DOCKET NO: FST CV16-6030157 S		: SUPERIOR COURT
WALKER, JEFFREY	2024 MAY 21 P 4:14	: JUDICIAL DISTRICT OF
V.		: STAMFORD-NORWALK
THE NORWALK HOSPITAL ASSOCIATION		: AT STAMFORD
		: MAY 21, 2024

MEMORANDUM OF DECISION

Pursuant to General Statutes § 52-190a, defendant moved for the sanction of dismissal in connection with the filing of an allegedly false certificate of reasonable inquiry and good faith opinion letter at the initiation of this lawsuit. For the reasons stated below, the motion is denied.

C.G.S. § 52-190a provides for a certificate of reasonable inquiry by an attorney or initiating party and a good faith opinion letter by a similar health care provider be appended to a medical malpractice complaint:

> "(a) No civil action ... shall be filed to recover damages resulting from personal injury or wrongful death ..., whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action ... has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint ... shall contain a certificate of the attorney or party filing the action ... that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant .... To show the existence of such good faith, the claimant or the claimant's attorney... shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate."

Section 52-190a provides a penalty for submission of a certificate "not made in good faith":

> "In addition to such written opinion, the court may consider other factors with regard to the existence of good faith. If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court upon motion or upon its own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The court may also submit the matter to the appropriate authority for disciplinary review of the attorney if the claimant's attorney or the apportionment complainant's attorney submitted the certificate."

This case, commenced in 2016, has a troubled history. The complaint was filed by counsel later suspended from practice for disciplinary reasons. Until recently, plaintiff proceeded *pro se*. The attorney who filed the complaint appended a good faith certification dated October 13, 2016, and a redacted good faith opinion letter dated October 3, 2016, that purported to be from a similar health care provider.

Defendant has questioned the attorney's good faith because plaintiff has been unable to produce the unredacted opinion letter and because there is no evidence anyone accessed plaintiff's medical records before the complaint was filed. Plaintiff *pro se* testified that he had not seen his medical records prior to their receipt in discovery. Defendant argued that without review of the medical records the attorney could not have undertaken a good faith inquiry, and the health care provider could not have opined there was evidence of medical negligence.[1]

[1] The opinion letter does not describe what records the health care provider reviewed, the letter refers to his "reviewing three visits and treatment [plaintiff] received at the urgent care center ...." Plaintiff has submitted an affidavit that avers he gave whatever records he had to his attorney. It is reasonable to assume these records were provided to the author of the opinion letter for his review. The Court does not agree the opinion letter was written so as to deceive defendant that the author had reviewed the entire medical record files. The medical records were under defendant's control, which included the audit trail of those who had viewed and/or printed those records.

The evidence is insufficient to find that the certification and opinion letters were not issued in good faith. The attorney filing the complaint and the author of the opinion letter could rely on information and records provided by plaintiff. The statute provides "In addition to such written opinion, the court may consider other factors with regard to the existence of good faith." This would include plaintiff's evidence related to the information and documents plaintiff provided to counsel. The inability to produce records turned over to prior counsel, lost in the interim, and present inability to produce the original opinion letter may be explained by the circumstances related to the termination of the prior attorney's representation and lack of turnover of suspended counsel's files.

This also is not a case where "no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery ...." C.G.S. § 52-190a. Now that plaintiff has retained experienced medical malpractice counsel, plaintiff has disclosed an expert witness who has reviewed the records and opined there were deviations from applicable standards of care.[2]

Moreover, dismissal is not a penalty provided under C.G.S. § 52-190a. The statutory sanctions are directed toward the attorney who failed to investigate in good faith, rather than the client. The Court has discretion to award sanctions against both, but that would not be appropriate on this record where there is no evidence of client participation in what is asserted to have been bad faith conduct by the attorney.[3]

Defendant argues that the failure to comply with C.G.S. § 52-190a warrants dismissal notwithstanding that is not a sanction listed in the statute.[4] In *Carpenter v. Daar*, 346 Conn. 80, 103-112 (2023), the Supreme Court overruled a line of cases that had held the failure to comply with C.G.S. § 52-190a was jurisdictional. In *LaConche v. Elligers*, 215

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[2] Plaintiff also argued that defendant had not "fully cooperated in providing informal discovery ..." under C.G.S. § 52-190a because plaintiff had shown failure to comply with discovery responsibilities as found by Judge Genuario in response to plaintiff's motion to compel. The Court has not decided that argument.

[3] The Court would not impute bad faith from attorney to client, as defendant urged.

[4] This remedy is provided for a failure to append an opinion letter under C.G.S. § 52-190a (c). The dicta in *Monti v. Wenkert*, 287 Conn. 101, 133 (2008), indicates "a false certificate" may result in dismissal under C.G.S. § 52-190a (c), which refers to the opinion letter:" The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action." That has not been proven here.

Conn. 701, 710-11 (1990), the Supreme Court had held that failure to comply with C.G.S. § 52-190a did not deprive a court of subject matter jurisdiction.[5] The drastic penalty of dismissal is not warranted or proportionate to the attorney's alleged failure to comply with Section 52-190a.

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Krumeich, J.T.R.

DECISION ENTERED IN
ACCORDANCE WITH THE
FOREGOING 5/21/24.
JDNO SENT 5/21/24.
COPIES TO ALL SELF-REP PARTIES
DCC.

[5] "The purpose of the certificate is to evidence a plaintiff's good faith derived from the precomplaint inquiry. It serves as an assurance to a defendant that a plaintiff has in fact made a reasonable precomplaint inquiry giving him a good faith belief in the defendant's negligence. In light of that purpose, the lack of a certificate does not defeat what would otherwise be valid jurisdiction in the court. The purpose is just as well served by viewing the statutory requirement that the complaint contain a good faith certificate as a pleading necessity akin to an essential allegation to support a cause of action." 215 Conn. at 711. In *Bennett v. New Milford Hosp., Inc.*, 300 Conn. 1, 27 (2011), the Supreme Court noted that the dismissal discussed hypothetically in *LeConche* for a bad faith certificate would be discretionary, not jurisdictional.