S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ANTOINETTE CARTER,

Plaintiff-Appellee,

v

A. NEAL WILSON, M.D. and A. NEAL WILSON, M.D., P.C.,

Defendants-Appellants,

and

DETROIT MEDICAL CENTER and HARPER HUTZEL HOSPITAL,

Defendants.

UNPUBLISHED
May 8, 2007

No. 270657
Wayne Circuit Court
LC No. 04-414457-NH

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendants, A. Neal Wilson, M.D. and A. Neal Wilson, M.D., P.C., appeal the denial of their motion for summary disposition in this medical malpractice action. Specifically, defendants contend that the affidavit of merit accompanying the complaint filed by plaintiff, Antoinette Carter, was defective because a qualified expert did not sign it. We affirm.

Plaintiff consulted with defendant to obtain surgical intervention for cosmetic changes to her appearance, generally described as a "face lift." Defendant simultaneously performed several surgical procedures on plaintiff, including: (a) blepharo-ptosis with obstruction of peripheral vision, (b) subplatysmal lipoma, (c) excessive facial skin, and (d) brow ptosis. Although no immediate complications were evidenced following the surgery, within a week plaintiff began to experience swelling, excessive fluid drainage and scarring. Defendant performed a second surgery on plaintiff to repair the scarring and fluid accumulation. When plaintiff continued to experience complications comprised primarily of the development of an excessive, hardened layer of skin in her neck area, which restricted her neck movement, she consulted another surgeon and initiated this lawsuit.

Accompanying plaintiff's complaint was an affidavit of merit, signed by Vladimir Panine, M.D. Dr. Panine is a board-certified dermatologist who performs a spectrum of cosmetic

surgical procedures. Defendant describes himself as a plastic surgeon, but is not board-certified in that specialty or any other specialty. Based on this discrepancy, defendants filed a motion for summary disposition, asserting that Dr. Panine was not qualified, under MCL 600.2169, to offer standard of care testimony against defendant and that, as a result, the affidavit of merit was deficient. In addition, defendants argued that because the affidavit of merit was insufficient, there was no tolling of the statute of limitations, necessitating the dismissal of plaintiff's cause of action with prejudice.

Plaintiff responded by asserting that her original counsel, who initiated the complaint, had a reasonable belief that Dr. Panine was qualified to sign the affidavit of merit because both Dr. Panine and defendant practiced the specialty of cosmetic surgery. Plaintiff's initial counsel, Grady L. Toombs, provided an affidavit in which he averred that he consulted with Dr. Panine to review plaintiff's medical records involving the surgery by defendant and that Dr. Panine had opined defendant had breached the standard of care. Dr. Panine also told plaintiff's counsel that the procedures performed by defendant were cosmetic surgical procedures, which Dr. Panine also performed on a regular basis. Plaintiff's former counsel indicated that he had reviewed the American Board of Medical Specialties website and determined that defendant was not board certified in any particular specialty. Specifically, plaintiff's counsel explained:

> Based upon a review of the records of Antoinette Carter, identifying the procedure performed by Dr. Alan Neal Wilson, a review of this surgical documentation by Dr. Vladimir Panine, Dr. Panine's acknowledgment that he was primarily practicing in this area of cosmetic surgery and that he (Dr. Panine) was credentialed to perform the same procedures as those performed upon Antoinette Carter by Dr. Wilson, I was led to reasonably believe Dr. Panine was qualified to testify as an expert witness pursuant to MCL 600.2169 regarding the claims against Dr. Alan Neal Wilson.

The trial court issued a written opinion denying defendant's motion for summary disposition stating, in relevant part:

> [B]ased on the information available to Plaintiff's attorney when he was preparing the affidavit of merit, which consisted of his expert's advice and information that Dr. Wilson was not board certified in a specialty, Plaintiff's attorney had a reasonable belief that Dr. Panine satisfied the requirements of MCL 600.2169.

Specifically, the trial court opined:

> [T]he parties have presented evidence that there is considerable overlap between the specialty of plastic surgery and cosmetic surgery, such that a physician who designates plastic surgery as his specialty might spend the majority of his time performing the same procedures as a cosmetic surgeon performs.
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> * * *
>
> [T]he fact that cosmetic surgery is not formally recognized as a specialty does not undermine the testimony of Dr. Wilson and Dr. Panine regarding the overlap between cosmetic surgery and other formally recognized specialties. The Court

> notes that on the Detroit Medical Center's website, Dr. Wilson's practicing specialty is listed as plastic surgery, and his clinical interests include facial/cosmetic surgery, liposuction, and blepharoplasm, which Dr. Panine considers cosmetic surgical procedures.

In addition to denying defendant's motion for summary disposition, the trial court entered a stay of proceedings pending the resolution of this appeal. The decision to grant or deny summary disposition is a question of law that we review de novo. *Schmalfeldt v North Pointe Ins Co,* 469 Mich 422, 426; 670 NW2d 651 (2003). Similarly, statutory interpretation is also a question of law that is reviewed de novo by this Court. *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29, 32; 658 NW2d 139 (2003).

In filing a complaint for medical malpractice, a plaintiff is required to provide, pursuant to MCL 600.2912d(1), an affidavit of merit "signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section [MCL 600.]2169." See also, *Grossman v Brown,* 470 Mich 593, 598; 685 NW2d 198 (2004). Specifically, MCL 600.2169 provides, in relevant 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.

MCL 600.2169 "contains strict requirements concerning the qualification of expert witnesses in medical malpractice cases," *McDougall v Shanz,* 461 Mich 15, 28; 597 NW2d 148 (1999), by mandating the qualifications of an expert witness "match" the qualifications of the defendant physician. *Tate v Detroit Receiving Hosp,* 249 Mich App 212, 221; 642 NW2d 346 (2002).

The Michigan Supreme Court has recently elaborated on the "matching" requirement in malpractice actions, stating:

> [T]he plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty. [*Woodard v Custer,* 476 Mich 545, 560; 719 NW2d 842 (2006).]

The Court went further to indicate, "a physician can be a specialist who is not board certified," and defined a "specialist" as "somebody who can potentially become board certified." *Id.* at 561. "[I]f the defendant physician practices a particular branch of medicine or surgery in which one can potentially become board certified, the plaintiff's expert must practice or teach the same particular branch of medicine or surgery." *Id.* at 561-562.

Defendants assert that, even on the most basic or superficial level, Dr. Panine's qualifications as a board-certified dermatologist do not match defendants' designated discipline of plastic surgery. Defendants further contend that plaintiff could not have reasonably believed, given defendants' stated area of practice of plastic surgery, that an affidavit of merit signed by a board-certified dermatologist would meet the statutory requirements. Although plaintiff acknowledges the discrepancy in the stated areas of practice for the two physicians, she contends that both defendant and Dr. Panine are "specialists" in cosmetic surgery. As such, plaintiff argues it was reasonable to believe the assertions of her expert that because both doctors performed the same or similar medical procedures that Dr. Panine would meet the expert witness requirements of MCL 600.2169(1) for purposes of completion of an affidavit of merit.

MCL 600.2912(d) only requires that plaintiff's attorney maintained a reasonable belief that the health professional used to sign the affidavit of merit met the statutory requirements of MCL 600.2169. *Geralds v Munson Healthcare,* 259 Mich App 225, 233; 673 NW2d 792 (2003). The lower criteria, which requires that an affidavit of merit need only be based on a reasonable belief, is due to the fact that discovery will not have been available at the time the affidavit was prepared and plaintiff would only have access to "publicly accessible resources to determine the defendant's board certification and specialization." *Grossman, supra* at 599. Whether an attorney's belief was reasonable is determined by the then existing circumstances, including the information that was available to, and resulting from the investigation conducted by, plaintiff's counsel. *Id.* at 599-600.

Although neither the American Board of Medical Specialties (ABMS) nor the American Osteopathic Association (AOA) recognize cosmetic surgery as a specialty, the American Board of Cosmetic Surgery does offer certification. Because certification is available, the practice of cosmetic surgery would be considered a "specialty" in accordance with the definition enunciated by *Woodard, Woodard, supra* at 561-562, and as recently reiterated by this Court that "any physician that can potentially become board certified in a branch of medicine or surgery is defined as a 'specialist' for purposes of MCL 600.2169(1)," *Gonzalez v St. John Hosp & Med Ctr,* ___ Mich App ___; ___ NW2d ___ (Docket No. 272093, issued April 9, 2007), slip op at 5. This Court has further determined that "there is no difference between a defendant physician who is board certified in a specialty but is practicing outside of that specialty at the time of the alleged malpractice and a physician . . . 'who can potentially become board certified' that is

practicing in a specialty but is not board certified in that specialty." *Id.*, slip op at 7. Hence, the important focus for comparison or matching of specialties is based on the actual area of practice and similarity of medical procedures being performed at the time of the alleged malpractice. In this instance, defendant, while not board certified in cosmetic surgery, is arguably eligible for certification and practices in that specialty. Similarly, plaintiff's expert, although board-certified in dermatology, is practicing outside his certification in the field of cosmetic surgery and would be eligible for certification in that specialty. As such, both physicians are sufficiently matched by their practice sub-specialty for purposes of fulfilling the requirements of MCL 600.2921 for completion of an affidavit of merit.

Additionally, plaintiff's counsel reviewed the AMA website and confirmed that defendant maintained no board certifications. Plaintiff's counsel also consulted with her expert who indicated that he was certified to perform the same surgical procedures as defendant had completed on plaintiff, and that he routinely and frequently performed these cosmetic procedures. Plaintiff's expert further asserted that the field of cosmetic surgery was extremely broad including a multitude of specialties and specifically encompassing both plastic surgery and dermatological expertise, with a tremendous degree of procedural overlap. Based on the information that was available to plaintiff's counsel at the time of completing the affidavit of merit, it was reasonable to believe that defendant and Dr. Panine were both eligible for board certification and would, therefore, be considered "specialists" in the area of cosmetic surgery. "Thus, at the moment the affidavit of merit was being prepared, plaintiff's attorney used the resources available to him and reasonably concluded that he had a match sufficient to meet the requirements for naming an expert." *Grossman, supra* at 599-600.

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto