STATE OF MICHIGAN

COURT OF APPEALS

DAVID SLAGGERT and LYNDA SLAGGERT, Plaintiffs-Appellees,	UNPUBLISHED July 6, 2006
v	No. 260776 Saginaw Circuit Court
MICHIGAN CARDIOVASCULAR INSTITUTE, P.C., LUIGI MARESCA, M.D., TIM BERKLEY, P.A., and JON SCHWARZ, P.A., Defendants-Appellants.	LC No. 04-052690-NH

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In this medical malpractice action, defendants appeal by leave granted the trial court's order denying their motion for summary disposition. We reverse.

I. Basic Facts and Procedural History

In December 2001, plaintiff David Slaggert underwent cardio-thoracic surgery for the replacement of a defective mitral valve.[1] The surgery was apparently uneventful and plaintiff was soon discharged from the hospital. However, in early January 2002 plaintiff suffered a stroke and gastrointestinal hemorrhaging requiring additional surgeries. Attributing these complications and the resulting residual effects to negligent postoperative monitoring and administration of the anticoagulant Coumadin, plaintiffs filed the instant suit against Michigan Cardiovascular Institute, P.C. (MCVI), and three of its employees, Dr. Luigi Maresca, M.D., and physician assistants Tim Berkley, P.A. and Jon Schwarz, P.A., in June 2004. As required by MCL 600.2912d, plaintiffs attached to their complaint an affidavit of merit signed by Dr. Robert Stark, M.D., a board-certified specialist in internal medicine practicing cardiology, who opined that defendants had failed to properly monitor and adjust plaintiff's postoperative Coumadin dosage and had also negligently added aspirin to the anticoagulation regimen, resulting in stroke and internal hemorrhaging.

[1] Because plaintiff Lynda Slaggert's claim for loss of consortium is derivative, the singular term "plaintiff" refers only to her husband, plaintiff David Slaggert.

In September 2004, defendants moved for summary disposition on the ground that the affidavit of merit signed by Dr. Stark did not comply with the requirements of MCL 600.2912d and MCL 600.2169 and was, therefore, defective. Specifically, defendants argued that Dr. Stark did not practice in the same specialty as Dr. Maresca, a board-certified thoracic surgeon practicing cardio-thoracic surgery, and therefore, pursuant to MCL 600.2169 was not qualified to testify as an expert witness against him. Defendants further argued that to the extent that an affidavit of merit by a physician might be sufficient to initiate suit against a physician assistant, because Dr. Stark did not specialize in the area of cardio-thoracic surgery, as did both Berkley and Schwarz, he was similarly precluded from offering expert testimony regarding their care and treatment of plaintiff.[2] Thus, defendants argued, the filing of the complaint and affidavit in June 2004 did not toll the period of limitation, which expired in July 2004.

Plaintiffs argued in response that, insofar as the administration of anticoagulants following surgery is outside the scope of practice for a thoracic surgeon, Dr. Maresca, who no longer actually performed surgical procedures, was not practicing in the field of cardio-thoracic surgery at the time of the alleged malpractice, but rather, cardiology. Thus, plaintiffs asserted, the affidavit of merit of a cardiologist was appropriate or, at least, counsel for plaintiff had a reasonable belief that it was appropriate, as required by MCL 600.2912d.

In response to plaintiffs' assertions in this regard, defendants submitted a copy of a printout from the American Medical Association (AMA) "Physician Select" website, indicating Dr. Maresca's board certification in thoracic surgery. Each defendant also submitted affidavits attesting to the parameters of their professional practice at the times relevant to the instant matter. In his affidavit, Dr. Maresca indicated that although he in fact no longer performs cardio-thoracic surgical procedures, he was at all relevant times a board-certified thoracic surgeon whose practice consisted "solely" of "performing pre-operative and post-operative work-up and care of cardio-thoracic surgery patients." Dr. Maresca further indicated that he had never practiced in the field of cardiology or held himself out to be a cardiologist, and that at all times he was responsible for plaintiff's care he was functioning in his capacity as a cardio-thoracic surgeon. In their affidavits, Berkley and Schwarz similarly averred that their practice as physician assistants is and always has been limited to "providing pre-, peri- and post-operative

---

[2] Citing MCL 600.2169(1)(b), defendants also argued that to properly initiate suit against Berkley and Schwarz, plaintiffs' were required, but failed, to also file an affidavit of merit by a physician assistant practicing in the area of cardio-thoracic surgery. However, given our conclusion that plaintiffs' counsel could not reasonably have believed that an affidavit of merit by a cardiologist met the requirements of MCL 600.2169 as to Dr. Maresca, and considering that plaintiffs did not in fact file an affidavit of merit by a physician assistant, it is irrelevant under the circumstances of this case whether an affidavit of a physician assistant is in fact required to successfully initiate suit against defendants Berkley and Schwarz. Accordingly, we do not address that question on appeal. See also *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 392-393; 668 NW2d 628 (2003) (medical malpractice plaintiff suing an institutional defendant under a vicarious liability theory must file an affidavit of merit from a health professional whose credentials match those of the institutional defendant's agent involved in the alleged malpractice).

care to cardio-thoracic patients" under the supervision of cardio-thoracic surgeons employed by MCVI.

The trial court, without expressly addressing whether Dr. Stark meets the requirement for an expert witness under MCL 600.2169, denied defendants' motion on the ground that counsel for plaintiff "had a reasonable belief at the time of filing the instant suit that the proposed expert would meet the qualifications specified by statute." This Court subsequently granted leave to appeal the trial court's ruling in this regard.

II. Analysis

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Defendants moved for summary disposition under MCR 2.116(C)(7) and (10).[3] Summary disposition is proper under MCR 2.116(C)(7) if the claim is barred by an applicable limitations period. *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 238; 625 NW2d 101 (2001). In reviewing a trial court's decision under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Bryant v Oakpointe Villa Nursing Center, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim, and is properly granted if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Pursuant to MCL 600.2912d(1), a plaintiff initiating a medical malpractice action must file with the complaint "an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirement for an expert witness under [MCL 600.2169]." MCL 600.2169 governs expert witness testimony regarding the appropriate standard of practice or care for health professionals and provides, in relevant part, that if a party against whom testimony is offered in a medical malpractice case is board certified in a specialty, "the expert witness must be a specialist who is board certified in that specialty." MCL 600.2169(1)(a). In challenging the trial court's order denying summary disposition, defendants assert, as they did below, that Dr. Stark was not qualified under MCL 600.2169 to sign the affidavit of merit required under MCL 600.2912d to initiate suit against Dr. Maresca because he is not board certified as a specialist in thoracic surgery. Defendants also argue that the trial court erred in concluding that regardless whether Dr. Stark was qualified in this regard, the affidavit

---

[3] Although defendants also moved for summary disposition under MCR 2.116(C)(8), where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (10), but the parties rely on matters outside the pleadings, as is the case here, MCR 2.116(C)(10) is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

was sufficient because plaintiffs' counsel's belief as to his qualification was reasonable. On review de novo, we agree.

In interpreting MCL 600.2169(1)(a), our Supreme Court recently held that the statute "requires that the expert witness 'must be' a specialist who is board certified in the specialty in which the defendant physician is also board certified." *Halloran v Bhan*, 470 Mich 572, 579; 683 NW2d 129 (2004). In *Halloran*, *supra*, the plaintiff alleged that the defendant, who was board certified in internal medicine but also held a certificate of added qualification in critical care medicine, committed malpractice during his treatment of the decedent in an emergency room. Although board certified in anesthesiology, the plaintiff's proposed expert witness also held a certificate of added qualification in critical care medicine. The defendant moved to strike the plaintiff's expert witness on the ground that he failed to satisfy the criteria of MCL 600.2169(1)(a). The trial court granted the motion, finding that the witness was not qualified to testify as an expert witness because he and the defendant did not share the same board certification. This Court reversed the trial court's decision, concluding that because the plaintiff's expert and the defendant shared the same subspecialty, the expert met the requirements of MCL 600.2169(1)(a). *Id*. at 575-576. However, the Supreme Court reversed this Court's decision, concluding that because the plaintiff's expert witness was not board certified in the same specialty as the defendant, he was not qualified to testify as an expert witness under MCL 600.2169(1)(a). *Id*. at 579.

Although acknowledging that *Halloran* supports the requirement that where a defendant doctor is determined to have a board-certified specialty, a plaintiff's standard of care expert must also share this board certification, plaintiffs assert that this requirement does not apply where, as here, "the defendants' malpractice . . . falls under a different specialty than the one in which the defendant is board certified." In support of this argument, plaintiffs rely on the dissenting opinions in *Halloran*, *supra*, and the response thereto in footnote 5 of the majority opinion:

> Contrary to the dissent's contention, we are not concluding that board certificates that are not relevant to the alleged malpractice have to match. There is simply no need to address that issue in this case because it is uncontested that the defendant physician was practicing internal medicine, not anesthesiology, when he allegedly committed malpractice. Thus, the defendant physician's internal medicine board certification is a "relevant" board certificate. [*Id*. at 577-578 n 5.]

Citing the dispute between the parties regarding whether Dr. Maresca was, at the time of the alleged malpractice, practicing cardiology or cardio-thoracic surgery, plaintiffs argue that unlike the circumstances presented in *Halloran*, the instant matter presents the facts necessary to address the question whether "board certificates that are not relevant to the alleged malpractice have to match." *Id*. We do not agree that this is such a case. Indeed, it is not disputed that plaintiff submitted to thoracic surgery or that Dr. Maresca is board certified in thoracic surgery. Thus, the circumstances here do not involve completely unrelated specialties. Cf. *Halloran*, *supra* at 588 (Kelly, J., dissenting) (questioning the logic of requiring a physician board-certified as an obstetrician-gynecologist to attest to the standard of practice or care for a defendant also so certified but who was in fact practicing dermatology at the time of the alleged malpractice). Consequently, we reject plaintiffs' implication that the board certification at issue here is not "relevant" to the malpractice alleged in this case, and hold that under the facts of this case the question whether the postoperative monitoring and administration of anticoagulants following

cardio-thoracic surgery was beyond the expertise of a thoracic surgeon, and should have been the responsibility of a cardiologist, is a matter for a witness trained and board certified in thoracic surgery, not cardiology. See *Nippa v Botsford Gen Hosp*, 257 Mich App 387, 397; 668 NW2d 628 (2003) (a primary purpose of MCL 600.29169(1)(a) is to "require a plaintiff's experts to specialize in the same specialty as the physicians they allege to be negligent").

In any event, regardless of any factual dispute regarding whether Dr. Maresca was practicing cardiology or cardio-thoracic surgery at the time of the alleged malpractice, it is well settled that MCL 600.2912d requires that counsel for plaintiff hold a reasonable belief that the health professional signing the affidavit of merit meets the requirements of MCL 600.2169, *Geralds v Munson Healthcare*, 259 Mich App 225, 233; 673 NW2d 792 (2003), and that, whether such a belief was reasonable is determined by the circumstances, including the information available to, and the investigation conducted by, the plaintiff's attorney, *Grossman v Brown*, 470 Mich 593, 599-600; 685 NW2d 198 (2004).

In *Grossman*, *supra*, the defendant physician, who was board certified in the area of general surgery and also held a "certificate of special qualifications in vascular surgery," performed surgery on the plaintiff's decedent. In preparation for litigation, the plaintiff's counsel researched the qualifications of the defendant to obtain a qualified expert witness to satisfy the affidavit of merit requirement, MCL 600.2912d. In doing so, counsel searched the AMA website, which indicated that the defendant's qualifications included board certification in general surgery, but provided no indication that the defendant held any board certification in vascular surgery. Based on this research, the plaintiff's counsel obtained an affidavit of merit from a physician board certified in general surgery, but who also specialized in vascular surgery. The defendant filed a motion for summary disposition, and the trial court denied the motion, concluding that the plaintiff's attorney had a reasonable belief that his expert satisfied the statutory prerequisites for an expert witness. *Id*. at 596-597.

The Supreme Court affirmed the trial court's denial of the dispositive motion, holding:

> Because this case presents a dispute involving the affidavit-of-merit stage, the issue before us is whether, according to MCL 600.2912d(1), plaintiff's attorney had a "reasonable belief" that his expert satisfied the requirements of MCL 600.2169. We hold that given the information available to plaintiff's attorney when he was preparing the affidavit of merit, he had a reasonable belief that Drs. Brown and Zakharia were both board-certified in their specialty of general surgery and that there was no board certification in vascular surgery.
>
> The salient and dispositive facts are that plaintiff's attorney consulted the AMA website, which supplied him with information that defendant Brown was only board-certified in general surgery and that there is no vascular surgery board certification. Further, counsel consulted Dr. Zakharia, his expert, who reiterated that there is no vascular surgery board certification.
>
> 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. [*Id*. at 599-600 (footnotes omitted).]

In the present case, plaintiffs fail to delineate whether there was ever any research into the qualifications of Dr. Maresca and whether there was any attempt to match those qualifications with an expert for the purposes of filing an affidavit of merit with the complaint.[4] To the contrary, the record demonstrates that a review the AMA website would cogently have revealed Dr. Maresca's board certification in thoracic surgery. Further, we note that the complaint filed by plaintiffs does not recognize such certification and, to the contrary, expressly alleges that Dr. Maresca is a "physician and *specialist in cardiology*, holding himself out to the public generally, . . . as possessing and being able to exercise that degree of skill, knowledge, and ability generally possessed by others in the same profession or common calling." (Emphasis added). We note also that, in answering this allegation, defendants acknowledged that Dr. Maresca was a physician, but expressly denied the remainder of the allegation as "untrue." Defendants similarly denied as "untrue" plaintiffs' allegations that as physician assistants, defendants Berkley and Schwarz are "held to the same standard of care of the supervising physician, *a cardiologist*." (Emphasis added). Such allegations strongly militate against any finding that counsel for plaintiff conducted an investigation from which he could reasonably have believed that the Drs. Stark and Maresca shared qualifications sufficiently similar to satisfy the requirements of MCL 600.2169. Accordingly, because the record wholly fails to demonstrate that counsel for plaintiff held a reasonable belief in this regard, we find that the trial court erred in reaching such conclusion. Indeed, as noted above, Dr. Maresca expressly attested that he was a board-certified thoracic surgeon at the time of his treatment of plaintiff, and that he treated plaintiff in that capacity. Plaintiffs failed to counter this assertion, which is supported by the documentary evidence submitted by defendants in seeking summary disposition, with documentary evidence of its own.

Consequently, we find the affidavit of merit submitted by plaintiffs to be insufficient to initiate suit in this matter. MCL 600.2912d. We further find that, because a defective affidavit cannot support a medical malpractice complaint for purposes of tolling the statute of limitations, *Geralds*, *supra* at 240, and there is no dispute that the time to cure any such defects has passed, summary disposition in favor of defendants was appropriate.[5] Accordingly, we reverse the trial court's order denying defendants' motion for summary disposition and remand this matter for

---

[4] Although, after defendants moved for summary disposition, Dr. Stark provided plaintiffs' counsel with a letter indicating his belief that Dr. Maresca was practicing in the field of cardiology at the time of the alleged malpractice, there is no indication that counsel for plaintiff was aware of this opinion "at the moment the affidavit of merit was being prepared." See *Grossman*, *supra* at 600. In any event, we note that with respect to the filing of an affidavit of merit under MCL 600.2192d, an attorney's reliance on a third party as to the qualifications of a physician has been held to be unreasonable. *Geralds*, *supra*.

[5] We reject plaintiffs' claim that the doctrine of equitable tolling should be applied here to save the case. Contrary to plaintiffs' assertion, their failure to comply with the requirements of MCL 600.2912d is not the product of confusion regarding the "legal nature" of their claim, but rather the factual basis therefor. Cf. *Byrant*, *supra* at 432 (applying equitable tolling to excuse a plaintiff's failure to satisfy the applicable period of limitation when the failure stemmed from the plaintiff's "understandable confusion about the legal nature of her claim").

entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray