

STATE OF MICHIGAN
COURT OF APPEALS

FLORA BROOKS,

Plaintiff-Appellant,

v

UNIVERSITY OF DETROIT MERCY SCHOOL
OF DENTISTRY, UNIVERSITY OF DETROIT
MERCY, and LINA KARAM, D.D.S.,

Defendants-Appellees.

UNPUBLISHED

October 23, 2007

No. 274932

Wayne Circuit Court

LC No. 06-608846-NH

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This dental malpractice case stems from treatment rendered by defendant Karam in April 2004. At that time, Karam was a fully licensed dentist involved in a residency program for specializing in oral and maxillofacial surgery (OMFS) but was not yet licensed as an oral surgeon or board certified in OMFS. Plaintiff's complaint was supported by an affidavit of merit from Dr. Richard Kraut, a dentist who is board certified in OMFS. Defendants contended that Karam, as a resident, was held to a general standard of care and that Kraut, as a specialist, was not qualified to serve as an expert pursuant to MCL 600.2169 and thus not qualified to provide an affidavit of merit pursuant to MCL 600.2912d.

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). Statutory interpretation is a question of law that is reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

A medical malpractice complaint must be accompanied by an affidavit of merit as provided by MCL 600.2912d. 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 section 2169." MCL 600.2912d(1). MCL 600.2169 "contains strict requirements concerning the qualification of expert witnesses in medical malpractice cases." *McDougall v Schanz*, 461 Mich 15, 28; 597 NW2d 148 (1999). In general, it requires "that the qualifications

of a purported expert match the qualifications of the defendant against whom that expert intends to testify.” *Decker v Flood*, 248 Mich App 75, 85; 638 NW2d 163 (2001). In addition, the expert must devote the majority of his professional time to the practice or teaching of the same health profession or specialty as practiced by the party against whom he testifies. MCL 600.2169(1)(b), (c).¹

Defendants’ argument finds support in *Decker* and *Bahr v Harper-Grace Hospitals*, 198 Mich App 31; 497 NW2d 526 (1993), rev’d in part on other grounds 448 Mich 135 (1995). In *Bahr*, this Court held that “interns and residents are not ‘specialists’ ” and thus “the applicable standard of care for such persons is” that applicable to general practitioners, i.e., “that of the local community or similar communities.” *Id.* at 34. In *Decker*, this Court held that that an expert who specializes in endodontics is not qualified to offer expert testimony as to the standard of practice of a general dentist even though he specialized in the type of treatment rendered by the defendant dentist. Therefore, *Bahr* compels the conclusion that Karam, as a general dentist who was a resident in OMFS, would be held to the standard of care applicable to general practitioners, and *Decker* compels the conclusion that Kraut, as a dentist who specializes in OMFS, is not qualified to serve as an expert witness against a general dentist who is training to specialize in, but is not yet licensed or board certified in, OMFS. Subsequent published cases, however, call these conclusions into doubt.

In *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), the Court, in analyzing MCL 600.2169, derived six principles regarding expert witnesses, including the following:

(1) “the plaintiff’s expert witness must match the one most relevant standard of practice or care – the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff’s expert must also be board certified in that specialty.” *Id.* at 560.

(2) “a ‘specialty’ is a particular branch of medicine or surgery in which one can potentially become board certified. Accordingly, if the defendant physician practices a particular branch of medicine or surgery in which one can potentially become board certified, the plaintiff’s expert must practice or teach the same particular branch of medicine or surgery.” *Id.* at 561.

In *Gonzalez v St John Hosp & Medical Ctr (On Reconsideration)*, 275 Mich App 290; ___ NW2d ___ (2007), the plaintiff’s expert, who was board certified in general surgery, supplied an affidavit of merit in a case against a surgical resident. *Id.* at 293. In light of *Woodard*, the Court determined that a surgical resident “was a physician who limited his training to surgery” and because he “could potentially become board-certified on completion of his

¹ While defendants questioned whether Kraut met the practice/teaching requirement of the statute, they presented no evidence indicating that he did not and limited their argument to whether Kraut, as a specialist, could serve as an expert witness against a resident. Consequently, we assume for purposes of this opinion that the practice/teaching requirement is not at issue.

residency,” he “would be considered a ‘specialist’” at the time he treated the plaintiff’s decedent. *Id.* at 298-299. The Court thus concluded that *Woodard* had overruled that portion of *Bahr* holding that residents are not specialists and held that “those physicians who are residents that limit their training to a particular branch of medicine or surgery and who can potentially become board certified in that specialty are specialists for purposes of analysis under the framework provided in MCL 600.2169(1).” *Id.* at 299. The Court further held that the plaintiff’s expert was potentially qualified to offer expert testimony against the resident and could do so if it was determined that he had knowledge of the applicable standard of care, he met the practice/teaching requirement of § 2169(1)(b), and was otherwise qualified to render expert testimony under MRE 702, MRE 703, and MCL 600.2955. *Id.* at 307-308.

In light of *Woodard* and *Gonzalez*, we conclude that a defendant dentist who is a resident in a specialty such as OMFS in which she can potentially become board certified is in fact a specialist within the meaning of § 2169(1)(a), and thus a dentist who is board certified in the same specialty is potentially qualified to offer expert testimony against the defendant dentist. Because Kraut is potentially qualified to offer expert testimony against Karam under § 2169, he was qualified to provide an affidavit of merit. Therefore, the trial court erred in granting defendants’ motion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis