

**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

Lois J. Dawson, Esquire  
1525 Delaware Avenue  
Wilmington, Delaware 19806  
Attorney for Plaintiff

Bradley J. Goewert, Esquire  
Lorenza A. Wolhar, Esquire  
Marshall, Dennehey, Warner, Coleman & Goggin  
1220 North Market Street  
P.O. Box 8888  
Wilmington, Delaware 19899  
Attorneys for Defendant

**Re: Dougherty et al. v. Horizon House, Inc. et al.  
C.A. No. 06C-05-250 RRC**

Submitted: June 16, 2008

Decided: June 25, 2008

Upon Defendant's "Motion to Determine if the Affidavit of Merit Complies  
with 18 *Del. C.* §§ 6853(a)(1) and (c)."  
Affidavit Found to Comply.

Dear Counsel:

Leslie Dougherty ("Plaintiff"),<sup>1</sup> a disabled adult, has alleged healthcare medical negligence on behalf of Horizon House, Inc. and Horizon House/Delaware, Inc. (collectively "Defendant"), the owner/operator of a group home for the mentally ill. The gist of the negligence alleged is that an employee of Defendant did not closely monitor Plaintiff, allowing him to

---

<sup>1</sup> Linda Schofield, Mr. Dougherty's sister, is also a Plaintiff in this action, acting as next friend of Leslie Dougherty.

“wander” outside on a cold winter night, ultimately resulting in the amputation or partial amputation of all of his fingers and one of his thumbs.

Plaintiff has filed an Affidavit of Merit from Susan Renz, a registered nurse. In response, Defendant has asked the Court to determine if Plaintiff’s Affidavit of Merit complies with 18 *Del. C.* §§ 6853(a)(1) and (c).

In making this determination, the Court must now decide, in this lawsuit alleging negligent supervision of a resident in a group home for the mentally ill, whether a registered nurse, otherwise found by this court to be qualified to testify at trial as an expert witness on the standard of care, is nonetheless excluded as the type of expert witness who may submit the required Affidavit of Merit pursuant to 18 *Del. C.* § 6853 because she is not a physician “licensed to practice medicine” pursuant to 18 *Del. C.* § 6853(c).

For the following reasons, the Court holds that Ms. Renz is not excluded by 18 *Del. C.* § 6853(c), and that Plaintiff’s Affidavit of Merit complies with 18 *Del. C.* §§ 6853.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff has had a long history of mental illness, including schizophrenia, delusional behavior, and suicidal ideation. Plaintiff’s mental condition eventually necessitated his moving to the Bennett House Group Home (“the Bennett House”), a residential group home for the mentally ill in Wilmington that is owned and operated by Defendant.

A “transition schedule” was prepared upon Plaintiff’s admission to the Bennett House. According to the transition schedule, Plaintiff was to be given “1:1 support,”<sup>2</sup> and a “certified nurse assistant” was to keep Plaintiff “in sight at all times unless [Plaintiff was] using the bathroom.”<sup>3</sup>

On January 22, 2005, apparently while the certified nurse assistant assigned to him was herself using the bathroom, Plaintiff walked out of the Bennett House and into a snowstorm. By the time he was found, Plaintiff had suffered severe frostbite to his hands, and eventually had to have eight fingers and one thumb amputated or partially amputated.

Plaintiff filed his complaint on May 23, 2006. Defendant filed an answer to the complaint on December 15, 2006. The Court held a scheduling conference on April 18, 2007, at which time a July 7, 2008 trial date was set.

---

<sup>2</sup> Scott Davis Depo., Ex. 3. The parties disagree as to the meaning of “1:1 support.” Plaintiff contends that it means 1-on-1 supervision, while Defendant represented at oral argument that Defendant will present expert testimony at trial that it means otherwise.

<sup>3</sup> *Id.*

A deadline date for identification of experts by Plaintiff was set, subsequently amended to a deadline date of February 14, 2008.

On March 16, 2007, Plaintiff filed the Affidavit of Merit of Susan Renz, a nurse practitioner who is licensed to practice nursing in Pennsylvania.<sup>4</sup> The Affidavit of Merit (originally unsigned by the affiant and not accompanied by a curriculum vitae, but later corrected) opined *inter alia* that Ms. Renz has “cared for numerous patients/clients that have had mental illness and neurological issues within facilities” and has “been engaged in the treatment of patients, and/or in the teaching/academic side of nursing, or similar fields of nursing as those providing care for the [Defendant.]” Ms. Renz further opined that there were “reasonable grounds to believe that healthcare medical negligence was committed by [Defendant] in the treatment and care of [Plaintiff], as [sic] that the breach was the approximate [sic] cause of the injuries sustained.”

Interestingly, and despite not being required by 18 *Del. C.* § 6853 to do so, Plaintiff served the Affidavit of Merit on Defendant’s counsel on or about its date of filing. Eleven months later, on February 13, 2008,<sup>5</sup> Defendant filed the instant motion asking the Court to determine if Ms. Renz’s Affidavit of Merit complies with 18 *Del. C.* §§ 6853(a)(1) and (c). Since the Court could see from the docket that Defendant had been served with the actual Affidavit of Merit, the Court requested that Defendant’s counsel advise the Court if Defendant believed that Ms. Renz’s Affidavit of

---

<sup>4</sup> 18 *Del. C.* § 6853 requires that all healthcare medical negligence complaints be accompanied by an Affidavit of Merit. The delay in filing the Affidavit of Merit in this case was apparently due to Plaintiff’s earlier view (since abandoned) that an Affidavit of Merit was unnecessary in this case, “given that there [was] no allegation of physician negligence.” Pl. Ans. To Def. Mot., at 3.

<sup>5</sup> Defendant’s counsel asserted, in an April 17, 2008 letter to the Court, that the reason for the delay in filing the instant motion was that she had “never been in this position before, with unfettered access to an Affidavit of Merit,” and was unsure of how to proceed, and further that, given Plaintiff’s then belief that an Affidavit of Merit was unnecessary, “the most prudent approach was to understand the facts underlying Plaintiff’s theories of negligence, and his basis for alleged liability, before challenging the Affidavit of Merit.” Def. Letter of April 17, 2008, at 2.

18 *Del. C.* § 6853(d) provides no time limitation governing the filing of motions asking the Court to inspect Affidavits of Merit, but such a motion should be close to the time of the filing of the answer to the complaint. (At oral argument, Defendant argued that the statute permitted the filing of such a motion almost to the eve of trial.) This Court notes that a future in filing a motion asking the Court to review an Affidavit of Merit in a case with different facts might result in the denial of such motion as untimely, especially if a trial scheduling order had established a filing deadline for a motion asking the Court to determine the sufficiency of an Affidavit of Merit.

Merit complied with 18 *Del. C.* §§ 6853(a)(1) and (c), and, if not, to set forth Defendant's reasons therefor. Defendant subsequently asserted that the affidavit was noncompliant because it had not been proffered by a "physician" who was "licensed to practice medicine."

The Court held oral argument on Defendant's motion at the pretrial conference on June 16, 2008. At that time, the Court also heard two of Defendant's motions in limine seeking to exclude Plaintiff's proffered expert testimony of Ms. Renz, and Lance Youles, an individual who, among other qualifications, has been licensed as a nursing home and assisted living administrator since 1978.<sup>6</sup> The Court held that Ms. Renz and Mr. Youles were qualified to testify as experts in the case pursuant to Delaware Rule of Evidence 702, since Ms. Renz was familiar with the standard of care required of a certified nurse assistant, and since Mr. Youles was competent to testify as to the standard of care required of managers and administrators of group homes. At that time, the Court reserved judgment on the instant motion, which it now addresses.

## II. CONTENTIONS OF THE PARTIES

Defendant asserts that the phrase "licensed to practice medicine," contained in 18 *Del. C.* § 6853(c), requires a physician licensed to practice medicine to submit an affidavit of merit in every healthcare negligence lawsuit, and that since Ms. Renz is not so licensed, nor is a physician, she is therefore unqualified to submit the Affidavit of Merit. Defendant argues that this non-compliance with the statute results in dismissal of this lawsuit. Defendant suggested at oral argument that a "psychiatrist" would be the most appropriate affiant in this kind of healthcare medical negligence case. Defendant also contends that since the deadline for Plaintiff's designation of experts has now expired, and that since Plaintiff has not proffered a "physician" as an expert witness to testify at trial as to the standard of care on the duties of the certified nurse assistant, Plaintiff's case must therefore be dismissed on that separate basis. Relatedly, Defendant argues that a nurse is not "qualified to render [an opinion as to] the causal connection between [the] alleged breach and injury."<sup>7</sup>

Plaintiff responds that Ms. Renz's Affidavit of Merit "complies with every provision of 18 *Del. C.* § 6853."<sup>8</sup> Plaintiff asserts that Ms. Renz meets

---

<sup>6</sup> Pl. Resp. to Def. Mot. to Exclude Test. of Lance Youles, ¶ 7.

<sup>7</sup> Def. Letter of February 25, 2008.

<sup>8</sup> Pl. Ans. To Def. Mot., at 4.

the requirement that an expert be “licensed to practice medicine” by being a nurse practitioner licensed to practice nursing in Pennsylvania.<sup>9</sup>

### III. STANDARD OF REVIEW

The relevant provision of 18 *Del. C.* § 6853(a)(1) states that

(1) [a complaint in a healthcare negligence lawsuit shall be accompanied by] an affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title ...

Eighteen *Del. C.* § 6854 provides that

[n]o person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with the degree of skill ordinarily employed in the field of medicine on which he or she will testify.

Eighteen *Del. C.* § 6853(c) provides in its entirety:

(c) 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.

Eighteen *Del. C.* § 6853(d) states, in part:

[u]pon motion by the defendant the court shall determine in camera if the affidavit of merit complies with paragraph (a)(1) and subsection (c) of this section.

Several well known rules of statutory construction apply. “If the statute as a whole is unambiguous and there is no reasonable doubt as to the

---

<sup>9</sup> *Id.* at 4.

meaning of the words used, the court's role is limited to an application of the literal meaning of those words.”<sup>10</sup> However, a “statute reasonably susceptible to different conclusions or interpretations is ambiguous, [and, therefore,] rules of construction must be applied to determine its meaning.”<sup>11</sup> “Ambiguity may also arise from the fact that giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequence as to compel a conviction that they could not have been intended by the legislature.”<sup>12</sup> In construing a statute, the Court's objective is to render a sensible and practicable meaning, not an absurd or unreasonable one.<sup>13</sup>

#### IV. DISCUSSION

An Affidavit of Merit is a preliminary hurdle intended for the early stages of a medical negligence lawsuit, one purpose of which is to filter out frivolous claims. To overcome this hurdle, 18 *Del. C.* § 6853 requires that, in a “healthcare medical negligence” action, a plaintiff must file an Affidavit of Merit of a qualified expert witness. Among other requirements, the Affidavit of Merit must contain the expert witness’s curriculum vitae, and the expert witness must state that there are reasonable grounds to believe that there has been healthcare medical negligence committed by the defendant, and that such negligence proximately caused the claimed injuries.<sup>14</sup>

This case seems to fall under the broad statutory definition of “healthcare medical negligence” lawsuit.<sup>15</sup> As such, Plaintiff was required to provide an Affidavit of Merit. This case is not the typical medical negligence claim. Plaintiff has not alleged negligence on the part of any individual healthcare provider; rather, Plaintiff has alleged that a certified nurse assistant in a group home for the mentally ill failed to keep adequate watch over a mentally ill patient. Both parties in this litigation apparently were unsure at earlier stages of this litigation as to whether this case required an

---

<sup>10</sup> *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007) (citing *In re Adoption of Swanson*, 623 A.2d 1095, 1096-97 (Del. 1993))

<sup>11</sup> *Id.*

<sup>12</sup> *Washington v. Christiana Service Co.*, 1990 WL 177645, at \*6 (Del. Super.)

<sup>13</sup> *Rodney Square Invr's. v. Board of Assess.*, Del. Super., 448 A.2d 237 (1982).

<sup>14</sup> 18 *Del. C.* § 6853(c).

<sup>15</sup> 18 *Del. C.* § 6801(7) defines a “medical negligence” lawsuit as any tort based on healthcare or professional services rendered by a health care provider. The parties agree that this is a “healthcare medical negligence” lawsuit under 18 *Del. C.* § 6801(7).

Affidavit of Merit, but 18 *Del. C.* § 6853(a) requires that an Affidavit of Merit is necessary in every healthcare medical negligence case.<sup>16</sup>

Eighteen *Del. C.* § 6853(a)(1), referencing 18 *Del. C.* § 6854, defines an expert witness qualified to offer testimony at trial as a person “familiar with the degree of skill ordinarily employed in the field of medicine on which he or she will testify.” However, 18 *Del. C.* § 6853(c) states that an expert authorized to sign an Affidavit of Merit must be “licensed to practice medicine.” In the usual healthcare medical negligence case brought against an individual physician, an expert witness qualified under 18 *Del. C.* § 6854 will almost always, if not always, be “licensed to practice medicine,” and the provisions of 18 *Del. C.* §§ 6853(a)(1) and (c) then are harmonious. However, in the instant case, the Court has found that Ms. Renz qualifies as an expert under 18 *Del. C.* § 6854 for the purposes of testifying at trial, but it appears that she does not qualify as an expert for Affidavit of Merit purposes under 18 *Del. C.* § 6853(c) since she is not “licensed to practice medicine.” The statute does not define the phrase “licensed to practice medicine”; however, 24 *Del. C.* § 1720(a)-(c) sets forth the “certification requirements to practice medicine,” which includes possessing a “degree of Doctor of Medicine or Doctor of Osteopathy.” Ms. Renz does not possess such a degree.<sup>17</sup>

This Court, in *Harris v. Christiana Care*, held that a nurse could submit an Affidavit of Merit despite not describing “himself/herself an expert in ‘critical care’ nursing, but rather in ‘nursing.’”<sup>18</sup> Defendant seeks to distinguish *Harris* from the present case by observing that, when the claims in *Harris* were consolidated, three other Affidavits of Merit were brought in, all signed by physicians.<sup>19</sup> Defendant also states that “it is unknown whether the affiant’s qualification to render a causation opinion was challenged.”<sup>20</sup> Despite Defendant’s attempts to distinguish *Harris*, the

---

<sup>16</sup> See *McBride v. Shipley Manor Health Care*, 2005 WL 2090695 (Del. Super.) (holding that a lawsuit alleging negligent nursing care on behalf of the staff of a skilled nursing home required an Affidavit of Merit).

<sup>17</sup> The Court disagrees with Plaintiff’s position that since Ms. Renz is a registered nurse, she is “licensed to practice medicine,” as the State of Delaware understands that term. In Delaware if one wishes to “practice medicine,” one must possess a “degree of Doctor of Medicine or Doctor of Osteopathy.” There is no difference of consequence here between the terms “licensed” and “certified.”

<sup>18</sup> *Harris v. Christiana Care Health Services, Inc.*, 2006 WL 1148478 (Del. Super.).

<sup>19</sup> See *Harris v. Christiana Care Health Services, Inc.*, 2007 WL 2473322 (Del. Super.).

<sup>20</sup> Def. Letter of April 17, 2008.

fact remains that this Court has previously allowed a nurse expert to submit an Affidavit of Merit.<sup>21</sup>

Defendant argues that, despite this apparent facial conflict, 18 *Del. C.* § 6853(c) acts to further restrict the qualifications required of an expert affiant. Defendant maintains that a “psychiatrist” should have submitted an Affidavit of Merit. The problem with Defendant’s reading of the statute is that it could exclude as an affiant an individual such as Ms. Renz who is qualified to render an expert opinion at trial as to the standard of care and causation in a case such as this. Indeed, the Court has already ruled that Ms. Renz is qualified to testify on the issue of the applicable standard of care pertaining to the certified nurse assistant. Defendant’s argument leads to a hypothetical “absurd” result that a physician licensed to practice medicine would be required to opine in an Affidavit of Merit as to the standard of care in a healthcare medical negligence case where food poisoning was allegedly caused by hospital food. The General Assembly could not have intended such an illogical result.

Similarly flawed is Defendant’s contention that Ms. Renz cannot render a causation opinion. In this case, the alleged breach of duty was failure to keep watch over a patient, and the resulting injury was frostbite. While ordinarily, in a healthcare medical negligence case, a physician licensed to practice medicine must render an expert opinion in the Affidavit of Merit that the negligence caused the claimed injuries, the Court sees no reason why a physician is required to render a causation opinion in this case, where, if a breach is found, the causal connection between breach and injury would be patently obvious.<sup>22</sup> Indeed, a psychiatrist would be no more qualified than a nurse with Ms. Renz’s background to offer a causation opinion in this case.

The statute is ambiguous when applied to the instant set of facts. In the face of this ambiguity, the Court’s objective is to render a “sensible and practicable meaning” to the statute, and one that is consistent with legislative intent, if that can be done.

---

<sup>21</sup> *Cf. Dishmon v. Fucci*, Del. Super., C.A. 06C-12-231, Barbiarz, J. (April 25, 2006) (ORDER) (holding that a physician was not sufficiently acquainted with the standard of care applicable to a physician’s assistant to submit an Affidavit of Merit. *Dishmon* underscores the fact that a physician may in fact not be the most qualified expert to render an opinion as to the standard of care in an Affidavit of Merit.

<sup>22</sup> At oral argument, Plaintiff’s counsel observed that Defendant’s position would require a physician licensed to practice medicine to render an expert opinion in an Affidavit of Merit as to causation even if Plaintiff had been hit by a car and killed, instead of suffering frostbite.



This objective is met by the Court’s holding in this case that 18 *Del. C.* § 6853(c), insofar as it requires an Affidavit of Merit from a physician “licensed to practice medicine,” may not be applicable in a case, such as this case, where no claim against an individual healthcare provider is asserted. Where, as in the instant case, an expert is qualified to testify as to the standard of care and as to causation, but is not “licensed to practice medicine,” then that provision of 18 *Del. C.* § 6853(c) is inapplicable.

## V. CONCLUSION

For the preceding reasons, the Court finds that the Affidavit of Merit of nurse Susan Renz complies with 18 *Del. C.* §§ 6853(a)(1) and (c).<sup>23</sup>

Very truly yours,

oc: Prothonotary

---

<sup>23</sup> The General Assembly may wish to consider the issues raised by this motion.