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in NJ Appeals Court Reinstates Medical Negligence Case, Finding Trial Judge Misapplied AOM Statute



"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," the per curiam opinion stated. "On remand, we direct the matter be assigned to a different judge."

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Medical Malpractice



Colleen Murphy



In an unpublished opinion, the New Jersey Appellate Division reinstated a medical negligence case, finding that the trial judge improperly rejected the plaintiffs' claim that they were prevented from filing an affidavit of merit due to the defendants' failure to produce medical records.

The per curiam opinion, issued by Judges Robert J. Gilson, Katie A. Gummer and James R. Paganelli, stated that Laura Christine Semprevivo died by suicide on Sept. 16, 2016. Two years later, a complaint was filed against her medical providers, Hassan Lahham and Liviu Holca, by her estate and Patricia and Ronald Semprevivo. The complaint alleged that the defendants prescribed opioids "without regard for her health, safety and well-being." The civil case information statement, filed with the complaint, identified the case as personal injury and not professional malpractice.

On March 30, 2019, the court dismissed the complaint on its own initiative, without prejudice, for lack of prosecution, according to the opinion. Then a judge granted Holca's motion to dismiss the complaint with prejudice and denied a motion by the plaintiffs to reinstate. The Appellate Division reversed that order and remanded the case. On July 9, 2021, Holca filed an answer to the complaint, including a demand for an AOM.

In a Sept. 8, 2021, motion to extend the time to file an AOM, plaintiff's counsel certified that they had missed the 60-day deadline due to inadvertent attorney error by plaintiff's current and former counsel, and due to the defendant's refusal to provide records to support an AOM, and a third-party refusal to provide any records. According to the opinion, the

defense cross-moved to dismiss the complaint with prejudice. In response, plaintiff's counsel certified that the defendant had not provided plaintiffs with "any records in response to the uniform interrogatories deemed served pursuant to Rule 4:17-1[(b)](2), or in response to any of the discovery demands plaintiffs have issued in the case."

According to the opinion, the judge granted the plaintiff's motion and extended the deadline to file an AOM by 60 days. A day before that due date, counsel for the plaintiffs filed a certification citing N.J.S.A. 2A:53A-28 and certifying "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."

According to the opinion, defense counsel did not dispute the failure to respond to discovery requests by the plaintiff.

"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)," the opinion said. "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 'visited the office of the prosecutor to follow up on that subpoena' or if he had followed up with a call or letter," the opinion said. "Counsel responded that he had not visited the prosecutor's office but had followed up with a call or letter."

The judge then dismissed the case with prejudice, and stated that he did not accept counsel's N.J.S.A. 2A:53A-28 certification. After the judge granted the extension, according to the opinion, plaintiff's counsel served the defendant with multiple discovery requests. None of those requests was answered.

"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 opinion stated. "The Legislature did not require the plaintiff to follow up on any outstanding discovery."

According to the opinion, the judge denied plaintiffs the statutory exemption based on what he believed to be the plaintiff's discovery failings and, in doing so, read into the requirements of N.J.S.A. 2A:53A-28.

"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," the opinion said.

"Accordingly, we reverse and remand," the opinion said. "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," the opinion concluded.

"I applaud the Appellate Division's decision handed down today," said Samuel D. Jackson of Lento Law, counsel to the plaintiffs. "This is the second time in a row we have successfully appealed the improper dismissal of this case."

"Lento Law Group will never stop fighting for our clients, no matter what procedural barriers we have to overcome," Jackson said. "As our complaint alleges, the defendant doctors' negligent over-prescription made Laura Semprevivo another unfortunate victim of the opioid crisis."

“Although the defendant doctors have already faced criminal charges, we are suing on behalf of Laura’s estate and her grieving parents to obtain some measure of justice for the terrible loss they suffered,” Jackson said.

Counsel to the defendants, Michael J. Heron of the Lenox Law Firm, did not immediately return a request for comment.

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