

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

November 29, 2010

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**RE: Jennifer F. Divita, et. al. V. Michael G. Sweeney, M.D., et. al.  
C.A. No. S10C-03-030-ESB  
Letter Opinion**

Date Submitted: August 16, 2010

Dear Counsel:

This is my decision on the Motion for Review of Affidavit of Merit filed by defendants Bayhealth Medical Center, Inc., Marietta Henrickson, R.N., and Monica Miles, L.P.N. Bayhealth operates the Kent General Hospital in Dover, Delaware, and employs Henrickson and Miles as nurses there. Plaintiff Jennifer F. Divita, individually and as the administratrix of the Estate of Benny Divita, II, and Beckett Divita, by and through his next friend, Jennifer F. Divita, filed a medical negligence action against Michael G. Sweeney, M.D., Brian M. Benson, Jr., M.D., Internal Medicine of Dover, P.A., Bayhealth, Henrickson and Miles. Benny Divita, II, was admitted to the Kent General Hospital for treatment related to acute gallbladder disease on April 4, 2008. Divita had, among other medical problems, obstructive sleep apnea. While he was being treated by the defendants, Divita continued to use his C-PAP machine and mask to manage his obstructive sleep apnea.

Divita died on April 5, 2008. The plaintiffs allege that his death was caused by “extensive bilateral pulmonary edema with alveolar hemorrhage caused by extensive aspiration of gastric material.” The plaintiffs alleged in their complaint that the defendants:

- a. Failed to provide Divita with proper and adequate care, diagnosis, and treatment for his medical condition;
- b. Failed to properly evaluate Divita for the continued use of his C-PAP machine given his presenting conditions, to wit: vomiting and nausea;
- c. Failed to properly evaluate Divita for the continued use of his C-PAP machine during sedation;
- d. Failed to take appropriate precautions to prevent aspiration;
- e. Failed to take appropriate measures and administer procedures to prevent Divita’s death;
- f. Failed to maintain sufficient personnel to properly care for and monitor Divita;
- g. Failed to properly and adequately supervise the nursing staff assigned to care for and treat Divita;
- h. Failed to properly and adequately train the nursing staff assigned to care for and treat Divita;
- i. Failed to admit or transfer Divita to an appropriate unit within the Kent General Hospital; and
- j. Were negligent in such other and further particulars as the evidence may show.

The plaintiffs submitted an Affidavit of Merit signed by John Penek, M.D., and his curriculum vitae. I shared this information with the parties and asked them to address the following two questions:

Whether Dr. Penek is qualified under 18 *Del.C.* § 6853(c) to offer an opinion on: (1) the alleged breaches of the standard of care by the two nurses, Marietta Henrickson and Monica Myles; and (2) the alleged “institutional” breaches of the standard of care by Bayhealth Medical Center, Inc.

18 *Del.C.* § 6853(a)(1) states, in part, that:

No healthcare negligence lawsuit shall be filed in this State unless the complaint is accompanied by 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.

18 *Del.C.* § 6853(c) states that:

The affidavit(s) of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable 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. 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 defendants, and the expert shall be Board certified in the same or similar field of medicine if the defendant(s) is Board certified. The Board Certification requirement shall not apply to an expert that began the practice of medicine prior to the existence of Board certification in the applicable specialty.

18 *Del.C.* § 6854 states that:

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.

An Affidavit of Merit is a preliminary hurdle intended for the early stages of a medical negligence lawsuit, one purpose of which is to screen out frivolous claims.<sup>1</sup> The requirements for an Affidavit of Merit are minimal.<sup>2</sup> The fact that a physician is qualified

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<sup>1</sup> *Dougherty v. Horizon House, Inc.*, 2008 WL 3488532, at \*3 (Del. Super. June 25, 2008).

<sup>2</sup> *Wilson v. James*, 2010 WL 1107787, at \* 2 (Del. Super. Feb. 19, 2010), and *Green v. Weiner*, 766 A.2d 492, 495-496 (Del. 2001).

to provide an affidavit under § 6853(c) prior to discovery by the opposing party does not automatically qualify the physician to offer an opinion regarding the standard of care at trial.<sup>3</sup> Moreover, it is well-established that a physician may offer an opinion as to the standard of care as to a non-physician, such as a physician's assistant, nurse-midwife, or a nurse, provided that the physician is familiar with the degree of skill ordinarily employed by a practitioner of the type about which he or she will be offering an opinion.<sup>4</sup>

The plaintiffs' complaint raises claims against Bayhealth for alleged "institutional" breaches of the standard of care, such as its training, staffing and supervision of its nursing staff, as well as claims of vicarious liability for the actions of two of its nurses, Henrickson and Miles. A critical issue in this case is whether the defendants' alleged failure to properly monitor Divita's use of his C-PAP machine and mask contributed to his death. As such, this case raises issues involving the standard of care provided in the areas of internal and pulmonary medicine and certain institutional issues regarding the training, staffing and supervision of the nursing staff that cared for Divita. I have concluded that, given the nature of the issues involved, the minimal requirements for an Affidavit of Merit, and Dr. Penek's training and experience, that he is qualified, under § 6853(a)(1) and (c), as an expert to offer an Affidavit of Merit addressing the alleged negligence of Bayhealth and its two nurses.

Dr. Penek is licensed to practice medicine and is board certified in internal medicine

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<sup>3</sup> *Wilson*, 2010 WL 1107787, at \*2.

<sup>4</sup> *Sturgis v. Bayside Health Association Chartered*, 942 A.2d 579 (Del. 2007), *Simmons v. Bayhealth Medical Center, Inc.*, 950 A.2d 659, 2008 WL 2059891 (Del. May 15, 2008) (TABLE), and *Wilson*, 2010 WL 1107787, at \*2.

and pulmonary diseases and sleep medicine. He has over 30 years of experience practicing in these areas, including serving as the Chief of Pulmonary and Critical Care Medicine at a large teaching hospital and as the medical director of a sleep disorder center. Dr. Penek's work at the teaching hospital also included serving as the Medical Director of Respiratory Therapy, supervision of the Pulmonary Function Laboratory and Rehabilitation Program, and as Director of the Critical Care Unit and Critical Care Program. Dr. Penek also has practiced for many years in the areas of pulmonary diseases and rehabilitation, critical care medicine and sleep medicine. Given the administrative jobs that Dr. Penek has held and his extensive experience in patient care, he certainly has dealt with the types of practice and "institutional" issues that are involved in this case. I am satisfied that, given Dr. Penek's long history of treating patients and his supervision of various units and personnel within a large teaching hospital, he is qualified as an expert to offer an opinion, at this preliminary stage of the proceedings, regarding the allegations regarding the care provided to Divita, as well as the training, staffing and supervision of the nursing staff that cared for Divita.

IT IS SO ORDERED.

Sincerely,

/S/ E. Scott Bradley

cc: Prothonotary