MDTC 2022 Winter Meeting

Michigan Supreme Court
2021-2022 Term and Beyond

Case Summary Table

Decisions 2021-2022 Term

- *Meyers v Rieck*, No. 162094, 2022 WL 2541769 (Mich, July 7, 2022) — ordinary negligence versus medical malpractice, and admissibility of standing orders
- *Legion-London v The Surgical Institute of Michigan Ambulatory Surgery Center*, 967 NW2d 381 (Mich, Dec. 29, 2021) — amending expert who signs affidavit of merit
- *Schaumann-Beltran v Gemmete*, 973 NW2d 308 (Mich, May 13, 2022) — video recording medical examinations

Pending 2022-2023 Term

- *Ottgen v Katranji*, No. 163216, Leave Granted, argued October 12, 2022 — tolling and complaints filed without affidavit of merit
- *Markel v William Beaumont Hosp*, No. 163086, Leave Granted, Argued October 12, 2022 — ostensible agency
- *Estate of Horn v Swofford*, No. 162302, MOAA, December case call — relevant specialty
- *Selliman v Colton*, No. 163226, MOAA, December case call — relevant specialty
- *Kostadinovski v Harrington*, No. 162909, MOAA, December case call — adding claims not in the notice of intent
- *Danhoff v Fahim*, No. 163120, MOAA, December case call —reliability standards for expert testimony

Meyers v Rieck

Supreme Court Docket No. 162094, 2022 WL 2541769 (Mich, July 7, 2022)

FACTS

The estate of a patient sued a nursing home, among others. It moved to amend its complaint to add a claim based on a nurse's alleged non-compliance with a standing order regarding patient care, which it framed as an ordinary-negligence claim. The trial court granted leave to amend.

The Court of Appeals[1] held that the new claim sounded in medical malpractice, rather than ordinary negligence. It held that the estate couldn't rely on the standing order alone, or in conjunction with expert testimony, to establish the standard of care. The Court also held that the standing order wasn't relevant or admissible for any purpose.

ISSUE

The Supreme Court ordered argument on the application to address (1) whether the claim sounds in ordinary negligence or medical malpractice, and (2) whether evidence of the standing order is admissible at trial.

HOLDING

The Supreme Court affirmed the Court of Appeals' holding that the new claim was for medical malpractice, not ordinary negligence.

It also affirmed the Court of Appeals' holding that the nursing home's standing order cannot by itself establish the standard of care.

But it reversed the Court of Appeals' holding that standing orders are inadmissible for any purpose. The Supreme Court held that "a medical provider's rules and regulations can be used as evidence to help determine the standard of care," but "any jury receiving such evidence must be instructed as to its proper use," i.e., the rules or regulations are not and do not establish the standard of care.

[1] 333 Mich App 402; 960 NW2d 218 (2020).

Legion-London v Surgical Institute of Michigan

967 NW2d 381 (Mich, Dec. 29, 2021)

FACTS

A patient filed a complaint against a doctor who specialized in orthopedic surgery, accompanied by an affidavit of merit executed by an expert who specialized in neurosurgery. The defendant moved for summary disposition because the expert's specialty didn't match his specialty. The patient moved to file an amended affidavit, signed by a different physician, that would relate back to the date of the original affidavit of merit. The trial court denied the plaintiff's motion, concluding that an affidavit signed by a new expert wasn't an "amendment."

The Court of Appeals[2] reversed. It held that MCR 2.118 didn't limit the nature of the amendment and, because MCR 2.112 permitted an amendment to an affidavit of merit to correct errors regarding the "qualifications of the signer," an amendment to an affidavit of merit could substitute an expert. The Court found no basis to conclude that allowing the patient to amend the affidavit of merit would affect the substantial rights of the doctor. Judge Cameron dissented.

ISSUE

The Supreme Court ordered argument on the application to address whether the second affidavit of merit constituted an amendment of the first affidavit of merit.

HOLDING

After hearing argument on the application, the Supreme Court denied leave. Justice Zahra, joined by Justice Viviano, dissented.

[2]331 Mich App 364; 951 NW2d 687 (2020).

Schaumann-Beltran v Gemmete

973 NW2d 308 (Mich, May 13, 2022)

FACTS

The plaintiff filed a medical-malpractice action against the defendants. The parties agreed that she would submit to a neuropsychological evaluation. The plaintiff wanted her attorney present and to record the examination. The defendant opposed both requests. The trial court ordered that the plaintiff could record the evaluation instead of having her attorney present.

The Court of Appeals reversed. It held that MCR 2.311(A) doesn't permit recording because, while it lets courts allow the examinee's attorney to be present, it says nothing about recording.

ISSUE

The Supreme Court ordered argument to address "whether the Court of Appeals correctly held that the trial court was not authorized, under MCR 2.311(A), to permit video recording of the neuropsychological examination."

HOLDING

MCR 2.311(A) allows courts to specify "conditions." "[W]hether to videorecord the examination is plainly a 'condition.'" So courts can permit parties to video record their medical examinations. The Supreme Court remanded for the Court of Appeals to consider whether recording was appropriate under the particular facts of the case.

Ottgen v Katranji

unpublished per curiam opinion of the Court of Appeals, issued May 20, 2021 (Docket No. 350767); 2021 WL 2026268, leave granted, 967 NW2d 233 (2021) (argued October 12, 2022)

FACTS

A patient filed a complaint against a doctor without an affidavit of merit. The doctor moved for summary disposition based on *Scarsella v Pollack*, 461 Mich 547; 607 NW2d 711 (2000), which held that a complaint filed without an affidavit of merit doesn't toll the statute of limitations. The trial court denied summary disposition because the patient inadvertently failed to attach a pre-existing affidavit of merit when he filed the complaint.

Based on *Scarsell*a, the Court of Appeals held that the statute of limitations barred one claim but not another claim that accrued later. The Court essentially treated the amended complaint, accompanied by an affidavit of merit, as the original complaint.

ISSUE

The Supreme Court granted leave and directed the parties to address (1) whether *Scarsella* was correctly decided, and (2) whether the complaint, filed without an affidavit of merit contrary to MCL 600.2912d(1), was subject to dismissal without prejudice.

Pending 2022-2023 Term

Markel v William Beaumont Hospital

unpublished per-curiam opinion of the Court of Appeals, issued April 22, 2021 (Docket No 350655) (2021 WL 1589739), leave granted, 965 NW2d 99 (2021) (argued October 12, 2022)

FACTS

A doctor wore a lab coat with the credentials of both the hospital and her employer when she provided treatment to a patient at the hospital. The patient claimed that the doctor committed malpractice and sought to hold the hospital vicariously liable on a theory of ostensible agency.

The Court of Appeals held that because the lab coat bore the credentials of both the hospital and the employer of the doctor, the lab coat didn't necessarily create an inference that the hospital employed the doctor.

ISSUE

The Supreme Court granted leave and directed the parties to discuss whether the Court of Appeals correctly applied the ostensible-agency test set forth in *Grewe v Mount Clemens General Hosp*, 404 Mich 240; 273 NW2d 429 (1978).

The Court directed the parties' attention to *Reeves v MidMichigan Health,* 489 Mich 908; 796 NW2d 468 (2011), a case in which the Court rejected an ostensible-agency theory. In *Reeves*, the defendant doctor wore a lab coat displaying the logo of his employer (not the hospital), didn't and discuss his employment status with the patient, and hospital forms referenced treatment "by interns, residents[,] medical students[,] and trainees" but not "independent contractors."

Estate of Horn v Swofford

334 Mich App 281; 964 NW2d 904 (2020), argument on application granted, 965 NW2d 210 (2021) (December case call)

FACTS

The estate of a patient alleged that the defendant doctor, who specialized in diagnostic radiology and previously specialized in neuroradiology (his certification in neuroradiology expired before the alleged malpractice), misinterpreted a cranial CT. (Note: Every diagnostic radiologist is trained to interpret cranial CT scans. A neuroradiologist has more expertise). The estate had experts in diagnostic radiology and neuroradiology. The estate moved to confirm that neuroradiology was the one most relevant specialty. The trial court concluded that diagnostic radiology was the one most relevant specialty.

The Court of Appeals reversed, holding that while diagnostic radiologists and neuroradiologists review cranial CT scans, neuroradiology was the one most relevant specialty for purposes of MCL 600.2912d(1) and MCL 600.2169(1).

ISSUE

The Supreme Court ordered argument on the application and directed the parties to address whether MCL 600.2169(1), as interpreted by *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), permits the patient (or the representative of the patient) to establish the standard of care with an expert whose subspecialty focuses on the type of care at issue, but whose subspecialty is not the same specialty of the doctor.

Selliman v Colton

unpublished per curiam opinion of the Court of Appeals, issued May 20, 2021 (Docket No. 352781); 2021 WL 940992, argument on application granted, 972 NW2d 843 (2022) (December case call)

FACTS

The defendant was board certified in otolaryngology (ear, nose, and throat) and facial plastic and reconstructive surgery. The plaintiff alleged malpractice related to rhinoplasty surgical procedures. The defendant averred that the procedures were cosmetic, so the relevant specialty was facial plastic and reconstructive surgery. The trial court agreed, but it denied the defendant's motion to strike the plaintiff's expert based on how he spent the majority of his time.

The Court of Appeals reversed. The plaintiff provided "no substantive argument" on which specialty must match, so the trial court "correctly determined that facial plastic reconstructive surgery is the most relevant specialty." The plaintiff's expert's testimony "unequivocally shows he did not spend a majority of his time in facial plastic and reconstructive surgery," so "the trial court abused its discretion by denying the motion to strike his testimony."

ISSUE

The Supreme Court ordered argument on the application and directed the parties to address three issues:

(1) whether the one most relevant specialty test as articulated in *Woodard v Custer*, 476 Mich 545 (2006), and as applied in this case, is consistent with the requirements of MCL 600.2169(1);

(2) whether the Court of Appeals properly applied the requirements of MCL 600.2169(1) in this case; and

(3) whether the Court of Appeals properly applied the abuse of discretion standard of review.

Kostadinovski v Harrington

unpublished per curiam opinion of the Court of Appeals, issued March 11, 2021 (Docket No. 351773); 2021 WL 940992, argument on application granted, 966 NW2d 152 (2021) (December case call)

FACTS

A patient abandoned the malpractice theories in his NOI, affidavit of merit, and complaint against a doctor. After the doctor moved for summary disposition, the patient moved to amend the complaint to add an entirely new theory of malpractice. The patient didn't serve the doctor with a new NOI or move to amend his NOI.

In the first appeal, the Court of Appeals held that MCL 600.2912b applies to a new theory of medical malpractice. But it remanded for the trial court to consider whether the plaintiff could amend the NOI under MCL 600.2301. On remand, the trial court denied leave to amend. In the second appeal, the Court of Appeals affirmed the trial court's conclusion that the proposed amendment of the complaint would deprive the doctor of a substantial right—pre-suit notice of the basis for the malpractice claim and opportunity to negotiate settlement without litigation.

ISSUE

The Supreme Court ordered argument on the application and directed the parties to address (1) whether MCL 600.2912b applies where a patient seeks to add a new theory of recovery against an already named health-care professional, and (2) if so, when and how a patient seeking to add a new theory of recovery may satisfy the requirements of MCL 600.2912b.

Danhoff v Fahim

unpublished per-curiam opinion of the Court of Appeals, issued May 6, 2021 (Docket No 352648) (2021 WL 1827959), argument on application granted, 969 NW2d 71 (2022) (December case call)

FACTS

A neurosurgeon allegedly punctured a patient's sigmoid colon during a procedure. The patient retained an expert who testified that perforation of the sigmoid colon is such a rare complication that, more likely than not, the neurosurgeon violated the standard of care. The expert based his opinion on his background and experience. He couldn't locate relevant medical literature to support his opinion that an injury to the sigmoid colon is invariably a breach of the standard of care. His research showed that an injury to the sigmoid colon is rare but not unheard of.

The Court of Appeals held that the expert's testimony was inadmissible because he failed to support his opinion with medical literature or otherwise establish the reliability of his opinion. His background and experience weren't sufficient to establish the reliability of his opinion.

ISSUE

The Supreme Court ordered argument on the application and directed the parties to address three related issues:

(1) whether *Edry v Adelma*n, 486 Mich 634; 786 NW2d 567 (2010) and *Elher v Misr*a, 499 Mich 11; 878 NW2d 790 (2016) correctly describe the role of supporting medical literature in determining the admissibility of expert testimony on the standard of care;

(2) if not, what a plaintiff must demonstrate to support an expert's standard-of-care opinion; and

(3) whether the plaintiffs' standard-of-care expert met the standards for determining the reliability of expert testimony and was thus qualified to testify as an expert witness under MRE 702 and MCL 600.2955 or whether a *Daubert* hearing was necessary before making that decision.

ATTORNEY

Michael J. Cook

michael.cook@ceflawyers.com

P: 248-351-5437 F: 248-351-5469

Mike's practice focuses on appellate and post-verdict litigation. After clerking for Michigan Supreme Court Justice Robert P. Young, Jr., Mike worked in the commercial-litigation department of a large Detroit-area law firm before joining Collins Einhorn's appellate department. The majority of Mike's practice involves briefing and oral advocacy in state and federal appeals. But his practice reaches beyond appellate courts. He has been retained to work with trial counsel to minimize risk exposure and posture a case for appeal through dispositive and other pre-trial motions. His post-trial work commonly includes addressing thorny entry-of-judgment issues, prevailing-party costs, and post-judgment motion practice aimed at framing issues for appeal.

Mike's successful appellate practice is rooted in thorough research and readable, punchy writing. A federal district court judge commenting on a brief that Mike wrote said that it "had a special ability to take complicated issues and make them as straightforward as possible for me to understand."

PROFESSIONAL ACTIVITES

- Association of Defense Trial Counsel
- Michigan Defense Trial Counsel
  - Board of Directors
  - Editor, Michigan Defense Quarterly
- Michigan Supreme Court Historical Society's Advocates Guild
- Oakland County Bar Association
- State Bar of Michigan

AREAS OF PRACTICE

Appellate

Medical Malpractice

EDUCATION

- Case Western Reserve University School of Law (J.D. magna cum laude, 2007)
- Michigan State University (B.A. with high honors, 2003)

ADMISSIONS

- State Bar of Michigan
- U.S. Court of Appeals, Sixth Circuit
- U.S. District Court, Eastern District of Michigan
- U.S. District Court, Western District of Michigan