STATE OF MICHIGAN

COURT OF APPEALS

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

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

O'CONNELL, J. (*dissenting*).

The majority concludes that the words "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 professional time to the relevant subspecialty in order to be qualified to testify as an expert witness. I disagree.

Although the majority adopts one credible interpretation of an ambiguous statute, I believe the correct interpretation of the phrase "devotes a majority of his or her professional time" means just that; the doctor spends the majority of his or her professional time as a board-certified plastic surgeon who practices the trade. In this case, in 2003 Dr. Frederick A. Valauri spent all his professional time working in his capacity as a board-certified plastic surgeon, and he spent more time practicing in the subspecialty of hand surgery than in any other subspecialty.[1] This, in my opinion, is sufficient to qualify him to provide expert testimony pursuant to MCL 600.2169(1)(b). In my opinion, putting up impossible barriers and expecting plaintiffs' experts to leap over those barriers was not the intent behind the statute.[2]

[1] Dr. Valauri spends the rest of his time on reconstructive surgery of the extremities and on cosmetic surgery.

[2] The purpose of MCL 600.2169 is to provide a guideline for the parties and courts to follow to help ensure that an expert witness is properly qualified by knowledge, skill, experience, training,

(continued…)

In *Casco Twp v Secretary of State*, 261 Mich App 386, 390-391; 682 NW2d 546 (2004), this Court set forth the standard for interpreting an ambiguous statute:

> The primary goal in statutory construction is to ascertain and give effect to the intent of the Legislature. When a statute's language is clear and unambiguous, we must assume that the Legislature intended its plain meaning and enforce the statute as written. It is only when the statutory language is ambiguous that this Court is permitted to look beyond the statute to determine the Legislature's intent. Statutory language is considered ambiguous when reasonable minds can differ with respect to its meaning. When construing an ambiguous statute, "[t]he court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose, but should also always use common sense." In this regard, courts should seek to avoid a construction that would produce absurd results, injustice, or prejudice to the public interest. [Citations omitted.]

I agree with the majority opinion that the only issue in this case is whether Dr. Valauri devoted a sufficient percentage of his practice to hand surgery to qualify as an expert witness.[3] MCL 600.2169 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:

(…continued)

or education to competently testify regarding the standard of care in the defendant doctor's area of specialty or subspecialty. The members of this panel presumably agree that Dr. Valauri meets the minimum qualifications under MRE 702 to testify as an expert in this case. However, the majority believes that MCL 600.2169 blocks the admission of Dr. Valauri as an expert because Dr. Valauri did not devote at least 50 percent of his practice to hand surgery.

Unfortunately, the majority's interpretation of this statute would permit a doctor who does three surgeries a month, two of them being hand surgeries, to testify as an expert in the area of hand surgery, but would bar a doctor who does 50 surgeries each month from testifying if only 24 of them are hand surgeries. Under such a scenario, the purpose of the statute is undermined—some qualified doctors would be unable to testify, while professional witnesses and other licensed physicians who merely dabble in medicine would be qualified to testify.

[3] In his deposition, Dr. Valauri testified that he devoted the majority of his practice to hand surgery. He is a member of the American Society for the Surgery of Hand. He devotes between 30 and 40 percent of his practice to hand surgery. About one-third of his practice is reconstructive surgery of the extremities, and the remaining quarter or so is cosmetic surgery. Between 1987 and 1993, approximately 80 percent of his practice was hand and extremity surgery. I would conclude that a board-certified plastic surgeon with a subspecialty in hand surgery who spends between 60 and 80 percent of his time operating on extremities and hands would be qualified to testify as an expert in this case.

> (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.
>
> (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*:
>
> (*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.

The conceptual difficulty that bedevils the present case is attributable to the use of the term "majority" in the statute and the common understanding of the term majority among most people in our society. Years ago, this Court, referring to an opinion by the United State Supreme Court, stated:

> The phenomenon of identical words meaning different things, even in a single document, such as an insurance contract or statute, let alone in two separate documents, is neither unique to the case at bar nor to the elasticity and inherent limitations of the English language. *Nat'l Organization for Women, Inc v Scheidler*, 510 US 249, 258; 114 S Ct 798, 804-05; 127 L Ed 2d 99, 109 (1994) (recognizing that the statutory term "enterprise" in 18 USC 1962 [a] and [b] does not import an economic motive that is required in conjunction with the term "enterprise" in 1962[c] because "enterprise" was used in two different senses in the different subparagraphs). [*Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 341; 535 NW2d 583 (1995).]

The fact that one word may have multiple meanings depending on its use only adds to the confusion. Such is the case with the term "majority." *Random House Webster's College Dictionary* (1997), defines the term "majority" as follows: "1. the greater part or number; a number larger than half the total. 2. the amount by which the greater number surpasses the remainder (disting. from *plurality*)."[4] Depending on the context and the speaker, the term "majority" can have one of two conflicting meanings. A "majority" could refer to an amount that exceeds 50 percent of the total, as definition 1 indicates. Or, a "majority" could refer to an amount that represents the largest percentage of the whole, even if this amount is less than 50 percent, as definition 2 indicates.

[4] *Random House Webster's College Dictionary* defines "plurality," in pertinent part, as "more than half of the whole; the majority."

Obviously, the different meanings associated with this term indicate that the proper meaning of the term "majority" often depends on the context in which it is used and, in the absence of contextual clues indicating which definition should be adopted, this term can create ambiguity. For example, what does the sentence "A majority of votes is needed to win" mean in the context of a three-way race for an elected office? Under the first definition of "majority," the winner must receive over half the votes cast. If a candidate receives only 45 percent of the vote, he or she does not win the election, even if the competitors have each received smaller percentages of the total votes cast. But under the second definition, the winner must simply receive the most votes of any candidate; therefore, the candidate with 45 percent of the vote has the majority of votes and wins the election, because he has more votes than either of his competitors.

The Legislature's use of the term "majority" in MCL 600.2169(1)(b) presents the same sort of ambiguity. MCL 600.2169(1)(b) states that a health professional called as an expert witness must have "devoted a majority of his or her professional time" in the preceding year to either the active clinical practice or the teaching of the same health profession or specialty in which the defendant physician is licensed. However, the statute fails to indicate whether an expert witness must spend over half his or her professional time on a particular specialty to be qualified as an expert witness, or whether the expert witness devotes a "majority of his or her professional time" on a particular specialty (and therefore is qualified to be an expert witness) if the expert witness simply devotes a larger percentage of his or her professional time on that specialty than on any other specialty.

In this case, this distinction determines whether Dr. Valauri is qualified to testify as an expert witness. Dr. Valauri devoted up to 40 percent of his practice to hand surgery in 2003, and he did not devote a larger percentage of his practice to any other specialty. Under the majority's interpretation of the statute, Dr. Valauri is not qualified to testify as an expert in this case because he did not devote at least 50 percent of his practice to hand surgery. But this interpretation assumes that the Legislature intended to define "majority" as "a number larger than half the total" when the statute does not make this intent clear. Instead, it is equally plausible that the Legislature intended for a "majority" to refer to the specialty that represented the largest percentage of a physician's practice, even if the physician spent less than half his or her professional time on that specialty. Under such an understanding of this term, Dr. Valauri would be qualified as an expert witness because he spent a majority of his time practicing the same specialty as the defendant, even though he did not devote over half his practice to the specialty.

Accordingly, I believe that the majority should have recognized that MCL 600.2169(1)(b) is ambiguous and considered the Legislature's intent when interpreting the statute. After considering the object and intent of the statute, which is to ensure that an expert witness has the appropriate qualifications and knowledge to testify regarding the appropriate standard of care, I conclude that the Legislature did not intend for an expert witness to meet an arbitrary threshold in order to testify with regard to the standard of care, but intended that an

expert witness is qualified to provide such testimony as long as the expert witness devoted the largest percentage of his or her practice to the same specialty as the defendant.[5] Such an interpretation ensures that the expert is familiar with the necessary standard of care without requiring a party to engage in the difficult, if not impossible, task of finding an expert whose practice paralleled that of the defendant.

I would reverse the decision of the trial court.

/s/ Peter D. O'Connell

[5] The majority includes in its opinion a hypothetical case in which a doctor who spent 10 percent of his time practicing in one of his 11 areas of specialization would be permitted to testify as an expert if he did not devote a larger percentage of his time to the practice of any other specialty. Admittedly, under my understanding of the statute, this scenario could occur. However, the majority fails to recognize that the doctor in this hypothetical case *also* must pass the MRE 702 threshold to qualify as an expert witness. Under MRE 702, an individual must be "qualified as an expert by knowledge, skill, experience, training, or education" to testify as an expert. If the trial court does not find such a doctor sufficiently qualified to testify, it may not qualify the doctor as an expert. Consequently, a proper application of MRE 702 would prevent the situation described by the majority from occurring if this doctor were, in fact, unqualified to testify as an expert. See *Woodard v Custer*, 476 Mich 545, 572-574; 719 NW2d 842 (2006) (a proffered expert meeting the criteria contained in a subsection of MCL 600.2169 is still subject to scrutiny under MRE 702).