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Reasonable Belief Does Not Validate Affidavit of Meritorious Defense

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In a recent published opinion, the Michigan Court of Appeals, bound by precedent, has reluctantly held that a physical therapist is not qualified to execute an affidavit of meritorious defense on behalf of an occupational therapist, pursuant to the identical licensing requirement in MCL 600.2169(1)(b).

In the case of *Brown v. Hayes, et al.* (No. 256966, rel'd 4/4/06), the plaintiff, after undergoing carpal tunnel surgery on both arms, was referred to the two defendants for work hardening therapy. The plaintiff alleged that both occupational therapists directed her to push an 800-pound cart, which resulted in extreme back pain. She further alleged that as a result of the back injury, she had to receive corrective surgery and treatment, which prevented her from returning to work.

The plaintiff filed a medical malpractice action on May 11, 2001, which included two affidavits of merit. One was signed by an occupational therapist and the other was signed by a physical therapist. The defendants answered the complaint and filed only one affidavit of meritorious defense signed by a physical therapist.

Three-years later, the plaintiff moved to default the defendants on the basis that the defendants' affidavit of meritorious defense was insufficient under MCL 600.2169 because it was not signed by an occupational therapist. The trial court granted the plaintiff's motion for default against the defendants.

Although the Michigan Court of Appeals court affirmed the trial court's order regarding the insufficiency of the defendants' affidavit of meritorious defense, the appellate court held that defense counsel did have a reasonable belief that the affidavit was valid because of the mistaken conclusion that the licensed health professional requirement of MCL 600.2169 precluded registered occupational therapists from filing such affidavits. In regard to the latter, the court reversed the trial court's order granting a default judgment against the defendants.

In making its ruling, the appellate court first examined what is meant by "licensed health professional," under § 2169. The court held that even though occupational therapists do not have a

license, they are licensed health professionals under the Michigan Public Health Code because they are registered and therefore meet the statutory requirement found in MCL 600.2169(1)(b).

The court also reasoned that the Public Health Code defines a “license” to be “an authorization...to practice where practice would otherwise be unlawful” and “an authorization to use a designated title which would otherwise be prohibited.” MCL 333.16106(2). Occupational therapists are authorized to use that title if they are registered under MCL 333.18301 *et seq.* Therefore, the court held that this registration of occupational therapists constitutes a license for purposes of the statute.

Next, the court turned to the question of whether the defendants’ physical therapy expert was engaged in the same health profession as the defendants. The court reluctantly concluded that the defendants and their expert were not engaged in the same health profession because they did not have identical licenses under the Public Health Code as required by the holding in *McElhaney v. Harper-Hutzel Hospital* ___ Mich. App. ___; ___ NW2d ___ (2006). Therefore, the defendants’ expert was not qualified to give expert testimony in this case.

However, the court’s majority contended and would have concluded that because both the expert and the defendants were involved in the same type of therapy, they were indeed engaged in the same health profession, if it were not for the ruling regarding the identical licensing requirement found in *McElhaney*.

The court reasoned that the defendants could have filed an affidavit of merit executed by either an occupational therapist or a physical therapist, but that the defendants reasonably believed that occupational therapists were precluded because they are unlicensed. The court held that this issue of reasonable belief regarding whether occupational therapists are licensed for purposes of the statute was one of first impression.

Therefore, defense counsel’s belief that the defense expert was engaged in the same health profession as the defendants was reasonable, at the time of the filing of the affidavit, because *McElhaney* had not yet been decided.

For a complete copy of the Michigan Court of Appeals published decision on *Brown v. Hayes, et al.*, (No. 256966, rel’d 4/4/06), [click here](#).

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