ASSEMBLY, No. 1966

STATE OF NEW JERSEY

219th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2020 SESSION

Sponsored by:
Assemblywoman NANCY J. PINKIN
District 18 (Middlesex)

SYNOPSIS

Revises affidavit of merit requirement in professional malpractice cases.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel.

AN ACT concerning professional malpractice and amending P.L.1995, c.139 and P.L.2004, c.17.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 2 of P.L.1995, c.139 (C.2A:53A-27) is amended to read as follows:

2. 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**]** at the time of filing **[**of the answer to**]** the complaint **[**by the defendant**]** , provide each defendant, including any business entity named as a 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 affidavit shall include a specific articulation of the duty of care allegedly breached and the conduct that constituted that breach, and shall provide the basis for identifying that duty, which shall not limit or preclude supplementation of the areas of alleged deviation in any subsequent formal expert report. 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). In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

(cf: P.L.2004, c.17, s.8)

2. Section 7 of P.L.2004, c.17 (C.2A:53A-41) is amended to read as follows:

7. 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

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

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.

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.

c. A court may waive the same specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association and board certification requirements of this section, upon motion by the party seeking a waiver, if **[**, after the moving party has demonstrated to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty,**]** the moving party has demonstrated extraordinary circumstances, the court has determined that an appropriate expert otherwise would not be available, and the court determines that the proposed expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine.

d. Nothing in this section shall limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

e. In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

f. An individual or entity who threatens to take or takes adverse action against a person in retaliation for that person providing or agreeing to provide expert testimony, or for that person executing an affidavit pursuant to the provisions of P.L.1995, c.139 (C.2A:53A-26 et seq.), which adverse action relates to that person's employment, accreditation, certification, credentialing or licensure, shall be liable to a civil penalty not to exceed $10,000 and other damages incurred by the person and the party for whom the person was testifying as an expert.

(cf: P.L.2004, c.17, s.7)

3. This act shall take effect immediately.

STATEMENT

Current law requires, 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 to 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. This is commonly referred to as the "affidavit of merit." This bill revises the affidavit of merit requirement to provide that the affidavit must be filed at the time the plaintiff files the complaint, instead of within 60 days following the date of the filing of the answer to the complaint by the defendant. The bill also requires that the affidavit include a specific articulation of the duty of care allegedly breached and the conduct that constituted that breach, and shall provide the basis for identifying that duty.

The bill also, in medical malpractice cases, revises the circumstances under which a court may waive the same specialty or subspecialty requirements of Section 7 of P.L.2004, c.17 (C.2A:53A-41). That section of law currently provides that, in an action alleging medical malpractice, a person shall not give expert testimony or execute an affidavit of merit 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 certain criteria. One of those criteria is that, if the party against whom or on whose behalf the testimony is offered is a specialist or subspecialist and the care or treatment at issue involves that specialty or subspecialty, 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 as the party against whom or on whose behalf the testimony is offered. This requirement can be waived if the moving party demonstrates to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty and the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine.

This bill provides that the specialty or subspecialty requirement can be waived upon motion by the party seeking a waiver, if the moving party has demonstrated extraordinary circumstances, the court has determined that an appropriate expert otherwise would not be available, and the court determines that the proposed expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time

teaching of, medicine in the applicable area of practice or a related field of medicine. The bill removes the requirement that the moving party demonstrate to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty.

The bill also clarifies that, in lawsuits 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 affidavit required pursuant to section 2 of P.L.1995, c.139 (C.2A:53A-27), in addition to being provided to a defendant that is a "licensed person," must also be provided to a defendant that is a business entity that is also a named defendant in the case.

Current law requires that, in professional malpractice cases, an affidavit be filed by 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. Various courts have pointed out that the statute is unclear with respect to whether business entities that employ licensed persons also must be provided such an affidavit. These business entities would typically be vicariously liable for the actions of their employees that are licensed persons, but the statute does not explicitly afford these business entities with the protection of the affidavit requirement. While certain courts have decided that the affidavit requirement extends to business entities, this bill would explicitly codify that requirement.