

# MAKING SENSE OF THE LINCHPIN TO MEDICAL MALPRACTICE LITIGATION: EXPERT MEDICAL WITNESS QUALIFICATION

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*Section 12-2604 of the Arizona Revised Statutes governs the qualification of expert witnesses in medical malpractice cases. Although section 12-2604 requires the testifying physician to share the specialty of the treating physician, “specialty” is left undefined. In Baker v. University Hospital, the Arizona Supreme Court interpreted specialty to mean a practice area in which a physician may obtain board certification. This Note examines the implications of that interpretation, and argues that defining specialty to align with the pretrial affidavit requirements in medical malpractice claims would better achieve the legislative purpose of expert witness qualification in those types of actions.*

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## INTRODUCTION

Medical malpractice litigation largely revolves around establishing the duty, or standard of care, that a physician owes to a patient.<sup>1</sup> Except for the most extraordinary circumstances, such as a surgeon leaving behind a scalpel in a patient’s stomach, the trier of fact usually relies on expert testimony to establish the standard of care.<sup>2</sup> As the linchpin to any successful medical malpractice claim, the qualification of an expert medical witness in Arizona is both a contentious and expensive process that exists within an amorphous web of intersecting statutes, common law, evidentiary rules, and policy objectives.<sup>3</sup>

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1. See, e.g., *Baker v. Univ. Physicians Healthcare*, No. CV–12–0102–PR, 2013 WL 897340, at \*2 (Ariz. Mar. 12, 2013); *Ryan v. S.F. Peaks Trucking Co.*, 262 P.3d 863, 869 (Ariz. Ct. App. 2011).

2. See *Ryan*, 262 P.3d at 870; see also Daniel J. McAuliffe & Shirley J. McAuliffe, *Weight and Necessity of Expert Evidence*, 1 ARIZ. PRAC. § 702:3 (4th ed. 2012) (“Expert testimony is necessary when common experience does not allow the jury to correctly decide the matter.”).

3. See *Symposium Transcript: What’s on the Horizon for Michigan Medical Malpractice?*, 14 MICH. ST. U. J. MED. & L. 477, 521 (2010) (“But I’ll just tell you, with regard to malpractice litigation, that the biggest drain, the biggest expense involved - it doesn’t matter how meritorious the case is. You know, the one-in-a-trillion case where the doctor says, ‘I admit it. I did it.’ You still have to have an expert. You still have to have somebody pay to review it, somebody to sign the affidavit of merit, you still have to go through all - it doesn’t matter, even if the doctor’s going to stand up and say, ‘I did it! I did it, there’s no question, I’m guilty. I did it, I committed malpractice.’ It doesn’t matter, the system requires it.”).

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The framework for qualifying expert medical testimony in medical malpractice actions hinges on section 12-2604.<sup>4</sup> The Arizona Supreme Court in *Baker v. University Physicians Healthcare*, recently interpreted section 12-2604 as a gatekeeper for determining which physicians can testify on standard of care.<sup>5</sup> To provide testimony as to the appropriate standard of care in a medical malpractice case, section 12-2604(A)(1) requires that an expert witness share the same specialty as the treating physician.<sup>6</sup> If the treating physician is board certified, 12-2604(A)(1) also requires that the expert be board certified in the same specialty.<sup>7</sup>

Section 12-2604 requires that “only physicians with comparable training and experience may provide expert testimony regarding whether the treating physician provided appropriate care,” but the statute is “ambiguous regarding its application to particular cases.”<sup>8</sup> Section 12-2604 does not designate which boards or organizations, if any, can establish or certify a physician’s specialty for its purposes. Related Arizona statutes governing health insurance review boards<sup>9</sup> and pretrial affidavits in support of medical malpractice claims only provide hints of how the word “specialty” should be defined.<sup>10</sup>

Requiring the testifying physician to match the specialty of the treating physician raises many issues that collectively stem from one principal inquiry: What meaning should be assigned to the word “specialty”? First, should the nature of the claimant’s injury inform the determination of which specialty is relevant? Second, what are the requirements for recognizing a physician’s association with a particular specialty? As a corollary, do physicians share a specialty if different certification boards or organizations bestow those specialties?<sup>11</sup> Third, should general practitioners,<sup>12</sup> physicians practicing emergency medicine,<sup>13</sup> or resident physicians fall outside the scope of section 12-2604?

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4. ARIZ. REV. STAT. ANN. § 12-2604 (2013).

5. *Baker*, 2013 WL 897340, at \*3.

6. ARIZ. REV. STAT. ANN. § 12-2604(A)(1).

7. *Id.*

8. *Baker*, 2013 WL 897340, at \*2.

9. See ARIZ. REV. STAT. ANN. §§ 20-841.04(F), 20-1057.01(E), 20-2532(A)(2), 20-2538(B).

10. See ARIZ. REV. STAT. ANN. § 12-2603.

11. Several different organizations confer board certification to physicians. For example, the American Board of Physician Specialties (“ABPS”) certifies both medical doctors (“MDs”) and doctors of osteopathic medicine (“DOs”). The American Board of Medical Specialties (“ABMS”) only certifies medical doctors and the American Osteopathic Association (“AOABOS”) certifies only doctors of osteopathic medicine.

12. In Michigan, a separate cause of action exists for medical negligence claims against general practitioners. *Gonzales v. St. John Hosp. & Med. Ctr.*, 745 N.W.2d 749, 750 (Mich. 2008); see also *Robins v. Garg*, 741 N.W.2d 49, 54 (Mich. Ct. App. 2007) (holding that general practitioners are not specialists because the ABMS does not certify general practitioners).

13. *Reeves v. Carson City Hosp.*, 736 N.W.2d 284, 288 (Mich. Ct. App. 2007) (holding that where a physician was *practicing* emergency medicine but was not board certified in it, the expert only needed to specialize in emergency medicine, and did not need to have a board certification).

The Arizona Supreme Court in *Baker* defined specialty as a practice area “in which a physician may obtain board certification.”<sup>14</sup> After a trial court determines the treating physician’s relevant specialty, section 12-2604(A)(1) then requires the testifying physician to share the same specialty as the treating physician’s relevant specialty, “even if physicians in other specialties might also have competently provided the treatment” in question.<sup>15</sup> In a malpractice action arising from a blood complication, *Baker* applied its interpretation 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 oncology/hematology.<sup>16</sup>

However, this outcome was driven by the court’s unnecessarily narrow definition of specialty. Instead, the court should have turned to section 12-2603—governing pretrial affidavits in medical malpractice claims—to define specialist as anyone with the background, experience, training, or education to provide standard of care testimony on the procedure in question.

This Case Note begins with a basic overview of the elements required to advance a medical malpractice action, followed by a summary of the law governing the qualification of expert medical witnesses. The Case Note then examines the implications of *Baker*, finding that the Arizona Supreme Court narrowly defined specialty in a way that, in some circumstances, could deviate from the underlying statutory purpose of providing quality expert medical testimony. Lastly, upon a review of alternative definitions of specialty, this Case Note proposes that a broader definition of specialty adopted from section 12-2063—governing requirements for pretrial affidavits in medical malpractice cases—is the most functional, complete, and flexible approach that conforms with the statutory language and purpose of section 12-2064.

## I. GENERAL REQUIREMENTS FOR ADVANCING A MEDICAL MALPRACTICE ACTION

Medical malpractice claims in Arizona encompass injuries or deaths arising from the rendering of health care, surgery, medicine, nursing, or other health-related services.<sup>17</sup> These claims require the plaintiff to prove the existence of a duty (standard of care), a breach of that duty, causation, and damages.<sup>18</sup> In

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14. *Baker v. Univ. Physicians Healthcare*, No. CV-12-0102-PR, 2013 WL 897340, at \*5 (Ariz. Mar. 12, 2013). The court concluded that “claimed” specialties “refers to situations in which a physician purports to specialize in an area that is eligible for board certification, regardless of whether the physician in fact limits his or her practice to that area.” *Id.* at \*6.

15. *Id.* at \*7.

16. *Id.* at \*1, \*7.

17. ARIZ. REV. STAT. ANN. § 12-561(2) (2013). Medical malpractice actions also include claims brought under the Adult Protective Services Act. *See Cornerstone Hosp. of Se. Ariz., L.L.C. v. Marner ex rel County of Pima*, 290 P.3d 460, 462 (Ariz. Ct. App. 2012) (citing ARIZ. REV. STAT. ANN. §§ 46-451 to -459 (2012)).

18. *Seisinger v. Siebel*, 203 P.3d 483, 492 (Ariz. 2009) (citing *Smethers v. Campion*, 108 P.3d 946, 949 (Ariz. Ct. App. 2005)).

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Arizona, standard of care is defined as an “exercise [of] 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.”<sup>19</sup> Physicians who perform the work of a specialist are held to the standard of care applicable to that specialty.<sup>20</sup>

Typically, the plaintiff must introduce expert testimony to prove that the standard of care was breached.<sup>21</sup> Plaintiffs alleging medical malpractice must certify whether expert testimony is required to prove their claim by providing the defendant with an affidavit signed by a consulting expert within forty days of the defendant’s responsive pleading.<sup>22</sup> The affidavit must contain four elements: (1) the expert’s qualifications to express an opinion; (2) the factual basis for each claim; (3) the acts, errors, or omission that the expert considers to have violated the applicable standard of care; and (4) the manner in which the health care professional’s conduct contributed to the damages or other relief sought by the plaintiff.<sup>23</sup>

Claims against the health care professional are dismissed without prejudice if the claimant fails to file and serve a preliminary affidavit after it has been determined that an affidavit is necessary.<sup>24</sup> For purposes of filing the affidavit, an expert is defined as a person who is “qualified by knowledge, skill, experience, training or education to express an opinion regarding a licensed health care professional’s standard of care or liability for the claim.”<sup>25</sup>

### *A. Qualifying an Expert Medical Witness in Arizona: Understanding the Intersection Between Rule 702, Section 12-2604, and the Common Law*

Like the affidavit’s requirements, Rule 702 of the Arizona Rules of Evidence permits expert testimony when a witness is qualified by knowledge, skill, experience, training, or education and such testimony would assist “the trier of fact to understand evidence or determine a fact in issue.”<sup>26</sup> Additionally, Rule

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19. See ARIZ. REV. STAT. ANN. § 12-563; see also *Smethers*, 108 P.3d at 949 (“This yardstick by which a physician’s compliance with such a duty is measured is commonly referred to as the standard of care.” (internal quotation marks omitted)).

20. *Gatson v. Hunter*, 588 P.2d 326, 346–47 (Ariz. Ct. App. 1978).

21. ARIZ. REV. STAT. ANN. § 12-2603(H)(1)(c) (“Expert testimony is necessary to prove the health care professional’s standard of care or liability for the claim.”). For a review of expert testimony and the standard of care, see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN B. BUBLICK, *THE LAW OF TORTS* § 303 (2d ed. 2012).

22. See *Gorney v. Meaney*, 150 P.3d 799, 801 (Ariz. Ct. App. 2007) (citing ARIZ. REV. STAT. ANN. § 12-2603(B) (2007)).

23. ARIZ. REV. STAT. ANN. § 12-2603(B).

24. *Id.* § 12-2603(F).

25. *Id.* § 12-2603(H)(2).

26. ARIZ. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on

702 “does not evaluate admissibility on the degree of qualification, but rather on the helpfulness to the fact finder.”<sup>27</sup>

In 2005, Arizona narrowed the criteria for qualifying expert testimony in medical malpractice claims by enacting section 12-2604. Section 12-2604(A)(1) requires that an expert be a physician<sup>28</sup> and 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.<sup>29</sup>

However, section 12-2604 does not require the testifying experts to share all the defendant physician’s specialties.<sup>30</sup> Where a party has multiple specialties or claimed specialties, some of those specialties likely bear no relevance to the underlying claim and would thus not establish “the appropriate standard of care.”<sup>31</sup> If a defendant claims to practice outside the scope of his actual specialties, section 12-2604 allows testimony by an expert witness with the same specialty as the defendant’s claimed specialty.<sup>32</sup>

sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principle and methods to the facts of the case.”)

27. Nicholas J. Kirby, Note, *Seisinger v. Siebel: Separation of Powers and Expert Witness Qualifications*, 51 ARIZ. L. REV. 805, 808 (2009) (citing *Seisinger v. Siebel*, 203 P.3d 483, 488 (Ariz. 2009); *Arizona v. Davolt*, 84 P.3d 456, 475 (Ariz. 2004)).

28. *Siesinger*, 203 P.3d at 493 (limiting testimony by health care professional to only physicians); *see also* *Smethers v. Campion*, 108 P.3d 946, 949, 955 (Ariz. Ct. App. 2005) (holding that in an addition to the expert witness’s testimony that he relied on eleven prior sets of cornea measurements for corrective eye surgeries complied with the standard of care, it was also appropriate and relevant for that witness to say that in his own practice he would have re-measured before proceeding with surgery).

29. ARIZ. REV. STAT. ANN. § 12-2604(A)(1); *see also* *Awsienko v. Cohen*, 257 P.3d 175, 177–78 (Ariz. Ct. App. 2011) (finding that the legislature created different standards for qualifying an expert to testify against a board-certified versus a non-board-certified physician specialist). If the defendant is a specialist, the expert must—at the time of the occurrence that is the basis for the action—have been the same specialty as the defendant. Conversely, board-certified experts need not have been board certified at the time of the occurrence. *Awsienko*, 257 P.3d at 178. Additionally, *Awsienko* concluded that a physician may specialize in a particular area of medicine without being board-certified. *Id.* at 177–78.

30. *Lo v. Lee*, 286 P.3d 801, 804 (Ariz. Ct. App. 2012) (reasoning that such an interpretation “goes far beyond the intent of the legislature . . . and could lead to unmanageable and absurd results”).

31. *Id.* at 804–05 (“Therefore, common sense would dictate that the testifying expert need not be trained in those specialties.”).

32. *Id.* (holding that a plastic surgeon was qualified under section 12-2604 to testify against an ophthalmologist with a subspecialty in plastic surgery because the

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Additionally, section 12-2604 requires the expert to have devoted a majority of their professional time to clinical practice or instruction in the year preceding the lawsuit.<sup>33</sup> Prior to the enactment of section 12-2604, “a long-retired physician could establish the standard of care.”<sup>34</sup> The Arizona legislature likely wished to end that practice and “ensure that physicians testifying as experts have sufficient expertise to truly assist the fact-finder on issues of standard of care and proximate causation.”<sup>35</sup>

Rule 702 is a flexible standard for expert witness testimony that qualifies anyone who can assist the fact-finder.<sup>36</sup> But section 12-2604 changes the type of evidence a plaintiff may present by limiting the pool of expert witnesses to an undefined group of physicians (i.e., those that share the same “specialty” as the treating physician).<sup>37</sup> The implications of this change did not go unnoticed. Former Arizona Governor Janet Napolitano expressed concern over section 12-2604 when she signed the statute into law.<sup>38</sup> Specifically, she expressed concern about “the effort . . . to restrict expert witness testimony in [medical] malpractice cases.”<sup>39</sup> She further stated that the courts, not the legislature, should be in charge of qualifying expert witnesses.<sup>40</sup>

### **B. Baker v. University Physicians Healthcare and the Definition of “Specialty”**

In *Baker v. University Healthcare Providers*, the Arizona Supreme Court attempted to clarify the meaning of specialty. In doing so, however, the court chose a definition that is unnecessarily narrow; based upon flawed reasoning; and conflicts with the purpose of expert witnesses—namely, to assist the fact-finder on issues related the standard of care and proximate causation.

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ophthalmologist performed a laser facial skin treatment and claimed to specialize in cosmetic and plastic surgery).

33. ARIZ. REV. STAT. ANN. § 12-2604(A)(2)(a)–(b).

34. Kirby, *supra* note 27, at 811.

35. Awsienko v. Cohen, 257 P.3d 175, 178 (Ariz. Ct. App. 2011).

36. Kirby, *supra* note 27, at 810–11.

37. See *Governale v. Lieberman*, 250 P.3d 220, 224 (Ariz. Ct. App. 2011) (“[Section] 12-2604 modified the common law to increase a plaintiff’s burden of production . . . [on] the defendant’s departure from the standard of care.” (citing *Seisinger v. Siebel*, 203 P.3d 483, 493 (Ariz. 2009) (internal quotation marks omitted))).

38. Letter from Janet Napolitano, Ariz. Governor, to Ken Bennett, Ariz. Senate President (April 25, 2005), available at <http://www.azleg.gov/govlettr/47leg/1R/SB1036.pdf>.

39. *Id.* (“While I fully support the notion that only qualified medical professionals should be allowed to testify as experts in malpractice actions, I believe our courts, not the legislature, are charged with making the expert witness determination. I am also sympathetic to the arguments of the opponents of this bill that these restrictions on experts may make it unduly onerous on bona fide claimants to introduce the expert testimony they need to prove their cases.”).

40. *Id.*

*Baker* defines specialty as a limited area of medicine in which a physician is or may become board certified.<sup>41</sup> Although the court first turned to medical and general dictionary definitions of specialty,<sup>42</sup> its holding is ultimately anchored in section 12-2604's reference to specialists who are—or who are not—board certified.<sup>43</sup> It also relied on the Michigan Supreme Court's adoption of a similar definition of specialty.<sup>44</sup>

To apply this rule, the Arizona Supreme Court directs trial courts to first determine whether the care or treatment at issue involves an identifiable specialty.<sup>45</sup> If a specialty or subspecialty is involved, the testifying physician must share the same specialty as the treating physician, “even if physicians in other specialties might also have competently provided the treatment” in question.<sup>46</sup> If the treating physician is board-certified within that specialty, then the “testifying expert must also be board certified in that specialty.”<sup>47</sup>

The court essentially relied on a dictionary definition, but limited that definition because of the context of the statute. First, the court noted that the *Dorland's Illustrated Medical Dictionary* defines 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.”<sup>48</sup> The court then reasoned that because the second clause of section 12-2604 refers to board certification, the first clause—which prescribes requirements for qualifying experts to testify against non-board-certified physicians—must also be related to board certification.<sup>49</sup> Lastly, the court bolstered its definition of specialty by citing Michigan's key case on their identical

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41. *Baker v. Univ. Physicians Healthcare*, No. CV-12-0102-PR, 2013 WL 897340, at \*5 (Ariz. Mar. 12, 2013) (“We construe ‘specialty’ for purposes of § 12-2604 as referring to a limited area of medicine in which a physician is or may become board certified.”).

42. *Id.* at \*4 (examining definitions from *Dorland's Illustrated Medical Dictionary*, *The American Heritage Dictionary*, and *The American Heritage Dictionary of the English Language*).

43. *Id.* (“Defining ‘specialty’ by referring to areas in which physicians can obtain certification is a reasonable approach because section § 12-2604 itself recognizes that physicians may become board certified in particular specialties.” (citing ARIZ. REV. STAT. ANN. § 12-2604(A)(1) (2013))).

44. *Id.* at \*5 (citing *Woodard v. Custer*, 719 N.W.2d 842, 851 (Mich. 2006)).

45. *Id.* at \*7.

46. *Id.*

47. *Id.*

48. *Id.* at \*4.

49. *Id.* The Arizona Court of Appeals in *Baker* defined “specialty” as one of the 24 boards established by the ABMS and excluded consideration of subspecialties. *Baker v. Univ. Physicians Healthcare*, 269 P.3d 1211, 1214–15 (Ariz. Ct. App. 2012), *vacated in part*, No. CV-12-0101-PR, 2013 WL 897340 (Ariz. Mar. 12, 2013). It is unclear how—or even if—this definition would apply to the portion of section 12-2604 related to the qualification expert testimony against a non-board-certified treating physician.

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statute, *Woodard v. Custard*, which also heavily relied on a medical dictionary definition.<sup>50</sup>

The court's interpretation of section 12-2604, however, is flawed. The Court's reliance on a dictionary definition is appropriate.<sup>51</sup> But the Court narrowed the scope of that definition for unconvincing reasons. First, there is no indication that the second clause of the statute, which refers to board certification, in any way *defines* specialty. Second, the court's reliance on *Woodard v. Custard* adds no weight or justification to the holding. In that case, the Michigan Supreme Court noted that "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."<sup>52</sup> It then applied a very medical-specific definition anchored in the board-certification taxonomy, like *Baker*.<sup>53</sup> But the interpretive rule that *Woodard* relied upon refers to "technical words and phrases" that have "acquired a peculiar and appropriate meaning *in the law*," not within some other profession.<sup>54</sup> This suggests that using a definition that is exclusively rooted in medical taxonomy may be inappropriate in the context of statutory interpretation, and that other interpretive methods should be applied instead.<sup>55</sup>

These statutory interpretation issues are especially disconcerting due to their resulting policy implications. Although section 12-2604 requires that physicians share the same specialty, specialty need not be defined so as to preclude those capable of performing the same treatment or procedure from testifying simply because of the taxonomy used by organizations that confer board certification. Under *Baker*, the world's most knowledgeable neurosurgeon, who dedicates his entire practice to spinal fusion surgeries, would not qualify to testify

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50. *Baker*, 2013 WL 897340, at \*5 (citing *Woodard v. Custer*, 719 N.W.2d 842, 850–51 (Mich. 2006)).

51. *Woodard*, 719 N.W.2d at 850–51.

52. *Id.* at 873 n.30 (quoting MICH. COMP. LAWS. § 8.3a (2013)).

53. *Id.*

54. *Id.* (emphasis added).

55. The attempt by Michigan courts to resolve issues surrounding a Michigan statute similar to section 12-2604 has resulted in a "minefield"; it has become impossible to discern a coherent understanding of the rules governing expert witness qualification. *See Symposium Transcript: What's on the Horizon for Michigan Medical Malpractice?*, *supra* note 3, at 519 ("Expert witnesses have become a minefield. How many times tonight have you heard that? A minefield for gamesmanship, and all kinds of roguish play. Who's an expert? Who's not an expert? And it doesn't go to the merits of the case. It doesn't go to the merits of what they know, it doesn't go to the substance of their knowledge. It goes to what the paper says, what their certificate says, what their certifications are."); *see also Woodard*, 719 N.W.2d. at 855–56 (majority opinion stating that plaintiff's expert needs to specialize in the field related to the injury in question whereas the concurrence by Chief Justice Taylor requires the plaintiff's expert to share every specialty possessed by the defendant physician); *Watts v. Canady*, 655 N.W.2d 784 (Mich. Ct. App. 2002) (delineating different expert medical witness qualification standards for the attorney's belief that the affidavit of merit is sufficient versus the standard governing whether the court found the affidavit sufficient).

on the standard of care against an orthopedic surgeon that also performs spinal fusion surgeries. This would be true even if that neurosurgeon helped write the portion of the board examination for orthopedic surgeons that covered spinal fusion surgery.<sup>56</sup> Such an outcome is dictated solely by the meaning assigned to the word specialty. By only qualifying an expert witness when the testifying and treating physicians are situated to share identical board certifications instead of a leading authority with a different certification, plaintiffs may be forced to retain witnesses who are less qualified to testify as to the level expected of a reasonable physician.<sup>57</sup>

A witness should have the expertise necessary to help the jury with issues regarding the relevant standard of care.<sup>58</sup> An appropriate interpretation of specialty should therefore align the text of the statute with 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."<sup>59</sup>

A narrow interpretation of specialty under section 12-2604 may dictate that a less-experienced physician testifies on the appropriate standard of care. By requiring that both the testifying and treating physicians are eligible for certification (or actually are certified) by the identical specialty board, physicians with superior training and experience may be excluded simply because the two physicians share different specialties in name, but not in practice. Such outcomes place a higher premium on the treating physician's credentials rather than the standard of care that a prudent and reasonable physician would have used during the procedure or care for which the injured party seeks to hold the physician accountable.

Conversely, a broader definition of specialty may permit the most experienced physicians to testify as expert witnesses, regardless of whether the defendant and expert have disparate titles. That is, a broad definition of specialty would allow testifying physicians to satisfy section 12-2604's same-specialty requirement when the testifying physician is familiar through his background and experience with the procedure or treatment in question. Such an interpretation would also honor the statute's legislative intent to permit testimony by experts who can assist the fact-finder regarding the appropriate standard of care or proximate causation.

By adopting a definition of specialty that is tethered to board certification categories, the court narrowly defined specialty in a way that could preclude substantively qualified experts from testifying. Because the logic of the court's statutory interpretation analysis is flawed, a look at other avenues for defining specialty is warranted.

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56. See *Symposium Transcript: What's on the Horizon for Michigan Medical Malpractice?*, *supra* note 3, at 519.

57. Athan Papailiou, *Making Sense of Expert Medical Witness Qualification After Baker*, ARIZ. L. REV. SYL. (Jan. 14, 2013), <http://www.arizonalawreview.org/2013/syllabus/making-sense-of-expert-medical-witness-qualification#more-1480>.

58. *Awsienko v. Cohen*, 257 P.3d 175, 178 (Ariz. Ct. App. 2011).

59. *Id.*

## II. ALTERNATIVE DEFINITIONS OF “SPECIALTY”

The purpose of section 12-2604 is to permit expert medical testimony that assists the fact-finder on issues of the standard of care and causation.<sup>60</sup> Two other approaches could have been used to produce a broader definition of specialty more consistent with this legislative purpose: (1) defining specialty using a broader dictionary definition; or (2) defining specialty from other Arizona statutes related to section 12-2604, including a section 12-2603, which prescribes the criteria for filing a pre-trial affidavit necessary for advancing a medical malpractice claim, and section 12-2538, which prescribes the criteria for qualifying physicians to serve on Arizona’s health insurance review boards. To the extent that the alternative definitions of specialty discussed in this Case Note always qualify the most knowledgeable physician to testify against the treating physician, these definitions have a better likelihood of producing workable outcomes than the one adopted in *Baker*.<sup>61</sup>

### A. Defining Specialty Using a Dictionary

*Dorland’s Illustrated Medical Dictionary* defines a specialist as “[1] a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, [2] by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice.”<sup>62</sup> Given that section 12-2604 does not define the term specialty, courts may refer to dictionary definitions to determine the ordinary meaning of a statutory term.<sup>63</sup> Such was the case in *Baker*, which relied in part on this definition.<sup>64</sup> But the *Baker* court focused on the second clause of this definition, anchoring its interpretation of specialty on board certification taxonomy.<sup>65</sup>

If the statutory interpretation of specialty were crafted to include both clauses of the *Dorland’s* definition, however, a broader scope of experts would qualify. A testifying physician would qualify as having the same specialty as an expert witness under section 12-2604 by satisfying one of two avenues: (1) the testifying physician could qualify by limiting their practice to the same branch of medicine or surgery as the treating physician<sup>66</sup>; or (2) the testifying physician

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60. *Awsienko*, 257 P.3d at 178 (citation omitted).

61. Under all of the definitions of specialty described, the testifying physician must be board certified if the treating physician is board certified—section 12-2604 makes this requirement clear. However, the alternative—and more flexible—definitions of specialty discussed in this Case Note permit a greater variety of board certified physicians to testify against the treating physician.

62. *Baker v. Univ. Physicians Healthcare*, No. CV-12-0102-PR, 2013 WL 897340, at \*4 (Ariz. 2013) (citing DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1767 (31st ed. 2007)).

63. *See In re Paul M.*, 7 P.3d 131, 133 (Ariz. Ct. App. 2000).

64. *Baker*, 2013 WL 897340, at \*4.

65. *Id.* at \*5.

66. For simplicity, it is assumed that a physician limits his or her practice to a branch of medicine or surgery when over half of the physician’s practice is devoted to a

could qualify by possessing the same specialty as recognized by a medical specialty board.

This interpretation of specialty would still incorporate the second clause of the dictionary definition, like *Baker's* interpretation, and therefore would include all those whom the court wished to qualify based on the board certification taxonomy. But under the first avenue, a court could also permit a non-board-certified neurosurgeon who limits his practice to performing spinal fusion surgeries to testify against a non-board-certified orthopedic surgeon who similarly limits his practice to spinal fusion surgeries. Or, a pediatrician who devotes his practice to the delivery of babies would qualify to testify against a gynecologist who also devotes his practice to the delivery of babies. Also, as required by the second clause of the statute, if the gynecologist were board certified, section 12-2604 would then require that the pediatrician also be board-certified.<sup>67</sup>

The downfall of this approach, however, is that the *Dorland's* definition of specialty does not describe when a physician has actually limited his or her practice to a particular branch of medicine or surgery. Therefore, it would be necessary to properly clarify the term “limiting” before applying this standard. The danger is that this definition could be so narrowly interpreted as to have the same effect as the *Baker* interpretation.<sup>68</sup>

Assuming that “limiting one’s practice” is defined broadly though, the *Dorland's* definition of specialty would comport with the language and legislative purpose of section 12-2604: limiting expert medical testimony to only those that can assist the fact-finder with issues of standard of care and causation.<sup>69</sup> Rather than hinging expert witness qualification on the matching of board-certified specialties, the *Dorland's* definition would permit testimony by physicians with the greatest knowledge on the procedure in question.

### ***B. Defining Specialty from Section 12-2603: Medical Malpractice Pretrial Affidavit***

Courts can also consider related statutes to achieve consistent meaning.<sup>70</sup> Accordingly, specialty can be defined by drawing from the requirements for

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particular procedure (for example, heart transplants, spinal fusion surgery, caesarian sections, etc.).

67. “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.” ARIZ. REV. STAT. ANN. § 12-2604(A)(1) (2013) (emphasis added).

68. A court could apply the same definition to “limiting one’s practice” as *Baker* did to “specialty”: If limiting one’s practice is defined as “only practicing within an area of medicine that a physician can receive board certification,” this dictionary definition would have the same narrow effect as *Baker*.

69. *Awsienko v. Cohen*, 257 P.3d 175, 178 (Ariz. Ct. App. 2011) (citation omitted).

70. *Baker v. Univ. Physicians Healthcare*, 269 P.3d 1211, 1213 (Ariz. Ct. App. 2012), *vacated in part*, No. CV-12-0101-PR, 2013 WL 897340 (Ariz. Mar. 12, 2013) (citing

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submitting a pretrial affidavit in medical malpractice claims.<sup>71</sup> As noted earlier, Arizona requires that an expert sign an affidavit when a plaintiff files a claim of medical negligence.<sup>72</sup> This expert must have the requisite “knowledge, skill, experience, training or education to express an opinion regarding a licensed health care professional’s standard of care or liability for the claim.”<sup>73</sup> Because this affidavit–expert and the specialist–expert at issue in 12-2604 both testify to the standard of care applicable to any medical malpractice case, the relation between the two sections seems reasonable. Therefore, it is reasonable to apply the language of the affidavit statute to section 12-2604.<sup>74</sup>

This broad definition of specialty also significantly departs from *Baker* because its analysis neither begins nor turns on a physician’s title or certification. Under this definition, a defendant’s specialty would be defined by his or her “knowledge, skill, experience, training or education” of the procedure in question.<sup>75</sup> Accordingly, the testifying expert would need to have the “knowledge, skill, experience, training or education to express an opinion regarding the . . . standard of care” in that specialty.<sup>76</sup> If the treating physician were board-certified, then the testifying physician would need to be board-certified in any field which provides also the knowledge, skill, experience, training, or education to express an opinion about the procedure in question.<sup>77</sup>

Consider an uncertified plastic surgeon sued for an injury arising from cosmetic eye surgery.<sup>78</sup> An ophthalmologist that can demonstrate sufficient knowledge or experience about cosmetic surgery around the eye would qualify as a specialist able to testify against the plastic surgeon.<sup>79</sup> The same would apply to the statute’s second clause regarding board certifications.<sup>80</sup> For example, any board-certified physicians whose background (i.e., knowledge, skill, experience, training, or education) enables them to render an opinion about baby deliveries would qualify as an expert witness against a board-certified gynecologist sued for a negligent delivery.

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*Awsienko*, 257 P.3d at 177; *Swift Transp. Co. v. Maricopa County*, 236 P.3d 1209, 1212 (Ariz. Ct. App. 2010)).

71. ARIZ. REV. STAT. ANN. § 12-2603 (B) (2013). Although section 12-2603 does not use the term “specialty,” it does set forth the requirements for which an expert signs an affidavit concerning standard of care in medical malpractice claims. For simplicity, it will thus be assumed that these requirements should similarly govern any definition of specialist in section 12-2604.

72. *See id.* § 12-2603(F).

73. *Id.* § 12-2603(H)(2). For simplicity, it is assumed that rendering an opinion about the applicable standard of care is the same as testifying about the applicable standard of care.

74. *Baker*, 269 P.3d at 1213 (citing *Awsienko*, 257 P.3d at 177; *Swift Transp. Co.*, 236 P.3d at 1212).

75. ARIZ. REV. STAT. ANN. § 12-2603(H)(2).

76. *Id.* §§ 12-2603(H)(2), -2604.

77. *See Lo v. Lee*, 286 P.3d 801, 805 (Ariz. Ct. App. 2012).

78. *Id.* at 802.

79. *Id.* at 805.

80. *See* ARIZ. REV. STAT. ANN. § 12-2604(A)(1).

However, defining specialty from section 12-2603 requires a preliminary finding that sections 12-2603 and 12-2604 are in fact related statutes. Arguments could arise that section 12-2603 is not sufficiently related to section 12-2604 to inform the definition of specialty.<sup>81</sup> Section 12-2603 requires that a consulting expert, qualified to express an opinion about the applicable standard of care, sign a preliminary affidavit before trial.<sup>82</sup> But at that stage, even a nurse could presumably sign the affidavit as a consulting expert.<sup>83</sup> Therefore, because section 12-2604 qualifies only physicians as testifying experts,<sup>84</sup> one might argue that the affidavit statute presents a lower standard of care than the standard actually presented at trial. Whereas it seems logical that both statutes would refer to the same duty owed to Arizona patients, it is plausible that the two statutes present distinct burdens of proof for different stages of litigation.

An additional reason why section 12-603 may not be a related statute is that it applies to only consulting experts—not testifying experts. Consulting experts are retained before trial for purposes of fulfilling the affidavit requirements prescribed by section 12-2603. Because section 12-2603 qualifies consulting experts, it is not a related statute and therefore not instructive on the question of how specialty should be defined in section 12-2604 for purposes of qualifying testifying experts.

Nevertheless, stronger arguments exist in support of finding that these statutes are related. Both statutes govern essential steps in any medical malpractice litigation. Filing an affidavit under section 12-2603 is a necessary pretrial motion, and qualifying an expert witness is necessary for establishing the standard of care at trial.<sup>85</sup> It would be illogical for sections 12-2603 and 12-2604 to refer to drastically different standards of care, as the *Baker* decision has implicitly held. Instead, the statutes should be read as focusing on the same policy: describing the appropriate standard of care.<sup>86</sup> The distinction between consulting and testifying experts also does not vitiate the argument that the two are in fact related statutes. Although the courts have distinguished between consulting and testifying experts for purposes of section 12-2603, they have held that a single expert can satisfy both requirements, signaling that the two statutes are related.<sup>87</sup>

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81. See *Baker v. Univ. Physicians Healthcare*, 269 P.3d 1211, 1213 (Ariz. Ct. App. 2012), *vacated in part*, No. CV-12-0101-PR, 2013 WL 897340 (Ariz. Mar. 12, 2013) (citing *Awsienko v. Cohen*, 257 P.3d 175, 177 (Ariz. Ct. App. 2011); *Swift Transp. Co. v. Maricopa County*, 236 P.3d 1209, 1212 (Ariz. Ct. App. 2010)).

82. See ARIZ. REV. STAT. ANN. § 12-2603(F).

83. A nurse would qualify to sign the affidavit so long as the nurse was familiar by “knowledge, skill, experience, training or education to render an opinion regarding a licensed health care professional’s standard of care.” *Id.*

84. ARIZ. REV. STAT. ANN. § 12-2604.

85. See ARIZ. REV. STAT. ANN. §§ 12-2603, -2604.

86. *Lo v. Lee*, 286 P.3d 801, 804 (Ariz. Ct. App. 2012) (“Therefore, common sense would dictate that the testifying expert need not be trained in those specialties.”).

87. See *Para v. Anderson ex rel. County of Maricopa*, 290 P.3d 1214, 1216 (Ariz. Ct. App. 2012). A consulting expert can serve as a testifying expert. The only consequence is the loss of the work product doctrine that would otherwise protect pretrial

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Accordingly, a definition of specialty informed by section 12-2603 is a workable solution. The affidavit standard comports with the language and legislative purpose of section 12-2604. By not requiring the testifying physician to strictly mirror the treating physician's board certification, this definition would permit the very best physicians to testify when they otherwise would not under *Baker*.

### *C. Defining Specialty from Section 20-2538: Independent Health Insurance Review Boards*

Section 20-2538—prescribing qualifications for physicians to serve on Arizona's independent health insurance review boards—can also inform the definition of specialty in section 12-2604.<sup>88</sup> Section 20-2538 permits out-of-state physicians to serve on a health insurance 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,<sup>89</sup> or (2) typically manage the medical condition, procedure, or treatment under review.<sup>90</sup> Therefore, sections 20-5238 and 12-2604 are related statutes because they both involve qualifications by which physicians review medical procedures.

Under this definition, testifying experts would satisfy section 12-2604 in two ways: if they are board certified by a specialty board in the same or similar area as the defendant physician, *or* if they typically manage the medical condition or procedure performed by the defendant physician. First, a physician qualifies as an expert witness if he or she is board certified by a specialty board in the same or similar area as the treating physician.<sup>91</sup> For example, a board-certified oncologist might qualify against a board-certified endocrinologist when the focus of both

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communications as privileged had the consulting expert been different from the testifying expert. *Id.*

88. The Court of Appeals in *Baker* seemingly relied on section 20-2538 to define specialty, but confused section 20-2538's reference to “appropriate medical specialty board” with the ABMS. *See* Papailiou, *supra* note 57. Defining specialty as possessing one of the 24 specialties recognized by the ABMS, the Court of Appeals in *Baker* found 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. *Baker v. Univ. Physicians Healthcare*, 269 P.3d 1211, 1214 (Ariz. Ct. App. 2012), *vacated in part*, No. CV-12-0101-PR, 2013 WL 897340 (Ariz. Mar. 12, 2013). Although the ABMS recognizes 24 different board certifications, it is not the only organization that oversees board certification. For example, the ABPS certifies both medical doctors and doctors of osteopathic medicine, and the AOABOS certifies only doctors of osteopathic medicine. The Arizona Court of Appeals did not explain why it was relying on the ABMS to define specialty and did not specifically reference section 20-2538.

89. Section 20-2538 is the only statute in which the Arizona legislature references a specialty board. *See* ARIZ. REV. STAT. ANN. § 20-2538(B) (2013). Nowhere in the Arizona Revised Statutes is the ABMS referenced.

90. *Id.* For simplicity, “typically” will be defined as anything not unusual or extraordinary.

91. *Id.*

physicians' practice concerns the intersection of blood and cancer issues. Second, the testifying physician would qualify if he or she typically manages the medical condition or procedure performed by the treating physician. For example, a gynecologist that typically delivers babies would qualify against an injury arising from a pediatrician who negligently delivered a baby.

However, section 20-2538 contains two undefined terms that are critical to providing specialty with a complete definition. First, section 20-2538 does not define what it means to "typically" treat a procedure under review. Courts could assign a narrow interpretation to this definition, thereby reducing the effectiveness of this broad definition.<sup>92</sup> Second, this definition does not explain what it means to be 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. Although it is clear when a testifying physician shares the same board certification as the treating physician, it is undefined when the treating physician is within a *similar* scope of practice. Again, this could be defined narrowly or broadly to yield drastically different outcomes.

Assuming its undefined terms are given broad meaning, section 20-2528 provides specialty a more flexible definition than *Baker* by not limiting the qualification of testifying physicians to those who match the board-certified specialty of the treating physician. By recognizing that a testifying physician can possess the same specialty as the treating physician if the treating physician typically manages the procedure in question, this definition also comports with the legislative purpose of section 12-2604 to limit expert medical testimony to only those that can assist the fact-finder with issues of standard of care and causation.

#### ***D. Evaluating Alternative Definitions of "Specialty"***

Admittedly, these alternative definitions of specialty are not divorced from their own set of questions and ambiguities, and many nuances were glossed over.<sup>93</sup> However, it is exactly this flexibility that makes them superior to the *Baker* interpretation.

Although the *Dorland's* definition of specialty, as well as a definition informed by Section 20-2538 governing health insurance review boards, are flexible, these definitions would leave trial courts and litigants confused with many unanswered questions. These definitions contain cumbersome and ambiguous

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92. This is similar to the problem faced under the dictionary definition proposed above. *See supra* Part II.A.

93. Unresolved questions implicated by the proposed alternative definitions of specialty under section 12-2604 include: (1) What does it mean to be a physician whose practice is limited to a particular branch of medicine or surgery; (2) Is being able to express an opinion about the procedure in question the same as being able to testify about the standard of care applicable to that procedure; (3) What does it mean to typically treat a procedure under review?; and (4) What does it mean to be 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?

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words like “limiting,” “typically,” or “similar,” which could spur additional litigation.<sup>94</sup>

Instead, section 12-2063, which governs pretrial affidavits, would best define specialty with the proper balance of completeness, flexibility, and functionality.<sup>95</sup> By not requiring the testifying physician to strictly mirror the treating physician’s board certification, as is the case under *Baker*, this definition would qualify physicians with background and knowledge about the procedure or treatment at issue. Furthermore, this definition does not come with a variety of undefined terms—baggage that would come along with the other proposed solutions. With the affidavit-based definition, courts could qualify the very best physicians to testify, ensuring “that physicians testifying as experts have sufficient expertise to truly assist the fact-finder on issues of standard of care and proximate causation.”<sup>96</sup> After all, Arizona’s standard of care 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.”<sup>97</sup>

The *Baker* definition, however, may force plaintiffs to retain witnesses who do not deliver care to the level expected of a reasonable physician in order to comply with *Baker*. In turn, the standard of care under *Baker* shifts from “how the procedure should occur” to “how someone with the same basic [board] certification *might* approach the procedure.”<sup>98</sup> Conversely, the section 12-2603 affidavit definition of specialty remains true to both Arizona’s standard of care and section’s 12-2604’s legislative purpose, asking a physician familiar with the procedure in question how the procedure at issue should have occurred.

### CONCLUSION

The purpose of section 12-2604 is to qualify expert medical witnesses who can assist the fact-finder in understanding issues concerning the applicable standard of care and proximate causation. Because the effect of section 12-2604 largely turns on what meaning is assigned to the undefined word “specialty,” this statute should be interpreted in a way that defines specialty in accordance with this purpose.

Accordingly, Arizona’s statute governing pretrial affidavits in medical malpractice cases best fits the definition. This definition would increase the quality of expert medical testimony by qualifying physicians who are knowledgeable about the care or treatment at issue, but who might not otherwise qualify under the *Baker* interpretation. In an era where the American healthcare system is rapidly evolving, this definition would also provide trial courts with a flexible yet easy-to-apply standard for qualifying the linchpin to any medical malpractice case—the expert medical witness.

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94. See *supra* Part II.A–B.

95. ARIZ. REV. STAT. ANN. § 12-2603 (2013).

96. *Awsienko v. Cohen*, 257 P.3d 175, 178 (Ariz. Ct. App. 2011).

97. ARIZ. REV. STAT. ANN. § 12-563(1).

98. Papailiou, *supra* note 57 (emphasis in original).