

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

GEORGE A. JACKSON,)
) C.A. No. 03C-12-009 JTV
Plaintiff,)
)
v.)
)
ROBERTA F. BURNS, M.D.,)
)
Defendant.)

Submitted: June 10, 2005
Decided: September 7, 2005

George A. Jackson, Georgetown, Delaware. *Pro se.*

Daniel L. McKenty, McCullough & McKenty, Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Defendant's
Motion To Dismiss
GRANTED

VAUGHN, President Judge

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ORDER

Upon consideration of the motion of defendant, Dr. Roberta Burns, to dismiss the plaintiff's complaint, the response of the plaintiff, George Jackson, and the record of the case, it appears that:

1. The plaintiff is an inmate in the Delaware correctional system. The defendant is a medical doctor who treated the plaintiff at a correctional facility in the course of her employment with First Correctional Medical Center. First Correctional Medical Center has, or had at the time, a contract with the Department of Correction to provide health care services to inmates. The plaintiff alleges Dr. Burns falsely diagnosed him with Hepatitis-C. He has filed a complaint asserting fraud as his grounds for relief.

2. The defendant contends that the complaint should be dismissed because the plaintiff has failed to state a claim upon which relief can be granted and failed to file an affidavit of merit as required by 18 *Del. C.* § 6853.¹ In support of her motion, Dr. Burns has submitted an affidavit signed by her and other documentary evidence. In her affidavit, Dr. Burns states, in pertinent part, that a laboratory blood test performed on the plaintiff on September 23, 2002 showed an ALT liver enzyme result of 67 which is a positive for Hepatitis-C antibodies. The affidavit further states that the

¹ § 6853. Affidavit of Merit, expert medical testimony .

(a) No healthcare negligence lawsuit shall be filed in this 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.

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result is not sufficiently elevated to require treatment, and the plaintiff was so advised. A copy of the laboratory test result is attached to the affidavit. Dr. Burns' affidavit explains the rationale of her treatment of the plaintiff in some detail and states that in her opinion her treatment of the plaintiff was proper.

3. When matters outside the pleadings are considered, the motion must be considered a motion for summary judgment.² Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.³

3. In an action for healthcare negligence, § 6853 requires that the plaintiff file with the complaint an affidavit of merit outlining the qualifications of an expert who will testify on the plaintiff's behalf as to the standard of care, breach thereof, and causation. The filing of a healthcare negligence action without the requisite affidavit of merit constitutes grounds for dismissal of the negligence claims.

4. The plaintiff argues that an affidavit of merit is not required because his complaint is an action in intentional tort and fraud. However, when a moving party through affidavits or other admissible evidence shows that there is no genuine issue as to any material fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.⁴ Here, although the plaintiff alleges that his claim is based upon intentional tort and fraud, he offers no evidence to support that claim.

² *Schultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. Ct. 1976).

³ Superior Court Civil Rule 56(c).

⁴ *Moore v. Sizemore*, 405 A.2d 679 (Del. Supr. 1979).

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The gist of his complaint is that Dr. Burns committed medical negligence. I therefore conclude that an affidavit of merit is required. Since none has been filed, the motion is **granted**.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
File