STOKES V. SWOFFORD, THE MICHIGAN SUPREME COURT'S DECISION, & ITS EFFECT ON MEDICAL MALPRACTICE CASES

On July 25, 2024, the Michigan Supreme Court issued its opinion in the *Stokes v. Swofford* matter.[1] In doing so, the Court partially overruled its 2006 opinion in the seminal case of *Woodard v. Custer*[2] and ruled that "subspecialties" are not considered to be "specialties" within the meaning of Mich. Comp. Laws 600.2169 in considering whether an expert is qualified to testify against a defendant medical provider.

The Underlying Facts and Road to the Michigan Supreme Court

In 2013, Dr. Michal J. Swofford reviewed a brain CT scan in connection with care provided to decedent Linda Horn, which ultimately resulted in a medical malpractice lawsuit. During the time in question, Dr. Swofford was a diagnostic radiologist who was interpreting the brain CT scan. Although he had a Certificate of Added Qualification in neuroradiology, it was expired by the time of the alleged malpractice.

In support of their claims against Dr. Swofford, the plaintiff hired a neuroradiologist to testify against him. The trial court ruled that the plaintiff's expert was unable to testify against Dr. Swofford because diagnostic radiology was the relevant specialty, and Plaintiff's expert was a neuroradiologist. Relying upon *Woodard*, the Michigan Court of Appeals reversed and opined that neuroradiology was actually the most relevant specialty since Dr. Swofford was evaluating a brain CT scan during the alleged malpractice. Therefore, the plaintiff's expert could testify against Dr. Swofford.

The Michigan Supreme Court granted leave, and in a 4:3 decision, although it agreed with the decision of the Court of Appeals, it disagreed with the rationale, and in doing so, overruled *Woodard* in part with a remand to the trial court. The Court stated that the most relevant specialty in *Horn v. Swofford* was diagnostic radiology in which plaintiff's expert spent 100% of his time in.

The Court also addressed the companion case of *Selliman v. Colton*[3] that was completely remanded since the record was unclear as to whether "facial plastic and reconstructive surgery" was a subspecialty or a specialty. The Court stated that "[w]hether facial plastic and reconstructive surgery is a specialty rather than a specialty is a fact-intensive inquiry to be reserved for the trial court, with the option of an evidentiary hearing as needed, to consider factors that would be relevant to the medical community in making this determination."

---

[1] MSC Case No. 162302

[2] In the 2006 case of *Woodard v. Custer*, the Michigan Supreme Court discussed the "same specialty requirement" of Subsection (1)(a) and indicated that the term "specialty" was defined as "a particular branch of medicine or surgery in which one can potentially become certified." Therefore, this included a *sub*specialty. "A subspecialty, although a more particularized specialty, is nevertheless a specialty."

[3] MSC Case No. 163226

What Was the Michigan Supreme Court's Ruling and Rationale?

To discuss the Court's ruling in *Stokes v. Swofford*, we must look at Mich. Comp. Laws § 600.2169 (emphasis added). Subsection (1) states *in relevant part*:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> > (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action **in the same specialty as the party against whom or on whose behalf the testimony is offered.** However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

Subsection (2) of the statute states:

> **In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum evaluate all of the following**:
>
> > (a) The educational and professional training of the expert witness.
> >
> > (b) **The area of specialization of the expert witness**.
> >
> > (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
> >
> > (d) The relevancy of the expert witness's testimony.

Subsection (3) states:

> This section 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.

In revisiting the *Woodard* decision, the Court ruled that *Woodard* misinterpreted the statute. First, it conflated the terms "specialty" and "subspecialty," which read additional text into the statute, since the statute did not reference "subspecialty." The matching required by Subsection (1) "is limited to general board specialties and does not require precise matching of subspecialties." Second, *Woodard* focused its

attention on Subsection (1) while ignoring Subsections (2) and (3), which the Court states offers a "checks and balances." The Michigan Supreme Court stresses that "specialties" and "subspecialties" are separate and distinct technical terms as set forth and defined by the *American Board of Medical Specialties*, *American Osteopathic Association*, *American Board of Physician Specialties*, or other nationally recognized physician umbrella-certifying organizations. If the Legislature wanted to incorporate "subspecialties" into the statute, then it would have done so.

The Court also believed that *Woodard* failed to consider Subsections (2) and (3). In trying to assuage concerns that the ruling may have, the Court provided a simple and straightforward internal medicine hypothetical. The Court offered that although both pulmonologists and cardiologists, for instance, fall under the internal medicine specialty, a trial court could rely upon Subsections (2) and (3) to easily exclude a hypothetical pulmonologist's opinions against a cardiologist.

What Does This All Mean for You?

In addition to immediately assessing a plaintiff's standard of care expert's specialty, defendant providers must be ready to make arguments invoking Subsections (2) and (3) in addition to other legal authority, such as evidentiary rules addressing expert witness qualifications. Therefore, even if the plaintiff's offered expert is purportedly in the "same specialty" as the defendant, they are still not qualified to provide testimony based upon other legal authority. Litigants must also be ready for a patchwork of trial court rulings to appear throughout the state. The chances of a party hiring a pulmonologist to testify as to the cardiologist's standard of care are slim. More likely is a similar scenario to the one that was presented in the underlying facts of *Stokes v. Swofford*. Additionally, as we see in the Michigan Supreme Court's analysis of the *Selliman* record, litigants must be ready to provide factual evidence as to whether a practice is specialty or subspecialty to begin with.

Whatever the case calls for, the attorneys at Foley, Baron, Metzger & Juip, PLLC are ready to assist you in addressing a case's relevant specialties, assessing experts, and handling any related arguments that may arise in the trial court and beyond. For questions on this case, contact FBMJ attorneys Brian Whitelaw or Silvia Alexandria Mansoor @ 734.742.1800.