

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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November 30, 2007

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**Re: *Simmons v. Bay Health Medical Center, Inc.*
C.A. No. 06C-08-136-JRS**

Dear Counsel:

As you know, this case involves allegations of medical negligence against a nurse at the Kent General Hospital in Dover, Delaware. Specifically, the plaintiff alleges that the nurse breached the standard of care by allowing him to transfer from a chair in his room to a commode in his room and back to the chair without adequate nursing assistance. The plaintiff fell during the transfer and was injured. The defendant has denied the plaintiff's allegations of medical negligence and, after full discovery, has moved for summary judgment on the ground that the plaintiff has

failed to meet his statutory burden to support his claims of medical negligence with competent expert testimony. For the reasons that follow, the Court has determined that the motion for summary judgment must be **GRANTED**.

In Delaware, medical negligence claims are creatures of statute.¹ The plaintiff's burden to comply with the applicable statutory provisions in order to avoid summary judgment is now well-settled:

Under 18 *Del. C.* § 6853, a party alleging medical malpractice must produce expert medical testimony that specifies (1) the applicable standard of care, (2) the alleged deviation from that standard, and (3) the causal link between the deviation and the alleged injury. A defense motion for summary judgment, by contrast, does not require a supporting expert's affidavit if the parties have adequate time for discovery and if 'the record unambiguously reflects that the plaintiff's allegations are not and will not be supported by any expert medical testimony.'²

In this case, the Court's scheduling order established deadlines by which the parties were required to identify experts, complete fact discovery, complete expert discovery, and initiate dispositive motion practice.³ The Court received no request to extend these deadlines and, by all accounts, the parties faced no difficulties in complying with them. The motion *sub judice* was filed after the close of discovery

¹ See 18 *Del. C.* § 6853 ("Section 6853").

² *Green v. Weiner*, 766 A.2d 492, 494-95 (Del. 2001)(citations omitted).

³ See Trial Scheduling Order, D.I. 19.

and prior to the dispositive motion deadline.

To support his claims of medical negligence, the plaintiff identified Demetrius Zerefos, D.O., a board certified family medicine practitioner licensed in the State of Delaware. Dr. Zerefos was designated as both a “standard of care” and “causation” expert. The plaintiff’s expert disclosure took three forms. First, the plaintiff filed with his complaint, and then supplied to defense counsel, an Affidavit of Merit in which Dr. Zerefos states:

The standard of care in the State of Delaware for the treatment of patients in the hospital would require such care and attention especially for an elderly patient with plaintiff’s medical condition who should not have been allowed to walk unattended so as to preclude and prevent such a fall and resulting fracture from occurring. Plaintiff would not have sustained such a fracture with proper attention and care. Plaintiff’s fall with the resulting injury was the result of a deviation from the required standard of care of a patient in the hospital by the Defendant’s employees.⁴

Second, Plaintiff’s counsel sent a letter to defense counsel dated April 13, 2007, in which he states:

Dr. Zerefos will be testifying consistent with his previously produced report/affidavit. Dr. Zerefos will testify that defendants engaged in medical malpractice and that their medical care/treatment of plaintiff fell below the standard of medical care. In addition, Dr. Zerefos will be testifying that within a reasonable degree of medical probability that there are reasonable grounds to believe that there has been healthcare

⁴ See Court Exhibit No. 1, marked at the November 28, 2007 hearing on the motion for summary judgment.

medical negligence committed by Kent General Hospital which caused plaintiff's injuries, namely a comminuted fracture in the left ankle, while he was a patient at Kent General Hospital on October 29, 2005.⁵

Finally, Dr. Zerefos gave a deposition on May 10, 2007. During that deposition, Dr. Zerefos was asked detailed questions regarding the opinions he would offer at trial. At the conclusion of defense counsel's examination of Dr. Zerefos, he asked the witness to state his ultimate opinion on the standard of care issue:

Question: Well, are you going to offer the opinion that the nurse [] breached the standard of nursing care in not getting someone else to go to the bathroom with her when she went to see if Mr. Simmons was finished and could return to his chair?

Answer: I can't really say that because if she assessed the patient and there was no reason to think that, you know, the patient was at high, you know, high risk, so to speak, to, you know, go to the bathroom with the assistance and there was no dizziness, he was alert, then I really can't say that, you know, she breached her, you know, medical needs.⁶

In its motion for summary judgment, the defendant argues that the undisputed facts of record reveal that the plaintiff has failed to carry his burden to support his claims of medical negligence with competent expert testimony. The defendant points particularly to Dr. Zerefos' deposition testimony in which he conceded that "[he

⁵ D.I. 21, Ex. B.

⁶ D.I. 21, Ex. C at 16.

couldn't] really say that" the defendant's nurse breached the standard of care.⁷

Plaintiff counters that the Court cannot determine that his expert's opinion is statutorily insufficient as a matter of law because there are factual issues in dispute that must be resolved by a jury before the adequacy of the expert testimony can be measured. Specifically, according to plaintiff, the jury must first determine, based on the facts presented, whether or not the plaintiff was medically stable at the time he was permitted to transfer from his chair to the commode and back with the assistance of only one nurse. Plaintiff argues that his expert's opinion hinges on the outcome of that factual determination. If the plaintiff was medically stable, then his expert will concede there was no breach of the standard of care; on the other hand, if the plaintiff was not medically stable, then his expert will opine there was a breach of the standard of care.⁸

Based on the parties' contentions, the Court has framed the issue as follows: can a plaintiff sustain his statutory burden to present expert testimony in support of his claims of medical negligence with an expert who will reach his opinions only after a lay jury has resolved a medical issue of fact? For the reasons that follow, the Court has concluded that such conditional expert testimony is not sufficient to sustain the

⁷ *Id.*

⁸ It should be noted that Dr. Zerefos never actually said this in his deposition.

plaintiff's burden under Section 6853.

As an initial matter, the Court notes that the disclosures of Dr. Zerefos' opinion in the affidavit of merit and in the plaintiff's counsel's letter were not adequate to satisfy the plaintiff's burden of disclosure under Delaware Superior Court Civil Rule 26(b)(4).⁹ Neither disclosure provided the "substance of the facts" upon which Dr. Zerefos' opinions would be based, or a "summary of the grounds" for his opinions.¹⁰ Nevertheless, the factual and medical bases for the opinions were explored thoroughly by counsel at deposition. This is a proper means by which to obtain from an expert a detailed preview of the testimony the expert will offer at trial.¹¹ When asked specifically whether he would be testifying at trial that the defendant breached the standard of care, Dr. Zerefos candidly acknowledged that "[he couldn't] really say

⁹ Rule 26 (b)(4)(A) (i) provides:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial to state the subject matter on which the expert is expected to testify, **and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.**(emphasis supplied)

¹⁰ *Id.*

¹¹ See *Sammons v. Doctors for Emergency Services, P.A.*, 913 A.2d 519, 530-32 (Del. 2006)(discussing generally the process by which an expert's testimony is disclosed to an opposing party in a medical negligence case); *Davis v. St. Francis Hospital*, 2002 WL 31357894 (Del. Super.)(reviewing plaintiff's expert deposition in detail to determine whether the expert offered a statutorily adequate opinion regarding proximate causation and granting summary judgment upon concluding that he did not).

that.” In the context of this motion for summary judgment, Dr. Zerefos’ concession cannot be ignored as the Court considers the adequacy of the plaintiff’s expert support for his claims of medical negligence. Simply stated, Dr. Zerefos’ opinion falls short of the mark set by Section 6853.

The Court must reject the plaintiff’s contention that the evaluation of Dr. Zerefos’ opinion should await the jury’s determination of whether the plaintiff was medically stable at the time of his transfer from chair-to-commode and subsequent fall.¹² As indicated, Dr. Zerefos testified clearly that he was unable or unwilling to make that determination based on the medical records and deposition testimony he reviewed prior to reaching his opinion or giving his deposition. Thus, at trial, the jury would be left to make the determination regarding the plaintiff’s medical status on its own, unguided by expert testimony. The Court is satisfied that to allow this to

¹² For purposes of this motion, the Court will accept the plaintiff’s suggestion that Dr. Zerefos would opine that the defendant nurse’s decision to accompany the plaintiff to and from the commode without additional assistance would be a breach of the standard of care **if** the plaintiff was medically unstable at the time of the transfer. This opinion, however, is not clearly and/or adequately stated in Dr. Zerefos’ deposition or in the other disclosures of his opinion.

happen at trial would be to allow the jury to engage in “unguided speculation.”¹³

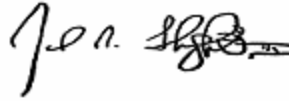
Without expert medical testimony, the jury in this case could not reliably assess the plaintiff’s medical condition at the time of the fall. Likewise, the jury could not be asked to determine whether the plaintiff was stable enough to transfer from chair to commode and back with the assistance of only one nurse unless the issue first was addressed by a competent medical expert. Not only did Dr. Zerefos decline to make that medical determination (or offer any opinion about it), he also declined to testify regarding the ultimate question of whether or not, under the facts presented here, the defendant breached the standard of care.¹⁴ This is fatal to the plaintiff’s claim of medical negligence.

¹³ *Davis v. Maute*, 778 A.2d 36, 40 (Del. 2001)(noting that jurors should not be permitted by the trial court to engage in “unguided speculation” in matters that are beyond lay understanding). *See also Walls v. Cooper*, 1991 Del. LEXIS 383, *15 (noting that matters relating to medical diagnosis or assessment “are not within the scope of common knowledge or readily amenable to a common sense analysis by a layperson.”); *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 533 (Del. 1988)(noting that if a party intends to make an argument involving an issue that is “within the knowledge of experts only and not within the common knowledge of laymen,” the party must present competent expert testimony to support that argument.).

¹⁴ Plaintiff has identified no other medical experts to address the plaintiff’s condition prior to the fall, or the standard of care issues relating to the care rendered by the defendant.

Based on the foregoing, defendant's motion for summary judgment is
GRANTED.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joseph R. Slights, III". The signature is written in a cursive style with a horizontal line at the end.

Joseph R. Slights, III

Original to Prothonotary