STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of DOLORES M. WRIGHT.

PATRICIA GAY, personal representative of the ESTATE OF DOLORES M. WRIGHT,

Plaintiff-Appellant,

v

SELECT SPECIALTY HOSPITAL,

Defendant-Appellee,

and

BATTLE CREEK HEALTH SYSTEM,

Defendant.

FOR PUBLICATION
January 31, 2012
9:00 a.m.

No. 301064
Calhoun Circuit Court
LC No. 2008-003757-NH

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

WHITBECK, J. (*dissenting*).

In this nursing malpractice case against Select Specialty Hospital, the majority decision reverses the trial court's order dismissing the Estate of Dolores M. Wright's cause of action. I respectfully dissent. Unlike the majority, I believe that the trial court properly determined that the Estate's originally proposed nursing expert, Kathleen Boggs, R.N., did not meet the requisite MCL 600.2169(1) qualifications to testify regarding the appropriate standard of care. I also believe that the trial court did not err in refusing the Estate's request to substitute Jean Hurynowicz, R.N. as its expert witness. And, further, I believe that the trial court did not abuse its discretion in ordering dismissal with prejudice because there is no remaining time available under the wrongful death saving period.[1] Accordingly, I would affirm.

[1] MCL 600.5852.

I. EXPERT'S PROFESSIONAL TIME UNDER MCL 600.2169

The salient question is whether Nurse Boggs devoted a sufficient amount of time in the active clinical practice of nursing or instruction in nursing to qualify as an expert witness under MCL 600.2169. The majority concludes that Nurse Boggs did meet the MCL 600.2169 qualifications because she "spent significantly more than 50% of her professional time in the active clinical practice of nursing or instructing nursing students." I disagree.

MCL 600.2169 provides, in pertinent part, as follows:

> (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 . . . and meets the following criteria:
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> * * *
>
> (b) . . . *[D]uring 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 . . . .
>
> (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 . . . .[2]

The term "majority" in subpart (1)(b) requires a proposed medical expert to spend greater than 50 percent of his or her professional time practicing or teaching in the same health profession during the year before the alleged malpractice.[3]

Nurse Boggs testified in her deposition that from about 2000 to December 2003, she was employed as the director of education at Northlake Medical Center. In this position, she "oversaw education for the whole facility[,]" including orienting new nurses to their units. More specifically, she testified as follows:

> *Q. [By Counsel]*: Were you taking an active role in patient care as the director of education?

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[2] Emphasis added.

[3] *Kiefer v Markley*, 283 Mich App 555, 559; 769 NW2d 271 (2009).

A. [Nurse Boggs]: Only as far as I was working with the new nurses on their nursing unit.

Q. And what percentage of your job as director of education was working with new nurses to orientate them to their new floors?

A. Probably 25 percent.

* * *

Q. And that was 25 percent of your time. What was the other 75 percent of your time spent doing?

A. Fifty percent teaching and 25 percent meetings and setting up classes.

In sum, according to Nurse Boggs' deposition testimony, she spent 25 percent of her time orienting new nurses to their assigned units, 25 percent of her time in meetings and setting up classes, and 50 percent of her time teaching. On the basis of this testimony alone, I would agree with the majority that Nurse Boggs would meet the MCL 600.2169(1)(b)(ii) requirement by spending greater than 50 percent of her professional time in the instruction of students: she clearly testified that she spend 50 percent of her time teaching and some additional portion of her time setting up classes, which although more akin to an administrative task, does arguably fall within the scope of "instruction of students." However, this deposition does not end the inquiry into the calculation of Nurse Boggs' time.

In her later-filed supporting affidavit, Nurse Boggs clarified,

> [I]n addition to the 25% of my professional time I spent in the active clinical practice of nursing, most of the rest, I believe 65%, of my total professional time was very much focused on the education and training of nurses in that accredited facility and in its accredited clinical research programs.

She explained that the remaining 10 percent of her time was spent performing "clerical tasks facilitating my instructional role[.]"

Thus, while continuing to claim that 25 percent of her time was spent in active clinical practice of nursing by virtue of her orientation of new nurses, Nurse Boggs significantly amended her explanation of the remaining 75 percent of her time. More specifically, according to Nurse Boggs, of the 65 percent that she claimed was spent "focused on the education and training of nurses[,]" she actually spent that time as follows:

- 25 percent "teaching new issues and . . . procedures and brushing up skills and knowledge bases on all policies, practices and procedures to our nurses in an accredited classroom setting";

- 10 percent "chairing the nursing policy and procedure committee, as a member of the education committee";

- 10 percent "teaching nurses[,] . . . emergency medical technicians[,] and others . . . basic life support classes, providing candidate advice for advanced life support certification . . . and in continuing my own training"; and

- 20 percent "as the co-chair of the policy and procedure committee of the hospital, as a member of the patient care and education committee and assisting in the preparation of the Joint Commission surveys which were the basis of our continuing accreditation."

On the basis of this additional information, I conclude that the trial court did not abuse its discretion in finding that Nurse Boggs was not qualified to testify as an expert under MCL 600.2169(1)(b).

With respect to active clinical practice, as stated, Nurse Boggs' testified in her deposition and averred in her affidavit that 25 percent of her time was spent in active nursing practice by virtue of her orientation of new nurses. However, in my interpretation, I believe that Nurse Boggs' time spent orienting new nurses to their units did not qualify as "active clinical practice" because it did not involve the active care of patients.[4] That is, I believe that the key component of the phrase "active clinical practice" is the word "active," which is defined, in pertinent part, as "3. marked by or disposed to direct involvement or practical action[;] . . . 6. characterized by current activity, participation, or use[.]"[5] Thus, in my opinion, working in a clinical setting merely overseeing employees who actually treat the patients is too removed from the type of experience contemplated by the statutory requirement.

Thus, I turn to consideration of the remaining 75 percent of Nurse Boggs' time. Again, Nurse Boggs clarified in her affidavit that, of that 75 percent, she actually spent 10 percent as chair of the nursing policy and procedure committee and 20 percent as the co-chair of the policy and procedure committee of the hospital. Thus, 30 percent of that 75 percent was clearly spent on activities other than active clinical practice or teaching.

That leaves only 45 percent of Nurse Boggs' time remaining. And although this time was arguably spent on the instruction of students in some capacity (10 percent on clerical tasks facilitating her instructional role; 25 percent on teaching and "brushing up" nurses on policies, practices, and procedures; and 10 percent teaching basic life support classes), 45 percent is below the requisite "majority" of time—that is, more than 50 percent—necessary to satisfy the statute. Accordingly, I would conclude that the trial court did not abuse its discretion in striking Nurse

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[4] See e.g., *Hatchett v Surapaneni*, unpublished opinion per curiam of the Court of Appeals, issued November 6, 2003 (Docket No. 238714) (stating that the proposed expert witness devoted a majority of his time to active clinical practice because "about 50 percent of his professional time was spent performing research—but it was clinical research, i.e., had a significant clinical component, *including patient care and treatment*[,]" and "about 30 percent of his time to *seeing his own clients*") (emphasis added).

[5] *Random House Webster's College Dictionary* (1997), 13-14.

Boggs as an expert because she was not qualified to offer expert testimony in this nursing malpractice case.

II. PROPER REMEDY

A. STANDARD OF REVIEW

The Estate argues that even if the trial court properly struck Nurse Boggs' testimony, it erred in dismissing the lawsuit because other remedies—such as amendment of the affidavit of merit and substitution of Jean Hurynowicz, R.N., for Nurse Boggs, or dismissal without prejudice—were available and appropriate remedies. This Court reviews for an abuse of discretion a trial court's decision to deny amendment of witnesses.[6] This Court also reviews for an abuse of discretion a trial court's decision to dismiss an action.[7]

B. UNDERLYING FACTS

After receiving notice of the Hospital's September 2010 motion to strike Nurse Boggs as an expert and dismiss the Estate's complaint with prejudice, the Estate retained Nurse Hurynowicz to review the pertinent documentation to determine whether the Hospital's nursing staff had committed malpractice in its treatment of Wright. Nurse Hurynowicz concluded that nursing malpractice had been committed, and in October 2010, the Estate served a supplemental witness list on the Hospital.

The Hospital moved to dismiss the Estate's supplemental witness list on the ground that it was untimely filed, two years after the initial complaint had been filed and only six weeks before trial. The Estate responded that seeking to replace Nurse Boggs with Nurse Hurynowicz was a prudent and necessary step to avoid adjournment of the trial in the event that the trial court concluded that Nurse Boggs did not qualify as an expert. And the Estate argued that even if the trial court refused to allow substitution of her with Nurse Hurynowicz, the proper remedy would be dismissal without prejudice.

The Hospital also filed a brief, arguing that dismissal with prejudice was the proper remedy. According to the Hospital, the Estate filed its complaint outside the applicable statute of limitations, and the deficient affidavit of merit did not toll the wrongful death savings statute, which expired on November 14, 2008; thus, the Estate's case would be timebarred, and dismissal with prejudice was the only available remedy.

After hearing further oral arguments on the matter, the trial court first stated that its understanding of the pertinent case law led to a conclusion that whether or not a plaintiff's attorney had a reasonable belief regarding its expert's qualifications, the remedy was dismissal without prejudice. However, the trial court questioned whether the close temporal proximity to the trial nevertheless warranted dismissal with prejudice. The trial court also indicated that it

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[6] *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991).

[7] *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

was persuaded by case law that stated a defective affidavit of merit does not toll the wrongful death savings statute and results in dismissal with prejudice.

C. AMENDMENT AND SUBSTITUTION OF NURSE HURYNOWICZ FOR NURSE BOGGS

The Estate argues that the trial court erred in not allowing it to substitute Nurse Hurynowicz as its expert witness. I disagree.

I first note that the Estate's reliance on *Dean v Tucker*[8] is misplaced because that case involved discovery sanctions rather than the failure to produce a witness qualified to testify under MCL 600.2169. Thus, the *Dean* factors are inapplicable.

With that said, I find it significant that the trial court's original scheduling order required that the Estate disclose all expert witnesses by August 18, 2009. That date was later extended until January 17, 2010. And a later scheduling order required that the Estate depose all expert witnesses by August 3, 2010. Here, the trial court had discretion to decline to entertain requests beyond the time frames agreed to and set forth in a scheduling order.[9] "Were the rules not so construed, scheduling orders would be meaningless."[10] This was not an extreme case warranting a finding of an abuse of discretion.[11] Indeed, I conclude that the trial court's refusal to allow the substitution of an entirely new expert witness only 50 days before trial was well within the range of principled outcomes, especially in light of its ruling that dismissal with prejudice was the proper remedy for the defective affidavit of merit.

D. DISMISSAL WITH PREJUDICE

The Estate argues that dismissal of the case should have been ordered without prejudice so that the Estate could refile its cause of action within the remaining time left in the period of limitations. The Hospital argues that it was proper for the trial court to dismiss the Estate's lawsuit with prejudice because the trial court struck the Estate's only nursing expert. Therefore, the Hospital argues, the Estate was unable to establish its prima facie case.

The Estate is correct that, pursuant to *Kirkaldy v Rim*,[12] the filing of a complaint and accompanying affidavit of merit tolls the applicable period of limitations until the validity of the affidavit is successfully challenged. Thus, where an affidavit of merit is found defective,

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[8] *Dean v Tucker*, 182 Mich App 27, 31-33; 451 NW2d 571 (1990).

[9] *People v Grove*, 455 Mich 439, 464-465; 566 NW2d 547 (1997).

[10] *Id.* at 469.

[11] *Id.*

[12] *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007).

dismissal without prejudice is the proper remedy, allowing the plaintiff to refile its cause of action within whatever time still remains in the period of limitations.[13]

However, as the trial court correctly recognized, pursuant to *Ligons v Crittenton Hosp*,[14] the filing of a complaint and accompanying affidavit of merit does not toll the wrongful death saving period.[15] Thus, where the wrongful death saving period has expired, the proper remedy for a personal representative's failure to submit a conforming affidavit of merit is dismissal with prejudice.[16]

Here, it is undisputed that the alleged malpractice occurred on November 14, 2003, and therefore, the applicable two-year period of limitation[17] expired on November 14, 2005. But the Estate did not file its complaint and affidavit of merit until November 5, 2008, almost three years after the two-year period of limitations expired. Thus, contrary to the Estate's contentions, *Kirkaldy* is inapplicable because there is no time remaining in the limitations period in which to refile the case.

The expiration of that period of limitations did not time bar the Estate's action, however, because under the wrongful death provision it had, at the latest, until November 14, 2008 to file its claim.[18] The Estate filed its complaint and affidavit of merit on November 5, 2008. But because under *Ligons* that filing had no tolling effect on the wrongful death saving period, there is no remaining time available under the wrongful death saving period and the successful challenge to the affidavit of merit requires dismissal with prejudice.

Accordingly, I conclude that the trial court did not abuse its discretion in ordering dismissal with prejudice.

I would affirm.

/s/ William C. Whitbeck

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[13] *Id.*

[14] *Ligons*, 285 Mich App at 354.

[15] MCL 600.5852.

[16] *Ligons*, 285 Mich App at 354.

[17] MCL 600.5805(6).

[18] Under the wrongful death savings provision, the personal representative of a deceased person may file an action at any time within two years after letters of authority are issued, but no later than three years after the period of limitations has run. MCL 600.5852.