

STATE OF MICHIGAN
COURT OF APPEALS

EILEEN HALLORAN, Temporary Personal
Representative of the ESTATE of DENNIS J.
HALLORAN, Deceased,

UNPUBLISHED
March 8, 2002

Plaintiff-Appellant,

v

RAAKESH C. BHAN, M.D., CRITICAL CARE
PULMONARY MEDICINE, P.C., and BATTLE
CREEK HEALTH SYSTEMS,

No. 224548
Calhoun Circuit Court
LC No. 98-003953-NH

Defendants-Appellees.

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals by leave granted the trial court's order striking plaintiff's expert witness because the expert's board certification did not match the board certification of defendant Bhan.¹ MCL 600.2169(1)(a). We reverse and remand.

At the time of the treatment giving rise to plaintiff's cause of action, defendant was board certified by the American Board of Internal Medicine (ABIM) and held a certificate of added qualification in critical care medicine, also from the ABIM. The parties agree that no separate board certification exists for critical care medicine. Rather, the different primary boards of medicine issue certificates of added qualifications in various subspecialties, including critical care medicine. In his answer to plaintiff's complaint in this matter, defendant admitted that he was practicing critical care medicine at the time he was caring for plaintiff's decedent.

Dr. Thomas Gallagher signed the required affidavit of merit that was attached to plaintiff's complaint, and plaintiff also filed an expert witness list naming Gallagher as an expert

¹ The issue presented in this appeal relates to defendant hospital Battle Creek Health Systems (BCHS) and Critical Care Pulmonary Medicine, P.C., Bhan's professional corporation, only on agency principles, and therefore the singular "defendant" will refer only to defendant Bhan.

witness who would testify regarding the standard of care applicable to defendant. In his affidavit, Gallagher testified that he “practice[d] the specialty of critical care medicine.” Gallagher testified at his deposition that he is board certified in anesthesiology by the American Board of Anesthesiology and holds a certificate of special qualification from that primary board of medicine (ABA) in critical care medicine.

Defendant moved the trial court for an order striking Dr. Gallagher as an expert witness because he did not meet the statutory requirements for an expert to provide standard of care testimony for or against defendant established by MCL 600.2169(1)(a). The parties submitted briefs, and the trial court heard oral arguments. Defendant argued that because Dr. Gallagher was not certified by the American Board of Internal Medicine, as defendant was, Gallagher did not meet the criteria of the statute (emphasizing the certification by the primary board of medicine). Plaintiff countered that where the area of actual medicine practiced and at issue (here the subspecialty of critical care) lacked its own board granting certification, the focus should be on the actual subspecialty being practiced and out of which the alleged malpractice stems. Furthermore, plaintiff asserted that because both defendant and Gallagher held certificates of added qualifications (albeit from different primary boards of medicine), and both practiced critical care medicine as a specialty (that does not offer board certification), under the circumstances of this case, Dr. Gallagher was qualified to serve as an expert witness.

The trial court construed MCL 600.2169(1)(a) consistent with defendant’s position, finding that the Legislature intended to refer to primary board certifications and because Gallagher was not board certified in the same primary specialty as defendant, he was not qualified to render standard of care testimony for or against defendant. The trial court therefore granted defendant’s motion to strike.

MCL 600.2169(1)(a) provides in pertinent part:

(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:

(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.

Plaintiff asserts that the first sentence of subparagraph (a) of subsection (1) provides that if the defendant is a specialist at the time of the occurrence, then the expert witness must specialize in that same specialty that serves as the basis for the action. Plaintiff further argues that the last sentence of subparagraph (a) of subsection (1) does not apply to this case because the subspecialty at issue, critical care medicine, does not have a primary board of medicine offering certification. We agree. Whether a witness is qualified to serve as an expert witness and the

actual admissibility of the expert's testimony are within the trial court's discretion. *Tate v Detroit Receiving Hosp*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 225833, issued January 15, 2002), slip op at 2. We review the trial court's decision for an abuse of discretion. *Id.*

The primary goal in construing a statute is to determine and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The specific language of the statute is the first source for determining the Legislature's intent, *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999), and when the plain and ordinary meaning of the language is clear, judicial construction is normally not needed or permitted, *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Courts can look beyond the statutory language only if it is ambiguous. *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 159; 615 NW2d 702 (2000). In such cases, courts must seek to give effect to the Legislature's intent through a reasonable construction. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001); *Tate, supra*, slip op at 4.

In deciding this case, we rely on this Court's analysis and holding in the recent opinion of *Tate, supra*. In the medical malpractice action in *Tate, supra*, slip op at 1-2, the plaintiff proffered an expert witness who was board certified and a specialist in internal medicine to testify against the defendant hospital's physician who was board certified in several specialties, including internal medicine. The plaintiff's theory in *Tate* was that the medical malpractice occurred during the practice of internal medicine and not during the practice of the other specialties. *Id.* at 5. The trial court concluded, however, that because the expert witness was not board certified in the exact same specialties as the defendant's physician, the expert witness was unqualified to testify. *Id.* at 2. This Court examined MCL 600.6129(1)(a), the statute at issue in the present case, and reversed the trial court. This Court stated:

[MCL 600.]2169(1)(a) specifically states that an expert witness must "specialize[] at the time of the occurrence that is the basis for the action" in the same specialty as the defendant physician. The statute further discusses board certified specialists and requires that experts testifying against or on behalf of such specialists also be "board certified in that specialty." The use of the phrase "at the time of the occurrence that is the basis for the action" clearly indicates that an expert's specialty is limited to the actual malpractice. Moreover, the statute expressly uses the word "specialty," as opposed to "specialties," thereby implying that the specialty requirement is tied to the occurrence of the alleged malpractice and not unrelated specialties that a defendant physician may hold. Indeed, *McDougall [v Schanz]*, 461 Mich 15, 24-25; 597 NW2d 148 (1999), states that "the statute operates to preclude certain witnesses from testifying solely on the basis of the witness' lack of practice or teaching experience in the *relevant* specialty."

* * *

Certainly § 2169 cannot be read or interpreted to require an exact match of every board certification held by a defendant physician. Such a "perfect match"

requirement would be an onerous task and in many cases make it virtually impossible to bring a medical malpractice case. . . . [W]e do not believe that *McDougall* stands for such a proposition. . . . Thus, where a defendant physician has several board certifications and the alleged malpractice only involves one of these specialties, § 2169 requires an expert witness to possess the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice. [*Tate, supra*, slip op at 4-5; emphasis in original.]

Similarly, the alleged malpractice in the instant case that serves as the basis for the action involves critical care medicine and not other specialties in which Gallagher and defendant are certified. There is no dispute that both defendant and Gallagher specialize in critical care medicine and are certified in critical care medicine. The fact that Dr. Gallagher lacks a board certification in internal medicine is irrelevant because plaintiff has not alleged malpractice against defendant for treatment rendered by defendant acting as an internist. As stated in *Tate, supra*, slip op at 4, “specialty” as it is used in MCL 600.2169(1)(a) is tied to the occurrence of the alleged malpractice and not the unrelated specialties that the physician may possess. Thus, contrary to defendant’s assertion, the second sentence of § 2169(1)(a), which states that “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*,” refers to the critical care specialty that serves as the basis for the action and not the specialty of internal medicine. Because there is no board certification for critical care medicine, the last sentence of § 2169(1)(a) does not apply to the present case. Therefore, Dr. Gallagher’s and defendant’s qualifications were matched for purposes of the statute.

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey