

SUPREME COURT OF THE STATE OF DELAWARE

Nichols v. Christiana Care Health System

Nichols v. Christiana Care Health System · No. No. 189, 2021 · Decided November 16, 2021

SUMMARY

The Delaware Supreme Court affirmed dismissal of Liza Nichols’s medical-negligence complaint against Christiana Care Health System for failure to satisfy Delaware’s affidavit-of-merit requirements. The court held that the submitted affidavit did not establish that the affiant was licensed to practice medicine as required by 18 Del. C. § 6853(c), and it declined to consider an unpreserved common-knowledge exception argument.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	Per curiam; signed by Tamika R. Montgomery-Reeves, Justice; Chief Justice Seitz; Justice Traynor; Justice Montgomery-Reeves
JURISDICTION	Delaware
DECIDED	November 16, 2021
DOCKET	No. 189, 2021
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the Superior Court's dismissal of a medical-negligence complaint for failure to provide a statutorily compliant affidavit of merit.
STANDARD OF REVIEW	De novo review of the Superior Court's decision.
PRECEDENTIAL VALUE	published Delaware Supreme Court order
PARTIES	Liza Nichols v. Christiana Care Health System

TOPICS

- medical malpractice
- professional negligence
- statutory interpretation
- motions to dismiss
- appellate procedure

PRACTICE AREAS

- health law
- medical malpractice
- professional negligence
- appellate procedure
- civil procedure

QUESTIONS PRESENTED

1. Whether the document submitted by Nichols satisfied Delaware's statutory affidavit-of-merit requirements for a medical-negligence action.
2. Whether an affidavit of merit must be signed by an expert licensed to practice medicine as of the date of the affidavit.
3. Whether the Superior Court erred by dismissing the complaint without finding that it was frivolous.
4. Whether Delaware recognizes a common-knowledge exception to the statutory affidavit-of-merit requirement.

HOLDINGS

1. An affidavit of merit does not comply with 18 Del. C. § 6853(c) when the expert signing it is not shown to be licensed to practice medicine as of the date of the affidavit. A document identifying the affiant only as a certified nursing assistant did not satisfy that requirement.
2. The Superior Court properly dismissed the complaint for failure to comply with the statutory affidavit-of-merit requirements; a separate finding that the complaint was frivolous was not required.
3. The Court did not adopt a common-knowledge exception to the affidavit-of-merit requirement following enactment of 18 Del. C. § 6853, and Nichols waived the argument by raising it for the first time in her reply brief.

KEY QUOTATIONS

“No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by . . . [a]n affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant.” (at 3)

“An expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit” (at 3-4)

FACTUAL BACKGROUND

Nichols alleged that she fell during a 2019 stay at Christiana Hospital and asserted medical negligence against Christiana Care Health System. In response to the Superior Court's direction, she submitted an affidavit of merit signed by Wanda R. Gross, who identified herself as a certified nursing assistant and opined that Christiana Care staff fell below the applicable standard of care. The document did not establish that Gross was licensed to practice medicine or otherwise satisfy several statutory affidavit requirements.

PROCEDURAL HISTORY

Nichols filed a medical-negligence complaint against Christiana Care Health System arising from a fall during a 2019 hospital stay. After the Superior Court ordered an amended complaint and advised Nichols that an affidavit of merit was required, Nichols submitted a document signed by a certified nursing assistant. The Superior Court treated the document as an affidavit of merit but dismissed the complaint because it lacked the required current

curriculum vitae, proximate-cause opinion, licensing and practice-history information, and board-certification statement. The Delaware Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Dishmon v. Fucci, 32 A.3d 338, 341-42 (Del. 2011)
- Monzo v. Nationwide Prop. & Cas. Ins. Co., 249 A.3d 106, 123 (Del. 2021)
- O’Donald v. McConnell, 2004 WL 1965034, at *2 (Del. Aug. 19, 2004)
- Walls v. Cooper, 1991 WL 247806, at *4 (Del. Nov. 8, 1991)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF THE STATE OF DELAWARE LIZA NICHOLS, § § No. 189, 2021 Plaintiff Below, § Appellant, § Court Below—Superior Court § of the State of Delaware v. § § C.A. No. N20C-09-166 CHRISTIANA CARE HEALTH § SYSTEM, § § Defendant Below, § Appellee. § Submitted: October 15, 2021 Decided: November 16, 2021 Before SEITZ, Chief Justice; TRAYNOR and MONTGOMERY-REEVES, Justices.

ORDER After consideration of the briefs and the record on appeal, it appears to the Court that: (1) The appellant, Liza Nichols, appeals from the Superior Court’s May 11, 2021 order dismissing Nichols’s complaint asserting a medical-negligence claim against appellee Christiana Care Health System (“CCHS”).

For the reasons discussed below, we affirm the Superior Court’s judgment. (2) On September 28, 2020, Nichols filed a medical-negligence complaint against CCHS in the Superior Court. The allegations in the complaint related to an incident during which Nichols fell during a stay at Christiana Hospital in 2019. CCHS filed a motion for a more definite statement, and the Superior Court ordered Nichols to file an amended complaint within thirty days.

The court also informed Nichols that 18 Del. C. §§ 6853(a)(1) and (c) required her to file an affidavit of merit because the complaint alleged medical negligence. Nichols filed an amended complaint, and CCHS moved to dismiss on the grounds that Nichols had not complied with 18 Del. C. §§ 6853(a)(1) and (c).

The court advised Nichols that she would have until April 21, 2021, to file an affidavit of merit. (3) On April 22, 2021, Nichols filed a motion to admit an affidavit of merit, in support of which she provided a document signed by Wanda R. Gross.¹ The document stated that Gross was a

nursing assistant, described her duties, and stated that it was her expert opinion that the conduct of the CCHS staff fell below the standard of care at the time of Nichols's fall.

The Superior Court accepted the document as an affidavit of merit and determined that the affidavit was signed by a nursing assistant and set forth the affiant's opinion that there were reasonable grounds to believe that CCHS breached the applicable standard of care² but determined that it did not comply with 18 Del. C. §§ 6853(a)(1) and (c) because (i) 1 Appendix to Answering Brief, at B44-81.

2 See 18 Del. C. § 6853(c) (providing that the affidavit 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"). 2 the affidavit was not accompanied by a current curriculum vitae;³ (ii) it failed to set forth the affiant's opinion that there were reasonable grounds to believe that the alleged breach of the standard of care proximately caused the injuries claimed in the complaint;⁴ (iii) Gross was not licensed to practice medicine as of the date of the affidavit;⁵ (iv) the affidavit failed to state whether in the three years immediately preceding the alleged negligent act, Gross was engaged in the treatment of patients and/or in the teaching/academic side of medicine;⁶ and (v) the affidavit did not state that Gross was board certified.⁷ The court therefore dismissed the complaint for failure to provide the required affidavit of merit, and Nichols has appealed.

(4) Nichols argues on appeal that the Superior Court erroneously concluded that the affidavit of merit did not satisfy Section 6853 and that the court erred by dismissing the complaint without finding that it was frivolous. CCHS contends that the Gross affidavit was both deficient under the statute and untimely.⁸ (5) We review the Superior Court's decision de novo.⁹ Title 18, Section 6853(a) of the Delaware Code provides that "[n]o health-care negligence lawsuit 3 Id. § 6853(a) (1).

4 Id. § 6853(c). 5 Id. 6 Id. 7 Id. 8 See 18 Del. C. § 6853(a), (a)(2) (providing that an affidavit of merit must accompany the complaint and that the court "may, upon timely motion of the plaintiff and for good cause shown, grant a single 60-day extension for the time of filing the affidavit of merit"). 9 *Dishmon v. Fucci*, 32 A.3d 338, 341-42 (Del. 2011). 3 shall be filed in this State unless the complaint is accompanied by... [a]n affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant."¹⁰ Section 6853(c) provides: The affidavit or affidavits 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 or defendants and that the breach was a proximate cause of injury or injuries 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 or defendants, and the expert shall be Board certified in the same or similar field of medicine if the defendant or defendants 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.¹¹ Even assuming that the affidavit satisfied the other statutory requirements, we conclude that the Gross affidavit did not comply with the requirement that the “expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit.” The affidavit stated that Gross was a “certified Nursing Assistant”; it did not indicate that she was “licensed,” nor did the various 10 18 Del.

C. § 6853(a)(1). Section 6854 provides: “No 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.” Id. § 6854. 11 18 Del. C. § 6853(c) (emphasis added). 4 attachments to the affidavit include a medical or nursing license issued to Gross.¹² Delaware law defines a “certified nursing assistant” as a “duly-certified individual under the supervision of a licensed nurse, who provides care that does not require the judgment and skills of a licensed nurse.”¹³ (6) In her reply brief, and citing authority from another jurisdiction, Nichols argues that there is a “common knowledge” exception to the requirement that a medical-negligence complaint be supported by an affidavit of merit.

Nichols waived this argument by failing to raise it in the opening brief.¹⁴ In any event, it appears that this Court has not adopted a “common knowledge” exception following the enactment of Section 6853.¹⁵ 12 Appendix to Answering Brief, at B44-81. 13 16 Del. C. § 3001 A(1).

Because of our conclusion that the affidavit did not establish that Gross was a licensed nurse, we need not address whether an affidavit from a licensed nurse would satisfy the requirement under Section 6853(c) that the expert signing an affidavit of merit shall be “licensed to practice medicine.” 14 See *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 123 (Del.

2021) (“Under Supreme Court Rule 14, an appellant waives an argument if he does not argue its merits within the body of his opening brief.”). 15 Cf. *O’Donald v. McConnell*, 2004 WL 1965034, at *2 (Del. Aug. 19, 2004) (stating that the “purpose of expert medical testimony, as recognized by the General Assembly,... is that, subject to the exceptions listed in the statute, the proximate cause of injuries that are claimed to be attributable to medical negligence are not within the common knowledge of a layperson”); *Walls v. Cooper*, 1991 WL 247806, at *4 (Del.

Nov. 8, 1991) (declining to apply “common knowledge” or “common sense” exception and noting that previous application of the exception predated enactment of Section 6853). 5 NOW,

THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. BY THE COURT: /s/ Tamika R. Montgomery-Reeves Justice 6

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