MAKING SENSE OF EXPERT MEDICAL WITNESS QUALIFICATION AFTER BAKER

Athan P. Papailiou

The framework for qualifying expert medical testimony in Arizona is codified at Ariz. Rev. Stat. Section 12-2604. Recently interpreted by the Arizona Court of Appeals in *Baker v. University Physicians Healthcare*[1] and under review by the Arizona Supreme Court, Section 12-2604 plays a critical role in defining the duty element of medical negligence. But faced with a poorly written statute, the Court of Appeals in *Baker* missed an opportunity to resolve a confusing yet crucial aspect of litigating malpractice claims in Arizona: expert witness qualification.

To provide testimony as to the appropriate standard of care in a medical malpractice case, Section 12-2604(A)(1) requires that an expert meet the following requirements:

> If the party against whom or on whose behalf the testimony is offered is or claims to be a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty or claimed specialty as the party against whom or on whose behalf the testimony is offered. If the party against whom or on whose behalf the testimony is offered is or claims to be a specialist who is board certified, the expert witness shall be a specialist who is board certified in that specialty or claimed specialty.[2]

The Court of Appeals in *Baker* found that Section 12-2604 requires a medical expert to be board-certified in the one of the same American Board of Medical Specialties (ABMS) boards as the board-certified defendant physician.[3] In a malpractice action arising from a blood complication, Baker applied this rule to find that an expert board-certified in internal medicine with subspecialties in oncology and hematology was unqualified to testify against a defendant-physician board-certified in pediatrics with a subspecialty in pediatric hematology/oncology.[4]

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1. Baker v. Univ. Physicians Healthcare, 269 P.3d 1211 (Ariz. Ct. App. 2012).
2. ARIZ. REV. STAT. § 12-2604(1).
3. *Baker*, 269 P.3d at 1214.
4. *Id.* at 1215.

Baker unnecessarily precludes board-certified physicians from testifying about procedures that they are otherwise qualified to perform themselves because of the nomenclature chosen by the ABMS. This interpretation prevented the plaintiff's witness in *Baker* from testifying, even though the injury underlying the medical malpractice action concerned a blood complication, not a pediatric issue. Thus, although both the testifying witness and defendant physician possessed the requisite skills to perform the procedure in question—both physicians possessed a subspecialty related to hematology—disparate ABMS certifications disqualified the plaintiff's expert. The effects of this interpretation extend beyond the factual circumstances of *Baker*. Under *Baker*, a board-certified neurosurgeon who devotes his or her entire practice to spinal surgery cannot testify against an orthopedic surgeon-defendant that also devotes his or her practice to the same spinal surgery simply because the ABMS has given the two physicians different certifications. By excluding board-certified physicians who are qualified to perform the same procedure as the defendant physician, simply because they possess different ABMS certifications, *Baker* places an impracticable premium on form over substance.

Furthermore, this interpretation alters the standard of care in medical malpractice cases by ignoring the legislature's intent to "ensure that physicians testifying as experts have sufficient expertise to truly assist the fact-finder on issues of standard of care and proximate causation." Arizona's standard of care is codified at Section 12-563, which requires healthcare providers to "exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the [same] profession or class … within the state acting in the same or similar circumstances."[5] By only qualifying witnesses that share ABMS certifications with the defendant physician, *Baker* may force plaintiffs to retain witnesses who do not deliver care to the level expected of a reasonable physician. In turn, the standard of care shifts from "how the procedure should occur" to "how someone with the same basic ABMS certification *might* approach the procedure."[6]

There are three approaches the Arizona Supreme Court can take to correct *Baker* in a way that is both practical and consistent with the legislature's intent.[7] First, the Supreme Court could rely on the broader definition of "specialist" found in Section 20-2538, which governs independent health insurance review boards.[8] Section 20-2538 permits out-of-state physicians to serve on the review board if they are (1) board-certified or board eligible by the appropriate "American medical specialty board" in the same or similar scope of practice as a physician licensed in Arizona or (2) typically manage the medical condition, procedure, or treatment

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5. ARIZ. REV. STAT. § 12-563

6. Although the Court of Appeals in *Lo v. Lee* circumvented this problem by allowing the testifying witness to be board-certified in the defendant physician's *claimed* specialty, little framework exists for what is a claimed specialty, and clarification from the Supreme Court is needed. Lo v. Lee, 286 P.3d 801, 805 (Ariz. Ct. App. 2012)

7. Indeed, Section 12-2604 is a poorly written statute and the best solution might be for the legislature to revisit the issue and simply rewrite it.

8. ARIZ. REV. STAT. § 20-2538.

under review.[9] Under the definition prescribed by 20-2538, the problem in *Baker* would be resolved because it would—in addition to allowing experts that share the defendant physician's board certification—allow witnesses that typically perform the procedure under review to testify.

Second, "specialist" in Section 12-2604 could be defined by Dorland's Medical Dictionary ("Dorland"), which the Court of Appeals used in *Awsienko v. Cohen*.[10] The Dorland definition would resolve the inconsistencies created by *Baker* because it is a more flexible definition. Under the Dorland definition, a physician would qualify as a standard-of-care witness so long as he or she shares the same board certification as the defendant-physician *or* limits his or her practice to the area of medicine underlying the injury in question. In other words, the Dorland definition does not qualify witnesses exclusively based on their board certification, but also permits testimony by physicians who "limit their practice to a particular branch of medicine or surgery."[11]

Lastly, the Court could lower the threshold for "claimed specialty" status under Section 12-2604. In *Lo v. Lee*, the Court of Appeals held that a board-certified plastic surgeon was qualified to testify against a board-certified ophthalmologist regarding a cosmetic laser eye procedure.[12] Despite the different board certifications, *Lo* concluded that the ophthalmologist claimed to be a plastic surgery specialist because he had advertised his services as such.[13] If physicians were not held accountable to their claimed specialty, the Court recognized that physicians could otherwise insulate themselves from malpractice claims by simply performing procedures far removed from their "uncommon" board certification.[14] Consistent with this logic, the Supreme Court could lower the standard for claimed specialty status to occur when the defendant-physician performs a procedure in

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9. Section 20-2538 is the only Revised Statute where the Arizona legislature references a specialty board. Nowhere in the Revised Statutes is the ABMS referenced.

10. *Awsienko*, 257 P.3d at 177 (defining 'specialist' as a "physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice." (citing Dorlands illustrated medical dictionary (28 ed. 1994)). *Awsienko* principally relied on the Dorland's definition to find that the legislature created different standards for qualifying an expert to testify against a board-certified versus a non-board-certified physician specialist (i.e. all board- certified specialists are specialists, but not all specialists are board-certified).

11. *Id.*

12. Lo v. Lee, 286 P.3d 801, 805 (Ariz. Ct. App. 2012) ("[Defendant] Lo claims to be a plastic surgery specialist. Chao is a board-certified plastic surgery specialist. Therefore, Chao is qualified under § 12-2604 to testify concerning the appropriate standard of care.").

13. *Id.* at 804. ("Although we need not determine the full range of information that could establish whether a medical professional has a claimed specialty as contemplated by § 12-2604(A)(1), it clearly includes public assertions made by that professional in describing his areas of expertise.").

14. *Id.* ("Moreover, a party with an uncommon or disparate set of specialties would be insulated from a malpractice claim despite the fact that one or more of the parties' specialties might be wholly unrelated to the merits of the claim.").

which a physician of different board certification would also be qualified to perform. Expanding *Lo*'s threshold for claimed specialty status beyond the defendant-physician's advertised procedures would resolve *Baker* because it would qualify any board-certified physicians capable of performing the procedure in question.

The confusion surrounding the qualifications of a standard-of-care witness in medical malpractice actions is problematic for claimants and defendants alike. By adopting the ABMS definition of board-certified specialist, *Baker* precludes board-certified physicians from testifying about procedures that they are otherwise qualified to perform but cannot due to differing ABMS titles. To pragmatically resolve this dilemma in a manner consistent with legislature's intent, the Court should define board-certified specialist using a more flexible definition found in either Section 20-2538 or the Dorland's Medical Dictionary. Alternatively, the Court could lower the threshold for "claim specialty" status.