S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MARILYN J. KIEFER and GEORGE KIEFER,	FOR PUBLICATION April 28, 2009 9:00 a.m.
Plaintiffs-Appellants,	
v	No. 280769 Washtenaw Circuit Court LC No. 05-001137-NH
JOHN M. MARKLEY, M.D., and CENTER FOR PLASTIC AND RECONSTRUCTIVE SURGERY, P.C.,	
Defendants-Appellees.	Advance Sheets Version

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

OWENS, J.

Plaintiffs appeal as of right the trial court's order granting defendants' motion in limine to strike plaintiffs' expert witness, Dr. Frederick A. Valauri, pursuant to MCL 600.2169(1)(b). We consider this case without oral argument, pursuant to MCR 7.214(E), and affirm.

Issues of statutory construction are reviewed de novo on appeal. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 59; 631 NW2d 686 (2001); *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004). However, a trial court's ruling regarding a proposed expert's qualifications to testify is reviewed for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Wolford* v *Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Woodard*, *supra* at 557, citing *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005). When interpreting a statute, the primary goal is to give effect to the Legislature's intent. *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007); *Grossman*, *supra* at 598. The language of the statute must first be reviewed. Judicial construction is neither required nor permitted if the statute is unambiguous on its face. It is assumed the Legislature intended the words expressed if the statute is unambiguous. *Brown*, *supra* at 593; *Grossman*, *supra* at 598. Courts may consult dictionary definitions of terms that are not defined in a statute. *Woodard*, *supra* at 561; *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005).

Plaintiffs argue that the trial court erred by finding that the language "devoted a majority of his or her professional time" in MCL 600.2169(1)(b) requires a physician to devote more than 50 percent of his or her professional time to the relevant specialty in order to be qualified to

testify as an expert witness. Plaintiffs further argue that the 30 to 40 percent of Dr. Valauri's time that was devoted to hand surgery constituted the majority of his professional time spread among the three different areas in which he practiced (hand surgery, reconstructive surgery of the extremities, and cosmetic surgery) and as such should be sufficient to qualify him to testify for purposes of MCL 600.2169(1)(b). We disagree.

The only issue in this case is whether Dr. Valauri devoted a sufficient amount of time to hand surgery in his practice to qualify as an expert witness under MCL 600.2169, which provides in relevant part as follows:

> (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:
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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.
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> (b) Subject to subdivision (c), 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:
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> (*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. [Emphasis added.]

The "specialty requirement is tied to the occurrence of the alleged malpractice and not unrelated specialties that a defendant physician may hold." *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 218; 642 NW2d 346 (2002). In *Woodard*, the Court quoted the language of MCL 600.2169(1)(b), noting:

> Obviously, a specialist can only devote a *majority* of his professional time to *one* specialty. Therefore it is clear that § 2169(1) only requires the plaintiff's expert to match one of the defendant physician's specialties.

* * *

> . . . As we explained above, one cannot devote a 'majority' of one's professional time to more than one specialty. [*Woodard*, *supra* at 560, 566 (emphasis in original).] [1]

The plaintiff's expert must have devoted a majority of his or her professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the one most relevant specialty the defendant physician was practicing at the time of the alleged malpractice. *Id*. See also *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622, 630; 736 NW2d 284 (2007) (remanding to the trial court to determine whether the plaintiff's expert spent the *majority* of his time in the active clinical practice of emergency medicine, the instruction of students in the relevant specialty, or as the medical director of emergency services and board member, advisor, and consultant to various entities).

The language in § 2169(1)(b) is unambiguous, and judicial construction is neither required nor permitted. *Brown*, *supra*; *Grossman*, *supra*. The statute states that the expert must have spent the *majority* of his or her time the year preceding the alleged malpractice practicing or teaching the specialty the defendant physician was practicing at the time of the alleged malpractice. MCL 600.2169(1)(b). To the extent the word "majority" needs explanation, it is defined as, "the greater part or larger number; more than half of a total." *Webster's New World Dictionary*, 2d College Ed (1980). MCL 600.2169(1)(b), therefore, requires a proposed expert physician to spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice. Dr. Valauri testified he spent only 30 to 40 percent[2] of his time in the practice of hand surgery, which, being a plurality rather than a majority of his time, is insufficient to qualify him as an expert for purposes of MCL 600.2169(1)(b).

Given the unambiguous language of the statute and the caselaw on this issue, this panel is constrained to affirm the trial court's decision. However, we note that this is not a result we think the Legislature intended. Defendant Dr. John M. Markley was board-certified in plastic surgery with an added qualification in hand surgery, as was Dr. Valauri. We believe that this similarity, coupled with the fact that Dr. Valauri spent more than 50 percent of his time in the

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[1] In his dissent, our esteemed colleague argues that the term "majority" should refer to "an amount that represents the largest percentage of the whole, even if this amount is less than 50 percent." Let us consider a situation where a doctor spends 40 percent of his time in one area, 40 percent in a second area, and 20 percent in a third. Under our colleague's definition, this hypothetical doctor would then be in the position of devoting the "majority" of his time to two different specialties. Because the *Woodard* Court maintained that this is impossible, it is clear that the *Woodard* Court relied on a definition of "majority" as "an amount that exceeds 50 percent of the total."

[2] Our colleague contends that Dr. Valauri spent 40 percent of his time in the practice of hand surgery. However, this was not his testimony. If he only spent 30 percent of his time practicing hand surgery, then even by the dissent's definition of "majority" he still would not have satisfied the requirements of MCL 600.2169(1)(b).

area of hand surgery and the closely related area of reconstructive surgery of other extremities, should qualify him as an expert in this situation. Nonetheless, we reluctantly hold that the trial court did not abuse its discretion by granting defendants' motion in limine to strike plaintiffs' expert witness. *Woodard*, *supra* at 557; *Wolford*, *supra* at 637.

We further note that although we believe that Dr. Valauri should qualify as an expert, we do not agree with the dissent's rationale. Using the definition of "majority" advocated by our colleague, an expert could engage in 11 different areas of practice, but because the expert spent 10 percent of his or her time in one area (greater than the amount of time spent in any other) he or she would qualify as an expert in that area. Although admittedly unlikely, this scenario demonstrates that defining "majority" as "an amount that represents the largest percentage of the whole, even if this amount is less than 50 percent," could result in expert opinions being rendered by under-qualified individuals.

Affirmed.

Whitbeck, P.J., concurred.

/s/ Donald S. Owens
/s/ William C. Whitbeck