

STATE OF MICHIGAN
COURT OF APPEALS

MELISSA BUDZINSKI ALLIET,
Plaintiff-Appellant,

v

JOSEPH BERENHOLZ, M.D.,
Defendant-Appellee.

UNPUBLISHED
February 12, 2004

No. 242469
Oakland Circuit Court
LC No. 01-033900-NM

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition. We reverse.

Plaintiff filed suit alleging that defendant, who is board certified in obstetrics and gynecology, committed medical malpractice when he delayed performing a cesarean section, thereby causing excessive bleeding and necessitating the performance of a hysterectomy.¹ Plaintiff attached an affidavit of merit from Dr. Hariton, who is board certified in obstetrics and gynecology.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that plaintiff failed to comply with MCL 600.2912d in that she did not file an affidavit of merit signed by a health professional who met the requirements stated in MCL 600.2169. The trial court granted defendant's motion and dismissed the case in its entirety, concluding that Dr. Hariton did not meet the requirements for an expert witness listed in MCL 600.2169(1) because, in the year immediately preceding the incident that gave rise to plaintiff's cause of action, he did not actively practice obstetrics. The trial court concluded that plaintiff's affidavit of merit was defective, and that defendant was entitled to summary disposition.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

¹ Plaintiff's complaint also alleged vicarious liability against non-participating defendant Providence Hospital and Medical Centers, Inc.

A medical malpractice plaintiff must file with the complaint an affidavit of merit signed by a health professional who meets or who the plaintiff's attorney reasonably believes meets certain statutory requirements. If the defendant is board certified in a specialty, the expert witness must be board certified in the same specialty. Furthermore, during the year preceding the incident which is the basis of the claim, the expert witness must have devoted a majority of his or her professional time either to the active clinical practice of the area in which the defendant specializes, or to the instruction of students or residents in that specialty. MCL 600.2912d; MCL 600.2169(1).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We agree. Plaintiff's complaint alleged that defendant delayed performing a cesarean section, and that the delay caused excessive bleeding which necessitated the performance of a hysterectomy that was performed negligently. The issues in this case relate directly to the specialty of obstetrics and gynecology. There is no dispute that Dr. Hariton was board certified in obstetrics and gynecology, as was defendant, or that he actively practiced gynecology and gynecologic surgery. Additionally, Dr. Hariton testified in his deposition that in the year preceding the incident that gave rise to plaintiff's claim he would see obstetrics patients "up to the first three months of pregnancy" and that, even though he no longer performed "primary deliveries," he continued to "assist in cesarean sections." The trial court's factual finding that Dr. Hariton was not practicing or teaching in obstetrics within one year immediately preceding the date of the occurrence is clearly erroneous. The trial court erred by concluding that Dr. Hariton did not meet the requirements for an expert witness in MCL 600.2169(1), and that plaintiff's affidavit of merit did not meet the requirements of MCL 600.2912d.

Reversed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White