

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. 138636

Court of Appeals No. 280267

Emmet Circuit Court
LC No. 05-009021-NH

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PLAINTIFF-APPELLANT'S REPLY BRIEF TO DEFENDANTS-APPELLEES'
BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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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 FACTS

Plaintiff-Appellant relies upon her Statement of Facts as set forth in her Application for Leave to Appeal.

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.

Defendant-Appellee’s brief opposing Plaintiff-Appellant’s Application for Leave to Appeal has restated the issue presented on appeal in an attempt to divert this honorable Court’s attention from what is truly at issue here – specifically the authority of a trial court, under MCR 2.116, to grant summary disposition in favor of a party solely on the basis of assertions made by witnesses in their affidavits.

The persistent and talismanic theme of Defendant, Northern Michigan Hospital’s response to Plaintiff’s application for leave to appeal is that the affidavits Defendant submitted in support of its motion for summary disposition – that of Dr. Rynbrandt and that of Dr. Beaudoin – offered evidence of what these physicians “actually” would have done had they been apprised by Defendants’ nurses of the true state of Plaintiff’s deteriorating condition; and that Plaintiff, accordingly, failed to present any “legally sufficient evidence” that the alleged negligence of the nurses, in not communicating this information, was a proximate cause of Plaintiff’s injuries. It is a clever reconstruction of the issue on appeal that overlooks the critical point that Defendant’s motion rested entirely upon the credibility of Dr. Rynbrandt and Dr. Beaudoin’s assertion of what they “actually” would have done.

We have set off the word “actually” in quotation marks to highlight the fundamental flaw, the inherent fallacy, at the heart of Defendant’s counter-argument. Quite simply, the

question of what actually would have been done had Defendant's nurses complied with the standard of care in reporting upon the worsening condition of Plaintiff, is irrefutably a disputed issue of fact. Only a jury, weighing all the evidence, and carefully evaluating the credibility of these assertions by Dr. Rynbrandt and Dr. Beaudoin, can lawfully make the determination of what Plaintiff's doctors "actually" would have done had Defendant's nurses communicated information concerning Plaintiff.

The jury might ultimately find that these assertions by Dr. Rynbrandt and Dr. Beaudoin are indeed credible, that they would have violated their professional standards of practice, and continued to stand by and do nothing for Plaintiff, unmoved by information that their patient was in increasing distress and, most probably, suffering from an acute post-surgical complication that should have been readily recognized, investigated, diagnosed and treated. If the jury is persuaded by Defendant that these assertions by these physicians are true, then Plaintiff will indeed lose this case for failure to prove that the wrongful conduct of Defendant's nurses was a proximate cause of Plaintiff's injuries.

But the jury could also reasonably conclude that these affirmations by Dr. Rynbrandt and Dr. Beaudoin, speculating upon what they would have done had they been confronted with this information from the nurses, are not credible, but are simply the product of their bias, self-interest, and desire to shelter their nursing colleagues and the hospital where they continue to treat their patients from harm. Weighing those assertions against the expert testimony Plaintiff offers – that the standard of care would have required a response to this information to investigate the source of Plaintiff's increasing distress – a jury could find it incredible that Dr. Rynbrandt or Dr. Beaudoin would have "actually" violated the standards of care pertaining to the treatment of Plaintiff, and

deliberately would have ignored their patient's medical needs. Accordingly, a jury could find, notwithstanding these assertions by Dr. Rynbrandt and Dr. Beaudoin, that, more likely than not, what they "actually" would have done under these circumstances is respond to their patient's medical needs in compliance with the applicable standards of care. And a jury reaching these conclusions would be able to find that the alleged negligence of Defendant's nurses was a proximate cause of Plaintiff's injuries.

We cannot overstate what a dangerous doctrine had been promoted by the Courts below in this case, one completely alien to our concepts of jurisprudence relating to the proper roles of court and jury. Defendant is urging support for nothing less than bench trial by affidavits. Defendant's brief dares to state that Dr. Rynbrandt and Dr. Beaudoin "testified" by affidavit as to what they actually would have done. Signing an affidavit is nothing at all similar to offering testimony in open court. Most likely these witnesses affixed their signature to these affidavits – drafted, no doubt, or at least carefully vetted by Defendant's counsel – in a quiet office, secure in the knowledge that they could no longer be sued by Plaintiff in affirming conduct below the standard of care, and anticipating that their words would be weighed only by a distant judge. This is not the same as sitting before the jury in a witness chair and being subject to the crucible of cross-examination probing every phrase and assertion for bias, prejudice and inconsistencies. ("Are you telling the jury, Dr. Beaudoin, that even though the standard of care requires that a patient having these post-surgical symptoms promptly have a CT scan of the abdomen, and even though you ordered a CT scan immediately when you

first became aware of this patient's symptoms, that had you been aware of this patient's symptoms sooner you "actually" would not have ordered the CT?")¹

Defendant's brief waxes on and on about these affidavits affirming what these doctors "actually" would have done with additional information concerning their patient, but says next to nothing as to why any court, or jury, should take these witnesses at their word. Obviously the courts below had no problem with this – and that is precisely the problem that we are asking this honorable Supreme Court to review. Perhaps if the facts were more blatant – for example, in a suit against a radiologist, where the treating surgeon might submit an affidavit affirming that even if the x-rays had not been mislabeled, he still would have proceeded to cut off the wrong leg! -- the courts below might have paused to more carefully weigh the ramifications of their rulings. But the fundamental principles relating to both proximate causation and summary disposition motions are as much in jeopardy in this case as in any the court might consider. As it stands, the published Court of Appeals' decision in this case signals that the trial courts may resolve disputed issues of fact solely on the basis of the affidavits of witnesses, and that any claims of negligence or malpractice, in which proximate cause depends upon the anticipated conduct of a third party, the third-party's own statement of what he or she would have done is unimpeachably conclusive. Yet neither of these precepts are consistent with common law, or common sense.

Defendant's only response to our thoughtfully presented arguments regarding the prohibition of resolving issues of credibility in a summary disposition motion is the

¹ Even if an affirmative answer is given, the jury would at least have the opportunity to see the witness' facial expression, hear the sound of his voice, and decide for itself if the answer was true.

unconvincing rejoinder that neither of the courts below “have made any judgments regarding the credibility of Dr. Rynbrandt or Dr. Beaudoin.” They most certainly and absolutely did! The whole basis for granting Defendant’s motion rests upon the courts below believing the affidavits of these doctors and according to their own affirmations of their predicted future conduct more credibility than that of Plaintiff’s expert. Ignoring the obvious fact that these affidavits presented affirmations that were just as “hypothetical” as the testimony of Dr. Phillips (essentially stating that “if presented with additional information it is likely I would have done nothing different”), the courts below failed to recognize that the truth of these assertions had no probative weight whatsoever independent of the credibility accorded to the affiants. These could have been out-and-out lies. They were certainly affirmations shaded to assist Defendant in this litigation. But the courts below judged them to have unimpeachable and invulnerable credibility, safe even against evidence that what these witnesses claim they would have done would have been in violation of the standard of care.

That the credibility of these affidavits tipped the scale below is evidenced by the fact that without these affidavits Defendant’s motion would surely have been denied (as it initially was). Contrary to Defendant’s argument, Plaintiff did present legally sufficient evidence on proximate causation in response to Defendant’s motion – the testimony of Plaintiff’s expert that the applicable standard of care requires a general surgeon, aware of the symptoms Plaintiff developed post-surgery, to immediately take steps to rule out the presence of an anastomotic leak (usually by ordering a CT scan). This was not timely done in Plaintiff’s case (resulting in her subject injuries) and Plaintiff alleges that this was not done because the nurses failed to keep Plaintiff’s surgeon Dr. Rynbrandt fully

apprised of Plaintiff's symptoms, or failed to take the matter up with Dr. Beaudoin when Dr. Rynbrandt failed to treat in accordance with the standard of care. Plaintiff submits that this expert testimony of what the standard of care required under the circumstances provides a legitimate basis upon which the jury reasonably could find that the negligence of Defendant's nurses was a proximate cause of Plaintiff not being treated in accordance with the standard of care and suffering her injuries as a result. On this basis, Defendant's motion for summary disposition should have been denied.

Plaintiff's evidence would have withstood Defendant's motion, notwithstanding Defendant's further submission of Dr. Rynbrandt and Dr. Beaudoin's affidavits, if the courts below disbelieved those affidavits. Defendant's motion was ultimately granted, therefore, because the courts below chose to believe the attestations in these affidavits. The court's below failed to realize that in granting this motion they were making a judgment of credibility in favor of Defendants, usurping the role of the jury, which traditionally is given the role of believing or disbelieving the testimony of a witness.

It should not have been Plaintiff's obligation, on a summary disposition motion, as Defendant's briefing suggests, to counter with evidence persuading the trial court that these affidavits were not credible. Credibility determination do not fall within the province of a trial court when a jury trial has been demanded. Plaintiff does not have to prove, for the purposes of this appeal, that Dr. Rynbrandt's and Dr. Beaudoin's claims of what they "actually" would have done are not credible.

Indeed, how could this Plaintiff, or any party, meet that burden. We cannot "water board" these witnesses to induce them to recant their statements. We know of no reliable mind reader who can attest that the statements were falsely made. But the law does

provide a judicial process for testing the veracity of such witness statements – and that is the jury trial. The courts below failed to appreciate that. In deciding this motion in favor of Defendants, on the basis of what witnesses, in affidavits, merely claimed they would have done, the courts below were making credibility determinations and undermining Plaintiff's right to a jury trial. Defendant's counter-arguments, denying that the Court's below were not judging the credibility of the affiants, falter upon the self-evident falsity of this premise. Every assertion by Defendant that these affidavits affirm what these doctors "actually" would have done is an assertion asking the courts to accept unquestioningly the credibility of the makers of these affidavits.

It should have been enough for Plaintiff to simply point out that the veracity of these assertions depended upon the credibility of these witnesses to defeat Defendant's motion, for as this long line of venerable cases cited in Plaintiff's application shows, summary disposition is inappropriate where the determination of disputed issues of fact rests upon the credibility of witnesses.

Defendant, on appeal, contests whether Plaintiff's evidence of what the standard of care required Plaintiff's physicians to do is sufficient to overcome the affidavits of those treating physicians speculating as to what they "actually" would have done. Certainly such evidence is, and must be, acknowledged as creating a genuine issue of fact by challenging the credibility of witnesses who predict that they would have behaved in a manner that would have been inconsistent with professional standards. Defendant relies upon less than a handful of Illinois intermediate court decisions in support of its "cause in fact" argument, but these have essentially been repudiated by the Illinois Supreme Court, in 2003, in Snelson v Kamm, 204 Ill. 2d 1, 787 NE2d 796 (2003), where the court

acknowledged that testimony of an expert as to what the standard of care required a treating physician to do, that contradicts what a treating physician testifies that he or she would have actually done, is sufficient to present a disputed question of fact for the jury to decide. Defendant's response brief criticizes this holding as being merely dictum in that case, and also criticizes the Alabama Supreme Court's holding to the same effect in Davison v Mobile Infirmary, 456 So 2d 14 (Ala, 1984) as one arising in a case having distinguishable facts (which is equally true of all the decisions Defendant relies upon). But this misses the point. What Defendant fails to grasp is that it is not the number of precedents that counts, but the logic and reasoning of the rulings. Defendant offers no legitimate rationale as to why cause of fact issues should be conclusively resolved on the dubious testimony of a treating doctor who claims he or she would not have acted in accordance with the standard of care. Surely such statements, in and of themselves, raise a red flag inviting scrutiny into the motives, bias, prejudices and interests of the witness. The testimony of a non-party treating physician is entitled to be accorded to no greater credibility than that of a party or an expert, by the court, as credibility determinations are to be made by the jury. Causation in fact, no less than the standard of care and its breach, is a fact question, Richards v Pierce, 162 Mich App 308, 316-318 (1987) and when the truth of an affirmation of fact depends upon the veracity or credibility of a witness, the issue is one exclusively for the jury to decide. Foreman v Foreman, 266 Mich App 132, 136 (2005). Defendant has presented no logical or valid reason for ignoring or abandoning this long settled principle of law.

Quite simply, the question of what these doctors "actually" would have done had Defendants' nurses complied with the standard of care is a disputed issue of fact

depending upon the credibility of the affiants, and therefore, a question for the jury to resolve. The trial court should not have granted Defendant's Motion for Summary Disposition, and the Court of Appeals should not have affirmed that ruling.

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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