STATE OF MICHIGAN

COURT OF APPEALS

TREVA LOWERY,

Plaintiff-Appellant,

v

MICHAEL R. BEER, M.D., MICHAEL J. MACKSOOD, D.O., and UROLOGICAL SERVICES, P.C.,

Defendants-Appellees.

UNPUBLISHED
February 24, 2009

No. 280836
Genesee Circuit Court
LC No. 05-081341-NH

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from the trial court's order granting defendants' motion for a directed verdict after a jury was selected, but before any witnesses were called. We reverse and remand.

Plaintiff filed this medical malpractice action alleging that defendants Drs. Michael Beer and Michael Macksood negligently damaged her spleen, requiring its removal, during surgery to remove plaintiff's left kidney for transplant to her brother. At trial, after a jury was selected but before any evidence was introduced, defendants moved for a directed verdict, arguing that although plaintiff's proposed expert, Dr. Ralph Duncan, met the qualification requirements of MCL 600.2169 to testify as an expert, he was not competent to offer expert testimony in this case because he was not familiar with the medical facilities available to plaintiff in the local Flint community. The trial court agreed and granted defendants' motion.

On appeal, plaintiff argues that the trial court erred both procedurally and substantively in granting defendants' motion for a directed verdict. Initially, and as suggested by the trial court, to the extent defendants' motion was improperly characterized as one for a directed verdict, it properly could have been treated as a motion for summary disposition, presumably under MCR 2.116(C)(10). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim.

> Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open

> an issue upon which reasonable minds might differ. [*Allstate Ins Co v Dep't of Mgt & Budget*, 259 Mich App 705, 709-710; 675 NW2d 857 (2003).[1]]

Thus, we now address whether the trial court's determination that Dr. Duncan could not testify about the appropriate standard of care because he was not familiar with the facilities available in the local community was substantively correct.

The correct standard of care in a medical malpractice action is determined as a matter of law. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 16 n 16; 651 NW2d 356 (2002). The trial court's decision whether an expert is qualified to testify regarding the specifics of the standard of care is reviewed for an abuse of discretion. *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 141; 528 NW2d 170 (1995).

Here, there was no dispute Dr. Duncan was qualified as an expert. The question was whether he could competently testify as to "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 . . . ." MCL 600.2912a(1)(b).[2]

Dr. Duncan had the same certification as the defendant physicians. Further, he explained in his deposition that all board certified urologists receive virtually the same education and training, and that all renal transplant facilities are required to adhere to the same qualifications. With respect to the surgery at issue here, he stated that he was familiar with the standard of care in the local community, explaining:

> All urologists in the United States are trained similarly in nationally approved resident programs which are monitored by the national certifying bodies and the testing is, again, a national examination. And also, all urologists receive additional postgraduate education at the same institutions and meetings so that the education and training is virtually the same for all urologists.

However, although this evidence indicates that Dr. Duncan was familiar with the standard of care for urologists and that the standards for urologists and renal transplant facilities are similar nationally, Dr. Duncan was not qualified to give testimony under MCL 600.2912a(1)(b), because he could not *also* testify about the standard of care "in light of the facilities available in the

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[1] The trial court rejected plaintiff's argument that the motion could not be considered because it was untimely under the court's scheduling order, and given the circumstances, that conclusion was not an abuse of discretion.

[2] Plaintiff argues that an expert familiar with the standard of care in a community may testify concerning the standard of care in that community, although he has not practiced in the community, and although he has not spoken to physicians there. *Robins v Garg* (*On Remand*), 276 Mich App 351, 356; 741 NW2d 49 (2007). *Robins*, however, was applying MCL 600.2912a(1)(a), which contains a different standard than under (1)(b). Also, there was sufficient testimony in *Robins* to satisfy the community standard criteria under that subsection. *Id*.

community or other facilities reasonably available under the circumstances . . . ." MCL 600.2912a(1)(b); *Cox*, *supra* at 17 n 17. Dr. Duncan's deposition testimony was unequivocal in that he had never been to the Flint area, and thus, was unfamiliar with both the hospital where the alleged negligence occurred or any other facility in the community. As the trial court noted, this defect could have been remedied had Dr. Duncan testified at trial and taken the opportunity to review or inspect local facilities.

Nevertheless, this defect should not have been fatal to plaintiff's case at the pre-trial stage. The trial court ruled, and defendant argues, that because plaintiff's expert could not testify to the facilities available in the community, plaintiff could not prevail as a matter of law. However, MCL 600.2912a(1)(b) is not necessarily geared to only an expert's testimony. Instead, it speaks to plaintiff's burden of proof in general, and as plaintiff argues, her burden can be met through plaintiff's expert or other qualified witnesses, including defendants themselves if called as adverse or hostile witnesses and found to be qualified to testify as to the facilities available in the Flint area. Hence, plaintiff should have been given the opportunity to establish the standard under MCL 600.2912a(1)(b) through her entire case in chief, and if she failed to do so, her case would have been properly dismissed by a directed verdict. The case, however, never reached that point.

Reversed and remanded. We do not retain jurisdiction. Costs to plaintiff as prevailing party.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray