

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

CHRISTOPHER H. WEST, :
 : C.A. No. K14C-06-021 WLW
Plaintiff, :
 :
v. :
 :
KENT GENERAL HOSPITAL/ :
BAYHEALTH, :
 :
Defendant. :

Submitted: December 19, 2014
Decided: February 5, 2015

ORDER

Upon Defendant's Motion to Dismiss.
Granted.

Christopher H. West, *pro se.*

James E. Drnec, Esquire of Balick & Balick, LLC, Wilmington, Delaware; attorney
for Defendant.

WITHAM, R.J.

This case involves a claim arising from an incident that took place on April 27, 2012, when the plaintiff, Christopher West (“West”), was a patient of the Defendant, Kent General Hospital (“KGH”).

The Defendant filed this Motion to Dismiss citing Plaintiff’s failure to file an affidavit of merit pursuant to 18 *Del. C.* § 6853(a)(1). For the reasons that follow, Defendant’s Motion to Dismiss is **GRANTED**.

BACKGROUND

Since in a motion to dismiss, all well-pleaded allegations in the complaint must be accepted as true, the Court begins by restating the factual allegations made by the Plaintiff, substantially in their entirety:

Being admitted to Kent General Hospital on August 27, 2012, the Plaintiff was placed in a situation where he had access to a metal spring in the bathroom. Plaintiff was in the hospital for ingesting multiple foreign objects in a suicide attempt. The hospital did not provide a mental health observer in Plaintiff’s room after surgery as policy states for patients under mental duress. The Plaintiff ingested the broken spring, which in another suicide attempt, perforated his esophagus and placed his life in jeopardy, causing extreme pain and requiring additional surgery at Christiana Hospital trauma unit. Permanent damage to Plaintiff’s neck has resulted because of Kent General Hospital, an agency run by Bayhealth, was negligent in its duty to protect a suicide patient from themselves, as per policy. The plaintiff has exhausted all administrative remedies.

STANDARD OF REVIEW

When deciding a motion to dismiss under Rule 12(b)(6), all well-pleaded

allegations in the complaint must be accepted as true.¹ The test for sufficiency is a broad one: the complaint will survive the motion to dismiss so long as “a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”² Stated differently, a complaint will not be dismissed unless it clearly lacks factual or legal merit.³

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.”⁴ In the present case, the Plaintiff’s Complaint is not accompanied by an affidavit of merit, and therefore, the outcome of this motion turns on whether this is a “healthcare negligence suit.” To invoke the protections of Section 6853, a defendant must show that the suit arises from the conduct of a “health care provider” and that the suit is based upon “medical negligence” as defined in Section 1801(7).⁵ KGH is certainly a healthcare provider within the meaning of the statute,⁶ therefore, the central issue

¹ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

² *Id.* (citing *Klein v. Sunbeam Corp.*, 94 A.2d 385 (Del. 1952)).

³ *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

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

⁵ *Fassett v. Christiana Care Health Services, Inc.*, 2010 WL 2433183, at *2 (Del. Super. June 17, 2010).

⁶ 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

here is whether the alleged conduct falls within the scope of medical negligence, and if so, whether an exception applies to excuse the affidavit of merit requirement.

While 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 recently explained 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.”⁷

In *Greenwald*, the plaintiff alleged her child was injured when a hospital employee negligently failed to secure or observe the child, allowing the child to fall off the examination table.⁸ In denying the Defendants’ motion to dismiss for lack of an affidavit of merit, the Court explained, “a jury could presumably determine whether [the healthcare provider] exercised due care in ensuring that [the child] was safe and secure on the examination table without the help of expert testimony. Thus, the first part of Plaintiffs’ claim is not subject to the affidavit requirement.”⁹

provide health care or professional services or any officers, employees or agents thereof acting within the scope of their employment . . .”

⁷ See *Greenwald v. Caballero-Goehring*, 2014 WL 7008959, at *2 (Del. Super. Nov. 25, 2014) (citing *Fassett*, 2010 WL 2433183, at *2) (holding that plaintiff’s alleged injury— where 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— was a garden variety tort claim and “a far cry from a medical error committed during the treatment of a patient.”).

⁸ *Greenwald*, 2014 WL 7008959, at *1.

⁹ *Id.* at * 4.

Unlike *Greenwald*, plaintiff's claim – that KGH breached a duty to protect a suicidal patient from himself– is inherently medical in nature. The question of whether a patient is suffering from mental duress, and thus requiring a mental health observer, would first require a medical diagnosis. Such a diagnosis requires specialized expert knowledge with respect to which an average juror would not have. Accordingly, KGH's alleged failure to assess whether the plaintiff was under mental duress and therefore likely to injure himself, is one of professional treatment. As such, the alleged conduct falls within the scope of medical negligence, and the Plaintiff's failure to submit an affidavit of merit with the complaint requires dismissal unless one of the specified exceptions apply.

There are two exceptions to the requirement that an Affidavit of Merit be submitted at the time of filing of a medical negligence complaint.¹⁰ A plaintiff may either request an extension for filing the affidavit, or the claim must fall within one of the three categories of conduct designated as giving rise to a rebuttable inference of medical negligence.¹¹ In the present case, neither exception applies. As such, the Plaintiff's claim must be dismissed.

¹⁰ See 18 *Del. C.* § 6853(a)(2).

¹¹ Section 6853(e) allows for a presumption of negligence such that an Affidavit of Merit is not required under three circumstances: (1) a foreign object was unintentionally left within the patient's body following surgery; (2) an explosion or fire originating in a substance used in treatment occurred during the course of treatment; or (3) a surgical procedure was performed on the wrong patient, the wrong organ, the wrong limb, or the wrong part of the patient's body.

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CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED**.
IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh