STATE OF MICHIGAN

COURT OF APPEALS

HOSEA MOORE,

Plaintiff-Appellant,

v

WILLIAM C. SHARP and PROVIDENCE HOSPITAL & MEDICAL CENTERS, INC.,

Defendants-Appellees,

and

OMNI MEDICAL GROUP,

Defendant.

UNPUBLISHED
April 22, 2008

No. 276664
Oakland Circuit Court
LC No. 2005-069461-NH

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from a judgment of no cause of action, following a jury trial. We affirm.

I. Background

Plaintiff underwent arthroscopic knee surgery on April 4, 2003, during which he received an epidural in his back as anesthesia. It was subsequently discovered that bacteria, identified as streptococcus constellatus, was introduced into plaintiff's back during the epidural, resulting in a blood infection. The infection caused plaintiff to develop spinal osteomyelitis between his L1 and L2 lumbar vertebrae. Plaintiff's condition was diagnosed and successfully treated in early May 2003. However, the infection caused permanent damage to the L1-L2 disc, resulting in chronic back pain. Plaintiff alleged that defendants committed medical malpractice by failing to timely and properly diagnose and treat his condition. Specifically, he contended that defendant Dr. William Sharp, who was board certified in internal medicine, breached the standard of care at various times between April 15, 2003, and May 7, 2003, by failing to order a blood culture and by failing to consult an infectious disease specialist.

On appeal, plaintiff argues that Dr. David Friedman, who was one of plaintiff's treating physicians, was improperly allowed to testify at trial regarding the applicable standard of care for an internist, and that the trial court abused its discretion by denying his motion for a new trial on this ground.

II. Standard of Review

This Court reviews a trial court's decision to deny a motion for a new trial for an abuse of discretion. *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006). An abuse of discretion occurs when the result is outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). This Court reviews de novo questions of statutory interpretation. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

III. Expert Testimony

A new trial may be granted when a party's "substantial rights are materially affected" or because of an "[e]rror of law occurring in the proceedings, or mistake of fact by the court." MCR 2.611(A)(1)(g). Plaintiff argues that he is entitled to a new trial because Dr. Friedman was not qualified as a matter of law to provide standard of care testimony.

MCL 600.2169 governs the admission of expert testimony, including standard of care testimony, in a medical malpractice action. The statute provides, in pertinent 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.
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> (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.

At the time of the alleged malpractice, Dr. Sharp was board certified in internal medicine and specialized in the practice of internal medicine.

We reject plaintiff's argument that Dr. Friedman did not meet the board certification requirement of MCL 600.2169(1)(a). Dr. Friedman was board certified in internal medicine at the time of Dr. Sharp's alleged malpractice. The statute plainly requires that, if applicable, the expert be board certified in the same specialty as the defendant physician at the time of the alleged malpractice. It is undisputed that at the time of the occurrence of the alleged malpractice, Dr. Sharp and Dr. Friedman were both board certified in internal medicine.

With regard to the practice/teaching requirement of MCL 600.2169(1)(b), however, there was no dispute that Dr. Friedman had devoted the majority of his time in the year immediately preceding the alleged malpractice to treating infectious diseases, not internal medicine. In a similar situation, our Supreme Court in *Woodard*, *supra* at 578, held that the plaintiff's proposed expert witness did not qualify to testify under MCL 600.2169(1)(b) because "he did not devote a majority of his time to practicing or teaching general internal medicine. Instead, he devoted a majority of his professional time to treating infectious diseases." Therefore, as defendants concede, Dr. Friedman was not qualified to provide standard of care testimony under MCL 600.2169.

Defendants argue, however, that plaintiff should not be permitted to complain that Dr. Friedman was not qualified to provide standard of care testimony, because plaintiff "opened the door" to Dr. Friedman's standard of care testimony by first introducing standard of care testimony from his own similarly situated expert, Dr. Bruce Ruben, which the trial court permitted over defendants' objection. We agree with defendants that Dr. Ruben likewise was not qualified to provide standard of care testimony. Like Dr. Friedman, Dr. Ruben was board certified in internal medicine and infectious diseases, but he had spent the majority of his time practicing in the infectious disease sub-specialty. We disagree with defendants, however, that the trial court's error in allowing Dr. Ruben to provide standard of care testimony precludes plaintiff from challenging the introduction of Dr. Friedman's improper testimony.

Nonetheless, we conclude that a new trial is not warranted because the admission of Dr. Friedman's standard of care testimony was harmless. No error in the admission of evidence will warrant a new trial unless the result appears inconsistent with substantial justice. MCR 2.613(A). Dr. Friedman's standard of care testimony was harmless because it was cumulative to that given by two of defendants' other expert witnesses, Dr. Vincent Mitek and Dr. Gordon Moss. See *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor, & Merrill, Inc*, 267 Mich App 625, 652; 705 NW2d 549 (2005). Further, there is no support in the record for plaintiff's argument that the jury gave "tremendous" weight to Dr. Friedman's testimony because he was

also one of plaintiff's treating physicians. If anything, Dr. Friedman's consulting relationship with Dr. Sharp, and his personal involvement in plaintiff's case, would have given the jury reason to view his testimony with greater caution. Thus, failure to grant a new trial is not inconsistent with substantial justice and the trial court's decision to deny plaintiff's motion for a new trial was not an abuse of discretion.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Mark J. Cavanagh