



## NEW JERSEY LAW REVISION COMMISSION

### **Tentative Report Addressing the Application of the Affidavit of Merit Statute to *Respondeat Superior* Claims**

**March 21, 2024**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **May 20, 2024**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Project Summary<sup>1</sup>

New Jersey’s Affidavit of Merit (“AOM”) statute<sup>2</sup> requires “a plaintiff bringing a malpractice or negligence claim against a ‘licensed person’<sup>3</sup>] to submit an AOM by an appropriately licensed person” pursuant to N.J.S. 2A:53A-27.<sup>4</sup> The AOM must state that there is a “reasonable probability” that the plaintiff’s claim is “meritorious.”<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

In *Haviland v. Lourdes Medical Center of Burlington County, Inc.*, the New Jersey Supreme Court addressed, as a matter of first impression, “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.<sup>8</sup> Relying on the legislative history of the statute and its language, and referencing the Appellate Division’s reasoning in similar cases, the *Haviland* Court concluded that, in those circumstances, “a plaintiff has no such obligation” to provide an AOM.<sup>9</sup>

## Statute Considered

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

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,

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<sup>1</sup> Preliminary work on this project was conducted by Sameer Ahmad during his time as a Legislative Law Clerk with the N.J. Law Revision Comm’n (Summer of 2023).

<sup>2</sup> N.J. STAT. ANN. §§ 2A:53A-26 to -29 (West 2024).

<sup>3</sup> 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 2024).

<sup>4</sup> *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 2024).

<sup>5</sup> *Haviland*, 250 N.J. at 371.

<sup>6</sup> N.J. STAT. ANN. § 2A:53A-26 (West 2024); *see also* N.J. STAT. ANN. § 2A:52A-27 (West 2024).

<sup>7</sup> *Haviland*, 250 N.J. at 371.

<sup>8</sup> *Id.* at 379.

<sup>9</sup> *Id.* at 372.

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.<sup>10</sup>

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### **Legislative History of N.J.S. 2A:53A-27**

The New Jersey Legislature enacted N.J.S. 2A:53A-26 and -27, in 1995 as part of “a tort reform package designed to ‘strike[ ] a fair balance between preserving a person's right to sue and controlling nuisance suits[.]’”<sup>11</sup> The AOM statute requires “an affidavit from an appropriate[ly] licensed professional attesting to the merit of plaintiffs’ claims” in actions concerning professional negligence.<sup>12</sup> Since its enactment, the New Jersey Supreme Court has emphasized that “[t]he core purpose underlying the statute is ‘to require plaintiffs ... to make a threshold showing that their claim is meritorious.... [so] that meritless lawsuits readily could be identified at an early stage of the litigation.’”<sup>13</sup>

The Supreme Court noted in *Haviland* that “[d]uring the initial drafting process, committee amendments were made to [N.J.S. 2A:53A-26] [to] ‘limit the professions to which the bill applies from all professions licensed under Title 45 of the Revised Statutes,’ to nine individual professions and a ‘health care facility.’”<sup>14</sup> Although three later amendments have expanded the definition of “licensed person,” most recently in 2019, the Legislature has not added “radiology technician” to its enumerated list of licensed persons.<sup>15</sup>

### **Background**

In *Haviland*, the plaintiff alleged that during an examination of his injured shoulder at Lourdes Medical Center, a radiology technician asked him to hold weights, which was contrary to the instructions of the plaintiff’s physician.<sup>16</sup> As a result, the plaintiff sustained further injuries to his shoulder, and required another surgical procedure.”<sup>17</sup>

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<sup>10</sup> N.J. STAT. ANN. § 2A:53A-27 (West 2024).

<sup>11</sup> *Haviland*, 250 N.J. at 376 (citing *Palanque v. Lambert-Woolley*, 168 N.J. 398, 404, (2001) (alteration in original) (internal quotations omitted) (quoting Office of the Governor, *News Release 1* (June 29, 1995)).

<sup>12</sup> *Id.* (internal quotations omitted).

<sup>13</sup> *Paragon Contractors, Inc. v. Peachtree Condo. Ass'n*, 202 N.J. 415, 421 (2010) (citing *In re Petition of Hall*, 147 N.J. 379, 391 (1997) (quoted in *Alan J. Cornblatt, P.A. v. Barow*, 153 N.J. 218, 242 (1998), *modified in part by, Ferreira v. Rancocas Orthopedic Assoc.*, 178 N.J. 144, 154 (2003)).

<sup>14</sup> *Haviland*, 250 N.J. at 383 (citing *A. Ins. Comm. Statement to S. 1493 1-2* (June 1, 1995)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 373.

<sup>17</sup> *Id.*

One year later, the 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 his radiological imaging.<sup>18</sup> The plaintiff further claimed that the technician’s employer, Lourdes Medical Center (“Center”), was vicariously liable for the acts of its employee, the technician.<sup>19</sup> The trial court dismissed the plaintiff’s claim citing that the plaintiff failed to provide “an AOM from another radiologist.”<sup>20</sup>

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].”<sup>21</sup> The Appellate Division relied on the fact that plaintiff’s vicarious liability claim implicated only the employee’s standard of care and not the standard of care of the licensed facility as covered by the AOM statute.<sup>22</sup> The Supreme Court granted the Center’s petition for certification.<sup>23</sup>

### Analysis

The New Jersey Supreme Court in *Haviland* addressed, as a matter of first impression, “the question of whether an AOM is required to maintain a negligence claim premised solely on a theory of respondeat superior for the alleged conduct of” an employee who is not a “licensed person” under the AOM statute.<sup>24</sup>

In affirming the Appellate Division’s decision, the *Haviland* Court reviewed other relevant Appellate Division decisions that previously examined vicarious liability in the AOM context.<sup>25</sup> Finding that AOMs are not required in the context of vicarious liability claims based solely on the conduct of unlicensed individuals outside of the standard of care of the licensed employer, the Supreme Court affirmed the decision of the Appellate Division.<sup>26</sup>

Cases decided by the Appellate Division in which the courts “grappled with applying the AOM statute to vicarious liability claims in other situations” that the Court in *Haviland* found “instructive” are briefly discussed below, followed by a discussion of the *Haviland* case.<sup>27</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 375.

<sup>21</sup> *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).

<sup>22</sup> *Id.* at 132.

<sup>23</sup> *Haviland*, 250 N.J. at 372.

<sup>24</sup> *Id.* at 379.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (quoting *Hill Int’l Inc. v. Atl. City Bd. of Educ.*, 438 N.J. Super. 562, 591 (App. Div. 2014) (citing *Borough of Berlin v. Remington & Vernick Eng’rs*, 337 N.J. Super. 590 (App. Div. 2001))).

<sup>27</sup> *Id.*

## *Applicability of Vicarious Liability under N.J.S. 2A:53A-27*

### - *Borough of Berlin v. Remington & Vernick Engineers*

In the *Berlin* case, the plaintiff provided an AOM from an unlicensed expert hydrologist to support a vicarious liability claim against a licensed engineering entity premised on the conduct of an employee-hydrologist who was not a licensed person.<sup>28</sup> The defendant objected that the statute required an AOM from a licensed person.<sup>29</sup> The *Berlin* court held that under the doctrine of substantial compliance, the non-licensed expert hydrologist was the “appropriately licensed person.”<sup>30</sup> The court reasoned 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.”<sup>31</sup>

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.”<sup>32</sup>

### - *Hill International Inc. v. Atlantic City Board of Education*

In *Hill*, 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.<sup>33</sup> 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.<sup>34</sup> The *Hill* court identified an important exception to the application of its holding.<sup>35</sup> 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 profession.”<sup>36</sup> 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.”<sup>37</sup>

### - *Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP*

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<sup>28</sup> *Id.* (citing *Berlin*, 337 N.J. Super. at 597).

<sup>29</sup> *Id.* (citing *Berlin*, 337 N.J. Super. at 592).

<sup>30</sup> *Id.* (citing *Berlin*, 337 N.J. Super. at 598).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 379 (citing *Hill Int’l Inc.*, 438 N.J. Super. at 591).

<sup>34</sup> *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).

<sup>35</sup> *Id.* at 591.

<sup>36</sup> *Id.*; See also *Id.* At 590 (“an AOM is not required when a plaintiff’s allegations against a professional are based upon ‘common knowledge’ and do not require proof of a deviation from a professional standard of care.” quoting *Triarsi v. BSC Grp. Servs., L.L.C.*, 422 N.J. Super. 104, 116-17 (App. Div. 2011)).

<sup>37</sup> *Id.* at 592-93.

The Appellate Division in *Shamrock* examined whether an AOM was required for vicarious liability claims against two unlicensed law firms based on the conduct of licensed attorney-employees.<sup>38</sup> The *Shamrock* court held that an AOM was required because the underlying action resulted from licensed attorneys' negligence and malpractice.<sup>39</sup> 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.<sup>40</sup>

- *McCormick v. State*

In *McCormick v. State*, a prison inmate filed a vicarious liability claim against the State for the negligent conduct of prison medical staff.<sup>41</sup> The Appellate Division examined 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."<sup>42</sup> 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."<sup>43</sup> Thus, despite plaintiff's arguments that the State was not a licensed person and that the State was liable under a theory of agency, in examining the underlying conduct, the court found that an AOM was required because the claims concerned the medical staff who were alleged to have engaged in conduct that deviated from the standards of their licensure.<sup>44</sup>

- *Haviland v. Lourdes Medical Center of Burlington County., Inc.*

In *Haviland*, the Supreme Court addressed whether an AOM was required for a vicarious liability claim against a licensed healthcare facility premised solely on the basis of the negligent conduct of an unlicensed radiology technician-employee.<sup>45</sup> The defendant healthcare facility 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."<sup>46</sup>

Conversely, the plaintiff contended that "defendant's 'strained reading' of the statute would require an AOM in every case where a plaintiff seeks to hold a health care facility vicariously

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<sup>38</sup> *Id.* at 380 (citing *Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP*, 416 N.J. Super. 1, 3 (App. Div. 2010)).

<sup>39</sup> *Id.* (citing *Shamrock*, 416 N.J. Super. at 22).

<sup>40</sup> *Id.* (quoting *Shamrock*, 416 N.J. Super. at 23).

<sup>41</sup> *Id.* (quoting *McCormick v. State*, 446 N.J. Super. 603, 609 (App. Div. 2016)).

<sup>42</sup> *Id.* (quoting *McCormick*, 446 N.J. Super. At 615).

<sup>43</sup> *Id.* at 381 (quoting *McCormick*, 446 N.J. Super. at 615).

<sup>44</sup> *Id.* (quoting *McCormick*, 446 N.J. Super. at 613).

<sup>45</sup> *Id.* at 372.

<sup>46</sup> *Id.* at 375.

liable, even where the alleged negligent conduct does not implicate any standard of medical care, such as when a hospital cafeteria employee negligently spills hot water on another person.”<sup>47</sup>

The Court noted that “under the doctrine of respondeat superior[,] an employer will be held vicariously liable ‘for the negligence of an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of [their] employment.’”<sup>48</sup> Additionally, “under the doctrine of respondeat superior, ‘the employer's standard of care is not directly implicated, but is imputed from that of its employee.’”<sup>49</sup>

The Court then explained that under N.J.S. 2A:53A-27, an AOM is required where “(1) a plaintiff's claim is for personal injuries, wrongful death, or property damages, (2) the personal injuries, wrongful death, or property damages result from an alleged act of malpractice or negligence, and (3) the alleged act of malpractice or negligence is carried out by a licensed person in the course of practicing the person's profession.”<sup>50</sup> Though the Court agreed that the first two elements applied to the plaintiff's claim, it found that the claim did not apply as to the third element because the act of negligence at issue here was not carried out by a license person in the practice of their profession. The Court thus concluded that “[b]ecause the alleged injury does not ‘result from’ an act committed ‘by a licensed person in his profession or occupation,’ an AOM is not required to maintain plaintiff's claim.”<sup>51</sup>

Furthermore, the Supreme Court considered the statutory language and legislative history of the AOM statute and emphasized that N.J.S. 2A:53A-27 requires an AOM only for claims “resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation.”<sup>52</sup>

The radiology technician was not a “licensed person” as defined by the statute.<sup>53</sup> The plaintiff's claim against the Center was not founded upon the negligence or malpractice of the licensed entity, but rather was attributable to the Center only “under the doctrine of respondeat superior.”<sup>54</sup> Therefore, the Court held that an AOM was not required, and explained that this

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<sup>47</sup> *Id.* at 376.

<sup>48</sup> *Id.* at 378 (quoting *Carter v. Reynolds*, 175 N.J. 402, 408-09 (2003)).

<sup>49</sup> *Id.* at 375 (quoting *Haviland*, 466 N.J. Super. at 131, 132).

<sup>50</sup> *Id.* at 382.

<sup>51</sup> *Id.* at 383 (quoting N.J. STAT. ANN. § 2A:53A-27 (West 2024)); But see *Martin v. Perinni Corp.*, 37 F. Supp. 2d 362, 365-366 (D.N.J. 1999) (stating that “[b]ecause of the doctrine of respondeat superior, an affidavit must also be provided where a negligent act committed by an unlicensed person in the course of his employment may be imputed to a licensed person”; And, inferring that “a business organization whose leadership is composed of “licensed persons” within the meaning of N.J.S.A. 2A:53A-26 is also considered a “licensed person” for purposes of the Affidavit of Merit statute”).

<sup>52</sup> *Id.* at 382 (quoting N.J. STAT. ANN. § 2A:53A-27 (West 2024)) (emphasis added).

<sup>53</sup> *Id.* at 383; *see also* N.J. STAT. ANN. § 2A:53A-26 (West 2024).

<sup>54</sup> *Haviland*, 250 N.J. at 383.

reading of the statute “accords with the Appellate Division cases . . . which focused ‘on the nature of the underlying conduct responsible for the plaintiffs’ injuries.’”<sup>55</sup>

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.”<sup>56</sup>

### ***Post-Haviland Case Law***

- *Morona S. Constr., LLC v. Diamond Agency, LLC*

In *Morona*, the plaintiff appealed a motion dismissing its complaint for failure to file an AOM against the defendants.<sup>57</sup> Among the claims filed, the court held that the plaintiff’s vicarious liability claim against a licensed insurance producer entity based on a negligent insurance agent-employee’s conduct, required an AOM.<sup>58</sup> Insurance producers, such as the entity and agent here, are licensed persons pursuant to N.J.S. 2A:53A-26(o). The agent employee in this case was an insurance producer who had been acting under a suspended – and later revoked – license at the time in issue.<sup>59</sup>

Despite the agent’s suspended license, the court held that the disposition in *Haviland* did not apply to the plaintiff’s claim against the agent because it was filed as a professional negligence claim specifically for “negligence by a licensed person in his profession or occupation.”<sup>60</sup> The court concluded that the plaintiff was required to file an AOM for its respondeat superior claim against the employer-entity, stating that the agent’s “practice or work ... fell outside acceptable professional or occupational standards.”<sup>61</sup> The court did, however, acknowledge that there was a basis for an exception to the AOM requirement.<sup>62</sup>

- *M.M. v. Atl. Health Sys., Inc.*

In *M.M.*, the Appellate Division examined “whether an affidavit of merit must be served

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<sup>55</sup> *Id.* (quoting *McCormick*, 446 N.J. Super. at 615).

<sup>56</sup> *Id.* at 383-84.

<sup>57</sup> *Morona S. Constr., LLC v. Diamond Agency, LLC*, No. A-3918-21, 2023 WL 4540402, at \*1 (App. Div. July 14, 2023).

<sup>58</sup> *Id.* at 4.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (quoting N.J. STAT. ANN. § 2A:53A-27 (West 2024)) (internal quotations omitted).

<sup>61</sup> *Id.* (quoting N.J. STAT. ANN. § 2A:53A-27 (West 2024)) (internal quotations omitted); See also *Triarsi v. BSC Grp. Servs., LLC*, 422 N.J. Super. 104, 114 (App. Div. 2011) (“To determine whether claims require submission of an affidavit of merit, ‘courts must look to the underlying factual allegations, and not how the claim is captioned in the complaint.... [I]t is the nature of the proof required that controls’”) (internal citations omitted).

<sup>62</sup> See generally *Id.* (“[t]he common knowledge exception to the [AMS] applies only when expert testimony is not required to prove a professional defendant's negligence.” quoting *Cowley v. Virtua Health Sys.*, 242 N.J. 1, 8 (2020)).



on a defendant, who as a physician is a ‘licensed person’ within the meaning of the Affidavit of Merit Statute, to support a negligence claim based on a failure to report suspected child abuse pursuant to N.J.S.[] 9:6-8.10.”<sup>63</sup> The *M.M.* court held that under the facts of the case, an AOM was not required.<sup>64</sup> In its analysis, the court reasoned that the harmful conduct at issue – “the failure to report suspected child abuse under N.J.S.[] 9:6-8.10 – [did] not implicate the standards of care within” the physician’s profession.<sup>65</sup> N.J.S. 9:6-8.10 applies to “all persons,” and is not specific to a profession or professions, thus the court concluded that the physician’s negligence in failing to report suspected child abuse, was not an “act of ... negligence ... carried out by a licensed person in the course of practicing the person's profession” pursuant to N.J.S. 2A:53A-27.<sup>66</sup>

### **Pending Bills**

There are no bills pending that concern N.J.S. 2A:53A-27 and the issue addressed by the Supreme Court in *Haviland v. Lourdes Medical Center*.

### **Conclusion**

The proposed modifications to N.J.S. 2A:53A-27 add language intended to clarify that claims in professional negligence or malpractice actions that are premised solely on vicarious liability or agency based on the conduct of non-licensed agents or employees and do not implicate the standard of care of the licensed party, do not require an affidavit of merit as held by the Supreme Court in *Haviland*.<sup>67</sup>

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<sup>63</sup> *M.M. v. Atl. Health Sys., Inc.*, No. A-2218-22, 2023 WL 5608960, at \*3 (N.J. Super. Ct. App. Div. Aug. 30, 2023).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 4 (citing *Haviland*, 250 N.J. at 382).

<sup>67</sup> *Haviland*, 250 N.J. at 383-84.

## APPENDIX

The proposed modifications to **N.J.S. 2A:53A-27** are shown below (with ~~striketrough~~, underlining, and *italics*<sup>68</sup>).

### **N.J.S. 2A:53A-27. Affidavit required in certain actions against licensed persons**

(a) 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.

~~(b) In an action for damages against a licensed person, eClaims that assert vicarious liability or agency against that licensed person<sup>69</sup> based solely on the conduct of a non-licensed employee or agent<sup>70</sup>, and that do not implicate the standard of care of the licensed defendant's profession, do not require an affidavit pursuant to this section.<sup>71</sup>~~

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<sup>68</sup> Italicized language represents language that has been modified for the release of the March 2024 Tentative Report based on direction received from the Commission at the March 2024 meeting.

<sup>69</sup> As reflected in the minutes, during the March 2024 Commission meeting, Commissioners suggested that introductory language pointing to theories of agency should be removed since it was duplicative. They also suggested that the proposed paragraph should begin with "Claims." Lastly, they agreed that the introductory language preceding "based solely" should be removed and the subsection should begin with "Claims." It was the consensus of the Commission to move forward with those modifications along with the addition of this explanatory footnote as recommended by Commissioner Bernard Bell.

<sup>70</sup> The term "agent" reflects the subsection's application to claims based on theories of agency. See *Id.* at 381 (quoting *McCormick v. State*, 446 N.J. Super. 603, 613 (App. Div. 2016)) ("If .... [licensed] professionals 'engage in harmful conduct that deviates from the standards of care of their respective fields of licensure, and a plaintiff claims that the defendant public entity is liable for that harm under agency principles, then an AOM from an appropriate qualified person is necessary to support the lawsuit"). See also *Id.* at 383-84 ("we hold that the AOM statute 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") (emphasis added).

<sup>71</sup> *Id.* at 379 (The Appellate Division later characterized claims premised solely on "theories of vicarious liability or agency that do not implicate the standards of care of the defendant's profession" as an exception to the statutory AOM requirement." (citing *Hill Int'l Inc.*, 438 N.J. Super. at 591. (citing *Borough of Berlin v. Remington & Vernick Eng'rs*, 337 N.J. Super. 590 (App. Div. 2001))); See also *Id.* at 372 ("we hold that the AOM statute does not require submission of an AOM to support a vicarious liability claim against a licensed health care facility based only on the conduct of its non-licensed employee."); See *Id.* ("Plaintiff's vicarious liability claim does not implicate Lourdes Medical Center's standard of care and therefore falls outside the intended scope of the AOM statute").

(c) In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c. 17 (C.2A:53A-41). In all other cases, 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 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 the case.

## COMMENT

The proposed language is added as a stand-alone paragraph of N.J.S. 2A:53A-27 to emphasize that an affidavit pursuant to this section is not required for vicarious liability or agency claims based solely on the conduct of a non-licensed employee or agent.<sup>72</sup> The modification is inserted before the final paragraph to indicate the scope of its applicability – the final paragraph applies only in actions for medical malpractice, whereas the first paragraph and the new paragraph apply broadly.

The proposed language also reflects the holding in *Haviland v. Lourdes Medical Center*, “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.”<sup>73</sup> Consistent with contemporary drafting practices, subsection lettering has been added to each paragraph of N.J.S. 2A:53A-27.<sup>74</sup>

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<sup>72</sup> *Id.*; N.J. STAT. ANN. § 2A:53A-27 (West 2024); See generally *New Hampshire Ins. Co. v. Diller*, 678 F. Supp. 2d 288, 308 n.25 (D.N.J. 2009), *as amended* (Jan. 13, 2010) (“[t]o determine whether a cause of action implicates the Affidavit of Merit statute, litigants and the court need not concern themselves with the claim’s denomination or label, but rather ‘should determine if the underlying factual allegations of the claim require proof of a deviation from the professional standard of care for that specific profession.’” (quoting *Couri v. Gardner*, 173 N.J. 328, 341(2002))) (emphasis added).

<sup>73</sup> *Id.* at 383-84.

<sup>74</sup> Subsection designations (a)-(c) are proposed based on recommendations from the Commission.