

STATE OF MICHIGAN
IN THE SUPREME COURT

SHERRI MARTIN,

Plaintiff-Appellant,

vs.

DAVID RYNBRANDT, M.D.; DAVID LEDINGHAM,
M.D.; ANDRIS KAZMERS, M.D.; and PETOSKEY
SURGEONS, P.C., a Michigan Corporation,

Defendants.

and

NORTHERN MICHIGAN HOSPITAL,
a Michigan non-profit corporation,

Defendant-Appellee.

Supreme Court No. _____

Court of Appeals No. 280267

Emmet Circuit Court
LC No. 05-009021-NH

1/27/09
Rec 37209

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APPL

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT BEING APPEALED AND RELIEF SOUGHT

Plaintiff-Appellant Sherri Martin seeks leave to appeal from the January 27, 2009 decision of the Court of Appeals (**Exhibit 1**) affirming the August 21, 2007 Order of the Emmet County Circuit Court granting Defendant, Northern Michigan Hospital, Inc.'s Motion for Summary Disposition. Plaintiff's timely Motion for Reconsideration of the Court of Appeals' decision was denied on March 12, 2009 (**Exhibit 2**).

Plaintiff commenced this medical malpractice case against several Defendants of whom all but Defendant-Appellee Northern Michigan Hospital, Inc. had been dismissed over the course of litigating this lawsuit.

Plaintiff's remaining claims against Defendant Hospital involve allegations of nursing malpractice – specifically, 1) the alleged failure of the hospital's nurses to inform the attending physician, Dr. David Rynbrandt, of post-surgical complications on a timely basis, and 2) the alleged failure to communicate up the chain-of-command the failure of Plaintiff's attending physician to address and treat these complications. Dr. Rynbrandt had been a named Defendant in this lawsuit and was dismissed after settling with Plaintiff. Thereafter, in support of Defendant's Motion for Summary Disposition, Dr. Rynbrandt submitted an affidavit to the Court asserting that he had been fully informed of the post-surgical condition of Plaintiff and that nothing the nurses would have advised him of would have caused him to alter the care he provided. (**Exhibit 8**) Defendant Hospital also submitted the affidavit of Dr. Jeffrey Beaudoin, the Medical Staff Section Chair of the hospital's Department of Surgery, who asserted that he, more likely than not, would not have suggested or requested any change in the care or treatment being provided to Plaintiff had he been asked to review the post-operative care being provided

immediately after the surgery. (**Exhibit 9**) Plaintiff had presented the Court with expert testimony that the standard of care required prompt intervention to treat the post-surgical complications of Plaintiff, and that if Dr. Rynbrandt did not undertake to provide appropriate treatment, the standard of care required Defendant's nurses to communicate this fact up the chain of command so that appropriate treatment would be provided on a timely basis.

In response to Defendant's motion, Plaintiff argued that the issues presented in the motion turned entirely upon the credibility of the factual assertions of Dr. Rynbrandt and Dr. Beaudoin regarding their state of mind and their intentions, which involve questions of fact that only a jury can properly resolve. The Circuit Court, nevertheless, concluded that Plaintiff's theory of causation was only conjecture and granted Defendant's motion. (**Exhibits 3 and 4**).

On appeal the Court of Appeals affirmed the trial court's ruling. Going beyond the ruling of the trial court, the Court of Appeals, in its published opinion, held that testimony regarding "what hypothetical doctors should have done" is insufficient evidence to create a genuine issue of fact on causation, and that Plaintiff had failed to demonstrate that had the nurses made the reports Plaintiff alleges they should have, that Plaintiff's care and treatment would have changed.

Plaintiff seeks leave from these decisions and asks that they be reversed. Plaintiff submits that both the Circuit Court and the Court of Appeals erred in resolving issues of credibility in favor of Defendant when such matters present questions of fact for the jury to decide. Both the Circuit Court and the Court of Appeals have decided this matter on the basis of the assumption that Dr. Rynbrandt and Dr. Beaudoin's affidavits

contain truthful statements regarding their state of mind, motives and intentions, whereas any such assumptions regarding the veracity of credibility of a witness are matters that should not be resolved by the court upon a motion for summary disposition. As Plaintiff had presented expert testimony demonstrating what the standard of care required the physicians treating Plaintiff to do under the circumstances, it should have been left to the jury to decide whether the statements presented by Dr. Rynbrandt and Dr. Beaudoin, asserting that they would not have taken action compliant with this standard of care, were credible.

For these reasons, Plaintiff asks that the rulings of the Courts before be reversed.

STATEMENT OF QUESTION INVOLVED

DID THE CIRCUIT COURT IMPROPERLY GRANT SUMMARY DISPOSITION IN FAVOR OF DEFENDANT ON THE BASIS OF ASSUMING THAT STATEMENTS MADE BY WITNESSES IN AFFIDAVITS REGARDING THEIR KNOWLEDGE, STATE OF MIND, INTENTIONS, AND MOTIVES WERE TRUE, AND REJECTING EVIDENCE FROM WHICH THE JURY COULD HAVE CONCLUDED THAT SUCH STATEMENTS WERE NOT CREDIBLE?

Plaintiff-Appellant says the answer is Yes.

Defendant-Appellee, the Circuit Court, and the Court of Appeals, say the answer is No.

STATEMENT OF PROCEEDINGS AND FACTS

This medical malpractice case concerns events that occurred subsequent to the performance of abdominal surgery. The principal claim of Plaintiff, Sherri Martin, is that Plaintiff suffered a post-surgical bowel leak that was not timely diagnosed or treated and repaired in the days immediately following surgery, thereby leading to abdominal inflammation and sepsis causing Plaintiff to suffer significant damage requiring several surgical repairs and extensive rehabilitation that could have been avoided had she received proper care.

Sherri Martin had been diagnosed as having a duodenal diverticulum and was referred to a general surgeon, Dr. David Rynbrandt, for treatment of this condition. Her medical records show that on May 1, 2003, Sherri Martin was admitted to Defendant Northern Michigan Hospital where Dr. Rynbrandt performed surgery which included an exploratory laparotomy and removal of the duodenal diverticulum. This procedure required severing the bowel in two places and then joining the severed segments together. A known risk of this procedure is that the two severed segments of bowel joined together in the surgery may develop a leak, resulting in material leaking from the bowel into the abdominal cavity where it can cause inflammation and sepsis to occur.

Plaintiff alleges that this is what occurred in the present case, and that her post-surgical course should have readily been recognized, within 72 hours of the surgery, as evidencing an abscess or leak occurring at the site of the bowel surgery. Plaintiff's medical records show a progressively deteriorating condition. The day following surgery Sherri's white blood count was elevated, her temperature elevated, she had a rapid heart rate, and she complained of abdominal pain (for which she was prescribed pain relievers on May 3 that masked her subsequent fever). On May 4, 2003 she also had low urine

output, continued tachycardia, elevated white blood count and elevated BUN and creatine levels. By May 5, 2003 her urine output continued to be low and was noted to be brown and foul smelling. She was noted to be confused, tachycardic, and her potassium level was also increasing. Her condition continued to deteriorate over the 6th and 7th.

During this 7-day period of time, the medical records show associates of Dr. Rynbrandt intermittently seeing Plaintiff, but the medical records are unclear as to whether some of the symptomology – the decreased urine output, the patient's confusion, and the elevated what blood count – were communicated by the nurses to Dr. Rynbrandt. What is certain is that Dr. Rynbrandt did not order a CT scan of Plaintiff's abdomen during these days which would have been diagnostic of a bowel abscess or leak. And the nurses did not attempt to contact the Chief of Surgery, Dr. Jeffrey Beaudoin, about the progressively deteriorating condition of Plaintiff and the attending doctor's lack of response thereto. The only medical intervention that occurred over this week post-surgery was the prescription by another doctor for Morphine and Toradol, given on May 2, to relieve the abdominal pain, and Dr. Rynbrandt's May 5 order that Plaintiff not be given any medications orally. (See Dr. Rynbrandt's affidavit). (**Exhibit 8**)

On May 8, 2003, Plaintiff was noted to be confused, her white blood count highly elevated, and her urine culture revealed enterococcus. She complained of shortness of breath and was noted to be lethargic. Late lab results were significantly abnormal. At some point late on May 8 or early on May 9, 2003, a nurse contacted Dr. Beaudoin and advised him of the abnormal symptoms of Plaintiff. He immediately ordered a CT scan, which revealed free air in the retroperitoneal area – diagnostic of a suspected bowel leak or abscess – and at 3:30 a.m. on May 9, 2009 Dr. Beaudoin performed laparoscopic

surgery that revealed the leak. Unfortunately, by this time the sepsis and abscess within the abdomen had become so advanced that multiple surgeries to drain the abscess and a lengthy hospital stay and extensive rehabilitation were required to restore Plaintiff to health.

The above facts are disclosed in Plaintiff's medical records as well as discussed in the deposition testimony of Plaintiff's general surgery expert, Dr. Eduardo Phillips. Dr. Phillips testified that something should have been done for Plaintiff within the first 72 hours following her surgery. (Phillips' dep, 16-17) (**Exhibit 6**) Specifically tests should have been ordered to evaluate the cause of her ongoing symptoms, especially a CT scan.

Q. ... Was it your opinion that by May 3rd or May 4th, there was in fact an anastomotic leak?

A. Yes.

Q. In your opinion, had a CAT scan been ordered during that period of time, do you have an opinion based upon your experience and based upon a reasonable degree of medical experience as to whether or not that CAT scan would have shown some findings that would have alerted the radiologist and for the surgeon as to the presence of a problem, sir?

A. Yes.

(Phillips' dep, 39)

Dr. Phillips explained how the CT scan would have disclosed a leak or abscess and also affirmed that had the leak or abscess been discovered within this earlier time frame it is more probable than not that Plaintiff would have avoided the additional surgeries and complications she went on to have. (Id., 33-35, 39-40). Plaintiff likely would have required only the placement of a drainage tube to drain the gastrointestinal tract until the anastomosis sealed itself and healed. (Id., 39-41)

Accordingly, Plaintiff filed her Complaint in this case against several Defendants alleging that their malpractice caused a delay in the diagnosis of the post-surgical leak that resulted in Plaintiff's condition progressively deteriorating to the point where she was required to have more extensive injuries, requiring additional treatments and longer recovery, than would have occurred if the true nature of her condition had been more promptly determined. Plaintiff filed her lawsuit against Dr. Rynbrandt, other physicians associated with Dr. Rynbrandt, his professional corporation, and Northern Michigan Hospitals, Inc. In the course of litigating this case the physician Defendants and their professional corporation were voluntarily dismissed from this lawsuit, leaving only the hospital as the remaining Defendant.

Plaintiff's claims against Defendant Hospital relate to allegations of nursing malpractice. Particularly these claims focus on the failure of Defendants' nurses to timely apprise Dr. Rynbrandt of all the dire symptomology of Plaintiff following surgery, and, in the absence of observing any treatment addressing the patient's deteriorating condition, their neglecting to go up the chain-of-command to obtain assistance for the patient. Plaintiff's nursing expert, Lawrence Boyd, R.N., testified:

- Q. And then when the doctor would then arrive is not up to the nurse, though, its up to the doctor, correct?
- A. Correct, but if the nurse is concerned about their patient, they phone a physician, say, look, this guy's lab values aren't looking right. The patient is not looking good. Urine output is low. Increased pain. Confused. Tachycardic. Maybe you should come in and see this patient. If the physician at that point chose not to, then a reasonable and prudent nurse would go to their supervisor, would be the next step and say, look, my patient is not doing that great. I have these abnormal lab results, and the physician doesn't seem too concerned or not coming in to respond to these. So it's a

nurse's duty to get either to their charge nurse or the unit manager with these concerns.

(Boyd dep, 25) (**Exhibit 7**)

Plaintiff's nursing expert offered multiple criticisms of Defendant's nurses in failing to adequately document and communicate to Dr. Rynbrandt Plaintiff's deteriorating condition and failing to take steps to secure appropriate medical treatment of Plaintiff. (Id.)

Defendant Northern Michigan Hospital filed a Motion for Summary Disposition, pursuant to MCR 2.116(C)(10), asserting that Plaintiff could not prove that the alleged nursing malpractice was a proximate cause of Plaintiff's injuries because Dr. Rynbrandt, after settling out of this case, opined that no matter what the nurses had told him about Mrs. Martin, his treatment of her would not have changed. (**Exhibit 5**) Initially Defendant's motion was denied by the Circuit Court, but Defendant subsequently filed a second motion for summary disposition presenting the same causation arguments, but accompanied by affidavits signed by Dr. Rynbrandt and Dr. Beaudoin. (**Exhibits 8 and 9**) Dr. Rynbrandt's affidavit indicated that he was at all times aware of the condition of Plaintiff and that nothing the nurses would have told him would have added to his knowledge of her condition or would have caused him to alter his treatment of Plaintiff. Dr. Beaudoin, who was Chief of Surgery, (and who ultimately was the physician who ordered the crucial diagnostic CT scan and then immediately performed surgery on Plaintiff to address her bowel leakage), affirmed in his affidavit that if he had been asked to review the treatment of Plaintiff before May 8, 2009, he "more likely than not" would "not have suggested or requested any change in the care and treatment being provided" by Plaintiff's attending physicians.

The Circuit Court granted Defendant Hospital's second Motion for Summary Disposition by an opinion and order entered August 9, 2007. Intriguingly the trial court's grant of summary disposition appears to recognize that a jury might disbelieve the claims of Dr. Rynbrandt regarding what he would have done, but ruled that Plaintiff's theory of causation "is no more likely than the alternative theories" and remains conjecture only. (Circuit Court's opinion, p. 6). Accordingly, the Circuit Court ruled that Plaintiff failed to carry her burden of showing that, more likely than not, he [Dr. Rynbrandt] would have done anything differently had he been verbally told the findings in question. (*Id.*, pp 6-7). The trial court's ruling respecting the "chain-of-command" theory of liability is unclear, but would also appear to rest upon a finding that Plaintiff would be unable to show that Dr. Beaudoin would have acted any differently if he had been asked to review Plaintiff's care earlier.

Plaintiff timely filed a claim of appeal from the granting of Defendant's motion. On January 27, 2009, the Court of Appeals released for publication its opinion affirming the ruling of the Circuit Court. However, the opinion goes further than the Circuit Court in holding that in determining issues of causation in these circumstances, the testimony of the actual physician as to what he or she would have done, if the standard of care had been followed, is conclusive.

Plaintiff submits that the decisions of the Court of Appeals and the Circuit Court are erroneous and contrary to Michigan law. For the reasons presented below, Plaintiff asks that these decisions be reversed.

ARGUMENT

THE CIRCUIT COURT IMPROPERLY GRANTED SUMMARY DISPOSITION IN FAVOR OF DEFENDANT ON THE BASIS OF ASSUMING THAT STATEMENTS MADE BY WITNESSES IN AFFIDAVITS REGARDING THEIR KNOWLEDGE, STATE OF MIND, INTENTIONS AND MOTIVES WERE TRUE, AND REJECTING EVIDENCE FROM WHICH A JURY COULD HAVE CONCLUDED THAT SUCH STATEMENTS WERE NOT CREDIBLE.

Plaintiff-Appellant submits that the Circuit Court erred in this case in granting summary disposition based upon the Court's own determination of the credibility of the affidavits of Dr. Rynbrandt and Dr. Beaudoin, and that the Court of Appeals erred in affirming that decision and, in so doing, essentially adopting a rule of law that makes the statements of witnesses regarding what they would have done under different circumstances essentially unimpeachable. Plaintiff, for the following reasons, asks that these rulings be reversed.

I. STANDARD OF REVIEW

A Circuit Court's grant or denial of a motion for summary disposition is reviewed de novo on appeal. Waltz v. Wyse, 469 Mich 642 (2004).

II. THE TRIAL COURT AND COURT OF APPEALS ERRED IN RESOLVING CREDIBILITY ISSUES ON A MOTION FOR SUMMARY DISPOSITION

This is a case that invites this honorable Court to review some of the fundamental legal principles that apply to motions brought under the summary disposition court rule, MCR 2.116(C)(10). Essentially Defendant Hospital's motion regarding causation in this case rested entirely upon the strength and veracity of two affidavits the hospital submitted in support of its motion. Plaintiff claims that the standard of care required that Plaintiff's persistent and deteriorating post-surgical symptoms be properly addressed in the first

days after her surgery by having her undergo additional diagnostic tests, such as a CT scan, to investigate why Plaintiff was getting worse, and not better. Plaintiff alleges that Defendant's nurses were aware of Plaintiff's steadily worsening condition and that the standard of care required the nurses to notify Plaintiff's attending physician, Dr. Rynbrandt, of all of Plaintiff's problems, to encourage him to respond to those medical problems, and to go above him in the chain-of-command if Dr. Rynbrandt appeared non-responsive to Plaintiff's increasingly nonreassuring symptoms. Defendant Hospital sought to defeat these claims of nursing malpractice upon a motion for summary disposition by submitting the affidavit of Dr. Rynbrandt asserting that the nurses could not have provided him with any additional information concerning Plaintiff that would have altered his treatment of Plaintiff during those post-surgical days, and an affidavit by Dr. Beaudoin, Dr. Rynbrandt's superior, affirming that, more likely than not, he would not have intervened to alter the treatment of Plaintiff had he been asked to review Dr. Rynbrandt's treatment of Plaintiff. It was on the strength of these two affidavits that the trial court granted Defendant's motion.

But in doing so, and in affirming the decision of the trial court in the Court of Appeals, the courts below violated one of the basic restrictions imposed by law upon motions for summary disposition. Defendant Hospital was granted summary disposition in this case based entirely upon the credibility the court's below gave to Dr. Rynbrandt's and Dr. Beaudoin's affidavits. While Plaintiff had presented expert testimony of a general surgeon, Dr. Phillips, that it would have been a violation of the standard of care for any general surgeon, fully apprised of the circumstances of Plaintiff's condition in the 72 hours after surgery to fail to take steps to diagnose the cause of her ongoing symptomology,

and, specifically, to order a CT scan (which would have shown the bowel leakage), the courts below chose to believe the truth of the assertions by Dr. Rynbrandt and Dr. Beaudoin that they, personally, would not have done anything different (notwithstanding that doing nothing was a breach of the standard of care.)

Were these affidavits truthful? First, that is a question that should neither be asked nor answered by the court upon a motion for summary disposition, since such matters are for the jury to decide. But there is a sound basis for questioning the truthfulness of these affidavits. Both of these witnesses are affiliated in some way with the Defendant Hospital – Dr. Beaudoin serves as the hospital's chief of staff of its surgery department and Dr. Rynbrandt is on staff at the hospital and uses its facilities to treat his patients. Both, therefore, have a personal interest and bias that favors the Defendant in this case. Dr. Rynbrandt did not make his assertions in his affidavit until his dismissal from this case under circumstances relieving him from any potential liability for having violated the standard of care in treating Plaintiff, while Dr. Beaudoin could safely assume that the running of the statute of limitations would spare him of any consequences arising from his treatment of Plaintiff. At the same time, although Dr. Beaudoin's affidavit insists that "more likely than not" he would not have done anything earlier to assist Plaintiff had he been asked to review her course of treatment, that statement itself is significantly impeached by the undeniable fact that immediately upon being informed of Plaintiff's symptoms he took it upon himself to order a diagnostic CT scan and, within only a period of a few hours, was himself performing surgery to address Plaintiff's post-surgical complication!

Plaintiff's point is this: Defendants' affidavits raise, but do not resolve, a genuine issue of fact as to causation in this case. Having presented evidence as to the treatment that Plaintiff, pursuant to the standard of care, should have received in the first 72 hours post-surgery, the affidavits of her actual treating physicians that they would have acted in a manner contrary to the standard of care only presents an issue of credibility for the jury to resolve. Briefly the trial court, in its opinion, showed a spark of insight in observing that the jury might not believe Dr. Rynbrandt (something the Court of Appeals appears not to have even considered!), but the trial court then drew the wrong conclusion from that insight. The courts below failed to recognize that if a jury chose not to believe the assertions made by Dr. Rynbrandt and Dr. Beaudoin, then the jury could reasonably conclude that the alleged malpractice of Defendant's nurses was a cause in fact and proximate cause of Plaintiff's injuries.

A. Credibility of Witnesses Should Not be Decided by the Court Upon Summary Disposition Motions

Michigan law has consistently and repeatedly held that it is not proper for the courts to make credibility determinations in deciding a motion for summary disposition. Where a case involves questions of credibility, intent, or state of mind, summary disposition is hardly ever appropriate. Harrison v Olde Financial Corp., 225 Mich App 601, 606, n 5; Michigan National Bank-Oakland v Wheeling, 165 Mich App 738, 744-745 (1988). Courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion. Skinner v Square D Co., 445 Mich 153, 161 (1994), Burkhardt v Bailey, 260 Mich App 636, 646-647 (2004); making credibility determinations and weighing evidence is not permissible in deciding summary dispositions motions. In re Handelsman, 266 Mich App 433, 438 (2005). Summary

disposition is especially suspect when the motive or intent are at issue and where a witness' credibility is crucial. Vanguard Ins Co. v Bolt, 204 Mich App 271, 276 (1994).

One of the more recent applications of this principle can be seen in White v Taylor Distributing Co., 482 Mich 136 (2008). In this case the plaintiff was injured in a rear-end automobile accident. The driver of the vehicle that caused the accident asserted a "sudden-emergency" defense based upon his claim that he had "blacked out" seconds before the collision. Defendant driver filed a motion for summary disposition and presented evidence of the driver's illness, diagnosed after the accident, that would cause him episodes of blacking out, of the post-accident medical records where he was diagnosed as having a "syncopal episode", and his own deposition testimony where he affirmed that he had blacked out before the accident. The trial court granted Defendant's motion over plaintiff's objection that whether the driver had, in fact, suffered a black out before the accident was a disputed question of fact. The Court of Appeals reversed and the Supreme Court granted review. In affirming the Court of Appeals, and reversing the summary disposition granted to defendant, the Court reaffirmed:

We do not assess defendant's credibility. But, under the legal and factual circumstances "[w]e do not ignore the inconsistencies in defendant's statements" Birdwell v Segel, 362 Mich 102, 106, 106 NW2d 386 (1960). The questions regarding whether defendant experienced a sudden emergency and whether defendant was negligent in driving under the facts presented in this case are proper questions for the jury

(Id., 142-143)

The Court of Appeals' decision, at 275 Mich App 615 (2007), which the Supreme Court affirmed, is even more instructive of this principle. The Court of Appeals cites the advisory committee notes to F.R.Civ.P. 56(e) (the federal equivalent to Michigan's

summary disposition rule) which observes that where “an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary disposition is not appropriate.” The Court of Appeals also follows the example of Wilmington Trust Co v Manufacturers Life Ins Co, 624 F.2d 707 (5th Cir., 1980), involving an insurance claim. The defendant insurer moved for summary disposition based upon the testimony of the underwriter who accepted an application containing an admitted misrepresentation. The underwriter testified that the misrepresentation was material to the policy and but for the misrepresentation the policy would not have been issued as it was. In reversing the summary judgment granted by the trial court, the Federal Court of Appeals emphasized that a material issue of fact rested upon the credibility of the underwriter, and by granting summary disposition, the court deprived plaintiff of prospectively impeaching the underwriter.

This should remind the court that underlying the oft-repeated admonition that a trial court should not decide issues of credibility upon a motion for summary disposition is a more sacred legal principle of law bearing upon the constitutional right of confrontation, and providing a litigant the opportunity to both cross-examine and impeach a witness upon whose testimony a crucial issue of fact depends. This is especially pertinent, as here, where the statements of witnesses upon which the motion for summary disposition relies are statements made in affidavits.

B. Where a Material Fact Question Depends upon the Credibility of a Witness' Affidavit Summary Disposition is not Appropriate

In the instant case the grant of summary disposition in favor of Defendant Hospital was premised entirely upon the weight and credibility ascribed to the statements made by Dr. Rynbrandt and Dr. Beaudoin in their affidavits. While many

cases have recognized the merits of an affidavit to create a question of fact precluding the grant of a motion for summary disposition, Plaintiff is aware of no case in Michigan in which a witnesses' affidavit has been found to be the basis for granting a party summary disposition in a tort action. Historically Michigan decisions have emphatically held that a summary disposition may not be granted on the strength of a witness' affidavit because the credibility of the witness making the affidavit is a matter only the jury can decide. [W]here the truth of a material factual assertion of a movant's affidavit depends upon the affiant's credibility, there inheres a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted." Brown v Pointer, 390 Mich 346, 354 (1973). See, e.g., Durant v Stahlin, 375 Mich 628, 647-648 (1965), Arber v Stahlin, 382 Mich 300, 309 (1969) (emphasizing the importance of cross-examining the affiant at trial). Similarly, see, Smith v Woronoff, 75 Mich App 24, 32-33 (1977).

In Durant v Stahlin, 374 Mich 82, 85 (1964), the Court observes:

Each motion [for summary judgment] was supported by an affidavit sworn to by the interested movant only. Each of the affidavits sets forth a flat on conclusionary denial – that only – of the plaintiff's declared charge against the movant-affiant. Thus we are confronted with a fact made immutable by the constitution; that in tort cases like the one at bar, where an issue of credibility rises directly from a prepossessed movant's solitary affidavit, summary judgment cannot be entered in favor of such movant without offense to the most sacred of all constitutional guarantees. ...

Among the cases cited in Durant, as expanding upon this principle is Sartor v Arkansas Natural Gas Corp., 321 U.S. 620, 626, 88 L.Ed 967, 64 S.Ct. 724 (1944), where the U.S. Supreme Court set aside a summary judgment based upon the submission of eight affidavits supporting the position of the moving party. The Court noted that "the mere fact that the witness is interested in the result is deemed sufficient

to require the credibility of the witness to be submitted to the jury as a question of fact”, and the court reaffirmed the importance of confrontation and cross-examination. “There are many things sometimes in the conduct of a witness on the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men. ...” The trial court, accordingly (and this honorable Court of Appeals) “must not usurp the trial jury’s right ... to determine an affiant’s credibility” by granting a summary disposition based upon a witnesses’ affidavit. See, e.g., SSC Associates Ltd Partnership v General Retirement System of Detroit, 192 Mich App 360, 365 (1991); Brown v Mayor of Detroit, 271 Mich App 692, 710-711 (2006).

In SSC Associates Ltd, supra, at 365, it is stated:

It is well settled that where the truth of a material factual assertion of a moving party’s affidavit depends upon the affiant’s credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted.

As more succinctly stated in Paul v U.S. Mutual Financial Corp., 150 Mich App 773, 779 (1986), “the trial court must avoid substituting a trial by affidavit and deposition for a trial by jury. A Court is not allowed to make findings of fact or to weigh the credibility of affiants or deponents.”

In Walker v Cahalan, 411 Mich 857 (1981), a libel action, this Court reversed an order of summary disposition noting:

... Defendant Cahalan’s affidavit provided evidence only of his state of mind: that he bore plaintiff Walker no malice and that he believed his statement to be true. The probative value of a witness’s testimony as to

his own state of mind depends upon his credibility, and, when the credibility of a witness or deponent is crucial, summary judgment should not be granted. ... An averment of what the defendant believed or thought, as distinguished from an averment of the existence of objective facts, does not put a plaintiff to the burden of presenting evidentiary facts of actual malice to withstand a summary judgment action.

The present case does not involve any "averment of the existence of objective facts" by the affidavits, Dr. Rynbrandt and Dr. Beaudoin, but averments of their state of mind – of what they imagine and contemplate they would have done had different facts been presented to them. Plaintiff should not be put to the burden of presenting evidentiary facts disproving their averments, but should be permitted to cross-examine the affiants before the jury to impeach the credibility of what they seek to affirm. This is particularly important here where Plaintiff can readily show the bias and interest¹ of these witnesses in favor of Defendant and that their testimony conflicts with what the standard of care would have obliged them to do if presented with different facts and, in Dr. Beaudoin's case, with what he actually did.

C. Summary Disposition is Inappropriate where there is Conflicting Evidence Regarding a Material Issue of Fact

The standards that apply to summary disposition proceedings are well entrenched in our jurisprudence. MCR 2.116(C)(10) was not intended to be a substitute

¹ As noted in Sartor, supra, the mere fact that the witness is interested in the result of the suit is sufficient to require the issue of credibility to go to the jury. See, also, Sonnentheil v Christian Moerlein Brewing Co., 172 U.S. 401, 408, 19 S.Ct. 233, 43 L.Ed 492.

for trial by jury, and case law has repeatedly emphasized that summary disposition should only be granted where the undisputed evidence before the court shows that nonmoving party's claim or defense has a fatal defect that cannot be overcome, or is one that is impossible to prove. In making this evaluation, the trial court may not weigh the evidence before it or make factual findings. Accordingly, "if the evidence before the court is conflicting, summary disposition is improper." DeFlavis v Lord & Taylor, Inc., 223 Mich App 432, 437 (2005).

The trial court in this case, unlike the Court of Appeals, recognized that jurors might disbelieve the physicians whose affidavits were presented to the court. But, unfortunately, the court nevertheless committed the error of weighing that evidence against that of Plaintiff's expert concerning what should have been done to address Plaintiff's post-surgical complications, and itself concluded that because Plaintiff's evidence did not outweigh the assertions made by these treating physicians, any finding that the malpractice of Defendant's nurses was a proximate cause of Plaintiff's injuries would rest purely on conjecture.

But in ruling in this way the trial court usurped the role of the jury and substituted its own findings of fact for those of the trier of fact. If, in fact, as the trial court acknowledged, the jury disbelieved the averments made by Dr. Rynbrandt and Dr. Beaudoin, and concluded instead that these physicians actually would have complied with the standards of their profession in responding to Defendant's nurses, then the jury would have a reasonable basis on which to find in favor of Plaintiff and against Defendant Hospital.

Not uncommonly a medical malpractice case presents such disputed questions of fact for jury resolution. While some cases may turn upon deciding between conflicting evidence what the standard of care required under the circumstances, in others the matter to be decided is simply whether the testimony of a physician in respect to complying with the standard of care is credible. For example, in Miles v. Van Gilder, 1 Mich App 522 (1964) it was established that the standard of care required that a surgeon avoid cutting the dura during the back surgery performed upon Plaintiff. Defendant surgeon testified that he performed the surgery properly. But Plaintiff experts opined that the dura had been severed based on spinal fluid leakage and drew the inference that this had to have occurred during the surgery defendant performed. Hence, notwithstanding the defendant surgeon's denial of responsibility for the injury to the dura, the Court of Appeals reversed the judgment N.O.V. entered by the trial court, noting that it was for the jury to draw legitimate inferences as to whether proper care had been used during the surgery.

A recent example of weighing conflicting evidence in a medical malpractice case is provided in the unpublished Court of Appeals decision, Barrick v Morse, Ct of App Doc No. 282977, released November 18, 2008 (**Exhibit 10**). Plaintiff presented an operative report indicating that in removing a surgical screw defendant physician had breached the standard of care by coring the screw out, stripping the screw tract. Defendant himself testified that he had, in fact, carefully backed the screw out, and not used a coring device along its entire length. The trial court granted defendants' motion for summary disposition based upon defendant's testimony. In reversing, the Court of Appeals noted, "Essentially, the trial court decided that defendant's deposition testimony

was more credible and worth more evidentiary weight than the operative report. Making credibility determinations and weighing evidence is not permissible in deciding a motion for summary disposition," citing In re Handelsman, 266 Mich App 433, 438 (2005).

Logically, if a defendant physician's own deposition testimony is not conclusive as to what defendant's conduct was under past circumstances, and is not a proper basis upon which summary disposition can be granted without violating the prohibition against the court making credibility determinations and weighing evidence, it becomes even more attenuated to grant summary disposition on the basis of what witnesses in affidavits predict they might have done under differing circumstances. All such testimony is subject to impeachment, and in the face of conflicting evidence, it is not appropriate for the trial court to weigh such evidence and conclude that simply because these affidavits predict one line of conduct, the jury might not draw the reasonable inference that had these physicians been asked to respond to the information that should have been given to them, it is more probable than not that they would have complied with the standard of care and provided appropriate and timely treatment to plaintiff. The conflicting evidence before the trial court mandated denying, not granting, Defendant's summary disposition motion.

D. The Out-of-State Cases Relied On by the Courts
Below are Factually Distinguishable

Both the trial court and the Court of Appeals were influenced to rule in favor of Defendant in this case by two out-of-state cases Defendant had brought to their attention. However, a more careful reading of these decisions from Ohio and Illinois show that they are factually distinguishable from the present case. Further, they do not

exhaust all the precedents from sister jurisdictions that have a bearing upon the issue presented here.

Albain v Flower Hospital, 50 Ohio St 3d 251, 553 N.E.2d 1038 (1990) was a case involving a placental abruption that caused a stillbirth. Plaintiffs filed suit against both a hospital and an obstetrician. The plaintiff mother had come to the hospital with vaginal bleeding at about 2:00 p.m. and Dr. Abbo, the defendant obstetrician, was phoned and agreed to see the patient after she finished seeing her patients in her office at 5:00 p.m. At about 3:50 p.m. Dr. Abbo was telephoned by the obstetrical nurse, who apparently reported all of plaintiff mother's vitals to be normal. Dr. Abbo finished her office appointments at about 6:00 p.m., went home to eat, and did not arrive until 8:00 p.m. The principal claim that plaintiffs made against the hospital nursing staff was that the nurse should have told Dr. Abbo, during the 3:50 phone call, that the patient's pad was saturated with bright red blood. What is interesting about this case is that Dr. Abbo actually testified that had this information been given to her, **she would have changed her conduct** and would have come to the hospital directly from her office, and arrived at around 5:30 p.m. instead of at 8:00 p.m. The reason plaintiffs failed to prevail on the proximate cause defense of the hospital was not because Dr. Abbo would not have done anything differently (for, according to her own testimony she would have made an effort to see the patient sooner), but because plaintiff's expert had testified that it was more probable than not that the fatal hypoxic episode had occurred at 4:00 p.m. – just 10 minutes after the nurse made the phone call at issue! Hence, even if Dr. Abbo had received the information plaintiffs alleged she should have been given, which would have changed her conduct, plaintiffs could not show that Dr. Abbo would have been

able to see her patient, or done anything different to prevent the fatal injury. (In fact, when she did arrive, Dr. Abbo did not perceive the child to be in immediate danger nor in need of an immediate C-section, but still contemplated a vaginal delivery. This was additional evidence that advising Dr. Abbo of the blood saturation earlier could not have altered the outcome).

Therefore, Albain presents a situation where the nurse's different conduct would have altered the attending physician's behavior towards the patient, but still too late to do the patient any good.

Seef v. Ingalls Memorial Hospital, 311 Ill. App 3d 7, 243 Ill. Dec. 806, N.E.2d 115 (1999) is an even more curious birth trauma case from a causation standpoint. In Seef the principal allegation against the defendant hospital's nursing staff was that they should have advised the attending obstetrician, a Dr. Sutkus, of unstable signs on a fetal heart monitor earlier. However, Dr. Sutkus "admitted that he would have misinterpreted the data on the monitor strips the same way", based upon his state of knowledge at the time – that is, he would not have recognized the ominous signs on these monitor strips even if he had been summoned by the nurses to look at them! On the separate issue of whether the nurses should have gone up the chain-of-command, the court noted that plaintiffs had not presented any expert testimony as to whether this should have been done or what would have been achieved, making this "chain-of-command" testimony too speculative.

Hence in Seef the court had to weigh testimony regarding a physician's conduct that was based not just on his state of mind, but his state of mind as circumscribed by an existing objective fact – his admitted lack of skill at the time in interpreting fetal heart

monitor strips. "We note initially" the court stated "that Dr. Sutkus' testimony was neither self serving nor hypothetical. Rather, Dr. Sutkus made an inculpatory, unequivocal statement regarding his mental state at the time of the incident. He took full blame for the baby's death by admitting that, based upon the state of his knowledge at the time, he misapprehended the seriousness of the situation: he admitted that, in hindsight, the baby should have been delivered sooner."

Dr. Sutkus' skill or ability to properly interpret a fetal monitor tape, which expert testimony can hardly challenge, is not the same as the question of whether Dr. Rynbrandt, in the present case, would have ordered a CT scan for Plaintiff sooner if the nurses had fully advised him of Plaintiff's distressed condition. And, unlike Seef, Plaintiff here had presented expert testimony in support of her chain-of-command allegations.

Interestingly, even faced with the unique facts in Seef, there was a dissenting opinion in that case. Besides emphasizing (as we have throughout this brief), that the weight of Dr. Sutkus' testimony was a matter for the jury to decide ("Dr. Sutkus speculated about what he would have done that the nurse acted in accordance with the standard of care, whereas [plaintiff's expert] offered not speculation, but an expert opinion as to how an obstetrician meeting the standards of care should have proceeded if properly notified. The weight to be given to Dr. Sutkus' and [plaintiff's expert] testimony was a matter for the jury to determine ... a trial court is not required to accept

a defendant's hypothetical² testimony as uncontroverted fact, particularly when the opposing party offers contradictory testimony"), the dissent even points out that the majority ruling is in conflict with another case previously decided by the same court, Suttle v Lake Forest Hospital, 315 Ill. App 3d 96, 733 N.E.2d 726 (2000), where a hospital and obstetrician failed to advise the pediatrician of an abnormal placenta noted at birth, resulting in improper pediatric treatment of the newborn's breathing problems, leading to permanent injury. Although the pediatrician testified that his treatment of the newborn would not have been different had he been made aware of the abnormal placenta, and the trial court dismissed claims against the obstetrician on this basis, on appeal the trial court's ruling was reversed on the basis that whether the pediatrician's treatment would have remained the same was a question for the jury to decide.

As a final, and significant coda, to this discussion, **it is important to note that three years later the Illinois Supreme Court decided to follow the dissenting opinion in Seef, in Snelson v Kamm, 204 Ill. 2d 1, 272 Ill. Dec 610, 787 N.E.2d 796, 820-821 (2003) when it observed (emphasis added):**

Snelson's suggestion that it is impossible for a plaintiff to prove causation where a doctor testifies that "he would not have acted differently regardless of what information could have been given him [by the nurses]" is a red herring for two reasons. First, Snelson mistakenly assumes that a doctor will not be willing to tell the truth about whether the conduct of hospital nurses affected his decision-making ability. **Second, a plaintiff would always be free to present expert testimony as to what a reasonably qualified physician would do with the undisclosed information and whether the failure to disclose the information was a proximate cause of the plaintiff's injury in order to discredit a**

² Curiously, the Court of Appeals in this present case would contend that Plaintiff could not overcome the affidavits of Dr. Rynbrandt and Dr. Beaudoin by presenting evidence of what "hypothetically" they should have done for Plaintiff. The Court failed to recognize that their own affidavits presented merely hypothetical testimony as to what they would have done.

doctor's assertion that the nurse's omission did not affect his decision making. Seef [supra] (O'Mara Frossard P.J., dissenting). In such a case, a factual dispute would be created sufficient for the jury to resolve.

Both the dissent in Seef, and the holdings in Suttle and Snelling, provide a better analysis of the law with regard to the facts present in this instant case, as does the Alabama Supreme Court's decision in Davison v Mobile Infirmary, 456 So. 2d 14 (Ala., 1984). In Davison, plaintiff alleged that defendant hospital was liable for the neglect of its radiologist to timely inform plaintiff's treating doctor of the presence of an accumulation of a mass of aspirin in plaintiff's digestive tract. The trial court directed a verdict for the hospital on the basis that the treating doctor, co-defendant, Dr. Esham, had testified that even if he had seen the X-ray report sooner, he would not have acted any differently, even though the standard of care required that prompt action be taken to neutralize the aspirin. In reversing the trial court's ruling, the Alabama Supreme Court stated:

At the risk of repetition, we restate the rationale for our holding. Because Dr. Esham testified he would not have treated the patient sooner had he known earlier of the X-ray findings, the trial court reasoned that, even if the Hospital was negligent, there was a failure of proximate cause. In directing the verdict for the hospital, the trial court usurped the jury's prerogative and decided a factual question-the question of the credibility of Dr. Esham-even though the court submitted that very factual issue to the jury.

The jury, acting within its exclusive fact-finding province, could have concluded that it was in the treating doctor's self-interest to say he would have done nothing sooner, for to have said otherwise would have been an admission of guilt, where, as here, he did nothing sooner or later to alleviate the toxic condition. As a premise for its directed verdict holding, the trial court also decided an additional factual question-whether the X-ray doctor's report, as routinely handled, adequately apprised the treating doctor of the unusual and dangerous potential of that which was revealed

by the X-ray. This, too, involved the credibility of the witness, which is always for the jury.

Rather than supporting Defendant's position in this case, Plaintiff submits that a more careful review and analysis of the out-of-state decisions that have addressed this issue show that it was indeed error for the trial court to grant, and for the Court of Appeals to affirm, summary disposition for Defendant solely on the basis of the affidavits of Dr. Rynbrandt and Dr. Beaudoin hypothecating on what they would have done if the nurses had complied with the standard of care.

E. Principles of Medical Malpractice of Law and Considerations of Public Policy Preclude Summary Disposition Based Upon Physician's Affidavits

In affirming summary disposition the Court of Appeals appeared troubled by Plaintiff's contention that the conduct of Dr. Rynbrandt and Dr. Beaudoin be measured against what a "hypothetical" physician would do under the same circumstances. In fact, the whole of medical malpractice law is premised on such a "hypothetical" physician and how that physician should act under the circumstances. The hypothetical reasonable physician of ordinary care and prudence is what the law considers in determining the "standard of care" against which the conduct of any particular physician must be evaluated to determine issues in controversy. This standard of care, based upon what the hypothetical physician of average prudence and care would do under the circumstances, and not upon the peculiar practice of any individual physician (or what that individual may by affidavit claim he would do) provides an objective standard that both the court and the trier of fact can apply in assessing both the conduct and credibility of a physician. When a physician affirms or testifies that he or she would have pursued a course of conduct that is in breach of the standard of care, it is

appropriate to allow a jury to weigh the credibility of such an assertion and within the jury's province to reject such testimony as being a product of bias, prejudice, self interest or the like. Davison, supra. Any alternative view would invite physicians to make any statements at all about what they would have done, to assist a colleague or an institution to escape liability on causation grounds, with no means of challenging the credibility of the statements. Indeed, that is precisely what the decision rendered by the Court of Appeals in the present case encourages, by accepting the affidavits of Dr. Rynbrandt and Dr. Beaudoin not as creating, but as resolving, in Defendants' favor, a disputed question of fact regarding what would have actually occurred had the nurses informed them sooner of the patient's condition and had they acted in accordance with, rather than in defiance of, the applicable, objective, standard of care.

Citing Skinner v Square D Co., supra, the Court of Appeals asserts that a finding of causation for Plaintiff in this case would be "mere speculation" because of the affidavits of Dr. Rynbrandt and Dr. Beaudoin. Plaintiff respectfully disagrees. It would not be "mere speculation" to conclude that if proper information had been communicated to these physicians, and if they had complied with the standard of care, then Plaintiff would have avoided the injuries arising from failure to provide proper treatment. Defendant Hospital has itself injected "speculation" about what would have been done by offering the affidavits of Dr. Rynbrandt and Dr. Beaudoin indicating that they might not have done anything to treat Plaintiff's condition any sooner even if that information had been communicated. This has introduced a disputed question of fact, resting entirely upon the credibility of these witnesses, as to whether the standard of care would have been followed or not by these physicians. As previously discussed,

that kind of "speculation" is merely that which obtains in any case where a jury has to resolve an issue of credibility regarding what an actor would or would not have done under the circumstances. Arguably all issues of credibility can be conceived as involving some degree of "speculation" as to whether or not a particular witness is telling the truth about their actions or intentions, but the law proceeds under the belief that jurors are capable of making that determination "by their natural intelligence and their practical knowledge of men and the ways of men". Sartor, supra. The question of whether or not these physicians would have complied with the standard of care, or instead have acted in the manner they affirm in their affidavits, does not invite the jury to speculate between two unresolvable and equally probable possibilities, as in Skinner, but to resolve a disputed issue of fact respecting the credibility of the two physicians, which task lies exclusively within the province of the fact finder. Appreciating the self interest and bias of staff physicians in favor of Defendant Hospital, and seeing these affidavits further impeached by the actual conduct of Dr. Beaudoin when he did learn of the true state of Plaintiff's condition, the jury could skeptically reject these sacrificial assertions by the physicians as not being credible, and reasonably conclude that these physicians would have complied with the standard of care, and rendered appropriate treatment sooner, had they been kept fully informed of Plaintiff's condition. This is not speculation, but a reasonable inference that can be drawn from the facts when those facts are viewed in a light most favorable to Plaintiff.

In other words, because the standard of care provides an objective standard of what should have been done during the time periods in question, the jury could use that objective standard to weigh the credibility of the statements by Dr. Rynbrandt and Dr.

Beaudoin surmising what they would have done. A finding by the jury relating to causation would not rest on “mere speculation” but upon the jury’s conclusion that it is more probable than not, notwithstanding the present representations of these doctors as to what they now think they would have done, that at the time in question they would have complied with what the standard of care required in light of the further information that should have been made available to them.

Plaintiff is legitimately concerned that by abandoning these objective standards and by permitting courts to dismiss medical malpractice cases on the basis of untested affidavits of physicians this ruling of the Court of Appeals can have far-reaching, dramatic, and harmful impact upon both medical malpractice cases specifically and summary disposition motions generally. Both Dr. Rynbrandt and Dr. Beaudoin authored their affidavits after their own potential liability to Plaintiff became moot – they were free to say whatever they liked regarding the care they would have rendered in the safety of being immune from any consequences for making these statements. Both have reasons to support the interests of the Defendant Hospital. Indeed, more often than not any physician under similar circumstances would be tempted to make averments supporting, rather than harming, a nursing staff the physician regularly works with, a colleague he shares professional interests with, a technician on whose reports he or she routinely relies. There is nothing unnatural about members of the medical profession huddling together in a defensive posture when one of its members faces danger from an outside adversary. Such collusion is a practical reality in plaintiffs bringing medical malpractice cases repeatedly (and is one of the reasons why most plaintiff experts reside in distant states).

But there is no sound reason why the courts should further encourage such collusion and dismiss medical malpractice cases solely on the weight of affidavits treating physicians submit to advance the interests of a colleague or an institution where they work.

Plaintiff, in this case, perhaps unwisely dismissed Dr. Rynbrandt from this action. It is possible that, had he remained a defendant in this lawsuit, his primary defense at trial to allegations that he failed to timely order a CT scan of Plaintiff would have been that he was unaware of the seriousness of Plaintiff's condition, that the hospital's nurses failed to keep him apprised of that condition! One of the dangers of the Court of Appeals' decision in this case is that it will discourage settlements in cases involving similar facts out of fear that any defendant released from the case will proceed to make inculpatory affidavits for the purpose of defeating any claims against the remaining parties. Plaintiff would certainly have not settled her claims piecemeal if it was thought that her remaining claims against the hospital could be tossed out solely on the strength of a former defendant's affidavit.

Moreover, by taking the unprecedented step of giving unimpeachable veracity to these two affidavits, the Court of Appeals is opening the door to future "trials by affidavit". This case signals to trial courts, not just in medical malpractice cases, but generally, that they will hereafter be empowered to decide questions of weight and credibility in summary disposition proceedings. This, as shown above, is a consequence of the Court of Appeals' decision that is in conflict with a long line of venerable precedents to the contrary. In sum, the Court of Appeals has published a

very troubling and potentially disastrous opinion in this case that should be carefully reviewed.³

F. Applying these Legal Precepts to the Present Case

Both of Plaintiff's experts testified as to what the nurses should have done in the face of the obvious signs of an anastomotic leak. The nurses should have brought the abnormal findings to the direct attention of Dr. Rynbrandt (Dr. Eduardo Phillips dep, pp 11-12). If Dr. Rynbrandt didn't respond or if the nurses became aware, as they should have, that Dr. Rynbrandt wasn't responding to Mrs. Martin's deterioration, they should have gone up the chain of command to the chief of surgery and, if there was still no appropriate response, they should have gone even higher (Dr. Eduardo Phillips dep, pp 17, 32, 33, 39, 40, 44 – 48). Dr. Phillips testified that based upon his experience and the standard of practice applicable, had the nurses gone up the chain of command, more probably than not, ultimately they would have found someone to timely intervene and had that timely intervention occurred all of Mrs. Martin's subsequent problems, including the multiple surgeries, ileostomy, six months in the hospital and near death due to sepsis would have been avoided. (Dr. Eduardo Phillips dep, pp 32 – 35, 39 – 40, 42 – 44, and 45 – 48).

Plaintiff's nursing expert Larry Boyd is a former employee of Northern Michigan Hospital. Mr. Boyd's discovery deposition was taken on March 1, 2007, and in that deposition he clearly established that his credentials meet the requirements of MCL

³ Plaintiff is not suggesting that summary disposition can never be granted under similar facts. If there is no expert testimony showing what the standard of care required under the circumstances, or if unimpeachable documentary evidence supports the averments in an affidavit, a court could justifiably grant the motion. But that is not our case.

600.2169 for purposes of giving standard of practice testimony against the nursing staff at Northern Michigan Hospital.

Mr. Boyd testified that the nurses at Northern Michigan Hospital committed multiple acts of malpractice including but not limited to:

- a. Failing to timely apprise Plaintiff's treating doctors including Dr. Rynbrandt of Mrs. Martin's deteriorating condition.
- b. Failing to adequately monitor Mrs. Martin's vital signs, food intake and urine output.
- c. Failing to go up the chain of command, and go over Dr. Rynbrandt's head to hospital administration when it became apparent that neither Dr. Rynbrandt nor any physician from his office were adequately addressing Mrs. Martin's deterioration.

Hence Plaintiff presented expert testimony to the trial court indicating what the standard of care required of Defendant Hospital's nurses, how it was breached, and asserting that as a proximate cause of that breach Plaintiff did not receive the timely intervention she required. Defendant, in moving for summary disposition, contended that on the issue of causation these claims were defeated by the affidavits Plaintiff's treating physician, Dr. Rynbrandt, and the surgical chief of staff, Dr. Beaudoin.

i. Dr. Rynbrandt's Affidavit

The length (13 pages) of Dr. Rynbrandt's affidavit does not add to its substance. His essential affirmation is that he saw Plaintiff every day and reviewed her chart and, accordingly, was well aware of her condition, and nothing else the nurses might have told him would have altered his treatment of Plaintiff.

However, apart from his affidavit, there is no documented evidence or corroborative testimony that he actually saw Plaintiff every day after her surgery and reviewed her chart. Defendant has not shown any entries in Plaintiff's medical records

confirming Dr. Rynbrandt's presence during the days at issue, even though these records dutifully record the bedside attendance upon Plaintiff by his assistants and residents. Plaintiff's expert will testify that if Dr. Rynbrandt was daily keeping abreast of Plaintiff's post-surgical developments, then the standard of care could have required him to recognize her ongoing symptoms as evidence of a possible leak or abscess and that he order tests, specifically a CT scan, to assist him in diagnosing the cause of her unresolving complications. But it is evident that this was not done. The only physician intervention that occurred during the first three days was another physician's prescribing of pain medication.

Accordingly, a jury might find that Dr. Rynbrandt was aware of Plaintiff's situation and simply breached the standard of care in not doing anything constructive for Plaintiff. But the jury might likewise doubt the veracity of Dr. Rynbrandt's affidavit and instead conclude that he did not take appropriate actions because of the failure on the part of the nurses to communicate to him the full facts of Plaintiff's post-surgical problems.

ii. Dr. Beaudoin's Affidavit

Plaintiff's more significant claim against Defendant Hospital's nurses rests upon the failure of Dr. Rynbrandt to order diagnostic tests for Plaintiff irrespective of whether his neglect to do so was a consequence of lack of information (nursing malpractice) or his own lack of diligence (his own breach of the standard of care). The nurses could see that Plaintiff was not recovering appropriately from surgery and, apart from an order for pain medications, that her attending physicians seemed not to be doing anything for her. Plaintiff's nursing expert testified that the standard of care under these circumstances required that this situation be reported up the chain of command. While

Plaintiff has pointed out below that the chain of command did not necessarily end with Dr. Beaudoin, the chief of surgery; it was Dr. Beaudoin's affidavit that Defendant relied upon to support its motion.

Plaintiff's general surgery expert, Dr. Phillips, testified that had the nurses taken Plaintiff's situation up the chain of command, the standard of care would have required the chief of surgery to discuss the situation with the attending (Phillips dep, 45) and see to it that diagnostic tests be timely ordered (Id., 44, 47).

Yet Dr. Beaudoin submitted an affidavit indicating that had the nurses approached him to review Plaintiff's treatment during the days at issue, he "more likely than not" would not have intervened in the way in which Plaintiff was being treated.

Again, the jury need not find such testimony – in conflict with evidence of the standard of care – to be credible. The jury could reasonably conclude, rather, that the chief of surgery of a hospital "more likely than not" would follow, not violate, the standard of care and would not ignore the concerns giving rise to such review, or permit a patient having Plaintiff's complications to remain untreated. And in making this assessment of the weight of Dr. Beaudoin's testimony the jury would note that when Dr. Beaudoin ultimately was apprised of Plaintiff's condition he immediately ordered the proper diagnostic tests that disclosed the source of her problems.

In sum, Plaintiff offered evidence that medical negligence by Defendant's nurses proximately contributed to Plaintiff's injuries by depriving Plaintiff of the opportunity to receive the type of treatment that would have been provided by physicians complying with the standard of care. Defendant's motion for summary disposition rested entirely upon the affidavits of the physicians treating Plaintiff averring that they would not have

complied with the standard of care under these circumstances. While these affidavits show that there is a disputed question of fact regarding the issue of causation, Plaintiff submits that the courts below erred in making determination of weight and credibility and granting Defendant's motion solely upon the veracity of these affidavits. For these reasons, Plaintiff asks that the decisions of the courts below be reversed.

RELIEF

For these reasons Plaintiff-Appellant prays this honorable Supreme Court will grant her application for leave to appeal.

Respectfully submitted,

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