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.

Publ opn 11-18-14

Court of Appeals No. 312885

Kent Circuit Court
Case No. 10-06307-NM

J. Redford

Ok

SHERWIN SCHREIER (P20065)
Schreier & Schreier
Attorney for Plaintiff- Appellee
25892 Woodward Avenue
Royal Oak, Michigan 48067
Tel: (248) 548-4000 / Fax: (248) 542-6301
sherwinschreier2@yahoo.com

MARK GRANZOTTO (P31492)
Mark Granzotto, P.C.
Attorney for Plaintiff- Appellee
225 South Troy Street, Suite 120
Royal Oak, Michigan 48067
Tel: (248) 546-4649 / Fax: (248) 544-3438
mg@granzottolaw.com

150719

ALBERT J. DIB (32497)
AMK DIB AND FAGAN, P.C.
Attorney for Plaintiff
Dib and Fagan Bldg.
25892 Woodward Avenue
4/20 Royal Oak, MI 48067
(248) 542-6300 / fax (248) 542-6301
adib@dibandfagan.com
55890

BRIAN W. WHITELAW (P33358)
Aardema Whitelaw, PLLC
Attorney for Defendants- Appellants
5360 Cascade Rd. SE
Grand Rapids, Michigan 49546
Tel: (616) 575-2060 / Fax: (616) 575-2080
bwhitelaw@aardemawhitelaw.com

NOREEN L. SLANK (P31964)
GEOFFREY M. BROWN (P61656)
MICHAEL J. COOK (P71511)
Collins Einhorn Farrell P.C.
Attorneys for Defendants- Appellants
4000 Town Center, Suite 909
Southfield, MI 48075
Tel: (248) 355-4141 / Fax: (248) 355-2277
noreen.slank@ceflawyers.com
geoffrey.brown@ceflawyers.com

DEFENDANTS-APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL

FILED

DEC 26 2014

LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

Index of Authorities iii

Exhibit Index viii

Statement Regarding Jurisdiction ix

Introduction: Reasons why leave should be granted. 1

Statement of Facts 4

A. Dr. Crocker performed surgery on Rock's ankle after he was injured while fixing a truck. 4

B. Though two doctors said that he could, Rock hasn't returned to work. 4

C. Rock alleges that Dr. Crocker committed medical malpractice during his surgery and post-operative care. 5

1. Dr. Crocker's motion regarding causation 5

2. Dr. Crocker's motion to preclude Dr. Viviano from offering expert testimony 8

3. Rock's motion in limine regarding no-fault benefits 12

Argument I: Claims of medical malpractice require proof that the alleged malpractice caused the plaintiff's alleged injuries. Malpractice claims fail when a plaintiff can't provide evidence of causation. Here, Rock and his expert admit that there was no causal link between two alleged acts of malpractice and his claimed injuries. Yet the lower courts concluded that the jury could still consider expert testimony on those meritless claims. The lower courts should have barred testimony on those claims. 14

A. Standard of Review 14

B. Rock's weight-bearing and screw-and-plate placement claims fail as a matter of law and are irrelevant because of the admitted lack of a causal link between these alleged acts and Rock's claimed damages. 14

Argument II: MCL 600.2169(1)(a) requires that a proposed standard-of-care medical-malpractice expert testifying against a board-certified specialist "must *be* a specialist who *is* board certified in the same specialty." It is undisputed that Dr. Viviano is not currently board-

certified because he allowed his certification to lapse. The trial court properly precluded him from offering standard-of-care testimony. 22

A. Standard of Review 22

B. Principles of Statutory Interpretation 22

C. Analysis 24

1. Under the plain language of the statute, Dr. Viviano is not qualified to testify. 25

2. Analysis of the preamendment version of the statute supports the plain-language construction of the current version. 32

3. A statute must be construed in "its grammatical context." Doing so supports the trial court's ruling here. 35

4. Arguments concerning "absurd results" are insufficient to avoid enforcement of an unambiguous statute. The Court of Appeals also incorrectly asserts that an "confounding consequences" will be obtained by enforcing MCL 600.2169(1)(a) as written. 38

D. Conclusion 42

Argument III: Evidence of collateral-source payments is admissible to show a plaintiff's lack of incentive to return to work if a defendant offers evidence showing that a plaintiff is malingering. Defendants provided evidence of malingering including evidence that Rock continued not to work despite being cleared to work by two treating physicians and that his previous years' incomes had been substantially less than his no-fault wage-loss benefits. The trial court should have denied Rock's motion in limine. 43

A. Standard of Review 43

B. Analysis 43

Relief Requested 48

INDEX OF AUTHORITIES

Cases

Altman v Fowler,
70 Mich 57; 37 NW 708 (1888) 17

Atkins v Suburban Mobility Auth for Reg Transp,
492 Mich 707; 822 NW2d 522 (2012) 24

Baley v United States,
516 US 137; 116 S Ct 501; 133 L Ed 2d 472 (1995) 23

Blacha v Gagnon,
47 Mich App 168; 209 NW2d 292 (1973) 43, 44, 45

Boyd v Wynadotte,
402 Mich 98; 260 NW2d 439 (1977) 17

Cameron v Auto Club Ins Ass'n,
476 Mich 55; 718 NW2d 784 (2006) 39

Cerniglia v French,
816 So2d 319 (La App 2002) 19, 20

Chmielewski v Xermac, Inc,
457 Mich 593; 580 NW2d 817 (1998) 32, 36

Craig ex rel Craig v Oakwood Hosp,
471 Mich 67; 684 NW2d 296 (2004) 14

Elezovic v Ford Motor Co,
472 Mich 408; 697 NW2d 851 (2005) 21

Garg v Macomb Cnty Cmty Mental Health Servs,
472 Mich 263; 696 NW2d 646 (2005) 23, 26

Girard v Wagenmaker,
437 Mich 231; 470 NW2d 373 (1991) 36

Halloran v Bhan,
470 Mich 572; 683 NW2d 129 (2004) ..... passim

Heshelman v Lombardi,
183 Mich App 72; 454 NW2d 603 (1990) 19

In re Certified Question (Kenneth Henes v Continental Biomass Ind, Inc),
468 Mich 109; 659 NW2d 597 (2003) 32

Johnson v Recca,
492 Mich 169; 821 NW2d 520 (2012) 34, 39, 42

Jones v Tranisi,
212 Neb 843; 326 NW2d 190 (1982) 20, 21

Kimmelman v Heather Downs Mgt Ltd,
278 Mich App 569; 753 NW2d 265, lv den 482 Mich 989 (2008) 38

King v Reed,
278 Mich App 504; 751 NW2d 525 (2008) 14

Kurta v Probelske,
324 Mich 179; 36 NW2d 889 (1949) 12

Laughridge v Moss,
163 Ga App 427; 294 SE2d 672 (1982) 20

Lewis v LeGrow,
258 Mich App 175; 670 NW2d 675 (2003) 16

Linn v Gilman,
46 Mich 628; 10 NW 46 (1881) 16

Mayor of Lansing v Mich Pub Serv Comm'n,
470 Mich 154; 680 NW2d 840 (2004) 32

Michalski v Bar-Levav,
463 Mich 723; 625 NW2d 754 (2001) 35, 36

Nasser v Auto Club Ins Ass'n,
435 Mich 33; 457 NW 637 (1990) ..... passim

Negri v Slotkin,
397 Mich 105; 244 NW2d 98 (1976) 37

People v Coston,
187 Mich 538; 153 NW 831 (1915) 16, 21

People v Doud,
223 Mich 120; 193 NW 884 (1923) 16

People v Flynn,
93 Mich App 713; 287 NW2d 329 (1979) 16

People v Lukity,
460 Mich 484; 596 NW2d 607 (1999) 14

People v McIntire,
461 Mich 147; 599 NW2d 102 (1999) 38, 42

People v Rice,
206 Mich 644; 173 NW 495 (1919) 16

People v Williams,
294 Mich App 461; 811 NW2d 88 (2011) lv den 491 Mich 854 (2012) 36

Persichini v William Beaumont Hosp,
238 Mich App 626; 607 NW2d 100 (1999) 19

Reeves v Carson City Hosp (On Remand),
274 Mich App 622; 736 NW2d 284 (2007) 39

Reichert v Peoples State Bank,
265 Mich 668; 252 NW 484 (1934) 34

Roberts v Mecosta Co Gen Hosp,
466 Mich 57; 642 NW2d 663 (2002) 29

Robinson v Detroit,
462 Mich 439; 613 NW2d 307 (2000) 23, 24, 34

Rowland v Washtenaw Cnty Rd Comm'n,
477 Mich 197; 731 NW2d 41 (2007) 24

Shinholster v Annapolis Hosp,
471 Mich 540; 685 NW2d 275 (2004) 37, 38

Stranahan v Genesee Co Farmers' Mut Fire Ins Co,
242 Mich 413; 218 NW 688 (1928) 16

Sun Valley 28

Sun Valley Foods Co v Ward,
460 Mich 230; 596 NW2d 119 (1999) 23, 27, 28

Univ of Mich Regents v Titan Ins Co,
487 Mich 289; 791 NW2d 897 (2010) 39

Weymers v Khera,
454 Mich 639; 563 NW2d 647 (1997) 15

Whitman v City of Burton,
493 Mich 303; 831 NW2d 223 (2013) 23

Wischmeyer v Schantz,
449 Mich 469; 536 NW2d 760 (1995) 19

Wlosinski v Cohn,
269 Mich App 303; 713 NW2d 16 (2005) 18, 20

Woodard v Custer,
476 Mich 545; 719 NW2d 842 (2006) 22, 31, 32

Young v Nandi,
276 Mich App 67; 740 NW2d 508 (2007), vacated in part on other grounds, lv den in part 482 Mich 1007 (2008) 37

Statutes

MCL 600.1483 37

MCL 600.215 ix

MCL 600.2169 ..... 2, 24

MCL 600.2169(1) ..... passim

MCL 600.2169(1)(a) ..... passim

MCL 600.2169(3) 40

MCL 600.2912a(1)(b) 15

MCL 600.5744 28

Other Authorities

Ed Wesoloski, *Med-mal expert with lapsed certification can testify*, Michigan Lawyers Weekly (Nov. 25, 2014) 3

Rules

MCR 7.301(A)(2) ix

MCR 7.302 ix

MCR 7.302(C)(2) ix

MRE 401 ..... 17, 19

MRE 402 19

MRE 403 ..... 19, 44, 45

MRE 608 19

MRE 702 40

EXHIBIT INDEX

Exhibit A	Opinion and Order Sustaining Defendants Objections to the Expert Testimony of Plaintiff's Treating Physician, Dr. David Viviano
Exhibit B	Order regarding motions in limine
Exhibit C	Court of Appeals Opinion.
Exhibit D	Rock Dep
Exhibit E	Dr. Crocker Dep
Exhibit F	Viviano Trial Testimony
Exhibit G	Dr. Balazsy Affidavit
Exhibit H	Dr. Viviano Return to Work Statement
Exhibit I	Dr. Balazsy Letter
Exhibit J	Rock's IRS returns, 2005-2008
Exhibit K	Dr. Goral Dep.
Exhibit L	Rock Answer to Causation Motion
Exhibit M	Preamendment text of MCL 600.2169(1)(a)

STATEMENT REGARDING JURISDICTION

Kent County Circuit Court Judge James Robert Redford entered an Opinion and Order Sustaining Defendants Objections to the Expert Testimony of Plaintiff's Treating Physician, Dr. David Viviano.[1] Plaintiff-appellee timely filed an application for leave to appeal that order, which the Court of Appeals granted. Defendants-Appellants then timely filed a cross-appeal contesting the trial court's ruling on two motions in limine.[2]

On November 18, 2014, the Court of Appeals (Judges Douglas B. Shapiro, William C. Whitbeck, and Cynthia Diane Stephens) issued a published opinion authored by Judge Shapiro.[3] Under MCL 600.215, MCR 7.301(A)(2), and MCR 7.302, this Court may grant leave to appeal after a decision of the Court of Appeals. Under MCR 7.302(C)(2) , defendants-appellants' application for leave to appeal is timely because it was filed within forty-two days of the Court of Appeals' November 18, 2014 opinion.

---

[1] **Exhibit A**, Opinion and Order Sustaining Defendants Objections to the Expert Testimony of Plaintiff's Treating Physician, Dr. David Viviano ("Opinion re: Expert").
[2] **Exhibit B,** Order regarding motions in limine.
[3] **Exhibit C**, Court of Appeals Opinion.

I.

Claims of medical malpractice require proof that the alleged malpractice caused the plaintiff's alleged injuries. Malpractice claims fail when a plaintiff can't provide evidence of causation. Here, Rock and his expert *admit* that there was *no* causal link between two alleged acts of malpractice and his claimed injuries. Yet the lower courts concluded that the jury could still consider testimony on those meritless claims. Should testimony regarding the meritless claims have been barred?

The trial court answered, "no," and denied defendants' motion in limine.

The Court of Appeals answered, "no" in a published opinion, holding that expert testimony on meritless claims "may be relevant to the jury's understanding of the case" and the evidence "is relevant to [Dr. Crocker's] competency in treating this injury."

Plaintiff answers, "no."

Defendants submit that the correct answer is "yes," and that this Court should vacate the Court of Appeals holding that evidence of an alleged violation of the standard of care that didn't cause any injury "may be relevant to the jury's understanding of the case."

II.

MCL 600.2169(1)(a) requires that a proposed standard-of-care medical-malpractice expert testifying against a board-certified specialist "must *be* a specialist who *is* board certified in the same specialty." (Emphasis added.) One of Rock's standard-of-care experts, Dr. Viviano, is not currently board-certified because he allowed his certification to lapse. Is Dr. Viviano barred under MCL 600.2169(1)(a) from giving standard-of-care testimony because he is not board certified?

The trial court answered "yes."

The Court of Appeals answered, "no," holding that "is" means "was" and that a testifying expert only needs to "have been board certified in the same specialty at the time of the occurrence that is the basis for the action."

Plaintiff answers, "no."
Defendants submit that the correct answer is "yes," and that this Court should reverse the Court of Appeals and reinstate the trial court's order barring Dr. Viviano from presenting standard-of-care testimony.

III.

Evidence of collateral-source payments is admissible to show a plaintiff's lack of incentive to return to work if a defendant offers other evidence that a plaintiff is malingering. Defendants provided evidence of malingering, including evidence that Rock continued not to work despite being cleared to work by two treating physicians. The collateral-source evidence demonstrates his motivation to avoid working: his no-fault wage-loss benefits were more than his income for each of the prior three years. Was such evidence admissible?

The trial court answered "no," and granted plaintiff's motion in limine.

The Court of Appeals answered, "no," holding that a "defendant may assert at trial that plaintiff is a malingerer," but the probative value of evidence of his financial motive for malingering is "substantially outweighed by the danger of unfair prejudice."

Plaintiff answers, "no."

Defendants submit that the correct answer is "yes," and that this Court should reverse the lower courts' rulings on plaintiff's motion in limine.

Introduction: Reasons why leave should be granted.

Defendant Dr. K. Thomas Crocker performed surgery on plaintiff Dustin Rock's ankle. Rock claimed that Dr. Crocker[4] breached the standard of care in several ways. His causation expert witness conceded that two of the alleged breaches didn't cause Rock's injury. Yet the Court of Appeals, in a published opinion, stated that "evidence of a 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."[5] The panel added that the evidence "is relevant to [Dr. Crocker's] competency in treating this injury":

> In addition to proving proximate causation, plaintiff must prove that defendant's treatment of him was negligent. And, as the trial court noted, whether defendant understood the proper use of the surgical plates and screws, and whether he understood when plaintiff could safely bear weight on his ankle, is relevant to his competency in treating this injury.[6]

Those statements open monstrous flood gates. Physicians are only liable when their treatment breaches the standard of care and causes injury. But the panel's analysis attempts to link "competency" on one matter to "negligence" on another. It observed that the plaintiff must prove that the defendant was negligent and then said that evidence of claims that didn't cause any harm is relevant to the defendant's competency. The danger here is that the opinion will be read to say that evidence of claims that didn't cause any harm can be used to show that the doctor was negligent.

---

[4] Rock also sued Dr. Crocker's medical practice, Thomas Crocker, D.O., P.C., but for simplicity this application refers to both defendants as Dr. Crocker.

[5] Ex. C, Court of Appeals Opinion, p. 9.

[6] Ex. C, Court of Appeals Opinion, p. 9 n 8.

But that's a fallacy. Whether a defendant made one mistake has no bearing on whether he made another. Evidence of other acts has long-been excluded because the inference drawn from it is flawed and likely to confuse a jury. The panel's ruling will send courts and juries into the quagmire of litigating claims that have no bearing on a plaintiff's injury. It is an error that must be corrected.

The jurisprudentially-significant problems with the panel's opinion don't end there. Dr. Crocker is a board-certified orthopedic surgeon. One of Rock's experts, Dr. David M. Viviano, was board certified from 2001-2011, but he let his certification lapse and hasn't renewed it. The medical-malpractice expert-testimony statute, MCL 600.2169, states that an expert witness must be licensed and, "if [the defendant] 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). Dr. Viviano isn't board certified anymore, so the trial court excluded his expert testimony. But the Court of Appeals reversed.

The issue is whether the expert must be board certified when he testifies or when the alleged malpractice occurred. The answer is simple. Since "[Dr. Crocker] is board certified, [Dr. Viviano] must be a specialist who is board certified in that specialty" to testify. MCL 600.2169(1)(a). Dr. Viviano isn't board certified. Under the rule that the Legislature established, he can't testify as an expert. But the Court of Appeals interpreted "must be a specialist who is board certified" to mean "must have been a specialist who was board certified." The panel emphasized that the standard of care is judged from when the alleged malpractice occurred. That's true, but the Legislature's

rule addresses a different policy issue. The Legislature's rule stops doctors who never had a board certification, couldn't maintain one, or wouldn't maintain one from sitting in judgment of those who have. Michigan Lawyers Weekly's headline succinctly captured the result of the Court of Appeals' opinion: "Med-mal expert with lapsed certification can testify."[7]

The panel didn't think that the Legislature's rule made sense, so it rewrote it (with the help of an ellipsis). That isn't how statutory interpretation works and fixing perceived legislative errors isn't a job for the courts. This Court should intervene to confirm that the Legislature's rule can't be cast aside simply because courts think there is a better rule to enforce.

The Court of Appeals' opinion raises a third jurisprudentially-significant issue. This Court has held that collateral source payments can be used to support an argument that the plaintiff is malingering. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 58; 457 NW 637 (1990). For example, Rock didn't return to work when his doctor's cleared him arguably because his no-fault benefits exceeded his income for each of the three years before he was injured. Yet the trial court excluded that evidence in a bare-bones ruling. Instead of applying *Nasser*, the Court of Appeals attempted to rehabilitate the trial court's ruling with its own rationale. But, if left untouched, the panel's rationale would eliminate the rule this Court established in *Nasser*. The panel's implicit rejection of *Nasser* shouldn't be left unaddressed.

---

[7] Ed Wesoloski, *Med-mal expert with lapsed certification can testify*, Michigan Lawyers Weekly (Nov. 25, 2014).

Statement of Facts

A. Dr. Crocker performed surgery on Rock's ankle after he was injured while fixing a truck.

In September 2008, Rock suffered a trimalleolar fracture of his right ankle while changing brake pads on a truck.[8] Two days later, Dr. Crocker performed surgery on Rock's ankle, which included inserting a plate and screws.[9] In October 2008, Rock had a post-operative appointment with Dr. Crocker. Rock claims that Dr. Crocker told him that he could start bearing weight on his ankle at that appointment.[10] But he admits that he didn't start doing so until after he moved across the state and began treating with Dr. Viviano.[11]

B. Though two doctors said that he could, Rock hasn't returned to work.

Rock hasn't worked since the accident.[12] Dr. Viviano cleared him to return to work in July 2009 and another orthopedic surgeon, Dr. Jeffrey Balazsy, agreed that he could return to work in March 2010.[13] Dr. Balazsy also averred that Rock "has exaggerated his injuries and/or pain" and that he lacked "motivation to improve his medical condition ...."[14] Rock's lack of motivation is explainable. He received no-fault

---

[8] Complaint, ¶4; Ex. C, Court of Appeals Opinion, p. 9.

[9] **Exhibit D**, Rock Dep., p. 107; Complaint, ¶5; Affidavit of Merit, ¶6; Ex. C, Court of Appeals Opinion, pp. 1, 7.

[10] Actually, Dr. Crocker only told Rock that he could touch his toe to the ground for balance during activities like brushing his teeth. **Exhibit E**, Dr. Crocker Dep., p. 53. But the dispute on that point is immaterial.

[11] Ex. D, Rock Dep., p. 101-102; **Exhibit F**, Viviano Trial Testimony, p. 12; **Exhibit G**, Dr. Balazsy Affidavit, ¶2.

[12] Ex. D, Rock Dep., pp. 20-24, 50-54.

[13] **Exhibit H**, Dr. Viviano Return to Work Statement; **Exhibit I**, Dr. Balazsy Letter.

[14] Ex. G, Dr. Balazsy Affidavit, ¶¶10, 11.

wage-loss benefits of $15,912 per year,[15] which was at least $4,000 more than he earned (including unemployment benefits) in each of the three years before his injury.[16]

C. Rock alleges that Dr. Crocker committed medical malpractice during his surgery and post-operative care.

In June 2010, Rock filed this action, claiming that Dr. Crocker committed medical malpractice with respect to the surgery and his post-operative care. The parties conducted discovery and the matter was nearing trial when the trial court decided three motions pertinent to this appeal.

1. Dr. Crocker's motion regarding causation

Dr. Crocker moved to bar Rock from pursuing his claims on two alleged breaches of the standard of care because his expert admitted that those alleged breaches didn't cause any damages. Rock's orthopedic-surgery expert, Dr. Antoni Goral, provided an affidavit of merit asserting that Dr. Crocker prematurely allowed Rock to bear weight on his right leg after the October 2008 post-operative appointment.[17] He also claimed that Dr. Crocker did not use enough screws or the right length plate, and that the plate and screws were not properly placed.[18] But, during his deposition, Dr. Goral testified that neither of those alleged errors caused Rock's injury.

Dr. Goral testified that, even if Dr. Crocker told Rock that he could put weight on his right foot, there was no evidence that it caused any of Rock's injuries:

> Q. .... You'll agree with me that there isn't any evidence at this time, based on what you reviewed, to show that as a result of allowing the patient to bear weight,

[15] Ex. D, Rock Dep., pp. 23-24.
[16] **Exhibit J**, Rock's IRS returns, 2005-2008.
[17] Affidavit of merit, ¶ 5.
[18] Affidavit of merit, ¶ 6.

> that the patient suffered further trauma and injury to the area that itself necessitated an additional surgical procedure?
>
> A. No. The reason for the secondary surgical procedure was based upon [a different allegation regarding the standard of care].
>
> Q. In other words, what I said is correct?
>
> A. Correct.[19]

In fact, Rock confirmed that he didn't put weight on his right foot after the October 2008 visit.[20]

And though Dr. Goral criticized the placement of the plate and screws, he agreed that this alleged breach "did not cause harm" because the fracture healed properly:

> Q. ... So although it's your belief that the placement of the fibular plate, the number of screws used did not meet the standard, you believe that it **did not cause harm** in this case because the fracture united?
>
> A. **Correct.**[21]

Consistent with that testimony, Dr. Goral also admitted that there was no change in the position of any of the fractured bones between Rock's last visit with Dr. Crocker and his first visit with Dr. Viviano.[22]

Dr. Crocker moved to strike evidence regarding these two alleged breaches of the standard of care because there was no causal connection between them and any alleged

---

[19] **Exhibit K**, Dr. Goral Dep., p. 48.
[20] Ex. D, Rock Deposition, 101, 102.
[21] Ex. K, Dr. Goral Dep., p. 59-60 (emphasis added).
[22] Ex. K, Dr. Goral Dep., p. 47.

injury. Rock's response admitted that the two allegations weren't linked to any harm.[23] Yet he argued that the evidence should be admitted anyway because "it goes to his knowledge and skill in performing the repair of this type of fracture."[24]

The trial court agreed with Rock and denied Dr. Crocker's motion. Without acknowledging the agreement on lack of causation,[25] the trial court stated that Rock's expert would testify that "the treatment provided by the defendant to the plaintiff fell below the standard of care."[26] It then reasoned that testimony on the weight-bearing and screw-and-plate-placement claims was admissible because the jury should "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 it 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 the injuries he did suffer were a result of his breaches and that the claims of the plaintiff are meritorious and should be compensated.[27]

After the Court of Appeals granted Rock's application for leave to appeal on a different issue (addressed below), Dr. Crocker filed a cross-appeal raising this issue. Dr. Crocker explained that his motion, which raised a merits-based defect in two of

---

[23] **Exhibit L**, Rock Answer to Causation Motion, ¶ 2 ("Plaintiff's retained expert Dr. Goral did state that two of the breaches of the standard of care had not caused any damages or injuries ...."); *Id.*, p. 3 ("Even though it did not cause any damage ....")

[24] *Id.*

[25] The court instead characterized this as merely being defendants' argument.

[26] Ex. B, Order regarding motions in limine, pp. 1-2.

[27] *Id.*, p. 2.

Rock's claims, was the equivalent of a motion for summary disposition—causation, of course, is a necessary element of every malpractice claim.[28] So Rock's agreement that the weight-bearing and screw-and-plate-placement claims lacked causation eliminated any basis to put them before the jury.

The Court of Appeals agreed that the trial court erred in failing to clearly order that Rock "may not seek damages for those violations."[29] Yet the panel quickly took away what it had given. The panel stated that the trial court may "reconsider" the motion to strike because "evidence of a 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."[30] In a footnote, the panel added that Rock must prove that Dr. Crocker was negligent and that the evidence "is relevant to [Dr. Crocker's] competency in treating this injury."[31] But the trial court has already stated a view consistent with the Court of Appeals' opinion.[32]

2. Dr. Crocker's motion to preclude Dr. Viviano from offering expert testimony

Rock identified Dr. Viviano as one of his standard-of care experts (Dr. Goral is the other).[33] Dr. Crocker moved to exclude Dr. Viviano's expert testimony because he

---

[28] Crocker Brief on Appeal, pp. 31-33; Crocker Reply Brief, p. 2.
[29] Ex. C, Court of Appeals Opinion, p. 9.
[30] Ex. C, Court of Appeals Opinion, pp. 9, 11.
[31] Ex. C, Court of Appeals Opinion , p. 9 n 8.
[32] Ex. B, Order regarding motions in limine, p. 2 (stating that the jury should "review in its entirety the quality of treatment provided by the defendant" and that "if [the jurors] believe [Dr. Crocker] also breached the standard of care in a variety of multiple other ways then it provides evidence which is relevant"); Ex. C, Court of Appeals Opinion, p. 8; see also *id.*, p. 9 n 8 ("[A]s the trial court noted, ...").
[33] Ex. A, Opinion re: Expert, 2.

didn't meet the requirements of MCL 600.2169(1)(a), which states that "if the party against whom or on whose behalf the testimony is offered, the expert witness must be a specialist who is board certified in that specialty." Dr. Crocker is a board-certified orthopedic surgeon.[34] Though Dr. Viviano was board certified from 2001 through 2011,[35] his board certification has expired and he hasn't been recertified.[36]

The trial court sustained Dr. Crocker's objection. In a written opinion, the court agreed that the statute requires a standard-of-care expert to be board certified when he testifies:

> 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* [*v Bhan*, 470 Mich 572; 683 NW2d 129 (2004)], 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.[37]

---

[34] *Id.*, p. 1, ¶1.

[35] *Id.*, p. 2, ¶¶2-4.

[36] *Id.*, p. 2, ¶4. Dr. Viviano is not currently board-certified. See https://www.abos.org/find-a-certified-orthopaedic-surgeon.aspx, accessed December 15, 2014.

[37] *Id.*, p. 3.

Accordingly, the trial court concluded that "the plain language of MCL 600.2169(1)(a) precludes Dr. Viviano from offering any testimony regarding the applicable standard of practice or care."[38]

Rock filed an application for leave to appeal that ruling, which the Court of Appeals granted. The panel's opinion, authored by Judge Shapiro, doesn't start with the statutory text. It starts with a discussion of what a plaintiff must establish and the observation that "decision-making must be judged against the standard of care that applied when [the defendant] acted" (which no one disputes). When it turned to the expert-witness statute, the panel focused on a provision concerning doctors who specialize, not who are board certified.[39] When it reached the board-certification requirement, the panel described it as providing that "[i]f the defendant is board certified in a specialty, then the testifying expert must **have been** board certified in the same specialty."[40] (The statute says "must be").

According to the panel, verb tense was unimportant because "the first sentence of MCL 600.2169(1)(a) ... employs the same present-tense verbs yet plainly refers to a past time period."[41] While it's true that the first sentence plainly refers to the past, that's because it contains the phrase "at the time of the occurrence." So, as the Court of Appeals observed, "despite employing the word 'is,' i.e., the present tense form of the

---

[38] *Id.*, p. 3.

[39] Ex. C, Court of Appeals Opinion, p. 2 ("Consistent with this principle, a physician who testifies to the standard of care at issue must have possessed, on the date of the alleged malpractice, the same relevant specialty qualifications as the defendant.").

[40] *Id.*, pp. 3-4.

[41] *Id.*, p. 4.

verb 'to be,' the first sentence still requires that the time at which the expert witness must so specialize is at a time in the past in relation to trial ...." But the sentence addressing board-certifications doesn't contain the phrase "at the time of the occurrence." The panel got past that omission only with the help of an ellipsis:

> Removing the clauses related to the defendant, and considering only those relevant to the testifying expert, the statute reads:
>
> > In an action alleging 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) ... 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 .... [or] the expert witness must be a specialist who is board certified in that specialty.[42]

The panel provided an alternative revision: "the statute requires that a testifying expert must 'specialize[] at the time of the occurrence that is the basis for the action in the same specialty ... [and be] board certified in that specialty.'"[43]

Having re-written the statute, the panel concluded that its interpretation reconciled with this Court's description of the board-certification requirement as an

---

[42] *Id.*, p. 4, quoting MCL 600.2169(1) (edit in original).
[43] *Id.*, p. 4, quoting MCL 600.2169(1) (edit in original).

"additional" requirement and a legislative amendment that "remove[d] an 'either/or' determination from the statute."[44]

Accordingly, despite the fact that MCL 600.2169(1)(a) requires experts testifying against board-certified doctors to "be a specialist who is board certified in that specialty," the Court of Appeals held the expert "must have been board certified in the same specialty at the time of the occurrence that is the basis for the action."[45]

3. Rock's motion in limine regarding no-fault benefits

Rock filed a pretrial motion seeking to bar Dr. Crocker from presenting evidence that Rock was receiving first-party wage-loss benefits from his auto insurer. Dr. Crocker's response explained that, though evidence of no-fault benefits is often excluded under the common-law collateral-source rule, it was admissible here because there was evidence of malingering that was independent of Rock's receipt of no-fault benefits: Dr. Balazsy's affidavit and Dr. Viviano's return-to-work statement.

The trial court, however, didn't consider whether defendants established a sufficient foundation of malingering. It simply applied the common-law collateral-source rule and, without explanation, stated that the evidence would be more prejudicial than probative:

> The Court is satisfied that the Collateral Source Rule bars the admission of [the no-fault] evidence. See *Kurta v Probelske*, 324 Mich 179; 36 NW2d 889 (1949). The Court does not believe that the introduction of the existence of PIP benefits in any way leads to further clarification of the issues at bar and it will be excluded. Even if there were any modest

---

[44] *Id.*, p. 5, quoting *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004) and 1993 PA 78.

[45] *Id.*, p. 7.

> probative value of such evidence, the Court believes that any probative value of PIP benefits would be substantially outweighed by the probative [sic] value and would confuse the jury.[46]

Paradoxically, the court added that Dr. Crocker could present evidence that Rock was malingering because he was "motivated by financial compensation."[47]

The Court of Appeals' ruling on this issue was equally odd. The panel acknowledged that Dr. Crocker "may assert at trial that plaintiff is a malingerer" and *Nasser*'s holding that collateral-source evidence is admissible "'to prove malingering or motivation on the plaintiff's part not to resume employment or to extend the disability.'"[48] But instead of assessing the trial court's ruling, the panel supplied its own analysis. It said that the no-fault benefits were "cumulative ... of the other evidence," i.e, evidence required for its admission under *Nasser*.[49] Its value was "limited," the panel said, because the benefits stopped in 2011.[50] And without discussion of any limiting instructions, the panel concluded that the jury may get confused and believe that it "should reduce plaintiff's damages by the amount of his insurance benefits."[51] The panel also thought that the evidence would require "a mini-trial on the question of whether plaintiff was legally and factually entitled to no-fault benefits."[52] So despite

---

[46] Ex. B, Order regarding motions in limine, p. 4.
[47] Ex. B, Order regarding motions in limine, p. 4.
[48] Ex. C, Court of Appeals Opinion, p. 10, quoting *Nasser*, 435 Mich at 58.
[49] *Id.*, p. 11.
[50] *Id.*, p. 11.
[51] *Id.*, p. 11.
[52] *Id.*, p. 11.

Nasser and the other evidence supporting Dr. Crocker's malingering argument, the panel held that the evidence of collateral source payments was not admissible.[53]

Argument I: Claims of medical malpractice require proof that the alleged malpractice caused the plaintiff's alleged injuries. Malpractice claims fail when a plaintiff can't provide evidence of causation. Here, Rock and his expert admit that there was no causal link between two alleged acts of malpractice and his claimed injuries. Yet the lower courts concluded that the jury could still consider expert testimony on those meritless claims. The lower courts should have barred testimony on those claims.

A. Standard of Review

Whether a plaintiff's claims of negligence fail as a matter of law is an issue of law that this Court reviews de novo. *King v Reed*, 278 Mich App 504, 520; 751 NW2d 525 (2008) (motion for directed verdict in a medical-malpractice case). In addition, "decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "[W]hen such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.*; *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004) ("A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law.").

B. Rock's weight-bearing and screw-and-plate placement claims fail as a matter of law and are irrelevant because of the admitted lack of a causal link between these alleged acts and Rock's claimed damages.

The Court of Appeals got this issue half right. But the part that it got wrong has far-reaching consequences that require this Court's intervention.

---

[53] *Id.*, p. 11.

"Under Michigan medical malpractice law, as part of its prima facie case, a plaintiff must prove that the defendant's negligence proximately caused the plaintiff's injuries." *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997); see MCL 600.2912a(1)(b). Rock admitted and doesn't dispute that he can't establish causation for his weight-bearing and screw-and-plate placement claims. Accordingly, Dr. Crocker explained to the Court of Appeals that those claims failed as a matter of law and that his motion to strike them was the legal equivalent of a summary-disposition motion.[54] The Court of Appeals agreed, stating that it was "effectively a request for partial summary disposition" and that "plaintiff may not seek damages for those violations ...."[55] The Court of Appeals got that part right.

The next step follows naturally from the first: if Rock can't seek damages for his weight-bearing and screw-and-plate-placement claims, then all standard-of-care opinions on those claims are irrelevant testimony about dead claims and shouldn't be admitted. Yet the Court of Appeals attempted to salvage the weight-bearing and screw-and-plate-placement allegations from the scrap heap. It stated that evidence on legally meritless claims is potentially admissible because "evidence of a 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."[56] The panel took a remarkably and improperly broad view of what is at issue in a medical-malpractice case. It stated that a plaintiff "must prove that the defendant's treatment of him was negligent" and that a

---

[54] Crocker Brief on Appeal, pp. 36-39; Crocker Reply Brief, p. 2.
[55] Ex. C, Court of Appeals Opinion, p. 8.
[56] Ex. C, Court of Appeals Opinion, p. 9.

non-injurious violation of the standard of care "is relevant to [the defendant's] competency in treating" the plaintiff.[57] Its ruling defies logic and over 100 years of evidence law.

First, there is no authority that endorses the admission of evidence on a meritless claim. Rock didn't cite any authority endorsing the admission of evidence on a meritless claim in the trial court. He didn't' cite any authority for it in his cross-appeal brief. And the panel didn't cite any authority for it. In fact, if the weight-bearing and screw-and-plate-placement claims were Rock's only claims, he wouldn't be able to present evidence supporting those claims to a jury because the case would be over.

Second, for over 100 years, the rule in Michigan has been that "evidence that a person has done an act at a particular time is not admissible to prove that he has done a similar act at another time." *Stranahan v Genesee Co Farmers' Mut Fire Ins Co*, 242 Mich 413, 415; 218 NW 688 (1928); see *People v Flynn*, 93 Mich App 713, 717; 287 NW2d 329 (1979) ("[E]vidence of other unrelated crimes or bad acts by the accused is inadmissible to show that he is guilty of the crime charged"), citing *People v Doud*, 223 Mich 120; 193 NW 884 (1923); *People v Rice*, 206 Mich 644; 173 NW 495 (1919); *People v Coston*, 187 Mich 538; 153 NW 831 (1915). Though often applied in criminal cases and now codified in MRE 404(b), the rule isn't confined to criminal cases and it stands as a rule of relevance and unfair prejudice. See *Lewis v LeGrow*, 258 Mich App 175, 207; 670 NW2d 675 (2003). In *Linn v Gilman*, 46 Mich 628, 633; 10 NW 46 (1881), this Court explained that if "collateral facts" concerning other acts "are incapable of affording any reasonable

[57] *Id.*, p. 9 n 8.

presumption or inference as to the final subject, they ought not to be admitted" because "they are likely to lead to multiplication of issues and to cause confusion and misjudgment." And in *Altman v Fowler*, 70 Mich 57, 60-61; 37 NW 708 (1888), the Court instructed that testimony regarding similar transactions was inadmissible because it "had no tendency to prove" any fact at issue. In other words, other acts evidence is inadmissible because:

> (1) It typically isn't relevant, i.e., it doesn't tend to make any fact of consequence more or less probable, MRE 401 and 402, and
>
> (2) It's unfairly prejudicial or confusing and misleading for the jury, MRE 403.

In *Boyd v Wynadotte*, 402 Mich 98, 104-105; 260 NW2d 439 (1977), this Court affirmatively stated that evidence of an alleged breach that didn't cause any harm has "no bearing on whether defendants were negligent." There, the plaintiff sued a city for medical malpractice arising from treatment he received at a city-owned hospital. This Court granted the plaintiff a new trial because the defendant improperly impeached him with his criminal conviction. But it also rejected the plaintiff's argument to amend his complaint to add a negligent record-keeping theory. The new theory couldn't be linked to his injury, so it was "not a ground for recovery":

> We agree with the defendants that the theory proffered[,] the failure of defendants to keep adequate records and notations of Boyd's treatment and care was "an additional departure from the standard of practice[,]" is not a ground for recovery under the circumstances of this case. [*Id.* at 104.]

This Court held that the negligent record-keeping theory "would have no bearing on whether defendants were negligent." *Id.* at 104-105. It stressed that the

plaintiff's "physical condition cannot be attributed to the alleged failure of the treating physicians to keep adequate records." *Id.* at 105. In other words, because there was no causal link between the alleged negligence and damages, the plaintiff was not going to be permitted to assert that the defendants were negligent based on allegedly deficient charting.

The Court of Appeals opinion in *Wlosinski v Cohn*, 269 Mich App 303; 713 NW2d 16 (2005) also illustrates the point. There, the plaintiff's son died after the defendant performed an unsuccessful kidney transplant. The complaint raised several medical-malpractice theories, including that the defendant mistreated a post-operative blood clot, prescribed the wrong medication, and failed to obtain the decedent's informed consent. The informed consent claim was based, in part, on "a discrepancy between the personal success rate [for kidney transplants] Dr. Cohn reported to her and his actual success rate." *Id.* at 306. The Court of Appeals reversed a jury verdict in the plaintiff's favor. It held that the informed consent claim failed because the plaintiff was informed of the risks of the procedure. The statistical discrepancy was irrelevant because there was no "hint of a relationship between Dr. Cohn's previous failed transplants and the failure of the decedent's new kidney." *Id.* at 310. The plaintiff "paraded the statistics before the jury to show that Dr. Cohn had a propensity to botch transplants." *Id.* at 312. But "[p]ropensity evidence is barred because it diverts a jury' attention from the facts of the case being tried and focuses it on the probability that the defendant, who has made so many mistakes before, made one again." *Id.* So the trial court erred because it "allowed the jury to conclude that Dr. Cohn had a proclivity to fail." *Id.* at 311.

The evidentiary use that the Court of Appeals endorsed in this case is akin to admitting evidence that a defendant physician was sued for malpractice in the past—something that Michigan courts don't permit. For example, this Court affirmed a trial court's refusal to permit the plaintiff to ask the defendant physician about prior medical malpractice lawsuits in *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999); see also *Heshelman v Lombardi*, 183 Mich App 72, 84-85; 454 NW2d 603 (1990); *Wischmeyer v Schantz*, 449 Mich 469, 482; 536 NW2d 760 (1995) ("[T]he mere fact that an expert may have been named in an unrelated medical malpractice action is not probative of his truthfulness under MRE 608 or relevant to his competency or knowledge.").

Courts in other jurisdictions have applied these same principles in analogous cases. For example, in *Cerniglia v French*, 816 So2d 319 (La App 2002), the court reversed a jury verdict against a doctor who performed surgery on the plaintiff. The trial court admitted testimony from two other patients who suffered similar complications from the same surgery. The plaintiffs argued that the testimony was relevant to show the defendant's lack of knowledge or skill. But the experts testified that the complication could occur without any negligence, so the other patients' testimony was "neither proof of medical malpractice, nor proof that the physician lacked necessary knowledge or skill." *Id.* at 323. Accordingly, the Court held that the testimony wasn't relevant under Louisiana's versions of MRE 401 and MRE 402. *Id.* at 324; see La Code Evid art 401, 402. The Court added that the testimony failed the balancing test under Louisiana's version of MRE 403. *Id.* at 324, quoting La Code Evid art 403. The witnesses couldn't testify that

their complications were "caused by negligence on the part of Dr. French," i.e., there was no causal link. *Id.* at 324. So the jury was "allowed to draw the improper inference that Dr. French lacked the proper training, knowledge, and skill to perform the surgery in question." *Id.* at 324. The Court analogized the testimony to evidence of a prior arrest:

> Evidence of prior arrests is inadmissible in criminal trials to prevent the jury from concluding that the defendant has a propensity for committing crimes; in this case, **the similar acts evidence should have been excluded to prevent the jury from concluding that Dr. French has a propensity to commit medical malpractice**. [*Id.* (emphasis added)]

See also *Jones v Tranisi*, 212 Neb 843, 845-846; 326 NW2d 190 (1982) (affirming exclusion of testimony from another patient because, "[i]f the plaintiff was offering Mrs. Vecchio's testimony to prove Tranisi's negligence in performing the operation on the plaintiff, it was not relevant for that purpose"); *Laughridge v Moss*, 163 Ga App 427, 428; 294 SE2d 672 (1982) (affirming exclusion of "alleged previous act of medical malpractice" because "[t]he general rule in a suit for negligence is that evidence of similar acts or omissions on other and different occasions is not admissible" (citation omitted)).

The Court of Appeals' suggestion that Rock's screw-and-plate-placement and weight-bearing claims "may be relevant" to Dr. Croker's "competency in treating this injury" runs afoul of the prohibition on propensity evidence. As *Wlosinski* observed, plaintiffs would always "parade" any and all potential errors "before the jury to show that [the defendant] had a propensity to botch" their treatment. 269 Mich App at 312. But courts have settled on the rule that "[p]ropensity evidence is barred" because it forces the defendant to defend a claim that isn't at issue and needlessly distracts or confuses the jury

about the claim that is at issue. *Id.*; see *Coston*, 187 Mich at 545 (holding that admission of other acts testimony was "erroneous and highly prejudicial" because "it proved the defendant guilty of a distinct and independent crime with which he was not charged in the information").

The panel's suggestion that evidence of "violations of the standard of care" that didn't cause injury may prove "negligence" for the claim at issue is a fallacy. Rock admits that Dr. Crocker's placement of the screws and plate and his advice concerning weight bearing didn't cause Rock's alleged injury. That means, those claims have no place in the causal chain. They didn't cause the injury and they didn't cause another error that led to the injury.

Consider a different context. If a lawyer doesn't file a proof of service, that doesn't mean that he failed to raise the right arguments in his brief. Or if a judge admits irrelevant evidence, that doesn't mean that his jury instructions were erroneous. One mistake (or even a series of mistakes) does not mean that another mistake occurred. See *Jones*, 212 Neb at 846 ("One cannot prove that one was negligent in causing an accident in 1980 because one was negligent in causing one on some earlier occasion."). Indeed, in the context of predicting an employee's behavior, this Court held that "improper behavior of a given type is not an inevitable predictor of other types of improper behavior ...." *Elezovic v Ford Motor Co*, 472 Mich 408, 430; 697 NW2d 851 (2005).

The panel's vague suggestion that the trial court could "consider what limiting jury instruction to give" is not a solution.[58] No instruction could cure the error in admitting the evidence because there is no proper use for it. Even if a jury was told that it couldn't award damages for the weight-bearing and screw-and-plate-placement claims, it is still error to allow the jury to use evidence on those claims to infer that Dr. Crocker committed some other negligent act.

The Court of Appeals' ruling that the screw-and-plate-placement and weight-bearing claims "is relevant" to a doctor's "competency" has far reaching implications. It's wrong in so many ways that this Court should peremptorily reverse its ruling or grant leave to further consider the panel's error.

Argument II: MCL 600.2169(1)(a) requires that a proposed standard-of-care medical-malpractice expert testifying against a board-certified specialist "must *be* a specialist who *is* board certified in the same specialty." It is undisputed that Dr. Viviano is not currently board-certified because he allowed his certification to lapse. The trial court properly precluded him from offering standard-of-care testimony.

A. Standard of Review

"This Court reviews questions of statutory interpretation de novo." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006), citing *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004).

B. Principles of Statutory Interpretation

This Court has endeavored mightily to ingrain the fundamental principles of statutory interpretation in the bench and bar of this state. For well over a decade, this Court has instructed that, first and foremost, a court's "task in construing a statute, is to

[58] Ex. C, Court of Appeals Opinion, p. 9.

discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Accordingly, statutory analysis "begin[s] by examining the most reliable evidence of that intent, the language of the statute itself." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013); *Sun Valley*, 460 Mich at 236 ("This task begins by examining the language of the statute itself."); *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) ("Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself.").

Court's must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley*, 460 Mich at 237, quoting *Baley v United States*, 516 US 137 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). But a statute's perceived "purpose" can't be placed ahead of its plain meaning. "The words of any statute can be effectively undermined by a sufficiently generalized statement of 'purpose' that is unmoored in the actual language of the law." *Garg v Macomb Cnty Cmty Mental Health Servs*, 472 Mich 263, 285 n 11; 696 NW2d 646 (2005). Accordingly, the language of the statute is paramount and "must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley*, 460 Mich at 237. "[E]ffect should be given to every phrase, clause, and word in the statute." *Id.* And when the statutory language is unambiguous, "the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Sun Valley*, 460 Mich at 236.

Time and again, this Court has "advance[d] the simple constitutional notion that [it] lacks the authority to rewrite statutory language or otherwise avoid by judicial innovation the Legislature's dictates." *Atkins v Suburban Mobility Auth for Reg Transp,* 492 Mich 707, 722 n 25; 822 NW2d 522 (2012). Enforcing statutes as they are written is the bedrock of a society governed by laws because it allows the citizenry "to know in advance what the rules of society are":

> "[I]t is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest." [*Rowland v Washtenaw Cnty Rd Comm'n,* 477 Mich 197, 216; 731 NW2d 41 (2007), quoting *Robinson,* 462 Mich at 467.]

The rule of law becomes muddled and legislated policy is lost when courts begin with a statute's purpose instead of its text. That's where the Court of Appeals' opinion went astray. The panel didn't start with the statutory text. It started in search of a policy or rationale for a rule, even though the rule was plain on the page in front of it.

C. Analysis

Unlike the Court of Appeals, this Court doubtlessly will start with the statutory text. The medical-malpractice expert-testimony statute, MCL 600.2169, requires a proposed medical-malpractice standard-of-care expert to meet certain criteria:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of care unless the person is licensed as a health care 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. [MCL 600.2169(1)(a) (emphasis added).]

The statute imposes three requirements for proposed standard-of-care experts. First, the licensing requirement: the proposed expert can't testify unless he "is licensed as a health care professional ...." It isn't disputed that this prohibits a currently unlicensed expert from testifying at trial. Second, the specialty requirement: if the defendant is a specialist, the witness must be someone who "specializes at the time of the occurrence...." There isn't any dispute that this provision refers to when the alleged malpractice occurred. Third, the board-certification requirement: if the defendant is board certified, "the expert witness must be a specialist who is board certified in that specialty." There shouldn't be any dispute that, like the licensing requirement, this provision prohibits a non-board-certified expert from testifying at trial.

1. Under the plain language of the statute, Dr. Viviano is not qualified to testify.

The analysis is straightforward. Dr. Viviano "is licensed as a health care professional in this state," so the licensing requirement is met. Dr. Crocker and Dr. Viviano were also both specialists in orthopedic surgery at the time of the alleged malpractice. So the specialty requirement is not at issue. But, under the board-certification requirement, "if [Dr. Crocker] is a specialist who is board certified,

[Dr. Viviano] must be a specialist who is board certified in that specialty." Dr. Crocker is board certified in orthopedic surgery; Dr. Viviano is not.[59] Based on the undisputed facts, the board-certification requirement isn't met and the Court of Appeals ruling in this case was wrong.

A witness cannot give standard-of-care testimony in a medical-malpractice case unless he meets the requirements of MCL 600.2169. *Grossman v Brown*, 470 Mich 593, 599; 685 NW2d 198 (2004). Because Dr. Viviano is not board certified in the same specialty as Dr. Crocker, MCL 600.2169(1)(a) prohibits him from testifying regarding the standard of care and the trial court's ruling was correct. *Halloran*, 470 Mich at 579.

Nevertheless, Rock insisted that the board-certification requirement refers to the time of the alleged malpractice, instead of the present (as the present tense of the words "be" and "is" require). Nothing in the statute even remotely implies that the board-certification requirement applies to the past. Yet the Court of Appeals agreed to ignore the present tense in the board-certification requirement.

The panel started in the wrong place. Instead of the most reliable evidence of legislative intent—the statutory text—the panel started with a discussion of what plaintiffs must prove in a medical malpractice case.[60] That's where it analysis first became "unmoored in the actual language of the law." *Garg*, 472 Mich at 285 n 11. There's no dispute that the standard of care is based on "the standard of medical care

---

[59] Ex. F, Viviano Trial Testimony, pp. 63-65; Ex. A, Order re: Expert, pp. 1-2.
[60] Ex. C, Court of Appeals Opinion, p. 2.

applicable at the time the care was provided."[61] But that proposition doesn't trump the statutory text.

When the panel reached the statutory text, it again selected the wrong starting point. It didn't start with the board-certification requirement or even the beginning of the statute. Instead, it jumped to the middle and observed that "[c]onsistent with [the panel's chosen starting point], a physician who testifies to the standard of care at issue must have possessed, on the date of the alleged malpractice, the same relevant specialty qualifications as the defendant."[62] That's true. But it's also irrelevant.

The panel observed that the specialty requirement "employs the same present-tense verbs yet plainly refers to a past time period."[63] It's true that the Legislature used the word "specializes" (the present-tense form) in the specialty requirement. But it also combined "specializes" with the past-oriented phrase "at the time of the occurrence that is the basis of the action." The Legislature knew how to distinguish between time periods. Though the specialty requirement uses the present-tense term "specializes," the addition of "at the time of the occurrence" makes it "clear that something different was intended." *Sun Valley*, 460 Mich at 237. If that same phrase was in the board-certification requirement, there wouldn't be any dispute in this case. The problem with the Court of Appeals' analysis is that the Legislature **didn't** use the phrase "at the time of the occurrence" in the board-certification requirement. Like the licensing

---

[61] Ex. C, Court of Appeals Opinion, p. 2.
[62] Ex. C, Court of Appeals Opinion, p. 2.
[63] Ex. C, Court of Appeals Opinion, p. 4.

requirement, there is no phrase modifying the present-tense verb in the board-certification requirement.

Sun Valley, which considered when a writ of restitution can issue after entry of a judgment of possession, is instructive on this point. Under MCL 600.5744, a writ of restitution "shall not be issued" until ten days after the judgment is entered. 460 Mich at 235-236. But the statute also contains a tolling provision:

> If an appeal is taken or a motion for new trial is filed before the expiration of the period during which the writ of restitution shall not be issued and if a bond to stay proceedings is filed, the period during which the writ shall not be issued shall be tolled until the disposition of the appeal or motion for new trial is final. [MCL 600.5744(5) (emphasis added).]

Sun Valley addressed whether the ten-day period was tolled if a bond wasn't filed "before the expiration of the period during which the writ of restitution shall not be issued." "It is a general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears." *Id.* at 237. This Court explained that, "[i]f the statute is read in its grammatical context, there is no ambiguity." *Id.* at 239. The time limit was only "linked to the first condition," i.e., "[i]f an appeal is taken or a motion for new trial is filed." *Id.* The second clause "contains no time limit," so "the stay bond need not be filed within ten days after the judgment for possession is entered." *Id.*

Like *Sun Valley*, this case concerns whether a clause modifies only the last antecedent. And, as in *Sun Valley*, "[i]f the statute is read in its grammatical context, there is no ambiguity." *Id.* at 239. The modifying clause—"at the time of the

occurrence" – is only linked to the word preceding it – "specializes" – in the licensing requirement. In *Sun Valley*, the two conditions were separated by a conjunction – "and." Here, the licensing requirement and the board-certification requirement are separated by a period. Like the second condition in *Sun Valley*, the board-certification requirement isn't modified by a clause in the preceding sentence.

The Court of Appeals, however, attempted to move the phrase "at the time of the occurrence" into the board-certification requirement with the help of an ellipsis. The panel revised the statute to say that, if the defendant is board certified, "a testifying expert must 'specialize[] at the time of the occurrence that is the basis for the action in the same specialty ... [and be] board certified in that specialty.'"[64] But, of course, that isn't what the statute says.

Courts perform statutory interpretation, not statutory revision. It's a fundamental tenet that courts "may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'" *Halloran*, 470 Mich at 577, quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The Court of Appeals' effort to read (or move) a phrase into the board-certification requirement that isn't there runs afoul of that tenet. It's wrong grammatically. It's wrong under the principles of statutory interpretation. And it's wrong under this Court's precedent interpreting the expert-testimony statute.

In *Halloran*, this Court made clear that the board-certification requirement is an "**additional** requirement for expert witness testimony" that applies "in spite of" the

---

[64] Ex. C, Court of Appeals Opinion, p. 4, quoting MCL 600.2169(1) (edit in original).

specialty requirement. *Halloran*, 470 Mich at 578 (emphasis in original). There, this Court reversed the Court of Appeals' holding that an expert needed to "share only the same subspecialty, but not the same board certification" because it was "contrary to the plain language of the statute." *Id.* at 578. The Court of Appeals erred in *Halloran* because the specialty requirement isn't linked to the board-certification requirement, as indicated "by the use of the word 'however' to begin the second sentence":

> [T]he second sentence imposes an **additional** requirement for expert witness testimony, not an optional one. In other words, "in spite of" the specialty requirement in the first sentence, the witness must also share the same board certification as the party against whom or on whose behalf the testimony is offered. [*Id.* at 578-579 (emphasis in the original).]

This Court added that it has "invariably stated" that "the argument that enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decided, not this Court." *Id.* at 579. So the end result was simple: "Because the proposed witness in this case is not board certified in the same specialty as Bhan, MCL 600.2169(1)(a) prohibits him from testifying regarding the standard of care." *Halloran*, 470 Mich at 579.

In *Halloran*, the witness never had the same board certification as the defendant. But while its facts are different, *Halloran*'s analysis and conclusion still control. This Court applied "the plain language of the statute," rejected concerns with supposed "unwise policy implications," and stated a straightforward conclusion that (with one small edit) could serve as the holding for this case: "Because the proposed witness in

this case is not board certified in the same specialty as [Dr. Crocker], MCL 600.2169(1)(a) prohibits him from testifying regarding the standard of care." *Halloran*, 470 Mich at 579.

The Court of Appeals attempted to contort *Halloran*'s statement that the board-certification requirement is an "additional requirement for expert witness testimony." According to the panel, "additional" meant that the two requirements were linked and the board-certification requirement "adds to rather than contradicts the first."[65] But requiring a current board certification doesn't "contradict" anything. The statute requires an expert to share the same specialty at the time of the alleged malpractice and share the same board certification at the time of trial. There is no conflict there. In addition, *Halloran* stated, in no uncertain terms, that the board-certification requirement applies "'in spite of' the specialty requirement in the first sentence...." *Id.* at 578-579. So they aren't dependent on each other. The specialty requirement demands one thing; the board-certification requirement demands another. The Court of Appeals' attempt to twist *Halloran* should be addressed and rejected.

The panel's reliance on *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006) is similarly strained. The section of *Woodard* that the panel cited discussed the specialty requirement and concluded that it "only requires the plaintiff's expert to match one of the defendant physician's specialties." *Id.* at 560. The reference to the board-certification requirement at the end of that discussion paraphrased the statutory text—"the plaintiff's expert must also be board certified in that specialty." *Id.* at 560. Nothing more was intended or can be extracted from that statement. *Woodard*'s observation that "the

[65] Ex. C, Court of Appeals Opinion, p. 5.

plaintiff's expert witness must also **have obtained** the same certification in order to be qualified to testify" is also unremarkable.[66] Stating that the witness must "have obtained" the relevant board certification doesn't answer the question. Since the proposed expert "must **be** a specialist who **is** board certified," he necessarily must have obtained that certification before he testifies. *Woodard* doesn't support the Court of Appeals' revision of the board-certification requirement because there is no dispute that the witness must "have obtained the same certification"; the issue is whether the witness must **be** board certified when he testifies. The panel overreached to say that *Woodard* addressed that issue.

2. Analysis of the preamendment version of the statute supports the plain-language construction of the current version.

Courts should not "resort to legislative history to cloud a statutory text that is clear." *Chmielewski v Xermac, Inc*, 457 Mich 593, 608; 580 NW2d 817 (1998) (citations omitted). Because the board-certification requirement isn't ambiguous, there is no need to resort to legislative history. But if this Court considers the legislative history, it will find that the legislative history confirms that the trial court's ruling was correct.

"[N]ot all legislative history is of equal value." *In re Certified Question (Kenneth Henes v Continental Biomass Ind, Inc)*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). One "legitimate" form of legislative history is a change in the statutory text. *Id.*; see *Mayor of Lansing v Mich Pub Serv Comm'n*, 470 Mich 154, 171; 680 NW2d 840 (2004) (describing

[66] Ex. C, Court of Appeals Opinion, p. 6, quoting *Woodard*, 476 Mich at 564 (emphasis added).

"the actual change in statutory language made by the Legislature" as "the most valuable type of legislative history available to us").

Before it was amended in 1993, the expert-testimony statute did not require a proposed standard-of-care expert to hold a current medical license (it was enough that the person "**was** a physician licensed to practice medicine") and it permitted the proposed expert to be a specialist either when he testifies or when the alleged malpractice occurred:

> (1) In an action alleging medical malpractice, if the defendant is a specialist, a person shall not give expert testimony on the appropriate standard of care unless the person ***is*** or ***was*** a physician licensed to practice medicine or osteopathic medicine and surgery or a dentist licensed to practice dentistry in this or another state and ... :
>
> (a) ***Specializes***, or ***specialized at the time of the occurrence which is the basis for the action***, in the same specialty or a related, relevant area of medicine or osteopathic medicine and surgery or dentistry as the specialist who is the defendant in the medical malpractice action. [MCL 600.2169(1)(a) before amendment by 1993 PA 78 (emphasis added).[67]]

The current version came about after enactment of 1993 PA 78, which,

(1) removed the past-tense language that permitted a currently unlicensed physician to testify;

(2) removed the language that allowed someone who didn't specialize at the time of the alleged malpractice to testify; and

(3) inserted the board-certification requirement with present-tense language similar to the licensing requirement.

---

[67] **Exhibit M** is the preamendment text of the statute.

So the statutory amendments were time-frame focused. The licensing requirement was changed to require a current medical license. The specialty requirement was changed to require specialization at the time of the alleged malpractice. And the board-certification requirement was added with language parroting the licensing requirement. Such language, especially in light of the Legislature's deliberate shift of verb tense in the other provisions of the statute, cannot be treated as accidental.

The Court of Appeals focused on the amendment of the specialty requirement. "Under the amended statute," said the panel, "the relevant qualifications must be tested at the time of the occurrence that is the basis for the action only."[68] But its assessment ignores the licensing requirement and how it was amended. It also assumes that the Legislature mistakenly omitted "at the time of the occurrence" from the board-certification requirement. Courts, however, are not permitted to assume that the Legislature made a mistake. Rather, "the Legislature is presumed to understand the meaning of the language it enacts into law...." *Robinson*, 462 Mich at 459; *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012) ("'[W]e have no right to enter the legislative field and, upon assumption of unintentional omission ..., supply what we may think might well have been incorporated.'"), quoting *Reichert v Peoples State Bank*, 265 Mich 668, 672; 252 NW 484 (1934).

The verb tense in the current version of the statute is a legislative choice. When it added the board-certification requirement, the Legislature also changed the relevant time frames for the other two requirements. The Legislature knew how to orient a

[68] Ex. C, Court of Appeals Opinion, p. 5.

provision to the past or present. The Court of Appeals erred when it presumed that the Legislature's use of present-only language for the board-certification requirement was a mistake. Its error should be reversed.

3. A statute must be construed in "its grammatical context." Doing so supports the trial court's ruling here.

This Court has faithfully respected the plain language of the Legislature's verb-tense selection. For example, *Michalski v Bar-Levav*, 463 Mich 723; 625 NW2d 754 (2001) addressed the impact of verb tense in the Handicapper Civil Rights Act (CRA). The CRA prohibits employers from discriminating against employees based on a handicap, which includes having or "being regarded as having" a physical characteristic that "substantially limits 1 or more" major life activities. MCL 37.1103(d). The plaintiff relied on evidence that the defendant believed that her physical characteristic "might substantially limit her major life activities in the future." *Michalski*, 463 Mich at 734. But that wasn't what the CRA prohibited. This Court held that the present-tense phrases—"substantially limits" and "regarded as having"—required evaluating the physical characteristic at the time of employment. *Id* at 735. The majority responded to the dissent's criticism of its "focus on the present-tense language of the statute" by reminding that the Legislature's choice of language must prevail: "The Legislature can and may rewrite the statute, but we will not do so." *Id* at 734, n 14. Accordingly, this

Court rejected the plaintiff's (and the dissent's) attempt to assign a future-tense interpretation to the Legislature's words.[69]

Likewise, in *Chmielewski*, 457 Mich 593, the dissent criticized that the majority's interpretation of a present-tense section of the CRA was a "strained plain-language argument." *Id.* at 610 n 20. The majority defended its analysis by stressing that "[s]urely, one could not seriously characterize as 'strained' an analysis that honors the Legislature's choice of the present tense."

In *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 373 (1991), this Court considered the Legislature's choice of the present-perfect tense versus the present tense in the Paternity Act. The Paternity Act defined "child born out of wedlock" to include "a child which the court **has determined** to be a child born during a marriage but not the issue of that marriage." MCL 722.711(a) (emphasis added). Relying on the present-perfect tense, this Court held that the statute required "a prior court determination that a child is born out of wedlock." 437 Mich at 242. The plaintiff's interpretation would have "read 'has determined' to mean 'may determine,'" which the majority equated as calling for "an alteration of the plain meaning of the words." *Id.* See also *People v Williams*, 294 Mich App 461, 476; 811 NW2d 88 (2011) lv den 491 Mich 854 (2012)

---

[69] *Michalski* held that the present-tense language referred to the time of the plaintiff's employment, instead of the time of trial. But statutes that prohibit discrimination against employees clearly apply to the timeframe of employment. The expert-testimony statute concerns trial procedure and applies to the timeframe of when a proposed expert would be called to give testimony. See MCL 600.2169(1) ("[A] person shall not give expert testimony on the appropriate standard of care unless ....").

(holding that the present-perfect tense—"has become liable to serve"—meant that a sentence could only be consecutive to a sentence that was imposed in the past).

Rock's argument principally relied on the plurality opinion in *Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004). There, the issue was whether the higher noneconomic-damages cap in MCL 600.1483, which requires proof that a plaintiff "has permanently impaired cognitive capacity," applied when the plaintiff's decedent was dead. The plurality held that the higher cap applied. The lead opinion rejected the defendants' reliance on the Legislature's use of the present tense.[70] But it also addressed an entirely different context. The higher cap applies if a plaintiff has a "**permanently** impaired cognitive capacity." A permanent impairment is one that is "expected to last forever." *Young v Nandi*, 276 Mich App 67, 80; 740 NW2d 508 (2007), vacated in part on other grounds, lv den in part 482 Mich 1007 (2008). Once a plaintiff is deemed to have a "permanent" condition (which the plaintiff in *Shinholster* had before he died), the question of whether he or she "has" it is settled forever—one **always** "has" a "permanent" condition.

Board certification is a more transient status. It isn't permanent or "expected to last forever." Once certified, a board-certified specialist must undertake steps to retain that status—steps Dr. Viviano undisputedly didn't or couldn't take.

---

[70] Despite Rock characterizing the lead opinion as "the Court's decision," only two justices accepted the rationale that Rock relies on, while two other justices concurred only in the result. As a result, the lead opinion is non-binding and "is not authority beyond the immediate parties. *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).

Courts closely scrutinize verb tense to determine what the Legislature intended. The gist of Rock's argument and the Court of Appeals analysis is that the Legislature's use of the present tense was a mistake that can be ignored. The Legislature explicitly wrote the specialty requirement in the past tense, but, they say, it forgot to include past-tense language in the board-certification requirement. As the lead opinion in *Shinholster* noted, "had the Legislature truly intended" to do what Rock and the Court of Appeals propose, "it knew how to make that intent specific." 471 Mich at 566. Courts don't have the authority to supply what the Legislature omitted.

4. Arguments concerning "absurd results" are insufficient to avoid enforcement of an unambiguous statute. The Court of Appeals also incorrectly asserts that an "confounding consequences" will be obtained by enforcing MCL 600.2169(1)(a) as written.

Rock urged and the Court of Appeals concluded that interpreting the expert-testimony statute as written will lead to "confounding consequences" or "absurd results." But, in Michigan, supposed "absurd results" do not permit courts to ignore or refuse to apply an unambiguous statute. *People v McIntire*, 461 Mich 147, 159; 599 NW2d 102 (1999) ("[I]n our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution."); *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 574; 753 NW2d 265, lv den 482 Mich 989 (2008) ("[T]his Court must follow the unambiguous language of a statute, even if doing so would produce an absurd or irrational result."). Though this Court's members "have differences concerning whether the 'absurd results' doctrine exists in Michigan,"

Johnson, 492 Mich at 192, those who subscribe to it view it as a narrowly-circumscribed doctrine. It "'must not be invoked whenever a court is merely in disagreement, however strongly felt, with the policy judgments of the Legislature'" and it only applies "'if it is quite impossible that [the Legislature] could have intended the result ....'" *Id.* at 193, quoting *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 80; 718 NW2d 784 (2006) (Markman, J., concurring) and *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 346; 791 NW2d 897 (2010) (Markman, J., dissenting).

If the supposed "confounding consequences" are considered, a closer look shows that they are neither confounding nor absurd. In fact, there are some scenarios that the Legislature likely intended to avoid and are only avoided if the statute is enforced as written. So the Legislature is not as "unwise," nor the results so "absurd" or "confounding," as the Court of Appeals portrayed it.

The panel's primary concern was that if a defendant lost his board-certification before trial—whether through retirement, death, or expiration—the plain language of the board-certification requirement would "permit testimony from an expert who had **never** been board certified."[71] While true, the panel missed the fact that the expert-testimony statute isn't the only standard for an expert's qualification. Experts who meet the statutory standards can be disqualified for other reasons because the expert-

[71] Ex. C, Court of Appeals Opinion, p. 7. Rock posited a scenario in which the defendant changes specialties after the alleged malpractice, Rock Brief on Appeal, p. 9, but that misunderstands (or ignores) the specialty requirement. In Rock's scenario, though the defendant switches specialties without losing his board certification, see, e.g., *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622; 736 NW2d 284 (2007), the switch doesn't change the specialty requirement.

testimony statute "does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section." MCL 600.2169(3). So the panel's "confoundment" that a plain-language interpretation of the board-certification requirement would "permit testimony" is overstated. The Legislature didn't intend the expert-testimony statute to be the end-all, be-all of expert qualification. And a proposed expert's lack of board certification when the alleged malpractice occurred may be a basis to exclude his testimony under MRE 702.

The panel was also concerned about allowing testimony from an expert who became board certified after the alleged malpractice. Again, the expert's lack of board certification when the alleged malpractice occurred may disqualify him under MRE 702. Since the Legislature acknowledged that the expert-testimony statute didn't and wasn't intended to address every disqualifying circumstance, the panel's hypotheticals are not a reason to disregard its plain language.

The point that the panel missed and that its interpretation would negate was this: The Legislature may have reasonably determined that where, as here, defendant physicians undertake the effort to obtain and maintain their board-certification credentials, they should only have their professional skill and expertise called into question by someone who has undertaken the same effort to maintain his or her own board certification. Obtaining certification is not a simple matter of mailing in a fee or an application. A board-certified orthopedic physician wishing to obtain or maintain board certification must complete a significant amount of continuing medical

education, undergo a peer and credential review, and take a written examination.[72] And many, if not all, specialty boards retain the right to revoke board certification under a variety of circumstances. For example, the American Boards of Surgery and Internal Medicine retain the right to revoke certification when a physician has his or her license revoked, makes misrepresentations on his or her application for certification, fails to maintain an acceptable level of competence, or for failure to maintain ethical, professional, or moral standards.[73] So the Legislature may have concluded that physicians who take the care to obtain and maintain their continuing-medical education, subject themselves to rigid peer review, and undergo the trouble of retaking certification examinations every ten years deserve to have only those potential experts who have done the same opine on whether they complied with the standard of care. There is nothing absurd about that policy, nor how it's effectuated under the board-certification requirement.

Notably, the panel's proposed interpretation of the board-certification requirement would have its own "confounding consequence": A physician who had his or her board certification revoked for a moral or ethical violation, or for making misrepresentations on his or her application for certification, or for a variety of other

---

[72] American Board of Orthopaedic Surgery, https://www.abos.org/certification/board-certification.aspx, accessed December 15, 2014.

[73] American Board of Surgery policies regarding revocation, http://www.absurgery.org/default.jsp?policyrevocation, accessed December 15, 2014; American Board of Internal Medicine general policies, http://www.abim.org/certification/policies/general-policies-requirements.aspx#sanctions-appeals, accessed December 15, 2014.

misconduct,[74] would be "qualified" to offer standard-of-care testimony against a board-certified physician. If absurdity was relevant, the panel's interpretation permits the more "absurd" result.

This Court doesn't need to delve into the "degrees of absurdity" that the panel's opinion invites. The statute must be enforced as written, even if it's considered "inefficacious" or "unwise." *McIntire*, 461 Mich at 159. And the panel's "confounding consequences" don't rise to the level of making it "quite impossible that [the Legislature] could have intended the result" in this case or the scenarios that the panel suggested. *Johnson*, 492 Mich at 193; *Halloran*, 470 Mich at 579 ("[T]he argument that enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decide, not this Court.").

D. Conclusion

The problem with the Court of Appeals' opinion is its method. The panel started out rationalizing a rule that it thought would make the most sense. Once it had a rule in mind, it went to the statutory text in search of a construction that supported its predetermined rule. But, as this Court has admonished, proper statutory interpretation starts with the statutory text. The panel's opinion in this case is the poster-child for statutory revision, not statutory interpretation. Because the Court of Appeals erroneously reversed the trial court's ruling and misconstrued the expert-testimony statute in a published opinion, this Court should either peremptorily reverse the Court of Appeals or grant leave to address its errors.

---

[74] Yet also managed to retain his or her medical license, another qualification for being a standard-of-care witness. MCL 600.2169(1).

Argument III: Evidence of collateral-source payments is admissible to show a plaintiff's lack of incentive to return to work if a defendant offers evidence showing that a plaintiff is malingering. Defendants provided evidence of malingering including evidence that Rock continued not to work despite being cleared to work by two treating physicians and that his previous years' incomes had been substantially less than his no-fault wage-loss benefits. The trial court should have denied Rock's motion in limine.

A. Standard of Review

"It is within the discretion of the trial court to admit [collateral-source] evidence bearing on the question of whether an injured party possessed sufficient incentive to return to work." *Blacha v Gagnon*, 47 Mich App 168, 174; 209 NW2d 292 (1973).[75] But a court does not properly exercise that discretion where it makes a ruling that is "quite summary" and without explanation of its reasoning. *Nasser v Auto Club Ins Assn*, 435 Mich 33, 62-63; 457 NW2d 637 (1990).

B. Analysis

Under the collateral-source rule, evidence of insurance coverage is not admissible for the purpose of mitigating damages. *Nasser*, 435 Mich at 58. But such evidence is admissible for other purposes. *Id.* "Most jurisdictions," including Michigan, "recognize an exception to the general rule of exclusion where the evidence is sought to prove malingering or motivation on the plaintiff's part not to resume employment or to extend the disability." *Id.*

There is a precondition to using collateral source evidence to prove malingering. The party offering the evidence must first present "'[s]ufficient facts ... which raise serious doubts in the minds of the jurors as to the extent of the injury actually

[75] This issue implicates the common-law collateral-source rule, and not the statutory rule found at MCL 600.6303.

suffered,'" i.e., there must be independent evidence that the plaintiff is malingering. *Nasser*, 435 Mich at 59, quoting *Blacha* 47 Mich App at 177-178. "Thus, the evidence should be admitted 'only if it appears to the trial judge from other evidence that there is a real possibility that plaintiff was motivated by receipt of collateral source benefits to remain inactive as long as he did.'" *Nasser*, 435 Mich at 59, quoting 22 Am Jur 2d, Damages, §967, p 1004. And while the trial court must also consider MRE 403, "it is, of course, possible for the trial court to reduce the prejudicial effect of the evidence through a curative instruction." *Nasser*, 435 Mich at 60 n 13.

In *Nasser*, the plaintiff was seeking first-party no-fault benefits. His insurer argued that his medical treatement was unnecessary and unreasonable. The insurer wanted to present evidence that the plaintiff was receiving payment for his medical treatment under a no-fault auto policy and other policies, i.e., he was "double dipping," to support its argument that he was malingering. *Id.* at 62-63. There was other evidence that the plaintiff was malingering. He claimed that he suffered severe injuries, yet the car he was driving had "'almost nonexistant' physical damage." *Id.* at 60. He did not require emergency medical treatment. "[E]very test performed on plaintiff returned negative results except one, which was unrelated to the accident." *Id.* And there was "expert testimony that all three of [his] hospitalizations were unnecessary ...." *Id.* at 61. This Court characterized the trial court's decision barring the collateral-source evidence as "quite summary," and explained that it "made no attempt to examine the circumstances presented by defendant to determine whether they established a real possibility that plaintiff was motivated to remain hospitalized or under treatment by his

continued receipt of collateral source benefits." *Id.* at 62. It was "apparent ... that [the trial court] believed this case to be a straightforward application of the collateral source rule," which was wrong. *Id.* Accordingly, this Court determined that the appropriate course was to instruct the trial court to "reconsider defendant's argument" on remand "in light of" the Court's discussion of the "exception to the collateral source rule...." *Id.*

Here, there was evidence that Rock was malingering. Both Dr. Viviano and Dr. Balazsy cleared Rock to return to work. But he didn't and the no-fault benefits, which exceeded his yearly income from each of the prior three years, explained why he would exaggerate his injuries. Accordingly, the collateral source evidence is admissible under *Nasser*. See also *Blacha*, 47 Mich App at 176 (collateral-source evidence held admissible when the defendant "established an adequate foundation in support of his contention that plaintiff's injury was not as incapacitating as alleged by plaintiff").

Judge Redford's decision was similar to the trial court's decision in *Nasser*. He made a conclusory statement that the collateral-source rule barred evidence of Rock's no-fault benefits.[76] As in *Nasser*, Judge Redford briefly mentioned malingering and MRE 403, but he didn't elaborate on either point. *Id.* at 61-62 ("[a]lthough [the trial court] briefly mentioned defendant's motive argument, as well as the MRE 403 balancing test," it didn't examine whether the circumstances "established a real possibility that plaintiff was [malingering]" or "elaborate" on its MRE 403 analysis).

The Court of Appeals panel in this case didn't follow *Nasser's* lead. Instead of assessing Judge Redford's ruling, the panel supplied its own and, in doing so, worked a

---

[76] Ex. B, Order regarding motions in limine, p. 4.

de facto overruling of *Nasser*. The panel gave four **new** reasons to exclude evidence that Rock received no-fault benefits that substantially exceeded his income from prior years:

(1) The evidence was cumulative;

(2) The benefits terminated in 2011;

(3) The jury may get confused and reduce Rock's damages by the amount of benefits he received; and

(4) It would "result in a mini-trial on ... whether plaintiff was legally and factually entitled to no-fault benefits."[77]

Judge Redford's decision wasn't based on those reasons and none of them are defensible.

The panel's cumulative-evidence reason gravely distorts the law. *Nasser* **requires** "other evidence" of malingering as a precondition to admitting collateral-source evidence. The panel's cumulative-evidence reason would eviscerate the rule. That is, if the "other evidence" makes the collateral-source evidence cumulative, then the collateral-source evidence would never be admissible. Moreover, the collateral-source evidence isn't "cumulative" because, unlike the doctor's testimony, it explains the motivation for Rock's malingering.

When the benefits terminated is irrelevant. Rock's injury occurred in 2008. The jury should learn that the no-fault benefits gave Rock a motive to "exaggerate[] his injuries and/or pain" for a significant part of the following three years.

The panel's concern that a jury may be confused and reduce Rock's damages is present any time collateral-source evidence is offered. As *Nasser* instructed, "it is, of

---

[77] Ex. C, Court of Appeals Opinion, p. 11.

course, possible for the trial court to reduce the prejudicial effect of the evidence through a curative instruction." 435 Mich at 60 n 13. Again, the panel's rationale would consume *Nasser*'s ruling and must be rejected.

Finally, the panel's concern about a "mini-trial" is misguided. Whether Rock was "legally" entitled to no-fault benefits isn't and never will be at issue. But the trial **will** concern the extent of Rock's injury. That issue will be disputed whether or not the collateral-source evidence is admitted. In other words, if Rock has evidence that he wasn't malingering, he will offer it regardless whether the collateral-source evidence is introduced.

The Court of Appeals analysis should concern this Court. It wasn't based on the trial court's ruling and it would effectively destroy *Nasser*'s holding that collateral-source evidence is admissible to show motive if there is other evidence that the defendant is malingering. The trial court should have admitted the evidence. And the Court of Appeals should have either reversed or, at a minimum, followed *Nasser*'s lead and directed Judge Redford to reconsider his ruling in light of *Nasser*. Indeed, Judge Redford's suggestion that Dr. Crocker could offer testimony that Rock was "motivated by financial compensation" suggests that he didn't fully appreciate the issue at hand. Accordingly, this Court should do what the Court of Appeals failed to do: reverse of the lower courts' rulings and remand for admission of the collateral-source evidence. At a minimum, this Court should vacate the lower courts' rulings and remand to the trial court for consideration of *Nasser*'s exception to the collateral-source rule.

Relief Requested

Defendants-appellants K. Thomas Crocker, D.O., and K. Thomas Crocker, D.O., P.C., ask this Court to grant leave to appeal, or, in the alternative, peremptorily reverse the Court of Appeals on each of the issues raised in this application.

AARDEMA WHITELAW, PLLC

BY: Brian Whitelaw
BRIAN W. WHITELAW (P33358)
Attorney for Defendants- Appellants
5360 Cascade Rd. SE
Grand Rapids, Michigan 49546
(616) 575-2060
bwhitelaw@aardemawhitelaw.com

COLLINS EINHORN FARRELL P.C.

BY: Noreen L Slank
NOREEN L. SLANK (P31964)
GEOFFREY M. BROWN (P61656)
MICHAEL J. COOK (P71511)
Attorneys for Defendants- Appellants
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141
noreen.slank@ceflawyers.com
geoffrey.brown@ceflawyers.com
michael.cook@ceflawyers.com

Dated: December 23, 2014