

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1907-21

GUY GILLIGAN, administrator
of the estate of IL SON GILLIGAN,
and GUY GILLIGAN, individually,

Plaintiffs-Respondents,

v.

SUSAN JUNOD, L.P.N.,

Defendant-Appellant,

and

VIRTUA SURGICAL GROUP,
P.A., i/j/s/a,

Defendant-Respondent.

APPROVED FOR PUBLICATION

November 9, 2022

APPELLATE DIVISION

Argued September 28, 2022 – Decided November 9, 2022

Before Judges Messano, Gilson, and Gummer.

On appeal from an interlocutory order of the Superior
Court of New Jersey, Law Division, Burlington
County, Docket No. L-1473-20.

Christopher M. Wolk argued the cause for appellant
(Blumberg & Wolk, LLC, attorneys; Christopher M.
Wolk and Timothy Zanghi, on the briefs).

Gary D. Ginsberg argued the cause for respondents Guy Gilligan, administrator of the estate of Il Son Gilligan, and Guy Gilligan, individually (Ginsberg & O'Connor, PC, attorneys; Gary D. Ginsberg, on the brief).

The opinion of the court was delivered by

GILSON, J.A.D.

This appeal presents a question of first impression: is a licensed practical nurse a "licensed person" as defined in and covered by the Affidavit of Merit (AOM) statute, N.J.S.A. 2A:53A-26 to -29. Defendant Susan Junod, a licensed practical nurse, appeals from orders declaring that plaintiff did not need to file an AOM to pursue professional-negligence claims against her and denying her motion to dismiss the complaint for failure to provide an AOM. We affirm both orders because the AOM statute applies only to certain specified "licensed person[s]" and a licensed practical nurse is not included in the statute.

I.

We discern the facts from the limited record developed on the parties' cross-motions concerning the need for an AOM.¹ On August 2, 2018, plaintiff's

¹ For purposes of analyzing the orders on appeal and the legal issue presented, we accept the facts as pled in plaintiff's amended complaint. Plaintiff acknowledges that defendant disputes her negligence and plaintiff's allegations concerning her communications with plaintiff. Those factual disputes, however, need not be resolved for us to address the legal issue presented on this appeal.

wife underwent colon surgery performed by Dr. Keith Meslin. Two days later, she was discharged from the hospital.

On the morning of August 6, 2018, plaintiff called Dr. Meslin's office and spoke with Junod. Junod is a licensed practical nurse who works for Virtua Surgical Group, P.A. (Virtua Group), the medical practice where Dr. Meslin works. Plaintiff told Junod that his wife was in pain and not able to eat. Junod informed plaintiff that his wife most likely was experiencing post-operative gas and that she should continue taking her medications, try to eat, drink liquids, and walk around. Later that morning, plaintiff called back and told Junod that the pain medications had sedated his wife. Junod advised plaintiff that his wife might be overmedicated and told him he should cut back on the medications and have his wife get up, eat, and walk around.

Later that same day, plaintiff left Junod "numerous messages" asking her to call him back to discuss his wife's condition. Sometime later that day, Junod returned plaintiff's phone calls and told him he should give his wife Maalox or Pepto Bismol and get her to eat and walk around.

The following morning, plaintiff found his wife unresponsive. Later that day, she was taken to a hospital and pronounced dead.

In July 2020, plaintiff, individually and as executor of his wife's estate, filed a medical-malpractice action. Initially, plaintiff named as defendants Dr. Meslin, an unknown nurse, and Virtua Group. After conducting some discovery, plaintiff dismissed the claims against Dr. Meslin and his direct claims against Virtua Group.² Plaintiff also filed an amended complaint, naming Junod as a defendant based on discovery that had revealed she was the nurse who spoke with plaintiff on August 6, 2018. Plaintiff alleged that Junod had been negligent in providing medical advice and in failing to consult with Dr. Meslin. Plaintiff also alleged that Virtua Group was vicariously liable for Junod's negligence as her employer.

In September 2021, the trial court conducted a Ferreira conference to identify any issues concerning an AOM.³ Junod took the position that plaintiff needed an AOM, while plaintiff argued he did not. Plaintiff, thereafter, filed a

² At oral argument before us, plaintiff's counsel stated that Dr. Meslin had prepared an affidavit in which he attested that he had not been informed of plaintiff's calls concerning his wife.

³ In Ferreira v. Rancocas Orthopedic Assocs., the Supreme Court mandated that a "case management conference be held within ninety days of the service of an answer in all malpractice actions," at which "the court will address all discovery issues, including whether an [AOM] has been served on defendant" and "whether [defendant] has any objections to the adequacy of the affidavit." 178 N.J. 144, 154-55 (2003).

motion seeking a declaration that he did not need an AOM. Defendant cross-moved to dismiss plaintiff's complaint for failure to file a timely AOM.

After hearing oral argument, on January 5, 2022, the trial court issued two orders: one granting plaintiff's motion for a declaration, and the other denying defendant's motion to dismiss. We, thereafter, granted defendant leave to appeal both interlocutory orders.

II.

There is one legal issue presented on this appeal: is a licensed practical nurse a "licensed person" covered by the AOM statute? Because that issue involves a question of law involving the interpretation of the AOM statute, we review the issue de novo. Yagnik v. Premium Outlet Partners, LP, 467 N.J. Super. 91, 106 (App. Div. 2021) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

In interpreting and construing the AOM statute, our "task 'is to discern and effectuate the intent of the Legislature.'" Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc., 250 N.J. 368, 382 (2022) (quoting Shelton v. Restaurant.com, Inc., 214 N.J. 419, 428-29 (2013) (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012))). "[T]he best indicator of that intent

is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). Accordingly, we focus our analysis on the text of the AOM statute.

The AOM statute was enacted in 1995 as part of a tort reform package. Burns v. Belafsky, 166 N.J. 466, 469-70 (2001). The statute was designed to strike a balance between reducing frivolous lawsuits and permitting injured plaintiffs to recover for meritorious claims. Id. at 474 (citing Peter Verniero et al., Report to the Governor on the Subject of Tort Reform 2, 14 (1994)). The AOM statute requires a plaintiff alleging "malpractice or negligence by a licensed person" to file an "affidavit of an appropriate licensed person" who can attest that there is a "reasonable probability" that defendant's conduct "fell outside acceptable professional or occupational standards or treatment practices." N.J.S.A. 2A:53A-27.

Section 26 of the statute identifies sixteen "licensed person[s]" and a "healthcare facility" as covered by the statute. N.J.S.A. 2A:53A-26. Accordingly, the AOM statute expressly limits the professionals covered by its terms. See Haviland, 250 N.J. at 377 (explaining that the AOM statute "explicitly limits the term 'licensed person' to" certain identified professionals).

One of the identified "licensed person[s]" in the AOM statute is "a registered professional nurse pursuant to P.L.1947, c. 262 (C.45:11-23 et seq.)."

N.J.S.A. 2A:53A-26(i). The statute identified in that subsection is the nursing licensure statute (the Nursing Statute), N.J.S.A. 45:11-23 to -84. The Nursing Statute defines "[t]he practice of nursing" for "a registered professional nurse." N.J.S.A. 45:11-23(b). The Nursing Statute also defines the practice of nursing for "a licensed practical nurse." Ibid. In addition, the Nursing Statute provides definitions for a "[h]omemaker-home health aide," an "[a]dvanced practice nurse," and a "[c]ollaborating physician." N.J.S.A. 45:11-23(c), (d), and (e).

Junod argues that by referencing the Nursing Statute, the Legislature intended to include a licensed practical nurse within the list of specified licensed professions in the AOM statute. We reject that construction based on the plain language of the AOM statute.

The AOM statute expressly uses the term "a registered professional nurse." N.J.S.A. 2A:53A-26(i). Although the AOM statute states that it covers "a registered professional nurse pursuant to P.L.1947, c. 262 (C.45:11-23 et seq.)," the reference to the Nursing Statute plainly does not include "a licensed practical nurse." The Nursing Statute states:

The practice of nursing as a registered professional nurse is defined as diagnosing and treating human responses to actual or potential physical and emotional health problems, through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being,

and executing medical regimens as prescribed by a licensed or otherwise legally authorized physician or dentist.

[N.J.S.A. 45:11-23(b).]

Nowhere in that definition of a registered professional nurse is there a reference to a licensed practical nurse. Instead, the Nursing Statute has a separate definition of the practice of nursing as a licensed practical nurse. In that regard, the Nursing Statute provides:

The practice of nursing as a licensed practical nurse is defined as performing tasks and responsibilities within the framework of casefinding; reinforcing the patient and family teaching program through health teaching, health counseling and provision of supportive and restorative care, under the direction of a registered nurse or licensed or otherwise legally authorized physician or dentist.

[Ibid.]

The plain reading of the AOM statute in conjunction with the Nursing Statute establishes several facts. First, the Legislature expressly identified "a registered professional nurse" as a "licensed person" covered by the AOM statute but did not include licensed practical nurses in the list of those professions covered by the statute. Second, the Legislature was clearly aware of the distinct and separate definitions it had given for "a registered professional nurse," as compared to "a licensed practical nurse." In that regard, the Nursing

Statute defines the practice of nursing separately for a registered professional nurse and a licensed practical nurse and recognizes the additional responsibilities of registered professional nurses to diagnose and treat physical and emotional health problems. Moreover, 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 or licensed or otherwise legally authorized physician or dentist." Ibid.

Our interpretation of the AOM statute is consistent with the statute's legislative history. As initially enacted, the AOM statute covered nine individual professions and a "healthcare facility." See S. Amends. to S. 1493, at 2 (June 1, 1995). In the process leading to the statute's original enactment, "committee amendments were made to 'limit the professions to which the bill applies from all professions licensed under Title 45 of the Revised Statutes,' to nine individual professions" Haviland, 250 N.J. at 383 (quoting A. Ins. Comm. Statement to S. 1493 1-2 (June 1, 1995)). Since 1995, the Legislature has amended the AOM Statute three times to expand the definition of "licensed person," to include seven other licensed professions. L. 2001, c. 372, § 1; L. 2010, c. 88, § 1; L. 2019, c. 263, § 2. Accordingly, the Legislature is clearly

aware of the specific professions covered by the AOM statute, but it has not expressly included a licensed practical nurse.

Our interpretation of the AOM statute is also consistent with the Supreme Court's interpretation of the statute in Haviland. In Haviland, the Court held that a plaintiff need not submit an AOM in support of a vicarious liability claim against a hospital based on the alleged negligent conduct of a hospital employee who is not a "licensed person" under the AOM statute. 250 N.J. at 383-84. The plaintiff in Haviland alleged that a radiology technician had negligently performed a post-surgery imaging exam resulting in injury to plaintiff's shoulder that eventually required surgery. Id. at 373. The Court held that an AOM was not necessary because the alleged malpractice was committed by a radiology technician who is not a "licensed person" under N.J.S.A. 2A:53A-26. Id. at 383-84. In reaching that holding, the Court recognized that a "licensed person" as defined in the AOM statute is expressly limited to certain professionals. The Court declined to expand the definition of "licensed person" beyond the "carefully circumscribed list of professions to which the Legislature has elected to apply the AOM requirement." Id. at 383. That same reasoning and construction of the AOM statute supports our holding.

Junod argues that her interpretation of the AOM statute is supported by the purpose behind the statute. The statute clearly had the intent of weeding out frivolous malpractice lawsuits by requiring an AOM in the early stages of litigation. Id. at 376; Burns, 166 N.J. at 474. As already summarized, however, the Legislature expressly limited the professions covered by the AOM statute. Consequently, if the Legislature believes that an AOM should be filed to pursue a claim against a licensed practical nurse, the Legislature can and knows how to amend the statute.

For example, in 2008, we held that a licensed midwife was not a "licensed person" under the AOM statute. Saunders by Saunders v. Cap. Health Sys. at Mercer, 398 N.J. Super. 500, 502 (App. Div. 2008). In 2010, the Legislature then amended the AOM statute to include "a certified midwife, certified professional midwife, or certified nurse midwife." N.J.S.A. 2A:53A-26(p); L. 2010, c. 88 § 1.

Junod also argues the Nursing Statute should be read to include all nurses because the definition of a registered professional nurse does not include an advanced practice nurse, but an advanced practice nurse is more highly trained than a registered professional nurse. The short rebuttal to that argument is that an advanced practice nurse must be a registered professional nurse. See N.J.S.A.

45:11-47 and -48 (listing the requirements for becoming an advanced practice nurse, including that the applicant "[i]s a registered professional nurse"). Moreover, the Legislature has clearly chosen not to apply the AOM statute based purely on advanced medical training. A physician assistant is highly trained but is not covered by the AOM statute. Compare N.J.S.A. 45:9-27.16 (identifying the medical procedures that a physician assistant may perform) with N.J.S.A. 2A:53A-26 (which does not list a physician assistant as a "licensed person" under the AOM statute).

In addition, Junod contends that existing case law recognized that licensed practical nurses are covered by the AOM statute. In making that argument, Junod relies primarily on our decision in Estate of Yearby v. Middlesex County, 453 N.J. Super. 388 (App. Div. 2018). Yearby involved claims against three nurses: two registered professional nurses and a licensed practical nurse. The professional-negligence and medical-malpractice claims against all three defendants were dismissed because the plaintiff had failed to file a timely AOM. Id. at 392. Thereafter, the plaintiff, represented by new counsel, moved to restore the professional-negligence claims contending that he had substantially complied with the statute and there were "extraordinary circumstances." Id. at 392-93. The trial court in Yearby granted the plaintiff's motion to restore the

action and the nurses appealed. We reversed, holding that the plaintiff had not shown "substantial compliance" or "extraordinary circumstances" that warranted restoring his claims. Id. at 393-94.

Junod argues that our decision in Yearby necessarily implied that an AOM was required to maintain a suit against a licensed practical nurse. We reject that interpretation because whether an AOM was required was not before us in Yearby; rather, the issues were whether the plaintiff had shown "substantial compliance" and "extraordinary circumstances" in connection with the AOM statute. Accordingly, 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.

We note that although plaintiff can pursue his claims without submitting an AOM, he still must demonstrate that Junod was professionally negligent. As counsel for plaintiff conceded before us at oral argument, plaintiff will be required to present expert testimony to establish the applicable standard of care, a deviation from that standard, and that the deviation proximately caused plaintiff's injuries. See Haviland, 250 N.J. at 384. We also note that while an AOM is not required for plaintiff to maintain his vicarious liability claim against

Virtua Group, that claim is limited to a respondeat superior claim based on the alleged negligence of Junod. Ibid.

In summary, we hold that the AOM statute does not cover a negligence claim against a licensed practical nurse. We remand this matter for further proceedings.

Affirmed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION