

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

DEBRA ELLET, as Administratrix of the )  
ESTATE OF JAMES ELLET, Deceased )  
and DEBRA ELLET, individually, )

Plaintiffs, )

v. )

C.A. NO, 04C-03-201-FSS  
**E-FILED**

JOSEPH RAMZY, M.D., )  
OTOLARYNGOLOGY )  
CONSULTANTS, P.A.; JOHN J. )  
CHABALKO, M.D.; ALBERT A. RIZZO, )  
M.D.; PULMONARY ASSOCIATES, )  
P.A.; ST. FRANCIS HOSPITAL, )

Defendants. )

Submitted: June 4, 2004  
Decided: September 29, 2004

**INTERIM ORDER**

**Upon Review of Affidavits of Merit**

Upon motion by Defendants under 18 *Del. C.* § 6853(d), the court has considered *in camera* whether the affidavits of merit filed by Plaintiffs in this medical negligence case comply with subdivisions (a)(1) and (c) of 18 *Del. C.* § 6853. As discussed below, the sealed affidavits of merit do not comply with subsection(c) because the expert affiants do not opine that the breach of the applicable standard of

care was a proximate cause of injury to Plaintiffs. The affidavit is equivocal.

Since 18 *Del. C.* § 6853 was amended, effective October 2003, no health care negligence lawsuit may be filed in Delaware unless the complaint is accompanied by an affidavit of merit as to each Defendant, and signed by an expert witness. As to each expert witness, the affidavit of merit must be accompanied by the expert's current *curriculum vitae*, showing that the expert is qualified under 18 *Del. C.* § 6854. Moreover, the affidavit of merit must state that there are reasonable grounds to believe that healthcare medical negligence has been committed by each Defendant. And, if the required affidavit is not filed, the suit shall be dismissed.<sup>1</sup> Specifically, 18 *Del. C.* § 6853(c) provides:

*Qualifications Of Expert And Contents Of Affidavit.* – 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 *the breach was a proximate cause of injury(ies)* claimed in the complaint . . . . (Emphasis added.)

Here, Plaintiffs filed affidavits of merit from two, statutorily qualified, medical experts relating to Defendants Chabalko, Rizzo and their professional practice, Pulmonary Associates, P.A.

Although Plaintiffs' affiants are statutorily qualified and they opine that

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<sup>1</sup> 18 *Del. C.* § 6853(a).

Defendants Chabalko, Rizzo and Pulmonary Associates, P.A. breached the applicable standard of care, their opinions that the breach was a proximate cause of injury are equivocal. Specifically, they opine “that the breach from the applicable standard of care was a proximate cause of and/or was a substantial contributing factor to the injuries suffered by Plaintiff . . . .” It is settled, beyond need for citation, that Delaware rejects the “substantial factor” causation standard. Delaware steadfastly adheres to the “but for” standard of causation.<sup>2</sup>

As presented in the affidavits of merit, the experts’ opinions leave open the possibility that the experts are only satisfied that Defendants’ medical negligence was a substantial factor in the decedent’s injury. The court is unwilling to allow this litigation to proceed, as the case stands, because the affidavits of merit are technically inadequate. The court must have unequivocal assurance that Plaintiffs and their experts are prepared to meet Delaware’s more rigorous “but for” proximate cause standard.

For the foregoing reasons, the court will allow Plaintiffs twenty-one (21) days in which to amend the affidavits of merit in order to make them unequivocal. The court’s leniency is appropriate because although the current affidavits of merit

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<sup>2</sup> *Culver v. Bennett*, 588 A.2d 1094, 1096-97 (Del. 1991); *Edwards v. Family Practice Associates, Inc.*, 798 A.2d 1059, 1065 (Del. Super. Ct. 2002).

can be read as insufficient, they also can be read as meeting the statutory requirements. Moreover, the affidavit of merit requirement is new and we are still feeling our way along.<sup>3</sup>

Plaintiffs have twenty-one (21) days from this order's date in which to submit unequivocal affidavits from the same affiants. The court will review any submission, *sua sponte*, and issue a final order as to Plaintiffs' compliance with 18 *Del. C.* § 6853(c). If Plaintiffs fail to submit the amended affidavits as required, the court may dismiss the complaint without further notice or opportunity to be heard.

**IT IS SO ORDERED.**

\_\_\_\_\_ s/ Fred S. Silverman

Judge

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oc: Prothonotary (Civil Division)  
pc: Richard Galperin, Esquire  
Paul Cottrell, Esquire  
Abigail E. Rodgers, Esquire

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<sup>3</sup> *Cf. Bell v. Yalamanchilli, et al.*, Del. Super., C.A. No. 03C-11-046, Johnston, J. (Mar. 25, 2004) (ORDER) (dismissing for failure to file an affidavit of merit or a timely request for an extension).