STATE OF MICHIGAN

COURT OF APPEALS

SCOTT JOHNSON and KATHLEEN JOHNSON,

Plaintiffs-Appellants,

v

SULTAN BHIMANI, M.D., and ADVANCED DIAGNOSTIC IMAGING, P.C.,

Defendants-Appellees,

and

COVENANT HEALTHCARE SYSTEM,

Defendant.

UNPUBLISHED
February 10, 2011

No. 292327
Saginaw Circuit Court
LC No. 04-054130-NH

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

Plaintiffs' expert witness in this medical malpractice case, Dr. Harold Parnes, is board-certified in diagnostic radiology. Defendant Sultan Bhimani, M.D., is board-certified in diagnostic radiology. Both physicians possess certificates of added qualification in neuroradiology. The radiologic images at issue depict the lumbosacral spine and sacroiliac joint, closely related anatomical areas falling within the purview of both specialties. The majority concludes that Parnes lacked the requisite qualifications under MCL 600.2169(1)(b) because he "did not spend more than 50 percent of his professional time practicing the one relevant specialty of general diagnostic radiology." *Ante* at 3. I respectfully disagree with the majority, and would find Parnes fully qualified to testify in this case.

Plaintiff Scott Johnson fell from a ladder, and presented at defendant Covenant Healthcare System complaining of pain in his abdomen, groin and hips. An emergency room physician ordered an x-ray of Johnson's lumbosacral spine. A short time later, the physician ordered a CT scan of Johnson's abdomen and pelvis. Bhimani interpreted all the radiologic studies as negative for fractures or other abnormalities. Bhimani described as follows at his deposition the "possible fractures" that a CT scan of the pelvis and abdomen may reveal: "Well, the CT study is involved from the upper part of the thoracic spine all the way to the pubic symphysis, so [that] includes the thoracic spine, the lumbar spine, the iliac bone, and the

sacrum." The sacrum is "the triangular bone just below the lumbar vertebrae, formed usually by five fused vertebrae (sacral vertebrae) that are wedged dorsally between the two hip bones." Dorland's Illustrated Medical Dictionary, 1373 (25th ed, 1974). The term sacroiliac pertains "to the sacrum and ilium; denoting the joint or articulation between the sacrum and ilium and the ligaments associated therewith." *Id*. The ilium is "the expansive superior portion of the hip bone." *Id*. at 763. Indisputably, the lumbar vertebrae and sacrum are structures of the spine.

Parnes opined that Bhimani failed to detect on the lumbosacral spine x-rays "separation of the left SI [sacroiliac] joint compared to the right[,] asymmetric." Regarding the CT scan, Parnes observed:

> If you look at the CT scan … you can see that there is a widening of the pubic symphysis on the scalp image which is basically the image that's used to sort of coordinate where all the image slices are going to be. So the scalp image shows the widening of the pubic symphysis. Additionally, on the individual images themselves, there is a fracture of the anterior left sacrum and a widening of the left SI joint as compared to the right side. Asymmetric.

According to Parnes, films like those at issue in this case are read by diagnostic radiologists and neuroradiologists:

> *Q*. Muscular skeletal films, diagnostic films, that doesn't fall within the realm of neuroradiology, correct?
>
> *A*. It falls within the realm of it as far as whether there was something related to the spine, or even sacroiliac joint, which we image, but it also falls in the realm of diagnostic radiology.

The American Board of Radiology agrees with Parnes's description of neuroradiology practice. The board defines neuroradiology as "a subspecialty of diagnostic radiology that utilizes diagnostic and interventional techniques, including computed tomography, magnetic resonance imaging, angiography, myelography, and radiographs to evaluate and treat conditions of the central nervous system, *spine*, and head and neck." <http://www.theabr.org/moc/moc_neuro_landing.html>, accessed January 16, 2011 (emphasis added).

In addition to their precisely matching specialties and subspecialties, Barnes and Bhimani share remarkably similar practice histories. After they achieved board certification in diagnostic radiology, both successfully completed fellowship training in neuroradiology. At his 2005 deposition, Bhimani testified that he "currently practice[s]" both "general radiology" and neuroradiology, and holds himself out as a neuroradiologist. Bhimani acknowledged that he held himself out as a neuroradiologist at the time the alleged medical malpractice occurred:

> *Q*. Did you hold yourself out to be a neuroradiologist in April 2002?
>
> *A*. I was a neuroradiologist during that time, too.

Bhimani estimated that in April 2002, when he reviewed Johnson's radiographs, "about 50 percent [of my practice] was neuro and 50 percent was general." During part of the year preceding the asserted malpractice, April 2001 through January 2002, Bhimani worked at McLaren Hospital. He recalled that "[d]uring the time, the job changed, and I was roughly figuring out to working about 25 percent neuro and 75 percent general diagnostic radiology." From 1985 to 2000, Bhimani practiced with Associated Radiologists of Flint. Throughout that time, his practice "was . . . close to about 70 percent neuro and 30 percent general."

Parnes estimated that he spent "somewhere between maybe 50 percent, 60 percent" of his professional time practicing neuroradiology.[1] He continued, "It is hard to say because if you consider lumbar spine, cervical spine, you know, head and neck, it depends also on a daily basis." Later in the deposition, he clarified that "50 to 80 percent" of his time "is neuroradiology."

The relevant statute, MCL 600.2169(1), delineates as follows the criteria necessary for qualification of an expert witness in a medical malpractice action:

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

[1] Neither counsel requested that Parnes provide a statistical breakdown of his practice over the course of the year before the occurrence at issue.

> professional school or accredited residency or clinical research program in the same specialty. [Emphasis added.][2]

The majority correctly observes that Parnes met the conditions in MCL 600.2169(1)(a), given that both he and Bhimani are board-certified radiologists. *Ante* at 2. But the majority finds that Parnes cannot fulfill the requirements of § 2169(1)(b)(*i*) "because he did not spend more than 50 percent of his professional time practicing the one relevant specialty of general diagnostic radiology." *Ante* at 3. The majority's focus on "the one relevant specialty" derives from *Woodard v Custer*, 476 Mich 545, 566; 719 NW2d 842 (2006), in which our Supreme Court held that

> in order to be qualified to testify under § 2169(1)(b), the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty.

Although the majority acknowledges the "overlap" present in this case between anatomical structures within the purview of both diagnostic radiology and neuroradiology, the majority rules that "the specialties of diagnostic radiology and neuroradiology are distinct from each other," and "practicing neuroradiology is not the same as practicing general diagnostic radiology." *Ante* at 3-4. While I agree that the two disciplines are "distinct from each other," *ante* at 4, I strongly disagree that any *meaningful* distinction between the two specialties exists in this case. In my view, Bhimani practiced both diagnostic radiology and neuroradiology, or either specialty, when he interpreted Johnson's films. Irrespective whether Bhimani claims to have worn the hat of a neuroradiologist or a diagnostic radiologist at the moment he interpreted Johnson's films, the standard of care governing his interpretation had no relationship to the label he attached to his specialty. Therefore, I would hold that Parnes possesses the requisite qualifications to give expert testimony under MCL 600.2169. In reaching this conclusion, I rely on the text of § 2169, relevant case law and common sense.

"We need not leave our common sense at the doorstep when we interpret a statute." *Price Waterhouse v Hopkins*, 490 US 228, 241; 109 S Ct 1775; 104 L Ed 2d 268 (1989), superseded in part by statute on other grounds as noted in *Landgraf v USI Film Products*, 511 US 244, 251; 114 S Ct 1483; 128 L Ed 2d 229 (1994). When endeavoring to interpret a statute in a manner faithful to the Legislature's intent, "a court should not abandon the canons of common sense." *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994). The majority presumes that because Bhimani claims to have been practicing diagnostic radiology at the time he interpreted films depicting Johnson's spine and pelvis, he could not have been practicing neuroradiology. Alternatively stated, the majority concludes that while interpreting films of Johnson's spine and pelvis, Bhimani somehow avoided drawing on his knowledge, training and extensive experience as a neuroradiologist, even though at the same time he held

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[2] Subsection (c) concerns general practitioners and has no relevance here.

himself out to the public as a neuroradiologist. According to the majority's reasoning, Bhimani somehow isolated his neuroradiology training and experience from his diagnostic radiologic consideration of Johnson's films, and reviewed the x-rays while utilizing only those neurons dedicated to diagnostic radiology methods. In my view, it simply defies logic to conclude that two radiologists sharing identical board certifications and certificates of added qualifications, whose practices involve substantial time commitments to precisely the same specialty and subspecialty, would observe different standards of care when interpreting films of an anatomic area falling within the realm of their mutual expertise.

Aside from common sense, case law does not support the disqualification of an expert whose qualifications and relevant practice mirror those of the defendant. In *Woodard*, 476 Mich at 560, our Supreme Court emphasized the role of relevance in interpreting MCL 600.2169:

> Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty.

The Court in *Woodard* applied the relevant specialty test in two different cases. The first, *Woodard v Custer*, involved a defendant physician who possessed board certification in pediatrics and certificates of special qualifications in pediatric critical care medicine and neonatal-perinatal medicine. *Id*. at 554. The plaintiff's proposed expert witness had board certification in pediatrics, but lacked any certificates of added qualifications. *Id*. at 554-555. The alleged malpractice arose from the defendant's placement of an arterial line in an infant patient's leg while the infant was a patient in a pediatric intensive care unit. *Id*. at 554, 575. The Supreme Court held "that the trial court did not abuse its discretion in finding that the defendant physician was practicing pediatric critical care medicine at the time of the alleged malpractice, and, thus, pediatric critical care medicine is the one most relevant specialty." *Id*. at 576.

In the second case discussed in *Woodard*, *Hamilton v Kuligowski*, the defendant physician specialized in general internal medicine and practiced that specialty at the time of the alleged malpractice. *Id*. at 577-578. The plaintiff's proposed expert witness was also board certified in general internal medicine, but devoted the majority of his professional time to the practice of infectious diseases, a subspecialty of internal medicine. *Id*. at 556, 578. The plaintiff averred that the defendant "failed to properly diagnose and treat the decedent while she exhibited prestroke symptoms." *Id*. at 556. The plaintiff's expert admitted that he was "not sure what the average internist sees day in and day out." *Id*. at 578. The malpractice asserted in *Hamilton* had no connection to infection or the subspecialty of infectious diseases. The Supreme Court affirmed the trial court's finding that the plaintiff's proposed expert lacked the requisite qualification under MCL 600.2169(1)(b) because he failed to "satisfy the same practice/instruction requirement." *Id*.

Because § 2169(1) uses the word "specialty" rather than "specialties," the Supreme Court determined that the statute "requires the matching of a singular specialty, not multiple

specialties." *Woodard*, 476 Mich at 559. The Supreme Court further explained that "the specialty requirement is tied to the occurrence of the alleged malpractice and not unrelated specialties that a defendant physician may hold." *Id*. The Supreme Court then addressed § 2169(1)(b), which requires that the plaintiff's expert have "'devoted a *majority* of his or her professional time to either' the 'active clinical practice' or the 'instruction of students' in 'the same specialty' as the defendant." *Id*. at 559-560 (emphasis in original). The Supreme Court added, "Obviously, a specialist can only devote a *majority* of his professional time to *one* specialty." *Id.* at 560 (emphasis in original).

Here, the purported malpractice arises from the interpretation of spine and hip films, which falls within the realm of two radiology specialties. The specialty requirement "tied to the . . . occurrence of the alleged malpractice" could include either diagnostic radiology or neuroradiology, depending on the qualifications of the physician who read the films. *Ante* at 2. Under the circumstances presented in this case, the two specialties qualify as closely related; indeed, they implicate interchangeable professional skills. Because the interpretation of spine and hip films fell within the intersection of diagnostic and radiology and neuroradiology, either constituted a relevant specialty.

Although Parnes and Bhimani share matching board certifications and virtually identical practice experience, the majority concludes that a mathematical calculation disqualifies Parnes from offering testimony in this case. In the majority's estimation, because Parnes "did not spend more than 50 percent of his professional time practicing the one relevant specialty of general diagnostic radiology," he cannot meet the statutory condition that a specialist has "devoted a majority of his or her professional time to … [t]he active clinical practice" of the specialty practiced by the defendant "at the time of the occurrence that is the basis for the action." *Ante* at 3; MCL 600.2169(1)(a) and (b). The Legislature incorporated in MCL 600.2169(b) a 50-percent practice requirement as a second indicator of a proposed expert's familiarity with the standard of care. In addition to sharing the same board certification, the proposed expert must also have regular, hands-on experience in the medical field practiced by the defendant *at the time of the alleged malpractice*. As a simple measure of experience within a medical discipline, the Legislature established a 50-percent rule; the proposed expert must devote at least half his or her professional efforts to the specialty engaged in by the defendant at the time of the "occurrence" giving rise to the case. § 2169(a), (b)(*i*). A physician who spends half his time in a particular specialty likely has familiarity with the standard of care governing professional conduct in that field.

With respect to the majority's statement, "It is not disputed that diagnostic radiology is the one most relevant specialty involve here," I respectfully submit that the majority has mischaracterized plaintiff's position in this case. *Ante* at 2. At the hearing on Bhimani's motion for summary disposition, plaintiffs' counsel insisted that "there's a lot of overlapping" between the two fields, and explained that "when a radiologist is looking, say, at a spine film, there's a merging there because, you know, you've got nerves in the spine, you've got bones in the spine." Because the professional conduct at issue here falls within the realms of both neuroradiology and diagnostic radiology, the 50-percent calculus reasonably applies to *either* discipline. Stated differently, when interpreting images of the spine and immediately surrounding structures, a physician certified in both diagnostic radiology and neuroradiology engages in professional conduct implicating equally two professional disciplines. Under the circumstances presented

here, the specialties are intimately related, and both are relevant.[3] Because Parnes devotes at least half his professional efforts to neuroradiology, I would hold that the text of MCL 600.2169(1)(b) sanctions Parnes's eligibility to testify in this case.

My analysis also comports with the Legislature's intent. In *McDougall v Schanz*, 461 Mich 15, 24-25; 597 NW2d 148 (1999), the Supreme Court explained that MCL 600.2169(1) "operates to preclude certain witnesses from testifying solely on the basis of the witness' lack of practice or teaching experience in the relevant specialty." In a footnote, the Supreme Court quoted the legislative history: "'This proposal is designed to make sure that expert witnesses actually practice or teach medicine. In other words, to make sure that experts will have firsthand practical expertise in the subject matter about which they are testifying.'" *Id*. at 25 n 9. Parnes lacked neither training nor recent practice experience in interpreting spine and hip films. Regardless whether the mathematical calculation applies to time spent in diagnostic radiology or neuroradiology, Parnes's board certifications and regular practice experience equip him with firsthand knowledge of the standard of care applicable to Bhimani's interpretation of Johnson's spine and hip films. Consequently, I would reverse the circuit court's grant of summary disposition to Bhimani.

/s/ Elizabeth L. Gleicher

[3] In contrast, the plaintiff's expert in *Hamilton*, 476 Mich at 556, devoted the majority of his professional time to the practice of an unrelated and irrelevant specialty.