MEDICAL MALPRACTICE

Revival of the Ferreira Conference: 'A.T. v. Cohen'

By Andrew J. Carlowicz Jr.

On Dec. 14, 2017, the Supreme Court issued its decision in *A.T. v. Cohen*, 2017 N.J. Lexis 1383 (2017). The holding in this case seems to inject new life into the moribund Ferreira conferences in professional liability cases.

By way of background, in 2003 the New Jersey Supreme Court issued two simultaneous decisions on the affidavit of merit (AOM) statute; namely *Ferreira v. Rancocas Orthopedic Associates*, 178 N.J. 144 (2003), and *Knorr v. Smeal*, 178 N.J. 169 (2003). In what was later characterized as paternal "hand holding," our Supreme Court ruled in those two cases that trial courts should conduct a conference—thereafter known as a "Ferreira" conference—prior to the expiration of the timeframe within which an AOM needed to be provided in a malpractice case, in order to see if an AOM was needed. Specifically the *Ferreira* court wrote that it "proposed" that:

> an accelerated case management conference be held within 90 days of the service of an answer in all malpractice actions …. At the conference the court will address … whether an AOM has been served on defendant. If an affidavit has been served, defendant will be required to advise the court whether he has any objection to the adequacy of the affidavit …. If no affidavit has been served, the court will remind the parties of their obligation under the statute and case law.

As an aside, in the *Knorr* opinion, the court wrote that the *Ferreira* opinion "required" such a conference.

This immediately resulted in logistical problems at the trial level. From that point forward trial courts would inconsistently schedule Ferreira conferences. Based on this author's experience, it also appears as though the courts were sending out notices for a Ferreira conferences based solely upon the plaintiff's complaint. Thus, in a case where the AOM requirement was actually triggered by the filing of a third-party complaint, no Ferreira conference would be scheduled.

Seemingly remedying these problems, the New Jersey Supreme Court issued another decision on this very issue in a case entitled *Paragon Contractors v. Peach Tree Condo*, 202 N.J. Super. 415 (2010). While the court gave the plaintiff a "do over" in *Paragon* and declined to dismiss the complaint despite a lack of compliance with the AOM statute, the majority opinion stated that "going forward reliance on the scheduling of a Ferreira Conference to avoid restrictions of the Affidavit of Merit statute is entirely unwarranted and will not serve to toll the statutory timeframes." Legal practitioners in this arena interpreted this to mean that while the court might schedule a Ferreira conference, if it did not and plaintiff failed to appropriately provide an AOM in a timely fashion, the lack of such a conference could not be used in opposition to a motion for dismissal.

In *Paragon*, the concurring opinion written by then Associate Justice Rivera-Soto

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was colorful to say the least. Voicing his obvious disdain for the court's self-imposed obligation to help incompetent lawyers avoid malpractice, he wrote the following:

> The imposition of the Ferreira Conference is yet another example of well-intentioned, but fundamentally misguided judicial tinkering. The source of the confusion that animates the relief today with yet another lawyer unable to comply with elementary statutory requirements—Ferreira itself—has condoned a continuing, albeit somewhat quelled stream of lawyer disregard for the mandates of the Affidavit of Merit statute. In each instance those coddled few who seek to excuse their basic inability to comply with a glaringly clear and straight-forward legislative mandate, thrash wildly about, seeking to lay blame everywhere but where it properly belongs; in the hands of the non-complying lawyer.
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> Now, 15 years after the Affidavit of Merit statute was enacted and 7 years after Ferreira, that tide should have abated and the judicial need to protect a handful of lawyers from their own professional shortcomings should come to a well-deserved end.
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> Although the parties have not addressed the point, anecdotal evidence strongly supports the view that the obligation to schedule and conduct Ferreira Conferences is observed only when it's breached: The vast majority of lawyers understand their professional obligations; it is only the wayward few who seem stubbornly unable to comply with this simple task; and, as a practical matter, our trial courts cannot, and as a consequence do not, pander to the few at the expense of the many. Yet, *Ferreira* imposes a system-wide obligation, designed solely to protect the less-than competent from what may be a well-earned malpractice claim.
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> It is, at the very least pathetic that our judicial system has catered to the lowest-common denominator practitioners. The goals of a properly constructed judicial system must be practical, but they should also be hortatory, seeking that all aspire to practice at a level greater than at minimum requirements.
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> In the final analysis, our citizenry is entitled to a continually improving system of justice, and not some ersatz construct where judges are diverted from their duties to baby-sit and spoon-feed those either too lazy or too unwilling to comply with their clearly defined obligations.

Now, seven years later, the New Jersey Supreme Court has drifted away from the biting—albeit arguably sound—commentary by Justice Rivera-Soto in what critics may assert appears to be a result-driven decision. In *A.T. v. Cohen,* 2017 N.J. LEXIS 1383 (2017), the injured plaintiff was a minor who suffered birth defects as a result of alleged medical malpractice. Being represented by a lawyer who clearly did not know the law, no affidavit of merit was provided in a timely manner. The defendant doctor moved for dismissal and the trial court granted that application, which was then upheld by the Appellate Division. However, in *A.T. v. Cohen,* the New Jersey Supreme Court reversed and reinstated the case.

In its decision, the Supreme Court reiterated the need for a Ferreira conference and wrote "that the Court will require modification of the judiciary's electronic filing and notification case management system to ensure that, going forward, necessary and expected conferences are scheduled to enhance parties compliance with the requirements of the Affidavit of Merit statute." Substitute plaintiff's counsel argued before the Supreme Court that the failure to hold a Ferreira conference and the former attorney's oversight were extraordinary circumstances which would justify the court's use of its discretion to grant a voluntary dismissal *without* prejudice (and thereby allow reinstitution of the minor's lawsuit). There is an exception to the AOM statutory obligation; namely the doctrine of extraordinary circumstances, which is a legal theory that has been used for many decades to overcome strict statutory requirements, and rightly so. It is legitimate to ask, however, whether the circumstances of the *A.T. v. Cohen* case rise to the level of extraordinary circumstances as that doctrine has been used over many decades.

In *A.T. v. Cohen,* Justice Lavecchia, writing for the court, acknowledged that the failure to conduct a Ferreira conference "alone" may not demonstrate extraordinary circumstances, but, she concluded that the "confluence of factors persuades us to recognize this case as sufficiently extraordinary to allow the untimely affidavit to be accepted and to require that the matter proceed on the merits." The other "factor" discussed by the court was the failure of predecessor counsel to know the law. However, it is difficult to understand the court's reasoning because it was also written in the opinion that, "while that type of attorney inadvertence will not, standing alone, support a finding of extraordinary circumstances (citations omitted) in this case the judiciary failed to do what this court expected; namely to act as a backstop."

So it appears as though the New Jersey Supreme Court agrees that the lack of a Ferreira conference alone does not constitute extraordinary circumstances. It appears that the court also agrees that attorney inadvertence alone is also not an extraordinary circumstance. When these two factors are added together, however, a trial court can now rescue plaintiff's claim from dismissal with prejudice based on the doctrine of extraordinary circumstances. Unstated in the opinion is that if there was no attorney inadvertence there would be no need for a Ferreira conference. On the other hand, if there was a Ferreira conference, then the attorney inadvertence would be prevented by the court's intervention.

Near the conclusion of the opinion Justice Lavecchia wrote, "With our announcement of those improvements comes a cautionary note. Counsel are on notice that disregarding the scheduling of the conference, or waiving the conference, will not provide a basis of relief from the AOM obligations." That seems to be a partial recognition part of what *Paragon* stood for, while at the same time still holding that if it is the trial court that "drops the ball" in failing to issue a notice for a Ferreira conference, then the *Paragon* rule no longer applies.

This author suspects that this decision may result in more motion practice on this issue and not less. By way of example, what will be the result when the trial court schedules a Ferreira conference 90 days after the answer is filed and it is rescheduled twice for a date 40 days later? The plain reading of the statute and the interpretive case law make it clear that the 120 day threshold is a "drop dead" date that courts may not extend. A myriad of other logistical problems wait on the horizon. For example, what happens when counsel inputs a non-malpractice CIS number with an initial pleading in a case that has both professional and non-professional defendants? This decision also does not address the scenario in which a third-party complaint is the first time a malpractice claim is asserted. Of course, there is an easy solution. We could simply expect lawyers to know the law, and pay the price for the failure to do so. ■

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