

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JOHN R. MILLER and JANET L.	:	NO. 04-00,691
MILLER, his wife,	:	
Plaintiffs	:	
	:	
vs.	:	
	:	CIVIL ACTION - LAW
ROBERT E. PURCELL, JR., M.D.,	:	
JOHN T. BURNS, M.D., SUSQUEHANNA:	:	
GASTROENTEROLOGY ASSOCIATES,	:	
LTD., RUDY J. NICOLAS, M.D., and	:	
LOCK HAVEN HOSPITAL,	:	
Defendants	:	Petitions for Judgment of Non Pros

OPINION AND ORDER

Before the Court in this medical malpractice action are Petitions for Judgment of Non Pros filed by four of the five defendants.¹ Argument on the petitions was heard October 15, 2004.

On April 26, 2004, Plaintiffs filed a Complaint setting forth claims of negligence and loss of consortium based on defendants' allegedly negligent medical care of Plaintiff John Miller in the spring of 2002. Also on April 26, 2004, Plaintiffs filed a "Certificate of Merit as to Robert E. Purcell, Jr., M.D., John T. Burns, M.D. Rudy J. Nicolas, M.D. and, by agency, or ostensible agency, Susquehanna Gastroenterology Associates and Lock Haven Hospital." On July 20, 2004, Defendants Purcell, Burns and Susquehanna Gastroenterology each filed a Praecipe for Entry of Judgment of Non Pros Pursuant to Pa.R.C.P. 1042.6. A similar praecipe was filed on July 21, 2004, by Defendant Lock Haven Hospital. As indicated in the title of the praecipis, such were filed pursuant to Rule 1042.6, which directs the Prothonotary, on praecipe of the defendant, to "enter a judgment of non pros against the plaintiff for failure to file a certificate of merit within the required time (60 days from the filing date of the complaint) providing that there is no pending timely filed motion seeking to extend the time to file the certificate." The praecipis informed the Prothonotary that although a certificate of merit had

¹ Defendant Nicolas did not file a petition.

been filed in this case, such was not in compliance with the rules, which require a separate certificate with respect to each defendant against whom a professional liability claim is asserted. Since Rule 1042.6 appears to address only the situation where the plaintiff fails to file any certificate at all, the Prothonotary refused to enter a judgment of non pros and suggested to Defendants that they petition the Court for such. Three of the instant petitions were then filed on July 23, 2004, by Defendants Purcell, Burns and Susquehanna Gastroenterology. On July 27, 2004, Plaintiff filed five separate certificates of merit. On August 10, 2004, Defendant Lock Haven Hospital filed its petition for judgment of non pros.

The rules do provide that “[a] separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.” Pa.R.C.P. Rule 1042.3(b).² And while the rules direct the Prothonotary to enter a judgment of non pros against a plaintiff who does not file a certificate of merit, there is nothing in the rules which speaks to the plaintiff who files a “combined” certificate.³ Defendants suggest that entry of a judgment of non pros is required inasmuch as the rules indicate that “[a] separate certificate of merit shall be filed ...”, and that the Court cannot ignore the letter of the law in the pretext of pursuing its spirit. The Court does not believe the rule to mandate entry of a judgment of non pros in the instant situation, however.

As Defendants readily agree, one of the purposes of the requirement of filing a certificate of merit is to prevent the litigation of frivolous malpractice claims. Thus, dismissing a claim where there has been no certificate filed makes sense, especially in light of the

² In general, the rule provides, in subsection (a), that in any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or (3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

³ The certificate of merit filed by Plaintiffs with their Complaint was defective only because it addressed all of the defendants in a single certificate; it contained the required language, identifying the existence of written statements by “appropriate licensed professionals” against the doctor defendants and also indicating that the claims against Susquehanna Gastroenterology and Lock Haven Hospital were based on vicarious liability. When Plaintiffs filed the separate certificates of merit on July 27, 2004, they merely repeated the applicable language of the initial certificate, while naming only one defendant in each certificate.

plaintiff's ability to obtain one or more extensions of time in which to file the certificate.⁴ The requirement for separate certificates appears to be a supplementary tool, designed to address the concern that a plaintiff may seek to pursue a claim against multiple defendants when only one defendant has been assessed by an appropriate licensed professional as probably having deviated from an acceptable professional standard. Requiring the filing of separate certificates will "weed out" the unfounded claims and address this concern, while allowing a plaintiff to pursue any remaining "legitimate" claims. Dismissing all claims, however, simply because the certificate was filed as a combined certificate, not only appears unnecessary, but also goes against the legislative policy contained in the Medical Care Availability and Reduction of Error Act, to "ensure a fair legal process and reasonable compensation for persons injured due to medical negligence in this Commonwealth." 40 P.S. Section 1303.502.

The Court believes its conclusion is also supported by analysis of the provisions of the immediately preceding rule, Rule 1042.2. That rule, entitled "Complaint", provides in subsection (a) that "[a] complaint shall identify each defendant against whom the plaintiff is asserting a professional liability claim", and in subsection (b) that "[a] defendant may raise by preliminary objections the failure of the complaint to comply with subdivision (a) of this rule." Pa.R.C.P. Rule 1042.2. The Court agrees with Judge Wettick's conclusion that the purpose of this rule is to have a judicial determination of whether the plaintiff is asserting a professional liability claim for which a certificate of merit must be filed before a defendant may obtain a judgment of non pros for failure to file a certificate of merit. Herrmann v. Pristine Pines of Franklin Park Inc., 64 Pa. D & C 4th (Allegheny County 2003). Of importance to the issue at hand is the procedure envisioned by the rule, as explained by Judge Wettick: where a complaint does not allege that the plaintiff is asserting a professional liability claim against a defendant but the defendant believes that the plaintiff is asserting such a claim and wishes to require the filing of a certificate of merit, the defendant may file preliminary objections and obtain a court order compelling the plaintiff to file an amended complaint which triggers the requirement of a

⁴ Rule 1042.3 provides: "The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days..." and in the Note, provides: "There are no restrictions on the number of orders that a court may enter extending the time for filing a certificate of merit provided that each order is entered pursuant to a new motion, timely filed and based on cause shown as of the date of filing the new motion."

certificate of merit. Id. This, rather than entry of a judgment of non pros, in spite of the fact the rule indicates a complaint “shall” contain certain language.

As Judge Wettick said, entry of a judgment of non pros for failure to comply with a rule where there can be uncertainty as to the applicability of the rule would be unreasonable, and the Supreme Court does not intend a result that is unreasonable. Id. Likewise, the Court believes entering a judgment of non pros for failure to file separate certificates of merit until the issue was brought to Plaintiffs’ counsel’s attention, would also be unreasonable.⁵ As for Defendants’ argument the Court should not ignore the letter of the law in the pretext of pursuing its spirit, the Court notes there is no directive in the rules to enter a judgment of non pros for failure to file separate certificates of merit. By Plaintiffs’ subsequent filing of such, however, the letter of the law has been followed.

ORDER

And now, this 3rd day of November 2004, for the foregoing reasons, the Petitions for Judgment of Non Pros are hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

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Hon. Dudley N. Anderson

⁵ As noted above, the separate certificates of merit were filed four days after the first petitions for judgment of non pros were filed.