

**CIVIL PRACTICE AND PROCEDURE****Affidavit of Merit Statute*****SUPREME COURT***

**8-9-16 Stephen Meehan v. Peter Antonellis, DMD, 226 N.J. 216  
Opinion by Cuff, P.J.A.D. (temporarily assigned)**

The enhanced requirements of section 41 of the Patients First Act which govern the qualifications of persons permitted to submit an affidavit of merit, or provide expert testimony, in a medical malpractice action, apply only in medical malpractice actions. In all other actions against a licensed professional, section 27 of the AOM statute prescribes the qualifications of the person who may submit an affidavit of merit against a licensed professional. The affidavit of merit that plaintiff submitted in this action, from a licensed dentist with experience in the treatment of sleep apnea, satisfies section 27. The trial court therefore improperly dismissed the complaint.

***APPELLATE DIVISION***

**08/25/16 ANTHONY MCCORMICK VS. STATE OF NEW JERSEY, 2016 N.J. Super.  
LEXIS 116  
Opinion by Sabatino, P.J.A.D.**

An injured plaintiff who alleges that he received inadequate medical care while housed in a government facility cannot avoid his obligation to serve an Affidavit of Merit (AOM) under N.J.S.A. 2A:53A-27 by naming only the public entity as a defendant in his complaint and not suing the individual licensed professionals who provided the allegedly inadequate care. We extend the holding of *Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP*, 416 N.J. Super. 1 (App. Div. 2010) (requiring an AOM where a legal malpractice complaint named only law firms as defendants and not their associate, the licensed attorney who acted negligently) to cases involving public entity defendants and involving other forms of malpractice.

**06/20/16 RACHELE LOUISE CASTELLO VS. ALEXANDER M. WOHLER, M.D., 446  
N.J. Super. 1  
Opinion by Fasciale, J.A.D.**

We held, in medical negligence cases, where a plaintiff's counsel timely serves an affidavit of merit (AOM) and reasonably relies on the AOM and expert's curriculum vitae, which erroneously reflects that the witness is actively practicing medicine, and, through no fault of the plaintiff's counsel, the error is first discovered after the expiration of the 120-day deadline imposed under the AOM statute, N.J.S.A. 2A:53A-26 to -29, exceptional circumstances exist requiring the judge to allow a plaintiff sufficient time to retain a different expert witness who is qualified under the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:53A-37 to -42, issue a new AOM, and serve a corresponding expert report. If warranted, the judge may include other procedures or requests for relief related to the extension of discovery and service of a new AOM and expert report.

**04/27/16 A.T., AN INFANT BY HER MOTHER AND NATURAL GUARDIAN, T.T., AND T.T., INDIVIDUALLY VS. M. COHEN, M.D., ET AL. 445 N.J. Super. 300  
Opinion by Currier, J.S.C. (temporarily assigned)**

The issue in this medical malpractice case is whether a minor plaintiff can take a voluntary dismissal without prejudice under Rule 4:37-1(b) to avoid a dismissal with prejudice of her complaint for the failure to provide an affidavit of merit (AOM) within the required timeframe. The court concludes that Rule 4:37-1(b) cannot be used to circumvent the time strictures in the AOM statute even if the statute of limitations has not expired. Plaintiff's counsel failed to file an AOM within 120 days of the filing of the answer. No extraordinary circumstances were presented; just an "oversight" of counsel. After defendants moved for summary judgment, counsel requested leave to take a voluntary dismissal under Rule 4:37-1(b), reasoning that there remained many years until the expiration of the statute of limitations due to plaintiff's status as a minor and there was no prejudice to defendants.

The court finds that permitting a voluntary dismissal in these circumstances would render the AOM statute and its underlying purpose meaningless. The minor's claim was pursued by her guardian ad litem and she was represented by counsel. The Legislature did not choose to carve out an exception for minors under the AOM statute as it has done with the statute of limitations in tort cases.

Judge Fisher dissents, concluding that a trial judge should have the authority to exercise discretion and grant a voluntary dismissal, if appropriate, to preserve the future of a minor's malpractice action. He notes the protections afforded minors, including the equitable tolling of a minor's suit under the Wrongful Death Act and the process requiring judicial approval of settlement reached on behalf of minors, R. 4:44. He finds the minimal prejudice incurred by defendants can be addressed by the trial judge with the imposition of any terms necessary to alleviate that harm upon the re-filing of the complaint.

**01/12/16 LUIS PEREZ VS. ZAGAMI, LLC, ETC., AND NASH LAW FIRM, LLC, ET AL., 443 N.J. Super. 345  
Opinion by Fasciale, J.A.D.**

This case of first impression presents the question of whether an affidavit of merit is required to support a malicious use of process claim when an advice of counsel affirmative defense is asserted in a SLAPP-back suit. The court concludes it is not. After a defamation case (SLAPP suit) brought by defendants was dismissed, plaintiff filed a complaint for malicious use of process (SLAPP-back suit). Defendants asserted an advice of counsel affirmative defense in their responsive pleading. Plaintiff moved to amend his complaint to add the law firm and individual attorneys as defendants. The law firm then moved to dismiss the action contending that plaintiff was required to file an affidavit of merit to support his claims.

The court upholds the trial judge's denial of the motion to dismiss. The court finds that a malicious use of process action is an intentional tort requiring proof of malice and not a deviation from a standard of care and therefore no affidavit of merit is needed to support the claim.