

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2713-20**

MICHAEL JOHN DELANY,

Plaintiff-Appellant,

v.

**DR. JAMES Q. ATKINSON, III,
and ATLANTICARE
PHYSICIANS GROUP,**

Defendants-Respondents,

and

**WALGREENS EASTERN CO.,
INC.,**

Defendant.

Submitted March 28, 2022 – Decided April 14, 2022

Before Judges Sumners and Vernoia.

On appeal from the Superior Court of New Jersey, Law
Division, Atlantic County, Docket No. L-1713-20.

Jacobs & Barbone, PA, attorneys for appellant (David
A. Castaldi, on the briefs).

AtlantiCare Health System, attorneys for respondents
(Jill R. O'Keeffe, of counsel and on the brief).

PER CURIAM

In this medical malpractice case, plaintiff Michael J. Delany appeals from an April 19, 2021 order granting defendants Dr. James Q. Atkinson, III, and AtlantiCare Physicians Group's (AtlantiCare) motion to dismiss the complaint for failure to state a cause of action under N.J.S.A. 2A:53A-29. Plaintiff argues the court erred by finding the physician providing the affidavit of merit supporting the malpractice claim did not satisfy the requirements under N.J.S.A. 2A:53A-41(a) to be qualified to render an expert's opinion on the standard of care at issue in this case. Unpersuaded by plaintiff's argument, we affirm.

Plaintiff filed a complaint alleging defendants committed medical malpractice by negligently and carelessly deviating from generally accepted standards of care. More particularly, plaintiff alleged Dr. Atkinson, who is board certified in internal medicine by the American Board of Medical Specialties (ABMS), negligently prescribed an incorrect and excessive dosage of Lisinopril to plaintiff for hypertension.¹ Plaintiff alleged that after taking the

¹ Plaintiff filed an initial complaint that was later amended. We refer to the amended complaint.

incorrectly prescribed dosage of the medication, he suffered a syncopal event, fell, and suffered significant physical injuries.

Defendants filed an answer to the complaint and requested plaintiff provide an affidavit of merit in accordance with N.J.S.A. 2A:53A-27. Plaintiff provided an affidavit of merit from Dr. Jack Stroh. The affidavit states Dr. Stroh is a physician licensed in the State of New Jersey, credentialed to treat hypertension at two hospitals, and a "specialist recognized by" the ABMS. Dr. Stroh's affidavit also states he is board certified in internal medicine, and, during the year immediately preceding the malpractice alleged in the complaint, he "devoted the majority of [his] professional time to the active clinical practice of internal medicine" and also provided "clinical instruction of students regarding cardiovascular diseases and hypertension" at Robert Wood Johnson Medical School. In the affidavit, Dr. Stroh opined there is a reasonable probability Dr. Atkinson's treatment of plaintiff "fell outside acceptable professional or occupational standards or treatment practices."

Defendants moved for summary judgment dismissal, arguing Dr. Stroh did not meet the qualifications to submit an affidavit of merit under N.J.S.A. 2A:53A-41(a) because he did not specialize in the same specialty as Dr. Atkinson at the time of the alleged malpractice. It is not disputed that at the

time of the alleged malpractice, Dr. Atkinson was board certified in internal medicine, specialized in the practice of internal medicine, and prescribed the Lisinopril to plaintiff while engaged in the practice of that specialty.

Defendants argued that although Dr. Stroh was also board certified in the ABMS specialty of internal medicine when the malpractice allegedly occurred, he did not specialize in the practice of internal medicine at the time. Defendants asserted that at the time of the alleged malpractice, Dr. Stroh actually specialized in two internal medicine subspecialties—interventional cardiology and cardiovascular disease. Defendants claimed Dr. Stroh therefore did not satisfy N.J.S.A. 2A:53A-41(a)'s requirement that a physician submitting an affidavit of merit "shall have specialized at the time of the occurrence that it is the basis for the action in the same specialty or subspecialty . . . as the party against whom . . . the testimony is offered." Plaintiff did not dispute Dr. Stroh practiced in the two subspecialties at the time of the alleged malpractice, but plaintiff contended Dr. Stroh satisfied N.J.S.A. 2A:53-41(a)'s "shall-have-specialized" requirement because he was board certified in internal medicine at that time.

The court heard argument on defendants' motion and determined Dr. Stroh did not possess the qualifications required under N.J.S.A. 2A:53A-41(a) to offer expert opinion on the standard of care applicable to plaintiff's medical

malpractice claim against Dr. Atkinson. The court rejected plaintiff's claim Dr. Stroh "specialized" in the same specialty – internal medicine – as Dr. Atkinson simply because both shared board certifications in internal medicine. The court determined N.J.S.A. 2A:53A-41(a)'s requirement that a plaintiff's expert "specialize" in the same specialty as a defendant physician is not satisfied by board certification alone. The court found Dr. Stroh did not specialize in the same specialty – internal medicine – in which Dr. Atkinson was engaged at the time of the alleged malpractice because Dr. Stroh's practice was in two ABMS subspecialties, interventional cardiology and cardiovascular disease. The court granted defendants' motion and entered an order dismissing the complaint under N.J.S.A. 2A:53A-29 for failing to state a cause of action. This appeal followed.

"To prove medical malpractice, ordinarily, 'a plaintiff must present expert testimony establishing (1) the applicable standard of care; (2) a deviation from that standard of care; and (3) that the deviation proximately caused the injury.'" Nicholas v. Mynster, 213 N.J. 463, 478 (2013) (quoting Gardner v. Pawliw, 150 N.J. 359, 375 (1997)). "Generally, a plaintiff's expert testifying to the standard of care allegedly breached by a defendant physician must be equivalently credentialed in the same specialty or subspecialty as the defendant physician." Id. at 467; see also Ryan v. Renny, 203 N.J. 37, 52 (2010) (same).

The New Jersey Medical Care Access and Responsibility and Patients First Act (Act), N.J.S.A. 2A:53A-37 to -42, sets forth "certain qualifications that expert witnesses in medical malpractice actions must possess." Castello v. Wohler, 446 N.J. Super. 1, 14 (App. Div. 2016) (citation omitted). More particularly, N.J.S.A. 2A:53A-41 "'establishes [the] qualifications for expert witnesses in medical malpractice actions' and 'provides that an expert must have the same type of practice and possess the same credentials, as applicable, as the defendant health care provider, unless waived by the court.'" Mynster, 213 N.J. at 479 (citation omitted).

The statute provides:

In an action alleging medical malpractice, a person shall not give expert testimony or execute an affidavit pursuant to the provisions of P.L.1995, c. 139 (C. 2A:53A-26 . . .) on the appropriate standard of practice or care unless the person is licensed as a physician or other health care professional in the United States and meets the following criteria:

a. If the party against whom or on whose behalf the testimony is offered is a specialist or subspecialist recognized by the [ABMS] or the American Osteopathic Association and the care or treatment at issue involves that specialty or subspecialty recognized by the [ABMS] or the American Osteopathic Association, the person providing the testimony shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty, recognized by the [ABMS] or the

American Osteopathic Association, as the party against whom or on whose behalf the testimony is offered, and if the person against whom or on whose behalf the testimony is being offered is board certified and the care or treatment at issue involves that board specialty or subspecialty recognized by the [ABMS] or the American Osteopathic Association, the expert witness shall be:

(1) a physician credentialed by a hospital to treat patients for the medical condition, or to perform the procedure, that is the basis for the claim or action; or

(2) a specialist or subspecialist recognized by the [ABMS] or the American Osteopathic Association who is board certified in the same specialty or subspecialty, recognized by the [ABMS] or the American Osteopathic Association, and during the year immediately preceding the date of the occurrence that is the basis for the claim or action, shall have devoted a majority of his professional time to either:

(a) the active clinical practice of the same health care profession in which the defendant is licensed, and, if the defendant is a specialist or subspecialist recognized by the [ABMS] or the American Osteopathic Association, the active clinical practice of that specialty or subspecialty recognized by the [ABMS] or the American Osteopathic Association; or

(b) the instruction of students in an accredited medical school, other accredited health professional school or accredited residency or clinical research program in the same health care profession in which the defendant is licensed, and, if that party is a specialist or subspecialist recognized by the [ABMS] or the American Osteopathic Association, an accredited medical school, health professional school or accredited residency or

clinical research program in the same specialty or subspecialty recognized by the [ABMS] or the American Osteopathic Association; or

(c) both.

[N.J.S.A. 2A:53A-41 (emphasis added).]

Where, as here, defendant is a physician with a specialty recognized by the ABMS and the care or treatment at issue involves the specialty, plaintiff's putative expert must possess the qualifications set forth in subsection (a) of N.J.S.A. 2A:53A-41. Mynster, 213 N.J. at 481-82. The putative expert "shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty, recognized by the [ABMS] . . . as the party against whom" the expert will testify. N.J.S.A. 2A:53A-41(a). Where the defendant physician is board certified, the expert "must have additional credentials." Id. at 482; see also N.J.S.A. 2A:53A-41(a). In addition to the requirement that the putative expert must specialize in the same specialty or subspecialty as the defendant physician, the expert must also satisfy the conditions set forth in subsections (a)(1) and (a)(2) of N.J.S.A. 2A:53A-41. Ibid.

Although Dr. Atkinson was board certified at the time of the alleged malpractice, it is unnecessary to address whether Dr. Stroh possessed the

additional qualifications required under subsections (a)(1) and (a)(2) of N.J.S.A. 2A:53A-41. That is because the court determined in the first instance that Dr. Stroh did not possess the threshold qualifications required under subsection (a). As noted, the court found Dr. Stroh was not qualified under subsection (a) because he did not "specialize[] at the time of the occurrence that is the basis for the action in the same specialty or subspecialty, recognized by the" ABMS "as the party against whom or on whose behalf [his] testimony is offered." N.J.S.A. 2A:53A-41(a).

Plaintiff does not dispute that Dr. Atkinson specialized in internal medicine, a specialty recognized by the ABMS, at the time of the treatment at issue, and that the challenged treatment, the alleged over-prescription of Lisinopril, involved the practice of the ABMS specialty of internal medicine. He also does not dispute that to qualify as an expert witness under N.J.S.A. 2A:53A-41(a), Dr. Stroh "shall have specialized" at the time of the alleged malpractice in the same specialty – internal medicine – as Dr. Atkinson. Plaintiff argues that although Dr. Stroh's practice at the time of the alleged malpractice was devoted to his subspecialties in cardiovascular disease and interventional cardiology, Dr. Stroh specialized in the practice of internal medicine as required under N.J.S.A. 2A:53A-41(a) because Dr. Stroh was board

certified in internal medicine at that time. Thus, in his brief on appeal, plaintiff frames the issue we must decide as follows: under N.J.S.A. 2A:53A-41(a), "[d]oes a doctor specialize in internal medicine if he is board certified by [AMBS] in the specialty of internal medicine[?]"

Courts are generally vested with discretion to determine whether a witness is qualified to provide expert testimony, Renny, 203 N.J. at 50, but "there is nothing in our jurisprudence 'to suggest that the broad view of expert qualifications embodied in the rules of evidence is sufficient to permit the testimony when the Legislature expresses a contrary view,'" ibid. (quoting Mizrahi v. Allstate Ins. Co., 276 N.J. Super. 112, 117 (Law Div. 1994)). Plaintiff's appeal requires that we determine whether the court's finding Dr. Stroh was not qualified to provide the affidavit of merit is consistent with the requirements of N.J.S.A. 2A:53A-41(a). Because there is no dispute as to the pertinent facts, and plaintiff argues on appeal only that the court misinterpreted N.J.S.A. 2A:53A-41(a), we are presented with an issue of statutory construction that we review de novo.² See State v. Arroyo-Nunez, __ N.J. Super. __, __

² As noted, defendants moved for summary judgment under N.J.S.A. 2A:53A-29, which provides in part that a failure to provide an affidavit of merit in accordance with N.J.S.A. 2A:53A-27 "shall be deemed a failure to state a cause of action." It does not appear the motion was supported by a statement of

(App. Div. 2022) (slip op. at 22) (explaining a "motion judge's interpretation of the law, including applicable statutory provisions" is reviewed de novo).

Our interpretation of N.J.S.A. 2A:53A-41(a) is guided by well-settled principles. The "goal of statutory interpretation is to determine and give meaning to the Legislature's intent." State v. Carter, 247 N.J. 488, 513 (2021). We review statutes plain language, "give words their generally accepted meaning[,] N.J.S.A. 1:1-1," and "read and construe words and phrases in their context." Ibid. Our task is complete where "the text of the law is clear," and we may look to extrinsic sources where a statute's language is ambiguous. Ibid.

Applying those principles, we first consider N.J.S.A. 2A:53A-41(a)'s plain language. The statute requires that a putative expert "shall have specialized" in the same specialty as the defendant physician at the time of the alleged malpractice. "Specialize" is a verb meaning "to concentrate one's efforts in a special activity, field, or practice." Merriam-Webster's Dictionary, 1681

material facts as required by Rule 4:46-2, and plaintiff does not include in the appendix on appeal all the motion papers submitted in support of defendants' motion. See R. 2:6-1(a)(1)(A) (requiring the appellant include in the appendix on appeal all pleadings in civil actions) and 1(a)(1)(I) (requiring the appellant include in the appendix on appeal "such other parts or the record . . . as are essential to the proper consideration of the issues"). Nonetheless, neither party argues on appeal that there are issues of fact, and the parties agree resolution of the issues on appeal involve solely the proper interpretation of N.J.S.A. 2A:53A-41(a).

(11th ed. 2020) (defining "specialize"); see also Medina v. Pitta, 442 N.J. Super. 1, 16 (App. Div. 2015) (stating "it is clear that 'specialize' as used in N.J.S.A. 2A:53A-41(a) means 'practice in a specialty' recognized by the ABMS"); Attorney's Illustrated Medical Dictionary, S47 (1997) (defining "specialize" as "[t]o channel one's training or practice to a particular branch of a field of study"). Thus, as the motion court correctly recognized, the ordinary meaning of "specialize[]" in N.J.S.A. 2A:53A-41(a) requires that Dr. Stroh must have been actively concentrating his practice in internal medicine, the specialty practiced by Dr. Atkinson, when the alleged malpractice occurred.

Plaintiff's interpretation of "specialized" ignores that the word is a verb, connotating and requiring action. As such, specialized can only reasonably be interpreted to require that Dr. Stroh shall have taken action, by actually practicing at the time of the alleged malpractice in the same specialty – internal medicine – as Dr. Atkinson. Plaintiff's interpretation of "specialized" incongruously and incorrectly converts the word into a noun – a person who shares the same board certification as the defendant physician – that does not require any action at all and is satisfied merely based on the expert's board certification status. The ordinary meaning of "specialized" does not support that interpretation. The ordinary meaning of the "specialized," see N.J.S.A. 1:1-1,

requires that a putative expert shall have acted, by concentrating his or her practice of medicine in the same specialty as the defendant physician, at the time of the alleged malpractice. For those reasons alone, we reject plaintiff's interpretation of N.J.S.A. 2A:53A-41(a).

We also reject plaintiff's claim Dr. Stroh satisfied N.J.S.A. 2A:53A-41(a) by merely having the same board certification as Dr. Atkinson because it ignores the Legislature distinguished board certification as a factor in determining a putative expert's qualifications from the "shall-have-specialized" requirement. In N.J.S.A. 2A:53A-41(a) the Legislature referred to the board certification of a defendant physician, but separately employed the "shall-have-specialized" as the threshold standard for a putative expert. Since it was clearly aware of board certifications as a potential benchmark by which qualifications of physicians might be measured, the Legislature would have stated an expert's board certification to describe the threshold requirement for a putative expert set forth in N.J.S.A. 2A:53A-41(a) if it intended that to be the case. Instead, the Legislature opted to provide that it is an expert's actions – specializing – and not his or her status as board certified in a specialty or subspecialty that renders the expert qualified to offer an opinion on a defendant physician's care and treatment of a plaintiff. The Legislature's use of different words to describe the different

standards undermines plaintiff's claim that the shall-have-specialized standard is the same as board certified status. See In re J.S., 223 N.J. 54, 74 n.5 (2015) ("Different words used in the same . . . statute are assigned different meanings whenever possible.").

The Legislature also provided additional requirements for experts offering opinions concerning board certified physicians. See N.J.S.A. 2A:53A-41(a)(1) and (2). One of those requirements is satisfied in part by a showing the putative expert is "board certified in the same specialty or subspecialty, recognized by the" ABMS "during the year immediately preceding the date of the" alleged medical malpractice. N.J.S.A. 2A:53A-41(a)(2). The requirement – board certification – would constitute unnecessary surplusage if, as plaintiff contends, the threshold "shall-have-specialized" qualification under N.J.S.A. 2A:53A-41(a) is satisfied by an identical showing the putative expert possessed the same board certification as the defendant physician. We therefore reject plaintiff's interpretation of the shall-have-specialized requirement for an additional reason; it would render N.J.S.A. 2A:53A-41(a)(2) nothing more than mere surplusage. Delanoy v. Twp. of Ocean, 245 N.J. 384, 401 (2021) ("Traditional principles of statutory construction require courts to give meaning to all words used in a

statute, for example, to avoid treating the Legislature's language as mere surplusage.").

Our interpretation of the shall-have-specialized requirement is also consistent with the Supreme Court's interpretation of N.J.S.A. 2A:53A-41(a). The Court has explained that subsection (a) of the statute, "must [be] view[ed]" in its "constituent parts to see how each piece operates within the overall scheme." Mynster, 213 N.J. at 481. Under subsection (a), "when a physician is a specialist and the basis of the malpractice action 'involves' the physician's specialty, the challenging expert must practice in the same specialty." Id. at 481-82 (emphasis added). The Court has further declared subsection (a) requires that "[a] medical expert must be a specialist in the same field in which the defendant physician specializes; there are no exceptions to that requirement" ³ Id. at 482.

Here, it is undisputed that at the time of the alleged malpractice, Dr. Stroh did not concentrate in the practice of internal medicine in which Dr. Atkinson was engaged when he allegedly negligently prescribed the Lisinopril plaintiff claimed caused his injuries. Instead, Dr. Stroh concentrated his practice in two

³ The requirement may be waived under N.J.S.A. 2A:53A-41(c). Plaintiff does not argue on appeal he is entitled to a waiver of the requirement.

subspecialties – cardiovascular disease and interventional cardiology – for which there is no evidence Dr. Atkinson practiced at the time of the alleged malpractice.⁴ The motion court therefore properly concluded that at the time of

⁴ The ABMS describes the specialty of internal medicine and the subspecialties of interventional cardiology and cardiovascular disease as follows:

Internal Medicine

An internist is a personal physician who provides long-term, comprehensive care in the office and in the hospital, managing both common and complex illnesses of adolescents, adults and the elderly. Internists are trained in the diagnosis and treatment of cancer, infections and diseases affecting the heart, blood, kidneys, joints and the digestive, respiratory and vascular systems. They are also trained in the essentials of primary care internal medicine, which incorporates an understanding of disease prevention, wellness, substance abuse, mental health and effective treatment of common problems of the eyes, ears, skin, nervous system and reproductive organs.

. . . .

Subspecialties

. . . .

Cardiovascular Disease

An internist who specializes in diseases of the heart and blood vessels and manages complex cardiac conditions,

the alleged malpractice, Dr. Stroh did not specialize in the same specialty as Dr. Atkinson as required under N.J.S.A. 2A:53A-41(a). The court correctly dismissed the complaint for failure to state a cause of action under N.J.S.A. 2A:53A-29.

Our determination Dr. Stroh did not possess the threshold shall-have-specialized qualification required under N.J.S.A. 2A:53A-41(a) to provide an expert opinion on defendants' alleged medical malpractice renders it unnecessary to determine if he otherwise satisfied the requirements under N.J.S.A. 2A:53A-41(a)(1) and (2). Any arguments made by plaintiff we have

such as heart attacks and life-threatening, abnormal heartbeat rhythms.

. . . .

Interventional Cardiology

An area of medicine within the subspecialty of [c]ardiology, which uses specialized imaging and other diagnostic techniques to evaluate blood flow and pressure in the coronary arteries and chambers of the heart, and uses technical procedures and medications to treat abnormalities that impair the function of the cardiovascular system.

[ABMS Guide to Medical Specialties, (2022), <https://www.abms.org/board/american-board-of-internal-medicine/#abim-im>, last visited April 4, 2022.]

not expressly addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION