

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOHN A. PARKINS, JR.
JUDGE

**NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
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January 11, 2012

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**Re: Robert J. Kijewski
v. Thomas B. Barnett, M.D. and
Delaware Surgery Center, Inc.
C.A. No. N11C-10-150 JAP**

Dear Counsel:

This is a medical negligence case in which the defendant surgeon allegedly removed plaintiff's kidney, erroneously thinking that it was "possibly an old hematoma." When plaintiff filed suit he did not file an Affidavit of Merit. Now before the court is Defendants' motion to dismiss based on the absence of an Affidavit of Merit.

This case turns on whether an Affidavit of Merit is required under the circumstances if this case. Section 6853 of title 18 requires a medical negligence plaintiff to file an Affidavit of Merit in all cases except "if the complaint alleges a rebuttable inference of medical negligence, the grounds

of which are set forth below in subsection (e) of this section.”¹ Subsection (e) in turn provides three instances in which there is a rebuttable inference of negligence not requiring supporting expert testimony. One--referred to herein as the (e)(3) exception--arises when a “surgical procedure was performed on ... the wrong organ, limb or part of the patient’s body.”²

Plaintiff contends the (e)(3) exception relieves him of any obligation to file an Affidavit of Merit. Defendant disagrees, arguing that the exception applies only when the health care provider *intentionally* operates on the wrong body part. Plaintiff counters that the plain language of the statute encompasses both intended and unintended surgical procedures on the wrong body part.

Although not cited by either side, the court finds that the Delaware Supreme Court’s opinion in *Freeman v. X-Ray Associates, P.A.*³ is controlling. In that case, a radiologist intended to biopsy the plaintiff’s liver using ultrasound guidance. Instead of obtaining liver tissue, however, the physician retrieved kidney tissue. The patient later brought suit, in which she claimed she could avail herself of the exception in (e) (3). The defendant physician made the same argument defendant Dr. Barnett has presented in this case -- the (e)(3) exception only applies to intended surgeries on the wrong organ. The Supreme Court disagreed, holding that the exception applies to both intended and unintended procedures:

¹ 18 *Del. C.* §6853 (b).

² *Id.* at (e) (3).

³ 3 A.3d 224 (Del. 2010).

Does the statute contemplate excluding unintended results from the meaning of a surgical procedure? “[S]tatutory language, where possible, should be accorded its plain meaning.” Moreover, when a statute is clear and unambiguous there is no need for statutory interpretation. Title Eighteen, Section 6853(e)(3) plainly states that a plaintiff need not provide a medical expert's opinion on the standard of care or breach thereof if a physician performs a surgical procedure on the wrong organ or part of the patient's body. There is no qualifying language in the statute that limits its application to intentional acts or precludes its application to inadvertent acts.⁴

The reasoning in *Freeman* is applicable here. Accordingly, the instant plaintiff may invoke the exception in (e)(3) and it was therefore unnecessary for her to submit an Affidavit of Merit. Defendant's motion is therefore **DENIED**.

On a final note, it appears from the allegations in the complaint and the date when the complaint was docketed that Plaintiff availed himself of the additional 90 days afforded under the statute of limitations when plaintiff notifies defendants of an intent to investigate. Counsel is reminded that in such cases, the statute requires plaintiff to attach a copy of the Notice of Intent to the complaint.

Very truly yours,

John A. Parkins, Jr.

cc: Prothonotary

⁴ *Id.* at 230 (footnotes omitted).