# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| RUBY & ASSOCIATES, P.C., and DAVID I. RUBY,<br><br>Plaintiffs/Counter-Defendants-Appellants,<br><br>v<br><br>GEORGE W. SMITH & COMPANY, P.C., GEORGE W. SMITH, and JOYCE W. MILLER,<br><br>Defendants/Counter-Plaintiffs-Appellees. | UNPUBLISHED<br>March 18, 2008<br><br>No. 274348; 275770<br>Oakland Circuit Court<br>LC No. 2003-054535-NM |

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

In Docket No. 274348, plaintiffs appeal as of right from a judgment, following a jury trial, dismissing plaintiffs' accounting malpractice action and awarding defendants $13,423.75 on their counterclaim for unpaid accounting fees. In Docket No. 275770, plaintiffs appeal as of right from the trial court's order awarding defendants costs in the amount of $14,927.50 for their expert witness fees. We reverse and remand.

## I. Facts

This case was originally assigned to Judge Colleen O'Brien. During the proceedings before Judge O'Brien, defendants moved to exclude the testimony of plaintiffs' accounting expert, Peter Burgher, on the basis that Burgher was not qualified to serve as an expert. Judge O'Brien denied the motion by an order entered on November 17, 2005, concluding that Burgher "is qualified under MRE 702 and applicable case law."

Shortly thereafter, on December 19, 2005, Judge O'Brien reassigned this case to a visiting judge to oversee the trial. In doing so, Judge O'Brien also entered a scheduling order providing, *inter alia*, that motions in limine should be filed and heard by February 8, 2006, and that they would be decided by Judge O'Brien. Defendants did not file any motion in limine regarding Burgher in accordance with that order.

Instead, during trial before the visiting judge, defendants moved the trial court to exclude Burgher's testimony. The basis for the motion was Burgher's alleged lack of qualifications to

meet the requirements of MRE 702. After voir dire of Burgher by the attorneys, the trial court ruled that Burgher was not qualified to serve as an expert because he was neither licensed in the state nor was he engaged in an active accounting practice:

> The controlling case in Michigan is *Craig vs. Oakwood Hospital*[1] decided by the Michigan Supreme Court on July 23rd, 2004. They held that an expert witness under 702 [sic] to meet the requirements of *Daubert*,[2] and one of the requirements that's stated in that case is that the Court, in considering the qualification of an expert witness, must at a minimum evaluate the following:
>
> The educational and professional training of the expert witness, the area of specialization of the expert witness, *and, this is the crux, the length of time the expert witness has been engaged in the active practice of the specialty*.
>
> Based on that *I cannot qualify him as an expert because he is not licensed since 1979. He is not in active practice*. [Emphasis supplied.]

Because plaintiff no longer had an expert witness qualified to testify at trial, the trial court entered a directed verdict in favor of defendant on plaintiffs' accounting malpractice claim and on defendants' counterclaim for unpaid fees.

## II. Analysis

On appeal, plaintiffs raise several challenges to the trial judge's decision to disqualify Burgher as an expert witness. We conclude that the trial judge erred in determining that Burgher was not qualified to testify as an expert and reverse on that basis.

A trial court's decision whether a witness is qualified as an expert is reviewed for an abuse of discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989). A trial court's decision to admit or exclude evidence is also reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). "To the extent that this inquiry requires examination of the meaning of the Michigan Rules of Evidence, we address such a question in the same manner as the examination of the meaning of a court rule or a statute, which are questions of law that we review de novo." *Id*.

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training, or education* may testify thereto in the form of an opinion or otherwise if (1) the

---

[1] *Craig v Oakwood Hosp*, 471 Mich 67; 684 NW2d 296 (2004).

[2] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

> testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [Emphasis added.]

We conclude that Burgher was qualified to testify as an expert in the practice of accounting under MRE 702, and that the trial court erred in relying on *Craig v Oakwood Hosp*, 471 Mich 67; 684 NW2d 296 (2004) to determine that the absence of a license and the lack of recent active engagement in the practice of accounting precluded Burgher's qualification as an expert.

As plaintiffs argue, the plain language of MRE 702 does not contain a requirement that a witness be licensed, engaged in the current practice of his profession, or have personally performed the specific actions claimed to constitute malpractice, in order to be qualified as an expert. Rather, the rule only requires that a witness be qualified by "knowledge, skill, experience, training, or education." The trial court's reliance on *Craig* for the licensure and active practice requirements was misplaced.

In *Craig*, a medical malpractice case, the Supreme Court held that a trial court erred in denying the defendant's motion in limine to exclude the testimony of the plaintiff's expert. In discussing the qualifications of an expert witness, the Court stated:

> In construing this rule of evidence, we must apply the legal principles that govern the construction and application of statutes. When the language of an evidentiary rule is unambiguous, we apply the plain meaning of the text without further judicial construction or interpretation.
>
> The plain language of MRE 702 establishes three broad preconditions to the admission of expert testimony. First, the proposed expert witness must be "qualified" to render the proposed testimony. Generally, the expert may be qualified by virtue of 'knowledge, skill, experience, training, or education.' *In a medical malpractice action such as this one*, the court's assessment of an expert's 'qualifications' are now guided by MCL 600.2169(2):
>
> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.
>
> Second, the proposed testimony must 'assist the trier of fact of fact to understand the evidence or to determine a fact in issue . . . .' In other words, the expert opinion testimony 'must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue.'

> Finally, under MRE 702 as it read when this matter was tried, expert testimony must have been based on a 'recognized' form of 'scientific, technical, or other specialized knowledge.' [*Craig, supra* at 78-79 (emphasis added) (some internal quotations and all footnotes omitted).]

Although the Supreme Court in *Craig* referred to additional requirements, beyond those set forth in MRE 702, for a witness to be qualified as an expert, those additional requirements were based on MCL 600.2169, which requires that a medical expert be licensed and have devoted a majority of his or her professional time to the active clinical practice of the profession during the year preceding the alleged malpractice. *Id*. Clearly, MCL 600.2169 is only applicable in a medical malpractice action and, therefore, is not applicable in this case. The trial judge erred by attempting to engraft the requirements of that statute, which are not present in MRE 702, as a prerequisite for qualification of plaintiffs' expert witness.

In *Mulholland* our Supreme Court similarly held that a trial court abused its discretion when it disqualified the plaintiff's witness from testifying as an expert simply because he was not a licensed professional. The Court stated:

> MRE 702 expressly provides that an expert may be qualified by virtue of his knowledge, skill, experience, training, or education. It does not refer to licensing as a method of qualification, much less as a requisite for the qualification of an expert. We do not believe that this omission was inadvertent. At best, a license is *evidence* of qualifications and thereby a useful shorthand in day-to-day commerce. Except in the most narrow legal sense, a license is not a qualification in itself. Even its value as evidence of qualifications is diminished in the courtroom where the expert is available and there is time for careful interrogation by both parties.
>
> It is perhaps tempting to equate the word 'expert' with the notion of a licensed professional. However, there is no basis for doing so in the text of MRE 702. [*Mulholland, supra* at 403-404 (emphasis in the original; footnotes omitted).][3]

Additionally, even if the trial court did not misapply medical malpractice standards to this case, it still abused its discretion in holding that Burgher was not qualified under MRE 702. Plaintiffs offered Burgher as an expert witness in the practice of accounting. Testimony disclosed that Burgher graduated from Columbia University in 1956, with a master's degree in business administration, and spent 23 years in active practice with Arthur Young & Company, a national accounting firm. He retired in 1979 and began testifying as an expert in the field of

---

[3] Defendants accurately point out that *Mulholland* was decided before MRE 702 was amended in 2004. But the 2004 amendment only changed the last portion of the rule, dealing with the reliability of proposed testimony. The requirement that a witness may be qualified by knowledge, skill, experience, training, or education was not changed. Thus, the *Mulholland* discussion regarding this portion of the rule remains applicable to this case.

accounting practice and management throughout the country. Although he no longer actively practices accounting and is no longer licensed to do so, he is registered as a public accountant in Michigan and several other states. He also teaches accounting courses and takes continuing education courses to keep current in the profession. Additionally, he owns several businesses and has supervised audits, acquisition investigations, and analyses, both in private practice and in his role as an expert, for thousands of businesses, large and small. He has been qualified as an accounting expert in many other cases. To say that Burgher was not qualified under MRE 702 was outside the range of principled outcomes. *Moldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The trial court's error in disqualifying Burgher as an expert cannot be considered harmless, because it served as the basis for the court's subsequent decision to direct a verdict for defendants. Accordingly, plaintiffs are entitled to a new trial. See *Mulholland*, *supra* at 411. In light of our decision, it is unnecessary to address plaintiffs' alternative arguments.

With respect to plaintiffs' appeal in Docket No. 275770, because defendants are no longer the prevailing parties, we vacate the trial court's order awarding defendants expert witness fees under MCR 2.625.

Reversed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood