

It is an Appellate Division Split

Paragon Contractors v. Peachtree Condominium Association *Against Saunders v. Capital Health System at Mercer*

by Gary Strong

There appears to be a split in the New Jersey Appellate Division concerning the affidavit of merit (AOM) statute.¹ However, a careful review of *Paragon Contractors, Inc. v. Peachtree Condominium Association*² and *Saunders v. Capital Health System at Mercer*³ reveals there are some consistencies in their respective holdings, specifically with their interpretation of the AOM statute and its construction by the Supreme Court in *Ferreira v. Rancocas Orthopedic*.⁴

FERREIRA CASE

The analysis starts with *Ferreira*, where the plaintiff was in possession of an AOM but inadvertently failed to serve it on the defendant. Soon after the expiration of the 120-day limitation in the AOM statute, counsel for the defendant mentioned to counsel for the plaintiff that the AOM had not been served. Counsel for the plaintiff immediately faxed the AOM to the defendant. Nevertheless, the defendant moved to dismiss the complaint for failure to serve the AOM. The trial court granted the motion, and the Appellate Division affirmed.

In reversing the Appellate Division, the Supreme Court held that the fundamental purpose of the AOM is to “flush out insubstantial and meritless claims that have created a burden on innocent litigants.” The *Ferreira* Court stated:

[t]his case brings to mind the adage that an ounce of prevention is worth a pound of cure. Therefore, going for-

ward, we will require case management conferences in the early stage of malpractice actions to ensure compliance with the discovery process, including the Affidavit of Merit statute and to remind the parties of the sanctions that will be imposed if they do not fulfill their obligations.

In authoring the *Ferreira* opinion, Justice Barry Albin spoke about the purpose of the required case management conference, stating:

[w]e trust that early court intervention in the discovery process will permit the [AOM] to fulfill its true purpose—to bring a swift demise to frivolous lawsuits while allowing meritorious ones to have their day in court.

It is important to note that while the *Ferreira* Court talked about the case management conference, it never held that the conference ‘tolls’ the time period to file the AOM. The *Ferreira* Court weighed the inequities of dismissing the plaintiff’s case when the attorney had obtained the AOM, thus showing “substantial compliance,” but had inadvertently failed to send it to the defendant’s counsel.

SANDERS CASE

Soon after the *Ferreira* case, the Appellate Division dealt with another case where the plaintiff possessed but inadvertently failed to serve an AOM. *Saunders* presented two issues to the court: 1) whether an AOM is required in a malpractice case brought against a midwife, and 2) whether a malprac-

tice case may be dismissed for failure to serve an AOM if the trial court did not hold a *Ferreira* conference.

In reversing the trial court’s decision, the Appellate Division held that a midwife is not a “licensed person” under the AOM. The Appellate Division also held that where the plaintiff possessed but failed to serve the AOM, the case should not be dismissed if a *Ferreira* conference had not been held. Judge Jack L. Lintner, author of the Appellate Division decision, stated:

Contrary to defendants’ contention and the motion judge’s decision, *Ferreira* mandates a case management conference within ninety days of the filing of an answer in a professional malpractice case. Counsel’s inadvertent failure to serve the Luciani Affidavit of Merit would have been discovered had the required case management conference been conducted.

Judge Lintner added:

It would be unfair to expose an attorney to potential professional liability where the court did not schedule the required conference within ninety days of the defendant’s answer.

The facts in *Ferreira* and *Sanders* are similar in that both counsel who needed to file the AOM “substantially complied” with the AOM by getting an the AOM within the statutory 120 days period, but not filing it and serving it upon the adversary. The *Sanders* court left open the issue of when an attorney does not

“substantially comply” with the AOM, and argues that the *Ferreira* conference never took place.

PARAGON CASE

Unlike the fact patterns in *Ferreira* and *Sanders*, the *Paragon* court addresses the case where an attorney does not “substantially comply” with the AOM, and argues as a defense that because the *Ferreira* conference never took place he or she can still file an AOM.

Paragon Contractors, Inc. sued *Peachtree Condominium Association* for unpaid fees. Thereafter, *Peachtree* sued *Key Engineers, Inc.* for “incomplete and defective design work in connection with the project.” *Key* filed its answer on Oct. 2, 2007, and filed a certification to change the track assignment to reflect the claim brought against it was a “professional liability manner.”

When no AOM was filed within 120 days, *Key* moved to dismiss pursuant to the AOM statute. *Peachtree’s* counsel’s argued that a

legal assistant from the firm spoke with the case manager’s office and was told that “the AOM would need to be filed prior to a [*Ferreira* conference] and that if the AOM was not filed by the date of such conference, then one would be filed on the consent of parties.”

The motion judge distinguished *Sanders* and dismissed *Peachtree’s* case, based upon the fact that *Peachtree* did not “substantially comply” with the AOM statute. In affirming the dismissal, the *Paragon* panel first found that “[t]here is nothing in the record to suggest that *Peachtree* did anything that would warrant application of the doctrine of substantial compliance. *Peachtree* did not possess an AOM within the 120-day period and the court found that it had not taken any steps to advise *Key* of the nature and substance of the malpractice claim.”

The *Paragon* panel then turned to the requirement that a *Ferreira* conference be held, and again distinguished *Sanders*:

[B]ecause we are of the opinion that *Ferreira* did not intend that the conference would be deemed a tolling device—a view that could only further complicate the resolution of future affidavit-of-merit controversies—we find it necessary to express our disagreement with *Saunders*.

The *Paragon* court concluded that if the Supreme Court had intended the *Ferreira* conference to toll the filing of the AOM, it would have clearly stated that intent. The *Paragon* panel, therefore, rejected any contention “that a trial court’s failure to schedule the case management conference required by *Ferreira* tolls the statutory deadline or otherwise excuses a malpractice claimant’s noncompliance with the Affidavit of Merit statute.”

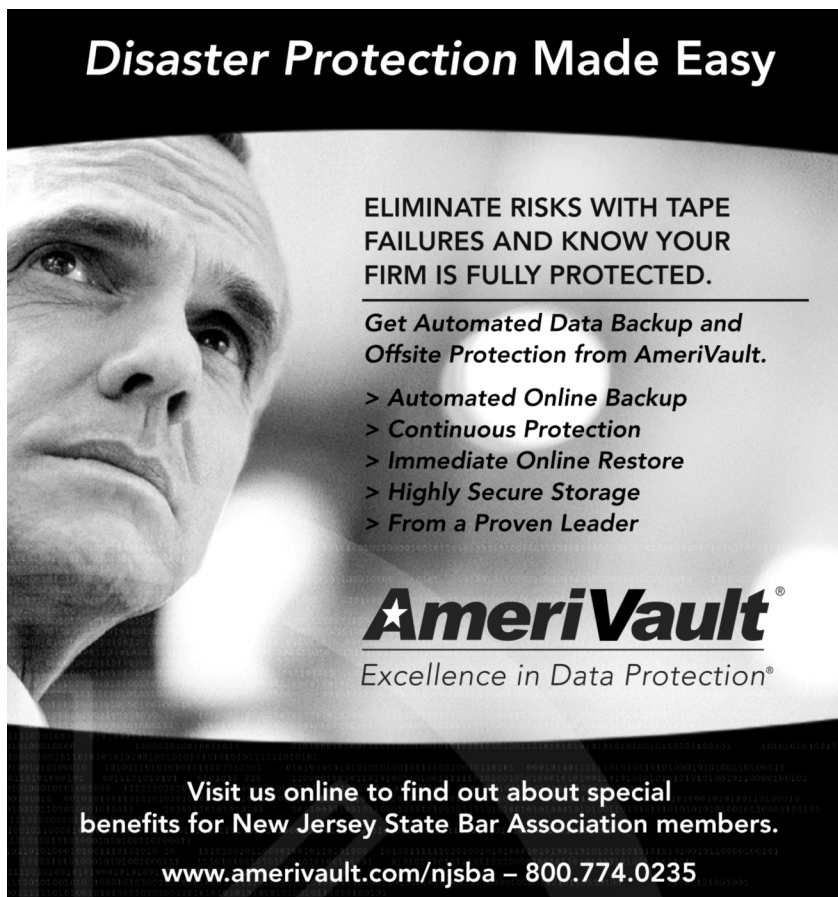
CONCLUSION

Attorneys who have ‘substantially complied’ with the statute, as in *Saunders*, by having an AOM but neglecting to serve it, or who can demonstrate ‘extraordinary circumstances,’ will still be able to prosecute their cases. In those rare cases where an oversight occurs, the plaintiffs will be saved by a *Ferreira* conference, or the absence of one. However, if the plaintiff has not taken steps to substantially comply with the AOM requirement, and there are no extraordinary circumstances, the plaintiff should expect the complaint will be dismissed with prejudice. Such parties, who ignore the AOM statute do so at their peril, and cannot expect to be saved at the last moment by a trial court’s failure to hold a *Ferreira* conference. ■

ENDNOTES

1. N.J.S.A. 2A:53A-26 to -29.
2. 406 N.J. Super. 568 (App. Div. 2009).
3. 398 N.J. Super. 501 (App. Div. 2008).
4. 178 N.J. 144 (2003).

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