

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

**JOHN A. PARKINS, JR.**  
*JUDGE*

NEW CASTLE COUNTY COURTHOUSE  
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**Re: Mary Ann Zappaterrini, Individually and as  
Personal Representative of the Estate of  
Mary Ramone  
v. St. Francis Hospital, Inc.  
C.A. No. 09C-02-197 JAP**

Submitted: April 2, 2009  
Decided: April 22, 2009

Upon Defendant's "Motion to Determine if the  
Affidavit of Merit Complies  
with Sections (a)(1) and (c) of Title 18 §6853"

Dear Counsel:

In this medical negligence case the plaintiffs allege that the defendant St. Francis Hospital was negligent in failing to properly assess the risk that their mother would fall. After being discharged to a nursing home (which is not a party to this action), the plaintiffs' mother fell and later died from her injuries. According to the complaint, this fall would have been avoided if the patient had properly been assessed while at St. Francis.

The defendant has filed a motion asking this Court to review the affidavit of merit filed by plaintiffs. The Court has undertaken the requested review, and these are its findings:

1. Plaintiffs have submitted two signed affidavits of merit. One is signed by a registered nurse and the other is signed by a board certified family practitioner with a certificate of added qualifications in geriatric medicine.
2. The affidavits are both accompanied by the respective expert's curriculum vitae.
3. Both experts state that in their opinion the defendant hospital breached the applicable standard of care and that this breach was a proximate cause of injury to the decedent.
4. Both experts were licensed more than three years prior to the events giving rise to this suit.

The Court concludes on the basis of the above that these affidavits satisfy the requirements of the Medical Negligence Act.

St. Francis suggests in its motion that the affidavits of merit must identify the specific agents of the defendant who were negligent and opine on the identified individual's negligence.<sup>1</sup> Although St. Francis

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<sup>1</sup> Defendant asserts in its motion that the Affidavit of Merit must:

4. That it gives an opinion that there has been healthcare medical negligence by EACH defendant, specifically including agents, servants and employees of St. Francis Hospital, Inc.
5. That the expert gives an opinion that each breach by EACH defendant was a proximate cause of

does not explain the basis for this, the Court assumes it relies upon the statutory language in 18 *Del. C.* §6853 requiring an “affidavit of merit as to each defendant.”<sup>2</sup> If this is the case, St. Francis reads the statute too broadly. Nothing in section 6853 requires the plaintiffs to identify the specific employees of a corporate defendant who are alleged to be negligent. Rather the plain language of the statute only requires that the affidavit opine on the conduct of “the defendant.” The St. Francis employees who committed the alleged negligent acts are not named as defendants. Accordingly, the literal terms of the statute do not require plaintiffs’ experts to identify them and opine separately on their conduct.

In a similar vein, the defendant asks this Court to determine whether the expert “is Board Certified in the same field of medicine as the hospital employee (none identified) that the expert opines is negligent.”<sup>3</sup> But section 6853 does not require such a showing. Once again, the Court must adhere to the plain language of the statute, which requires only that the opining expert “shall be Board certified in the same or similar field of medicine if the *defendant(s)* is Board certified.”<sup>4</sup> The term “Board certified” refers to physicians, and because the defendant is not a physician, the statutory requirement of similar Board certification is not applicable.

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injuries alleged in the Complaint, specifically including agents, servants and employees of St. Francis Hospital, Inc.

(Motion, ¶¶ 4,5)(underscoring in original)

<sup>2</sup> 18 *Del. C.* §6853.

<sup>3</sup> Motion, ¶ 8.

<sup>4</sup> 18 *Del. C.* §6853 (c)(emphasis added).

Finally, defendant asserts that the opinions in the Affidavit of Merit must be expressed “with reasonable probability.” It is, of course, true that medical experts will ordinarily not be permitted to offer an opinion unless they can express their opinions “to a reasonable degree of medical probability.”<sup>5</sup> But the Medical Negligence Act alters that standard at this preliminary screening stage. The Affidavit of Merit need only contain an opinion “there are reasonable grounds to believe” the defendant departed from the standard of care in a manner that proximately caused injury to the plaintiff.<sup>6</sup> The Court finds that the affidavits satisfy this standard.

**IT IS SO ORDERED.**

Very truly yours,

John A. Parkins, Jr.

cc: Prothonotary

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<sup>5</sup> *E.g., Floray v. State*, 720 A.2d 1132, 1136 (Del. 1998). This Court has observed in other cases that Affidavits of Merit contain opinions expressed to a reasonable degree of medical probability. *E.g., Patrick v. Sahm*, 2009 WL 807482 (Del. Super. Mar. 19, 2009). But in none of those cases did this Court consider or decide whether that standard was applicable to Affidavits of Merit.

<sup>6</sup> 18 *Del. C.* §6853 (a)(1).