

STATE OF MICHIGAN
COURT OF APPEALS

RANEE LEE RAAB and RICHARD RAAB,

Plaintiffs-Appellants,

v

ROBERT F. JOYCE, D.O.,

Defendant-Appellee.

UNPUBLISHED

June 28, 2005

No. 254222

Montcalm Circuit Court

LC No. 02-001379-NH

RANEE LEE RAAB and RICHARD RAAB,

Plaintiffs-Appellees,

v

ROBERT F. JOYCE, D.O.,

Defendant-Appellant.

No. 256269

Montcalm Circuit Court

LC No. 02-001379-NH

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In this action alleging medical malpractice and loss of consortium, plaintiffs appeal as of right from the trial court's order precluding plaintiffs' expert from testifying as to the standard of care applicable to defendant and dismissing plaintiffs' suit. Defendant also appeals as of right, challenging the trial court's denial of case evaluation sanctions in the "interest of justice." See MCR 2.403(O)(11). Because we conclude that the trial court erred in precluding the testimony of plaintiffs' expert, we reverse and remand.

In April 2001, plaintiff Raneë Raab underwent hysterectomy and bladder suspension surgeries at the hands of defendant, an osteopathic doctor and board-certified general surgeon. Shortly after the surgeries Raneë experienced complications allegedly related to these procedures. Following a third surgery to correct these complications, plaintiffs filed the instant suit alleging that defendant, as a general surgeon, was negligent in undertaking the procedures without first consulting a urologist and obstetrician/gynecologist. As support for this allegation, plaintiffs sought to call Dr. Marc Cooperman, a medical doctor who is also a board-certified general surgeon. On the eve of trial, however, defendant moved to strike Cooperman as a

witness qualified to testify regarding the standard of practice or care applicable to defendant, arguing that Cooperman failed to meet the requirements for qualification to offer such testimony set forth in MCL 600.2169 and MRE 702. The trial court agreed and, after precluding Cooperman from testifying as a witness at trial, dismissed plaintiffs' suit. However, finding that the basis for the dismissal involved an unsettled area of law, the court declined to impose case evaluation sanctions against plaintiffs. These appeals followed.

Because we find it to be dispositive, we first address plaintiffs assertion that the trial court erred in concluding that Cooperman failed to meet the requirements of MCL 600.2169 and MRE 702 and was not, therefore, qualified to render testimony regarding the standard of care applicable to defendant. The qualification of a witness as an expert is a matter left to the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994). However, as questions of law, we review de novo the interpretation of both statutes and court rules. *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

In every action alleging medical malpractice, the plaintiff is required to present expert testimony articulating "the recognized standard of practice or care" and opining whether the defendant failed to provide that standard of practice or care. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 216; 642 NW2d 346 (2002). MCL 600.2169, however, imposes strict requirements regarding those experts qualified to offer such testimony. In relevant part, the statute provides:

(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty. [MCL 600.2169.]

In concluding that Cooperman failed to meet the requirements set forth in MCL 600.2169(1)(a), the trial court found relevant the fact that Cooperman does not possess the same basic educational credentials as that of defendant. Specifically, the court indicated that it did not "believe under the statute that Dr. Cooperman as an M.D. general surgeon, even though he is

board certified, matches up as contemplated by the statute to testify as to what a board certified general surgeon D.O. would do.” The trial court further found that because Cooperman acknowledged in his deposition that he did not himself perform hysterectomies as a matter of course in his practice, and in fact had never performed a bladder suspension surgery, he could not be considered to have been engaged in the same active clinical practice as defendant for purposes of MCL 600.2169(1)(b)(i).

With respect to the relevance of any variation in educational credentials, plaintiff argues that MCL 600.2169(1)(a) requires only an identity of board certifications between the expert and the defendant and that, therefore, the trial court erred in finding the disparity at issue here relevant. We agree. Indeed, the plain language of the statute mandates this conclusion. The *only* requirements imposed by MCL 600.2169(1)(a) are that the expert witness and the defendant either share a specialty, or share board certification in a shared specialty. Because both Cooperman and defendant were board-certified general surgeons, this requirement was met and the trial court erred in concluding otherwise.

The trial court also erred in finding that because Cooperman did not himself routinely perform hysterectomies and had yet to perform a bladder suspension surgery, he was not, for purposes of MCL 600.2169(1)(b)(i), engaged in an active clinical practice similar to that of defendant. Again, the plain and unambiguous language of the statute requires only that Cooperman have actively engaged in the clinical practice of a general surgeon during the year preceding the alleged malpractice. With respect to such activities, Cooperman testified during his deposition that until his heart attack in March 2001 his practice encompassed “all aspects of general surgery.” Such testimony was sufficient to show that Cooperman met the requirements of MCL 600.2169(1)(b)(i). Consequently, we find that trial court abused its discretion concluding that Cooperman failed to meet the requirements set forth in MCL 600.2169.

The trial court similarly erred in concluding that MRE 702 constituted an independent and “more persuasive” ground for striking Cooperman’s testimony. MRE 702 provides that:

[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In finding that Cooperman lacked the “knowledge, skill, experience, training, or education” required to qualify as an expert under MRE 702, the trial court again relied on the fact that Cooperman did not himself routinely perform the procedures at issue, and had acknowledged during his deposition that he was unfamiliar with the training received by an osteopathic physician in general, and by defendant in particular. However, Cooperman’s admitted unfamiliarity with the surgical procedures at issue and the training received by defendant is not relevant to the determination whether he was qualified under MRE 702 to testify as an expert. Indeed, his testimony was not sought to be presented for the purpose of showing that defendant was negligent in the manner in which he performed the procedures, but rather to show that defendant breached the standard of care applicable to a general surgeon by undertaking

to perform such procedures without having first consulted with specialists purportedly more knowledgeable in those areas. Although the factors cited by the trial court, should defendant present evidence of specialized training or credentialing in such procedures beyond that of a typical general surgeon, will likely affect the force of that testimony, such “[g]aps or weaknesses in [a] witness’ expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility.” *Wischmeyer v Schanz*, 449 Mich 469, 480; 536 NW2d 760 (1995), quoting *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987).

Accordingly, we reverse the trial court’s order of dismissal and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.¹

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

¹ Because we conclude that the trial court erred in precluding the testimony of plaintiffs’ expert, we need not address whether case evaluation sanctions in favor of defendant were properly denied.