STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL PIONTEK, Personal Representative of the ESTATE OF MARGARET R. PIONTEK,

Plaintiff-Appellant,

v

JAMES ARMSTRONG, D.O.,

Defendant-Appellee,

and

WILLIAM RAMINICK, D.O., LOUIS TEGTMEYER, D.O., and GARDEN CITY OSTEOPATHIC HOSPITAL,

Defendants.

UNPUBLISHED
December 27, 2002

No. 235792
Wayne Circuit Court
LC No. 00-021366-NH

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right from an order of the circuit court granting summary disposition to defendant James Armstrong, D.O. We reverse.

The facts underlying this appeal are not in dispute. The decedent, Margaret Piontek, was referred by her primary care physician to appellee in July 1997, for review of an abdominal aneurysm that had been under observation for several years. The aneurysm was apparently located on the inferior mesenteric artery, which branches off from the abdominal aorta.[1]

On August 13, 1997, at Garden City Hospital, appellee performed surgery on the decedent to repair the artery. The day following the surgery, appellee went on a two-week vacation. During appellee's absence, the decedent's primary care physician was in charge of her

[1] The abdominal aorta is "the part of the descending aorta that supplies structures below the diaphragm." *Stedman's Medical Dictionary* (26th ed, 1995), p 110.

post-operative medical care. At some point in those two weeks, Piontek experienced significant post-operative difficulties. An infectious disease consultation was done four or five days after the surgery, followed by additional diagnostic procedures after appellee's return. These additional procedures included: (1) an ultrasound guided paracentesis, performed by gastroenterologist William Raminick, D.O., on September 3, 1997; (2) a CAT scan on September 3 or 4, 1997; (3) the insertion of a catheter on September 10, 1997; (4) a fistula gram on September 17, 1997; and (5) a proctosigmoidoscopy on September 18, 1997. The proctosigmoidoscopy identified a colon perforation. No surgery was undertaken to address this perforation. The decedent died on September 21, 1997.

On June 30, 2000, appellant filed his complaint in the present case against appellee, Louis Tegtmeyer, D.O., Garden City Osteopathic Hospital, and Raminick.[2] Stipulated orders dismissing with prejudice Dr. Tegtmeyer, Garden City, and Dr. Raminick were entered, respectively, on October 10, 2000, May 25, 2001, and July 9, 2001. The affidavit of merit filed regarding the claim against appellee was signed by Wayne S. Gradman, M.D.

On May 25, 2001, appellee filed a motion to strike plaintiff's expert witness (Gradman) and enter summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that pursuant to MCL 600.2169, Gradman could not serve as an expert witness against appellee because Gradman is board certified in general surgery, whereas appellee is board certified in cardiovascular thoracic surgery. Plaintiff countered that the requirements of the statute were satisfied because both Gradman and appellee were board certified in general surgery.

On May 31, 2001, appellee filed a second motion for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing that because the board certifications of the two doctors did not match, Gradman's affidavit of merit was invalid. Accordingly, because the estate was opened on July 6, 1998, appellee argued that plaintiff's cause of action was barred by the statute of limitations. Plaintiff countered that summary disposition was improper because both doctors were board certified in general surgery. Alternatively, plaintiff argued that the statute of limitation should be tolled because of his reasonable belief that Gradman was qualified to testify as an expert witness.

At a June 22, 2001, hearing, the circuit court denied appellee's motion to grant summary disposition based on a faulty affidavit of merit and the statute of limitations, reasoning as follows: "I am not going to grant your motion to dismiss the case on the basis of an affidavit which you claim is incompetent. I think it could fit under the section in the statute that says who the plaintiff's attorney reasonably believes meets the requirement for an expert witness under section 2169." The court also observed that the question of whether Gradman meets the requirements of an expert witness under section 2169 is the "thorny issue in the case." After taking the matter under advisement, the court granted appellee's motion to strike and for summary disposition based on the argument that Gradman was not qualified to testify as an expert under MCL 600.2169.

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[2] Appellant filed his Notice of Intent to File a Claim in June 1999, and his first complaint on March 21, 2000. A stipulated order dismissing that case was entered in June 2000.

Plaintiff argues that the trial court erred in concluding that Gradman was unqualified to testify, and as a consequence, granting summary disposition to appellee. We agree. This Court reviews decisions on motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the motion was premised on MCR 2.116(C)(8) and (10), because the trial court examined evidence outside the pleadings when rendering its decision, the issue will be reviewed under the standard of review applicable to (C)(10) motions. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633, n 4; 601 NW2d 160 (1999).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

"Whether a witness is qualified to render an expert opinion and the actual admissibility of the expert's testimony are within the trial court's discretion. Such decisions are reviewed on appeal for an abuse of discretion." *Tate v Detroit Receiving Hospital*, 249 Mich App. 212, 215; 642 NW2d 346 (2002) (citations omitted).

Section 2169 reads 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.
>
> (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.

In *Tate, supra* at 220, this Court concluded that "section 2169 requires an expert witness to possess the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice." As *Tate* observed, "the specialty requirement is tied to *the occurrence of the alleged malpractice* and not unrelated specialties that a defendant physician may hold." *Id.* at 218 (emphasis added). This requirement assures that the medical expert has "'firsthand practical expertise in the subject matter about which [the expert is] . . . testifying.'" *McDougall v Schanz*, 461 Mich 15, 25, n 9; 597 NW2d 148 (1999), quoting *McDougall v Eliuk*, 218 Mich App 501, 509, n 1; 554 NW2d 56 (1996) (TAYLOR, P.J., dissenting).

It is clear from plaintiff's complaint that plaintiff's theory of the case is predicated on the actions of appellee during the course of the decedent's post-operative care. Specifically, plaintiff alleges that appellee failed to timely recognize, diagnose, and treat a bowel ischemia that eventually led to a perforation of the bowel. This allegation of malpractice does not involve the actual surgery on the decedent's abdominal aorta. We believe that the post-operative care of the decedent falls under the broad specialty of general surgery, particularly where the condition that led to the decedent's death is unrelated to the scope of the surgery performed. Further, we believe that because the medical issues implicated in this case are common and equally developed in the schools or systems of medicine practiced by appellee and Gradman, plaintiff need not secure a D.O. to testify about the appropriate standard of care. Therefore, as a board certified general surgeon, Gradman was qualified to testify under section 2169.

Accordingly, we hold that the trial court erred in striking Gradman and granting summary disposition to appellee. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper