2013 WL 9792665 (Mich.App.) (Appellate Brief)
Court of Appeals of Michigan.

Helen EDWARDS, Plaintiff-Appellant,
v.
Anne HEPNER, M.D., Defendant-Appellee,
and
GTHI, P.L.L.C. d/b/a Grand Traverse Heart Associates, Defendant.

No. 316285.
September 23, 2013.

LC No. 2012-029148-NH Hon. Philip E. Rodgers, Jr.

Defendant Appellee's Brief On Appeal

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*iv JURISDICTIONAL AUTHORITY

Jurisdiction is conferred upon the Michigan Court of Appeals by MCR 7.205(C). The Order granting Defendant's Motion under MCR 2.116(C)(10) was entered April 25, 2013, in the Grand Traverse County Circuit Court by Judge Philip E. Rodgers, Jr., and was a final order disposing of all claims.

*v COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT CORRECTLY DETERMINE THE ONE MOST RELEVANT SPECIALTY UNDER MCL 600.2169 WAS ECHOCARDIOLOGY APPLICABLE TO DEFENDANT ANNE HEPNER, M.D.'S ORDER FOR A TRANSESOPHOGEAL ECHOCARDIOGRAM ON OCTOBER 28, 2009?

The trial Court answered	Yes
The Defendant-Appellee answers	Yes
The Plantiff-Appelant answers	No

I. DID THE TRIAL COURT ERR BY GRANTING THE MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10) WITH PREJUDICE?

The trial Court answered	No
The Defendant-Appellee answers	No
The Plantiff-Appelant answers	Yes

*1 COUNTER-STATEMENT OF FACTS

Introduction

The primary erroneous factual allegations advanced by Plaintiff-Appelant's Brief on Appeal is the date of the alleged malpractice and the conclusion that Defendant-Appellee Anne Hepner, M.D., cardiologist with a sub-specialization (and board certification) in echocardiography (or echocardiology), was not practicing this specialty when she evaluated the benefits of and ordered the transesophageal echocardiogram ("TEE") on October 28, 2009.

The October 30, 2009, attempted TEE and esophageal perforation is the date the damage took place. The date the alleged negligence took place was on or before October 28, 2009. October 28, 2009 is the date Dr. Hepner ordered the TEE after she evaluated what benefits this test would provide for this complicated patient. Dr. Hepner was relying on her specialized knowledge in the field of echocardiology when determining the best medical course of action. The cardiologists who previously cared for Ms. Edwards relied on Dr. Hepner's specialized knowledge to perform the risk/ benefit analysis required after two failed TEE attempts.

Plaintiff-Appellant is correct, any physician can order a TEE. Plaintiff-Appellant is completely misguided and misdirects this Court when attempting to argue that Dr. Hepner was acting as a cardiologist when ordering a TEE attempt on October 28, 2009. Her board certification in echocardiography was the specialty she was practicing at the time of the alleged malpractice.

As the facts will show, a failed TEE in August 2009 was ordered and conducted with the assistance of Dr. Sanford, a gastroenterologist. This was followed by an admission to ***2** Munson Hospital in October 2009. Ms. Edwards was having congestive heart failure but the reason was unclear.

The facts will underscore the support for Defendant-Appellee's and Judge Rodgers' decision that Dr. Hepner not only was practicing echocardiography when she ordered the TEE on October 28, 2009, but Dr. Hepner was the most qualified physician (holding the certificate of added qualifications in echocardiography) to evaluate the benefits a TEE would provide.

Plaintiff-Appellant also misguides this Court when attempting to argue that October 30, 2009, is relevant to this analysis because Dr. Hepner did nothing (meaning did not employ her specialty of echocardiology) but stood by and watched Dr. Barnes, a gastroenterologist, attempt the TEE and perforate the esophagus. Carefully reading Plaintiff-Appellant's brief will uncover the misdirection.

The Order for the TEE is the claimed negligence. The Order for the TEE took place on or before October 28, 2009. On this date, Dr. Hepner relied on her training in echocardiography to determine that a TEE may reveal the answer to the question of what was causing Ms. Edwards' heart failure and then move forward with either a single or a double valve repair versus simply treating congestive heart failure with medication. The valve surgery carries a significant risk of morbidity especially in a 82 year-old woman with additional co-morbidities. Thus, Ms. Edwards required Dr. Hepner's specialty in the expertise of echocardiography to direct her medical care.

Defendant-Appellee would also like to bring the Court's attention to Plaintiff-Appellant' s argument that the Order granting the motion for summary disposition should have been without prejudice. The argument that Defendant was required to challenge the Affidavit of Merit is unfounded. The Affidavit of Merit is filed at the earliest stage of the litigation and ***3** MCL 600.2912d allows Plaintiff to file the affidavit under a reasonable belief standard that they have chosen the correct specialty. This reasonable belief safety net is eliminated at the time of trial. See MCL 600.2169.

In further opposition to Plaintiffs argument that Defendants were required to challenge Plaintiff's Affidavit of Merit is the fact that Plaintiff never raised this argument until the appeal. Dr. Hepner's Affidavit of Meritorious Defense placed Plaintiff on notice of the “one most relevant specialty.” In this Affidavit, Dr. Hepner clearly identifies the standard of care as “that of a board certified cardiologist with certificate in echocardiology.” (Exhibit 1)

Defendants placed Plaintiff on notice that the standard of care was echocardiology and not simply cardiology. Defendants were not required to challenge Plaintiffs Affidavit of Merit. Defendants complied with the Court's Scheduling Order and filed a timely Motion under MCR 21.116(C)(10). This motion was proper and challenged Plaintiff's ability to support the elements of a medical malpractice action at the time of trial. Plaintiff's singular standard of care expert was disqualified from offering opinions of a breach of the standard of care under MCL 600.2169. Defendant's Motion was granted and Plaintiff's case was dismissed with prejudice.

Plaintiff never retained an appropriate expert and never inquired of Defendant as to what the “one most relevant specialty” was at the time of the alleged malpractice. Plaintiff offers no legal authority, failed to preserve the issue on appeal, and failed to file a Complaint within two days of the final order dismissing the case. Thus, even if Plaintiff were correct the Statute of Limitations ran on April 27, 2013.

***4** Dr. Hepner was practicing echocardiography on and before October 28, 2009, when she evaluated the benefits a TEE would provide in Ms. Edwards care. The one most relevant specialty is echocardiology as this specialty is specifically designed for TEE procedures. Plaintiff's expert, Dr. Friedlander, has never held the certificate of added qualifications in echocardiology. Therefore, he could not match the specialty of Dr. Hepner on October 28, 2009, when she evaluated the benefits the TEE would or could provide.

Facts

Plaintiff, Helen Edwards, had been a patient of Grand Traverse Heart since 2003. Initially, she was evaluated by Dr. Schuil, an internal medicine specialist (without the additional sub-specialization in echocardiography) in November of 2003 and diagnosed her with atrial fibrillation. Dr. Schuil ordered a transthoracic echocardiogram (TTE) in 2003. This procedure was attempted and aborted. Since this test was performed in 2003, the only relevant information gained relevant to this appeal was that Ms. Edwards had esophageal pathology that prevented the transthoracic echocardiogram from being performed. Her cardiac disease progressed but, as the facts will show, conflicting information was being obtained through both the serial transthoracic echocardiograms ("TTE") and a cardiac catheterization performed in August 2009.

In 2009, Ms. Edwards developed aortic stenosis which waxed and waned between mild and moderate based on serial transthoracic echocardiograms ("TTE"). A standard echocardiogram or echo is obtained by applying a transducer to the front of the chest. The ultrasound beam travels through the chest wall (skin, muscle, bone, tissue) and lungs to reach the heart. Because it travels through the front of the chest or thorax a standard echocardiogram is also known as a transthoracic echo, as shown below:

TABLE
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***5** (Exhibit 2 "TTE".)

In 2009, her aortic stenosis did progress but the measured velocities suggested moderate stenosis but the calculated area which relies on measurements (from the TTE) which are sometimes difficult to make an accurate diagnosis. It suggested the aortic stenosis was moderate but also uncovered moderately severe mitral regurgitation. There was conflicting information on the transthoracic echos and it was further complicated by the catheterization. This led to a decision by Dr. Macintosh to perform a cardiac catheterization. Catheterization of cardiac chambers has the ability to measure the pressure gradient across a valve and derive valve area from it. Thereby, it can assist in diagnosis of, for example, aortic stenosis. The cardiac catheterization demonstrated moderate aortic stenosis and uncovered 2-3 mitral regurgitation which is moderately severe (on a scale of 1-4). (Exhibit 3)

Based on conflicting information between the TTEs and the catheterization, Dr. Macintosh testified he ordered a transesophageal echocardiogram ("TEE") to be performed by Dr. Hepner, with the assistance of Dr. Sanford, a gastroenterologist, due to the known history for trouble swallowing pills and the prior 2003 failed TEE attempt. A transesophageal echocardiogram is where the echo transducer is placed in the esophagus that connects the mouth to the stomach. Since the esophagus sits behind the heart, the echo beam does not have ***6** to travel through the front of the chest, avoiding many obstacles. In other words, it offers a much clearer image of the heart, particularly, the back structures, such as the left atrium, which may not be seen as well by a standard echo taken from the front of the heart. The TEE can provide a measured area which is accurate. It has this advantage over the transthoracic echo which relies on a measurement of the left ventricular outflow tract which is then squared in the formula that derives the calculated area. Because the left ventricular outflow tract measurement is difficult to make (transthoracic echo) and is squared...this can lead to error in the calculated valve area. The TTE showed severe stenosis and the measured velocities that were in the moderate range. One would hate to send an **elderly** frail lady to the operating room based on an erroneous valve area. A TEE is also better at evaluating the mitral valve and is used to assess mitral valves for repair, another concern in this case. A TEE is shown in the picture below:

TABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

(Exhibit 2 "TEE".)

On August 30, 2009, an attempt was made by Dr. Sanford (gastroenterologist) to complete the TEE with Dr. Hepner present. There was known esophageal pathology such as difficulty swallowing pills and therefore a gastroenterologist was employed. Dr. Sanford was unwilling to pass the TEE scope because he thought there was a possible Zenker's diverticulum and the TEE probe kept drifting toward this area when he tried to pass it under ***7** direct visualization. This is the first evidence of the Zenkers' Diverticulum. The procedure was terminated without completing the TEE and Ms. Edwards was referred for an esophagram to evaluate the Zenker's diverticulum.

On October 6, 2009, Ms. Edwards presented to Munson Medical Center with shortness of breath and occasional chest tightness which had progressed for five days. (Exhibit 5) Clearly severe aortic stenosis with heart failure (which is what the patient was admitted for) needs surgery. Moderate aortic stenosis with heart failure due to atrial fibrillation, diastolic dysfunction (stiff heart which she did have) does not require surgery. Her risk of complications from surgery was high (20%) and adding a second valve would have increased that risk further. Before considering high risk surgery in this **elderly** lady she needed a clear diagnosis (moderate or severe AS?, significant MR needing surgery or not?, or medical therapy for atrial fibrillation, diastolic dysfunction) Thus, Dr. Hepner's speciality was certainly used to decide the benefits a TEE would provide. Also, she underwent an echocardiogram on October 7, 2009, which demonstrated atrial fibrillation, marked enlargement of both atria and left ventricular hypertrophy. As well, the TTE showed moderate to severe aortic stenosis. The discharge instructions from this evaluation indicate that Ms. Edwards was to follow-up with Dr. Hepner at Grand Traverse Heart. (Exhibit 6)

Prior to presenting to Dr. Hepner, Plaintiffs Zenker's diverticulum was evaluated. Dr. Collins, an ear nose and throat specialist, evaluated the Zenker's diverticulum. Dr. Collins didn't recommend repair because he thought the Zenker's was small and the patient wasn't symptomatic enough.

***8** Subsequently, Dr. Hepner evaluated Ms. Edwards in her office on October 28, 2009, and recommended a transesophageal echocardiogram ("TEE") with the assistance of Dr. Barnes, a gastroenterologist. In fact, Dr. Hepner discussed this case with Dr. Barnes on October 28, 2009, weighing the risks as Dr. Barnes conveyed and comparing the benefits the TEE would provide (her specialty.) This is the only date and time relevant to the evaluation of the "one most relevant specialty." The fact that the prior TEEs were ordered by other specialties is irrelevant and an attempt to misguide this Court. Dr. Hepner refers to herself as a "cardiologist" in her deposition but she is a board-certified echocardiologist evaluating the benefits a TEE would provide in a complicated cardiac patient. The benefits a TEE would provide are tremendously important to Ms. Edwards care including whether to do surgery for one valve, two, valves, or no valves at all. In any event, the result, i.e., that the "one most relevant specialty" was determined to be echocardiology is certainly within a principled outcome.

Dr. Hepner planned a special procedure for Ms. Edwards third TEE using a pediatric transesophageal echocardiogram scope along with an overtube to assist in completing the procedure. Ms. Edwards agreed and the procedure was scheduled for October 30, 2009. The actual perforation of the esophagus is not the focus of Plaintiffs allegations, but the decision to recommend the second TEE in 2009 (third overall), is the singular theory of liability in this case. The order for the TEE occurred on October 28, 2009. The order for the TEE required Dr. Hepner to utilize her specialized knowledge of echocardiography to evaluate the benefits the TEE may uncover versus the risk the gastroenterologist assessed. Dr. Barnes believed he could complete the procedure without much risk. Dr. Hepner, knowing in depth based on her board-certification in echocardiology, what a TEE can reveal, ordered the test.

***9** STANDARD OF REVIEW

Statutory interpretation is reviewed under a de novo standard. *Woodard v Custer* 476 Mich 545, 557 (2006). A trial court's decision regarding the qualifications of a proposed expert witness is reviewed for an **abuse** of discretion. Id. "An **abuse** of discretion occurs when the decision results in an outcome falling outside the principled outcomes. "*Id.*

ARGUMENT

II. DID THE TRIAL COURT CORRECTLY DETERMINE THE ONE MOST RELEVANT SPECIALTY UNDER MCL 600.2169 WAS ECHOCARDIOLOGY APPLICABLE TO ANNE HEPNER, M.D.'S ORDER FOR A TRANSESOPHOGEAL ECHOCARDIOGRAM ON OCTOBER 28, 2009?

The singular issue presented here is what specialty Dr. Hepner was practicing on October 28, 2009, when she ordered the TEE procedure to be performed on October 30, 2009. Plaintiff-Appellant agrees that Dr. Hepner is "board-certified" in echocardiology pursuant to MCL 600.2169. Plaintiff-Appellant agrees that his sole expert, Dr. Friedlander is not board certified in echocardiology. Thus, the only issue is whether the trial court's determination that Dr. Hepner was practicing echocardiology when she ordered the TEE on October 28, 2009 was outside the principled outcomes when applying MCL 600.2169. Plaintiff-Appellant agrees that *Woodard v Custer* 476 Mich 545 (2006) is the controlling authority. The standard of review is an **abuse** of discretion or whether Judge Philips E. Rodgers, Jr.'s decision that Dr. Hepner was practicing echocardiology fell outside this standard or outside the principled outcomes. Judge Rodgers' decision was well within this standard.

Plaintiff-Appellant misdirects this Court to the prior orders for the TEE procedures. The prior orders for the TEE procedures do not enter into this analysis. Plaintiff-Appellant is correct that Dr. Paul Turner, an internist, ordered the first TEE and Dr. Macintosh ordered the ***10** second TEE. The fact that the prior orders for TEEs were not placed by a board-certified echocardiologist is simply irrelevant. On page 22 of Plaintiff-Appellant's Brief of Appeal, the issue is fleshed out but glossed over by Plaintiff-Appellant when directing the Court's attention to the procedure date of October 30, 2009. Dr. Hepner was simply waiting for Dr. Barnes to pass the TEE transducer. The focus of the trial court was on Dr. Hepner's decision to order the TEE. Again, this was Plaintiffs sole allegation of negligence. It occurred on October 28, 2009, and involved Dr. Hepner evaluating the benefits a TEE would provide in the face of two prior failed TEEs, and the patient's evolving and confusing cardiac condition.

In Plaintiff-Appellant's own words the "events that form this medical malpractice action" as they relate to the conduct of Defendant Dr. Hepner are "limited to her decision to order the TEE study." (Plaintiff-Appellant's brief of Appeal, page 23, line. 10.)

What specialty was Dr. Hepner practicing when she ordered the TEE on October 28, 2009? The answer is clearly echocardiology. This is supported by the fact that Dr. MacIntosh (a cardiologist who does not hold the board certification in echocardiography) specifically requested Dr. Hepner to perform the TEE. (Exhibit 8) Dr. MacIntosh knew it was going to be a more difficult TEE, so Dr. MacIntosh ordered the TEE with Dr. Hepner and with Dr. Sanford, a gastroenterologist, to assist in passing the probe. Dr. MacIntosh requested Dr. Hepner because she is specially trained in echocardiography and holds the board certification in this subspecialty.

On August 30, 2009, a TEE attempt was unsuccessful. This is the event that removes any doubt that Dr. Hepner was practicing echocardiography on October 28, 2009, when she ordered the TEE with the very specialized assistance from Dr. Barnes, a gastroenterologist.

***11** Dr. Hepner evaluated Ms. Edwards in her office on October 28, 2009, as a physician specializing in echocardiography and recommended a transesophageal echocardiogram with the assistance, this time, of Dr. Barnes. A special procedure would be employed using a pediatric transesophageal echocardiogram probe along with an overtube to assist in completing the procedure. Ms. Edwards agreed and the procedure was scheduled for October 30, 2009. The actual perforation is not the focus of Plaintiff's allegations; rather, the decision to recommend the second TEE on October 28, 2009, was the singular theory of liability in this case. The theory Plaintiff advanced in her Complaint is that the risks of the procedure (the third TEE) outweighed the benefit of the information to be obtained by the TEE. The question for this Court is whether Judge Philip E. Rodgers' decision was outside the principled outcomes. The answer is simply no!

The Michigan Standard Jury Instruction is helpful and instructive on this point.

> When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a [Name profession.] of ordinary learning, judgment or skill in [this community or a similar one / [Name particular specialty.]] would do, or the doing of something which a [Name profession.] of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case.

Mi Civ JI 30.01

How can Dr. Friedlander, Plaintiffs only standard of care expert, use his learning, judgment, or skill in this situation to testify that Dr. Hepner breached the standard of care? He admitted that he recognizes the subspecialty of echocardiography, but he does not know the specifics of the subspecialty board. (Exhibit 9) Dr. Friedlander did not have the board certification in echocardiology does not have the learning or the skill that Dr. Hepner had when she ordered the TEE ***12** on October 28, 2009 and he should not be permitted to testify about the propriety of Dr. Hepner's care, as a matter of law under MCL 600.2169. Dr. Friedlander testified at pages 65 and 66 of his deposition that it was reasonable to order a TEE if the esophagus were normal. (Exhibit 6) It was the esophageal problems the patient had had that made it questionable. He also testified he had never done a TEE as an attending and had never done one with a gastroenterologist (Exhibit 9, page 68.) He also contends he would have to defer to a gastroenterologist as to the cause of the perforation which was not at the Zenkers.

Finally, Dr. Hepner executed an affidavit that she was practicing echocardiology at the outset of this case. (Exhibit 1). Echocardiology is the same as echocardiography. Thus, the specialty she was practicing was echocardiology or echocardiography, Plaintiff was on notice of this fact and failed to retain an appropriate expert. Plaintiffs Affidavit clearly states the claim against Dr. Hepner was based on the Order for the TEE. (Exhibit 7) The prior orders for a TEE did not involve physicians with a specialty in echocardiology. The Order for the TEE on October 28, 2009, required Dr. Hepner to utilize her specialized knowledge of the information a TEE would provide. The board certification held by Dr. Hepner is focused solely on echocardiograms. Judge Rodgers' decision that this specialty was the "one most relevant specialty" on October 28, 2009, is correct and could not possibly fall outside the range of principled outcomes. Plaintiff-Appellant's appeal should be denied.

In *Woodard v Custer* 476 Mich 545; 719 NW2d 842 (2006), the Michigan Supreme Court applied MCL 600.2169 to two cases to determine whether plaintiffs' ***13** proposed expert witnesses were qualified to give expert testimony on the appropriate standard of care. The name of one of the consolidated cases decided by the *Woodard II Court* was *Hamilton v Kuligowski*. In *Hamilton*, the plaintiff alleged that the defendant physician failed to properly diagnose and treat the decedent when she exhibited prestroke symptoms. The defendant was board certified in general internal medicine and specialized in general internal medicine. Plaintiffs proposed expert witness was board certified in general internal medicine and devoted a majority of his professional time to infectious diseases, a subspecialty of internal medicine. (*Hamilton* decided *subnom Woodard*)

The trial court granted defendant's motion for a directed verdict on the basis that plaintiffs expert was not qualified to testify against the defendant physician because plaintiffs expert specialized in infectious disease and did not devote a majority of his professional time to practicing or teaching general internal medicine. The Court of Appeals reversed, concluding that plaintiffs expert was qualified to testify against the defendant physician because both plaintiffs proposed expert witness and the defendant physician specialized in internal medicine and because plaintiffs proposed expert did devote a majority of his professional time to the practice of internal medicine given that the treatment of infectious diseases is a subspecialty of internal medicine. See *Hamilton v Kuligowski*, 261 Mich App 608; 684 NW2d 366 (2004).

On appeal to the Michigan Supreme Court (decided *sub nom Woodard*) the Supreme Court reversed the *Hamilton* Court of Appeals focusing specifically on MCL 600.2169(1)(b), which it referred to as the "same practice/instruction" requirement. ***14** The *Hamilton* Supreme Court explained its analysis for concluding that plaintiffs proposed expert did not satisfy the same practice/instruction requirement of MCL 6002169(1)(b):

> The defendant physician specializes in general internal medicine and was practicing general internal medicine at the time of the alleged malpractice. During the year immediately preceding the alleged malpractice, plaintiffs proposed expert witness did not devote a majority of his professional time to practicing or teaching general internal medicine. Instead, he devoted a majority of his professional time to treating infectious diseases.

Id., at 577-578.

The case at bar isn't precisely identical to *Hamilton* but it could have been raised if there were no dispute about the specialty Dr. Hepner was practicing at the time of the occurrences that gave rise to Plaintiffs Complaint. Thus, the lack of a practice/instruction requirement is a secondary argument disqualifying Dr. Friedlander from testifying against Dr. Hepner on the standard of care or breach thereof.

The application of the holding from the *Woodard v. Custer* case is exactly on point to the holding by Judge Rodgers in this case. The care provided at issue in *Woodard* was to a boy in the pediatric critical care unit. His legs were fracture, allegedly from placing arterial lines. The defendant physician was a pediatrician with a sub-specialization (board-certification) in pediatric critical care. Plaintiff's expert who signed the Affidavit of Merit was a board-certified pediatrician. Defendants challenged the Affidavit of Merit based on the "one most relevant specialty" being pediatric critical care and Plaintiffs expert and affiant failed to have this board certification and the Affidavit was invalid or deficient. The motion was denied because of the relief valve provided by MCL 600.2912d that Plaintiff only need to "reasonably" believe that they have selected the correct expert when filing the ***15** Affidavit of Merit. This is exactly the situation presented here except Defendant choose not to the file the motion to challenge the Affidavit knowing the likelihood that the reasonable belief safety would protect Plaintiffs filling. Yet, Defendants filed an appropriate Affidavit of Meritorious Defense where Dr. Hepner attested to the fact that she was practicing echocardiology.

Defendants in *Woodard* filed a Motion for Summary Disposition under MCR 2.116(C)(10), exactly as Defendant-Appellant Hepner did on this case. The trial court found there was no question that the infant patient was critically ill when these procedures were performed and the one most relevant specialty was pediatric critical care. The motion filed under MCR 2.116(C)(10) was granted with prejudice.

In the present case, we have a patient in an echocardiologist's office being evaluated to determine if a TEE should be completed. Specifically, what benefits a TEE would provide. Dr. Hepner decided to Order the TEE and this is the alleged negligence. This case is identical to *Woodard.* Dr. Hepner is board-certified in echocardiology. Dr. Hepner was practicing echocardiology when she evaluated the benefits this test would provide for Ms. Edwards on October 28, 2009. Ms. Edwards had a complicated cardiac condition including esophageal pathology requiring a physician with specialized skill when evaluating the benefits a TEE would provide. The other cases cited by Plaintiff-Appellant including *Tate v. Detroit Receiving Hospital,* 249 Mich App 212 (2002) have no bearing on the issue presented here. Each case is fact specific with regard to applying MCL 600.2169.

In *Tate*, the question presented was what was the "one most relevant specialty" of a physician rounding on a patient receiving general medical care. In the instant ***16** case, the facts are a patient in an echocardiologists's office discussing the benefits of a TEE. The significant difference in facts makes *Tate* completely inapplicable to this case.

Again, Plaintiff misdirects this Court by citing *Gay v Select Specialty Hospital,* 295 Mich 284, 291-292. Plaintiff suggests that Judge Rodgers' decision that Dr. Hepner was practicing echocardiology was an erroneous interpretation or application of the law. The appropriate question is whether Judge Rodgers determination that echocardiology was the one most relevant specialty fell outside the principled outcomes. It did not and the appeal should be denied.

II. DID THE TRIAL COURT ERR BY GRANTING THE MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10) WITH PREJUDICE?

Plaintiffs second argument presented is much more direct and easily explained and defeated by reference to the MCR 2.112(L), MCL 600.2169, and MCR 2.116(C)(10). The essence of this second argument is advanced on the false premise that Defendant was required to challenge Plaintiff's Affidavit of Merit. This is simply false. MCR 2.112(L) provides as follows

(L) Medical Malpractice Actions.
(1) In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in MCL 600.2912d and 600.2912e. Notice of filing the affidavit must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court.

(2) In a medical malpractice action, unless the court allows a later challenge for good cause:

***17** (a) all challenges to a notice of intent to sue must be made by motion, filed pursuant to MCR 2.119, at the time the defendant files its first response to the complaint, whether by answer or motion, and

(b) all challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the signer, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301.

MCR 2.112(L).

Nothing in MCR 2.112(L) requires that a defendant must challenge the affiant of an Affidavit of Merit. The Court simply provides a timeline to challenge the affidavit. MCL 600.2169 as applied to the affidavit stage and includes language that the affidavit is valid if the plaintiff “reasonably believes” that the affiant is qualified. This language emanates from MCL 600.2912d.

600.2912d Action alleging medical malpractice; complaint to be accompanied by affidavit of merit; filing extension; failure to allow access to medical records.
(1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiffs attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiffs attorney **reasonably believes** meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiffs attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

(a) The applicable standard of practice or care.

(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

***18** (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

MCL 600.2169 (Emphasis added.)

The language "reasonably believes" creates a standard easily overcome defending against a Motion for Summary Disposition filed by Defendant-Appellant Hepner at the early stage of litigation. MCL 600.2169 reads as follows:

MCL 600.2169 Qualifications of expert witness in action alleging medical malpractice; determination; disqualification of expert witness; testimony on contingency fee basis as misdemeanor; limitations applicable to discovery.
(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.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in 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, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding ***19** 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) Active clinical practice as a general practitioner.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

This is the standard that applies to experts testifying at the time of trial. Under MCL 600.2169 there is no "reasonably believes" safety valve for plaintiffs who may not know the exact facts or specific specialty to be followed. Thus, by the time of trial, MCL 600.2169 bars any expert witness from testifying as to the standard of care, or breach thereof, for or against a health professional unless their qualifications match the party against whom or for whom they intend to offer testimony. *Woodard*, supra at 559.

Plaintiff's reliance on *Kirkaldy v Rim*, 478 Mich 581 (2007) is inapplicable to this case. In *Kirkaldy*, Defendant's motion challenged the Affidavit of Merit not the expert witness testifying at trial. Plaintiff cites no authority for the proposition that a motion granted under MCR 2.116(C)(10) striking Plaintiff's singular standard of care expert from testifying as to the applicable standard of care or breach thereof should be granted without prejudice. Plaintiff relies only on the unsupported position that defendants are required to challenge the Affidavit or Merit. This is a proposition which is unsupported by any case law, statute, or court rule.

Plaintiff cites *Greathouse v Rhoades,* 465 Mich 885 (2001), and agrees that this case stands for the proposition that a party is permitted to challenge a witness' qualifications to testify at any time. The argument Plaintiff-Appellant pursues is not supported by case law. In ***20** fact, MCR 2.112(L)(2) has no requirement that a defendant must challenge the Affidavit of Merit if it believes that expert is unqualified. As argued above, MCL 600.2912d allows Plaintiff to reasonable believe that his affiant is qualified. In this particular case, Defendant chose not to challenge the Affidavit of Merit by Plaintiffs expert and affiant, Dr. Friedlander. This litigation decision is prudent based on the "reasonably believes" language. As noted above, Defendant filed an Affidavit of Meritorious Defense identifying the "one most relevant specialty" as "that of a board certified cardiologist with certificate in echocardiology of ordinary learning, judgment, or skill when presented with the same of similar circumstances." Therefore, Defendants placed Plaintiff on notice that Defendant believed and asserts that the standard of care is that of a cardiologist who is "board-certified" in echocardiology. Plaintiff-Appellant's argument is self-defeating by citing *Greathouse.*

In further support denial of this, Defendants point to the Statute of Limitations in this case. Plaintiff-Appellant is correct that the filing of a complaint and an affidavit tolls the Statute of Limitations. *Kirkkaldy v Rim,* 478 Mich 581, 585-586. Yet, upon dismissal of this action, April 25, 2013, the Statute of Limitations began to run. No subsequent complaint was filed and therefore, the 2 year Statute of Limitations in MCL 600.5805(6) expired April 27, 2013.

Finally, Plaintiff failed to preserve the issue regarding the entry of the Court's Order granting Summary Disposition with prejudice. Plaintiff attempted to object but failed to file a timely objection. The objection was ignored and Defendant's Order granting the Motions for Summary Disposition with prejudice was entered on April 25, 2013.

*21 CONCLUSION AND RELIEF REQUESTED

Based on the foregoing, Defendant-Appellee, respectfully requests that this Honorable Court deny the Plaintiff-Appellant's Appeal.

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