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

LAWRENCE FISHER,	:	
	:	**C.A. No: 12C-01-028 (RBY)**
_____Plaintiff,	:	
	:	
v.	:	
	:	
BAYHEALTH MEDICAL CENTER, INC. d/b/a KENT GENERAL HOSPITAL, and DR. STEPHEN MALONE,	:	
	:	
Defendants.	:	

Submitted: April 15, 2013
Decided: April 24, 2013

Upon Consideration of Defendant Dr. Stephen Malone's Motion to Dismiss
DENIED

ORDER

Andrew G. Ahern, III, Esq., Joseph W. Benson, P.A., Wilmington, Delaware for Plaintiff.

James E. Drnec, Esq., Balick & Balick, LLC, Wilmington, Delaware for Defendant Bayhealth Medical Center, Inc.

John A. Elzufon, Esq., and Andrea C. Rodgers, Esq., Elzufon, Austin, Tarlove & Mondell, P.A., Wilmington, Delaware for Defendant Dr. Stephen Malone.

Young, J.

SUMMARY

This matter arises, as so many do, over the effect of 18 Del. Code § 6853. Here, as is often the case, a dispute exists concerning the efficacy of one physician's position on another's care. In this case, a general surgeon has commented upon the procedure of an orthopedic surgeon. Because the facts of the actual situation of the case are far from established, it cannot be said that the Affidavit of Merit is deficient to the extent of dismissing Plaintiff's claim. Accordingly, Defendant's Motion is **DENIED**. Yet the extent of the claim must be limited to that area of practice over which the merit-affiant legitimately has expertise.

DISCUSSION

As is so frequently the situation in medical malpractice cases during the very preliminary "affidavit of merit" stage, the dispute regarding the merit-affiant's ability to state a standard of care breach by the Defendant physician pits two positions, which meet each other only marginally. Here, we have a general surgeon's comments on an orthopedic surgeon's work.

Plaintiff has stressed that, while the merit-affiant physician is, admittedly, not an orthopedic surgeon, *Dishmon vs Fucci*[1] demonstrates that the merit-affiant is capable of satisfying the 18 Del. Code § 6853 requirements. There is, in the matter under consideration, only one of the § 6853 requirements with which Defendant takes exception: the demand that the merit-affiant be certified in the

[1] *Dishmon v. Fucci*, 32 A.3d 338 (Del. 2011).

same or similar field of medical practice.

This determination is, of course, colored by the circumstances. If a brain surgeon treated a child for a sprained ankle, a certified general practitioner presumably could satisfy § 6853, because – for that medical procedure – he did, indeed, practice in the same field as the brain surgeon, vis à vis the treatment of a sprained ankle. On the other side of the coin, if the brain surgeon were pursued for a claim of negligence doing brain surgery, presumably even a neurosurgeon whose practice was limited to low back care could not comment.

So, here we have the general surgeon purporting to comment on the work of an orthopedic surgeon. The defense says that the procedures under question involve delicate spinal surgery, which the American Board of Surgery essentially precludes as an area within a general surgeon's capabilities. That would be the analogous to the low back neurosurgeon's commenting on brain surgery.

The Plaintiff, to the contrary, says the issue is the Defendant's method of performing an incision, a procedure with which general surgeons are entirely familiar.

As referenced, *Dishmon*, while stating that the requirements of § 6853 are "purposefully minimal," nevertheless reiterates that the requirements were created by the Legislature to operate as an important prophylactic measure to prevent frivolous claims. Because (as *Dishmon* also points out) no Legislative intent exists to evoke mini-trials on the merit affidavit, we cannot determine the precise issue of this case at this time.

Accordingly, if Plaintiff's claim is based upon the method of Defendant's

incision, then the merit-affiant has satisfied his obligation under § 6853. If, though, the claim exceeds that process, then a surgeon with proper credentials, exceeding those of a general surgeon, who does not suggest any experience in these more sophisticated procedures, would be required to meet the statutory affidavit requirement.

Hence, if Plaintiff elects to proceed with his claim on the bases of the present affidavit, then the claim perforce will be limited to the area Plaintiff has stated. Thus, Plaintiff will be held to his statement that the incision was the negligent performance. That will be the exclusive allegation of malpractice pursued.

Should Plaintiff attempt to take the position that, once the door is open to proceeding with his claim, anything that develops, through inferences or arguments or even later developed experts, relative to any more sophisticated spinal procedures, as mentioned by Defendant, those efforts would be thwarted. If § 6853 is to have any validity (and it is not some incidental sidelight of comprehensive legislation; it is a significant statute standing on its own), then it must be afforded its "important prophylactic" effect.

CONCLUSION

So long as Plaintiff's claim involves the propriety of Defendant's incision, the Affidavit of Merit sufficiently provides for Plaintiff's statutory obligations under § 6853. To that effect, Defendant's Motion is **DENIED**. Plaintiff is, however, precluded from pursuing claims of negligence which exceed the expertise of a general surgeon as extrapolated from the criteria established by the

certifying agency, the American Board of Surgery.

IT IS SO ORDERED._____

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Counsel
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