

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 SUPPLEMENTAL BRIEF IN
SUPPORT OF HER APPLICATION FOR LEAVE TO APPEAL**

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Suppl

FILED

AUG 10 2009

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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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 incorporates by reference her Statement of Facts as set forth in her original 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.

Plaintiff-Appellant has taken the liberty of submitting this Supplemental Brief to this Honorable Court because of unique and extraordinary circumstances. Subsequent to the submission of Plaintiff's Application in this case, the Court of Appeals issued a decision in another case that certifies the importance of this honorable Court taking up the present case for its review.

Attached to the Supplemental Brief is a copy of the Court of Appeals' to be published decision of July 14, 2009 of Ykimoff v W. A. Foote Memorial Hospital, Court of Appeals Docket No: 279472. (**Exhibit 1**)

This Court of Appeals decision is pertinent to the present appeal not only because it involves a factual situation that is essentially undistinguishable from those of the present case, but also because two of the three panel members deciding Ykimoff were also panel members who sat on the present case in the Court of Appeals, and most of the discussion of the panel judges and, indeed, the reason why there are three separate concurring opinions, focus on an analysis of the Court of Appeals' decision in the present case.

This application is one taken from the same Martin v Ledingham, 282 Mich App 158 (2009) decision that has been dissected so thoroughly in the Ykimoff decision by Judges Talbot, Bandstra, and Gleicher. Judges Talbot and Bandstra's separate

ruling in the present case. Judge Gleicher, who was bumped off the panel that decided the present case, eschews trying to distinguish Ykimoff from Martin, affirming her conviction that Martin was wrongly decided.

Plaintiff will allow these Judges' opinions in Ykimoff to speak for themselves, but especially commend to this honorable Court the insight and analysis set forth in Judge Gleicher's Opinion.

However, Plaintiff shall review the Ykimoff concurrences of Judges Talbot and Bandstra for the special insight these concurrences provide as to the decision that they, with Judge Murray (who took the place of Judge Gleicher), rendered in the present case.

The first of two points Plaintiff offers to this honorable Court relates to the Opinion of Judge Talbot in Ykimoff. Both this case, (Martin), and Ykimoff involve claims against a hospital based upon the alleged negligent failure of nursing staff to apprise a treating physician of the post-surgical condition of a patient thereby delaying that physician's timely intervention to prevent further injury to the patient. In the present case, the surgeon's name was Dr. Rynbrandt; in Ykimoff, it was Dr. Eggert. In both cases, the treating surgeon affirmed that even had he received that information about the patient from the nurses, he would not have acted any differently towards the patient. In both cases, the Plaintiff countered that testimony with expert testimony that it would have been a breach of the standard of care for a physician not to promptly act upon that information.

There are some slight differences here. One is that the testimony of Dr. Eggert in Ykimoff was presented at trial before the jury, as was the testimony of plaintiff's experts, and the matter of the credibility of Dr. Eggert's assertions regarding what he would have done was, of course, left to the jury to decide. In contrast, in this case, the trial court

decided summary disposition in favor of defendant based solely on Dr. Rynbrandt's affidavit. That was an assertion never subject to cross-examination or impeachment. The trial court, and Judges Talbot and Bandstra, on appeal, simply accepted those affidavit assertions to be true, never questioning their credibility.

In beating a retreat from the decision in this case (Martin), Judge Talbot in Ykimoff takes pains to try to find some factual distinctions that justify his contradictory rulings. He emphasizes the very "fact-intensive nature of the ruling in Martin" that **"necessarily leads to concern regarding the broader applicability of that decision and the implied impact on legitimate issues pertaining to credibility in determining proximate causation and usurpation of the jury's role."**

This statement in itself virtually invites this honorable Court's review of Martin and, indeed, strangely echoes Plaintiff's own application which warns, "In sum, the Court of Appeals has published a very troubling and potentially disastrous opinion in this case (Martin) that should be carefully reviewed." (Plaintiff's Application for Leave, pp. 28-29).

Judge Talbot finds, as a distinguishing fact in Martin, that "the treating physician was apprised of his patient's condition, but elected not to intervene or alter the course of treatment . . ." Yet, on what basis can Judge Talbot make such a distinction. The only evidence that Dr. Rynbrandt was apprised of his patient's condition was his own untested affidavit making that assertion.

Judge Talbot labors to draw a distinction between what a treating physician claims he knows and what a treating physician claims he would have done. He contends, in effect, that the former assertion is unchallengeable, while the latter is subject to the trier of fact's assessment of credibility. Apparently, if Dr. Eggert had testified at trial in Ykimoff

(or even just by affidavit) that he knew what condition his patient was in, then a directed verdict would have been warranted. Or would it? Consider the contortions Judge Talbot goes through to find some distinction between the conduct of Dr. Eggert in Ykimoff and that of Dr. Rynbrandt in this case:

Dr. Eggert's admission that his post-operative notes summarized "what I thought" had transpired [in the recovery room/PACU] serves to demonstrate the speculative nature of his averment that the provision of timely information by nursing staff would not have impacted his actions. In particular, based on the discrepancies between Dr. Eggert's testimony and the documented symptoms, Dr. Eggert's statement, "Regardless of what the record says, I know they're following the patient and assessing for vascular problems and did not find any *at all* until the thrombosis took place, at which time it became clear," raises issues of credibility. Dr. Eggert's absolute assertion that he would not have intervened sooner, even if the PACU nurses had contacted him and related plaintiff's symptoms, is particularly suspect given the immediacy of his initiation of surgical intervention upon arrival at the hospital.

In *Martin*, the credibility of the treating physician was not called into question because he was both kept apprised of his patient's condition on an ongoing basis and his actual behavior regarding medical intervention completely coincided with his subsequent assertions. However, unlike the physician in *Martin*, Dr. Eggert's credibility is not eliminated as an issue; rather it is pushed to the forefront. The reasoning in *Martin* cannot be applied pro forma to the factual circumstances of this case because its application is limited to situations demonstrating a conformance between verbal assertions and actual behavior. Because establishment of proximate cause hinged on the credibility of Dr. Eggert's averments, which could not be shown retrospectively to conform to the medical records and testimony elicited, the matter was properly submitted to the jury for resolution. *Skinner, supra* at 161.

Excuse us, Judge Talbot, but we question whether you took the same "cautionary approach" to the facts in Martin as you did in Ykimoff. Again, the only evidence that the treating physician in this case was kept apprised of his patient's condition was his own affidavit. There was no supporting documentation. His own inaction, Plaintiff submits, especially in light of evidence that the standard of care required intervention under the

circumstances, is not conclusive that he was informed (as he claimed in his affidavit), but circumstantial evidence impeaching his credibility. Rather than attesting to a conformance between verbal assertions and actual behavior, the facts in Martin betray a vital inconsistency between Dr. Rynbrandt's assertions, "I knew everything" and his conduct, "I ignored what I knew." Frankly, in the present case, Judge Talbot could have written, and should have written, as he did in Ykimoff that "because establishment of proximate cause hinged on the credibility of Dr. Rynbrandt's averments (about what he knew), which could not be shown retrospectively to conform with the medical records and testimony elicited, the matter (should have been) submitted to the jury for resolution."

Even more perplexing about Judge Talbot's extended and tortured analysis is that Judge Talbot seems to have forgotten entirely about Dr. Beaudoin and Plaintiff's other claim of negligence in this case, that when Dr. Rynbrandt failed to attend to his patient, the nurses should have gone up the chain of command to enlist Dr. Beaudoin's assistance. In fact, everything Judge Talbot says about Dr. Eggert, and proximate cause being a question for the jury to decide in Ykimoff, could be said about Dr. Beaudoin. He, too, signed an affidavit averring that had he been contacted by the nurses, he would have done nothing differently. But he made no claim that he knew all along what was going on with the patient, Ms. Martin, and the evidence is clear that when he did find out, he immediately intervened. Was not Dr. Beaudoin's affidavit, like Dr. Eggert's trial testimony, also "speculative at best and self-serving at its worst"? Judge Talbot in Ykimoff finds Dr. Eggert's "absolute assertion that he would not have intervened sooner" to be "particularly suspect given that the immediacy of his initiation of surgical intervention upon arrival at the hospital." Why does this make Dr. Eggert's trial testimony "suspect" but not Dr.

Beaudoin's affidavit, when Dr. Beaudoin essentially did the same thing? Did Judge Talbot simply forget about Dr. Beaudoin's role in the present case? Was this alternative claim even considered by him when he sat on the panel in this case? These are questions that need to be weighed in light of these laborious attempts in Ykimoff to preserve the integrity of the decision Judge Talbot signed onto in this case.

It is interesting that in Judge Talbot's survey of cases in Ykimoff there is still no reference made to Davidson v Mobile Infirmery, 456 So. 2d 14 (Ala 1984) nor to Snelson v Kamm, 204 Ill 2d 1, 272 Ill Dec. 610, 787 N.E. 2d 796 (2003) which trumps all the earlier Illinois cases mentioned. (See Plaintiff's Application). In any event, the distinctions Judge Talbot identifies in these cases from the facts presented Ykimoff are the same distinctions that apply in the present case.

Judge Bandstra's concurrence in Ykimoff is much briefer and less analytical, but no less disturbing. At least Judge Bandstra seems to recognize that there were two physicians involved in this case (Martin) whereas Judge Talbot's opinion seems focused only on one. Judge Bandstra asserts that in Martin, "We properly concluded that the plaintiff had failed to come forward with sufficient evidence that the nurses' alleged failure to report to the doctors was, as a matter of logic, a cause of fact of any injury to the plaintiff." But what does this mean? Plaintiff offered the same evidence in Ykimoff, evidence that the standard of care required Plaintiff's post-surgical problem to be treated, evidence that Plaintiff's treating physicians had not come to treat it, and evidence questioning the credibility of these physicians when they affirmed in affidavits that they would not have intervened. Judge Bandstra reveals his hand, and his error, in his observation that the doctors in this case (Martin) "unequivocally stated that, even if the

nurses made the reports that the Plaintiff claimed were appropriate, they would not have altered their treatment in response.” But wasn’t that same “unequivocal” statement made by Dr. Eggert in the case in which Judge Bandstra was agreeing that the credibility of that statement was for the jury to decide?

But, says Judge Bandstra in retort in Ykimoff, the issue was for the jury to decide because Dr. Eggert’s testimony was “replete with caveats and admissions” that would have allowed the jury to conclude that with better reports, he would have more aggressively responded to the patient’s problems. Yet, what “caveats or admissions” are these? Judges Talbot and Bandstra have the benefit of hindsight in seeing all the evidence presented at trial. In the present case, the decision was made solely on the basis of affidavits. Plaintiff was denied even the opportunity to cross-examine these doctors and perhaps elicit from them some caveats and admissions impeaching their credibility.

And Judge Bandstra’s objection to expert testimony regarding the standard of care is unsupportable. He insists that the cause in fact element of Plaintiff’s claim can only be satisfied by evidence showing what the treating physician would, in fact, have done if different reports had been provided. Judge Bandstra fails to perceive that ultimately that cause in fact question rests upon the credibility to be accorded to that treating physician. Evidence of what the standard of care required under the circumstances is clearly relevant to determining that credibility. Otherwise, a physician’s own assertion of what he or she would have done can never be questioned or challenged, which is exactly where the law stands under Martin.

Had Judge Bandstra dissented in Ykimoff, it would have made more sense. There is simply no logic to be found in his own half-hearted attempt to distinguish the facts in Ykimoff from those of Martin. Both involved the same “unequivocal” statements by the treating physicians of what they would have done. Frankly, it is not “logical” to assume that a statement by a physician that he would not have complied with professional standards of care under particular circumstances is wholly unimpeachable by a plaintiff, and not subject to a jury’s assessment of its credibility. Quite clearly, in Ykimoff, the jury chose not to believe the unequivocal assertions made by Dr. Eggert. In the present case, Plaintiff never got that far, the affidavits of the physicians having been found credible by a jury of four (the trial judge and the three judges on the Court of Appeals). Judge Bandstra, apparently, would elevate the “logic” and beliefs of a judge above that of the jury in medical malpractice cases. He chose to affirm the summary disposition entered in the present case because it is not logical to suppose that the statements in the affidavits of Plaintiff’s treating physicians, as to what they claimed they knew, and claimed they would have done, might not be true. Yet, somehow, in Ykimoff, Judge Bandstra could see his way clear to letting the jury decide these same issues of credibility. It would have been helpful for the benefit of future litigants if Judge Bandstra had explicitly listed in his opinion all the bits and pieces of evidence offered by plaintiff in Ykimoff, yet apparently absent in Martin, that made the “cause in fact” issue in Ykimoff a jury submissible question.

Plaintiff respectfully asks this honorable Court to review the Ykimoff decision in considering the present Application. Clearly, in light of the publication of both these decisions, practitioners and trial courts alike may be bewildered as to what law applies

under similar situations in future cases. Accordingly, Plaintiff again asks that leave to appeal be granted in this case, particularly as Ykimoff proves Plaintiff's prediction that Martin is, indeed, a "troubling" decision.

RELIEF

For these reasons Plaintiff-Appellant again asks that her Application for Leave to Appeal be granted.

Respectfully submitted,

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Dated: August 7, 2009

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STATE OF MICHIGAN
COURT OF APPEALS

JAMES YKIMOFF,

Plaintiff-Appellee/Cross-Appellant,

v

W. A. FOOTE MEMORIAL HOSPITAL,

Defendant-Appellant/Cross-Appellee,

and

DAVID EGGERT, M.D.,

Defendant-Cross-Appellee,

and

DAVID PROUGH, M.D.,

Defendant.

FOR PUBLICATION
July 16, 2009

No. 279472
Jackson Circuit Court
LC No. 04-002811-NH

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

BANDSTRA, J. (*concurring*).

I concur with the lead opinion and write separately to explain my conclusion that this case is factually different from *Martin v Ledingham*, 282 Mich App 158; ___ NW2d ___ (2009), as well as my firm disagreement with the approach advocated in Judge Gleicher's concurring opinion.

The record in this case establishes clearly that, prior to his decision to undergo the bypass graft surgery, plaintiff was fully informed by Dr. Eggert that the procedure was a serious matter that could well result in negative consequences no matter how carefully it was conducted. Nonetheless, plaintiff decided to take the risks necessarily attendant to the surgery and, as alleged in his complaint, he experienced post-surgical problems which have resulted in this lawsuit.

Of course, the mere fact of injury does not suffice to impose liability against the hospital (“defendant”) in this malpractice lawsuit. Instead, plaintiff must establish that his injuries “were the proximate result” of defendant’s failure to comply with an appropriate standard of care. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). As part of this required “proximate cause” proof, plaintiff had to come forward with evidence showing that “[a]s a matter of logic, . . . defendant’s negligence was a cause in fact of . . . plaintiff’s injuries.” *Id.* at 87.

Much like *Martin*, this case involves the allegation that, had defendant’s nurses better informed Eggert regarding plaintiff’s post-operative condition, he would have taken different actions which would have mitigated plaintiff’s injuries. In *Martin*, we properly concluded that the plaintiff had failed to come forward with sufficient evidence that the nurses’ alleged failure to report to the doctors was, as a matter of logic, a cause in fact of any injury to the plaintiff. To the contrary, the only evidence pertaining to that logical connection directly refuted it. The doctors unequivocally stated that, even if the nurses had made the reports that the plaintiff claimed were appropriate, they would have not altered their treatment of the plaintiff in response. Notwithstanding Judge Gleicher’s complaints, *Martin* did nothing more than recognize that the plaintiff had the burden to establish a logical connection between the alleged negligence and the alleged injury. The plaintiff having failed to do so, *Martin* naturally concluded that summary disposition was warranted.

In the case before us today, evidence was presented upon which a rational fact-finder could conclude that there was a logical connection between the alleged negligence and the alleged injury. As did the doctors in *Martin*, Eggert stated that, had he received better and more complete reports from defendant’s nurses regarding plaintiff’s post-operative condition, he would not have altered his treatment in response. Nonetheless, as explained in the lead opinion, Eggert’s testimony was replete with caveats and admissions considering which the jury could reasonably conclude that, in fact, better and more complete reporting may well have led to him to more aggressively respond to plaintiff’s problems.¹ In that sense, the burden of proving a possible logical cause in fact connection between the nurses’ reports and plaintiff’s injury was satisfied.²

Judge Gleicher’s opinion seems to completely absolve a plaintiff from any burden to come forward with affirmative cause in fact evidence in support of a malpractice claim. As I understand the argument, liability could be imposed even though all the evidence presented

¹ The evidence of a logical cause in fact here was certainly not strong; it merely rose minimally to a level where a genuine issue was presented for the fact-finder’s determination.

² As in *Martin*, *supra* at 161-162, plaintiff’s expert’s opinion here about what Eggert should have done had he received better reports from the nurses is irrelevant. The logical cause in fact element of plaintiff’s claim can be satisfied only by evidence showing what Eggert would, in fact, have done had different reports been provided, without regard whatsoever to any hypothetical obligations he may have had under an applicable standard of care. Such standard of care evidence would, of course, be relevant in a different case - if Eggert, having received better reports from the nurses, was being sued for failing to undertake a different treatment in response.

directly refutes a logical finding of cause in fact because that evidence is subject to disbelief by the finder of fact. In other words, as Judge Gleicher would have it, a plaintiff could bring a case to the fact-finder without any evidence to support a logical finding of cause in fact, merely on the hope that the fact-finder would disbelieve evidence establishing that no logical cause in fact existed.

That would certainly be a novel approach inconsistent with the usual understanding of a plaintiff's burden of proof. It would also subvert the usual summary disposition rule which protects a defendant from litigation if "there is no genuine issue" on an element of a plaintiff's claim. MCR 2.116(C)(10). Even if the only available evidence undermines a plaintiff's claim, Judge Gleicher would still apparently find a genuine issue arising from the possibility that the fact-finder could disbelieve that evidence.

The radical approach advocated by Judge Gleicher would be directly contrary to the long stated rule that "it is not a legitimate inference to draw from testimony denying the existence of a fact sought to be proved, that such denial is evidence that the fact exists." *Quinn v Blanck*, 55 Mich 269, 272; 21 NW 307 (1884). Judge Gleicher selectively quotes from a number of Michigan precedents that are portrayed as being contrary to this commonsensical *Quinn* rule. However, none of those precedents allowed a plaintiff merely to rely on evidence contrary to a proposition in order to establish that proposition. Instead, each case involved factual disputes based on contradictory evidence and, unremarkably, those disputes were allowed to go to the fact-finder for determination.³

³ In *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881), only "most of" the facts surrounding the execution of a bond were undisputed. The rest of the facts, apparently to be deduced from the testimony of seven people involved in the execution of the bond, "were not conceded or beyond dispute." While the Supreme Court opined that the account of the bond's execution favoring the claimant "probably ought to have satisfied anyone," it further concluded that this determination was properly in the hands of the jury considering the apparently varying evidence. Similarly, in *Cuddle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940), the Supreme Court determined that a fact question existed for jury determination where testimony by a person that he had mailed a notice, while "not directly contradicted," was inconsistent with evidence from a principal of the person's employing company as to the manner in which the notice had been sent, as well as evidence that various recipients of the notice had complaints regarding the receipt of the notice. Again, in *Arndt v Grayewski*, 279 Mich 224, 230; 271 NW 740 (1937), the Supreme Court unremarkably found a fact question existed for jury determination where the testimony of an eye witness to an accident was "disputed by the physical facts, and seriously questioned by the testimony of one of the defendants." *Morgan v Engels*, 372 Mich 514; 127 NW2d 382 (1964), involved a routine malpractice suit dispute between a doctor who claimed he had not violated any standard of practice and an expert witness who testified that he had. In *Strach v St. John Hosp*, 160 Mich App 251, 270-271; 408 NW2d 441 (1987), a fact question was presented where a doctor's testimony that he had informed plaintiffs that he was an independent contractor was contradicted by the plaintiffs' testimony that they did not recall so being told. And, finally, in *Taylor v Mobley*, 279 Mich App 309, 314; 760 (continued...)

Further, the most recent of these precedents, *Taylor v Mobley*, 279 Mich App 309, 316; 760 NW2d 234 (2008), was not a case like the present one, where a plaintiff burdened with the responsibility to present evidence in support of a claim arguably failed to do so. The plaintiff in *Taylor* presented her own testimony in support of the contested noneconomic damages element of her claim. Accordingly, *Taylor* did not present any argument similar to the one we address here about a failure to properly shoulder a burden of proof; *Taylor* is completely inapposite.

And, finally, Judge Gleicher's "additional concerns" with this opinion are simply unfounded. They are based on a failure to recognize that my analysis rests on the fact that our law places a burden of proof upon a plaintiff seeking to recover damages. Thus, a plaintiff failing to come forward with any evidence in support of an element of a claim is properly subject to summary disposition for failing to shoulder that burden of proof. In other words, a plaintiff is penalized for failing to come forward with evidence precisely because the law imposes a burden of proof on a plaintiff.⁴ That same analysis does not apply to a party upon which no burden of proof is imposed. And, thus, Judge Gleicher's conclusion that the rule requiring a plaintiff to present evidence in support of a claim means that a plaintiff who does so is entitled to summary disposition is logically unfounded.

/s/ Richard A. Bandstra

(...continued)

NW2d 234 (2008), our Court held that a jury could disbelieve a plaintiff's account of extreme pain and suffering where there was "countervailing evidence that undermined plaintiff's credibility," testimony that plaintiff appeared to be only in 'a little bit of pain' immediately after the dog bite giving rise to the action, and other contradictory evidence.

⁴ Of course, this same analysis applies to any party, not just a plaintiff, who bears a burden of proof. For example, in many areas of our law, the burden of presenting proof of a defense is imposed on a defendant once a plaintiff presents a prima facie case in support of a claim. If a defendant fails to come forward with any evidence in support of a defense to the claim, the plaintiff is entitled to summary disposition.

STATE OF MICHIGAN
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JAMES YKIMOFF,

Plaintiff-Appellee/Cross-Appellant,

v

W. A. FOOTE MEMORIAL HOSPITAL,

Defendant-Appellant/Cross-
Appellee,

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DR. DAVID EGGERT,

Defendant-Cross-Appellee,

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DR. DAVID PROUGH,

Defendant.

FOR PUBLICATION
July 16, 2009

No. 279472
Jackson Circuit Court
LC No. 04-002811-NH

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur with the lead opinion that the trial court properly denied defendant W. A. Foote Memorial Hospital's motion for judgment notwithstanding the verdict or a new trial, and correctly granted summary disposition to defendant Dr. David Eggert. I further agree that the higher medical malpractice damages cap in MCL 600.1483(1)(c) does not apply to the facts of this case. I write separately to express disagreement with the proposition that this case is logically distinguishable from *Martin v Ledingham*, 282 Mich App 158; __ NW __ (2009).

The lead opinion rejects the hospital's contentions that plaintiff failed to create a genuine issue of fact concerning causation, holding that because the jury remained free to disbelieve Dr. Eggert's testimony, "the matter was properly submitted to the jury for resolution." *Ante* at 12. Judge Bandstra's concurring opinion posits that Dr. Eggert's testimony "was replete with caveats and admissions" which allowed the jury to determine that "better and more complete reporting may well have led" to more aggressive treatment of plaintiff's problems. *Ante* at 3. Both the

lead opinion and Judge Bandstra's concurring opinion assert that the weaknesses inherent in Eggert's testimony completely distinguish it from *Martin*. I respectfully disagree. In my view, "the jury is free to credit or discredit *any* testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001) (emphasis supplied). Moreover, I believe that this Court incorrectly decided *Martin*.

I. *Martin's* Similarity to this Case and its Disregard of the Jury's Factfinding Prerogative

In *Martin*, this Court confronted a factual scenario strikingly similar to the instant case. The plaintiff in *Martin* asserted that the nurses breached the applicable standard of care by failing to apprise the plaintiff's surgeon of her worsening postsurgical condition. The plaintiff's surgeons submitted affidavits in support of summary disposition pursuant to MCR 2.116(C)(10), alleging "that they would not have changed the course of plaintiff's treatment had nurses employed by defendant informed them of plaintiff's condition as plaintiff alleged they should have." *Id.* at 159. The plaintiff submitted evidence "showing that, had the nurses properly reported, a notified doctor would have had the duty to change plaintiff's treatment." *Id.* at 160. In affirming summary disposition for the defendant hospital, the Court in *Martin* considered the surgeons' affidavits, and ultimately rejected the notion that a factfinder could determine that cause in fact existed "merely because the fact-finder disbelieved the doctors involved[.]" *Id.* at 163. The Court reasoned, "This evidence was insufficient to create a genuine issue on factual causation because it only concerned what hypothetical doctors should have done had better reports been provided." *Id.* at 161-162. According to *Martin, id.* at 163-164, a jury's disbelief of the doctors actually involved in a plaintiff's care would result in an inherently speculative finding of causation, directly contravening our Supreme Court's holding in *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994).

No meaningful distinction exists between the causation proofs presented in *Martin* and those introduced during the trial of this case. I respectfully reject the lead opinion's reasoning that "[i]n *Martin*, the credibility of the treating physician was not called into question because he was both kept apprised of his patient's condition on an ongoing basis and his actual behavior regarding medical intervention completely coincided with his subsequent assertions." *Ante* at 12. In my view, the credibility of the treating physician could be questioned for any reason, regardless whether his conduct conformed with his words.

In *Martin*, the surgeons' affidavits set forth *opinions* regarding (1) the extent or quantity of their knowledge regarding the plaintiff's condition ("[Dr.] Rynbrandt repeatedly stated that he had *ample* information regarding plaintiff and her situation . . . ," *id.* at 162, emphasis added), and (2) the quality of their knowledge ("he reviewed plaintiff's chart and was otherwise *adequately* apprised of developments . . . ," *id.*, emphasis supplied). Dr. Rynbrandt's affidavit further opined that "nothing the nurses could have done differently would have altered the care that he provided plaintiff." *Id.* at 162.

The lead opinion asserts, "The very fact-intensive nature of the ruling in *Martin* necessarily leads to concern regarding the broader applicability of that decision . . ." *Ante* at 9. But *Martin* contains woefully few facts. The lead opinion attempts to distinguish *Martin* by emphasizing that the affiant surgeons in that case actually behaved in accordance with the words recited in their affidavits. But that is not what the case says, and I am at a loss to read facts into *Martin* that simply do not exist. Had the surgeons in *Martin* been present at the patient's bedside

when the plaintiff claims that intervention should have occurred, I daresay their affidavits would have so reflected. Instead, the affidavits assert the same reasoning adopted by Dr. Eggert: “that they would not have changed the course of plaintiff’s treatment *had nurses employed by defendant informed them of plaintiff’s condition as plaintiff alleged they should have.*” *Martin, supra* at 159 (emphasis supplied). *Martin* neither examines nor references the “actual behavior” of the treating physicians. I simply find no basis in *Martin* for the lead opinion’s determination that the physician’s behavior in that case “completely coincided with his subsequent assertions.” *Ante* at 12.

According to the lead opinion, “the physician in *Martin* in averring that nursing staff could not have done anything differently to impact his treatment decision is describing his actual analysis of the presenting situation and subsequent action or inaction, and is neither speculating nor relying on hindsight.” *Ante* at 9. I respectfully disagree. The affidavits submitted in *Martin* embody opinion testimony addressing the character of the affiants’ knowledge, and the manner in which they would have responded if the nurses had provided “better reports.” *Id.* at 161-162. Rather than reporting first-hand knowledge obtained from actual observation of the plaintiff contemporaneous with the nursing observations, the affidavits recite the affiants’ speculation about what they would have done under circumstances that did not actually exist. In essence, the surgeon’s affidavits qualify as answers to the hypothetical question, “What would you have done had the nurses behaved in the manner described by the plaintiff’s nursing expert?” In my view, this evidence is actually more speculative and less reliable than testimony describing the standard of care, which must conform to the rigorous requirements of MRE 702 and 703. The plaintiff’s expert testimony called into question the credibility of the surgeons’ affidavits by asserting that the standard of care applicable to the affiants required swifter intervention. If the jury believed the plaintiff’s experts in this regard, it should then have determined whether to believe that the surgeons would have breached the standard of care.

Because the affidavits in *Martin* provided opinions rather than facts, the credibility of their signers should have been explored at a trial. It is for this central reason that I disagree with the holding in *Martin* that the affidavits supplied a *factual* basis for summary disposition. Although Judge Bandstra characterizes as “radical” my approach to this issue, *post* at 4, I propose nothing new. More than a century ago, the United States Supreme Court concisely articulated the foundation for the principle that a witness’s credibility always remains subject to a jury’s consideration:

The jury were the judges of the credibility of the witnesses ... and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon 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 to be guided in determining the weight and credibility of his testimony. That part of every case ... 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; and, so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function. [*Aetna Life Ins Co of Hartford v Ward*, 140 US 76, 88; 11 S Ct 720; 35 L Ed 371 (1891).]

Multiple cases demonstrate that until *Martin*, Michigan's appellate courts had consistently adhered to the core principles, derived from *Aetna Life Ins Co* and similar cases,¹ that (1) every witness's testimony is subject to disbelief by the finder of fact, and (2) a court may not usurp the jury's prerogative to accept or reject any testimony.

For example, in *Wooden v Durfee*, 46 Mich 424, 427; 9 NW 457 (1891), our Supreme Court reversed the grant of a verdict directed by the trial court on the basis of "undisputed" evidence that "probably ought to have satisfied anyone[.]" Writing for a unanimous Court, Justice Cooley explained that despite the absence of any conflicting evidence, the jury "may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment." *Id.* Our Supreme Court again emphasized that a witness need not be believed in *Yonkus v McKay*, 186 Mich 203, 210; 152 NW 1031 (1915), stating,

To hold that in all cases when a witness swears to a certain fact the court must instruct the jury to accept that statement as proven, would be to establish a dangerous rule. Witnesses sometimes are mistaken and sometimes unfortunately are willfully mendacious. The administration of justice does not require the establishment of a rule which compels the jury to accept as absolute verity every uncontradicted statement a witness may make.

¹ The core principles underpinning the case law cited throughout this concurring opinion emanate from the Seventh Amendment to the United States Constitution, not an "extreme ideological position" or "personal preference," *ante* at 30. See also *The Conqueror*, 166 US 110, 133; 17 S Ct 510; 41 L Ed 937 (1897), criticized on other grounds in *Brooklyn Eastern Dist Terminal v United States*, 287 US 170, 175; 53 S Ct 103; 77 L Ed 240 (1942), "[T]he ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinions of scientific witnesses[.]" and *Head v Hargrave*, 105 US 45, 49; 15 Otto 45; 26 L Ed 1028 (1881):

It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion.

In *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940), the Supreme Court again acknowledged that “[u]ncontradicted testimony may be disentitled to conclusiveness because, from lapse of time or other circumstances, it may be inferred that the memory of the witness is imperfect as to the facts to which he testified, or that he recollects what he professes to have forgotten.” *Id.* See also *Arndt v Grayewski*, 279 Mich 224, 231; 271 NW 740 (1937), holding that eyewitness testimony “is not conclusive upon the court or a jury if the facts and circumstances of the case are such as irresistibly lead the mind to a different conclusion.”

In *Strach v St John Hosp*, 160 Mich App 251, 271; 408 NW2d 441 (1987), this Court held that a jury could disregard a physician’s un rebutted testimony, reasoning that “a jury may disbelieve the most positive evidence even when it stands uncontradicted, and the judge cannot take from them their right of judgment.” *Id.*, citing *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948). More recently, in *Taylor v Mobley*, 279 Mich App 309, 314; 760 NW2d 234 (2008), this Court held that the jury justifiably rejected the plaintiff’s uncontradicted and unchallenged testimony regarding her personal pain and suffering after a dog bite. This Court observed that “the jury could have simply disbelieved and discredited plaintiff’s testimony regarding pain and suffering.” *Id.* The Court referenced in a footnote several additional cases standing for the proposition that “the jurors’ prerogative to disbelieve testimony, including uncontroverted testimony, is well established.” *Id.* at 314 n 5.

These cases underscore that despite Dr. Eggert’s emphatic, un rebutted assertion that he would not have operated on plaintiff at 7:00 p.m. irrespective of what he may have learned from the nurses, the jury possessed the authority to disbelieve every word that Dr. Eggert uttered. The lead opinion asserts that Dr. Eggert’s testimony was “speculative at best and self-serving at its worst,” and thus could be disregarded. *Ante* at 9. But in my view, these characterizations qualify as wholly irrelevant to the requisite focus of the analysis here. The case law discussed above posits that the jury can disregard testimony that, in the words of Justice Cooley, “probably ought to have satisfied anyone[.]” *Wooden, supra* at 427. Regardless whether this Court views the testimony of a treating physician as entirely rational and in accord with the medical records, or completely self-serving and verging on the absurd, a judge cannot remove from a jury its “right of judgment.” *Strach, supra* at 271. From the time of *Wooden, supra*, through *Kelly, supra*, the governing principle in Michigan has been that a jury possesses the freedom to disregard a witness’s opinions for any reason, or for no discernible reason. That a jury has exercised this right does not render its proximate cause decision “speculative.” Rather, the correct inquiry is whether sufficient record evidence demonstrates that the defendant’s negligence is “a cause of plaintiff’s injury, and . . . that the plaintiff’s injury . . . [is] a natural and probable result of the negligent conduct.” M Civ JI 15.01.²

² A trial court retains the authority to grant summary disposition if a medical malpractice plaintiff fails to present evidence documenting what a reasonable physician would have done under the same or similar circumstances, or that an alternative course of conduct would likely have altered the plaintiff’s outcome. Additionally, a trial court may analyze the evidence under MCR 2.611(A)(1)(e) to determine whether the “great weight of the evidence” supports the jury’s

(continued...)

II. Improper Factfinding by the *Martin* Court in the Context of Summary Disposition

This Court's decision in *Martin* contravenes another accepted jurisprudential rule. "It is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on 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." *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 365; 480 NW2d 275 (1991); see also *Arbelius v Poletti*, 188 Mich App 14, 18-19; 469 NW2d 436 (1991). However, in *Martin*, this Court accepted as true the treating physicians' averments describing what they would have done if fully advised by the nurses about the plaintiff's condition. The Court rejected the notion that record evidence, including the testimony of the plaintiff's expert witness, sufficed to challenge the veracity of the treating physicians' contentions. Despite the apparent absence of any evidence rebutting the plaintiff's expert concerning the standard of care, the Court in *Martin* found as fact that the treating physicians would have violated that standard. *Id.* at 161-163. I believe that in light of *SSC Assoc Ltd Partnership* and a related line of established case law, this conclusion constitutes legal error and supplies a second ground warranting reconsideration of *Martin*.

III. Causation in *Martin* and this Case

But the most troubling aspect of both *Martin* and this case concerns the meaning of proximate causation and the proper application of our Supreme Court's opinion in *Skinner*, *supra*. A brief review of *Skinner* reveals that the lead opinion, Judge Bandstra's concurring opinion, and *Martin* have entirely misconstrued the law.

At the time of his death, the decedent in *Skinner* had been operating an electric metal "tumbling machine" of his own design and manufacture. *Id.* at 157. The plaintiffs theorized that defendant Square D defectively designed a switch that the decedent had incorporated in his tumbling machine. According to the plaintiffs, the switch's "large 'phantom zone'" sometimes inaccurately signaled that the switch was "off" while power actually continued flowing to the machine. *Id.* at 158. Because no one witnessed the decedent's accident, no direct evidence existed demonstrating any relationship between the switch and the decedent's electrocution. The plaintiffs' case against Square D was entirely circumstantial, predicated on a mere assumption that the Square D switch had played a role in the decedent's death. *Id.* at 163. Furthermore, some of the physical evidence directly contradicted the hypothetical accident scenario proposed by the plaintiffs. *Id.* at 171-172. Square D maintained that even assuming the presence of a defect in its switch, the plaintiffs' circumstantial proofs failed to demonstrate that the decedent "was misled by the switch when he was fatally electrocuted." *Id.* at 158. The Supreme Court agreed, finding that the record contained no direct or circumstantial evidence from which a reasonable jury could infer the mechanism of the decedent's electrocution or whether the switch contributed to the accident. *Id.* at 174. The Supreme Court emphasized in *Skinner* that "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id.* at 164.

(...continued)

proximate cause finding.

Skinner simply has no applicability here, or to the scenario presented in *Martin*. In both this case and *Martin*, record evidence created a question of fact regarding whether the plaintiffs sustained injury *because they did not receive timely postoperative surgery*; expert testimony in both cases demonstrated that “but for” the absence of timely surgical intervention, the plaintiffs would not have sustained injury. Unlike *Skinner*, in which no direct or circumstantial evidence connected the defect in the switch with the decedent’s electrocution, admissible expert opinions in *Martin* and the instant case directly linked the plaintiffs’ injuries with a delay in their second operations. And breaches of the nursing standard of care constituted a cause of that delay, according to the plaintiffs’ evidence.

The plaintiffs’ expert physicians here and in *Martin* thus supported the “but for” causation requirement with their testimony that if the plaintiffs had undergone earlier second surgeries they would have recovered uneventfully. And, most critically, the experts further opined that had the treating physicians been informed of their patients’ worsening conditions, the standard of care would have required prompt second operations. A firm factual foundation supported the expert testimony supplied in both cases, providing admissible evidence from which a jury could conclude that a reasonably prudent physician would have taken the patients back to the operating room, thereby preventing injury. While the plaintiffs in *Skinner* entirely lacked evidence that the switch constituted a cause in fact of the decedent’s electrocution, the plaintiffs here and in *Martin* produced evidence that the nurses’ negligence resulted in patient injury. This evidence establishes cause in fact. See also *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004):

Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or “but for”) that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause.

It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant’s conduct was a cause in fact of his injuries only if he “set(s) forth specific facts that would support a reasonable inference of a logical sequence of cause and effect.” A valid theory of causation, therefore, must be based on facts in evidence. And while “(t)he evidence need not negate all other possible causes,” this Court has consistently required that the evidence “exclude other reasonable hypotheses with a fair amount of certainty.” [Citations omitted.]

Here and in *Martin*, the plaintiffs presented evidence that supported “a reasonable inference of a logical sequence of cause and effect.” *Craig, supra* at 87. On the basis of that evidence, a jury could reasonably infer that nursing negligence constituted a cause in fact of the plaintiffs’ injuries. *It is reasonable to further infer that a doctor informed of his patient’s serious postoperative problems will conform his conduct to the applicable standard of care.* Speculation and conjecture play no part in the creation of this inference. The expert opinions, premised on actual medical records and provided in accordance with MRE 702 and 703, afford a reasonable basis for a jury’s conclusion that the nurses’ negligence was “a cause of plaintiff’s injury, and

second, that the plaintiff's injury . . . [was] a natural and probable result of the negligent conduct." M Civ JI 15.01. In summary, unlike *Skinner*, in which the plaintiffs lacked any factual support for their expert's opinion connecting the switch with the mechanism of the decedent's death, the medical malpractice plaintiffs here and in *Martin* introduced evidence from which a jury could reasonably infer that earlier surgery, performed in accordance with the standard of care, would have prevented injury.³

IV. Additional Concerns with Judge Bandstra's Approach

Judge Bandstra's opinion asserts that "[t]he logical cause in fact element of plaintiff's claim can be satisfied only by evidence showing what Dr. Eggert would, in fact, have done had different reports been provided, without regard whatsoever to any hypothetical obligations he may have had under an applicable standard of care." *Post* at 3 n 2. But suppose that Dr. Eggert had testified that if the nurses had notified him of changes in plaintiff's condition, he would have immediately taken plaintiff to the operating room. According to Judge Bandstra's concurring opinion and *Martin*, Dr. Eggert's testimony would necessarily result in summary disposition *for plaintiff* with regard to proximate causation. This result would fly in the face of the overriding rule that a jury may elect to disbelieve Dr. Eggert and reject his testimony for any reason, including that it seems either self serving or likely false. Alternatively, suppose that Dr. Eggert had remained a codefendant in the instant medical malpractice case. Under Judge Bandstra's reasoning, if Dr. Eggert testified that he would not have operated until 8:40 p.m. notwithstanding what the nurses told him, this testimony would automatically relieve the nurses of any liability for their negligence.

With all due respect, Judge Bandstra's analysis is plainly incorrect, not only because the jury has the authority to disbelieve Dr. Eggert, but also because the physician's negligence would constitute merely an intervening cause of the plaintiff's injury. This Court has soundly rejected the notion that intervening negligence eliminates proximate causation by an initial tortfeasor:

An act of negligence does not cease to be a proximate cause of the injury because of an intervening act of negligence, if the prior negligence is still operating and the injury is not different in kind from that which would have resulted from the prior act. The courts of this state have held that whether an intervening negligent act of a third person constitutes a superseding proximate cause is a question for the jury. An intervening cause is not an absolute bar to liability if the intervening event is foreseeable, though negligent or even criminal. [*Taylor v Wyeth Laboratories, Inc*, 139 Mich App 389, 401-402; 362 NW2d 293 (1984) (citations omitted).]

"Consequences of a doctor's negligent acts in treating the plaintiff's original injury are considered foreseeable. Hence, whether the doctor's intervening negligent act constitutes a

³ It bears emphasis that an expert witness's testimony may not be admitted unless "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." MRE 703.

superseding proximate cause is a question for the jury.” *Richards v Pierce*, 162 Mich App 308, 317; 412 NW2d 725 (1987).

Judge Bandstra would hold, as this Court did in *Martin*, that a trial court *must* accept a physician’s hypothetical description of what he would have done had he known the actual facts, even if this testimony is soundly rebutted by competent evidence establishing that in so doing, the physician would have violated the standard of care. Such an approach elevates rank speculation over expert medical opinion. In an analogous setting involving informed consent, the United States Court of Appeals for the District of Columbia explained the reasons that courts should soundly reject this subjective standard of proof:

In our view, this method of dealing with the issue on causation comes in second-best. *It places the physician in jeopardy of the patient’s hindsight and bitterness. It places the factfinder in the position of deciding whether a speculative answer to a hypothetical question is to be credited. It calls for a subjective determination solely on testimony of a patient-witness shadowed by the occurrence of the undisclosed risk.* [*Canterbury v Spence*, 464 F2d 772, 790-791 (CA DC, 1972) (emphasis supplied, citations omitted).]

A physician’s expressed opinion concerning his hypothetical conduct under different circumstances should face objective testing by a jury. Although a physician’s testimony regarding causation is a relevant consideration, neither logic nor law dictates that it should always control the outcome of the causation issue.

V. Conclusion

The central proximate cause question in both this case and *Martin* is whether the patient would have benefited from timely nursing reports to the attending surgeon. Here, a jury soundly rejected Dr. Eggert’s contention that he would have ignored earlier information signaling a vascular catastrophe. In a different case, a jury might fully credit a physician’s comparable testimony, and reject that the physician probably would have adhered to the standard of care described by the plaintiff’s expert. Resolution of this question resides solely with the jury. In summary, with the caveats expressed in this opinion, I concur in the lead opinion’s affirmance of the trial court’s denial of the hospital’s motion for judgment notwithstanding the verdict or a new trial, the partial grant of summary disposition to Dr. Eggert, and the remand for a recalculation of damages.

/s/ Elizabeth L. Gleicher