STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF DOUGLAS P. KLETT, by MARTIN KLETT, Personal Representative, Plaintiff-Appellee,	UNPUBLISHED December 17, 2020
v SUBBARAO CHAVALI, M.D., Defendant-Appellant.	No. 350382 Bay Circuit Court LC No. 18-003279-NH

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the trial court's order granting plaintiff's motion to preclude defendant from offering standard of care testimony at trial because he did not meet the qualifications of an expert witness under MCL 600.2169(1). Defendant argues that MCL 600.2169(1) does not apply to a party-physician and if it does, the statute prevents him from presenting an adequate defense. We affirm.

I. FACTUAL BACKGROUND

Defendant, a medical doctor with board-certified specialties in cardiology and internal medicine, testified during his deposition that he spent the majority of his professional time practicing cardiology. Plaintiff sued defendant for medical malpractice after plaintiff's decedent died from a pulmonary embolism while under defendant's care. Plaintiff alleged that defendant breached his duty of care by, among other things, failing to recognize and appreciate decedent's prior history and other risk factors. Plaintiff moved to preclude defendant from testifying as an expert witness about the applicable standard of care for internal medicine, the specialty that defendant practiced when the alleged malpractice occurred. Plaintiff argued that under MCL 600.2169(1), defendant did not qualify to testify as an expert witness because he did not spend the

[1] *Estate of Klett v Chavali*, unpublished order of the Court of Appeals, entered January 16, 2020 (Docket No. 350382).

majority of his professional time in the preceding year practicing or teaching internal medicine. Defendant countered that MCL 600.2169(1) did not apply to bar a defendant from testifying as an expert witness. The circuit court disagreed, holding that defendant failed to qualify as an expert witness under MCL 600.2169(1).

II. STANDARDS OF REVIEW

In *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016) (quotation marks and citations omitted), our Supreme Court set forth the standards of review applicable to appellate review of a trial court's ruling to exclude expert testimony in a medical malpractice action as follows:

> We review the circuit court's decision to exclude evidence for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. We review de novo questions of law underlying evidentiary rulings, including the interpretation of statutes and court rules. The admission or exclusion of evidence because of an erroneous interpretation of law is necessarily an abuse of discretion.

III. ANALYSIS

Defendant argues that MCL 600.2169(1) does not apply to party-physicians. We disagree.

In *Elher*, our Supreme Court explained:

> A plaintiff in a medical malpractice action must establish (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Generally, expert testimony is required in a malpractice case in order to establish the applicable standard of care and to demonstrate that the professional breached that standard. An exception exists when the professional's breach of the standard of care is so obvious that it is within the common knowledge and experience of an ordinary layperson. The proponent of the evidence has the burden of establishing its relevance and admissibility.
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> The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169. [*Elher*, 499 Mich at 21-22 (quotation marks and citations omitted).]

Defendant argues that the trial court should not have precluded him from testifying on his own behalf regarding the applicable standard of care. MCL 600.2169(1) guides trial court's decision-making in this regard and provides in relevant part:

> 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.
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> (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.

"When interpreting statutory language, we begin with the plain language of the statute." *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016) (citation omitted). "We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used." *Id*. (quotation marks and citation omitted). "Additionally, when determining this intent we must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Id*. (quotation marks and citation omitted).

Defendant first argues that he is qualified to testify on his own behalf under MCL 600.2169(1) because the qualifications of a proposed expert are determined on the basis of the qualifications of the defendant. Although the experience of an expert witness under MCL 600.2169(1)(a) directly corresponds to the experience of the party against whom or on whose behalf the testimony is offered, this argument ignores the additional requirements of MCL 600.2169(1)(b), which requires that the specialist must have devoted *a majority* of his or her professional time to active clinical practice or instruction of the specialty. Defendant testified that he practiced the majority of the time within the year immediately preceding the alleged occurrence of malpractice in his cardiology specialty, not internal medicine. Defendant, therefore, did not qualify under MCL 600.2169(1)(b).

Defendant next argues that a party-physician is not an expert witness under MCL 600.2169(1). The plain language of MCL 600.2169(1), however, states that "a person shall not give expert testimony on the appropriate standard of practice or care" unless the person meets the specified statutory criteria. The statute does not set forth any exception to the requirement regarding standard of practice or care. Our Supreme Court noted in *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016), that a "physician who testifies regarding the standard of care at issue must satisfy the requirements of MCL 600.2169(1)," without making any distinction between

a party-physician and a nonparty expert witness. Further, we are unaware of any caselaw recognizing a party-defendant exception for which defendant advocates and we are "not required to search for authority to sustain or reject a position raised by a party without citation of authority." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008) (citation omitted). Accordingly, regardless whether the testimony is sought from a party or a nonparty physician expert witness, such person may not testify regarding the applicable standard of care unless the person meets all of the essential statutory criteria.

Defendant argues that because the plain language of MCL 600.2169(1) distinguishes between "the party against whom or on whose behalf the testimony is offered" and "the expert witness," a party-physician is naturally excluded from being considered an expert witness. Nowhere in MCL 600.2169, however, does the Legislature distinguish a party witness from a nonparty witness. Again, we point out that MCL 600.2169(1) very specifically directs that "*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 specified statutory] criteria." (Emphasis added.) If the Legislature intended to make a specific exception for a party-physician who chooses to testify as an expert witness regarding the applicable standard of care, it could have done so, but has not.

Defendant also argues that precluding him from offering testimony about the applicable standard of care would prevent him from being able to present an adequate defense. We disagree. Defendant is free to testify as to the actions he took and the reasons he believed they were appropriate. Pursuant to MCL 600.2169(1), however, because he did not practice the majority of his time in the internal medicine specialty within the last year before the incident, he cannot testify regarding the applicable standard of care for internal medicine. Defendant will have to rely upon the testimony of a physician expert who specializes in internal medicine and devoted the majority of his or her professional time to the active clinical practice within that specialty or in the instruction of students in an accredited health professional school or accredited residency or clinical research program in the same specialty as required under MCL 600.2169(1)(b). Defendant, therefore, is not prevented from adequately defending himself.

The trial court did not err by granting plaintiff's motion because defendant did not spend the majority of his professional time practicing or teaching the specialty of internal medicine in the year preceding the alleged malpractice occurrence. The trial court correctly interpreted and applied MCL 600.2169, and appropriately ruled that defendant lacked the qualification to testify regarding the standard of practice or care in this case.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford