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STATE OF MICHIGAN
IN THE SUPREME COURT

ANTONIO SELLIMAN,

Plaintiff-Appellant,

vs.

JEFFREY J. COLTON, MD,
JEFFREY J. COLTON, PLLC, and
THE COLTON CENTER,

Defendants-Appellees.

Supreme Court Case No. 163226
Court of Appeals Case No. 352781
Lower Court Case No. 18-167068-NH
Hon. Jeffrey S. Matis
Oakland County Circuit Court

PLAINTIFF-APPELLANT'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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CERTIFICATE OF SERVICE

***** ORAL ARGUMENT REQUESTED *****

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ARGUMENT

I. JURISPRUDENTIALLY SIGNIFICANT ISSUES ARE RAISED BY THIS APPLICATION

Defendant argues Plaintiff has failed to establish the need for Supreme Court review, asserting that "there is *consistency* of ruling by this Court and by the Court of Appeals on the 'one most relevant specialty' rule of *Woodard [v Custer,* 476 Mich 545; 719 NW2d 842 (2006)] and, more precisely here, that overlapping specialties do not count towards the majority requirement of §2169(1)(b)(i)." **Answer to Application, pg. 12** ***(****emphasis original)* Defendant claims Plaintiff's arguments in urging the requested review are based upon "Plaintiff's faulty *interpretation* of certain Court of Appeals opinions". ***Id.*** To the contrary, Plaintiff relies on the interpretations of multiple Court of Appeals judges as expressed in their various opinions, a sampling of which is recounted below.

In *Kiefer v Markley,* 283 Mich App 555; 769 NW2d 271 (2009), a panel of the Court of Appeals affirmed the trial court's disqualification of plaintiff's expert based on testimony that he spent a plurality, rather than a majority (30 to 40 percent as opposed to 50 percent) of his time in the practice of hand surgery. *Id.* at 557, 559. Despite their holding, the *Kiefer* majority (Judges Whitbeck and Owens) noted "this is not a result we think the Legislature intended." *Id.* at 560. The Court believed the similarity in certification between the defendant and plaintiff's expert, coupled with the fact that plaintiff's expert spent more than 50 percent of his time in the area of hand surgery and the closely related area of reconstructive surgery of other extremities, should qualify him as an expert, yet they were compelled to affirm the disqualification by existing caselaw. *Id.* at 559

Two years later, in *Johnson v Bhimani,* Docket No. 292327, rel'd February 10, 2011 (unpublished), a panel of the Court of Appeals, applying *Woodard, Hamilton v Kuligowski,* 476

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Mich 545; 719 NW2d 842 (2006), and *Kiefer*, rejected plaintiff's argument that a neuroradiologist expert was qualified to testify against a defendant practicing diagnostic radiology at the time of the alleged malpractice. **Appellant's Exhibit 11a** In a dissenting opinion, Judge Gleicher explained the absurdity that results from too close an adherence to the traditional understanding of *Woodard, Hamilton,* and *Kiefer*:

> I strongly disagree that any *meaningful* distinction between the two specialties exists in this case. In my view, Bhimani [defendant] 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.
>
> 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.
> **Appellant's Appendix pg. 000866a**

Just as the practice at issue in *Johnson* – interpreting films – fell within the realm of mutual expertise for both a neuroradiologist and a diagnostic radiologist, the practice at issue in this case – performance of a rhinoplasty procedure – falls within the realm of mutual expertise for both an otolaryngologist and a facial plastic surgeon. This dissent illustrates that the "one most relevant specialty" test of *Woodard* is logically inapplicable in some medical malpractice cases.

Later, in *Estate of Patricia E. LeBlanc v Agnone,* Docket Nos. 330330 and 330416, rel'd July 6, 2017, (unpublished), a panel of the Court of Appeals affirmed the trial court's ruling that plaintiff failed to establish their proposed expert satisfied the active clinical practice requirement of MCL 600.2169(1). **Appellant's Exhibit 11c** The defendant in *LeBlanc* was board certified in internal medicine and medical oncology. Plaintiff's proposed expert was also board certified in

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internal medicine and medical oncology, with additional certifications in numerous other specialties. While the parties agreed defendant was practicing medical oncology at the time of the alleged malpractice, plaintiff's expert expressed difficulty dividing the time he spent practicing his various specialties during confusing and at times contentious deposition testimony. The Court of Appeals thus concluded it would be improper to combine the proposed expert's time spent in medical oncology with the time spent practicing other overlapping specialties. In an opinion concurring in part and dissenting in part, Judge Ronayne Krause correctly observed that "the purpose of MCL 600.2169 is to preclude expert testimony from an underqualified expert, not from an arguably overqualified expert. Furthermore, this case serves to demonstrate how the interpretation given to the statute is not only incompatible with its plain language, in that it treats 'a majority' as synonymous with 'the majority,' but it is also incompatible with the reality of how medicine is practiced." **Appellant's Appendix pg. 000907a** Judge Ronayne Krause further found the "lack of clarity or coherence [in plaintiff's expert's testimony] is obviously the result of a cultural clash between a formality and reality." **Appellant's Appendix pg. 000908a** Essentially, the "one most relevant specialty" formulation is a legal formality at odds with the realities of the practice of medicine, as evidenced in both *LeBlanc* and the instant case.

In *Perez v Henry Ford Health System,* Docket No. 340082, rel'd December 4, 2018 (unpublished), the Court of Appeals found plaintiff's expert, who was board certified in neurology, as well as neurocritical care and vascular neurology, unqualified to testify against a defendant who was a board-certified neurologist practicing as a general neurologist at the time of the alleged malpractice. **Appellant's Exhibit 11d** Judge Shapiro dissented, concluding that because plaintiff's proposed expert "made it clear that her practice as a consulting neurologist, whether with the general medical unit or the intensive care unit, involves caring for all of a patient's neurological

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needs" the requirements of MCL 600.2169(1)(b) are satisfied. **Appellant's Appendix pg. 000922a** The dissent in *Perez,* like *Johnson*, makes it clear that a blind adherence to the "one most relevant specialty" formulation of *Woodard, Hamilton,* and *Kiefer* overlooks both common sense and the intent of the Legislature in enacting the statute. In some cases, including the instant case, no meaningful or practical distinction can be found which renders one specialty more relevant than the other for purposes of qualifying an expert witness.

That the current jurisprudence surrounding the qualification of an expert witness in a medical malpractice action needs re-examination was again encouraged by a judge of the Court of Appeals in *Higgins v Traill,* Docket No. 343664, rel'd July 30, 2019 (unpublished), **Appellant's Exhibit 12a** In a concurring opinion, Judge Gleicher wrote "*Woodard* holds that only one specialty may be practiced at a time, and only one specialty may be matched. *Id*. This case demonstrates that the 'one specialty' concept is incompatible with real life." **Appellant's Reply Appendix pg. 000015b** Judge Gleicher urged reconsideration of *Woodard*. **Appellant's Reply Appendix pg. 000010b** This sentiment was echoed by Judge Shapiro one year later in *Mallory v Beaumont Health Sys.,* Docket No. 350263, rel'd December 22, 2020 (unpublished), **Appellant's Exhibit 12b** In *Mallory,* Judge Shapiro wrote

> I concur as to Dr. Bastani because the caselaw requires me to do so. However, for the same reasons stated in Judge GLEICHER's dissent in *Higgins v Traill*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 343664), 2019 Mich. App. LEXIS 4295, I urge the Supreme Court to reconsider and clarify the rule governing medical expert matching. It has been 25 years since the medical malpractice statute was adopted and it is time we had a rule that can be readily understood and applied, particularly given the evolving nature of medical subspecialties. See e.g., *Jilek v Stockson*, 289 Mich App 291, 296-305; 796 NW2d 267 (2010), rev'd 490 Mich 961; 805 NW2d 852 (2011).
> **Appellant's Reply Appendix pg**. **000033b**

Less than a year ago, in *Estate of Horn v Swofford*, Docket No. 349522, 2020 WL 6219561 (Mich. Ct. App. Oct. 22, 2020) Judge Boonstra wrote separately to "encourage our Supreme Court

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to provide much-needed clarity in this complex area of law." **Appellant's Exhibit 13** Judge Boonstra noted that

> while this case turns largely on the Supreme Court's decision in *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006), by which we are bound, that decision featured no less than four opinions, including two concurring opinions (one of which was authored by the author of the four-Justice majority opinion) and a three-Justice dissent that maintained that it actually was the majority opinion (by virtue of the second concurrence). Moreover, this Court's unpublished decision in *Higgins v Traill*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 343664), featured a separate concurring opinion by Judge GLEICHER in which she maintained that *Woodard*'s analysis was faulty in certain respects and should be reconsidered. Although the Supreme Court subsequently denied leave to appeal in *Higgins*, it did so on an evenly-split 3-3 vote, with one Justice not participating.
> **Appellant's Reply Appendix pg. 000046b**

As illustrated above, Plaintiff does not argue for Supreme Court review based upon "faulty *interpretation* of certain Court of Appeals opinions". And Plaintiff does not misconstrue these cases, as Defendant suggests. Repeatedly, members of the Court of Appeals have explicitly encouraged this Court to reconsider and clarify expert qualification in medical malpractice cases. There is no dispute that MCL 600.2169(1) exists to ensure "experts will have firsthand practical expertise in the subject matter about which they are testifying." *McDougall v Schanz*, 461 Mich. 15, 25; 597 NW2d 148 (1999) Beginning with *Woodard*, the statute has been bastardized by a judicially created mathematical calculation to permit disqualification of an expert who holds the same board certifications, practices the same medicine, and performs the same procedure as the defendant, as is the case here. While an expert such as Dr. Armstrong, who testified that he has performed over 400 rhinoplasties, may be disqualified, another physician similarly board certified in facial plastic and reconstructive surgery who does not perform rhinoplasty but instead administers Botox injections and chemical peels would not be disqualified. For the benefit of both

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the bench and the bar in this state, this Court should grant leave to reconsider expert qualification in medical malpractice cases so that such absurdities do not continue.

II. THE COURT OF APPEALS CLEARLY ERRED IN CONCLUDING THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENDANTS' MOTION TO STRIKE BASED ON THE DEPOSITION TESTIMONY OF PLAINTIFF'S EXPERT

Review by this Court is also requested because the Court of Appeals decision is clearly erroneous. The panel concluded "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" and "the trial court correctly determined that facial plastic and reconstructive surgery is the most relevant specialty". *Selliman* at *2, *6. Respectfully, the trial court did not explicitly rule facial plastic and reconstructive surgery was the one most relevant specialty, and to the extent it implicitly did so, the determination was based on Defendants' self-serving Affidavit, which was attached not to the principle Motion, to which Plaintiff could respond, but the Reply, to which Plaintiff-Appellant could not, other than at oral argument. MCR 2.116(G)(1)(a)(iv).

The Court of Appeals stated in Footnote 4 of its opinion that "although Selliman disputes Defendants-Appellees' contention that facial plastic and reconstructive surgery is the one most relevant specialty, he provides no substantive argument in support of that assertion." This is clearly error, as Plaintiff provided substantive argument in support of its assertion in his Response to the motion, in his Motion to Amend Witness List, filed after receipt of Defendants' Reply, and at oral argument on both motions. **Appellant's Exhibits 9, 10** At every opportunity, Plaintiff has disputed facial plastic and reconstructive surgery is the one most relevant specialty. In so finding, the Court of Appeals appears to have accepted Defendants' argument, made without any actual support, that

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the determinant of the relevant specialty is whether the rhinoplasty is for "cosmetic" or "functional" reasons.[1] This argument is based solely on Dr. Colton's self-serving Affidavit, wherein he announces his treatment of Plaintiff involved only facial plastic and reconstructive surgery, a position directly contradicted by Defendants' own expert's Affidavit of Meritorious Defense.

While it is true Plaintiff did not present any documentary evidence to specifically rebut Dr. Colton's Affidavit, he had no opportunity to do so, as the non-moving party is not entitled to a sur-reply. MCR 2.116(G)(1)(a)(iv). In their Answer, Defendants respond to this argument by stating that Plaintiff's Application does nothing to dissuade this finding. To the extent Defendants suggest Plaintiff should present some documentary evidence to this Court that was not, and indeed could not have been, part of the record below, to do so would be improper. MCR 7.310(A) Because it is based, at least in part, on the false premises that the trial court properly determined the one most relevant specialty to be facial plastic and reconstructive surgery and that Plaintiff failed to challenge that determination, the Court of Appeals decision is clearly erroneous.

In their Answer, Defendants argue Plaintiff's reliance on *Turkish v William Beaumont Hospital,* Docket No. 339522, rel'd December 13, 2018 (unpublished) is misplaced, claiming the expert's testimony in that case was equivocal, while Dr. Armstrong's testimony in this case was not. **Appellant's Exhibit 11e** This is unconvincing. The expert in *Turkish* explicitly stated that he spent a majority of his time practicing sports medicine. **Appellant's Appendix pg. 000931a**

[1] This case came to the Court of Appeals on a 2-1 decision granting leave to appeal. Judge Gleicher would have denied leave, correctly concluding that the standard of care for performing a rhinoplasty is the same regardless of whether the rhinoplasty is performed for cosmetic or medical reasons, and thus the "one most relevant specialty" formulation is logically inapplicable to this case. **Appellant's Exhibit 2**

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Nevertheless, the Court of Appeals concluded this testimony was "not conclusive of what he was actually practicing during the relevant period". ***Id.*** The Court of Appeals further found the trial court did not abuse its discretion in finding the proposed expert was qualified, in part based on his testimony that even with respect to persons certified in a subspecialty such as sports medicine, they are still practicing the specialty, due to the potential overlapping medical conditions and treatment options. This Court subsequently denied leave to appeal. *Turkish v William Beaumont Hospital*, 504 Mich 963; 932 NW2d 783 (2019).

Similarly, in *In Re Estate of Linda Roberdeaux*, Docket No. 323802, rel'd October 18, 2016 (unpublished), the Court of Appeals affirmed a trial court's decision to allow standard-of-care testimony against a board certified internist who was practicing internal medicine at the time of the alleged malpractice by a board certified internist who testified unequivocally that he spent the majority of his practice in geriatrics, a subspecialty of internal medicine, during the relevant time period. **Appellant's Exhibit 11f** The Court of Appeals found the trial court did not abuse its discretion in so finding because the expert's testimony that he predominantly practiced "geriatrics" was not conclusive of what he was actually practicing during the relevant time period. The Court of Appeals found that "the trial court could have found that [the expert] spent the majority of his time practicing internal medicine in the year preceding the alleged malpractice." **Appellant's Appendix pg. 000946a** This Court subsequently denied leave to appeal, over the dissenting opinion of Justice Markman, who opined that the expert's testimony that he practiced geriatrics, and not internal medicine, plainly disqualified him from testifying against a general internist. *In re Estate of Linda Roberdeaux*, 500 Mich 1025; 897 NW2d 164 (2017).

When measured against these rulings, it is clear the Court of Appeals gave no deference to the trial court's decision in this case. For purposes of MCL 600.2169(1), Dr. Armstrong's

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testimony was far less problematic than that at issue in *Turkish* and *Roberdeaux.* When ruling on the Motion to Strike Dr. Armstrong and for Summary Disposition, the trial court stated that "there were multiple questions with multiple answers" and "seemingly contradictory statements" on the subject of Dr. Armstrong's practice such that "the Court cannot determine at this time whether Dr. Armstrong is qualified or not". The trial court's ruling reflects a reasonable and principled outcome under the circumstances. Thus, the Court of Appeals clearly erred in ruling the trial court abused its discretion in denying the motion to strike Dr. Armstrong's testimony.

CONCLUSION AND RELIEF REQUESTED

Respectfully, this Court should grant leave to consider all of the issues raised by Plaintiff-Appellant. The one most relevant specialty test articulated in *Woodard* and subsequent jurisprudence is logically inapplicable to this case and others like it, where the proposed expert (here, Dr. Armstrong) and defendant (here, Dr. Colton) spent the majority of their professional time in the same active clinical practice, practicing the same medicine, performing the same procedures. Leave to appeal should be granted to re-examine the proper interpretation and application of MCL 600.2169(1) in this and other medical malpractice actions. Further, the trial court did not abuse its discretion in denying Defendants-Appellees' motion to strike, because trial courts are afforded wide discretion to determine the qualifications of an expert witness, and the trial court's ruling was within the range of principled outcomes. In finding to the contrary, the Court of Appeals clearly erred.

WHEREFORE, Plaintiff-Appellant Antonio Selliman respectfully requests this Court summarily reverse the Court of Appeals May 20, 2021 Opinion, or in the alternative, requests this Court schedule oral argument on this application, grant leave to appeal, and any such other and further relief as this Court deems appropriate.

Dated: September 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 2, 2021, she caused to be served a copy of Plaintiff-Appellant's Reply in Support of Application for Leave to Appeal, Index of Exhibits, Exhibits 12 and 13, and this Certificate of Service as follows:

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