

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of NATASHA DOUGLAS.

MARCIA DOWNS f/k/a MARCIA DOUGLAS,
Personal Representative for the Estate of
NATASHA DOUGLAS,

Plaintiff-Appellant,

v

MARILYN KEEBLER a/k/a MARILYN S.
MORRIS, DANIEL J. VERBURG, DANIEL J.
VERBURG, M.D., P.C., d/b/a BAY VIEW
OBSTETRICS & GYNECOLOGY d/b/a BURNS
CLINIC OBSTETRICS & GYNECOLOGY,
DEBBIE PLUIM a/k/a DEBRA PLUIM, and
JEFFREY W. WILDER,

Defendants,

and

NORTHERN MICHIGAN HOSPITALS, INC.,
d/b/a NORTHERN MICHIGAN HOSPITAL,

Defendant-Appellee.

MARCIA DOWNS f/k/a MARCIA DOUGLAS,
Personal Representative for the Estate of
NATASHA DOUGLAS,

Plaintiff-Appellant,

v

NORTHERN MICHIGAN HOSPITALS, INC.,
d/b/a NORTHERN MICHIGAN HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
July 19, 2012

No. 298330
Emmet Circuit Court
LC No. 03-007681-NH

No. 298723
Emmet Circuit Court
LC No. 04-008040-NH

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

After the trial court granted defendant Northern Michigan Hospital's two motions in limine and plaintiff indicated it therefore could not establish a prima facie case, the trial court dismissed these actions. Plaintiff appeals as of right, challenging the orders granting the motions in limine and seeking the appointment of a new judge. We previously consolidated these appeals and now affirm.

This case has a complex and protracted history that is of little relevance to the issues before us. In a nutshell, four separate lawsuits were filed and dismissed, resulting in four previous appeals to this Court. This Court consolidated the appeals and, with the exception of a claim against Northern Michigan Hospital (NMH), upheld the dismissals.¹ However, with respect to two of the appeals, dealing with the third and fourth lawsuits, the Supreme Court reversed and remanded to this Court.² On remand, this Court remanded to the circuit court.³ While on remand to the circuit court, the action against the individual defendants was resolved. Also on remand to the circuit court, partial summary disposition was granted to NMH on claims of vicarious liability for all of the individual defendants. The remaining claims in this case therefore pertain to the hospital's vicarious liability for the acts and/or omissions of a labor and delivery nurse.

On October 23, 2000, plaintiff was admitted to NMH for the induction of labor. A drug called Cyotec was administered. Plaintiff maintains that the drug was contraindicated for induction of labor. After it was given, there was a period during which a fetal monitor was not attached. The baby went into fetal distress. She was delivered by caesarian section at 10:54 a.m. but died at 7:42 p.m. due to hypoxia and severe birth asphyxia.

Plaintiff first argues that the trial court erred in excluding testimony by her two proposed experts, who were nurse midwives.

MCL 600.2169 provides in pertinent part as follows:

¹ *Downs v Keebler*, unpublished opinion per curiam of the Court of Appeals, issued November 28, 2006 (Docket Nos. 253611, 255045, 256422, 256462). See also *Downs v Keebler*, unpublished order of the Court of Appeals, entered December 12, 2006 (Docket Nos. 253611, 255045, 256422, 256462) (amending earlier opinion to correct an error regarding the relief to be given plaintiff with respect to NMH).

² *Downs v Keebler* and *Downs v Northern Michigan Hosps, Inc*, 480 Mich 1081; 745 NW2d 101 (2008).

³ *Downs v Keebler*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2008 (Docket Nos. 256422, 256462).

(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:

* * *

(b) Subject to subdivision (c) [which deals with general practitioners], 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.

The trial court concluded that the nurse midwives did not practice the same health profession as the labor and delivery nurse. Accordingly, it excluded their testimony. Although the broader question involves the admission of expert testimony, resolution of this issue turns on the interpretation of MCL 600.2169(1)(b). Issues of statutory interpretation are issues of law that are reviewed de novo. *Adair v State of Mich*, 486 Mich 468, 477; 785 NW2d 119 (2010).

In *2000 Baum Family Trust v Babel*, 488 Mich 136, 175; 793 NW2d 633 (2010), the Court stated:

[O]ur goal when interpreting a statute is “to ascertain and give effect to the intent of the Legislature” as reflected in the language of the statute, and if such language is “clear and unambiguous,” we need go no further. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). However, our duty in construing a statute requires us to consider the “meaning of the critical word or phrase as well as ‘its placement and purpose in the statutory scheme.’” *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (emphasis added), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). That is, all words and phrases must be considered in statutory context. . . . [Emphasis in original.]

The Court should not interpret a statute in a way that renders part of it nugatory or mere surplusage. *Grimes v Dep’t of Transp*, 475 Mich 72, 89; 715 NW2d 275 (2006). “When a statute specifically defines a given term, that definition alone controls.” *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Statutes, however, “must be construed to prevent absurd results.” *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) (quotation marks and citation omitted). An interpretation of a statute is absurd when “it is clearly inconsistent with the

purposes and policies of the act in question.” *King v State of Mich*, 488 Mich 208, 218; 793 NW2d 673 (2010), quoting *Cameron v Auto Club Ins Ass’n*, 476 Mich 55, 128-129; 718 NW2d 784 (2006) (KELLY, J., dissenting).

For the nurse midwives to qualify to offer expert testimony against the labor and delivery nurse, they would have to be “licensed as health professionals” and have “devoted a majority of [their] professional time” to “[t]he active clinical practice of the same health profession” or “[t]he instruction of students . . . in the same health profession” as the labor and delivery nurse. MCL 600.2169(1)(b). To discern the meaning of this section, it is necessary to construe the term “licensed” and “health profession.” The nurse midwives were “licensed” as nurses and had certifications as nurse midwives. They shared the same “license” as the labor and delivery nurse and her health profession was nursing. Thus, the question is whether the nurse midwives devoted the majority of their clinical practice or instruction of students to the “health profession” of nursing. In other words, is the profession of a nurse, here a labor and delivery nurse, the same health profession as that of a nurse midwife.

In interpreting § 2169(1)(b), the Courts in *Bates v Gilbert*, 479 Mich 451, 459; 736 NW2d 566 (2007), and *Brown v Hayes*, 270 Mich App 491, 501; 716 NW2d 13 (2006), rev’d on other grounds 477 Mich 966 (2006), looked to MCL 333.16105(2), a provision of the Public Health Code, for a definition of “health profession.” It provides:

“Health profession” means a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration issued under this article.

“Registration” is defined under the Public Health Code as “an authorization only for the use of a designated title which use would otherwise be prohibited under this article. Registration includes specialty certification of a licensee and a health profession specialty field license.” MCL 333.16108(2).

Plaintiff points out that § 2169(1) focuses on *license* and “health profession,” not “health profession specialty field.” While this is true, the definition of “health profession” leads to the conclusion that a health profession can be determined by reference to a license *or* registration, and that registration includes a specialty certification. Here, the labor and delivery nurse’s occupation performed pursuant to her license was nursing. The occupation that the nurse midwives performed pursuant to their registration was nurse midwifery. They are different health professions as evidenced by the fact that one is practiced pursuant to the nursing license while the other is practiced pursuant to the registration/specialty certification. Thus, although they shared the same nursing license, the nurse midwives could testify as experts relative to the labor and delivery nurse only if their additional certifications did not preclude the testimony and the majority of their active clinical practice or instruction time involved the health profession of nursing.

Defendants argue that because there is no exact match between the licensing credentials of the labor and delivery nurse and the nurse midwives, they cannot testify against her. They rely on *Bates* for the proposition that one who is overqualified cannot offer expert testimony. Defendants’ argument erroneously extends the holding of *Bates* beyond the context of the case. “[O]phthalmologists are physicians who treat diseases of the eye, [while] optometrists are not

physicians and do not generally treat eye diseases or perform invasive procedures, but merely examine the human eye to ascertain defects or abnormal conditions that can be corrected or relieved by the use of lenses.” *Bates*, 479 Mich at 460-461. Here, the nurse midwives and the labor and delivery nurse were both licensed as nurses. Defendants also rely on *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), for this proposition. However, in *Woodard* the Court held that *relevant* specialties and board certifications must match. *Id.* at 559.

Nonetheless, *Woodard* would appear to bar the testimony of the nurse midwives in this case. In a companion case to *Woodard*, *Hamilton v Kuligowski*, the defendant was a board certified internist and the proposed expert was a board certified internist with an infectious disease subspecialty. *Id.* at 556. The proposed expert had spent the majority of the preceding year treating infectious disease. *Id.* at 578. The Court held that because “he devoted a majority of his professional time to treating infectious diseases,” he did “not satisfy the same practice/instruction requirement of § 2169(1)(b).” *Id.* In other words, the expert was not barred because he had more specialized credentials, but because he had not been practicing or teaching in the relevant field.

Because the labor and delivery nurse was engaged in nursing, the relevant “health profession” was nursing. Thus, to qualify as expert witnesses, the nurse midwives would have to qualify based on their nursing credential. It would have to be shown that they spent the majority of their time the previous year practicing or teaching nursing, not nurse midwifery. Because neither could satisfy these criteria, their testimony was properly excluded.

Plaintiff argues that when construed in this manner, § 2169(1)(b) violates the due process clause because requiring a match when the nurse midwives unquestionably possess the pertinent knowledge would be an arbitrary and capricious result. In *Shavers v Attorney General*, 402 Mich 554, 612-613; 267 NW2d 72 (1978), quoting *Mich Cannors & Freezers Ass’n, Inc v Agricultural Marketing & Bargaining Bd*, 397 Mich 337, 343-344; 245 NW2d 1 (1976), the Court held that “[t]he test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.” “[T]he law shall not be unreasonable, arbitrary or capricious, and [] the means selected shall have a real and substantial relation to the object sought to be attained.” *McAvoy v H B Sherman Co*, 401 Mich 419, 436; 258 NW2d 414 (1977), quoting *Nebbia v New York*, 291 US 502, 525; 545 S Ct 505; 78 L Ed 940 (1934). The purpose of § 2169(1)(b) is to ensure that experts in medical malpractice cases have the relevant expertise. This is a permissible objective. Moreover, requiring that a proposed expert have practiced or taught primarily in the field about which they are testifying for a relevant time period bears a substantial relationship to that objective. Many professionals will have relevant knowledge about what another professional does. However, requiring that they practice or instruct in the relevant field, even if there is a closely related field, ensures up-to-date relevant knowledge and is not arbitrary or capricious.

Plaintiff further argues that § 2169(1)(b) conflicts with MRE 702 and therefore violates the judiciary’s rulemaking authority protected by Const 1963, art 3, § 2, and art 6, § 5. Plaintiff acknowledges that the Supreme Court reached a different result in *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

Plaintiff next argues that the trial court abused its discretion in excluding evidence that defendant did not have a policy or procedure pertaining to the use of Cyotec for induction of labor. However, based on *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 765-766; 431 NW2d 90 (1988), and *Jilek v Stockson*, 289 Mich App 291; 796 NW2d 267 (2010),⁴ plaintiff acknowledges that such evidence could not by itself establish the standard of care and that expert testimony was necessary. Because the expert testimony was properly excluded, we need not address this issue. Moreover, we need not address plaintiff's request that this case be assigned to a different judge.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

⁴ Pending for oral argument on whether to grant leave or peremptorily reverse. *Estate of Jilek v Stockson*, 488 Mich 1053 (2011).