STATE OF MICHIGAN

COURT OF APPEALS

KELLEY CREGO,

Plaintiff-Appellant,

v

EDWARD W. SPARROW HOSPITAL ASSOCIATION, SPARROW HEALTH SYSTEM, SHIRLEY LIMA, M.D., and AMBER MCLEAN, D.O.,

Defendants-Appellees.

FOR PUBLICATION
April 16, 2019
9:10 a.m.

No. 338230
Ingham Circuit Court
LC No. 17-000031-NH

Before: CAVANAGH, P.J., and MARKEY and LETICA, JJ.

MARKEY, J.

In this medical malpractice action, plaintiff appeals by delayed leave granted the trial court's order granting summary disposition in favor of defendant Amber McLean, D.O. To the extent that plaintiff's claims against defendants Edward W. Sparrow Hospital Association and Sparrow Health System were based on vicarious liability arising from Dr. McLean's conduct, the court also summarily dismissed those claims. The trial court rejected plaintiff's affidavit of merit that had been executed by Steven D. McCarus, M.D., determining that the affidavit failed to satisfy the requirements of MCL 600.2912d(1) and MCL 600.2169(1)(b)(*i*). The court concluded that Dr. McCarus and Dr. McLean did not engage in the practice of the "same health profession" for purposes of MCL 600.2169(1)(b)(*i*), because Dr. McLean is a doctor of osteopathy and Dr. McCarus is a doctor of allopathy or medical doctor. Considering that the alleged malpractice concerns a laparoscopic hysterectomy, the relevant field of medicine implicated in this case is the specialty of obstetrics-gynecology. Because Dr. McLean and Dr. McCarus are both board-certified obstetrician-gynecologists (OB-GYNs), we hold that the trial court erred in refusing to honor plaintiff's affidavit of merit. The fact that Dr. McLean is a licensed osteopathic physician, a D.O. and Dr. McCarus is a licensed allopathic physician, an M.D., is not pertinent in analyzing MCL 600.2169(1)(b)(*i*). It is irrelevant because the specialty of obstetrics-gynecology governs the standard of practice or care under MCL 600.2169(1)(a). This in turn means that the only question to answer under MCL 600.2169(1)(b)(*i*) is whether Dr. McCarus, during the year immediately preceding the alleged act of malpractice, devoted a

majority of his professional time to the active clinical practice of obstetrics-gynecology. There is simply no dispute that Dr. McCarus did so. Accordingly, we reverse the trial court's ruling granting summary disposition of those claims related to Dr. McLean's alleged malpractice in performing the laparoscopic hysterectomy.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The construction of MCL 600.2169 presents a question of law subject to de novo review. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "[T]his Court reviews a trial court's rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion." *Id.* A trial court abuses its discretion when its decision falls outside the range of principled and reasonable outcomes. *Id.* Additionally, "[a] trial court necessarily abuses its discretion when it makes an error of law." *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

"When interpreting a statute, the primary rule of construction is to discern and give effect to the Legislature's intent, the most reliable indicator of which is the clear and unambiguous language of the statute." *Perkovic v Zurich American Ins Co*, 500 Mich 44, 49; 893 NW2d 322 (2017). Such language must be enforced as written, "giving effect to every word, phrase, and clause." *Id.* Further judicial construction is only permitted when statutory language is ambiguous. *York Charter Twp v Miller*, 322 Mich App 648, 659; 915 NW2d 373 (2018). When determining the Legislature's intent, statutory provisions are not to be read in isolation; rather, they must be read in context and as a whole. *In re Erwin Estate*, 503 Mich 1, 6; __ NW2d __ (2018).

MCL 600.2912d(1) requires a medical malpractice plaintiff to "file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." And MCL 600.2169 provides in relevant part:

> (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) [D]uring 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.[1]

In *Woodard*, 476 Mich at 558-559, our Supreme Court construed the language in MCL 600.2169(1)(a), observing:

> Although specialties and board certificates must match, not *all* specialties and board certificates must match. Rather, § 2169(1) states that "a person shall not give expert testimony on the *appropriate* standard of practice or care unless . . . ." (Emphasis added.) That is, § 2169(1) addresses the necessary qualifications of an expert witness to testify regarding the "*appropriate* standard of practice or care," not regarding an inappropriate or irrelevant standard of medical practice or care. Because an expert witness is not required to testify regarding an inappropriate or irrelevant standard of medical practice or care, § 2169(1) should not be understood to require such witness to specialize in specialties and possess board certificates that are not relevant to the standard of medical practice or care about which the witness is to testify. . . . .
>
> Further, § 2169(1) refers to "the same specialty" and "that specialty." It does not refer to "the same specialties" and "those specialties." That is, § 2169(1) requires the matching of a singular specialty, not multiple specialties.

"[I]f a defendant physician is a specialist, the plaintiff's expert witness must have specialized in the same specialty as the defendant physician at the time of the alleged malpractice." *Woodard*, 476 Mich at 560-561. Moreover, under MCL 600.2169(1)(a), a proposed expert witness must hold the same board certification as the party against whom the testimony is offered. *Id.* at 562-563. But "the plaintiff's expert does not have to match all of the defendant physician's specialties; rather, the plaintiff's expert only has to match the one most relevant specialty." *Id*. at 567-568. And the one most relevant specialty is "the specialty engaged in by the defendant physician during the course of the alleged malpractice." *Id*. at 560.

Here, the requirements of Subsection (1)(a) were satisfied because the two doctors are both board-certified OB-GYNs. Indeed, the only "specialty" implicated in this case is obstetrics-gynecology, and application of MCL 600.2169(1)(a) requires matching credentials in that specialty field. There is no assertion that Subsection (1)(a) requires Dr. McCarus to be an osteopathic physician like Dr. McLean. And the relevant standard of practice or care associated with performing the laparoscopic hysterectomy is set by reference to the practice of obstetrics-gynecology.[2] Because plaintiff's affidavit of merit complies with Subsection (1)(a) of MCL

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[1] Plaintiff does not claim that Dr. McCarus's affidavit satisfied Subsection (1)(b) under the teaching provision in Subsection (1)(b)(*ii*), which we have omitted. Plaintiff instead relies on Dr. McCarus's active clinical practice as an OB-GYN.

[2] Dr. McCarus averred in a separate affidavit that was prepared in response to defendants' motion for summary disposition that Dr. McLean was required "to follow the . . . nationally

600.2169, the next step in the analysis and the focal point of this appeal concern whether Subsection (1)(b)(*i*) was satisfied.

There appears to be agreement that Dr. McCarus's affidavit of merit satisfied the one-year, clinical-practice component of MCL 600.2169(1)(b)(*i*), but this agreement is only in regard to whether Dr. McCarus practiced obstetrics-gynecology during the one-year period. Defendants proceed to argue that Subsection (1)(b)(*i*) was not fully satisfied because the one-year, clinical-practice provision had to also be established in connection with the health profession of osteopathic medicine, and Dr. McCarus is an allopathic physician. We conclude that both defendants and the trial court misconstrue the demands of Subsection (1)(b)(*i*) of MCL 600.2169.

When examining Subsection (1)(b)(*i*) in context and together with Subsection (1)(a), it becomes evident that if matching credentials in satisfaction of Subsection (1)(a) are established, the very same question of matching credentials is not reexamined or revisited when analyzing compliance with Subsection (1)(b)(*i*). Rather, if Subsection (1)(a) is established by showing matching credentials, here board certification in the specialty of obstetrics-gynecology, the next step in the analysis entails a determination under Subsection (1)(b) as to whether the plaintiff's expert actually practiced or taught in the specialty matched under Subsection (1)(a) for the requisite period of time. Therefore, in this case, the only pertinent question regarding compliance with Subsection (1)(b)(*i*) is whether Dr. McCarus devoted a majority of his professional time to the active clinical practice of obstetrics-gynecology during the year immediately preceding the alleged act of medical malpractice. The answer to that question is a resounding, "Yes."

The heart or crux of our position regarding the interplay between Subsection (1)(a) and Subsection (1)(b) of MCL 600.2169 is that if the practice of a particular specialty must be examined in relation to Subsection (1)(a) and the standard of care, then the pertinent inquiry for purposes of Subsection (1)(b), assuming Subsection (1)(a) is satisfied, is whether the proposed expert taught or practiced *in the specialty field* for the one-year duration the statute requires. Subsection (1)(b) does not require re-evaluation of whether there are matching credentials. Whether a defendant and a plaintiff's expert practiced in the "same health profession," as that terminology is used in Subsection (1)(b)(*i*), need only be resolved when a specialty, board certified or otherwise, is not implicated under the facts of a particular case.

Once again, MCL 600.2169(1)(b)(*i*) provides that a health professional proffered as an expert must have devoted a majority of his or her time during the year immediately preceding the date of the alleged malpractice to "[t]he 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." (Emphasis added.) Defendants place great reliance on use of the conjunctive "and" in Subsection (1)(b)(*i*), maintaining that it

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recognized and nationally accepted Standard of Care for all Board-Certified OB-GYNs, regardless if [she is an] M.D.[] or D.O." This to us is a very important fact and, indeed, the reality in the practice of medicine.

reveals the Legislature's intent to require one year of active clinical practice in the same health profession *and* in the same specialty. It is true that the use of the term "and" generally reflects that two statutory clauses linked by the term must both be satisfied. *In re Koehler Estate*, 314 Mich App 667, 681-682; 888 NW2d 432 (2016). But this Court has also warned that the general rule should not be applied when it renders the construction dubious, and there is clear legislative intent to the contrary. *Id.* at 682; *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50-51; 575 NW2d 79 (1997).

In our view, the use of the word "and" was simply the Legislature's attempt to clarify at the end of Subsection (1)(b)(*i*) that if, in fact, a specialist is involved, the one-year, clinical-practice requirement pertains to the specialty. We think it highly unlikely that the Legislature even envisioned or contemplated a scenario in which a specialty is successfully matched, yet there is a distinguishing feature in regard to the health professions practiced by the expert and party.[3] Stated otherwise, it is fair to surmise that the Legislature operated under the assumption that if specialties match, then the two health professionals at issue necessarily practice in the same health profession. Therefore, we cannot conclude that the Legislature's use of the word "and" in MCL 600.2169(1)(b)(*i*) reveals an intent to require active clinical practice for the requisite period in some field or discipline other than the matching specialty. Whether a board-certified OB-GYN is a D.O. or an M.D. is entirely meaningless for purposes of describing the standard of practice or care. The case at hand involves alleged malpractice in the performance of a laparoscopic hysterectomy, a medical procedure which falls squarely within the specialty of obstetrics-gynecology. When Subsection (1)(b)(*i*) is considered in context and together with Subsection (1)(a), defendants' position cannot be sustained.

Furthermore, indirectly and implicitly, the *Woodard* Court answered the question posed to this panel in the instant appeal. Discussing MCL 600.2169(1)(b), the Court stated:

> MCL 600.2169(1)(b) provides that if the defendant physician is a specialist, the expert witness must have "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 . . . the active clinical practice of that specialty [or][t]he instruction of students in an . . . accredited health professional school or accredited residency or clinical research program in the same specialty." Once again the statute refers to "the same specialty" and "that specialty," implying that only a single specialty must be matched. In addition, § 2169(1)(b) requires the plaintiff's expert to have "devoted a majority of his or her professional time" to practicing or teaching the specialty in which the defendant physician specializes. As we explained above, one 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

[3] To be clear, we are proceeding on the assumption that osteopathic and allopathic physicians do not practice the same health profession. We take no substantive stance on that question.

> 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 565-566 (alterations and omissions in original; emphasis added).]

Notably missing from the last sentence in this passage is any reference to an additional requirement that the plaintiff's expert and the defendant physician practice in the "same health profession."[4] And the following footnote in *Woodard* adds further support:

> If the defendant physician is not a specialist, § 2169(1)(b) requires the plaintiff's expert witness to have "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 . . . [t]he active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed [or][t]he 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 . . . ." [*Woodard*, 476 Mich at 565-566 n 11 (alterations and omissions in original).]

This footnote suggests that the "same health profession" language is only implicated when a specialist is not involved.

The case law cited by defendants and the trial court is simply inapposite relative to the precise issue posed in this appeal. The opinion in *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488; 711 NW2d 795 (2006), indicated that OB-GYNs could not offer expert testimony regarding the alleged negligence of a nurse mid-wife because they did not practice in the same health profession as required by MCL 600.2169. *McElhaney* did not involve a defendant who was a "specialist." The same can be said with respect to *Brown v Hayes*, 270 Mich App 491; 716 NW2d 13 (2006), rev'd in part on other grounds 477 Mich 966 (2006), which involved a failed attempt to rely on an expert who was a physical therapist when the defendants were occupational therapists. And in *Bates v Gilbert,* 479 Mich 451; 736 NW2d 566 (2007), the defendant was an optometrist, and the plaintiff sought, unsuccessfully, to rely on an affidavit of merit by an ophthalmologist. Again, the defendant was not a specialist. All of these cases had to focus exclusively on the "same health profession" language in MCL 600.2169(1)(b)(*i*) because the "specialist" and "specialty" language in that same provision was not even triggered. No party was a specialist. In the instant case, defendant Dr. McLean is a specialist in obstetrics and gynecology.

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[4] We fully appreciate that the *Woodard* Court was addressing the issue of multiple specialties; however, the Court nonetheless devoted a section of its opinion to Subsection (1)(b), and the Court's omission of the "same health profession" language when speaking of a specialist is telling. *Woodard*, 476 Mich at 565-566.

Finally, we take note of the language in MCL 600.2169(2), which, in the process of determining the qualifications of an expert witness, requires a court to evaluate "[t]he length of time the expert witness has been engaged in the *active clinical practice* or instruction of the health profession ***or*** the specialty." MCL 600.2169(2)(c)(emphasis added). This language reinforces our view that with respect to the "active clinical practice" requirement in MCL 600.2169(1)(b)(*i*), the Legislature only demanded that an expert engage in the active clinical practice of the relevant specialty for the requisite period—no more, no less. Defendants' construction of MCL 600.2169(1)(b)(*i*) results in an internal inconsistency in the statute when taking into consideration the language in MCL 600.2169(2)(c). See *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (words in a statute should not be construed in isolation, but must be read together to harmonize their meaning; words and clauses should not be divorced from those which precede and those that follow); *Messenger v Dep't of Consumer & Indus Servs*, 238 Mich App 524, 533; 606 NW2d 38 (1999) (we should interpret a statute in a manner that achieves harmony between and among specific provisions in the statute).

In sum, we hold that the trial court erred in ruling that Dr. McCarus's affidavit of merit failed to satisfy the requirements of MCL 600.2169(1)(b)(*i*). In light of our ruling, we need not entertain arguments regarding the "reasonable belief" provision in MCL 600.2912d(1).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiff may tax costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh

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Before: CAVANAGH, P.J., and MARKEY and LETICA, JJ.

LETICA, J. (dissenting in part, concurring in part).

I respectfully disagree with the majority's reading of MCL 600.2169(1)(b)(*i*) and would affirm the trial court's determination that an allopathic physician[1] was not qualified to offer standard-of-care testimony against an osteopathic physician[2] because, despite their common board-certified specialty, they were licensed differently. Nevertheless, I agree that the circuit court's order dismissing Crego's complaint against the osteopathic physician and the hospital with prejudice must be reversed because Crego's attorney could have reasonably believed that the allopathic physician satisfied the requirements of MCL 600.2169 when filing the affidavit of merit (AOM).

[1] An allopathic physician or medical doctor (M.D.) is licensed to engage in the practice of medicine under part 170, MCL 333.17001 *et seq*., of the Public Health Code, MCL 333.1101 *et seq*.

[2] An osteopathic physician or doctor of osteopathy (D.O.) is licensed to engage in the practice of osteopathic medicine and surgery under part 175, MCL 333.17501 *et seq*., of the Public Health Code.

I. EXPERT QUALIFICATION UNDER MCL 600.2169

A plaintiff initiating a medical malpractice action must file with the complaint "an affidavit of merit signed by an expert who the plaintiff's attorney reasonably believes meets the requirements of MCL 600.2169." *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004) (emphasis omitted). See also MCL 600.2912d(1). MCL 600.2169(1), in turn, sets forth the criteria a proposed expert witness must satisfy in order to testify regarding the appropriate standard of practice or care. *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016). In pertinent part, the statute reads:

> (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.
>
> (*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.
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> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, 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*) Active clinical practice as a general practitioner.
>
> (*ii*) 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. [MCL 600.2169(1)(a) through (c).]

Here, Crego asserted a claim of medical malpractice against Dr. McLean, a board-certified obstetrician gynecologist. The AOM attached to Crego's complaint was signed by Dr. McCarus, who is board certified in the same specialty. As recognized by the majority, the parties do not appear to dispute that Dr. McCarus's specialization and board certification satisfies the requirements of subdivision (a) or that Dr. McCarus spent the majority of his professional time in the year preceding the alleged malpractice in the active clinical practice of obstetrics and gynecology. The crux of the parties' disagreement turns on whether Dr. McCarus can satisfy the requirements of subdivision (b)(*i*);[3] specifically, whether he was engaged in the active clinical practice of the "same health profession" in which Dr. McLean is "licensed." See MCL 600.2169(1)(b)(*i*).

The majority accepts Crego's argument that the "same health profession" language is applicable only in cases involving a nonspecialist defendant.[4] And, like Crego, the majority highlights the following excerpt from *Woodard v Custer*, 476 Mich 545, 565 & n 11; 719 NW2d 842 (2006):

> MCL 600.2169(1)(b) provides that if the defendant physician is a specialist, the expert witness must have "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 . . . the active clinical practice of that specialty [or] [t]he instruction of students in an . . . accredited health professional school or accredited residency or clinical research program in the same specialty."[11]

> [11] *If the defendant physician is not a specialist*, § 2169(1)(b) requires the plaintiff's expert witness to have "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 . . . [t]he *active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed* [or] [t]he 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 . . . ." [Emphasis added; alterations in original.]

The majority concludes that Dr. McCarus is qualified to offer standard of care testimony against Dr. McLean because he practiced the same specialty at the relevant time, regardless of whether

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[3] Because Dr. McCarus's AOM does not indicate that he engaged in instruction of students during the relevant time, subdivision (b)(*ii*) is not at issue.

[4] As Crego failed to present this argument below, I would review it for plain error affecting her substantial rights. *In re Smith Trust*, 278 Mich App 283, 285; 731 NW2d 810 (2007).

allopathic medicine and osteopathic medicine are the "same health profession." I respectfully disagree.

The primary issue in *Woodard* was the degree to which an expert's specialization, certification, and relevant experience must match that of the defendant when multiple specialties, subspecialties, or certificates of special qualification are involved. *Id*. at 554-557, 578-579. Indeed, in granting the applications for leave to appeal in *Woodard* and its companion case, the Court directed the parties to brief, among other items, "whether MCL 600.2169(1)(b) requires an expert witness to practice or teach the same subspecialty as the defendant"; "whether MCL 600.2169 requires an expert witness to match all specialties, subspecialties, and certificates of special qualification that a defendant may possess, or whether the expert witness need only match those that are relevant to the alleged act of malpractice"; "the proper construction of the words 'specialist' and 'that specialty' in MCL 600.2169(1)(a) and MCL 600.2169(1)(b)(*i*)"; and "the proper construction of 'active clinical practice' and 'active clinical practice of that specialty' as those terms are used in MCL 600.2169(1)(b)(*i*)." *Id*. at 556 n 2, 557 n 3. It is clear from these directives and the discussion in *Woodard* that the Supreme Court was focused on interpreting the "specialty" language in MCL 600.2169. Because the *Woodard* Court was not called upon to interpret the "same health profession" language of the statute, the above-quoted passage from *Woodard* does not have precedential value with respect to this issue. See *Riverview v Michigan*, 292 Mich App 516, 523; 808 NW2d 532 (2011) ("A matter that a tribunal merely assumes in the course of rendering a decision, without deliberation or analysis, does not thereby set forth binding precedent."). Instead, I read the above-quoted passage as recognizing (1) that MCL 600.2169(1)(b)(*i*) requires, *among other things*, that the expert be engaged in the active clinical practice of the same specialty practiced by the defendant, and (2) that a nonspecialist—who by necessity cannot engage in the active clinical practice of a specialty—need only engage in the active clinical practice of the same health profession in which the defendant is licensed. Unlike the majority, I do not read *Woodard* as holding that the "same health profession" requirement is inapplicable to a specialist.

This conclusion is further supported by well-recognized principles of statutory construction. It is axiomatic that a court's driving purpose in statutory interpretation is to discern and give effect to the intent of the Legislature as expressed by the plain or statutorily defined meaning of the language itself. *Grossman*, 470 Mich at 598; *Brown v Hayes*, 270 Mich App 491, 497; 716 NW2d 13 (2006), rev'd in part on other grounds 477 Mich 966 (2006). When the language is unambiguous, it must be enforced as written. *Grossman*, 470 Mich at 598. And if at all possible, " '[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory . . . .' " *People v Pinkney*, 501 Mich 259, 288; 912 NW2d 535 (2018) (alteration in original), quoting *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

MCL 600.2169(1)(b)(*i*) provides that an expert must have spent a majority of his or her professional time in "[t]he 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 the party is a specialist, the active clinical practice of that specialty." (Emphasis added). As recognized by the majority, "and" is a conjunctive term. See *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 33; 732 NW2d 56 (2007), overruled in part on other grounds by *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455; 795 NW2d 797 (2010). Thus, its use in this context indicates

that "if the party is a specialist," the expert must satisfy *both* requirements—that is, active clinical practice in the same health profession *and* the same specialty. In fact, when introduced, the underlying bill included the word "or."[5] Later, however, the Legislature opted to replace the disjunctive word "or" with the conjunctive word "and." Interestingly, the majority points to the use of the word "or" in MCL 600.2169(2) to suggest there is an internal consistency, but what I glean from this is that the Legislature chooses "or" when it opts to do so.

Moreover, accepting the majority's reading that the clause following the word "and" trumps, it renders the introductory language in subdivision (b)(*i*) surplusage as to physicians who specialize. This is a result that I endeavor to avoid. *Pinkney*, 501 Mich at 283 n 59, 288. In addition, it wrongly assumes no other licensed health professional may specialize when both nurses and dentists can. See MCL 333.17210(1) (authorizing a specialty certification for nurses with advanced training in certain "health professional specialty fields"); MCL 333.16608 (identifying "prosthodontics, endodontics, oral and maxillofacial surgery, orthodontics, pediatric dentistry, periodontics, or oral pathology" as fields in which a dentist may specialize). See also *Cox v Hartman*, 322 Mich App 292; 911 NW2d 219 (2017) (distinguishing between a nurse practitioner and a registered nurse); *Decker v Flood*, 248 Mich App 75, 79, 83-84; 638 NW2d 163 (2001) (holding that a dentist who routinely performed root canals and was a " 'doctor of dental surgery' . . . [as well as] a member of the American Association of Endodontists," was not qualified to offer expert testimony or provide an AOM on the standard of practice applicable to a general practitioner dentist who was allegedly negligent when he performed a root canal).

Finally, the language at issue in MCL 600.2169(1)(b)(*i*) ("the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed") also appears in both MCL 600.2169(1)(b)(*ii*) and (c)(*ii*). I read these identical words as having the same meaning throughout this statute.

Crego further posits that our focus should be on the "health profession" language, which MCL 333.16105(2) describes as "a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration issued under this article." Crego then suggests that Dr. McCarus and Dr. McLean share the same occupation, i.e., that of an obstetrician gynecologist. Again, Crego ignores the qualifying language "performed by an individual acting pursuant to a license or registration issued under this article," and our task is to give meaning to every word the legislature uses.

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[5] As introduced, the pertinent portion of 1993 SB 270 read:

> (*i*) THE active clinical practice of ~~medicine or osteopathic medicine and surgery or the active clinical practice of dentistry or to,~~ the SAME HEALTH PROFESSION IN WHICH THE DEFENDANT IS LICENSED *OR*, IF THE DEFENDANT IS A SPECIALIST, THE ACTIVE CLINICAL PRACTICE OF THAT SPECIALTY OR A RELATED, RELEVANT AREA OF PRACTICE. [Emphasis added.]

Turning to the balance of Crego's claim of error with respect to this issue, *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488; 711 NW2d 795 (2006), controls. MCR 7.215(J)(1). In that case, the plaintiff alleged that he was injured at birth as a result of negligence on the part of a nurse midwife employed by the defendant hospital, and he proffered proposed standard-of-care testimony from two obstetrician gynecologists. *McElhaney*, 269 Mich App at 489, 495-496. This Court affirmed the trial court's determination that the proposed experts were not qualified to testify against the nurse midwife because they did not practice in the same health profession as the nurse midwife, as required by MCL 600.2169(1)(b)(*i*). *Id.* at 496. In reaching that conclusion, this Court reasoned that the nurse midwife was licensed to practice in nursing under MCL 333.17211 and certified in nurse midwifery under MCL 333.17210, while the proposed experts were "physicians" as defined in the Public Health Code.[6] *Id*. The Court acknowledged that "it may appear reasonable that a physician with substantial educational and professional credentials should be able to testify about the standard of care of a nurse who works in a closely related field," but concluded that it was "constrained by the plain words of the statute that the expert witness must practice in the 'same health profession.' " *Id*. at 497.

Shortly after *McElhaney*, another panel of this Court considered a similar issue in the context of expert testimony offered by a physical therapist in support of an occupational therapist defendant. *Brown*, 270 Mich App at 493-494. The *Brown* Court observed that the Public Health Code defined the term "health profession" as "a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration issued under this article." *Id*. at 501, quoting MCL 333.16105 (quotation marks omitted). Given this broad definition, the *Brown* Court opined that, despite the disparity between the license required of a physical therapist under part 178 of the Public Health Code and the registration required of an occupational therapist under part 183 of the Public Health Code, *Brown*, 270 Mich App at 498, both the proposed expert and the defendant were in the same "vocation, calling, occupation, or employment" because it was undisputed that they both engaged in so-called "work-hardening therapy," *id*. at 501-502.[7] Nonetheless, the *Brown* Court recognized that *McElhaney*, 269 Mich App at 497, had already held "that two people cannot be engaged in the 'same health profession' for purposes of this statute unless each has an identical license under the Public Health Code." *Brown*, 270 Mich App at 502. Bound by that precedent, the *Brown* Court concluded that the physical therapist expert was not qualified under MCL 600.2169(1)(b) to testify regarding the standard of care applicable to an occupational therapist. *Id*. at 502-503.

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[6] See former MCL 333.17001(1)(c), as amended by 1990 PA 248 (defining the term "physician" as "an individual licensed under this article to engage in the practice of medicine"). Although "physician" is now defined by subdivision (e), the definition remains the same. See current MCL 333.17001(1)(e).

[7] According to an uncontested affidavit provided by the defendant's proposed expert, "both occupational therapists and physical therapists receive training in work-hardening techniques, that they often work side by side in work-hardening therapy programs, and that there is no difference between the work performed by an occupational therapist and a physical therapist in a work-hardening therapy program." *Brown*, 270 Mich App at 501-502.

Later, in *Bates v Gilbert*, 479 Mich 451; 736 NW2d 566 (2007), our Supreme Court seemingly agreed with this Court's consideration of licensing to determine compliance with MCL 600.2169. There, the plaintiff supported her complaint alleging medical malpractice against an optometrist with an AOM signed by an ophthalmologist. *Id*. at 453. The Supreme Court determined that the plaintiff's counsel could not have reasonably believed that ophthalmology was the "same health profession" as optometry. *Id*. at 460-461. As explained in *Bates*, optometry is defined and regulated by part 174 of the Public Health Code and involves nonphysicians who "examine the human eye to ascertain defects or abnormal conditions that can be corrected or relieved by the use of lenses." *Id*. at 459-461. Ophthalmologists, on the other hand, are physicians engaging in the practice of medicine, regulated under part 170 of the Public Health Code. *Id*. at 460. Thus, although ophthalmologists provided similar care in that they "treat diseases of the eye," ophthalmology could not be considered the same health profession as optometry for purposes of expert qualification under MCL 600.2169. *Id*. at 460-461.

Here, two physicians who admittedly hold a board certification from the same national organization[8] and practice in the same specialty, are licensed under different parts of the Public Health Code. Dr. McCarus is licensed under part 170, which governs the practice of medicine and defines a "physician" as "an individual who is licensed under this article to engage in the practice of medicine." MCL 333.17001(1)(e). It further defines the "practice of medicine" as "the diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts." MCL 333.17001(1)(h). In contrast, Dr. McLean is licensed under part 175, governing osteopathic medicine and surgery, which defines a "physician" as "an individual who is licensed under this article to engage in the practice of osteopathic medicine and surgery." MCL 333.17501(1)(d). Part 175 also provides the following definition for the "practice of osteopathic medicine and surgery":

> [A] *separate, complete, and independent school of medicine and surgery* utilizing full methods of diagnosis and treatment in physical and mental health and disease, including the prescription and administration of drugs and biologicals, operative surgery, obstetrics, radiological and other electromagnetic emissions, and placing special emphasis on the interrelationship of the musculoskeletal system to other body systems. [MCL 333.17501(1)(f) (emphasis added).]

This definition, and the placement of provisions concerning osteopathic medicine in a different part than those applicable to the general "practice of medicine," suggests that the Legislature did not intend that osteopathic medicine and allopathic medicine be treated as the

[8] The American Board of Medical Specialties (ABMS) recognizes 24 primary medical specialties, including obstetrics and gynecology, and the American Osteopathic Association recognizes 18 primary medical specialties, including obstetrics and gynecology. The ABMS certified Dr. McCarus, an osteopathic physician, as a specialist in obstetrics and gynecology.

same health profession.[9] Therefore, given the different licensing and regulations applicable to Dr. McLean, as an osteopathic physician, and Dr. McCarus, as an allopathic physician, I would hold that the trial court did not err by ruling that Dr. McCarus was not actively engaged in the "same health profession in which [Dr. McLean] is *licensed*[.]" See MCL 600.2169(1)(b)(*i*) (emphasis added). Because Dr. McCarus did not satisfy the conditions of MCL 600.2169(1)(b)(*i*), the trial court correctly determined that he was unqualified to provide standard-of-care testimony against Dr. McLean.

I recognize that this Court has previously held that an expert, who was an osteopathic physician board-certified in family practice, was qualified to testify against an allopathic physician defendant, who was a general practitioner, under MCL 600.2169, "as long as MCL 600.2169(1)(c)(*i*) or (*ii*) is also satisfied." *Robins v Garg (On Remand)*, 276 Mich App 351, 359-360; 741 NW2d 49 (2007). Because the expert's "family practice" was a "general practice" and because the expert "was engaged in general practice medicine . . . for the year preceding the date of the alleged malpractice," this Court determined that "he was qualified under MCL 600.2169(1)(c), and that plaintiff's affidavit of merit complied with MCL 600.2912d(1)." *Id*. at 360-361. On the other hand, this Court also recognized that if the defendant was board-certified in family practice and the proposed expert was a general practitioner, the proposed expert would not be qualified to testify under MCL 600.2169(1)(a) because he would not be a board-certified specialist. *Id*. at 360 n 3. My conclusion here is not inconsistent with *Robins* because MCL 600.2169(1)(b) explicitly conditions its application "[s]ubject to subdivision (c)," and MCL 600.2169(1)(c)(*i*), unlike MCL 600.2169(1)(b)(*i*) and (*ii*), contains no requirement of licensure in the same health profession.[10]

II. REASONABLE BELIEF REGARDING EXPERT QUALIFICATION

Crego also argues that the circuit court erred by dismissing the claims arising from Dr. McLean's conduct because her trial counsel reasonably believed that Dr. McCarus was qualified to offer standard-of-care testimony against Dr. McLean. I agree.

As already noted, a plaintiff commencing a lawsuit alleging medical malpractice must attach an AOM to his or her complaint. MCL 600.2912d(1); *Grossman*, 470 Mich at 598. While an expert may not offer testimony concerning the standard of practice or care at trial in the absence of strict compliance with the requirements of MCL 600.2169, MCL 600.2192d(1) recognizes that at the time the AOM is prepared, the plaintiff and his or her attorney have only limited information available from which to determine the credentials of the defendant and, correspondingly, the credentials required of the proposed expert. *Grossman*, 470 Mich at 598-599. Thus, because the expert who signs the AOM must be selected without the benefit of full

[9] Part 180 of Public Health Code also provides licensing to yet a third type of physician—a podiatric physician. See MCL 333.18001(c).

[10] While the statutory language dictates this result, I recognize that allopathic physicians far outnumber their osteopathic counterparts and, therefore, securing an expert for a medical-malpractice matter involving a specialist with an osteopathic licensure may prove challenging.

discovery, MCL 600.2912d(1) allows "considerable leeway in identifying an expert affiant" at the AOM stage of the proceedings. *Bates*, 479 Mich at 458. Yet the flexibility afforded by MCL 600.2912d(1) is not without limits. "[P]laintiff's counsel must invariably have a *reasonable belief* that the expert satisfies the requirements of MCL 600.2169." *Id*. In determining the reasonableness of counsel's belief, courts consider the information available to counsel at the time the AOM was prepared, including publicly available information, *Grossman*, 470 Mich at 599-600, and relevant statutes and caselaw, *Bates*, 479 Mich at 461.

Despite my disagreement with Crego's reading of the above-quoted language from *Woodard*, it is accepted by the majority and appears reasonable. Moreover, *Robins*, although decided under MCL 600.2169(1)(c), is published authority supporting the propriety of an osteopathic physician furnishing an AOM against an allopathic physician. The circuit court was correct that *Bates*, *McElhaney*, and *Brown* are well-established, but none of them involved physicians as defendants. In fact, this question appears to be one of first impression even though the statute has been in existence since 1993. Given these circumstances and the underlying facts, I would conclude that Crego's counsel could have reasonably believed his proposed expert satisfied the requirements of MCL 600.2169 and the AOM was proper.

For this reason, I agree that the circuit court's order of dismissal must be reversed and the case remanded for further proceedings.

/s/ Anica Letica