STATE OF MICHIGAN

COURT OF APPEALS

GARY E. GIUSTI,

Plaintiff-Appellant,

and

BLUE CROSS & BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

MT. CLEMENS GENERAL HOSPITAL,

Defendant-Appellee,

and

JAMES LARKIN, D.O., JAY KANER, D.O., and TRI-COUNTY NEUROLOGICAL ASSOCIATES, P.C.,

Defendants.

UNPUBLISHED
December 2, 2003

No. 241714
Macomb Circuit Court
LC No. 1999-003849-NH

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in this medical malpractice action. We affirm.

On September 14, 1999, plaintiff commenced this action alleging that as a result of negligence, malpractice, and willful and wanton misconduct with regard to the medical treatment he received in 1997 following presentations to the emergency room, during a hospital admission, and during post-hospitalization visits, he suffered severe injuries. The defendants were Mt. Clemens General Hospital (MCGH), an emergency room physician at MCGH, Dr. James Larkin, a neurologist at MCGH, Dr. Jay Kaner, and Tri-County Neurological Associates, P.C. The affidavit of merit was signed by Alexander Mauskop, M.D., a purported expert in neurology. A second affidavit of merit was subsequently filed that was signed by Frank J. Baker, II, M.D., a

purported expert in emergency medicine. On March 7, 2001, Dr. Larkin was dismissed as a defendant by stipulation.

On February 25, 2002, MCGH filed a motion for summary disposition, pursuant to MCR 2.116(C)(8) and (C)(10), arguing that (1) it could not be vicariously liable for Dr. Kaner's actions because Dr. Kaner had "a separate and distinct physician-patient relationship with Plaintiff which predated the treatment at MCGH at issue," (2) plaintiff's emergency room expert, Dr. Baker, was not qualified pursuant to MCL 600.2169 to offer such expert testimony because he did not devote a majority of his professional time to the practice of emergency medicine in 1997 but, instead, worked half-time in emergency medicine, and (3) even if Dr. Baker was qualified to testify, plaintiff failed to establish causation.

On March 1, 2002, Dr. Kaner and Tri-County Neurological Associates moved for summary disposition, pursuant to MCR 2.116(C)(10), arguing that plaintiff failed to establish a breach in the standard of care since his neurology expert, Dr. Mauskop, indicated that "if the facts of the case were consistent with Dr. Kaner's testimony, then no violation of the standard of care existed."

On March 13, 2002, plaintiff responded to MCGH's motion for summary disposition and stipulated that MCGH could not be held vicariously liable for the actions of Dr. Kaner. Plaintiff argued, however, that (1) Dr. Baker was qualified as an expert in emergency medicine as evidenced by his testimony that, in 1997, he worked eight to ten shifts a month when full-time was considered fourteen shifts a month and, further, by his affidavit attached for consideration which indicated that in the immediately preceding year he devoted a majority of his professional time to the active clinical practice of emergency medicine, (2) MCL 600.2169 did not apply to the action because, at the time the lawsuit was filed, the statute was adjudicated unconstitutional, (3) plaintiff's causation expert, Dr. Mauskop, testified that an occluded carotid artery could have been detected at his initial presentation to MCGH with proper testing, and (4) Dr. Larkin's and Dr. Kaner's testimony could be used to establish a breach in the standard of care and proximate cause.

On March 29, 2002, a stipulation and order dismissing, with prejudice, Dr. Kaner and Tri-County Neurological Associates was entered by the court. On May 16, 2002, the trial court issued its opinion and order granting MCGH's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court held that (1) MCL 600.2169 applied to the case, (2) Dr. Baker was not qualified under MCL 600.2169 because he admitted in his deposition that he considered himself to work only half-time and, thus, did not devote a majority of his professional time to the practice of emergency room medicine, (3) Dr. Mauskop testified that he would not offer testimony as to the standard of care relative to emergency room physicians or other physicians involved in the original hospitalizations and, thus, was neither qualified nor prepared to testify as to emergency room care rendered to plaintiff, and (4) plaintiff's reliance on Dr. Larkin and Dr. Kaner as experts was unsupported because the record did not reflect that either physician was qualified under MCL 600.2169 or that either could establish the standard of care or breach of such standard of care. Accordingly, the case was dismissed. This appeal followed.

Plaintiff argues that the trial court erred in prohibiting Dr. Baker from testifying in this case because he was qualified under MCL 600.2169 to render expert testimony. We disagree. The qualification of a witness as an expert, and the admissibility of such testimony as evidence,

are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Mulholland v DEC Int'l Corp,* 432 Mich 395, 402; 443 NW2d 340 (1989).

To establish a prima facie case of professional negligence in a medical malpractice action the plaintiff must prove the applicable standard of care, breach of that standard, and an injury caused by that breach. See *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997). Expert testimony is mandatory, with few exceptions. *Locke v Pachtman*, 446 Mich 216, 223-224, 230; 521 NW2d 786 (1994); *Carlton v St John Hosp*, 182 Mich App 166, 171; 451 NW2d 543 (1989). MCL 600.2169 imposes requirements regarding the qualifications of expert witnesses who would render such testimony, and provides:

> (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:
>
> * * *
>
> (b) Subject to subdivision (c), during the year immediately proceeding 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 this case, the trial court concluded that Dr. Baker did not devote a majority of his professional time to the active clinical practice of emergency medicine or the instruction of students in emergency medicine. We agree with the trial court.

> Dr. Baker testified, in pertinent part, as follows:
>
> *Q*. And in 1997, which was the time frame in question in this particular case, were you working full-time as an ER physician?
>
> *A*. In 1997, I was basically half-time in emergency medicine. I was working at MacNeal Hospital, doing eight to ten shifts a month. The full-timers were doing about 14.
>
> *Q*. When did you – what was the first year you started becoming half-time in ER?
>
> *A*. Well, in terms of half-time clinical, it was when I left the University of Chicago. I decided I wasn't going to work any more hundred hour weeks.

> *Q*. I don't blame you. So after 1987, at least from a clinical standpoint, after leaving the University of Chicago, you have been half-time in ER medicine, correct, from a clinical standpoint?
>
> *A*. Yes.

Dr. Baker's testimony was clear and unequivocal—he did not devote a majority of his professional time to the active clinical practice of emergency medicine for about the ten years preceding the date of the occurrence that gave rise to this action. Although he testified that he averaged 20 to 24 hours a week, he also testified that he considered himself to be half-time clinical because he spent one day a week reviewing cases as an expert witness, "another day a week doing medical education-related things, mostly related to my own CME" and he spent "a significant amount of time working on overseas programs, mostly in Russia and the former Soviet Union." In our opinion, Dr. Baker's own interpretation as to his employment status, i.e., that he did not devote a *majority* of his professional time to active clinical practice, is the most reliable and must prevail over any nullifying interpretation, including his submission of a later, contrary affidavit. See *Dykes v William Beaumont Hosp*, 246 Mich App 471, 479-480; 633 NW2d 440 (2001). And, in light of the facts, his interpretation appears accurate. Further, Dr. Baker did not formally instruct students in emergency medicine. Practicing medicine in a teaching hospital does not fulfill the requirements of MCL 600.2169(1)(b)(ii). Accordingly, we do not agree with the dissenting opinion that the trial court abused its discretion in disqualifying Dr. Baker as an expert witness under MCL 600.2169. Considering the facts on which the trial court acted, we cannot say that its decision was without justification or excuse, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or was "so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias," *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Next, plaintiff argues that the trial court abused its discretion in prohibiting Dr. Mauskop from testifying on the issue of causation. We disagree. After the trial court noted that plaintiff's only remaining claims were against MCGH and were related to emergency room visits, it held that Dr. Mauskop, a neurologist, was not qualified under MCL 600.2169 to offer expert testimony regarding treatment rendered to plaintiff by emergency room physicians. In his appeal brief, plaintiff does not address this finding, but merely argues that Dr. Mauskop was qualified to testify as to the issue of causation. However, even if Dr. Mauskop was qualified to testify as to the issue of causation, he was not qualified to testify as to the standard of care and breach of the standard of care related to the treatment rendered by emergency room physicians during the emergency room visits. Therefore, this is not a ground on which to reverse the trial court's grant of summary dismissal.

Finally, plaintiff argues that he should be able to elicit the necessary causation testimony from the former defendants, Drs. Larkin and Kaner, to establish his prima facie case. We disagree. As noted by the trial court, the record did not establish that either physician was qualified under MCL 600.2169 to render such expert testimony. Contrary to plaintiff's argument on appeal that "the qualifications of these doctors to testify as experts cannot be seriously disputed," both physicians could actually devote only half of their professional time to the practice of neurology and emergency room medicine. Accordingly, plaintiff failed to establish that the requirements of MCL 600.2169 have been met with regard to either physician.

Further, even if Dr. Larkin was qualified to render expert testimony as to the applicable standard of care related to plaintiff's emergency room visits, his testimony regarding a breach of that standard and causation consisted of, as held by the trial court, "nothing more than conjecture concerning 'inappropriate' behavior hypothetically attributed to an emergency room nurse." And, even if Dr. Kaner was qualified to render causation testimony, he was not qualified to testify as to the standard of care and breach of the standard of care related to the treatment rendered by emergency room physicians during plaintiff's emergency room visits. Therefore, this issue is without merit. In sum, the trial court properly granted summary disposition in MCGH's favor because plaintiff lacked sufficient expert testimony to establish a prima facie case of medical malpractice.

Affirmed.

/s/ Bill Schuette
/s/ Mark J. Cavanagh