STATE OF MICHIGAN

COURT OF APPEALS

ANISE PATTERSON, Individually and as Personal Representative of the ESTATE OF RONALD D. PATTERSON,

Plaintiff-Appellant/Cross-Appellee,

v

ST. JOSEPH MERCY HOSPITAL ANN ARBOR and TRINITY HEALTH-MICHIGAN,

Defendants-Appellees,

and

ST. JOSEPH MERCY HOSPITAL MEDICAL GROUP PRACTICE, JULIE SIDELINGER, PA, JOHN DOE(s), and JANE DOE(s),

Defendants,

and

INTERNAL MEDICINE SPECIALISTS OF HOWELL, PLLC, and GERALD DRESLINSKI, M.D.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
October 28, 2021

No. 352631
Washtenaw Circuit Court
LC No. 19-000002-NH

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

In this professional negligence action, plaintiff Anise Patterson, individually and as personal representative of the Estate of Ronald Patterson, appeals by right from the trial court's

order dismissing plaintiff's complaint without prejudice. This proceeding arises out of medical treatment rendered to decedent Ronald Patterson[1] by defendant Dr. Gerald Dreslinski and various other individuals or entities at defendant St. Joseph Mercy Hospital Ann Arbor (the SJM defendants). Patterson presented to SJM's emergency room on January 25, 2015, where he allegedly received improper treatment that caused him to suffer complications and, eventually, his death on April 3, 2015, at the age of 61. In the proceedings below, defendants contended that plaintiff failed to comply with discovery; whereas plaintiff contended that defendants withheld documentary evidence that was necessary for plaintiff to identify appropriate experts and for any experts to form opinions. The trial court dismissed plaintiff's complaint after plaintiff's counsel failed to appear, as ordered, for a hearing. Defendants Dr. Dreslinski and Internal Medicine Specialists of Howell, PLLC, (the IMS defendants) cross-appeal, arguing that the trial court had previously erred by rejecting their challenges to plaintiff's notice of intent to sue and affidavit of merit signed by Dr. Steven L. Anton. We vacate the trial court's order dismissing this case and remand for explicit consideration on the record of the factors under *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), and whether a lesser sanction might better serve the interests of justice. We affirm the trial court's rejection of challenges to plaintiff's notice of intent to sue and Dr. Anton's affidavit of merit.

I. RELEVANT FACTS AND PROCEEDINGS

Ronald Patterson arrived at the emergency department of SJM, on January 25, 2015, with acute gastrointestinal bleeding and low blood pressure. Patterson had recently been found to suffer from atrial fibrillation and, according to plaintiff's complaint, his medical history included recent nosebleeds "with exposure to Xarelto," anemia, and risks of "internal bleeding and severe hemorrhage." Patterson went into cardiac arrest ("Code Blue") at approximately 1:30 p.m. Medication intended to be administered intravenously escaped into the surrounding tissue of Patterson's arm, an event referred to as "extravasation," causing a "full-thickness" wound, meaning a wound damaging all layers of the skin and extending into the subcutaneous tissue or beyond. The wound became infected, and Patterson had to undergo skin grafts. Patterson suffered from sepsis, anemia, and acute respiratory distress syndrome until his death on April 3, 2015.

In January 2019, plaintiff filed a wrongful-death action based on allegations of medical malpractice.[2] During discovery, plaintiff sought medical records from SJM that she believed would allow her to discover the facts about Patterson's severe extravasation injury. The hospital provided several thousand pages of medical records, which plaintiff contended were haphazardly ordered and missing critical—but inferentially extant—documentation of what exactly happened during the treatment of Patterson's cardiac arrest and during an apparent second "Code" event.

[1] Hereinafter, "Patterson" refers to the decedent, Ronald Patterson.

[2] Eventually, the trial court dismissed from the action the individual named and unnamed defendants from St. Joseph Mercy Hospital Ann Arbor, as well as St. Joseph Mercy Hospital Medical Group Practice. For purposes of this appeal, the defendants are St. Joseph Mercy Hospital Ann Arbor and Trinity Health-Michigan, referred to hereafter as "the SJM defendants," and Dr. Dreslinski and Internal Medicine Specialists of Howell, PLLC, referred to hereafter as "the IMS defendants."

Plaintiff therefore filed a request for the metadata/audit trail of the decedent's electronic medical record. Throughout this time, the SJM defendants and the IMS defendants had repeatedly asked plaintiff to identify her expert witnesses and to provide deposition dates for her lay and expert witnesses. By November, plaintiff still had not provided deposition dates for any experts or for two of her lay witnesses. In addition, plaintiff had not deposed Dr. Dreslinski or the healthcare providers made available to her by the SJM defendants.

The IMS defendants, joined by the SJM defendants, moved to compel the depositions of plaintiff's lay and expert witnesses. Plaintiff's attorney did not appear at the November 14, 2019 hearing on the motion, but she arranged for an attorney from another firm to appear in her place. No explanation was provided at that time as to why plaintiff's attorney was not present, although the trial court expressed the belief that plaintiff's attorney had sent another attorney to serve as sacrificial "cannon fodder." After defendants recounted their efforts to get plaintiff to identify and produce for deposition her expert witnesses, and noting that plaintiff could depose individuals who were present for Patterson's treatment to establish what documentation was created, defendants asked the trial court for help to get the case "out of the ditch and back on the road." The trial court ruled that it would continue the hearing for a week, and it "want[ed] [plaintiff's] attorney back next week." At that time, the attorneys for the parties were to appear and agree on a deposition schedule. The parties were then to spend day after day during the month of December taking all the depositions they needed in a room across from the courtroom. The court indicated that it was going to be trying another case during that month, and if any questions arose, the parties were to come in during the court's trial. The court concluded: "And if I don't have compliance with that I'm either defaulting or dismissing. I'm not horsing around."

Plaintiff's attorney did not appear at the November 21, 2019, hearing, nor did she arrange for coverage. According to emails provided by plaintiff's attorney, it appears that, the day before the hearing, she had contacted defense counsel and a court employee by telephone, seeking to reschedule the hearing because she had the flu and would be unable to attend. The defense attorneys apparently did not agree to any such rescheduling. The court employee indicated that the hearing would only be cancelled if the parties could agree to a stipulated order regarding the motion to compel, and there would not be any further scheduling orders entered. At the November 21, 2019, hearing, the defense attorneys reiterated the futility of their efforts to obtain discovery regarding plaintiff's expert witnesses, but they did not inform the trial court about plaintiff's counsel's flu. The trial court ruled that the case was dismissed without prejudice, without providing any further comment or explanation. In an order issued December 3, the court referred to the hearings on November 14 and November 21, and it dismissed plaintiff's complaint without prejudice as to all named defendants for the reasons stated on the record. The trial court denied plaintiff's motion for reconsideration, and this appeal followed. As explained more thoroughly below, the IMS defendants argue on cross-appeal that the trial court erred by denying their challenges to the notice of intent to sue that plaintiff purportedly served on the IMS defendants and to the affidavit of merit signed by Dr. Anton.

II. DISMISSAL OF PLAINTIFF'S COMPLAINT

Plaintiff contends that the trial court abused its discretion by dismissing her complaint because dismissal was neither reasonable nor just under the circumstances. We agree, although

on different grounds, that the trial court's dismissal of plaintiff's complaint was an abuse of discretion on this record and in the manner in which the dismissal occurred.

Although the trial court did not specify which court rule it relied upon to dismiss plaintiff's case, the trial court's dismissal of the case sua sponte suggests reliance on MCR 2.504(B). Under MCR 2.504(B)(1), when a party fails to comply with court rules or a court order, upon motion by the opposing party or sua sponte, a trial court may enter a default judgment or dismiss the noncomplying party's action. "Dismissal is a drastic step that should be taken cautiously." *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). "Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Id.* In *Dean*, 182 Mich App at 32-33, this Court summarized as follows some of the factors a trial court should consider before imposing the sanction of dismissal:

> (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice.

When a trial court fails to consider the *Dean* factors before imposing a discovery sanction, this Court has reversed and remanded for consideration of the factors. See, e.g., *Duray Dev LLC v Perrin*, 288 Mich App 143, 164-166; 792 NW2d 749 (2010) (reversing the trial court's discovery sanction and ordering the court on remand to, among other things, consider the relevant *Dean* factors).

As defendants tacitly or expressly conceded at oral argument, the record shows that the trial court simply did not consider the *Dean* factors or consider whether a lesser sanction than dismissal without prejudice would have better served the interests of justice. Rather, defendants argue that, under the circumstances of this case, dismissal was so clearly appropriate that the trial court's failure to consider the *Dean* factors should be excused. The record certainly does not foreclose the possibility that dismissal was indeed appropriate, but we are not persuaded that the circumstances were so egregious that we should usurp the trial court's role.

Defendants point out, accurately, that in *Marquette v Village of Fowlerville*, 114 Mich App 92, 96-97; 318 NW2d 618 (1982), this Court affirmed a trial court's dismissal of the plaintiffs' complaint with prejudice, following the plaintiffs' failure to comply with an order to submit a brief by the trial court's deadline and failure to offer any reasonable explanation for that noncompliance two months later. This Court characterized the plaintiffs' conduct as "an obstinate refusal." *Id.* at 97. This Court further observed that the plaintiffs "did not show good cause for the delay in filing their brief and did not show that they were vigorously pursuing their claim," and the "defendant had no method by which to remedy the delay caused by plaintiffs." However, *Marquette* was decided before *Dean*, and to the extent *Marquette* discussed the trial court's findings, it only noted

that at the time, "GCR 1963, 504.2 [did] not require specific findings of fact when the motion to dismiss is made prior to trial." *Id.*

Defendants also contend that the trial court was not obligated to resort to a lesser sanction, citing as authority for their position *Bass v Combs*, 238 Mich App 16; 604 NW2d 727 (1999), overruled in part on other grounds *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618 (2008). However, in *Bass*, it appears that the trial court did consider the *Dean* factors. *Bass*, 238 Mich App at 26-27, 35. Furthermore, the facts in *Bass* appear more egregious than those in the present case. In *Bass*, the trial court, over the course of fifteen months, "issued no less than three written orders and two oral orders from the bench demanding that" the plaintiff comply with a particular discovery request, and it gave "explicit warnings that [the plaintiff's] failure to comply would result in dismissal of her claim." *Id.* at 33. In addition, the plaintiff did not timely respond to other discovery requests. *Id.* at 33-34. After the trial court finally dismissed the plaintiff's complaint with prejudice, this Court affirmed, observing in part that the trial court did not abuse its discretion in light of the plaintiff's disregard of her discovery obligations for more than one year. *Id.* at 35. This Court characterized the plaintiff's conduct as "wilful disobedience." *Id.*

This case had been filed for less than a year, and plaintiff had actively litigated the case. Plaintiff responded to the IMS defendants' demand for a response to their affirmative defenses, and to motions for the summary disposition of various original defendants, and to challenges—at the trial court and the appellate court level—to the notice of intent served on the IMS defendants and to the affidavit of merit signed by Dr. Anton. In addition, plaintiff filed objections to orders filed by defendants, moved for reconsideration of the trial court's order dismissing some of the original defendants from the case, and responded to various other motions filed by defendants. None of this excuses plaintiff's failure to respond to defendants' request for information and deposition dates for plaintiff's expert witnesses, but it does contradict any impression that plaintiff was not engaged in this case. Furthermore, plaintiff did have a consistent explanation for why she had failed to comply with discovery: that the evidence indicated the existence of records that defendants repeatedly failed to provide and that plaintiff needed before she could find appropriate experts, much less provide those experts to the defense. The substantive adequacy of that explanation is not clear from the record.[3] However, on its face, it is not so wholly unreasonable that we should deem plaintiff to have engaged in "wilful disobedience" or "obstinate refusal," at

[3] Defendants equally-reasonably pointed out that plaintiff could have deposed witnesses who were known to be present during the treatment or who were responsible for record-keeping in order to find out whether the records in question really did exist, what might have happened to them (and why) if they did exist, and so on. Defendants also pointed out that they had offered such possible witnesses to plaintiff to be deposed, and SJM's attorney "ha[d] given [plaintiff's attorney] every single thing that I have from my client." Again, we do not hold that the trial court's sanction of dismissal was necessarily inappropriate, but because it appears that plaintiff and defendants both have arguments that are not clearly unreasonable on their faces, we should not make that determination in the absence of a reviewable record of the trial court's analysis of the *Dean* factors.

least from the vantage point of an appellate court rather than the trial court.[4] See *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881).

Here, the trial court did threaten to dismiss the matter if plaintiff's counsel did not appear the next week, but plaintiff's counsel did make some effort to persuade defendants and the trial court to reschedule; and unlike the plaintiff in *Bass*, the present plaintiff has not violated multiple discovery orders because multiple orders have not been issued. Furthermore, we are seriously concerned that at no time did anyone inform the trial court that plaintiff's counsel was (at least allegedly) absent due to an illness, rather than due to neglect, and had made some effort to reach out to opposing counsel. We understand defendants' argument that they did not feel at liberty to agree to reschedule, given that their attendance at the November 21, 2019, hearing was pursuant to a direct order from the trial court applicable to all parties' attorneys. Plaintiff likewise had no right simply to disregard the order. Furthermore, although it is possible that plaintiff should have undertaken greater efforts to contact the trial court, the court employee should also have informed the trial court that plaintiff had made at least some effort. Nevertheless, we regard it as somewhat disingenuous for defendants' attorneys to have failed to ensure that the trial court knew plaintiff's counsel had not simply decided not to show up for no reason at all. That plaintiff's attorney was suffering from a communicable and potentially-serious disease, and thus really should not have been exposing others to such contagions in any event, should have been expressly considered by the trial court before it imposed the sanction of dismissal.

We conclude that the trial court abused its discretion by dismissing plaintiff's complaint without express consideration on the record of the *Dean* factors, including consideration of why plaintiff's attorney was not present and whether a lesser sanction than dismissal without prejudice might better serve the interests of justice. Accordingly, we reverse the trial court's December 3, 2019 order and remand this matter to the trial court for the court's explicit consideration of the *Dean* factors and whether a lesser sanction might be more appropriate.

III. CROSS-APPEAL

On cross-appeal, the IMS defendants contend that the trial court erred by rejecting their challenges to plaintiff's notice of intent and the affidavit of merit signed by Dr. Anton. More specifically, the IMS defendants raise two arguments: first, that plaintiff did not make a good-faith effort to ensure that the IMS defendants received the notice of intent; and secondly, that Dr. Anton's specializations did not properly match Dr. Dreslinski's specializations, so Dr. Anton was not a qualified affiant. We disagree with both assertions. "The proper application of a statute is a question of law that is reviewed de novo on appeal." *Ligons v Crittenton Hosp*, 285 Mich App 337, 342-343; 776 NW2d 361 (2009).

[4] We additionally note that consideration of the *Dean* factors is especially important in cases like this, due to the immense procedural hurdles and challenges involved in merely bringing a medical malpractice claim into court at all.

A. NOTICE OF INTENT TO SUE

"[A] medical malpractice action can only be commenced by filing a timely [notice of intent] and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired." *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68, 94; 869 NW2d 213 (2015). The requirement to serve a timely notice of intent is governed by MCL 600.2912b, which states in relevant part:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.
>
> (2) The notice of intent to file a claim required under subsection (1) *shall be mailed to the last known professional business address* or residential address of the health professional or health facility who is the subject of the claim. *Proof of the mailing constitutes prima facie evidence of compliance with this section*. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered. [Emphasis added].

The running of the limitations period for a medical malpractice action is tolled when a plaintiff mails the notice of intent required by MCL 600.2912b(1). *Trowell v Providence Hosp*, 502 Mich 509, 515; 918 NW2d 654 (2018); *Haksluoto v Mt Clemens Reg Med Ctr*, 500 Mich 304, 310; 901 NW2d 577 (2017). When a notice of intent "is timely the period of limitations is tolled despite defects contained therein." *DeCosta v Gossage*, 486 Mich 116, 123; 782 NW2d 734 (2010). Proof of mailing shows compliance with § 2912b(1). *Haksluoto*, 500 Mich at 310. "The statute does not require that a defendant receive [a notice of intent] before the period of limitations expires." *DeCosta*, 486 Mich at 126.

Plaintiff undisputedly mailed her notice of intent to sue to the address for Dr. Dreslinski and IMS found on the website of the Michigan Department of Licensing and Regulatory Affairs (LARA). Plaintiff presented evidence in the trial court showing that LARA listed the business address of IMS as 820 Byron Rd., Suite 100, and that this is the address to which her attorney mailed the notice of intent. Plaintiff also presented a printout of the 2017 annual report for IMS showing that the resident agent, William Bush, D.O., changed the address of the registered office from Suite 200 to Suite 100. Unfortunately, Suite 200 was Dr. Dreslinski's actual correct location, and the notice of intent mailing was returned to plaintiff's attorney undelivered. The IMS defendants contend that plaintiff's attorney failed to take any subsequent steps to discover Dr. Dreslinski's proper address and re-mail the notice of intent to that address. They conclude that plaintiff is therefore not entitled to the presumption that timely mailing the notice of intent is prima facie evidence of compliance with MCL 600.2912b. Accordingly, the IMS defendants argue that they are entitled to summary disposition because the period of limitations and the wrongful-death saving period expired before they were served with a notice of intent.

We disagree. Although plaintiff's counsel could have sought out and found other sources listing the address of IMS as Suite 200 rather than Suite 100, and perhaps doing so might have been the better practice in an ideal world, it was entirely reasonable for plaintiff's counsel to rely on the address that IMS itself formally listed as its business address with the State of Michigan. Plaintiff's counsel reasonably obtained the address for IMS and Dr. Dreslinski from the relevant state department and mailed the notice of intent to the IMS defendants at that address, in compliance with the requirements of MCL 600.2912b(1) and (2). Accordingly, plaintiff complied with MCL 600.2912b(1). See *Haksluoto*, 500 Mich at 310.

Defendants argue, however, that once the notice of intent was returned to plaintiff's attorney as undelivered, failing to take reasonable steps to determine the correct address was inconsistent with a good-faith effort at compliance with MCL 600.2912b and, therefore, that plaintiff forfeited any presumption that she complied with the statute. Defendants further argue that compliance with § 2912b should be determined by whether a plaintiff's efforts accomplish the purpose of the statute. The purpose of the statute is "to promote settlement in place of formal litigation, thereby reducing the cost of medical-malpractice litigation while still providing compensation to injured plaintiffs." *DeCosta*, 486 Mich at 119. Because the IMS defendants did not receive the notice of intent, the purpose of the statute to promote settlement instead of litigation was not accomplished. Therefore, they argue, plaintiff did not comply with § 2912b.

We again disagree. The Legislature has clearly indicated what constitutes compliance with MCL 600.2912b: mailing a notice of intent to the "last known professional business address or residential address of the health professional or health facility who is the subject of the claim." MCL 600.2912b(2). Although it is true that plaintiff could have done more after the notice of intent was returned, defendants cite no authority requiring plaintiff to have done so. Plaintiff's attorney could have mailed the notice of intent to Suite 200 at 820 Byron Road, but to do so would not have been reasonable in light of the information plaintiff's attorney possessed from LARA showing that the agent for IMS had changed the address with the state from Suite 200 to Suite 100. Mailing the notice of intent to what appeared to be a previous address would not have complied with § 2912b. As the trial court observed, it seems reasonable that plaintiff should not be faulted for the IMS defendants' own error in reporting their address to the state. The IMS defendants' failure to receive the NOI was essentially self-inflicted. For these reasons, we affirm the trial court's rejection of the IMS defendants' challenge to plaintiff's notice of intent.

B. AFFIDAVIT OF MERIT

Next, the IMS defendants challenge Dr. Anton's affidavit of merit, contending that, because Dr. Dreslinski specializes in internal medicine, but Dr. Anton specializes in cardiology, plaintiff's attorney could not have reasonably believed that Dr. Anton was a qualified affiant under MCL 600.2912d. Again, we disagree.

MCL 600.2912d states in relevant part:

> (1) Subject to subsection (2),[5] 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*. [Emphasis added].

MCL 600.2169 states in relevant part:

> (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. [Emphasis added.]

Section 2169 does not require that a proposed medical expert exactly match the defendant physician's specialties or board certifications, but only requires that the expert be specialized in the same specialty[6] engaged in by the defendant physician during the alleged malpractice. *Woodard v Custer*, 476 Mich 545, 558; 719 NW2d 842 (2006); *Hoffman v Barrett (On Remand)*, 295 Mich App 649, 663; 816 NW2d 455 (2012). At the affidavit-of-merit stage, § 2912d requires only that plaintiff's attorney reasonably believe that the expert meets the requirements of § 2169; it does not require that the expert actually meet those requirements. *Grossman v Brown*, 470 Mich 593, 599; 685 NW2d 198 (2004) ("while at the affidavit-of-merit stage a plaintiff's attorney need only 'reasonably believe' the expert is qualified, at trial the standard is more demanding because the statute states that a witness 'shall not give expert testimony' unless the expert 'meets the [listed] criteria' in MCL 600.2169(1)"); *Jones v Botsford Continuing Care*, 310 Mich App 192, 201; 871 NW2d 15 (2015) ("the issue is not whether the attorney's judgment proves to be incorrect, but rather whether the attorney's belief, though erroneous in hindsight, was reasonable at the time"). When determining the reasonableness of an attorney's belief that the expert signing the affidavit met the requirements of § 2169, the court must examine the information available at the time the attorney filed the affidavit of merit. *Bates v Gilbert*, 479 Mich 451, 459; 736 NW2d 566 (2007); *Grossman*, 470 Mich at 599. An attorney's reasonable belief regarding the qualifications of an

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[5] This subsection is not relevant to resolution of the question presented.

[6] "[A] 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified. Accordingly, if the defendant physician practices a particular branch of medicine or surgery in which one can potentially become board certified, the plaintiff's expert must practice or teach the same particular branch of medicine or surgery." *Woodard v Custer*, 476 Mich 545, 561-562; 719 NW2d 842 (2006).

expert at the time of filing the complaint and the affidavit of merit does not control whether that expert is actually qualified to testify under § 2169. *Grossman*, 470 Mich at 599.

Dr. Anton stated in his affidavit of merit that he is a licensed health professional who is board certified in cardiology and in internal medicine. The record indicates that when the affidavit of merit was filed, plaintiff's counsel had a substantial basis to believe that Dr. Dreslinski was specialized in and practicing cardiology or the treatment of cardiological disease at the time of the alleged malpractice. Documents filed by plaintiff show that several sources on the Internet stated that Dr. Dreslinski specialized in cardiology or cardiovascular disease. Those sources included St. Joseph Mercy Hospitals in Livingston and Ann Arbor and a prescriber list from the Centers for Medicare and Medicaid. Plaintiff's attorney attested that, before preparing the affidavit of merit, she contacted the American Board of Medical Specialties and learned that Dr. Dreslinski was board certified in internal medicine. She concluded that Dr. Dreslinski was certified in internal medicine and was a cardiology practitioner, so she obtained as an expert Dr. Anton, who matched both Dr. Dreslinski's apparent cardiac specialty and internal medicine specialty. She therefore believed Dr. Anton met the requirements of MCL 600.2169.

Given the apparently reliable public sources indicating that Dr. Dreslinski specialized in cardiology or cardiovascular disease and the nature of the malpractice allegedly committed by Dr. Dreslinski (prescribing Xarelto to treat atrial fibrillation) it was reasonable for plaintiff's counsel to believe that Dr. Dreslinski specialized in cardiology and was practicing cardiology at the time he adjusted Patterson's Xarelto prescription. Even if it later turned out that Dr. Dreslinski did not specialize in cardiology, it was reasonable under the circumstances for plaintiff to conclude—at the time the complaint was filed—that Dr. Dreslinski was a cardiology specialist and to obtain an affidavit of merit from a cardiologist. As noted by the trial court, plaintiff's counsel's reasonable belief that Dr. Dreslinski specialized in cardiology at the time she filed the affidavit of merit does not affect whether Dr. Anton will ultimately be allowed to testify as an expert witness under MCL 600.2169, an issue which could be raised later in the proceedings.

The IMS defendants argue that there was readily available information showing that Dr. Anton specialized in a different area than Dr. Dreslinski. Like plaintiff's attorney, the IMS defendants provide evidence from numerous Internet sites in support of their position that Dr. Dreslinski specializes in internal medicine, but Dr. Anton specializes in cardiology. The IMS defendants also argue that caselaw supports their position that plaintiff's attorney could not reasonably believe that Dr. Anton was a qualified affiant. However, none of the cases upon which defendants rely compel the conclusion that the trial court erred by denying defendants' challenge to plaintiff's affidavit of merit.

In *Geralds v Munson Healthcare*, 259 Mich App 225, 233; 673 NW2d 792 (2003), overruled on other grounds by *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), this Court rejected the proposition that an attorney could rely on pure assumptions that a physician held a board specialty without actually asking the physician outright; here, plaintiff clearly did make inquiries into Dr. Anton's specializations. The rest of the cases upon which defendants rely are largely cited for the proposition that, unlike in those cases, plaintiff could not have reasonably believed Drs. Dreslinski and Anton shared the same specialties. However, in drawing that conclusion, defendants simply rely on the same incorrect analysis discussed above: that plaintiff was incorrect and therefore plaintiff's belief must have been unreasonable. Plaintiff's attorney

relied on numerous sources tending to suggest that Dr. Dreslinski did, in fact, practice cardiology, and plaintiff's attorney reasonably decided to err on the side of caution. As the trial court properly, if implicitly,[7] observed, whether Dr. Anton would ultimately be able to testify is not the issue; it is whether plaintiff's attorney derived a reasonable belief that the doctors matched specialties on the basis of the then-available information.

The IMS defendants further argue that Dr. Anton's internal medicine specialty "was revealed to be a sub-specialty of 'cardiovascular disease' " and that this further establishes that he is unqualified under § 2169 to give expert testimony because "it is the sub-specialty that governs." In *Woodard*, 476 Mich at 562, our Supreme Court held that "if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action." The IMS defendants contend that, because the subspecialty of "cardiovascular disease" is recognized as a specialty distinct from internal medicine, regardless of the overlap, Dr. Anton is not qualified under § 2169 to give standard-of-care testimony. However, if Dr. Anton's internal medicine specialty is in the subspecialty of cardiovascular disease, and Dr. Dreslinski was practicing the same subspecialty at the time he allegedly committed malpractice, this arguably supports the reasonable belief that Dr. Anton was a qualified affiant. "An affidavit is sufficient if counsel reasonably, albeit mistakenly, believed that the affiant was qualified under MCL 600.2169." *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002). Ultimately, defendants once again simply argue that plaintiff's belief must have been unreasonable purely because that belief was (allegedly) incorrect. That is not the correct standard.

Lastly, the IMS defendants argue that Dr. Anton is not qualified under § 2169 to give standard-of-care testimony because he cannot meet the active clinical practice requirement of § 2169(b). Section 2169(b)(i) requires an expert witness to have devoted a majority of his or her professional time to "[t]he 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." As evidence that Dr. Anton does not meet this qualification, defendants submit a 2007 deposition transcript in which Dr. Anton indicated that, although he was an internist, he specialized in cardiology and that 100% of his practice was in cardiology. On the basis of Dr. Anton's 2007 deposition testimony, defendants argue that, because Dr. Anton did not spend the majority of his professional time practicing or teaching in the same specialty as Dr. Dreslinski in the year before the alleged malpractice, MCL 600.2169(1)(b), he is not a qualified affiant.

Dr. Anton's testimony from 2007, in other words, some eight years before Patterson presented to SJM's emergency room, does not necessarily establish the nature of his practice during the year before the alleged malpractice. Moreover, Dr. Anton stated in his affidavit of merit

[7] Defendants contend that the trial court improperly deferred the question of whether Dr. Anton matched specialties with Dr. Dreslinski for purposes of deciding the propriety of the affidavit of merit. Although the trial court's statements could have been clearer, it is apparent from their context that the trial court decided the issue of the affidavit of merit and instead deferred the issue of whether Dr. Anton would be qualified to testify as an expert at trial.

that he was "actively practicing as an internal medicine and cardiology physician by treating patients and have been so practicing for a number of years, including the time period involved in this case." Regardless of whether Dr. Anton's statement in the affidavit of merit is sufficient to definitively establish his qualification to testify under § 2169(b), it supports the reasonableness of plaintiff's attorney's belief that Dr. Anton was qualified. It is axiomatic that a belief does not need to be correct for it to be reasonable.

We affirm the trial court's rejection of defendants' challenges to plaintiff's notice of intent and affidavit of merit. We vacate the trial court's order of dismissal and remand for the trial court either (1) to reconsider that order and reopen the case; or (2) to provide us with a reviewable record of its express consideration of the *Dean* factors, including consideration of plaintiff's attorney's illness at the time of the November 21, 2019, hearing and whether a lesser sanction might better serve the interests of justice, in support of its dismissal. Nothing in this opinion should be construed as requiring any particular outcome. We retain jurisdiction. We direct that the parties shall bear their own costs on appeal. MCR 7.219(A).

/s/ Michelle M. Rick
/s/ Amy Ronayne Krause
/s/ Anica Letica

Court of Appeals, State of Michigan

ORDER

Estate of Ronald D Patterson v St. Joseph Mercy Hospital Ann Arbor

Docket No. 352631

LC No. 19-000002-NH

Michelle M. Rick
Presiding Judge

Amy Ronayne Krause

Anica Letica
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 21 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court is either (1) to reconsider that order and reopen the case; or (2) to provide us with a reviewable record of its express consideration of the *Dean* factors, including consideration of plaintiff's attorney's illness at the time of the November 21, 2019, hearing and whether a lesser sanction might better serve the interests of justice, in support of its dismissal. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

Michelle Rick

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

October 28, 2021
Date

Jerome W. Zimmer Jr.
Chief Clerk