STATE OF MICHIGAN

IN THE SUPREME COURT

DUSTIN ROCK, Plaintiff-Appellee,	Supreme Court Case No. 150719
v.	Court of Appeals Case No. 312885
DR. K. THOMAS CROCKER and DR. K. THOMAS CROCKER, D.O., P.C., Defendants-Appellants,	Kent County Circuit Court No. 10-006307-NM

AMICUS CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY

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STATEMENT OF QUESTIONS PRESENTED

Pursuant to this Court's order granting leave to appeal,[1] the following issues are presented:

1. Whether the lower courts erred in concluding that allegations relating to violations of the standard of care that the plaintiff's expert admitted did not cause the plaintiff's injury were admissible as evidence of negligence?

Plaintiff-Appellee says "no."
Defendants-Appellants say "yes."
The Trial Court said "no."
The Court of Appeals said "no."
Amicus Curiae MSMS says "yes."

2. Whether the Court of Appeals erred in holding that, if the defendant is a board-certified specialist, MCL 600.2169(1)(a) only requires an expert to be board certified in that same specialty at the time of the malpractice, and not at the time of trial?

Plaintiff-Appellee says "no."
Defendants-Appellants say "yes."
The Trial Court would say "yes."
The Court of Appeals said "no."
Amicus Curiae MSMS says "yes."

[1] *Rock v Crocker*, 497 Mich 1034; 863 NW 2d 330 (2015).

INTEREST OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has frequently been afforded the privilege of acting as *amicus curiae* with respect to legal issues of significance to the medical profession. This case presents such issues, and, by order dated October 15, 2015, this Court has graciously allowed MSMS to file an amicus curiae brief to address the issues raised by the Court of Appeals' opinion in *Rock v Crocker*, 308 Mich App 155; 863 NW2d 361 (2014).

These issues are of great significance to MSMS and its member physicians, who have an interest in ensuring that medical malpractice litigation is conducted fairly, according to the rules of evidence adopted by this Court and the statutory requirements for expert standard of care testimony adopted by the Legislature. The rules announced by the Court of Appeals in *Rock* disregard these standards. Allowing an expert to testify regarding causally-unrelated standard of care breaches to show the defendant's general incompetence and negligence in treating the plaintiff violates MRE 404(b)'s prohibition against propensity evidence. Likewise, the board certification requirement embraced by MCL 600.2169(1)(a) is explicitly present tense and assures the expert's continuing expertise and reliability at the time testimony is rendered, in contrast to other provisions of the statute, which are explicitly keyed to the "time of the occurrence" (specialization) or "the year immediately preceding the date of the occurrence" (professional practice time). Construing the board certification requirement as if it contained that same temporal language reads words into the statute that do not exist and disregards the words that do.

STATEMENT OF FACTS

Lacking an independent basis for reciting the facts, MSMS relies upon the Statement of Facts contained in Defendants-Appellants' Brief on Appeal.

ARGUMENT

I. The Court of Appeals Erred in Permitting Expert Testimony Regarding Causally-Unrelated Standard of Care Breaches to Show the Defendant's Negligence and General Incompetence in Treating the Plaintiff.

Disregarding the long-standing prohibition against propensity evidence,[2] *Rock* sets the jurisprudence of this state on a dangerous course. For nearly a century, well before the codification of the rules of evidence, this Court recognized that evidence of other conduct, wrongs, and acts could distract the jury from the task at hand and cause them to base their ruling upon a perceived propensity of the defendant to do the wrong thing. "Preventing the jury from drawing this inference recognizes the risk that propensity evidence might weigh too much with the jury and … so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *People v Watkins*, 491 Mich 450, 468-469; 818 NW2d 296 (2012) (citation and internal quotation marks omitted).[3]

MRE 404(b) codifies "the fundamental principle that courts and juries try cases, not persons; thus, in reaching its verdict, a jury may consider only evidence of the events in question, not the defendant's prior acts." *People v Mardlin*, 487 Mich 609, 634; 790 NW2d 607 (2010) (Kelly, CJ, dissenting). But now, in *Rock*, the lower courts have endorsed the admission of other-

[2] See e.g., *Stranahan v Genesee County Farmers Fire Ins Co*, 242 Mich 413, 415; 218 NW 688 (1928) ("It is the general rule 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").

[3] See also *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973) ("Evidence of other crimes is barred because it has been decided that whatever probative value such evidence has is outweighed by the disadvantage of diverting the trier of fact from an objective appraisal of the defendant's guilt or innocence").

acts evidence precisely because of its forbidden propensity qualities. This is clearly prohibited by MRE 404(b), which states in pertinent part:

> *Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith*. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

(emphasis added).

In *People v Vandervliet*, 444 Mich 52; 508 NW2d 114 (1993), this Court explained that inferences drawn from other-acts evidence "pose serious legal relevance issues" if the only theory of relevance is to show defendant's inclination to wrongdoing:

> "The first step in this theory of logical relevance is inferring the defendant's character from the defendant's prior misdeeds. Rule 404(b) refers to this step as introducing the uncharged acts 'to prove the character of a person.' This step poses the legal relevance danger of prejudice. In the process of deciding whether to draw the inference, the jury must focus on the *type of person the defendant* is...
>
> "The second step in this theory of logical relevance compounds the legal relevance dangers. The second step is *inferring the defendant's conduct on a particular occasion from his or her subjective character*. In the words of Rule 404(b), the plaintiff or prosecutor introduces the evidence of the defendant's subjective character 'in order to show that he acted in conformity therewith.'
>
> "When the proponent uses the defendant's subjective character as proof of conduct on a particular occasion, there is a substantial danger that the jury will overestimate the probative value of the evidence."

Id. at 63-64 (emphasis added), quoting *People v Engleman*, 434 Mich 204, 213 n 16; 453 NW2d 656 (1990), quoting Imwinkelried, *Uncharged Misconduct Evidence*, § 2:18 at 48-49, pp 48-49.

In *Rock*, Plaintiff's expert testified that Dr. Crocker breached the standard of care by improperly using screws and a plate in the surgery he performed on Plaintiff's ankle and by improperly telling Plaintiff that he could bear weight on his ankle. However, the expert did not dispute and/or admitted that the alleged breaches *did not cause damage to Plaintiff*. *Rock*, 308

Mich App at 167-168. While the Court of Appeals agreed that the Plaintiff could not seek damages for the alleged breaches at trial, it nonetheless permitted evidence of the alleged violations to be presented to the jury. The basis for the Court's ruling was that "evidence of the course of defendant's violations of the standard of care, even if the violations did not directly cause plaintiff's eventual injury, *may be relevant to the jury's understanding of the cas*e." *Id*. at 170 (emphasis added). In a footnote, the Court of Appeals explained:

> 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, are relevant to his competency in treating this injury*.

Id. at 171, n 8 (emphasis added).[4]

The Court of Appeals made no attempt to fit its admissibility ruling into an exception to MRE 404(b). Nor did the Trial Court, which concluded that the jury should be permitted to examine "all the claims" and "if satisfied that in addition to the difficulties of treatment that actually caused injuries if they believe the Defendant Doctor also breached the standard of care in a variety of multiple other ways then it provides evidence which is relevant because it makes a question of fact more likely than not …" The Trial Court added that "the conduct by the defendant sought to be excluded is all part of the *res gestae* of the claims before the Court." *Rock*, 308 Mich App at 169.

The lower courts' analysis is clearly wrong. In *People v Jackson*, 498 Mich 246; 869 NW2d 253 (2015), this Court ruled that there is no res gestae exception to MRE 404(b) and if the

[4] The Court of Appeals added that "because we have ruled that plaintiff may not seek damages for those alleged violations, the trial court's view of the calculus of probative value and prejudicial effect may change." The Court therefore reversed the evidentiary ruling and remanded to the trial court to consider the MRE 403 issue and "what limiting jury instruction to give in the event it finds the evidence admissible." *Rock*, 308 Mich App at 170-171.

only point of the evidence is to show "*defendant's inclination to wrongdoing*," the evidence is not admissible. [5] *Rock* does not address MRE 404(b) and is directly at odds with *Jackson*. Reversal is required.

A. Evidentiary Errors Are Reviewed for An Abuse of Discretion But the Interpretation of a Rule of Evidence is Reviewed De Novo .

While a decision to admit or exclude evidence is reviewed for an abuse of discretion, an abuse of discretion exists when the trial court "makes an error of law in the interpretation of a rule of evidence," which is reviewed de novo. *People v Jackson*, 498 Mich 246, 257; 869 NW2d 253 (2015). In other words, when the evidentiary ruling involves the question of whether a rule of evidence precludes admission, the decision is subject to de novo review. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

B. Testimony Regarding Causally-Unrelated Breaches of the Standard of Care, Which Have No Relevance Other Than As Propensity Evidence, is Inadmissible Under MRE 404(b).

Rock does not address the applicability of MRE 404(b). In disregard of that rule and its exceptions, admissibility was allowed on the ostensible basis that the standard of care breaches are relevant to the jury's understanding of the case and to Dr. Crocker's competence, and are part of the res gestae of the claims before the Court. This rationale, which fails to identify any logical relevance to a *material fact in issue*, smacks of a propensity purpose. Just a few months ago, this

[5] This Court observed that the "inherently indefinite and malleable" concept of res gestae evidence "proves problematic when … used to define the boundaries of MRE 404(b)'s applicability" and cited to other jurisdictions which have rejected a similarly unworkable "inextricably intertwined" standard as being too "vague, overbroad, and prone to abuse." *Jackson*, 498 Mich at 270, 273-274. The "inextricably intertwined" doctrine "is based on the notion that evidence inextricably intertwined with charged conduct is, by its very terms, not *other* bad acts and therefore, does not implicate Rule 404(b) at all." *United States v Gorman*, 613 F3d 711, 717-718 (CA7 2010). That inextricably intertwined doctrine was overruled in *Gorman*, where the Court held that it "has outlived its usefulness." *Id*. at 719.

Court unanimously disavowed an attempted bypass of MRE 404(b) and held that MRE 404(b) "creates no res gestae exception from its coverage." *Jackson*, 498 Mich at 250-251.

In *Jackson*, this Court was asked to decide whether testimony regarding a pastor's sexual relationship with other parishioners was admissible in his trial for criminal sexual conduct as a res gestae by-pass exception to MRE 404(b). This Court held that the testimony was "other-acts evidence" subject to the scrutiny of MRE 404(b) and that there was no res gestae exception to that rule. *Id*. at 250, 265-266. Citing *People v Vandervliet*, 444 Mich 52, 61-63; 598 NW2d 114 (1993), this Court confirmed that "[i]f the proponent's *only theory of relevance is that the other act shows defendant's inclination to wrongdoing* in general to prove that the defendant committed the conduct in question, the evidence is not admissible." *Jackson*, 498 Mich at 258 (emphasis added). As explained in *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012):

> MRE 404(b) requires the exclusion of other acts evidence *if its only relevance is to show the defendant's character or propensity to commit the charged offense*.

(emphasis added).

In *Jackson*, this Court clarified that MRE 404(b) provides a list of reasons that would justify the admission of what might otherwise be propensity evidence for non-propensity reasons. The proponent's initial burden is to show that the evidence is relevant to a proper purpose under MRE 404(b)'s nonexclusive list or is otherwise probative of a fact *other than defendant's propensity*:

> Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant solely to the defendant's character or criminal propensity.

498 Mich at 259 (quoting *Mardlin*, 487 Mich at 615-616) (footnotes omitted)(emphasis in original). This requires the proponent to show that "the evidence is logically relevant to a

material fact in the case, as required by MRE 401 and MRE 402, and is *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character." *Mardlin*, 487 Mich at 615.

Indeed, even when an MRE 404(b) exception is invoked, to ensure a fair trial the courts in their role as "gatekeepers of evidence" must "'vigilantly weed out character evidence that is disguised as something else.'" *People v Reynolds*, 495 Mich 940; 843 NW2d 483 (2014) (Viviano, J., dissenting). In other words, trial courts should not succumb to the "'common pitfall' of admitting the prior misconduct evidence 'merely because it has been "offered" for one of the rule's enumerated proper purposes.'" *Reynolds*, 495 Mich at 940 (Viviano, J., dissenting) (quoting *People v Crawford*, 458 Mich 376, 387, 388; 582 NW2d 785 (1998).

Undue prejudice that arises "because the evidence also unavoidably reflects the defendant's character" is addressed under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "'probative value is substantially outweighed by the danger of unfair prejudice …'" *Mardlin*, 487 Mich at 616. Unfair prejudice may be found if the impermissible character of the other-acts evidence "'is likely to have significantly overshadowed any legitimate probative value' the evidence may have had." *Jackson*, 498 Mich at 277 (quoting *People v Crawford*, 458 Mich at 376, 398; 582 NW2d 785 (1998).

This analytical sequence is set forth in *Vandervliet*, which adopted the test articulated by the United States Supreme Court in *Huddleston v United States*, 485 US 681, 691-692 (1988): first, the evidence must be relevant to an issue other than propensity under MRE 404(b); second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue or fact of consequence at trial; third, the trial judge "should employ the balancing process under

MRE 403;" and fourth, the trial court may give a limiting instruction under MRE 105. *Vandervliet*, 444 Mich at 74.

Rock egregiously fails this test of admissibility. MRE 404(b) is violated by the admission of testimony regarding causally-unrelated breaches of the standard of care to show Dr. Crocker's "competency in treating the injury" or on the basis that evidence that Dr. Crocker "breached the standard of care in a variety of multiple other ways … provides evidence which is relevant because it makes a question of fact more likely than not …" No relevance beyond the forbidden propensity inference has been or can be shown. No exception to MRE 404(b) has been or can be invoked. It is clear that the only relevance here is to show Dr. Crocker's propensity to commit negligence. This is a forbidden purpose, which triggers MRE 404(b) and prohibits admissibility.

In this sense, the analysis is no different than evidence of other lawsuits, or conduct involving other patients and outcomes. In *Persichini v Beaumont Hosp*, 238 Mich App 626; 607 NW2d 100 (1999), the Court of Appeals concluded that it was improper for plaintiff to ask defendant whether he had "previously been a defendant in multiple other medical malpractice actions" because "evidence of prior malpractice actions against a witness is not relevant to the witness' competency or knowledge." *Id*. at 631. Similarly, in *Wlosinski v Cohn*, 269 Mich App 303; 713 NW2d 16 (2005), the Court of Appeals concluded that evidence of a surgeon's history of transplant failures was prohibited character and propensity evidence which should have been excluded. The transplant failures were not evidence of negligence nor relevant to informed consent and were "paraded … before the jury to show that Dr. Cohn had a propensity to botch transplants." *Id*. at 312. The Court explained:

> Propensity evidence is barred because it diverts a jury's 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. *Cf. People v Matthews*, 17

> Mich. App. 48, 51-52; 169 N.W.2d 138 (1969). In other words, it punishes a defendant for his misfortune rather than his fault.

Id. at 312. The same purpose is explicit in *Rock*.

As in *Boyd v City of Wyandotte*, 402 Mich 98; 260 NW2d 439 (1977), where this Court held that the defendants' alleged failure to keep adequate records was not ground for recovery in an action for damages allegedly caused by the failure to properly treat a leg injury, the alleged causally-unrelated breaches here have no bearing on Plaintiff's recovery and lack the legal relevance necessary to support admissibility. See also, *Zdrojewski v Murphy*, 254 Mich App 50, 64; 657 NW2d 721 (2002) (concluding that "failure to keep adequate records … has no bearing on whether the defendant medical care providers were negligent"). The causally-unrelated breaches are blatant other-acts evidence and should have been excluded..

C. *Rock*'s Published Endorsement of Propensity Evidence Will Unfairly Prejudice Defendants and Unduly Burden the Litigation Process.

*Roc*k is an unfortunate development in the law of medical malpractice. It cannot be reconciled with the "fair trial" imperative and will unquestionably prejudice defendants. The propensity inference gives jurors free reign to judge *the person* not the facts, and to find liability because *the person* seems unworthy or apt to do wrong. Even when properly instructed, juries cannot be expected to ignore the evidence they have been shown, or to find no use for it. As this Court has long recognized, the very danger of propensity evidence is its tendency to "overpersuade" the jury and thereby deny "a fair opportunity to defend."

Additionally, *Rock* will have an untoward effect on the litigation process. The science of medicine is often challenging for juries and difficult to comprehend. Meticulous preparation is required to present the complex medical facts in an understandable manner so the jury can navigate the conflicting testimony of competing medical experts across multiple medical specialties, and decide the critical standard of care, breach and causation issues in a fair and

intelligent manner. The upshot of *Rock* is to exponentially complicate and burden this process. If the jury will now be permitted to draw propensity inferences from asserted standard of care breaches that are unrelated to the outcome, that evidence must be countered with the same or even greater intensity than that addressed to recovery-related breaches. Thus, even though causally-unrelated breaches could not otherwise carry the day, they must now be subject to the same investigation, discovery, depositions, and expert analysis that attend recovery-related allegations, with the commensurate expenditures of time, effort and expense.

Rock is an action for medical malpractice. But nothing in the several paragraphs of the opinion which address this issue explicitly limits its reach to this context. The holding of *Rock* could apply across the spectrum of malpractice actions (including actions against lawyers, engineers, architects, and accountants), to products liability actions, and to negligence actions of every sort. The impact is not ameliorated by MRE 403. Quite the contrary, given that the causally-unrelated breaches lack any legal relevance under MRE 404(b), there is no probative value to balance under MRE 403. *Rock* should be reversed.

II. The Court of Appeals Erred in Concluding That the Board Certification Requirement in the Expert Witness Qualification Statute Relates to the Time of Malpractice Rather Than to the Time the Testimony is Given.

Another issue raised by this appeal involves the interpretation of the statute that governs the qualification of an expert witness in a medical malpractice case. The statute, MCL 600.2169, requires that a standard of care witness for or against a defendant specialize at the time of the occurrence in the same specialty as the defendant if the defendant is a specialist. Additionally, if the defendant-specialist is board certified, the expert must also be board certified in that specialty. MCL 600.2169(1)(a).[6] Further, the expert must have devoted a majority of his or her

[6] In *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006), this Court held that only the appropriate specialty, that being practiced at the time of the malpractice, must match.

professional time to the active clinical practice of that specialty and/or to the instruction of students in that specialty during the year immediately preceding the occurrence that is the basis for the claim. MCL 600.2169(1)(b).

The Legislature's determination that the reliability of expert testimony requires that the specialty and board certifications of the expert match that of the defendant reflects the stringency of real world practice. The rapid advancement of medical science has necessitated increasing efforts by the medical profession to insure that physicians are properly trained in their practice areas. This frequently requires multiple levels of specialized training and certification within a particular field of medicine.

At issue here is the temporal requirement imposed by MCL 600.2169(1)(a) with respect to the board certification of experts. MCL 600.2169 provides in pertinent part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, *specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered.* However, if the party against whom or on whose behalf the testimony is offered *is a specialist who is board certified*, the expert witness *must be* a specialist *who is board certified* in that specialty.
>
> (b) Subject to subdivision (c), *during the year immediately preceding the date of the occurrence that is the basis for the claim or action*, devoted a majority of his or her professional time to either or both of the following: …
>
> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, *during the year immediately preceding the date of the occurrence that is the basis for the claim or action*, devoted a majority of his or her professional time to either or both of the following: …

In *Rock*, at the time of the alleged malpractice Dr. Crocker and Plaintiff's expert, Dr. Viviano, specialized and were board-certified in orthopedic surgery. However, while

Dr. Crocker maintained his board certification through the time of trial, Dr. Viviano's board certification expired. Because Dr. Viviano was not board certified at the time his testimony was to be given, the Trial Court concluded that he was not qualified to give expert testimony under MCL 600.2169(1)(a), stating:

> 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.

The Court of Appeals disagreed with the Trial Court's analysis, rejecting the conclusion that the board certification requirement "employs the present tense and, therefore, must refer to the time when the testimony is delivered." *Rock*, 308 Mich App at 161. Rather, the Court of Appeals held that "an expert testifying against a board-certified defendant must have been board certified in the same specialty at the time of the occurrence that is the basis for the action." *Id.*[7]

The Court of Appeals' reading of MCL 600.2169(1)(a) is contorted and incorrect. Rather than give effect to the plain meaning of the statute, *Rock* reads the board certification requirement as if it contained the same temporal terminology that exists in the specialization and professional practice requirements. Reading the plain language of the statute, and giving effect to differences in the temporal language of the various requirements, an expert who testifies against or on behalf of a specialist who is board certified must be board certified in that specialty at the

[7] As shown above, the statute does not employ the past tense "must have been board certified" but simply says "must be."

time testimony is given. Nothing in the context or language of the statutory provision ties the board certification requirement to the time of the occurrence.

A. This Court Reviews Issues of Statutory Interpretation De Novo.

The interpretation of a statute presents a question of law which is subject to de novo review. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

B. The Court of Appeals Fails to Give Effect to the Plain Meaning of MCL 600.2169(1) and Disregards Differences in the Temporal Terminology of the Specialization, Board Certification and Professional Practice Requirements.

In concluding that the board certification requirement only applies at the time of the occurrence that is the basis for the claim, the Court failed to give effect to the plain meaning of MCL 600.2169(1)(a). The Court reasoned that, despite the use of present tense verbs, the first sentence of the provision (relating to the specialty requirement) "still requires that the time at which the expert witness must so specialize be a time in the past in relation to the trial, i.e., at the time of the occurrence that is the basis for the action" and the second sentence (relating to board certification) "employs nearly identical present-tense verbs." *Id.* But the Court disregards the fact that the temporal language which ties the specialization and professional practice requirements to the time of the occurrence (specialization) or to the year immediately preceding the date of the occurrence (professional practice) does not exist in the board certification requirement. With respect to the board certification requirement, two present tense verbs control. For comparison, the operative language is as follows:

> If the party against whom or on whose behalf the testimony is offered *is* a specialist, *specializes at the time of the occurrence* … [MCL 600.2169(1)(a)]
>
> [I]f 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)]

> [D]uring the *year immediately preceding the date of the occurrence* that is the basis for the claim, *devoted* a majority of his or her professional time to either or both of the following: … [MCL 600.2169(1)(b)]
>
> If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the *year immediately preceding the date of the occurrence* … , *devoted* a majority of his or her professional time to either or both of the following: … [MCL 600.2169(1)(c)]

Every word in a statute is to be given full effect according to its plain meaning. *See Joseph v ACIA*, 491 Mich 200, 215; 815 NW2d 412 (2012)*; Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999)*; Murphy v Michigan Bell Tel Co*, 447 Mich 93, 98; 523 NW2d 310 (1994)*; Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). A court may not read words into a statute that the Legislature did not see fit to add. Nor may plainly expressed words be disregarded. Rather,

> [e]ffect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory.

Whitman v City of Burton, 493 Mich 303, 311-312; 831 NW2d 223 (2013) (footnotes omitted). Further, "[t]he use of different terms within similar statutes generally implies that different meanings were intended." 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 46:6, p 252. These rules of statutory construction do not permit this Court to read the "time of occurrence" language into the board certification requirement when the Legislature did not see fit to place it there. Indeed, there are no words in the board certification provision which remove it from its present tense context.

The last antecedent rule prevents the Court from reading the "at the time of the occurrence" clause as if it also modified the board certification requirement. In *Sun Valley*, this Court explained that "a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears." 460 Mich at 237. Here, the last antecedent subject to the "at the

time of the occurrence" clause is "specializes." There is no evidence – grammatical or otherwise - that the Legislature intended to extend the "at the time of the occurrence" clause to the board certification requirement. In fact, precisely the opposite intent appears: the requirements have been placed in separate sentences, the latter of which begins with the proviso "however."

In *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004), this Court concluded that the second sentence of MCL 600.2169(1)(a) – the board certification requirement - imposes a separate and additional requirement for expert testimony apart from the specialization requirement. This is signaled by use of the word "however:"

> *Random House Webster's College Dictionary* (2d ed) defines "however" as "in spite of that" and "on the other hand." Applying this definition to the statutory language compels the conclusion that the 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.

470 Mich at 578-579.[8]

Requiring that specializations match as of the time of the occurrence and that board certifications match as of the time of trial poses no conflict. The expert must share the defendant's specialization at the time of the occurrence to assure that the expert is familiar with the applicable standard of care. This is further assured by the requirement that the expert have devoted a majority of his or her professional time to the practice of the defendant's specialty in the year immediately preceding the occurrence.

Because trial can occur many years after an occurrence and medical practices and procedures can change, it is essential that the specialization requirement be tied to the time of the occurrence. But the standard of care is not dependent upon – and does not change because of –

[8] "Share" is a present tense verb.

board certification. Board certification, like licensure, is another qualification which the expert must possess if the defendant does. MCL 600.2169(1) provides that a person "shall not give expert testimony … unless the person is licensed as a health professional…" Just as a license confirms that the witness has met educational requirements and professional standards, board certification means that the physician is "certified to practice in a particular medical specialty by a national board recognized by the American board of medical specialties or the American osteopathic association [sic]." MCL 333.2701(a). Unlike the specialization requirement, it is perfectly reasonable to insist that that board certification qualification be current through the time of trial. While the specialization requirement attests to the expert's knowledge of the standard of care at the time of the alleged malpractice, the board certification requirement focuses on the expert's reliability at the time his or her testimony is given.

The Court of Appeals misconstrues the import of *Woodard*, touting as an explanation of the statute's meaning *Woodard*'s statements that "[T]he plaintiff's expert witness must match the one most relevant standard of practice or care – the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty" and that "if a defendant physician has *received* [board] certification from a medical organization …., the plaintiff's expert witness must also have *obtained* the same certification in order to be qualified to testify concerning the appropriate standard of medical practice or care. *Rock*, 308 Mich App at 164-165 (with emphasis, brackets and ellipsis added by the Court of Appeals). The Court of Appeals reasons from these quotes that since Dr. Viviano had at one time "obtained" and "received" board certification, the statutory requirement is satisfied. *Id*. at 165.

This reliance on *Woodard* is misplaced. *Woodard* could just as easily be cited to support the present tense nature of the board certification requirement in that its many repeated references to board certification employ the present tense verb "is" rather than the past tense "was at the time of the occurrence." See e.g., *Woodard*, 476 Mich at 554-555 ("Plaintiffs' proposed expert witness … is board-certified in pediatrics …"); *Id.* at 556 ("Plaintiff's proposed expert witness is board certified in general internal medicine …"); *Id.* at 561 ("if the defendant physician is 'a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty'") (emphasis and internal quotations omitted); *Id.* at 577 ("Plaintiffs' proposed expert witness is not board certified in pediatric critical care medicine.").

These references are in contrast to those addressing the specialization requirement, which like the statute, refer back to the time of the occurrence. See e.g., *Woodard*, 476 Mich at 562 ("if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence …"); *Id.* at 578 ("If a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence …").

The Court of Appeals concludes its analysis by alluding (although not explaining) the "confounding circumstances" that might result if the defendant was board-certified at the time of trial but retired, died or allowed his or her board-certification to lapse before trial, or if an expert was not board-certified at the time of the occurrence but became board-certified during the litigation. *Rock*, 308 Mich App at 166-167. This Court has repeatedly held that the wisdom of a statute is not for the courts to assess, stating in the context of this very statute:

> As we have invariably stated, the 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.

Halloran, 470 Mich at 579. The judicial role "precludes imposing different policy choices than those selected by the Legislature." *The Herald Co v City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). As this Court explained in *Hanson v Bd of Co Rd Comm'rs of the Co of Mecosta*, 465 Mich 492, 504; 638 NW2d 396 (2002), the judiciary is "not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy." The function of this Court is to enforce the statute as written.

RELIEF REQUESTED

Amicus Curiae Michigan State Medical Society supports the request of Defendants-Appellants K. Thomas Crocker, D.O., and K. Thomas Crocker, D.O., P.C. to reverse the Court of Appeals decision in *Rock*, and further concurs in the request of Amicus Curiae The Board of Regents of the University of Michigan for a "bright-line rule" excluding as a matter of law evidence of causally-unrelated breaches of the standard of care.

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Dated: November 5, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2015 I electronically filed the foregoing of Amicus Curiae Brief of Michigan State Medical Society with the Clerk of the Court using the ECF system which will electronically serve all parties of record.

/s/ Joanne Geha Swanson
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