PRE-COMPLAINT DISCOVERY IN FEDERAL COURT, PENNSYLVANIA, AND NEW JERSEY

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INTRODUCTION

Presuit or pre-complaint discovery is both a tool, and often a necessity, in both state and federal court. Pre-complaint discovery for the purpose of perpetuation of testimony is generally permitted in both state and federal court. Pre-complaint discovery, however, may also be a tool for fleshing out facts and witnesses prior to filing a formal complaint. In Pennsylvania, the Rules of Civil Procedure specifically contemplate the need for pre-complaint discovery as sometimes essential to the plaintiff's ability to draft pleadings.[1] In New Jersey, a recent amendment to the rules governing Civil Procedure also contemplates the need for uncovering facts and witnesses prior to filing a formal complaint, in order to comply with the Affidavit of Merit statute. This amendment was in response to a 1997 New Jersey Supreme Court case in which the court recognized that, in exceptional circumstances, certain malpractice and negligence cases may warrant presuit discovery relief. The Federal Rules of Civil Procedure, on the other hand, do not plainly contemplate any presuit discovery beyond perpetuation of testimony. Nevertheless, some federal courts have expanded the scope of presuit discovery. This paper outlines the rules and cases that frame the use and feared abuse of rules permitting pre-complaint discovery.

FEDERAL RULE OF CIVIL PROCEDURE 27

Federal Rule of Civil Procedure 27, "Depositions Before Action or Pending Appeal," provides for the perpetuation of testimony prior to filing a formal complaint. The primary purpose for taking discovery pursuant to Rule 27 is simply to preserve evidence which otherwise is likely to be lost. No independent basis of federal jurisdiction is required prior to invoking Rule 27. What is required, however, is a showing that the anticipated action requiring perpetuation of testimony or other evidence will be within federal jurisdictional standards.

Rule 27 permits a party to seek an order from the court to take a deposition of "any expected adverse party." Prior to taking a Rule 27 deposition, a petitioner must make a verified application to the court, in the district of the residence of any expected adverse party, verifying the following:

1. The petitioner expects to bring a cause of action, but is presently unable to bring it;
2. The substance of the expected action and the petitioner's connection to it;
3. The facts the deposition is expected to establish and the reasons for wanting perpetuation;
4. The names and addresses of expected adverse parties; and
5. The names and addresses of those to be deposed, as well as the substance of the expected testimony.

Fed. R. Civ. P. 27(a)(1).

Personal service of notice of the hearing, together with a copy of the petition, must be made on any expected adverse party as provided in Fed. R. Civ. P. 4(d)[2] at least 20 days before the hearing. Fed. R. Civ. P. 27(a)(2). Granting of the petition is subject to court satisfaction that perpetuating the proposed testimony may prevent "a failure or delay in justice." Fed. R. Civ. P. 27(a)(3). The court would then issue an order directing the deposition to be taken, specifying the substantive parameters of the deposition. Id. Testimony perpetuated under these rules may be used subject to Fed. R. Civ. P. 32, relating to use of depositions in court proceedings. Fed. R. Civ. P. 27(a)(4).

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[1] When a defendant joins an additional defendant, the original defendant may also avail himself or herself of this type of discovery, when necessary.

[2] Due diligence is required in attempting service, but the court may order alternative service if necessary. The court must also appoint an attorney for absent parties or must cross-examine the deponent, if an adverse party is otherwise unrepresented. Fed. R. Civ. P. 27(a)(2).

The plain language and vast majority of case law applying Rule 27 apparently limits the use of Rule 27 to preservation of testimony. Most courts, therefore, have not permitted Rule 27 to be used merely to discover facts and witnesses in order to draft a complaint or evaluate the merits of the case. Notwithstanding the plain language of Rule 27, as well as the case law applying Rule 27, a few courts have nevertheless expanded the scope of Rule 27 discovery. See, e.g., In re Alfa Industries, Inc., 159 F.R.D. 456 (S.D.N.Y. 1995) (focusing on Rule 27 language "prevent a failure or delay of justice," the court permitted presuit factual discovery because petitioner showed that, absent such information, suit would be delayed, although no evidence or testimony would be lost); Lubrin v. Hess Oil Virgin Islands Corp., 109 F.R.D. 403 (D. Virgin Islands 1986) (site inspection and deposition permitted because court believed the Federal Rules of Civil Procedure do not preclude separate equitable actions for the purpose of discovery")[3]; Reints v. Sheppard, 90 F.R.D. 346 (M.D. Pa. 1981) (although denying plaintiff's Rule 27 petition requesting pre-complaint discovery in order to file a more detailed complaint, the court specifically stated it "would be willing to grant such a request in a situation where plaintiff truly did not have knowledge of sufficient facts to plead his case"). See also Eric H. Vance, "Pre-Complaint Discovery in Pennsylvania--Uses and Abuses," Pennsylvania Bar Association Quarterly, October, 1999, at 133-43.

Select Federal Cases Applying Rule 27

Kelly v. Whitney, 1998 WL 877625 (D. Or. 1998)

[3] This case is not really about a Rule 27(a) petition to perpetuate testimony. The court determined this was a separate equitable action filed for the purpose of discovery. Under Fed. R. Civ. P. 34(c), as it was at the time of this decision, independent actions against persons not parties for production of documents and things and permission to enter upon land was not precluded. The court stated, "[s]ince [the plaintiff] has filed a separate action in equity seeking discovery, we will allow him to enter [the defendant's] premises to inspect the site of his accident." Lubrin at 405. Because a separate equitable action in discovery was already filed, the court then permitted a 30(b)(6) deposition. Id.

Anticipating suit against employees or officers of the Internal Revenue Service, the plaintiff filed a Rule 27 petition seeking perpetuation of testimony of the potential defendants. The court denied the plaintiff's petition, because the plaintiff not only did not demonstrate an inability to file suit presently, but also "failed to prove, or even allege, any risk that the testimony he seeks to perpetuate will be lost if it is not immediately preserved." Kelly at *2. Rule 27 applies only in special situations where it is necessary to prevent testimony from being lost. Id.

In re Storck, 179 F.R.D. 57 (D. Mass. 1998)

Anticipating a potential medical malpractice action, the plaintiff sought discovery of certain documents pursuant to Rule 27. The plaintiff acknowledged that she was not seeking perpetuation of deposition testimony, but merely the production of documents. Although not explicitly ruling on the appropriateness of a document request under Rule 27, the court concluded that the plaintiff did not seek preservation of evidence that would be unavailable otherwise. Storck at 58. "[Rule 27] is not designed to allow pre-complaint discovery. . . . A Rule 27(a) deposition may not be used as a substitute for discovery." Id. (citations omitted). Because the plaintiff made it clear that she was seeking document discovery solely to fill out information needed to bring suit, the court denied her petition as plainly inadequate on its face. Id. at 59.

In re Petition of Ford, 170 F.R.D. 504 (M.D. Ala. 1997)

The significance of this case lies in the court's rejection of the plaintiff's contention that Fed. R. Civ. P. 11 and Fed. R. Civ. P. 27 should be read and considered together. The plaintiff argued that Rule 11 "stresses the need for some prefiling inquiry into both the facts and the law." Ford at 507 (citing advisory committee notes to the 1983 amendments to Rule 11). Moreover, Rule 11 authorizes sanctions for noncompliance. Id. The court, however, determined "that Rule 27 is not a vehicle for compliance with Rule 11." Id. at 508. Although the court acknowledged precedent for ruling otherwise, the court did not agree that such precedent was an accurate statement of the law. Citing the plain language of the rules themselves, the court concluded "Rule 27 is not a device for uncovering and/or discovering evidence, and Rule 11 simply does not address the issue of perpetuation of testimony." Id. at 509. The plaintiff's petition was, therefore, denied.

In the Matter of Sitter, 167 F.R.D. 80 (D. Minn. 1996)

Anticipating a medical malpractice action, the plaintiff sought pre-complaint discovery under Rule 27 in order to comply with a Minnesota Affidavit of Merit statute. The plaintiff contended that Minnesota's statutory mandate effectively precluded her from filing suit, because the relevant medical records were insufficient for any expert to responsibly conclude medical malpractice caused the harm alleged. Sitter at 81. She sought, therefore, depositions to evaluate her claim. Id. The respondents argued that Rule 27 is not intended to permit pre-complaint discovery, but rather is intended to preserve testimony that would otherwise be lost prior to filing a complaint. Id. at 81-82. The court agreed with the respondents, and, inter alia, concluded that

the plaintiff's Rule 27 petition could not be used as a substitute for discovery. Id. at 82.[4] The plaintiff's petition was, therefore, denied.

In the Matter of Petition of Alpha Industries, Inc., 159 F.R.D. 456 (S.D.N.Y. 1995)

In a rare case where the court expands the scope of Rule 27 pre-complaint discovery, the plaintiff anticipated a copyright or trademark infringement suit under the Lanham Act, a federal statute. The plaintiff argued that Fed. R. Civ. P. 11 prohibited the plaintiff from filing suit immediately because it did not know the identity of the individual distributors alleged to be in breach of a commercial agreement, nor could the plaintiff be sure if the respondent was selling counterfeit goods. Alpha Industries at 456-57. Moreover, the plaintiff alleged continuing and ongoing economic injury and, absent the information sought, there would be nothing to prevent a failure or delay of justice. Id. at 457. The respondents countered that Rule 27 is not to be used to determine if a cause of action exists, or to determine against whom an action exists, unless the petitioner can show that the evidence sought may be lost or destroyed. Id.

The court rejected the respondents' argument, citing Professor Moore, and stating "ordinarily, a showing that the petitioner is presently unable to bring the expected action . . . is sufficient showing of the danger of the loss of evidence by delay." Id. (citation omitted). The

[4] The court noted that Minnesota's Affidavit of Merit statute was designed to curb nuisance suits and to grant the plaintiff's petition would impose a substantial nuisance upon the practitioners to be deposed. Sitter at 82. The court also pointed out that Minnesota's Rule of Civil Procedure 27, which was substantially the same as the federal rule, had been interpreted by Minnesota state courts as providing no pre-complaint discovery relief in order to comply with the Affidavit of Merit statute. Id. If the court granted the plaintiff's petition here, the court would be inappropriately encouraging forum shopping. Id.

court concluded that the petitioner here had to delay bringing suit until the information sought was received, and that showing was sufficient to permit Rule 27 perpetuation. Id.[5]

In re Petition of Delta Quarries and Disposal, Inc., 139 F.R.D. 68 (M.D. Pa. 1991)

The court here granted the plaintiff's Rule 27 petition, primarily because an adequate showing of the potential for lost testimony existed due to a witness' poor health. Although no showing was made sufficient to believe the witness' condition was life threatening, the potential for his condition to worsen impressed the court enough to grant the petition. The most interesting aspect of this case is the court's apparent appreciation for the plaintiff's argument that Rule 11 obligations should be considered when reviewing a Rule 27 petition. "Indeed, the applications of Rule 11 have evolved significantly in recent years, and counsel's concerns with respect to his Rule 11 obligations are much appreciated by the court." Delta Quarries at 69.

Conclusion

Although it is unlikely Rule 27 would be interpreted to permit pre-complaint discovery for anything other than the perpetuation of testimony or evidence, a petition that focuses on the need for such discovery to "prevent a failure or delay of justice," might persuade a court to issue an order permitting the discovery. Particularly in a case where facts necessarily precedent to filing a complaint are in the exclusive possession of an adverse party, a court may expand the scope of Rule 27. Nevertheless, because the petition must set forth the substance of an expected action, Rule 27 generally cannot be used to determine whether or not an action exists.[6]

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[5] Apparently, the court here integrated Rule 11 and Rule 27, deciding that the potential for continuing harm absent the discovery equated to a potential "failure or delay of justice."

[6] As intimated in the case summaries supra, although pre-complaint discovery pursuant to Rule 27 could limit the likelihood of being subjected to a Rule 11 claim, most courts have held that preventing a Rule 11 violation will not satisfy the requirements of Rule 27. See, e.g., In re Petition of Ford, 170 F.R.D. 504 (M.D. Ala. 1997) and W.W.

PRESUIT DISCOVERY IN PENNSYLVANIA

Perpetuation of Testimony in Pennsylvania

Pennsylvania Rule of Civil Procedure 1532 is Federal Rule of Civil Procedure 27's Pennsylvania counterpart and is used exclusively for perpetuating testimony. Rule 1532 requires a separate complaint setting forth: (1) the names of prospective parties, if known, or a general description of such parties; (2) the nature of the expected action, the plaintiff's connection with the action, and the need for perpetuation of testimony; (3) the name and address of the person whose testimony must be perpetuated and the substance of the expected testimony. Pa. R. Civ. P. 1532(a). Court approval seems implicit in Rule 1532, and once approved, the testimony may be taken by deposition or before the court. A final order is then issued deciding if the testimony is to be perpetuated or not. Pa. R. Civ. P. 1532(b). Once perpetuated under this rule, the testimony may be used at trial or hearing subject to Rule 4020. Please note, however, an order perpetuating testimony under Rule 1532 does not adjudicate whether the testimony is either relevant or material. See Eric H. Vance, "Pre-Complaint Discovery in Pennsylvania--Uses and Abuses," Pennsylvania Bar Association Quarterly, October, 1999, at 133-43.

Pre-Complaint Discovery Under Pa. R. Civ. P. 4001(c)

Pennsylvania Rule of Civil Procedure 4001(c) specifically contemplates pre-complaint discovery as sometimes necessary to the preparation of pleadings. Because Pennsylvania Rule of Civil Procedure 1007 explicitly permits a party to begin an action by writ of summons, lawyers may choose to begin an action absent the facts necessary to file a proper complaint. Particularly in instances where a statute of limitations may be running, filing by writ will save the statute

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Adock, Inc. v. Fort Wayne Pools, Inc., 1997 WL 805201 (E.D. Pa. 1997). But see In re Alpha Industries, Inc., 159 F.R.D. 456 (S.D.N.Y. 1995).

while Rule 4001(c) may permit the discovery of facts necessary to file a formal complaint. Beginning an action by summons and using pre-complaint discovery could be more efficient then conducting the type of investigation necessary to begin an action by filing a complaint. Adverse parties may be more receptive to requests for discovery once suit is filed, although adverse parties will likely resist pursuant to the rules.[7]

The principal rules governing pre-complaint discovery in Pennsylvania include the following: Pennsylvania Rule of Civil Procedure Rule 4001(c), 4007.3, 4011(b) and 4012.[8] Rule 4001(c) permits deposition or written interrogatories for the "preparation of pleadings." Rule 4007.3 allows the court, upon motion, to direct the sequence and timing of discovery "for the convenience of parties and witnesses and in the interest of justice." Rule 4011(b) precludes discovery that "would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party." Finally, Rule 4012 allows the court to "make any order which justice requires to protect the party or person from unreasonable annoyance, embarrassment, oppression, burden or expense."

Pennsylvania appellate courts have expressly recognized that the Rules of Civil Procedure anticipate and permit pre-complaint discovery. Neither discussing nor directing the scope of such presuit discovery, however, the appellate courts merely point out that the rules permit a party to obtain information necessary to the preparation of pleadings after beginning an

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[7] For example, Pennsylvania Rule of Civil Procedure 1037, "Judgment Upon Default or Admission. Assessment of Damages," requires the prothonotary to enter a rule to file a complaint within 20 days after service of the rule, upon praecipe of the defendant. If the complaint is not filed within 20 days, a plaintiff may be subject to a judgment of non pros. As the case law shows, an adverse party will likely seek a protective order under Pennsylvania Rule of Civil Procedure 4012, in conjunction with issuing a rule to file a complaint.

[8] Pennsylvania Rule of Civil Procedure 126, "Liberal Construction and Application of Rules," applies generally, and may be argued, whether seeking pre-complaint discovery or opposing it. "The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not effect the substantial rights of the parties." Pa. R. Civ. P. 126.

action by filing a praecipe for a writ. Once suit is commenced, the party would then be free to take discovery within the scope of, and subject to, the limitation of the Rules of Civil Procedure.

Pennsylvania Appellate Court Cases

Gross v. United Engineers and Constructors, Inc., 224 Pa. Super. 233, 302 A.2d 370 (1973).

Involving an action for defamation, the issues in this case included the duty of a plaintiff to plead material facts forming the basis of the plaintiff's claim. In Gross, the complaint failed to state a cause of action for libel and slander, because there were no allegations concerning the content of oral or written statements claimed to have been made, the identity of the person or persons making the statements, the relationship of the person or persons to the defendant, their authority to act on behalf of the defendant, the identity of the person or persons to whom the statements were made, and the relationship of the person or persons to third parties receiving the alleged communications. Although the rules permit certain material facts to be alleged generally, the rules require specificity for other material facts. The court noted that it is not sufficient that the defendant knows the basis for a plaintiff's claim, but rather the rules require that the facts be set forth in the plaintiff's complaint. Gross at 236-37, 302 A.2d at 372. The defendant's knowledge of the facts does not excuse the plaintiff from properly pleading a cause of action. Id. at 237, 302 A.2d at 372.

In Gross, the Superior Court made clear the appropriate procedure to use when a plaintiff does not have sufficient facts to plead his case:

> [A] plaintiff is not excused from pleading the facts necessary to sustain his cause of action on the ground of that the facts were known to the defendant and not to the plaintiff. The plaintiff still has the burden of filing a complaint which supports his claim, and if he lacks any information necessary to the preparation of his complaint he may obtain discovery. . . . The proper procedure, therefore, for plaintiff to have followed in obtaining information necessary to the preparation of an adequate complaint was to commence his action by filing a praecipe for a writ.

> The action then having been commenced, the plaintiff would be free to obtain discovery within the scope and subject to the limitation of the rules.

Id. (citations omitted).

Lapp v. Titus, 224 Pa. Super. 150, 302 A.2d 366 (1973).

This case involved defense counsel's reasonable, but erroneous, belief that a defendant could require a complaint to be filed before depositions had to take place. In a footnote, the Superior Court stated "the need for pre-complaint discovery and the dangers of pleading without it are graphically illustrated in Gross v. United Engineers and Constructors Inc., 302 A.2d at 370 (1973), in which a complaint was dismissed in a libel action for failure to specify the libellous (sic) acts and the parties to whom the statements were made. That case is explicit in its approval of pre-complaint discovery. Lapp at 155-56 n.5, 302 A.2d at 369 n.5 (emphasis added).

Baker v. Rangos, 229 Pa. Super. 333, 324 A.2d 498 (1974).

This case discussed whether a complaint satisfied the requirements for pleading specific material facts in concise and summary form. In Baker, the Superior Court reaffirmed that the Rules of Civil Procedure require fact pleading. The material facts pleaded must be sufficient to enable the adverse party to prepare its case. The "complaint must do more than give a defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. It should formulate the issues by fully summarizing the material facts. . . . 'material facts' are 'ultimate facts,' I.e. those facts essential to support the claim." Baker at 349, 324 A.2d at 505. In other words, a complaint must contain averments of all the facts a plaintiff will eventually have to prove in order to recover, and the facts must be sufficiently specific to allow the defendant to

prepare a defense. In Baker, the Superior Court once again reaffirmed the procedure to follow for pre-complaint discovery announced in Gross. Id. at 350, 324 A.2d at 506.

General State Authority v. The Sutter Corp., 44 Pa. Commw. 156, 403 A.2d 1022 (1979).

In General State Authority, the Commonwealth Court held that, inter alia, a complaint failing to allege any material facts that would constitute breach of contract or to refer to any specific acts of commission or omission which would put the defendants on notice of facts constituting the breach alleged, as well as a complaint against a supplier of roofing insulation failing to specify the time or place of sale of insulation, were each defective themselves, failing to state claims against the defendants. In short, "the pleadings are defective because they do not allege material and specific facts necessary to the theory of liability relied upon." General State Authority, at 167, 403 A.2d at 1028. Rule 1019 requires a complaint to state material facts necessary to support a cause of action and specifically make averments as to time, place and items of special damage. The Commonwealth Court reaffirmed Gross, again laying out the proper procedure to obtain information necessary to the preparation of an adequate complaint. Id. at 168, 403 A.2d at 1028. The plaintiff should have filed a writ, then the plaintiff would have been free to obtain discovery subject to the Rules of Civil Procedure. Id.

Spain v. Vicente, 315 Pa. Super. 135, 461 A.2d 833 (1983)

Like Gross, this case involved a defamation action. The Superior Court held that, when challenging the sufficiency of a complaint, a "complaint must stand or fall of its own accord." Spain at 141, 461 A.2d at 836. The court also cites Gross regarding the proper procedure to obtain the information necessary to prepare an adequate complaint. Id. at n.2.

Gallucci v. Phillips and Jacobs, Inc., 418 Pa. Super. 306, 614 A.2d 284 (1992).

In another defamation action, the Gross case was again cited by the Superior Court regarding the procedure to be followed in order to commence an action and file an adequate complaint. Galluci at 313-14, 614 A.2d at 288. Despite a rapidly approaching statute of limitations, the court stated that the plaintiffs could have followed the procedure outlined in Gross, or could have prepared a complaint and requested leave to amend later. Id. at 314, 614 A.2d at 289. The plaintiffs "had the duty to apprise themselves of the necessary facts and pursue legal recourse within the statute of limitations. The procedural rules of this Commonwealth allow a party the means to comply with the statute of limitations while acquiring additional information for a complaint." Id.

As these cases reveal, Pennsylvania appellate courts affirm the use of pre-complaint discovery, advising parties to avail themselves of such discovery pursuant to the rules, when necessary. The appellate cases, however, do not discuss the parameters within which pre-complaint discovery may be conducted. Pennsylvania trial courts, on the other hand, have established parameters of pre-complaint discovery under the Rules of Civil Procedure on numerous occasions.

District and County Cases

Martin v. Hodlofski, 53 Pa. D & C2d 144 (C.P. Phila. 1971).

In Martin, the plaintiff commenced suit by writ of summons against a corporate defendant and an individual defendant. The plaintiff then filed a notice of the taking of the oral deposition of the individual defendant, stating that the scope and purpose of the examination was

to discover relevant facts, events, and circumstances related to the action for uses and purposes authorized by the Pennsylvania Rules of Civil Procedure. The defendant subsequently filed a motion for a Protective Order, followed by a rule to file a complaint within twenty (20) days or suffer a judgment of non pros. The plaintiff then countered with a rule on the defendants to show cause why entry of judgment of non pros should not be stayed until twenty (20) days after completion of plaintiff's discovery, inter alia.

The plaintiff sought to take the deposition of the individual defendant prior to filing a complaint, because he lacked the information necessary to prepare the complaint. The plaintiff believed the necessary information was completely and exclusively within the knowledge of defendants. On the other hand, the defendants objected to being subjected to discovery until after they had been served with a complaint. The defendants claimed they needed to be informed of the nature of the plaintiff's claim, in order to judge the relevance of the plaintiff's inquires.

The court, relying upon the old Pennsylvania Rule of Civil Procedure 4007(a), explained that pre-complaint discovery is permitted if it is "relevant to the subject matter involved in the action and will substantially aid in the preparation of the pleadings." Martin at 146 (emphasis added). The court acknowledged that, under this rule, discovery had been allowed prior to filing a complaint, but was invariably subject to carefully constructed limitations and a showing that a complaint could not be drafted without such discovery. Id.

All the court had before it was the plaintiff's bare statement that he lacked information necessary to prepare a complaint and that he needed from defendants the "relevant facts, events, and circumstances related to the action." Id. The court said:

> [W]e feel it is incumbent on plaintiff to do more than this before subjecting defendants to unrestricted examination; he should supply the court and defendants with such information regarding the nature of his claim and the scope of his proposed examination, to form the basis for determination of whether or not

> plaintiff is able to frame a complaint without prior discovery and whether or not the proposed discovery will be relevant and will substantially aid in the preparation of the complaint.

Id. Accordingly, the court entered an order directing the plaintiff to either file a complaint within twenty (20) days or file an amended notice to take depositions setting forth the nature of the information sought.

Crown Marketing Equip. Co. v. Provident Nat'l Bank, 3 Pa. D. & C.3d 364 (C.P. Phila 1977).

In Crown, the court was deciding a dispute between a defendant and an additional defendant. The defendant had filed a motion to extend the time for filing a complaint against the additional defendant, pending the taking of depositions, while the additional defendants had moved for a Protective Order to prevent the taking of the deposition until after a complaint was filed. The court acknowledged that pre-complaint "discovery is permissible but subject to a showing that without the discovery a complaint could not be drafted." Crown at 365. Denying the defendant's motion for an extension of time and granting the additional defendants motion for a Protective Order, the court stated that the supporting Memorandum of counsel for each party set forth acts sufficient for the defendant to file a complaint. The court explained that the "[d]efendant apparently wants to discover, inter alia, the precise nature of the additional defendant's employment with plaintiff, what tasks they were to perform for plaintiff and what they actually did perform. While they have a right to depose [the witness] for this purpose at the proper time, it seems to us that those reasons form no basis for permitting pre-complaint discovery. Id. at 366 (emphasis added).

Cowell v. Borough of Penn Hills, 34 Pa. D. & C.3d 539 (C.P. Allegheny 1982).

In this case, suit was begun by writ of summons. No complaint was filed. Pursuant to Pennsylvania Rule of Civil Procedure 4009, the plaintiff requested each defendant to produce all writings relating to the events involving the plaintiff, which occurred at the Ritzland Shopping Center in Penn Hills on May 24, 1981. The defendants failed to comply with the Request for Production and the plaintiff subsequently moved the court for sanctions.

At oral argument on the motion, the plaintiff argued that he needed the documents at this time to discover which police officers and police departments were involved in the incident for the purpose of preparing his complaint. The defendants countered that the plaintiff must file a complaint before any production of documents may be ordered. The court required the defendants to produce the documents requested, in part because the applicable Rules of Civil Procedure contain no limitations barring discovery until a complaint is filed. "To the contrary, [Rule 4003.1] permits the party to obtain discovery regarding any matter relevant 'to the subject matter involved in the pending action.'" Cowell at 540-41 (emphasis in original) (citation omitted). The court stated that Pennsylvania Rule of Civil Procedure 1007 allows a party to start an action by filing a praecipe for a writ of summons. Id. at 541. Discovery, therefore, is permitted under Rule 4003.1, subject to its relevance to the subject matter of the action. Id.

The defendants, however, also contended that the plaintiff's motion for production must be denied, because the plaintiff's motion did not include a brief statement of the nature of the cause of action and of the matters to be inquired into. The court, however, said this requirement is contained only in Rule 4007.1(c), which governs depositions by oral examination. Id. Rule 4009, which governs the production of documents, contains no similar requirement. Id. The court then pointed out that the appropriate response from the defendants was a motion for a

Protective Order, which would seek to protect the defendants from unreasonable annoyance, oppression or burden. Id. at 542.

Wable v. Watkins, 47 Pa. D. & C.3d 485 (C.P. Somerset 1986).

This case involved a dispute between the defendants and an additional defendant, with a motion by defendants to extend the time for filing a complaint against the additional defendant, and the additional defendant's motion for a Protective Order pursuant to Pennsylvania Rule of Civil Procedure 4012. The original defendants filed a praecipe to issue a writ to join an additional defendant. The defendants then noticed a pre-complaint deposition of the additional defendant, and filed a motion requesting an extension of time for filing a complaint against her. The additional defendant filed a motion for a Protective Order and objected to the defendants' requested extension of time for filing a complaint. The additional defendant contended that:

1. The notice of deposition fails to contain a "statement of the nature of the cause of action" against the additional defendant as required by Pennsylvania Rule of Civil Procedure 4007.1(c); and

2. The notice impermissibly proposes to determine whether or not defendants had a cause of action against the additional defendant; and

3. In order to justify pre-complaint discovery, the requesting party must show that a complaint could not be drafted absent such discovery, and the defendants have not shown that need. The defendant's Notice of Deposition, in pertinent part, was as follows:

> The purpose of said deposition is not only to ascertain the usual information of a witness, particularly an eyewitness to all the events surrounding the fall and injury of plaintiff, but also to ascertain from [additional defendant], who has been joined as an additional defendant by Writ of Summons, for the purpose of preparing a complaint against her.

> The scope of the examination is to include questions to ascertain whether additional defendant has breached any duty to plaintiff that may have caused or contributed to plaintiff's fall and ensuing injuries; toward this end questions will include the additional defendant's knowledge or information as to plaintiff's vision, characteristics of her eyeglasses, observation of plaintiff's physical infirmities and necessity and use of crutches, the reason or necessity of plaintiff's entering defendant's dwelling, additional defendant's observations once in the dwelling of the stairway and lighting, any help, assistance or warnings that additional defendant or cautions that additional defendant may have given plaintiff.

Wable at 487-88.

The court first stated that Rule 4007.1 governs procedure and depositions by oral examination. Id. at 488. In particular, 4007.1(c) requires that notice of a deposition for the purpose of preparing a complaint "shall include a brief statement of the nature of the cause of action and of the matters to be inquired into." Id. Although the defendants' notice of taking depositions stated the purpose and several areas of inquiry, it did not include a brief statement of the nature of the action as required by the rule. "The reason for this requirement is that a person who has not yet been served with a complaint may not be aware of the exact basis of the action or what is to be adjudicated and may thus be totally unprepared to submit to oral examination." Id. Fairness dictates that a party be apprised of the nature of the action alleged. And, under Pennsylvania Rule of Civil Procedure 4003.1, the matter sought to be discovered has to be relevant to the subject matter involved in the action. Id. at 488-89. No one can determine the relevance to the defendants' claims against the additional defendant, unless the nature of the cause of action is indicated. Id. at 489. The court also agreed with the additional defendant's argument that pre-complaint discovery cannot be used in order to determine whether a cause of action exists. Id.

Although the court cited cases referencing the old Rule 4007, which rule is now split among Rules 4001(c), 4003.1, 4007.1 and 4007.2, the court said the principles announced in

those cases are still valid. Id. at 490. This is so even though the present rules do not contain the requirement that discovery must "substantially aid" in the preparation of pleadings, or preparation or trial of the case. Id. The rules still require the requesting party to have a cause of action prior to noticing a pre-complaint deposition. It follows, therefore, that pre-complaint depositions cannot be used for the purpose of determining whether or not a cause of action exists. Id.

The court further agreed with the additional defendant's contention that the defendants should not be permitted to take an oral deposition without showing that a complaint could not be prepared absent the discovery. Once again, the court cited the cases decided under the old rules. Nevertheless, the basic principles announced in those cases remain sound under the very language of the present rules. Here, because a description of the cause of action has not been given by the defendants in their notice of taking depositions, it was not possible to determine if areas of inquiry are relevant or whether the defendants required the deposition in order to prepare a complaint. Id. at 490-92.[9]

Anderson v. PennDOT, 47 Pa. D. & C.3d 429 (C.P. Cumberland 1987).

The plaintiff began this suit against the defendant by writ of summons. The parties were served. A rule was issued and served on each defendant to show cause why the plaintiff should not be given 180 days in which to complete pre-complaint discovery and twenty (20) days thereafter in which to file a complaint. Because no complaint was filed, the only factual basis upon which the court could act upon the plaintiff's petition was the petition itself. The plaintiff

claimed his action arose out of a motorcycle accident on August 11, 1984. The petition did not set forth where or how the accident occurred, but simply averred that the helmet the plaintiff was wearing at the time was not marked with the name of the manufacturer. The plaintiff sued the apparent manufacturer of the helmet, the companies he believed distributed the helmet, and PennDOT. The plaintiff argued that pre-complaint discovery would "eliminate problematic matters which may be raised in the future through Preliminary Objections," and would "result in more effective and efficient presentation and pleading" of his case. Anderson at 431.

The court acknowledged authority to allow pre-complaint discovery in certain limited and controlled situations. Id. The court acknowledged that pre-complaint discovery might be permitted under carefully constructed limitations and upon a showing that, without the discovery, a complaint could not be drafted. Id. Here, however, the court believed the plaintiff had enough facts to draft a complaint. Id. The plaintiff knew where and how the accident happened, and therefore, he could plead material facts in support of a cause of action as required under the Rules. Id. If the alleged manufacturers and distributors made the helmet, the plaintiff could plead negligence or product liability against those entities. If it turned out that the manufacturers and distributors were incorrectly identified, the defendants could obviously find a way to be removed from the case. The court stated that the "[p]laintiff simply has not set forth in his Petition averments necessary to form a sufficient basis for subjecting defendants to pre-complaint discovery. To grant the Motion with respect to any of the defendants would substantially delay the case to the prejudice of all of them." Id. at 432. Accordingly, the court

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[9] Clearly, the notice describes a slip and fall, apparently anticipating discovering that the additional defendant contributed in some way to the accident. Arguably, this sufficiently describes the nature of the cause of action. Nevertheless, it does appear that the original defendant sought to determine whether a cause of action actually exists.

ordered the plaintiff to file a complaint against the named-captioned defendants within twenty (20) days of the order.

Chrysler v. Zigray, 7 Pa. D. & C. 4th 408 (C.P. Lackawanna 1990).

The plaintiff sought pre-complaint discovery in a breach of contract action. The defendants sought a Protective Order denying same. The court began by saying "it is clear that pre-complaint discovery is contemplated and allowed by the Rules of Civil Procedure; its purpose is to lay bare the appropriate facts…. however, 'the granting of relief in a discovery proceeding is dependent upon a prima facie showing of necessity, since the relief is not to be granted as a matter of right.'" Chrysler at 409 (citations omitted). The court stated that, when a plaintiff is making a bonafide attempt to discover facts to assist in presenting a more complete case, "litigants must reconcile themselves to the fact that under the Rules every inquiry carries with it some degree of annoyance." Id. at 411 (citation omitted). A party moving for a Protective Order, therefore, has a burden of showing that the discovery requested is merely annoying, or unreasonably oppressive or expensive. Id. Because the defendants did not sustain their burden, the court ordered plaintiff's counsel to have access to the documents requested, subject to strictly limited use in the preparation of pleadings, the preparation or trial of the case.

Conclusion

Pennsylvania trial courts have both approved and denied pre-complaint discovery. Parties apparently walk a tightrope when noticing the purpose of the deposition and matters to be inquired into pursuant to Rule 4007.1. Parties may not engage in pre-complaint discovery for the purpose of determining whether or not a cause of action exists, but pre-complaint discovery may be pursued in order to prepare pleadings. A palpable tension exists between the rights of an

adverse party to know what it needs to prepare, or defend, and the need for the noticing party to prepare its case in compliance with the rules. A deposition notice that is exquisitely detailed regarding the nature of the action and the matters to be inquired into is likely doomed as alleging facts sufficient to file an adequate complaint. On the other hand, a notice devoid of any meaningful description of the nature of the action or matters to be inquired into provides insufficient notice to an adverse party of either the action contemplated or the relevance of the deposition to the action. Finally, it must be shown that, absent the discovery, a proper complaint cannot be drafted.

Judge Wettick, a judge in the court of Common Pleas of Allegheny County, drafted a fascinating opinion in September, 1998, addressing pre-complaint discovery. In Elaine J. Potts v. Consolidated Rail Corporation, a copy of which is found at 147 Pittsburgh L.J. 40 (1999), Judge Wettick analyzes the tension between the rights of the parties and the apparent permissiveness of the rules, as well as his experience resolving that tension. In Potts, Judge Wettick states:

> I have never issued an opinion addressing the scope of pre-complaint discovery. Within the past year on most Fridays, I have received at least one motion for a protective order seeking a court order staying discovery until the pleadings are closed. Usually, the motion is filed by a defendant who contends a complaint should be filed before either party engages in discovery. The second most common situation involves discovery sought either by a plaintiff or a defendant while preliminary objections are pending. Upon presentation of these motions, I advise counsel that I ordinarily stay discovery until the pleadings are closed unless the parties seeking the discovery can show a compelling reason. There are exceptions to this Rule where the discovery request is narrow and the production of the information that is sought will not cause annoyance, embarrassment, oppression, burden or expense to the responding party. Consider, for example, a discovery request in which the plaintiff seeks a copy of the plaintiff's written employment agreement with the defendant or the plaintiff's request for his or her medical records to a medical provider.

147 Pittsburgh Legal Journal at 40-41.

Judge Wettick then goes on to list the reasons why justice requires that discovery be barred until a plaintiff's complaint has been filed, preliminary objections have been resolved, and the defendant has filed an answer. First, defendants need the opportunity to show that a complaint fails to state a cause of action before responding to discovery. Second, fact pleading as required by the Pennsylvania Rules of Civil Procedure seeks to narrow issues in contention. The discovery rules are premised on the belief that discovery will also be narrowed if the dispute is initially defined by the pleaded facts. Third, until a complaint is filed, neither the defendant nor the court may be in a position to determine if the discovery sought involves matters relevant to the action. Fourth, prior to filing a complaint, plaintiff's counsel has the opportunity to investigate the case with the plaintiff, witnesses favorable to the plaintiff, review documents in control of the plaintiff, and consider and frame legal issues that will govern the litigation. Without knowledge of the claim, the defendant is not in the same position, and consequently, defense counsel should be given sufficient time to determine the nature of the action before being required to respond to extensive discovery.

> In most oral arguments involving a defendant's motion to bar discovery until a complaint is filed, I advise the plaintiff's counsel that he or she is already in a position to file a complaint on the basis of the description of the lawsuit that the plaintiff's counsel offers at the oral argument. Frequently, I receive one of the following responses to my statement that the plaintiff should file a complaint. The plaintiff's counsel may state that he or she needs to engage in discovery because possibly the discovery will show that the defendant is not legally responsible for the plaintiff's harm[10] or the plaintiff's counsel may state that the defendant will file preliminary objections seeking greater specificity if the complaint is filed without additional discovery.

147 Pittsburgh Legal Journal at 41. Judge Wettick responds to the first argument by stating that it should be the defendant's call. Presumably, Judge Wettick means that the defendant can

[10] An argument to which defense counsel once responded that she "no longer believes in the tooth fairy."

provide exculpatory discovery if he or she so chooses, but should not be required to. Judge Wettick responds to the second argument by offering "if preliminary objections raising insufficient specificity are sustained, I will permit the discovery that is necessary for the preparation of the amended complaint." Id.

Ultimately, Judge Wettick reaffirmed his own ruling in Pennsylvania Manufacturers Association Insurance Company v. Indyk, 7 Pa. D. & C.3d 333 (C.P. Allegheny 1978), in which he stated:

> [M]oreover, we believe that discovery prior to the filing of a complaint should be discouraged because a defendant who is served only with a writ of summons and a notice of deposition cannot effectively prepare for the deposition and has little basis for challenging the relevancy of any question. Thus, we should construe [the rules] to require plaintiff, wherever possible, to file and serve prior to discovery a complaint which sets forth any facts presently known to plaintiff and to permit discovery to aid in the preparation of an amended complaint which will include those missing facts for which discovery is necessary.

Id. at 42 (citations omitted).

While accepting that the rules permit a party to engage in discovery in preparation of a pleading, Judge Wettick, as well as most other Common Pleas Courts, will require the party to show that the pleading cannot be prepared absent such discovery. Filing a writ and noticing a deposition immediately thereafter will also likely prompt a rule to file a complaint and a motion for a protective order. If there is truly a need for discovery in order to prepare a complaint, the Pennsylvania Rules and case law can support that need, albeit subject to strict limitation and obvious control from the court.

Pertinent Pennsylvania Rules of Civil Procedure Governing Pre-complaint Discovery

Rule 126. Liberal Construction and Application of Rules.

The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every

stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Rule 1007. Commencement of Action.

An action may be commenced by filing with the prothonotary

(1) a praecipe for a writ of summons, or

(2) a complaint.

Rule 1019. Contents of Pleadings. General and Specific Averments.

(a) The materials facts on which a cause of action or defense is based shall be stated in a concise and summary form.

(b) Averments of fraud or mistake shall be averred with particularity.

. . .

(f) Averments of time, place and items of special damage shall be specifically stated.

. . .

(h) A pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason and to set forth the substance in writing.

Rule 1037. Judgment Upon Default or Admission. Assessment of Damages.

(a) If an action is not commenced by a complaint, the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros.

Rule 4001. Scope. Definitions.

(c) Subject to the provisions of this chapter, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery, or for the preparation of pleadings, or for the preparation or trial of a case, or for use at a hearing upon Petition, Motion or Rule, or for any combination of the foregoing purposes. (Emphasis added).

Rule 4007.1. Procedure in Deposition by Oral Examination.

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action, except that no notice need be given a defendant who was served by publication and has not appeared in the action. A party noticed to be deposed shall be required to appear without subpoena.

(b) The notice shall conform with the requirements of subdivision (c) of this Rule and of Rule 4007.2(b) and (c) where appropriate and shall state the time and place of taking the deposition and the name and address of each person to be examined if known, and, if the name is not known, a general description sufficient to identify the deponent or the particular class or group to which the deponent belongs.

(c) The purpose of the deposition and matters to be inquired into need not be stated in the notice unless the action has been commenced by writ of summons and the plaintiff desires to take the deposition of any person upon oral examination for the purpose of preparing a complaint. In such case, the notice shall include a brief statement of the nature of the cause of action and of the matters to be inquired into. (Emphasis added).

Rule 4007.2. When Leave of Court Required.

(a) Except as provided by Rule 4003.5(a)(2) and by subdivisions (b) and (d) of this Rule, a deposition may be taken without leave of court.

(b) Leave of court must be obtained if a plaintiff's notice schedules the taking of a deposition prior to the expiration of thirty (30) days after service of the original process and the defendant has not served a Notice of taking deposition or otherwise sought discovery, unless the party or person to be examined is:

(1) aged or infirmed, or

(2) about to leave the county in which the action is pending for place outside the Commonwealth or a place more than 100 miles from the courthouse in which the action is pending.

(c) If the plaintiff proceeds under subdivision (b)(1) or (2) of this rule, the notice of taking the deposition shall set forth the facts which support taking it without leave of court. The plaintiff's attorney shall sign the notice and the signature shall constitute a certification that the best of the attorney's knowledge, information and belief the statement of facts as true.

Rule 4012. Protective Orders.

(a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense. . . .

PRE-COMPLAINT DISCOVERY IN NEW JERSEY

A New Jersey state court action alleging personal injuries, wrongful death, or property damage as a result of malpractice and negligence by a licensed person in his or her profession or

occupation, is subject to an Affidavit of Merit statute.[11] Rule 4:11-1 of the New Jersey rules governing civil practice controls discovery before an action is filed. Prior to 1998, Rule 4:11-1 was substantially identical to Rule 27(a) of the Federal Rules of Civil Procedure governing perpetuation of testimony. The principal difference between the federal rule and the New Jersey rule lies in New Jersey's explicit authorization to perpetuate documentary evidence, as well as testimony. Presently, however, pre-complaint discovery may be ordered pursuant to Rule 4:11-1 under "extraordinary circumstances," if necessary to comply with the Affidavit of Merit statute. In 1998, as a direct result of the New Jersey Supreme Court decision, In re Petition of Hall, 147 N.J. 379, 688 A.2d 81 (1997), Rule 4:11-1 was amended to include the following:

> The court may also grant a pre-complaint petition for depositions filed pursuant to this rule by a person asserting that due to extraordinary circumstances, which shall be explained in detail by affidavit, such depositions are necessary to enable compliance with [the Affidavit of Merit statute].

The genesis of this amendment, its need, and the legislative background of the old rule is thoroughly explained by the New Jersey Supreme Court in Hall.

In Re Petition of Hall, 147 N.J. 379, 688 A.2d 81 (1997).

This case involved a patient's guardian ad litem petition seeking an order granting presuit depositions of health care providers. The New Jersey Supreme Court held that possible inability to plead a cause of action, or to comply with the Affidavit of Merit statute, was not an adequate showing to justify the grant of a petition for presuit depositions under the rules of civil procedure permitting perpetuation of testimony.

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[11] **N.J.S.A. 2A:53A-27 to 2A:53A-29.**

In August, 1995, the plaintiff was admitted to the emergency room of Burdette Tomlin Memorial Hospital as a result of a surfing accident in which he lacerated the jugular vein in his neck. During surgery to repair the laceration, the plaintiff suffered cardiac arrest and was without oxygen for more than ten minutes. As a result of that lack of oxygen, the plaintiff lives at a low level cognitive state. Shortly after the surgery, the plaintiff's family hired counsel to determine if the plaintiff's permanent brain damage was caused by medical malpractice. Although the plaintiff's counsel obtained operative records, key notes were illegible.

Approximately a month after the surgery, the plaintiff's counsel filed a petition pursuant to Rule 4:11-1 in support of an Order to Compel presuit depositions of specific healthcare providers. The petition asserted that the depositions were necessary to comply with the Affidavit of Merit statute. The Affidavit of Merit statute requires that, within sixty (60) days of each defendant's answer to a malpractice complaint, an affidavit by a qualified expert must be filed stating that there exists a reasonable probability that the professional service complained of deviated from acceptable professional standards. The plaintiff's petition also alleged that the depositions seek to determine why the plaintiff suffered cardiac arrest during his surgery.

As Rule 4:11-1 existed at the time of this decision, the rule was substantially identical to Rule 27(a) of the Federal Rules of Civil Procedure. Hall at 385, 688 A.2d at 84. The principle difference from the Federal Rule is 4:11-1's authorization to perpetuate documentary evidence, as well as testimony. Id. The Hall court conducted an in-depth analysis of federal court decisions applying Fed. R. Civ. P. 27(a), as well as state court decisions applying rules substantially based upon the federal rules. The Hall court explained that, uniformly, the federal and state court rules cited apply only to situations where, for one reason or another, testimony might be lost to a prospective litigant, unless taken immediately. Id. The testimony would then

be perpetuated for use at some later time. Id. Consistently, courts have rejected the contention that such rules could be used to assist a litigant in discovering facts necessary to plead a cause of action. Id. at 386, 688 A.2d at 84. Their purpose was not to enable a prospective litigant to discover facts upon which to frame a complaint. Id.[12]

The Hall court then discussed criticism that has been expressed about the restrictive manner in which Fed. R. Civ. P. 27(a) and its state counterparts have been applied. Particularly in cases requiring specific allegations of fault, restrictive application of the rules have occasionally been criticized as antithetical to the basic concept of discovery or mandated compliance with Affidavit of Merit statutes. Id. at 389-90, 688 A.2d at 86 (citations omitted).

Turning back to the case before it, the Hall court then explained the Affidavit of Merit statute in New Jersey. See N.J.S.A. 2A:53A-27 to 2A:53A-29. In New Jersey, the Affidavit of Merit statute applies to actions for damages for personal injuries, wrongful death, or property damage resulting from malpractice or negligence by a licensed person in his or her profession or occupation. Licensed persons include accountants, architects, attorneys, dentists, engineers, physicians, podiatrists, chiropractors, professional nurses, and health care facilities. See N.J.S.A. 2A:53A-26. The legislative history of the Affidavit of Merit statute supports the conclusion that its purpose is to require plaintiffs in malpractice cases to make a threshold showing of a meritorious claim. Hall at 391, 688 A.2d at 87. The Hall court ultimately concluded that a plaintiff's possible inability to plead a cause of action, or to comply with the mandate of the Affidavit of Merit statute, does not constitute an adequate showing to justify the grant of a petition for presuit discovery.

[12] The Hall court's summary of federal and state courts applying such Rules of Civil Procedure can be extremely useful for identifying how, when, and where perpetuation of testimony may be granted or denied.

Notwithstanding this holding, the Hall Court also explained that the Affidavit of Merit statute occasionally may impose a burdensome mandate on plaintiffs with a meritorious claim. Id. Judicial intervention authorizing presuit discovery, therefore, could be essential to guard against the dismissal of valid claims. Id. The court, however, notes that New Jersey's Affidavit of Merit statute contains built-in safeguards to prevent deliberate obstruction or frustration of the statutory mandate. Id. For example, the time for filing the affidavit is not calculated from the date of the complaint, but rather from the date of each defendant's answer. Id. For good cause, the sixty (60) day period to file the Affidavit can be extended by an additional sixty (60) days. Id. at 392, 688 A.2d at 87. The plaintiff, therefore, can have as much as 120 days to timely file the required affidavit.

Ultimately, if a plaintiff certifies that a defendant refused, for forty-five (45) days, to provide the plaintiff with medical records or information substantially relevant to the affidavit, the filing of the affidavit is not required. Id. In such cases, a sworn statement in lieu of the affidavit may be filed. N.J.S.A. 2A:53A-28. Moreover, the content of the affidavit is summary in nature. Hall at 392, 688 A.2d at 88. There is no need for the same detailed explanation and analysis that ordinarily would be contained an expert's report required later in discovery. Id. The affidavit only a certifies that a reasonable probability exists that the defendant deviated from professional standards. Id.

Finally, the Hall court asked the Civil Practice Committee to review the practical implications of the Affidavit of Merit statute. Id. at 393, 688 A.2d at 88. Pending receipt of the Committee's recommendations, or amendment to the rules governing civil practice, the court authorized trial courts to grant petitions for pre-suit discovery in malpractice cases in exceptional circumstances. Id. Trial courts must be persuaded that, notwithstanding the safeguards

contained in the Affidavit of Merit statute, pre-complaint discovery relief is essential in order to permit the plaintiff to comply with the provisions of the statute. Id. The Hall court expected orders permitting such pre-suit discovery to be issued sparingly and only where necessary to avoid unjust dismissals. Id. As a result of Hall, Rule 4:11-1(a) was amended in 1998 to include language authorizing presuit discovery in exceptional circumstances.

Conclusion

As Hall explains, the Affidavit of Merit statute has built-in safeguards to prevent deliberate obstruction or frustration of its mandate. Time is calculated from the date of defendant's answer, not from the date of the complaint. Good cause permits an additional 60 day period within which the affidavit must be filed, for a total of 120 days. The affidavit is not required when a defendant refuses for 45 days to provide the plaintiff with medical records or information substantially relevant to the required affidavit. Finally, the affidavit is summary in nature only. No detailed explanation in the nature of an expert report need be given in the affidavit. The affidavit need only certify that a reasonable probability exists that the defendant deviated from professional standards. Nevertheless, both the Hall court, and now the New Jersey rules, contemplate "extraordinary circumstances" where presuit discovery may be necessary to comply with the Affidavit of Merit statute. Although case law has not yet developed the parameters of those "extraordinary circumstances," it is clear that the door is now open for such pre-complaint discovery.

Pertinent New Jersey Rules Governing Pre-Complaint Discovery

NJSA 2A: 53A-26. "Licensed person" defined.

As used in this Act, "licensed person" means any person who is licensed as:

(a) an accountant,

(b) an architect,

(c) an attorney,

(d) a dentist,

(e) an engineer,

(f) a physician,

(g) a podiatrist,

(h) a chiropractor,

(i) a registered professional nurse, and

(j) a health care facility.[13]

NJSA 2A: 53A-27. Affidavit required in certain actions against licensed persons

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person 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 of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The courts may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause. The person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by Board certification or by devotion of the person's practice substantially

[13] All of these licensed persons are defined as such pursuant to specific rules and statues in New Jersey. See 2A: 53A-26 for those specific rules or statutes.

to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in this case. (Emphasis added).

NJSA 2A: 53A-28. Sworn statement in place of affidavit permitted

An affidavit shall not be required pursuant to section 2 of this act if the plaintiff provides a sworn statement in lieu of the affidavit setting forth that: the defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit; a written request therefor along with, if necessary, signed authorization by the plaintiff for release of the medical records or other records or information requested, has been made by certified mail or personal service; and at least 45 days have elapsed since the defendant received the request. [14]

NJSA 2A: 53A-29. Failure to provide affidavit or statement.

If the Plaintiff fails to provide an Affidavit or statement in lieu thereof, pursuant to section 2 or 3 of this Act, it shall be deemed a failure to state a cause of action.[15]

N.J. Rules governing civil procedure

Rule 4:11. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL OR FOR USE IN OTHER JURISDICTIONS.

4:11-1. Before action.

a. Petition. A person who desires to perpetuate his or her own testimony or that of another person or preserve any evidence or to inspect documents or property or copy documents pursuant to R. 4:18-1 may file a verified petition, seeking an appropriate order, entitled in the petitioner's name, showing:

[14] Section2 of this Act is 2A: 53A-27. Section 3 of this Act is 2A: 53A-28.
[15] Section2 of this Act is 2A: 53A-27. Section 3 of this Act is 2A: 53A-28.

> 1. that the Petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought;
> 2. the subject matter of such action and the petitioner's interest therein;
> 3. the facts which the Petitioner desires to establish by the proposed testimony or evidence and the reasons for desiring to perpetuate or inspect it;
> 4. the names or a description of the persons the petitioner expects will be opposing parties and their addresses so far as known;
> 5. the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each; and
> 6. the names and addresses of the persons having control or custody of the documents or property to be inspected and a description thereof.
>
> The court may also grant a pre-complaint petition for depositions filed pursuant to this rule by a person asserting that due to extraordinary circumstances, which shall be explained in detail by affidavit, such depositions are necessary to enable compliance with NJSA 2A: 53A-27 to -29 (Affidavit of Merit Statute). (Emphasis added).[16]

The comments to Rule 4:11-1 note that "the rule had been held to be generally inapplicable to pre-suit discovery sought for the purpose of enabling a potential plaintiff to comply with the [Affidavit of Merit statute]. However, after [Hall], in which the Supreme Court of New Jersey suggested that the rule might be utilized for that purpose in exceptional circumstances and referring the matter for further study to the Civil Practice Committee," Rule 4:11-1(a) was amended to permit pre-suit depositions where the petitioner asserts an inability,

[16] Rule 4:11-1 also details notice and service, order and examination, and use of deposition.

because of extraordinary circumstances, to otherwise comply with the Affidavit of Merit requirement.

Rule 4:18, relating to discovery and inspection of documents and property, and particularly Rule 4:18-1(c), relating to persons not parties, specifically states that "pre-litigation discovery within the scope of this rule may also be brought by petition pursuant to Rule 4:11-1." Rule 4:18-1(c) apparently permits pre-litigation discovery in the nature of production of documents and things to be pursued against a person who is not a party, in order to comply with the Affidavit of Merit statute, upon petition asserting extraordinary circumstances, which is explained in detail by Affidavit.

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