

When an Expert Opinion is Required to Support a Certificate of Merit in a Professional Liability Action

In January 2003, the Supreme Court of Pennsylvania promulgated Pennsylvania Rule of Civil Procedure 1042.1 *et seq.*, which is a chapter of rules that apply to professional liability actions, including those against lawyers. The rules provide a screening process for professional liability claims. Generally, the rules force plaintiffs to engage a duty-of-care expert, if needed, early on in the litigation because an expert opinion may be needed to support a certificate of merit. Subject to some exceptions, the certificate of merit must be filed within 60 days after filing the complaint, and where “the expert testimony is not needed under the circumstances,” a certificate of merit must be filed to say so.

It is not always obvious that an expert is required. Surely, when the claim arises out of a blown statute of limitations, an expert would not be required to establish a breach of the duty of care. In some instances, an application to the court may be required to determine whether a certificate of merit must be supported by expert opinion. A recent case in another state gives one illustration of how such an application may play out.

In *Prosser v. Zeldin*, 2010, WL 5392707 (N.J. Super. A.D.), in a so-called “unpublished opinion,” a panel of the Superior Court of New Jersey, Appellate Division, was called upon to interpret N.J.S.A. 2A:53A-27, a statute that requires what it calls an affidavit of merit in professional liability actions, instead of a certificate of merit as required in Pennsylvania. But the affidavit of merit serves substantially the same purpose as the certificate of merit, which is to prompt the plaintiff to secure an opinion early on from “an appropriate licensed per-

son 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 complaint, fell outside acceptable professional ... practices.”

There are procedural differences between New Jersey’s affidavit of merit and Pennsylvania’s certificate of merit. For example, the expert signs the affidavit of merit; the lawyer signs the certificate of merit based upon the written opinion given by the expert. Moreover, the remedy for failure to file the affidavit of merit is dismissal with prejudice, whereas the failure to file a certificate of merit in Pennsylvania is the entry of judgment of non pros, which is without prejudice. Finally, under case law, an affidavit of merit is not required when the negligent conduct “involves matters of common knowledge,” which relies on the ability of the jury to resort to “ordinary understanding and experience, to determine a defendant’s negligence.”

In *Prosser*, the underlying matter involved defendant lawyer’s representation of his client in a divorce. The terms of a settlement agreement had been placed on the record at what was scheduled to have been the first day of the hearing and then later reduced to writing. After the lawyer and his client parted ways, the client filed a motion in the divorce action to vacate the judgment, alleging “that his marriage to his former spouse was not legal because no valid marriage license had been issued.” The court denied the motion both for technical reasons and on the basis that “producing a license was not essential to proving the validity of the marriage in a divorce proceeding as long as there was other evidence presented during the hearing to establish the fact of the marriage.”

The client, acting pro se, then sued his lawyer, alleging legal malpractice. In his original complaint, he complained that his lawyer had coerced him into agreeing to the divorce settlement. He contends instead that the lawyer should have defended the divorce because “[d]uring the entire divorce process [the client told lawyer] that there was nothing in [a] public record that served as a legal document to confirm that there was a legal marriage.” Therefore, in the client’s view, the marriage was invalid and the divorce action could and should have been defended on that basis. The lawyer, also acting pro se, filed an answer to the complaint in which he denies all such allegations and demands that the client serve an affidavit of merit within 60 days. Instead of filing an affidavit of merit, the client filed an amended complaint and requested an extension of time in which to satisfy the affidavit of merit requirement, which prompted the court to grant him a three-week extension.



Avoiding Liability



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Again, the client filed no affidavit of merit. Instead, he wrote a letter to the court to apologize for his failure to serve an affidavit of merit and to state, among other things, that no affidavit of merit was required under these circumstances “because expert testimony is not required and the malpractice can be established as a matter of common sense.”

The lawyer filed a motion to dismiss the amended complaint for failure to serve an affidavit of merit. The client opposed, contending that no affidavit of merit was required because, in his view, his allegations show negligent conduct that “was blatant and a matter that is common sense. ...” The client contended that his attorney’s failure to prove the absence of a valid marriage “is a matter of common sense for which no expert testimony is required.” The trial court disagreed and, as a consequence, granted the motion and dismissed the action with prejudice.

The court on appeal affirmed. The panel does acknowledge in its per curiam opinion that client had alleged as actionable that his lawyer had “coerced” him into entering the settlement agreement. But, rather than dealing with that issue, it instead concentrates its analysis on the allegation that lawyer should have defended client in the divorce action on the basis that the marriage was invalid because there is no evidence that a marriage license had been procured when the ceremony occurred in Jamaica. Because the validity of a marriage is determined under the law of the jurisdiction in which the marriage ceremony was performed, the court finds that whether a

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marriage license is required must be determined under Jamaican law. Therefore, the court reasoned, knowledge of Jamaican law is not common knowledge and, as a consequence, an expert is required because determining whether the lawyer was negligent for his failure to pursue this argument requires an expert. As a result, for this and another reason, the court found that an affidavit of merit was required to support client's claim.

Fortunately, Pa. R.C.P. 1042.6(c) provides a mechanism for determining whether a certificate of merit is required under any given circumstance, without the plaintiff having to find out the hard way by suffering a non pros. When a defendant serves the notice of intention to file a praecipe for non pros, the plaintiff has 30 days in which to file a motion to determine the need for a certificate of merit. If the ruling is adverse, the plaintiff has time in which to file a certificate of merit.

While Pennsylvania provides this mechanism, the petition process may present issues as novel as the Jamaican marriage license that never was.