

STATE OF MICHIGAN
COURT OF APPEALS

MARY JANE CICOLA, personal representative of
the estate of JOHN JOSEPH CICOLA,

Plaintiff-Appellant,

v

MARGARET ROSENTHAL, D.O.,

Defendant-Appellee,

and

DETROIT OSTEOPATHIC HOSPITAL d/b/a BI-
COUNTY COMMUNITY HOSPITAL, R. SANDY,
D.O., JOHN LINDEMUTH, D.O., and BI-COUNTY
EMERGENCY PHYSICIANS, P.C.,

Defendants.

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Plaintiff filed this suit for medical malpractice on July 17, 1993. On January 4, 1995, defendant Dr. Margaret Rosenthal filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that plaintiff's only expert witness, Dr. Kim Friedman, was an emergency medicine physician whereas defendant was an internal medicine physician. Accordingly, defendant argued, MCL 600.2169; MSA 27A.2169 precluded Dr. Friedman from testifying that defendant deviated from the standard of care of an internist. The trial court granted defendant's motion. Plaintiff appeals as of right. We reverse.

In 1986, the Michigan Legislature passed a series of bills commonly referred to as the tort reform acts of 1986. Kelley v Murray, 176 Mich App 74, 77-78; 438 NW2d 882 (1989). One of

* Circuit judge, sitting on the Court of Appeals by assignment.

the acts, MCL 600.2169; MSA 27A.2169, established new and more stringent standards for the qualification of expert witnesses in medical malpractice actions. *Id.* This statute was later amended to further restrict who could qualify as an expert witness in a medical malpractice case. The amendment became effective October 1, 1993.

Plaintiff argues that the trial court erroneously applied the 1993 version of this statute. Before we address which version of the statute was applicable, we must first determine whether the trial court should have relied on this statute at all. In *McDougall v Schanz*, ___ Mich App ___; ___ NW2d ___ (Docket No. 178042, issued 8/27/96) slip op p 3, this Court declared the tort reform acts of 1986 unconstitutional to the extent that they conflict with MRE 702. As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). However, appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome. *Id.*, p 547. Pursuant to that exception, we consider the effect that *McDougall* has on this case. *Id.*

In the hearing for defendant's motion for summary disposition, the parties extensively argued whether Dr. Friedman qualified as an expert under MCL 600.2169; MSA 27A.2169. Because the trial court held that emergency medicine was not related to internal medicine, it granted defendant's motion. The plain language of MRE 702 grants the trial court discretion to qualify a witness as an expert if the expert possesses the requisite "knowledge, skill, experience, training or education." *McDougall*, *supra*, slip op p 3. This rule does not exclude experts solely because the expert does not specialize in the same or a related area of medicine as the defendant. *Id.* Accordingly, the trial court erred by relying on MCL 600.2169; MSA 27A.2169 in deciding defendant's motion for summary disposition. *McDougall*, *supra*, slip op p 3. We express no opinion as to whether Dr. Friedman was competent to testify under MRE 702.

Reversed.

/s/ Myron H. Wahls

/s/ E. Thomas Fitzgerald

/s/ Leopold P. Borrello