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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DANIELLE GENOVESE, *Plaintiff/Appellant*,

v.

BODYNEW INC, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0296
FILED 5-24-2018

Appeal from the Superior Court in Maricopa County
No. CV2014-000018
The Honorable Douglas Gerlach, Judge

AFFIRMED

COUNSEL

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By Burton Rosenblatt, Sara Siesco
Counsel for Plaintiff/Appellant

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By Cristina M. Chait, Eileen Dennis GilBride
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which
Presiding Judge Peter B. Swann and Judge Randall M. Howe joined.

GENOVESE v. BODYNEW, et al.
Decision of the Court

C A T T A N I, Judge:

¶1 Danielle Genovese appeals from the superior court's dismissal of her medical malpractice action for failure to identify a standard of care expert consistent with the expert qualification requirements of Arizona Revised Statutes ("A.R.S.") § 12-2604(A). For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In mid-2012, Genovese underwent a surgical breast lift and augmentation with a tummy tuck and abdominal liposuction performed by Marvin Borsand, D.O., who is board certified in cosmetic surgery by the American Board of Cosmetic Surgery. Over the next months, Genovese suffered significant complications from the surgery, and she eventually sued Borsand for medical malpractice.

¶3 Consistent with the requirement of A.R.S. § 12-2603(A), Genovese certified that expert opinion testimony would be necessary to prove her medical malpractice claim. Under A.R.S. § 12-2604(A)(1), if the defendant doctor is a specialist, such opinion testimony can only be provided by someone with the same specialty, and if the defendant doctor is board certified in the specialty, the expert must also be certified in the same specialty. Genovese later identified James Chao, M.D., who was not certified in cosmetic surgery but was board certified in plastic surgery by the American Board of Plastic Surgery (one of the areas governed by the American Board of Medical Specialties), as her standard of care expert.

¶4 Before surgery, Genovese had signed an informed consent statement noting her agreement that, in the event of a malpractice case, she would retain a board-certified cosmetic surgeon as an expert. But after filing her malpractice case, she apparently had difficulty retaining such an expert and sought a ruling that Chao was qualified to serve as an expert under A.R.S. § 12-2604(A)(1). Genovese argued that Chao, as a board-certified plastic surgeon, met the requirements of the statute because (1) in her view, cosmetic surgery is not a specialty separate from plastic surgery; (2) based on references to plastic surgery on his website, Borsand claimed a specialty in plastic surgery; and (3) in any event, the procedures at issue were "inherently" plastic surgery.

¶5 The superior court concluded, based on the record presented, that cosmetic surgery was a specialty different than plastic surgery and that Borsand had been practicing within his cosmetic-surgery specialty when

GENOVESE v. BODYNEW, et al.
Decision of the Court

performing Genovese's procedures. Noting the evidence of specific requirements for board certification as a cosmetic surgeon and the limited evidence presented regarding requirements for board certification as a plastic surgeon, and thus having no basis to conclude that the two certifications were in any way comparable, the court found that Genovese had not established that Chao met the requirements of § 12-2604(A)(1). Genovese moved for reconsideration, which the court denied after briefing and argument. The court then granted Genovese's request for additional time to retain a compliant expert.

¶6 As of March 2016 – almost a year after the court's initial ruling disqualifying Chao – Genovese had still not retained another expert, and the superior court granted Borsand's motion to dismiss on that basis. Genovese timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶7 Genovese argues that the superior court erred by ruling that Chao did not meet the statutory qualifications required under § 12-2604 to testify as a standard of care expert against Borsand. We review the superior court's assessment of an expert's qualifications for an abuse of discretion. *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 387, ¶ 30 (2013). To the extent the ruling presents an issue of statutory interpretation, we review de novo. *Id.*

¶8 Section 12-2604(A)(1) delineates specific qualifications necessary for expert testimony on the standard of care in a medical malpractice case:

- A. 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 the person meets the following criteria:
 1. If the party against whom or on whose behalf the testimony is offered is or claims to be a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty or claimed specialty as the party against whom or on whose behalf the testimony is offered. If the party against whom or on whose behalf the testimony is offered is or claims to be a specialist who is board certified, the expert witness shall be a specialist

GENOVESE v. BODYNEW, et al.
Decision of the Court

who is board certified in that specialty or claimed specialty.

The testifying expert must also have “devoted a majority of [his/her] professional time” over the preceding year to active clinical practice or instruction/research “in the same specialty or claimed specialty.” A.R.S. § 12-2604(A)(2). Stated simply, if the treating physician “is or claims to be a specialist,” and the treatment at issue was within the specialty, the testifying expert must specialize “in the same specialty or claimed specialty.” A.R.S. § 12-2604(A)(1); *Baker*, 231 Ariz. at 384, ¶ 14. And, if the treating physician “is or claims to be a specialist who is board certified,” the testifying expert “shall be a specialist who is board certified in that specialty or claimed specialty.” A.R.S. § 12-2604(A)(1).

¶9 The Arizona Supreme Court has narrowly construed § 12-2604 and has declined to second guess whether a proposed expert who has arguably similar expertise – and who is undisputedly qualified to perform the procedure – should be permitted to testify if the expert’s specialization and certification differs from that of the party against whom the testimony is to be offered. In *Baker*, a 17-year-old patient died after being treated for a serious blood disorder by a physician who was board certified in pediatrics and the subspecialty of pediatric hematology-oncology. 231 Ariz. at 382, ¶¶ 2-3. The Arizona Supreme Court upheld the superior court’s ruling in the resulting medical malpractice case that, for purposes of § 12-2604, the plaintiff’s proposed expert who was board certified in internal medicine and the subspecialties of hematology and oncology was not certified in the same specialty (*pediatric* hematology-oncology) as the defendant physician. *Id.* at 382, 387, ¶¶ 3, 31. The court held that a “specialty” under § 12-2604 is a limited area of practice in which board-certification is available, including a subspecialty of another specialty as well as specialties certified by bodies other than the American Board of Medical Specialties. *Id.* at 385-86, ¶¶ 21, 24.

¶10 The *Baker* court reasoned that, by defining a specialty “by reference to practice areas in which a physician may obtain board certification,” specialties would be “objectively identifiable” based on “recognition by certifying bodies [(rather than by the court on a case-by-case basis)] that certain practice areas involve distinct training and experience.” *Id.* at 385, ¶ 21; *see also id.* at ¶ 17 (“[T]he statute is more reasonably interpreted as contemplating that ‘specialty’ has a more general, objectively determinable meaning.”). Section 12-2604 thus simplifies the analysis of whether a proposed expert will be allowed to testify in a malpractice case and avoids the need to litigate whether a proposed

GENOVESE v. BODYNEW, et al.
Decision of the Court

expert's experience is substantially similar to that of the doctor against whom the testimony is to be offered.

¶11 The court recognized that “[a] physician need not be considered a specialist in order to practice in a certain area of medicine, and physicians who specialize may provide medical treatment outside their specialty.” *Id.* at 383, ¶ 9. But the court made clear that the statute requires a testifying expert to be certified in the board-certified treating physician’s specialty, “even if physicians in other specialties might also have competently provided the treatment” and even though “different specialists may be prepared by training and experience to treat the same medical issue for a particular patient.” *Id.* at 383, 387, ¶¶ 9, 31. Thus, even though the proposed expert was board certified in hematology and oncology and was presumably capable of treating the 17-year-old patient’s blood disorder, the expert’s lack of certification in *pediatric* hematology-oncology precluded him from providing expert testimony. *Id.* at 387, ¶ 31.

¶12 Here, as in *Baker*, the proposed expert had experience that—as a practical matter—rendered him competent to opine on the medical procedures at issue. But, as in *Baker*, the expert did not satisfy the requirements of § 12-2604.

¶13 The record before the superior court evidenced that the American Board of Cosmetic Surgery certifies surgeons in a different—albeit related and even overlapping—specialty than the American Board of Plastic Surgery. Thus, even though plastic surgeon Chao is qualified to (and does) perform cosmetic surgery, he is not board-certified in the same specialty as cosmetic surgeon Borsand, so under § 12-2604 cannot act as an expert against Borsand in this case. Although we are sympathetic to the notion that Chao was qualified—as a practical matter—to offer an expert opinion on the standard of care applicable to this case, § 12-2604—as interpreted by the Arizona Supreme Court—requires more.

¶14 Genovese argues that cosmetic surgery is not a separate specialty within the meaning of § 12-2604, or at least that the specialty of plastic surgery encompasses cosmetic surgery as well. But Genovese did not dispute that the American Board of Cosmetic Surgery is a certifying board that has operated for over 30 years certifying eligible surgeons in cosmetic surgery. That is, cosmetic surgery is “a limited area of medicine in which a physician [] may become board certified,” and it thus qualifies as a specialty as defined in *Baker*. *See id.* at 385, ¶ 21.

GENOVESE v. BODYNEW, et al.
Decision of the Court

¶15 Genovese contends, however, that cosmetic surgery is subsumed within the specialty of plastic surgery as certified by the American Board of Plastic Surgery. For this proposition, Genovese relies on a single sentence from the American Board of Plastic Surgery’s website: “Cosmetic surgery is an essential component of plastic surgery.” But as the superior court noted, “[n]o evidence [was] submitted on plaintiff’s behalf that would allow one to know the requirements for board certification as a plastic surgeon, much less whether those requirements are in any way comparable to the requirements that Dr. Borsand satisfied to obtain his certification as a cosmetic surgeon.”

¶16 Moreover, the fact that board-certified plastic surgeons may also competently perform cosmetic surgical procedures does not establish that cosmetic surgery is the same specialty as plastic surgery. *See id.* at 383, ¶ 9 (“[D]ifferent specialists may be prepared by training and experience to treat the same medical issue for a particular patient.”). This is not to say that cosmetic surgery and plastic surgery are different specialties simply because they are certified by different boards; the statute is premised on certification in the same specialty, and we do not discount the possibility that different boards may provide certification in the same specialty. *See* A.R.S. § 12-2604(A)(1). But here, the record reflects that the American Board of Cosmetic Surgery’s certification process requires focused training in cosmetic procedures that is different than the training and experience required for board certification in plastic surgery. *See Baker*, 231 Ariz. at 385, ¶ 21 (relying on “recognition by certifying bodies that certain practice areas involve distinct training and experience” to define specialties). Although the fields are related and even overlap, the distinct training and experience requirements for board certification—given the record presented—support the court’s conclusion that a specialty in plastic surgery does not necessarily evidence specialization in cosmetic surgery as well. *See id.* at 383, 385–86, ¶¶ 9, 21, 24. Accordingly, the superior court did not abuse its discretion by concluding that Genovese failed to establish that her proposed expert was board certified in the same specialty as Borsand.

¶17 Genovese further argues, based on references to plastic surgery on Borsand’s website, that Borsand “claims” a specialty in plastic surgery. Section 12-2604(A)(1) requires an expert testifying against a treating physician who “claims to be a specialist” to in fact specialize in the claimed specialty. And “public assertions made by [a] professional in describing his or her areas of expertise,” including statements on the professional’s website, are evidence that could establish a claimed specialty. *Lo v. Lee*, 231 Ariz. 531, 533, ¶ 7 (App. 2012), *ordered depublished in part*, ¶¶ 5–6, *by* 231 Ariz. 484 (2013).

GENOVESE v. BODYNEW, et al.
Decision of the Court

¶18 The statements on Borsand’s website do not assert any special expertise in plastic surgery, but instead simply describe certain procedures as plastic surgery. *Compare id.* (noting that the physician’s declarations constituted a claim to a particular specialization in plastic surgery). Use of “plastic surgery” as a descriptor does not constitute a “claim[] to be a specialist” in plastic surgery. Moreover, Genovese’s assertion that Borsand held himself out as a plastic surgeon is flatly contradicted by the consent form she signed in which she acknowledged his specialization in cosmetic surgery and agreed to, in case of a medical malpractice claim, use a “board-certified expert medical witness(es) . . . in the same specialty as Marvin A. Borsand, D.O. (cosmetic surgery).” Under these circumstances, the superior court did not err by concluding Borsand had not claimed to be a specialist in plastic surgery.

¶19 Genovese additionally contends that, because Borsand’s website describes the procedures at issue (breast lift and augmentation, tummy tuck and abdominal liposuction) as plastic surgery, Borsand was practicing in the area of plastic surgery and not cosmetic surgery when performing her surgery, so § 12-2604 does not now require a cosmetic surgery expert. *See Baker*, 231 Ariz. at 384, ¶ 14 (holding that § 12-2604(A) “requir[es] that a testifying expert specialize ‘in the same specialty or claimed specialty’ as the treating physician only when the care or treatment at issue was within that specialty”). Although one page on Borsand’s website lists the procedures performed as “plastic surgery procedures,” the website elsewhere characterizes the services provided generally—as well as specific procedures like breast augmentation and breast lift that Genovese underwent—as “cosmetic surgery” and characterizes Borsand and the other surgeons as “cosmetic surgeons.” Because Genovese’s argument is premised on Borsand’s representations about the nature of the procedures, the record as a whole supports the superior court’s conclusion that Borsand was practicing within his specialty of cosmetic surgery when performing Genovese’s procedures.

¶20 Genovese also argues that § 12-2604 does not require a testifying expert to have certifications identical to those held by the treating physician, *see id.* at 387, ¶ 28, and that because both Chao and Borsand perform the procedures at issue, Chao should be qualified to testify as an expert. Although the testifying expert need not hold additional certifications just because the treating physician does, the testifying expert must “be certified in the specialty at issue in the particular case.” *Id.* Here, Borsand is board certified in the specialty of cosmetic surgery. And although Chao might qualify as a specialist in cosmetic surgery if he devotes a majority of his practice to cosmetic procedures like those at issue

GENOVESE v. BODYNEW, et al.
Decision of the Court

in this case, *see id.* at 385, ¶ 17, he nevertheless is not board certified in cosmetic surgery as required to testify against Borsand. *See also id.* at 387, ¶ 31 (“Section 12-2604 therefore required a testifying expert to be certified in that specialty, even if physicians in other specialties might also have competently provided the treatment.”).

¶21 In sum, based on the record presented, cosmetic surgery qualifies as a specialty, related to but distinct from plastic surgery. The record supports the superior court’s conclusion that Borsand devoted the majority of his time to (and was in fact board certified in) the specialty of cosmetic surgery, and the surgical procedures that Genovese underwent were within the ambit of cosmetic surgery. *See id.* at 386, ¶ 27. Even though Chao performed cosmetic surgical procedures (and even if that experience rendered him a specialist in cosmetic surgery), he was not board certified in cosmetic surgery. Accordingly, because § 12-2604(A)(1) requires a testifying expert to be board certified in the relevant specialty in which the treating physician is board certified, Chao did not meet the statutory requirements to give expert testimony against Borsand regarding the appropriate standard of care in this case. And because, even after being given additional time to comply, Genovese did not retain an expert who met the statutory requirements, dismissal was appropriate.

CONCLUSION

¶22 The judgment is affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA