

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

**PEGGY L. ABLEMAN  
Judge**

**New Castle County Courthouse  
500 North King Street, Suite 10400  
Wilmington, Delaware 19801-3733  
Telephone (302) 255-0660**

January 18, 2006

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RE: Elizabeth Sammons v. Doctors for Emergency  
Services, P.A., et al.  
C.A. No. 03C-12-267-PLA

Dear Counsel:

The Court has before it the “Motion of Doctors for Emergency Services, P.A. to Determine If Affidavit of Merit Complies with 18 Del.C. §6853(a)(i) and (c)” filed by counsel for Doctors for Emergency Services (hereinafter “DFES”) in this case. The motion asks the Court to review the adequacy of the Affidavit of Merit and the Curriculum Vitae that were filed with the complaint when the case was initiated in March 2004. DFES asks that the Court determine anew whether these documents meet the statutory requirements of 18 Del.C. §6853.

Shortly after this case was filed and assigned in due course, counsel for Christiana Health Care Services, Inc. and various employee doctors filed

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a motion seeking a ruling by the Court on whether the affidavit was in compliance with the statute, with respect to each of the defendants. In response, the Court ruled that "the Court believes that the affidavits are in order and comply with the statutory language, as to each named defendant." Accordingly, the case was permitted to proceed against all of the defendants, including DFES. During the entire time this litigation has been pending, neither defendants nor their attorneys were privy to the contents of the affidavit or curriculum vitae, as is specifically required by the statute.

The case was tried to a jury on December 12, 2005 through December 21, 2005. Since the assigned Judge was involved in a lengthy Bench trial, the case was assigned to this Judge for trial. Following seven days of testimony, the jury returned a verdict in favor of all defendants on December 21, 2005.

After the presentation of plaintiff's evidence, it became apparent to DFES' counsel that plaintiff had not, during the course of this litigation, ever produced a witness who was board certified in emergency medicine. No such specialist was identified during discovery and Dr. Munoz -- the only witness who testified against DFES and the members of that practice -- was forced to admit during vigorous cross-examination that, not only was he not board certified in emergency medicine, but that he had for some time been misrepresenting his credentials on his website. In fact, it was revealed at trial that the misleading information had been pointed out to Dr. Munoz in trial in another jurisdiction in May of 2005. Yet, as of the date of his appearance in this trial, he had done nothing to correct the misrepresentation on the website.

Not surprisingly, in light of Dr. Munoz's testimony at trial, counsel for DFES became suspicious about the contents of the original certification to this Court pursuant to the statute. Hence, the instant motion was filed. After conferring with the Judge originally assigned to this case, the motion was referred to me for decision since I had presided over this lengthy trial and had greater familiarity with the issues and the trial testimony of the experts.

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I have now reviewed the Affidavit of Merit and the accompanying curriculum vitae with greater scrutiny. I can now reveal that the affidavit and curriculum vitae were indeed those of Dr. Munoz. I conclude that the affidavit does not meet the requirements of 18 Del.C. §6853. This is a matter of serious concern to the Court, not just because the plaintiff should never have been permitted to proceed against DFES and its physicians in the first place, but because the very structure of Dr. Munoz's curriculum vitae could well have misled the Court into ruling that it was in compliance with the statute in the first instance.

Dr. Munoz specifically lists "American Board of Emergency Medicine" under the heading "certification" but then includes the notation "Board Eligible." Presumably, the Court was misled by this subtle distinction. The Court's original ruling on this issue, however, does not alter the fact that the language of the statute unequivocally states that "[n]o healthcare negligence lawsuit shall be filed in this state unless the complaint is accompanied by an affidavit of merit." That affidavit must meet the following standards:

[a]n 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.\***

I read the foregoing statutory language to require that medical malpractice cases be supported by appropriate opinions from properly qualified experts in the same specialty as the defendants, and that this requirement is the responsibility of plaintiff's counsel, irrespective of any

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\*18 Del.C. §6853(c) (emphasis added).

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contrary ruling by the Court. In fact, the statute absolutely bars the filing of such cases if they are not properly supported, even if the Court is never specifically asked to review the adequacy of the affidavit and curriculum vitae.

At this juncture, I have no way of knowing where responsibility lies for this circumstance. But, one fact is now clear. That is, DFES spent two years defending litigation that should not have been permitted to have been filed under 18 Del.C. §6853. Moreover, even after Dr. Munoz testified at trial, plaintiff's counsel failed to inform the Court that the affidavit was not in compliance with the statute, a fact of which neither this Judge nor defense counsel was aware.

I have determined to schedule a hearing with counsel and Dr. Munoz. My secretary will contact counsel shortly to do so. Specifically, I will expect to hear evidence on counsel's efforts to comply with the statute and to what extent, if any, Dr. Munoz is responsible for misleading either counsel or the Court, or both. I will also need to determine an appropriate remedy, if necessary. Procedurally, it may be that the case should be dismissed against DFES under Rule 60(b), *nunc pro tunc*. While that would cure the Court's initial misguided finding of compliance, it will hardly compensate for the extraordinary time and expense that DFES incurred in defending this lawsuit, which was the very reason why the statute requiring an affidavit of merit was enacted in the first place. I will be looking to counsel to suggest possible remedies to deal with this most unfortunate and somewhat unprecedented situation.

Yours very truly,

Peggy L. Ableman

PLA:jmd  
cc: Prothonotary