RECEIVED by MSC 5/4/2023 8:36:36 PM

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. 2018-167068-NH
Hon. Jeffrey S. Matis
Oakland County Circuit Court

PLAINTIFF-APPELLANT'S REPLY BRIEF ON APPEAL

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

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

RATTON LAW GROUP, PC
RACHEL M. RATTON (P83860)
MICHAEL T. RATTON (P42399)
Attorneys for Plaintiff-Appellant
1300 Broadway | Seventh Floor
Detroit, MI 48226
PH | (313) 771-0074
EM | rachel@rattonlaw.com

RECEIVED by MSC 5/4/2023 8:36:36 PM

TABLE OF CONTENTS

PAGE NO.

INDEX OF AUTHORITIES.....ii

INTRODUCTION.....1

ARGUMENT.....2

I. *WOODARD* WAS WRONGLY DECIDED AND SHOULD NOT BE RETAINED.....2

II. *WOODARD* IS NOT CONSISTENT WITH THE REQUIREMENTS OF MCL 600.2169(1).....3

A. *WOODARD*'S "ONE MOST RELEVANT SPECIALTY" TEST IS NOT CONSISTENT WITH MCL 600.2169(1).....3

B. *WOODARD*'S CONSTRUAL OF "MAJORITY OF...PROFESSIONAL TIME" IS NOT CONSISTENT WITH MCL 600.2169(1).....5

III. UNDER THE PROPER APPLICATION OF MCL 600.2169(1), THE COURT OF APPEALS DID NOT REACH THE RIGHT RESULT IN THIS CASE.....6

CONCLUSION AND RELIEF REQUESTED.....10

CERTIFICATE OF COMPLIANCE.....11

CERTIFICATE OF SERVICE.....12

RECEIVED by MSC 5/4/2023 8:36:36 PM

INDEX OF AUTHORITIES

CASES

Estate of Horn v Swofford,
334 Mich App 281; 964 NW2d 904 (2020).....2, 3

Patelczyk v Olson,
95 Mich App 281; 289 NW2d 910 (1980).....8

Woodard v Custer,
476 Mich 545; 719 NW2d 842 (2006).....*passim*

STATUTES

MCL 500.3151.....4

MCL 600.2169(1).....*passim*

MCL 600.2169(1)(a).....4, 6

MCL 600.2169(1)(b).....5

RULES

MCR 2.116(G)(1)(a)(iv).....7

MCR 7.212(B).....11

MCR 7.212(G).....11

OTHER

M Civ JI 30.01.....8

Webster's New World Dictionary, 2d College Ed (1980).....5

RECEIVED by MSC 5/4/2023 8:36:36 PM

INTRODUCTION

Defendants-Appellees continue to claim that Plaintiff-Appellant's argument is a criticism not of *Woodard v Custer,* 476 Mich 545 (2006), but of MCL 600.2169(1). It is difficult to understand how Defendants can continue to make such a claim with any sincerity when Plaintiff has consistently argued *Woodard* is untethered from the plain language of the statute and advocated for an application more faithful to its text. Plaintiff does not take issue with the existence of MCL 600.2169(1), which is reasonable, but with the currently prevailing judicial interpretation of same, which is not. It was reasonable for the Legislature to amend MCL 600.2169(1) in 1993 to strengthen statutory guardrails in response to a perceived problem with "hired gun" experts. What is unreasonable, and intellectually untenable, is the current body of law interpreting MCL 600.2169(1).

Defendants have also continued to claim that Plaintiff urges this Court not to apply MCL 600.2169(1) in this case. *Def's Brief, pg. 26* At oral argument on the Application, counsel for Plaintiff conceded that she should have been more precise when arguing the "one most relevant specialty" test is "logically inapplicable". It is not Plaintiff's position, as Defendants assert, that MCL 600.2169(1) is not applicable to this medical malpractice action – it clearly is. Rather, Plaintiff's position is that in certain cases, including this one, *Woodard*'s interpretation of the statute requires the application of tests that are illogical under the particularized facts of the case. These instances demonstrate the infirmity of *Woodard*'s central holdings.

Further, Defendants argue that "the correctness of *Woodard* is shown by Plaintiff's inability to proffer a better interpretation of the statute". *Def's Brief, pg. 2* That it may be difficult to articulate a "better interpretation" of a statute is no reason to retain one that is clearly faulty. And Plaintiff has proffered what he believes to be a better interpretation of the statute repeatedly

RECEIVED by MSC 5/4/2023 8:36:36 PM

in these appellate proceedings.[1] *See e.g. Pltf's Brief, pp. 16-21, pp. 25-27* Curiously, Defendants take issue with Plaintiff's discussion of "irrelevant criticisms" of *Woodard.* Plaintiff has urged this Court to revisit *Woodard* and re-examine expert qualification pursuant to MCL 600.2169(1); presumably, in granting the Application, this Court is considering doing so. Such consideration necessarily includes all of *Woodard'*s flawed central holdings, not only those directly at issue in this case.[2]

Finally, Defendants assert that even if *Woodard*'s interpretation of MCL 600.2169(1) is set aside, the Court of Appeals did not err in concluding Plaintiff's expert is not qualified under the statute. But Defendants' argument is based on the flawed, judicially created "one most relevant specialty" and "majority of professional time means greater than 50%" tests of *Woodard* and its progeny. Applying only the plain language of MCL 600.2169(1), the Court of Appeals clearly did not reach the right result in this case.

ARGUMENT

I. *WOODARD* WAS WRONGLY DECIDED AND SHOULD NOT BE RETAINED

As more fully explained in Plaintiff's principle Brief, *Woodard* is wrongly decided because it is poorly reasoned and misconstrues a plainly worded statute. None of the stare decisis factors weigh in favor of retaining *Woodard.* Defendants claim "nothing about *Woodard*'s holdings has proven to be unworkable in practice". *Defs' Brief, pg. 36* Plaintiff replies that this case and its

[1] In short, Plaintiff proposes the better interpretation of MCL 600.2169(1) is that:
(1) there may be more than one relevant specialty for purposes of determining expert qualification;
(2) the term "specialty" does not include subspecialties;
(3) the term "board certified" does not include certificates of added qualification; and
(4) the term "majority" means the greater part of a whole and a physician can spend the "majority" of his time practicing a specialty and subspecialty or two related specialties.

[2] The criticisms that Defendants claim are "irrelevant" to this case are undisputedly relevant to the companion case of *Estate of Horn v Swofford*, 334 Mich App 281; 964 NW2d 904 (2020).

RECEIVED by MSC 5/4/2023 8:36:36 PM

companion prove the unworkability of *Woodard.* The Court of Appeals application of *Woodard* to these cases has resulted in two absurd results: here, where an expert who is a mirror image of the defendant in training and practice has been disqualified and *Estate of Horn,* where the defendant is not qualified to testify about the standard of care applicable to his own alleged malpractice.

II. *WOODARD* IS NOT CONSISTENT WITH THE REQUIREMENTS OF MCL 600.2169(1)

A. *WOODARD*'S "ONE MOST RELEVANT SPECIALTY TEST" IS NOT CONSISTENT WITH MCL 600.2169(1)

The "one most relevant specialty" test articulated by *Woodard* has no basis in the text of the statute and should be replaced with a test that acknowledges there may be more than one relevant specialty for purposes of testifying on the appropriate standard of care. Defendants argue that because MCL 600.2169(1) employs the singular "that specialty", there can only be one relevant specialty. But the statute does not say a physician can only specialize in one specialty or that only one specialty is implicated by allegations of medical malpractice. By nature of his board certifications, Defendant Dr. Colton is a specialist in both otolaryngology and facial plastic and reconstructive surgery; so too is Plaintiff's expert Dr. Armstrong. Defendants' claim that "Plaintiff essentially argues that the Legislature should have left in place the previous version" of MCL 600.2169(1), which only required an expert to specialize in "the same specialty or a related, relevant area of medicine" borders on insincere. *Def's Brief, pp.1-2* Plaintiff has never made such an argument. Dr. Armstrong does not specialize in "a related, relevant are of medicine", he specializes in the same exact specialties as Dr. Colton.

This case concerns separate board certifications from separate entities. The American Board of Otolaryngology-Head and Neck Surgery (ABOHNS) is a member board of the American Board of Medical Specialties; The American Board of Facial Plastic and Reconstructive Surgery

RECEIVED by MSC 5/4/2023 8:36:36 PM

(ABFPRS) is not. If it concerned a specialty and subspecialty or two different but related specialties, this would be a much easier case. For example, if Dr. Colton was solely board certified in plastic surgery by the American Board of Plastic Surgery (another ABMS board) and Dr. Armstrong was solely board certified in otolaryngology by the ABOHNS, Dr. Armstrong would not satisfy MCL 600.2169(1)(a). If Dr. Colton was solely board certified in facial plastic and reconstructive surgery by the ABFPRS and Dr. Armstrong was solely board certified in otolaryngology by the ABOHNS, Dr. Armstrong would also not satisfy MCL 600.2169(1)(a).[3]

Defendants have filed an amicus brief submitted by the ABMS in *Woodard*, claiming that same contradicts Plaintiff's assertion that there is no reason to believe the Legislature intended subspecialties to be treated as synonymous with specialties when drafting the requirements of MCL 600.2169(1). But this brief was presumably authored at some point in 2005, when *Woodard* was pending before this Court over a decade after MCL 600.2169(1) was amended. That the ABMS considered subspecialties to be specialties gives no indication that the Legislature held a similar belief when choosing the words of the statute in 1993.[4]

[3] The ABMS amicus brief argued that "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..." **Appellees' Appendix, 05b** By this argument, the only specialty that should be considered in this case is that of otolaryngology, because it is the only specialty certification by an ABMS member board.

[4] Additionally, in 2019 the Legislature enacted MCL 500.3151, which adopted the operative phrases of MCL 600.2169(1) for purposes of qualifying a physician to perform a medical examination at the request of an insurer: "same specialty", "board certified", and "majority of...professional time". If any one of the central holdings of *Woodard* actually reflected the intent of the Legislature (that "subspecialty" is synonymous with "specialty", that "board certification" includes certificates of added qualification, that "majority" means greater than 50%, etc.), it would seem the Legislature would have taken the opportunity to write MCL 500.3151 to more closely align with *Woodard*'s interpretation of MCL 600.2169(1), rather than adopt identical language.

RECEIVED by MSC 5/4/2023 8:36:36 PM

B. *WOODARD'*S CONSTRUAL OF "MAJORITY OF...PROFESSIONAL TIME" IS NOT CONSISTENT WITH MCL 600.2169(1)

Concerning *Woodard'*s interpretation of "majority of...professional time", Defendants again claim the amendment of MCL 600.2169(1) reflects a legislative intent that is not borne out by the actual language of the statute. Defendants claim the decision to replace "substantial portion of...professional time" with "a majority of...professional time" necessarily means the proposed expert must spend greater than 50% of his professional time in the practice of a singular specialty. Plaintiff agrees that it is nonsensical to say that an individual can spend the majority of his time engaging in more than one specialty, but only if "majority" necessarily means greater than 50%, and it does not. While "majority" can mean more than half, it can also mean the greater part of a whole. *Webster's New World Dictionary*, 2d College Ed (1980). No language in the statute suggests that a doctor may only be engaged in the practice of one specialty or subspecialty at a time. No language in the statute suggests that a doctor cannot practice a specialty when he is practicing a subspecialty. *Woodard* made these pronouncements based on its flawed reasoning that "obviously, a specialist can only devote a *majority* of his professional time to *one* specialty." *Woodard* at 560 (italics original).

To the contrary, the statute itself recognizes one can devote "a majority" of one's time to more than one profession – "either or both" the active clinical practice of medicine or the instruction of students. MCL 600.2169(b) Just as the plain language of the statute permits a proposed expert devote a majority of his time to more than one profession, it permits a physician to devote a majority of his time to more than one specialty. In response to this argument, Defendants claim the Legislature "chose to allow aggregation" of professions, but not specialties. *Def's Brief, pp. 20-21* Defendants misunderstand Plaintiff's argument. Plaintiff points to this language as evidence that the Legislature did not intend "majority" to mean greater than 50%, as

RECEIVED by MSC 5/4/2023 8:36:36 PM

Woodard and its progeny hold. One cannot, by definition, devote a "majority" of their time to two different professions if "majority" means 50% – it is mathematically impossible. And Plaintiff is not advocating for an "aggregation" of specialties. A proposed expert must be board certified in the same relevant specialty; no aggregation or combination of irrelevant or different specialty certifications could overcome that requirement.

Dr. Armstrong and Dr. Colton perform the same procedures as part of their clinical practices. **Appendix 62a** If Dr. Colton practices facial plastic and reconstructive surgery when he performs rhinoplasty, it inescapably follows that Dr. Armstrong practices facial plastic and reconstructive surgery when he performs rhinoplasty surgery. If Dr. Armstrong practices otolaryngology when he performs rhinoplasty, it inescapably follows that Dr. Colton practices otolaryngology when he performs rhinoplasty surgery. If rhinoplasty is within the purview of both an otolaryngologist and a facial plastic and reconstructive surgeon, and Dr. Colton and Dr. Armstrong are identically and doubly board certified, then Dr. Armstrong and Dr. Colton necessarily share the same active clinical practice of the same specialty.

III. UNDER THE PROPER APPLICATION OF MCL 600.2169(1), THE COURT OF APPEALS DID NOT REACH THE RIGHT RESULT IN THIS CASE

By nature of their identical board certifications, the Court of Appeals correctly concluded that Dr. Armstrong's qualifications "match" Dr. Colton's qualifications as required by MCL 600.2169(1)(a). **Appendix 292a** Where the Court of Appeals erred was in its analysis of "the one most relevant specialty" and "the majority of professional time" requirements. The panel's analysis was grounded not in the text of MCL 600.2169(1), but in the flawed *Woodard* interpretation of the statute.

The panel determined that "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

RECEIVED by MSC 5/4/2023 8:36:36 PM

and reconstructive surgery" and "the trial court correctly determined that facial plastic and reconstructive surgery is the most relevant specialty".[5] **Appendix 291a, Appendix 295a** The Court of Appeals further opined that "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" and that "[t]hroughout his testimony, Dr. Armstrong understood that the procedure at issue, a cosmetic rhinoplasty, fell under the practice of FPRS." **Appellant's Appendix 0294a** To the contrary, Dr. Armstrong did not testify that the procedure at issue fell under the practice of facial plastic and reconstructive surgery, nor did he testify that all "cosmetic" rhinoplasties categorically and singularly fall under that practice. In actuality, Dr. Armstrong testified that many "functional" surgeries fall into the category of facial plastic reconstructive surgery and that rhinoplasty is a common procedure he performs under both his "cosmetic" and "functional nasal" practices. **Appellant's Appendix 0060a-0061a** The Court of Appeals erred in accepting Defendants' argument, made without any actual support, that the determinant of the relevant specialty is whether the procedure was for "cosmetic" or "functional" reasons.

Defendants' fixation on the classification of the procedure at issue as "cosmetic" is a senseless splitting of hairs purely for purposes of legal strategy. Defendants argue that there is a "genuinely substantive" distinction between an otolaryngologist and a facial plastic and reconstructive surgeon in this case because the negligence involved not only performance of a rhinoplasty, but the injection of multiple steroids. *Defs' Brief, pg. 44* The affidavits of the retained

[5] Plaintiff maintains that the trial court did not explicitly rule facial plastic and reconstructive surgery was the one most relevant specialty. **Appendix 278a** 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 could not, other than at oral argument. MCR 2.116(G)(1)(a)(iv). If this matter is remanded and the "one most relevant specialty" remains at issue, Plaintiff should be afforded an opportunity to fully respond to the Affidavit.

RECEIVED by MSC 5/4/2023 8:36:36 PM

medical experts in this case, Dr. Armstrong for Plaintiff and Dr. Michael Carron for Defendants, suggest otherwise.

After review of Plaintiff's medical records , the pleadings, and Dr. Armstrong's Affidavit of Merit, and based upon his medical education, training, and experience, Dr. Carron averred the applicable standard of care to be that of a "physician specializing in otolaryngology-head and neck surgery and facial, plastic and reconstructive surgery of ordinary learning, skill and judgment". **Appellant's Appendix 0025a** Defendants have never sought to amend Dr. Carron's Affidavit or in any way retract his previous opinion following Dr. Armstrong's deposition. Instead, rather than rely on the opinion of their retained expert, Defendants attempt to unilaterally declare the applicable standard of care through attorney argument and a contradictory and self-serving Affidavit from Dr. Colton attached to a trial court reply brief. **Appendix 0228a-0229a**

Importantly, despite arguing that "the propriety of this alleged course of treatment falls within the specialty of a facial plastic and reconstructive surgeon and does *not* fall within the specialty of ENT", Defendants have never contested that the standard of care for performing a rhinoplasty is the same regardless of whether the procedure is performed for cosmetic or functional reasons. *Def's Brief, pg. 27* In medical malpractice actions, the standard of care is determined by what an ordinary [name profession/name particular specialty] of ordinary learning, judgment or skill would do or would not do under the same or similar circumstances. M Civ JI 30.01; *Patelczyk v Olson*, 95 Mich App 281, 283-285; 289 NW2d 910 (1980) In this case, regardless of whether the bracket is completed by inserting "physician", "otolaryngologist", or "facial plastic and reconstructive surgeon", Dr. Armstrong is qualified to testify as to the standard of care because he, like Dr. Colton, is all of those things – a board certified physician, otolaryngologist, and facial plastic and reconstructive surgeon.

RECEIVED by MSC 5/4/2023 8:36:36 PM

Both otolaryngologists and facial plastic and reconstructive surgeons perform rhinoplasty, for both ostensibly "cosmetic" and "functional" reasons. The standard of care for performing the procedure is the same. Consider what would result from a conclusion to the contrary: an otolaryngologist performing rhinoplasty to remove a genetic dorsal hump would not be permitted to testify against an otolaryngologist performing the same procedure to remove the same hump from a patient who broke their nose in a car accident, because the former is "cosmetic" and the latter "functional". Are two experts required to testify against a facial plastic and reconstructive surgeon who negligently corrects a deviated septum caused by trauma and in the course of the same rhinoplasty procedure negligently narrows a bulbous nasal tip? Can it be true that an otolaryngologist commits malpractice when performing a rhinoplasty in a certain fashion, but a facial plastic and reconstructive surgeon does not when he performs the same procedure in the same fashion?

Applying only the plain language of MCL 600.2169(1), rather than the flawed, judicially created precepts of *Woodard,* the Court of Appeals clearly did not reach the right result in this case. Plaintiff's proposed expert is a mirror image of both Defendants and their retained expert. These three identically board certified physicians practice the same medicine and perform the same procedures, including the procedure giving rise to the alleged malpractice. The only difference, if one exists, is how they describe the division of their professional time amongst two equally relevant and interrelated specialties – an arbitrary, illogical, and purely legal exercise untethered from the statute and divorced from the actual practice of medicine. Under the edicts of *Woodard,* Plaintiff's proposed expert has been determined by the Court of Appeals to be unqualified to give expert testimony on the standard of care required for a procedure he has performed over 400 times

RECEIVED by MSC 5/4/2023 8:36:36 PM

in the course of his career. Such a ridiculous result cannot possibly have been the intention of the Michigan Legislature in enacting MCL 600.2169(1).

CONCLUSION AND RELIEF REQUESTED

Beginning with *Woodard,* MCL 600.2169(1) has been so bastardized by judicially created precepts that the current state of the law permits 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. Such an absurd result is at odds with the express intentions of the Michigan Legislature in enacting the statute. This Court should take this opportunity to overrule *Woodard*, which is poorly reasoned and wrongly decided. In doing so, this Court should clarify the proper interpretation and application of MCL 600.2169(1), remaining faithful to the text of the statute as written. Wherefore, Plaintiff respectfully requests that this Court overrule *Woodard,* reverse the May 20, 2021 opinion of the Court of Appeals, which is clearly erroneous under the proper application of MCL 600.2169(1), and remand this matter to the Oakland County Circuit Court for further proceedings.

Dated: May 4, 2023

Respectfully submitted,

RATTON LAW GROUP, PC

/s/ Rachel M. Ratton

RACHEL M. RATTON (P83860)
MICHAEL T. RATTON (P42399)
Attorneys for Plaintiff
1300 Broadway | Seventh Floor
Detroit, MI 48226
PH | (313) 771-0074
EM | rachel@rattonlaw.com

RECEIVED by MSC 5/4/2023 8:36:36 PM

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Plaintiff-Appellant's Reply Brief on Appeal complies with the type-volume limitations set forth in MCR 7.212(B) and (G). This brief uses a 12-point proportional font (Times New Roman), has at least one-inch page margins, and its text is double-spaced, except for quotations and footnotes, which are single-spaced. The number of countable words is 3, 172. I am relying on the word count of Microsoft Word, the word-processing system used to produce this document.

Dated: May 4, 2023

Respectfully submitted,

/s/ Rachel M. Ratton

RACHEL M. RATTON (P83860)
Attorneys for Plaintiff
1300 Broadway | Seventh Floor
Detroit, MI 48226
PH | (313) 771-0074
EM | rachel@rattonlaw.com

RECEIVED by MSC 5/4/2023 8:36:36 PM

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 4, 2023, she served a copy of Plaintiff-Appellant's Reply Brief on Appeal and this Certificate of Service upon counsel of record as disclosed below:

1. Jeffrey Gerish (P51338)
   Counsel for Defendants-Appellees
   jgerish@plunkettcooney.com
   Counsel was electronically served via MiFile.

2. Paul J. Dwaihy (P66074)
   Counsel for Defendants-Appellees
   paul.dwaihy@tnmglaw.com
   Counsel was electronically served via MiFile.

Dated: May 4, 2023

Respectfully submitted,

/s/ Rachel M. Ratton

RACHEL M. RATTON (P83860)
Attorneys for Plaintiff
1300 Broadway | Seventh Floor
Detroit, MI 48226
PH | (313) 771-0074
EM | rachel@rattonlaw.com