

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Ben T. Castle, Esquire
Young Conaway Stargatt & Taylor LLP
1000 West Street, 17th Floor
Wilmington, Delaware 19899-0391
Attorney for Plaintiff

Richard Galperin, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, Delaware 19899-2306
Attorney for Defendants

Submitted: August 3, 2010
Decided: August 26, 2010

***Re: Arnold P. Kemp v. Christiana Care Health Services, Inc. a/k/a
Christiana Care Health System, Inc., a Delaware Corporation;
Ehyal Shweiki, M.D. and Surgical & Critical Care Associates¹
C.A. No. N10C-07-012 RRC***

Upon Defendants' Motion to Determine Whether Plaintiff's Affidavit of Merit
Complies with 18 Delaware Code § 6853.

AFFIDAVIT OF MERIT FOUND NON-COMPLIANT.

Dear Counsel:

Currently before the Court is Defendants' "Motion to Determine if the Affidavit of Merit Complies with Sections (a)(1) and (c) of Title 18, § 6853." After an *in camera* review of the affidavit filed in this medical negligence case, this Court holds that the affidavit of merit does not comply with 18 *Del. C.* § 6853 because the affidavit does not sufficiently allege proximate causation as to Dr. Shweiki.

¹ The record does not indicate the exact name of this business entity if it is anything other than as stated.

18 Del. C. § 6853(a)(1) provides that all healthcare negligence complaints be 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. 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. The affidavit of merit and curriculum vitae shall be filed with the court in a sealed envelope which envelope shall state on its face:

18 Del. C. § 6853(c) states that:

Qualifications of expert and contents of affidavit. --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 defendant(s), 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.

Here, there is no question that Plaintiff's expert is qualified. The expert's most recent *curriculum vitae* establishes that the expert has practiced medicine for three years prior to the alleged incident and has numerous Board certifications in a similar field of medicine as Dr. Shweiki.

Despite the expert's qualifications, this Court finds that his affidavit does not comply with 18 Del. C. § 6853 because the affidavit does not properly allege proximate causation.² The affidavit of merit states in pertinent part:

² Although the affidavit does not utilize the specific statutory words "there are reasonable grounds to believe that there has been healthcare medical negligence committed by each defendant[.]" this Court finds that this affidavit of merit complies with this requirement by using the words "... the failure to perform a thorough hand examination, the failure to properly identify the median nerve, and the failure to repair the median nerve transection falls below the standard of care one would expect from a surgeon" It is certainly preferable that the language used in affidavits of merit state explicitly that the expert believes that there are "reasonable grounds to believe that there has been healthcare medical negligence committed by each defendant," or by using words of similar import that leave no doubt that the expert has utilized the statutory standard.

[T]he failure to repair the median nerve transection falls below the standard of care one would expect from a surgeon and this resulted in pain, nerve dysfunction, neuroma formation, the need for future surgery and will result in future hand dysfunction to the plaintiff Arnold P. Kemp.

Delaware law adheres to the “but for” standard of causation.³ As presented, the affidavit of merit is unclear as to whether the negligence of Dr. Shweiki was simply a contributing factor to Plaintiff’s injury or was the “but for” cause of that injury. The Court holds that an affidavit of merit should state that the actions of the defendants were a “but for” cause of Plaintiff’s injury, using those words or other words that leave no doubt that the “but for” standard was utilized by the expert.⁴

Plaintiff must re-file any new affidavit of merit by September 15, 2010. The Court will then review the new affidavit of merit and will issue a final order as to Plaintiff’s compliance with 18 *Del. C.* § 6853.⁵

Very truly yours,

Richard R. Cooch, J.

cc: Prothonotary

³ *Ellet v. Ramzy*, 2004 WL 2240153 at * 1 (Del. Super.) (holding that an affidavit of merit did not comply with 18 *Del. C.* § 6853 because the Court did not “have unequivocal assurance that Plaintiffs and their experts [were] prepared to meet Delaware’s more rigorous ‘but for’ proximate cause standard.”).

⁴ *Id.* (holding that “[t]he court must have unequivocal assurance that Plaintiffs and their experts are prepared to meet Delaware’s more rigorous “but for” proximate cause standard.”).

⁵ The affidavit of merit does not allege negligence as to Surgical & Critical Care Associates and does not state any basis why Christiana Care Health Services was negligent. Additionally, proximate causation is not alleged as to either Christiana Care Health Services or Surgical & Critical Care Associates. This omission is most likely because the Court assumes that the only theory of negligence asserted against Christiana Care Health Services and/or Surgical & Critical Care Associates is based on a theory of *respondent superior*. See Compl. ¶ 3 (“At all times relevant hereto, defendant Shweiki was acting in the course and scope of his employment with the defendant hospital *and/or* Surgical & Critical Care Associates”) (emphasis added). The Court presumes that, during or after discovery, Plaintiff will state whether either one or both defendants are claimed to be liable because of *respondent superior*. If Defendant had asserted an independent theory of negligence against either Christiana Care Health Services or Surgical & Critical Care Associates, the affidavit of merit would have had to assert independent negligence and proximate causation as to Christiana Care Health Services and/or Surgical & Critical Care Associates to comply with the statute.