STATE OF MICHIGAN

COURT OF APPEALS

SHERRI RIEGER and MICHAEL RIEGER,

Plaintiffs-Appellants,

v

JOHN M. CILLUFFO, M.D. and JOHN M. CILLUFFO, M.D., PLC,

Defendants-Appellees.

UNPUBLISHED
February 17, 2011

No. 295604
Grand Traverse Circuit Court
LC No. 09-027146-NH

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from the trial court's order granting defendants' motion to strike plaintiffs' expert witness. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs brought this malpractice action alleging that Dr. Cilluffo, a board-certified neurosurgeon, negligently performed back surgery (a procedure called BAK cage) on Sherri Rieger in September 2006. In support of their claims, plaintiffs presented an affidavit of merit signed by Dr. Gary Lustgarten, a board-certified neurosurgeon.

Defendants took Dr. Lustgarten's deposition on September 23, 2009, to determine his qualifications to testify as an expert witness. In his deposition, Dr. Lustgarten acknowledged that he may have testified in a previous deposition that he planned to stop performing surgeries in September of 2004. He testified that his plans changed effective January 1, 2005, and that he performed between eight and ten surgeries after that time and before May or June of 2005. At that point he stopped performing surgeries full-time, but had performed about a dozen operations since then, as an assistant surgeon or co-surgeon. His last surgery as active lead surgeon was at the end of May or the beginning of June of 2005. Dr. Lustgarten testified that he is still engaged in the full time office practice of neurosurgery, and he hoped to retire in December 2010. His average workweek is 60 hours. Dr. Lustgarten further testified that he spends about five to ten percent of his time performing independent medical examinations, five to ten percent of his time doing medical legal work, and the remainder of his time seeing patients.

Defendants moved to strike Dr. Lustgarten as an expert witness, asserting that in the year preceding the September 11, 2006 occurrence in this case, he had not devoted the majority of his

professional time to the active practice of neurosurgery. At the conclusion of the hearing, the trial court noted that the statute at issue was MCL 600.2169(1)(b), and the question was whether the witness had devoted the majority of his time to the active clinical practice of neurosurgery in the year preceding the incident. The trial court questioned the meaning of the phrase active clinical practice, and whether it was necessary that the witness actually perform neurosurgical procedures to be qualified. The trial court found it was prudent to grant defendants' motion, and allow the parties to take an immediate appeal and get the issue resolved. The trial court stated that it would leave it to this Court to determine what is meant by clinical practice in the specialty in the year prior.

This Court granted plaintiff's application for leave to appeal, limited to the issue raised on appeal; i.e., whether the trial court erred in its interpretation of MCL 600.2169(1)(b). A trial court's ruling concerning the qualifications of a proposed expert is generally reviewed for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). However, this case presents an issue of statutory interpretation, a question of law considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

MCL 600.2169(1) provides in 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) 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.

At the time of the malpractice, Dr. Cilluffo was board certified in neurosurgery, as is Dr. Lustgarten. Thus, there is no dispute that subsection (1)(a) of the statute is satisfied. It is also

undisputed that Dr. Lustgarten did not instruct students. Specifically at issue here is whether Dr. Lustgarten also satisfies subsection (1)(b) and whether the majority of his work during the year before the incident, that is, September 2005 to September 2006, qualified as engaging in the active clinical practice of neurosurgery. The statute does not define "active clinical practice," but consulting dictionary definitions leads to the conclusion that, contrary to the trial court's belief, it does not require the specialist to spend the majority of his or her time performing surgery. The dictionary defines clinical as: "1. pertaining to a clinic. 2. concerned with or based on actual observation and treatment of disease in patients rather than experimentation or theory." Random House Webster's College Dictionary (1992).

The trial court found that Dr. Lustgarten "clearly has an ongoing office practice . . . His credentials are not in dispute." However, the trial court continued, "But if in fact, the specialty requirement that's tied to the occurrence is actual performance of neurosurgical procedures . . . in the year prior, this physician hasn't demonstrated that," (apparently relying on *Kiefer v Markley*, 283 Mich App 555; 769 NW2d 271 (2009), as supporting this conclusion). In *Kiefer*, the defendant physician allegedly negligently performed hand surgery. The proposed expert spent forty percent of his time practicing the specialty of hand surgery and the remainder of his time practicing the related specialties of cosmetic and reconstructive surgery. This Court held that the focus had to be on the area of hand surgery alone. *Id*. at 559-560. But in *Kiefer*, there was no dipute over hand surgery being one specialty and cosmetic surgery and reconstructive surgery being *separate*, albeit related, specialties. In the present case, however, there is no evidence that operative neurosurgery is a separate specialty from non-operative neurosurgery. Dr. Lustgarten's testimony supports this conclusion. He testified unambiguously that he was "currently involved in the practice of neurosurgery" full-time, and that he was "still engaged in the full-time practice of office neurosurgery." Unlike *Kiefer*, where the proposed expert engaged in hand surgery, and cosmetic and reconstructive surgery, the only specialty here is neurosurgery, and all the statute requires is that the expert engages in the active clinical practice of the same *specialty* as the defendant, not that he must perform the exact same types of procedures. The trial court erred in treating the defendant's practice as a subspecialty of neurosurgery where there was no evidence that such a subspecialty existed.

Defendants' argument that Dr. Lustgarten did not engage in any form of active clinical practice of neurosurgery also fails. Dr. Lustgarten testified that he planned to continue practicing full-time office neurosurgery only until December 2008 but, by the time of his deposition in 2009, that had not happened and he was still working 60 hours per week seeing patients, evaluating and conducting conservative care of spinal maladies, and referring patients to surgeons as needed. How this presents "an inadequate basis" for establishing his qualifications is not explained by defendants. Dr. Lustgarten undisputedly spent the majority of his professional time seeing patients, thus satisfying the "active clinical practice" requirement of the statute. Defendants' argument implies that the type of work performed has a bearing on what specialty an expert practices. However, the statute and case law do not support defendants' approach of breaking down a specialty into its various components and analyzing how much time the expert devoted to each component of that specialty. The record here shows that Dr. Lustgarten practiced in the specialty of neurosurgery in 2005, and was still practicing in the specialty at the time of his 2009 deposition.

Defendants' motion to strike Dr. Lustgarten should have been denied by the trial court. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro