

STATE OF MICHIGAN
COURT OF APPEALS

GARY MEYERS,¹

UNPUBLISHED
December 10, 1999

Plaintiff-Appellant,

v

No. 209718
Wayne Circuit Court
LC No. 96-646574 NH

JEROME W. CIULLO, M.D., and SPORTS
MEDICINE CENTER OF METRO DETROIT,
P.C.,

Defendants-Appellees.

Before: Doctoroff, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

The trial court granted defendant's motion in limine to disqualify plaintiff's expert witness from giving standard of care testimony regarding a hemi-arthroplasty that defendant, Dr. Ciullo, performed on plaintiff's shoulder. Because plaintiff had no other evidence by which to establish damages resulting from a failure by Dr. Ciullo to comply with the recognized standard of care applicable to him, the court also granted summary disposition to defendants. Plaintiff now appeals by right. We affirm.

Dr. Ciullo is a board certified orthopedic surgeon and world recognized expert in shoulder surgery. Plaintiff presented to Dr. Ciullo complaining of pain, instability, and internal derangement of his left shoulder. Dr. Ciullo performed a diagnostic arthroscopy, and subsequently performed a hemi-arthroplasty, which included implanting a shoulder prosthesis. Apparently the hemi-arthroplasty was unsuccessful in eliminating plaintiff's difficulties and eventually, Dr. Ciullo recommended additional surgery. Plaintiff sought another opinion, and was told that the left shoulder prosthesis implanted by Dr. Ciullo was loose and its base was eroding his humerus bone. Moreover, the head of the prosthesis was sitting too high, forcing plaintiff's rotator cuff to ride over the head of the prosthesis. Plaintiff sued Dr. Ciullo and the clinic from which he works, based on the theory that the present condition of his shoulder resulted from, or was exacerbated by, the professional negligence of Dr. Ciullo.

On the day of trial, defendants moved to preclude standard of care testimony by plaintiff's proposed expert witness, Dr. Arthur Lorber, who had been deposed four days earlier by telephone.

Dr. Lorber testified to being in private practice as an orthopedic surgeon since 1970. He completed his residency in orthopedic surgery at the University of Kentucky in 1972 and was board certified in orthopedic surgery in 1973. He did not complete any fellowships following the completion of his residency. Dr. Lorber testified that he ceased all hospital affiliations in 1991 or 1992, and has since been doing office practice, consultations and evaluations.

During the time period that Dr. Ciullo performed the hemi-arthroplasty on plaintiff, Dr. Lorber was no longer performing surgeries. Although Dr. Lorber's special interest was the spine, he is a general orthopedic surgeon. Dr. Lorber is not a member of American College of Orthopedic Surgeons, nor a member of the American Shoulder and Elbow Surgeon Society. Dr. Lorber never performed a total arthroplasty of the shoulder, although he did do shoulder surgeries such as rotator cuff repair, acromioplasty, excision of the distal clavicle, and repair of the anterior capsule and labrum. He did participate in hemi-arthroplasties during his residency and has read about and seen many cases done by other physicians. He reads every issue of the monthly *Journal of Bone and Joint Surgery*.

The trial court expressed its concern that, pursuant to MRE 702, Dr. Lorber did not appear to be sufficiently familiar with the procedure at issue to express an expert opinion on the standard of care applicable to Dr. Ciullo. The trial court found that any opinion Dr. Lorber might render regarding whether Dr. Ciullo properly diagnosed plaintiff's problems and performed the hemi-arthroplasty correctly, derived solely from the benefit of hindsight and the fact that the hemi-arthroplasty was not successful in eliminating plaintiff's shoulder problems -- not from any personal knowledge or skill that Dr. Lorber had regarding this procedure. Consequently, the trial court granted defendants' motion to preclude Dr. Lorber from giving expert testimony. Immediately thereafter, defendants brought an oral motion for summary disposition on the basis that, with the exclusion of Dr. Lorber, plaintiff had no evidence to establish that Dr. Ciullo had not complied with his applicable standard of care. The trial court granted defendants' motion for summary disposition.

Plaintiff contends that because Dr. Lorber, like Dr. Ciullo, was a board certified orthopedic surgeon, he was qualified by knowledge, skill, experience, training or education, to testify, pursuant to MRE 702, as an expert witness in a medical malpractice case involving orthopedic surgery. We are mindful that, at the time the trial court rendered its decision, MCL 600.2169; MSA 27A.2169, a statute that sets specific qualifications for experts giving standard of practice testimony in a medical malpractice action, had been determined by this Court to be unconstitutional. *McDougal v Eliuk*, 218 Mich App 501, 505-506; 554 NW2d 56 (1996), rev'd sub nom *McDougal v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). We are also aware that the statute in question expressly provides: "This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section." MCL 600.2169(3); MSA 27A.2169(3). Consequently, as a threshold matter, we must determine if the trial court properly excluded the challenged testimony under MRE 702. We review the court's decision in this regard only for an abuse of discretion. *Bahr v Harper-Grace Hosps*, 448 Mich 135, 141; 528 NW2d 170 (1995). "An abuse of discretion exists where an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there is no justification for the ruling made." *Carpenter v Consumers Power Co*, 230 Mich App 547, 562; 584 NW2d 375 (1998).

In professional malpractice cases, expert testimony is usually required to establish the standard of care, breach of that standard and causation. *Locke v Pachtman*, 446 Mich 216, 223-224; 521 NW2d 786 (1994). “A party offering the testimony of an expert witness must demonstrate the witness’ knowledge of the applicable standard of care.” *Bahr, supra* at 141.

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 by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

For purposes of a medical malpractice claim, a doctor is a specialist by virtue of advanced training and board certification in a particular field of medicine, not by virtue of a practice concentrated on one part of the body. *Jalaba v Borovoy*, 206 Mich App 17, 21-22; 520 NW2d 349 (1994). Consequently, Dr. Lorber was a specialist in the same field of medicine as Dr. Ciullo, orthopedic surgery. However, that fact alone is not dispositive, in light of the evidence that Dr. Lorber lacked significant familiarity with the procedure at issue (i.e., shoulder hemi-arthroplasty). Although the weight and credibility of a qualified expert’s testimony is for the jury to determine, *Carpenter, supra* at 561, the initial matter of qualification is left to the trial court, MRE 104; MRE 702; MRE 403. See, also, *Bahr, supra* at 141. Because an unprejudiced person would have serious reservations as to whether Dr. Lorber was sufficiently qualified by knowledge, skill, experience, training or education, to provide expert testimony as to the standard of care applicable to Dr. Ciullo in the performance of the procedure in question, we cannot say that the trial court abused its discretion in failing to qualify Dr. Lorber, under MRE 702, to provide standard of care testimony in this case.

Because we hold that the court properly excluded the challenged testimony under MRE 702, we find it unnecessary to address whether the testimony would also have been properly excluded under MCL 600.2169; MSA 27A.2169.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

¹ Sharon Meyers was dismissed as a plaintiff, below, with prejudice, by stipulation of the parties, prior to the entry of the order being appealed.