SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: Lillian M. Saddler and Carey S. Saddler, III v. Nanticoke Memorial Hospital Individually and d/b/a Alexander Doman, M.D.
C.A. No. N12C-04-062-RRC

Submitted: September 26, 2012
Decided: December 24, 2012

On Defendant Nanticoke Hospital's "Motion to Dismiss for Failure to Comply with 18 *Del. C.* § 6853(a)(1) and (c)."

DENIED.

Dear Counsel:

I. INTRODUCTION

Plaintiffs are asserting medical negligence claims against a doctor, as well as vicarious liability claims against the doctor's employer, a hospital. Separately, Plaintiffs assert claims against the hospital involving various types of negligent hospital administration. The defendant hospital seeks to dismiss Plaintiffs' negligent administration claims, asserting that an Affidavit of Merit was required to support such claims. The hospital contends that, although this Court found that a proper Affidavit of Merit was proffered regarding the doctor and the hospital's potential vicarious liability, the affiant did not address the related negligent administration claims nor was the affiant an expert otherwise qualified to address such claims.

Plaintiffs contend that an Affidavit of Merit was not required as to the various claims of negligent hospital administration. Resolving this Motion requires statutory construction of 18 *Del. C.* §§ 6801 and 6853. This Court concludes that the Affidavit of Merit statute was not intended to require a plaintiff to produce an affidavit from an expert addressing the torts of alleged negligent hospital administration. Therefore, the hospital's Motion to Dismiss is **DENIED**.

II. FACTUAL AND PROCEDURAL HISTORY

On April 5, 2012, Plaintiffs Lillian M. Saddler and Carey S. Saddler (collectively "Plaintiffs") filed a medical negligence action against Nanticoke Memorial Hospital and Alexander Doman, M.D. The complaint alleges that Lillian Saddler was a patient at Nanticoke for a surgical procedure related to an ankle fracture and that Dr. Doman was her treating physician. Mr. Saddler's sole claim is for loss of consortium.

The complaint alleges, in pertinent part:

> (8) Defendants, acting individually, jointly, severally, and through their employees, agents[,] servants, principals and/or owners in the case of Nanticoke, committed medical negligence in violation of 18 *Del. C*. Chapter 68, in that they:
>
> (a) Failed to perform to the requisite standards of reasonable medical care in performing an Open

> Reduction and Internal Fixation surgical procedure [ORIF] with implantation of internal hardware in treatment of a comminuted trimalleolar ankle fracture;
>
> (b) Failed to order timely updated diagnostics of Mrs. Saddler's lower extremity;
>
> (c) Failed to order appropriate and timely follow-up appointments and proper ambulatory devices (i.e. cane, walker);
>
> (d) Failed to advise and inform Mrs. Saddler of the dangers/perils of the improperly performed procedure.
>
> (9) Nanticoke's negligence includes the following:
>
> (a) Failed to select and retain only competent physicians;
>
> (b) Failed to oversee all persons who practice medicine within its walls as to patient care; and
>
> (c) Failed to formulate, adopt and enforce adequate rules and policies to ensure quality care for their patients.[1]

Plaintiffs filed an Affidavit of Merit contemporaneously with the complaint pursuant to 18 *Del. C*. §6853(a)(1). On June 6, 2012, Defendant filed a Motion for Review of the Affidavit of Merit to ensure its compliance with 18 *Del. C*. §6853(a)(1) and (c). On July 17, 2012 the Court issued a letter opinion finding that the Affidavit of Merit satisfied 18 *Del. C.* §6853 insofar as the allegations against Dr. Doman were concerned, but, with respect to the separate negligence claims against Nanticoke Hospital, the Court noted that "[n]othing in the Affidavit of Merit directly addresses that separate alleged negligence of Nanticoke Memorial Hospital."[2] The Court disclosed the Affidavit's assertions as relevant to Nanticoke's negligence. The Affidavit of Merit provided, in pertinent part:

> Based on my review of the medical records pertaining to the medical care and treatment Lillian Saddler received by defendants and the injury she received as a result of such

[1] Pl's Complaint at ¶ 8-9 (emphasis added).
[2] Letter Opinion at p. 2 (July 19, 2012).

> care and treatment, it is my expert opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the defendants in this case and that such breach was a proximate cause of injury to Mrs. Saddler.

In light of the Court's observations that the Affidavit of Merit did not address the negligent administration claims against the hospital, Nanticoke Memorial Hospital filed a Motion to Dismiss for Plaintiffs failure to comply with 18 *Del. C.* §6853.

III. CONTENTIONS

A. Nanticoke Memorial Hospital's Contentions

Defendant Nanticoke Memorial Hospital contends that the related hospital administration tort claims against it should be dismissed because Plaintiffs failed to comply with 18 *Del. C.* §6853 §§ (a)(1) and (c). Defendant argues that the proffered Affidavit of Merit did not comply because it did not distinguish between "each defendant" as ostensibly required by §6853(a)(1) and because it was not signed by an expert who had been "engaged in the same or similar field of medicine as Nanticoke." Defendant asserts that, in order to pursue non-*respondeat superior* claims of negligent hospital administration, in addition to opining on negligence and causation per §6853(a)(1), Plaintiffs needed an expert experienced in hospital administration with sufficient familiarity with the institutional issues pertinent to the complaint. Specifically, Nanticoke argues that hospital administration, credentialing, and physician hiring are specific areas requiring an expert's familiarity to qualify as an affiant on those claims.

Nanticoke concedes that the Delaware Supreme Court held in *Dishmon v. Fucci*[3] that where a plaintiff has brought a claim against both a physician and physician's assistant, that there was at least in that factual scenario, no need separately to have addressed the liability of "each defendant." However, Defendant contends that hospital administration and surgery are far different and require different experience. Defendant asserts that, unlike prior cases in which this court has upheld trial testimony because the expert was qualified to render an assessment of court administrative or personnel matters, no sufficient demonstration was made in this case. Defendant acknowledges that, irrespective of the Court's findings on this motion, Nanticoke will remain in the case pursuant to the vicarious liability

[3] 32 A.2d 338 (Del. 2011).

claims. Although not directly stated, Defendant in effect contends that negligent hospital administration claims qualify as "medical negligence" within the meaning of the statute.

B. Plaintiffs' Contentions

Plaintiffs contend that Defendant's assertions were settled by the Delaware Supreme Court's recent decision in *Dishmon v. Fucci.*[4] There, the Court held that the affiant, under the facts of that case, was not required to distinguish between each defendant under the statute. Plaintiffs argue that at least two contrary Superior Court cases relied upon by Defendant have been superseded by *Dishmon*, at least to the extent they are in conflict. Plaintiffs assert that Nanticoke's assertion that an expert of an identical field must sign the affidavit leads to an "absurd" result in these circumstances because it would require an expert **hospital** to "sign" an Affidavit of Merit. Plaintiffs state that a hospital does not "practice medicine" and cannot be "board certified." Finally, Plaintiffs argue, even if it were possible for an expert hospital to sign an affidavit, discovery and a review of the records would be first required. Although not directly stated, Plaintiffs in effect contend that negligent hospital administration claims do not qualify as "medical negligence" under the statute. Finally, Plaintiffs contend (and Defendant agrees) that, at a minimum, Nanticoke should not be dismissed because Plaintiffs have filed vicarious liability claims against Nanticoke.

IV. DISCUSSION

An Affidavit of Merit is a preliminary hurdle in a health care medical negligence lawsuit, one purpose of which is to filter out frivolous claims. To overcome the hurdle, 18 *Del. C.* §6853 requires that a plaintiff file an Affidavit of Merit from a qualified expert witness. In this case, Plaintiffs' claims against Dr. Doman and the vicarious liability claims against Nanticoke quite clearly fall under the broad statutory definition of "healthcare medical negligence." Because the claims against Dr. Doman and the vicarious liability claims against Nanticoke are healthcare medical negligence claims, Plaintiffs were required to have provided a supportive Affidavit of Merit, and the Court has found that the proffered affidavit fulfilled the statutory requirement. Defendant has conceded that the vicarious liability claims against Nanticoke will proceed irrespective of the Court's ruling on this motion to dismiss because the sole issue now before this Court is whether Plaintiffs were also required to have an Affidavit of Merit for their separate tort

[4] 32 A.2d 338 (Del. 2011).

claims against Nanticoke Hospital for negligent hiring, oversight, and administration.

18 *Del. C.* §6801 provides definitions which are applicable to the Affidavit of Merit statute and are relevant to this case. "Health care" is defined as "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient ***during the patient's medical care, treatment or confinement***."[5] A "[h]ealth care provider" is defined in pertinent part as "any person, corporation, facility or institution licensed by this State pursuant to Title 24, excluding Chapter 11 thereof, or Title 16 to provide health care or professional services or any officers, employees, or agents thereof acting within the scope of their employment."[6] Finally, "[m]edical negligence" is defined as:

> [A]ny tort or breach of contract ***based on health care or professional services rendered***; or which should have been rendered, by a health care provider to a patient. The ***standard of skill and care*** required of every health care provider in rendering ***professional services or health care*** to a patient shall be that degree of skill and care ordinarily employed in the same or ***similar field of medicine*** as defendant, and the use of reasonable care and diligence.[7]

18 *Del. C.* §6853 (a) provides, in pertinent part:

> No ***healthcare negligence lawsuit*** should be filed in the State unless the complaint is accompanied by: (1) An affidavit of merit ***as to each defendant*** signed by an expert witness, as defined in §6854 of this title, and 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.***[8]

18 *Del. C.* §6853 (c) provides, in pertinent part:

> Qualifications of expert and contents of affidavit. –The affidavit or affidavits of merit shall set forth the expert's

[5] 18 *Del. C.* §6801(4) (emphasis added).
[6] 18 *Del. C.* §6801(5).
[7] 18 *Del. C.* §6801(7).
[8] 18 *Del. C.* §6853 (a) (emphasis added).

> opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause of injury or injuries claimed in the complaint. An ***expert signing an affidavit of merit shall be licensed to practice medicine*** as of the date of the affidavit; and in the 3 years immediately preceding the alleged negligent act has ***been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant or defendants, and the expert shall be Board certified in the same or similar field of medicine if the defendant or defendants is Board certified.***[9]

18 *Del. C.* §6854 provides:

> No person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with the degree of skill ordinarily employed in the field of medicine on which he or she will testify.

Several rules of statutory construction apply. The rules of construction are "designed to ascertain and give effect to the intent of the legislators, as expressed in the statute."[10] "If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the court's role is limited to an application of the literal meaning of those words."[11] However, a "statute reasonably susceptible to different conclusions or interpretations is ambiguous, [and, therefore,] rules of construction must be applied to determine its meaning."[12] "Ambiguity may also arise from the fact that giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequence as to compel a conviction that [ ] could not have been intended by the legislature."[13] In construing a statute, the Court's objective is to render a "sensible and practicable meaning," not an absurd or unreasonable one.[14]

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[9] 18 *Del. C*. §6853 (c) (emphasis added).
[10] *Chase Alexa, LLC v. Kent County Levy Court,* 991 A.2d 1148, 1151 (Del. 2010).
[11] *Leatherbury v. Greenspun,* 939 A.2d 1284, 1288 (Del. 2007) (citing *In re Adoption of Swanson,* 623 A.2d 1095, 1096-97 (Del.1993)).
[12] *Id*.
[13] *Washington v. Christiana Service Co.,* 1990 WL 177645, at *6 (Del. Super. Oct. 12, 1990).
[14] *Rodney Square Invr's. v. Board of Assess.,* 448 A.2d 237 (Del. Super. 1982).

Recently, the Delaware Supreme Court stated in *Dishmon v. Fucci* [15] that Affidavit of Merit requirements are "'purposefully minimal' and the General Assembly did not intend a mini-trial at this stage of the litigation."[16] Notably, in ordinary negligence cases, an Affidavit of Merit is not required. Requiring an Affidavit of Merit is an exception to the procedure in common law negligence actions. A statute such as this which imposes duties in abrogation of the common law should be strictly construed.[17]

While Delaware courts have determined that an Affidavit of Merit is necessary in every healthcare medical negligence case,[18] the issue in this case whether an Affidavit of Merit is required when separate claims are made against a hospital based upon negligence in hospital administration that allegedly contributed to plaintiff's injuries. There can of course be more than one proximate cause of an injury.[19] Section 6853(a)(1) is ambiguous when applied to this case's circumstances. In the face of this ambiguity, the Court's objective is to render a "sensible and practicable meaning" to the statute, and one that is consistent with legislative intent.

This Court concludes that an Affidavit of Merit is not required when a plaintiff asserts related claims against a hospital for negligence in hospital administration, because claims for negligent administration, hiring, and oversight are not healthcare medical negligence claims, but rather are ordinary negligence claims, pursuant to§6801(4) [20] Similar negligent administrative claims could be

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[15] 32 A.3d 338 (Del. 2011).
[16] *Id*. at 342-43.
[17] 3 Sutherland Statutory Construction § 61:1 (7th ed.) ("Statutes which impose duties or burdens or establish rights or provide benefits not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation. Where there is any doubt about their meaning or intent they are given the effect which makes the least, rather than the most, change in the common law.")
[18] 2008 WL 3488532, at *4 (Del. Super. June 25, 2008) (citing *McBride v. Shipley Manor Health Care,* 2005 WL 2090695 (Del. Super. Mar. 23, 2005) (holding that a lawsuit alleging negligent nursing care on behalf of the staff of a skilled nursing home required an Affidavit of Merit).
[19] *Duphily v. Delaware Elec. Co-op., Inc*., 662 A.2d 821, 829 (Del. 1995).
[20] Although there might be circumstances, such as in a teaching hospital, where one medical practitioner is supervised by another, and the failure to supervise causes a plaintiff's injuries such that the failure to supervise is itself healthcare medical negligence and requires an Affidavit of Merit, no evidence suggests that scenario here, and, notably, Plaintiffs did not allege such supervision in the complaint. Moreover, presumably discovery would be necessary to demonstrate such circumstances as well as causation, which are both not possible at the time of filing of the complaint. Requiring an Affidavit of Merit to accompany such a claim, before

brought separate from a healthcare medical negligence action altogether and those claims would not require an Affidavit of Merit. For example, if a hospital janitor were negligently hired or supervised and that negligent hiring or supervision caused injury to a hospital patient, any legal action against a hospital would not require an Affidavit of Merit simply because the injuries occurred in a hospital, otherwise a "health care provider" pursuant to 18 *Del. C.* §6801(5).

The janitor example is illustrative even though this case's circumstances are not as attenuated. Certainly, the supervision, hiring, and administration of doctors are more closely related to a healthcare medical negligence claim, than is the supervision of a janitor; however, the relatedness, absent being directly causal, is irrelevant. As noted earlier, "health care" is defined under the statute as an act performed by a health care provider "***during the patient's medical care, treatment or confinement.***"[21] The Affidavit of Merit requirement is explicitly limited to healthcare medical negligence actions. Hospital administration is an ongoing task and can be outside the scope of healthcare medical negligence in part because it can be temporally unrelated to the patient's medical care.

This Court notes that this issue has been raised, generally in a few other Superior Court decisions. In some cases this Court has reasoned that an Affidavit of Merit was required to support negligent hospital administration claims. Thus, in *Divita v. Sweeney*,[22] this court found that an expert was qualified to execute an Affidavit of Merit regarding a negligent supervision claim because the affiant had an extensive history of patient treatment and also of supervising various medical personnel units within a large teaching hospital. However, *Divita* did not analyze whether the negligent hospital administration claims constituted a claim for health care medical negligence within the meaning of §6801(7). Similarly, in *Doran v. Urology Assoc. of Southern Delaware*,[23] this Court also did not analyze whether a negligent hospital administration claim constituted a health care medical negligence claim, but instead focused on the affidavit's sufficiency and whether the expert was qualified to opine regarding credentialing, hiring, training, and supervision of employees.

Although both *Divita* and *Doran* analyzed the particular Affidavits of Merit as if an Affidavit were required in negligent hospital administration claims, neither

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discovery, would render the Affidavit of Merit requirement very difficult. The very generality of the claims as stated at ¶9 of the complaint illustrates this point.

[21] 18 *Del. C.* §6801(4) (emphasis added).

[22] 2010 WL 5313492 (Del. Super. Nov. 29, 2010).

[23] 2008 WL 2955454 (Del. Super. July 25, 2008).

court focused on the preliminary question whether negligent administration claims constitute healthcare medical negligence and therefore, whether such a claim is subject to the Affidavit of Merit statute. As a result, *Divita* and *Doran* are distinguishable because while they both analyzed an expert's qualifications to opine in an Affidavit of Merit on negligent hospital administration, they did not address the question whether they even met the definition for health care medical negligence. This Court considers both *Divita* and *Doran* correctly decided based on the issues before the Court in those two particular cases.[24] This Court has noted, in *dicta*, that the Affidavit of Merit requirement might not always be applicable to an institutional defendant.[25]

In *McBride v. Shipley Manor Health Care*,[26] where, in holding that a skilled nursing home was a "health care provider" under the statutes, the Court required an Affidavit of Merit be provided even though the defendant was an institutional defendant. The Court reasoned that expert testimony would be required to establish a standard of care and that it was the General Assembly's intent to require "an expert sooner rather than later."[27] However, this case is also different from the instant case in that *McBride* involved apparently only health care medical negligence claims, whereas the instant case includes separate related ordinary negligence tort claims.

It appears to this Court that to require an Affidavit of Merit for administrative, institutional, non-health care medical negligence claims misreads the statute and goes beyond the legislature's intent. The primary support in favor

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[24] Other Superior Court cases have analyzed an expert's ability to give **trial** testimony on alleged negligent hospital administration. *See Ciarlo v. St. Francis Hosp.*, 1994 WL 713864, at *6-7 (Del. Super. Sept. 9, 1994) (holding that an affiant was not sufficiently well-versed in the practice and procedure in Delaware hospitals regarding training nurses or in dealing with language barriers to offer an expert report at trial on hospital administration.); *Riggs National Bank v. Boyd*, 2000 WL 303308, at *5 (Del. Super. Feb. 23, 2000) (holding that a physician was not an expert in medical licensing administration and that his testimony was "largely speculative" and thus not admissible at trial because he "had never been in the credentialing business.") However, the standards for trial testimony and an Affidavit of Merit are different. *See Wilson v. James*, 2010 WL 1107787, at *2 (Del. Super. Feb. 19, 2010) ("The fact that a physician is qualified to provide an affidavit under §6853(c) prior to discovery by the opposing party does not automatically qualify him to offer an opinion regarding standard of care at trial.")

[25] *Dougherty,* 2008 WL 3488532, at *5 (Del. Super. June 25, 2008) (holding that the rendering of a "sensible and practicable" meaning to the Affidavit of Merit statute is accomplished "by the Court's holding in this case that 18 *Del. C.* § 6853(c), insofar as it requires an Affidavit of Merit from a physician 'licensed to practice medicine,' may not be applicable in a case, such as this case, where no claim against an individual healthcare provider is asserted.") (citation omitted).

[26] 2005 WL 2090695 (Del. Super. Mar. 23, 2005).

[27] *Id*. at *1

of applying an Affidavit of Merit requirement as Nanticoke argues is found in §6853(a)(1)'s requirement that "no healthcare negligence **lawsuit**" can proceed without an Affidavit of Merit "as to **each** defendant."[28] However, when read together with the entirety of the pertinent statutes, it becomes clear that "each defendant" does not contemplate circumstances where defendants are institutional defendants because the requirements for a medical practitioner expert under 18 *Del. C.* § 6854, do not apply logically to a non-medical practitioner expert.

Furthermore, a full reading of the statute clarifies that the "no . . . **lawsuit**" language does not contemplate a lawsuit that includes both health care medical negligence claims and related non-health care medical negligence **claims**. Since 18 *Del. C.* § 6801 (7) defines medical negligence as being "[a]ny tort or breach of contract **based on health care or professional services rendered**," it is reasonable to conclude that claims **not** "based on health care or professional services" would not be subject to the same requirements.[29] As stated earlier, negligent hospital administration claims are not always torts based on health care medical negligence.

Applying the Affidavit of Merit statute to negligent hospital administration claims causes "unreasonable" or "absurd" consequences when read in light of the applicable statutes and does not serve the legislature's intent. For an affiant to be a proper affiant he or she must be "licensed to practice medicine," have "been engaged in the treatment of patients and/or the teaching/academic side of medicine in the same or similar field of medicine as the defendant or defendants," and be "[b]oard certified in the same or similar field of medicine if the defendant or defendants are board certified."[30] Each of these contemplates requiring an affiant to be a physician of like experience and skill to that of a medical practitioner defendant.

An affiant's possessing like experience and skill to that a physician defendant serves no logical purpose in application to a defendant hospital that is being sued for administrative negligence.[31] The purpose of an affiant having similar skill and experience is to create a hurdle to filter out frivolous health care medical negligence claims. The reasoning is that if no expert with similar skill and

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[28] 18 *Del. C.* §6853 (a)(1) (emphasis added).
[29] 18 *Del. C.* § 6801 (7) (emphasis added).
[30] 18 *Del. C.* §6853(c)
[31] *Zappaterrini v. St. Francis Hosp., Inc*, 2009 WL 1101618 (Del. Super. Apr. 22, 2009) (holding that 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.")

experience will aver that the standard of care was breached, the health care medical negligence claim is without merit. While frivolous claims may potentially appear in every type of legal action, there is no such filter in place for negligent hiring or supervision claims because the Affidavit of Merit requirement is unique to health care medical negligence actions.

Hospital administration is not a "field of medicine"[32] and, although it requires skill and experience, it can differ from the skill and experience required in patient treatment. It is possible for one to be an expert in hospital administration without professional medical training. Although administrative tasks in hospitals are often performed by medical professionals, they could also be delegated to non-medically trained personnel. If the General Assembly intended to require an Affidavit of Merit for negligent hospital administration claims, a non-medically trained, but otherwise acceptable expert would be unable to execute an affidavit (although not barred from potentially testifying at trial.) This seems unreasonable and contrary to the legislature's intent. Extending the Affidavit of Merit requirement to negligent supervision, hiring, and administration claims, stretches the statute beyond its apparent intent.

In *Dishmon*,[33] the Delaware Supreme Court emphasized that Affidavit of Merit requirements are "'purposefully minimal' and the General Assembly did not intend a mini-trial at this stage of the litigation."[34] Presumably an expert will be required to testify at trial in support of Plaintiffs' negligent hospital administration related claims; however, an Affidavit of Merit is not also required to address the undeveloped negligent administration claims at this early stage of proceedings.

Therefore, Defendant's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

cc: Prothonotary

[32] 18 *Del. C.* §6801(7).
[33] 32 A.3d 338 (Del. 2011).
[34] *Id*. at 342-43.