM affiants and requires "the challenging expert to be equivalently-qualified to the defendant[.]" Ryan v. Renny, 203 N.J. 37, 52 (2010). The statute applies to three categories of medical malpractice defendants:

- (1) those who are specialists in a field recognized by the American Board of Medical Specialties (ABMS) but who are not board certified in that specialty;
- (2) those who are specialists in a field recognized by the ABMS and who are board certified in that specialty;
- and (3) those who are "general practitioners."

[Buck v. Henry, 207 N.J. 377, 389 (2011) (quoting N.J.S.A. 2A:53A-41).]

With respect to who may provide an AOM against a general practitioner, N.J.S.A. 2A:53A-41 provides:

b. If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, 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:

(1) active clinical practice as a general practitioner; or active clinical practice that encompasses the medical condition, or that includes performance of the procedure, that is the basis of the claim or action; or

(2) the instruction of students in an accredited medical school, health professional school, or accredited residency or clinical research program in the same health care profession in which the party against whom or on whose behalf the testimony is licensed; or

(3) both.

"A 'general practitioner' is defined by what he is not -- he is not a 'specialist or subspecialist.'" Buck, 207 N.J. at 391 (quoting N.J.S.A. 2A:53A-41).

Plaintiff argues that defendant is a "general practitioner" pursuant to the Patients First Act and because Tonks indisputably maintains an active practice

that includes the performance of knee-replacement surgery, he is a qualified affiant under the plain language of the statute. We agree that Tonks is a qualified affiant but for a different reason.

In Meehan, the Court addressed whether it was proper for a plaintiff to submit an AOM from a dentist who specialized in prosthodontics and the treatment of sleep apnea in a negligence action against an orthodontist who provided the plaintiff with an appliance to treat sleep apnea that the plaintiff claimed had caused the dislocation of some of his teeth. 226 N.J. at 220. The Court held that the plaintiff need not have submitted a "like-credentialed" AOM:

The plain language of section 41 states that the like-qualified standards apply only to physicians. And it does so repeatedly. For example, N.J.S.A. 2A:53A-41(a) governs parties to a medical malpractice action who are specialists or subspecialists recognized by the [ABMS] or the American Osteopathic Association. Those organizations recognize and establish the criteria for board certification only for physicians. . . .

Similarly, only a physician falls within the bounds of N.J.S.A. 2A:53A-41(b). That subsection addresses general practitioners and limits the expert or affiant to a physician (1) actively engaged in "clinical practice as a general practitioner" or active in clinical practice involving the medical condition or procedure that is the basis of the claim, or (2) who instructs students at an accredited medical school, health professional school, or residency or research program

Interpreting section 41's like-qualified credential requirements as applying only to physicians who are defendants in medical malpractice actions is also supported by and consistent with the stated purpose of the Patients First Act and its legislative history. . . . In enacting the Patients First Act, the Legislature made several findings and declarations regarding the state of health care in this State and identified the retirement or relocation of physicians as a problem hampering the delivery of high-quality health care in New Jersey.

. . .

Furthermore, the Legislature determined that a confluence of factors, including a dramatic escalation of medical malpractice liability insurance premiums, was related to the State's tort liability system and contributing to the State's shortage of qualified physicians. . . . The Legislature concluded that certain reforms were necessary to counteract the identified problems. . . . One of those reforms is embodied in the enhanced standards contained in section 41 governing a person who submits an [AOM] or an expert opinion in favor of or against a physician in a medical malpractice action. The problems identified by the Legislature and the measures adopted to address those problems pertain only to physicians. There is no mention made of any other licensed professional in section 41.

In sum, we conclude that the plain language of sections 27 and 41 lead to the inexorable conclusion that the enhanced credential requirements established under section 41 for those submitting affidavits of merit and expert testimony apply only to physicians in medical malpractice actions.

[Id. at 233-34 (emphasis added).]

The Court proceeded to address the question of whether section 27 imposed "a similar like-qualified standard for affiants and experts in all other

negligence actions against designated professionals[.]" Id. at 235. It concluded: "There is simply no textual support for the application of the like-qualified requirements of section 41 to those submitting an [AOM] in negligence actions against designated professionals[.]" Ibid.

Notwithstanding the Court's statement near the beginning of its opinion that section 41 "applies only in actions for medical malpractice[.]" id. at 221, given the Court's repeated limitation of such actions to "physicians" in the determinative portion of the opinion, we interpret that statement to mean actions for medical malpractice only against physicians. There is nothing in the opinion that would lead to the conclusion that the Court intended to encompass nurses within the definition of physicians, regardless of specialty.

Because there is no heightened "like-for-like" requirement prohibiting Tonks from authoring an AOM against defendant, he need only have satisfied section 27's requirement that the affiant "have particular expertise in the general area or specialty involved in the action," which we conclude Tonks did. Indeed, defendant does not dispute Tonks' expertise in knee-replacement surgery. She concedes she was a member of the operative team and that she assisted in the surgery as a perioperative registered nurse. Notably, the central allegation against defendant and Wexler is identical: one or both negligently severed plaintiff's popliteal artery and vein. Under these circumstances, we

find that Tonks is an expert who satisfies section 27 of the AOM statute and that plaintiff need not have filed an AOM from a registered nurse. Whether and to what extent Tonks may serve as an expert against defendant at trial remains to be fleshed out in discovery, and we express no opinion on that subject.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION