

STATE OF MICHIGAN
COURT OF APPEALS

DALE BRADSHAW,

Plaintiff-Appellant,

v

WEST SHORE MEDICAL CENTER and
MUNSON HEALTH CARE, d/b/a MUNSON
HOME HEALTH,

Defendants-Appellees.

UNPUBLISHED

April 6, 2006

No. 258764

Manistee Circuit Court

LC No. 04-011537-NH

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition and dismissing plaintiff's medical malpractice claim. The trial court ruled that even if the nurse practitioner who signed the affidavit of merit was qualified under MCL 600.2912d and MCL 600.2169(1) to certify that the applicable standard of care was breached, the affiant was unqualified under MCL 600.2129(2) to certify that such a breach proximately caused plaintiffs' injuries. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

An order granting summary disposition is reviewed by this Court de novo. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(7), the contents of the complaint are accepted as true unless specifically contradicted by affidavits or other appropriate documents. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone, and documentary evidence is not considered. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All factual allegations in support of the claim are accepted as true, and all reasonable inferences or conclusions which can be drawn from the facts are construed in the light most favorable to the nonmoving party. *Adair, supra* at 119. Statutory interpretation is a question of law subject to de novo review. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

The affidavit of merit statute, MCL 600.2912d, requires a medical malpractice plaintiff to file an affidavit of merit along with the complaint that certifies, among other things, that the standard of care was breached and that a breach of the standard of care proximately caused the plaintiff's injury. *Id.* Also, MCL 600.2912d requires that an attorney filing the affidavit of merit must reasonably believe that the affiant would be qualified to testify as an expert witness under MCL 600.2169. In a medical malpractice suit against an institutional defendant such as this, "the term 'party' under MCL 600.2169(1)(a) encompasses the agents for whose alleged negligent acts the hospital may still be liable." *Nippa v Bosford General Hosp (On Remand)*, 257 Mich App 387, 393; 668 NW2d 628 (2003).

Defendants first argue that the affiant was not qualified to certify the merit of the proximate cause issue because the affiant, a nurse practitioner, could not meet the expert witness requirement of MCL 600.2169(2) with respect to the proximate cause issue. Because defendants concede for appeal purposes that the affiant would be qualified under MCL 600.2169(1) to testify as to breach of the applicable standard of care, defendants argue that MCL 600.2912d required plaintiffs to supply *two* affidavits of merit: one from a physician capable of testifying on proximate cause, and one from a nurse (such as affiant), who could testify as to the standard of care. While this appeal was pending, a panel of this Court held that an affiant need not meet the expert-witness qualifications under MCL 600.2169(2) because any reference in MCL 600.2912d to MCL 600.2169 refers exclusively to subsection (1) of the statute and not subsection (2), which refers to expert witness qualification during trial. *Sturgis Bank & Trust Co v Hillsdale Comm Health Ctr*, 268 Mich App 484, 489; 708 NW2d 453 (2005). More specifically, the *Sturgis* Court held that a medical malpractice plaintiff is "only required to submit an affidavit of an expert practicing or teaching in the same health care profession as those accused of wrongdoing and that the affidavit contain the necessary elements listed in MCL 600.2912(1)(a)-(d)." *Id.* at 495-496. In *Sturgis*, the Court also reversed the trial court's holding that "two affidavits of merit were necessary, one from a nurse because this was the health profession practiced by those accused of malpractice and one from a doctor who could aver with regard to proximate cause." *Id.* at 488.

Because defendants similarly argue that two affidavits were required for similar reasons, defendants' argument must also fail. Like defendants in the instant case, the defendant in *Sturgis* argued that the affidavit of merit was defective because it was signed by a nurse practitioner instead of a doctor who could testify concerning proximate cause, even though the affiants practiced in the same practice as the alleged wrongdoer. *Id.* at 487. Accordingly, the trial court committed error requiring reversal when it held that MCL 600.2912d required the affiant to qualify under MCL 600.2169(2).¹

¹ Because defendants concede that the affiant met the requirements of MCL 600.2169(1), it is unnecessary to reach plaintiff's alternative argument that his attorney reasonably believed that the affiant would meet the requirements of MCL 600.2169. *Sturgis, supra* at 489 (holding that the Court need not reach the plaintiff's alternative argument that it reasonably believed the affiant was properly qualified since the affiant was found to be properly qualified under MCL 600.2169(1), which was dispositive).

Finally, defendants argue that the affidavit of merit was deficient because it did not sufficiently detail proximate cause. Although defendants' arguments are not clear in this matter, they apparently argue that the affidavit of merit did not sufficiently detail the manner in which the alleged negligence proximately caused the injury. Notably, defendants do not expressly state how the detail is lacking or what should have been stated. Were we to accept defendants' argument that the causation statement was insufficient when defendants do not suggest any standard to make such a determination, we would necessarily adopt an undefined standard. Thus, future medical malpractice defendants would simply argue that any proximate cause statement lacks sufficient detail and then essentially define sufficient detail as a bit more detail than the plaintiff provided. Moreover, because defendants do not state how this Court should make this determination, the issue is waived. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Reversed and remanded for further proceedings consisted with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Donald S. Owens