

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

JON D. KALINOWSKI and)	
CATHERINE A. DOWNS,)	
Plaintiffs,)	
)	
v.)	C.A. No.: 12C-01-063 FSS
)	(E-FILED)
GREGORY D. ADAMS, M.D.,)	
GLASGOW FAMILY PRACTICE, P.A.,)	
and GLASGOW FAMILY PRACTICE)	
OF DELAWARE, L.L.C.,)	
Defendants.)	

Submitted: February 29, 2012
Decided: March 9, 2012

ORDER

Upon Review of the Affidavits of Merit – *DISMISSED*
WITHOUT PREJUDICE.

This is a healthcare negligence suit. On October 16, 2009, at Defendant Dr. Gregory Adams’s direction, Plaintiff Kalinowski underwent an abdominal CT exam, which showed a “non-specific liver mass present.” The report sent to Dr. Adams stated, “Further evaluation recommended with an MRI of the liver.” Kalinowski learned he had metastatic liver cancer in 2011. Plaintiffs allege Dr.

Adams negligently failed to refer Kalinowski to an oncologist after receiving the report.

On February 29, 2012, Defendants moved to have the court review Plaintiffs' affidavits of merit, *in camera*, to determine if they comply with 18 *Del. C.* § 6853(c).¹ Plaintiffs submitted two affidavits: one from a surgical oncologist and one from a family medicine physician. The surgical oncologist's affidavit does not comply because the affiant is not Board certified in a comparable field as Dr. Adams,² but the submission creates no problem. The family medicine expert's affidavit does not comply because it did not clearly opine that Defendants' alleged negligence proximately caused Kalinowski's injury.

In Delaware, a healthcare negligence lawsuit cannot be filed without an affidavit of merit, signed by an expert witness, and filed with the expert's current *curriculum vitae*.³ The expert must be licensed to practice medicine as of the affidavit's date, and must have been engaged in the same or similar field as the Defendant in the three years immediately preceding the alleged negligence.⁴ The

¹ 18 *Del. C.* § 6853(d).

² *Id.* § 6853(c) (“[T]he expert shall be Board certified in the same or similar field of medicine if the defendant or defendants is Board certified.”).

³ *Id.* § 6853(a)(1).

⁴ *Id.* § 6853(c).

affidavit must state that reasonable grounds exist to believe Defendants were negligent, and this negligence proximately caused Kalinowski's injury.⁵

The court finds the family medicine expert's affidavit was filed properly, and for the most part, it complies with 18 *Del. C.* § 6853(c):

1. The expert signed the affidavit;
2. The expert attached a current *curriculum vitae*;
3. The expert is currently licensed to practice medicine;
4. The expert is Board certified in family medicine, the same field as Dr. Adams;
5. The expert has been treating patients and teaching medicine in the same field as Dr. Adams for at least three years immediately preceding the alleged negligent act; and
6. The affidavit states a reasonable ground exists to believe Defendants breached their standard of care to Plaintiff.

The affidavit, however, does not clearly state Defendants' actions proximately caused Kalinowski's injuries. It states, "As a result of the violation of the standard of care, [Kalinowski] suffered injury."

Delaware follows a "but for" standard for proximate causation.⁶ The family medicine expert's affidavit is inadequate because it is unclear whether the

⁵ *Id.*

⁶ *See Culver v Bennett*, 588 A.2d 1094, 1097 (Del. 1991).

violation of care was merely a factor in Kalinowski's injury.⁷ While the court will not turn the affidavit of merit procedure into a mini-summary judgment, the court will not parse these affidavits to glean their meaning. If the expert believes Defendants' negligence proximately caused Kalinowski's injuries, the affidavit should say so in simple, clear language.

Because the affidavit substantially complies with the statute,⁸ Plaintiffs have twenty-one days to file an updated affidavit from the family medicine expert clearly stating Defendants' negligence proximately caused Kalinowski's injuries.

If the affidavit is amended, the court will review it and the case will proceed. If the affidavit is not properly amended within twenty-one days, the court will dismiss the complaint without further notice or opportunity to be heard.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

cc: Prothonotary (Civil)
pc: Kenneth M. Roseman, Esquire
Frederick S. Freibott, Esquire

⁷ See, e.g., *Ellet v. Ramzy*, 2004 WL 2240153, at *1 (Del. Super. Sept. 29, 2004) (Silverman, J.) (“[Experts] 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 . . .’ 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.”).

⁸ See *Ashley v. Tull*, 2005 WL 1952880 (Del. Super. July 12, 2005) (Bradley, J.); see also *Ellet*, 2004 WL 2240153, at *1.

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