

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GEORGE ESHO, as Personal Representative  
of the ESTATE OF AZHAR ESHO, M.D., Deceased,

Plaintiff,

Case No. 21-008454-NH  
Hon. Brian R. Sullivan

-vs-

RAJANANDHAM SAMUDRALA, MD,  
DANNY MA, MD, EDSA NEGUSSIE, MD,  
ASCENSION ST. JOHN HOSPITAL, GROSSE  
POINTE PHYSICIANS X-RAY CENTER d/b/a  
EASTPOINTE RADIOLOGISTS, P.C.,  
ASCENSION PROVIDENCE HOSPITAL-SOUTHFIELD  
CAMPUS, and SOUTHFIELD RADIOLOGY  
ASSOCIATES, PLLC., Jointly and Severally,

Defendants.

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**ORDER GRANTING DEFENDANTS MOTION TO PRECLUDE  
STANDARD OF CARE TESTIMONY AND TO LIMIT  
PROXIMATE CAUSE TESTIMONY OF DR. DUNCAN**

At a session of said Court, held in the City  
County Building, City of Detroit, County of  
Wayne, State of Michigan, on  
1/30/2023

PRESENT: HONORABLE BRIAN R. SULLIVAN

Defendants Rajanandham Samudrala, MD, Danny Ma, MD, Edsa Negussie, MD, and Eastpointe Radiologists filed a motion to limit the testimony of plaintiff's expert Dr. Duncan. Defendants assert Dr. Duncan does not meet the qualifications of the defendants' area of practice as required by MCL 600.2919. Moreover, defendants contend Duncan refused to testify as to a basis for his proximate cause opinion in regard to the urologist.

Plaintiff asserts the statutory requirement is met as Duncan is a board certified urologist. Genitourinary radiology is a subspecialty of urology and he holds a certificate with the American Board of Urology. Radiology is included in those boards. Duncan spends a majority of his time in active clinical practice/ teaching urology, which includes radiology.

The Court concludes Duncan is not a board certified diagnostic radiologist. While he may utilize radiographic diagnostic devices in his practice, he does not have the same qualifications as those of a diagnostic radiologist. Finally, Dr. Duncan did not meet his burden to establish he devoted a majority of his practice to diagnostic radiology the year before the occurrence in this case. Duncan has not met the statutory criteria and cannot give standard of care testimony against the defendants.

## **BACKGROUND**

Plaintiff, Dr. Esho, by her estate, filed a medical malpractice action against Samudrala and Ma and alleged they were board certified radiologists and agents of Eastpointe Radiologists, d/b/a Grosse Pointe Radiologists. Plaintiff alleged, in essence, that these individuals, employees of Eastpointe Radiologists, failed to properly interpret an ultrasound and MRIs and CTs, performed on the deceased on January 19 and March 4, 2019.

The facts show Dr. Esho had back pain. She went to her doctor who ordered an ultrasound on January 2, 2019. That test revealed a 1.8 cm complex cyst of the left kidney. Dr. Esho was referred to a urologist. On January 13, 2019 Dr. Esho had a CT urogram performed on her. The pain continued. On January 18, 2019, an MRI was ordered, which was performed on January 23 2019. Samudrala, an employee of Eastpointe interpreted

this MRI and rendered a diagnosis of cyst in left kidney upper pole and an adenoma on the adrenal gland.

Dr. Esho had continued pain and a CT urogram was ordered for her on March 4, 2019. This CT was interpreted by Ma, also of Eastpointe radiology and he did not note any change in Dr. Esho's condition.

Dr. Esho's pain continued and on June 21, 2019 a CT urogram was performed which noted an increase in the mass of the left kidney. An MRI of the spine was performed on June 26, 2019 which showed a mass in the L4 vertebrae. That mass was determined to be high grade leiomyosarcoma in the renal mass with metastasis to the blood and marrow of the L4 vertebrae. Dr. Esho was treated for the cancer but ultimately died on June 30, 2021.

Plaintiff sued Samudrala (Count I) and Ma (Count II) for their alleged failure to properly diagnose or use a differential diagnosis. Samudrala was involved in the January 23, 2019 and March 4, 2019 MRIs Ma was involved with the March 4, 2019 radiograph.

Plaintiff filed suit and alleged defendants were negligent in their failure to diagnose the kidney cancer and provide a differential diagnosis. A differential diagnosis would have led to the discovery of the pathology earlier and deprived the urologist from ordering more confirmatory studies, such as a biopsy, which would have helped Dr. Esho.

Defendants filed a motion to preclude plaintiff's expert from giving testimony on the basis that the suit against Samudrala, Ma, and Negussie (per a concurrence) is against them as diagnostic radiologists. All three are alleged to be board certified radiologists engaged in diagnostic radiology, and all of whom failed to diagnose Dr. Esho's kidney

cancer.

Plaintiff's expert witness is Dr. Ralph Duncan, a board certified and practicing urologist. Dr. Duncan limited his testimony to radiologic studies only and refused to opine or testify as to the urologist. See Duncan deposition, Pages 30, 75, 77, 78.

Defendants claim Dr. Duncan does not statutorily or factually qualify to give expert testimony against these defendants in the area of diagnostic radiology because he is not a board certified radiologist and did not devote a majority of his time to the practice of radiology in the year before the events of the lawsuit.

Dr. Duncan asserts he is a board certified urologist. He also asserts he is able to render an opinion and provide expert testimony against the radiologists because he is board certified in genitourinary radiology and uroradiology. Plaintiff contends this is a match for purposes of giving testimony.

The Court concludes Duncan cannot provide expert standard of care testimony as he does not meet the statutory qualifications to testify against the diagnostic radiologists. In addition, Dr. Duncan lacks the requisite clinical practice requirement of diagnostic radiology in the year immediately preceding the date of occurrence under MCL 600.2169(b).

Moreover, Dr. Duncan will be precluded from giving proximate cause testimony if he refuses to allow the defendants to explore, examine and discover the basis of any proximate cause opinion as to Dr. Esho and her urologist.

### **EXPERT TESTIMONY**

MCL 600.2169 controls expert testimony in a medical malpractice case. MCL 600.2169 provides, in pertinent 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.

MCL 600. 2169(b) further provides:

(b) Subject to subdivision (c), **during the year immediately preceding the date of the occurrence that is the basis for the claim of 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 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, residency or clinical research program in that same specialty.**

The elements of professional negligence, including medical malpractice, are that plaintiff must prove the applicable standard of care, breach of that standard of care by defendant, proximate cause between the breach and injury. See *Wischmeyer v Schanz*, 449 Mich 469, 484 (1995). Expert testimony is necessary to establish the standard of care because the ordinary person lacks the common knowledge and experience to determine

the skill and competence of the medical act to determine if it meets the standard of practice, and expert testimony is required to demonstrate the defendant breached that standard. See *Locke v Pachtman*, 446 Mich 216, 223 (1994); *Wischmeyer*, 449 Mich at 484. Causation requires both cause in fact and proximate cause. *Haliw v Sterling Heights*, 464 Mich 297, 310 (2001); *Skinner v Square D Co.*, 445 Mich 153, 163-164 (1994).

The qualifications of Duncan are in the record and in the briefs of the parties, including his deposition testimony. His board certification is in urology. The issue of whether Duncan meets the requirements of MCL 600.2169(1)(b) is a matter of application of the facts to the requirements of the statute.

**1. Board Certification.** Plaintiff identified the particular area of specialty as diagnostic radiology in both the complaint and in the affidavit of merit filed with the case. See affidavit of Dr. Jonathan Berlin.

There is no dispute that Dr. Duncan is not a board certified radiologist, although he clearly studied radiology according to this deposition testimony. But the study of a particular subject does not elevate that particular knowledge to equate with that specialty required by MCL 600.2109.

Duncan is a board certified urologist. Duncan states that subject of radiology was on his boards and is subsumed in his board certification. His testimony addresses the three defendants who he asserts failed to diagnose or provide a differential diagnosis as to Dr. Esho, which is standard of care testimony and testimony as to the breach of the standard of practice of those three board certified diagnostic radiologists.

Duncan's expertise does not match that of the three defendant doctor board certified

radiologists. Duncan's testimony on the standard of care to these defendants is not permitted under the statute for the reason he lacks the same specialty as required by law as do the three defendants.

Plaintiff's affidavit of merit as to these defendants was filed by Jonathan Berlin, MD. Berlin opined the defendants practiced in the area of diagnostic radiology. Plaintiff opted to use Dr. Ralph Duncan as his expert for damages, proximate cause testimony and standard of practice testimony. Dr. Duncan testified all three radiologists failed to describe the possibility of cancer on any of the reports of the ultrasounds, CT scans, MRIs, and failed to provide a differential diagnosis of cancer. (Duncan deposition, P 16,17). That differential diagnosis would have alerted the urologist to perform further testing, such as a biopsy, to detect the cancer.

Duncan admitted in his deposition that he is not a board certified "general radiologist" and by implication not a diagnostic radiologist. However, he testified and asserted he is a board certified uroradiologist. (Duncan deposition P20, 22). That certification is part of his board certification in urology. Uroradiology is part of urology, not part of the board certification toward diagnostic radiology. Urology is a separate board from radiology. See deposition of Duncan P 20, 22, 59). In this instance, the Court concludes Duncan does not meet the requirement of the same board certification as the three defendants and cannot give standard of care testimony against them.

**2. Clinical Practice.** The second requirement is that Duncan have spent the majority of his time in the year preceding the occurrence, to the active clinical practice or teaching it, which is in the complaint and affidavit of merit alleged to be diagnostic

radiology. The requirement of the “treatment of patients” is active clinical practice, and that active clinical practice must be that of the defendants who are subject to this suit, diagnostic radiology. See *Gay v Select Specialty Hospital*, 295 Mich App 284, 295-298 (2012).

Duncan testified he uses the tools but in his function as a urologist. However, Duncan also fails to meet the requirement of spending a majority of his time in the field of diagnostic radiology as required by the statute. The statute requires that he have spent the majority of his time in the one-year before the occurrence to the active clinical practice of the area in this case, diagnostic radiology, which is confirmed by Duncan’s own account of the facts as stated in his deposition.

Duncan must have spent the majority of his time doing one or the other, radiology or urology, not both. The use of a diagnostic tool in the performance of a different medical end does not raise the use of that tool into a different specialty, diagnostic radiology. That included training does not meet the statutory criteria of the majority of his time in diagnostic radiology one year before the occurrence in the complaint. He cannot provide an opinion on diagnostic radiology on that basis. Many professions are trained in the use of diagnostic devices as part of the performance of their medical and other duties. For instance, an orthopedic doctor frequently takes and reads x-rays, MRIs, CT scans as diagnostic tools of the knee, hand, shoulder and back. But that use does not transform the orthopedic doctor who can read that radiograph into a diagnostic radiologist. They are used for similar reasons, diagnosis, but that is quite a general term and reading the scans is an art as well as a science, otherwise they need not be interpreted and anyone could do it and the use of



diagnostic radiologists would be part of the particular specialty of urology, orthopedics or oncology. Nor does the dental use of an x-ray render the dentist a diagnostic radiologist. True, the x ray is read as a tool in the functioning as a dentist and as a diagnostic tool, but it is a limited use and does not transform the dentist into a diagnostic radiologist. The statute requires the naming of the specialty, in this case, diagnostic radiology, and that the majority of the time the year preceding the occurrence to be in the clinical or teaching of that area, the primary area of practice, diagnostic radiology. MCL 600.2169.

Duncan did not testify as to the amount of time in his radiographic interpretation. See deposition P40. He said he did not know. That answer does not meet the statutory requirement that Duncan be board certified in the same specialty as the parties against whom his testimony is being offered, diagnostic radiology, and that he have devoted a majority of his professional time to active clinical practice of diagnostic radiology during the year immediately preceding the date on which the alleged malpractice occurred, (2018-2019), as to the one most relevant specialty. MCL 600.2169. That specialty is diagnostic radiology according to the complaint and to the affidavit of merit and Duncan.

Duncan is statutorily required to have spent a quantum of time, a majority of his professional time, to the active clinical practice of the same health profession in which the specialty in which defendants are licensed, diagnostic radiology. Duncan either could not, or would not, answer the amount of time he devoted to diagnostic radiology, if any. The party advancing a proposition bears the burden of establishing it, which includes the proponent of an expert witness to demonstrate that expert is qualified to give testify as a such a witness. See MCR 702; MCL 600.2905 and MCL 600.2169; *Clerc v Chippewa*

*County War Memorial Hosp*, 477 Mich 1067 (2007). Duncan did not meet it.

Plaintiff must show Duncan can meet the statutory requirements above. Duncan must have had the same specialty at the time of the occurrence as the defendants, diagnostic radiology. However, Duncan was board certified in urology, not diagnostic radiology although he had some familiarity with the subject. Moreover, Duncan must have he engaged in active clinical practice, or taught, diagnostic radiology at the time of and for a year immediately preceding the occurrence. Duncan either refused or was unable to give any percent of time that he spent performing diagnostic radiology as part of his practice. This answer does not meet the statutory requirement set forth above.

**3. Conclusion.** The Court concludes Duncan does not meet the statutory criteria to be able to provide expert standard of care testimony against defendants.

Duncan cannot provide proximate cause testimony based on his refusal in his deposition to allow defendants the opportunity to explore, examine and investigate his opinion as to proximate cause, etc. To the extent this testimony is standard of care testimony it is excluded. If Duncan cannot, or will not, provide a basis for his opinion as to the proximate cause to the defendants in discovery, he cannot so testify to it at trial, and

IT IS SO ORDERED.

/s/ Brian R. Sullivan 1/30/2023  
BRIAN R. SULLIVAN  
Circuit Court Judge

ISSUED:

Pursuant to MCR 2.602 this Order does not resolve all pending claims and does not close the above captioned matter.