

DOCKET NO. HHD CV 23-6172274-S : SUPERIOR COURT  
 :  
 MARKANTHONY ROBERTS : JUDICIAL DISTRICT OF HARTFORD  
 :  
 V. : AT HARTFORD  
 :  
 1 EMERSON DRIVE SOUTH OPERATIONS, :  
 LLC, D/B/A/ KIMBERLY HALL - SOUTH :  
 CENTER, ET AL : JUNE 5, 2024

**MEMORANDUM OF DECISION RE:  
 MOTION TO DISMISS (#106)**

The defendants move the court to dismiss this medical malpractice action because the plaintiff allegedly failed to provide a legally sufficient opinion letter from a “similar health care provider,” pursuant to General Statutes §§ 52-190a and 52-184c. The court agrees and, accordingly, grants the motion to dismiss.

I

BACKGROUND

A

The Complaint


The court summarizes the essential allegations of the plaintiff’s Complaint.

In April 2021, the plaintiff was involved in a severe motor vehicle accident and suffered fractures to his C4 and C6 vertebrae and contusions/compression of his spinal cord. Despite surgery the following day, the plaintiff was left quadriplegic. Complaint (dated July 25, 2023) (Cmpl.), ¶¶ 7-8.

On May 4, 2021, the plaintiff was transferred to Gaylord Hospital, where he remained until August 4, 2021, when he was transferred to the defendants’ facility (Facility), a long term skilled nursing and rehabilitation facility in Windsor, Connecticut. Cmpl., ¶¶ 2, 9-17.

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Upon admission, the plaintiff discovered that the Facility was not equipped or trained to handle quadriplegics generally or the plaintiff's particular case. Unnamed employees, servants, and/or agents of the defendants began to reduce and/or diminish the plaintiff's treatment, eventually stopping his physical and occupational therapy entirely. On September 17, 2021, both Physical and Occupational Therapy services at the Facility discharged the plaintiff from their care without any written explanation. The plaintiff never received any other type of physical or occupational therapy until January 2022, when Dr. Gallagher (first name not identified), his treating physician, referred him to Occupational Therapy. Despite this referral, Occupational Therapy only met with the plaintiff three times. Cmpl., ¶¶ 18-23.

On June 9, 2022, Dr. Gallagher observed that "[E]xtensive Physical Therapy should start as soon as possible further delay will cause increased percentage of permanent damage." Cmpl., ¶ 24. Notwithstanding this referral, Occupational Therapy did not perform any therapy services, stating instead that "the patient is at baseline functional level requiring total assist for ADLs and hooyer lift to CWC." Cmpl., ¶ 25.

The plaintiff met with Physical Therapy on July 6, 2022, which recommended ten to fifteen sessions over a four-week period. Only seven sessions occurred over two weeks. Cmpl., ¶ 26.

On July 19, 2022, Physical Therapy again discharged the plaintiff and recommended that his therapy be assumed by the nursing staff, who were not qualified to provide such care for a patient in the plaintiff's condition. Cmpl., ¶ 27.

On October 24, 2022, the plaintiff met with Occupational Therapy for a "quarterly screen." Occupational Therapy recommended three sessions per week for a four-week period to address adaptive techniques and increase quality of life. Despite this recommendation, the

plaintiff only received seven sessions of Occupational Therapy, which focused on his shoulder and wrist function. Cmpl., ¶¶ 28-29.

Paragraph 30 of the Complaint alleges ten specifications of negligence:

“30. The Defendant facility, through its agents, apparent agents, servants and/or employees, departed from the applicable standard of care in the care, treatment and supervision of the Plaintiff in one or more of the following ways:

- a. By misrepresenting the facility’s capability to treat quadriplegic patients such as the Plaintiff;
- b. In failing to identify and address the Plaintiff’s need for intensive therapeutic care with an adequate frequency of therapy sessions;
- c. In failing to provide sufficient therapeutic procedures during his limited sessions by only performing E-stim and wheelchair practice;
- d. In failing to provide the Plaintiff with intensive therapy for a minimum of a six-month period, as the applicable standard of care would require;
- e. By assigning nurses rather than staff trained in Physical or Occupational Therapy to supervise the Plaintiff’s treatment;
- f. By discharging the Plaintiff from Occupational Therapy in September of 2021 and then failing to reevaluate him for a four-month period until January of 2022;
- g. In failing to provide intensive therapy to the Plaintiff following his January 2022 evaluation as the standard of care would require;
- h. In failing to provide the Plaintiff with additional Occupational Therapy services following his June 10, 2022, evaluation, despite Dr. Gallagher’s recommendation of intensive therapy the previous day;

i. In terminating the Plaintiff's Physical Therapy services in July of 2022, despite Dr. Gallagher's prior recommendation of intensive therapy in June; and

j. Failing to provide any type of intensive therapeutic interventions to provide Plaintiff with the necessary care to facilitate his recovery since July of 2022." Cmpl., ¶ 30.

As a result of the negligence of the Facility's "agents, apparent agents, servants and/or employees," the plaintiff alleges that he suffered injuries, including, inter alia, an increase in symptoms of paralysis, continued medical care and treatment, future medical expenses, and the lost enjoyment of his life's activities. Cmpl., ¶¶ 31-35.

## B

### The Opinion Letter

The plaintiff appended to his Complaint the opinion letter of a licensed and board-certified physical therapist with a specialty in treating complex injuries, including quadriplegic injuries. The author opines that the "standard of care required for [the plaintiff's injuries] is that there must be significant and sustained physical therapy for at least six months following the injury for the best chance of any type of recovery. Further, the standard of care requires that the physical therapy after that first six months should be continuous and sustained to ensure that the patient does not decrease in mobility or their quality of life." The author describes the different ways in which he believes the Facility's therapists breached the standard of care. He concludes, "within a reasonable degree of medical certainty that the occupational and physical therapists at Kimberly Hall committed negligence in the care and treatment of [the plaintiff], and that this negligence was a substantial factor in producing harm to [the plaintiff]."

## II

### DISCUSSION

#### A

Section 52-190a states in relevant part that a plaintiff “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.” (Emphasis added.) Section 52-184c provides two definitions of a similar health care provider. Pursuant to § 52-184c (b), such a provider is one who: “(1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.” Alternatively, § 52-184c (c) provides that “one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a ‘similar health care provider.’”

“[F]ailure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.” General Statutes § 52-190a (c). Although the Supreme Court had long held that non-compliance with § 52-190a implicated personal jurisdiction, the court recently held that the opinion letter requirement under § 52-190a is a “unique, statutory procedural device that does not implicate the court’s jurisdiction in any way.”

*Carpenter v. Daar*, 346 Conn. 80, 87-88, 287 A.3d 1027 (2023) [hereinafter "*Carpenter*"]. The purpose of the opinion letter is to "weed out frivolous medical malpractice suits. . . ." *Id.*, 112. The sufficiency of an opinion letter is determined solely on the basis of the allegations of the complaint and the opinion letter, without resort to jurisdictional fact-finding. *Id.*, 346 Conn. 125. A plaintiff must undertake a 'reasonable inquiry' into the credentials of the defendant health care provider to secure the appropriate similar health care provider to author the opinion letter." *Id.*, 117, n.24 (citing *Doyle v. Aspen Dental of Southern CT, PC*, 179 Conn. App. 485, 497, 179 A.2d 249 (2018)).

The Supreme Court has addressed the application of § 52-190a to institutional defendants. In *Wilkins v. Connecticut Childbirth & Women's Ctr.*, 314 Conn. 709, 104 A.3d 671 (2014), the court rejected the argument that § 52-190a does not require a good faith opinion letter to support claims against institutional health care providers. "Medical malpractice can be committed only through the acts or omissions of people, specifically, medical professionals. Thus, when a medical malpractice action is brought against an institution, the malpractice necessarily is committed by the institution's officers, employees or agents. Accordingly, the 'defendant health care provider' for purposes of § 52-184c *is the person who allegedly committed the medical malpractice*, not the person or institution that ultimately may be held liable for that malpractice." (Emphasis added.) *Id.*, 722.

## B

The defendants contend that the opinion letter at issue is insufficient for two reasons: (1) the author is not a "similar health care provider" under General Statutes § 52-184c (b), and (2) the opinion letter lacks sufficient factual detail. Because the court agrees with the first alleged deficiency, the court does not address the second claim.

The problem here is that, except for Dr. Gallagher, the plaintiff's treating physician at the Facility, the Complaint does not specifically identify any of the defendants' agents, servants or employees who were allegedly negligent in the plaintiff's care and treatment. At best, it refers generally to physical and occupational therapists.

More importantly, as the defendants argue in their motion to dismiss, the "claims of negligence are related to the overall treatment and care provided to the Plaintiff, not any specific act of negligence committed by a physical therapist. At a long-term care facility such as the Defendants' facility, a licensed physician is in charge of a resident's medical care and dictates the course of treatment to be provided; the treatment and/or care is simply carried out by the nursing staff, occupational therapists, physical therapists, and other medical/nursing providers. Because the plaintiff's allegations relate to the overall care and treatment, a similar health provider would be a licensed physician with experience in treating patients in a long-term care setting; to the extent the allegations of negligence relate to how nurses carried out any of these orders, a nurse would be required to qualify as a similar health care provider." Memorandum of Law in Support of Motion to Dismiss (#106), p.9.

The court agrees with the defendants' characterization of the plaintiff's negligence allegations. This is not a case in which a plaintiff claims that a physical or occupational therapist provided negligent therapy; if it were, the court would agree that the author of the opinion letter was a "similar health care provider" under § 52-184c (b), at least as to physical therapists in the defendants' employ. This is a case in which unnamed agents, servants and employees of the Facility allegedly failed to coordinate or provide care for the plaintiff in accord with the treating physician's directives. Under these circumstances, the court concludes that a "similar health care provider" is a person with credentials comparable to the individual(s) at the Facility who were

responsible for ensuring that the plaintiff's overall care and treatment was consistent with the treating physician's directives. Dr. Gallagher seems to be that person, or perhaps the Facility has a medical director. But it is not a physical therapist.

The court is compelled to observe that the "similar health care provider" requirement of § 52-190a may be ill-suited to certain types of institutional negligence claims. When a plaintiff alleges that a surgeon, radiologist, primary care physician, nurse or other health care provider breached the standard of care while treating the patient, the opinion letter requirement of § 52-190a is a sensible way to weed out frivolous malpractice lawsuits. *Carpenter v. Daar*, 346 Conn. 112. When a plaintiff seeks to hold an institutional defendant vicariously liable for the acts or omissions of a specific, identified health care provider, § 52-190a also serves that purpose. But when a plaintiff claims that unnamed agents, servants or employees of an institution, such as a hospital or long-term care facility, were negligent with respect to the overall care and treatment of the plaintiff, compliance with § 52-190a becomes problematic.

To illustrate, consider the plaintiff's allegation that the defendants were negligent "[b]y assigning nurses rather than staff trained in Physical or Occupational Therapy to supervise the Plaintiff's treatment." Cmpl., ¶ 30 (e). That negligence allegation is directed to the individual responsible for making assignment decisions, not to the nurses or physical therapists themselves. That allegation is also quite different from claiming that a particular physician or nurse made a mistake while treating a patient—presumably the type of negligence allegation that § 52-190a was enacted to address.

The best solution to this difficulty would be for the General Assembly to clarify how and whether § 52-190a applies to institutional defendants who have been sued for "institutional failures," i.e., failures of managing and coordinating the provision of medical care. For now,

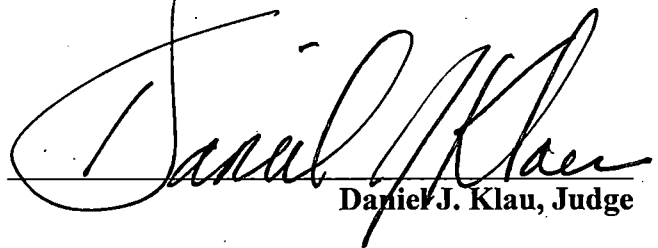


however, the law is unclear, so litigants and courts are left to struggle with atypical negligence claims against institutional health care providers.

III

ORDERS

For the foregoing reasons, the defendants' Motion to Dismiss is GRANTED.



Daniel J. Klau, Judge

## Checklist for Clerk

**Docket Number:**

HHD CV23-6172274S

**Case Name:** Roberts v. 1 Emerson

**Memorandum of Decision dated:** 6/5/2024

**File Sealed:** Yes No X

**Memo Sealed:** Yes No X

**This Memorandum of Decision may be released to the Reporter of Judicial Decisions for Publication XXXX**

**This Memorandum of Decision may NOT be released to the Reporter of Judicial Decisions for Publication**

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# State of Connecticut Judicial Branch Superior Court Case Look-up



Superior Court Case Look-up  
Civil/Family  
Housing  
Small Claims

[HHD-CV23-6172274-S](#)

ROBERTS, MARKANTHONY v. 1 EMERSON DRIVE SOUTH OPERATIONS LLC D/B/A KIMBERL Et AI

Prefix: HD3

Case Type: T28

File Date: 07/31/2023

Return Date: 08/29/2023

[Case Detail](#) [Notices](#) [History](#) [Scheduled Court Dates](#) [E-Services Login](#) [Screen Section Help](#) [Exhibits](#)

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Attorney/Firm Juris Number Look-up

Case Look-up

By Party Name

By Docket Number

By Attorney/Firm Juris Number

By Property Address

Information Updated as of: 06/05/2024

### Case Information

Case Type: T28 - Torts - Malpractice - Medical

Court Location: HARTFORD JD

List Type: No List Type

Trial List Claim:

Last Action Date: 04/02/2024 (The "last action date" is the date the information was entered in the system)

Short Calendar Look-up

By Court Location

By Attorney/Firm Juris Number

Motion to Seal or Close

Calendar Notices

Court Events Look-up

By Date

By Docket Number

By Attorney/Firm Juris Number

### Disposition Information

Disposition Date:

Disposition:

Judge or Magistrate:

Legal Notices

Pending Foreclosure Sales

Understanding

Display of Case Information

Contact Us

### Party & Appearance Information

Party

No Fee Party Category

P-01 MARKANTHONY ROBERTS

Attorney: [FAZZANO TOMASIEWICZ LLC](#) (414049) File Date: 07/31/2023  
96 OAK STREET  
HARTFORD , CT 06106

Plaintiff

D-01 1 EMERSON DRIVE SOUTH OPERATIONS LLC D/B/A KIMBERLY HALL-SOUTH CENTER

Attorney: [COONEY SCULLY & DOWLING](#) (010872) File Date: 08/30/2023  
HARTFORD SQUARE NORTH  
10 COLUMBUS BOULEVARD  
HARTFORD , CT 06106

Defendant

D-02 KIMBERLY HALL SOUTH RE, LLC

Attorney: [COONEY SCULLY & DOWLING](#) (010872) File Date: 08/30/2023  
HARTFORD SQUARE NORTH  
10 COLUMBUS BOULEVARD  
HARTFORD , CT 06106

Defendant



Comments

### Viewing Documents on Civil, Housing and Small Claims Cases:

If there is an [e](#) in front of the docket number at the top of this page, then the file is electronic (paperless).

- Documents, court orders and judicial notices in electronic (paperless) civil, housing and small claims cases with a return date on or after January 1, 2014 are available publicly over the internet.\* For more information on what you can view in all cases, view the [Electronic Access to Court Documents Quick Card](#).
- For civil cases filed prior to 2014, court orders and judicial notices that are electronic are available publicly over the internet. Orders can be viewed by selecting the link to the order from the list below. Notices can be viewed by clicking the **Notices** tab above and selecting the link.\*
- Documents, court orders and judicial notices in an electronic (paperless) file can be viewed at any judicial district courthouse during normal business hours.\*

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