

To: New Jersey Law Revision Commission
From: Sameer Ahmad, Legislative Law Clerk
Re: Affidavit of Merit Statute - Application to *Respondeat Superior* Claims
(N.J.S. 2A:53A-27)
Date: July 10, 2023

MEMORANDUM

Project Summary

New Jersey’s Affidavit of Merit (“AOM”) statute¹ requires “a plaintiff bringing a malpractice or negligence claim against a ‘licensed person’^[2] to submit an AOM by an appropriately licensed person” pursuant to N.J.S. 2A:53A-27.³ The AOM must state that there is a “reasonable probability” that the plaintiff’s claim is “meritorious.”⁴

N.J.S. 2A:53A-26 defines “licensed persons” to include qualifying health care facilities, so plaintiffs must provide AOMs when making a claim that the licensed facility itself acted negligently.⁵ The statutory language does not, however, address whether an AOM is required in the context of a vicarious liability claim against a licensed facility arising out of the conduct of its unlicensed employee.⁶

In *Haviland v. Lourdes Medical Center of Burlington County, Inc.*, the New Jersey Supreme Court addressed “whether an AOM is required to maintain a negligence claim premised solely on a theory of respondeat superior for the alleged conduct of” an unlicensed employee.⁷ Relying on the legislative history of the statute and its language, as well as the Appellate Division’s reasoning in similar cases, the *Haviland* Court concluded that, in those circumstances, “a plaintiff has no such obligation.”⁸

Statute Considered

N.J.S. 2A:53A-27 provides, in relevant part:

¹ N.J. STAT. ANN. §§ 2A:53A-26 to -29 (West 2023).

² N.J.S. 2A:53A-26 lists the following as “licensed persons:” accountant; architect; attorney admitted to practice law in New Jersey; dentist; engineer; physician in the practice of medicine or surgery; podiatrist; chiropractor; registered professional nurse; physical therapist; land surveyor; registered pharmacist; veterinarian; insurance producer; certified midwife, certified professional midwife, or certified nurse midwife; licensed site remediation professional; and “a health care facility as defined in N.J.S.A. 26:2H-2.” N.J. STAT. ANN. § 2A:53A-26 (West 2023).

³ *Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc.*, 250 N.J. 368, 371 (2022); *see also* N.J. STAT. ANN. § 2A:53A-27 (West 2023).

⁴ *Haviland*, 250 N.J. at 371.

⁵ N.J. STAT. ANN. § 2A:53A-26; *see also* N.J. STAT. ANN. § 2A:52A-27.

⁶ *Haviland*, 250 N.J. at 371.

⁷ *Id.* at 379.

⁸ *Id.* at 372.

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 court 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.⁹

Background

In *Haviland*, Plaintiff alleged that during an examination on his injured shoulder at Lourdes Medical Center, a radiology technician asked him to hold some weights, which went against Plaintiff's physician's instructions.¹⁰ As a result, Plaintiff sustained further injuries to his shoulder, and required another surgical procedure."¹¹

One year later, Plaintiff filed a complaint alleging that the technician was "careless, negligent, and/or reckless . . . and had deviated from accepted standards of medical care" in performing Plaintiff's radiological imaging.¹² Plaintiff also claimed that the technician's employer, Lourdes Medical Center ("Center"), was vicariously liable for the acts of the technician.¹³ The trial court dismissed Plaintiff's claim because he failed to provide "an AOM from another radiologist."¹⁴

The Appellate Division reversed the trial court's dismissal, holding that "an AOM [was] not required for a health care facility when the plaintiff's claims in a medical negligence action [were] limited to vicarious liability for the alleged negligence of its employee, who does not meet the definition of a licensed person under [N.J.S. 2A:53A-26]."¹⁵ The Appellate Division relied on the fact that Plaintiff's vicarious liability claim implicated only the employee's standard of care.¹⁶ The Supreme Court granted the Center's petition for certification.¹⁷

⁹ N.J. STAT. ANN. § 2A:53A-27.

¹⁰ *Haviland*, 250 N.J. at 373.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 375.

¹⁵ *Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc.*, 466 N.J. Super. 126, 135-36 (App. Div. 2021), *aff'd*, 250 N.J. 368 (2022).

¹⁶ *Id.* at 132.

¹⁷ *Haviland*, 250 N.J. at 372.

Analysis

On appeal, the Center maintained that “because a health care facility can render medical care only through its individual employees, the Legislature could not have intended that those employees must also be ‘licensed persons’ for the AOM statute to apply.”¹⁸ Plaintiff contended that the AOM statute was only meant to apply to *direct* claims against licensed persons.¹⁹

Appellate Division Cases

In affirming the Appellate Division’s decision, the Supreme Court reviewed relevant appellate decisions²⁰ finding that AOMs are not always required in the context of vicarious liability claims of negligence on the part of unlicensed individuals.²¹

The Court began by discussing *Borough of Berlin v. Remington & Vernick Engineers*.²² In *Berlin*, the plaintiff provided an AOM *from* an unlicensed person to support a vicarious liability claim against a licensed engineering entity premised on the conduct of an unlicensed employee.²³ The defendant objected that the statute required an AOM from a licensed person.²⁴ The *Berlin* court held that the person signing the AOM need only have the same qualifications as the person against whom the direct claim was brought since the “[t]he liability pressed against the [defendant] engineering firm [was] solely vicarious.”²⁵ The *Haviland* Court explained that the *Berlin* decision established that “vicarious liability claims are tethered to the AOM requirements as to the alleged employee, not the employer.”²⁶

Next, the Court turned to *Hill International Inc. v. Atlantic City Board of Education*, in which a licensed engineer submitted an AOM to support the plaintiff’s claim that an architect negligently deviated from his duty of care in the construction of a school.²⁷ Although New Jersey engineers and architects have “overlapping areas of expertise and training,” the *Hill* court held that the engineer’s AOM was not sufficient because it was not from a “like-licensed” person.²⁸ The *Hill* court provided an important exception to the application of its holding.²⁹ An AOM from a “like-licensed” person is not required when “plaintiff’s claims are strictly confined to theories of vicarious liability or agency that do not implicate the standards of care of the defendant’s

¹⁸ *Id.* at 375.

¹⁹ *Id.*

²⁰ *Id.* at 379.

²¹ *Id.*

²² *Id.* (citing *Borough of Berlin v. Remington & Vernick Eng’rs*, 337 N.J. Super. 590 (N.J. Super. Ct. App. Div. 2001)).

²³ *Id.* (citing *Berlin*, 337 N.J. Super. at 597).

²⁴ *Id.* (citing *Berlin*, 337 N.J. Super. at 592).

²⁵ *Id.* (citing *Berlin*, 337 N.J. Super. at 598).

²⁶ *Id.*

²⁷ *Id.* at 379 (citing *Hill Int’l Inc. v. Atl. City Bd. of Educ.*, 438 N.J. Super. 562, 591 (App. Div. 2014)).

²⁸ *Hill*, 438 N.J. Super. at 580 (concluding that because N.J.S 2A-53A-26 specifically listed architects and engineers separately, the Legislature intended to treat them differently with regard to AOMs).

²⁹ *Id.* at 591.

profession.”³⁰ For example, if the plaintiff made a negligence claim against an employee and a “claim . . . against [the employer] solely based upon a theory of vicarious liability . . . , the plaintiff would need to obtain an AOM from an expert with the same kind of professional license as the negligent employee.”³¹

The *Haviland* Court then discussed the Appellate Division’s decision in *Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP*.³² In *Shamrock*, no AOM was filed and the vicarious liability claim, brought against an unlicensed law firm, was premised on the negligence of one of its licensed attorneys.³³ The *Shamrock* court held that an AOM was required because the action resulted from the licensed attorney’s negligence and malpractice.³⁴ The *Haviland* Court noted that the *Shamrock* court “reasoned that the AOM statute specifically ‘contemplates such potential vicarious liability’ by ‘mak[ing] the affidavit requirement applicable to any action for damages . . . resulting from’ a licensed person’s professional malpractice or negligence.”³⁵

Finally, in *McCormick v. State*, the Appellate Division focused on whether an AOM is required when a licensed employee “engages in . . . negligent conduct that [did] not implicate professional standards of care” in the context of a claim “that the [unlicensed employer] is liable for that harm under agency principles.”³⁶ The *McCormick* court held that an AOM was required only if the “claim of vicarious liability hinge[d] upon allegations of deviation from professional standards of care by licensed individuals who worked for the [unlicensed] defendant.”³⁷

Statutory Language

The Supreme Court considered the statutory language and legislative history of the AOM statute and pointed out that N.J.S. 2A:53A-27 requires an AOM for claims “*resulting from* an alleged act of malpractice or negligence *by a licensed person* in his profession or occupation.”³⁸

The radiology technician was not a “licensed person” as defined by the statute.³⁹ Plaintiff’s claim against the Center was not founded upon the negligence or malpractice of the licensed entity, but rather, was only attributable to the Center “under the doctrine of respondeat superior.”⁴⁰ Therefore, the Court held that an AOM was not required, and explained that this reading of the

³⁰ *Id.*

³¹ *Id.* at 592-93.

³² *Id.* at 380 (citing *Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP*, 416 N.J. Super. 1, 4 (App. Div. 2010)).

³³ *Id.* at 380 (citing *Shamrock*, 416 N.J. Super. at 4).

³⁴ *Id.* (citing *Shamrock*, 416 N.J. Super. at 22).

³⁵ *Id.* (quoting *Shamrock*, 416 N.J. Super. at 23).

³⁶ *Id.* (quoting *McCormick v. State*, 446 N.J.S. Super. 603, 615 (App. Div. 2016)).

³⁷ *Haviland*, 250 N.J. at 380 (quoting *McCormick*, 446 N.J.S. Super. at 615-16).

³⁸ *Id.* at 382 (quoting N.J. STAT. ANN. § 2A:53A-27) (emphasis added).

³⁹ *Id.* at 383; *see also* N.J. STAT. ANN. § 2A:53A-26.

⁴⁰ *Haviland*, 250 N.J. at 383.

statute “accords with the Appellate Division cases . . . which focused ‘on the nature of the underlying conduct responsible for the plaintiffs’ injuries.’”⁴¹

Legislative History

The *Haviland* Court also deemed its interpretation “consistent with the statute’s legislative history” because during the initial drafting process, legislators limited the professions subject to the AOM requirement to nine identified professions plus “a health care facility.”⁴² Although the AOM statute has been amended several times to include additional professions, none of those amendments added “radiology technician.”⁴³

Accordingly, the Supreme Court held “that [N.J.S. 2A:53A-27] does not require submission of an AOM to maintain a vicarious liability claim against a licensed health care facility based on the conduct of its non-licensed agents or employees.”⁴⁴

Pending Bills

There are no pending bills in New Jersey that concern the issue addressed by the Supreme Court in *Haviland v. Lourdes Medical Center*.

Conclusion

Staff requests authorization to conduct additional research and outreach to determine whether it would be useful to modify N.J.S.A. 2A:53A-27 to clarify the scope of the AOM requirement as discussed by the Supreme Court in *Haviland*.⁴⁵

⁴¹ *Id.* (quoting *McCormick*, 446 N.J. Super. at 615).

⁴² *Id.* at 383.

⁴³ *Id.*

⁴⁴ *Id.* at 383-84.

⁴⁵ *Id.*