

To: New Jersey Law Revision Commission
From: Shelby E. Ward, Esq.¹ and Carol Disla-Roa, Legislative Fellow
Re: Affidavit of Merit Statute – “Licensed Practical Nurse” (N.J.S. 2A:53A-26)
Date: May 6, 2024

MEMORANDUM

Project Summary

The New Jersey Affidavit of Merit (“AOM”) statute, N.J.S. 2A:53A-26 to -29, provides that in an action for damages for personal injuries “resulting from an alleged act of malpractice or negligence by a licensed person,” the plaintiff shall provide the 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.”²

N.J.S. 2A:53A-26 defines “licensed person” as one of sixteen listed professions (plus a “health care facility”), including “a registered professional nurse” under subsection (i).³ The definition of “licensed person” within the AOM statute has been interpreted to include only the seventeen persons explicitly listed within the statute.⁴

In *Gilligan v. Junod*, the Appellate Division considered, as a matter of first impression, the issue of whether a licensed practical nurse is a “licensed person” as defined in the AOM statute.⁵ The *Gilligan* Court analyzed the legislative history and plain language of the statute and concluded that a licensed practical nurse is not a “licensed person” for purposes of that statute.⁶

Statute Considered

N.J.S. 2A:53A-26 provides:

As used in this act, “licensed person” means any person who is licensed as:

- a. an accountant pursuant to P.L.1997, c. 259 (C.45:2B-42 et seq.);
- b. an architect pursuant to R.S.45:3-1 et seq.;
- c. an attorney admitted to practice law in New Jersey;

¹ Preliminary research and drafting for this memorandum was conducted by Shelby E. Ward, Esq., as a pro bono volunteer with the N.J. Law Revision Comm’n during the Summer and Fall of 2023. Ms. Ward’s work was updated and supplemented by Carol Disla-Roa.

² N.J. STAT. ANN. § 2A:53A-27 (West 2024).

³ N.J. STAT. ANN. § 2A:53A-26(i) (West 2024).

⁴ *Gilligan v. Junod*, 474 N.J. Super. 39, 43-44 (App. Div. 2022), *leave to appeal denied*, 253 N.J. 273 (2023) (citing *Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc.*, 250 N.J. 368, 377 and 383 (2022) (explaining the expressly limited scope of “licensed persons” under the statute and reasoning that the legislature “carefully circumscribed list of professions to which the Legislature has elected to apply the AOM requirement”)).

⁵ *Gilligan* at 40.

⁶ *Id.* at 48.

- d. a dentist pursuant to R.S.45:6-1 et seq.;
- e. an engineer pursuant to P.L.1938, c. 342 (C.45:8-27 et seq.);
- f. a physician in the practice of medicine or surgery pursuant to R.S.45:9-1 et seq.;
- g. a podiatrist pursuant to R.S.45:5-1 et seq.;
- h. a chiropractor pursuant to P.L.1989, c. 153 (C.45:9-41.17 et seq.);
- i. a registered professional nurse pursuant to P.L.1947, c. 262 (C.45:11-23 et seq.);
- j. a health care facility as defined in section 2 of P.L.1971, c. 136 (C.26:2H-2);
- k. a physical therapist pursuant to P.L.1983, c. 296 (C.45:9-37.11 et seq.);
- l. a land surveyor pursuant to P.L.1938, c. 342 (C.45:8-27 et seq.);
- m. a registered pharmacist pursuant to P.L.2003, c. 280 (C.45:14-40 et seq.);
- n. a veterinarian pursuant to R.S.45:16-1 et seq.;
- o. an insurance producer pursuant to P.L.2001, c. 210 (C.17:22A-26 et seq.);
- p. a certified midwife, certified professional midwife, or certified nurse midwife pursuant to R.S.45:10-1 et seq.; and
- q. a licensed site remediation professional pursuant to section 7 of P.L.2009, c. 60 (C.58:10C-7).⁷

Background

In *Gilligan*, the Plaintiff, as the executor of his deceased wife’s estate, brought a medical malpractice claim against Susan Junod, a licensed practical nurse (“Defendant”).⁸ The Plaintiff’s wife had colon surgery and experienced medical complications, which led to the Plaintiff calling the doctor’s office on multiple occasions for medical advice.⁹ The Defendant was the person who spoke with the Plaintiff, and she provided general medical advice.¹⁰ Five days from the date of the surgery, the Plaintiff found his wife unresponsive; she was taken to the hospital and later pronounced dead.¹¹

The Plaintiff subsequently filed a medical malpractice action against the Defendant for failing to consult with the doctor in the medical practice before she gave the Plaintiff medical advice for his late wife.¹² The Defendant filed a motion to dismiss, arguing that as a licensed practical nurse, she was a licensed person under the AOM statute and therefore Plaintiff must submit an AOM.¹³ The Plaintiff rejected this argument and sought a declaration that an AOM was not required.¹⁴ Following oral argument, the trial court granted the Plaintiff’s motion for a declaration and denied the Defendant’s motion to dismiss.¹⁵

⁷ N.J. STAT. ANN. § 2A:53A-26 (West 2024) (emphasis added).

⁸ *Gilligan*, at 41.

⁹ *Id.* at 41.

¹⁰ *Id.* at 41-42.

¹¹ *Id.* at 42.

¹² *Id.* at 42.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

The Appellate Division granted the Defendant leave to appeal the interlocutory orders.¹⁶ Ultimately, it affirmed and remanded the matter for further proceedings.¹⁷

Analysis

The *Gilligan* Court examined as a matter of first impression whether “a licensed practical nurse [is] a ‘licensed person’ as defined in and covered by the Affidavit of Merit (AOM) statute.”¹⁸ Examining the language and history of the statute, the Appellate Division emphasized that the AOM statute explicitly identifies sixteen occupations as well as a “healthcare facility” as a “licensed person” under the statute, including “a registered professional nurse pursuant to... [N.J.S.] 45:11-23 et seq....”¹⁹

The Appellate Division also noted that in *Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc.*, the Supreme Court of New Jersey emphasized that “‘licensed person’ as defined in the AOM statute is expressly limited to certain professionals.”²⁰ In *Haviland*, the plaintiff filed a vicarious liability claim against a licensed health care facility for the underlying conduct of “a radiology technician [who] had [allegedly] negligently performed a post-surgery imaging exam resulting in injury to plaintiff’s shoulder....”²¹ The *Haviland* Court “held that an AOM was not necessary because the alleged malpractice was committed by a radiology technician who is not a ‘licensed person.’”²²

The Defendant argued that because subsection (i) of the AOM statute references the Nursing Statute (N.J.S. 45:11-23), it was the Legislature’s intention “to include a licensed practical nurse within the list of specified professions in the AOM statute.”²³ In response, the Court stated that although the AOM statute references the Nursing Statute when it mentions “registered professional nurse,” the Legislature did not intend to include a licensed practical nurse within the definition of a “licensed person” under the AOM Statute.²⁴

The Court explained that the Legislature specifically included separate definitions for a “registered professional nurse” and a “licensed practical nurse” in the Nursing Statute, and that the reference to “registered professional nurse” in subsection (i) of the AOM statute is limited accordingly.²⁵ The Court concluded that the Legislature did not intend to include a licensed practical nurse when it mentioned only a “registered professional nurse” under the definition of a

¹⁶ *Id.*

¹⁷ *Id.* at 48.

¹⁸ *Id.* at 40.

¹⁹ N.J. STAT. ANN. § 2A:53A-26(i) (West 2024).

²⁰ *Id.* at 46 (citing *Haviland* at 383).

²¹ *Id.* (citing *Haviland* at 373).

²² *Id.* (citing *Haviland* at 383-84).

²³ *Id.* at 44.

²⁴ *Id.* at 45-46.

²⁵ *Id.* at 45.

“licensed person” in the AOM Statute.²⁶

The Defendant claimed that her interpretation of “the AOM statute is supported by the purpose behind the statute.”²⁷ The Court pointed out that if the Legislature wished to amend the statute, it was capable of doing so, noting that in the 2008 decision in *Saunders by Saunders v. Cap. Health Sys. at Mercer*, the court “held that a licensed midwife was not a ‘licensed person’ under the AOM statute.... [,]” and “[i]n 2010, the Legislature.... amended the AOM statute to include “a certified midwife, certified professional midwife, or certified nurse midwife.”²⁸

The Defendant also argued that “existing case law recognized that licensed practical nurses are covered by the AOM statute”²⁹ relying on an earlier case in which there were “claims against three nurses: two registered professional nurses and a licensed practical nurse.... [and] [t]he claims against all three defendants were dismissed because the plaintiff had failed to file a timely AOM.”³⁰ The Court rejected the Plaintiff’s argument explaining that the issues it addressed in that case concerned “whether the plaintiff had shown ‘substantial compliance’ and ‘extraordinary circumstances’” and that “any statements in *Yearby* concerning the requirements for an AOM were not focused on the question of whether an AOM was required for a licensed practical nurse.”³¹

Ultimately, the Court held that “the AOM statute does not cover a negligence claim against a licensed practical nurse.”³²

Pending Bills

There is one bill pending that seeks to amend the language of N.J.S. 2A:53A-26 however it is not relevant to the issue in *Gilligan*.³³

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding N.J.S. 2A:53A-26 to determine whether the statute would benefit from modification.

²⁶ *Id. See Id.* at 45 (stating that the Nursing Statute “recognizes the additional responsibilities of registered professional nurses to diagnose and treat physical and emotional health problems.... [and] in defining the practice of nursing as a licensed practical nurse, the Legislature expressly recognized that a licensed practical nurse works under the direction of ‘a registered nurse....’”).

²⁷ *Id.* at 46.

²⁸ *Id.* (citing 398 N.J. Super. 500, 502 (App. Div. 2008)); N.J. STAT. ANN. § 2A:53A-26(p) (West 2024).

²⁹ *Id.* at 47; *Estate of Yearby v. Middlesex County*, 453 N.J. Super. 388 (App. Div. 2018).

³⁰ *Id.*; *Yearby* at 392.

³¹ *Id.* at 48.

³² *Id.*

³³ *See generally* Statement to S.B. 54, 2024 Leg., 221st Sess. (Jan. 9, 2024) (“[t]his bill would require a plaintiff to obtain an affidavit of merit in a malpractice suit against an enrolled agent [of the IRS], by adding enrolled agents to the list of professionals covered”).