

To: New Jersey Law Revision Commission
From: Erik Topp
Re: *McCormick v. State*
Affidavit of Merit Requirement in Suits Against Public Entities
N.J.S. 2A:53A-26 to -29
Date: November 6, 2017

MEMORANDUM

Executive Summary

In *McCormick v. State*,¹ the Appellate Division considered a question not previously decided by the case law concerning affidavits of merit - whether an individual alleging negligence in a medical malpractice case may “avoid the need to obtain an AOM by suing only the public entity and not the professionals.”²

The Court determined that a litigant may not circumvent the affidavit of merit requirement by suing only the public entity,³ on the grounds that an AOM is required where a claim of vicarious liability against the State is based on “allegations of deviation from professional standards of care by licensed individuals who worked for” the State.⁴

Background

McCormick was an inmate in State custody who sought treatment for severe head pains in June 2010.⁵ When he complained about the issue, he was given a general painkiller, but was not formally evaluated or diagnosed.⁶ When the problem persisted, McCormick was transferred to a hospital, where he was diagnosed with and treated for a brain abscess.⁷ After his treatment, McCormick was discharged back to the South Woods State Prison, where he continued to suffer from blurred vision and dizziness.⁸ McCormick filed notice of tort claim and filed suit against the State and the State alone, alleging that the medical staff at South Woods failed to adequately treat him.⁹ The case was dismissed with prejudice for failure to provide an AOM; the Court stated that one was necessary because the allegations involved conduct by licensed professionals.¹⁰

¹ 446 N.J. Super. 603 (App. Div. 2016).

² *Id.* at 607.

³ *Id.*

⁴ *Id.* at 614–15.

⁵ *Id.* at 608.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 609.

¹⁰ *Id.* at 610.

On appeal, the Appellate Division determined that McCormick was required to provide an AOM, but afforded him an opportunity to be heard and potentially to go back and obtain them as needed.¹¹ In determining that McCormick was required to provide an AOM, the Court stated that a litigant may not avoid the requirement by suing an entity on its own, even though the statute states that a litigant need only provide an affidavit of merit where he pursues an action against a “licensed person.”¹² The relevant portion of the statute states the following:

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.¹³

While the statute literally reads that an AOM is required where a “licensed person” is the subject of a claim, the court stated that the Legislature’s intent in crafting the law was to require a proof of the conduct alleged, meaning that an AOM is required whenever the suit is rooted in an allegation that a professional “engage[d] in harmful conduct that deviates from the standards of care of their respective fields of licensure” and that a “public entity is liable for that harm.”¹⁴ The Court in *McCormick* suggested that “arguments based on a hyper-literal reading of the AOM statute do not excuse plaintiff from his failure to supply a proper affidavit to support his claims that fundamentally are allegations of medical negligence. He cannot avoid the important screening mechanism of the AOM statute by suing only the public entity that procured the services of the individual health care professionals who worked at the prison.”¹⁵ The Court explained that

The State employs or utilizes through contracts a host of licensed professionals who work in its prisons, hospitals, mental health facilities, institutions, transportation systems, and other operations. These professionals include doctors, nurses, therapists, counselors, engineers, and scores of other licensees encompassed within the broad sweep of the AOM statute. *N.J.S.A. 2A:53A–26*.

¹¹ *Id.* at 616, 618.

¹² *Id.* at 612.

¹³ *N.J.S. 2A:53A-27*.

¹⁴ *McCormick*, 446 N.J. Super. at 613.

¹⁵ *Id.* at 612.

If such professionals while serving the State, or for that matter any other public entity, 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.¹⁶

The Appellate Division cautioned, however, that “an affidavit will only be needed when the underlying harmful conduct involves professional negligence, implicating the standards of care within that profession.”¹⁷

Conclusion

While it may be argued that the intent of the law is reasonably clear in requiring an AOM even when a claim is not literally against a “licensed person,” the Court recognized that until the *McCormick* opinion was issued, there was no case law so holding. A3620, introduced by Assemblywoman Nancy J. Pinkin for the new legislative session, addresses issues regarding the submission of an affidavit of merit and some of the information that it should include, however the bill does not appear to completely address the specific issue raised by this case.

Staff seeks authorization to conduct additional research and outreach to determine whether modifying the Affidavit of Merit statute would aid in interpretation of the law and potentially eliminate the need for further litigation regarding the issue raised in *McCormick v. State*.

¹⁶ *Id.* at 613.

¹⁷ *Id.* at 613-614