STATE OF MICHIGAN

COURT OF APPEALS

DEBRA PERRY, as Next Friend of POURCHIA STALLWORTH,

Plaintiff-Appellee,

v

BON SECOURS COTTAGE HEALTH SERVICES and DON MICHEAL SCHRODER, M.D.,

Defendants-Appellants,

and

HENRY FORD HEALTH SYSTEM and FRANCISCO JOSE RODRIGUEZ,

Defendants.

UNPUBLISHED
December 22, 2009

No. 287813
Wayne Circuit Court
LC No. 05-535173-NM

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

In this medical malpractice action, defendants appeal as of right the trial court's order dismissing plaintiff's complaint without prejudice following the trial court's determination that plaintiff's expert, Dr. Steven Rothenberg, was not qualified to testify at trial under MCL 600.2169. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

On December 9, 2005, plaintiff filed a medical malpractice action against defendants. The complaint alleged that defendant Dr. Don Micheal Schroder, a physician who specialized in general surgery, negligently injured plaintiff's minor daughter's left iliac artery during a laparoscopic appendectomy at defendant hospital. The complaint further alleged that Dr. Francisco Rodriguez, a physician who specialized in general surgery, with a sub-specialty in vascular surgery, negligently repaired the left iliac artery. According to the complaint, defendant hospital was liable for the negligent acts and omissions of its agents. Plaintiff filed with her complaint the affidavit of Dr. Paul Collier, a physician who was board certified in general surgery with added qualifications in vascular surgery. The affidavit was dated July 19, 2005.

In January 2007, defendants Dr. Schroder and hospital moved to strike Dr. Collier's affidavit of merit and for partial summary disposition. According to defendants, Dr. Collier's affidavit was insufficient under MCL 600.2169(1) with respect to Dr. Schroder and defendant hospital because Dr. Collier stated in his deposition that he devoted the majority of his professional time during the year preceding the alleged malpractice to vascular surgery rather than general surgery. Thus, defendants contended, Dr. Collier's affidavit of merit was insufficient to commence plaintiff's medical malpractice action and did not toll the statute of limitations, so dismissal of plaintiff's claims against defendants hospital and Dr. Schroder with prejudice was appropriate.

In an order dated February 20, 2007, the trial court granted defendants' motion to strike the affidavit of Dr. Collier with respect to defendant Dr. Schroder, granted defendants' motion for partial summary disposition and dismissed with prejudice plaintiff's case against defendants Dr. Schroder and hospital. Plaintiff sought leave to appeal with this Court. In lieu of granting leave to appeal, this Court reversed the trial court's dismissal of plaintiff's complaint with prejudice, stating that the remedy for filing a nonconforming affidavit of merit is dismissal without prejudice.[1] In addition, we remanded for the trial court to determine whether, under *Grossman v Brown*, 470 Mich 593, 599-600; 685 NW2d 198 (2004), plaintiff's counsel had a reasonable belief that Dr. Collier was qualified under MCL 600.2169 to sign an affidavit of merit with respect to Dr. Schroder. On remand, the trial court determined that plaintiff's lawyer had a reasonable belief that Dr. Collier was qualified under MCL 600.2169 to sign an affidavit of merit with respect to defendant Dr. Schroder and set aside its previous order dismissing plaintiff's complaint with prejudice. Thereafter, defendants unsuccessfully sought leave to appeal in this Court[2] and in our Supreme Court.[3]

At some point, counsel for plaintiff was sufficiently concerned that Dr. Collier would not be qualified under MCL 600.2169 to testify at trial[4] and therefore sought after another expert to testify at trial. On July 11, 2008, plaintiff filed a motion seeking a determination whether Dr. Rothenberg, who was board certified in both general surgery and pediatric surgery, was qualified under MCL 600.2169(1) to testify at trial regarding the standard of care. The trial court held that the relevant specialty being performed at the time of the alleged malpractice was surgery and that Dr. Rothenberg had devoted the majority of his professional time to the practice of pediatric surgery in the year preceding the occurrence of the alleged malpractice. Thus, the trial court ruled that Dr. Rothenberg was not qualified to testify as an expert witness in the case. Therefore,

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[1] *Perry v Bon Secours Cottage Health Services*, unpublished order of the Court of Appeals, entered August 16, 2007 (Docket No. 276737).

[2] *Perry v Bon Secours Cottage Health Services*, unpublished order of the Court of Appeals, entered April 11, 2008 (Docket No. 281557).

[3] *Perry v Bon Secours Cottage Health Services*, 482 Mich 898; 753 NW2d 166 (2008).

[4] Based on statements counsel for plaintiff made on the record, it appears that plaintiff sought the expert testimony of Dr. Rothenberg based on counsel's determination that Dr. Collier would be ineligible to testify at trial under *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006).

in a stipulated order, the trial court dismissed plaintiff's complaint without prejudice. Defendants appeal this order as of right.

II. Standard of Review

This case involves the interpretation of both MCL 600.2912d(1) and MCL 600.2169. "Statutory interpretation is an issue of law that is reviewed de novo." *Bates v Gilbert*, 479 Mich 451, 455; 736 NW2d 566 (2007). "The grant or denial of a motion for summary disposition is also reviewed de novo." *Id.*

III. Analysis

Defendants first argue that the trial court erred in holding that counsel for plaintiff had a reasonable belief under MCL 600.2912d(1) that the expert who signed plaintiff's affidavit of merit, Dr. Collier, who was board certified in general surgery, satisfied MCL 600.2169 with respect to defendants Dr. Schroder and hospital.

At the outset, we note that plaintiff challenges this Court's jurisdiction over this issue. Plaintiff's jurisdictional challenge is somewhat unclear, but appears to be based on the fact that both this Court and our Supreme Court denied applications for leave to appeal regarding this issue. We reject any challenge to this Court's jurisdiction to consider defendants' argument relating to the trial court's ruling that counsel for plaintiff had a reasonable belief that Dr. Collier satisfied MCL 600.2169. In an appeal of right to this Court from a final order, a party may raise issues challenging holdings of the lower court in prior orders in the case. *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309, 315; 760 NW2d 699 (2008), vacated on other grounds ___ Mich ___; 773 Mich 265 (2009).

MCL 600.2912d(1) provides that "the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." MCL 600.2169 provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
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> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
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> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

* * *

At the affidavit of merit stage of medical malpractice litigation, "the plaintiff's attorney only has available publicly accessible resources to determine the defendant's board certifications and specialization" because no discovery is available at this stage. *Grossman*, *supra* at 599. Because "the plaintiff's counsel may have limited information available to ensure a proper 'matching' between the plaintiff's expert and the defendant" at this time, he or she "must therefore be allowed considerable leeway in identifying an expert affiant . . . ." *Bates*, *supra* at 458, citing *Grossman*, *supra* at 599. However, "such leeway cannot be unbounded. The plaintiff's counsel must invariably have a *reasonable belief* that the expert satisfies the requirements of MCL 600.2169." *Bates*, *supra* at 458. The information available to the plaintiff's attorney when he or she was preparing the affidavit of merit is considered when determining the reasonableness of an attorney's belief that an expert signing an affidavit of merit satisfies MCL 600.2169. *Grossman*, *supra* at 599-600.

Defendant Dr. Schroder was board certified in general surgery. Because Dr. Schroder was performing an appendectomy on plaintiff's minor child, it would have been reasonable for counsel for plaintiff to conclude that Dr. Schroder was engaged in the specialty of general surgery at the time of the alleged negligence.[5] Furthermore, because Dr. Schroder was board certified in general surgery, it was reasonable for counsel for plaintiff to conclude that an affidavit of merit with respect to Dr. Schroder must be signed by a board certified general surgeon. MCL 600.2169(1)(a). Dr. Collier's curriculum vitae (CV) states that Dr. Collier is board certified in general surgery. Thus, based on the information available to counsel for plaintiff at the affidavit of merit stage of the proceedings, it was reasonable for plaintiff's counsel to conclude that Dr. Collier could sign an affidavit of merit with respect to Dr. Schroder.

Defendants argue that plaintiff failed to properly investigate Dr. Collier's credentials and that a review of Dr. Collier's CV and Dr. Collier's responses to questions during his deposition clearly demonstrated that he devoted a majority of his clinical practice to vascular surgery. Thus, defendants contend, plaintiff's attorney could not have had a reasonable belief that Dr. Collier satisfied MCL 600.2169(1)(b) with respect to Dr. Schroder, who devoted a majority of his professional time to general surgery. According to Dr. Collier's CV, in addition to being board certified in general surgery, Dr. Collier has added qualifications in vascular surgery and is a member of several vascular organizations. At the affidavit of merit stage of the proceedings,

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[5] In its order dismissing plaintiff's complaint without prejudice following its determination that Dr. Rothenberg was not qualified to testify at trial, the trial court determined that the relevant specialty at the time of the alleged malpractice was "surgery." Furthermore, defendants' brief on appeal asserts that "Dr. Schroder was specializing in general surgery at the [time of] the alleged malpractice . . . ."

counsel for plaintiff's awareness of Dr. Collier's vascular qualifications and membership in vascular organizations does not, without more, constitute information that Dr. Collier devoted the majority of his professional time to vascular surgery in the year preceding the alleged malpractice, and does not render unreasonable counsel's belief that Dr. Collier could sign the affidavit of merit with respect to Dr. Schroder. In addition, we also reject defendants' argument that Dr. Collier's responses to questions in his deposition, in which he asserted that he devoted 60% of his practice to vascular surgery and 40% of his practice to general surgery, demonstrate the unreasonableness of counsel for plaintiff's belief that Dr. Collier could sign the affidavit of merit with respect to Dr. Schroder. Even assuming that Dr. Collier's deposition testimony establishes that Dr. Collier devoted a majority of his professional time to vascular surgery in the year preceding the alleged malpractice, Dr. Collier's deposition was taken December 1, 2006, almost one year after plaintiff's complaint was filed on December 9, 2005, and more than one year after Dr. Collier signed his affidavit of merit on July 19, 2005. Discovery information, such as Dr. Collier's deposition, was not available to plaintiff's counsel at the affidavit of merit phase of the proceedings. *Grossman*, *supra* at 599. Thus, counsel for plaintiff could not have considered such information in determining whether Dr. Collier would satisfy MCL 600.2169(1)(b) with respect to Dr. Schroder. *Id.* at 599-600.

Defendants next argue that plaintiff could not have reasonably believed that one affidavit of merit would be sufficient with respect to two defendant physicians with distinct specialties. Defendants contend that Dr. Collier's affidavit could only be deemed effective with respect to defendant Dr. Rodriguez, who was board certified in vascular surgery, and that the affidavit was not merely deficient with respect to Dr. Schroder, but that, in effect, plaintiff failed to file an affidavit with respect to defendant Dr. Schroder. Accordingly, defendants assert that the statute of limitations was not tolled, and any claim against defendants Dr. Schroder and hospital is time barred. This argument is predicated on defendants' argument that the trial court erred in ruling that plaintiff's attorney reasonably believed that Dr. Collier satisfied MCL 600.2169 with respect to Dr. Schroder. Because we reject plaintiff's argument in that regard, defendants' argument that plaintiff in effect failed to file an affidavit of merit with respect to Dr. Schroder fails as well. Furthermore, we observe that while it is true that the statute of limitations is not tolled when a plaintiff in a medical malpractice action "wholly omits" to file an affidavit of merit as required by MCL 600.2912d(1), *Scarsella v Pollak*, 461 Mich 547, 553; 607 NW2d 711 (2000), our Supreme Court has rejected the argument that the filing of a defective affidavit of merit is the functional equivalent of failing to file an affidavit of merit. *Kirkaldy v Rim*, 478 Mich 581, 583-584; 734 NW2d 201 (2007).

Defendants finally argue that the trial court erred in dismissing plaintiff's complaint against them without prejudice following the trial court's determination that Dr. Rothenberg was not qualified to testify under MCL 600.2169. According to defendants, the trial court should have dismissed plaintiff's claim against them with prejudice because plaintiff has been unable to support her claim against defendants with expert testimony, and defendants have already spent a great deal of time and expense defending the litigation. "Generally, the decision whether to dismiss a case with prejudice is within the trial court's discretion." *Rinke v Auto Moulding Co*, 226 Mich App 432, 439; 573 NW2d 344 (1997). Because our legal system favors disposing of litigation on the merits, dismissing a case with prejudice should only be applied in extreme situations. *North v Dep't of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986).

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro