IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FONSHAE BECKETT,	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 04C-11-250 RRC
	)	
BEEBE MEDICAL CENTER, INC. and	)	
RAMAKRISHNA TATINENI, M.D.,	)	
Defendants.	)	

Submitted: May 13, 2005
Decided: August 4, 2005

On Defendants' Motion to Dismiss
GRANTED.

MEMORANDUM OPINION

L. Vincent Ramunno, Esquire, Ramunno, Ramunno & Scerba, P.A., Wilmington, Delaware, Attorney for Plaintiff.

Diane M. Andrews, Esquire, Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware, Attorney for Defendant Beebe Medical Center, Inc..

Dennis D. Ferri, Esquire, Morris, James, Hitchens & Williams LLP, Wilmington, Delaware, Attorney for Defendant Ramakrishna Tatineni, M.D..

COOCH, J.

I. INTRODUCTION

Defendant Ramakrishna Tatineni, M.D. ("Dr. Tatineni") has filed a motion to dismiss the medical negligence complaint of Fonshae Beckett ("Plaintiff") on the grounds that Plaintiff was required under 18 *Del. C.* §6853(a)(1) to have provided an Affidavit of Merit at the time of filing her complaint. Dr. Tatineni asserts that Plaintiff's allegation that her healthcare providers were negligent in not removing a toothpick from her foot required an accompanying Affidavit of Merit because the admitted nonremoval of the toothpick does not implicate the "foreign object" exemption in §6853(e)(1) to otherwise excuse Plaintiff from filing an Affidavit of Merit. The motion to dismiss was joined by defendant Beebe Medical Center, Inc. ("Beebe").

Plaintiff counters that she was not required to file an Affidavit of Merit because pursuant to 18 *Del. C.* §6853(e)(1) an Affidavit of Merit is unnecessary if the complaint alleges a "rebuttable inference of medical negligence." Plaintiff claims that the rebuttable inference of medical negligence stems from Defendants' failure to remove a toothpick that had lodged in Plaintiff's foot. Plaintiff argues that the toothpick was a "foreign object" within the meaning of §6853(e)(1).

The preliminary issue before this Court is whether a toothpick that was introduced into a patient's body before the commencement of treatment

by a healthcare provider, and not left in a patient's body by the healthcare provider, falls within the meaning of "foreign object" in to 18 *Del. C.* §6853. This Court holds that the term "foreign object" refers only to those objects not present in the patient's body before commencement of treatment by a healthcare provider and which were left in the patient's body by the defendant healthcare provider in the course of treatment. The complaint therefore did not allege a rebuttable inference of negligence and required an Affidavit of Merit.

The second issue is whether it then follows that Plaintiff's complaint must be dismissed for Plaintiff's failure to have provided an Affidavit of Merit, or whether the Court may consider Plaintiff's recently filed Affidavit of Merit to cure the defect. This Court holds that it is too late for Plaintiff to file an Affidavit of Merit because 1) Plaintiff made a conscious decision at the time of filing the complaint not to file an Affidavit of Merit and 2) the strict time deadlines of §6853(a)(2) governing extensions of time to plaintiffs to file an Affidavit of Merit were not followed.

The third issue is whether Beebe waived the right to assert "failure to provide an Affidavit of Merit" as a defense when it did not raise that defense in its answer. This Court holds that Beebe has timely raised the defense of "failure to provide an Affidavit of Merit" in adopting Dr. Tatineni's motion

to dismiss.

The complaint must therefore be dismissed.

II. FACTS

On December 31, 2002, Plaintiff suffered an injury when a toothpick became imbedded in her left foot. Two days later, Plaintiff went to Beebe where a CAT scan was performed. The CAT scan revealed that a linear foreign body was imbedded in her foot. The next day, January 3, 2003, Dr. Tatineni, an employee of Beebe, performed exploratory surgery on Plaintiff's foot to remove the toothpick; however, Dr. Tatineni did not find or remove the toothpick. Plaintiff was discharged from the medical center without the toothpick having been removed. In March 2003, a second surgery located the toothpick and it was removed.

The complaint alleging medical negligence on the Defendants' part was filed on November 24, 2004. Along with the complaint, Plaintiff's counsel wrote to the Prothonotary stating:

> I am enclosing the original and 2 copies of the Complaint in the above captioned matter. Please note that an Affidavit of Merit is not required because as alleged in the Complaint there is a refutable [sic] inference of negligence since a foreign body was left in the Plaintiff's foot after surgery.[1]

[1] Dr. Tatineni's Motion to Dismiss at Ex. B.

Also, in paragraph 7 of the complaint, Plaintiff invoked 18 *Del C.* §6853 for the proposition that she was not required to submit an Affidavit of Merit.

Beebe answered the complaint on December 16. Beebe did not then raise the absence of an Affidavit of Merit as an affirmative defense in its answer. The statute of limitations ran on January 3, 2005, two years after the surgery performed by Dr. Tatineni. Dr. Tatineni filed his motion to dismiss on January 12 and Beebe Medical has adopted Dr. Tatineni's motion as its own. On March 14, 2005, approximately four months after the filing of the complaint and 2 months after the statute of limitations had run, Plaintiff filed an Affidavit of Merit with the Prothonotary.[2]

III. DEFENDANTS' MOTION TO DISMISS

A. Contentions of the Parties.

1. Defendants' Contentions.

Defendants argue that Plaintiff was required under 18 *Del. C.* §6853(a)(1) to provide an Affidavit of Merit with her complaint.[3]

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[2] Defendants then filed a "Motion to Strike Plaintiff's Affidavit of Merit" on April 1, 2005. However, this Court's holding that Plaintiff's complaint must be dismissed renders the motion to strike moot.

[3] Defendant's Motion to Dismiss at ¶ 2.

Defendants, relying heavily on a 1984 Delaware Superior Court case, contend that §6853(e)(1), which states that "a rebuttable inference . . . [of] negligence shall arise where . . . [a] foreign object was unintentionally left within the body of the patient following surgery,"[4] refers only to objects left in a patient's body by a defendant-healthcare provider and does not include foreign objects that were present before commencement of the healthcare provider's treatment.[5] Defendants argue that Plaintiff "was under a duty to perform a reasonable inquiry as to whether or not [her] case met one of the exceptions to the requirement for" an Affidavit of Merit and, having failed to do so, her complaint should be dismissed.[6]

2. Plaintiff's Response.

Plaintiff responds that it was "crystal clear that it was [negligence]" for Defendants not to have found" not to find and removed a toothpick that was revealed in a CAT scan.[7] Plaintiff argues, in essence, that she had a toothpick lodged in her foot, that the toothpick was revealed on the CAT scan and that it was negligent of Defendants not to have removed the

[4] 18 *Del. C.* §6853(e)(1).

[5] Defendants' Motion to Dismiss at ¶ 4.

[6] Defendants' Reply at ¶ 4.

[7] Plaintiff's Response at ¶ 8.

toothpick. Plaintiff asserts that she was not required to provide an Affidavit of Merit pursuant to the "rebuttable inference of negligence" provision of §6853(e).

Plaintiff argues, alternatively, that if she was required to have provided an Affidavit of Merit, then she should now be granted an opportunity to cure the defect. Plaintiff's argument in this regard is that the provision of §6853(a)(1), which states, "[]f the required affidavit does not accompany the complaint . . . then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court," should be read to mean that the Prothonotary is the "gatekeeper and enforcer" of §6853[8] and therefore it was incumbent upon the Prothonotary to have refused to accept the complaint, despite Plaintiff's counsel's contrary statement to the Prothonotary. Plaintiff further contends that if the Prothonotary, as the "gatekeeper and enforcer" of the statute, accepts (as here) a medical negligence complaint without an Affidavit of Merit, then "the acceptance of the complaint confirmed the determination by the Court's personnel that the suit was in compliance."[9] Plaintiff argues that "[she] was

[8] Plaintiff's Response to the Motion to Dismiss at ¶ 11.

[9] Plaintiff's Response to the Motion to Dismiss at ¶ 15.

mislead by court personnel," and that the Court should accept the Affidavit of Merit filed by Plaintiff's counsel with the Prothonotary on March 14.[10]

Plaintiff also argues, in passing, that Beebe has waived the right to raise the defense of "failure to provide an Affidavit of Merit" because this defense was not raised in Beebe's answer.

B. Standard of Review

When deciding a motion to dismiss "all factual allegations of the complaint are accepted as true."[11] In deciding the motion, the Court must determine "whether the plaintiff may. . . recover under any plausible circumstances capable of proof under the complaint."[12] A motion to dismiss must "present[] a question of law and cannot be granted where the pleading raises any material issues of fact."[13]

[10] Plaintiff's Response to the Motion to Dismiss at ¶ 15.

[11] *Plant v. Catalytic Constr. Co.,* 287 A.2d 682, 686 (Del. Super. 1972), *aff'd* 297 A.2d 37 (Del. 1972).

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

[13] *Fagnani v. Integrity Fin. Corp.,* 167 A.2d 67, 68 (Del. 1960).

C. Discussion

1) The toothpick left in Plaintiff's foot at the conclusion of surgery was not a "foreign object unintentionally left within the body of the patient following surgery" that entitled Plaintiff to a rebuttable presumption of negligence.

The first issue before this Court is whether a toothpick that was introduced into a patient's body before the commencement of treatment by a healthcare provider, and not left in a patient's body by the healthcare provider, falls within the meaning of "foreign object" pursuant to 18 *Del. C.* §6853. Section §6853(e)(1) provides that

> No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death, except that such expert medical testimony shall not be required if a medical negligence review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence; provided, however, that a rebuttable inference that personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances:
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> (1) A foreign object was unintentionally left within the body of the patient following surgery;[14]

This Court holds that "foreign object" within the meaning of 18 *Del. C.* §6853 refers only to those objects (such as sponges, surgical instruments, needles, tubes and the like) left in the patient's body by the defendant healthcare provider in the course of treatment. Because Plaintiff's claim is

thus subject to the Affidavit of Merit requirement of §6853(a)(1), Plaintiff's complaint must be dismissed.

The Delaware Supreme Court has held that "the main reason for the passage of the legislation [Chapter 68 of Title 18 of the Delaware Code (entitled "Healthcare Medical Negligence Insurance and Litigation Act")] was the concern over the law at that time and the rising costs of malpractice liability insurance,"[15] a concern that has not diminished since the statute's enactment. Prior to the enactment of this Act, "the need for expert medical testimony to support a plaintiff's claim in a medical malpractice action had been generally recognized. [Citation omitted.] However, 'the Act particularized the need for expert medical testimony and defined those cases in which a rebuttable inference of negligence could arise with it'."[16] In other words, the General Assembly codified the generally accepted judicial rule

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[14] 18 *Del. C.* §6853(e)(1).

[15] *See Ewing v. Beck*, 520 A.2d 653, 658 (Del. 1986), (stating that "[t]he preamble of the Act specifically provided:
'WHEREAS, the General Assembly determined it is *necessary to make certain modifications to its current legal system as it relates to health care malpractice claims* if the citizens of Delaware are to continue to receive a high quality of health care while still assuring that any person who has sustained bodily injury or death as a result of a tort or breach of conduct on the part of a health care provider resulting from professional services rendered, or which should have been rendered, can obtain a prompt determination of adjudication of that claim and receive fair and reasonable compensation from financially responsible health care providers who are able to insure their liability . . .'" *Ewing,* 520 A.2d at 658-59 quoting 60 Del. Laws C. 373.

[16] *Sostre v. Swift*, 603 A.2d 809, 810 (Del. 1992).

that a plaintiff must provide, before trial, expert testimony to support a claim for negligence in a medical malpractice claim.

In July 2003, the General Assembly revised §6853 to include an Affidavit of Merit requirement.[17] The effect of this amendment was to require a plaintiff to file an Affidavit of Merit contemporaneously with the complaint except in certain specific situations enumerated in the statute.

Section 6853 states in pertinent part

> (a) No healthcare negligence lawsuit shall be filed in this State unless the complaint is accompanied by:
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> (1) An affidavit of merit as to each defendant signed by an expert witness . . . If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (2) of this subsection has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court . . .
>
> (2) The court, may, upon timely motion of the plaintiff and for good cause shown, grant a single 60 day extension for the time of filing the affidavit of merit. Good cause shall include, but not be limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert review.
>
> (3) A motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend. The filing of a motion to extend the time for filing

[17] 18 *Del. C.* §6853 was amended in July 2003 by 74 Del. Laws, c. 148, which rewrote the section heading (retitling the section *Affidavit of Merit, expert medical testimony*), redesignated the former section text as (e) and inserted (a) through (d), (the Affidavit of Merit requirements). Section 6853 was amended again in October 2003 by 74 Del. Laws, c. 391, which rewrote the second sentence in (a)(1) (removing the dismissal of suit language and substituting the language, "If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (2) of this subsection has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court").

> an affidavit of merit tolls the time period within which the affidavit must be filed until the court rules on the motion . . .
>
> (b) An affidavit of merit shall be unnecessary if the complaint alleges a rebuttable inference of medical negligence, the grounds of which are set forth below in subsection (e) of this section . . .
>
> (e) No liability shall be based upon asserted negligence unless expert medical testimony is presented . . . however, that a rebuttable inference that personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances:
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> (1) A foreign object was unintentionally left within the body of the patient following surgery[18]

Thus, the July 2003 amendment of §6853 changed the requirement that a plaintiff must provide supporting expert testimony before trial to a requirement that a plaintiff must provide, in essence, expert testimony at the time of filing a medical negligence claim unless the complaint "alleges a rebuttable inference of medical negligence."[19]

While the statute does not define what constitutes a "foreign object," and the Delaware case law is scant, the few cases from Delaware that have, at least tangentially, addressed the issue, as well as case law from other jurisdictions, support the proposition that "foreign object" only refers to medically related items inadvertently left in the patient's body by the defendant healthcare provider in the course of treatment.

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[18] 18 *Del. C.* §6853.

[19] 18 *Del. C.* §6853. §6853(a)(2) provides for a single 60 day extension for the time of filing the Affidavit of Merit upon "timely" motion of the plaintiff and for "good cause."

This Court held 21 years ago in *Lacy v. Searle* that the *res ipsa loquitur* allegation that a intrauterine device (I.U.D.) that was supposed to be removed by the defendant, but was not, "[did not] satisfy 18 *Del. C.* §6853."[20] *Lacy* was decided on a motion to dismiss in which the defendant doctor argued that §6853 did not include an IUD previously located in the patient's body as a foreign object for purposes of the "foreign object" exception to the presumption of negligence. The *Lacy* Court agreed and held that "the phrase used in §6853(1) ("foreign object") was used to refer to an object which was not present in the person's body before commencement of the immediate health care provider procedure which was present in the person's body after conclusion of the procedure."[21] The *Lacy* court went to hold that "[i]n this case the IUD was present in plaintiff's body before the procedure commenced, and hence was not within the meaning of that phrase"; therefore, the plaintiff was not entitled to the inference or presumption of negligence.[22] *Lacy* thus stands for the proposition that an object that was present in the patient's body before the treatment of the defendant is not considered a "foreign object" for purposes of §6853(e)(1).

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[20] *Lacy v. Searle*, 484 A.2d 527 (Del. Super. 1984).

[21] *Lacy*, at 531.

[22] *Lacy*, at 531.

In a later Delaware Supreme Court case, *Sostre v. Swift*, the Supreme Court held that

> Section 6853 does not require a plaintiff in a medical malpractice action to produce expert testimony in a limited number of exceptional circumstances. The unambiguous language of Section 6853 relieves a plaintiff of the burden of presenting any expert medical testimony to prove the existence of a personal injury beyond that which is necessary to establish that a foreign object was unintentionally left within the patient's body.[23]

The Court further stated that "[s]ection 6853 provides that a 'personal injury' is established *per se* by the unintentional presence of a foreign object within a plaintiff's body."[24]

In *Sostre*, the defendant-doctor had unintentionally left the tip of a broken catheter in the plaintiff-patient's body during delivery of the patient's baby. The plaintiff filed suit against the doctor and medical center alleging negligence; however, the plaintiff did not identify a medical expert who would testify at trial that the broken catheter had caused the patient plaintiff any personal injury. The Supreme Court held that "[w]hen the [plaintiffs] produced facts on the record to establish the presence of an exception specifically set forth in Section 6853, [the "foreign body" exception in this

[23] *Sostre v. Swift*, 603 A.2d 809, 813 (Del. 1992).

[24] *Sostre v. Swift*, 603 A.2d 809, 813 (Del. 1992).

case] the unambiguous language of that statute made it unnecessary for them to produce any expert medical testimony to avoid a nonsuit."[25]

While neither *Lacy* or *Sostre* specifically defined the term "foreign body" within the meaning of §6853, a reasonable reading of the two cases indicate that "foreign object" refers to an object (of a surgical or healthcare nature) which was not present in the person's body before commencement of the healthcare provider's procedure that was, however, present in the person's body after the procedure.

This reading of the term "foreign object" in §6853 is consistent with other jurisdictions that have defined the term, albeit often within the context of medical malpractice statute of limitations. The definition of "foreign object" in a statute of limitations ought to be the same as in §6853 because the intent of both statutes is to limit unmeritorious claims while eliminating the cost of providing expert testimony in certain specific situation in which negligence may be presumed.[26]

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[25] *Sostre at* 813.

[26] *See Flanagan v. Mount Eden General Hospital,* 248 N.E.2d 871 (N.Y. 1969) (holding that "[when] a foreign object is left in a patient's body . . . no claim can be made that the patient's action may be feigned or frivolous . . . [and]there is no possible causal break between the negligence of the doctor or hospital and the patient's injury . . . the danger of belated, false or frivolous claims is eliminated"). The *Flanagan* court "created a common law discovery rule for ["foreign objects"], with the period of limitations to commence when "the patient could have reasonably discovered the malpractice."

Some jurisdictions have two statutes of limitation for medical negligence claims; those statutes of limitation are usually bifurcated into one statute of limitation for medical malpractice based on negligent treatment and medication cases and another statute for medical negligence involving a foreign object left in a patient's body. In these jurisdictions, the courts have held that "foreign object" refers only to objects left inadvertently in the patient's body by the healthcare provider.[27] Some of these jurisdictions have also held that a "foreign object" is neither a non-medically related item,[28] nor

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LaSorsa v. Oelbaum, 768 N.Y.S.2d 558 (N.Y. App. Div. 2003). The New York legislature codified *Flanagan* in N.Y. C.P.L.R. 214-a. *LaSorsa v. Oelbaum,* 768 N.Y.S.2d at 561.

[27] *Despres v. Moyer*, 827 A.2d 61 (Me. 2003) (holding that "one can only 'leave' a foreign object that one has inserted, and that if a physician has not inserted the foreign object in question, the exception to the statute does not apply"); *Rodriguez v. Manhattan Medical Group, P.C.*, 567 N.E.2d 235 (N.Y. 1990) (holding that "this Court in *Flanagan v Mount Eden Gen. Hosp.* recognized a narrow exception . . . in cases where a "foreign object," such as surgical clamps, had accidentally been left inside the patient's body"), *Garrett v. Brooklyn Hosp.*, 99 N.Y.S.2d 621 (N.Y. app. Div. 1984) (holding that "[a] glass fragment retrieved in 1980 was not introduced into plaintiff's body as the result of any affirmative act on the part of one of defendant's employees"); *Federici v. Kaiser Community Health Foundation*, 1982 Ohio App. LEXIS 13498 (holding that "'the foreign object rule' espoused . . . is limited to physical objects which were placed by the defendant into the plaintiff during the course of medical treatment"); *Dunaway v. Ball,* 453 N.Y.S.2d 313 (N.Y. App. Div. 1982) (holding that "the foreign object in this case was introduced into plaintiff's body by a doctor, rather than as a result of an accident"); *Dalbey v. Banks*, 264 S.E.2d 4 (Ga. 1980) (holding that "[w]here a physician places a foreign object in his patient's body during treatment, he has actual knowledge of its presence . . . [h]is failure to remove it goes beyond ordinary negligence").

[28] *Garrett,* 99 N.Y.S.2d 621 (holding that "traumatically introduced glass fragment already embedded in her right hand" was not a 'foreign object'"); *Dalbey*, 264 S.E.2d 4 (holding that particles of ceramic glass were not "foreign objects"); *Soto v. Greenpoint Hosp*, 429 N.Y.S.2d 723 (N.Y. App. Div. 1980) (holding that a toy lodged in patient's

a medical item that was present in the patient before the commencement of the treatment by the defendant healthcare provider.[29]

This Court holds that the toothpick that was present in Plaintiff's foot before the commencement of treatment by Defendants and not left by Defendants during said treatment is not a "foreign object" within the meaning of 18 *Del C.* §6853(e)(1). As this Court held in *Lacy,* "the phrase used in §6853(1) ("foreign object") was used to refer to an object which was not present in the person's body before commencement of the healthcare provider procedure which was present in the person's body after conclusion of the procedure."[30] Plaintiff was thus required to provide a timely Affidavit of Merit along with her complaint in order to comply with §6853(a)(1).

2) Plaintiff should not be allowed to now file an Affidavit of Merit.

The next issue is whether the complaint should be nevertheless not dismissed, as Plaintiff argues, because the Prothonotary, acting as the purported "gatekeeper and enforcer" on November 24, 2004 (the day the

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esophagus was not a "foreign object").

[29] *Despres*, 827 A.2d 61 (holding that gauze and other material placed in empty tooth socket by prior doctor were not "foreign objects"), *Rodriguez,* 567 N.E.2d 235 (holding that an I.U.D. placed by a prior doctor is not a "foreign object"); *see also Flanagan,* 248 N.E.2d 871 (holding that surgical clamps left in patient were "foreign objects").

[30] *Lacy*, at 531.

complaint was filed) erroneously accepted the complaint without an Affidavit of Merit and therefore Plaintiff should be able to cure the defect by filing an Affidavit of Merit, as Plaintiff attempted to do on March 14. This Court holds that Plaintiff should not be allowed to file an untimely Affidavit of Merit.

This Court declines to endorse Plaintiff's argument that the Prothonotary is the "gatekeeper and enforcer" of the statute to the extent Plaintiff seeks. While it is correct, as Plaintiff argues, that the General Assembly removed the "suit shall be dismissed" language from §6853 in October 2003 and replaced that language with "[i]f the required affidavit does not accompany the complaint . . . then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court,"[31] this Court nevertheless finds that the claim should be dismissed.

Employees of the Prothonotary cannot make determinations such as whether a medical negligence complaint raises a rebuttable inference of negligence. This Court presumes that the General Assembly expected the Prothonotary to act in a mechanical manner in reviewing medical negligence complaints and intended that the Prothonotary not accept a medical

[31] 18 *Del. C.* §6853(a)(1).

negligence complaint without an affidavit unless a representation has been made, as happened here, by the filing attorney that the complaint did not require an Affidavit of Merit because it fell within one of the exceptions contained in §6853.

In the instant case, Plaintiff's counsel advised the Prothonotary that the complaint did not require an Affidavit of Merit because of the "foreign object" exception pursuant to §6853(e)(1).[32] Once Plaintiff's counsel represented (incorrectly, as now found by this Court) that the claim did not require an Affidavit of Merit, Plaintiff's counsel cannot now avoid the requirements of §6853 by arguing that the Prothonotary's acceptance somehow mislead him such that counsel should be able to cure the defect by filing an Affidavit of Merit after the statute of limitations has run.

Further, §6853(a)(2) sets forth a narrow exception to the requirement that an Affidavit of Merit be filed with the complaint. That statute requires "[a] timely motion of the plaintiff" seeking an extension to file an Affidavit of Merit after the filing of the complaint. Section 6853(a)(2) provides that "[t]he court, may, upon timely motion of the plaintiff and for good cause shown, grant a single 60 day extension for the time of filing the affidavit of merit." Under §6853(a)(3)

> [a] motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend. The filing of a motion to extend the time for filing an affidavit of merit tolls the time period within which the affidavit must be filed until the court rules on the motion.

Plaintiff did not file a timely motion pursuant to §6853(a)(2) to seek a 60 day extension in which to file an Affidavit of Merit. Instead, Plaintiff simply filed an Affidavit of Merit more than four months after the complaint was filed with the Prothonotary.[33] The provisions of §6853(a) governing post-complaint filings of Affidavits of Merit are strict and unambiguous.

3) Beebe can assert "failure to provide an Affidavit of Merit" as defense.

This Court does not find that Beebe has waived the defense of failure to provide an Affidavit of Merit pursuant to 18 *Del. C.* §6853, as summarily argued by Plaintiff, when Beebe did not then raise the defense in it answer. Plaintiff's argument is presumably based on Superior Court Civil Rule 8(c), which requires "[i]n pleading to a preceding pleading, a party shall set forth" all affirmative defenses.[34] The rule then lists a series of affirmative defenses. Failure to provide an Affidavit of Merit is not one of the enumerated

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[32] Plaintiff's Complaint ¶ 7 and Defendant's Motion to Dismiss at Ex. B.

[33] *But see McBride v. Shipley Manor Health Care*, 2005 Del. Super. LEXIS 87 (permitting the plaintiffs in mid-litigation 21 days in which to file an Affidavit of Merit, (but without discussing the requirements of §6853(a)(2) and (3))).

[34] Super. Ct. R. 8(c).

affirmative defenses. Even if the absence of an Affidavit of Merit was an affirmative defense this Court has the discretion to accept the defense as being timely raised.[35] This Court held in *Garnett v. One Beacon Insur. Co.*, that where the challenged defense is not one of the listed affirmative defenses in Rule 8 and the defense is raised "relatively early" in the case, this Court in its discretion can deem a defendant's affirmative defense as timely raised even if the defense was not raised in the answer.[36] Therefore, this Court in its discretion holds that Beebe has timely raised the defense of "failure to provide an Affidavit of Merit" by adopting Dr. Tatineni's motion to dismiss.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss pursuant to Title 18 Del. C. §6853 (a)(1) is **GRANTED.**

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oc: Prothonotary

[35] *Fletcher v. Ratcliffe*, 1996 Del. Super. LEXIS 326) citing *Lewis v. Hermann,* N.D. Ill., 775 F. Supp. 1137, 1143 (1991), *aff'd,* 7th Cir., 13 F.3d 1028 (1994) (holding that "[w]hether a defendant has waived an affirmative defense by failing to assert it timely is a matter left to the discretion of this Court").

[36] *Garnett v. One Beacon Insur. Co.*, 2002 WL 1732371 at *5 (Del. Super.).