

Vicarious Liability—Do You Really Need an Affidavit of Merit?

If a plaintiff’s fundamental cause of action sounds in professional negligence against a “licensed person,” he or she may not evade the AOM requirement by suing only a public entity, and not the individual “licensed person.” But what about the alleged medical negligence of an unlicensed person?

New Jersey Law Journal

May 6, 2021

By Heather M. LaBombardi and Nataliana A. Guida

Time and time again, a familiar question arises in the context of medical malpractice actions involving hospitals and health care facilities: Is an affidavit of merit always required against a health care facility where a plaintiff’s theory of negligence against it sounds only in vicarious liability? This question often plagues plaintiff and defense counsel alike, and has recently garnered the attention of our higher courts. The critical inquiry involves assessing the underlying theories of liability and determining whether the individual alleged to be an agent of the health care facility can be considered a “licensed person” under the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26. If the answer to the latter question is in the affirmative, then an affidavit of merit (AOM) is indeed required.

Pursuant to the Affidavit of Merit Statute, a plaintiff who alleges professional negligence against a “licensed person” must serve an affidavit from an appropriately qualified individual stating that the action has merit within 60 days of the defendant’s answer, or an additional 60 days thereafter upon a finding of good cause. N.J.S.A. 2A:53A:27. Failure to do so will result in dismissal of a

plaintiff’s complaint, with prejudice. *Meehan v. Antonellis*, 226 N.J. 216 (2016).

In the context of medical malpractice actions, the Affidavit of Merit Statute defines a “licensed person” to include “a dentist,” “a physician in the practice of medicine or surgery,” “a podiatrist,” “a chiropractor,” “a registered professional nurse,” “a health care facility,” “a physical therapist,” “a registered pharmacist,” and “a certified midwife, certified professional midwife, or certified nurse midwife.” N.J.S.A. 2A:53A-26(d), (f)-(m), (p). If a plaintiff files suit against any of these individuals, then an AOM is certainly required.

Although application of the Affidavit of Merit Statute is often straightforward, there are certain areas where controversy arises, particularly when a plaintiff institutes suit against a health care facility or entity but not an individual “licensed person,” instead pursuing their cause of action through a theory of vicarious liability.

The Appellate Division was confronted with the issue of whether an AOM was required in that particular situation in *McCormick v.*

State, 446 N.J. Super. 603 (2016). The plaintiff, a prisoner, sued the state of New Jersey alleging that he received inadequate medical care while he was an inmate at South Woods State Prison. Instead of suing the individual medical providers, the plaintiff sued only the State for medical malpractice. More than two years after the complaint was filed, the state filed a Motion to Dismiss as the plaintiff had failed to serve an appropriate AOM. In response, the plaintiff argued that the State was not a “licensed person” under the terms of the Affidavit of Merit Statute, and as such, an AOM was not required. Moreover, the plaintiff emphasized that no Ferreira conference had been held, which would have otherwise apprised him of the defendant’s opposition sooner, thereby affording him time to obtain an appropriate AOM if one was indeed determined to have been necessary. The trial court granted the state’s Motion to Dismiss, which the plaintiff appealed.

The Appellate Division agreed with the trial court and held that an AOM was indeed required, since the underlying claims were against licensed professionals for their alleged acts of medical negligence. In so holding, the court noted that the plaintiff attempted to circumvent the intent of the legislature by suing only the entity, which was an unacceptable course of action. *McCormick*, 446 N.J. Super. at 614. The Appellate Division further instructed courts to refrain from a “hyper-literal” reading of the Affidavit of Merit Statute in determining whether a defendant can be considered a health care facility for purposes of construing the Act, and emphasized that in making such determination, the focus should be on the nature of the underlying conduct of the medical personnel who allegedly harmed the plaintiff. *Id.* at 613. In other words, if a

plaintiff’s fundamental cause of action sounds in professional negligence against a “licensed person,” he or she may not evade the requirement by suing only a public entity, like the State, and not the individual “licensed person.”

Although the Appellate Division ultimately agreed with the trial court’s conclusion concerning the necessity of an AOM, the lack of a Ferreira conference was not inconsequential. Had a Ferreira conference been conducted within 90 days from the service of the defendant’s answer, the need for an AOM would have been discussed, and the plaintiff could have otherwise secured an Affidavit of Merit in a more timely fashion. As a result, the Appellate Division remanded the matter back to the trial court for a *Ferreira* conference to be conducted.

So what lessons have we learned from *McCormick*? A litigant cannot circumvent the requirements of the Affidavit of Merit Statute by avoiding naming a “licensed person” as a defendant. Ultimately, if a public entity is being sued for vicarious liability related to the actions of its staff or agents who are acting in their capacity as “licensed person(s),” then an AOM is required.

But what happens when a plaintiff’s theory of liability against a health care facility is based solely upon its vicarious liability for the alleged medical negligence of an unlicensed person? Recent case law suggests that an AOM is not required in such circumstances.

Our Appellate Division addressed this exact issue earlier this year in *Haviland v. Lourdes Medical Center of Burlington Co.*, 466 N.J. Super. 126 (App. Div. 2021). The plaintiff in *Haviland* instituted suit against Lourdes Medical Center under a theory of vicarious

liability, alleging that he was injured during a radiological examination of his left shoulder, at which time an unidentified technician instructed him to carry weights, contrary to the instructions of the physician who had ordered the study. The plaintiff did not serve an AOM, reasoning that one was not required since a radiology technician is not a “licensed person” enumerated within the Affidavit of Merit Statute, and his complaint against Lourdes was based only upon the doctrine of respondeat superior. Defendant Lourdes Medical Center filed a Motion to Dismiss for lack of an AOM, which the trial court granted and the Appellate Division ultimately reversed.

The Appellate Division reiterated its holding in *McCormick* and reasoned that an AOM is not required against a health care facility where a plaintiff’s claims are limited to vicarious liability for the alleged negligence of the facility’s employee, and that employee is not a “licensed person” under the Affidavit of Merit Statute. The Appellate Division’s holding in *Haviland* represents a rather straightforward application of what *McCormick*

initially suggested—that the critical inquiry in such situations involves analyzing whether the employee or agent of the defendant health care facility can be considered a “licensed person” under the Affidavit of Merit Statute in the first place.

The old adage “better safe than sorry” certainly rings true in realm of the Affidavit of Merit Statute. Best practice would be to serve an AOM early and in all situations where medical malpractice is alleged, especially where a health care facility is the sole-named defendant. A Ferreira conference should be held early as well, affording the plaintiff ample time to resolve any issues surrounding application of the Affidavit of Merit Statute and preserving a defendant’s objections and future grounds for dismissal.



Heather M. LaBombardi and Nataliana A. Guida are associates in the Health Care Department in the Roseland office of Marshall Dennehey Warner Coleman & Goggin, where they defend medical professionals and providers in a wide array of health care liability matters.