

STATE OF MICHIGAN
IN THE SUPREME COURT

SHERRI MARTIN,
Plaintiff–Appellant,

v

Supreme Court
No. 138636

DAVID LEDINGHAM, M.D., DAVID
RYNBRANDT, M.D., ANDRIS KAZMERS,
M.D., AND PETOSKEY SURGEONS, P.C.
Defendants,

Court of Appeals
No. 280267

and

Emmet County Circuit Court
No. 05-009021-NH

NORTHERN MICHIGAN HOSPITAL,
Defendant–Appellee.

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**APPELLEE’S SECOND SUPPLEMENTAL BRIEF IN OPPOSITION TO
APPELLANT’S APPLICATION FOR LEAVE TO APPEAL**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

COUNTER-STATEMENT OF FACTS 1

LEGAL ARGUMENT 1

 I. THE TRIAL COURT PROPERLY GRANTED
 DEFENDANT HOSPITAL’S MOTION FOR SUMMARY
 DISPOSITION PURSUANT TO MCR 2.116(C)(10) IN
 THIS CASE, WHERE PLAINTIFF FAILED TO
 PRESENT ANY LEGALLY SUFFICIENT EVIDENCE
 OF PROXIMATE CAUSATION IN RESPONSE TO
 DEFENDANT’S MOTION..... 1

 A. THE HOSPITAL’S RESPONSE TO MAJ’S
 ARGUMENTS..... 2

 B. THE HOSPITAL’S RESPONSE TO JUDGE
 GLEICHER’S CRITICISMS..... 10

RELIEF REQUESTED..... 15

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INDEX OF AUTHORITIES

Cases

<i>Lytle v Malady (On Rehearing)</i> , 458 Mich 153; 579 NW2d 906 (1998).....	11
<i>Mazur v Blendea</i> , 413 Mich 540; 321 NW2d 376 (1982)	11
<i>People v Allen</i> , 2009 WL 609553 (Unpublished, Docket No. 287203, <i>rel'd</i> 3-10-09).....	11
<i>Quinn v Blanck</i> , 55 Mich 269; 21 NW 307 (1884).....	11
<i>Skinner v Square D Co.</i> , 445 Mich 153; 516 NW2d 475 (1994).....	14
<i>Weymers v Khera</i> , 454 Mich 639; 563 NW2d 647 (1997)	14
<i>Ykimoff v Foote Memorial Hospital</i> , 285 Mich 80; 776 NW2d 114 (2009).....	2, 10, 11

Rules

MCR 2.116.....	4
MCR 2.116(C)(10).....	1, 4, 8
MCR 2.116(G)(3)(b).....	4
MCR 2.116(G)(4).....	4
MCR 2.116(G)(6).....	4
MCR 2.119.....	4
MCR 2.119(B)(1).....	5
MRE 701	7
MRE 702	7
MRE 704	8

COUNTER-STATEMENT OF FACTS

The Defendant Hospital shall continue to rely upon the discussion of the pertinent facts set forth in its prior submissions in opposition to Plaintiff's Application for Leave to Appeal.

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED DEFENDANT HOSPITAL'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) IN THIS CASE, WHERE PLAINTIFF FAILED TO PRESENT ANY LEGALLY SUFFICIENT EVIDENCE OF PROXIMATE CAUSATION IN RESPONSE TO DEFENDANT'S MOTION.

This Supplemental Brief – the second to be filed by the Defendant Hospital in opposition to Plaintiff's Application for Leave to Appeal – is respectfully submitted in accordance with this Court's Order of April 2, 2010, directing the Clerk of the Court to schedule oral arguments on the application. The Hospital is mindful of the Court's instruction that the parties should not submit restatements of their application papers, and thus, it shall continue to rely upon the arguments made, and authorities cited, in its prior submissions, which are hereby incorporated by reference.¹ The Hospital shall utilize this opportunity for supplemental briefing to address arguments made in the amicus curiae brief filed by the Michigan Association for Justice ("MAJ"), and to provide additional responses to the

¹ The Hospital's original response entitled "Appellee's Answer in Opposition to Appellant's Application for Leave to Appeal" was filed with the Court on May 13, 2009. The Hospital's first supplemental brief entitled "Appellee's Supplemental Brief in Opposition to Appellant's Application for Leave to Appeal" was filed with the Court on August 25, 2009 in response to a supplemental brief filed on behalf of Plaintiff–Appellant Martin on August 10, 2009.

criticisms of the Court of Appeals' decision in this case expressed by Judge Gleicher in her concurring Opinion in *Ykimoff v Foote Memorial Hospital*, 285 Mich 80, 120-135; 776 NW2d 114 (2009)

A. THE HOSPITAL'S RESPONSE TO MAJ'S ARGUMENTS.

The arguments advanced in MAJ's amicus curiae brief supplement the Plaintiff's continuing effort to mischaracterize the holdings of the lower courts as improper finding of disputed facts and judging of credibility. Like Plaintiff Martin, the MAJ is staunchly unwilling to recognize or acknowledge that the opinion of Plaintiff's expert was **not** rejected because it was found *incredible* or insufficient to *outweigh* conflicting evidence, but was instead found insufficient because it was *irrelevant*, and therefore *inadmissible* to refute the affidavits of the actual physicians involved with Plaintiff's treatment. MAJ's arguments consist, largely, of a repetition of the arguments previously made by the Plaintiff, and to that extent, they have already been answered by the arguments previously made in opposition to Plaintiff's application.

The MAJ has raised some additional arguments challenging the legal sufficiency of the Hospital's affidavits – arguments which have not been raised in the Plaintiff's application or addressed by the lower courts in this litigation. Specifically, MAJ has suggested that the Hospital's affidavits were defective because they provided opinions, not facts, and thus, were legally insufficient to support the Hospital's motion for summary disposition. The Hospital respectfully suggests, at the outset, that the Court should decline to consider these arguments at all, since they were not raised in Plaintiff's application or considered in the proceedings below. The MAJ does not do proper service to this Court as amicus curiae by raising technical objections not raised by the parties or adjudicated below in order to seek a favorable

disposition for the party it supports. Presumably, this Court has not requested oral argument to ponder such questions. But if the Court should choose to consider these arguments, they should be rejected for lack of merit.

It has not been disputed that Dr. Rynbrandt and Dr. Beaudoin were physicians who were actually involved in Plaintiff's care during the times at issue. Their affidavits clearly reflect that the statements made therein were based upon their own involvement and their own thorough review of the medical records. Thus, it is wholly inaccurate to suggest, as MAJ has, that these affidavits were made without the necessary personal knowledge. It is equally unfounded to suggest that the statements made therein were mere "lay predictions based on a hypothetical scenario." These were the actual doctors involved, and thus, they were certainly competent to say, as a matter of fact, what they would or would not have done if additional reports had been made in the manner Plaintiff claimed was necessary.²

Nor is there any basis for MAJ's suggestion that the testimony provided in these physician affidavits was inadmissible or otherwise inappropriate to the extent that their statements might be considered an expression of opinion as to how the affiants would have responded to the additional reports Plaintiff claims should have been made. If opinion at all, such opinions were clearly admissible because they were properly based upon each Doctor's

² If opinions expressed in the Hospital's affidavits are considered to be lay opinions, so too, are the opinions of Dr. Philips, who possesses the same qualifications as Dr. Beaudoin and Dr. Rynbrandt. To the extent that the testimony of Plaintiff's expert can establish the standard of care applicable to Dr. Rynbrandt and Dr. Beaudoin, those attending physicians were equally qualified to opine on that subject. To the extent that the Hospital's affidavits address questions of fact, *i.e.*, what the affiant physicians would actually have done if the allegedly necessary reporting had been made, they alone had the personal knowledge required to opine on that issue. And if their predictions are deemed to have been based upon a hypothetical scenario, so too, are the opinions of Plaintiff's expert, who has opined concerning the same scenario.

personal knowledge and participation in Plaintiff's care. Certainly, it may be acknowledged that an affidavit which merely states an unsupported belief is not sufficient because the testimony it offers to present would not be admissible, but that is clearly not the case here.

There is no basis for MAJ's suggestion that the Hospital's affidavits did not comply with the requirements of MCR 2.116 and MCR 2.119. MCR 2.116(G)(3)(b) requires that affidavits, depositions, admissions, or other documentary evidence be submitted "in support of the grounds asserted in the motion" when summary disposition is sought under MCR 2.116(C)(10):

"(G) Affidavits; Hearing.

"(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

* * *

"(3) Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required

* * *

"(b) when judgment is sought based on subrule (C)(10)."

MCR 2.116(G)(4) provides that when a motion under subrule (C)(10) is made and supported in this manner, the opposing party must set forth specific facts showing that there is a genuine issue for trial. If the opposing party fails to do so, judgment must be granted in favor of the moving party, if appropriate. MCR 2.116(G)(6) provides that affidavits, depositions and documentary evidence may be considered only to the extent that their content or substance would be admissible as evidence to establish or deny the ground for the motion:

"(4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. **When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere**

allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

* * *

“(6) Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be **admissible as evidence to establish or deny the grounds stated in the motion.**” (Emphasis added)

MCR 2.119(B)(1) provides that affidavits submitted in support of or in opposition to a motion must be: 1) made on personal knowledge; 2) state with particularity facts admissible in evidence establishing or denying the grounds stated in the motion; and 3) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit:

“(B) Form of Affidavits.

“(1) If an affidavit is filed in support of or in opposition to a motion, it must:

“(a) be made on personal knowledge;

“(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and

“(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.”

The affidavits of Dr. Rynbrandt and Dr. Beaudoin satisfied each of these requirements, and thus, properly supported the Hospital’s motion for summary disposition in this case. As noted previously, establishment of Plaintiff’s cause of action against the Hospital requires the Plaintiff to present admissible evidence that Dr. Rynbrandt, and/or another physician having

authority to review his treatment decisions, would have taken appropriate corrective action based upon the omitted reports, had they been made, and that this action would have prevented the injuries in question. In its motion for summary disposition, the Hospital properly demonstrated that this showing – essential for establishment of the requisite cause-in-fact – cannot be made in this case because Dr. Rynbrandt and Dr. Beaudoin have unequivocally confirmed that they would not have taken action to alter the Plaintiff's treatment if the nurses had made the additional reports that Plaintiff claims were necessary. The existence of this impediment was established by the Hospital's affidavits, which accurately reported the opinions of these physicians, actually involved in the Plaintiff's treatment, that they would not have altered Plaintiff's treatment if the additional reports had been made. The existence and substance of their opinions are facts which have been accurately stated in their affidavits, which have also recited, in detail, the facts upon which they were based.

The Hospital's affidavits did not purport to establish facts not supported by personal knowledge, nor have they expressed opinions unsupported by the facts of the case. Thus, the Court will not be aided by MAJ's lengthy discussion of cases appropriately holding that affidavits must be based upon personal knowledge, as opposed to unsupported opinions, conclusions, or "information and belief."

There is also no basis for MAJ's suggestion that a motion for summary disposition cannot be based upon an affidavit expressing an admissible opinion. MAJ has cited decisions stating the familiar admonishment that "opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." But when the quoted language is read in context, as it

must be, it is immediately apparent that the inclusion of “opinions” in this listing of materials that cannot properly support or oppose a motion for summary disposition was intended as a reference to incompetent or unsupported opinions – opinions which do not satisfy the requirements for admission of opinion testimony under the applicable rules of evidence.

To the extent that the affidavits of Dr. Rynbrandt and Dr. Beaudoin contain expressions of their opinions, those opinions have appropriately provided admissible evidence of the troublesome *fact* that defeats Plaintiff’s ability to establish proximate causation in this matter – the fact that they would not have altered Plaintiff’s treatment if the nurses had provided the additional reports that Plaintiff now claims were required. Their opinions on this important point were based upon personal knowledge derived from their participation as treating physicians and their detailed review of the medical records, and were therefore admissible under the rules of evidence.

Under MRE 702, a properly qualified expert may provide testimony in the form of an opinion if the court determines that the testimony will assist the trier of fact to understand the issue or determine a fact in issue:

“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

Under MRE 701, a witness not testifying as an expert may give testimony in the form of an opinion or inferences if the opinions or inferences are rationally based upon the perceptions of the witness and helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue:

“If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”

And under MRE 704, otherwise admissible testimony in the form of an opinion or inference cannot be deemed objectionable because it embraces an ultimate fact to be decided by the trier of fact:

“The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.”

Whether their content is classified as statement of fact, expression of lay or expert opinion, or some combination of these, the affidavits of Dr. Rynbrandt and Dr. Beaudoin have provided admissible evidence supporting the Hospital’s claim that Plaintiff cannot establish the required element of proximate causation in this case. Plaintiff has not presented any admissible evidence capable of refuting that claim.

The MAJ has gone to great lengths to discuss principles which have never been disputed in this matter. The Hospital has never disputed that it is inappropriate for a trial court to weigh credibility of witnesses or make findings on disputed questions of fact when deciding a motion for summary disposition under MCR 2.116(C)(10). MAJ’s lengthy discussion of cases establishing these principles is therefore unhelpful. A review of the lower court decisions will quickly reveal that they have not based their holdings upon a determination of credibility or any findings made with respect to legitimately disputed facts. The trial court and the Court of Appeals have merely concluded, correctly, that the Plaintiff’s proposed proofs were not responsive to the essential question of what Dr. Rynbrandt and Dr. Beaudoin would have done in response to the reports that Plaintiff claims the nurses should have made.

As the lower courts have correctly noted, the Plaintiff was required to prove that additional reporting by the Hospital's nurses would have brought about a beneficial response by the physicians that were actually involved, or would have become involved, in Plaintiff's treatment. They have properly held that Plaintiff's proposed opinion testimony as to what a hypothetical Doctor complying with the standard of care (as defined by Dr. Phillips) would have done did not shed any light upon the very different question of what the actual Doctors would have done, and therefore did not refute the Hospital's showing that summary disposition was warranted for Plaintiff's inability to establish proximate causation. This being the case, the trial court was not presented with a genuine question of fact. Plaintiff simply failed to present *any* relevant evidence to refute the admissible evidence offered in support of the Hospital's motion for summary disposition. Thus, there was no conflicting evidence to weigh, no finding of fact to be made, and no necessity for judging credibility.

It is noteworthy that having unfairly criticized the lower courts for impermissibly judging credibility, the MAJ has asserted that Dr. Rynbrandt's affidavit was incredible, and therefore did not provide adequate support for the Hospital's motion. But Plaintiff and MAJ have offered no basis, beyond raw speculation, to conclude that the testimony of these affiants was untruthful. Dr. Rynbrandt and Dr. Beaudoin were not parties to the action,³ and thus, had no financial stake in the outcome of Plaintiff's lawsuit. The Court should decline MAJ's invitation to assume that their testimony was biased just because they practice at the Defendant Hospital. On pages 29 and 30 of MAJ's amicus brief, its speculation ripens into an "interest of justice and public policy" argument built upon the wildly speculative assumption

³ As Defendant has noted previously, Dr. Rynbrandt was originally joined as a defendant in this action, but Plaintiff's claim against him was dismissed pursuant to a settlement before the filing of the Hospital's motion for summary disposition.

that health care providers will perjure themselves, and even modify medical records, to protect their colleagues if the Court of Appeals' decision in this case is not reversed. The argument goes so far as to suggest that their counsel will also "simply not tell the truth." There is no basis whatsoever for this assumption that these professionals, or anyone else, will be tempted by the Court of Appeals' holding in this case to disregard their obligation to tell the truth under oath, or that anyone will fall victim to that temptation. The suggestion that they will is both unfounded and insulting. There are remedies to be applied when such abuses are discovered, including licensing sanctions, civil liability and criminal penalties. It is neither necessary nor appropriate for this Court to provide any additional deterrence.

B. THE HOSPITAL'S RESPONSE TO JUDGE GLEICHER'S CRITICISMS.

In her concurring opinion in *Ykimoff*, Judge Gleicher devoted considerable attention to criticizing the Court of Appeals' decision in this case. The Hospital has addressed Judge Gleicher's criticisms in their first Supplemental Brief, but some of the points made in that brief warrant further discussion.

Judge Gleicher has correctly noted that jurors have no obligation to accept any evidence, and are therefore free to reject even uncontroverted testimony. This has never been disputed. But Judge Gleicher's criticism appears to overlook the well-established rule that disbelief of a denial does not provide any affirmative substantive proof of the matter denied. And as Judge Bandstra correctly noted in his concurrence in *Ykimoff*, the validity of this time-honored rule, first articulated in the case of *Quinn v Blanck*, 55 Mich 269, 272; 21 NW 307

(1884), has not been diminished by any of the subsequent authorities cited in Judge Gleicher's concurrence. *Ykimoff, supra*, 285 Mich at 118-119, fn. 3 (Bandstra, J., concurring).⁴

Nonetheless, Judge Gleicher has inappropriately suggested that summary disposition should have been denied in this case based upon the mere possibility that the jury might have disbelieved the testimony of Dr. Rynbrandt and/or Dr. Beaudoin, and based upon that denial alone, rendered a finding of fact in Plaintiff's favor founded upon a lack of evidence. This is not, and never has been, permitted under the law of this state, as Judge Bandstra aptly noted in *Ykimoff*. If this case was taken to trial and the jurors disbelieved the testimony of Dr. Rynbrandt and Dr. Beaudoin, there would be no substantive evidence of what they would have done if the nurses had made the additional reports that Plaintiff claims were necessary. And without admissible substantive evidence that the nurses' reports would have produced a beneficial response sufficient to avoid the injury, the Plaintiff cannot satisfy her burden of proving proximate causation.

The Court should note that Judge Gleicher's criticisms have also been based upon mischaracterizations of the lower court holdings. She suggested, for example, that the Court of Appeals had "rejected the notion that record evidence, including the testimony of the plaintiff's expert witness, sufficed to challenge the veracity of the treating physicians." 285 Mich App at 128. In a similar vein, Judge Gleicher also declared that the Court of Appeals

⁴ As Defendant has noted before, this Court has reaffirmed the validity of this principle, which appropriately recognizes the important legal distinction between substantive proof and evidence presented for impeachment, in *Mazur v Blendea*, 413 Mich 540, 547; 321 NW2d 376 (1982) and *Lyle v Malady (On Rehearing)*, 458 Mich 153, 182; 579 NW2d 906 (1998). In its more recent decision in *People v Allen*, 2009 WL 609553 (Unpublished, Docket No. 287203, *rel'd* 3-10-09), the Court of Appeals cited this Court's decision in *Blanck* with approval for its holding that "[i]t 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." (slip op p. 3)

had “found as fact that the treating physicians would have violated [the standard of care.]” *Id.* But as previously discussed, the lower court decisions in this case were not based upon any finding with respect to the veracity of Dr. Rynbrandt or Dr. Beaudoin or any assumption that they would have violated the standard of care. They were based, instead, upon their proper recognition that Dr. Phillips could not offer any admissible substantive proof of what the actual Doctors involved would have done.

Judge Gleicher’s criticism of the lower court decisions in this case appears to have also been based, in part, upon an assumption that Dr. Phillips’ opinion as to what a general surgeon *should* have done under the hypothesized circumstances could have been considered admissible substantive proof of what Dr. Rynbrandt and Dr. Beaudoin actually *would* have done under those circumstances. Judge Gleicher opined that:

“Here and in *Martin*, the plaintiffs presented evidence that supported “ ‘ a reasonable inference of a logical sequence of cause and effect.’ . . . 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 or her conduct to the applicable standard of care.* ”

285 Mich App at 131 (Emphasis in Opinion)

This assumption is faulty because there are serious gaps in the “logical sequence of cause and effect” that Judge Gleicher has envisioned – gaps which the Plaintiff is unable to bridge with admissible substantive proof. Although it is reasonable to suppose that a reasonable and competent physician will comply with the applicable standard of care in most cases, Dr. Phillips had no basis to predict that Dr. Rynbrandt or Dr. Beaudoin would have treated the Plaintiff according to the standard of care as *he* defined it under the hypothesized circumstances. Dr. Phillips has not professed to have any personal knowledge of Dr. Rynbrandt or Dr. Beaudoin, and thus, he has not offered, and cannot offer, any competent

opinion as to whether either of them would have agreed and/or complied with his understanding of the appropriate standard of care. As the trial court appropriately noted, there is a distinct possibility that Dr. Rynbrandt and/or Dr. Beaudoin “may not have agreed with Plaintiff’s surgical expert about what the standard of care required, or may have simply negligently failed to provide the care which Plaintiff’s expert says was required by the standard.” (Trial Court Opinion of August 9, 2007, p. 6) That possibility appears to be more of a certainty in light of the statements contained in the Hospital’s affidavits, which have made an uncontroverted showing that Dr. Rynbrandt and Dr. Beaudoin would not have altered the Plaintiff’s care in the manner that Dr. Phillips thought necessary.

The value of Dr. Phillips’ opinion is further diminished by the fact that Dr. Rynbrandt was originally joined as a defendant in this action. Before settling her claim against Dr. Rynbrandt, the Plaintiff claimed that he had violated the standard of care with respect to the treatment provided in this case and supported her claim with an affidavit of merit, as required by law. How can she now suggest a *probability* that Dr. Rynbrandt would have complied with the standard of care as defined by Dr. Phillips when he has provided a sworn affidavit stating that he would not have done so? And the Court should note that the inference is even weaker with respect to Dr. Beaudoin because there is no basis for a jury to find a probability that he would ever have been consulted at all. Would the nurses have taken the matter to Dr. Beaudoin if they had reported concerns to Dr. Rynbrandt and received his assurance that no further action was required? There is no way that this question can be answered with any degree of certainty.

In light of these uncertainties, the trial court appropriately concluded that “[a]mong the plausible explanations, Plaintiff’s theory of causation is no more likely than the alternative

theories. Plaintiff's theory remains conjecture only." (Trial Court Opinion of August 9, 2007, p. 6) Even if the testimony of Plaintiff's expert as to what a reasonable Doctor complying with the standard of care *should* have done could be considered competent evidence of what these Doctors actually *would* have done in the absence of their affidavits stating that they would have done otherwise, that testimony cannot suffice to satisfy Plaintiff's burden of proof in the face of their anticipated testimony that they would, in fact, have done otherwise.

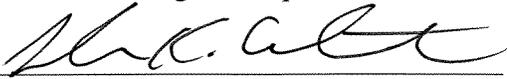
To ask the jury to find causation under these circumstances would be an impermissible invitation for them to find causation based upon speculation, and to allow them to do so would be an impermissible allowance of a verdict based upon speculation. As Defendant Hospital has noted previously, this Court has made it very clear that causation cannot be based upon speculation. *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997); *Skinner v Square D Co.*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). A strong showing must be made, and such a showing cannot be made in this case. Summary disposition was properly granted in this case for Plaintiff's inability to establish the required proximate causation. Accordingly, the Defendant Hospital again respectfully submits that Plaintiff's Application for Leave to Appeal should be denied.

RELIEF REQUESTED

WHEREFORE, Defendant–Appellee Northern Michigan Hospital respectfully requests that Appellant’s Application for leave to Appeal be denied.

Respectfully submitted,

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