

THE ESTATE OF JAMES EVANS BY HIS  
GENERAL ADMINISTRATOR AND  
ADMINISTRATOR AD  
PROSEQUENDUM DAVID EVANS;  
AND DAVID EVANS AND LAURYN  
EVANS INDIVIDUALLY,

Plaintiff,

vs.

DAWN WARNER, RN, DR. SAIRA  
AHMED, DR. BRYAN DAVIS, DR.  
AHSAN ABDULGHANI; WEDGEWOOD  
AMERICANA, WEDGEWOOD  
RESIDENTIAL HEALTH CARE  
FACILITY; HELPING HAND  
BEHAVIORAL HEALTH.

Defendants.

SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-000737-24

On Appeal from Interlocutory Order  
Entered in the Superior Court, Law  
Division, Ocean County

*Sat Below:*

Honorable Robert E. Brenner, J.S.C.  
Ocean County Superior Court  
Docket No. OCN-L-340-24

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**BRIEF AND APPENDIX ON BEHALF OF APPELLANTS'  
MOTION FOR LEAVE TO APPEAL  
Pa-1 through Pa-79**

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**PRELIMINARY STATEMENT**

Plaintiffs/Appellants, the Estate of James Evans (“Appellants”) file this Brief in support of their appeal of the Trial Court’s decision to deny the Appellants’ Motion to Affirm the Sufficiency of their Affidavits of Merit, and outright dismiss the defendant, Helping Hand Behavioral Health (the “Defendant”) with prejudice at the outset of the case. This is a medical malpractice matter that arises out of care provided to the decedent while he was a resident of the defendant, Wedgewood Americana – a residence affiliated with the Defendant. On February 15, 2023, the decedent was provided an improper amount of insulin medication for treatment of his diabetes. This resulted in the decedent suffering from a severe hypoglycemic episode that went unnoticed, resulting in his demise at the age of 28.

The Complaint in this matter was filed on February 6, 2024, alleging claims of malpractice against various providers, including the Defendant - an entity that is alleged to be vicariously liable for the negligence of the co-defendant care providers and entities. Affidavits of Merit were served by the Plaintiffs which were authored by Dr. Robin Goland and Nurse Katherine Moses. After an Answer was filed by the Defendant on June 14, 2024, an objection to the Affidavits of Merit was raised in that the Defendant contended it could not be vicariously liable. This was based upon their contention that no care was provided at their facility and that they did not employ any of the individuals involved in the treatment of the decedent. This was so

despite the fact that no discovery on the issue of vicarious liability has been exchanged.

A Ferreira Conference was held before the Honorable Judge Robert E. Brenner, J.S.C. on August 5, 2024, in which concerns regarding the Defendant's objection was raised by the Plaintiffs, but the issue was not resolved at that time. Instead, Judge Brenner entered an Order on August 12, 2024, providing all defense counsel an additional ten days to set forth any additional objections to the Affidavits of Merit. After the expiration of the ten-day period, the Plaintiffs filed a Motion to Affirm the Sufficiency of the Affidavits of Merit. In the Motion, the Plaintiffs argued that the Affidavits of Merit were statutorily sufficient, that the issue of vicarious liability is beyond the scope of whether the Affidavits comply with the Affidavit of Merit Statute, and that no discovery has taken place on whether the Defendant is in fact vicariously liable for the actions of any of the co-defendants. The motion was opposed by the Defendant on the same basis that they felt they cannot be vicariously liable.

After oral argument on October 2 and October 11, 2024, Judge Brenner determined - without any evidence in the record - that the Affidavits of Merit were insufficient based upon the opinion that the Defendant cannot be vicariously liable in this case. The Trial Court also denied the Plaintiffs: (1) the ability to conduct any discovery on the issue of vicarious liability as to the Defendant; and (2) the ability

to obtain a new Affidavit of Merit that complied with the Court's ruling. Instead, the Trial Court dismissed the Defendant outright from the case, with prejudice.

Judge Brenner failed to appreciate that the determination of whether an entity is ultimately vicariously liable is a factual and legal inquiry that is beyond the scope of whether an Affidavit of Merit is statutorily sufficient. In this case, the Affidavits of Merit contained all of the applicable language set forth in the Affidavit of Merit Statute and properly placed the Defendant on notice of the medical providers and entities that they may be held vicariously liable for in this case. Furthermore, there was no objection by the Defendant to the affiants' qualifications or their ability to author an Affidavit of Merit. Therefore, the Affidavits of Merit should have been found to be statutorily sufficient.

Furthermore, no evidence was presented by the Defendant in the motion record to substantiate their claim that they are not vicariously liable. At a minimum, the Plaintiffs should have been able to explore through discovery whether the Defendant is in fact vicariously liable in this case through means of a direct employment relationship or apparent authority. Instead, the Defendant was dismissed with prejudice before discovery even began to take place. This appeal follows to answer the question of whether the Affidavits of Merit in this case are statutorily sufficient such that the Defendant should remain as a party in this case.



## **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

Plaintiffs, the Estate of James Evans by his General Administrator and Administrator Ad Prosequendum David Evans; and David Evans and Lauryn Evans Individually (collectively, the “Plaintiffs”) filed this action for the wrongful death of the decedent in the Superior Court, Law Division, Ocean County, Docket. No. OCN-L-340-24 on or about February 6, 2024. (Pa1). The Defendant filed an Answer on June 14, 2024. (Pa21).

In compliance with N.J.S.A. 2A:53A-27 (the “Affidavit of Merit Statute”), two Affidavits of Merit were served upon all the parties including the Defendant. The first is authored by Dr. Robin Goland – a board-certified medical doctor in the field of internal medicine and endocrinology. (Pa41) The second is from Nurse Katherine Moses. (Pa57). Both Affidavits of Merit identify each of the medical providers at issue and contain the requisite language set forth in the Affidavit of Merit Statute. An objection letter to the Affidavit of Merit was received by the Defendant on July 26, 2024. (Pa71). Thereafter, a Ferreira Conference was held before the Honorable Robert E. Brenner, J.S.C. on August 5, 2024.<sup>1</sup> (See e.g., 1TR). While arguments were raised by the Plaintiffs concerning the Defendant’s objection, no decision was entered by Judge Brenner during the conference on the issue.

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<sup>1</sup> The transcript of the Ferreira Conference held on August 5, 2024 is designated as 1TR.

(1TR7:23-8:13). Instead, because other defense counsel were not in a position to determine whether they were objecting to the Affidavits of Merit, Judge Brenner provided an additional ten days for defense counsel to provide any additional objection. (1TR18:2-11). After the Ferreira Conference, an Order was entered on August 12, 2024, by the Trial Court indicating that within ten days of the Order, counsel for the defense was to notify counsel for the Plaintiffs of any objection to the sufficiency of the Affidavits of Merit, along with the basis for same. (Pa61). No additional objection from the Defendant was received, and only one additional objection was received by the defendant, Dr. Saira Ahmed, which is not at issue in this appeal. (Pa65)

After the expiration of the ten-day period, the Plaintiffs filed a Motion on August 30, 2024, to Affirm the Sufficiency of the two Affidavits of Merit supplied or, in the alternative, to stay the time period from the Ferreira Conference to the motion hearing date in order to obtain an Affidavit of Merit that complies with the court's ruling. (Pa35). An Opposition to the Motion was filed by the Defendant on September 16, 2024. (Pa74). Judge Brenner then held Oral Argument on October 2, 2024, and granted the Plaintiffs' motion as to the defendant, Dr. Saira Ahmed.<sup>2</sup> (2TR15:19-28:6). Judge Brenner also initially denied the Plaintiffs' motion as to the

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<sup>2</sup> Oral Argument was held before the Honorable Robert Brenner on October 2, 2024. The transcript from this argument is designated as 2TR.

Defendant, but ultimately reserved. (2TR37:10-46:3; 53:3-8). The Trial Court based its decision to initially deny the motion on the opinion that the Defendant did not employ the medical professionals at issue and the care and treatment did not occur at the Defendant's facility and therefore, the Defendant could not be held vicariously liable. (2TR42:21-46:3). However, after counsel for the Plaintiffs set forth that no evidence has been presented to make a determination on the employment status of any of the medical professionals, coupled with the inability of the Plaintiffs' counsel to obtain an Affidavit of Merit that complied with the Court's ruling without discovery, Judge Brenner reserved on the motion as to the Defendant. (2TR46:7-51:20).

Thereafter, on October 11, 2024 – 119 days after the Defendant filed an Answer - the Court held an additional hearing on the Plaintiffs' motion.<sup>3</sup> (See e.g., 3TR) At that time, Judge Brenner determined: (1) that the Plaintiffs' motion was being denied, (2) that the Defendant was being dismissed with prejudice, and (3) that the Plaintiffs would not be given the opportunity to pursue discovery on the Defendant or obtain a new Affidavit of Merit that complied with the Court's ruling. (3TR5:4-9:7; Pa77). The Plaintiffs now move for leave to appeal pursuant to R. 2:2-4 and R. 2:5-6.

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<sup>3</sup> Oral Argument was held before the Honorable Robert Brenner on October 11, 2024. The transcript from this argument is designated as 3TR.

**LEGAL ARGUMENT**

**POINT I: IT IS IN THE INTERESTS OF JUSTICE FOR THIS COURT TO GRANT THE INSTANT MOTION FOR LEAVE TO APPEAL**

This Court may grant interlocutory appeal when the interests of justice require it. “[T]he Appellate Division may grant leave to appeal, in the interest of justice, from an interlocutory order of a court or of a judge sitting as a statutory agent, or from an interlocutory decision...” See R. 2:2-4. The power to grant leave to appeal from an interlocutory order is discretionary. State v. Reldan, 100 N.J. 187, 205 (1985); see also State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997).

The New Jersey Supreme Court has recognized that this Court has broad discretion in formulating when the applicable standard is met:

The Appellate Division enjoys considerable discretion in determining whether the “interest of justice” standard has been satisfied and, as a result, whether to grant a motion for leave to file an interlocutory appeal...The Appellate Division has, for example, granted review of interlocutory orders that actually or effectively dismiss a party’s claims or defenses. It has also granted leave to review orders concerning novel questions of law, [and] matters relating to questions of privilege[.]

Brundage v. Estate of Carambio, 195 N.J. 575, 599-600 (2008) (internal citations omitted).

This Court’s immediate review is appropriate in order to determine whether it was permissible for Judge Brenner to find the Plaintiffs’ Affidavits of Merit to be statutorily insufficient based upon factual and legal principles of vicarious liability

without any discovery, and to outright dismiss the Defendant, with prejudice. In this case, the Plaintiffs provided two Affidavits of Merit that contained the requisite language required by the Affidavit of Merit Statute, N.J.S.A. 2A:53A-27. Furthermore, they contained the identity of all of the medical providers that were known at this time to be at issue in the case. The Defendant did not raise any objection to the substance of the Affidavits of Merit or the qualifications of the affiants. Therefore, they should have been found to be statutorily sufficient.

The only issue that has been raised by the Defendant is its claim – without any support - that it cannot be vicariously liable for the actions of any of the providers identified in the Complaint. In his decision, Judge Brenner rejected any possibility that the Defendant can be vicariously liability without any evidence in the record and no exchange of discovery on the issue. Fundamentally, New Jersey Coury Rule 4:10-2(a) allows parties to obtain discovery regarding any matter which is relevant to any claim or defense. Based upon the Trial Court’s ruling, the Plaintiffs were deprived of the ability to obtain discovery and develop a legal theory as to the Defendant at the Affidavit of Merit stage.

Whether the Defendant is vicariously liable for the actions of any of the other co-defendants is unrelated to the determination of whether the Affidavits of Merit are statutorily sufficient. The entity’s liability is a factual determination in which discovery should be conducted on the subject – and none has been provided to date.

At a minimum, the Affidavits of Merit place the Defendant on notice as to the medical providers that the Plaintiffs contend it is vicariously liable for in this case. This satisfies the requirements of the Affidavit of Merit Statute. Each of these arguments was rejected by Judge Brenner in his determination that discovery was not necessary and the entity should be outright dismissed with prejudice. Furthermore, the Plaintiffs were deprived of the ability to cure any deficiencies and serve a new Affidavit of Merit.

Thus, this case provides a perfect opportunity for this Court to resolve this important issue. Because this question addresses important issues of general applicability and the harm which is, in part, sought to be avoided would occur absent immediate appeal, this Court is requested to exercise its discretion and find that the interests of justice favor granting immediate appeal.

**POINT II: JUDGE BRENNER ERRED IN FINDING THE PLAINTIFFS' AFFIDAVITS OF MERIT INSUFFICIENT AND DISMISSING DEFENDANT HELPING HAND BEHAVIORAL HEALTH WITH PREJUDICE (Pa77; 3TR8:1-9:7)**

**A. The Affidavits of Merit Supplied by the Plaintiffs are Statutorily Sufficient pursuant to N.J.S.A. 2A:53A-27 (Pa41, 57)**

Pursuant to N.J.S.A. 2A:53A-27, a plaintiff in an action against a licensed professional must produce an affidavit from an expert attesting to the merits of the claim. By its terms, the Affidavit of Merit Statute "applies to all actions for damages based on professional malpractice." Ryan v. Renny, 203 N.J. 37, 50-51 (2010).

Furthermore, the Affidavit of Merit Statute sets forth that 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 N.J.S.A. 2A:53A-41 (the “Patients First Act”).

The dual purpose of the Affidavit of Merit (“AOM”) statute is to “weed out frivolous lawsuits early in the litigation while, at the same time, ensuring that plaintiffs with meritorious claims will have their day in court.” Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 178 (2003). By enacting the AOM statute, the Legislature did not intend to “create a minefield of hyper-technicalities in order to doom innocent litigants possessing meritorious claims.” Ferreira, 178 N.J. at 151, 836 A.2d 779 (quoting Mayfield v. Cmty. Med. Assocs., P.A., 335 N.J. Super. 198, 209, 762 A.2d 237 (App. Div. 2000)). Because the statute’s aim is “to identify and eliminate unmeritorious claims against licensed professionals and to permit meritorious claims to proceed efficiently through the litigation process,” our courts recognize the doctrines of substantial compliance and extraordinary circumstances, which can “temper the draconian results of an inflexible application of the statute” when an AOM is insufficient. Meehan v. Antonellis, 226 N.J. 216, 229 (2016) (quoting Ferreira, 178 N.J. at 151, 836 A.2d 779).

As held in Cornblatt v. Barow, 153 N.J. 218, 241 (1998), “the only part of the statute detailing what must be included in the [AOM]” is the specification “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 AOM statute "is silent as to any requirement that the affidavit specifically identify a defendant by name." Medeiros v. O'Donnell & Naccarato, Inc., 347 N.J. Super. 536, 540 (App. Div. 2002).

The wording of the Affidavit of Merit statute "anticipated vicarious liability claims...by mak[ing] the affidavit requirement applicable to 'any action for damages...resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation.'" Haviland v. Lourdes Medical Center of Burlington County, 250 N.J. 368, 382-383 (2022) (quoting Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J. Super. 1, 23 (App. Div. 2010)). Furthermore, the requirement of an AOM from a like-licensed professional will not apply if the 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. Hill Intern., Inc. v. Atlantic City Bd. of Educ., 438 N.J. Super. 562, 591 (App. Div. 2014).

In this case, the Plaintiffs have complied with the requirements of the Affidavit of Merit Statute such that it was inappropriate for the Trial Court to find that they were statutorily insufficient and deny the Plaintiffs' motion. The Affidavits



of Merit of Dr. Goland and Nurse Moses were supplied to the Defendant within 60 days following the date of the filing of their Answer to the Complaint. They identify each of the parties that the Plaintiffs claim are at issue, and indicate that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited by those parties fell outside acceptable professional treatment standards. No objection was raised by the Defendant as to the timing of service of the Affidavits or the language contained within them. Furthermore, there is no objection by the Defendant as to the qualifications of the affiants to author the Affidavits of Merit pursuant to the Affidavit of Merit Statute or the Patients First Act, N.J.S.A. 2A:53A-41. Fundamentally, the Affidavits of Merit of Dr. Goland and Nurse Moses place the Defendant on notice of the medical providers that the Plaintiffs claim they are vicariously liable for in this matter. Therefore, they clearly comply with the requirements of the Affidavit of Merit statute and at a minimum, the Plaintiffs have substantially complied with the purpose of the Statute to avoid the defeat of a valid claim.

The objection raised by the Defendant is that they cannot be vicariously liable based upon their contention that they did not employ any of the medical providers at issue and the treatment at issue did not occur at their facility. However, nothing was provided in the record by the Defendant to substantiate this legal claim. Namely, there were no certifications or affidavits submitted by the Defendant from any of its

corporate representatives as to the employment status or relationship with the co-defendants. There have been no contracts, employment agreements or even a list of employees produced. There has been no discovery exchanged on the Defendant's level of control or involvement in this case. In essence, the Defendant's argument is an improper motion for summary judgment disguised as an objection to the Plaintiffs' Affidavits of Merit. The New Jersey Supreme Court instructs it is inappropriate to grant a dispositive motion when discovery is incomplete. Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 193 (1988).

In his decision, Judge Brenner relied upon the case of Hargett v. Hamilton Park Opco, LLC, 477 N.J. Super. 390 (App. Div. 2023) in finding that the Affidavits of Merit do not identify any individual that the Defendant would be vicariously liable for in this case. (2TR40:12-42:24). His decision was based upon the belief that none of the medical providers were employed by the Defendant and none of the treatment took place there. (Pa44:2-4). However, the focus of Hargett was entirely different from the case at hand. In Hargett, the issue before the court was whether the Affidavit of Merit sufficiently identified the responsible parties for purposes of vicarious liability. Id. at 395. In Hargett, the plaintiff supplied an Affidavit of Merit that broadly stated that the "treatment provided by Alaris [Health]...and Jersey City Medical Center, and members of their nursing and nursing administrative staff, fell outside acceptable professional standards and was the cause of harm..." Id. at 394.

The court found that it was not possible to identify any Alaris Health nurses who the plaintiff asserted were negligent because the Affidavit of Merit referred generally to the entire nursing staff over an extended period of time. Id. at 398.

That issue is not applicable in this case, as the Affidavits of Merit provided by the Plaintiffs contain the identity of all the individuals and entities that are known at this time to be involved in the malpractice at issue. The Affidavits of Merit clearly identify Drs. Ahmed, Davis and Abdulghani, Nurse Warner, Wedgewood Americana, Wedgewood Residential Health Care Facility, and Helping Hand Behavioral Health. Furthermore, the complaint contains fictitious pleadings for other entities and individuals that may not yet be known and for whom the Defendant is vicariously liable.

However, whether the Defendant is ultimately vicariously liable for the actions of any of the other defendants is irrelevant to the determination of whether the Affidavits of Merit are sufficient. The focus of the Affidavit of Merit statute is not on the ability to ultimately prove the claim, but rather to substantiate that the case has merit based upon the attestation of an appropriately licensed professional, which the Plaintiffs have provided. See e.g., N.J.S.A. 2A:53A-27. New Jersey is a notice pleading state and at this preliminary stage of the litigation, the court should not be concerned with the ability of the litigant to prove the allegation. Printing Mart v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). The entity's liability is a

factual determination in which discovery must be conducted on the subject. Therefore, it was improper for Judge Brenner to find that the Affidavits of Merit were statutorily insufficient based upon a factual and legal determination without any discovery.

**B. Judge Brenner's decision improperly found that the Defendant cannot be vicariously liable in this case (2TR45:20-46:3)**

In his decision to deny the Plaintiffs' motion, Judge Brenner ultimately found that the Defendant cannot be vicariously liable in this case based upon the opinion that they did not employ any of the medical providers at issue and the care and treatment did not occur at their facility. Specifically, Judge Brenner relied upon the holding in Moschella v. Hackensack Meridian Jersey Shore Univ. Med. Ctr., 258 N.J. 110 (2024) which states that: "[t]o establish vicarious liability, a plaintiff must demonstrate an employment relationship and that the alleged tort occurred in the scope of that employment." Id. (quoting Carter v. Reynolds, 175 N.J. 402, 408-09 (2003)).

However, there was no evidence in the record that was before the Trial Court to make a factual or legal determination that the Defendant did not employ or have any control over any of the medical providers at issue during the treatment of the decedent. The only piece of evidence that was produced by the Defendant in the motion record was a license by the Department of Health pertaining to the Defendant for Adult Partial Care Services. (Pa76). Furthermore, there may be providers or

entities in the case that are not known at this time whom the Defendant is vicariously liable for and thus, why the Complaint contains a “John Doe” fictitious pleading. (See e.g., Pa1). In essence, Judge Brenner made a legal and factual determination that the Defendant cannot be vicariously liable without any discovery or evidence.

Judge Brenner’ decision also failed to consider that the Defendant may also be vicariously liable under the theory of apparent authority. (2TR45:16-19). Since the defendant, Wedgewood Americana appears to be one of the residences of the Defendant, vicarious liability can attach through apparent authority. Namely, “when, by its actions or the totality of the circumstances, a principal creates in a third party the impression of apparent authority, the principal will be held vicariously liable for the negligence of its apparent agent because the principal’s actions “somehow mislead [] the public into believing that the relationship or the authority exists.” Estate of Cordero, ex rel. Cordero v. Christ Hosp., 403 N.J. Super. 306, 312 (App. Div. 2008) (quoting Basil v. Wolf, 193 N.J. 38, 67 (2007)).

Apparent authority is established if the principal’s conduct “would lead a person to reasonably believe that another person acts on the principal’s behalf,” and the agent’s service is accepted “by one who reasonably believes the service is rendered on behalf of the principal.” Id. at 315. The following facts should be considered when determining whether a principal’s conduct would lead a similarly-situated patient to reasonably believe that the doctor acted on the principal’s behalf:

“[(1)] whether the hospital supplied the doctor; [(2)] the nature of the medical care and whether the specialty is typically provided in and an integral part of the medical treatment received in a hospital; [(3)] any notice of the doctor’s independence from the hospital or disclaimers of responsibility; [(4)] the patient’s opportunity to reject the care or select a different doctor; [(5)] the patient’s contacts with the doctor prior to the incident at issue; and [(6)] any special knowledge about the doctor’s contractual arrangement with the hospital.”

Cordero, 403 N.J. Super. at 318-19.

Furthermore, “[a]ctive or explicit misrepresentations of agency by the principal are not required.” Id. at 315. It is enough if the principal places “a person in a position from which third parties will infer that the principal assents to acts necessary to fulfill the responsibilities of that position.” Id. at 316.

As the Cordero case makes clear, it is not necessary that the Defendant directly employ any of the providers at issue or that the treatment occur at their facility in order for the entity to be found vicariously liable. Rather, it is a multitude of factors that must be analyzed and if the Defendant had some level of control over the other defendants and created an appearance of agency to the public, that will suffice. In this case, when analyzing the factors articulated in Cordero, we do not yet know whether the Defendant: (1) supplied any of the medical providers to the decedent at Wedgewood for treatment; (2) whether there was any notice of their independence; (3) whether the decedent had the opportunity to reject their care; (4) whether the decedent had contact with the providers prior to arriving at Wedgewood; or (5) any

knowledge about the medical providers' contractual arrangement with the Defendant. Thus, why discovery is crucial.

In his decision, Judge Brenner determined that there was nothing in the record to establish apparent authority or that the Defendant had any control over the other parties at issue. (2TR45:14-16). However, the Defendant's website suggests otherwise, in that it markets to the public that the defendant, Wedgewood is one of its residences. (P73). The Defendant's website, at a minimum, creates the perception to the public that the entity has some level of authority or control over Wedgewood, such that they can potentially be found vicariously liable for Wedgewood and the actions of the medical providers that treated the Plaintiff. Therefore, just because the Defendant may not directly employ any of the medical providers and the Plaintiff did not treat there during the time period at issue, does not mean that the entity cannot be held vicariously liable in this case. However, all of these issues require discovery, which the Plaintiffs were deprived of based upon the Trial Court's ruling. Each of those arguments was rejected by Judge Brenner in his determination that discovery was not necessary and the entity should be outright dismissed with prejudice.

**C. The Plaintiffs were improperly precluded from conducting discovery on the issue of vicarious liability as to Defendant Helping Hand Behavioral Health (2TR42:25-43:12)**

By dismissing the Defendant with prejudice, the Plaintiffs were improperly precluded from conducting discovery on the issue of vicarious liability. "Our

discovery rules must ‘be construed liberally in favor of broad pretrial discovery.’” Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 541 (App. Div. 2003) (quoting Payton v. New Jersey Turnpike, 148 N.J. 524, 535 (1997)). This is because “our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties [may become] conversant with all the available facts.” Jenkins v. Rainer, 69 N.J. 50, 57 (1976). Our courts are committed to, among other things, fairness and quality service. Estate of McClenton v. Carbone, 2019 N.J. Super. Unpub. LEXIS 2632, \*6 (App. Div. 2019). The judiciary must strive to follow a policy in favor of generally deciding contested matters on their merits rather than based on procedural deficiencies. See Woodward-Clyde Consultants v. Chemical & Pollution Sciences, Inc., 105 N.J. 464, 472-74 (1987).

In his decision, Judge Brenner accepted as true - without any support in the record - the Defendant’s argument that it did not employ the co-defendants and did not have any control over them. (2TR45:14-24). In essence, the Trial Court made legal and factual conclusions without allowing the parties to explore if they are correct. Judge Brenner’s ruling is inconsistent with an abundance of case law holding that matters should be decided on their merits after there has been a complete exchange of information from all parties. This is also articulated in New Jersey Court Rule 4:10-2(a), which permits discovery on any claim or defense that is raised.



The purpose of discovery is a search for the truth so that cases may be decided on their merits. Indeed, the Plaintiffs' Complaint contains a notice to produce intended to obtain discovery on, *inter alia*, the relationship between each of the parties, including their employment status, contract agreements, control and the like. (Pa16-20). At the time of the Trial Court's decision on October 11, 2024, these issues remain unknown and no responses were received to the Plaintiffs' notice to produce. Based upon forthcoming responses to the notice to produce, along with interrogatory responses and deposition testimony, it will be revealed as to the extent of the Defendant's involvement in this case and whether it had a substantial role in the care or treatment of the decedent. Yet, the entity is now dismissed with prejudice and so the Plaintiffs are wholly precluded from developing a legal theory against the Defendant regardless of what may be produced or learned during discovery. Fundamentally, Judge Brenner's decision to outright dismiss the Defendant with prejudice improperly precluded the Plaintiffs from conducting discovery on whether the entity can be held vicariously liable and deciding this case on the merits.

**D. The Plaintiffs were improperly denied the ability to cure any deficiencies pertaining to the Affidavits of Merit (3TR8:1-9:7)**

Finally, the Trial Court's October 11, 2024, ruling improperly denied the Plaintiffs the ability to cure any deficiencies in the Affidavits of Merit. To combat the "avalanche of litigation" generated by the AOM statute, the Supreme Court "declared in *Ferreira* that an accelerated case management conference should be

conducted within ninety days of the filing of an answer to identify and address any and all issues concerning the [AOM] served or not served by the plaintiff." Meehan, 226 N.J. at 229. In Meehan, the Supreme Court pointed out that "[a]n effective *Ferreira* conference would probably have prevented [the] appeal" because "[t]he trial court pointedly declined to resolve the issues presented by [the] plaintiff." Id. at 240, 141. The Supreme Court reiterated "the need for a timely and effective *Ferreira* conference in all professional negligence actions" because "[t]he conference is designed to identify and resolve issues regarding the [AOM] that has been served or is to be served." Id. at 241, 141.

In this case, a Ferreira Conference was held on August 5, 2024 – 52 days after the Defendant filed an Answer. During the Conference, the Plaintiffs raised concerns about, *inter alia*, the Defendant's objection to the Affidavits of Merit and the issue of vicarious liability. (1TR7:23-8:13). If the issue regarding the objection was resolved at that time, it would have left the parties with a substantial amount of time to cure any deficiencies. However, that issue was not resolved at the Ferreira Conference, which precipitated the need to engage in the underlying motion practice. Oral argument was initially held on the motion on October 2, 2024 – 110 days after the Defendant filed an Answer.

During oral argument on October 2, 2024, the Court denied the Plaintiffs' motion as to the Defendant in holding that the entity did not employ any of the co-

defendants. As a result of the ruling, Plaintiffs' counsel indicated that a new Affidavit of Merit would need to be obtained, but that clarification was needed from the Trial Court in order to do so. (2TR47:19-24). Specifically, since the trial court held that the co-defendants were not employees of the Defendant, clarification was needed as to how to obtain an Affidavit of Merit that complied with Judge Brenner's ruling when the Plaintiffs were wholly unaware as to who the employees of the Defendant were without discovery. (2TR48:1-49:11). Discussion was also had concerning a stay in order to allow for limited discovery on the issue of vicarious liability or to get another Affidavit of Merit, since only ten days remained before the 120-day time period set forth in the Affidavit of Merit statute expired. (2TR46:4-47:21). Based upon this colloquy, Judge Brenner reserved his decision until the next motion day to finalize his ruling. (2TR53:3-18).

Thereafter, a second oral argument was held on October 11, 2024 – 119 days after the Defendant filed an Answer. During the argument, Judge Brenner read his decision into the record, at which time he: (1) dismissed the Defendant from the case with prejudice; (2) found that there was no basis for discovery on the issue of vicarious liability; (3) denied the Plaintiffs' request for alternative relief in the form of a stay; and (4) denied the Plaintiffs the ability to obtain a new Affidavit of Merit that conformed to the Trial Court's ruling.

In essence, the Trial Court's ruling created a Catch-22. Judge Brenner denied the Plaintiffs' motion based upon his belief that the Defendant did not employ any of the individuals identified in the Affidavits of Merit and Complaint. However, the Plaintiffs were left with no opportunity to obtain a new Affidavit of Merit that complied with the Court's ruling since no discovery was exchanged as to who the Defendant's employees were at the time of the malpractice. Furthermore, the Court's ruling came on the eve of the timeframe set forth by the Affidavit of Merit statute of 120 days instead of at the Ferreira Conference, which would have allowed the Plaintiffs the ability to cure any deficiencies. At this point, the Plaintiffs were left in an impossible position and given no opportunity to cure.

Judge Brenner also indicated in his decision that the Plaintiffs have known since the Ferreira conference that the sufficiency of the two Affidavits of Merit were being contested and could have taken the opportunity to serve another one during the statutory timeframe. (3TR8:22-9:2). However, as can be seen from the transcript, the Plaintiffs raised concerns during the Ferreira conference about the Defendant's objection, which was not addressed or resolved by Judge Brenner at that time. Instead, more time was given to the defendants to raise additional objections to the Affidavits of Merit, which precipitated the filing of the underlying motion. Since the Defendant's objection was based upon a legal theory without any discovery, it was

not possible to obtain a new Affidavit of Merit until the Court made a ruling on the objection.

Finally, the Trial Court denied the Plaintiffs' request for a stay of the time from the Ferriera Conference to the time that the decision on the Plaintiffs' motion was made. A stay would have been an equitable remedy that would have avoided the strictures of the Affidavit of Merit Statute and allowed the Plaintiff the time to obtain a new Affidavit of Merit that complied with the Court's ruling. In Paragon Contrs., Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 422-34 (2010), the Supreme Court held: "we have recognized equitable remedies that 'temper the draconian results of an inflexible application of the statute'--extraordinary circumstances and substantial compliance." Id. (quoting Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 151 (2003)). In this case, a stay would have been particularly useful as the Trial Court's decision came on the eve of the 120-day timeframe set forth in the Affidavit of Merit Statute. Therefore, in addition to the fact that Judge Brenner's decision impermissibly rejected the Plaintiffs' Affidavits of Merit, the Plaintiffs were also given no time to cure the deficiencies and avoid a dismissal of the Defendant, with prejudice.

**CONCLUSION**

For all of the foregoing reasons, this Court is requested to grant interlocutory appeal, reverse the decision of Judge Brenner, and find the Affidavits of Merit submitted by the Plaintiffs/Appellants to be statutorily sufficient.

Respectfully Submitted,

***s/Robert J. Banas***  
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*Attorneys for Plaintiff, the Estate  
of James Evans*

Dated: November 22, 2024

**IN THE SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

Docket: A-000737-24 (AM-000093-24)

**Filed: November 22, 2024**

THE ESTATE OF JAMES EVANS  
BY HIS GENERAL  
ADMINISTRATOR AND  
ADMINISTRATOR AD  
PROSEQUENDUM DAVID  
EVANS, and DAVID EVANS and  
LAURYN EVANS, individually  
Plaintiffs,  
v.  
DAWN WARNER, RN, DR. SAIRA  
AHMED, DR. BRYAN DAVIS, DR.  
AHSAN ABDULGHANI,  
WEDGEWOOD AMERICANA,  
WEDGEWOOD RESIDENTIAL  
HEALTH CARE FACILITY,  
HELPING HAND BEHAVIORAL  
HEALTH,  
(cont. on next page)

On appeal from:

LAW DIVISION - CIVIL PART  
OCEAN COUNTY

Docket No.  
OCN-L-340-24

SAT BELOW:

Hon. Robert E. Brenner, J.S.C.

**BRIEF OF RESPONDENT HELPING HAND BEHAVIORAL HEALTH**

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(cont. from prev. page)

JOHN DOES 1-10 ( a fictitious designation representing a class of as yet unknown individuals involved directly or indirectly in Plaintiff's medical care and/or are otherwise responsible for Plaintiff's injuries)

JANE DOES 1-10 ( a fictitious designation representing a class of as yet unknown individuals involved directly or indirectly in Plaintiff's medical care and/or are otherwise responsible for Plaintiff's

injuries),DOE PHYSICIAN GROUP,

P.C. or DOE MANAGED CARE

COMPANY 1-10 ( a fictitious designation representing a class of as yet unknown individuals involved directly or indirectly in Plaintiff's medical care and/or are otherwise responsible for Plaintiff's injuries)

Defendants

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## **Statement of Facts and Procedural History**

This matter arose with the filing of Plaintiff’s Complaint on February 26, 2024. (Pa1-20) The complaint alleged medical malpractice against, *inter alia*, Helping Hand Behavioral Health (“Helping Hand”). (Id.) The New Jersey Department of Health licensed Helping Hand to provide “Adult Partial Care Services.” (Pa76) It is a non-residential facility located in Clayton, New Jersey.<sup>1</sup> (Id.)

The complaint stems from the death of Plaintiff’s decedent, whose death Plaintiff alleged was the result of receiving an excessive amount of insulin at Wedgewood Residential Health Care Facility (“Wedgewood”), the residential care facility where he was a resident. (Pa1-20)

Helping Hand filed its Answer on June 14, 2024. (Pa21-34) As part of its Answer, Helping Hand also made a demand for an Affidavit of Merit under N.J.S.A. 2A:53A-27. (Id.) Plaintiff served two Affidavits of Merit authored by Robin Goland, M.D. and Katherine Moses, RN. (Pa42-43; Pa58)

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<sup>1</sup> See, N.J.A.C. 10:37F-1.3 (defining “Partial care” as “an individualized, outcome-oriented mental health service, which provides a comprehensive, structured, ***non-residential***, interdisciplinary treatment and psychiatric rehabilitation program in a community setting to assist consumers who have serious mental illness in increasing or maximizing independence and community living skills and enhancing the quality of their lives.” Emphasis added.)

On July 26, 2024, Helping Hand's counsel sent a letter to Plaintiff's counsel objecting to the Affidavits of Merit and citing the case law supporting the objection. (Pa72) On August 5, 2024, the parties appeared for a conference under Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003) before the Hon. Robert E. Brenner, where the objection to the Affidavits of Merit were made on the record. (1T4:2-19:3)<sup>2</sup>

Helping Hand argued that the affidavits by Dr. Goland and Nurse Moses were insufficient, because the claim alleged vicarious liability against Helping Hand, but the affidavits did not identify any act taken by any employee of Helping Hand. (1T11:1-11:18)

Subsequently, plaintiff filed a Motion to deem the Affidavits of Merit sufficient as to a co-defendant and Helping Hand. (2T4:1-54:11) This motion was opposed, reply papers were submitted, and lengthy oral argument occurred on October 2, 2024. (Id.) The Court reserved its decision on the issue of the Affidavits of Merit served as to Helping Hand and scheduled a second hearing on October 11, 2024. (2T53:3-8) On October 11, 2024, after the second hearing,

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<sup>22</sup> 1T=August 5, 2024 transcript of Ferreira Conference.  
2T=October 2, 2024 transcript of Motion to Waive Affidavit of Merit  
3T=October 11, 2024 transcript of Motion to Waive Affidavit of Merit

Judge Brenner denied Plaintiff's application to deem the Affidavits of Merit sufficient as to Helping Hand. (3T4:1-10:14; Pa77-79)

As more than 120 days passed after the filed Answer, the time to serve an appropriate Affidavit of Merit as to Helping Hand passed without Plaintiff serving a proper Affidavit of Merit against Helping Hand, Helping Hand was entitled to a dismissal, with prejudice.

### **Legal Argument**

#### ***ISSUE I. THIS COURT SHOULD DENY INTERLOCUTORY APPEAL BECAUSE PLAINTIFF FAILED TO SHOW THAT SUCH AN APPEAL WOULD BE IN THE INTEREST OF JUSTICE.***

##### ***Applicable Standard***

The standard of review governing the grant or denial of an application for interlocutory appeal is set forth in Rule 2:2-4. This Court may grant leave to appeal "in the interest of justice." However, the power to grant leave to appeal is highly discretionary and this Court should exercise that discretion sparingly, in exceptional cases. State v. Reldan, 100 N.J. 187, 205 (1985); State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997). "An application for leave to appeal is not mandatory and not necessarily desirable.... Interlocutory appellate review runs counter to a judicial policy that favors an uninterrupted proceeding at the trial level with a single and complete review." Reldan at 205, internal cite and quotation omitted.

Further, in Brundage v. Estate of Carambio, 195 N.J. 575 (2008), this Court emphasized the court system’s aversion to piecemeal appeals. Brundage, 195 N.J. at 599 (the “stringent standard” necessary to grant interlocutory appeals arises from the “general policy against piecemeal review of trial-level proceedings.”)

In this case, Plaintiff’s petition to this Court fails to identify exactly what irreparable injury exists in this case or how the interests of justice overcome the prohibition against piecemeal appeals. The mere fact that Judge Brenner dismissed one of a number of defendants for failure to comply with the Affidavit of Merit statute does not demonstrate irreparable injury or make immediate appeal in the interest of justice. Any error that Plaintiff believes Judge Brenner committed can be reviewed by this Court at the conclusion of the case after a final order; at that time, this Court can issue any appropriate order.

Plaintiff, however, can point to no urgent necessity or injustice justifying immediate review of the type for which interlocutory appeal was designed to address. In Romano v. Maglio, 41 N.J. Super. 561 (App. Div. 1956), certif. den’d 22 N.J. 574 (1956), cert. den’d 353 U.S. 923, 1 L.Ed. 2d 720, 77 S.Ct. 682 (1957), the Appellate Division held that interlocutory appeal is proper where grave or irreversible damage is at stake, such as orders affecting

injunctions, receiverships, or where the Court determines that personal jurisdiction over a defendant exists. Romano, 41 N.J. Super. at 568.

This case does not present the kind of matter that will be destroyed absent immediate appeal. No question of privilege or immunity that would be gone forever if not enforced are present, nor is there any type of diminishing asset at issue that would degrade over time, necessitating immediate review. Rather, Plaintiff simply believes that Judge Brenner erred and to avoid some unspecified, “harm.” (Pb7-9)

However, merely disagreeing with the trial judge’s determination—even one that resulted in the dismissal of one of the parties—is not a sufficient basis upon which to move for immediate appellate review. The principle favoring unitary appeals after a final order would be decimated if immediate appeal were deemed appropriate, simply because the plaintiff believes the dismissal of one of the defendants pre-trial is erroneous.

Further, adding an interlocutory appeal now would be wasteful of scarce judicial and legal resources. This Court has recognized that appeals are expensive to litigants, and that “[t]his expense should be avoided or at least consolidated in a final appeal at which all issues can be reviewed unless there is an urgent necessity for the earlier review.” DiMarino v. Wishkin, 195 N.J. Super. 390, 396 (App. Div. 1984).

The absence of any irreparable injury means that there is no cause for this Court's immediate involvement in this case. For all the aforementioned reasons, Plaintiffs have not shown that this case warrants interlocutory appeal. The extraordinary remedy of immediate appeal should therefore be denied.

*There Was No Error In Judge Brenner's Order*

Additionally, as the following section will demonstrate, there was no error in Judge Brenner's order.

The Affidavit of Merit Statute (hereinafter "Statute") applies to all actions for damages resulting from an alleged act of malpractice or negligence by a "licensed person" in his or her profession or occupation. See N.J.S.A. 2A:53A-26 and N.J.S.A. 2A:53A-27. The Statute requires a plaintiff to 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 matter of the Complaint, fell outside acceptable professional or occupational standards or treatment practices." See N.J.S.A. 2A:53A-27.

N.J.S.A. 2A:53A-26 states in pertinent 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 sixty (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 of treatment practices.

N.J.S.A. 2A:53A-26 (Emphasis added.)

Furthermore, pursuant to N.J.S.A. 2A:53A-29, “[i]f the plaintiff fails to provide an Affidavit or a Statement in lieu thereof, pursuant to Section 2 or 3 of this Act, it *shall be deemed* a failure to state a cause of action.” N.J.S.A. 2A:53A-29 (Emphasis added.) Specifically, failure to provide an Affidavit of Merit within sixty days of the date on which a Defendant’s Answer is filed, or failure to obtain the single, sixty-day extension permitted by statute, constitutes a failure to state a cause of action and will result as a dismissal with prejudice. N.J.S.A. 2A:53A-29; Cornblatt v. Barow, 153 N.J. 218, 244 (1998). The Court may grant a single sixty-day extension (for a total of 120 days from the filing of Defendant’s Answer) to file an appropriate Affidavit of Merit; however, it is not within the Court’s discretion to grant more than one additional period, not to exceed sixty days, upon a finding of good cause. N.J.S.A. 2A:53A-27.

The statutory purpose of the Statute is to require Plaintiffs to make a threshold showing that their claim is meritorious. In re Petition of Hall, 147

N.J. 379, 391 (1997). The effect is to eliminate meritless lawsuits at the early stages of litigation. Id. The Statute “serves a gate-keeping function so that only those cases that meet a threshold of merit proceed through litigation stream.” Hubbard v. Reed, 331 N.J. Super. 283, 292 (App. Div. 2000), reversed on other grounds, 168 N.J. 387 (2001). The language of the Statute and the Legislature’s intent are patent, and “the court’s sole function is to enforce the statute in accordance with those terms.” Phillips v. Curiale, 128 N.J. 608, 618 (1992).

In this case, Helping Hand filed its Answer on June 14, 2024. As part of the filed Answer to the Complaint, it demanded an Affidavit of Merit pursuant to N.J.S.A. 2A:53A-27. Plaintiff served Affidavits of Merit authored by Robin Goland, M.D. and Katherine Moses, RN, respectively, but Helping Hand objected to both and the Court subsequently deemed them deficient.

The submission of an appropriate Affidavit of Merit is an element of a professional malpractice claim. Meehan v. Antonellis, 226 N.J. 216, 228 (2016). An Affidavit of Merit is required when the plaintiff’s claim of vicarious liability hinges upon allegations of deviation from professional standards of care by licensed individuals who worked for the named defendant. Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc., 250 N.J. 368, 381 (2022).

Generally, an Affidavit of Merit should identify the licensed person who allegedly deviated from the acceptable standard of care. See Medeiros v. O'Donnell & Naccarto, Inc., 347 N.J. Super. 536, 542 (App. Div. 2002). At the very least, it must be possible to identify, by the description within the Affidavit of Merit, the licensed person or entity alleged to have deviated from the applicable standard of care. Hargett v. Hamilton Park OPCO, LLC, 477 N.J. Super. 390, 397-98 (App. Div. 2023).

In Hargett, the plaintiff sued named defendant facilities for the negligence of unnamed “nursing and administrative staff” at those facilities. Id. at 393. The plaintiff served a single Affidavit of Merit in support of all of her claims, which stated:

[T]here exists a reasonable probability that the care, skill, or knowledge exercised in the treatment provided by Alaris [Health] . . . and Jersey City Medical Center, and the members of their nursing and nursing administrative staff, fell outside acceptable professional standards and was the cause of harm . . . to Ingram.

Id. at 394 (second alteration in original).

The trial court found that the Affidavit of Merit was deficient because failed to provide *specific notice* as to a *specific employee* as to a *specific claim of negligence* and failed to provide notice as to who may have violated the

applicable standard of care. Id. at 395. The Appellate Division affirmed the trial court’s decision, holding:

Here, it is not possible to identify any Alaris Health nurses who Kotz asserts were negligent because the AOM refers generally to the entire Alaris Health nursing staff over an extended period and indiscriminately combines the nursing staffs of two separate facilities. Appellant did not satisfy her obligation as to Alaris Health by serving an AOM that opines collectively as to the care provided by its nurses and the nurses at Jersey City Medical Center. Appellate was required to ‘provide each defendant’ with an appropriate AOM and failed to do so.

Id. at 398.

The Court further held that “[a]t a minimum, the AOM statute entitles a defendant facing a vicarious liability claim to an AOM limited to alleged deviations by *its own licensed employees*. Alaris Health was entitled to an AOM that offered a clear opinion that *its own nurses* deviated from the applicable standard of care.” Id. The Court expressly took issue with the fact that the Affidavit of Merit left open the possibility that the affiant of merit was not able to offer an opinion as to the named facility’s nurses standing alone. Id.

In the present case, the affiant, Robin S. Golan, M.D. opines as to  
Helping Hand:

Based on my review, I am of the opinion that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited by Dr. Saira Ahmed, Dr. Bryan Davis, Dr. Ahsan Abdulghani, Wedgewood

Americana, Wedgewood Residential Health Care Facility and Helping Hand Behavioral Health fell outside acceptable professional treatment standards.

(Pa42)

Similarly, affiant, Katherine Moses, RN, opines as to Helping Hand, “[b]ased on my review, I am of the opinion that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited by Dawn Warner, RN, Wedgewood Americana, Wedgewood Residential Health Care Facility and Helping Hand Behavioral Health fell outside acceptable professional treatment standards.” (Pa58)

Neither opinion provides Helping Hand with sufficient notice as to a claim for *vicarious liability*. Plaintiffs have not identified any individual in the Affidavits of Merit for whom Helping Hand would be vicariously liable. Plaintiff’s counsel has represented that plaintiff is not pursuing direct claims of negligence against Helping Hand. As is clear from the case law, Plaintiffs must provide Helping Hand with an Affidavit of Merit that indicates that Plaintiffs’ claims against it (for vicarious liability) have merit. Plaintiffs’ filed Affidavits of Merit fail to do so. As such, Plaintiffs’ Affidavits of Merit as to Helping Hand are insufficient as a matter of law.

More specifically, the three medical doctors named and Nurse Warner *did not* provide any care or treatment to Plaintiff at Helping Hand, nor is there

any allegation in this case that they did. It is undisputed that Helping Hand is located in Clayton, New Jersey and licensed by the Department of Health to provide “Adult Partial Care Services.” It is a non-residential partial care facility.

It is further undisputed that Wedgewood, where Plaintiff’s decedent was a resident and where he received the medical care upon which Plaintiff’s claim is based, is a residential facility entirely separate from Helping Hand. Unlike Helping Hand, Wedgewood is located in Glassboro, New Jersey. The medical providers named as Defendants in this case and identified in the Affidavits of Merit do not provide any care or treatment at Helping Hand, but rather at the Wedgewood, nor is there any allegation that they provided care for Plaintiff’s decedent at Helping Hand.

Plaintiff based his argument solely on the fact that Helping Hand’s website referenced Wedgewood as one of three Residential Health Care Facilities with which it is affiliated, to argue that the Affidavits of Merit, referencing physicians and nurses that did not provide any care at Helping Hand, are somehow sufficient. However, even common ownership of separate facilities is not a basis upon which a theory of vicarious liability might lie, and an Affidavit of Merit that does nothing more than lump all of the defendants together fails to abide by the requirements of the law in Hargett.

Despite an affiliation or overlap in ownership between the two facilities pursuant to the holding of Hargett, Helping Hand is not on notice of vicarious liability claims, as the affiants do not reference any care provided at Helping Hand. Therefore, Judge Brenner properly denied Plaintiff's application to deem the two Affidavits of Merit sufficient.

Further, contrary to Plaintiff's claim that Judge Brenner found that Helping Hand cannot be vicariously liable (see, Pb15), Judge Brenner determined that "Helping Hand is not on notice for the reason I've stated of potential vicarious liability claims as the affiants do not reference any care provided at Helping Hand nor any of the individual defendants being employed there." (2T45:20-24) Given the undisputed facts that the decedent treated at Wedgewood, that the claim stems from that treatment, that he received no treatment at Helping Hand, and that the facilities are separate entities, the Affidavits of Merit premised on nothing but a claim of common ownership between Helping Hands and Wedgewood is insufficient to meet the Hargett standard.

Furthermore, Plaintiff cited to *no* legal authority for the proposition that a Court may grant a stay of the period within which they must serve a sufficient Affidavit of Merit, if the previously served Affidavits of Merit are

insufficient, in order to conduct discovery or to “cure” deficiencies in their Affidavits of Merit. (See, Pb18-24)

A Court cannot alter the legislatively prescribed time periods under the Statute. See, e.g., Paragon Contractors, Inc. v. Peachtree Condominium Ass’n, 202 N.J. 415, 424-25 (2010) (holding that the failure to hold a Ferreira conference does not toll the Affidavit of Merit filing period). “[P]arties are presumed to know the law and are obliged to follow it.” Id. at 424.

Plaintiffs may solely request an *extension* of the time by which to file an Affidavit of Merit for extraordinary circumstances—they may not request an extension of time for *legal insufficiency*. See Hyman Zamft & Manard, LLC v. Cornell, 309 N.J. Super. 586, 593 (App. Div. 1998). Therefore, Plaintiffs may not request a stay (or toll) of the period by which they must file their Affidavit of Merit and have not demonstrated or asserted the existence of any extraordinary circumstances which would warrant an extension of the time to file.

As a result, there was no error in Judge Brenner’s order dismissing Plaintiff’s claims against Helping Hand.



**Conclusion**

For all of the foregoing reasons, Helping Hand asks this Court to deny Plaintiff's motion.

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