

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA**

<b>KAREEM MILLHOUSE,</b>	:	
<b>Plaintiff</b>	:	
	:	
<b>vs.</b>	:	<b>NO. CV-19-0716</b>
	:	
<b>RODWAN K. RAJJOUB, MD, et al.,</b>	:	
<b>Defendants</b>	:	<b>CIVIL ACTION - LAW</b>

**OPINION**

**I. Factual History**

According to Plaintiff's Complaint, on March 8, 2017, Defendant, Dr. Rodwan Rajjoub, performed a posterior spinal fusion at L5-S1 and inserted an intervertebral fusion device. At his post-surgical appointment on April 17, 2017, Plaintiff presented to Dr. Rajjoub complaining of numbness and paralysis in his lower left extremity. At that time, Plaintiff was scheduled for a second appointment with Dr. Rajjoub for July 2017. Dr. Rajjoub instructed Mr. Millhouse to continue wearing his back brace. On April 19, 2017, Dr. Rajjoub, after speaking with Dr. Andrew Edinger who is a physician at the Lewisburg Penitentiary, lifted Plaintiff's medical hold which resulted in his transfer to a federal correctional institution in Pine Knot, Kentucky. Plaintiff subsequently missed his July 2017 appointment and was no longer able to wear his back brace. As a result, it is alleged that he has sustained worsening neuropathy in the left foot, nerve damage in the lower right leg, worsening low back pain, working neuropathy in the lower left leg, and increased pain. He also claims mental anguish and emotional distress.

## II. Procedural History

Plaintiff filed his first Complaint regarding this matter on August 1, 2018 in federal court against the instant Defendants as well as Dr. Andrew Edinger and the United States of America. Plaintiff did not file a certificate of merit, as required by Pa.R.C.P. 1042.3. Defendants, Dr. Edinger and the United States sent a Notice of Intention to Move for Dismissal due to failure to file a certificate of merit on October 10, 2018 and the instant Defendants did the same on February 6, 2019. The Middle District ultimately dismissed the matter without prejudice in part because Plaintiff failed to file a certificate of merit.

Plaintiff re-filed his federal action on April 18, 2019 against the Federal Bureau of Prisons, United State of America, Dr. Andrew Edinger, and Jessie Ayers. The Court conditionally granted Plaintiff's Motion for Appointment of Counsel to assist in obtaining a certificate of merit; however, the Federal Bar Association's Pro Bono Committee later informed the Court that it was unable to find counsel to assist Plaintiff with this issue. Plaintiff subsequently failed to file a certificate of merit by the Court-ordered deadline of November 5, 2019 and his Motion for Waiver of the requirement was denied.

The instant medical malpractice action was initiated by Complaint on May 2, 2019 wherein Plaintiff claims that Defendants, Dr. Rajjoub and Lycoming Neurosurgical Associates, "deprived [him] of adequate medical care" by "interrupting post-surgical care." *Plaintiff's Complaint at ¶¶ 3 and 27*. A certificate of merit was not filed with the Complaint. Because Plaintiff failed to file a

certificate within sixty (60) days of the filing of the Complaint, Defendants filed a Notice of Intention to Enter Judgment of Non Pros on July 12, 2019.

On July 26, 2019, Plaintiff filed a Motion for Appointment of Counsel, which was denied by this Court on October 25, 2019 as well as a Motion for Extension of Time to File a Certificate of Merit, which was granted pursuant to the Court's October 25, 2019 Order. Plaintiff was given until December 24, 2019 to file his certificate of merit. Having received no certificate of merit by that date, Defendants filed another Notice of Intent for Entry of Judgment of Non Pros on November 25, 2019.<sup>1</sup> A Notice of Filing Judgment was entered on January 7, 2020.

Plaintiff filed the instant Motion for Extension of Time on December 26, 2019.<sup>2</sup> In the motion, he states that he wrote letters to The Lewisburg Prison Project, the Pennsylvania Law Institute Project, The Washington Lawyers Committee, and Michael C. Donnell, Esq asking for assistance in obtaining a certificate of merit. Plaintiff has received no responses other than a January 24, 2020 letter from the Lewisburg Prison Project which states: "Unfortunately, certificates of merit are difficult to obtain and we are not able to assist you with this."

Defendants filed their Memorandum in Opposition to Plaintiff's Motion on February 10, 2020 arguing that Plaintiff's request for an extension should be denied because 1) he failed to file the instant motion "on or before the expiration of the extended time where a court has granted a motion to extent time . . ."

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<sup>1</sup> It should be noted that, while the November 25, 2019 Notice is attached to Defendants' Praecipe for Entry of Judgment of Non Pros filed on January 7, 2020, the Court could find no evidence that the Notice was ever filed with the Prothonotary. There is, however, a Certificate of Service dated November 25, 2019 indicating that the Notice was mailed to Plaintiff.

pursuant to Pa.R.C.P. 1042.3(d); and 2) Plaintiff has had ample time to obtain a certificate of merit, especially considering the fact that he has known about the requirement since at least October of 2018. Plaintiff filed a response on February 24, 2020 and oral argument was held on March 9, 2020 with Plaintiff participating by telephone.

### III. Discussion

“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 . . . .” Pa.R.C.P. No. 1042.3(a).

During oral argument, Plaintiff asserted first that a Certificate of Merit is not needed in a case such as this because any lay jury would be able to understand the negligent acts or omissions of the Defendants without the need for expert testimony. However, even assuming Plaintiff is correct, he is nevertheless required to file a Certificate of Merit stating so. Rule 1042.3 states:

(a) 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 .

...  
**(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.**

**Note: In the event that the attorney [or party] certifies under subdivision (a)(3) that an expert is unnecessary for prosecution of the claim, in the absence of exceptional**

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<sup>2</sup> Plaintiff's Motion is dated December 19, 2019 but was not filed with the Prothonotary until December 26<sup>th</sup>. The Court recognizes that there is a delay due to the Plaintiff's incarceration in a federal facility in Florida.

**circumstances the attorney [or party] is bound by the certification and, subsequently, the trial court shall preclude the plaintiff from presenting testimony by an expert on the questions of standard of care and causation.**

Pa.R.C.P. No. 1042.3(a)(3) and *Note* (emphasis added).

Therefore, Plaintiff is required to comply with Rule 1042.3 in the filing of a certificate of merit that meets at least one of the subsections.

The Court, however, is of the opinion that expert testimony is required in this case. In a medical malpractice case, expert testimony is required when there are allegations that the care and treatment of a patient fell below the standard of care. It cannot be assumed that a lay jury would possess the necessary knowledge and experience required to make a determination as to what that standard of care is, whether that standard of care was breached, and whether that breach caused the alleged damages. The jury, therefore, must be educated and guided by experts who have the requisite knowledge and experience. “The only exception to this otherwise invariable rule is in cases where the matter under investigation is so simple, and the lack of skill or want of care so obvious, as to be within the range of the ordinary experience and comprehension of even non-professional persons . . . .” *Robinson v. Wirts*, 127 A.2d 706, 710 (Pa. 1956). *See, e.g., Dux v. Shaver*, 161 A. 481 (Pa. Super. 1932) (dentist allowed a small, quickly rotating tool to fall into a patient’s mouth, grinding and tearing her tongue); *Davis v. Kerr*, 86 A. 1007 (Pa. 1913) (doctor left a gauze pad in the body of a patient following surgery).

Chief Justice Stern gives further examples of hypothetical cases where expert testimony would not be needed:

[T]here might be imagined a case where a surgeon engaged in removing a tumor from a patient's scalp would let his knife slip and cut off his patient's ear, or where he undertook to stitch a wound on his patient's cheek and by an awkward move would thrust his needle into the patient's eye. It would be a matter of common knowledge and observation that such things do not ordinarily attend the service of one exercising ordinary skill and experience in the work of surgery because they involve ulterior or extraneous acts or omissions the judgment of which would not require scientific opinion.

*Robinson*, 127 A.2d at 710.

This case is distinguishable from the above examples. Here, Plaintiff argues that Defendant was negligent by cancelling his follow-up appointment after his surgery and authorizing the Plaintiff's transfer to another correctional facility. It cannot be presumed, without expert testimony, that Dr. Rajjoub's post-surgery medical decisions fell outside the standard of care or that any injuries and/or damages sustained by the Plaintiff were caused by Dr. Rajjoub's post-surgery medical decisions. Therefore, an expert is required to testify as to the after-surgery standard of care.

Finding that a certificate of merit is required, Plaintiff seeks an extension of time to secure one. Plaintiff, in his motion, states that Pennsylvania law allows 60-day extensions "in succession without limitation." This statement is simply incorrect. Rule 1042.3(d) states:

The court, **upon good cause shown**, shall extend the time for filing a certificate of merit for a period not to exceed sixty days . . . .

*Note:* 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** . . . . .

In ruling upon a motion to extend time, the court shall give appropriate consideration to the practicalities of securing expert review . . . .

Pa.R.C.P. No. 1042.3(d) and *Note* (emphasis added).

Despite Plaintiff's assertion, Plaintiff must show good cause prior to obtaining an extension. Further, under Pennsylvania law, a Plaintiff may seek relief from judgment for failure to prosecute if the Plaintiff offers a "reasonable explanation" or "legitimate excuse" for failure to comply with the Rules of Civil Procedure requiring a certificate of merit. *Ramos v. Quien*, 631 F.Supp.2d 601 (E.D. Pa. 2008).

The Court must first address Defendants' argument that Plaintiff's instant motion is untimely. The Rule states, in pertinent part, that a "motion to extend the time for filing a certificate of merit must be filed by the **thirtieth day after the filing of a notice of intention** to enter judgment of non pros on a professional liability claim under Rule 1042.6(a) **or on or before the expiration of the extended time** where a court has granted a motion to extend the time to file a certificate of merit, **whichever is greater**. Pa.R.C.P. No. 1042.3(d) (emphasis added).

The Court gave Plaintiff until December 24, 2019 to file his certificate of merit. The Defendants' Notice of Intent was dated November 25, 2019, although it does not appear that it was ever filed. The thirtieth day would have been December 25, 2019 and, since this date is longer than December 24<sup>th</sup>, Plaintiff had until December 25<sup>th</sup> to file his motion. Even so, since December 25<sup>th</sup> is a holiday, it is common practice that Plaintiff would have had until December 26, 2019 to file his motion, which is dated December 19<sup>th</sup> and was time-stamped by

the Prothonotary on December 26<sup>th</sup>. Therefore, Plaintiff's Motion for Extension is timely.

Second, the Court is satisfied that Plaintiff has shown good cause and a reasonable effort in attempting to obtain a certificate of merit. He stated that he has sent out several letters to different organizations asking for assistance in obtaining a certificate of merit and is waiting on responses. The Court is sympathetic to the fact that Plaintiff is currently incarcerated and, therefore, it is more difficult and timely to send and receive correspondence. However, the Court also notes that Plaintiff has been given ample opportunities to file a certificate of merit and is well aware of this requirement. With these facts in mind, the Court is willing to grant Plaintiff one more extension of time to file his certificate of merit. Failure to do so will result in an automatic dismissal of Plaintiff's claims regarding this action.

**ORDER**

**AND NOW**, this 11<sup>th</sup> day of **March, 2020**, upon consideration of Plaintiff's Motion for Extension of Time to File Certificate of Merit and Defendants'

Response thereto, it is hereby Ordered that:

1. Plaintiff is required to file a Certificate of Merit pursuant to Pa.R.C.P. 1042.3; and



2. Plaintiff shall have sixty (60) days from the date of this Order to file a Certificate of Merit. Failure to do so will result in dismissal of Plaintiff's cause of action.

BY THE COURT,

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Hon. Ryan M. Tira, Judge

RMT/ads

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