STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA M. LANE KONING, Personal Representative of the Estate of DIRK KONING, Deceased,

Plaintiff-Appellee,

v

BOHUSLAV FINTA, M.D., and WEST MICHIGAN HEART, P.C.,

Defendants,

and

SPECTRUM HEALTH HOSPITALS, d/b/a SPECTRUM HEALTH-BUTTERWORTH CAMPUS,

Defendant-Appellant.

UNPUBLISHED
July 1, 2008

No. 278265
Kent Circuit Court
LC No. 06-011536-NH

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant, Spectrum Health Hospitals ("defendant"), appeals by leave granted from a circuit court order denying in part its motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's husband, Dirk, underwent heart surgery performed by Dr. Bohuslav Finta at defendant hospital. Dirk developed complications that either went undetected or were detected but not corrected in time and he later died. In this medical malpractice action, plaintiff sought to hold defendant hospital liable for the negligence of Dr. Finta and any other agents and employees involved in Dirk's care.[1] Plaintiff's complaint was accompanied by an affidavit of merit from

[1] Plaintiff later conceded that defendant was not vicariously liable for Dr. Finta's negligence and dismissed that aspect of plaintiff's complaint. That ruling is not at issue here.

David Martin, a physician who is board certified in cardiovascular disease and clinical cardiac electrophysiology. Defendant moved to dismiss on the ground that Dr. Martin was not qualified to provide an affidavit of merit regarding the alleged negligence of staff members. The trial court disagreed and denied that aspect of defendant's motion.

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 also reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

A medical malpractice action may be commenced against a licensed health care professional or a licensed health facility. MCL 600.5838a(1). The complaint must be accompanied by an affidavit of merit from a qualified expert certifying that the claim has merit. MCL 600.2912d(1). The affidavit 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). The affiant must identify the applicable standard of care, opine that the defendant breached that standard, specify the actions that should have been undertaken or omitted to comply with the standard of care, and specify the manner in which the breach of the standard of care was the proximate cause of the injury. *Id.* "[A]n affidavit of merit is required in every medical malpractice action, including those initiated against nonphysicians," *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 494-495; 711 NW2d 795 (2006), such as "nurses, medical technologists, physical therapists, and optometrists." *Bates v Gilbert*, 479 Mich 451, 456; 736 NW2d 566 (2007).

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). Section 2169 requires that an expert be licensed as a health professional. If the party against whom he testifies is a specialist, the expert must specialize in the same field. If the party against whom he testifies is a board-certified specialist, the expert must be board certified in the same specialty. MCL 600.2169(1)(a). 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) and (c).

Because an institutional defendant such as a hospital "is incapable of committing any independent actions, including negligence," a medical malpractice action brought against a hospital is necessarily premised on a vicarious liability theory, i.e., that the hospital is liable for the actions of its agents, and the standard of care applicable to the hospital is the same standard of care that is applicable to each agent alleged to have been negligent. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 12-15; 651 NW2d 356 (2002); *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 391-392; 668 NW2d 628 (2003). "All procedural requirements are applicable to the hospital in the same manner and form as if [its agent] were a named party to the lawsuit" and thus when a plaintiff files a medical malpractice action against a hospital, she must submit with her complaint an affidavit of merit from a health care professional who practices in the same field as the agent alleged to have breached the applicable standard of care. *Nippa, supra* at 392-393. Accord *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr,*

268 Mich App 484, 492; 708 NW2d 453 (2005) (§ 2169[1] requires that the affiant practice or teach in the same health profession as the individual who committed the alleged malpractice).

Plaintiff seeks to hold defendant liable for various staff members who allegedly breached the standard of care by; (1) failing to recognize that Dirk was developing pericardial effusion and tamponade (PET), (2) failing to treat the developing PET, (3) failing "to maintain proper anticoagulation" during the PET, (4) failing "to immediately correct the markedly elevated ACT level," and (5) failing "to immediately stop and reverse the heparin when the pericardial effusion was detected." Neither the complaint nor the affidavit of merit identifies the staff members claimed to be at fault, e.g., staff physicians, residents, interns, radiologists, anesthesiologists, medical technologists, nurses, etc., and thus there is no basis for concluding that a cardiologist such as Dr. Martin is qualified to render an expert opinion regarding, or provide an affidavit of merit against, any staff member who is not also a physician specializing in cardiology.

Plaintiff argues that she was only required to file one affidavit and, because she filed an affidavit signed by a licensed health care professional, she met the requirements of § 2912d. We disagree. Section 2912d(1) requires "an affidavit" signed by "a health professional," but the health professional must be qualified to serve as an expert under § 2169. As discussed previously, this means that the affiant must practice or teach in the same area of medicine practiced by the staff member alleged to have been negligent. Because Dr. Martin is a physician specializing in cardiovascular disease and clinical cardiac electrophysiology, he is only qualified to render an expert opinion against other physicians specializing in the same fields.

Plaintiff argues that if this Court concludes that Dr. Martin's affidavit was insufficient, the requirements of § 2912d(1) were nonetheless met because her counsel reasonably believed that Dr. Martin was qualified to serve as an expert. Again, we disagree.

The fact that a court determines that an affiant is not qualified to serve as an expert witness only means that he cannot testify as an expert at trial. His affidavit of merit could still be sufficient for initiating the action if "the plaintiff's attorney reasonably believes [the affiant] meets the requirements for an expert witness under section 2169." MCL 600.2912a(1). That is because, at the affidavit-of-merit stage of the proceedings, discovery is not available and "the plaintiff's attorney may have limited information available to ensure a proper 'matching' between the plaintiff's expert and the defendant[.]" *Bates, supra* at 458. Thus, "[a]n affidavit is sufficient if counsel reasonably, albeit mistakenly, believed that the affiant was qualified under MCL 600.2169." *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002).

Because the complaint must be accompanied by an affidavit from an expert who matches the qualifications of the individual alleged to have committed malpractice, counsel must undertake some action to determine the area of practice of the individuals alleged to have committed malpractice and whether they are specialists or board-certified specialists. Certainly plaintiff's counsel would have a reasonable belief that Dr. Martin was qualified to serve as an expert against another cardiologist such as Dr. Finta and, therefore, Dr. Martin would be qualified to serve as an expert to the extent defendant was alleged to be vicariously liable for Dr. Finta's negligence. However, Dr. Martin also rendered an opinion regarding hospital staff members other than Dr. Finta. Those staff members were not identified in the complaint or in the affidavit, and plaintiff's counsel essentially admitted that he had no idea who those staff members were, given that he asked for time to conduct discovery to learn their identities. If

counsel could not identify the hospital staff members sought to be held liable, he could not know their areas of practice and could not have reasonably believed that Dr. Martin (or any other proposed expert) was qualified to serve as an expert against them.

Finally, plaintiff suggests that an affidavit of merit is not required to the extent that a hospital staff member is not a licensed health care professional. Plaintiff has not briefed the merits of this argument or cited any relevant supporting authority and, therefore, it may be deemed abandoned. *Coble v Green,* 271 Mich App 382, 391; 722 NW2d 898 (2006).

Because Dr. Martin was not qualified to serve as an expert against any individual other than Dr. Finta and because plaintiff conceded that defendant is not vicariously liable for Dr. Finta's negligence, the affidavit of merit was insufficient to support a malpractice claim against defendant under a vicarious liability theory. Therefore, the trial court erred in denying defendant's motion with respect to plaintiff's claim that defendant was liable for the malpractice of staff members other than Dr. Finta. Defendant was entitled to dismissal of plaintiff's complaint without prejudice. *Kirkaldy v Rim,* 478 Mich 581, 586; 734 NW2d 201 (2007).

Reversed and remanded for entry of an order granting defendant's motion and dismissing plaintiff's claim against it without prejudice. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto