

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW BONDIE,

Plaintiff-Appellant,

v

CYNTHIA RUBERT, M.D.,
CYNTHIA RUBERT, M.D., P.C., and
WEST BRANCH REGIONAL MEDICAL
CENTER.

Defendants-Appellees.

UNPUBLISHED

May 3, 2011

No. 295832

Ogemaw Circuit Court

LC No. 06-656083-NH

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from the trial court's order striking plaintiff's expert witness and granting summary disposition to defendants. We affirm.

On October 10, 2004, plaintiff was admitted to defendant medical center after sustaining injuries in a car accident. The injuries included a closed-head injury, nerve injury, multiple fractures, an ankle sprain, a shoulder contusion, and hand injuries. During plaintiff's eight-day stay he was treated by defendant Dr. Cynthia Rubert. Dr. Rubert treated many of plaintiff's injuries; the treatment included performing surgery and treating plaintiff's hand injuries during both his in-patient stay and follow-up care. Dr. Rubert eventually referred plaintiff to a hand specialist for evaluation. On December 21, 2004, plaintiff's right-hand index finger was amputated. Plaintiff alleged that defendants' actions and omissions aggravated and exacerbated the injuries to his right index finger, leading to the amputation.

Plaintiff's proposed expert concerning the proper standard of care was a board-certified orthopedic surgeon who had an additional certification in hand surgery, a subspecialty of orthopedic surgery. Plaintiff's expert devoted approximately 70% of his professional practice to sports injuries and hand surgery and devoted the remaining 30% of his professional time to joint replacement and general orthopedics. Dr. Rubert is a board-certified orthopedic surgeon, but does not hold any additional certifications in hand surgery.

The trial court determined that plaintiff's expert did not meet the statutory requirements for time spent in the practice or instruction of Dr. Rubert's specialty. The trial court struck plaintiff's only standard-of-care expert and granted summary disposition to defendants.

We review de novo a trial court's decision on a motion for summary disposition. *Gonzalez v St John Hosp & Med Ctr*, 275 Mich App 290, 294; 739 NW2d 392 (2007). We also review de novo questions of statutory interpretation. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). A trial court's decision regarding the qualifications of a proposed expert witness is reviewed for an abuse of discretion. *Id.* "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id.*

"In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury." *Gonzales*, 275 Mich App at 294. For an expert to be qualified to testify on behalf of a defendant regarding the applicable standard of care, that expert's qualifications must match the defendant's specialty qualifications, and a majority of the expert's professional time (whether in clinical practice or instruction) must be devoted to the same health profession as the defendant's. MCL 600.2169(1).

Specifically, MCL 600.2169(1) provides:

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 professional school or accredited residency or clinical research program in the same specialty.

"[A] 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified." *Woodard*, 476 Mich at 561. A specialist is "a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice." *Id.*, quoting *Dorland's Illustrated Medical Dictionary*. This definition makes clear that it is not

necessary for a physician to have specific advanced training and certification to be considered a specialist. See *id.* at 561-562.

There is no dispute that hand surgery is a specialty because it is a branch of surgery in which one can become board-certified. The determinative question in this case is whether Dr. Rubert was practicing as a specialist in hand surgery at the time she treated plaintiff's hand injuries. Indeed, if she was practicing instead as a general orthopedic surgeon, then plaintiff's proposed expert would be inadequate, considering that he did not devote enough time to general orthopedic surgery to satisfy the statutory requirement. As noted in *Kiefer v Markley*, 283 Mich App 555, 558; 769 NW2d 271 2009, "[t]he 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."

Orthopedic surgery is a broad specialty that includes the treatment of hands. We conclude that Dr. Rubert was practicing within her specialty as a board-certified orthopedic surgeon when she treated defendant for multiple injuries, including the hand injuries he sustained in the accident. While hand surgery does have its own specialty, that does not mean that Dr. Rubert was practicing outside of her specialty as an orthopedic surgeon when she treated plaintiff's injured hand. Because Dr. Rubert was practicing as a general orthopedic surgeon when she treated plaintiff for multiple injuries, the standard of care for a board-certified orthopedic surgeon must be established by an expert who meets both the statute's specialty-matching and practice/instruction requirements for an orthopedic surgeon. Plaintiff's proposed expert did not meet the practice/instruction requirement of the statute.

The trial court's decision to exclude plaintiff's expert was within the principled range of outcomes and was not an abuse of discretion. Accordingly, the trial court's grant of summary disposition was also proper.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Kurtis T. Wilder