STATE OF MICHIGAN

COURT OF APPEALS

ANTONIO SELLIMAN,

Plaintiff-Appellee,

v

JEFFREY J. COLTON, M.D., JEFFREY J. COLTON, PLLC, and COLTON CENTER,

Defendants-Appellants.

UNPUBLISHED
May 20, 2021

No. 352781
Oakland Circuit Court
LC No. 2018-167068-NH

Before: MARKEY, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

In this interlocutory appeal, defendants appeal by leave granted[1] the order denying their motion to strike plaintiff, Antonio Selliman's, expert witness and partially denying their motion for summary disposition. For the reasons stated in this opinion, we reverse and remand for further proceedings.

I. BASIC FACTS

This case stems from Selliman's rhinoplasty surgical procedures that defendant Dr. Jeffrey J. Colton, M.D., performed from 2012 through 2017. Selliman alleges that the surgeries caused a nasal deformity to develop, which additional surgical procedures failed to correct. He filed this action against Dr. Colton, his corporation, and his medical facility. Dr. Colton is board-certified in otolaryngology, or "ear, nose, throat" (ENT), which involves surgery and treatment of conditions related to the head and neck. He is also board-certified in facial plastic and reconstructive surgery. Selliman's proposed standard-of-care expert, Dr. Michael J. Armstrong, holds the same certifications.

[1] *Selliman v Colton*, unpublished order of the Court of Appeals, entered May 27, 2020 (Docket No. 352781).

Defendants filed a motion to strike Dr. Armstrong's testimony and for summary disposition. They argued that the specialty at issue is facial plastic and reconstructive surgery and that Dr. Armstrong did not spend the majority of his professional time practicing facial plastic and reconstructive surgery in the year immediately preceding the alleged malpractice as required under MCL 600.2169(1)(b). Defendants relied on Dr. Armstrong's deposition testimony stating that he devoted 90 percent of his practice to ENT and 10 percent of his practice to facial plastic and reconstructive surgery. They argued that the fact that there may be some overlap between ENT and facial plastic and reconstructive surgery was irrelevant because an expert is statutorily required to have spent the majority of his or her professional time practicing the one most relevant specialty.

Selliman opposed defendants' motion, arguing that Dr. Armstrong was qualified under MCL 600.2169. Selliman also disputed that his treatment had been solely cosmetic because his condition had resulted in functional issues and difficulty breathing. He disputed that facial plastic and reconstructive surgery was the one most relevant specialty, but he argued that, even if it were, Dr. Armstrong's testimony should not be stricken. Selliman argued that defendants had misconstrued Dr. Armstrong's testimony and that Dr. Armstrong had actually testified that within his facial plastic and reconstructive surgery practice 10 percent of his surgeries were for cosmetic purposes and 90 percent were for functional or medical purposes. Selliman maintained that, reading Dr. Armstrong's deposition testimony as a whole, Dr. Armstrong was qualified to testify under MCL 600.2169(1).

The trial court denied defendants' motion. Because Dr. Colton averred in his affidavit that the procedures at issue were cosmetic in nature, the court opined that the most relevant specialty was facial plastic and reconstructive surgery.[2] The court also determined, however, that Dr. Armstrong's testimony was unclear as to whether he devoted 90 percent of his practice to ENT and 10 percent to facial plastic and reconstructive surgery or whether 10 percent of his facial plastic and reconstructive surgery practice was cosmetic in nature and 90 percent was functional or medical in nature. The court opined that portions of Dr. Armstrong's testimony were "seemingly contradictory," so it denied defendants' motion to strike Dr. Armstrong as an expert witness.

II. EXPERT WITNESS QUALIFICATIONS

A. STANDARD OF REVIEW

Defendants argue the trial court erred when it denied defendants' motion to strike. This Court's interpretation of MCL 600.2169(1) is reviewed de novo. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). We review for an abuse of discretion "a trial court's rulings concerning the qualifications of a proposed expert witness to testify." *Id*. "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id*.

[2] Although Selliman challenged the accuracy of Dr. Colton's averment that the procedures were solely cosmetic, he did not present any documentary evidence to rebut it.

B. ANALYSIS

In a medical malpractice action, the plaintiff must prove: "(1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Cox v Hartman*, 322 Mich App 292, 299; 911 NW2d 219 (2017) (quotation marks and citation omitted). "Failure to prove any one of these elements is fatal." *Id.* (quotation marks and citation omitted). Generally, "expert testimony is necessary in a malpractice action to establish the applicable standard of care and the defendant's breach of that standard." *Id.* at 300. "The proponent of the evidence has the burden of establishing its relevance and admissibility." *Elher v Misra*, 499 Mich 11, 22; 878 NW2d 790 (2016).

An expert testifying regarding the standard of care must meet the requirements of MCL 600.2169(1). *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016). MCL 600.2169(1) provides:

> (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.

In *Woodard*, 476 Mich at 560, our Supreme Court held that an expert "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 . . . ." "That is, if a defendant physician is a specialist, the . . . expert witness must have specialized in the same specialty as the defendant physician at the time of the alleged malpractice." *Id.* at 560-561. Here, it is undisputed that, as required by MCL 600.2169(1)(a), Dr. Armstrong's qualifications "match" Dr. Coltron's qualifications.

As it relates to the requirement that the expert devote the majority of his or her professional time to practicing or teaching a specialty, our Supreme Court has stated:

> [O]ne cannot devote a "majority" of one's professional time to more than one specialty. Therefore, 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. [*Woodard*, 476 Mich at 566.]

The term "majority" in MCL 600.2169(1)(b) requires that an expert "spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice." *Kiefer v Markley*, 283 Mich App 555, 559; 769 NW2d 271 (2009).

In this case, Dr. Armstrong averred in an affidavit that "[d]uring the one year period prior to the treatment involved in this case I devoted the majority of my professional time to the active clinical practice" of ENT and facial plastic and reconstructive surgery. At that time, he did not offer a breakdown to indicate whether the majority of his professional time was spent on ENT or on facial plastic reconstructive surgery. Subsequently, during his deposition, Dr. Armstrong testified as follows:

> *Q.* Can you give me an approximation of the percentage of your professional time that's devoted to ENT, general ENT, as opposed to --
>
> *A.* Excluding what?
>
> *Q.* As opposed to facial plastic and reconstructive surgery.
>
> *A.* There are certainly medical conditions that overlap quite a bit. A lot of my nasal functional surgeries would fall into the category of facial plastics. You know, I would say that the practice might be 10 percent cosmetic, 90 percent functional; but rhinoplasty is one of the more common procedures that I do.
>
> *Q.* Within your cosmetic practice?
>
> *A.* Or within my functional nasal practice. They're not all cosmetic.
>
> *Q.* Okay. So can you give me an approximation of currently the breakdown of your practice, general otolaryngology versus facial plastic and reproductive surgery?
>
> *A.* Reconstructive.
>
> *Q.* Reconstructive surgery; sorry. That didn't make sense.
>
> *A.* I've not looked at it recently; but as I said, 10 percent maybe, in the facial plastic realm and 90 percent would be considered more medically ENT.
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> * * *
>
> *Q.* Okay. Same set of questions, 2015 to 2017: Was your practice then approximately 90 percent otolaryngology and 10 percent facial plastic and reconstructive surgery?

A. Yes.

Q. Okay. And the facial plastic and reconstructive surgery would include cosmetic rhinoplasties?

A. Yes.

Based upon the above testimony, it is clear that Dr. Armstrong unequivocally testified that 10 percent of his practice consists of facial plastic and reconstructive surgery procedures and 90 percent of his practice consists of ENT procedures. Notwithstanding plaintiff's argument that Dr. Armstrong's testimony on this point related to the proportionality of functional versus cosmetic rhinoplasties, from the context of the questions, it appears that defendants sought answers related to the proportionality of the whole of Dr. Armstrong's practice—ENT versus facial plastic and reconstructive surgery. And, though Dr. Armstrong responded to defendants' questions about the proportionality of his practice by using the terms "functional" and "cosmetic," Dr. Armstrong understood and used the term "functional" to equate with his ENT practice, while his facial plastic and reconstructive surgery practice was for cosmetic services.[3] Thus, Dr. Armstrong's testimony unequivocally shows he did not spend a majority of his time in facial plastic and reconstructive surgery, the relevant specialty. As a result, the trial court abused its discretion by denying the motion to strike his testimony.

Moreover, although Dr. Armstrong testified that there is some overlap regarding rhinoplasty procedures, the unrefuted evidence shows that Selliman's procedures were cosmetic, so facial plastic reconstructive surgery is the most relevant specialty. As the trial court recognized, defendants presented Dr. Colton's affidavit stating that Selliman presented to him for aesthetic rhinoplasty revision procedures and that Selliman's treatment did not involve general ENT

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[3] Throughout his testimony, Dr. Armstrong understood that the procedure at issue, a cosmetic rhinoplasty, fell under the practice of FPRS. For example:

Q. Okay. Same set of questions, 2015 to 2017: Was your practice then approximately 90 percent [ENT] and 10 percent facial plastic and reconstructive surgery?

A. Yes.

Q. Okay. And the facial plastic and reconstructive surgery would include cosmetic rhinoplasties?

A. Yes.

Q. What other types of cosmetic procedures do you do?

A. Facelifts; eyelids; Botox; Radiesse, . . . laser treatment; and skin cancer repairs.

procedures. Selliman presented no evidence rebutting Dr. Colton's affidavit. In addition, Dr. Armstrong testified that Selliman suffered no medical complications as a result of Dr. Colton's surgeries, and that his only complaint was the appearance of his nose. He also testified as follows:

> *Q*. Dr. Colton's not performing a surgery on [Selliman's] nose to fix some medical condition; he's doing it because [Selliman] is telling him he wants his nose to look a certain way, right?
>
> *A*. Right.
>
> *Q*. He wants it narrower, and he wants it lower, right?
>
> *A*. Right.

Therefore, the trial court correctly determined that facial plastic and reconstructive surgery is the most relevant specialty.[4] Consequently, while Selliman directs this Court to the overlap between rhinoplasty procedures performed for medical or functional reasons and procedures performed for cosmetic reasons, and although he cites caselaw pertaining to overlapping specialties, the issue is not relevant in this case because Selliman's procedures were cosmetic, thereby making the one most relevant specialty facial plastic and reconstructive surgery, not ENT.

III. MOTION TO AMEND WITNESS LIST

In his brief on appeal, Selliman argues that if this Court reverses the trial court's order denying the motion to strike, we should find that the trial court also erred by denying his motion to amend the witness list. Selliman did not file a cross-appeal under MCR 7.207. Although an appellee need not file a cross-appeal to advance alternative reasons rejected by a trial court in support of the court's judgment, an appellee cannot obtain greater relief or a decision more favorable than rendered by the lower court without taking a cross-appeal. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Because Selliman seeks to expand the scope of relief awarded by the trial court and he did not file a cross-appeal, he is not entitled to this requested relief. In any event, our grant of leave was limited to the issues raised in the application, none of which involved the propriety of the trial court's decision to not permit Selliman to amend his witness list.

[4] Although Selliman disputes defendants' contention that facial plastic and reconstructive surgery is the one most relevant specialty, he provides no substantive argument in support of that assertion. "A party cannot simply assert an error or announce a position and then leave it to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012) (quotation marks and citation omitted).

Reversed and remanded for further proceedings consistent with this opinion. Defendants may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Brock A. Swartzle