S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

SALLY NIPPA, Personal Representative of The Estate of ROBERT NIPPA, deceased,

Plaintiff-Appellant,

v

BOTSFORD GENERAL HOSPITAL,

Defendant-Appellee.

FOR PUBLICATION
July 3, 2003
9:05 a.m.

No. 229113
Oakland Circuit Court
LC No. 99-016078-NH

ON REMAND
Updated Copy
August 15, 2003

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

O'CONNELL, J.

This case is before us on remand from our Supreme Court "for reconsideration in light of *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1 [651 NW2d 356] (2002)." *Nippa v Botsford Gen Hosp*, 468 Mich 881 (2003). In our opinion, *Cox* supports our decision in *Nippa v Botsford Gen Hosp*, 251 Mich App 664; 651 NW2d 103 (2002) (*Nippa I*), which the Supreme Court, in lieu of granting leave to appeal, vacated in its order of remand. That is, a plaintiff must attach to a medical-malpractice complaint against an institutional defendant an affidavit of merit executed by a physician who specializes or is board-certified in the same specialty as the health professionals on whose conduct the action is based. Thus, we come to the same conclusion as we did in our previous decision where we affirmed the trial court's order granting summary disposition for defendant.

I. OUR PREVIOUS DECISION IN *NIPPA I*

In *Nippa I*,[1] plaintiff argued that

> pursuant to the plain language of MCL 600.2169(1)(a),[2] Dr. Markowitz was competent to testify against defendant . . . . [P]laintiff maintained that because the

[1] For a complete statement of the underlying facts in the present case, see *Nippa I*, *supra* at 665-667.

[2] According to MCL 600.2912d(1), "the plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit signed by a health professional who the (continued…)

> hospital, the only named defendant to the action, was not board certified . . . , plaintiff was not required to produce an expert witness with like qualifications [as the doctors she alleged were negligent in her complaint]. [*Nippa I*, *supra* at 666-667.]

We concluded that plaintiff's affidavit of merit in this medical-malpractice case was insufficient because it was not signed by a doctor who specializes or is board-certified in the same specialty as the doctors on whose conduct the action was based. MCL 600.2169; see also *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 218-219, 220; 642 NW2d 346 (2002), cited in *Nippa I*, *supra* at 672-673. We disagreed with plaintiff's position then and we continue to do so now.

II. OUR SUPREME COURT'S DECISION IN *COX*

In *Cox*, *supra*, our Supreme Court held that a hospital may be held vicariously liable for the acts of its agents. *Cox*, *supra* at 11. "[A] hospital's vicarious liability arises because the hospital is held to have done what its agents have done." *Id.* at 15. Even when the hospital is the only named defendant, the issue remains whether the hospital's agents violated the standard of care applicable to them. *Id.* at 5, 14-15. Our Supreme Court stated:

> Vicarious liability is "indirect responsibility imposed by operation of law." As this Court stated in 1871:
>
> "[T]he master is bound to keep his servants within their proper bounds, and is responsible if he does not. *The law contemplates that their acts are his acts, and that he is constructively present at them all*." [*Smith v Webster*, 23 Mich 298, 299-300 (1871) (emphasis added).]
>
> In other words, the principal "is only liable because the law creates a practical identity with his [agents], so that he is held to have done what they have done." *Id.* at 300. See also *Ducre v Sparrow-Kroll Lumber Co*, 168 Mich 49, 52; 133 NW 938 (1911). [*Cox*, *supra* at 11 (citation omitted).]

III. ANALYSIS

(…continued)

plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." MCL 600.2169(1)(a) provides that a medical expert witness must meet the following criteria (among others) that are at issue in this case:

> 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.

After reviewing our Supreme Court's remand order, we conclude that the Court remanded this case for us to apply the logic of *Cox* to the present facts.

Again, the Court in *Cox* held that under a vicarious-liability theory, a principal "'is only liable because the law creates a practical identity'" between the principal and its agents. *Id.*, quoting *Smith*, *supra* at 300. The principal is held to have done what the agent has done. The law contemplates that the agent's acts are the principal's acts and that the principal "'is constructively present at them all.'" *Id*. Applying the logic of *Cox* to the present case, we hold that the standard of care applicable to the hospital is the same standard of care that is applicable to the physicians named in the complaint. For all practical purposes the hospital stands in the shoes of its agents (the doctors).

Thus, we opine that with regard to vicarious liability, medical-malpractice law applicable to a physician is also applicable to the physician's hospital. Plaintiff cannot avoid the procedural requirements of the law by naming only the principal as a defendant in a medical-malpractice lawsuit. All procedural requirements are applicable to the hospital in the same manner and form as if the doctor were a named party to the lawsuit. This is so because the law creates a practical identity between a principal and an agent, and, by a legal fiction, the hospital is held to have done what its agents have done. *Id*. It would be absurd to have one set of legal rules for a hospital and another set of legal rules for its agents. See, e.g., *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 142-143, 150; 662 NW2d 758 (2003) (statutory construction should avoid an illogical or absurd result).[3]

Consequently, a plaintiff who sues an institutional defendant such as defendant hospital must premise her claim on vicarious liability because the institution itself is incapable of committing any independent actions, including negligence. *Cox*, *supra* at 12. Vicarious liability imposes a legal fiction on defendant hospital providing that the principal is only liable because the law creates a practical identity with its agents so that the hospital is held to have done what the agents have done. *Id*. at 11-12. The law treats the principal and the agent as sharing a single identity, transporting the acts of the doctors (the agents) to the hospital (the principal). Just as an institution itself is incapable of committing any independent actions, including negligence, an institution itself is incapable of making an averment in an affidavit of merit. Therefore, the term "party" under MCL 600.2169(1)(a) encompasses the agents for whose alleged negligent acts the hospital may still be liable. A plaintiff must submit with a medical-malpractice complaint against an institutional defendant 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. *Cox*, *supra* at 11-12, 15; *Nippa I*, *supra* at 672-673; see also MCL 600.2912d(1).

IV. THE DISSENTING OPINION

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[3] But see *Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 614 n 4; 658 NW2d 494 (2003) (noting our Supreme Court's disapproval of the "absurd result" rule of statutory construction).

The dissenting opinion[4] faults the majority opinion for "rewrit[ing] MCL 600.2169 to make it less 'illogical . . . .'"[5] *Post* at ___. Unfortunately, the dissent's conclusion that plaintiff is not required to file an affidavit signed by a board-certified specialist in the same specialty as defendant's doctors is exactly contrary to the clear intent of MCL 600.2169(1)(a). See *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998) (Legislature's intent is paramount in statutory construction); *Nippa I*, *supra* at 673 (the purpose of MCL 600.2912d[1] and 600.2169 is to ensure trustworthy medical expert testimony and to discourage frivolous lawsuits). The dissent's strained reading of the statute actually defeats the true purpose of the statute. In *Tate*, *supra* at 218, this Court held, "Subsection 2169(1)(a) specifically states that an expert witness must 'specialize[] at the time of the occurrence that is the basis for the action' in the same specialty as the defendant physician."[6]

The English language with all its nuances is not as precise or logical a language as the dissenting opinion advocates. The conceptual difficulty that bedevils the dissenting opinion is its dogged, literalist application of a generic term, "party," to a specific set of facts. By employing an unrealistic approach, the dissent allows itself to wear blinders, losing all peripheral vision and resulting in a collision with reason and common sense. See *Houghton Lake*, *supra*; *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999) (statutory construction should avoid rendering a statute nugatory). The named parties to this lawsuit have asked us to give

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[4] We agree with the dissenting opinion that the facts of *Cox* do not neatly apply to the present case, see *post* at ____, but because our Supreme Court's order on remand asks us to apply *Cox*, we are endeavoring to do so. See *Nippa v Botsford Gen Hosp*, 468 Mich 881 (2003).

[5] While we do not believe in judicial activism, we do believe that the role of the judiciary is more than that of a simple statute-reading machine that spits out the plain language of what is put in. Cf. *Sington v Chrysler Corp*, 467 Mich 144, 161-162; 648 NW2d 624 (2002) ("[S]tare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes. Rather, it is our duty to re-examine a precedent where its reasoning . . . is fairly called into question.") (internal quotation marks and citations omitted).

Judging is an art. It is not best served by reaching absurd results or by reaching decisions that lack common sense or violate the intention of the Legislature. We note that writing is "[t]he bare transmission of data" from the writer to the reader. Irving Younger, *Culture's the Thing*, 8 Scribes J Leg Writing 137, 138 (2001-2002). It is simply "a mechanical function requiring only a command of grammar, syntax, and vocabulary. Though grammar, syntax, and vocabulary can be programmed into a computer," no computer will ever be able to replace the role of judge in our society, and no computer or mechanical device can function at the level of a judge. *Id*. "The reason is that there are demesnes of [judging] closed to computers," mechanical devices, "and to those who aspire to no more than a computer's function." *Id*. Computers can reach absurd or illogical results on the basis of the process chosen to program the computer. Reaching an absurd or illogical result is best left to mechanical devices. In our opinion, the judge's role is significantly different.

[6] *Tate* involved a medical-malpractice action with a hospital as the sole defendant. *Id*. at 213-214.

meaning to § 2169 as it relates to the term "party." In our view, the majority opinion has accomplished this goal with common sense and indisputable logic. After reading our opinion, the reader and the practitioner have a logical rule to follow when addressing the requirements of § 2169.[7]

Indeed, the dissent concludes that the proper definition for the term "party" in § 2169 is "party defendant." *Post* at ___. Of course, the phrase "party defendant" does not appear in the statute, but that does not stop the dissenting opinion from constructing an impregnable circle that leaves unanswered the issue how our Supreme Court's opinion in *Cox* applies to the present case.

We would like to make clear what § 2169 does *not* state. It is clear that the statute does not state "party defendant" or "party of record" as the dissenting opinion would have one believe.[8] Nor does it say "party plaintiff." It does not say "agent for party defendant," and it does not say "agent for party plaintiff." Nor does the statute say that an agent for another hospital may qualify as an expert medical witness under § 2169 and MCL 600.2912d(1) in a medical-malpractice lawsuit against a hospital only. Nor does § 2169 say that an affidavit of merit from any health-care professional may be filed when a hospital is the sole defendant. What § 2169 does say is "party." As we previously stated, we conclude that the term "party" is broad enough to include party plaintiff, party defendant, and the alleged negligent party as stated in the complaint by the plaintiff.[9] The negligent person or entity can still be referred to as a party for

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[7] We repeat that the unavoidable result of the dissenting opinion's analysis is that any plaintiff can avoid the primary affidavit-filing procedural requirement of MCL 600.2912d(1) and MCL 600.2169 by filing a lawsuit against an institutional entity only. Clearly, this is not what the Legislature intended. See *Frankenmuth Mut Ins Co*, *supra* (the Legislature's intent is paramount in statutory construction); see also *Hoste*, *supra*; *Nippa I*, *supra* at 673.

[8] The dissenting opinion's attempt to amend the plain meaning of the statute may be attributable to the fact that the term "party" has multiple meanings. We note in the following example that the term "party" has three separate meanings:

> The "party" of the first part would like to know if the "party" of the second part would like to attend the "party" at the courthouse restaurant on Friday evening.

In *Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 341; 535 NW2d 583 (1995), remanded 453 Mich 953 (1996), we concluded that the phenomenon of identical words having different meanings (i.e., a homonym), even in a single document, was neither unique to that case nor to the elasticity and inherent limitations of the English language. *Random House Webster's College Dictionary* (2001) contains twelve separate definitions for the term "party." As we referenced in *Nippa I*, *supra* at 673-677, Black's Law Dictionary (6th ed) includes definitions of the phrases adverse party, aggrieved party, formal party, indispensable party, innocent party, interested party, necessary party, nominal party, party in interest, party opponent, proper party, and real party in interest, among others.

[9] The dissenting opinion, *post* at ___, faults the majority opinion for "amend[ing] MCL 600.2169 so that the term 'party' in that statute includes the term 'agent.'" We find no support in the law or

(continued…)

the practical purposes of the statutes' procedural requirements without offending the English language or violating the rules of logic. The majority chooses to resolve this linguistic problem with a straightforward, common-sense approach. In this manner, we accomplish the task given to this Court—application of the vicarious-liability doctrine described in *Cox* to the interpretation of the term "party" in the affidavit-filing requirement of the medical-malpractice statutes.[10]

In sum, the dissent's ultimate conclusion that any physician can swear to an affidavit of merit when the only defendant is a hospital is not supported by MCL 600.2169(1)(a), especially when one of the primary purposes of the statute is to require a plaintiff's experts to specialize in the same specialty as the physicians that they allege to be negligent. The dissenting opinion's pigeonholed definition of the term "party" destroys the intended purpose and meaning of the statute.

V. CONCLUSION

In order to commence an action for medical malpractice, a plaintiff is required to file an affidavit of merit. MCL 600.2912d(1). This affidavit must be signed by a doctor who has the same specialty as the doctor who the plaintiff alleges to be negligent. MCL 600.2169(1)(a). Defendant's physicians involved in this matter are board-certified in general surgery and infectious diseases. Plaintiff's expert indicates in his affidavit of merit that he is not board-certified in either specialty; therefore, the trial court properly dismissed the complaint.

Affirmed.

Meter, J., concurred.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter

(…continued)

the majority opinion for the dissenting opinion's conclusion. We conclude only that the term "party" encompasses the negligent party as set forth in the complaint filed by plaintiff.

[10] We further note that it takes the dissenting opinion numerous pages to attempt to discern the true meaning of the term "party." If the term was as clear, concise, and logical as the dissenting opinion claims, then no doubt this dilemma could be resolved in a few sentences. See, generally, *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (statutory interpretation is precluded if the plain language of the statute is clear).