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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0907-21**

ESTATE OF LAURA
CHRISTINE SEMPREVIVO,
by and through its administrator
ad prosequendum PATRICIA
SEMPREVIVO, and PATRICIA
SEMPREVIVO and RONALD
SEMPREVIVO in their own rights,

Plaintiffs-Appellants,

v.

HASSAN LAHHAM,

Defendant,

and

LIVIU HOLCA,

Defendant-Respondent.

Submitted December 6, 2022 – Decided January 20, 2023

Before Judges Gilson, Gummer, and Paganelli.

On appeal from the Superior Court of New Jersey, Law
Division, Atlantic County, L-2343-18.

Lento Law Group, PC, attorneys for appellants (Samuel D. Jackson, on the briefs).

Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, LLC, attorneys for respondent (Michael J. Heron, on the brief).

PER CURIAM

In this medical-negligence case, plaintiffs appeal an order dismissing their complaint with prejudice based on a failure to file an affidavit of merit pursuant to the Affidavit of Merit statute (AOM statute), N.J.S.A. 2A:53A-26 to -29. Because the motion judge erred in dismissing the case based on his improper rejection of a sworn statement submitted pursuant to N.J.S.A. 2A:53A-28, we reverse.

I.

We summarize the facts asserted in the complaint and the protracted procedural history from the record before us, focusing on the aspects of the case regarding the affidavit-of-merit issue.

Laura Christine Semprevivo committed suicide on September 16, 2016. Two years later, her estate, Patricia Semprevivo in her own right and as the estate administrator, and Ronald Semprevivo filed a complaint against the decedent's medical providers, Hassan Lahham and Liviu Holca. Plaintiffs alleged defendants had prescribed opioids to the decedent "without regard for

her health, safety and well[-]being," "carelessly and negligently failed to maintain and provide [an] adequate safety protocol when prescribing" the opioids, and "negligently failed to properly supervise their employees," thereby "directly caus[ing]" her death. In the civil case information statement filed with the complaint, plaintiffs' counsel identified the nature of the case as personal injury and not professional malpractice.

On March 30, 2019, the court on its own initiative dismissed the complaint without prejudice for lack of prosecution. A judge subsequently granted defendant Holca's motion to dismiss the complaint with prejudice and denied plaintiffs' motion to reinstate. We reversed that order and remanded the case. Est. of Semprevivo v. Lahham, 468 N.J. Super. 1 (App. Div. 2021).

On July 9, 2021, defendant Holca filed an answer to the complaint, including a demand for an affidavit of merit pursuant to N.J.S.A. 2A:53A-27.¹ On August 31, 2021, the court granted defendant's request to reclassify the matter as a professional-negligence case and scheduled a conference pursuant to Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144, 154-55 (2003), to

¹ The court entered default as to defendant Lahham on September 9, 2021, because he had not responded to the complaint. Lahham is not participating in this appeal. Given Lahham's non-participation in the case, we mean defendant Holca when we refer to "defendant."

take place on September 7, 2021, exactly sixty days after the filing of defendant's answer. The court conducted the Ferreira conference and a case management conference on September 7, 2021. Plaintiffs had not yet filed an affidavit of merit.

On September 8, 2021, plaintiffs moved to extend the time to file an affidavit of merit. In support of the motion, plaintiffs' counsel, who was not the attorney who had filed the complaint, certified on information and belief that plaintiffs had missed the sixty-day deadline for submitting an affidavit of merit "due to a combination of inadvertent attorney error of this firm and [p]laintiffs' prior counsel, [d]efendant's refusal to provide records to support an affidavit of merit, and third-party entities' refusal to provide any records in response to [p]laintiffs' lawful demands."

Defendant cross-moved to dismiss the complaint with prejudice based on plaintiffs' failure to submit an affidavit of merit. In opposition to the cross-motion, plaintiffs' counsel certified defendant had not provided plaintiffs with "any records in response to the uniform interrogatories deemed served pursuant to R[ule] 4:17-1[(b)](2), or in response to any of the discovery demands [p]laintiffs have issued in the case." After hearing argument, the judge granted plaintiffs' motion, denied defendant's motion, extended the deadline to file an

affidavit of merit by sixty days to November 6, 2021, and scheduled another Ferreira conference to take place on Monday, November 8, 2021.

On November 5, 2021, plaintiffs' counsel filed a certification, citing N.J.S.A. 2A:53A-28, which provides an affidavit of merit is not required

if the plaintiff provides a sworn statement . . . setting forth that: the defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit; a written request therefore along with, if necessary, a signed authorization by the plaintiff for release of the medical records or other records or information requested, has been made by certified mail or personal service; and at least 45 days have elapsed since the defendant received the request.

Counsel certified that on September 8, 2021, plaintiffs had served defendants with a request for their responses to Form C and Form C(3) interrogatories and with a Notice to Produce, seeking "medical records and other information having a substantial bearing on preparation of" the affidavit of merit. Counsel also certified that on October 9, 2021, plaintiffs had sent defendants a request for a copy of the records provided by the Law Offices of John E. Bruder to defendant on September 9, 2021, regarding "State vs. Liviu Holca, M.D., Case #14000376." According to counsel, those records included the file in "the prosecution's case against Dr. Holca." Counsel certified defendant had not provided plaintiffs with any records or responses to plaintiffs' discovery requests

and plaintiffs' "doctor" had been unable to prepare an affidavit of merit "due to having insufficient records." Counsel stated on information and belief that the records in defendant's possession "would have a substantial bearing on preparation of" the affidavit of merit.

At the November 8, 2021 Ferreira conference, plaintiffs' counsel asked the judge to allow plaintiffs to proceed without an affidavit of merit pursuant to N.J.S.A. 2A:53A-28 based on defendant's failure to produce the requested records and discovery responses. Defense counsel did not dispute defendant had failed to respond to plaintiffs' discovery requests. Defense counsel conceded he had received documents from attorney Bruder but asserted those records did not contain "any medical records at all with regard to any of the patients Dr. Holca treated" and that "[t]here are no medical records in my possession." Arguing it was incumbent on plaintiffs to obtain medical records, defense counsel faulted plaintiffs' counsel for not issuing his own subpoena on attorney Bruder, stating "it's amazing how I serve a subpoena and I get the records but somehow plaintiffs' counsel who has the same information I have with regard to Mr. Bruder never sent him a subpoena for the records."

Defense counsel did not explain why defendant had not responded to plaintiffs' discovery requests. Defense counsel did not explain why he had not

produced a copy of the subpoenaed records to plaintiffs in accordance with his obligation under Rule 4:14-7. See R. 1:9-2 ("subpoenas for pretrial production shall comply with the requirements of R. 4:14-7(c)"); R. 4:14-7(c) ("If evidence is produced by a subpoenaed witness . . . , the parties to whom the evidence is so furnished shall forthwith provide notice to all other parties of the receipt thereof and of its specific nature and contents, and shall make it available to all other parties"); Crescenzo v. Crane, 350 N.J. Super. 531, 543-44 (App. Div. 2002) ("The Rule [4:14-7(c)] demands adherence to its terms The power and authority to secure records is a profound one that must be exercised carefully."); Cavallaro v. Jamco Prop. Mgmt. 334 N.J. Super. 557, 569 (App. Div. 2000) (finding "the subpoena power is a significant one which much be exercised in good faith and in strict adherence to the [applicable] rules"). Counsel nevertheless agreed he would forward the records to plaintiffs' counsel on the next day.

The judge did not ask defense counsel why he had not already produced the subpoenaed records to plaintiffs pursuant to Rule 4:14-7(c), why defendant had not responded to plaintiffs' discovery requests, what efforts defendant had made to find the requested records, or why defendant had not provided a good-faith-search certification pursuant to Rule 4:18-1(c). Instead, the judge

demanded plaintiffs' counsel disclose immediately the name of plaintiffs' expert and questioned him about why he had not served attorney Bruder with a subpoena. When counsel disclosed the expert's name and advised the judge he had sent a subpoena for the prosecution's records, the judge asked him if he had "visit[ed] the office of the prosecutor to follow up on that subpoena" or if he had followed up with a call or letter. Counsel responded that he had not visited the prosecutor's office but had followed up with a call or letter.

Before the conference was over, the judge placed a decision on the record dismissing the case based on plaintiffs' failure to submit an affidavit of merit pursuant to N.J.S.A. 2A:53A-27. The judge found plaintiffs' counsel had "not follow[ed] through with the extension that was provided by this court" and, accordingly, held it was "appropriate to dismiss this claim." The judge stated he did not accept counsel's N.J.S.A. 2A:53A-28 certification "as [in] any way being any substitute or any mitigating factor whereby an [a]ffidavit of [m]erit should have been filed within 120 days." On November 16, 2021, the judge entered an order memorializing his dismissal of the complaint with prejudice.

This appeal followed. Plaintiffs contend the judge erred in not relieving them of the affidavit-of-merit requirement pursuant to N.J.S.A. 2A:53A-28 based on defendant's failure to produce the requested discovery. Plaintiffs also

fault the judge for imposing on them additional discovery-related requirements not contained in the AOM statute.

II.

We review de novo dismissals based on failures to comply with the AOM statute, Castello v. Wohler, 446 N.J. Super. 1, 14 (App. Div. 2016), in part because they involve a legal determination, specifically "the statutory interpretation issue of whether a cause of action is exempt from the affidavit of merit requirement," Cowley v. Virtua Health Sys., 242 N.J. 1, 14-15 (2020), and in part because they involve a dismissal of a complaint for failure to state a claim. "The submission of an appropriate affidavit of merit is considered an element of the claim." Meehan v. Antonellis, 226 N.J. 216, 228 (2016); see also N.J.S.A. 2A:53A-29. Thus, "[f]ailure to submit an appropriate affidavit ordinarily requires dismissal of the complaint with prejudice." Ibid.; see also Cowley, 242 N.J. at 16 (noting our Supreme Court has construed the AOM statute "to require dismissal with prejudice for noncompliance").

The AOM statute requires a plaintiff who alleges medical negligence by a licensed professional to provide the defendant with an affidavit from a medical expert in the professional's field within sixty days of the defendant's filing of an answer. See N.J.S.A. 2A:53A-27. In the affidavit the plaintiff's medical expert

must opine that a reasonable probability exists that the standard of care exercised in the alleged malpractice fell outside the acceptable professional standards. Ibid.; see also Cowley, 242 N.J. at 8. Plaintiffs do not dispute defendant is a "licensed" professional under the AOM statute or that their claims are governed by it. See N.J.S.A. 2A:53A-26(f).

The purpose of the AOM statute is to "identify and eliminate unmeritorious claims against licensed professionals and to permit meritorious claims to proceed efficiently through the litigation process" Meehan, 226 N.J. at 229; see also Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc., 466 N.J. Super. 126, 131 (App. Div. 2021) (explaining that the intent of Legislature was to ensure parties did not waste time or resources on unnecessary litigation), aff'd, 250 N.J. 368 (2022). Thus, pursuant to the statute, "a plaintiff must provide 'each defendant' with an affidavit that indicates the plaintiff's claim has merit." Fink v. Thompson, 167 N.J. 551, 559-60 (2001) (quoting N.J.S.A. 2A:53A-27). Underscoring the significance of the affidavit-of-merit requirement, the statute further provides that "[t]he court may grant no more than one additional period, not to exceed [sixty] days, to file the affidavit . . . upon a finding of good cause." N.J.S.A. 2A:53A-27.

"The purpose of the [AOM] statute, however, is not to afford malpractice defendants with a sword to fight off a malpractice action by procrastinating in providing records and other relevant materials that a competent, conscientious expert would have to analyze before submitting an [a]ffidavit of [m]erit." Barreiro v. Morais, 318 N.J. Super. 461, 470 (App. Div. 1999). Accordingly, the Legislature enacted N.J.S.A. 2A:53A-28, a statutory exemption to the affidavit-of-merit requirement. N.J.S.A. 2A:53A-28 excuses a plaintiff from submitting an affidavit of merit if the plaintiff provides a sworn statement that the defendant failed to respond within forty-five days to a written request for medical records or other information "having a substantial bearing on [the] preparation of the affidavit."

"N.J.S.A. 2A:53A-28 reflects a legislative recognition that a plaintiff may be prevented from making [a threshold showing that the claims asserted are meritorious] if a defendant fails to produce essential medical records or other information." Scaffidi v. Horvitz, 343 N.J. Super. 552, 558 (App. Div. 2001); see also Davies v. Imbesi, 328 N.J. Super. 372, 376 (App Div. 2000) (finding "the Legislature recognized that in certain instances a plaintiff might be unable to supply an affidavit of merit because a recalcitrant defendant had failed to supply required records").

The statutory exemption does not apply to the failure to produce any record. Rather, N.J.S.A. 2A:53A-28 applies only to "records having a substantial bearing on the preparation of the affidavit" Under these circumstances, when a defendant has failed to provide any discovery responses whatsoever, "it should be presumed that the 'medical records or other records or information' not produced have had 'a substantial bearing on preparation of the affidavit.'" Aster v. Shoreline Behavioral Health, 346 N.J. Super. 536, 543 (App. Div. 2002) (quoting N.J.S.A. 2A:53A-28). "[T]he burden of establishing otherwise should be borne by the party that has not produced the records" Ibid.

Defendant plainly did not make a showing sufficient to overcome the presumption that the records he failed to furnish had "a substantial bearing on preparation of the affidavit." N.J.S.A. 2A:53A-28. Defendant, for example, did not respond to plaintiffs' counsel's certification with his own sworn statement. Defendant did not certify he had never treated the decedent. Defendant did not certify he had engaged in a good-faith search for medical records regarding the decedent and had not located any. Defense counsel did not provide a certification describing the documents he had received from attorney Bruder regarding "the prosecution's case against Dr. Holca," as an effort to demonstrate

defendant had an objectively adequate basis for withholding their production. Defense counsel made unsworn, verbal assertions at the Ferreira conference that the prosecution case file did not contain "any medical records at all with regard to any of the patients Dr. Holca treated" and that "[t]here are no medical records in my possession." Counsel's unsworn assertions, which said nothing about what records may have been in defendant's possession, are not sufficient to overcome the presumption that the records defendant failed to produce had "a substantial bearing on [the] preparation of the affidavit." N.J.S.A. 2A:53A-28.

The judge faulted plaintiffs for "not follow[ing] through with the extension that was provided by this [c]ourt" Neither the law nor the record supports that conclusion. After the judge granted the extension, plaintiffs' counsel served defendant with multiple discovery requests, all of which went unanswered. Moreover, for a plaintiff to be entitled to the statutory exemption under N.J.S.A. 2A:53A-28, the Legislature required only one thing: a sworn statement that the defendant failed to respond within forty-five days to a written request for medical records or other information "having a substantial bearing on [the] preparation of the affidavit." The Legislature did not require the plaintiff to follow up on any outstanding discovery. It did not require the plaintiff to certify he or she was not in default in any discovery obligation owed

to the defendant. Cf. R. 4:23-5(a)(1) (requiring a movant support a motion to dismiss or suppress a pleading for failure to provide discovery with an affidavit stating movant is not in default of any discovery obligation).

The judge denied plaintiffs the statutory exemption based on what he believed to be plaintiffs' discovery failings. In doing so, the judge improperly read into N.J.S.A. 2A:53A-28 requirements the Legislature did not include. In statutory construction, "we start with the words the Legislature used." Simadiris v. Paterson Pub. Sch. Dist., 466 N.J. Super. 40, 45-46 (App. Div. 2021). A court cannot "write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (quoting Craster v. Bd. of Comm'rs of Newark, 9 N.J. 225, 230 (1952)). Rather, a court's "duty is to construe and apply the statute as enacted." Ibid. (quoting In re Closing of Jamesburg High Sch., 83 N.J. 540, 548 (1980)). Applying the AOM statute as enacted, we conclude the judge erred in rejecting the sworn statement plaintiffs submitted pursuant to N.J.S.A. 2A:53A-28 and in dismissing the complaint with prejudice. Accordingly, we reverse and remand.

On remand, we direct the matter be assigned to a different judge. The newly-assigned judge is to enter an order exempting plaintiffs from the affidavit-

of-merit requirement pursuant to N.J.S.A. 2A:53A-28 and scheduling a case management conference.

Reversed and remanded. 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