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**CHANGES TO THE AFFIDAVIT OF MERIT STATUTE:
HOW A RECENT APPELLATE DIVISION DECISION CREATES
NEW REQUIREMENTS FOR CLAIMS AGAINST DESIGN PROFESSIONALS**

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In 1995 the New Jersey Legislature passed the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26, et seq., with the intention of weeding out frivolous claims against certain professionals, including design professionals. In a professional malpractice matter, a plaintiff must comply with the Affidavit of Merit Statute in order to make a showing that the claim is meritorious so that meritless lawsuits can be readily identified in the early stages of litigation. In re Hall, 147 N.J. 379 (1997).

The statute provides:

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. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

N.J.S.A. 2A:53A-27

N.J.S.A. 2A:53A-29 states “[I]f the plaintiff fails to provide an affidavit or a statement in lieu thereof...it shall be deemed a failure to state a cause of action.” Therefore, the failure to timely provide an Affidavit of Merit can doom a professional malpractice claim.

For years, many in the construction industry would rely upon an Affidavit of Merit provided by an engineer in professional malpractice actions against an architect. However, a recent Appellate Division decision in Hill Int’l v. Atl. City Bd. of Educ., 438 N.J. Super. 562 (App.Div. 2014), has effectively barred submitting an Affidavit of Merit from an engineer in a professional malpractice action against an architect. To support claims of malpractice or negligence liability, the affidavit of merit must be issued by an affiant who is licensed within the

same profession as the defendant.¹ That like-licensed requirement applies even in matters involving architects and engineers wherein the relevant professional licensure laws overlap to some degree. An Affidavit of Merit from such a like-licensed expert is not, however, required in circumstances where the plaintiff's claims are confined to theories of vicarious liability or agency and do not assert or implicate deviations from the defendant's professional standards of care. Hill Int'l, 438 N.J.Super. at 570.

The Hill Int'l court relied heavily upon the engineering licensure statute, N.J.S.A. 45:8-28(b), which expressly acknowledges the separate and distinct laws that regulate the practice of architecture:

The provisions of the chapter concerning the licensure of engineers shall not be construed to prevent or affect the employment of architects in connection with engineering projects within the scope of the act to regulate the practice of architecture and all the amendments and supplements thereto. Nothing herein shall prohibit licensed architects from providing or offering services consistent with the Building Design Services Act, N.J.S.A. 45:4B-1, et seq.

Hill Int'l, 438 N.J.Super. at 584-585.

The Hill Int'l Court leaves open the question of whether non-like-licensed design professionals may issue expert reports and provide expert testimony in professional malpractice actions involving architects and/or engineers. However, it is now clear that when malpractice is alleged against an architect or engineer, the threshold evaluation of a plaintiff's claim must be made by a like-licensed professional.²

¹ Section 41 of the New Jersey Medical Care Access and Responsibility and Patients First Act, N.J.S.A. 2A:53A-37, et seq., codified a similar requirement for medical experts.

² Subject to a potential review by the Supreme Court or legislative changes to the Affidavit of Merit Statute; however, if the statute is amended it would likely be done to conform to the holding in Hill Int'l.

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