

STATE OF MICHIGAN
COURT OF APPEALS

BONNIE JEAN GONZALEZ, Personal
Representative of the Estate of CONDE
GONZALEZ,

Plaintiff-Appellant,

v

ST. JOHN HOSPITAL & MEDICAL CENTER,

Defendant-Appellee,

and

NORTHEAST SURGICAL ASSOCIATES, P.C.,
PETER D. KOWYNIA, M.D., and
CHRISTOPHER N. VASHI, M.D.,

Defendants.

UNPUBLISHED
February 6, 2007

No. 272093
Wayne Circuit Court
LC No. 05-506716-NH

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

FITZGERALD, J. (*concurring*).

I concur with the majority opinion because I am compelled to do so by *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 138; 528 NW2d 170 (1995), which held that interns and residents are nonspecialists, as well as by *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), which held that MCR 600.2169(1) requires that the plaintiff's expert witness on the standard of practice or care must specialize in the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice. Here, although the defendant physician was a third-year surgical resident who limited his practice to general surgery, Michigan law holds him to be a nonspecialist. Hence, under *Woodard*, plaintiff's expert, despite being a general surgeon who is clearly qualified to testify to the standard of care applicable to a general surgeon, is not qualified to testify under § 2169(1). Like the trial court, I find this result absurd. This case represents yet another example of the difficulties in interpreting and applying § 2169(1). I continue to believe that MCL 600.2169 is unconstitutional for the reasons set forth

in *McDougall v Eliuk*, 218 Mich App 501, 554 NW2d 56 (1996),¹ rev'd *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). See also *McDougall*, 461 Mich at 38 (Cavanagh, J., dissenting) and *Woodard, supra* at 579-580 (Cavanagh, J., concurring).

/s/ E. Thomas Fitzgerald

¹ Fitzgerald, P.J., joined by Houk, J., with Taylor, J., dissenting.