

STATE OF MICHIGAN
COURT OF APPEALS

SYLVIA DISTEFANO, as Independent Personal
Representative of the Estate of BABY GIRL
DISTEFANO, Deceased, and SYLVIA
DISTEFANO and JOHN DISTEFANO, Individually,

UNPUBLISHED
October 26, 1999

Plaintiffs-Appellees,

v

No. 204787
Oakland Circuit Court
LC No. 95-496139 NH

MICHIGAN WOMENS HEALTH INSTITUTE,
P.C., d/b/a MICHIGAN WOMENS HEALTH
INSTITUTE, and LAWRENCE B. PRUSSACK,
M.D.,

Defendants-Appellants.

Before: Hoekstra, P.J., and O'Connell and Danhof*, JJ.

O'CONNELL, J. (dissenting).

I respectfully dissent. The majority concludes that it was error for the trial court to admit the expert testimony of a witness who was not qualified under MCL 600.2169(1); MSA 27A.2169(1), this error was harmless. Unlike the majority, I cannot conclude that this error was harmless.

The majority notes that this case is "peculiar" in that the trial court was relying on *McDougall v Eliuk*, 218 Mich App 501; 554 NW2d 56 (1994), which was reversed after the trial court's ruling. See *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). However, this is irrelevant in determining whether the error was harmless. I would conclude that the error was not harmless because it was critical to the outcome of the case; therefore, to refuse to reverse is inconsistent with substantial justice. MRE 103(a); *Hurt v Michael's Food Center, Inc*, 220 Mich App 169, 177; 559 NW2d 660 (1996).

In this case, three out of the four expert witnesses who testified regarding the standard of care were not qualified under the statute and should not have been allowed to testify. Not only was one of

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

plaintiff's expert witnesses not qualified, but both of defendant's expert witnesses were also not qualified. Additionally, the testimony of plaintiff's experts differed in one important respect—one of the experts testified that Dr. Prussack violated the standard of care solely on the basis of his misreading of results from a blood test, while the other expert testified that it was the blood-test results and the presence of a fever that should have alerted Dr. Prussack to the infection. Although plaintiffs did not present alternative theories of liability, whether Sylvia Distefano reported the fever to Dr. Prussack was disputed at trial. The majority notes that “almost all of the testimony introduced at trial was proper,” but that three out of the four expert witnesses testifying to the standard of care should not have been allowed to testify. I cannot conclude that, where seventy-five percent of the expert testimony should not have been allowed, the evidentiary error was harmless. Accordingly, I would reverse and remand for a new trial.

/s/ Peter D. O'Connell