

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

TIFFANY COX and ALPHONSO )  
KEMP, as Parents and natural guardians )  
of K.K., a minor, )

Plaintiffs, )

v. )

BAYHEALTH MEDICAL CENTER, )  
INC., a Delaware Corporation, ROBERT )  
Q. SCACHERI, M.D., BEVERLY A. )  
SANTANA, MSN, CNM and )  
DEDICATED TO WOMEN OB-GYN, )  
P.A., )

Defendants. )

C.A. No. K19C-11-002 NEP  
In and For Kent County

JURY TRIAL OF TWELVE  
DEMANDED

Submitted: February 11, 2020  
Decided: March 3, 2020

**ORDER**

***Upon Review of the Affidavits of Merit  
DEFERRED in part, ACCEPTED in part***

This matter involves a healthcare negligence suit filed by Plaintiffs Tiffany Cox and Alphonso Kemp, as parents and guardians of K.K., a minor child, against Defendants Robert Scacheri, M.D., Beverly Santana, MSN, CNM, Bayhealth Medical Center, Inc., and Dedicated to Women OB-GYN, P.A., (all Defendants hereinafter collectively "Defendants"). Defendant Bayhealth Medical Center, Inc. (hereinafter "Moving Defendant") has asked the Court to review the affidavits of merit filed in this case to determine whether they satisfy 18 *Del. C.* § 6853.

In this case, Plaintiffs filed their Complaint on November 1, 2019, alleging that Defendants were medically negligent and breached the applicable standard of care. Specifically, with regard to the allegations against Moving Defendant, Plaintiffs allege, *inter alia*, that Moving Defendant failed to provide timely and proper medical and obstetric care, failed to provide timely and proper medical interventions, failed to closely monitor, evaluate, and respond to Plaintiff Tiffany Cox's medical status, including but not limited to K.K.'s fetal heart rate readings, failed to timely perform a cesarean section, and failed to timely and properly recognize K.K.'s fetal distress. As a consequence of Moving Defendant's alleged negligence, K.K. allegedly suffered severe and permanent hypoxic ischemic brain injury. The Complaint alleges that Moving Defendant provides health-related services to the general public.

In Delaware, a healthcare negligence lawsuit must be filed with an affidavit of merit as to each defendant, signed by an expert, and accompanied by the expert's current *curriculum vitae*.<sup>1</sup> The expert must be licensed to practice medicine as of the affidavit's date and engaged in this practice in the same or similar field as the defendant in the three years immediately preceding the alleged negligence, and Board certified in the same or similar field as the defendant if the defendant is Board certified.<sup>2</sup> The

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<sup>1</sup> 18 *Del. C.* § 6853(a)(1).

<sup>2</sup> *Id.* § 6853(c). Of course, these requirements apply only if the expert is a physician, and the requirements regarding "same or similar field" apply only if the defendant is a physician. *McNulty v. Correct Care Solutions, LLC*, 2017 WL 1323711, at \*2 (Del. Super. Apr. 7, 2017) (requirement of "same or similar" Board certification does not apply where defendant is not a physician); accord *Zappaterrini v. St. Francis Hosp., Inc.*, 2009 WL 1101618, at \*1 (Del.

affidavit must also state that reasonable grounds exist to believe that the defendant was negligent in a way that proximately caused the plaintiff's injury.<sup>3</sup> The affidavit must be filed under seal and, upon request, may be reviewed *in camera* to ensure compliance with statutory requirements.<sup>4</sup> The affidavit's requirements are "purposefully minimal."<sup>5</sup> Affidavits that merely track the statutory language are deemed sufficient.<sup>6</sup>

In this matter, three affidavits of merit are under consideration, all of which are applicable to Moving Defendant, and as requested by Moving Defendant, the Court has performed an *in camera* review. With regard to the first expert, a physician, it appears that Plaintiffs have failed to attach a current *curriculum vitae*, as noted in the Court's Order regarding the request for review filed by Defendant Scacheri. For the reasons given in that Order, the Court will provide a limited period for Plaintiffs to submit a current *curriculum vitae*, and the Court will defer consideration of the affidavit pending that submission.

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Super. Apr. 22, 2019) (“[B]ecause the defendant is not a physician, the statutory requirement of similar Board certification is not applicable.”). Here, Plaintiffs allege negligence against Moving Defendant based on agency principles. Thus, the statutory requirement of “same or similar” Board certification is not applicable because Moving Defendant is not a physician, and all three experts in the present case may speak to whether Moving Defendant was negligent. *See McNulty*, 2017 WL 1323711, at \*2 (finding “same or similar” Board certification requirement not applicable when moving defendants were not physicians).

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

<sup>4</sup> *Id.* § 6853(d).

<sup>5</sup> *Mammarella v. Evantash*, 93 A.3d 629, 637 (Del. 2014) (quoting *Dishmon v. Fucci*, 32 A.3d 338, 342 (Del. 2011)).

<sup>6</sup> *Dishmon*, 32 A.3d at 342–43.

Turning to the second expert, a registered nurse and certified nurse midwife, it appears that the *curriculum vitae* provided may also not be current.<sup>7</sup> The Court will also defer consideration of this affidavit for a limited period to provide Plaintiffs an opportunity either to provide an updated *curriculum vitae* or to confirm that the one submitted is current.

Finally, with regard to the third expert, the Court finds as follows:

- a. The expert signed the affidavit.
- b. The current *curriculum vitae* of the expert is attached.<sup>8</sup>
- c. The expert, who is a registered nurse, has training and experience in that field.
- d. The affidavit states that reasonable grounds exist to believe that the Moving Defendant, along with the other Defendants, breached the applicable standard of care, and that the breaches were a proximate cause of the injuries to K.K.

**WHEREFORE**, in consideration of the above, the Court will defer consideration of the affidavit of the expert who is a physician, and **Plaintiffs shall be provided an additional twenty-one (21) days from the date of this Order** to provide a current *curriculum vitae* for that expert. The Court will also defer consideration of the expert who is a registered nurse and certified nurse midwife, and **Plaintiffs shall be provided an additional twenty-one (21) days from the date of this Order** either to provide a

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<sup>7</sup> The most recent date of employment given in the *curriculum vitae* is 2015.

<sup>8</sup> It is apparent that the *curriculum vitae* is current, as it includes employment dates and publication dates through 2019, the date of the affidavit.

current *curriculum vitae* for that expert or to confirm that the one already submitted is current. Finally, the Court finds that the affidavit of the third expert, a registered nurse, complies with 18 *Del. C.* § 6853(a)(1) and (c).

**IT IS SO ORDERED.**

/s/Noel Eason Primos

Judge

NEP/wjs

*Via File&ServeXpress*

oc: Prothonotary

Counsel of Record