

STATE OF MICHIGAN
COURT OF APPEALS

ERIK JAMES DECKER and VICKI DECKER,

Plaintiffs-Appellants,

v

KEVIN FLOOD, DDS, and KEVIN FLOOD, DDS
PC,

Defendants-Appellees.

FOR PUBLICATION
October 26, 2001
9:15 a.m.

No. 224482
Kent Circuit Court
LC No. 99-005971-NM

Updated Copy
January 4, 2002

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

NEFF, P.J. (*concurring*).

I concur in affirming the trial court's grant of summary disposition for defendants on the basis of the record in this case. I agree affirmance is the correct result, but write separately to address statutory considerations that ostensibly applied to plaintiffs' case, but were not raised.¹ My concern is that such considerations not be foreclosed in cases of this nature merely on the basis of our decision in this case.

MCL 600.2912d(1) provides, in relevant part:

Subject to subsection (2),^[2] the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint 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 600.2169]. [Emphasis added.]

¹ Counsel's failure to raise these arguments before the trial court precludes our consideration of these arguments on appeal. See *People v Carines*, 460 Mich 750, 761-762, n 7; 597 NW2d 130 (1999); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1997).

² The exception of subsection 2 pertains to access to medical records and does not apply in this case. See MCL 600.2912d(2).

In this case, plaintiffs' counsel did not argue that he *reasonably believed* that the affidavit supplied met the requirements of § 2169, even though it appears from the record that could have been the case. The standard set forth by the Legislature is clearly one of "reasonable belief." Applying the language of the statute, I conclude that if counsel reasonably, albeit mistakenly, believed that the affiant qualified as an expert witness under § 2169, then the trial court's subsequent finding to the contrary would not have been fatal to plaintiffs' case, i.e., a basis for summary disposition in favor of defendants. See *Scarsella v Pollak*, 461 Mich 547, 553, n 7; 607 NW2d 711 (2000) (distinguishing between the situation where the required affidavit of merit is wholly omitted and the situation where it is defective or inadequate).

Evidence of the levels of specialty and certifications with regard to the practice of dentistry was not set forth in the trial court.³ Plaintiffs' counsel averred that Dr. Gallagher "has no additional degree or schooling than Dr. Flood, but chooses to limit his practice to root canal surgery."⁴ Counsel maintained that Dr. Gallagher was a general practitioner and that the standard of care for performing root canal surgery is the same for Dr. Flood and Dr. Gallagher. It was counsel's contention that Dr. Gallagher's affidavit met the statutory requirements. There was at least an argument to be made that counsel *reasonably believed* that the affidavit of merit met the statutory requirements.

No consideration was given to the fact that the standard of care required of Dr. Gallagher with regard to a root canal may in fact be the same as that for Dr. Flood despite the fact that Dr. Gallagher limits his practice to root canal surgery. Both Dr. Gallagher and Dr. Flood practice in the same local community, Grand Rapids, Michigan. In this case, the fact that Dr. Gallagher limits his practice to root canals is less likely to render him unfamiliar with the local standards applicable to a general practitioner. See *Birmingham v Vance*, 204 Mich App 418, 422; 516 NW2d 95 (1994) ("The standard of care for general practitioners is that of the local community or similar communities, while the standard for a specialist is nationwide."). The extent to which these circumstances bear, if at all, on the ultimate determination of the adequacy of the affidavit of merit under the statute is open to question.

This Court has previously addressed the fading logic in standard of care distinctions between general practitioners and specialists in cases such as this, where there is an overlap between the procedures performed by general practitioners and those who have specialized practices. *Id.* at 424-427. I concur with the well-reasoned opinion in *Vance*, in which Chief Judge Doctoroff stressed the need for further consideration and modification of standard of care requirements in view of the prolific advancements in communication and technology in recent

³ Plaintiffs' counsel stated during oral argument that he was not aware of board certification for endodontists or whether it is similar to board certification in other areas of the medical field. It was defense counsel's contention that two to three years' additional training was required to specialize as an endodontist, according to information defense counsel obtained from the web site of the American Association of Endodontists.

⁴ Plaintiffs' brief on appeal, however, calls this assertion into question, in stating: "Dr. Gallagher has additional training and is certified as an endodontist. Dr. Flood is not."

years. *Id.*, citing *Siirila v Barrios*, 398 Mich 576; 248 NW2d 171 (1976), opinion by Williams, J. Today's communication and technology capabilities render meaningless any distinction in the standard of care "where a general practitioner is providing a service that has become uniform throughout the nation such as a root canal . . ." *Vance, supra* at 425, citing *Siirila, supra* at 615. Accordingly, I would urge the Legislature to revisit these requirements.

/s/ Janet T. Neff