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STATE OF MICHIGAN

COURT OF APPEALS

ANTONIO R. HERRERA,

Plaintiff-Appellant,

v

RICHARD SEILER, DPM, and HOLLAND FOOT AND ANKLE CENTER,

Defendants-Appellees.

UNPUBLISHED
December 19, 2019

No. 347902
Ottawa Circuit Court
LC No. 17-005172-NH

Before: METER, P.J., and O'BRIEN and TUKEL, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants, Richard Seiler, DPM (Dr. Seiler), and Holland Foot and Ankle Center (together, "defendants"). On appeal, plaintiff argues that the trial court erred by granting summary disposition to defendants because a national standard of care was appropriate in this case, the deposition testimony of A. Michael Marasco, DPM (Dr. Marasco), addressed the applicable national and local standards of care for a doctor of podiatry in this case, and the trial court should not have dismissed the case with prejudice because the statute of limitations did not expire. We affirm.

I. UNDERLYING FACTS

In April 2015, plaintiff repeatedly visited Dr. Seiler because plaintiff had an ulcer on his right heel. Plaintiff then fractured his right calcaneus on May 29, 2015. Later that same day, plaintiff underwent open reduction and internal fixation surgery to place screws in his foot. During the surgery, Dr. Seiler observed undiagnosed osteomyelitis in plaintiff's right foot.[1] Following surgery, plaintiff's foot broke when he was asked to walk by a staff member at

[1] Osteomyelitis is a bone infection.

Holland Hospital. Complications arising out of plaintiff's broken foot and osteomyelitis eventually led to the amputation of plaintiff's right leg below the knee in August 2015.

Plaintiff filed a complaint and affidavit of merit on November 21, 2017. Plaintiff alleged that the failure of Dr. Seiler to diagnose his osteomyelitis was malpractice that resulted in the amputation of plaintiff's right leg below the knee. Defendants answered and argued that Dr. Seiler did not commit malpractice because his treatment of plaintiff was in accordance with the standard of practice.

Defendants then moved to strike Dr. Marasco as an expert witness and for summary disposition. Defendants argued that Dr. Marasco was not qualified to testify as an expert in this case because he did not know the applicable local standard of care of Holland, Michigan, where Dr. Seiler treated plaintiff. Plaintiff responded that Dr. Marasco was qualified to testify as an expert in this case because he did know the local standard of care, but plaintiff also argued that the national standard of care applied. Following an evidentiary hearing, the trial court found that Dr. Marasco could not testify as an expert because he did not know the local standard of care. The trial court additionally found that Dr. Marasco's lack of knowledge of the local standard of care in Holland, Michigan was "fatal" to plaintiff's case and dismissed plaintiff's claim with prejudice because "any refiling of this action is barred by the statute of limitations." This appeal followed.

II. STANDARD OF CARE

Plaintiff argues that a national standard of care applies in this case. We disagree.

A trial court's summary disposition ruling is reviewed de novo. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v Midmichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016). "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

The moving party has the initial burden to support its claim with documentary evidence but, once the moving party has met this burden, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Additionally, if the moving party asserts that the nonmovant lacks

evidence to support an essential element of one of his or her claims, the burden shifts to the nonmovant to present such evidence. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016). Finally, "[i]ssues of statutory interpretation are reviewed de novo." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011).

In MCL 600.2912a, the Legislature codified the standard of care a plaintiff must prove in a medical malpractice case. That section states, in relevant part:

> (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> > (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
> >
> > (b) The defendant, if a specialist, failed to provide 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, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

Podiatrists are general practitioners and, therefore, are subject to the local community standard of care. *Jalaba v Borovoy*, 206 Mich App 17, 21; 520 NW2d 349 (1994).

Plaintiff argues that a national standard of care should apply in this case because the medical treatment at issue in this case should not have varied by locality. Plaintiff, however, bases this argument on opinions of this Court that were decided before November 1, 1990. As such, these cases do not have any precedential authority. See MCR 7.215(J)(1). Furthermore, podiatrists have long been subject to only the local standard of care because they are general practitioners. See *Jalaba*, 206 Mich App at 2. Thus, the local standard of care for a podiatrist treating a patient in Holland, Michigan applied in this case.

III. DR. MARASCO'S QUALIFICATION AS AN EXPERT WITNESS

Plaintiff argues that Dr. Marasco should have been qualified as an expert witness because he knew the local standard of care in Holland, Michigan. We disagree.

As discussed earlier, a trial court's summary disposition ruling is reviewed de novo. *Walters*, 481 Mich at 381. "The trial court's decision regarding whether an expert witness is qualified is reviewed for an abuse of discretion." *Turbin v Graesser*, 214 Mich App 215, 217-

218; 542 NW2d 607 (1995). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325-326; 760 NW2d 503 (2008). A decision on a close evidentiary question ordinarily cannot constitute an abuse of discretion, *Barr v Farm Bureau Gen Ins Co*, 292 Mich App 456, 458; 806 NW2d 531 (2011), but an erroneous application of the law is by definition an abuse of discretion, *Gay v Select Specialty Hosp*, 295 Mich App 284, 292; 813 NW2d 354 (2012).

"A plaintiff in a medical malpractice action must establish (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016) (citation and quotation marks omitted). In general, "expert testimony is required in a malpractice case in order to establish the applicable standard of care and to demonstrate that the professional breached that standard." *Id*. (citation and quotation marks omitted). But an expert witness is not required "when the professional's breach of the standard of care is so obvious that it is within the common knowledge and experience of an ordinary layperson." *Id*. at 21-22 (citation omitted). Finally, "[t]he proponent of the evidence has the burden of establishing its relevance and admissibility." *Id*. at 22 (citation omitted).

"The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169."[2] *Elher*, 499 Mich at 22 (citation and quotation marks omitted). MRE 702 states:

> 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 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.

MRE 702 "requires the circuit court to ensure that *each aspect* of an expert witness's testimony, including the underlying data and methodology, is reliable." *Elher*, 499 Mich at 22 (citation omitted; emphasis added). Because an expert in a medical malpractice case must testify about the proper standard of care, MCL 600.2912a, this means that the trial court must ensure that the expert's testimony about the applicable standard of care is reliable.

In considering the medical opinion testimony of an expert in a malpractice case, our Supreme Court has held that "[a] lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony." *Elher*, 499 Mich

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[2] MCL 600.2955 and MCL 600.2169 address an expert's scientific opinions and an expert's medical qualifications respectively. Because only Dr. Marasco's knowledge of the local standard of care in Holland, Michigan, rather than his scientific opinions or medical qualifications are at issue, we will not address them further.

at 23 (citation omitted). Furthermore, "[u]nder MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Id*. (citation and quotation marks omitted). Strictly speaking, our Supreme Court's statement that an expert witness's opinion generally must be supported by more than just his or her experience and background is limited to the reliability of the expert witness's medical opinions. Nevertheless, we hold that an expert witness's opinion of the standard of care should be placed under similar scrutiny.

The standard of care is a threshold issue that an expert witness must be qualified to testify about before a trial court even considers the expert witness's substantive testimony. See MCL 600.2912a. Accordingly, the trial court should be assured of the reliability of an expert witness's testimony about the applicable standard of care in any given case before determining that the witness is qualified to testify as an expert. This Court has previously addressed the issue of the circumstances under which a nonlocal expert is familiar with the local standard of care applicable in a given case, and has held that an expert can testify about the standard of care in a community other than the one in which he or she resides and practices. See *Bahr v Harper-Grace Hosps*, 448 Mich 135, 141; 528 NW2d 170 (1995) ("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."). Nevertheless, this Court has declined to set forth any bright-line rules in making such a determination. See *Turbin*, 214 Mich App at 218-219. Furthermore, "[a] nonlocal expert may be qualified to testify if he or she demonstrates a familiarity with the standard of care in an area similar to the community in which the defendant practiced." *Decker v Rochowiak*, 287 Mich App 666, 686; 791 NW2d 507 (2010).

An expert witness can become familiar with the local standard of care by talking with local doctors, reading about the community in question, and conducting other research of the community in question. *Turbin*, 214 Mich App at 218-219. An expert, however, must establish a basis for how he or she is familiar with the local standard of care about which the expert is called upon to testify. See *Decker*, 287 Mich App at 687-688 (holding that an expert was sufficiently familiar with the local standard of care because she testified about how the staffing and resources of the hospital and size of the community in question compared to the hospital and size of the community in her city); *Turbin*, 214 Mich App at 218-219 (holding that the expert was adequately familiar with the local standard of care because he reviewed pamphlets, brochures, the yellow pages, and "a listing of Michigan hospitals that included various types of data about the hospitals" to familiarize himself with the local standard of care for the community in question).

As addressed earlier, the applicable standard of care is that of a podiatrist in Holland, Michigan. Dr. Marasco, however, testified at his deposition that he believed a national standard of care applied in this case. In his second affidavit, Dr. Marasco again stated that he believed a national standard of care applied in this case because, in his opinion, the practice of podiatry and specifically the diagnosis and treatment of osteomyelitis "does not vary depending upon locale or where the patient was being treated." In this same affidavit, however, Dr. Marasco additionally stated that based on his unspecified research, Merrillville, Indiana and Holland, Michigan were similar in population and had similar availability of medical specialists, procedures, and technology. Specifically, Dr. Marasco stated that Merrillville, Indiana and Holland, Michigan had similar access to infectious disease specialists because of Holland, Michigan's proximity to

Grand Rapids, Michigan. Dr. Marasco, however, failed to specify what his research entailed or how he came to these conclusions.

In its written order granting summary disposition to defendant, the trial court found that "Dr. Marasco's experience appeared to be limited to Indiana" and that "[h]is familiarity with Michigan at any level is minimal." Accordingly, the trial court found that as a matter of law, Dr. Marasco failed to understand and apply the applicable standard of care. When ruling on a motion for summary disposition, however, a trial court may only consider substantively admissible evidence, even if that evidence was not offered in an admissible form. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999) ("The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the *substantively admissible* evidence actually proffered[.]") (emphasis added). Thus, the trial court should have considered Dr. Marasco's statement in his affidavit that, based on his research, Holland, Michigan and Merrillville, Indiana were similar communities because those statements were properly before the trial court in determining Dr. Marasco's qualifications as an expert witness. See MRE 104(a) ("Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court[.]"). Based on the trial court's written order granting summary disposition to defendant, it is unclear whether the trial court took at face value Dr. Marasco's statements about his research comparing Holland, Michigan and Merrillville, Indiana. Instead, it is clear that the trial court did not believe that Dr. Marasco could reliably testify about the standard of care applicable in this case: the local standard of care in Holland, Michigan. The trial court's conclusion was based on three major points: (1) Dr. Marasco's repeated statements that a national standard of care applied, (2) Dr. Marasco's limited experience in Michigan, and (3) Dr. Marasco's failure to establish with particularity how he became familiar with the standard of care in Holland, Michigan. Dr. Marasco repeatedly stated that, in his opinion, a national standard of care applied and the standard of care was the same whether a podiatrist was practicing in Holland, Michigan or Merrillville, Indiana. Based on the record before this Court, Dr. Marasco's only professional interaction with Holland, Michigan came in this case when he completed his unspecified research in comparing Holland, Michigan and Merrillville, Indiana.

Whether the trial court erred by granting summary disposition to defendants is a close call. Dr. Marasco testified that a national standard of care applied in this case. As discussed earlier, however, a local standard of care applies in this case. See *Jalaba*, 206 Mich App at 21. But Dr. Marasco also established that, based on his research, he believed the communities of Holland, Michigan and Merrillville, Indiana were similar and that they offered similar medical services. Thus, viewing the evidence in the light most favorable to plaintiff, Dr. Marasco's opinion that the standard of care in Merrillville, Indiana was the same as the general national standard of care could establish that the local standard of care in Holland, Michigan was the same as the national standard of care. The only basis for Dr. Marasco being qualified to offer such an opinion, however, was unspecified references to his "research" comparing Holland, Michigan and Merrillville, Indiana. MRE 702 required the trial court to ensure, as a preliminary matter, that each aspect of Dr. Marasco's testimony was reliable before qualifying him as an expert witness. See *Elher*, 499 Mich at 22. As addressed earlier, MRE 702 also required the trial court to ensure a reliable basis for Dr. Marasco's knowledge of the standard of care in Holland, Michigan. Dr. Marasco failed to describe with any specificity why he believed that the

communities of Holland, Michigan, and Merrillville, Indiana were similar. The trial court clearly was not satisfied that Dr. Marasco was familiar with Holland, Michigan and, therefore, found that he was not qualified to be an expert in this case. While we are inclined to disagree with the trial court's conclusion that Dr. Marasco was unqualified to be an expert in this case, we do not believe that the trial court made an error of law or that the trial court's decision was outside the range of principled outcomes. Thus, the trial court did not abuse its discretion in finding Dr. Marasco's unqualified to testify as an expert witness. See MRE 702.

IV. DISMISSAL WITH PREJUDICE

Plaintiff argues that the trial court erred by dismissing his claim with prejudice. We disagree.

As discussed earlier, a trial court's summary disposition ruling is reviewed de novo. *Walters*, 481 Mich at 381. Furthermore, this Court reviews the interpretation of court rules de novo using the principles of statutory interpretation. *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012).

The applicable statute of limitations for medical malpractice actions is two years. MCL 600.5805(8); *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 515; 918 NW2d 645 (2018). The period of limitations, however, "is tolled when a complaint and affidavit of merit are filed and served on the defendant." *Kirkaldy v Rim*, 478 Mich 581, 585; 734 NW2d 201 (2007). But an affidavit of merit only tolls the statute of limitations; it does not toll a saving period. *Ligons v Crittenton Hosp*, 490 Mich 61, 76; 803 NW2d 271 (2011). The period of limitations is also tolled for 182 days when a notice of intent to file claim is filed. MCL 600.2912b(1) (establishing the 182-day period); MCL 600.5856(c) (establishing that the statute of limitations tolls during that notice period); *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68, 79; 869 NW2d 213 (2015) (holding that "under MCL 600.5856(c), the running of the two-year period of limitations is tolled during the notice period.").

Plaintiff argues that the statute of limitations was tolled in this case after he filed his complaint and affidavit of merit and that the trial court's order granting summary disposition to defendants was effectively a determination of the validity of the affidavit of merit. Plaintiff is correct that the statute of limitations tolls when an affidavit of merit is filed and that the statute of limitations does not begin to run again until the affidavit of merit is determined to be defective. See *Kirkaldy*, 478 Mich at 585. Plaintiff is incorrect, however, that the trial court determined that the affidavit of merit was defective. Rather, the trial court determined that plaintiff could not sustain his medical malpractice cause of action because he did not have a qualified expert witness who could support his allegations. Without a qualified expert witness, plaintiff could not sustain his cause of action. See *Elher*, 499 Mich at 21 (holding that, in general, an expert witness is required to sustain a medical malpractice cause of action). But a determination that a plaintiff does not have a qualified expert witness is different from a determination that his or her affidavit of merit was defective. See *Jones v Botsford Continuing Care Corp*, 310 Mich App 192, 199-200; 871 NW2d 15 (2015) (discussing the difference between the challenge to an affidavit of merit and a challenge to an expert witness's qualifications). Thus, the trial court did not find, expressly or implicitly, that plaintiff's affidavit of merit was defective.

Because the trial court did not find that the affidavit of merit was defective, the statute of limitations was most likely tolled in this case. The statute of limitations, however, may have already run before plaintiff filed his complaint and affidavit of merit. The surgery which plaintiff claims constituted malpractice took place on May 29, 2015, and his leg was amputated as a result of this alleged malpractice in August 2015. As such, absent any saving provision or tolling for the filing of plaintiff's notice of intent, the statute of limitations would have expired on May 29, 2017; he did not file the complaint and affidavit of merit until November 21, 2017.

The parties failed to argue at the trial court level that the statute of limitations expired or that any savings provisions applied that would have extended the statute of limitations. None of the savings provisions established by MCL 600.5851 to MCL 600.5855 are applicable in this case, but the statute of limitations might have been tolled by plaintiff's notice of intent had it been filed before the statute of limitations expired.[3] The notice of intent, however, was not included in the lower court record. Accordingly, it is unknown whether the notice of intent operated to toll the statute of limitations until November 21, 2017, the date on which plaintiff filed his complaint and affidavit of merit.[4] Consequently, we cannot confirm whether the trial court's statement that the statute of limitations had run was factually accurate. The trial court dismissed plaintiff's claim with prejudice because it found that the statute of limitations had expired. We cannot affirm the trial court's decision to dismiss plaintiff's claim with prejudice on that ground.

This Court, however, "will not reverse a trial court's order of summary disposition when the right result was reached for the wrong reason." *Forest Hills Co-operative v City of Ann Arbor*, 305 Mich App 572, 615; 854 NW2d 172 (2014). As discussed earlier, the trial court granted summary disposition to defendants because plaintiff failed to support his claim with a qualified expert. A plaintiff's failure to support his or her medical malpractice claim with a qualified expert is grounds for dismissal with prejudice. See *Woodard v Custer*, 476 Mich 545, 577; 719 NW2d 842 (2006) ("Because plaintiffs failed to present an expert qualified under [MCL 600.]2169(1) to testify with regard to the appropriate standard of practice or care, the trial court properly dismissed plaintiffs' claim with prejudice."). Thus, the trial court did not err by dismissing plaintiff's claim with prejudice.

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[3] None of the savings provisions established by MCL 600.5851 to MCL 600.5855 are applicable in this case: plaintiff was not an infant suffering from a disability, MCL 600.5851, a victim of female genital mutilation, MCL 600.5851a, a minor victim of sexual conduct, MCL 600.585, MCL 600.5851b, or deceased, MCL 600.5852, nor were defendants absent from the state of Michigan, MCL 600.5853. Additionally, plaintiff's claim was not tolled due to the United States being at war, MCL 600.5854, nor did defendant commit fraud to conceal plaintiff's claim from plaintiff, MCL 600.5855.

[4] If plaintiff filed his notice of intent no later than May 23, 2015, the statute of limitations would have tolled until November 21, 2015.

V. CONCLUSION

Affirmed.

/s/ Patrick M. Meter
/s/ Colleen A. O'Brien
/s/ Jonathan Tukel