

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL PIONTEK, Personal Representative of
the ESTATE OF MARGARET R. PIONTEK,

UNPUBLISHED
April 5, 2005

Plaintiff-Appellant,

v

No. 235792
Wayne Circuit Court
LC No. 00-021366-NH

JAMES ARMSTRONG, D.O.,

Defendant-Appellee,

ON REMAND

and

WILLIAM RAMINICK, D.O., LOUIS
TEGTMAYER, D.O., and GARDEN CITY
OSTEOPATHIC HOSPITAL,

Defendants.

Before: Jansen, P.J., and Sawyer, and Cooper, JJ.

PER CURIAM.

This case is before us for the second time. In our original opinion in this case, we reversed the circuit court's order granting summary disposition to appellee James Armstrong, D.O. and held that the circuit court erred in striking plaintiff's expert witness Wayne Gradman, M.D. *Piontek v Armstrong*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2002 (Docket No. 235792) (*Piontek I*).¹ Thereafter, the Supreme Court vacated our opinion for reconsideration in light of *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004). *Piontek v Armstrong*, 471 Mich 908; 688 NW2d 285 (2004) (*Piontek II*).

The facts were adequately presented in our original opinion, *Piontek I, supra*, slip op at 1-2, as follows:

¹ On remand, Judge Sawyer has been substituted for Judge Holbrook, Jr., who sat on the original panel and has since retired.

The facts underlying this appeal are not in dispute. The decedent, Margaret Piontek, was referred by her primary care physician to appellee in July 1997, for review of an abdominal aneurysm that had been under observation for several years. The aneurysm was apparently located on the inferior mesenteric artery, which branches off from the abdominal aorta.²

On August 13, 1997, at Garden City Hospital, appellee performed surgery on the decedent to repair the artery. The day following the surgery, appellee went on a two-week vacation. During appellee's absence, the decedent's primary care physician was in charge of her post-operative medical care. At some point in those two weeks, Piontek experienced significant post-operative difficulties. An infectious disease consultation was done four or five days after the surgery, followed by additional diagnostic procedures after appellee's return. These additional procedures included: (1) an ultrasound guided paracentesis, performed by gastroenterologist William Raminick, D.O., on September 3, 1997; (2) a CAT scan on September 3 or 4, 1997; (3) the insertion of a catheter on September 10, 1997; (4) a fistula gram on September 17, 1997; and (5) a proctosigmoidoscopy on September 18, 1997. The proctosigmoidoscopy identified a colon perforation. No surgery was undertaken to address this perforation. The decedent died on September 21, 1997.

On June 30, 2000, appellant filed his complaint in the present case against appellee, Louis Tegtmeier, D.O., Garden City Osteopathic Hospital, and Raminick.³ Stipulated orders dismissing with prejudice Dr. Tegtmeier, Garden City, and Dr. Raminick were entered, respectively, on October 10, 2000, May 25, 2001, and July 9, 2001. The affidavit of merit filed regarding the claim against appellee was signed by Wayne S. Gradman, M.D.

On May 25, 2001, appellee filed a motion to strike plaintiff's expert witness (Gradman) and enter summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that pursuant to MCL 600.2169, Gradman could not serve as an expert witness against appellee because Gradman is board certified in general surgery, whereas appellee is board certified in cardiovascular thoracic surgery. Plaintiff countered that the requirements of the statute were satisfied because both Gradman and appellee were board certified in general surgery.

On May 31, 2001, appellee filed a second motion for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing that because the board certifications of the two doctors did not match, Gradman's affidavit of merit was invalid.

² The abdominal aorta is "the part of the descending aorta that supplies structures below the diaphragm." *Stedman's Medical Dictionary* (26th ed, 1995), p 110.

³ Appellant filed his Notice of Intent to File a Claim in June 1999, and his first complaint on March 21, 2000. A stipulated order dismissing that case was entered in June 2000.

Accordingly, because the estate was opened on July 6, 1998, appellee argued that plaintiff's cause of action was barred by the statute of limitations. Plaintiff countered that summary disposition was improper because both doctors were board certified in general surgery. Alternatively, plaintiff argued that the statute of limitation should be tolled because of his reasonable belief that Gradman was qualified to testify as an expert witness.

At a June 22, 2001, hearing, the circuit court denied appellee's motion to grant summary disposition based on a faulty affidavit of merit and the statute of limitations, reasoning as follows: "I am not going to grant your motion to dismiss the case on the basis of an affidavit which you claim is incompetent. I think it could fit under the section in the statute that says who the plaintiff's attorney reasonably believes meets the requirement for an expert witness under section 2169." The court also observed that the question of whether Gradman meets the requirements of an expert witness under section 2169 is the "thorny issue in the case." After taking the matter under advisement, the court granted appellee's motion to strike and for summary disposition based on the argument that Gradman was not qualified to testify as an expert under MCL 600.2169. [Footnotes in original.]

The circuit court entered an order granting appellee's motion for summary disposition on the ground that Gradman's affidavit was insufficient to commence the complaint. It also entered orders granting appellee's other motion to strike plaintiff's expert witness and for summary disposition on the ground that Gradman was not qualified under MCL 600.2169 to give expert testimony. We reversed those decisions in our original opinion. On remand, we find that questions of fact exist that require this Court to remand the matter to the circuit court for further consideration in light of *Halloran*.

The circuit court granted appellee's motion to strike Gradman as plaintiff's expert witness and for summary disposition on the ground that Gradman did not qualify to testify as an expert witness because he was not board certified in the same subspecialty as was appellee. In reversing the trial court's decision in our previous opinion, we opined that plaintiff's allegations of medical malpractice were based on the post-operative care received by decedent, that post-operative care fell under the broad category of general surgery, and that because Gradman was board certified as a general surgeon, he was qualified to testify as an expert witness against appellee. *Piontek I*, slip op at 4. However, *Halloran* dictates we look to the qualifications of the defendant doctor, as opposed to what post operative care was administered. The *Halloran* Court held that "MCL 600.2169(1)(a) requires that the proposed expert witness must have the same board certification as the party against whom or on whose behalf the testimony is offered." *Id.* at 574. Thus, the proper question was whether Gradman had the same board certifications as appellee.

The circuit court apparently accepted appellee's assertion that he was board certified in cardiothoracic surgery. A careful review of the record provides no support for this contention. The assertion that appellee is board certified in cardiothoracic surgery is not supported by evidence in the record before this Court. Appellee stated in his deposition that he was board certified in general surgery. Appellee's assertion that he is board certified in cardiothoracic surgery, made in briefs and motions, is not established by any documentation submitted in

support of his motions for summary disposition. Furthermore, no evidence on the record before this Court establishes that a physician can become board certified, as opposed to obtaining a certificate of special qualification, in a subspecialty.

Our Supreme Court remanded this case for reconsideration in light of *Halloran*; however, the facts of the instant case are the opposite of those presented in *Halloran*. In this case, it appears that appellee and Gradman were board certified in the same primary specialty, whereas in *Halloran*, the defendant and the proposed expert witness were board certified in different primary specialties, but held certificates of special qualification in the same subspecialty. The *Halloran* Court held that pursuant to MCL 600.2169(1)(a), a proposed expert witness must have the same primary board certification as the party against whom or on whose behalf the expert testimony is offered, even if the proposed witness and the party against whom or on whose behalf the expert testimony is offered have the same subspecialty. *Id.* at 574. *Halloran* did not address the issue of whether the subspecialty, if any, practiced by a proposed expert witness must match that of the defendant in all cases. This Court has declined “to graft a requirement for matching subspecialties onto the plain ‘specialty’ language of MCL 600.2169(1).” *Hamilton v Kuligowski*, 261 Mich App 608, 611-612; 684 NW2d 366 (2004).

We, again, vacate the circuit court’s orders granting appellee’s motions for summary disposition and remand this matter for reconsideration in light of *Halloran*. In this case, if appellee is in fact board certified in cardiothoracic surgery, as opposed to general surgery, then Gradman’s board certification does not match that of appellee, and under *Halloran*, *supra* at 578-579, Gradman is not qualified to give expert testimony against appellee. MCL 600.2169(1)(a). If both appellee and Gradman are board certified in general surgery, then Gradman meets the requirements of MCL 600.2169(1)(a) as interpreted in *Halloran*. See also *Hamilton*, *supra* at 611-612 (plain language of MCL 600.2169 does not require the matching of subspecialties). Under such circumstances, plaintiff would be entitled to a denial of appellee’s motion to strike the expert witness and for summary disposition.

Also, on remand, if in fact both appellee and Gradman are board certified in general surgery and appellee is board certified in cardiothoracic surgery, the circuit court may deny appellee’s motion for summary disposition if it finds that plaintiff’s counsel reasonably believed that the proposed expert was qualified, under MCL 600.2169, to give expert testimony against appellee at the time the affidavit was prepared. See *Grossman v Brown*, 470 Mich 593, 598-600; 685 NW2d 198 (2004).

On remand, we vacate the circuit court’s orders granting appellee’s motions for summary disposition and remand for further consideration of those motions consistent with this opinion and in light of *Halloran*. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Jessica R. Cooper