

STATE OF MICHIGAN
IN THE SUPREME COURT

DUSTIN ROCK,

Plaintiff-Appellee,

-vs-

DR. K. THOMAS CROCKER and
DR. K. THOMAS CROCKER, D.O., P.C.,

Defendants-Appellants.

Supreme Court No. 150719

Court of Appeals No. 312885

Kent County Circuit Court
No. 10-06307-NM

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

*** ORAL ARGUMENT REQUESTED ***

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.	iii
STATEMENT OF QUESTIONS PRESENTED.....	v
STATEMENT OF FACTS.	1
ARGUMENT.....	8
I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE INTRODUCTION OF EVIDENCE OF OTHER ERRORS THAT DR. CROCKER MADE DURING HIS TREATMENT OF MR. ROCK.	8
II. THE COURT OF APPEALS PROPERLY DETERMINED THAT MCL 600.2169(1)(a) REQUIRES THAT A STANDARD OF CARE EXPERT IN A MEDICAL MALPRACTICE CASE MUST MATCH THE DEFENDANT’S BOARD CERTIFICATION AS OF THE DATE THE MALPRACTICE OCCURRED.	11
RELIEF REQUESTED.	27

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Albro v Drayer</i> , 303 Mich. App. 758; 846 N.W.2d 70 (2014).	6
<i>City of Novi v Robert Adell Children’s Funded Trust</i> , 473 Mich 242; 701 NW2d 144 (2005). . .	11
<i>Dawe v Dr. Reuven Bar-Levav & Associates, P.C.</i> , 485 Mich 20; 780 NW2d 272 (2010).. . . .	19
<i>Gilbert v Daimler Chrysler Corp</i> , 470 Mich 749; 685 NW2d 391 (2004).	11
<i>Jilek v Stockson</i> , 490 Mich 291; 805 NW2d 852 (2011)..	12
<i>Kowalski v Fiutowski</i> , 247 Mich App 156; 635 NW2d 502 (2001).	11
<i>Maldonado v Ford Motor Co</i> , 476 Mich 372; 719 NW2d 809 (2006).	11
<i>McDougall v Eliuk</i> , 218 Mich App 501; 554 NW2d 56 (1996)	21
<i>People v Aldrich</i> , 246 Mich App 101; 631 NW2d 67 (2001).	10
<i>People v Crawford</i> , 458 Mich 376; 582 NW2d 785 (1998).	10
<i>People v Crawford</i> , 458 Mich 376; 582 NW2d 785 (1998).	10
<i>People v Kreiner</i> , 415 Mich 372; 329 NW2d 716 (1982)..	10
<i>People v Starr</i> , 457 Mich 490; 577 NW2d 673 (1988).	10
<i>Rock v Crocker</i> , 497 Mich 1034; 863 NW2d 330 (2015).	6
<i>Ross v Crocker</i> , 308 Mich App 155; 863 NW2d 361 (2014).	5
<i>Shinholster v Annapolis Hospital</i> , 471 Mich 540; 685 NW2d 275 (2004).	16
<i>Waknin v Chamberlain</i> , 467 Mich 329; 653 NW2d 176 (2002)	10
<i>Woodard v Custer</i> , 476 Mich 545; 719 NW2d 842 (2006)	12
<i>Woodman v Kera</i> , 486 Mich 227; 785 NW2d 1 (2010)	10

Statutes

MCL 1483(1)(b)..... 16

MCL 600.1483..... 16

MCL 600.1483(1)(a). 17

MCL 600.1483(1)(b) 17

MCL 600.1483(1)(c) 17

MCL 600.2169..... 3

MCL 600.2169(1). 4

MCL 600.2169(1)(a). 4

MCL 600.2169(1)(b). 13

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS PROPERLY CONCLUDE THAT THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT PLAINTIFF COULD PRODUCE EVIDENCE AT TRIAL OF THE DEFENDANT'S FAILURE TO COMPLY WITH THE APPLICABLE STANDARD OF CARE IN HIS TREATMENT OF THE PLAINTIFF EVEN IF THESE ACTS DID NOT CONTRIBUTE TO PLAINTIFF'S INJURY?

Plaintiff-Appellee says "Yes".

Defendants-Appellants say "No".

- II. DID THE COURT OF APPEALS CORRECTLY INTERPRET MCL 600.2169(1) IN CONCLUDING THAT PLAINTIFF'S STANDARD OF CARE EXPERT, DR. DAVID VIVIANO, ONLY NEEDED TO MATCH THE DEFENDANT'S BOARD CERTIFICATION AS OF THE DATE OF THE MALPRACTICE COMMITTED IN THIS CASE?

Plaintiff-Appellee says "Yes".

Defendants-Appellants say "No".

STATEMENT OF FACTS

This is a medical malpractice action arising out of professional negligence that occurred during Dustin Rock's September 28, 2008 ankle surgery. The physician who performed that surgery was Dr. K. Thomas Crocker, a board certified orthopedic surgeon.¹

On September 26, 2008, Dustin Rock was changing the brake pads on a truck when he sustained an injury to his right ankle. X-rays taken the following day revealed a trimalleolar fracture of his ankle. (App. 14a). That same day Dr. Crocker performed surgery attempting to repair Mr. Rock's fractured ankle. (*Id.*)

Approximately one month after Dr. Crocker performed this surgery, Mr. Rock sought treatment from another orthopedic surgeon, Dr. David Viviano. (App. 37a). Dr. Viviano concluded that because of several things that Dr. Crocker did wrong during the September 28, 2008 surgery, the fracture was incompletely reduced. (App. 39a-42a). As a result, Dr. Viviano recommended revision surgery. (App. 39a). Dr. Viviano conducted this second surgery on Mr. Rock's ankle on November 4, 2008. (App. 40a). Dr. Viviano performed a third surgery on Mr. Rock's ankle approximately four months later. (App. 43a).

Mr. Rock filed this malpractice action in the Circuit Court for the County of Kent against Dr. Crocker on June 21, 2010. (App. 13a-19a). In the course of pretrial proceedings, Mr. Rock identified two standard of care experts whom he would call as witnesses at trial. One of these two experts was Dr. Viviano, the orthopedic surgeon who had attempted to correct the adverse results of Dr. Crocker's surgery. The second standard of care expert identified by Mr. Rock was Dr. Antoni

¹Dr. Crocker's professional corporation was also named as a defendant. For simplicity purposes, this brief will refer to Dr. Crocker as the sole defendant.

Goral. In an affidavit of merit that he signed at the outset of the case and in deposition testimony that he later provided, Dr. Goral identified a series of things that Dr. Crocker did wrong in the course of the September 2008 surgery and his post-operative care of Mr. Rock.

Dr. Goral was deposed in November 2011. In that deposition, he testified to the various ways in which Dr. Crocker breached the standard of care in his treatment of Mr. Rock. Dr. Goral further testified that Dr. Crocker had given inappropriate advice when he told Mr. Rock that he could use the surgically repaired ankle to bear weight following the September 28, 2008 surgery. (App. 22a). However, Dr. Goral testified that, based on a comparison of the last x-rays taken by Dr. Crocker and those taken by Mr. Rock's subsequent treater, Dr. Viviano, this substandard advice could not have caused the ankle problems that Mr. Rock experienced later. (App. 22a-23a).

Dr. Goral also testified that Dr. Crocker had performed the September 2008 surgery improperly. Dr. Goral testified that standard procedure for repairing a distal fibular fracture was the use of five screws above the fracture and five below the fracture. (App. 24a). Dr. Crocker did not use the standard ten screws. (*Id.*). Despite the fact that Dr. Crocker had deviated from the accepted standard of care, Dr. Goral testified that Dr. Crocker managed to "get lucky" and this part of Mr. Rock's fracture healed. (*Id.*).

A jury trial was scheduled to begin on October 1, 2012. In advance of that trial, plaintiff took the *de bene esse* deposition of his other standard of care expert, Dr. Viviano. (App 35a-76a). Dr. Viviano testified that Dr. Crocker breached the standard of care applicable to an orthopedic surgeon in a number of ways. (App. 42a-43a).

In that deposition, counsel for Dr. Crocker explored Dr. Viviano's board certification. Dr. Viviano was originally board certified in orthopedic surgery in 2001, seven years before the

malpractice that is the subject of this case. (App. 36a). Dr. Viviano was also board certified as of September 2008, when the professional negligence that is the subject of this case occurred. Dr. Viviano's board certification expired as of December 31, 2011 and, because of his own health problems, Dr. Rock could not seek recertification at the time his board certification expired. (App. 50a-53a). However, Dr. Viviano indicated in his deposition that he was in the process of recertifying. (App 50a).

As the October 1, 2012 trial date approached, Dr. Crocker filed two motions of relevance to the issues presented in this appeal. He filed a motion in limine to exclude any evidence of Dr. Crocker's breaches of the standard of care that did not result in injury to Mr. Rock. (App. 77a-86a).

Dr. Crocker also filed a motion on September 26, 2012, challenging the qualifications of Dr. Viviano. (App. 95a-101a). He argued in that motion that Dr. Viviano was not qualified to provide expert testimony under MCL 600.2169 because he would not be board certified at the time of trial.

The circuit court issued an order dated September 26, 2012 in which it denied Dr. Crocker's motion to exclude evidence of his breaches of the standard of care that did not result in injury to Mr. Rock. (App. 106a-108a). The circuit court acknowledged that the evidence provided by plaintiff's expert, Dr. Goral, indicated that two of Dr. Crocker's breaches of the standard of care did not result in any injury to Mr. Rock. Despite that fact, the circuit court ruled that there was potential relevance to this evidence. On that basis, the circuit court rejected Dr. Crocker's motion in limine to exclude this evidence:

The difficulty with [defendants'] analysis is that it looks at the conduct which is alleged to be deficient in the treatment provided by the defendant in a complete vacuum. This is inappropriate and it does not give the jury an adequate opportunity to review in its entirety the quality of treatment provided by the defendant. It is certainly reasonable for a reasonable finder of fact to examine all the claims of the

plaintiff and if satisfied that in addition to the difficulties of treatment that actually caused injuries if they believe the Defendant Doctor also breached the standard of care in a variety of multiple other ways then it provides evidence which is relevant because it makes a question of fact more likely than not, that is, that the doctor did not perform his duties as is required by the standard of care and that injuries he did suffer were a result of his breaches and that the claims of the plaintiff are meritorious and should be compensated. It is also possible that the jury will reject this evidence and find it has no bearing or credibility; however, it should not be excluded.

The Court further finds the conduct by the defendant sought to be excluded is all part of the *res gestae* of the claims before the Court.

As relates to the MRE 403 test, the Court does not believe that the prejudice of this information substantially outweighs its probative value. To the contrary, the prejudicial impact is *de minimis* if any and it is in the Court's assessment highly probative of whether or not that which was provided in medical care to the plaintiff in the time in question fell below the appropriate standards. For these reasons the Defendants' Motion in Limine to exclude that evidence is respectfully DENIED.

(App. 107a).

The following day, the circuit court issued another written decision in which it granted Dr. Crocker's motion precluding Dr. Viviano from providing standard of care testimony at trial. (App. 102a-105a). Focusing on the tense of the verbs used in MCL 600.2169(1)(a), the circuit court agreed with Dr. Crocker that Dr. Viviano could testify at trial as to standard of care only if he was, at the time of providing that testimony, board certified in orthopedic surgery:

The Court finds this statute to be clear on its face that if the party against whom the testimony is offered is a board certified specialist, then the expert witness must "be" a specialist who "is" board certified in that specialty. The statutory language is in the present tense, indicating that the Legislature intended that an expert must be board certified at the time the testimony is given. This is supported in the case law interpreting this statute. In *Halloran, supra*, the Michigan Supreme Court held that MCL 600.2169(1)(a) requires a proposed expert witness to "have" the same board certification as the party against whom or on whose behalf the testimony is offered. *Halloran, supra* at 574.

(App. 104a).

Mr. Rock applied to the Court of Appeals for leave to appeal from the circuit court's September 27, 2012 order. On September 12, 2013, a panel of the Court of Appeals granted his application for leave. Dr. Crocker filed a cross-appeal in which he challenged, among other things, the circuit court's ruling on his motion in limine to exclude evidence of certain breaches of the standard of care that did not result in injury to Mr. Rock.

On November 18, 2014, a panel of the Court of Appeals issued its decision. *Ross v Crocker*, 308 Mich App 155; 863 NW2d 361 (2014). The panel reversed the circuit court's determination that Dr. Viviano was not qualified to provide standard of care testimony under MCL 600.2169(1)(a). Reading that subsection as a whole, the Court of Appeals rejected Dr. Crocker's argument that the tense of the verbs used in §2169(1)(a)'s second sentence required that Dr. Viviano be board certified at the time of the trial:

Defendant's primary argument is that the second sentence of MCL 600.2169(1)(a) employs the present tense and, therefore, must refer to the time when the testimony is delivered. However, this argument is belied by the first sentence of MCL 600.2169(1)(a), which employs the same present-tense verbs yet plainly refers to a past time period, i.e., the time of the occurrence that is the basis for the action. That is, the first sentence provides: "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." (Emphasis added.) Thus, despite employing the word "is," i.e., the present-tense form of the verb "to be," the first sentence still requires that the time at which the expert witness must so specialize be a time in the past in relation to the trial, i.e., at the time of the occurrence that is the basis for the action. The second sentence employs nearly identical present-tense verbs: "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 the specialty." (Emphasis added.) Accordingly, defendant's argument that the present-tense verbs employed by the second sentence of the statute require that they be read to apply to the "present," i.e., the time of the testimony, is belied by the sentence directly before it and ignores our mandate to read the statute as a whole.

308 Mich App at 161-162.

With respect to Dr. Crocker's cross-appeal of the circuit court's ruling with respect to evidence of breaches of the standard of care that did not result in injury to Mr. Rock, the Court of Appeals agreed with Dr. Crocker that Mr. Rock could not seek damages on those claims. *Id.* at 170. The Court of Appeals refused, however, to reverse the circuit court's ruling as to the potential admission of evidence of these breaches of the standard of care. Instead, the Court remanded the case to the circuit court with instructions that it exercise its discretion under MRE 403:

The second issue raised in defendant's motion is the request that the trial court exclude all evidence that defendant violated the standard of care in these two respects. This aspect of the motion goes to the admission of evidence, which we review for an abuse of discretion. *Albro v Drayer*, 303 Mich. App. 758, 760, 846 N.W.2d 70 (2014). We agree with the trial court that evidence of the course of defendant's violations of the standard of care, even if the violations did not directly cause plaintiff's eventual injury, may be relevant to the jury's understanding of the case. But, because we have ruled that plaintiff may not seek damages for those alleged violations, the trial court's view of the calculus of probative value and prejudicial effect may change. See MRE 403. Accordingly, we reverse the evidentiary ruling so that the trial court may exercise its discretion in that context and consider what limiting jury instruction to give in the event it finds the evidence admissible.

308 Mich App at 170-171.

Dr. Crocker sought leave to appeal in this Court from the Court of Appeals November 18, 2014 ruling. On June 3, 2015, this Court issued an order granting his application for leave to appeal. *Rock v Crocker*, 497 Mich 1034; 863 NW2d 330 (2015). The Court's grant of leave was limited to the following issues:

(1) whether the lower courts erred in concluding that allegations relating to violations of the standard of care that the plaintiff's expert admitted did not cause the plaintiff's injury were admissible as evidence of negligence; and (2) whether the Court of Appeals erred in holding that, if the defendant is a board-certified specialist, MCL 600.2169(1)(a) only requires an expert to be board certified in that same specialty at the time of the malpractice, and not at the time of trial.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE INTRODUCTION OF EVIDENCE OF OTHER ERRORS THAT DR. CROCKER MADE DURING HIS TREATMENT OF MR. ROCK.

Dr. Crocker filed a motion in limine seeking to exclude at trial evidence of certain errors made by Dr. Crocker in his treatment of Mr. Rock. These errors were the subject of testimony provided by plaintiff's expert, Dr. Goral. In responding to Dr. Crocker's motion, plaintiff did not deny the fact that Dr. Goral acknowledged that these errors were not a cause in fact of the injuries that Mr. Rock sustained. Plaintiff contended, however, that evidence of these errors would still be relevant at trial.

The circuit court in its September 26, 2012 Opinion denied Dr. Crocker's motion. (App. 106a-108a). On the appeal of that ruling, the Court of Appeals construed Dr. Crocker's motion as one for partial summary disposition on the two theories for which causation testimony was lacking. The Court of Appeals ordered the dismissal of these claims as a basis for the recovery of damages. 308 Mich App at 170.²

However, the Court of Appeals ruled that the circuit court did not abuse its discretion in ruling that it would not in advance of trial exclude evidence of the errors that Dr. Crocker made. The Court of Appeals observed that this evidence "may be relevant to the jury's understanding of the case." *Id.*

²Plaintiff did not assert in the circuit court or on appeal to the Court of Appeals that these theories could be the basis for recovery inasmuch as Dr. Goral specifically denied that these acts proximately caused Mr. Rock's injuries. To some extent, Dr. Crocker's arguments in his brief to this court seek to relitigate this issue that he has already prevailed on. Plaintiff has not in the wake of Dr. Goral's deposition testimony suggested that the specific acts can be the basis for a claim for recovery. This issue, instead, is one of evidence.

The Court of Appeals remanded the case to the circuit court to weigh the value of this evidence against its potential unfair effect under MRE 403. 308 Mich App at 170-171. Thus, the Court of Appeals reversed the circuit court's evidentiary ruling and remanded with instructions for the circuit court to consider MRE 403 as well as possible limiting instructions to be given in the event it determined that this evidence was to be admitted. *Id.* Thus, as things presently stand, the circuit court's original ruling allowing this evidence to be admitted has been reversed pending an additional determination by the trial court.

The circuit court did not abuse its discretion in reaching the result that it did. The circuit court properly concluded that the jury was entitled to a complete picture of the quality of care that Dr. Crocker provided to Mr. Rock. Dr. Crocker will presumably be testifying both as a witness to the facts of Mr. Rock's treatment as well as an expert who will testify that his performance was in compliance with the applicable standard of care. Dr. Crocker will be testifying at trial as to his experience and expertise in the handling of a trimalleolar ankle fracture. He will be asking the jury to rely on that experience and expertise when he testifies that he did not commit malpractice in any part of his treatment of Mr. Rock.

The jury is entitled to know every way in which Dr. Crocker's performance failed to meet the applicable standard of care for an orthopedic surgeon, even if his medical errors did not cause an injury to Mr. Rock for which he is seeking damages. The jury is, therefore, entitled to know that Dr. Crocker did not act as a reasonable orthopedic surgeon would act when he provided advice to Mr. Rock with respect to bearing weight on his ankle post-surgery. And the jury has a right to hear testimony that Dr. Crocker selected the incorrect metal plate and used the wrong number of screws in his surgical repair of Mr. Rock's ankle fracture.

Dr. Crocker purports to rely on “100 years of evidence law.” Def’s Brf, at 11. It should be noted that his reliance on venerable cases from this Court on various principles of evidence law is misplaced. *See Waknin v Chamberlain*, 467 Mich 329, 332-333; 653 NW2d 176 (2002) (holding that “a rule announced in an opinion by thisw Court did not survive the adoption of the Michigan Rules of Evidence”); *see also People v Kreiner*, 415 Mich 372, 377; 329 NW2d 716 (1982); *People v Starr*, 457 Mich 490, 502, n. 12; 577 NW2d 673 (1988); *Woodman v Kera*, 486 Mich 227, 270, n. 8; 785 NW2d 1 (2010) (J. Markman, concurring).

The Michigan Rules of Evidence define the scope of relevant evidence as including evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. As this Court has recognized, MRE 401 establishes a broad principle of admissibility. *People v Crawford*, 458 Mich 376, 409; 582 NW2d 785 (1998). Under the broad definition of relevancy provided in that rule, evidence is relevant and admissible “if it is helpful in throwing light on any material point.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

MRE 401 has two components – materiality and probative value. Materiality describes the requirement that the fact to be proven must relate to something that is truly at issue in the case. *People v Crawford*, 458 Mich at 388. The probative force inquiry asks whether the proffered evidence tends to make that material fact ““ more probable or less probable than it would be without the evidence.”” *Id.* at 389, quoting MRE 401. “The threshold is minimal: ‘any’ tendency is sufficient probative force.” 458 Mich at 389-390.

Under the broad test of relevancy provided in MRE 401, admission of Dr. Goral’s testimony is appropriate. What Dr. Goral will testify to is a fundamental mismanagement of a trimalleolar

fracture on the part of Dr. Crocker. While Dr. Crocker may have been in Dr. Goral's words "lucky" that these fundamental mistakes did not result in injury to Mr. Rock, the fact that he made such mistakes is both material and his probative value.

The Court has recognized that "[t]he determination that a trial court abused its discretion involves far more than a difference in judicial opinion". *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). An abuse of discretion can be found only when "an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005). Stated another way, a circuit court's decision constitutes an abuse of discretion only if it falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Under this deferential review standard, the circuit court's decision to deny defendants' motion in limine did not constitute an abuse of discretion.

II. THE COURT OF APPEALS PROPERLY DETERMINED THAT MCL 600.2169(1)(a) REQUIRES THAT A STANDARD OF CARE EXPERT IN A MEDICAL MALPRACTICE CASE MUST MATCH THE DEFENDANT'S BOARD CERTIFICATION AS OF THE DATE THE MALPRACTICE OCCURRED.

As of September 2008 when the malpractice at issue in this case occurred, plaintiff's standard of care expert in this case, Dr. Viviano, held a board certification in orthopedic surgery, the same board certification as that held by the defendant, Dr. Crocker. At the time Dr. Viviano's *de bene esse* deposition was taken in August 2012, his board certification had lapsed. Dr. Crocker argues that under MCL 600.2169(1)(a), it was entirely irrelevant that Dr. Viviano was board certified in orthopedic surgery at the time of the malpractice committed in this case. In Dr. Crocker's view,

§2169(1)(a) demands that Dr. Viviano be board certified at the time he testifies at trial. The circuit court agreed with Dr. Crocker, the Court of Appeals reversed that ruling, and this Court has now agreed to review this question as to the appropriate interpretation of §2169(1).

What Dr. Crocker advocates in this case is that this Court take a Michigan statute that was poorly written to begin with and, as a result, bound to create confusion and uncertainty, *see e.g. Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006) and *Jilek v Stockson*, 490 Mich 291; 805 NW2d 852 (2011), and he requests that the Court add whole new layers of confusion and uncertainty to that statute. There is no reason why this Court should multiply the uncertainty created by this already perplexing statute. While it can hardly be said that MCL 600.2169(1) is a model of clarity, the fact is that an insightful and realistic reading of the text of this statute supports the conclusion reached by the Court of Appeals in this case. For the reasons that follow, this Court should affirm the Court of Appeals decision in this case.

The legal issue raised by Dr. Crocker call for the interpretation of the statute governing the qualifications of standard of care experts in medical malpractice cases, §2169(1), which provides:

(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.

(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).

MCL 600.2169(1) sets up several requirements that an expert in a medical malpractice action must meet before providing standard of care testimony. Such an expert must first be a licensed health professional under §2169(1). MCL 600.2169(1)(a) also requires that, where the defendant is a specialist or a board certified specialist, a standard of care expert must “match” that specialty or board certification. MCL 600.2169(1)(b) further imposes a practice requirement, mandating that a standard of care expert devote a majority of his/her professional time to the same area of practice as the defendant. Finally, §2169(1)(c) governs the practice qualifications necessary to provide standard of care testimony against a general practitioner.

Dr. Crocker’s contention that Dr. Viviano is not qualified to testify as to the standard of care in this case rests on the language contained in §2169(1)(a). That subsection provides:

(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.

MCL 600.2169(1)(a) contains two sentences. The first specifies that if the defendant is a specialist, a standard of care expert must be a physician who “specializes at the time of the [alleged malpractice] in the same specialty as the party against whom the . . . testimony is offered.” There is no question that Dr. Viviano meets the requirements of this first sentence of §2169(1)(a). As of September 2008 when the malpractice alleged in this case occurred, Dr. Viviano specialized in orthopedic surgery, the same specialty as Dr. Crocker.

The second sentence of §2169(1)(a) goes on to further refine the “matching” of qualifications called for by the statute. It provides that where the defendant is not merely a specialist, but board certified in that specialty, “the expert must be a specialist who is board certified in that specialty.” Based on the present-tense verbs used in this second sentence of §2169(1)(a), “be” and “is”, Dr. Crocker argues that this sentence requires that a standard of care expert testifying against a board certified expert must be board certified in the same specialty as the defendant at the time that witness testifies. Thus, while Dr. Viviano was, like Dr. Crocker, a board certified orthopedic surgeon at the time Dr. Crocker operated on Mr. Rock, Dr. Crocker argues that Dr. Viviano could not provide standard of care testimony unless he is board certified as of the date of trial.

As the Court of Appeals correctly concluded in this case, the basic flaw in Dr. Crocker’s argument is that it focuses exclusively on the second sentence of §2169(1)(a). Dr. Crocker contends that the tense of the verbs used in that sentence is dispositive of the issue presented in this case. The

appropriate interpretation of §2169(1)(a), however, requires consideration of the entirety of that subsection. In light of other language in §2169(1)(a), there is no reason to give such undue weight to the tense of the verbs used in the second sentence of that subsection. The first sentence of this subsection demonstrates why this is so.

As noted previously, that first sentence of §2169(1)(a) sets out a requirement as to the professional status of a standard of care expert *as of the date of the defendant's malpractice, i.e.*, “at the time of the occurrence that is the basis for the action.” But, the verb used by the Legislature to introduce this phrase is of great significance to the issue presented here. The first sentence of §2169(1)(a) indicates that, where the defendant is a specialist, an expert can give standard of care testimony only if he/she “*specializes* at the time of the occurrence that is the basis for the action in the same specialty as the defendant.” (emphasis added).

This clause in the first sentence of §2169(1)(a) references a time period in the past - “at the time of the occurrence that is the basis for the action . . .” Yet, despite the fact that this clause unquestionably pertains to past events, *the verb that introduces this clause - “specializes” - is in the present tense*, not the past tense. The fact that the Legislature used a present tense verb in the first sentence of §2169(1)(a) to describe a time period in the past undermines the entirety of Dr. Crocker’s argument as to how the second sentence of §2169(1)(a) must be read.

The essence of Dr. Crocker’s legal position in this case is that, by using present-tense verbs in the second sentence of §2169(1)(a), the Legislature *had to be* referring to the “present”, *i.e.* when the proposed expert actually testifies at trial. However, the sentence that precedes it demonstrates conclusively that the Legislature could and did use a verb in the present tense to denote a time period in the past. To argue as Dr. Crocker does that the use of a present tense verb in the second sentence

of §2169 *must* refer to the present, not the past, one has to completely ignore the first sentence of that subsection. Since a present tense verb in the first sentence of §2169(1)(a) is used to introduce a clause pertaining to past events, there is no reason why the use of the present tense in the second sentence of that subsection does not do the same.

The significance of the verb tenses used in §2169(1)(a) is properly explained in the analysis contained in Justice Stephen J. Markman’s plurality opinion in *Shinholster v Annapolis Hospital*, 471 Mich 540; 685 NW2d 275 (2004). In that case, the Court considered the two-tier statutory limitation on noneconomic damages applicable to medical malpractice cases under MCL 600.1483. That statute calls for the higher tier limitation to be applied where the “plaintiff *has* permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions.” MCL 1483(1)(b) (emphasis added). Thus, MCL 600.1483 uses a present tense verb, “has”, to describe one of the conditions that would give rise to a higher noneconomic damage award under that statute.

In *Shinholster*, the defendant’s malpractice left plaintiff’s decedent in a coma for a period of months until she ultimately died. Thus, there was no dispute in that case that the plaintiff suffered from a permanently impaired cognitive capacity in the immediate aftermath of the defendant’s malpractice. However, the defendant in *Shinholster* contended that use of the present tense verb in §1483(1)(b) meant that plaintiff would have to establish that she has a permanently impaired cognitive capacity *at the time of trial*. Since the plaintiff in *Shinholster* was deceased by the time that trial, the defendant argued that the higher cap of §1483(1)(b) could not apply since, by the time of trial, plaintiff did not *have* a permanently impaired cognitive capacity.

In response to this argument, the plaintiff in *Shinholster* disputed whether §1483(1)(b)

required that the plaintiff *have* a permanently impaired cognitive capacity as of the time of trial. Plaintiff argued, instead, that the point in time that the plaintiff must *have* cognitive incapacity was at a far earlier point in time - at the time of defendant's malpractice.

A majority of the Court in *Shinholster* rejected defendant's argument based on the tense of the verb used in §1483(1)(b). In his plurality opinion, Justice Markman could not dispute the fact that §1483(1)(b) used a present tense verb. What he determined, however, was that the Court had to assess the Legislature's "point of reference" in using that present tense verb. 471 Mich at 562. In other words, under Justice Markman's analysis, the Court had to address whether the point of reference of the present tense verb used in §1483(1)(b) - "*has* permanently impaired cognitive capacity" - was meant to apply to the time that the malpractice occurred or whether it was tied to the date that the trial was held.

Justice Markman examined the language of the statute as well as the implications of the defendant's argument and came to the conclusion that the "point of reference" of the statute had to be the date of malpractice, not the date of trial: "the point of reference for determining whether the injured person fits within MCL 600.1483(1)(a), (b) or (c) is any time after and as a result of the negligence action." 471 Mich at 540.

The reasoning in the *Shinholster* plurality opinion is significant here. As in *Shinholster*, this Court is not being asked to take a verb written in the present tense and rewrite it into the past tense. Instead, what this Court must do is to determine what "present" time period this present tense verb is making reference to. What should be obvious from the language of the first sentence of §2169(1)(a) is that the "present" time period being referred to in that subsection is "at the time of the occurrence that is the basis for the action."

Thus, the first sentence of §2169(1)(a) begins with a phrase using the present tense: “[i]f the party against whom or on whose behalf the testimony is offered *is* a specialist . . .” (emphasis added). In this case, the party against whom expert testimony would be offered is Dr. Crocker. The statute calls for expert testimony against Dr. Crocker to come from a comparable specialist not because Dr. Crocker *is presently* a board certified orthopedic surgeon, but because he *is* as of the time of the malpractice, an orthopedic surgeon. The point of reference of the first sentence of §2169(1)(a) is, therefore, on Dr. Crocker’s professional status *as of the date of the malpractice* - he *is* an orthopedic surgeon as of that date - not on his (irrelevant) status as of the date the trial is held.

Reading §2169(1)(a) as Dr. Crocker advocates, would render the first of several completely ridiculous results. If the “point of reference” of the present-tense verbs used in §2169(1)(a) is to the date that expert testimony is to be provided at trial, it would necessarily mean that the application of §2169(1) and the determination of which expert is qualified to provide standard of care testimony would be dependent on the professional status of *both* Dr. Viviano *and* Dr. Crocker as of the time of trial. Dr. Crocker’s position in this case is that because Dr. Viviano’s professional status changed between the date of the malpractice and trial, his ability to provide standard of care testimony also changed. But, the statute also uses present-tense verbs to describe the status of the defendant. As a result, if Dr. Crocker were correct in his interpretation of §2169(1), if the professional status that Dr. Crocker had as of September 28, 2008 - board certified orthopedic surgeon - were to change in any way, the experts who would qualified to provide standard of care testimony under §2169(1) would also be subject to change.

If Dr. Crocker were, for example, to change specialties between the date of the malpractice and the date of trial, he would (under Dr. Crocker’s analysis of §2169(1) no longer *be* an orthopedic

surgeon specialist and any standard of care expert would be required to “match” Dr. Crocker’s new specialty regardless of whether he committed the malpractice in question as an orthopedic surgeon.³

Equally bizarre is what Dr. Crocker’s retirement prior to trial would mean for purposes of §2169(1). In such an event, Dr. Crocker would no longer *be* an orthopedic surgeon at the time of trial and, as such, §2169(1)(a) would have no role whatsoever to play in the case because, under defendant’s argument, Dr. Crocker would not *be* a specialist at the time the trial takes place.

Even stranger to contemplate would be Dr. Crocker’s death prior to trial. If defendant’s “real time” argument were correct and §2169(1)(a) applies only on the date that expert testimony is actually provided, Dr. Crocker’s death would mean that he no longer *is* a specialist or a board certified specialist. If one were to accept the defendant’s argument, should Dr. Crocker die at some point between the date of the malpractice and the conclusion of this case, *the entirety of §2169(1)’s requirements for “matching” experts would completely fall by the wayside.* Thus, if Dr. Crocker’s argument were correct, a completely unrelated event such as the retirement or death of a malpractice defendant could dramatically alter the necessary qualifications of any standard of care testimony to be provided in such a malpractice case.

Consider a case that was before this Court approximately five years ago, *Dawe v Dr. Reuven Bar-Levav & Associates, P.C.*, 485 Mich 20; 780 NW2d 272 (2010). In *Dawe*, plaintiff sued a psychiatrist for medical malpractice arising out of a deadly assault in which the plaintiff was seriously injured and the defendant doctor was killed. At the time of his death, the defendant

³This would be a strange result in light of the fact that the relevant specialty for purposes of trial should be the specialty that the defendant was engaged in at the time of the malpractice. As will be explained *infra*, such a result would also be at odds with this Court’s decision in *Woodard*.

specialized in the field of psychiatry and was board certified in that specialty.

However, by the date of trial, the defendant obviously was no longer a specialist nor was he board certified. As a result, under the reading of §2169(1)(a) that Dr. Crocker asks this Court to adopt, neither the first nor second sentence of §2169(1)(a) would be applicable since the defendant in *Dawe* is not a specialist as of the date of trial nor is he a “specialist who is board certified.”⁴

For good measure, if Dr. Crocker were correct in his verb-tense-infused argument, the additional qualifications pertaining to practice requirements set out in §2169(1)(b) would be equally inapplicable in the circumstances presented in the *Dawe* case. That subsection requires a standard of care expert to devote a majority of his/her professional time to the active clinical practice in which the defendant is licensed and, if that defendant is a specialist, the active clinical practice of that specialty. If, as in *Dawe*, the defendant doctor dies between the date of malpractice and the date of trial, that doctor would no longer be licensed or be a specialist and §2169(1)(b) would not apply under Dr. Crocker’s analysis. As a result, §2169(1) would be inapplicable in its entirety in a case

⁴The death of an expert witness could produce another absurdity under Dr. Crocker’s reading of §2169(1). Assume that the defendant is board certified in orthopedic surgery and plaintiff retains an expert who matches the defendant’s qualifications perfectly - the expert is also board certified in orthopedic surgery and was so at the time of the malpractice being alleged. In the course of the case, plaintiff’s expert’s *de bene esse* deposition is taken. The expert provides standard of care evidence in that deposition which she is fully qualified to provide under §2169(1)(a). However, between the date of that deposition and the trial, the expert dies. Under any construction of §2169(1)(a), this hypothetical expert was qualified to give standard of care testimony against defendant at the time her *de bene esse* deposition was taken. However, at the time of trial when that deposition testimony would be offered to the trier of fact, that expert, having died, would no longer be board certified. Under Dr. Crocker’s interpretation of §2169(1)(a), this expert would have gone from fully qualified to standard of care testimony at the time of her deposition to unqualified by the time of trial. The disqualification of such an expert would not be based on her lack of qualifications or lack of knowledge of the applicable standard of care. Rather, if Dr. Crocker’s argument in this case were adopted, this hypothetical expert’s testimony could not be offered at trial for the totally adventitious reason that she failed to survive to the time of trial.

such as *Dawe* in which the defendant dies between the date of malpractice and trial.⁵

Another necessary implication of Dr. Crocker's argument in this case is that the qualifications of a standard of care expert in a medical malpractice case could *never* be definitively established until the date of trial. The essence of Dr. Crocker's argument is that events can transpire at some point between the date of malpractice and trial that could dramatically affect who will be deemed qualified to testify under §2169(1). As indicated above, this effect on the operation of §2169(1) can result from a change in professional status of either the proposed expert or the defendant. Since these changes could occur up to and including the beginning of trial, it would mean that until that trial begins, it would be impossible to state with complete assurance whether a particular expert is or is not qualified to testify. Under Dr. Crocker's proposed reading of §2169, uncertainty over the qualifications of a particular expert would necessarily exist until the start of trial.

For example, Dr. Crocker is of the view that because Dr. Viviano no longer has his board certification, he is disqualified from testifying at trial as to the standard of care applicable to Dr. Crocker's treatment of Mr. Rock. However, if on the first day of trial, Dr. Crocker were to be hit by a car and killed while he is walking to the courthouse, Dr. Viviano would (for the reasons discussed above) suddenly become a qualified expert under §2169(1) under Dr. Crocker's reading of this statute even without a board certification.

⁵Defendant correctly points out that §2169(3) provides that an expert witness may be disqualified on other grounds. Def's Brf at 41. Thus, an expert may be disqualified on the basis of MRE 702. But, since the Michigan Legislature enacted §2169(1) precisely because the standards for the admission of expert testimony under that court rule were viewed as too lax, *see McDougall v Eliuk*, 218 Mich App 501, 509-510, n. 1; 554 NW2d 56 (1996) (Taylor, J., dissenting), it is difficult to imagine that the Legislature contemplated resort to MRE 702 in every case in which a medical malpractice defendant died between the date of malpractice and trial.

Or take what is perhaps a less far-fetched hypothetical. In his deposition, Dr. Viviano indicated that he would be reapplying for board certification. (App. 50a). If on the day before trial was to begin in this case, Dr. Viviano obtained his board certification once again, Dr. Crocker would have no argument that his standard of care testimony would be allowed under §2169(1).

The point of this is that Dr. Crocker's position in this case would dictate the conclusion that the qualifications of an expert under §2169(1) could not be determined with complete assurance until the trial started. As this Court is probably aware, questions concerning an expert's ability to testify under §2169 are, as in this case, normally raised in the form of a pretrial motion to strike that expert's testimony. Under Dr. Crocker's view of §2169, all such pretrial motions would be technically premature because changes could take place by the time of trial in either the professional status of the expert or the professional status of the defendant which could affect a potential expert's qualifications under §2169.

Optimally, the selection of an appropriate expert in a medical malpractice case should be governed by rules that are both clear and certain. The parties should be able to confidently select the appropriate expert at an early stage of every medical malpractice. Because of complexities in both medicine and §2169, clarity and certainty in the selection of an appropriate expert is not always possible. But, what Dr. Crocker proposes in this case is a whole new level of uncertainty in which the qualifications of a potential could be a state of flux until the trial begins. There is no reason to compound the complexities created by §2169.

Finally, Dr. Crocker's argument also overlooks the fact that this Court has already appropriately interpreted the present-tense verbs used in §2169 in the past tense. In *Woodard*, the case that remains the seminal decision from this Court on the subject of §2169, the Court began its

analysis by accenting the significance of the phrase “appropriate standard of care” in §2169(1). Based on that phrase, the opinion in *Woodard* stressed that §2169(1), “addresses the necessary qualifications of an expert witness to testify regarding the ‘appropriate standard or practice or care’, not regarding the inappropriate or irrelevant standard of medical practice or care.” 476 Mich at 558-559.

The remainder of the *Woodard* majority opinion was an attempt to ascertain precisely what the “appropriate” standard of care was. In its search for the “appropriate” standard of care, the Court in *Woodard* looked retrospectively and realistically to what the defendant was doing at the time the malpractice occurred. Thus, the *Woodard* Court held:

Because the plaintiff’s expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff’s expert witness must match the one most relevant standard of practice or care—the *specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff’s expert must also be board certified in that specialty.*

Id., at 560 (emphasis added).

Thus, what this Court held in *Woodard* is that a standard of care expert under §2169(1)(a) must match the specialty that the defendant was engaged in at the time that the malpractice was committed, not his specialty at the time of trial. Thus, despite the fact that the first sentence of §2169(1)(a) begins with the phrase, “[i]f the party against whom or on whose behalf the testimony is offered *is* a specialist,” the *Woodard* majority read that sentence as providing that a standard of care expert must match the specialty of the defendant: “[i]f the party against whom or on whose behalf the testimony is offered *was* a specialist during the course of the alleged malpractice.”

Similarly, while the second sentence of §2169(1) speaks of an expert who *is* board certified,

the above quotation from *Woodard* indicates that to be qualified under that statute, the expert must be board certified in the specialty that the defendant *was* engaged in at the time of the malpractice.

Under the interpretation of §2169(1)(a) proposed by Dr. Crocker, the use of the present-tense verbs in the second sentence of that statute would render the board certification that the defendant had on the date of the malpractice irrelevant. According to defendant, what would be relevant is the defendant's board certification at the time testimony was given. The above quotation from *Woodard*, therefore, took a present tense verb in the second sentence of §2169(1)(a) and construed it in the past tense.

The same is true of another portion of the *Woodard* majority opinion. Addressing itself to the practice requirements of §2169(1)(b), the *Woodard* majority ruled:

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 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.

Id., at 566 (emphasis added).

MCL 600.2169(1)(b) calls for a standard of care expert in an appropriate case to devote a majority of his/her professional time to the area in which the defendant *is* a specialist. As the above quoted portion of the *Woodard* majority opinion indicates, this provision calls for the expert to show that she spent a majority of her professional time practicing or teaching the specialty that the defendant *was* practicing at the time the malpractice occurred. Once again, the analysis employed by the majority in *Woodard* demonstrates that the "point of reference" of the present-tense verbs used in §2169(1) is not the date that the expert provides trial testimony; it is, instead, the date of the malpractice.

For all of these reasons, this Court should affirm the Court of Appeals determination that Dr. Viviano is qualified under §2169(1)(a) to provide standard of care testimony in this case.

RELIEF REQUESTED

Plaintiff-Appellee Dustin Rock requests that this Court affirm the Court of Appeals
November 18, 2014 decision.

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