

DID THE STATE NURSE PRACTICE ACT REQUIRE A SWORN STATEMENT OF MERIT (AOM) TO BE FILED BEFORE A PROFESSIONAL NEGLIGENCE ACTION AGAINST AN LPN COULD GO FORWARD?

written by Nancy Brent | March 5, 2025

In the state in which this case was filed, an [Affidavit of Merit \(AOM\)](#), a procedural requirement, was required to be filed with a case against specified health care providers in that state, including nurses.

The Affidavit, sworn to by a health care provider of the same profession, attests to the worth of the case being filed after a thorough review of the case to be filed.

In this particular case (Gilligan v. Junod, 285 A. 3d 316 (2022), the court had to interpret the state nurse practice act to determine if an LPN was included in this requirement.

Details of the case Prior to the Lawsuit

A call was made to the surgical group practice where the LPN worked. The husband told the LPN that his wife was “in pain and unable to eat.” The LPN told the husband that his wife was probably experiencing post-operative gas and she should continue to take her medications, try to eat, drink liquids, and ambulate.

Later that same morning, the husband called the surgical group practice again and informed the LPN that the pain medications “sedated” his wife. The LPN told the husband that perhaps the wife was “overmedicated” and he should cut back on the medications, get his wife up, have her eat, and ambulate.

Later the same day, the husband left “numerous messages” for the LPN asking that she call him back due to his wife’s condition.

Sometime later that same day, the LPN returned the husband’s calls and told him to give his wife Maalox or Pepto Bismol, get her to eat, and have her ambulate.

The next day, the patient was unresponsive and was taken to a hospital where she was pronounced dead.

Husband Files Medical Malpractice Case

The husband, on his behalf and as executor of his wife's estate, filed a medical malpractice case against the wife's physician, an unknown nurse, and the surgical group practice.

After discovery was completed, the husband's claim against the physician and his direct claim against the surgical group practice were voluntarily removed by the husband.

He then filed an amended complaint against the LPN and the surgical group practice when it was determined that it was the LPN with whom he spoke about his wife's condition.

The claim against the surgical group practice was based on a [*respondeat superior*](#) claim as the LPN's employer.

The allegations against the LPN were that she was professionally negligent in the advice she gave the husband concerning his wife's condition and failing to contact the wife's physician concerning her condition.

At the trial court level, the court conducted a hearing to evaluate any issues concerning the AOM. The LPN's position was that the husband needed an AOM while the husband's position was that one was not needed.

The husband then filed a motion seeking the court to clarify that an AOM was not needed. The LPN filed a [Motion to Dismiss](#) the husband's complaint for failure to file an AOM.

After oral arguments on the two motions, the trial court granted the husband's motion and denied the LPN's motion.

Both orders were appealed.

Appellate Court Decision

The one legal question on appeal was whether an LPN is a "licensed person" covered by the AOM statute, thus requiring an AOM to be filed with a case against an LPN before it could proceed in the judicial system.

The Appellate Court carefully analyzed the AOM statute, stating that it was part of a tort reform package to "strike a balance between reducing frivolous lawsuits and permitting injured plaintiffs to recover for meritorious claims."

The AOM statute, the Court continued, requires a plaintiff alleging "'malpractice or negligence by a licensed person'" to file a sworn statement by a licensed person (of the same profession) to attest that there is a "'reasonable probability'" that the defendant's conduct "'fell outside acceptable or

professional occupational standards or treatment practices.”’

Sixteen licensed persons (and a healthcare facility) are identified in the AOM statute, which limits the professionals covered by the statute.

A registered professional nurse is one of those sixteen licensed persons listed. The statute also refers to the state nurse practice act and its definition of a registered professional nurse. LPN practice is also defined separately in the nurse practice act.

The LPN claim’s was that the legislature intended to include LPNs within the list of identified licensed persons in the statute.

The Court rejected her argument holding that there is no reference to LPNs in the definition of a registered professional nurse and that an LPN works under the direction of a registered nurse or other licensed health care providers.

The Court also discussed prior case law supporting its position.

The Court held that although there was no need for an AOM in his case, the husband would still need to provide evidence that the LPN was professionally negligent, including testimony from an expert witness to establish the standard of care and the LPN’s failure to uphold that standard.

The Court also held that no AOM was required to support his claim against the surgical group practice, but that claim was limited to the *respondeat superior* allegations.

The trial court’s order that no AOM was needed against the LPN was affirmed and the case was remanded back to the trial court for further proceedings.

Talking Points of this Case

The case will now proceed through the judicial process. Although no determination has yet to be made, there is a real question as to the LPN’s conformity with her standard of care in this situation.

As an LPN, you know that you work under the direction of an RN, licensed physician or other licensed health care provider. As such, you cannot make patient care decisions outside the definition of your LPN practice in your state nurse practice act and rules.

The LPN in this case needed to immediately communicate to the patient’s physician the husband’s continuing reports of his wife’s condition. Instead, the LPN advised the husband to decrease medications, take over the counter medications, and ambulate her.

Had the LPN immediately informed the physician of the husband’s concerns, his wife may have survived.

Knowing and adhering to your definition of practice in your state is essential. So too is communicating patient conditions to those who direct your responsibilities specified in your nurse practice act.

Documenting communications with your patients and with health care providers you notify about those communications is also part of your legal responsibilities. You can read about general nursing documentation tips [here](#).

Know that many states require Affidavits (or Certificates) of Merit to be filed along with, or soon after, a plaintiff files a professional negligence case.

You may be asked by an attorney to evaluate the care provided by an LPN for an AOM, especially if you have done so in the past or if you have established a business providing this service to attorneys. Be certain to carefully evaluate the case and provide an honest and complete assessment of the LPN's conduct.

You may also be asked to testify at trial as an expert witness since you have already evaluated the case for the AOM. The attorney with whom you work will advise you on testifying in court.

The case underscores the importance of state nurse practice acts. Although nurse practice acts are involved in many lawsuits when patient injury or death is the focus of a lawsuit, in this case it was used to determine whether the case could continue to be heard by the court. The respective definitions of professional registered nursing and licensed practical nursing were key factors in this determination.