

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

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MICHIGAN SUPREME COURT

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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.

As the Defendant Hospital has noted in its original response in opposition to Plaintiff's application for leave to appeal, the decision of the Court of Appeals in this case has not created any new rule of law warranting scrutiny and approval or disapproval by this Court. The Court of Appeals has merely applied the well established rule that a plaintiff must present some form of competent and legally admissible evidence providing factual support for his or her claim when the defendant has supported a motion for summary disposition under MCR 2.116(C)(10) with competent and legally admissible evidence that one or more of the required elements of the plaintiff's cause of action cannot be established. Applying this time-honored principle, the Court of Appeals properly affirmed the trial court's finding that Plaintiff had failed to sustain her burden of establishing a genuine issue of material fact as to the essential element of proximate causation – a failure which properly warranted a grant of summary disposition under MCR 2.116(C)(10) in this case.

Plaintiff has recently filed a supplemental brief in support of her application for leave to appeal, which directs the Court's attention to the Court of Appeals' more recent decision in the case of *Ykimoff v W.A. Foote Memorial Hospital*, ___ Mich App ___; ___ NW2d ___ (Docket No. 279472, *rel'd* 7-16-09). Plaintiff maintains that *Ykimoff* has seriously undermined the validity of the Court of Appeals' decision in this case because the pertinent facts of *Ykimoff* are "essentially undistinguishable from those of the present case," and yet,

Judges Talbot and Bandstra, who participated in the decision of this case, found their decision in this case to be factually distinguishable, and therefore inapplicable, without a principled basis for doing so. This supplemental brief in opposition to Plaintiff's application is now submitted on behalf of the Defendant Hospital to show that this claim is unfounded.

Plaintiff's argument is built upon the unsound premise that the pertinent facts of *Ykimoff* are "essentially undistinguishable from those of the present case." (Plaintiff's Supplemental Brief, p. 2) That is not the case, however, and when this is seen to be true, it becomes readily apparent that *Ykimoff* is properly distinguishable, and thus, casts no doubt upon the validity of the Court's prior decision in this case. Judges Talbot and Bandstra properly concluded that their prior decision in this case was not controlling in *Ykimoff*, in light of the important differences in the pertinent facts of the two cases. Their recognition of those differences, and their principled determination that their prior holding in this case was not controlling in *Ykimoff* in light of those differences, refutes Plaintiff's exaggerated suggestion that the Court's decision in this case will have a broad-reaching impact in future cases. As Judge Talbot noted in *Ykimoff*, the Court's decision in this case was very fact-intensive, and this necessarily suggests that its holding will be narrowly applied to cases with sufficiently similar facts.

It may be acknowledged that there are similarities between the two cases. In *Ykimoff*, as in this case, the plaintiff's surgeon, Dr. Eggert, testified that his treatment of the plaintiff's condition would not have been any different if the nurses had reported the changes in plaintiff's condition as the plaintiff claimed they should have done. But the critical difference, and the point that Judge Talbot might have explained more clearly, is that in *Ykimoff*, Dr. Eggert's contradictory trial testimony itself provided a legally sufficient, if not

overly compelling, basis for the jury to find that he would have intervened sooner with treatment that would have prevented the plaintiff's injuries if the nurses had made a more timely report of the plaintiff's deteriorating condition, despite his direct examination testimony to the contrary. As Judge Talbot noted in his lead opinion in *Ykimoff*, Dr. Eggert's testimony was full of inconsistencies – discrepancies which prompted Judge Bandstra to note that his 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.**” (Judge Bandstra's concurrence, p. 2 – Emphasis added)

As Judge Talbot's Opinion in *Ykimoff* reveals, there was disagreement between Dr. Eggert and the plaintiff's expert witness regarding the cause of the plaintiff's injuries **and** the nature of the symptoms observed by the nurses in the Post-Anesthesia Care Unit (PACU) in the hours following the surgery. The plaintiff's expert opined that the symptoms observed by the nurses were caused by the formation of a blood clot which began to occur shortly after the completion of the surgery, and that the injuries at issue were caused by the delay in diagnosis and treatment of the clot occasioned by the nurses' failure to report their observations sooner. Dr. Eggert expressed his opinion that the plaintiff's residual impairment was neurological in nature, having been caused by prolonged clamping of blood vessels during the surgery, and although he acknowledged that it was essential to monitor the plaintiff's condition for formation of blood clots after the surgery in light of its extended duration, he felt that the blood clot did not form until a very short time – within minutes – before the nurses observed a mottling of the skin on the plaintiff's right leg, which they promptly reported. Accordingly, Dr. Eggert felt that the vascular emergency that he suspected upon his return to the Hospital

did not begin to develop until very shortly before the mottling of the skin was observed, and thus, the various symptoms observed by the nurses in the PACU prior to that time had not suggested the onset of a vascular emergency requiring an earlier report of the plaintiff's condition. (Opinion, pp. 3-5)

The difficulty for the Hospital in *Ykimoff* was that Dr. Eggert's own trial testimony contained inconsistencies and admissions which provided admittedly scant, but legally sufficient, support for the jury's apparent finding that he would, in fact, have provided a beneficial response if contacted earlier, despite his "unequivocal" direct examination testimony to the contrary. As Judge Talbot's opinion notes, Dr. Eggert acknowledged that several of the symptoms observed, but not reported, by the nurses in the PACU during the time at issue could have been considered indicative of the formation of a blood clot. These acknowledgements were consistent with the testimony of the plaintiff's expert, and fundamentally inconsistent with his earlier testimony that the nurses had assessed the plaintiff's condition for vascular problems, and had found no evidence of a vascular problem at all "until the thrombosis took place." (Opinion, pp. 6-7)

Thus, as Judge Talbot appropriately observed, these acknowledgments **did** support a finding that the nurses **did not** keep Dr. Eggert sufficiently informed of the plaintiff's changing condition, despite his statement to the contrary. It is also important to note that the evidence of Dr. Eggert's response to the situation presented in *Ykimoff* provided a ready answer to the question of how he would have responded if he had been recalled to the Hospital sooner, and upon his return, discovered the existence of the several symptoms observed by the nurses in the PACU – symptoms which he, himself, acknowledged could be indicative of the formation of a blood clot. Judge Talbot's opinion in *Ykimoff* reveals that

when Dr. Eggert was finally contacted by the nurses, he returned to the hospital promptly, and upon examining the plaintiff, suspected a vascular emergency. This suspicion brought about an immediate response – a prompt return to the operating room for exploratory surgery which detected and removed the obstruction. (Opinion, p. 2) In light of this clear evidence of how Dr. Eggert **did** respond when his examination of the plaintiff raised a suspicion of vascular emergency, the jury could properly have concluded, and apparently did conclude, that he would have responded in the same way if an earlier report of the plaintiff’s symptoms had brought about an earlier diagnosis of the problem. Under these circumstances, this rather clear evidence of how Dr. Eggert **did** respond upon discovery of a vascular emergency provides ample support for Judge Talbot’s finding that Dr. Eggert’s “unequivocal” testimony that he would have done nothing if contacted sooner was inconsistent with his own conduct.

All of this provided a legally sufficient basis for the jury’s verdict in *Ykimoff*, and thus, the denial of the Hospital’s motion for JNOV in that case does not come as a surprise. But as noted previously, the Court’s decision in *Ykimoff* does not undermine the validity of the Court of Appeals’ decision in this case because the pertinent facts of this case are very different. In this case, Plaintiff’s claim against the Hospital was disposed of by an order granting summary disposition under MCR 2.116(C)(10). As noted previously, the Hospital’s motion was supported by the affidavits of Dr. Rynbrandt and Dr. Beaudoin, which related their sworn testimony that they would not have altered the Plaintiff’s treatment if the additional reports of her condition had been made by the nurses in the manner claimed to have been necessary.

Dr. Rynbrandt’s lengthy and detailed affidavit asserted that he had been fully informed with regard to Plaintiff’s condition during the period in question, and that his care of Plaintiff would not have been altered if the nurses had made additional reports to him as Plaintiff has

alleged they should have done. Dr. Rynbrandt testified, in his affidavit, that he had reviewed Plaintiff's medical records in detail. (Rynbrandt Affidavit, ¶ 4) He stated that he had reviewed and evaluated all of the various laboratory results and conditions in question every day that he had seen Plaintiff, and on the days that she had been seen by another physician, he had either agreed with the care provided or changed the care ordered by the other physician. With regard to each of the criticisms of the nurses listed in Plaintiff's Complaint, Dr. Rynbrandt stated there was nothing that the nurses could have done differently which would have led him to alter Plaintiff's treatment. (Rynbrandt Affidavit, ¶¶ 18, 19, 21, 23, 25, 28, 29, 31, 32, 34, 41, 42, 46, 48, 51, 53, 57, 61, 67, 73, 74, 75, 76)

In Paragraph 7 of his affidavit, Dr. Rynbrandt expressed his opinion that the nurses had fully informed him of Plaintiff's condition and progress through telephone conversations and other discussions, and through their entries in Plaintiff's medical record. In Paragraph 8 of his affidavit, Dr. Rynbrandt stated that "I do not believe that any of the actions alleged by Plaintiff in Paragraph 61, had the nurses performed them as Plaintiff alleges they should have been performed, would have led me to alter the care that I provided to Mrs. Martin."

Defendant also presented an affidavit of Dr. Jeffrey Beaudoin, the Chief of Surgery to whom the nurses would have reported under Hospital policy if further reporting had been deemed necessary. In his affidavit, Dr. Beaudoin stated that he had reviewed Plaintiff's Complaint and the allegations made against Dr. Rynbrandt therein, and that he had also reviewed, in detail, Plaintiff's medical records from Northern Michigan Hospital pertaining to the treatment at issue. (Beaudoin Affidavit, ¶ 4) Dr. Beaudoin stated that if he had been contacted pursuant to the Hospital's policy for review of Plaintiff's treatment, he would have reviewed Plaintiff's medical record, including nursing notes and laboratory test results;

discussed Plaintiff's care and treatment with Dr. Rynbrandt; and might also have spoken with and examined Plaintiff. (Beaudoin Affidavit, ¶ 8) Based upon his detailed review of the matter, Dr. Beaudoin expressed his belief that, more likely than not, he would not have suggested or requested any change in the care provided to the Plaintiff by the surgeons attending to her care, including Dr. Rynbrandt, if he had been contacted for review of her treatment under the Hospital's Responsibilities For Patient Care: Lines of Authority policy. (Beaudoin Affidavit, ¶ 10)

The testimony provided by these affidavits has not been refuted or diminished by inconsistent admissions or any other evidence inconsistent with their assertions that Plaintiff's treatment would not have been altered by additional or better reporting. In contrast to the evidence reviewed in *Ykimoff*, Plaintiff has not presented any evidence disputing Dr. Rynbrandt's testimony that he was kept fully apprised of Plaintiff's condition through his examinations and ongoing discussions and review of the medical records, including the results of all studies performed, throughout the course of Plaintiff's hospitalization. But more importantly, Plaintiff has not presented any evidence whatsoever to support her claim that Dr. Rynbrandt or Dr. Beaudoin would, in fact, have done anything differently if the nurses had made additional or more complete reports of her condition. Plaintiff has not identified any inconsistencies, admissions or caveats in the affidavits of Dr. Rynbrandt or Dr. Beaudoin which could support a finding that either of them would have performed their duties differently if the nurses had made additional or more complete reports of Plaintiff's condition, and thus, there is no basis here to conclude, as the Court of Appeals did in *Ykimoff*, that their

denials were in any way inconsistent with their conduct.¹ If there were any such inconsistencies, admissions, or caveats to be relied upon here, they could have been discovered and fully developed through deposition testimony, but Plaintiff did not present any such testimony for the court's consideration.

Plaintiff has merely presented expert opinion testimony as to what her expert feels these physicians should have done in compliance with the standard of care if additional or better reports had been made, but that was not the relevant issue. As noted previously, the critical issue, and the only relevant question with respect to the motion for summary disposition at issue, was what these Doctors actually would have done, not what they should have done. In *Ykimoff*, Dr. Eggert's testimony provided competent proof of what he probably would have done if the nurses had reported the plaintiff's condition sooner. No such evidence has been presented here.

But even if Dr. Phillips' testimony as to what a hypothetical physician should have done could properly be considered competent evidence of what these physicians would have done, a trier of fact could not properly conclude that they would have performed as Dr.

¹ Plaintiff has noted that Dr. Beaudoin performed exploratory surgery which detected and repaired the intestinal leak in the early morning hours of May 9th, after being called to consult as the surgeon-on-call late in the evening of May 8th. Drawing a comparison to *Ykimoff*, she suggests that this fact tends to refute Dr. Beaudoin's testimony that he would not have suggested any changes in Plaintiff's treatment if contacted earlier pursuant to the Hospital's policy. But the Court should note that this case is different, in this respect, from the situation found in *Ykimoff*. In *Ykimoff*, Dr. Eggert's own trial testimony was replete with inconsistencies and admissions which provided an adequate basis for the jury to conclude that his surgical intervention would probably have occurred earlier if the nurses had made more timely and complete reports of the plaintiff's deteriorating condition. In this case, although Dr. Beaudoin found cause to order a CT scan, and eventually, to perform exploratory surgery, after being summoned to Plaintiff's bedside late in the evening of May 8th, his affidavit contains nothing to suggest that he would have found any of those measures to be necessary if called to consult at an earlier time.

Phillips opined they should have, despite their unequivocal, unqualified and uncontroverted denial that they would have so performed. To indulge such an inference under these circumstances would be pure speculation, which, as noted previously, cannot suffice to establish proximate causation. To establish the requisite cause-in-fact, a plaintiff must present substantial evidence from which the trier of fact may conclude that, “more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.” *Skinner v Square D Co.*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). Thus, as this Court emphasized in *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997), a mere possibility of causation cannot suffice:

“The Plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.”

454 Mich at 647-648 (quoting *Skinner v Square D Co.*, *supra*; and Prosser & Keaton, Torts (5th ed), § 41, p. 269)

Accordingly, causation theories based upon mere speculation are insufficient to create a question of fact for a jury. *Skinner v Square D Co.*, *supra*, 445 Mich at 164-165.

Plaintiff has also commended the criticisms of the Court of Appeals’ holding in this case expressed in Judge Gleicher’s concurring opinion in *Ykimoff*. With all due respect to Judge Gleicher, the Defendant Hospital respectfully suggests that those criticisms are also unfounded. The lower courts have correctly applied the well established rule that a plaintiff must present some form of competent and legally admissible evidence providing factual support for her claim to avoid summary disposition under MCR 2.116(C)(10) when the defendant has supported its motion with competent and legally admissible evidence that one or more of the required elements of the plaintiff’s cause of action cannot be established. They

have not engaged in any impermissible weighing of credibility or finding of facts on disputed issues of fact, as Plaintiff and Judge Gleicher seem to believe, and saying that they have does not make it so, regardless of how often, or how vigorously, it is said. They have merely applied the settled law of this state to properly conclude that Plaintiff has failed to sustain her burden of establishing a genuine issue of material fact as to the essential element of proximate causation – a failure which properly warranted a grant of summary disposition under MCR 2.116(C)(10) in this case.

In the absence of any competent proof to support her claim that Dr. Rynbrandt and/or Dr. Beaudoin would have taken some additional or different action to prevent her injuries if they had been better informed by the Hospital's nurses, Plaintiff contends that summary disposition should have been denied based upon the *possibility* that the jury might have disbelieved their testimony and made the necessary finding of fact in her favor in the absence of any actual proof. This claim lacks merit for two reasons. First, it is contrary to the well established principles governing adjudication of motions for summary disposition. When considering a motion under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the non-moving party. *Quinto v Cross and Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted under subrule (C)(10) when the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* The initial evidentiary burden is on the moving party, who is required to support the motion by affidavits, pleadings, depositions, admissions, and other documentary evidence. *Id.* But when the moving party has done so, the burden shifts to the non-moving

party, who must establish the existence of a genuine issue of material fact. *Id.* If the non-moving fails to satisfy its burden of showing facts establishing a genuine issue of material fact, summary disposition is appropriately granted. *McCormick v Auto Club Insurance Association*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

A mere restatement of allegations and denials contained in the pleadings will not suffice to carry the non-moving party's burden. MCR 2.116(G)(4). When the moving party has carried its burden, as the Defendant Hospital did in this case, the non-moving party must present actual evidence, for "it is no longer sufficient for plaintiffs to *promise to offer* factual support for their claims at trial." *Smith v Globe Life Ins Co.*, 460 Mich 446, 455 n 2; 597 NW 2d 28 (1999) (emphasis in Opinion). Conclusory allegations are insufficient, *Quinto, supra*, 451 Mich at 371, and courts may consider evidence only insofar as it would be substantively admissible at trial. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163-164; 645 NW2d 643 (2002); MCR 2.116(G)(6). Thus, it was not sufficient for Plaintiff to argue that evidence to be presented at trial might conceivably establish a basis for relief. Plaintiff was required to show a legally sufficient basis for her claim in response to Defendant's motion, and she failed to do so.²

Second, and more importantly, establishment of an alleged cause of action must be based upon competent and admissible proof. It has long been well settled in Michigan that disbelief of a denial does not constitute affirmative substantive proof of the matter denied. And as Judge Bandstra correctly noted in his concurrence in *Ykimoff*, the validity of this time-

² As noted previously, Plaintiff had the opportunity to try to discover and develop any "inconsistencies, admissions, or caveats" which might have established a basis for a finding of proximate causation through deposition testimony of Dr. Rynbrandt and/or Dr. Beaudoin, but she did not present any such testimony for the court's consideration.

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. (Bandstra concurrence, pp. 3-4) ³ Thus, the Plaintiff and Judge Gleicher have 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*. (Bandstra concurrence, pp. 2-3) 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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Dated: August 25, 2009

³ 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 *Lytle 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) (Appendix "A"), 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)

A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

FLOYD PHILLIP ALLEN,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
March 10, 2009

No. 287203
Ionia Circuit Court
LC No. 06-013487-FH

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals by leave granted and defendant cross-appeals an order of the circuit court granting defendant a new trial. Defendant was convicted following a jury trial of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(d) (victim related to defendant by blood). Defendant was thereafter sentenced to 36 months' probation, with the first 11 months to be served in jail. We reverse the trial court's order granting a new trial and reinstate defendant's conviction and sentence.

The victim testified that on a Monday sometime between September and October 2006, defendant, her father, put his hands down her pants while she was watching wrestling on television with him in his bedroom. Specifically, she testified that during a commercial break he asked her to come up on his bed to give her "daddy some lovin." Her father usually said he wanted "some lovin" when he wanted to "cuddle for a little bit," so she got up on her father's bed. They were "cuddling for a little while," and then her father "slipped his hand down [her] pants" for "like two, three minutes" before she finally told him to stop. She testified that her father's hand was in her pants and under her underwear on her vagina and that defendant moved his hand around at first and then "he just kind of stopped and just left it there." After telling defendant to stop, she got off the bed and went to her own bedroom and locked her door. Her father had touched her "[a]t least 10" other times in the past when they were watching wrestling, including other incidents of placing his hands inside her pants. The last time defendant touched her, he said, "you're getting harr[y] [sic] I'm going to have to shave you like I did your mother." The victim spoke with her older brother and her uncle about what occurred to get their opinion

on what she should do. She told them before telling her mother because she was concerned she might have to go back to foster care¹ if her mother told the authorities.

The victim's mother, defendant's wife, testified that she was not present when the alleged touching occurred. She also testified that her husband in the five years prior to the incident had begun telling her that her pubic hair was long and that "he thought he should shave it." She allowed defendant to shave her pubic hair about "four or five" times. She further testified that she never discussed or mentioned that defendant had shaved her pubic hair and that she had never heard defendant discuss it with anyone.

Defendant did not call any witnesses and chose not to testify. The jury returned a verdict of guilty, and defendant was sentenced on November 6, 2007. On May 13, 2008, defendant filed a motion for a new trial or evidentiary hearing in the trial court, arguing in part that he received ineffective assistance of counsel when counsel advised him not to testify. At the subsequent *Ginther*² hearing, defendant testified that he should have been permitted to testify in order to explain how his daughter found out about the shaving incident. Defendant said that he had a conversation with his son, the victim's older brother, about women's grooming habits, and indicated that he told his son that he shaved his wife "for certain things."

During trial counsel's testimony, the trial court asked whether she remembered having any discussions with defendant about his conversation with his son regarding his mother's grooming habits. She testified that she recalled discussing the possibility that his son might testify and "the pros and cons of whether that would be successful. Whether or not he would—he would come in and testify or even tell the truth about it and whether or not that could potentially backfire." After additional questioning by the parties, the trial court again questioned defendant's trial counsel and asked whether she had discussed with the son whether he would testify or corroborate the conversation defendant had relayed. She indicated that she did not think she could locate or contact him, and that she never asked the victim to see if her brother had relayed the alleged conversation to her.

At the close of the hearing, the trial court sua sponte raised the issue of whether trial counsel should have interviewed defendant's son about whether he and defendant had ever discussed his father's alleged habit of shaving his mother's vaginal pubic hair, or should have interviewed the victim to see if her brother ever relayed the conversation to her. The hearing was continued and defendant's son was located and called to testify.

The son testified that he did have a conversation with his father about why women shave their pubic hair, but that he did not recall his father revealing any details about his father shaving his mother's her pubic hair. Further, he testified that he never had any discussions with the victim involving whether she shaved her pubic hair or revealing any information from the conversations with their father about their father shaving their mother's pubic hair. The trial

¹ The victim and her younger brother were in foster care prior to this incident for unrelated issues to this matter that dealt with the condition of the housing they were living in.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

court concluded that defense counsel was ineffective for failing to interview defendant's son and granted defendant's request for a new trial.

Plaintiff argues on appeal that the trial court erred in granting defendant a new trial. We agree. We review a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Here, the trial court's decision to grant a new trial was based on its determination that defendant received ineffective assistance of counsel. See MCR 2.611(A)(1)(a). "The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). We review de novo a trial court's constitutional determinations, while factual findings are reviewed for clear error. *Id.*

Ineffective assistance of counsel is proven if a defendant can show that "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The trial court concluded that trial counsel's failure to interview defendant's son or have him testify constituted ineffective assistance of counsel. While it does appear that trial counsel's decision not to even interview a witness whose testimony might explain a key piece of otherwise inculpatory evidence was unreasonable, we do not believe the son's testimony could have created reasonable doubt.

As previously noted, defendant's son testified at the *Ginther* hearing that he did not recall any conversation with his father about his mother's grooming habits. Although he admitted that such a conversation may have occurred, he specifically testified that he never had any conversations with the victim about such grooming habits or whether their mother shaved her pubic hair or permitted their father to do so. Therefore, assuming trial counsel had investigated defendant's son's possible testimony, that testimony would not have helped defendant establish an alternative explanation for the victim's knowledge of her mother personal grooming habits.

If the jury believed defendant's son, then the evidence supported the prosecution because there was no evidence that the victim could have found out about defendant's shaving of her mother's pubic hair other than by defendant telling her. If the jury disbelieved defendant's son's testimony, they still could not reasonably infer that the facts were exactly the opposite of what he testified. An inference is a factual conclusion that can be fairly and rationally drawn or deduced from other facts. 29 Am Jur 2d, Evidence, § 199, p 213. "[I]t is not a legitimate interference 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).

The court's reasoning to the contrary was speculation, i.e., speculation that the jury would have "add[ed] one and two and getting three" even in the face of defendant's son's denials, and does not add up to a "reasonable probability that . . . the result would have been different [or that] the result that did occur was fundamentally unfair or unreliable." *Odom*, *supra*. Additionally, we note that the trial court's justification for his conclusion included evidence that was not supported by the testimony. Specifically, the trial court indicated that defendant's son "indicated a number of different ways but he did also indicate that he may have

said something about shaving to his mother.” In fact, there was no testimony that defendant’s son ever spoke with his mother about the shaving. Thus, these findings were clear error. *Cline, supra*.

Because defendant has not shown that interviewing defendant’s son and getting him to testify could have created reasonable doubt, defendant did not meet his burden to show ineffective assistance of counsel, *Odom, supra*, and the trial court erred when it concluded otherwise. Having erred in determining that defendant received ineffective assistance of counsel, the trial court’s decision to grant defendant a new trial based on that erroneous determination constituted an abuse of discretion. See *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006), quoting *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996) (Holding that “a court ‘by definition abuses its discretion when it makes an error of law.’”).

On cross-appeal, defendant argues he received ineffective assistance of counsel because his trial counsel did not call him the stand to testify at his trial. At trial, defense counsel requested a recess to discuss with her client whether he should testify. After the recess, the trial court asked defense counsel whether defendant would be testifying and trial counsel stated the following:

You’re Honor, it’s my understanding and after discussing with my client that he is electing his right to remain silent and that he will not be testifying. Therefore we would be requesting the jury instruction. I believe that would be the normal procedure when the defendant doesn’t testify.

Further, at the hearing on the motion for a new trial, in response to the trial court’s question about whether she advised defendant to testify or not defendant’s trial counsel stated the following:

We did ask for, at the second trial, ask for time so we could discuss it and I can clearly state that I did not advise him not to testify. I advised him and discussed with him, as I do with every client, the pros and cons of testifying. That obviously if someone elects to testify there’s strengths and weaknesses involved with that testimony for each individual, obviously that would be different.

* * *

I have a pretty much set routine that I would discuss with a client that I do on every case regarding whether or not they’re going to elect to testify. They have the right to remain silent, they don’t have to testify but if they should chose to testify then I go through the questions that I would ask them. I basically go through what I anticipate would be a cross-examination of them and that’s what’s discussed and ultimately it has to be their decision. I don’t believe that I can tell them they can’t testify. Just similarly I can’t tell them that they have to testify. It has to absolutely be their decision.

The trial court then asked if defense counsel remembered ultimately who made the decision whether defendant would testify or not and defense counsel stated, "It was his decision to testify or not testify and it was his decision that he was not going to testify." Accordingly, the record supports the judge's finding that defendant made the decision not to testify and did not object when his trial counsel told the trial court his decision. It is axiomatic that defendants can neither be compelled nor prohibited from testifying, and that the ultimate decision rests solely with the defendant. Because the decision to testify belonged to defendant, and defendant alone, that decision cannot constitute ineffective assistance of counsel, as it is not a decision made by counsel.

Next, defendant argues the prosecutor committed prosecutorial misconduct in his closing statement by stating the following:

When somebody is rubbing your vagina under your pants, inside your underwear and it's your father, is there another purpose other than sexual conduct? [The victim] didn't think so and [she] was there. And in this case absolutely this was her father and you need to remember this is uncontroverted testimony. There is no testimony here today but for [the victim] and [her mother]. It's uncontroverted.

Defendant asserts it was improper for the prosecutor to tell the jury the victim's testimony was uncontroverted because it impinged on his Fifth Amendment³ right not to testify given that only defendant could have provided an alternative explanation. Acknowledging that no evidence has been offered contrary to a point does not imply that someone had a responsibility to do so. Further, this Court has held that a statement that the evidence is uncontroverted does not constitute an impermissible comment on a defendant's failure to take the stand. See *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995) (citations omitted) (stating that a prosecutor may comment on whether evidence was uncontroverted.).

Moreover, the trial court instructed the jury that defendant was presumed innocent until proven guilty and that defendant had the absolute right not to testify and that defendant's choosing to not testify "must not affect [the jury's] verdict in any way." Jurors are presumed to follow a judge's instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Reversed and remanded for reinstatement of defendant's conviction and sentence. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Brian K. Zahra
/s/ Douglas B. Shapiro

³ US Const, Am V.