STATE OF MICHIGAN

COURT OF APPEALS

SALLY NIPPA, Personal Representative of the Estate of ROBERT NIPPA, deceased, Plaintiff-Appellant, v BOTSFORD GENERAL HOSPITAL, Defendant-Appellee.	FOR PUBLICATION June 21, 2002 9:00 a.m. No. 229113 Oakland Circuit Court LC No. 99-016078-NH Updated Copy August 30, 2002

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

WHITBECK, C.J. (*dissenting*).

I respectfully dissent. In my view, the majority disregards the plain language of the law in order to avoid reaching what it considers to be an absurd result. Because the relevant word—"party"—in the relevant statute—MCL 600.2169(1)(a)—is a legal term of art that has acquired a particular meaning in the law and because applying that meaning would lead to a sensible, rather than an absurd, result, I would apply the statute as the Legislature wrote it. I would, therefore, reverse the order of the trial court.

I. Basic Facts And Procedural History

As the majority opinion indicates, Sally Nippa (Nippa) sued Botsford General Hospital, and *only* Botsford General Hospital, in her capacity as the personal representative of Robert Nippa's estate. In her second amended complaint, Nippa alleged that Botsford was liable for the negligent treatment Drs. Wiley Fan, Gerald Blackburn, and Harris Mainster rendered to Robert Nippa. With her original complaint, Nippa filed an affidavit of merit from Dr. Arnold Markowitz. Botsford sought dismissal under MCL 2.112(L). Although Dr. Markowitz is board certified in internal medicine, Botsford pointed out that Drs. Fan and Blackburn are board certified in infectious diseases and Dr. Mainster is board certified in general surgery; accordingly, Dr. Markowitz's board-certified specialty is not the same as those of Drs. Fan, Blackburn, and Mainster. In essence, Botsford argued that while Drs. Fan, Blackburn, and Mainster were themselves not parties, it was their alleged negligence that was being imputed to the hospital under a theory of vicarious liability. Therefore, Botsford argued, MCL 600.2169(1)(a) required Dr. Markowitz' board-certified specialties to match those of the allegedly offending physicians. The trial court agreed.

II. Statutory Provisions

Two subsections of MCL 600.2169 are at issue here. Subsection 1 provides:

> 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:
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> (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.*[1]

Subsection 2 of this same statute provides:

> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
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> (a) The educational and professional training of the expert witness.
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> (b) The area of specialization of the expert witness.
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> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.

III. Standard Of Review

Here, we are interpreting statutory provisions. Therefore, our review is de novo.[2]

IV. Statutory Interpretation

The Michigan Supreme Court has recently rearticulated the principles that courts should apply in interpreting statutes. In *Roberts v Mecosta Co General Hosp,*[3] Justice Young, writing for the majority of the Supreme Court, stated that the "anchoring rule of jurisprudence" is that courts are to effect the intent of the Legislature. Justice Young then stated:

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[1] Emphasis supplied.

[2] *Donajkowski v Alpena Power Co,* 460 Mich 243, 248; 596 NW2d 574 (1999).

[3] *Roberts v Mecosta Co General Hosp,* 466 Mich 57, 63; 642 NW2d 663 (2002).

> To do so, we begin with an examination of the language of the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).[4]
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> A clear and unambiguous statute requires full compliance with its provisions as written. *Northern Concrete Pipe, Inc v Sinacola Companies-Midwest, Inc*, 461 Mich 316, 320; 603 NW2d 257 (1999).[5]
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> It is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers. *Senters v Ottawa Savings Bank*, 443 Mich 45, 56; 503 NW2d 639 (1993).[6]

In *Pohutski v City of Allen Park*,[7] Chief Justice Corrigan, writing for the majority of the Supreme Court, stated that

> [w]hen parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. "The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory. *In re MCI* [*Telecommunications Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999).]

In *Robertson v DaimlerChrysler Corp*,[8] a case the majority cites but then shunts aside, Justice Markman, writing for the majority of the Supreme Court, turned directly to the question whether courts should substitute their judgment regarding what is logical for the policies that are actually reflected in the law, stating:

> [T]he "fundamental principles" that we see at stake here implicate the role of this Court in the constitutional separation of powers. That is, we believe that it is the constitutional duty of this Court to interpret the words of the lawmaker, in

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[4] *Id.*

[5] *Id.* at 66.

[6] *Id.* at n 5.

[7] *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

[8] *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 758; 641 NW2d 567 (2002).

> this case the Legislature, and *not* to substitute our own policy preferences in order to make the law less "illogical."[9]

In commenting on the dissent's reading of subsection 301(2) of the worker's compensation act, Justice Markman observed:

> The dissent interprets section § 301(2) as if these words did not exist, as if they were not there at all. The dissent ignores these words apparently because it disagrees with the limitations that these words impose upon worker's compensation benefits. Thus, the dissent chooses to amend § 301(2) by summarily reading these words out of the law. In doing so, the dissent ignores the compromises and negotiations that may have preceded the inclusion of these words in the law, it ignores the concerns of the Legislature in avoiding abuse of the worker's compensation system that may have motivated such language, and it ignores the majorities of each house of the Legislature, and the Governor, who approved *these* words, not those that the dissent prefers. However, our judicial role "precludes imposing different policy choices than those selected by the Legislature . . . ." *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001).[10]

Summarized, then, the Supreme Court has articulated a rather clear philosophy of statutory interpretation. The elements of this philosophy are: that if the Legislature uses language that is clear and unambiguous, courts should enforce the statute as written; that every word is used for a purpose and, as far as possible, we give effect to every clause and sentence; that we are not to assume that the Legislature inadvertently made use of one word or phrase instead of another and we should take care to avoid a construction that renders any part of the statute surplusage or nugatory; that we interpret the words of the Legislature and do not substitute our own policy preferences in order to make the law less "illogical"; and that we do not amend the statute by reading words out of (or, by logical extension, into) the law in order to impose different policy choices than those the Legislature selected. In my view, the majority in this case ignores, or departs from, each of these rather sensible directives.

V. Interpreting Clear And Unambiguous Language

The critical word at issue in this case is "party" in MCL 600.2169(1)(a). The majority states, accurately, that Nippa contends that this word refers only to those litigants actually a party to the record.[11] The majority goes on to say that we should not interpret the word "'party' narrowly to denote solely a party to the record proceeding."[12] The majority concedes, however,

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[9] Emphasis in original.

[10] *Id.* at 758-759 (emphasis in original).

[11] Nippa states in her brief that, "Undeniably and conspicuously, plaintiff's action for medical malpractice was not brought against any *'party'* who was a specialist, nor was it brought against a *'party'* who was board certified in any area of medicine."

[12] *Ante* at ___.

that the word "'party' is a legal term of art that has acquired a particular meaning in the law."[13] The majority then quotes Black's Law Dictionary (6th ed), p 1122, for the proposition that

> "[p]arty is a technical word having a precise meaning in legal parlance; *it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant*, whether composed of one or more individuals and whether natural or legal persons; *all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.*"[14]

In this case, the "party defendant" is undeniably Botsford. Drs. Fan, Blackburn, and Mainster may be interested persons. They may be Botsford's agents. But they are *not* parties. Therefore, under the clear and unambiguous words of the statute, Nippa did *not* need to file an affidavit of merit from a board-certified physician (or physicians) with specialties matching the specialties of these three physicians. Further, by definition, Botsford cannot be board certified in any specialty because it is an institution. The plain language of MCL 600.2169(1)(a) requires an affidavit of merit only "if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified[.]" Nippa, while required to file an affidavit of merit signed by a physician, was therefore *not* required, when it sued only Botsford, to file such an affidavit signed by a board-certified specialist.[15] To require anything else is to enforce another (as yet unwritten) statute, not the one that the Legislature wrote.

VI. Giving Effect To Every Clause And Sentence

The majority concludes, however, that accepting this plain meaning interpretation of the statute would "'effectively repeal'" MCL 600.2169, "rendering it nugatory and meaningless . . . ."[16] Presumably, the majority concludes that interpreting the word "party" to mean . . . well . . . a *party* would, in the instance of a hospital that is the sole defendant, eliminate the requirement for an affidavit of merit signed by a board-certified specialist. My first response is that, while this is obviously so, the language of the statute is not absolute but conditional, recognizing that board-certification may not be germane in every instance.[17] It is difficult for me to see how recognizing the conditional requirement of the statute is to "effectively repeal" it, or to render it "nugatory and meaningless."

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[13] *Ante* at ___.

[14] *Ante* at ___ (emphasis supplied).

[15] I recognize, as I noted above, that Dr. Markowitz is board certified in internal medicine. Botsford's argument, which the majority accepts, is that Dr. Markowitz' board-certified specialties must match those of Drs. Fan, Blackburn, and Mainster. My contention is that, because Botsford is the only "party defendant" and because it cannot by definition be board certified in any specialty, the affidavit Nippa submitted did not need to be signed by a board-certified specialist.

[16] *Ante* at ___.

[17] MCL 600.2169(1)(a) ("[*I*]*f* 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).

Secondly, the majority simply ignores the balance of the statute. MCL 600.2169(2) sets out extensive standards by which trial courts are to evaluate the qualifications of an expert witness in an action alleging medical malpractice. Thus, under the statutory scheme that the Legislature actually enacted—and not the one the majority wishes it had enacted—a plaintiff who sues only a hospital does not avoid the requirement of an affidavit of merit. Rather, that plaintiff must show that the physician signing the affidavit of merit, while not necessarily board certified, meets all the standards in MCL 600.2169(2). The majority's approach here quite clearly fails to give *any* effect to the standards in MCL 600.2169(2). It is difficult for me to see, therefore, how the majority's interpretation of the statute gives meaning to every clause and sentence. Indeed, under the majority's approach, it appears that MCL 600.2169(2) does not even exist. It is, under this interpretation, MCL 600.2169(2) that is rendered "nugatory," "meaningless," and "surplusage."

If, however, the provisions of MCL 600.2169(2) were to be taken into account, the result would be eminently sensible and the furthest thing from absurd: a plaintiff suing a hospital, and *only* a hospital, would be required to show that the physician signing the affidavit of merit, while not necessarily board certified, meets all the standards in MCL 600.2169(2). Such a result would, in my view, comport with the law that the Legislature passed and the Governor signed, preserving in the process the compromises and negotiations that may have preceded the inclusion of these words into the law.

VII. Substituting Policy Preferences

The majority cites *Dorris v Detroit Osteopathic Hosp Corp*[18] for the proposition that the Supreme Court has expressed its dissatisfaction with "gamesmanship." The gamesmanship to which the majority refers here is that "plaintiffs in medical malpractice actions could routinely avoid the requirements of § 2169 by declining to name individual physicians as defendants."[19] I find it interesting that the majority reaches the conclusion that complying with the plain words of the statute that the Legislature actually wrote—and, again, not the one that the majority wishes it had written—is "gamesmanship." The majority's policy preference, clearly, is that a plaintiff should be required to file affidavits of merit signed by board-certified physicians whose specialties match those of the individual physicians who are not parties but for whose alleged negligence the plaintiff seeks to hold a party defendant hospital accountable under a theory of derivative liability. Candidly, that would be my policy preference as well. Such an approach would appear to be logical, fair, and, on the surface at least, workable. The problem, of course, is that this is *not* the policy preference that the Legislature expressed in the clear and unambiguous words of the statute.

VIII. Amending The Statute

The majority states that "if the Legislature had intended to strictly limit the definition of the word 'party' to parties of record as that word is generally defined in the law, it could have so

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[18] *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43-47; 594 NW2d 455 (1999).

[19] Ante at ____.

stated."[20] Here, the majority simply presumes that the Legislature was ignorant of the fact that the word "party" is a legal term of art that has acquired a particular meaning in the law and that the Legislature just inadvertently made use of that word, instead of another, broader (or narrower) one. Acting on this presumption of ignorance, the majority then amends the statute to comport with its policy preferences: that the term "party" *should* also refer to the individuals who are claimed to have actually committed the alleged medical malpractice. Accordingly, the statute, as the majority amends it,[21] now reads: "However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, OR WHEN VICARIOUS LIABILITY IS ALLEGED AND THE INDIVIDUAL CLAIMED TO HAVE COMMITTED THE ACTUAL ACT OF MEDICAL MALPRACTICE IS A SPECIALIST WHO IS BOARD CERTIFIED, the expert witness must be a specialist who is board certified in that specialty."

As I noted above, such an amended statute would be logical, fair, and, I would hope, workable. Perhaps the Legislature will enact such an amendment. As yet, however, it has not. There is nothing in our judicial commissions or anywhere to be found in the concept of the separation of powers that empowers us to perform this task as the Legislature's surrogate. It is not within our judicial responsibilities to undertake to do what the Legislature should have done, but did not do. The majority chooses to embark on just such an undertaking. I do not. I would, therefore, reverse.

/s/ William C. Whitbeck

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[20] *Ante* at ___.

[21] Using the amendatory bill format.