

STATE OF MICHIGAN
COURT OF APPEALS

JOHN H. HENIGE,

Plaintiff-Appellant,

v

DR. MICHAEL R. DEMERS, M.D., DR. ALLAN
M. GRANT, M.D., and ASSOCIATED
ORTHOPEDICS OF DETROIT, P.C.,

Defendants-Appellees.

UNPUBLISHED

October 29, 2002

No. 233282

Macomb Circuit Court

LC No. 98-002733-NH

Before: Hoekstra, P.J., and Wilder and Zahra

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motions for summary disposition in this medical malpractice action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiff's action is based on defendants' alleged failure to properly diagnose and treat a plantar wart on his left foot. Plaintiff presented two expert witnesses to establish his claim, David Touchton and Edwin Season. The trial court ruled that Touchton was not qualified to testify as an expert because he did not meet the qualifications set forth in MCL 600.2169, a ruling not challenged on appeal. The trial court further found that Season's testimony was insufficient to establish a violation of the applicable standard of care and granted the motions.

Season testified that given the description of plaintiff's condition in the medical records and the ultimate diagnosis of a wart, he believed that the condition defendants treated "probably was a wart." Season testified that even if the condition was a wart, defendants would not

necessarily have violated the standard of care by diagnosing a callus and performing surgery. They would have violated the standard of care only if the condition was a wart and distinguishing features specific to a wart were present. If it was a callus or had in fact appeared the way it was described in Grant's notes, then defendants had not violated the applicable standard of care in treating it with surgery.

Because Season could not determine from the records the exact nature of the condition confronting defendants and thus could not state with certainty that defendants had committed malpractice, plaintiff proposed to have Touchton testify that the condition was in fact a wart, thus providing a basis for Season to testify that the treatment rendered by defendants violated the standard of care. However, Touchton did not know for a fact that the condition defendants observed was a wart because he did not see it himself. Rather, he concluded from plaintiff's history and the description of the condition that it must have been a wart. In other words, unlike Season, Touchton was prepared to say that the condition described by defendants showed the distinguishing features specific to a wart. This is simply another way of saying that defendants failed to properly diagnose plaintiff's condition, and an expert must meet the requirements of MCL 600.2169 to render such an opinion. Therefore, the trial court did not err in granting defendants' motions.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra