# STATE OF NEW YORK

7728

# IN SENATE

February 13, 2018

Introduced by Sen. HANNON -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to requiring an affidavit of merit and expert discovery in medical, dental and podiatric malpractice actions

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. Section 3012-a of the civil practice law and rules, as amended by chapter 507 of the laws of 1987, is amended to read as follows:

§ 3012-a. [~~Certificate~~] **Affidavit** of merit in medical, dental and podiatric malpractice actions. (a) In any action for medical, dental or podiatric malpractice, the complaint shall be accompanied by [~~a certificate, executed by the attorney for the plaintiff, declaring~~] **an affidavit of merit executed by a healthcare professional who the plaintiff's attorney or, the plaintiff if not represented by an attorney, reasonably believes is knowledgeable in the relevant issues involved in the particular action to be an expert physician in a medical malpractice action, an expert dentist in a dental malpractice action or an expert podiatrist in a podiatric malpractice action, stating** that[~~:~~

~~(1) the attorney has reviewed the facts of the case and has consulted with at least one physician in medical malpractice actions, at least one dentist in dental malpractice actions or at least one podiatrist in podiatric malpractice actions who is licensed to practice in this state or any other state and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action; or~~

~~(2) the attorney was unable to obtain the consultation required by paragraph one of this subdivision because a limitation of time, established by article two of this chapter, would bar the action and that the certificate required by paragraph one of this subdivision could not reasonably be obtained before such time expired. If a certificate is~~

EXPLANATION--Matter in **italics** (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD14556-02-8

~~executed pursuant to this subdivision, the certificate required by this section shall be filed within ninety days after service of the complaint; or~~

~~(3) the attorney was unable to obtain the consultation required by paragraph one of this subdivision because the attorney had made three separate good faith attempts with three separate physicians, dentists or podiatrists, in accordance with the provisions of paragraph one of this subdivision to obtain such consultation and none of those contacted would agree to such a consultation~~] the physician in a medical malpractice action, or the dentist in a dental malpractice action, or the podiatrist in a podiatric malpractice action has reviewed the complaint in the malpractice action and all medical records supplied by the plaintiff's attorney, or plaintiff if not represented by an attorney, and states each of the following with individual particularization to the specifically named defendant or defendants:

(1) The applicable standard of practice or care concerning the allegations contained in the complaint.

(2) The applicable standard of practice or care breached.

(3) The actions that should have been taken or omitted in order to have complied with the applicable standard of care.

(4) The manner in which the breach of the standard of practice or care was the proximate cause of the plaintiff's injury.

(b) [~~Where a certificate is required pursuant to this section, a single certificate shall be filed for each action, even if more than one defendant has been named in the complaint or is subsequently named~~] Where an affidavit of merit is required pursuant to this section, an individual affidavit shall be filed for each named defendant who is a physician, dentist or podiatrist named in the complaint.

(c) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur", this section shall be inapplicable. In such cases, the complaint shall be accompanied by [~~a certificate~~] an affidavit, executed by the attorney, declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing [~~a certificate~~] the affidavit of merit required by this section.

(d) [~~If a request by the plaintiff for the records of the plaintiff's medical or dental treatment by the defendants has been made and such records have not been produced, the plaintiff shall not be required to serve the certificate required by this section until ninety days after such records have been produced~~] The plaintiff may, in lieu of serving the affidavit of merit required by this section, provide the defendant or defendants with the information required by paragraph one of subdivision (d) of section thirty-one hundred one of this chapter within the period of time prescribed by this section, provided that the disclosure be executed by the physician in a medical malpractice action, or the dentist in a dental malpractice action, or the podiatrist in a podiatric malpractice action who has reviewed the complaint in the malpractice action and all medical records supplied by the plaintiff's attorney.

(e) [~~For purposes of this section, and subject to the provisions of section thirty-one hundred one of this chapter, an attorney who submits a certificate as required by paragraph one or two of subdivision (a) of this section and the physician, dentist or podiatrist with whom the attorney consulted shall not be required to disclose the identity of the physician, dentist or podiatrist consulted and the contents of such consultation; provided, however, that when the attorney makes a claim under paragraph three of subdivision (a) of this section that he was unable to obtain the required consultation with the physician, dentist~~

~~or podiatrist, the court may, upon the request of a defendant made prior to compliance by the plaintiff with the provisions of section thirty-one hundred of this chapter, require the attorney to divulge to the court the names of physicians, dentists or podiatrists refusing such consultation~~] The plaintiff's attorney or, the plaintiff if not represented by an attorney, may with good cause shown, file a motion to extend the period of time to file the required affidavit of merit. The motion shall be filed together with the complaint. The court may grant reasonable time to file the affidavit of merit, not to exceed ninety days, except the time may be extended beyond ninety days if the court determines that a defendant or non-party has failed to cooperate with access to medical or dental records necessary for the affidavit of merit or that other circumstances warrant extension of time.

(f) [~~The provisions of this section shall not be applicable to a plaintiff who is not represented by an attorney.~~

~~(g) The plaintiff may, in lieu of serving the certificate required by this section, provide the defendant or defendants with the information required by paragraph one of subdivision (d) of section thirty-one hundred one of this chapter within the period of time prescribed by this section~~] Any complaint alleging medical, dental, or podiatric malpractice that is not accompanied by an affidavit of merit as required by this section shall be deemed defective as a matter of law and, upon motion by the defendant, be dismissed on the merits by the court. Such dismissal shall be with prejudice.

§ 2. Subdivision (a) of section 3101 of the civil practice law and rules is amended by adding a new paragraph 5 to read as follows:

(5) notwithstanding any provision of subparagraph (i) of paragraph one of subdivision (d) of this section to the contrary, in an action for medical, dental or podiatric malpractice, each party shall serve the disclosure described in such subparagraph within sixty days preceding the filing required by rule thirty-four hundred two of this chapter. Further, at any time after joinder of issue, any party may, by written notice made to and served upon all other parties and filed with the court; conduct an examination upon oral deposition, of any person who has been disclosed as an expert witness by any other party. Each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this chapter and, unless otherwise ordered by the court, all expert witness depositions shall be taken before the filing required by rule thirty-four hundred two of this chapter. If any party, having received such notice, fails to make that party's expert witness available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action. For purposes of rule thirty-one hundred ten and rule thirty-one hundred seventeen, an expert witness, as provided in this section, shall be considered a party. Each party seeking the deposition of an expert witness shall pay the expert a reasonable fee for the time spent at the deposition.

§ 3. Paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules, as amended by chapter 184 of the laws of 1988, subparagraph (ii) as amended by chapter 165 of the laws of 1991, is amended to read as follows:

1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which

each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. [~~In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.~~

~~(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule three-one hundred seven of this chapter. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.~~

~~(iii)~~] **(ii)** Further disclosure concerning the expected testimony of any expert**, except as expressly provided in paragraph five of subdivision (a) of this section,** may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

§ 4. This act shall take effect on the ninetieth day after it shall have become a law, except that section one of this act shall take effect on the one hundred eightieth day after this act shall have become a law.