STATE OF MICHIGAN

COURT OF APPEALS

PAULINE SHENDUK,

Plaintiff-Appellant,

v

HARPER HOSPITAL and JOSEPH G. TALBERT,

Defendants-Appellees.

UNPUBLISHED
October 29, 1999

Nos. 199547, 200389
Wayne Circuit Court
LC Nos. 96-619269 NH
96-641382 NH

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

MURPHY, J. (concurring and dissenting).

I concur in the majority's analysis of plaintiff's arguments because I am compelled to do so by the recent Supreme Court decision in *McDougall v Shanz*, 461 Mich 15; 597 NW2d 148 (1999), and adherence to established rules of statutory construction. I write separately, however, to express my view that this produces a nonsensical and likely unjust result under the facts of this case. I dissent from the result reached by the majority because I believe there existed an alternative to the remedy of dismissal imposed by the trial court.

I first note my concerns with the majority analysis in which I reluctantly concur. Application of the *McDougall* holding in this case effectively requires this Court to acquiesce in closing the door of the courthouse to a seriously injured party because the party's proffered expert witness, who from the record appears highly qualified, does not possess the same credentials as that of the treating physician. This outcome is mandated by *McDougall*, even though a different result would obtain under judicially established rules of evidence relating to qualification and admissibility of expert witness testimony. MRE 702.[1] Unlike the majority in this case, I do respectfully question the *McDougall* decision because of its impact on the judiciary's constitutional authority to govern trials by determining rules of practice and procedure. By applying the *McDougall* holding in this case, we may well be witnessing an injustice by giving superiority to an act of the Legislature that runs contrary to a judicially created rule of evidence promulgated under the authority of the Michigan Constitution.[2]

In this case, as the majority concisely explains, however, well-established principles of statutory interpretation mandate the conclusion that plaintiff's attorney could not have "reasonably believed," under MCL 600.2912d(1); MSA 27A.2912(4)(1), that Dr. Fiore met the requirements for an expert

witness pursuant to MCL 600.2169; MSA 27A.2169. My concern is that in this case these principles restrict our ability to afford a more logical construction to the expert witness statute we are now compelled to apply. As indicated, application of this expert witness statute is compelled by the Supreme Court's recent decision holding the statute constitutional. *McDougall, supra*.

MCL 600.2169; MSA 27A.2169 was enacted because the Legislature was dissatisfied with the manner in which some trial courts, in the medical malpractice arena, exercised their discretion regarding expert witnesses under MRE 702. See n 3, *post*. Despite the ability of appellate courts to check the inappropriate exercise of this discretionary power, the Legislature instead removed all discretion. In determining that this restrictive statute takes precedence over MRE 702, the Supreme Court has severely hampered our ability to provide justice. This case is especially illustrative of the negative effect of the Supreme Court's decision as a doctor who would unquestionably qualify as an expert witness under MRE 702 is, by operation of MCL 600.2169; MSA 27A.2169, excluded from participation in this case. Moreover, by operation of MCL 600.2912d(1); MSA 27A.2912(4)(1), which incorporates the expert witness statute, the courtroom door has in fact been slammed shut in the face of this plaintiff.

I agree with Justice Cavanagh's concern, *McDougall, supra* at 58-63, regarding that majority's determination that rules implicating considerations of "judicial dispatch," and nothing more, remain the only rules as to which the judiciary may exercise its constitutional grant of supremacy. In exercising control over previous medical malpractice actions courts could flexibly employ MRE 702 to weed out claims with no legal merit. In applying this rule courts undoubtedly, and appropriately, considered factors other than efficiency and judicial dispatch. Because more than efficiency was at issue, however, the Supreme Court has removed that flexibility. The result in this case follows, and I am not convinced that the negation of the judiciary's constitutional authority to control this aspect of trial proceedings was appropriate. Handcuffed as we are, what appears to be a meritorious claim is foreclosed by the operation of statutes enacted with the primary intent of screening out frivolous actions.

As a threshold to initiating a medical malpractice action, pursuant to MCL 600.2912d(1); MSA 27A.2912(4)(1) the complainant must also file an affidavit of merit. This statute establishes the requirements of the affidavit, providing in pertinent part:

> . . . 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. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

The only issue of contention regarding the adequacy of this plaintiff's affidavit concerns whether plaintiff's attorney *reasonably believed* that the signatory of the affidavit qualified as an expert witness under MCL 600.2169; MSA 27A.2169, which in turn provides in pertinent 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:

(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.

* * *

(2) In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

(a) The educational and professional training of the expert witness.

(b) The area of specialization of the expert witness.

(c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.

(d) The relevancy of the expert witness's testimony.

In this case, the evidence is undisputed that defendant Dr. Talbert was board certified in general surgery and in thoracic surgery with a specialty in cardiothoracic surgery. It is further undisputed that plaintiff's proffered expert, Dr. Louis Fiore, was board certified in internal medicine and in the subspecialty of medical oncology and the subspecialty of hematology. As drafted, the statute clearly requires that when a defendant has board certification in a particular specialty an expert witness must hold matching board certification. Thus the majority's finding, that "under the clear and unambiguous statutory language of MCL 600.2169; MSA 27A.2169, Dr. Fiore was not qualified to give expert testimony in this case," is the only permissible conclusion. I nevertheless sympathize with plaintiff's argument that by such operation the statute can, and in this case has, worked a nonsensical result.

Plaintiff's contention is that the statute is arguably ambiguous to the extent that it does not provide for every possible scenario of alleged medical malpractice. Specifically, in this case plaintiff argues that Dr. Talbert was acting outside the scope of his specialty when the alleged malpractice occurred. Plaintiff argues that because the expertise of the specialty may be demonstratively irrelevant to such a claim, we should find that it could not have been the Legislature's intent to require a matching specialist under such circumstances. Thus, plaintiff argues, we should find credible the contention that it was *reasonably believed* that despite not satisfying MCL 600.2169; MSA 27A.2169 Dr. Fiore would qualify as an expert sufficient for the purpose of filing the affidavit of merit.

Given the preliminary facts supporting this claim, plaintiff's argument is compelling. Plaintiff alleges that Dr. Talbert's malpractice occurred during post-operative treatment with heparin, contending that treatment with this drug is generic to all medical fields and is not distinct within the cardiothoracic specialty. Dr. Fiore's curriculum vitae unquestionably demonstrates that he is an expert on the issue of heparin treatment. Assuming that plaintiff's theory could be established at trial, the argument that Dr. Fiore's testimony would be of significant help to the jury is well founded. As the statute reads on its face, however, Dr. Fiore's lack of knowledge regarding the allegedly irrelevant field of cardiothoracic surgery prevents the jury from hearing his highly relevant testimony on the critical issue.

The requirement of matching specialties may make sense in the context of alleged malpractice within the scope of the specialty as it limits testimonial privileges to those doctors with equivalent knowledge of and experience in the subject area.[3] If a doctor commits malpractice while acting outside the scope of his specialty, however, the statutory requirement operates to limit testimony to that of a doctor potentially as unqualified as the defendant in the area of practice at issue, a result blatantly counterintuitive.[4] On its face the statute wholly fails to provide for such a scenario, suggesting no avenue by which parties can ensure that under such circumstances the best expert testifies. As a consequence today's conclusion results.

As we are compelled to so enforce the matching specialist requirement, a major intent of the statute is effectively eviscerated. I cannot, however, reconcile my reservations about the statute with a legal analysis that would permit the result plaintiff prays we reach. There simply is none. The language of the statute is clear and unambiguous - plaintiff's suggestion notwithstanding - and we must therefore apply its plain meaning. See *Rickner v Frederick,* 459 Mich 371, 378; 590 NW2d 288 (1999). That it is apparent that the Legislature made no provision for circumstances such as these, unfortunately does not change our duty. In fact, it is arguable that our adherence to the "plain meaning" principle is further mandated by the history of the statute. The statutory language we now consider is that of the 1993 version of the statute. Prior to this most recent amendment the pertinent language of the 1986 version read:

> (1) In an action alleging medical malpractice, if the defendant is a specialist, a person shall not give expert testimony on the appropriate standard of care unless the person is or was a physician licensed to practice medicine or osteopathic medicine and surgery or a dentist licensed to practice dentistry in this or another state and meets both of the following criteria:

> (a) Specializes, or specialized at the time of the occurrence which is the basis for the action, in the same specialty *or a related, relevant area of medicine* or osteopathic medicine and surgery or dentistry as the specialist who is the defendant in the medical malpractice action. [Emphasis added.]

"A change in statutory language is presumed to reflect a change in the meaning of the statute." *Eaton Farm Bureau v Eaton Township*, 221 Mich App 663, 668; 561 NW2d 884 (1997). Thus, the increased restriction of the current 1993 version, not allowing for specialists of a *related* discipline, indicates that strict adherence is intended.

Despite my inability to interpret these statutes in accord with plaintiff's argument, I would nevertheless reverse the trial court's dismissal in Docket No. 199547. In *VandenBerg v VandenBerg*, 231 Mich App 497, 502; 586 NW2d 570 (1998), where the plaintiff failed to file an affidavit of merit at the time she filed the complaint, this Court concluded that MCL 600.2912d; MSA 27A.2912(4) does not mandate dismissal for noncompliance.[5] Noting that the trial court in that case did not consider any other sanction for the plaintiff's noncompliance, this Court determined that the purpose of deterring frivolous suits was fulfilled because the defendants received service of the appropriate affidavit of merit at the same time as they received service of the complaint. *Id.* at 502-503. Although, as concluded under the mandated interpretation of the statutes, this plaintiff's timely affidavit of merit was *technically* inappropriate, I believe that this affidavit similarly satisfied the statutory purpose.

From the record, it appears that the trial court's review of plaintiff's affidavit of merit was cursory at best. Noting only that the two doctors' specialties did not match, and dismissing the action on that basis, the court refused to consider plaintiff's contention that the affidavit supported the meritorious nature of the claim of malpractice related to the hematological aspects of plaintiff's treatment. As discussed, I believe plaintiff's argument has merit. I further believe that close examination of the affidavit and Dr. Fiore's credentials supports that argument. I would find that in failing to fully consider the affidavit, and by contemplating no remedy other than dismissal, the trial court's review did not serve the purpose of the statute.

Dismissal not mandated by the statute, the trial court could have entered an alternative order. In the most obvious possibility, reflective of the remedy provided by MCL 600.2912d(2); MSA 27A.2912(4)(2), the court could have required plaintiff to refile a compliant affidavit within twenty-eight days. Though it may be argued that dismissal without prejudice did not wholly foreclose plaintiff's action - the trial court did acknowledge plaintiff's ability to refile the entire complaint - I do not believe that these alternative orders are practically equivalent. An order requiring plaintiff to secure a new affidavit in twenty-eight days would unquestionably have demanded less to sustain the claim than plaintiff was forced to do under the dismissal order. As indicated by the majority in its discussion of Docket No. 200389, for whatever the reason plaintiff was unable to refile the papers necessary to reinitiate her action, of which a new affidavit was but one item, within the time remaining under the statute of limitations. Had the court better evaluated the merit of plaintiff's claim, in light of the relevant though technically inappropriate affidavit, a more specific order requiring mere correction of the technical failing would perhaps have resulted in the maintenance of this non-frivolous action. Given the failure to

consider alternative remedies, I would reverse on a finding that imposition of the harsh sanction of dismissal was inappropriate. *Id.* at 503.

As the majority has affirmed the trial court, however, I would respectfully urge the Supreme Court to utilize this case as a vehicle to reconsider its ruling in *McDougall* and its attendant ramifications. As my comments above indicate, deference to the Legislature should not come at the expense of the judiciary's constitutional responsibility to provide for and protect the practice and procedures established to assure that justice occurs.

/s/ William B. Murphy

[1] MRE 702 provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[2] "The Supreme Court shall by general rules establish, modify, amend and simplify the practice and procedures in all courts of this state . . . ." (Const 1963, art 6, § 5.)

[3] See *Report of the Senate Select Committee on Civil Justice Reform*, issued September 26, 1995 (emphasis added), stating in pertinent part:

> As a practical matter, in many courts merely a license to practice medicine is needed to become a medical expert on an issue.
>
> This has given rise to a group of national professional witnesses who travel the country routinely testifying for plaintiffs in malpractice actions. These "hired guns" advertise extensively in professional journals and compete fiercely with each other for the expert witness business. For many, testifying is a full-time occupation and they rarely actually engage in the practice of medicine. There is a perception that these so-called expert witnesses will testify to whatever someone pays them to testify about.
>
> *This proposal is designed to make sure that expert witnesses actually practice or teach medicine. In other words, to make sure that experts will have firsthand practical expertise in the subject matter about which they are testifying.* In particular, with the malpractice crisis facing high-risk specialists, such as neurosurgeons, orthopedic surgeons and ob/gyns, this reform is necessary to insure that in malpractice suits against specialists the expert witnesses actually practice in the same specialty. This will protect the integrity of our judicial system by requiring real experts instead of "hired guns."

[4] See *McDougall, supra,* Cavanagh, J. dissenting, at 67, (anticipating precisely the scenario now faced and concluding that under such circumstances the statute frustrates its purpose).

[5] Cf. *Scarsella v Pollak,* 232 Mich App 61; 591 NW2d 257 (1998), in which a separate panel of this Court reached the opposite conclusion where the plaintiff filed his affidavit of merit only after the statute of limitations had run. Although the *Scarsella* panel explicitly distinguished *VandenBerg* in a footnote, the analyses in the bodies of these two opinions appear contradictory.