IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

COLLEEN GREENWALD and GARY GREENWALD, individually and as Guardians Ad Litem for KILEY ANN GREENWALD,	)	C.A. No. K14C-04-027 JTV
Plaintiffs,	)	
v.	)	
LINDA CABALLERO-GOEHRINGER, M.D., and CENTER FOR PEDIATRIC AND ADOLESCENT MEDICINE, P.A.,	)	
Defendants.	)	

Submitted: October 10, 2014
Decided: November 25, 2014

Chandra J. Williams, Esq., Rhodunda & Williams, Wilmington, Delaware. Attorney for Plaintiffs.

Dennis D. Ferri, Esq., Morris James, Wilmington, Delaware. Attorney for Defendant Caballero-Goehringer.

Lorenza A. Wolhar, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware. Attorney for Defendant Center for Pediatric and Adolescent Medicine, P.A.

Greenwald v. Caballero-Goehringer, et al.
C.A. No. K14C-04-027
November 25, 2014

Upon Consideration of Defendants' Motion to Dismiss
DENIED

VAUGHN, Judge

OPINION

This case involves a claim arising from an incident during a doctor's appointment that took place on April 27, 2012. The plaintiffs are Kiley Ann Greenwald, a minor, ("Kiley"), and her parents, Colleen Greenwald ("Mrs. Greenwald") and Garry Greenwald ("Mr. Greenwald"), individually and as Guardians Ad Litem for Kiley (collectively, "plaintiffs"). The defendants are Linda Caballero-Goehringer, M.D. ("Dr. Caballero") and Center for Pediatric and Adolescent Medicine, P.A. ("the Center") (collectively, "defendants").

Defendant Dr. Caballero filed this Motion to Dismiss for plaintiffs' failure to file an affidavit of merit pursuant to 18 *Del. C.* § 6853(a)(1).

FACTS

On April 27, 2012, Mrs. Greenwald took her daughter Kiley, who was four months old at the time, to the Center for a routine infant checkup with Dr. Caballero. Kiley was placed on an examination table, which was allegedly positioned in an unsafe and dangerous manner.[1] During the checkup, a nurse entered the examination room and engaged Dr. Caballero in conversation. While Dr. Caballero continued her conversation with the nurse, Kiley rolled off the examination table and onto the floor.

[1] Compl. ¶ 10. The facts are taken from the complaint.

Dr. Caballero was allegedly so engaged in conversation that several seconds passed with Kiley crying on the floor while Mrs. Greenwald rushed around the examination table to pick up her daughter and alert the doctor that Kiley had fallen.[2]

Following the fall, Dr. Caballero told Mrs. Greenwald that Kiley's fall did not warrant further treatment or a hospital visit. Relying on Dr. Caballero's advice and believing that Kiley was okay, Mrs. Greenwald advised Mr. Greenwald to continue his planned military trip.

After Dr. Caballero left the examination room, a male nurse entered the room and examined Kiley. Concerned by his observations, he was heard arguing with Dr. Caballero when he left the room. Dr. Caballero then reentered the room and sent Kiley for an x-ray. Mrs. Greenwald took Kiley to Kent General Hospital for an x-ray, the results of which created such concern that Kiley was sent for an immediate CT Scan. The results of the CT Scan caused need for Kiley to be emergency airlifted to Nemours/A.I. DuPont Hospital for Children in Wilmington, Delaware. Mrs. Greenwald was not permitted to accompany her daughter on the helicopter and instead had to drive from Milford to Wilmington alone while Mr. Greenwald was unavailable on an airplane and unable to be by Mrs. Greenwald's or his daughter's side.

Kiley sustained significant head injuries, pain, and suffering, all of which may be permanent in nature. The plaintiffs allege that these injuries were proximately caused by Dr. Caballero's gross negligence, recklessness, and/or failure to ensure

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[2] Compl. ¶ 13.

Kiley's safety.[3]

Mrs. Greenwald and Mr. Greenwald have suffered mental anguish and emotional distress, as well as extensive medical expenses for the treatment of Kiley's head injuries, all of which they claim were also proximately caused by Dr. Caballero's gross negligence, recklessness, and/or failure to ensure Kiley's safety.[4]

Plaintiffs' complaint alleges gross negligence, recklessness, and/or failure to ensure Kiley's safety. Specifically, they argue that Dr. Caballero and the Center breached their duty of care by (a) failing to take reasonable measures to ensure an infant's safety; (b) failing to maintain a reasonably safe environment; c) failing to warn of a dangerous condition; and (d) failing to institute or follow internal policies to prevent harm to infant patients.[5] Plaintiffs further argue that Dr. Caballero and the Center breached their duty of care by their acts and/or omissions in caring for Kiley immediately following the fall.[6]

Dr. Caballero moved to dismiss the case on the ground that the plaintiffs failed to file an Affidavit of Merit with the complaint pursuant to 18 *Del. C.* § 6853(a)(1).[7] The Center subsequently filed a motion to join Dr. Caballero's Motion to Dismiss.

Plaintiffs oppose the Motion to Dismiss, and argue that an Affidavit of Merit

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[3] Compl. ¶ 26.

[4] Compl. ¶ 27.

[5] Compl. ¶ 14.

[6] Compl. ¶ 16.

[7] The case was accepted by the Prothonotary without an Affidavit of Merit because it was filed under the personal injury case category, not the medical negligence case category.

is not required because the disputed negligent conduct does not fall within the medical negligence umbrella. They argue alternatively that they should be permitted to submit an Affidavit of Merit with respect to any specific claims deemed medical negligence.

DISCUSSION

Section 6853 provides that "[n]o healthcare negligence lawsuit shall be filed in this State unless the complaint is accompanied by . . . [a]n affidavit of merit."[8] The central issue here is whether this is a "healthcare negligence lawsuit." To invoke the protections of the statute, a defendant must show (1) that the suit arises from the conduct of a "health care provider" and (2) that the suit is based upon "medical negligence" as the term is defined in Section 1801(7).[9] The parties do not dispute the fact that the defendants are health care providers.[10] Thus, the question is whether the alleged conduct falls within the scope of medical negligence.[11]

Delaware courts have never explicitly stated a standard for determining whether a negligence claim falls into the scope of medical negligence or ordinary negligence. This Court did, however, distinguish medical negligence claims from "garden variety

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[8] 18 *Del. C.* §6853(a)(1); *Dishmon v. Fucci*, 32 A.3d 338, 344-45 (Del. 2011).

[9] *Fassett v. Christiana Care Health Services, Inc.*, 2010 WL 2433183, at *2 (Del. Super. June 17, 2010).

[10] Pursuant to § 6801(5), a "health care provider" is "a person, corporation, facility or institution licensed by this State pursuant to Title 24, excluding Chapter 11 thereof, or Title 16 to provide health care or professional services or any officers, employees or agents thereof acting within the scope of their employment . . ." Dr. Caballero is and was at all relevant times licensed to practice medicine in Delaware.

[11] There are exceptions to the Affidavit of Merit requirement in 18 *Del. C.* § 6853(e). None of those exceptions are applicable here.

tort claim[s]" in *Fasset v. Christiana Care Health Services, Inc.* when it held that the Medical Malpractice Act protections requiring an Affidavit of Merit are invoked only when a negligence claim arises out of alleged errors in the rendering of professional treatment.[12]

In *Fasset,* the plaintiff alleged that he was injured when a hospital employee negligently pushed the plaintiff's wheelchair in a manner that caused the plaintiff's leg to become stuck between the floor and the wheelchair.[13] This Court held that the claim was a "garden variety" tort claim and explained that the alleged conduct was "a far cry from a medical error committed during the treatment of a patient."[14]

Relying on this Court's ruling in *Fassett*, the District Court of Delaware held in *Phipps v. St. Francis Hospital, Inc.*[15] that the Affidavit of Merit requirement did not apply to a claim of negligence arising when a patient was injured as a result of negligent transfer of the patient from a gurney to a hospital bed.[16] The court held that plaintiff's claim was "merely a garden variety tort claim in which a fact finder may find a departure from the ordinary standard of care and causation without the assistance of an expert."[17]

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[12] *Id.*

[13] *Id.* at *1.

[14] *Id* .

[15] *Phipps v. St. Francis Hospital, Inc.*, 2011 WL 5570141 (D. Del. Nov. 16, 2011).

[16] *Id.* at *2

[17] *Id.*

Looking outside of Delaware, two cases are particularly helpful in providing guidance on this issue. In a case involving facts more similar to those of this case, the Superior Court of New Jersey held that a complaint alleging that hospital employees negligently failed to secure a stool or handle bar to assist a patient in climbing on an examination table which resulted in injuries to the plaintiff was not a medical malpractice action, but instead, a simple negligence allegation.[18] The court explained that jurors are capable of assessing simple negligence occurring in a hospital without expert testimony to establish the standard of ordinary care.[19]

The Georgia Court of Appeals recently addressed the same issue. In *Kerr v. OB/GYN Associates of Savannah*,[20] the patient-plaintiff filed a complaint alleging that she was injured when a medical assistant negligently allowed her to fall off the examination table after the assistant injected the patient with a vaccination.[21] The court explained that the determination of whether a claim is one for medical negligence requiring an expert affidavit "is determined on the basis of whether the act or omission was made regarding a medical question."[22] Medical questions are defined

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[18] *Nowacki v. Community Medical Center*, 652 A.2d 758, 766 (N.J. Super. 1995).

[19] *Id.* ("'[T]he question whether restraints or special supervision should have been provided to prevent an accident is not one which requires specialized knowledge, but is a matter of common sense which the jury is competent to assess without expert guidance.'") (quoting John E. Theuman, Annotation, *Hospital's Liability for Patient's Injury or Death as a Result of Fall from Bed*, 9 A.L.R.4th 149, 155 (1981)).

[20] 723 S.E.2d 302 (Ga. Ct. App. 2012).

[21] *Id*. at 303.

[22] *Id*. at 304.

as "those concerning highly specialized expert knowledge with respect to which a layman can have no knowledge at all."[23] The court noted the difficulty of distinguishing medical negligence from ordinary negligence in cases involving a person's fall while in the care of medical professionals, but explained that the distinction is a question of law for the court.[24] Ultimately, the court determined that a defendant's liability for injuries as a result of a person's fall while in the care of medical professionals was not a medical question, and therefore no expert affidavit was required to be filed with the complaint.[25]

In this case, the plaintiffs first claim that Kiley was injured as a result of defendants' failure to ensure the infant's safety. Second, they claim that damages (both Kiley's physical injuries and their own emotional and financial injuries) were complicated by the defendants' actions and/or omissions in caring for Kiley immediately after the fall.

The first claim, arising from the Dr. Caballero's failure to ensure that Kiley did not fall from the examination table, appears to be one of ordinary negligence. This negligence claim is similar to the more general "patient handling" claims asserted in *Fasset* and *Phipps*. The gist of plaintiffs' claim is that Dr. Caballero failed to keep a proper lookout for Kiley's safety on the examination table. I find that this claim is

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[23] *Id.*

[24] *Id.*

[25] *Id.* The court explained that a jury would be capable of determining whether the medical assistant exercised due care in attempting to prevent the patient's fall from the examination table without the help of expert evidence. *Id.*

one based on ordinary negligence, not medical negligence. Thus, the first part of plaintiffs' claim is not subject to the affidavit of merit requirement.

The second claim, which is essentially a claim that Dr. Caballero initially misdiagnosed the fall as not causing injury, did, however, involve the exercise of professional, medical judgment. A jury would likely need expert testimony to determine whether Dr. Caballero's evaluation of Kiley's injuries or lack of injuries fell below the standard of care. As such, this part of plaintiffs' claim falls within the realm of medical negligence claims and plaintiffs were required to submit an Affidavit of Merit as to this part of their claim when they filed their complaint.

The plaintiffs' request that they be given leave to submit an Affidavit of Merit for any part of their claim which requires one. Under 18 *Del. C.* § 6853(2) the court may, upon timely motion and for good cause shown, grant one 60-day extension for the filing of an Affidavit of Merit. A motion is defined as timely under 18 *Del. C.* § 6853(3) if it is filed on or before the filing date that the plaintiff seeks to extend. The plaintiffs argue, in support of this request, that the statute of limitations on a medical negligence claim of a minor under six years of age does not expire until the latter of two years from the date of the alleged medical negligence or until the minor reaches age six. The minor plaintiff in this case was four months old at the time of the alleged medical negligence. Thus, it would appear that the plaintiffs are well within their time to file a second action for that part of the claim which I have concluded is a medical negligence claim.[26] I am satisfied that good cause has been shown to allow the late

[26] As to what statute of limitations applies to any claims asserted by the parents individually arising out of the alleged medical negligence which occurred after the baby fell off the table, I

filing of an Affidavit of Merit by the fact that a substantial part of the plaintiffs claim has been determined to be an allegation of ordinary, not medical, negligence**.** On the question of allowing an Affidavit of Merit to be filed "out of time," the Delaware Supreme Court has held that the Superior Court has discretion to act consistent with the public policy that favors a trial on the merits.[27] The plaintiffs should have an opportunity to file an Affidavit of Merit in this action. Therefore, the plaintiffs are granted leave to submit an Affidavit of Merit within 60 days of the filing of this opinion.

For the foregoing reason, the defendants' Motion to Dismiss is ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

express no opinion.

[27] *Beckett v. Beebe Medical Center, Inc.*, 897 A.2d 753 (Del. 2006).