



## Ryan v. Renny, 999 A.2d 427 (N.J. 2010)

Topics Covered: Affidavit of Merit, Certificate of Merit, Expert Witnesses and Professional Liability

**Outcome: Very Unfavorable**

### Issue

The issue in this case was whether the New Jersey medical malpractice expert testimony/affidavit of merit law should be narrowly construed to allow standard of care testimony only by a physician who is board certified or experienced in the specialty of the physician being sued except in extraordinary circumstances or whether the board certification/experience requirement can be waived without a full explanation.

### AMA Interest

The AMA believes that expert witnesses in medical liability cases should have comparable education, training, and experience or board certification in the same field as a defendant physician.

### Case Summary

Andrew Renny, MD, a board certified gastroenterologist, performed a colonoscopy on Abby Ryan. Allegedly, this was done negligently, and he perforated her bowel. She and her husband sued Dr. Renny for medical malpractice.

In New Jersey, a plaintiff in a medical malpractice suit must, within 60 days of the filing of the answer to the complaint, submit an affidavit of merit, which is to attest that the care provided by the defendant fell outside acceptable professional standards. The person who signs the affidavit must demonstrate expertise in the medical procedure at issue, as evidenced by board certification or by a specialized area of practice. If good cause is shown, the court can extend the 60 day deadline by an additional 60 days. However, a court has discretion to waive these testimonial requirements, upon motion, if the moving party (a) demonstrates an inability to obtain an otherwise suitable expert after a good faith effort to find one and (b) secures another physician to sign the affidavit or provide the testimony, even though the substitute physician is not a specialist in the area of practice, so long as the substitute expert has "sufficient training, experience and knowledge" to testify.

In their suit against Dr. Renny, the Ryans submitted an affidavit signed by a general surgeon, who was not board certified in gastroenterology and had not performed a colonoscopy in several years. The general surgeon's affidavit asserted that he was knowledgeable in issues involving colonoscopies and perforated bowels.

Dr. Renny moved to dismiss the complaint, because the affidavit failed the specialization requirements of the New Jersey statutes. In response, the Ryans' attorney advised the court

that he had contacted three gastroenterologists, all of whom “declined to provide an opinion relating to the actions of the defendant Andrew Renny, M.D.” Following these efforts, the attorney secured the general surgeon’s affidavit. After hearing oral argument, the trial judge waived the specialty requirement and denied the motion to dismiss the complaint. Dr. Renny appealed the denial of the motion to dismiss to the Appellate Division of the New Jersey Superior Court.

The Appellate Division found that the affidavit of merit law had been passed to weed out unmeritorious medical malpractice lawsuits at an early stage of the proceedings. For that reason, the law required an affiant to possess the higher qualifications of a specialist or sub-specialist, rather than those of a generalist. That purpose could be defeated if a plaintiff could obtain a waiver merely by showing that specialists in the area were unwilling to sign an affidavit of merit, without an explanation for their unwillingness. Examples of possibly satisfactory explanations might be a conflict of interest, a practice of refusing to become involved in litigation as an expert witness, or a refusal to travel outside a limited geographic area. With such an explanation, the trial court might then consider whether the affidavit or testimony of the generalist would suffice.

Here, no explanation had been given for the gastroenterologists’ refusal to sign the Ryans’ affidavit of merit. Accordingly, the Appellate Division held that the trial judge should have granted the motion to dismiss. The Appellate Division reversed the order granting the waiver and directed that the complaint be dismissed.

The Ryans appealed to the New Jersey Supreme Court. The Supreme Court, in a split decision, reversed. It found that the Ryans’ attorney had made a good faith effort to find a gastroenterologist willing to testify, and that was sufficient to satisfy the first part of the waiver requirement, regardless of the reasons why the gastroenterologists refused to testify. Further, the general surgeon was sufficiently familiar with colonoscopies to satisfy the second part of the waiver requirement. The case was remanded to the trial court for further proceedings.

### **Litigation Center Involvement**

The Litigation Center and the Medical Society of New Jersey filed an *amicus* brief in the New Jersey Supreme Court to support Dr. Renny and urge a narrow interpretation of the statutory waiver provision.

Supreme Court of New Jersey brief