

New Jersey Appellate Court Requires Affidavit of Merit in COVID-19 Litigation Against an Assisted Living Facility

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An affidavit of merit is required to prosecute a professional negligence claim against an assisted living facility in New Jersey. The recent appellate decision of *Priolo v. Shorrock Garden Care Ctr.*, No. A-3032-20, 2022 N.J. Super. Unpub. LEXIS 1726 (Super. Ct. App. Div. Sep. 20, 2022) concerned that legal issue in the context of a claim arising from a resident who contracted COVID-19. Moving forward, parties to assisted living litigation should expect that an affidavit of merit will be required to maintain a negligence or malpractice claim against the facility.

In *Priolo*, the plaintiff alleged that the assisted living facility deviated from the standard of care "in failing to implement and execute appropriate protocols and standards for managing and minimizing the existing threat and risks posed by the COVID-19 virus." The allegations included failure to follow State mandated guidelines regarding management and containment of the virus, failure to implement testing protocols, visitation policies and employee testing. These deviations allegedly resulted in a resident contracting COVID-19. The defendant facility argued that because the allegations arise out of medical care, including infection control and the alleged failure to prevent the transmission of COVID-19 within a licensed healthcare facility, the plaintiff had to submit an affidavit of merit from a qualified individual opining that a reasonable probability exists that there was a deviation from the applicable standard of care. The plaintiff provided an affidavit, authored by an expert who holds a master's in business administration and a master's in health administration. According to the expert's curriculum vitae, he "is a healthcare administrative consultant who specializes in assisting healthcare systems, including assisted living facilities, to 'achieve strategic business objectives.'"

The appellate court affirmed a lower court's decision to dismiss the case. The appellate court began by analyzing whether an assisted living facility is a health care facility for purposes of the affidavit of merit statute. The court held that the legislative scheme relevant to a definition of "health care facility" under *N.J.S.A. 26:2H-2* allowed the court to "infer the Legislature intended an assisted living facility to also fall within" the statutory law [*N.J.S.A. 26:2H-2*] and be considered a health care facility subject to the requirements of the affidavit of merit statute. Accordingly, an affidavit of merit was required by the plaintiff to support the complaint.

If you have any questions or would like additional information, please contact Rafael Vergara (vergarar@whiteandwilliams.com; 212-631-4416) or Daria B. Janka (jankad@whiteandwilliams.com; 856-317-3669).

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