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EDWARD NICHOLAS et al.

Plaintiff/Respondent,

vs.

DR. CHRISTOPHER MYNSTER et al.

Defendant-Appellant.

SUPREME COURT OF NEW JERSEY

DOCKET NUMBER 068439

A-6/7-11

ON MOTION FOR LEAVE TO APPEAL

FROM THE SUPERIOR COURT OF

NEW JERSEY- LAW DIVISION

DOCKET NO.: ATL-L-1966-07

CIVIL ACTION

**BRIEF AND APPENDIX
FOR AMICI CURIAE
MEDICAL SOCIETY OF NEW JERSEY
AND THE AMERICAN MEDICAL ASSOCIATION**

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INTEREST OF THE PROPOSED AMICI

This matter presents the straightforward issue of whether in a medical malpractice lawsuit involving a physician practicing a recognized specialty the courts will enforce the legislatively established requirement that for an expert witness to be competent to testify as to the pertinent standard of care that expert must have current experience and credentials in the same specialty, including when present, the same certification issued by the defendant's specialty board organization. This Brief is submitted in connection with the application by the Medical Society of New Jersey ("MNSJ") and the American Medical Association ("AMA") to appear as amici curiae in this matter. Participation by MSNJ and the AMA on behalf of their physician memberships will sharpen the focus on physician-related issues presented on this appeal. Such participation will also add to and to some extent respond to the contribution made by other organizations seeking recognition as amicus curiae.

The MSNJ is a non-profit professional society organized under the laws of the State of New Jersey and is located at 2 Princess Road, Lawrenceville NJ 08648. It was founded in 1766. It was the first state society of physicians in the nation and is the primary organization of physicians in New Jersey. There are currently over 7,000 physician members in the MSNJ.

The AMA, an Illinois non-profit corporation, is the largest professional association of physicians and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these still remain its core purposes. Its members practice in every state, including New Jersey, and in every specialty. MSNJ is an affiliate and constituent member of the AMA.

The AMA and MSNJ join this Brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

The MSNJ and the AMA have played important roles in advocating on behalf of their members over the years. For over 240 years, the MSNJ has been an advocate of quality health care and health services for all citizens of this State, and has offered leadership and assistance to its physician members. The

MSNJ regularly participates in important issues in the judicial, legislative and regulatory arenas.

The MSNJ has participated in the judicial arena either as a party, as an amicus or in a representational capacity, on behalf of the medical profession and the physicians of New Jersey as a whole, in a number of cases before the Supreme Court of New Jersey, the Appellate Division and in the Federal courts. These include: Liguori v. Elmann, 191 N.J. 527 (2007); In re License Issued to Zahl, 186 N.J. 341 (2006); Johnson v. Braddy, 186 N.J. 40 (2006); New Jersey Ass'n of Nurse Anesthetists, Inc. v. New Jersey State Bd. of Med. Exam'rs, 183 N.J. 605 (2005); Cmty. Hosp. v. More, 183 N.J. 36 (2005); Macedo v. Dello Russo, 178 N.J. 340 (2003); Howard v. UMDNJ, 172 N.J. 537 (2002); Morlino v. Med. Ctr., 152 N.J. 563 (1997); Hirsch v. New Jersey State Bd. of Med. Exam'rs, 128 N.J. 160 (1992); MSNJ v. New Jersey Dep't of Law & Pub. Safety, Div. of Consumer Affairs, 120 N.J. 18 (1990); Betancourt v. Trinitas, 415 N.J. Super. 301 (App. Div. 2010); Webb v. Witt, 379 N.J. Super. 18 (App. Div. 2005); New Jersey Ass'n of Health Plans v. Farmer, 342 N.J. Super. 536 (App. Div. 2000), Petrocco v. Dover Gen. Hosp., 273 N.J. Super. 501 (App. Div. 1994); Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266 (3d Cir. 2001); and Vacco v. Quill, 521 U.S. 793 (1997). These were all cases involving issues of importance to the medical profession or to the patients it is privileged to

serve.

Of greater pertinence to the matter sub judice, in the ten-year period leading up to 2004, MSNJ had actively participated in addressing the need for reforms in the handling of medical malpractice claims. Representatives of MSNJ had testified before the legislative committees concerning a number of bills. This led to the enactment of the New Jersey Medical Care Access and Responsibility and Patients First Act, including standards for expert affidavits of merit and testimony in connection with such lawsuits as codified at N.J.S.A. 2A:53A-41, at issue in the matter before the Court. MSNJ continues to be involved in the efforts at legislative reform. Moreover, MSNJ appeared in an amicus capacity in Ryan v. Renny, 203 N.J. 37 (2010), in which this Court considered the issue of the showing to be made by a plaintiff seeking waiver of the same specialty requirement of N.J.S.A. 2A:53A-41. The AMA also participated in the submission of the Ryan v. Renny amicus brief.

Because of the importance of the issue of expert testimony in resolving medical liability claims, the likelihood of its repetition, and the involvement of the MSNJ in developing the law and public policy in cases affecting the practice of medicine, the MSNJ together with the AMA wishes to participate and be heard in the issues in the present appeal as amici curiae.

PROCEDURAL HISTORY
AND
STATEMENT OF FACTS¹

Most of the pertinent facts are entwined with the procedural posture of this case. Accordingly, the Procedural History and Statement of Facts are combined in this Brief.

The Complaint in this matter was filed on March 29, 2007. [SDa27] The lawsuit arose out of construction work being done by plaintiff Edward Nicholas in the basement of the home of defendant Francis Carini using a gas-powered cutting machine manufactured by defendant Stihl Incorporated. On April 8, 2005, Mr. Nicholas collapsed at the work site after inhaling noxious fumes and vapors that had built up in the work space. He was brought to the Emergency Department facilities of defendant SJ Regional Medical Center in Vineland. The presenting problem was carbon monoxide poisoning. [SDa31 to SDa33] At the Emergency Room, Mr. Nicholas came under the care of defendant Christopher Mynster, M.D. Dr. Mynster is certified by the American Board of Emergency Medicine. [MDa50]

After his initial evaluation of the patient, Dr. Mynster contacted defendant Rekha Sehgal, M.D. who came to the Emergency

¹ References are to the Appendix materials filed with the Appellate Division and then submitted to the Supreme Court in connection with the motions for leave to appeal. The following legend will be used:

SDa - Appendix to Brief on behalf of defendant Rekha Sehgal, M.D.
MDa- Appendix to Brief on behalf of defendant Christopher Mynster, M.D.

Room and then admitted the patient for further care in the Intensive Care Unit. As noted by the trial court in its findings of fact, there was no dispute that Dr. Sehgal is certified by the American Board of Family Practice. [MDa3]²

Responsive pleadings were filed by defendants Mynster and Sehgal on June 21, 2007 and June 18, 2007 respectively. [MDa28; SDa55]

Following the filing of responsive pleadings, Plaintiff provided an Affidavit of Merit from Lindell Weaver, M.D. dated October 11, 2006. Dr. Weaver does not practice either Emergency Medicine or Family Practice. He is not certified in either field. His credentials include certification by the American Board of Internal Medicine and subspecialty certification in Critical Care and Pulmonary Disease by the same American Board of Internal Medicine as well as certification from the American Board of Preventative Medicine. As reflected in his undated written report [SDa77 to SDa83], it was Dr. Weaver's opinion that the standard of care required that Dr. Mynster and/or Dr. Sehgal refer the patient for hyperbaric oxygen treatment immediately following his presentation to the hospital and that had Mr. Nicholas received hyperbaric oxygen his problems would have been prevented or mitigated.

² Also named as defendants in the Complaint were Joseph J. Diorio, M.D. and Timothy Rhymes, M.D. Both were dismissed from the litigation earlier and are not parties to this appeal.

Thereafter, on September 14, 2007, the court conducted a case management conference consistent with the directives in Ferreira v. Rancocas Orthopedic Assoc., 178 N.J. 144 (2003). Counsel for defendant Mynster challenged the sufficiency of the Weaver affidavit since he was not certified in Emergency Medicine comparable to Dr. Mynster. The court entered an Order on October 9, 2007 requiring any supplemental affidavits of merit be provided within 120 days of the filings of each defendants' Answer. [MDa59 to MDa60] Plaintiff provided an additional Affidavit of Merit from James Doghramji, M.D. dated October 15, 2007. [MDa61]

Defendant Mynster persisted in challenging the sufficiency of Plaintiff's affidavits including a motion for summary judgment filed in October 2007. [MDa62 to MDa68] However, the objection and related motion was withdrawn on November 16, 2007 after receiving a letter from counsel providing information as to the work experience of Dr. Doghramji in the field of Emergency Medicine. [MDa69 to MDa73] Although Dr. Doghramji was not Board-certified in Emergency Medicine, the defendant Mynster withdrew that challenge and the matter continued through discovery.

However, the only expert report on behalf of plaintiff addressing the issue of standard of care as to the medical providers was authored by Lindell Weaver, M.D. Although he had

provided an Affidavit of Merit, Dr. Doghramji did not prepare an expert report.

Dr. Weaver was deposed on July 9, 2010. Although certified in several specialty areas, Dr. Weaver testified that he did not do a residency in family practice or have residency training in emergency medicine. [MDa88; MDa97] He was not board certified in either of these areas. [MDa88; MDa97] He had last worked in an emergency room setting in 1987. [MDa106] This was 18 years before the treatment at issue was rendered and 20 years before the filing of the lawsuit. He also acknowledged that he did not know how the average family practitioner would have treated this patient in 2005. [MDa108]

Defendants Mynster and Sehgal filed motions to bar the testimony of Dr. Weaver at trial and for the entry of summary judgment based on the lack of testimony to be presented at trial that would establish a prima facie case. The motion was originally returnable October 15, 2010 and was heard on November 12, 2010 by the Honorable Joseph Kane, J.S.C.

On December 13, 2010, Judge Kane entered Orders denying the motions of both defendant physicians. [MDa1 to MDa6; SDa1 to SDa6] In the accompanying Memorandum of Decision, Judge Kane employed a similar analysis as to both defendants:

This Court finds that the issue of Dr. Weaver not being board certified in either Family Medicine or Emergency Medicine goes to Dr. Weaver's credibility

not admissibility. The fact that Dr. Weaver stated he did not know what a family physician would do in Plaintiff's case also goes to Dr. Weaver's credibility. The [New Jersey Supreme] Court in Khan [v. Singh, 200 N.J. 82 (2009)] allowed the expert to testify despite the fact that the expert had a different specialty than the defendant doctor. Khan could stand for the proposition that an expert who has a different specialty than the alleged negligent doctor but practices similar medicine is sufficient to allow the expert to testify so long as the similar medicine is reasonably related to the patient's treatment. Plaintiff alleges that the course of treatment was negligent within the standard of care. Dr. Weaver is a specialist in the course of treatment recommended by both Dr. Sehgal and Dr. Mynster. For this reason, this Court finds that Dr. Weaver may testify as an expert. [MDa5 to MDa6]

A motion for reconsideration was denied by Order of March 21, 2011. [MDa8] A motion for leave to appeal was filed with the Appellate Division but denied by Order dated May 11, 2011.

Both defendants moved before the Supreme Court of New Jersey for leave to appeal pursuant to R. 2:2-2(b). These motions were granted on September 9, 2011 with the decision posted on the Judiciary Website on September 19, 2011.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S APPROACH TO THE ASSESSMENT
OF PLAINTIFF'S PROPOSED MEDICAL EXPERT
WAS INCONSISTENT WITH THE STANDARDS
AND ENHANCED REQUIREMENTS ENACTED
WITH THE 2004 AMENDMENTS IN THE
NEW JERSEY MEDICAL CARE ACCESS AND
RESPONSIBILITY AND PATIENTS FIRST ACT
FOR THE COMPETENCY OF PROPOSED EXPERT WITNESSES.

The events giving rise to this cause of action occurred on April 8, 2005 when Edward Nicholas became ill and was brought to the Emergency Department of SJ Regional Medical Center. As such, this litigation is subject to and controlled by the provisions of N.J.S.A. 2A:53A-41 that went into effect as of July 7, 2004. Those provisions supplemented the Affidavit of Merit Statute that had originally been enacted in 1995.

The trial court's view that a medical witness' credentials and experience were matters affecting the weight to be given to an opinion and not the threshold question of the competence of the witness to express that opinion reflects an outdated and superseded approach to expert qualifications. Moreover, the trial court's reliance on this Court's decision in Khan v. Singh, 200 N.J. 82 (2009), which had involved a medical procedure done in May 2000, was especially misguided. It utilized only a portion of the opinion and allowed itself to

disregard an important qualifying passage in the opinion as highlighted below.

In general, as we have held, "[i]n terms of qualifications, an expert 'must be suitably qualified and possessed of sufficient specialized knowledge to be able to express [an expert] opinion and to explain the basis of that opinion.'" ... More particularly, in the medical malpractice arena, we have held that the key is "whether [an expert] has sufficient knowledge of professional standards applicable to the situation under investigation to justify his expression of an opinion relative thereto." ... Although for causes of action accruing after July 7, 2004, that determination must also take account of the provisions of the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:53A-37 to -42 (fixing qualifications in addition to N.J.R.E. 702 for medical malpractice experts), we need not consider them in this matter. [Id. at 100 (citations omitted)(emphasis added).]

In the later opinion of Ryan v. Renny, 203 N.J. 37 (2010), this Court endorsed the proposition that in considering whether a witness is qualified under N.J.R.E. 601 and 702 the trial judge must use "sound discretion" but "[t]hat discretion can, of course, be guided by statute." Id. at 50. Quoting from Mizrahi v. Allstate Ins. Co., 276 N.J. Super. 112, 117 (Law Div. 1994), Justice Long wrote: "Indeed, there is nothing in our jurisprudence 'to suggest that the broad view of expert qualification embodied in the rules of evidence is sufficient to permit the testimony when the Legislature expresses a contrary view.' . . . The Affidavit of Merit statute is such an expression." Ibid.

The recognition in Ryan v. Renny regarding the legislative expression of limits on judicial discretion regarding an expert's qualifications is significant in assessing the trial court's ruling on this appeal. Its conclusion that an expert who has a different specialty than the defendant but practices "similar medicine" is sufficient to permit the expert to testify "so long as the similar medicine is reasonably related to the patient's treatment" is directly contrary to the straightforward language of the controlling statute. N.J.S.A. 2A:53A-41 provides that a person "shall not give expert testimony" in a medical malpractice lawsuit against a physician practicing a recognized specialty "unless . . . the person providing the testimony shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty." There is no allowance for some notion of "similar medicine."

This matter is unlike the other cases arising under the Affidavit of Merit previously considered by this Court. Those cases had involved questions of whether plaintiffs in malpractice cases have made a threshold showing that their claim is meritorious so that meritless lawsuits readily could be identified at an early stage of litigation.³ At least as to Dr.

³ In contrast to Ferreira v. Rancocas Orthopedic Assoc., 178 N.J. 144 (2003), there was no delay on the part of defense counsel in raising challenges to the sufficiency of plaintiff's proffered affidavit so as to

Mynster that screening process was presumably carried out with the presentation of the Affidavit of Merit by Dr. Doghramji who represented himself as having actual current experience in Emergency Medicine treatment matters. The issue here is whether plaintiff's proof as to be presented at trial were sufficient.

Liability is not presumed based on injury alone but requires proof of fault. Another bedrock principle of our jurisprudence is that the decision assessing liability needs to be based on reliable information and evidence from competent witnesses. The current Affidavit of Merit Statute, in addition to providing for prompt screening of cases for merit, deals with establishing a baseline for the competency of witnesses providing opinion testimony in malpractice cases.

A medical malpractice plaintiff is nearly always required to present expert testimony to establish the standard of care and a defendant's alleged deviations from that standard of care. Verdicchio v. Ricca, 179 N.J. 1, 23 (2004). This is axiomatic. It is part of the substantive law defining the elements of the cause of action. In the absence of such expert opinion, the Complaint is subject to dismissal either at trial or on a motion for summary judgment following the expiration of time for service of an expert report with an opinion in support of the

lull counsel into inaction with the potential for forfeiture. Similarly, in sharp contrast to Buck v. Henry, 203 N.J. 432 (2010), there was never any question that defendant Mynster maintained that his area of practice was Emergency Medicine and that he was treating the patient within his specialty.

Complaint. When required (as it usually is), such expert opinion is an essential element of the substantive prima facie case that a plaintiff must establish in order to make out a claim for tort compensation.

A subsidiary but nonetheless central element defining the substantive cause of action is that when the defendant is a specialist the standard of care against which the conduct is to be measured is different - that is, higher - than that for a general practitioner. In the long established and utilized Model Charge, the following language appears:

Specialists in a field of medicine represent that they will have and employ not merely the knowledge and skill of a general practitioner, but that they have and will employ the knowledge and skill normally possessed and used by the average specialist in the field. Thus, when a physician holds himself/herself out as a specialist and undertakes to diagnose and treat the medical needs of a patient, the law imposes a duty upon that physician to have and to use that degree of knowledge and skill which is normally possessed and used by the average specialist in that field, having regard to the state of scientific knowledge at the time that he/she or she attended the plaintiff. [Model Civil Jury Charges 5.50A]

Fundamentally, the common law has long precluded witnesses from providing opinions unless their competence to do so was established. See generally E.W. Cleary, McCormick on Evidence §§ 11, 13, 69 at 26-28, 33-34, and 167 (3d ed. 1984). The opinions as to standard of care, deviation, and causation presumptively are being provided by an "expert" with appropriate knowledge,

training, and experience. Our courts had adopted what may fairly be described as a liberal approach to the question of what type of background on the part of a proposed expert passes muster under the Opinion Rule.

In Carbone v. Warburton, 11 N.J. 418 (1953), this Court had stated "[t]he fact that [the proffered expert witness] is not a specialist may disparage his qualifications and thereby the weight to be given his opinion, but it does not render him incompetent to state an opinion." Id. at 426. Nonetheless, the Court also commented:

We agree, however, that plaintiff's inability to obtain some other expert witness cannot be a reason for accepting the opinion testimony of a proffered medical expert not otherwise qualified. The defendant's legal duty must be measured by some medical standard of care and treatment, and what that standard is and whether defendant negligently departed from it to the plaintiff's injury can competently be testified to only by one qualified to know of it. [Id. at 428(emphasis added).]

The low threshold that emerged from the case law even included recognizing expert witness status as to persons who did not hold a license in the field in question. See, e.g., Sanzari v. Rosenfeld, 34 N.J. 128, 137-38 (1961) (physician anesthesiologist testifying as to dental standards of care); Rosenberg by Rosenberg v. Cahill, 99 N.J. 318, 327-28 (1985) (medical doctor testifying as to standard of care for chiropractor).

With the Affidavit of Merit Statute enacted in 1995, the Legislature took action with regard to the matter of qualifications of experts in professional liability actions. As originally enacted, it only addressed early screening by requiring that the affidavit be submitted by "an appropriate licensed person" who has "particular expertise in the general area or specialty involved." N.J.S.A. 2A:53A-27. The purpose of the 2004 amendments to the Affidavit of Merit Statute concerning medical liability actions found in N.J.S.A. 2A:53A-41 was to tighten up the requirements for expert witness testimony in medical malpractice cases. Even if there may have been earlier cases that suggested a looser standard in areas of overlapping practice between different specialties, those cases would be deemed superseded by the new statute. The new 2004 statutory provisions required that experts practice the "same specialty" and be Board-certified in the same specialty as the defendant.

The Legislature is presumed to have been aware of the existing law at the time the present N.J.S.A. 2A:53A-41 was enacted in 2004. Estate of Nicolas v. Ocean Plaza Condo. Ass'n, Inc., 388 N.J. Super. 571, 584 (App. Div. 2006). In light of this presumption, the inference arises that the Legislature intended to change the prior law and impose stricter requirements as to who may testify against medical specialists

and in particular a Board-certified medical malpractice defendant. This conclusion is also buttressed by the legislative history concerning the 2004 amendments which describes them as part of "a comprehensive set of reforms affecting the State's tort liability system, health care system and medical malpractice liability insurance carriers." See N.J.S.A. 2A:53A-38(f) and accompanying Historical Note. Testimony before the Assembly Joint Committees specifically identified concerns about "hired gun" experts as among the problems that needed to be addressed. See, e.g., Pub. Hearing before Assembly Health and Humans Servs. Comm. and Assembly Banking and Insurance Committee at 110 (June 3, 2002); Ibid. at 143 (August 1, 2002). Thus, the Carbone weight and credibility approach cannot trump the legislative intent and action with the enactment of the explicit "same specialty" language.

Modern medicine has become complex and often involves the development of a focus on particular body systems or disease. Specialties have evolved in medicine so as to permit physicians to provide better quality care in an area of concentration.

While the "specialization" of a physician may at first have some vagueness, the statute provided an objective metric for this determination. It references the specific specialties recognized either by the American Board of Medical Specialties or the American Osteopathic Association. The statute itself

disposes of the concern presented by amicus New Jersey Association for Justice regarding a claim that a physician is a Board Certified Minimally Invasive Spine Specialist. [NJAJb3] This is not one of the recognized specialty areas.

The American Board of Medical Specialties (ABMS) is an umbrella organization comprised of 24 medical specialty member boards.⁴ The American Osteopathic Association recognizes 18 comparable specialties with a certificate of special or added qualifications for subspecialties from these boards.⁵ The allopathic boards of the ABMS can also certify appropriately trained osteopathic physicians. As allopathic M.D.s, both Dr. Mynster and Dr. Sehgal were certified by the ABMS boards. Both Emergency Medicine and Family Practice are separately recognized as specialties by ABMS.

The mission of the ABMS is to assist the member boards in the development and implementation of proper educational

⁴ The American Board of Medical Specialties (ABMS) is comprised of twenty-four boards for different specialties. The complete census includes: American Board of Allergy and Immunology, American Board of Anesthesiology, American Board of Colon and Rectal Surgery, American Board of Dermatology, American Board of Emergency Medicine, American Board of Family Medicine, American Board of Internal Medicine, American Board of Medical Genetics, American Board of Neurological Surgery, American Board of Nuclear Medicine, American Board of Obstetrics and Gynecology, American Board of Ophthalmology, American Board of Orthopaedic Surgery, American Board of Otolaryngology, American Board of Pathology, American Board of Pediatrics, American Board of Physical Medicine and Rehabilitation, American Board of Plastic Surgery, American Board of Preventive Medicine, American Board of Psychiatry and Neurology, American Board of Radiology, American Board of Surgery, American Board of Thoracic Surgery, and American Board of Urology. See [http://www.abms.org/About ABMS/member boards.aspx](http://www.abms.org/About%20ABMS/member%20boards.aspx)

⁵ See [http://www.osteopathic.org/index.cfm?PageID=ado cert.](http://www.osteopathic.org/index.cfm?PageID=ado%20cert)

programs for the varying recognized board certified specialties. The Council of Medical Education of the American Medical Association designates the specialty areas that are appropriate for board certification.

The intent of the certification of physicians is to provide assurance to the public that a physician specialist certified by a Member Board of the ABMS has successfully completed an approved educational program and evaluation process with an examination designed to assess the knowledge, skills, and experience required to provide quality patient care in that specialty. The educational requirements of the member board specialties vary depending on the board certification sought. It is only after satisfactory completion of an approved residency that the physician can apply for the board certification examination.

This underscores another factor involved in the consideration of this matter: that medicine is dynamic and not static. As a result, the knowledge base and skill set are evolving and subject to change. In recognition of that reality, in 2002 New Jersey enacted a requirement for continuing medical education as a condition for biennial registration renewal of a physician's license. N.J.S.A. 45:9-7.1. For registration cycles beginning in 2005 and thereafter, physicians must complete 100 credits of continuing medical education. N.J.A.C. 13:35-6.15.

Since 2006 ABMS has also required ongoing continuing education and measurement of current competency to maintain specialty certification status.

Under the statute if a medical malpractice defendant is a specialist (or subspecialist) or Board-certified in a specialty (or sub-specialty) and the care and treatment at issue involves their specialty area, then the two requirements of N.J.S.A. 2A:53A-41(a) are triggered. The first of these requirements is where the defendant is a specialist then the opposing expert "shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty." Ibid.

If the defendant was a Board-certified specialist, the second of the statutory requirements, that the opposing expert be either credentialed by a hospital to treat patients for the medical condition or to perform the procedure that is the basis for the claim or be Board-certified in the same specialty or sub-specialty as the defendant, and have devoted a majority of their practice the year immediately preceding the date of the occurrence to either the active clinical practice or instruction of students in the same specialty or subspecialty, is also triggered. N.J.S.A. 2A:53A-41(a).

Significantly, the Affidavit of Merit Statute provides that a plaintiff may move pursuant to N.J.S.A. 2A:53A-41(c) for

waiver with regard to the "same specialty" or Board-certification symmetry requirements. Such a waiver, however, is only available

after the moving party has demonstrated to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty, [and] the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine. [Ibid.]

A waiver may therefore be granted upon application and demonstration by the moving party that: (1) "a good faith effort" to identify a suitable expert has been made; (2) there is an inability to identify such an expert; and (3) that the proposed substitute expert, although not possessing the same qualifications of the defendant, "possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine." In Ryan v. Renny, this Court recognized that with this waiver provision, the Legislature had "created a safety valve for those cases by providing the judge with broad discretion to accept an expert with 'sufficient training, experience and knowledge to provide the testimony[,] but only if plaintiff made a good faith effort to satisfy the statute.'" 203 N.J. at 56. In this matter, plaintiff has made no claim of entitlement to a waiver.

The statute should be enforced as it has been written, and as the Legislature intended, as it is well-settled that "[w]hen the words in a statute are clear, and their literal application is compatible with the overall legislative design, the interpretive process is satisfied by enforcement of the plain meaning of the words." Foster v. Newark Hous. Auth., 389 N.J. Super. 60, 68 (App. Div. 2006). See also Miah v. Ahmed, 179 N.J. 511, 520 (2004) ("When the meaning of statutory language is clear and unambiguous, our duty is to enforce the statute as written"); O'Connell v. State, 171 N.J. 484, 488 (2002) ("A court may neither re-write a plainly written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of plain language.").

In addition to the plain meaning found in the text of the statute, as noted in Carbone, supra: "We agree, however, that plaintiff's inability to obtain some other expert witness cannot be a reason for accepting the opinion testimony of a proffered medical expert not otherwise qualified." 11 N.J. at 428.

Waivers of the same-specialty and same-Board certification requirements should not be easily granted. To do so would return to the era of Carbone and allow the witness' qualifications and experience to be a matter that goes to the "weight" given by the jury to the testimony. This appears to be an unwise choice and one that is contrary to the statutory language and legislative

intent as well as the growing consensus as to the gate-keeping responsibility of the court regarding expert testimony. It encourages the type of shopping for witnesses described as "hired guns" or other more pejorative terms.⁶ For a substitution of experts to be satisfactory, the waiver provision also requires "active involvement" on the part of the proposed substitute expert.

If the same-specialty and same Board-certification requirements of N.J.S.A. 2A:53A-41(b) mean anything, then they must bar Dr. Weaver from testifying as an expert against Dr. Mynster or Dr. Sehgal in this case. This conclusion is consistent with the plain language of the statute which demands that a Plaintiff either comply with the same-specialty and same-Board certification requirements or avail himself of the waiver provision in a timely fashion and with an appropriate showing as to the inability to identify such a specialist to obtain a supporting report and testimony.

As a matter of public policy, the State of New Jersey has recognized that the mere filing of a medical malpractice lawsuit

⁶ The comments of Federal Circuit Judge Posner in Austin v. Am. Ass'n of Neurological Surgs., 253 F.3d 967, 973 (7th Cir. 2001), are germane:

There is a great deal of skepticism about expert evidence. It is well known that expert witnesses are often paid very handsome fees, and common sense suggests that a financial stake can influence an expert's testimony, especially when it is technical and esoteric and hence difficult to refute in terms intelligible to judges and jurors. More policing of expert witnessing is required, not less.

can result in loss of time, expense, and other adverse collateral consequences. Thus, in order "to curtail the filing of frivolous malpractice actions," the New Jersey Affidavit of Merit Statute, N.J.S.A. 2A:53A-27, was enacted in 1995. See Zamft v. Cornell, 309 N.J. Super. 586, 593 (App. Div. 1998).

The need for corrective action was further recognized with the comprehensive package of legislation enacted in 2004 to address the "dramatic escalation in medical malpractice liability insurance premiums, which is creating a crisis of affordability in the purchase of necessary liability coverage for our health care providers." N.J. State Bar Ass'n v. State, 387 N.J. Super. 24, 36 (App. Div.), certif. denied, 188 N.J. 491 (2006).

The litigation process itself can have these adverse consequences notwithstanding the eventual ultimate dismissal of the claim. Accordingly, as stated by this Court in In re Petition of Hall, 147 N.J. 379, 391 (1997): "[The purpose of the Affidavit of Merit Statute was] to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation." But the policy reasons behind the screening effect of the affidavit of merit continue to be present at the time of trial. Reliable and knowledgeable witnesses need to be involved in the trial. Since the liability issue invariably is whether there has been a

breach of the standard of care for the medical specialty of the defendant physician on trial, that information comes best from someone practicing in that same field. To speak of "similar medicine" is simply not the same as "same medicine."

POINT II

THE 2004 AMENDMENTS TO THE AFFIDAVIT OF MERIT STATUTE
PROVIDING ENHANCED REQUIREMENTS FOR THE
COMPETENCY OF PROPOSED EXPERT WITNESSES
IS A SUBSTANTIVE PROOF ELEMENT THAT
DOES NOT RENDER THE AFFIDAVIT OF MERIT STATUTE
CONSTITUTIONALLY INFIRM AS VIOLATING
THIS COURT'S EXCLUSIVE AUTHORITY
OVER PRACTICE AND PROCEDURE.

An issue that had not been raised by the parties or considered by the courts below is not properly presented as part of an amicus submission. See Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Assn., 91 N.J. 38, 48-49 (1982). Neither the litigants nor the trial judge addressed any constitutional issue involving N.J.S.A. 2A:53A-41. Notwithstanding that proposition, "a direct challenge" to the 2004 amendments to the Affidavit of Merit Statute in the Patients First Act is advanced by amicus New Jersey Association of Justice. It asserts that the statute represents an unconstitutional encroachment on this Court's constitutional prerogatives concerning practice and procedure. Referring to the comments in a concurring opinion in Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 159-69

(2003) that the constitutionality of the statute "remains unresolved," it advances this challenge despite the limitation on the scope of an amicus submission. The following observations are provided for such assistance as they may provide the Court.

The constitutional concerns identified by Chief Justice (then Justice) Zazzali arose from the prior Affidavit of Merit Statute's requirement that the affidavit be filed and served within a specific and strict time and not the substantive provisions of the amended Affidavit of Merit Statute. Id. at 164. He accepted the Legislature's authority to "define a cause of action" and to "declare that an affidavit of merit to be an element of a professional malpractice cause of action." Id. at 159-60, 163-64.

The "same specialty" requirement does not have a "procedural" quality but rather is a substantive requirement as to the type of evidence that must be produced to sustain the cause of action. In Liberty Mut. Ins. Co. v. Land, 186 N.J. 163 (2006), Justice Zazzali had approved of the Legislature's identifying differing elements for a cause of action under the Insurance Fraud Prevention Act from those required to show common law fraud and also in providing for a burden of proof at the level of a preponderance of the evidence rather than by clear and convincing evidence used with common law fraud claims.

Because the Legislature had not explicitly provided for a burden of proof regarding IFPA actions, in his dissent Justice Albin referred to the judicial power to fashion and allocate burdens of proof derived from the Court's constitutional power practice and procedure. But he commented: "That is not to say that the Legislature cannot create a civil action and assign a burden of proof to the prosecution of the matter." Id. at 183. See also Crespo v. Crespo, 408 N.J. Super. 25, 32-34 (App. Div. 2009), aff'd o.b., 201 N.J. 207(2010) (upholding evidential provisions of Prevention of Domestic Violence Act against separation of powers challenge).

The Appellate Division has upheld the constitutionality of the section of the amended Affidavit of Merit Statute dealing with great specificity with the issue of expert witnesses and expert testimony against the assertion that it violated separation of powers because of conflict with the Rules of Evidence. New Jersey State Bar Ass'n v. State, supra, 387 N.J. Super. at 50. This panel of the Appellate Division noted "in particular" the waiver provision at issue in this matter as an escape valve under which a litigant might obtain judicial relief and utilize an expert who did not fit precisely within the parameters set down by the statute. The same conclusion that the statute does not intrude upon the judiciary's power to determine what evidence is admissible was reached by another

panel of the Appellate Division in an unreported opinion of Gardner v. Farkas, 2008 WL 5204667, 2008 N.J. Super. Unpub. LEXIS 1926 (Dec. 15, 2008).⁷ See also Chamberlain v. Giampapa, 21 F.3d 154 (3d Cir. 2000) (holding New Jersey Affidavit of Merit Statute to be "substantive" and not just a sufficiency of pleadings issue for diversity jurisdiction application.) There is no contrary decision from the Appellate Division.

Pursuant to Article VI, Section 2, Paragraph 3 of the New Jersey Constitution of 1947, the Supreme Court of course has exclusive and plenary authority over procedural rules governing the courts. Winberry v. Salisbury, 5 N.J. 240, 245-46, cert. denied, 340 U.S. 877 (1950).

Justice Zazzali had cited one decision from another jurisdiction - Ohio - which had held that there was a separation of powers violation with that state's affidavit of merit requirement since the Ohio court rules did not require attorneys to file verified pleadings. See Hiatt v. S. Health Facilities, 626 N.E.2d 71 (Ohio 1994). The Ohio Supreme Court subsequently adopted a court rule that requires the filing of an affidavit of merit in medical liability matters. See Banfield v. Brodell, 862 N.E.2d 129, (Ohio Ct. App. 2006), appeal not allowed, 862 N.E.2d 117 (Ohio 2007).

⁷ In compliance with R. 1:36-3, a copy of the opinion is in the Appendix to this Brief.

The contention that a statute requiring that the expert testimony in a medical practice action brought against a specialist must be from an equivalent specialist violates the separation of powers and constitutional authority of a court to promulgate rules regarding practice and procedure has been addressed by the highest courts in other states with comparable constitutional provisions vesting exclusive authority in the court. No violation has been found. See McDougall v. Schanz, 597 N.W.2d 148 (Mich. 1999); Seisinger v. Siebel, 203 P.3d 483 (Ariz. 2009). But see Mayhorn v. Logan Med. Found., 454 S.E.2d 87 (W.Va. 1994) (standard of care testimony only from expert "engaged or qualified in the same or substantially similar medical field as the defendant health provider" found to violate separation of powers because of the court's rules of evidence).

The Arizona Supreme Court in Seisinger v. Siebel had compared the assessment of a witness' qualifications under Rule 702 and the statute. It observed:

To be sure, a trial judge could conclude under Rule 702 that a particular physician who has not recently practiced or taught is not qualified to testify about the current standard of care. But, particularly when the standard of care has not materially changed during the period after a physician left active practice or teaching, a trial judge might also well conclude that the witness remains qualified through "knowledge, skill, experience, training, or education" to assist the jury through expert testimony. As to such a witness, the statute automatically produces a different result than the Rule might produce. Indeed, such was the obvious intent of the statute: It is

designed to limit which physicians are qualified to express expert opinions. [203 P.3d at 488 (emphasis added).]

As Justice Long had observed in Ryan v. Renny, supra, there is nothing in the line of New Jersey decisions considering expert qualifications under the rules of evidence that suggests that they are "sufficient to permit the testimony when the Legislature expresses a contrary view. [And] the Affidavit of Merit statute is such an expression." 203 N.J. at 50. As noted by this Court recently in State v. Byrd, 198 N.J. 319, 343-44 (2009), the delegates to the 1947 Constitutional Convention were either unable or unwilling to classify rules of evidence as either procedural rules or substantive law. Indeed, it observed that there was considerable support for the position that evidence rules contain elements of both. See Busik v. Levine, 63 N.J. 351, 367 appeal dismissed, 414 U.S. 1106 (1973) (noting that evidence rules contain elements of both "'procedural'" and "'substantive'" law).

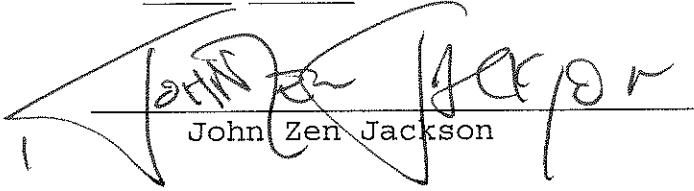
With the 2004 amendments to the Affidavit of Merit Statute, the Legislature has expressed a view as to the admissibility and competency of testimony from physicians not satisfying the same-specialty provisions of the statute. This was constitutionally proper.

CONCLUSION

For the foregoing reasons it is submitted that this Court should reverse the order of the Law Division and direct the entry of judgment dismissing the Complaint.

Respectfully,

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American Medical Association
As Amici Curiae

Dated: 12/2/11 
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A P P E N D I X

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C

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Jeffrey S. GARDNER and Carol J. Gardner, Plain-
tiffs-Appellants,
v.
Klara FARKAS, M.D. and St. Barnabas Health Care
System, Defendants,
and
Richard C. Hartwell, M.D., John Sarris, M.D. and
Coastal Neurosurgery, P.A., Defen-
dants-Respondents.

Argued Nov. 19, 2008.
Decided Dec. 15, 2008.

Background: Patient brought medical malpractice action against neurosurgeons. The Superior Court, Law Division, Ocean County, Docket No. L-1423-05, granted defendants' motion to dismiss for failure to comply with affidavit of merit statute. Subsequently, patient's motion to reconsider was denied. Patient appealed.

Holdings: The Superior Court, Appellate Division, held that:

- (1) affidavit of merit statute was not unconstitutionally vague, and
(2) affidavit of merit statute did not violate the separation of powers doctrine.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ↪ 1133

92 Constitutional Law
92VIII Vagueness in General
92k1132 Particular Issues and Applications
92k1133 k. In General. Most Cited Cases

Health 198H ↪ 604

198H Health
198HV Malpractice, Negligence, or Breach of
Duty
198HV(A) In General
198Hk601 Constitutional and Statutory
Provisions
198Hk604 k. Validity. Most Cited Cases

Affidavit of merit statute, requiring patient in medical malpractice action to demonstrate within 120 days of the filing of defendants' answer a "reasonable probability" that the care or treatment rendered fell outside accepted professional standards, was not void for vagueness. N.J.S.A. 2A:53A-27.

[2] Constitutional Law 92 ↪ 2362

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2362 k. Evidence. Most Cited Cases

Health 198H ↪ 604

198H Health
198HV Malpractice, Negligence, or Breach of
Duty
198HV(A) In General
198Hk601 Constitutional and Statutory
Provisions
198Hk604 k. Validity. Most Cited Cases

Affidavit of merit statute, requiring patient in medical malpractice action to demonstrate within 120 days of the filing of defendants' answer a "reasonable probability" that the care or treatment rendered fell outside accepted professional standards, did not impermissibly invade the decision-making responsibility entrusted to trial court to determine admissibility of evidence nor otherwise violate the separation of powers doctrine. U.S.C.A. Const. Art. 3, § 1 et seq; N.J.S.A. 2A:53A-27.

Not Reported in A.2d, 2008 WL 5204667 (N.J.Super.A.D.)
(Cite as: 2008 WL 5204667 (N.J.Super.A.D.))

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1423-05. Gregg D. Trautmann argued the cause for appellants (Trautmann & Associates, L.L.C., attorneys; Mr. Trautmann, on the brief).

Jeremy P. Cooley argued the cause for respondents (Lenox, Socey, Formidoni, Brown, Giordano & Casey, L.L.C., attorneys; Mr. Cooley and Patrick F. Carrigg, on the brief).

Before Judges CUFF, FISHER and BAXTER.

PER CURIAM.

*1 In this medical malpractice action, plaintiffs Jeffrey S. Gardner and Carol J. Gardner appeal from the September 9, 2005 order that granted the dismissal motion of defendants Richard C. Hartwell, M.D. and John Sarris, M.D. ^{FNI} The judge held that because both defendants were neurosurgeons, the affidavit of merit plaintiff supplied from an anesthesiologist was inadequate as a matter of law because it failed to satisfy the applicable statute that requires a plaintiff to supply an affidavit of merit from a physician with a practice in the same specialty as that of the defendant. A year later, plaintiff unsuccessfully moved for reconsideration. Plaintiff appeals both orders, arguing the affidavit of merit statute is unconstitutionally vague and unconstitutionally violates the separation of powers doctrine. We reject these claims and affirm both orders.

FNI. All further references to plaintiff shall signify Jeffrey Gardner. Carol Gardner sued per quod.

I.

Plaintiff underwent a laminectomy, a neurosurgical procedure that was performed by defendants Hartwell and Sarris, who are neurosurgeons. Defendant Farkas was the anesthesiologist. On February 15, 2005, plaintiff filed suit against the three physicians and against the hospital where the surgery was performed, alleging that the blocks used by defendant neurosurgeons to position plaintiff on the operating table during the ten-hour surgery caused permanent disfigurement to plaintiff's legs and chest and numbness of his upper right thigh. Plaintiff made no allegations about the actual operative techniques used by Hartwell and Sarris during the surgery, but confined

his claim to the injuries resulting from improper positioning of the blocks during the surgery.

On July 12, 2005, plaintiff served an affidavit of merit executed by Mitchell B. Sosis, M.D. Sosis's affidavit did not specify his field of practice or expertise. Instead, his affidavit merely stated that he "ha[s] particular expertise in the general area or specialty involved in the action" because he devotes his practice "substantially to the general area or specialty involved in the action." Based upon his review of plaintiff's surgical records, Sosis opined that the care, skill or knowledge exercised by defendants Farkas, Hartwell and Sarris fell outside acceptable professional standards.

After learning that Sosis is an anesthesiologist who has never practiced in the field of neurosurgery, has never completed an internship or residency in that field and is not credentialed by any hospital to perform the procedure at issue, defendants notified plaintiff of their intent to challenge the affidavit of merit provided by Sosis. When the 120-day statutory time period in which to serve an affidavit of merit expired on August 5, 2005, plaintiff had not filed any additional affidavits of merit. Consequently, defendants moved for dismissal alleging a violation of the affidavit of merit statute.

After oral argument, Judge Ford found that because Sosis "is not a neurosurgeon, does not have experience in neurosurgery, does not treat patients in that regard" and has a "function entirely different than one who is doing a neurological procedure," the affidavit of merit provided by Sosis did not satisfy the requirements of *N.J.S.A. 2A:53A-41a*, as applied to defendant neurosurgeons.

*2 The September 9, 2005 order determining that the affidavit of merit was not filed by an "appropriate licensed person" resulted in dismissal of plaintiff's complaint in relation to defendants Hartwell, Sarris and Coastal Neurosurgery, P.A. in accordance with *N.J.S.A. 2A:43A-29*, which provides that failure to provide an affidavit of merit "shall be deemed a failure to state a cause of action."

In September 2006, a year after Judge Ford denied his earlier motion, plaintiff moved for reconsideration, arguing that Judge Ford "misunderstood [plaintiff's] argument in large measure" because "[i]t's

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not a question of the surgery [Hartwell and Sarris] performed, [but instead] how he was positioned on the table.” After considering the arguments from both sides, Judge Foster denied plaintiff’s motion for reconsideration, concluding that plaintiff had presented nothing new. Thereafter, plaintiff proceeded to trial against the remaining defendants, Farkas and St. Barnabas, resulting in a defense verdict.

On appeal, plaintiff does not challenge the substance of Judge Ford’s determination that Sosis was not an “appropriate licensed person” within the meaning of *N.J.S.A. 2A:53A-41a*. Nor does plaintiff argue that because defendant neurosurgeons, in positioning plaintiff for surgery, had engaged in a role traditionally performed by anesthesiologists, his submission of the affidavit of an anesthesiologist was sufficient on the question of whether defendant neurosurgeons deviated from accepted practice in the manner in which they positioned plaintiff.

Instead, plaintiff argues on appeal: (1) the affidavit of merit statute is unconstitutionally vague, both facially and as applied; and (2) the statute is unconstitutional because it violates the separation of powers doctrine contained in *N.J. Const.* art. IV § 2, ¶ 3. Neither Judge Ford, nor Judge Foster on the motion for reconsideration, addressed plaintiff’s constitutional claims, most likely because plaintiff never briefed them.

II.

[1] *N.J.S.A. 2A:53A-26* to -41, commonly known as the affidavit of merit statute, requires a person suing certain licensed professionals, including physicians, to demonstrate within 120 days of the filing of an answer, a “reasonable probability” that the care or treatment rendered fell outside accepted professional standards. *N.J.S.A. 2A:53A-27*. Such showing must be in the form of an affidavit of merit. *Ibid.* The physician who provides the affidavit of merit must be credentialed by a hospital to treat patients for the medical condition that is the basis for the plaintiff’s claim. Alternatively, the physician may also hold a board certification in the same specialty or subspecialty as the defendant physicians and actively devote his medical practice to the same specialty as the defendant(s) or teach that specialty at an accredited medical school, or both. *N.J.S.A. 2A:53A-41a*.

We turn first to plaintiff’s claim that the affidavit

of merit statute is unconstitutionally vague. In *Alan J. Cornblatt, P.A. v. Barow*, 153 *N.J.* 218, 247, 708 A.2d 401 (1998), the Court rejected that very claim when it held that “it is evident ... due process considerations of vagueness do not threaten the statute’s validity.” Plaintiff presents no meritorious basis upon which to depart from the Court’s ruling in *Cornblatt*, nor are we, as an intermediate appellate court, authorized to do so. Consequently, we reject his claim that the statute is unconstitutionally vague.

*3 [2] Defendant next argues that the affidavit of merit statute runs afoul of the separation of powers provisions of the New Jersey Constitution. He maintains—without elaboration—that by enacting the statute, the Legislature impermissibly invaded the decision-making responsibility entrusted to judges.

In *N.J. State Bar Ass’n v. State*, 387 *N.J.Super.* 24, 902 A.2d 944 (App.Div.), *certif. denied*, 188 *N.J.* 491, 909 A.2d 726 (2006), we rejected that very claim. We held that the affidavit of merit statute was “not invalid” and did not intrude upon the judiciary’s power to determine what evidence is admissible. *Id.* at 39, 50, 902 A.2d 944. We pointed to “the escape clause [of *N.J.S.A. 2A:53A-41c*] under which a litigant may obtain judicial relief and utilize an expert who does not fit precisely within the parameters set down by the statute.” *Id.* at 50, 902 A.2d 944. In doing so, we rejected the plaintiff’s claim that by limiting the physicians deemed to possess expertise sufficient to execute the affidavit of merit, the statute impermissibly conflicted with the judiciary’s right, set forth in *N.J.R.E. 702*, to determine the qualifications of experts. *Ibid.* In light of our decision in *N.J. State Bar Ass’n*, we conclude that plaintiff’s separation of powers argument is also devoid of merit.

Affirmed.

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