

STATE OF MICHIGAN  
IN THE SUPREME COURT

**SHERRI MARTIN**

Plaintiff-Appellant,

v

**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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**BRIEF *AMICUS CURIAE* ON BEHALF OF  
THE MICHIGAN ASSOCIATION FOR JUSTICE**

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TABLE OF CONTENTS

Index of Authority. . . . . ii

Index of Exhibits. . . . . vi

Interest of Amicus. . . . . 1

Statement of Facts. . . . . 1

Standard of Review. . . . . 1

Argument. . . . . 2

**I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEREIN IT GRANTED SUMMARY DISPOSITION BY IMPROPERLY CONDUCTING A ‘TRIAL BY AFFIDAVITS,’ MAKING CREDIBILITY DETERMINATIONS, AND CONVERTING SPECULATIVE BIASED HYPOTHETICAL TESTIMONY INTO CONCLUSIVE EVIDENCE. . . . . 2**

**A. The Lay Opinions Found in the Affidavits Do Not Meet the ‘Personal Knowledge’ and ‘Facts’ Requirements of MCR 2.119, and are Thus Legally Insufficient to Support Summary Judgment. . . . . 5**

**B. The Lower Courts Erroneously Resolved a Factual Issue that Involved a Material Credibility Determination, Improperly Weighing Defendant-Appellee’s Self-Serving Affidavits against the Affidavits Submitted by Plaintiff-Appellant’s Experts. . . . . 11**

**C. The Affiants’ Opinions Based Only Upon Biased Hypotheticals are Insufficient Where They Were Not Based on the Facts in the Record. . . . . 23**

**D. The Lower Courts Improperly Granted Summary Disposition Where The Issue of Causation Necessarily Involves Questions of Subjective Motives, Feelings, and Reactions. . . . . 25**

**E. The Interests of Justice and Public Policy Weigh in Favor of Reversing the Trial Court’s Improper Decision As It Clearly Contravenes Well-Established Michigan Laws. . . . . 29**

Conclusion. . . . . 30

## INDEX OF AUTHORITY

### **Case Law**

<i>Aetna Life Insurance Co. v Ward</i> , 140 US 76; 11 S Ct 720; 35 L Ed 371 (1891).....	13
<i>Albeiro v City of Kankakee</i> , 246 F3d 927 (CA 7, 2001).....	23
<i>Alpert v United States</i> , 481 F3d 404 (CA 6, 2007).....	8, 9
<i>Anderson v Liberty Lobby, Inc.</i> , 477 US 242; 106 S Ct 2505; 91 L Ed 2d 202 (1986).....	2, 12
<i>Arber v Stahlin</i> , 382 Mich 300; 170 NW2d 45 (1969).....	11, 20, 21, 22
<i>Automatic Radio Manufacturing Co., Inc. v Hazeltine Research, Inc.</i> , 339 US 827; 70 S Ct 894; 94 L Ed 1312 (1950).....	6
<i>Batick v Seymour</i> , 186 Conn 632; 443 A2d 471 (1982).....	25, 26
<i>BellSouth Telecomms. v W.R. Grace &amp; Co.</i> , 77 F3d 603 (CA 2, 1996).....	13
<i>Bobier v Norman</i> , 138 Mich App 819; 360 NW2d 313 (1984).....	5
<i>Brown v Pointer</i> , 390 Mich 346; 212 NW2d 201(1973).....	12
<i>Crossley v Allstate Insurance Company</i> , 139 Mich App 464; 362 NW2d 760 (1984).....	1, 6, 12
<i>Cadle Co. v Hayes</i> , 116 F3d 957 (CA 1, 1997).....	6
<i>Clauson v Lloyd</i> , 103 Nev 432; 743 P2d 631 (1987).....	16, 21, 29
<i>Craig v Oakwood Hosp.</i> , 471 Mich 67; 684 NW2d 296 (2004).....	2, 3
<i>Davis v Zahradnick</i> , 600 F2d 458 (CA 4, 1979).....	12
<i>Dennison v Allen Group Leasing Corp.</i> , 110 Nev 181; 871 P2d 288 (1994).....	29
<i>Drake v 3M</i> , 134 F3d 878 (CA 7, 1998).....	7
<i>Drake v Williams</i> , 2008 Tenn App LEXIS 240 (Tenn App, Apr. 25, 2008).....	13, 14

<i>Durant v Stahlin</i>	
375 Mich 628; 135 NW2d 392 (1965).....	1, 2, 11, 13, 18
<i>Dykes v William Beaumont Hosp.,</i>	
246 Mich App 471; 633 NW2d 440 (2001).....	17
<i>Ellis v England,</i>	
432 F3d 1321 (CA 11, 2005). ....	6
<i>Fletcher v Atex, Inc.,</i>	
68 F3d 1451 (CA 2, 1995).. ....	7
<i>Fowler v Borough of Westville,</i>	
97 F Supp 2d 602 (D NJ, 2000).....	6
<i>Friend v Doe,</i>	
1987 Ohio App LEXIS 5758 (Ohio App, Feb. 3, 1987). ....	19
<i>F.R.C. Int'l, Inc. v United States,</i>	
278 F3d 641 (CA 6, 2002).....	7
<i>Grewe v Mt. Clemens General Hospital,</i>	
404 Mich 240; 273 NW2d 429 (1978).....	23
<i>Hadley v Inmon,</i>	
2006 US Dist LEXIS 3370 (ED Tenn, 2006). ....	8, 9
<i>Hurd v Williams,</i>	
755 F2d 306 (CA 3, 1985).....	6
<i>In re Livent, Inc. Noteholders Sec. Litig.,</i>	
355 F Supp 2d 722 (SD NY, 2005). ....	9
<i>Jameson v Jameson,</i>	
85 US App DC 176; 176 F2d 58 (1949). ....	6
<i>Jones v Graneto,</i>	
1995 Ohio App LEXIS 1357 (Ohio App, Mar. 30, 1995).....	18, 19
<i>Jones v Shek,</i>	
48 Mich App 530; 210 NW2d 808 (1973).....	5
<i>Lecton v Dyll,</i>	
65 SW3d 696 (Tex App, 2001). ....	14, 15
<i>Lynch v Athey Products Corp.,</i>	
505 A2d 42; 1985 Del Super LEXIS 1447 (1985).....	6
<i>Maldonado v Ramirez,</i>	
757 F2d 48 (CA 3, 1985).....	6
<i>Martin v Ledingham,</i>	
282 Mich App 158; ___ NW2d ___ (2009).....	4, 21, 28
<i>Metropolitan Life Ins. Co. v Reist,</i>	
167 Mich App 112; 421 NW2d 592 (1988).....	12, 17, 18
<i>Mitchell v Toledo Hospital,</i>	
964 F2d 577 (CA 6, 1992).....	7
<i>Pace v Capobianco,</i>	
283 F3d 1275 (CA 11, 2002).....	7, 8

<i>Parr v Dutt</i> , 2003 Mich App LEXIS 1746 (July 22, 2003) . . . . .	16, 17
<i>Poller v Columbia</i> , 368 US 464; 82 S Ct 486; 7 L Ed 2d 458 (1962) . . . . .	18
<i>Provident Life &amp; Accident Ins. Co. v. Goel</i> , 274 F3d 984 (CA 5, 2001) . . . . .	9
<i>Rinaldi v CCX, Inc.</i> , 2008 US Dist LEXIS 77394 (WD NC, 2008) . . . . .	15
<i>Reddy v Good Samaritan Hosp. &amp; Health Ctr.</i> , 137 F Supp 2d 948 (SD Ohio, 2001) . . . . .	6
<i>Remes v Duby, (On Remand)</i> , 87 Mich App 534; 274 NW2d 64 (1978) . . . . .	6
<i>Sartor v Arkansas Natural Gas Corporation</i> , 321 US 620; 64 S Ct 724; 88 L Ed 967 (1944) . . . . .	12, 13
<i>Searer v West Michigan Telecasters Inc.</i> , 381 F Supp 634 (WD Mich, 1974) <i>aff'd without op</i> , 524 F2d 1406 (CA 6, 1975) . . . . .	7
<i>Sellers v M.C. Floor Crafters, Inc.</i> , 842 F2d 639 (CA 2, 1988) . . . . .	7
<i>Shaffer v St. Joseph's Mercy Hosps. of Macomb</i> , 2007 Mich App LEXIS 2884 (Mich App, Dec. 27, 2007) . . . . .	4, 5
<i>Shanley v Braun</i> , 1997 US Dist LEXIS 20024 (ND Ill, Dec. 4, 1997) . . . . .	15, 16
<i>Siirila v Barrios</i> , 398 Mich 576; 248 NW2d 171 (1976) . . . . .	29
<i>Skinner v Square D Company</i> , 445 Mich 153; 516 NW2d 475 (1994) . . . . .	1, 2, 3, 11
<i>Snelson v Kamm</i> , 204 Ill 2d 1; 787 NE2d 796 (2003) . . . . .	10
<i>Sonnentheil v Christian Moerlein Brewing Co.</i> , 172 US 401; 19 S Ct 233; 43 L Ed 492 (1899) . . . . .	12
<i>Stagman v Ryan</i> , 176 F 3d 986 (CA 7, 1999) . . . . .	23
<i>State Mutual Life Assurance Company v Deer Creek Park</i> , 612 F2d 259 (CA 6, 1979) . . . . .	7
<i>Suttle v Lake Forest Hospital</i> , 315 Ill App 3d 96; 733 NE2d 726 (2000) . . . . .	9, 10
<i>Syvongxay v Henderson</i> , 147 F Supp 2d 854 (ND Ohio, 2001) . . . . .	6
<i>SSC Associates Limited Partnership v The General Retirement System of the City of Detroit</i> ,	

192 Mich App 360; 480 NW2d 275 (1991).....	5, 6, 12
<i>Walker v Cahalan</i> , 411 Mich 857; 306 NW2d 99 (1981).....	25
<i>Washington v Georgia Baptist Medical Center</i> , 223 Ga App 762; 478 SE2d 892 (1996).....	19, 20
<i>West v Livingston County Rd. Comm.</i> , 131 Mich App 63; 345 NW2d 608 (1983).....	23
<i>White v Taylor Distrib. Co.</i> , 482 Mich 136; 753 NW2d 591 (2008).....	20, 21
<i>Wiley v Henry Ford Cottage Hosp.</i> , 257 Mich App 488; 668 NW2d 402 (2003).....	2
<b>Michigan Constitution</b>	
Const 1963, art 1, § 14. ....	11
<b>Michigan Statutes</b>	
MCL 257.402(a).....	20
MCL 600.2912a(1)(a). ....	2
<b>Michigan Court Rules</b>	
MCR 2.116.....	7
MCR 2.116(C)(10).....	1, 6
MCR 2.116(G)(3).....	1
MCR 2.119.....	7, 10
MCR 2.119(B)(1)(a). ....	1, 10
MCR 2.119(B)(1)(b). ....	1, 10
<b>Michigan Rules of Evidence</b>	
MRE 104(e).....	11
<b>Federal Rules of Civil Procedure</b>	
Rule 56.....	6, 8
Rule 56(e).....	6-9, 16, 23

## INDEX OF EXHIBITS

Exhibit A	<i>Shaffer v St. Joseph's Mercy Hosps. of Macomb</i> , 2007 Mich App LEXIS 2884 (Mich App, Dec. 27, 2007)
Exhibit B	<i>Hadley v Inmon</i> , 2006 US Dist LEXIS 3370 (ED Tenn, 2006)
Exhibit C	<i>Drake v Williams</i> , 2008 Tenn App LEXIS 240 (Tenn App, Apr. 25, 2008)
Exhibit D	<i>Rinaldi v CCX, Inc.</i> , 2008 US Dist LEXIS 77394 (WD NC, 2008)
Exhibit E	<i>Shanley v Braun</i> , 1997 U.S. Dist. LEXIS 20024 (ND Ill, Dec. 4, 1997)
Exhibit F	<i>Parr v Dutt</i> , 2003 Mich App LEXIS 1746 (Mich App, July 22, 2003)
Exhibit G	<i>Jones v Graneto</i> , 1995 Ohio App LEXIS 1357 (Ohio App, Mar. 30, 1995)
Exhibit H	<i>Friend v Doe</i> , 1987 Ohio App LEXIS 5758 (Ohio App, Feb. 3, 1987)

### **INTEREST OF AMICUS**

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in trial litigation work. MAJ consists of member attorneys dedicated to advocating for the interest of the public and protecting the integrity of the justice system. MAJ recognizes an obligation to assist this Court on significant issues of law that would affect substantially the orderly administration of justice in the trial courts of this state. MAJ supports the Plaintiff-Appellant in urging this Court to reverse the decisions of the lower courts and remand the instant matter to the trial court.

### **STATEMENT OF FACTS**

*Amicus curiae*, the Michigan Association for Justice, hereby adopts the Statement of Facts contained in Plaintiff-Appellant Sherri Martin's brief.<sup>1</sup>

### **STANDARD OF REVIEW**

The Michigan Court Rule, MCR 2.116(C)(10), permits summary disposition *only* where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Skinner v Square D Company*, 445 Mich 153, 160; 516 NW2d 475 (1994). A motion for summary disposition, pursuant to MCR 2.116(C)(10), must be supported by "[a]ffidavits, depositions, admissions, or other documentary evidence. . ." MCR 2.116(G)(3). "The moving party is required to identify by supporting affidavit those facts which it believes cannot be genuinely disputed." *Crossley v Allstate Insurance Company*, 139 Mich App 464, 468; 362 NW2d 760 (1984). An affidavit filed in support of a motion for summary disposition must be "made on personal knowledge" stating "with particularity facts admissible as evidence establishing or denying the grounds stated in the motion . . ." MCR 2.119(B)(1)(a),(b).

The *Skinner* Court quoted *Durant v Stahlin*, 375 Mich 628; 135 NW2d 392 (1965), in

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<sup>1</sup> For the sake of brevity, Amicus will refer to Plaintiff-Appellant as "Plaintiff."

explaining that the nonmovant “must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case.” *Skinner*, 445 Mich at 161, quoting *Durant*, at 640. A genuine issue of material fact exists where the record would allow a reasonable jury to find in the movant’s favor with respect to facts that may affect the outcome of the suit. *Anderson v Liberty Lobby, Inc.*, 477 US 242, 248; 106 S Ct 2505; 91 L Ed 2d 202 (1986). In reviewing a motion for summary disposition, not only must a court give the benefit of all reasonable doubt to the nonmovant, so too must it construe all legitimate inferences in favor of the nonmoving party in determining whether a genuine issue of material fact exists. *Craig v Oakwood Hosp.*, 471 Mich 67, 77; 684 NW2d 296 (2004); *Skinner*, at 162.

### ARGUMENT

**I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEREIN IT GRANTED SUMMARY DISPOSITION BY IMPROPERLY CONDUCTING A ‘TRIAL BY AFFIDAVITS,’ MAKING CREDIBILITY DETERMINATIONS, AND CONVERTING SPECULATIVE BIASED HYPOTHETICAL TESTIMONY INTO CONCLUSIVE EVIDENCE**

The trial court improperly granted summary disposition where the evidence in the record and the testimony of Plaintiff-Appellant’s experts sufficiently raised a genuine issue of material fact. “In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury.” *Wiley v Henry Ford Cottage Hosp.*, 257 Mich App 488, 492; 668 NW2d 402 (2003)(citation and quotations omitted). Specifically, MCL 600.2912a(1)(a) provides that the plaintiff must prove that the defendant “failed to provide the plaintiff the recognized standard of acceptable professional care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the

plaintiff suffered an injury.” The element of proximate cause incorporates “both cause in fact and legal (or ‘proximate’) cause. *Craig, supra* at 86.

Contrary to the opinions of the trial court and the court of appeals, the instant case stands in stark contrast to *Skinner*. The *Skinner* plaintiffs argued that the faulty switch confused the decedent as to whether it was on or off and due to his confusion he touched live wires that electrocuted him. For the relevant part, the *Skinner* Court found that the testimony provided by the plaintiffs’ experts was insufficient to establish causation. Although the experts testified that the faulty switch was the proximate cause of the decedent’s death, their testimony was flawed as their testimony assumed that, “(somehow) the wires were unhooked, and the power was on when Mr. Skinner began working on the machine.” *Id.* at 174. None of the experts’ assumed facts were supported by the record. The *Skinner* Court held that there was a lack of evidence to support “how the machine would have been turned back on after the wires had been unhooked.” *Id.* at 172. Accordingly, the Court concluded that, “[b]ecause the experts’ conclusions regarding causation are premised on mere suppositions, they did not establish an authentic issue of causation.” *Id.* Instead of establishing facts that “would support a reasonable inference of a logical sequence of cause and effect,” the plaintiffs “posited a causation theory premised on mere conjecture and possibilities.” *Id.* at 174.

Although the lower courts went to great lengths to square the instant matter with *Skinner*, the glaring distinctions in the cases demonstrate that the courts drew an erroneous analogy. In contrast to the *Skinner* experts who assumed facts in order to come to their conclusions, Plaintiff’s general surgery expert, Dr. Eduardo Phillips, based his opinions solely on the facts in evidence, including the medical documentation of the treatment received by Mrs. Martin. His opinions are not only consistent with the medical record but they are also consistent with the actions of the subsequent

treating physician who acted in the same manner as plaintiff's expert testified a reasonable physician would act under the same circumstances. In fact, the lower courts have not identified any facts considered by Dr. Phillips that have no basis in the record. Nonetheless, the courts below held Dr. Phillips' expert opinion regarding causation as speculative.

The consistency between the facts in the record and the testimony of Dr. Phillips in addition to the expert testimony provided by Plaintiff's nursing expert, Lawrence Boyd, appeared irrelevant in the analyses of the lower court in contrast to the affidavits submitted by defendant-appellee Northern Michigan Hospital.<sup>2</sup> As stated in the opinion by the Court of Appeals, the testimony by Plaintiff's expert "was insufficient to create a genuine issue of factual causation because it only concerned what hypothetical doctors should have done had better reports been provided." *Martin v Ledingham*, 282 Mich App 158, 161-162; \_\_\_ NW2d \_\_\_ (2009). Instead of ruling that a factual dispute existed, the trial court, fixated on the testimony submitted by defendant took it up itself to improperly resolve a material factual issue under the guise of summary disposition.

The instant matter is more akin to *Shaffer v St. Joseph's Mercy Hosps. of Macomb*, 2007 Mich App LEXIS 2884 (Mich App, Dec. 27, 2007)[*Exhibit A*]. In *Shaffer*, the Plaintiff's expert testified at his deposition that he could not "quantitate the degree to which the risk would have been improved or reduced." *Id.* at \*8. The defendants then moved for summary disposition. The *Shaffer* plaintiff responded with an affidavit by her expert, in which he stated that, "had defendants diagnosed and immediately treated plaintiff, the likelihood that she would have avoided subsequent surgery and heart valve replacement would have been more than fifty percent." *Id.* at 11. Looking

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<sup>2</sup> For the sake of brevity, Amicus will also refer to defendant-appellee Northern Michigan Hospital as "defendant."

to the totality of the expert's testimony, as found in his deposition and affidavit, in a light most favorable to the plaintiff, the *Shaffer* Court held that the plaintiff presented sufficient evidence to defeat summary disposition on the issue of proximate cause.

The lower courts thus committed three errors. They firstly weighed the affidavit of Plaintiff's expert against the affidavit by the former defendant, secondly credited the latter with the truth, and by so doing they thirdly construed all reasonable inferences in favor of the movant. Rather than find a genuine factual dispute precisely because the opinions of Plaintiff's expert were proffered in direct contradiction to the testimony by the former defendant, ***the lower courts effectively ruled that an expert's opinions are per se insufficient to create a genuine issue of material fact if they contradict opinions offered by treating physicians.*** The lower courts effectively converted a disputed opinion offered by Plaintiff's expert into a speculative opinion on the basis that it was disputed instead of properly deferring the issue to a trier of fact.

**A. The Lay Opinions Found in the Affidavits Do Not Meet the 'Personal Knowledge' and 'Facts' Requirements of MCR 2.119, and are Thus Legally Insufficient to Support Summary Judgment**

Statements made in an affidavit that merely proffer a belief fail to meet the requirements set forth in the Michigan Court Rules and are thus, legally insufficient to support summary disposition. Contrary to affidavits made on personal knowledge, affidavits that merely allege statements to the best of the affiant's knowledge or belief are legally insufficient. *Jones v Shek*, 48 Mich App 530, 532-533; 210 NW2d 808 (1973). An opposing party "has no obligation to submit any affidavit until the moving party submits a proper affidavit regarding a dispositive fact." *SSC Associates Limited Partnership v The General Retirement System of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991), citing *Bobier v Norman*, 138 Mich App 819; 360 NW2d 313 (1984).

"Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not

satisfy the court rule; disputed fact (or lack of it) must be established by admissible evidence." *SSC Associates*, at 364; *Crossley*, 139 Mich App at 468; *Remes v Doby, (On Remand)*, 87 Mich App 534, 537; 274 NW2d 64 (1978).

Likewise, statements made "on information and belief" are insufficient to satisfy the personal knowledge requirement of Rule 56(e) of the Federal Rules of Civil Procedure, the federal equivalent of MCR 2.116(C)(10). The requirement that an affidavit "'shall' be made upon personal knowledge and 'shall' set forth admissible facts" renders affidavits made "upon information and belief" noncompliant. *Automatic Radio v Hazeltine*, 339 US 827, 832; 70 S Ct 894; 94 L Ed 1312 (1950); *See also Reddy v Good Samaritan Hosp. & Health Ctr.*, 137 F Supp 2d 948, 956 (SD Ohio, 2001), *citing Jameson v Jameson*, 85 US App DC 176, 176 F2d 58, 60 (1949)("Belief, no matter how sincere, is not equivalent to knowledge."). "[C]onclusory allegations which, without a factual foundation, do not amount to more than speculation and conjecture and cannot be tested or countered by the opposing party . . . [are] inadequate to oppose or support a motion for summary judgment. *Lynch v Athey Products Corp.*, 505 A2d 42; 1985 Del Super LEXIS 1447 (1985), *citing Maldonado v Ramirez*, 757 F2d 48 (CA 3, 1985), and *Hurd v Williams*, 755 F2d 306 (CA 3, 1985). "[S]tatements prefaced by the phrases, 'I believe' or 'upon information and belief' are properly subject to a motion to strike." *Fowler v Borough of Westville*, 97 F Supp 2d 602, 607 (D NJ, 2000); *Ellis v England*, 432 F3d 1321, 1326 (CA 11, 2005)("Statements in affidavits that are based, in part, on information and belief, cannot raise genuine issues of fact, and thus also cannot defeat a motion for summary judgment."); *Cadle Co. v Hayes*, 116 F3d 957 (CA 1, 1997)(holding that statements found within an affidavit made upon information and belief are not considered upon a motion for summary judgment); *Syvongxay v Henderson*, 147 F Supp 2d 854, 859 (ND Ohio, 2001); *Crossley, supra*. Indeed, "Rule 56 demands something more specific than the bald assertion of the general

truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.” *Drake v 3M*, 134 F3d 878, 887 (CA 7, 1998). As such, speculation or conjecture as to the “true nature of the facts” have no place in summary judgment. *See Fletcher v Atex, Inc.*, 68 F3d 1451, 1456 (CA 2, 1995).

In particular, the Sixth Circuit has long established that statements made in affidavits that are “nothing more than rumors, conclusory allegations and subjective beliefs” are insufficient under Rule 56(e). *Mitchell v Toledo Hospital*, 964 F2d 577, 584-85 (CA 6, 1992). *See also Sellers v M.C. Floor Crafters, Inc.*, 842 F2d 639, 643 (CA 2, 1988)(similarly holding that an affidavit which was based on “personal knowledge or upon information and belief” was insufficient to support a motion for summary judgment). “Affidavits composed of hearsay and opinion evidence do not satisfy Rule 56(e) and must be disregarded.” *State Mutual Life Assurance Company v Deer Creek Park*, 612 F2d 259, 264 (CA 6, 1979); *See also Searer v West Michigan Telecasters Inc.*, 381 F Supp 634 (WD Mich, 1974), *aff'd without op.*, 524 F2d 1406 (CA 6, 1975). The Sixth Circuit has also instructed that, “courts should disregard conclusions of law (or ‘ultimate fact’) found in affidavits” submitted in support of summary judgment. *F.R.C. Int’l, Inc. v United States*, 278 F.3d 641, 643 (CA 6, 2002).

The decisions of the trial court and the court of appeals are solely founded on the incredible and legally insufficient affidavits of Dr. Rynbrandt, a former defendant in the instant matter, and Dr. Beaudoin. Yet, the relevant statements in the affidavits wholly fail to comply with the requirements of MCR 2.116 and 2.119, as they consist not of factual statements made upon personal knowledge but lay predictions based on a hypothetical scenario and not grounded in the facts in the record.

Courts throughout the country have consistently held that affidavits or statements therein, not made upon personal knowledge are legally insufficient to support or opposed summary judgment. The Eleventh Circuit in *Pace v Capobianco*, 283 F3d 1275, 1278-1279 (CA 11, 2002), ruled that a

trial court erred in relying on a belief as submitted in an affidavit to deny summary judgment. In *Pace*, an affidavit was submitted in which the affiant stated that he “observed motion in the red car which I believe was [Davis] raising his hands towards the roof of his car in an attempt to surrender.” *Id.* at 1278 (quotations omitted). The district court concluded that the affidavit was sufficient to successfully oppose summary judgment because it created an issue of fact as to whether Davis’ hands were visibly in the air. The Eleventh Circuit disagreed. It ruled that:

[R]ule 56(e)’s personal knowledge requirement prevents statements in affidavits that are based, in part, “upon information and belief” – instead of only knowledge – from raising genuine issues of fact sufficient to defeat summary judgment. . . . Even if the affidavit is otherwise based upon personal knowledge . . . a statement that the affiant believes something is not in accordance with the Rule. *Id.* at 1279.

Accordingly, it held that a statement of belief asserted in an affidavit does not comply with Rule 56, and thus does not constitute a sufficient basis to grant or deny summary judgment.

In *Alpert v United States*, 481 F3d 404 (CA 6, 2007), the Sixth Circuit affirmed a trial court’s rejection of statements made in an affidavit on the basis of their noncompliance with Rule 56. The factual issue before the court was “the year in which the discharge of the debt by creditors of the [Alpert’s corporation] occurred.” *Id.* at 406. The claimants filed an affidavit stating, “[t]o the best of my knowledge and belief, many of the unsecured creditors had also written off the Cumulus debt as uncollectible in 1994, 1993, or 1992” *Id.* at 407. The Court held that the claimants failed to present sufficient evidence of a discharge of debt in 1992, 1993, or 1994. The affidavit, made upon a claimant’s belief failed to demonstrate personal knowledge as required by Rule 56(e), and thus was legally insufficient. See also, *Hadley v Inmon*, 2006 US Dist LEXIS 3370 (ED Tenn, 2006)(holding that an affidavit that read “I believe the document entitled Assignment of Bid is a forgery” was insufficient under Rule 56(e).)[*Exhibit B*], in which the Court similarly held that the beliefs submitted in an affidavit were insufficient under Rule 56(e). The *Hadley* Court also discussed that,

“Rule 56(e) requires that affidavits supporting or opposing summary judgment must include facts based on personal knowledge. Statements made on information and belief are insufficient to satisfy the personal knowledge requirement of Rule 56(e).” *Hadley*, at \*8 (citations omitted).

Similarly, statements made “to the best of [the affiant’s] knowledge” were rejected in *In re Livent, Inc. Noteholders Sec. Litig.*, 355 F Supp 2d 722, 735 (SD NY, 2005). The *In re Livent* Court refused to “convert what would otherwise be inadmissible statements into evidence that is admissible. . .” *Id.* at 735. It reasoned that, “[j]ust as allegations in affidavits put forth on ‘information and belief’ are inadmissible on summary judgment,” so too were the portions of Topol’s affidavit that . . . are only accurate to the best of his knowledge, which may be limited or nonexistent.” *Id.*

Additionally, the Fifth Circuit in *Provident Life & Accident Ins. Co. v. Goel*, 274 F3d 984 (CA 5, 2001), opined that a statement asserting, “I now firmly believe that I did not sign the amendment” was of “questionable admissibility” because “[a] statement that an affidavit is based on the affiant’s personal belief does not automatically satisfy the requirement [of Rule 56(e)] that the affidavit be based on personal knowledge.” *Id.* at 1000.

The Court in *Suttle v Lake Forest Hospital*, 315 Ill App 3d 96; 733 NE2d 726 (2000), held that expert testimony that refutes the testimony provided by the treating physician relating to causation is sufficient to create a genuine issue of material fact. The plaintiff’s expert testified to a reasonable degree of medical certainty that the defendant’s inadequate care led to a delay of treatment which was a proximate cause of the neurological injuries suffered by the plaintiff’s ward while she was in her mother’s womb. The *Suttle* defendant disagreed, arguing that the doctor’s testimony that his treatment would have been the same regardless of his knowledge of the condition of the placenta. The *Suttle* Court rejected the defendant’s argument, holding that, “whether Dr.

Salter's treatment of Diana would have remained the same had any of the hospital personnel informed him of the condition of the placenta was a question of fact for the jury to determine. *Id.* at 104-105 (citation omitted); *Snelson v Kamm*, 204 Ill 2d 1; 787 NE2d 796 (2003)(explaining that, "a plaintiff would always be free to present expert testimony as to what a reasonable qualified physician would do with the undisclosed information and whether the failure to disclose the information was a proximate cause of the plaintiff's injury in order to discredit a doctor's assertion that the nurse's omission did not affect his decisionmaking").

The lower courts improperly treated the legally insufficient affidavits of Drs. Rynbrandt and Beaudoin as dispositive evidence, legally precluding conflicting expert opinions from creating a genuine issue of material fact. The statements made in the affidavits at issue in the case at bar similarly fail to comply with the requirements of MCR 2.119(B)(1)(a) and (b). Their admissibility, much less the conclusive effect afforded them, should be scrutinized. Given that the statements were formed only upon belief as opposed to knowledge, they clearly do not qualify as admissible statements under MCR 2.119 for summary judgment purposes. As cited by the lower courts, the affidavit of Dr. Rynbrandt, relevantly states:

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 provided to Mrs. Martin. . . [See Exhibit 8 to Plaintiff-Appellant's Application for Leave to Appeal, ¶ 8 (emphasis added)]

Dr. Beaudoin's affidavit also provides:

If I had been contacted at that time, as part of my review, I would have reviewed the patient's medical record, including nursing notes and laboratory test results, I would have discussed Sherri Martin's care and treatment with Dr. Rynbrandt, the attending physician, I may have spoken with and examined Mrs. Martin.

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If I had been contacted . . .during that period from May 1-7, 2003, in my capacity as the medical Staff Section of General Surgery Chair, I **believe**, more likely than not, that I would not suggested or requested any change in the care and treatment being provided by the surgeons attending to her care, including Dr. Rynbrandt and Dr.

Kazmers. [See Exhibit 9 to Plaintiff-Appellant's Application for Leave to Appeal, ¶ 8, 10 (emphasis added)]

Both affidavits essentially state that even if the standard of care had been complied with by the nurses, the physicians would not have changed their conduct towards Mrs. Martin. However, Dr. Beaudoin seems to struggle with his beliefs. There exists no legal or sensible grounds for the lower courts' extraordinary exercise of judicial authority.

This Court should hold, as do the First, Second, Fifth, Sixth, Eleventh and D.C. Circuits, that statements made upon belief fail to satisfy the personal knowledge requirement that applies to affidavits and statements made therein. Thus, the subject statements should be held to be insufficient as a matter of law to support summary judgment.

**B. The Lower Courts Erroneously Resolved a Factual Issue that Involved a Material Credibility Determination, Improperly Weighing Defendant-Appellee's Self-Serving Affidavits against the Affidavits Submitted by Plaintiff-Appellant's Experts**

The trial court erred by granting summary judgment on the issue of causation where the credibility of the defendant's affiants' was crucial to and inseparable from the factual issue of causation. The lower courts erroneously disregarded well-established authority propounded by this Court that instructs that questions turning on the credibility of a witness may not be resolved on a motion for summary disposition. *Skinner*, 445 Mich at 161. Where, "the credibility of a witness or deponent is crucial, summary judgment should not be granted." *Arber v Stahlin*, 382 Mich 300, 308; 170 NW2d 45 (1969). In addition, in Michigan there is a constitutional right to fact-finding by the jury, Const 1963, art 1, § 14, as well as the evidentiary rule which enforces it, MRE 104(e). This Court has heretofore emphasized that, "where an issue of credibility rises directly from a prepossessed movant's solitary affidavit, summary judgment cannot be entered in favor of such movant without offense to the most sacred of all constitutional guarantees." See *Durant*, *supra* at

84. “[W]here the truth of a material factual assertion of a movant’s affidavit depends on the affiant’s credibility, there inheres a genuine issue to be decided at a trial by the trier of fact and a motion for summary judgment cannot be granted.” *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201(1973)(citations omitted). Summary disposition is “especially suspect where motive and intent are at issue.” *Crossley, supra*. “The trial court must not usurp a trial jury’s right, nor anticipate its own right as the trial factfinder if such it may become later, to determine the affiant’s credibility.” *SSC Associates*, 192 Mich App at 365.

Summary judgment cannot be invoked where “affidavits present conflicting versions of the facts which require credibility determinations.” *Davis v Zahradnick*, 600 F2d 458, 460 (CA 4, 1979). “[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”

*Anderson*, 477 US at 249. The words of the *Anderson* Court ring true today as ever:

credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. *Id.*

Michigan courts, including this Court, have also articulated the well-settled law 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 a trial by the trier of fact and a motion for summary judgment cannot be granted. Moreover, summary judgment is especially suspect where motive and intent are at issue, or where the credibility of a witness or deponent is crucial. *Metropolitan Life Ins. Co. v Reist*, 167 Mich App 112,121; 421 NW2d 592 (1988)(citations omitted); *Brown, supra* at 354.

In addition, the United States Supreme Court succinctly addressed the instant credibility and interest issue, holding that, “the mere fact that a witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.” *Sonnentheil v Christian Moerlein Brewing Co.*, 172 US 401, 408; 19 S Ct 233; 43 L Ed 492 (1899); *Sartor v Arkansas Natural Gas Corporation*, 321 US 620, 628-629; 64 S Ct 724; 88 L Ed

967 (1944); *Durant*, at 90. Embedded in the principle that a credibility determination is best reserved for a trier of fact is the notion that cross examination of a witness is “the best method yet devised for testing the trustworthiness of testimony.” *Sartor*, at 628. The *Aetna Life Insurance Co. v Ward*, 140 US 76, 88; 11 S Ct 720; 35 L Ed 371 (1891), decision explained the significance of a jury's role in evaluating the credibility of witnesses and its right to weigh their testimony to “determine how much dependence [is] 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, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; 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. *Id.*

As such, in a case where the credibility of witnesses is crucial to an issue, a court cannot simply accept the testimony of a witness as true and grant summary disposition.

The Second Circuit in *BellSouth Telecomms. v W.R. Grace & Co.*, 77 F3d 603 (CA 2, 1996), held that the district court properly disregarded self-serving affidavits during its summary judgment review. BellSouth argued that the statute of limitations was tolled as result of its ignorance of the cause of action and filed affidavits signed by its executives in which the executives “disclaimed knowledge of the essential elements” of its claim. *Id.* at 615. The Second Circuit upheld that treatment of the affidavits “because the affiants’ statements advocated conclusions of law.” *Id.* It held that, “ultimate or conclusory facts and conclusions of law . . . cannot be utilized on a summary judgment motion,” and concluded that the lower court had properly disregarded the affidavits that it characterized as “recitations of the affiants’ mental state.” *Id.*

In *Drake v Williams*, 2008 Tenn App LEXIS 240, 18-44 (Tenn App, Apr. 25, 2008)[*Exhibit C*], the Court held, in part, that the affidavit submitted by the plaintiffs’ expert sufficiently rebutted

the affidavits filed in support of the defendants' a motion for summary judgment. The affidavit submitted by the plaintiffs' expert expressed that the care provided by defendants fell below the requisite standard of care and the deviation caused the injury that would not have otherwise occurred. *Id.* at \*30. Aside from questioning the sufficiency of the affidavits proffered by the defendants, the *Drake* Court asserted that, "we have determined that the physician affidavit submitted by the plaintiffs is sufficient to establish genuine issues of material fact." *Id.* at \*29. The Court of Appeals affirmed the trial court's finding that the affidavit by the plaintiffs' expert established a genuine issue of material fact for a trier of fact to determine.

In *Lection v Dyll*, 65 SW3d 696 (Tex App, 2001), the court ruled that summary judgment regarding the issue of a physician-patient relationship was improper. The defendant argued, in part, that there existed no opportunity to form a relationship due to the departure of the plaintiff from the hospital. In support of his argument, he testified in an affidavit that, "he was led to believe the patient had gone and [another physician's] inquiry was moot . . ." *Id.* at 707. The *Lection* Court extensively discussed the admissibility of the affidavit:

[t]he affidavit of an interested witness can support summary judgment if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. The phrase "could have been readily controverted" means "the testimony at issue is of such a nature which can be effectively countered by opposing evidence." Self-serving statements in affidavits of interested witnesses concerning their state of mind are uncontrovertible because "the mental workings of an individual's mind are matters about which adversaries have no knowledge or ready means of confirming or controverting." *Id.* at 701(citations omitted).

Thus, the *Lection* Court held that the defendant's affidavit was not proper summary judgment evidence because he was an interested witness and his affidavit related to his state of mind and was thus, uncontrovertible. *Id.* Further, the *Lection* found circumstantial evidence that contradicted the affidavit, including deposition testimony by another treating physician who consulted defendant as

the on-call neurologist. The *Lection* Court concluded that there was “some evidence” that defendant believed the patient was still in the hospital or could be readily contacted. Therefore, “[c]ontrary to [defendant]’s assertions, the evidence does not conclusively prove no opportunity existed for the formation of the physician-patient relationship.” *Id.* at 707.

*Rinaldi v CCX, Inc.*, 2008 US Dist LEXIS 77394 (WD NC 2008)[**Exhibit D**], involved a defendant’s assertion of the after-acquired evidence defense, which can bar recovery for a breach of employment contract claim. The *Rinaldi* employer argued that had it known of Rinaldi’s dishonesty and gross-negligence, it would have terminated him. It submitted an affidavit by the Chairman of the Board of CCX, in support of its argument. However, the Court found the statement “self-serving and uncorroborated. It certainly is not self-evident nor [subject] to the Court giving it conclusive effect” *Id.* at \*24. The Court found that the affidavit alone stating what the chairman “now believes CCX would have done in a hypothetical situation is insufficient to establish the material fact that CCX would in fact have fired Rinaldi.” *Id.* Thus, the Court denied summary judgment.

In *Shanley v Braun*, 1997 US Dist LEXIS 20024, 32-33 (ND Ill, Dec. 4, 1997)[**Exhibit E**], the court found a genuine issue of material fact regarding whether Shanley qualified for a tolling of the state of limitations as a result of her psychiatric condition. The defendants “offered self-serving affidavits evidencing their ‘expert’ opinions,” which provided that “‘to a reasonable degree of psychiatric certainty,’ Shanley was capable of making rational decisions and understanding the nature of her legal rights.” *Id.* at \*27-28. The *Shanley* Court noted that the affidavits, which expressed that the plaintiff was capable of making rational decisions at the time of her treatment with defendants, failed to explain why she was receiving medical and psychiatric treatment by defendants if they indeed thought she could make rational decisions. The *Shanley* plaintiff responded to the motion by submitting affidavits from her expert psychiatrist and psychologist who examined Shanley

and her medical history, and testified that Shanley suffered from a legal disability at the time that she was receiving treatment from the defendants. The *Shanley* defendants sought to strike the expert affidavits submitted by plaintiff in part on the basis that the experts examined Shanley after the relevant time period. However, the *Shanley* Court rejected said argument stating, “[i]f this were to be the rule, then the insanity defense would be almost impossible to raise unless a licensed psychologist happened to be on hand at the time of the crime to perform an evaluation.” *Id.* at \*29. The *Shanley* Court thus found that the affidavits signed by plaintiff’s experts were sufficient to raise a genuine issue of material fact despite the defendant’s self-serving testimony.

The Court in *Clauson v Lloyd*, 103 Nev 432;743 P2d 631 (1987), reversed a district court’s order granting summary judgment on the basis of the defendant’s affidavit. It found that the affidavit failed to demonstrate the absence of a genuine issue of material fact. In addition to stating his name and reciting insufficient generalizations, the affidavit stated that the defendant’s actions complied with the applicable standard of care. Finding the affidavit insufficient, the *Clauson* Court cited to Rule 56(e) and considered that:

[w]ere we to hold that the affidavit in this case is strong enough to support a summary judgment motion, the effect would be chilling: any defendant physician could come into court, file a motion for summary judgment alleging solely that the conformed to the applicable standard of care without any valid supporting documentation and if the plaintiff did not procure an expert to refute the charge, his case would be thrown out. *Id.* at 435.

As such, the *Clauson* Court concluded that the moving party did not meet its initial burden of showing an absence of a genuine issue of material fact.

In *Parr v Dutt*, 2003 Mich App LEXIS 1746 (July 22, 2003)[*Exhibit F*], the Court of Appeals held that summary disposition was inappropriate where the affidavit of a plaintiff’s expert created a genuine issue of material fact. In his deposition, the plaintiff’s expert was asked “[i]s it your opinion, Doctor, that, had his been diagnosed in June of 1997, that she would not have had to

undergo the exenteration?” The expert replied, “I don’t know.” *Id.* The defendants then moved for summary disposition. The *Parr* plaintiff opposed the motion and submitted the affidavit of her expert in support of her opposition. The expert’s affidavit stated that, while he did not “‘know’ whether exenteration would have been necessary,” had he been further questioned, he would have testified that, “to a reasonable degree of medical certainty, it is more likely than not that exenteration would have been avoided.” *Id.* at \*3.

The *Parr* Court distinguished the case before it from *Dykes v William Beaumont Hosp.*, 246 Mich App 471; 633 NW2d 440 (2001). In *Dykes*, the plaintiff’s expert testified that he had no way of knowing whether the decedent would have lived longer with the receipt of certain medication, he could not state “within a reasonable degree of medical certainty” whether certain procedures would have changed the outcome or what the results would have been. The *Dykes* expert was asked questions that requested his opinions to “a reasonable degree of medical certainty,” as opposed to indicating “absolute knowledge concerning causation.” *Id.* at 9, *citing Dykes*, 246 Mich App at 479 n 6. The deposition questions posed to the *Parr* expert were phrased in absolute terms. Thus, in contrast to *Dykes*, the *Parr* expert was asked questions that requested his opinion in terms of “absolute knowledge concerning causation.” *Dykes*, at 479 n 6. The *Parr* Court considered the expert’s absolute opinions irrelevant as the material question was “whether it was *more likely than not* that plaintiff would have avoided the exenteration . . .” *Id.* at \*10 (emphasis in original). The *Parr* Court, viewing the evidence in the light most favorable to the plaintiff, held that the affidavit of the plaintiff’s expert was sufficient to defeat summary disposition as it raised a genuine issue of material fact.

In *Metropolitan Life Insurance Company v Reist, supra*, the plaintiff insurance company filed a complaint for interpleader following the death of its insured decedent. The decedent’s widow filed

a motion for summary disposition arguing an absence of a genuine issue of material fact to support a finding that the death was not accidental. The widow's co-defendants opposed the motion. The *Reist* Court determined that, "the ultimate issue of material fact turns upon the credibility of the affiants and, particularly, the credibility of [the widow] herself." *Id.* at 117. It also considered the documentary evidence, including the affidavits submitted by the co-defendants, that raised issues as to the widow's credibility as well as her motive and opportunity. The *Reist* Court held 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 a trial by the trier of fact and a motion for summary judgment cannot be granted." *Id.* at 121 (citations omitted). It further emphasized that, "summary judgment is especially suspect where motive and intent are at issue, or where the credibility of a witness or deponent is crucial." *Id.* (citation omitted). Accordingly, the *Reist* Court determined that the summary dismissal was erroneous where evidence contradicted the widow's self-serving affidavit and raised a genuine issue of material fact.

In *Durant*, the Michigan Supreme Court held that a question of credibility arose by virtue of the fact that the affiants had an interest in the result. *Id.* at 88. The *Durant* Court looked to language in *Poller v Columbia*, 368 US 464, 473; 82 S Ct 486; 7 L Ed 2d 458 (1962), as guidance for Michigan courts to deny attempts at a trial by affidavit:

It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. ***Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."*** *Durant*, at 90 (emphasis added).

In *Jones v Graneto*, 1995 Ohio App LEXIS 1357 (Ohio App, Mar. 30, 1995)[*Exhibit G*], a panel of the Ohio Court of Appeals held that an affidavit submitted by the plaintiff's expert stating that plaintiff's medical problem was caused by chiropractic manipulation was sufficient to create a genuine issue of material fact. The defendant moved for summary judgment and submitted an

affidavit stating that his treatment of the plaintiff complied with the applicable standards of care and that his treatment did not cause plaintiff's injuries. *Id.* at \*3-4. However, the Court of Appeals panel found the medical testimony provided by the *Jones* plaintiff's expert was sufficient to defeat summary judgment. *Id.* at \*5.

The decision in *Friend v Doe*, 1987 Ohio App LEXIS 5758 (Ohio App, Feb. 3, 1987)[***Exhibit H***], held that an expert affidavit submitted by the plaintiff was sufficient to create a genuine issue of material fact. The *Friend* defendant moved for summary judgment and filed an affidavit asserting that he complied with the applicable standard of care and that the plaintiff's injuries were not related to his actions. In turn, the *Friend* plaintiff submitted an expert affidavit asserting that the defendant's care did not comply with the requisite standard of care and that said care caused the plaintiff's injuries. The *Friend* Court held that the affidavit submitted by the plaintiff's expert:

***squarely contradicted*** those statements contained in the defendant's affidavit. In such a circumstance the trial court could only find that there was a genuine issue of material fact and that the moving party was not entitled to judgment as a matter of law. *Id.* at \*4 (emphasis added).

In *Washington v Georgia Baptist Medical Center*, 223 Ga App 762; 478 SE2d 892 (1996), the Georgia Court of Appeals reversed a trial court's decision to grant summary judgment holding that the affidavit submitted by the plaintiff's expert sufficiently raised a genuine issue of material fact. Affidavits were submitted by the defendant doctors and the plaintiff's expert. In contrast to the self-serving affidavits filed by the *Washington* defendants, the *Washington* plaintiff's expert opined that the defendant doctors had failed to comply with the applicable standards of care and that their failures caused the plaintiff's injuries. The *Washington* Court acknowledged that, "[i]n an action for medical malpractice the affidavit of the defendant stating that [the] care met the appropriate standard of care entitles the defendant to summary judgment if that opinion is not countered by the opinion of another expert." *Id.* at 767 (quotation omitted). However, as the expert

for the *Washington* plaintiff had in fact countered the defendants' affidavits, it held that the expert's affidavit sufficiently raised a genuine issue of material fact and thus, successfully defeated summary judgment.

In *White v Taylor Distrib. Co.*, 482 Mich 136; 753 NW2d 591 (2008), this Court reversed a trial court's decision to grant summary judgment, finding that a genuine issue of material fact regarding defendant's sudden emergency defense remained. The *White* defendant was involved in a motor vehicle accident, striking the plaintiff's vehicle from the rear. The defendant argued that he blacked out while he was driving to rebut the statutory presumption of negligence under MCL 257.402(a). In support of his motion, the defendant submitted his deposition testimony, the accident report and medical records. This Court refused to "assess defendant's credibility" holding that, "[t]he questions regarding whether defendant experienced a sudden emergency and whether defendant was negligent in driving under the facts presented in this case are proper questions for the jury." *Id.* at 143.

This Court's decision in *Arber v Stahlin*, is also relevant to the instant analysis. In *Arber*, every defendant submitted an affidavit stating that the publication at issue was made without "actual malice." Yet, the court looked at the totality of the facts and information before it and asked:

could not a jury find or reasonably infer that defendants intended solely to "get Durant" and that they were not in the least concerned with plaintiffs, who were virtual anonymities in the political area, or with the true facts regarding their participation in the Durant campaign? Could not a jury also find or reasonably infer that the hurried publication of the allegedly libelous document was indicative of a reckless disregard of whether it was true or not? *Id.* at 307-308.

Thus, a determination in favor of one party over the other was dependent on the issue of credibility. This Court concluded that summary judgment is improper where "the credibility of a witness or deponent is crucial . . ." *Id.*

Likewise, this Court should find that summary disposition was improperly granted as the

credibility of the affiants was crucial to the material issue disposed of by the trial court. Here, as in *Arber*, the issue of a material fact, or lack thereof, exclusively turned upon the credibility of Drs. Rynbrandt and Beaudoin. The trial court recognized but disregarded the issue of Dr. Rynbrandt's credibility: "[w]hile Plaintiff may be able to raise a triable question as to Dr. Rynbrandt's veracity, this does not mean there is a triable question of causation." [See Exhibit 3 to Plaintiff-Appellant's Application for Leave to Appeal, p. 6] The trial court conveniently glossed over the fact that it summarily disposed of Mrs. Martin's claim by deciding the "triable question" that is Dr. Rynbrandt's veracity. Instead of acknowledging the fallacy of a distinction, as the issue of causation necessarily involves a question of veracity, the trial court improperly and artificially addressed them as mutually exclusive subjects.

This Court should hold as it did in *White* and *Arber* that summary disposition is inappropriate where the credibility of the witness is crucial to the determination. This Court should properly conclude that the testimony offered by Plaintiff's experts establishes a logical sequence of cause and effect and sufficiently raises a genuine issue of material fact which would allow a reasonable jury to find in Plaintiff's favor. Indeed, a decision to the contrary would have a chilling effect far more grave than that articulated by the *Clauson* Court, as the word or belief of a defendant treating physician, although disputed would be for all intents and purposes conclusive irrefutable evidence as a matter of law.

In stark contrast to the Courts cited above that denied summary disposition despite the defendants' testimony, the trial court granted and court of appeals affirmed summary disposition solely on affidavits submitted by "the real doctors" in which they testify as to "what they would actually have done. . ." *Martin*, 282 Mich App at 162. The mischaracterization by the court of appeals is a subtle yet significant error in and of itself as the affidavits submitted by 'the real doctors'

did not contain testimony as to what they *really* or *actually* would have done. No, the affidavits peculiarly contained testimony as to what the physicians *believed* they would have done. As a matter of point, the term 'believe' was inserted in nearly every one of Dr. Rynbrandt's affidavit and it was likewise sprinkled into Dr. Beaudoin's. Even if the statements were not preceded with "I believe," the issues of credibility arises. The trial court's decision inherently involved a credibility determination, which the court made in favor of defendant, the movant, which clearly contravenes the well-established canon of law that ambiguities and doubts are resolved in favor of the non-movant.

The totality of the facts demonstrates that the only expert testimony provided to the trial court was from Plaintiff's expert, which explicitly refutes the affidavits offered by the defendant. Plaintiff's standard of care expert clearly testified that the standard of care required a physician, once informed of a patient's deteriorating condition, to examine the patient and order diagnostic testing, including a CT scan. [See Exhibit 3 to Plaintiff-Appellant's Application for Leave to Appeal, p. 16-17, 39] In addition, the evidence in the record reveals that when Mrs. Martin's condition was eventually communicated to Dr. Beaudoin, he immediately examined her and ordered diagnostic testing, including a CT scan. The actions of Dr. Beaudoin should, if not outweigh his words, at least be of equivalent weight. Where the only standard of care testimony is provided by Plaintiff's expert, the lower courts must have construed Dr. Rynbrandt's affidavit as an implicit concession of negligence. Also the court must have given more weight to Dr. Beaudoin's words than his actions, which contradict them. Like the *Arber* Court considered, the evidence in the record and the inferences that arise therefrom also beg the questions: could not a jury find or reasonably infer that defendant colluded with the affiants to submit the affidavits solely to avoid liability by defeating causation? Could not a jury also find or reasonably infer that Dr. Beaudoin's words contradict his

actions as when he was contacted by the nurses, he immediately ordered diagnostic tests and operated on Plaintiff, and therefore, his affidavit smacks of a lack of trustworthiness?

Just as the self-serving testimony of the defendants in the case law cited above was legally insufficient, so too are the self-serving denials made by Drs. Rynbrandt and Beaudoin.

**C. The Affiants' Opinions Based Only Upon Biased Hypotheticals are Insufficient Where They Were Not Based on the Facts in the Record**

The trial court inappropriately considered an inadmissible lay opinion that was founded on facts not contained in the record. "[W]here a party does proceed to examine an expert witness by the use of hypothetical questions, the answer must be based on facts contained therein and the hypothetical questions must be premised on facts already in evidence." *West v Livingston County Rd. Comm.*, 131 Mich App 63, 67; 345 NW2d 608 (1983), citing *Grewe v Mt. Clemens General Hospital*, 404 Mich 240, 257-258; 273 NW2d 429 (1978). Statements put forth in affidavits that are made on speculation or conjecture do not satisfy Rule 56(e) requirements. *Albeiro v City of Kankakee*, 246 F 3d 927, 933 (CA 7, 2001); *Stagman v Ryan*, 176 F 3d 986, 995 (CA 7, 1999).

Although the trial court acknowledged that Plaintiff provided evidentiary support from her nurse and general surgery experts, it disregarded their opinions as irrelevant in light of the lay opinions offered by Drs. Rynbrandt and Dr. Beaudoin, which amount to nothing more than educated guesses about hypothetical fact patterns. According to the court, Plaintiff's expert only testified as to what the standard of care required of a physician in the position of Drs. Rynbrandt and Beaudoin, but he did not "establish, that more likely than not, the care by Dr. Rynbrandt, Dr. Beaudoin, or any other physician would have been altered by verbal communication from Defendant NMH's nurses." [See Exhibit 3 to Plaintiff-Appellant's Application for Leave to Appeal, p. 6]

The court further opined that, "Plaintiff was not under the care of a hypothetical physician who always renders care consistent with the standard of care as determined by Plaintiff's surgical

expert, Dr. Phillips." [See Exhibit 3 to Plaintiff-Appellant's Application for Leave to Appeal, p. 5] The trial court concluded that, "[i]n light of Dr. Rynbrandt's affidavit, and in the absence of any other evidence, it is clear that Plaintiff cannot do this." [See Exhibit 3 to Plaintiff-Appellant's Application for Leave to Appeal, p. 6] The trial court's conclusion that there was an absence of evidence to support a genuine issue of material fact, despite the evidence in the record including the standard of care testimony and the actions of Dr. Beaudoin that directly contradict the affidavits of Drs. Rynbrandt and Beaudoin, is telling of the trial court's grave error.

Apparently, the trial court required the Plaintiff to present evidence that Drs. Rynbrandt and Beaudoin would have personally acted differently to establish a genuine issue of material fact. The trial court and the court of appeals fail to recognize that neither Drs. Rynbrandt and Beaudoin nor Plaintiff can conclusively establish what the physicians would have done had they been contacted by the nurses. The most any party could do is present relevant evidence to assist a trier of fact decide that ultimate issue. A trier of fact could disbelieve the testimony presented in the affidavits just as easily as it could believe the testimony. After all, the affidavits merely present a hypothesis as to what would have occurred based on facts that directly contradict the facts in the record. The trial court erroneously concluded that Plaintiff's experts only spoke to the care of "a hypothetical physician." Rather, the affidavits by either party could only speak to what the *actual* physicians would have *hypothetically* done.

In a somewhat more unequivocal opinion, a panel of the Michigan Court of Appeals affirmed that a treating physician's testimony with respect to a hypothetical situation is conclusive as a matter of law. It too held that the testimony of plaintiff's expert as to what a physician in compliance with the standard of care would have done merely amounted to speculation and conjecture, as opposed to the lay testimony by the treating doctors on the same subject. The trial court accepted as absolute

the affiants' predictions based on an alternative reality, which predictions are directly contradicted by the facts in the record and as such, are not absolute but hypothetical. The rationale employed by the Court of Appeals is just as fatally flawed as that employed by the trial court insofar as both courts ruled that the treating physicians' affidavits stating opinions relating to hypothetical fact patterns were dispositive of an issue, despite conflicting testimony and evidence presented by the Plaintiff.

**D. The Lower Courts Improperly Granted Summary Disposition Where The Issue of Causation Necessarily Involves Questions of Subjective Motives, Feelings, and Reactions**

“[S]ummary judgment procedure is particularly inappropriate where the inference which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions.” *Batick v Seymour*, 186 Conn 632; 443 A2d 471 (1982)(quotations and citations omitted). “The probative value of a witness' testimony as to his own state of mind depends upon his credibility, and when the credibility of a witness or deponent is crucial, summary judgment should not be granted.” *Walker v Cahalan*, 411 Mich 857; 306 NW2d 99 (1981)(citation omitted).

In *Batick*, the court considered an appeal by a plaintiff who alleged that the defendant fraudulently conveyed realty to his wife. The defendant filed a motion for summary judgment and submitted two affidavits in support, which stated that neither he nor his attorney anticipated that the plaintiff would file a lawsuit and that the subject transfer of assets to his wife was not an attempt to conceal assets from the plaintiff. The *Batick* plaintiff did not file an opposing affidavit, which the court attributed to the plaintiff's lack of “personal knowledge of the mental state which influenced the defendant to quitclaim a one-half interest in his house to his wife.” *Id.* Instead, the *Batick* plaintiff argued that the defendant had failed to show the non-existence of a factual dispute and presented deposition testimony, which revealed that at time of the transfer the defendant was aware of the plaintiff's serious injuries. The lower court granted summary judgment.

The *Batick* Court expressed that the lower court “was not entitled to assume the truth of the defendant’s declarations concerning his intentions in making the conveyance simply because of the absence of an affidavit contradicting them.” *Id.* at 645. Correspondingly, “jurors would not have been compelled to believe the defendant’s declarations that his motivation in executing the deed to his wife was wholly unrelated to any concern about his potential liability to the plaintiff even though no other evidence than that presented in the summary judgment proceeding came before them.” *Id.* at 647.

It clarified that during a summary judgment review, “the inference which may ordinarily be drawn from the failure of a party to file an opposing affidavit is not warranted where the other party is the only person having knowledge of the particular facts involved.” *Id.* at 646. After reciting the procedural rule on affidavits, which included the requirements of “personal knowledge” and that a affiant “shall set forth such facts as would be admissible in evidence,” the *Batick* Court explained that, “[i]n no way could the plaintiff have complied with these requirements of the rule in an affidavit pertaining to the defendant’s mental state at the time of the transfer.” *Id.*

The *Batick* Court prudently held that, “[i]t is . . . well recognized that summary judgment procedure is particularly inappropriate where the inference which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions.” *Id.* at 647 (citations omitted). It found that the defendant’s intention at the time of the conveyance was in dispute and that the plaintiff’s “inability to file an opposing affidavit was obvious.” *Id.* at 646, 648. Thus, it reversed the lower court’s decision granting summary judgment.

The trial court here improperly conducted a trial by affidavit, granting summary judgment based on the beliefs stated in affidavits filed in support of defendant's motion for summary

disposition. Plaintiff alleged in her complaint that the nurses employed by defendant failed to communicate her deteriorating condition to her attending physician, Dr. Rynbrandt, who would have more likely than not taken steps to diagnose her condition, including performing a CT scan. In the alternative, Plaintiff alleged that had Plaintiff's attending physician not responded to the nurses' communication(s), the nurses had a duty to report the situation to physicians higher up on the chain of command who, more likely than not, would have discussed the situation with the attending physician and ordered diagnostic testing for Plaintiff.

Plaintiff's general surgery expert, Dr. Phillips, who provided the only testimony with respect to the applicable standard of care, testified that had the nurses informed the attending physician or physicians within the chain of command, a reasonable physician would have conducted diagnostic testing to further evaluate Plaintiff. Defendant moved for summary disposition twice. With its second attempt, defendant submitted the affidavits of Drs. Rynbrandt and Beaudoin, coincidentally just after a settlement was reached between the former physician and Plaintiff. In fact, the only relevant support for defendant's motion for summary disposition were the affidavits. As referenced more fully above, the affidavit of Dr. Rynbrandt speciously avers that he would not have acted any differently had the nurses complied with the applicable standard of care. Similarly, the affidavit of Dr. Beaudoin also avers that he too would not have changed the course of treatment for Mrs. Martin, even if he were contacted by the nurses.

Even if this Court were to overlook the fact that the relevant portions of the affidavits are opinions touted by defendant as truth, this Court cannot deny that whether the arguments float or sink turns solely on a credibility determination. Basically, Drs. Rynbrandt and Beaudoin argue that if the nurses had acted as they had not, which is to say if they had properly communicated Mrs. Martin's deteriorating condition, we would not have changed the course of her treatment. The slight

and slighted caveat being that Dr. Beaudoin's equivocates in his belief as he clearly expresses that he "may have spoken with and examined Mrs. Martin." [See Exhibit 9 to Plaintiff-Appellant's Application for Leave to Appeal, ¶ 8]

Adding insult to injury, the Court of Appeals went so far as to judicially bar a jury from making a credibility assessment:

we conclude that a fact-finder's determination that there was cause in fact merely because the fact-finder disbelieved the doctors involved would be exactly the kind of speculation that Skinner disapproved in the absence of any affirmative cause-in-fact proof advanced by plaintiff. *Martin, supra* at 163.

The Court effectively held that the jury would be **required** to believe Drs. Rynbrandt and Beaudoin. To the contrary, the trier of fact should be free to reasonably conclude that Dr. Rynbrandt would have acted reasonably and responsibly according to the standard of care testimony provided by Plaintiff's standard of care expert and that he would have acted just as Dr. Beaudoin did, ***in fact***, act. To rule otherwise, would be to restrict the trier of fact from making determinations as fundamental as weighing a witness' words against his actions and to grant a special evidentiary privilege to treating physicians, which privilege renders their opinions dispositive on any given factual issue.

This Court should return the issue of credibility to the fact-finder where sufficient facts support the testimony by Plaintiff's experts who dispute the claims of Drs. Rynbrandt and Beaudoin. Currently, the law as it stands supports the proposition that a belief proffered by a treating physician in a self-serving affidavit, even a belief that contradicts the physician's own actions, will be held dispositive as a matter of law, irrespective of whether the plaintiff submitted an expert affidavit that squarely contradicts the physician's assertions.

Summary disposition should have been denied where the issue of causation inherently raised questions of credibility that should have been reserved for a trier of fact, especially considering the affiants' interest in supporting defendant.

**E. The Interests of Justice and Public Policy Weigh in Favor of Reversing the Trial Court's Improper Decision As It Clearly Contravenes Well-Established Michigan Laws**

The *Clauson* Court explained that its refusal to grant summary judgment to a medical malpractice defendant was to avoid opening a floodgate to defendants who would easily submit affidavits stating that they followed the standard of care applicable and did not cause the plaintiff's injuries. *See also Dennison v Allen Group Leasing Corp.*, 110 Nev 181; 871 P2d 288 (1994). One need only consider that the an out-of-state expert is an informal requirement of bringing a medical malpractice suit - as local physicians prefer to protect each other by refusing to testify against one another - to conclude that physicians who uniformly follow an informal rule against testifying against one another would just as uniformly follow a legal ruling that permits them, quite conveniently, to avoid litigation and liability. *See Siirila v Barrios*, 398 Mich 576, 626 n 16; 248 NW2d 171, 192 (1976)(referring to the 'conspiracy of silence,'). However, permitting the opinions by the Court of Appeals and the trial court to stand would encourage not only physicians but would encourage the entire spectrum of defendants to engage in a level of collusion that has thus far been restricted by summary judgment authority.

Should the Court of Appeals' ruling be permitted to stand, as it is presently, defendant doctors and other health care providers will be encouraged, as will their counsel, to simply not tell the truth about what they actually "would have done" when presented with the actual facts of their own treatment of a specific patient. Doctors are no exception to the human pitfall of denial, especially if serves to avoid legal liability.

This appellate decision gives physicians and other defendants a license to speculate in the way most helpful to the their defense or the defense of their fellow colleagues. Plaintiffs must face lengthy detailed medical records over which they have no control (that are sometimes modified after

the fact) and medical professionals as fact witnesses who sincerely fear retribution for providing testimony that is adverse to the interest of their employer or colleague. In order to establish causation, medical malpractice plaintiffs rely largely on the testimony provided most often by their retained experts, and only if they are very lucky, perhaps a subsequent treater who will honestly assess the care and condition of the patient at issue. If a highly qualified medical expert, with no axe to grind, who merely provides an assessment of the facts as laid out by the records and the medicine can be completely nullified by a defendant physician's self-serving opinion, there will be no manner in which Plaintiffs can succeed in the vast majority of medical negligence cases.

All jurists and litigants interested in this case must not underestimate that litigators in the medical negligence field take the cues sent to them by the appellate courts very literally. If this case is not overturned, the medical professionals and medical providers of this State will be tempted, if not urged, to simply not tell the truth to avoid the cost and risks of litigation, and many plaintiffs harmed by medical errors will be unjustly left without a remedy.

### CONCLUSION

In the case at bar, the trial court improperly granted, and the court of appeals erroneously, affirmed summary disposition where factual issues clearly remained. The decisions of the lower courts can only be described as an egregious exercise of trial by affidavit, which this court should be loath to uphold. Accordingly, this Court should reverse the decision of the trial court.

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