STATE OF MICHIGAN

COURT OF APPEALS

CINDY STEVENS and STEVE STEVENS,

Plaintiffs-Appellants,

v

LANSING ANESTHESIOLOGISTS, P.C., INGHAM REGIONAL MEDICAL CENTER, and MCLAREN HEALTH CARE CORP,

Defendants,

and

DOUGLAS BEZ, D.O.,

Defendant-Appellee.

UNPUBLISHED
November 17, 2016

No. 328971
Ingham Circuit Court
LC No. 13-000056-NH

Before: Owens, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs Cindy Stevens and Steve Stevens appeal as of right the trial court's order granting a directed verdict to defendant Douglas Bez, D.O. based on plaintiffs' failure to proffer a qualified expert on the standard of care under MCL 600.2169(1)(b)(*i*).[1] Because the trial court did not abuse its discretion by excluding the opinion of plaintiffs' expert, the trial court's grant of a directed verdict was not erroneous given the absence of expert testimony supporting plaintiffs' medical malpractice claim, and the trial court did not abuse its discretion by denying plaintiffs' request to add an unidentified replacement expert to their witness list mid-trial, we affirm.

I. FACTS & PROCEDURAL HISTORY

[1] Throughout this opinion, "plaintiff" refers to Cindy Stevens individually, whereas "plaintiffs" refers to both Cindy and Steve Stevens.

In October 2011, plaintiff underwent coronary arterial bypass graft (CABG) surgery. The CABG surgery was successful, but plaintiff experienced complications related to the injection of sodium bicarbonate through a peripheral intravenous ("IV") line placed in her right hand, which caused the tissue to become necrotic and required multiple surgeries. As a result, plaintiff has significant scarring and she continues to suffer pain as well as loss of function in her hand.

In 2012, plaintiffs provided defendant, the anesthesiologist in charge of plaintiff's medications during the surgery, with a notice of intent to file suit.[2] Plaintiffs later filed a three-count complaint, alleging medical malpractice, ordinary and gross negligence, and loss of consortium. Plaintiffs' theory was that defendant breached the standard of care by administering sodium bicarbonate, the caustic substance that caused plaintiff's injury, through the IV in plaintiff's hand rather than through the central IV line.

Plaintiffs attached an affidavit of merit (AOM) to their complaint, provided by Jason Brajer, M.D. With respect to Dr. Brajer's qualifications, the AOM provided:

> 2. I graduated from Johns Hopkins University in 1976 with a Bachelor of Arts, and received my Doctor of Medicine degree from Hahnemann Medical College in 1980. I completed an internship at Albert Einstein Medical Center in 1981, and an Anesthesiology Residency at Thomas Jefferson University in 1984. I completed a fellowship in Cardiovascular Anesthesia and Obstetrical Anesthesia at Thomas Jefferson University in 1985;
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> 3. During the year preceding the alleged malpractice I practiced on a full time basis as an anesthesiologist with 100% of my time devoted to clinical practice. I currently practice as a full time anesthesiologist with 100% of my time devoted to clinical practice at Grossinger NeuroPain Specialists in Ridley Park, Pennsylvania[.]

During discovery, Dr. Brajer testified at his deposition that the last time he performed anesthesia in a CABG procedure was in 1988. He indicated that he left the hospital system altogether in 2008, after which he did some "part-time anesthesia" through early 2009, but "basically, effective[], as of September of 2008," he had been practicing "office-based pain management." He explained that his pain management practice entailed x-ray guided interventional spine and large joint injections for the treatment of semi-acute and chronic pain.

Trial ensued during which plaintiffs, after presenting eight of their witnesses, sought to introduce Dr. Brajer as an expert in the "field of anesthesiology" in order to establish the applicable standard of care. Dr. Brajer testified that he currently practiced in "pain management," but that he had participated in "at least a thousand" cardiac surgeries as an anesthesiologist. During voir dire, he clarified that he had not participated as an anesthesiologist

[2] Plaintiffs also filed suit against Lansing Anesthesiologists, P.C., Ingham Regional Medical Center, and McClaren Health Care Corporation. These parties were dismissed from the action by stipulation.

in a hospital procedure for "[a] little less than three years" before plaintiff's CABG procedure. He further admitted that he had not participated in a CABG procedure since 1988, 23 years earlier. Upon further questioning, he confirmed that he was board certified in pain management, which he admitted does not require one to be an anesthesiologist.

Defendant then moved to strike Dr. Brajer as an expert witness under MCL 600.2169(1). The trial court granted defendant's request, concluding that defendant's specialty was anesthesiology and that, although Dr. Brajer was a board certified anesthesiologist, Dr. Brajer was not qualified as an expert witness "based on the *Woodard*[3] case" because he "was not practicing anesthesiology in the year prior to the incident in this matter [as required by MCL 600.2169(1)(b)(*i*)]. He was practicing pain management." The trial court then granted defendant's related motion for a directed verdict and denied plaintiffs' motion to amend their witness list to add a new, yet to be identified, expert. Plaintiffs appeal as of right.

II. MOTION TO STRIKE & DIRECTED VERDICT

Plaintiffs first argue that the trial court erred by granting defendant's motion for a directed verdict because, according to plaintiffs, Dr. Brajer qualified as an expert. Specifically, plaintiffs assert that the trial court, in considering Dr. Brajer's qualifications, was only permitted to consider the evidence presented before or up to the point when defendant moved for a directed verdict. Plaintiffs maintain that the trial record at the time of defendant's motion was insufficient to support the trial court's findings regarding Dr. Brajer's qualifications, or lack thereof, to testify as an expert. Thus, plaintiffs argue that the trial court abused its discretion by excluding Dr. Brajer's testimony and that the directed verdict was premature. We disagree.

"A trial court's rulings concerning the qualifications of proposed expert witnesses are reviewed for an abuse of discretion." *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard*, 476 Mich at 557. We review de novo a trial court's decision to grant a directed verdict motion. *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 345; 871 NW2d 136 (2015). "A party is entitled to a directed verdict if the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law." *Id*.

In a medical malpractice action, it is the plaintiff's burden to prove: "(1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). "Failure to prove any one of these elements is fatal." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003). With respect to the standard of care, a plaintiff must show "that the medical care provided by the defendant fell below the standard of medical care applicable at the time the care was provided." *Rock*, 499 Mich at 260. The relevant standard of care must be established through expert testimony. *Gonzalez v St John Hosp & Med Ctr*, 275 Mich App 290, 294; 739 NW2d 392 (2007).

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[3] *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006).

To testify as an expert in a medical malpractice action, an individual must satisfy the requirements of MCL 600.2169, which provides, in 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:
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> (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.
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> (b) Subject to subdivision (c) [not relevant], *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:
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> (*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. [Emphasis added.]

Briefly stated, MCL 600.2169(1) requires "that the qualifications of a purported expert match the qualifications of the defendant against whom that expert intends to testify." *Decker v Flood*, 248 Mich App 75, 85; 638 NW2d 163 (2001).

More specifically, at issue in this case is MCL 600.2169(1)(b)(*i*). Under this provision, if, as in this case, a defendant physician is a specialist, in order to qualify as an expert, "the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty." *Woodard*, 476 Mich at 566. A "specialty" is "a particular branch of medicine or surgery in which one can potentially become board certified." *Woodard*, 476 Mich at 561. Moreover, a "subspecialty is a specialty" for purposes of MCL 600.2169(1), meaning that "if the defendant physician specializes in a subspecialty and was doing so at the time of the alleged malpractice, the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching that subspecialty." *Woodard*,

476 Mich at 562, 566 n 12. Conversely, a physician devoting a majority of his or her time to a subspecialty would not qualify as an expert relative to a defendant physician who practiced the more general specialty. See *id.* at 577-578. For example, in *Hamilton v Kuligowski*, a companion case to *Woodard*, the defendant physician was board certified in internal medicine and practicing general internal medicine while the proposed expert was also board certified in internal medicine but primarily worked as an infectious disease specialist, which was a subspecialty of internal medicine. See *id.* at 556, 577-578. The Court held:

> [P]laintiff's proposed expert witness did not devote a majority of his time to practicing or teaching general internal medicine. Instead, he devoted a majority of his professional time to treating infectious diseases. As he himself acknowledged, he is "not sure what the average internist sees day in and day out." Therefore, plaintiff's proposed expert witness does not satisfy the same practice/instruction requirement[.] [*Id.* at 578.]

In the instant matter, defendant was engaged in the practice of anesthesiology at the time of the alleged malpractice, making anesthesiology the one most relevant specialty. See *id.* at 560, 566. Dr. Brajer was board certified in anesthesiology and board certified in pain management.[4] It is undisputed that he did not devote a majority of his time to anesthesiology in the year preceding the alleged malpractice. Indeed, Dr. Brajer conceded that he had not acted as an anesthesiologist for a hospital surgical procedure for years before the procedure in question and he had not participated in a CABG surgery since 1988. Cf. *id.* at 577 n 21 (criticizing proposed expert who had not performed "the specific medical procedure that was allegedly performed negligently in this case, since his residency in the early 1980's"). Instead, he was engaged in clinical pain management. Because he did not, in the year preceding the alleged malpractice, devote a majority of his professional time to the same specialty as that practiced by defendant, and there is no indication that Dr. Brajer instructed students in this field, we conclude that the trial court did not abuse its discretion by finding that Dr. Brajer did not qualify as an expert witness under MCL 600.2169(1)(b). Consequently, the trial court properly excluded Dr. Brajer's proposed testimony.

In contrast to our conclusion that the trial court did not abuse its discretion by determining that Dr. Brajer was not qualified to testify, plaintiffs assert that the evidence was

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[4] On appeal, plaintiffs suggest that pain management is not necessarily a distinct specialty from anesthesiology. However, this assertion is plainly belied by Dr. Brajer's own testimony. In addition to his board certification in anesthesiology, Dr. Brajer indicated that he was certified in "pain management" by the American Academy of Pain Management. He further testified that "pain management" was a recognized subspecialty by the American Board of Medical Specialties and that, while Dr. Brajer was an anesthesiologist, one did not need to be an anesthesiologist in particular to specialize in "pain management." Under *Woodward*, this type of subspecialty for which certification is available constitutes a "specialty" for purposes of MCL 600.2169(1). See *Woodard*, 476 Mich at 561-562, 565; *Jones v Botsford Continuing Care Corp*, 310 Mich App 192, 210; 871 NW2d 15 (2015).

insufficient to support the trial court's findings and that this ruling was "premature."[5] Specifically, plaintiffs take issue with the trial court's finding that "[defendant was] not practicing pain management in any fashion whereas Doctor Brajer is[,]" suggesting that this finding is without support because defendant had not yet testified with regard to the specialty he practiced at the time of the alleged malpractice. Absent sufficient evidence of defendant's specialty and what that specialty entailed, plaintiffs maintain the trial court could not reasonably conclude that defendant's and Dr. Brajer's specialties did not match for purposes of MCL 600.2169(1).

However, witnesses at trial, including, for example, a resident physician present in the operating room, identified defendant as the attending anesthesiologist for the surgery in question. Given this evidence, the trial court did not abuse its discretion by determining that anesthesiology was the relevant specialty. See *Woodard*, 476 Mich at 569 n 15 & 576 n 19. Indeed, while plaintiffs now contest defendant's relevant specialty for purposes of comparison to Dr. Brajer's area of practice, in the trial court, plaintiffs attempted to offer Dr. Brajer as an expert in anesthesiology. Further, during argument concerning Dr. Brajer's qualifications, plaintiffs' counsel stated that the relevant specialty "is anesthesiology" and counsel argued that Dr. Brajer was a qualified expert in this area because pain management is "part and parcel of anesthesiology." In other words, plaintiffs' counsel conceded that defendant was practicing anesthesiology at the time of the alleged malpractice. In conceding these facts, plaintiffs have waived any argument on appeal that the trial court's finding regarding the relevant specialty was erroneous. See *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 64; 799 NW2d 177 (2010) ("A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.").

In sum, the trial court's finding that Dr. Brajer was not qualified as an expert witness and its decision to grant defendant's motion to strike was not an abuse of discretion. See *Rock*, 499 Mich at 260. Because plaintiffs had no expert witness to testify to the standard of care applicable at the time of the surgery, plaintiffs failed to meet their burden of proving the elements of their medical malpractice claim. See *Gonzalez*, 275 Mich App at 294. In the absence of evidence

[5] In making this argument, plaintiffs contend that the trial court was only permitted to consider evidence offered at trial up to the time of defendant's directed verdict motion. This argument confuses the standards applicable to motions for a directed verdict and the qualification of expert witnesses. While a motion for a directed verdict involves consideration of all the evidence presented up to the point of the motion to determine whether a fact question exists, *Heaton v Benton Const Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009), consideration of a proposed expert's qualifications is a preliminary question entrusted to the discretion of the trial court, *Woodard*, 476 Mich at 571 n 16; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 685 NW2d 391 (2004). When determining a preliminary question, a trial court is not bound by the rules of evidence and may consider evidence presented by the proponent and, if applicable, the opponent of the expert witness. See MRE 104(a); *Gay v Select Specialty Hosp*, 295 Mich App 284, 293; 813 NW2d 354 (2012). Ultimately, there was nothing improper in the evidence relied on by the trial court or premature in the timing of the trial court's decision.

establishing the standard of care, the trial court did not err by granting a directed verdict for defendant. Cf. *Woodard*, 476 Mich at 578.

III. MOTION TO AMEND WITNESS LIST

Finally, plaintiffs argue that the trial court erred by denying their request to amend their witness list to add a new expert witness in place of Dr. Brajer. According to plaintiffs, good cause for the amendment existed because plaintiffs were surprised by defendant's motion to strike and plaintiffs had diligently pursued their case causing no delays in the litigation.

A trial court's decision on a motion to amend a witness list and to adjourn the proceedings is reviewed for an abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). As part of the discovery process, the trial court, under MCR 2.401(I)(1), sets the time period for submitting witness lists and disclosing whether any witness is an expert. In the event that a witness is "not listed in accordance with this rule[,]" the trial court "may order that" the witness "will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2). In considering whether a witness not properly named on a witness list should be allowed to testify, the trial court may consider the following non-exhaustive list of factors:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of [the movant] engaging in deliberate delay; (6) the degree of compliance by the [movant] with other provisions of the court's order; (7) an attempt by the [movant] to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice. [*Duray Development, LLC v Perrin*, 288 Mich App 143, 165; 792 NW2d 749 (2010) (footnote omitted).]

In this matter, the trial court's scheduling order required disclosure of plaintiffs' expert witnesses by October 1, 2013. Plaintiffs listed Dr. Brajer in their witness list and did not move to amend their list until the third day of trial. Notably, at the time plaintiffs sought to amend their witness list, they did not have another expert available. Before ruling on plaintiffs' motion, the trial court questioned plaintiffs whether any other witness on their list could testify to their proposed standard of care and considered the qualifications of each proposed witness, but concluded that each would not qualify. The trial court queried what it was to do with the jury that had already been sworn during a period when plaintiffs must look for another expert witness and the court also noted that defendant was ready to proceed with trial. In the context of an ongoing jury trial, the court concluded that it simply could not suspend trial for "however long it would take, 90 days or 120 days," to allow the plaintiffs to obtain a new expert and permit depositions. Ultimately, there being no lesser sanctions available, the trial court denied plaintiffs' motion to amend their witness list and struck Dr. Brajer.

We acknowledge that Michigan courts prefer disposition of litigation on the merits, *Tisbury*, 194 Mich App at 21, but we cannot conclude under the present circumstances that the trial court's denial of plaintiffs' motion to amend their witness list was an abuse of discretion.

While plaintiffs' failure to name a qualified expert on their witness list does not appear to have been a willful omission, the factual aspects of this case do not otherwise demonstrate good cause. Despite plaintiffs' claim of surprise, there is nothing new about the requirements of MCL 600.2169(1) and indeed the *Woodward* decision outlining these requirements in detail was decided more than a decade ago. Given the existing state of the law and the substance of Dr. Brajer's deposition testimony, plaintiffs knew, or should have known, that Dr. Brajer's qualifications were problematic well before trial. See generally *Rock*, 499 Mich at 267 (noting that the requirements of MCL 600.2169 allow "a plaintiff to ensure that an expert is qualified well in advance of the time of the testimony"); *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 494; 708 NW2d 453 (2005) (describing a plaintiff attorney's obligation to use the benefit of discovery to better ascertain the qualifications of the defendant physician to confirm that a proposed expert is qualified under MCL 600.2169). Indeed, plaintiffs admit on appeal that the issue of Dr. Brajer's qualifications was "foreseeable," and they offer no reason why they did not exercise reasonable diligence to cure the defect before trial.[6] In the face of plaintiffs' inadequate preparation and apparent lack of foresight, given the age of the case, the trial court did not abuse its discretion by denying plaintiffs additional time to search for an unidentified expert to add to their witness list mid-trial, well after the close of discovery. See *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 630; 506 NW2d 614 (1993); *Bates v Detroit*, 66 Mich App 701, 706; 239 NW2d 716 (1976).

This is particularly true given that defendant had no notice of who the unidentified expert witness might be or how the unknown expert might testify, and defendant would have had to expend more resources litigating this matter, perhaps requiring retention of a counter-expert and development of a new strategy mid-trial. Cf. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90-91; 618 NW2d 66 (2000) (disallowing late expert testimony when the opposing party had "no chance to conduct any discovery of the expert and that it would be unfair to require [the opposing party] to prepare on such short notice"). Moreover, despite plaintiffs' assertion that defendant was the only party to cause delay in this case, the record reflects that plaintiffs repeatedly refused to comply with discovery deadlines, causing defendant to file numerous motions to compel. Overall, plaintiffs did not demonstrate good cause to support amendment of their witness list. We therefore conclude that the trial court did not abuse its discretion by denying plaintiffs' leave to amend.

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[6] While ostensibly conceding in their brief that defendant did not have to challenge Dr. Brajer's qualifications before trial, much of plaintiffs' argument nonetheless focuses on the assertion that plaintiffs' failure to timely identify a qualified witness should be excused because defendant engaged in gamesmanship by waiting until trial to challenge the admissibility of Dr. Brajer's testimony. To be clear, there is no rule that an opposing party must challenge a medical malpractice expert before trial or within a reasonable time of learning the expert's identity. See *Cox v Bd of Hosp Managers for Flint*, 467 Mich 1, 17 n 18; 651 NW2d 356 (2002); *Greathouse v Rhodes*, 465 Mich 885; 636 NW2d 138 (2001). Instead, it is ultimately the *proponent* of expert testimony in a medical malpractice case who "must satisfy the court that the expert is qualified." *Elher v Misra*, 499 Mich 11, 22; 878 NW2d 790 (2016) (citation omitted). Quite simply, it was plaintiffs' obligation, not defendant's, to ensure that plaintiffs had a qualified expert for trial.

Affirmed.

/s/ Donald S. Owens
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering