# STATE OF MICHIGAN

# COURT OF APPEALS

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| TIMOTHY L. BLOUNT and LAURA BLOUNT,<br><br>Plaintiffs-Appellants/Cross-Appellees,<br><br>v<br><br>JEAN MARIE PIERRE, M.D. and GARDEN CITY MEDICAL CENTER, P.C.,<br><br>Defendants-Appellees/Cross-Appellants. | UNPUBLISHED<br>October 13, 2009<br><br>No. 286808<br>Wayne Circuit Court<br>LC No. 07-709744-NH |

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

In this medical malpractice case, plaintiffs appeal and defendants cross-appeal as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs Timothy and Laura Blount allege that defendant Jean Marie Pierre, M.D. committed malpractice when he performed surgery on Timothy Blount's tongue without sufficient knowledge or expertise to perform the surgery. At issue in plaintiffs' appeal is whether the trial court erred by applying the wrong standard of practice or care in evaluating the testimony of plaintiffs' expert witness, Marvin E. Werlinsky, D.O. The trial court held that Dr. Werlinsky lacked foundation for his testimony because he based his opinions on his own experience and not on his knowledge of the standard of practice or care of a general practitioner, entitling defendants to summary disposition under MCR 2.116(C)(10). Plaintiffs contend the applicable standard of practice or care is that of a family practitioner, not a general practitioner, and that defendants failed to ask Dr. Werlinsky at his deposition if he knew the standard of care for a family practitioner. In defendants' cross-appeal, the issue is whether the trial court properly found that plaintiffs' notice of intent was sufficient.

Plaintiffs originally filed suit in 2006, alleging that Dr. Pierre "held himself out as a

family practice physician." Plaintiffs' complaint was accompanied by an affidavit of merit signed by Dr. Werlinsky, a physician specializing in family practice.[1] That action, however, was voluntarily dismissed. In 2007, plaintiffs filed a new complaint, alleging that Dr. Pierre "held himself out as a general practice physician." This was in conformity with plaintiffs' notice of intent (NOI), which identified the applicable standard of care as that of a general practitioner. The 2007 complaint was filed with an affidavit of merit signed by Dr. H. Edward Klemptner, a general practitioner. However, plaintiffs withdrew Dr. Klemptner as a witness and decided to rely on Dr. Werlinsky to provide expert testimony regarding the standard of care.

Defendants moved for summary disposition, arguing in part that Dr. Werlinsky was not qualified to testify because he is not familiar with the standard of care for a general practitioner in Michigan. The trial court found that Dr. Werlinsky's testimony was without foundation. Specifically, the court quoted Dr. Werlinsky's deposition testimony and found:

> Dr. Werlinsky testified that Dr. Pierre should have referred this matter to a specialist because he did not have the experience to perform a biopsy. Dr. Werlinsky also indicated doing a biopsy was not common for him in his practice. He assumed that this was not a common procedure that general practitioners performed, but when specifically asked whether he knew, he said he did not know personally.
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> Dr. Werlinsky is testifying based upon his own experience and not on his knowledge of the standard of practice or care of a general practitioner in taking a biopsy of a tongue. Dr. Werlinsky's testimony is without foundation.

Because the trial court's conclusion that Dr. Werlinsky's testimony was insufficient disposed of the case, the court dismissed the complaint with prejudice.

In this appeal, plaintiffs argue that the trial court erred by considering the standard of care applicable to a general practitioner when evaluating Dr. Werlinsky's deposition testimony.[2] Plaintiffs contend the applicable standard of care is that of a family practitioner, asserting that Dr. Pierre "holds himself out as a family practitioner" and that defendants' motion "did not rebut the allegation" in plaintiffs' complaint to this effect.[3] Citing MCL 600.2169(1)(c), plaintiffs contend that "Dr. Werlinsky may not offer testimony against a general practitioner," but he "may clearly testify" against a family practitioner.[4] Plaintiffs allege that during Dr. Werlinsky's

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[1] In the affidavit of merit, plaintiffs' expert is identified as Dr. "Wurlinsky;" however, in is deposition, he is identified as Dr. "Werlinsky."

[2] Although it is not necessary for resolution of the issues on appeal, neither party has produced any evidence to enable us to ascertain which standard of practice or care applies to Dr. Pierre.

[3] Plaintiffs appear to be confusing the allegations they made in their 2006 lawsuit with the allegations contained in their complaint in this case.

[4] Plaintiffs acknowledge but fail to apply this Court's analysis in *Robins v Garg*, 276 Mich App 351; 741 NW2d 49 (2007). In *Robins*, a case that coincidentally involved Dr. Werlinsky, this
(continued…)

deposition, defense counsel muddled the standard of care applicable to general practitioners (MCL 600.2912a(1)(a)) with the standard of care applicable to the specialty of family medicine (MCL 600.2912a(1)(b)), and thereafter "misled the trial court into assuming that familiarity with Michigan practice was a foundational requirement for Dr. Werlinsky's testimony." The deposition was taken for purposes of discovery only; plaintiffs argue that they should be given a chance at trial to ask Dr. Werlinsky a straightforward question about the correct, national standard of care applicable to family practitioners.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). For motions under MCR 2.116(C)(10), although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the nonmoving party "'must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case.'" *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) (citation omitted). In an action alleging medical malpractice, the plaintiff bears the burden of proving the applicable standard of care, breach of that standard by the defendant, injury, and proximate causation between the alleged breach and the injury. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). "Failure to prove any one of these elements is fatal." *Id*. Under MCL 600.2912a(1)(b), if the defendant doctor is a specialist, the plaintiff must establish "the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances" (often called the "national" standard). In contrast, if the defendant doctor is a general practitioner, the plaintiff must establish "the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community" (often called the "local" standard). MCL 600.2912a(1)(a). A physician can specialize in an area of medicine without being board certified in that specialty. *Woodard v Custer*, 476 Mich 545, 561; 719 NW2d 842 (2006).

The actual text of Dr. Werlinsky's deposition, in relevant part, reads:

> *Q*. So it's your position, your opinion today that Dr. Pierre was not, as a general practitioner or family practitioner, was not qualified to perform this biopsy?

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(…continued)

Court held that a family practitioner *can* be qualified to testify against a general practitioner:

> The practices of a family practitioner and a general practitioner are alike in that neither practice is limited to a specific branch of medicine. For purposes of satisfying the requirements of MCL 600.2169, therefore, we hold that an expert who is a board-certified family practitioner is qualified under MCL 600.2169(1)(c) to testify against a defendant doctor who is a general practitioner, as long as 600.2169(1)(c)(*i*) or (*ii*) is also satisfied. Accordingly, because Dr. Werlinsky was engaged in general practice medicine, as a family practitioner, for the year preceding the date of the alleged malpractice, we conclude that he was qualified under MCL 600.2169(1)(c) . . . . [*Id*. at 360-361 (citation omitted).]

*A*. Yes.

*Q*. What do you base that on?

*A*. The fact that this is a procedure that should be performed–there was nothing in the records that showed that he had any training with regards to this type of a procedure. Also–

* * *

*A*. I am sure that this procedure is not a common procedure that would be done very frequently.

*Q*. What do you base that on?

*A*. My examination of patients over 41 years.

*Q*. Is that not common for you or is that not common for practitioners in Michigan or what?

*A*. It is not common for me. I can only speak for myself and the patients I have seen over 41 years.

*Q*. You cannot speak for what is common for family practitioners or general practitioners in Michigan, can you?

*A*. I would certainly assume in my own mind that it is not a common procedure that general practitioners perform.

*Q*. I am not asking if you assume, do you know?

*A*. No, I do not know personally.

Notably, the trial court did not base its ruling on the national/local distinction, but on its conclusion that Dr. Werlinsky's testimony lacked foundation because it was "based upon his own experience" and not on his knowledge of any standard of care, citing *Patelczyk v Olson*, 95 Mich App 281; 289 NW2d 910 (1980). In *Patelczyk*, this Court found that a doctor's testimony regarding what he did in his own practice failed to establish that he knew what the applicable standard of care was or what would constitute an impermissible deviation from the applicable standard. *Id*. at 287. Dr. Werlinsky similarly testified, stating that he could only speak for himself, and that, for him, the procedure was uncommon. This is insufficient to establish either the standard of care for a general practitioner or the standard of care within the specialty of family practice.

Assuming the standard of care applicable to Dr. Pierre is that of a general practitioner, plaintiffs have produced no evidence to establish that Dr. Werlinsky was familiar with the recognized standard of practice or care for a general practitioner in the community in which Dr. Pierre practices or in a similar community. MCL 600.2912a(1)(a). Even if Dr. Werlinsky's testimony were sufficient to establish the national standard of care relevant to a family

practitioner, summary disposition was proper because the complaint upon which this suit is based alleged that Dr. Pierre held himself out as a *general practitioner*. This was consistent with the NOI and the affidavit of merit filed with the complaint. On appeal, plaintiffs promise to elicit testimony at trial regarding the correct standard, but provide no reason why this was not done either at the deposition or at the time of defendants' motion for summary disposition. "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden*, *supra* at 120.

Our conclusion on this issue renders it unnecessary for us to address defendants' cross-appeal.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering