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3rd Circ. Ruling Over NJ Merit Statute May Have Nat'l Impact

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In a case of first impression, the U.S. Court of Appeals for the Third Circuit affirmed the trial court's dismissal of design defect claims against a residential homebuilder under New Jersey's Product Liability Act when the plaintiff-homeowner failed to comply with New Jersey's Affidavit of Merit Statute, N.J.S.A. § 2A:53A-26, et seq.

Though not precedential, the holding in *Calender v. [NVR](#) Inc.*, No. 12-4132, -- Fed. Appx. -- (3d Cir. Dec. 13, 2013), has significant implications for the New Jersey construction industry and, more broadly, for businesses that employ licensed professionals whose alleged malpractice gives rise to claims against their employers. Practitioners must be cognizant of the merit statute, which requires a threshold showing early in litigation that a plaintiff's claim is meritorious.

Factual and Procedural History

The plaintiff in *Calender* purchased a newly constructed home from the defendant homebuilder. The homebuilder's internal staff architects had designed the home and prepared and sealed the construction plans that were utilized to obtain the construction permits and construct the home. After changing an air filter on an air conditioning unit located in his attic, plaintiff fell and was injured when the step ladder that he was using for attic access tipped over during his descent. He alleged that the homebuilder was liable under the state's product liability act and other theories for defective architectural design, improper construction and inadequate warnings relating to the home's attic access. Plaintiff did not timely supply an affidavit of merit pursuant to the merit statute to substantiate his common law negligent design claim or his design defect claim under the Product Liability Act.

As explained below, the trial court then granted a motion to dismiss the design defect claims because the plaintiff failed to obtain an affidavit of merit articulating how the homebuilder's architect deviated from the applicable professional standard of care in designing the attic access and home. Then, in granting summary judgment in the builder's favor on the remaining claims, the court dismissed the failure to warn claims on the basis that any danger posed by the attic access was open and obvious.

Application of the Merit Statute to Claims Against Homebuilders

The merit statute mandates the early dismissal of negligence and malpractice claims

against a variety of New Jersey licensed professionals if the plaintiff fails to serve, within 60 days of the defendants' answer (or a statutory 60 day extension thereof), an affidavit stating that there is a reasonable probability that the licensed professional did not meet the applicable professional standard of care.

The affidavit must be that of "an appropriate licensed person" under the statute with an area of professional expertise similar to that of the defendant professional. A plaintiff's failure to obtain an affidavit of merit in a case involving a licensed professional can be fatal to his case, as it is deemed a failure to state a claim and warrants dismissal with prejudice. The merit statute specifically applies to 16 categories of licensed professionals, such as accountants, attorneys, engineers, architects as well as many categories of health care providers such as dentists, physicians, pharmacists and nurses.

The merit statute had not previously been applied to afford protection against design claims under New Jersey's Product Liability Act, nor had it previously been applied directly to residential homebuilders or other construction companies that employ licensed architects and engineers.

Both the trial court and Third Circuit determined that the merit statute applies to design claims against a homebuilder because these claims, by their nature, implicate the judgment of its licensed professionals. While the Third Circuit's opinion did not touch on the issue, the trial court noted that residential homes are legally required to be designed by a licensed professional architect or engineer. Thus, there was no question that the alleged negligence or design defect necessarily was the work of a licensed professional subject to the merit statute.

Courts Evaluate the Underlying Allegations, Not Just the Legal Theory Asserted

An important consideration in both the trial and Third Circuit's opinions in *Calender* was that — irrespective of the theory that the plaintiff asserted against the homebuilder — at its heart, the plaintiff was challenging the architectural designs and plans.

The Third Circuit relied on the New Jersey Supreme Court's decision in *Couri v. Gardner*, 173 N.J. 328 (2002). In *Couri*, the Supreme Court decided that the necessity for an affidavit of merit depended on whether the claim required proof of a deviation from a professional standard of care.

In *Couri*, plaintiff brought a breach of contract action against a licensed professional psychiatrist whom plaintiff had retained as an expert witness. The Supreme Court ruled that an affidavit of merit might be required in breach of contract actions, depending on the nature of the allegations. However, the Supreme Court held that because the contract allegations related to the professional's dissemination of a report concerning child custody issues, rather than claims that the psychiatrist deviated from the professional standard of care relating to his professional services, no affidavit was required there.

In Calender, in contrast, the Third Circuit found that the nature of the claims, including the alleged breach of the sale contract for the home, related directly to the architect's allegedly improper design of the attic access. In so ruling, both the trial court and Third Circuit noted that by law, the architectural plans were required to be prepared by a licensed professional architect or engineer, and thus the homebuilder's in-house licensed architect necessarily would have been responsible for the allegedly improper design.

Likewise, both courts found it significant that plaintiffs would need to introduce their own expert testimony regarding the architect's alleged design error and other allegedly more suitable alternative designs to prove the claim. That need further illustrated that the claim involved professional negligence at its heart regardless of the legal theory attached to the claim by the plaintiffs. In short, if the claim will require evidence of a deviation from a standard of care of a licensed professional, the affidavit of merit statute is likely to apply.

Recent case law has applied the same general analysis. For example, in a case decided in January 2014, an architect moved for summary judgment dismissing claims arising from the conversion of a warehouse to a church after the plaintiff failed to file an affidavit of merit.

The district court granted partial summary judgment dismissing some aspects of the plaintiff's breach of contract claim, but permitted other portions of that claim to proceed to trial. The court granted summary judgment, dismissing the breach of contract claims alleging that the architect: (1) caused delays and cost overruns by having to repeatedly revise its designs until they met the township's requirements, and (2) applied the wrong zoning and firewall codes, because they required proof of deviation from the professional standard of care.

In contrast, breach of contract claims alleging that the architect exceeded the budget and refused or failed to complete drawings did not require proof of a deviation from the professional standard of care, and thus they survived the architect's motion for summary judgment notwithstanding plaintiff's failure to file an affidavit of merit.

In sum, application of the merit statute to construction, product liability and other claims requires close scrutiny of the claims, factual allegations and required proofs.

Merit Statute Requirements Apply Even When the Professional is Not a Defendant

In Calender, the trial court and Third Circuit agreed that the merit statute may apply even if the design architect or engineer is not a named defendant. Thus the Calender decision extends to homebuilders the same affidavit of merit protection that has been regularly applied to professional services entities that employ licensed professionals, such as law firms, medical and architectural groups and accounting firms.

Both the trial court and Third Circuit agreed that it was immaterial that the named defendant was the homebuilder, rather than the engineer or architect employed by the homebuilder.

“Homebuilder” is not an enumerated category of licensed professional in the affidavit of merit statute and, in fact, a “health care facility” is the only entity, as opposed to individual, that is specifically listed in the affidavit of merit statute as a “licensed professional” protected by the act. However, the Third Circuit focused on the nature of the allegedly deficient attic and found it significant that expert testimony would be required to demonstrate whether the homebuilder’s designs and plans met the appropriate standard of care. Thus, construction companies, design-build contractors and other entities directly employing licensed professionals likely are similarly entitled to the protections afforded by the merit statute.

That result furthers the public policy behind tort reform laws such as the merit statute, which is to limit frivolous and costly lawsuits against professionals and their employers who are often the targets of such suits. Indeed, the district court noted that a plaintiff cannot be permitted to circumvent the affidavit of merit requirement by suing an entity such as a homebuilder rather than the licensed professionals employed by the entity.

Practical Implications

Although New Jersey’s merit law, on its face, seems to apply primarily to malpractice and negligence claims, the Calender decision and other recent decisions have held that the statute is broader and applicable to certain product liability claims. The ruling and rationale may have broader application beyond New Jersey, as at least 11 states have some form of an affidavit of merit requirement for claims involving the alleged negligence of a licensed professional.

Practitioners in the construction and product liability practice areas should be alert to the potential application of affidavit of merit statutes in litigation, whether claims are pled as direct malpractice claims or are disguised as legal theories. A few examples of less common areas where the merit statute might apply, depending on the facts, in the wake of the Calender decision include:

- Construction and design defect and associated personal injury claims against homebuilders, design-build contractors or commercial landlords;
- Product liability claims involving designs by licensed engineers;
- Financial institutions claims relating to insurance procurement; and
- Real estate title claims involving survey deficiencies.

As the courts continue to define the boundaries of the affidavit of merit statutes in New Jersey and other states, practitioners should be sure to look beyond the identity of the

named defendant and nature of the legal claim asserted and evaluate whether the underlying basis is the alleged misconduct of a licensed professional.

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Ballard Spahr defended the trial court claims against NVR, Inc.