

Court of Appeals, State of Michigan

ORDER

Lawrence Kwasniewski III v Steven D. Harrington MD

Docket No. 268774

LC No. 04-401893-NH

Stephen L. Borrello
Presiding Judge

Kathleen Jansen

Jessica R. Cooper
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued February 27, 2007 is hereby VACATED. A new opinion will be issued.

The Court orders that the motion to file amicus curiae brief is GRANTED.

Judge Jansen would DENY the motion for reconsideration.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR 12 2007
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

LAWRENCE KWASNIEWSKI III, Personal
Representative of the Estate of LAWRENCE
KWASNIEWSKI JR.,

UNPUBLISHED
February 27, 2007

Plaintiff/Cross-Appellee-Appellant,

v

No. 268774
Wayne Circuit Court
LC No. 04-401893-NH

STEVEN D. HARRINGTON, M.D., and
SOUTHEASTERN MICHIGAN CARDIAC
SURGEONS,

Defendants,

and

ST. JOHN HOSPITAL AND MEDICAL CENTER,

Defendant/Cross-Appellant-
Appellee

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals by leave granted, and defendant cross-appeals, the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).¹ The trial court granted summary disposition, in relevant part, based on the inadequacy of plaintiff's notice of intent (NOI), MCL 600.2912b, as it related to Dr. Colleen App, a general surgery resident at defendant hospital. We affirm, but for a different reason than that articulated by the trial court.

I. Facts and Procedural History

¹ Plaintiff's appeal relates only to the trial court's grant of summary disposition as to defendant hospital's vicarious liability for one of its resident physicians, Dr. Colleen App, who was not named as a defendant in plaintiff's lawsuit against defendants. Dr. App's involvement in the care of plaintiff's decedent will be discussed more fully below.

On October 17, 2001, plaintiff's decedent underwent coronary artery bypass graft surgery. Defendant Dr. Harrington performed the surgery at defendant hospital. About two hours after the decedent's surgery, immediately after he had been transferred to the intensive care unit, hospital personnel observed massive bleeding from his chest tube and a code was called. Dr. App, a general surgical resident (and the chief surgical resident) at defendant hospital, responded to a page from the ICU. Defendant Dr. Harrington, who was driving home at the time, was contacted by cell phone. Apparently pursuant to Dr. Harrington's direction, Dr. App opened the decedent's chest and attempted to stop the bleeding, but without success. Dr. Harrington returned to the hospital, located the site of the bleeding, and surgically repaired it. The decedent was pronounced dead that day due to bleeding from the surgery site and aortic rupture.

Plaintiff filed his first NOI on September 4, 2002. The NOI named Drs. Harrington and George Haddad, defendant hospital, Southeastern Michigan Cardiac Surgeons, and "any employees or agents" of those defendants who were involved in the decedent's treatment. On January 8, 2004, plaintiff filed an amended NOI. On January 22, 2004, plaintiff filed a wrongful death action against defendants. Plaintiff attached to his complaint the affidavit of Don Patrick, M.D., who was board certified in both general surgery and cardio thoracic surgery.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that summary disposition should be granted as to all individual defendants other than Dr. Harrington. Regarding Dr. App, defendant argued that plaintiff did not have a viable claim against Dr. App because neither the NOI nor the affidavit of merit identified a claim based on her conduct. Defendant also claimed that because plaintiff's affidavit of merit was signed by Dr. Patrick, a specialist in cardio thoracic surgery, plaintiff failed to satisfy MCL 600.2169 because Dr. Patrick was not qualified to address the standard of care for Dr. App, who was a resident in general surgery. The trial court granted defendant's motion for summary disposition. In granting the motion with respect to defendant hospital's vicarious liability for the conduct of Dr. App, the trial court stated:

In the present case, because Plaintiff's NOI is silent with regard to any breach of the standard of care related to treating Plaintiff's decedent's post-operative hemorrhaging, the Plaintiff failed to minimally allege that Dr. App, as an agent of Defendant St. John Hospital, was at fault. Because the Court finds that the NOI failed to identify a claim based on Dr. App's conduct, it need not address Defendant's allegations that the Affidavit of Merit was deficient.

Plaintiff moved for reconsideration of the trial court's rulings related to Dr. App. The trial court denied plaintiff's motion, ruling:

Throughout his pleadings, Plaintiff states that the standard of care applicable to Dr. App required her to (1) open Plaintiff's decedent's chest; (2) identify the source of bleeding; and (3) place her finger on the site of the bleeding to control it. Per Roberts II [*Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 686; 684 NW2d 711 (2004)], Plaintiff was not required to state such a detailed standard of care in his NOI. However, Plaintiff was required to state a standard of care and alleged breach sufficient to put St. John Hospital on notice as to Plaintiff's claim that its agent, Dr. App, had failed to properly treat

the decedent's hemorrhage. Plaintiff's NOI does not state a standard of care that even approximates "(1) open Plaintiff's decedent's chest; (2) identify the source of bleeding; and (3) place her finger on the site of the bleeding to control it."

II. Standard of Review

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Memorial Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005).]

III. Analysis

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition based on the failure of plaintiff's NOI to comply with MCL 600.2912b(4). Whether plaintiff's NOI complied with MCL 600.2912b(4) is a close question. However, we need not resolve this issue on appeal because we are persuaded by defendant's argument on appeal that summary disposition was appropriate because plaintiff's affidavit of merit failed to comply with MCL 600.2169.

To commence a medical malpractice action, a plaintiff must file both a complaint and an affidavit of merit. MCL 600.2912d(1); *Saffian v Simmons*, 267 Mich App 297, 302; 704 NW2d 722 (2005), lv pending 475 Mich 861 (2006). The affidavit of merit must be signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. MCL 600.2912d(1); *Saffian, supra* at 302. MCL 600.2169 provides, in relevant 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.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) Active clinical practice as a general practitioner.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

At the time of her alleged negligence and the death of plaintiff's decedent, Dr. App was a surgical resident, training to become a doctor of general surgery. To the extent that plaintiff's complaint alleges that defendant hospital is vicariously liable for the conduct of its employees,² which include Dr. App, we observe that a plaintiff who sues a hospital and alleges that the hospital is vicariously liable for the negligent conduct of one its physicians "must submit with a

² In fact, plaintiff's complaint does not contain a vicarious liability claim and does not specifically allege that defendant hospital is vicariously liable for the conduct of Dr. App.

medical-malpractice complaint . . . an affidavit of merit from a physician who specializes or is board-certified in the same specialty as that of the institutional defendant's agents involved in the alleged negligent conduct." *Nippa v Botsford General Hosp (On Remand)*, 257 Mich App 387, 393; 668 NW2d 628 (2003); see also MCL 600.2912d(1). As a surgical resident, Dr. App was not board certified in any specialty at the time of plaintiff's decedent's death and therefore was not considered a specialist. This Court has previously stated that "[i]t is clear that interns and residents are not 'specialists[.]'" *Bahr v Harper-Grace Hosps*, 198 Mich App 31, 34; 497 NW2d 526 (1993), rev'd on other grounds 448 Mich 135 (1995). See also *Carlton v St John Hosp*, 182 Mich App 166, 173; 451 NW2d 543 (1989) (holding that the trial court did not abuse its discretion in refusing to permit the expert testimony of an internist and cardiologist against a resident).

Because Dr. App was considered a general practitioner at the time of the decedent's death, MCL 600.2169(1)(c) applies, and Dr. Patrick was only qualified to give expert testimony against Dr. App if he, in the year preceding the death of plaintiff's decedent, devoted the majority of his professional time to active clinical practice as a general practitioner or to the instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession as Dr. App. Dr. Patrick testified in his deposition that in 2001, he was not practicing as a general surgeon and that he was not actively teaching residents, medical students or interns in any capacity. MCL 600.2169(1)(c) actually requires an expert to actively practice as a general practitioner, not a general surgeon. While Dr. Patrick stated in his deposition that he had not actively practiced as a general surgeon in the year preceding Dr. App's alleged negligence, there is no evidence in the record that Dr. Patrick actively practiced as a general practitioner in the year preceding Dr. App's alleged negligence. To the contrary, Dr. Patrick's deposition testimony established that in 2001, Dr. Patrick practiced medicine as a cardio thoracic surgeon and also performed some peripheral vascular repair and some thoracic surgery. Therefore, because Dr. Patrick did not devote a majority of his professional time to active clinical practice as a general practitioner and was not involved in the instruction of students in 2001, Dr. Patrick was not qualified under MCL 600.2169(1)(c) to testify against Dr. App.

In *Bahr v Harper-Grace Hosps*, 448 Mich 135, 141; 528 NW2d 170 (1995), our Supreme Court stated that a specialist may testify regarding the conduct of nonspecialists if the specialist has knowledge of the applicable standard of care. However, in his affidavit, Dr. Patrick did not assert that he was familiar with the standard of care for a general surgery resident. He only claimed to be "familiar with the standard of care for interns, residents, and physicians practicing in the field of cardio thoracic surgery"³ Furthermore, in his deposition, Dr. Patrick acknowledged that the standard of care for a board certified cardio thoracic surgeon was different than the standard of care for a general surgery resident, and he did not claim that he was

³ We note that in the lower court record, there is an affidavit purportedly prepared by Dr. Patrick that is not signed or notarized in which Dr. Patrick avers that he is board certified in general surgery and that he is familiar with the standard of care for general surgeons and senior general surgical residents. However, the parties do not reference this affidavit of merit and it does not appear that it was actually submitted to the trial court.

qualified or familiar with the standard of care applicable to interns and residents. The only thing Dr. Patrick said about Dr. App's standard of care in his deposition is: "Being a senior chief resident in general surgery, her response to the patient should have been at a higher standard."

One further factor that must be considered is whether plaintiff's counsel reasonably believed that Dr. Patrick was qualified to testify against Dr. App under MCL 600.2169(1). A plaintiff filing a medical malpractice action is required to file "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." MCL 600.2912d(1). A reasonable belief regarding an expert's qualifications is one that is confirmed by independent investigation. See *Grossman v Brown*, 470 Mich 593, 599-600; 685 NW2d 198 (2004). The websites for the American Board of Medical Specialties⁴ and the American Medical Association⁵ (AMA) indicate that Dr. Patrick is board certified in both surgery and thoracic surgery, and the AMA's website indicates that Dr. Patrick's specialty is thoracic surgery. Dr. Patrick indicated in his deposition that he had been board certified as a general surgeon since 1972,⁶ but that he never practiced as a general surgeon and was not practicing as a general surgeon in 2001. According to his deposition, he was certified in 1972 and had not been recertified because he was "grandfathered in." Dr. Patrick's affidavit states that Dr. Patrick is "board certified in the specialty of Cardio Thoracic Surgery" and that Dr. Patrick was "board certified in the specialty of Cardio Thoracic Surgery, familiar with the standard of care for interns, residents, and physicians practicing in the field of cardio thoracic surgery"

Dr. Patrick's affidavit of merit, which was prepared on December 31, 2003, did not assert that Dr. Patrick was board certified in general surgery. However, Dr. Patrick had been board certified in general surgery since 1972, and this information was readily available if counsel for plaintiff had undertaken an investigation. The fact that the second affidavit of merit, which was dated January 2005 and which was unsigned and unnotarized and apparently was never submitted to the trial court, did include information that Dr. Patrick was board certified in general surgery and that he was familiar with the standard of care for general surgeons and senior general surgical residents underscores that this information was available and that counsel for plaintiff did discover the fact that Dr. Patrick was board certified in general surgery sometime after the December 31, 2003, affidavit of merit was prepared. If counsel for plaintiff had investigated Dr. Patrick's credentials and been aware that he was board certified in general surgery, certainly he would have asked Dr. Patrick to include such information in the December 31, 2003, affidavit of merit. We therefore conclude that counsel for plaintiff failed to conduct an independent investigation of Dr. Patrick's credentials at the time of Dr. Patrick's December 31,

⁴ The American Board of Medical Specialties is the primary standard-setting organization for medical doctors. The address for the website is: <http://www.abms.org/>.

⁵ The address for the American Medical Association's website is <http://www.ama-assn.org/>.

⁶ The American Board of Medical Specialties contains a disclaimer stating: "Important Notice: This service is not completely accepted by the JCAHO and NCQA for commercial use to verify physician credentials because no dates are supplied."

2003, affidavit and that plaintiff's counsel therefore could not have reasonably believed that Dr. Patrick was qualified to testify against Dr. App under MCL 600.2169(1).

In sum, we affirm the granting of summary disposition in favor of defendant, but for a different reason than that articulated by the trial court.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper