

STATE OF MICHIGAN  
COURT OF APPEALS

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RAYMOND NEWSOME and NANCY  
NEWSOME,

UNPUBLISHED  
November 14, 2006

Plaintiffs-Appellants,

and

BLUE CROSS & BLUE SHIELD OF  
MICHIGAN,

Intervening Plaintiff,

v

PETER BONO, D.O., TRI COUNTY  
ORTHOPEDICS, P.C., and BOTSFORD  
GENERAL HOSPITAL,

No. 270237  
Oakland Circuit Court  
LC No. 2004-062278-NH

Defendants-Appellees.

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Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendants' motions for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Raymond Newsome was injured at work. Defendant Bono recommended and performed spinal surgery in May 2002. Newsome suffered postsurgical complications and continued back pain. Plaintiffs filed this malpractice action in November 2004. It was accompanied by an affidavit of merit from Dr. Sanford Davne and a nurse, Jane Garrett. The trial court ruled that plaintiffs' counsel did not have a reasonable belief that Davne was qualified to serve as an expert. See MCL 600.2912d. It also ruled that the affidavits of merit contained deficient statements of causation. Because the filing of a complaint with an affidavit of merit that does not meet the requirements of § 2912d is insufficient to commence the lawsuit and thus the filing of a complaint with a nonconforming affidavit does not toll the limitations period, which continues to run, *Gerals v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003); *Mouradian v Goldberg*, 256 Mich App 566, 572-575; 664 NW2d 805 (2003), the trial court dismissed the complaint with prejudice.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Statutory interpretation is a question of law which is reviewed de novo on appeal. *In re MCI Telecommunications Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

A plaintiff filing a medical malpractice action is required to file "an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." MCL 600.2912d(1). Section 2169 "contains strict requirements concerning the qualification of expert witnesses in medical malpractice cases." *McDougall v Schanz*, 461 Mich 15, 28; 597 NW2d 148 (1999). Section 2169 requires that an expert be licensed as a health professional. If the party against whom he testifies is a specialist, the expert must specialize in the same field. If the party against whom he testifies is a board-certified specialist, the expert must be board certified in the same specialty. MCL 600.2169(1)(a). In addition, and what is at issue here, is that "during the year immediately preceding the date of the occurrence that is the basis for the claim or action," the expert must have devoted a majority of his professional time to the practice or teaching of the same health profession or specialty as practiced by the party against whom he testifies. MCL 600.2169(1)(b) and (c). The problem here is that an expert need not be actively practicing or teaching at the time he is retained. Rather, he must have been actively practicing or teaching (on a more-or-less full-time basis) during the year immediately preceding the event(s) giving rise to the cause of action. Therefore, when counsel retained an expert in 2004, the relevant question was not how long he had been practicing or teaching, or even whether he was currently practicing or teaching, but whether he had been practicing or teaching between May 2001 and May 2002.

Defendant Bono is a board-certified practicing orthopedic surgeon. Davne is also a board-certified practicing orthopedic physician. However, it is undisputed that Davne had temporarily ceased practicing and teaching in 1998 and did not resume his practice until the summer of 2002. Although Davne was not qualified to testify as an expert witness at trial, his affidavit of merit could still be sufficient for initiating the action if plaintiffs' attorney reasonably, albeit mistakenly, believed that he met the requirements for serving as an expert witness. MCL 600.2912d(1); *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002). A reasonable belief regarding the expert's qualifications is one that is confirmed by independent investigation. *Grossman v Brown*, 470 Mich 593, 599-600; 685 NW2d 198 (2004). A belief based on assumptions or the opinions of third persons, unconfirmed by independent investigation, is not reasonable. *Geralds, supra* at 232-233.

Plaintiffs' counsel contacted an expert witness locator service and requested "an actively practicing board certified orthopedic surgeon" who was familiar with the type of procedure performed by Bono. The service referred him to Davne, whose curriculum vitae (CV) indicated that he was board certified in the relevant specialty. Counsel independently confirmed Davne's board certification. He also spoke to Davne, who represented "that he had been practicing for over twenty years." While that statement implied that he had been continuously practicing during the past 20 years and thus was practicing between May 2001 and May 2002, that statement was belied by his CV, which does not reflect any actual professional activity after 2000 other than attending a couple of conferences. Further, while the CV indicates that Davne held the position of instructor from "Jan 1982-Present," the "Teaching Activities" section indicates that he last taught in 1998. There is nothing to indicate that counsel specifically

inquired or did anything else to ascertain whether Davne had devoted a majority of his time to practicing or teaching orthopedic surgery during the relevant time period. When faced with conflicting information regarding an expert's qualifications, it is incumbent upon counsel to seek clarification rather than to rely on favorable information while ignoring unfavorable information. Because counsel had information available to him which showed that, despite Davne's representation, he was not qualified to serve as an expert, the trial court did not err in concluding that counsel's belief regarding Davne's qualifications was not reasonable.

Plaintiffs' claim against the hospital's nursing staff was supported by Garrett's affidavit of merit. The affidavit of merit must contain a statement regarding the applicable standard of practice, an opinion that the defendant breached the standard of practice, the actions the defendant should have taken or omitted to comply with the standard of practice, and "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." MCL 600.2912d(1)(d). While the statement need not be exquisitely detailed, the affiant "is required to make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings." *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 701; 684 NW2d 711 (2004) (emphasis in original).

Garrett offered an opinion on what the standard of practice required of defendant Botsford and what it should have done to comply with the standard of practice. She then stated, "within a reasonable degree of nursing certainty, the violations of the standard of care are a proximate cause of the damages claimed by the plaintiff." However, "it is not sufficient . . . to merely state that the defendants' alleged negligence caused an injury." The affiant must explain how the breach caused the injury. *Roberts, supra.* at 699 n 16. Because Garrett's affidavit contains no such explanation, the trial court did not err in granting Botsford's motion for summary disposition.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Christopher M. Murray  
/s/ Pat M. Donofrio