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STATE OF MICHIGAN

IN THE SUPREME COURT

ANTONIO SELLIMAN,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

SC No. 163226
COA No. 352781
LC No. 18-167068-NH
(Oakland Circuit Court)

DEFENDANTS-APPELLEES' APPENDIX TO BRIEF ON APPEAL

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2005 WL 3465389 (Mich.) (Appellate Brief)
Supreme Court of Michigan.

Johanna WOODARD, Individually and as Next Friend of Austin D. Woodard, a Minor, and Steven Woodard, Plaintiffs-Appellees and Cross-Appellants,

v.

Joseph R. CUSTER, M.D., Defendant-Appellant and Cross-Appellee,

and

Michael K. Lipscomb, M.D., Michelle M. Nypaver, M.D., and Mona M. Riskalla, M.D., Defendants;

Johanna Woodard, Individually and as Next Friend of Austin D. Woodard, a Minor, and Steven Woodard, Plaintiffs-Appellees, and Cross-Appellants,

v.

University of Michigan Medical Center, Defendant-Appellant and Cross Appellee.

Nos. 124994, 124995.
October 17, 2005.

COA: No. 239868
COA: No. 239869
Appeal from the Michigan Court of Appeals Meter, P.J., and Talbot and Borrello, JJ.

Brief of Amicus Curiae American Board of Medical Specialties in Support of Defendants-Appellants and Cross-Appellees

Max R. Hoffman, Jr. (P23199), M. Brian Cavanaugh (P62127), Debra A. Geroux (P50955), Butzel Long, 110 W Michigan Avenue, Ste. 1100, Lansing, Michigan 48933, (517) 372-6622, Attorneys for Amicus Curiae, American Board of Medical Specialties.

William K. McVisk, Johnson & Bell, Ltd., 55 East Monroe Street, 41st Floor, Chicago, Illinois 60603, (312) 984-0229, Co-Counsel for Amicus Curiae, American Board of Medical Specialties.

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***iv** *INDEX OF ATTACHMENTS*

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***v** *STATEMENT OF QUESTIONS PRESENTED*

1. What are the appropriate definitions of the terms ""specialty'' and ""board certified'' as used in MCL § 600.2169(1)(a)?

2. Whether either ""specialty'' or ""board certified'' includes subspecialties or certificates of special qualification?

3. Whether MCL § 600.2169 requires an expert witness to match all specialties, subspecialties, and certificates of special qualifications that a defendant may possess, or whether the expert witness need only match those that are relevant to the alleged act of malpractice?

***1** *STATEMENT OF INTEREST OF AMICUS CURIAE*

The American Board of Medical Specialties (""ABMS'') is the umbrella organization for the 24 approved medical specialty boards in the United States. *See* Affidavit of Stephen H. Miller, M.D., M.P.H., attached at Tab 1 at „3. The ABMS is a nonprofit organization, established in 1933, and serves to coordinate the activities of its Member Boards and to provide information to the public, the government, the profession and its Members concerning issues involving specialization and certification in medicine. *Id* at „3. The ABMS' mission is to maintain and improve the quality of medical care in the United States by assisting the Member Boards in their efforts to develop and utilize professional and educational standards for the evaluation and certification of physician specialists. *Id* at „3.

The purpose of certification is to give assurance to the public that physicians certified in a specialty have the education and training needed by a specialist in that field of medicine and that they have demonstrated that they possess the necessary knowledge and skills of the specialty. *Id* at „5.

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Certification by an ABMS Member Board is voluntary, but today most physicians seek to be certified. Nearly 90% of all physicians are certified by an ABMS Member Board. *Id* at „6. The 24 ABMS Member Boards each offer at least one " "primary'' or general certificate in specialties such as internal medicine, pediatrics, surgery and neurological surgery, and also certify physicians in numerous subspecialties, such as cardiology, infections disease, pediatric cardiology, pain medicine and pediatric surgery.

Most physicians obtain primary certificates for a specialty, but others choose to focus their practice on one area within a specialty by pursuing additional training and taking additional examinations in a subspecialty. For example, a specialist in internal ***2** medicine may choose to focus primarily on diseases of the heart and, after completing their training to become an internist, take additional training in cardiology. While a physician need not be certified in a particular subspecialty in order to practice in that area, physicians who tend to focus their practice in a particular subspecialty and develop an expertise in that area often seek certification in that subspecialty. *Id* at „7. Certification in a subspecialty therefore connotes the achievement of a level of expertise and experience in that subspecialty in addition to the experience and expertise of a physician trained only in the primary specialty. *Id.*

ABMS Member Boards provide both primary certificates and subspecialty certificates. However, the subspecialty designation does not imply that the certification is any less valid than the primary certification. Indeed, for an ABMS Member Board to offer a subspecialty certificate, the Member Board must establish that the subspecialty is a distinct and important area of specialization, and that the Board requires both rigorous training and testing for applicants to be certified. *Id* at „8.

The ABMS and its Member Boards have a strong interest in promoting the recognition of each subspecialty as a distinct and unique area in which physicians receive specialized and extensive training and undergo rigorous testing in order to become certified. *Id* at „9. Where, as here, a testifying expert is required by law to have the same relevant board certification as the party or expert against whom he is testifying, this requirement should encompass board certification in relevant subspecialties as well. *Id* at „10.

***3** *SUMMARY OF ARGUMENT*

In enacting MCL §600.2169, the legislature did not define the terms " "specialty'' or ""board certified.'' However, the term ""board certified'' has a well recognized meaning within the medical and legal community and refers to certification by one of the 24 Member Boards of the ABMS. ABMS Member Boards certify physicians in both general specialties and in subspecialties, both of which are equally valid markers for specialized knowledge of a distinct medical field.

If the requirements of MCL §600.2169(1)(a) are to be meaningful, then the terms ""board certified'' and ""specialty'' should be given the meaning ascribed to them by the boards who are charged with the responsibility of certifying physicians, and which have been recognized in numerous states as setting the standards for physician specialty certification. ABMS Member Boards grant certificates in both primary certification specialties and in subspecialties within the field of the primary specialties. The term ""board certified'' applies equally to those physicians certified in a primary specialty and those who attain certification in one of the ABMS recognized subspecialties, because the requirements to obtain subspecialty recognition are as rigorous as the requirements for a primary certificate. Likewise, ABMS requirements for recognition of a primary specialty are essentially the same as its requirements for a subspecialty. Therefore, ""board certified'' and " "specialty'' as used in MCL § 600.2169(1)(a) should include certification in a primary specialty as well as certification in any one of the ABMS recognized subspecialties.

Additionally, MCL § 600.2169 does not require an expert witness to match all specialties, subspecialties, and certificates of special qualifications that a defendant may ***4** possess. The statute requires an expert witness to match only the specialty which encompassed the treatment from which the alleged malpractice arose.

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ARGUMENT

I. MCL §600.2169 Should Be Construed To Require Board Certification In The Same Subspecialty As The Defendant Physician As Well As The Same General Specialty As The Defendant Physician.

Under Michigan law, to establish that a physician has committed medical malpractice, a plaintiff must establish that the physician deviated from the standard of care applicable to the specialty in which the physician was practicing. MCL 600.2912a(b). As this Court held, the ""standard of care for a specialist should be that of a reasonable specialist practicing medicine in the light of present day scientific knowledge.'' *Naccarato v. Grob,* 384 Mich. 248, 180 N.W.2d 788 (1970). This means that a specialist in cardiology, when treating a heart condition, is expected to have the knowledge and skills of a specialist in diseases of the heart, while a specialist in internal medicine, whose practice is more general, would be expected to have the knowledge and skills of those practicing in general internal medicine, but would not be required to have the same specialized knowledge of the heart as a cardiologist.

Additionally, a specialist is held to a national standard of care, while a generalist is held to the standards of the local community. As one court explained:

> The reliance of the public upon the skills of a specialist and the wealth and sources of his knowledge are not limited to the geographic area in which he practices. Rather his knowledge is a specialty. He specializes so that he may keep abreast. Any other standard for a specialist would negate the fundamental expectations and purpose of a specialty.

Jalaba v. Borovy, 206 Mich.App. 17, 520 N.W.2d 349 (1994).

As a corollary to this rule requiring physicians treating patients to comply with the standard of care applicable to their specialty, Michigan law also requires experts ***5** testifying about the standard of care to specialize in the same specialty as the defendant physician. MCL §600.2169(1)(a). This statute also specifies that if the defendant physician is board certified in a specialty, the expert who testifies against the defendant to establish the standard of care must also be board certified. These provisions require that " "proof of malpractice "emanate from sources of reliable character as defined by the legislature.' '' *McDougall v Schanz,* 461 Mich 15; 597 NW2d 48 (1999).

In enacting MCL 600.2912a(b) and MCL §600.2169, the legislature did not define the terms ""specialty'' and ""board certified.'' Given the legislation's purpose of establishing standards of reliability for sources of the proof of malpractice, it makes sense that these terms should be used in the manner in which they are used by most of the medical profession as determined by the bodies the medical profession has entrusted to establish the standards for board certification and specialization.

ABMS is the organization recognized by most of the medical profession as establishing the standard for board certification of specialists. ABMS, a non-profit organization established in 1933, is the umbrella organization for the 24 approved medical specialty boards in the United States. ABMS coordinates the activities of its Member Boards and provides information to the public, the government, the profession and its Members concerning issues involving specialization and certification in medicine. ABMS' mission is to maintain and improve the quality of medical care in the United States by assisting its Member Boards in their efforts to develop and utilize professional and educational standards for the evaluation and certification of physician specialists.

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The governing body of each ABMS Member Board is comprised of specialists qualified in the specialty represented by the board. The individual Member Boards ***6** evaluate physician candidates who voluntarily seek certification by an ABMS Member Board. To accomplish this function, the Member Boards determine whether candidates have satisfactorily completed approved residency training programs, evaluate candidates with comprehensive examinations, and certify those candidates who have satisfied the boards' requirements. ABMS Member Boards also offer recertification for qualified diplomates at intervals of seven to ten years.

During the ten-year period from 1994 through 2003, ABMS Member Boards issued general certificates to 241,494 physicians, and 80,224 subspecialty certificates. In 1999, nearly 90% of all physicians in the United States were certified by an ABMS Member Board.

The reason so many physicians voluntarily choose to become board certified by ABMS Member Boards is that ABMS board certification assures the public that a physician specialist has successfully completed both a rigorous training program and comprehensive examinations designed to assess the knowledge, skills, and experience required to provide quality patient care in that specialty.

ABMS Member Boards require applicants for board certification to establish that they have completed a specified period of postgraduate medical training in their specialty from an approved residency program. To be certified in a primary specialty area, physicians must complete three or more years of training from a residency program approved by the Accreditation Council for Graduate Medical Education (''ACGME'') before becoming eligible to take the certification examination. Each board then administers written and, for some boards, oral examinations, to determine whether the applicant has successfully mastered.

***7** As a result of the rigor of certification requirements by ABMS Member Boards and the acceptance of ABMS certification within the medical profession, the term ''board certification'' has come to mean certification by an ABMS Member Board. As one court noted, '' ''Board certification' is a term of art that the ABMS popularized among physicians and has come to designate a certain level of qualification.'' *American Academy of Pain Management v Joseph,* 353 F3d 1099, 1104 (CA 9 2004). As the United States Supreme Court noted:

Board certification of specialists in various branches of medicine, handled by the 23 member boards of the American Board of Medical Specialties is based on various requirements of education, residency, examinations and evaluations.... The average member of the public does not know or necessarily understand these requirements, but board certification nevertheless has ''come to be regarded as evidence of skill and proficiency of those to whom they [have] been issued.''

Peel v Attorney Registration & Disciplinary Comm'n of IL, 496 US 91, 102 n11; 110 S Ct 2281; 110 LEd2d 83 (1990). [1] Several states prohibit physicians from advertising that they are ''board certified'' unless their certification is from an ABMS Member Boards or a board deemed equivalent by the state's licensing authorities. *E.g.,* Cal Bus & Prof Code §651(h)(5)(B); FSA §458.3312.FSA §458.3312.

When the legislature enacted the requirement that experts be ''board certified'', it used a term that is synonymous with certification by an ABMS Member Board. Likewise, when construing the term ''specialty'' in MCL §600.2169, this Court should use the term as it is used by ABMS Member Boards, which have the responsibility for determining the areas of medicine that represent a distinct body of knowledge and warrant designation as a specialty and for determining the qualifications for physicians who can be certified as specialists in each area. ABMS and its Member Boards recognize ***8** the importance and validity of both general certification and subspecialty certification because both general specialties and subspecialties represent a distinct body of knowledge, and certification for both requires extensive training and rigorous testing.

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ABMS limits the number of new specialty boards that can be approved by requiring that the new board establish: (1) that it is based on new concepts in medical science; (2) that the specialty represents a distinct and well-defined area of medical practice, based on a substantial advance in medical science, and (3) that the new board requires its diplomates to have acquired capabilities and demonstrated knowledge in the field and that there is a plan for preparatory programs in graduate medical education approved by ACGME in the field. *Eleventh Revision of Essentials for Approval of Examining Boards in Medical Specialties.*

Similarly, for an ABMS Member Board to offer a subspecialty certification, the board must establish that: (1) there is a body of scientific medical knowledge underlying the area which is in large part distinct from, or more detailed than, that of other areas in which certification is offered; and (2) applicants for certification possess appropriate credentials, including certification by approved primary specialty board, completion of specified education and training or experience in the subspecialty field. ABMS Bylaws, §7.3. Subspecialty certification training programs must be at least one year in duration and must incorporate a specific and identifiable body of knowledge. ABMS Bylaws, §7.2(d). These programs must be associated with a residency accredited by the ACGME. ABMS Bylaws, §7.2(c).

Thus, whether a certificate is for a general specialty or a subspecialty, it reflects advanced knowledge in a distinct and identifiable body of medical knowledge and ***9** requires the diplomate to have completed substantial postgraduate medical training from an ACGME approved residency program before sitting for rigorous examinations. Diplomates in both general and subspecialty areas are equally entitled to be called specialists.

There is no requirement that a physician be certified in a subspecialty area to offer medical services related to the subspecialty, just as there is no requirement that a physician be board certified in any specialty area to offer services encompassed within the specialty. ABMS policy provides that in " "making the determination of what privileges a practitioner will be permitted to exercise, medical specialty certification or subcertification should be considered as only one of several valid and important criteria.'' *The Delineation of Clinical Privileges,* Policy adopted by ABMS Assembly, March 18, 1977.

Nevertheless, ABMS does recognize that subspecialty certification connotes a particular expertise and degree of experience in the subspecialty area:

> Specialty certification in a subspecialty field is of significance for physicians preparing for careers in teaching, research, or practice restricted to that field. Such special certification is a recognition of exceptional expertise and experience ....

(The Significance of Certification in Medical Specialties: A Policy Statement, Adopted by the ABMS Assembly 9/18/75; Revised 9/23/93) (emphasis added).

The failure to recognize that subspecialty certification is equally as important as specialty certification for purposes of MCL §600.2169(1)(a) would undermine the purposes of the statute, to the detriment of both plaintiffs and defendants. Enabling general specialists to testify as to the standard of care applicable to those with more specific and advanced training could result in a lower standard of care being applied to ***10** subspecialists because the experts testifying about the standard of care may not be familiar with the medical developments, tests and procedures that would be taught to subspecialists. It would also defeat the statute's purpose of ensuring that the proof of malpractice '"emanates from sources of reliable character as defined by the legislature.'' *McDougall v Schanz,* 461 Mich 15; 597 NW2d 48 (1999).

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Under MCL § 600.2169, claims against a physician that involve a particular specialty or subspecialty should be evaluated with the aid of an expert who has achieved the same level of expertise and experience in that particular specialty or subspecialty as the defendant physician. There is no justification for excluding subspecialties from this requirement.

II. MCL § 600.2169 Requires An Expert Witness To Be Board Certified In The Specialty Or Subspecialty In Which The Defendant Physician Is Certified And Which Encompasses The Medical Care Provided.

ABMS supports the position of Defendants-Appellants that board certification is required in the same specialty or subspecialty that was being practiced at the time of the claimed malpractice if the party against whom the expert is testifying is board certified in that specialty or subspecialty. Certification in specialties or subspecialties that are not relevant to the issue involved in the malpractice claim at issue should not be considered when determining whether an expert is qualified under MCL § 600.2169. This is consistent with the purpose of the statute, which is to ensure that the expert witness testifying against the defendant has attained the same level of expertise as the defendant in the area of medicine that is at issue.

CONCLUSION

For the all of the reasons set forth herein, ABMS respectfully supports Defendants-Appellants' position that the word "'specialty'' as used in MCL § 600.2169 ***11** includes any subspecialty recognized by any of the 24 members of the ABMS in which a physician may seek certification.

Appendix not available.

Footnotes

1 At the time of the *Peel* decision, there were only 23 ABMS Member Boards.

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