STATE OF MICHIGAN

COURT OF APPEALS

ELMER SOULLIERE, a/k/a ELMER SOULLIER,

Plaintiff-Appellant,

v

ROBERT JOHNSON, M.D.,

Defendant-Appellee,

and

NORTHERN MICHIGAN HOSPITAL, INC.,

Defendant.

UNPUBLISHED
August 16, 2007

No. 268874
Emmet Circuit Court
LC No. 04-008169-NH

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing his complaint for failure to comply with the notarization requirements of MCL 600.2102 and directing a verdict in favor of defendant on the basis that plaintiff's standard of care witness was precluded from testifying pursuant to MRE 702 and MCL 600.2169. We reverse and remand for proceedings consistent with this opinion.

I. Underlying Facts

In July 2000, plaintiff underwent open heart surgery involving aortic and mitral valve replacements. The surgery was performed by defendant, Robert Johnson, M.D., at Northern Michigan Hospital, Inc.[1] During the operation, temporary pacing wires were attached to plaintiff's heart. Plaintiff's proffered standard of care witness, Alex T. Zakharia, M.D., testified that such wires are often inserted during cardiac surgery so that the patient can be connected to

[1] By stipulation, plaintiff's claims against Northern Michigan Hospital, Inc. were dismissed with prejudice. Accordingly, the hospital is no longer a party to this action and references in this opinion to "defendant" are to Johnson alone.

an external pacer following the surgery to improve cardiac rhythm if necessary. Zakharia testified that the wires are "temporary in the sense that we usually remove them on the fourth or fifth day, and that is the usual, unless there is a need for them to stay longer then you can keep them longer as long as they're functioning." In plaintiff's case, the pacing wires were not removed in the days following surgery and he developed a post-operative wound infection, the source of which, according to Zakharia, were the pacing wires, as well as sternal[2] wires that also remained inside plaintiff.

Plaintiff asserted that on or about October 11, 2001, he was readmitted to the hospital to have both types of wires surgically removed by defendant. However, defendant failed to completely remove the wires during this surgery. According to Zakharia, defendant's failure to completely remove the wires violated the relevant standard of practice and caused plaintiff's infection to persist and worsen. Plaintiff subsequently was forced to undergo additional surgeries to debride his sternum, remove the wires, reconstruct the sternal wound, and close the operative site leaving him scarred and disabled.

II. Procedural History

On April 6, 2004, plaintiff filed this malpractice action. With the complaint, plaintiff filed an affidavit of merit signed by Zakharia, which was notarized in Florida by Dade County notary Nadine M. Matos. Thereafter, this Court issued an opinion indicating that out-of-state affidavits of merit had to comply with MCL 600.2102(4), which requires that out-of-state affidavits be certified by the clerk of the court in the county where the affidavit was taken. *Apsey v Mem Hosp* (*On Reconsideration*), 266 Mich App 666; 702 NW2d 870 (2005).[3] Plaintiff's affidavit failed to meet this requirement. Plaintiff subsequently filed a second affidavit of merit prepared by Zakharia and notarized in Florida by Norma Soler. Accompanying the second affidavit was a certification from Florida Secretary of State Sue Cobb that Soler was a commissioned notary public in that state.

Defendant moved to dismiss this action on the basis that plaintiff's second affidavit of merit was still not in compliance with MCL 600.2102(4). Defendant also moved to exclude testimony from Zakharia on the basis of MRE 702 and MCL 600.2169. Following oral argument, the trial court granted the motion to exclude Zakharia's testimony and a directed verdict in favor of defendant because Zakharia was plaintiff's only proffered standard of care witness. The trial court also granted defendant's motion for dismissal on the basis that plaintiff's affidavit of merit did not comply with MCL 600.2102(4).

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[2] Sternal wires are the wires used to keep the sternum together after surgery.

[3] We would note that our Supreme Court has subsequently overruled this decision. *Apsey v Memorial Hosp,* 477 Mich 120; 730 NW2d 695 (2007).

III. *Apsey*

Plaintiff raises several arguments challenging the constitutionality MCL 600.2102. However, we need not address these claims in light of our Supreme Court's overturning of this Court's holding in *Apsey*. *Apsey v Memorial Hosp*, 477 Mich 120; 730 NW2d 695 (2007). The Supreme Court concluded that MCL 600.2102(4) only provides an additional method for authenticating out-of-state affidavits to that found in the Uniform Recognition of Acknowledgements Act (URAA), MCL 565.261 *et seq*. *Apsey*, *supra* at 124. Because the affidavit initially proffered by plaintiff constitutes a "notarial act" under the URAA, *id*. at 128, it may be used "in this state with the same effect as if performed by a notary public of this state" because it was performed by a notary public authorized to perform notarial acts in the place where the notarial act was performed. MCL 565.262. Accordingly, the trial court erred by dismissing this case on the basis of the allegedly defective affidavit of merit.

IV. MCL 600.2169

Plaintiff also asserts that the trial court erred by barring testimony from Zakharia on the basis that he did not specialize in cardiac surgery and did not devote a majority of his professional time to the practice of cardiac surgery in the year preceding the alleged malpractice at issue here. "Whether a witness is qualified to render an expert opinion and the actual admissibility of the expert's testimony are within the trial court's discretion. Such decisions are reviewed on appeal for an abuse of discretion." *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002) (citation omitted).

In relevant part, MCL 600.2169 states as follows:

> (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) [concerning general practitioners], 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.

This statute requires that the specialty of a standard of care witness match the relevant specialty of the defendant. *Woodard v Custer*, 476 Mich 545, 558-560; 719 NW2d 842 (2006). Moreover, if the expert is to testify against or on behalf of a board certified specialist, then the expert must be board certified in the same specialty. *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004). "[A] 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified." *Woodard*, *supra* at 561. The relevant specialty is the one "engaged in by the defendant physician during the course of the alleged malpractice . . . ." *Id.* at 560. If the defendant specializes in a subspecialty, then the standard of care witness must have also specialized in that subspecialty. *Id*. at 562. "[A] 'subspecialty' is a particular branch of medicine or surgery in which one can potentially become board certified that falls under a specialty or within the hierarchy of that specialty." *Id.*

In this case, plaintiff alleges that defendant was performing surgery in October 2001 to remove the pacing and sternal wires due to an infection. Defendant contended, and the trial court agreed, that defendant was engaged in the practice of cardiac surgery at the time of the malpractice. However, no evidence was presented that cardiac surgery is a specialty "in which one can potentially become board certified." *Id.* at 561. Rather, cardiac surgery is included within the realm of thoracic surgery. As stated by the American Board of Thoracic Surgery:

> Thoracic surgery encompasses the operative, perioperative, and surgical critical care of patients with acquired and congenital pathologic conditions within the chest. Included is the surgical repair of heart lesions, and congenital and acquired conditions of the coronary arteries, valves, and myocardium. It also includes pathologic conditions of the lung, esophagus, and chest wall, abnormalities of the great vessels, tumors of the mediastinum, and disease of the diaphragm and pericardium. Management of the airway and injuries to the chest are also within the scope of the specialty. [American Board of Thoracic Surgery, *About Us* <http://www.abts.org/doc/4016> (accessed June 27, 2007).]

No evidence has been presented that one can become board certified in "cardiac surgery" as a subspecialty of thoracic surgery.

Moreover, it is not clear that the surgery at issue could be described as cardiac surgery, where the evidence indicates the chest wall did not have to be opened to remove the wires. Rather, Zakharia testified that the wires could have been removed by gently pulling them out through an incision in the skin. Regardless, because the procedure involved surgery to treat a

pathologic condition (infection) within the chest, it falls within the specialty of thoracic surgery. Both defendant and Zakharia were board certified in thoracic surgery. Accordingly, Zakharia met the requirements of MCL 600.2169(1)(a).

A standard of care witness must also meet the practice/instruction requirements of MCL 600.2169(1)(b). *Woodard*, *supra* at 565-566. Although Zakharia has been an instructor in the past, no evidence was presented that he was spending the majority of his professional time in that capacity in the year prior to the incident in question. Accordingly, the issue is whether in the year prior to the alleged malpractice Zakharia devoted the majority of his professional time to "the active clinical practice" of thoracic surgery. MCL 600.2169(1)(b)(*i*).

Zakharia's resume indicates that since 1985 he has been engaged in a cardiovascular and thoracic surgery practice in Miami. He further testified that he had been practicing cardiothoracic and vascular surgery for approximately 40 years at the time of his 2006 deposition, including the period covering the year prior to the alleged malpractice. Zakharia testified that, as of 1999 and continuing through the time of his deposition, two-thirds of his practice involved thoracic procedures. Zakharia testified that 35 to 40 percent of his thoracic practice involved lung surgery.

Defendant argues from this evidence that less than 50 percent of Zakharia's professional time was devoted to cardiac surgery. However, we again note that the relevant "specialty" is thoracic surgery, not cardiac surgery. Because Zakharia testified that two-thirds of his surgical practice involved thoracic procedures, the evidence indicates that he devoted the majority of his professional time to "the active clinical practice" of thoracic surgery in accord with the requirements of MCL 600.2169(1)(b)(*i*).

In light of these facts, we conclude the trial court abused its discretion when it found that Zakharia was not qualified to testify regarding the appropriate standard of care pursuant to MCL 600.2169(1).

V. MRE 702

Plaintiff next asserts that the trial court erred by alternatively excluding Zakharia's testimony pursuant to MRE 702. "[J]ust because an expert is qualified under § 2169(1) does not mean that the trial court cannot disqualify the expert on other grounds." *Woodard*, *supra* at 572. MCL 600.2169(2) provides as follows:

> 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:
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> (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.

MCL 600.2169(3) further provides that § 2169 "does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section." MRE 702 provides that an expert may be qualified to testify "as an expert by knowledge, skill, experience, training, or education."

Zakharia received his medical degree in 1962, was certified by the American Board of Surgery and the American Board of Thoracic Surgery in 1968, and was voluntarily recertified by the American Board of Thoracic Surgery in 1984. He belongs to multiple professional societies, has authored several publications on the subject of thoracic surgery, and has given numerous presentations regarding the same. Before he began his cardiovascular and thoracic surgery practice in 1985, he was an assistant professor of thoracic and cardiovascular surgery at the University of Miami School of Medicine, was an attending cardiovascular and thoracic surgeon at Jackson Memorial Hospital, was the chief of cardiothoracic surgery at a veterans health administration hospital in Miami, and was an attending and chief cardiovascular and thoracic surgeon in Beirut. Zakharia also served as a guest peer reviewer for the Annals of Thoracic Surgery from 1992 to 2000 and presently sits on the Florida Medical Association Scientific Committee.

Zakharia testified that during the first ten years he was in private practice, he focused his work on cardiac surgery including valvular surgery. Because he was subsequently involved in a car accident that precludes him from performing lengthy surgeries, he now limits his involvement in cardiac surgery to admissions and assisting other surgeons in cardiac procedures. During his deposition in 2006, Zakharia testified that while assisting in operations within the past few years, he was involved with patients who had temporary pacing wires and had also overseen such patients in his role as an attending physician. He offered as evidence of his recent experience several patient records from July and August 2002 indicating that during that period he performed major debridements of the sternum, an exploration of the anterior chest of a patient with an infected incision, and the removal and replacement of sternal wires. Zakharia testified that over the years he has also been involved in teaching medical students and residents how to place and remove pacing wires.

Despite this lengthy and apparently distinguished career in thoracic surgery, the trial court found Zakharia was not qualified to testify as an expert regarding the proper standard of care because "in this case there is no evidence that Dr. Zakharia has ever performed the type of valve replacement surgery with the follow-up of, removal of pacing wires from the heart, and in the face of an infection that is in question in this case." In reaching this conclusion, the trial court relied on a particular exchange between Zakharia and his attorney during his deposition. When questioned regarding whether he had ever been confronted with a situation involving a post-operative infection following open heart surgery, Zakharia answered, "I have met similar circumstances, it was not my own case, and I have those records to show if we need to." When asked whether the above-referenced case was not one where he personally treated and cared for the patient, he indicated that was "correct." However, when then asked whether he had cared for patients in whom it was necessary to remove wires secondary to an infection where he had discovered a pool of pus or necrotic material, he answered "Yes." Zakharia subsequently indicated that on a regular basis he debrided surgical wounds on patients who had open heart surgeries performed by other surgeons. Contrary to the trial court's understanding of this

testimony, we conclude that it demonstrates that Zakharia had cared for patients in whom it was necessary to remove wires secondary to an infection.

Our review of the entire record leads us to the conclusion that the trial court abused its discretion in finding that Zakharia was not qualified by his knowledge, skill, experience, training, and education to testify with regard to the proper standard of care at issue in this case. *Woodard*, *supra* at 557; MRE 702. Zakharia was educated and professionally trained through various residencies and specializes in thoracic surgery. Zakharia has been engaged in the active clinical practice of thoracic surgery in excess of 40 years. MCL 600.2169(2). Of particular relevance to this matter, Zakharia testified that he has engaged in valvular surgery, has been involved in operations on patients who have had temporary pacing wires within the past few years, has recently performed major debridements of the sternum, explored the anterior chest of a patient with an infected incision, and removed and replaced sternal wires. He has also taught medical students and residents how to place and remove pacing wires. This background is sufficient to qualify Zakharia as an expert witness under MRE 702.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K.Zahra