

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

BARBARA COHEN-THOMAS and)
VAN THOMAS,)
)
)
Plaintiffs,) C.A. No: N14C-03-039 MJB
v.)
)
GABRIEL E. LEWULLIS, M.D.,)
and CAPITAL ORTHOPAEDIC)
SPECIALISTS, P.A.,)
)
Defendants.)

ORDER

Submitted: April 23, 2014
Decided: June 9, 2014

*Upon Defendants' Motion to Determine if Plaintiffs' Affidavit of Merit
Complies with 18 Delaware Code § 6853.*

This is a medical negligence claim filed by Barbara Cohen-Thomas and Van Thomas ("Plaintiffs") against Dr. Gabriel E. Lewullis and Capital Orthopaedic Specialists, P.A. ("Defendants").

Pursuant to 18 *Del. C.* § 6853(a)(1), a medical negligence complaint must be accompanied by an Affidavit of Merit and current *curriculum vitae* from a qualified expert witness. The Affidavit of Merit must be filed under seal, but a

defendant can request an *in camera* review of the Affidavit¹ to ensure that it complies with the specific, statutory requirements of *18 Del. C. § 6853(c)*.²

On April 23, 2014, Defendants filed a Motion for Review of Plaintiffs' Affidavit of Merit. The Court has reviewed the Affidavit of Merit and the Court finds as follows:

1. The Affidavit is signed by an expert witness.
2. The Affidavit is accompanied by a current *curriculum vitae*.
3. The Affidavit does comply with *Del. C. § 6853(a)(1)*.
4. The Affidavit does state, with a reasonable degree of medical certainty, that in the expert's opinion there are reasonable grounds to believe that the applicable standards of care were breached by each Defendant and that breach was the proximate cause of the injuries alleged in Plaintiffs' Complaint.³

¹ *18 Del. C. § 6853(d)*.

² *18 Del. C. § 6853(c)* provides as follows:

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.

³ Plaintiffs contend Capital Orthopaedic Specialists, P.A. is liable solely based on the doctrine of *respondeat superior*. *In re McKelvey v. Manley*, 1997 WL 528001, at *2 (Del. Super. Ct. Feb. 20,

4. The expert was a licensed physician as of the date of the Affidavit.
5. For at least three years immediately prior to the alleged negligent act(s), the expert was engaged in the treatment of patients and/or the teaching/academic side of medicine in the same or similar field of medicine as Defendants.⁴
6. The expert is board-certified in Orthopedic Surgery.

THEREFORE, having reviewed the Affidavit of Merit, the Court finds that **Plaintiffs have met the requirements** set forth in 18 *Del. C.* § 6853.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

2007) (“Under the doctrine of *respondeat superior*, ‘an employer is liable for the torts of his employee committed while acting within the scope of his employment.’”) (citation omitted).

⁴ 18 *Del. C.* § 6853(c).