

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CLAY ALEXANDER DODSON, Plaintiff,	:	No. CV-19-1803
	:	
vs.	:	
	:	Civil Action – Law
	:	
UNIVERSITY OF PITTSBURGH MEDICAL CENTER, Defendant.	:	<i>Defendant’s Motion to Strike Certificate of Merit and Written Statement of Plaintiff’s Expert</i>

ORDER

AND NOW, following argument held August 26, 2021 on Defendant’s Motion to Strike Certificate of Merit and Written Statement of Plaintiff’s Expert, and on Plaintiff’s eleven assorted filings, the Court hereby issues the following ORDER.

Procedural History

On October 30, 2019, Plaintiff Clay Dodson (“Plaintiff”) initiated this professional liability action by the filing of a Complaint. Following extensive motions practice, by Order dated March 4, 2021, this Court directed Plaintiff to file a Fifth Amended Complaint.¹ Plaintiff thereafter filed his Fifth Amended Complaint on April 8, 2021. Plaintiff then filed three self-styled motions over the next several weeks: 1) a “Motion to Note Errors” filed on April 19, 2021; 2) a “Motion to Comply to Subpoena” filed on April 27, 2021; and 3) a “Motion to Enter Information” filed on April 30, 2021.

On May 6, 2021, Defendant filed a Motion to Strike Certificate of Merit and Written Statement of Plaintiff’s Expert (“Motion to Strike”). Within this Motion, Defendant notes that Plaintiff’s “Motion to Note Errors” at paragraph 6 contends “it was I the Plaintiff, and ‘NOT’ Dr. Carpenter, expert witness, who added Dr. Ritter in the comment “Other” and signed [the Certificate of Merit].” Defendant therefore argues that there is a reasonable basis to question whether the Certificate of Merit was validly signed, asserting further that there are discrepancies between Dr. Carpenter’s signature on his expert report and on the Certificate of Merit. Defendant further submits that, regardless of the validity of the signature, when the Certificate of Merit is viewed in conjunction with Dr. Carpenter’s written statement, the written statement is legally

¹ The Court’s Order of March 4, 2021 provides a summary of the procedural history up to this point.

inadequate as a matter of law to support a vicarious liability claim against UPMC.

Following the Court's receipt of Defendant's Motion to Strike, Plaintiff filed eleven responsive motions. These include: 1) a "Motion to Enter Information Regarding Perceived Incorrect Information in Your March 4th 2021 Court Order" filed on May 10, 2021;² 2) a "Motion to Strike Defendant's Motion to Strike the Plaintiff's Certificate of Merit and Expert Witness Statement" also filed on May 10, 2021; 3) a "Motion to Strike Defendant's False Claims" filed on May 20, 2021; 4) a document titled "This is a Reference and not a Motion" filed on June 7, 2021; 5) a "Motion to Prohibit Discrimination" filed on June 8, 2021; 6) a "Motion to Prohibit Abuse of Process" filed on June 9, 2021; 7) a "Motion to Sustain Documents" filed on June 14, 2021; 8) a "Motion to Enforce Rule PA.R.C.P. 4.1" filed on June 24, 2021; 9) a "Motion to Refute Defendant's May 6th 2021 Statements" filed on June 28, 2021; 10) a "Second Motion to Enforce Rule PA.R.C.P. 4.1" filed on July 12, 2021; and 11) a "Third Motion to Enforce Rule PA.R.C.P. 4.1" filed on July 19, 2021.

On August 24, 2021, Defendant filed an Omnibus Response in Opposition to the above-listed eleven filings. Within this Omnibus Response, Defendant asserts that these eleven filings are uniformly deficient as improperly formatted, vague, and failing to include a clear prayer for relief. Defendant asserts that deficiencies recurrent across various filings include Plaintiff's bald assertions of discrimination, references to a breach of contract when the Court has already sustained preliminary objections to this claim, and requests that summary judgment be entered in favor of Plaintiff before the close of pleadings. Plaintiff filed a Response to the Omnibus Response on August 30, 2021, and a Second Response to the Omnibus Response on September 7, 2021. Defendant filed a Response in Opposition to Plaintiff's Second Response on September 22, 2021.

At the August 26, 2021 hearing, the Court had the opportunity to review the various filings with Plaintiff. The Court is satisfied from Plaintiff's representations at the hearing that these filings were to serve as a response to Defendant's Motion to Strike, or are meant to provide information supplementing the record, but do not otherwise require further action by the Court. The Court therefore limits the scope of this Order to

² On May 12, 2021, Defendant filed a "Response in Opposition to Plaintiff's Motion to Enter Information 5/7/2021."

the request for relief contained in Defendant's Motion to Strike.

Plaintiff further explained at the August 26, 2021 hearing that the signatures upon both the Certificate of Merit and the Expert Report are those of Dr. Carpenter. He clarified that his statement at paragraph 6 of the "Motion to Note Errors" was merely intended to express that Plaintiff prepared the information on the Certificate of Merit, such as adding the caption and naming the parties. Dr. Carpenter then signed this pre-prepared Certificate. Defendant's attorney, Richard F. Schluter, Esquire, indicated at argument that Defendant does not challenge this representation, so the validity of the Certificate of Merit is not at issue. Rather, the Court must address the sufficiency of the Certificate of Merit when reviewed in conjunction with Dr. Carpenter's written statement.

Analysis

Pursuant to Pennsylvania Rule of Civil Procedure 1042.3(a)(2), a plaintiff pursuing a claim for vicarious liability in a medical professional liability action must file a Certificate of Merit signed by an appropriate licensed professional stating that "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[.]" On January 8, 2020, Plaintiff filed a Certificate of Merit containing language mirroring that in Rule 1042.3(a)(2) and signed by Dalton R. Carpenter, M.D. The Certificate of Merit identifies the University of Pittsburgh Medical Center as the Defendant, and lists Dr. Zachary T. Ritter under "Other." The Court notes that Plaintiff was not required to list the name of a specific provider or providers for whom Defendant is alleged to be vicariously liable, but has apparently done so by listing Dr. Ritter's name.³

The Certificate of Merit requirement applies differently to represented and unrepresented parties. A party whose attorney has signed the Certificate of Merit is not required to submit an expert report in conjunction with the Certificate of Merit. However,

³ Pa.R.C.P. 1042.3(a)(2), note ("A certificate of merit, based on the statement of an appropriate licensed professional required by subdivision (a)(1), must be filed as to the other licensed professionals for whom the defendant is responsible. The statement is not required to identify the specific licensed professionals who deviated from an acceptable standard of care. The purpose of this subdivision is to ensure that a claim of vicarious liability made against a defendant is supported by a certificate of merit. Separate certificates of merit as to each licensed professional for whom a defendant is alleged to be responsible are not required. Only a single certificate of merit as to a claim under subdivision (a)(2) is required.") (emphasis added).

under Rule 1042.9, upon dismissal of a defendant from the action or a verdict in favor of a defendant, within thirty days of the written request of said defendant the plaintiff must provide the defendant with the written statement from a licensed professional upon which the Certificate of Merit was based.⁴ The Court has the power to impose sanctions should it find that the attorney violated Rules 1042(a)(1) or (2), “by improperly certifying that an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge experienced 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.”⁵

In contrast, under Rule 1042.3(e), “[i]f a certificate of merit is not signed by an attorney, the party signing the certificate of merit shall, in addition to the other requirements of this rule, attach to the certificate of merit the written statement from an appropriate licensed professional[.]”⁶ The explanatory comment to Rule 1042.12 explains that Rule 1042.3 creates a distinction between represented and unrepresented parties because “only an attorney is subject to disciplinary proceedings for abusing the rules of civil procedure governing certificates of merit.”⁷ While there is no analogous provision to Rule 1042.9 for *pro se* parties, Defendant cites the Superior Court’s recent memorandum opinion in *Joyner v. Thomas Jefferson University Hospitals, Inc.*, for the proposition that a defendant may challenge the sufficiency of a *pro se* plaintiff’s Certificate of Merit by challenging the sufficiency of the underlying written statement.⁸ Defendant contends that this is consistent with the purpose of the Certificate of Merit requirements of Rule 1042.1 *et seq.*, which are “intended to shield against frivolous claims of professional liability against medical and other professionals. . . .”⁹

Here, Defendant avers that Dr. Carpenter’s statement does not conform to the

⁴ Pa.R.C.P. 1042.9(a).

⁵ Pa.R.C.P. 1042.9(b).

⁶ Pa.R.C.P. 1042.3(e).

⁷ Pa.R.C.P. 1042.12, note.

⁸ Defendant’s Motion to Strike Plaintiff’s Certificate of Merit and Written Statement of Plaintiff’s Expert ¶ 23 (May 6, 2021) (citing *Joyner v. Thomas Jefferson Univ. Hosps., Inc.*, 248 A.3d 496 (Table) (Pa. Super. 2021)).

⁹ Defendant’s Motion to Strike Plaintiff’s Certificate of Merit and Written Statement of Plaintiff’s Expert ¶ 24 (quoting *Ditch v. Waynesboro Hosp.*, 17 A.3d 310 (Pa. 2011) (per curium)).

Certificate of Merit rules in that it fails to identify: 1) the provider(s) being criticized; 2) the care at issue; 3) the alleged standard of care; and 4) the alleged ‘deviations’ from the standard of care.”¹⁰ Defendant also avers that the statement is deficient because Dr. Carpenter did not review any medical records with the sole exception of x-rays and a single record from a non-UPMC treating physician.¹¹ Dr. Carpenter includes a list of “Records Reviewed” in his written statement. These are limited to: 1) Initial x-ray of right ankle of Mr. Dodson; 2) X-rays of the initial ORIF of the fracture; 3) X-rays and spot fluoroscopic views of the right ankle in progressive dates; 4) Geisinger facility consultation report; and 5) Color photos of ankle, foot, and leg of Mr. Dodson.¹²

Although Defendant accurately summarizes the deficits in Dr. Carpenters’ report, the Court is disinclined to strike the Certificate of Merit on the bases that Defendant has enumerated. The single case the Defendant cites for the proposition, *Joyner*, is non-precedential. Further, *Joyner*, even if treated as persuasive authority, dealt with a different issue: the question of whether the proposed expert constituted an “appropriate licensed professional” as expressly required by Rule 1042.3(e). Conversely, there is no requirement under Rule 1042.3 that the underlying report be based on Plaintiff’s full medical history or identify the individual providers alleged to have been negligent. Indeed, the latter requirement would be inconsistent with Rule 1042.3(a)(2), which does not require the Certificate of Merit to identify the individual providers for whom the defendant is vicariously liable.

Defendant appears to be taking the position that the written statement required to support Plaintiff’s Certificate of Merit must meet the standard for expert reports sufficient to support expert testimony at trial. The standards for admission of expert testimony at trial are clear. Although there is no challenge to Dr. Carpenter’s competence as a

¹⁰ Defendant’s Motion to Strike Plaintiff’s Certificate of Merit and Written Statement of Plaintiff’s Expert ¶ 26.

¹¹ *Id.*

¹² Dr. Carpenter’s Preliminary Report is attached as Exhibit A to Defendant’s Motion to Strike Plaintiff’s Certificate of Merit and Written Statement of Plaintiff’s Expert. Plaintiff was questioned at argument whether he also provided Dr. Carpenter a copy of his Complaint to review. Plaintiff stated that he could not remember. On August 30, 2021, Plaintiff post-hearing filed a “Motion to Correct Court Statement,” in which Plaintiff provides that to obtain an expert report, in late 2019 he sent an email to American Medical Experts, LLC, a company that specializes in providing expert witness services. Plaintiff purports to have attached his Complaint to that email. American Medical Experts, LLC then connected Plaintiff with Dr. Carpenter. Plaintiff avers that he believes that Dr. Carpenter did review the initial Complaint, but did not list it among the records reviewed because it is not a medical record.

qualified expert at this juncture, his skill and experience will not permit him to state a judgment at trial based on mere conjecture.¹³ “Expert testimony must be based on more than mere personal belief, and must be supported by reference to facts, testimony or empirical data.”¹⁴ “The admission or exclusion of expert testimony is in the sound discretion of the trial court and will not be overruled absent a clear abuse of discretion.”¹⁵ A trial court thereby may properly preclude expert testimony where the proffered expert report contains only conclusory statements as to the defendant’s negligence or non-negligence.¹⁶ Further, a trial court may determine that a medical expert’s methodology is insufficient, and therefore inadmissible at trial, if the expert fails to review relevant medical records in preparing their expert report.¹⁷

The Court agrees that the written statement attached to the Certificate of Merit, lacking in detail and conclusory as it is, and based on limited medical information, would not withstand challenge if Plaintiff intended to have Dr. Carpenter testify at trial based on this written statement alone. However, there is no concomitant statute or case law of which the Court is aware suggesting that the written statement submitted with the Certificate of Merit must meet that standard. Indeed, Rule 1042.9 only imposes liability in cases where the Plaintiff cannot timely provide a written statement by an appropriate licensed professional attesting to “a reasonable probability that the care, skill or knowledge experienced or exhibited in the treatment, practice... fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm.”¹⁸ That a *pro se* plaintiff may face a lower burden at the outset of their case than at the trial stage is congruent to this Court, as to hold otherwise would require a *pro se* plaintiff to provide his expert report at the outset of his claim. No plaintiff who is represented by counsel in a professional liability action is held to such a standard.

¹³ *First Methodist Episcopal Church v. Bangor Gas Co.*, 130 A.2d 517, 524 (Pa. 1957).

¹⁴ *Snizavich v. Rohm & Haas Co.*, 83 A.3d 191, 195 (Pa. Super. 2013) (quoting *Downey v. Crozer-Chester Med. Ctr.*, 817 A.2d 517, 528 (Pa. Super. 2003) (en banc)).

¹⁵ *Klyman v. Se. Pennsylvania Transp. Auth.*, 480 A.2d 299, 302 (Pa. Super. 1984) (citing *Laubach v. Haigh*, 252 A.2d 682, 683 (Pa. 1969); *Kubit v. Russ*, 429 A.2d 703 (Pa. Super. 1981)).

¹⁶ See e.g., *Miller v. Purcell*, No. 04-00691, 2006 WL 6631080 (Lyco. Cty. C.P. Aug. 21, 2006) (citing *Jones v. Constantino*, 631 A.2d 1289 (Pa. Super. 1993)).

¹⁷ See e.g., *Brian v. Ass'n of Independent Oil Distributors*, No. 3413 OF 2011, 2016 WL 11640965, at *1 (Westmoreland Cty. C.P. July 19, 2016); *Anderson v. Janssen Pharmaceuticals, Inc.*, No. 1112-01405, 2015 WL 3539602, at *5 (Phila. Cty. C.P. May 04, 2015); *Finley v. First Realty Property Management, Ltd.*, No. CV2003031486, 2006 WL 6558972 (Westmoreland Cty. C.P. May 04, 2006).

¹⁸ Pa.R.C.P. 1042.9(b).

The Court is satisfied from review of Dr. Carpenter's written statement that he identifies the surgeries performed on Plaintiff's ankle at UPMC facilities as having fallen below the standard of care, resulting in infection and eventual necrosis in Plaintiff's ankle. It is not entirely clear from the report if Dr. Carpenter alleges negligence in the performance of the surgeries or negligence in the failure to timely follow-up when Plaintiff began experiencing post-surgical infections. Nonetheless, the Court is satisfied that Plaintiff has met his burden under Rule 1042.3(e) in obtaining a written statement supportive of his Certificate of Merit.

Conclusion

Pursuant to the foregoing, Defendant's Motion to Strike Certificate of Merit and Written Statement of Plaintiff's Expert is DENIED. Defendant shall have twenty (20) days from today's date to file an Answer or Preliminary Objections to Plaintiff's Fifth Amended Complaint.

IT IS SO ORDERED this 6th day of October, 2021.

By The Court,

Eric R. Linhardt, Judge

ERL/jcr

cc: Clay A. Dodson

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