

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

FREDERICK W. SMITH, JR.,)	
)	
Plaintiff,)	
)	C.A. No. N12C-02-254 MMJ
v.)	
)	
CORRECT CARE SOLUTIONS,)	
LLC,)	
)	
Defendant.)	

Submitted: April 25, 2012
Decided: June 20, 2012

On Defendant's Motion to Dismiss for Failure to Provide an
Affidavit of Merit as Required by 18 *Del. C.* § 6853
GRANTED

MEMORANDUM OPINION

Frederick W. Smith, Jr., *Pro Se*

Chad J. Toms, Esquire, Whiteford Taylor Preston LLC, Wilmington,
Delaware, Attorneys for Defendant

JOHNSTON, J.

Plaintiff Frederick W. Smith, Jr. filed suit against Defendant Correct Care Solutions, LLC (“Correct Care”), claiming medical negligence.

Pursuant to Superior Court Rule of Civil Procedure 12(b)(6), Correct Care moved to dismiss Smith’s Complaint, arguing that Smith failed to attach an affidavit of merit as required by 18 *Del. C.* § 6853.

For the following reasons, Correct Care’s Motion to Dismiss is granted.

FACTUAL AND PROCEDURAL CONTEXT

For purposes of this motion, all facts are set forth in the light most favorable to the non-moving party. On January 13, 2012, while incarcerated in the James T. Vaughn Correctional Center, Smith claims that Dr. Linda Surdo-Galef forced him to take medicine that led to dizziness and severe migraines. Smith further claims that Surdo-Galef threatened to admit him to the Correctional Center Hospital for 30 days as a result of his filing medical grievances. Additionally, Smith contends that Surdo-Galef gave him the wrong medication for his blood pressure, and eventually stopped providing the medicine completely.

On February 23, 2012, Smith filed suit against Correct Care, alleging medical negligence.

On March 29, 2012, in lieu of an answer, Correct Care filed a Motion to Dismiss, arguing that Smith failed to provide an affidavit of merit as required by 18 *Del. C.* § 6853(a).

On April 9, 2012, Smith filed a Response to Correct Care's Motion to Dismiss. Smith claims that an affidavit of merit is unnecessary because the facts of the case present a rebuttable inference of medical negligence.¹

With leave of Court, Correct Care filed a Reply Brief in support of its Motion to Dismiss. Correct Care argues that the Complaint does not allege facts sufficient to create a rebuttable inference of medical negligence.

STANDARD OF REVIEW

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”² When applying this standard, the Court will accept as true all non-conclusory, well-pleaded allegations.³ In addition, every reasonable factual inference will be

¹ As further justification for why no Affidavit of Merit was filed with the Court, Smith contends that inmates are not allowed to possess medical files, doctor's reports, or doctor's opinions. Smith, however, offers no support for this contention.

² *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

³ *Id.*

drawn in favor of the non-moving party.⁴ If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.⁵

DISCUSSION

In 2003, the Legislature enacted 18 *Del. C.* § 6853 in an effort to reduce the number of meritless medical negligence lawsuits.⁶ Section 6853(a) provides, in pertinent part, that all healthcare negligence complaints be accompanied by an affidavit of merit as to each defendant signed by an expert witness, accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been healthcare medical negligence committed by each defendant.⁷ By requiring an affidavit of merit, Section 6853(a) simply requires a plaintiff to make a *prima facie* showing that there are reasonable grounds to believe that negligence occurred and caused an injury.⁸

Section 6853(c) requires the affidavit of merit to “set forth the expert's opinion that there are reasonable grounds to believe that the applicable

⁴ *Wilmington Sav. Fund. Soc’y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

⁵ *Spence*, 396 A.2d at 968.

⁶ *Dishmon v. Fucci*, 32 A.3d 338, 342 (Del. 2011).

⁷ 18 *Del. C.* § 6853(a)(1).

⁸ *Dishmon*, 32 A.3d at 342 (citing *Dambro v. Meyer*, 974 A.2d 121, 134 (Del. 2009)).

standard of care was breached by the named defendant(s) and that the breach was a proximate cause of injury(ies) claimed in the complaint.”⁹ Subsection (c) further provides that the expert witness must: be licensed to practice medicine as of the date of the affidavit; have practiced or taught in the same field of medicine alleged in the negligence complaint for the three years prior to the event; and be board certified in the same field as the defendant.¹⁰

If a party fails to file an affidavit of merit with the Superior Court, the Court will not entertain the case.¹¹ However, the Court may, in its discretion, grant a 60-day extension upon timely motion of the plaintiff and for good cause.¹² “Good cause shall include, but not be limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert review.”¹³ In this case, Smith did not file such a motion.

An affidavit of merit is not required, however, if the complaint alleges a rebuttable inference of negligence.¹⁴ Section 6853(e) provides three

⁹ 18 *Del. C.* § 6853(c).

¹⁰ *Id.*

¹¹ *Dishmon*, 32 A.3d at 344-45.

¹² 18 *Del. C.* § 6853(a)(2).

¹³ *Id.*

¹⁴ 18 *Del. C.* § 6853(b).

exceptional circumstances in which there is a rebuttable inference of negligence, not requiring supporting expert testimony:

(1) A foreign object was unintentionally left within the body of the patient following surgery; (2) An explosion or fire originating in a substance used in treatment occurred in the course of treatment; or (3) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body.¹⁵

In *Jackson v. Burns*,¹⁶ a doctor wrongly diagnosed an inmate with Hepatitis-C. This Court determined that the legal question concerned medical negligence, and thus required an affidavit of merit. Because an affidavit of merit and curriculum vitae never were filed, the Court dismissed the complaint.¹⁷ In another case, an incarcerated plaintiff brought suit against the correctional facility's medical staff for refusing him proper medical treatment. The Court dismissed the medical negligence claim for failure to provide the affidavit of merit.¹⁸

Smith filed his Complaint on February 23, 2012, alleging medical negligence. Smith, however, did not file an affidavit of merit with the Court, as required by Section 6853(a). According to Smith, he is relieved of any

¹⁵ 18 *Del. C.* § 6853(e).

¹⁶ 2005 WL 3007803 (Del. Super.).

¹⁷ *Id.* at *1.

¹⁸ *Deputy v. Conlan*, 2009 WL 1509300, at *1 (Del. Super.).

obligation to file an affidavit of merit because his treatment by Surdo-Galef established a rebuttable inference of medical negligence.

The Court finds that Smith's allegations of medical negligence required him to file an affidavit of merit. Smith has not alleged facts sufficient to raise a rebuttable inference of medical negligence. Smith's only allegations of alleged medical negligence concern the prescription of inappropriate medication or incorrect dosages of medication – neither of which fit into Section 6853(e)'s explicit criteria for exemption from the affidavit of merit requirement.

CONCLUSION

The Court finds that Smith has failed to file an affidavit of merit as required by Section 6853(a). Because Smith has failed to demonstrate facts sufficient to exempt him from this requirement, his Complaint must be dismissed.

THEREFORE, Correct Care Solutions, LLC's Motion to Dismiss for Failure to Provide an Affidavit of Merit is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston