

STATE OF MICHIGAN  
IN THE SUPREME COURT

JAMES YKIMOFF,  
Plaintiff/Appellee,

Michigan Supreme Court Docket  
No. \_\_\_\_\_

of 7/16/09

v.

Court of Appeals Docket No. 279472

W.A. FOOTE MEMORIAL HOSPITAL,  
Defendant/Appellant,

Jackson County Circuit Court  
Case No.: 04-2811-NH

E. Grant

and DAVID EGGERT, MD and  
DAVID PROUGHT, M.D.  
Defendants / etc

**NOTICE OF HEARING**

**DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

**JULY 16, 2009 ORDER OF THE COURT OF APPEALS**

**JULY 9, 2007 ORDER DENYING DEFENDANT'S MOTION FOR  
JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE  
ALTERNATIVE FOR A NEW TRIAL**

**MARCH 26, 2007 ORDER FOR JUDGMENT ON JURY VERDICT**

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APPL  
9122  
35504

**EXHIBITS (Bound Separately)**

**AND AFFIDAVIT OF SERVICE**

**- ORAL ARGUMENT REQUESTED -**

**FILED**

AUG 27 2009

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**James Ykimoff v W.A. Foote Memorial Hospital**

Michigan Supreme Court Docket No. \_\_\_\_\_  
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Jackson County Circuit Court Case No. 04-2811-NH

**DEFENDANT/APPELLANT'S**  
**APPLICATION FOR LEAVE TO APPEAL**  
***(Exhibits Bound Separately)***

**~ Oral Argument Requested ~**

35504



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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES .....	iii
INDEX OF EXHIBITS (Bound Separately) .....	vi
JURISDICTIONAL STATEMENT .....	vii
STATEMENT OF QUESTION PRESENTED FOR REVIEW .....	viii
STATEMENT OF MATERIAL FACTS AND ORDERS APPEALED FROM .....	1
ARGUMENT .....	5
I.    The trial court erred in denying defendants' motion for directed verdict and motion for judgment notwithstanding the verdict where plaintiff failed to prove cause in fact proximate causation by presenting no evidence at trial to establish that but for the negligence of defendant Foote Hospital's nurses, plaintiff James Ykimoff would not have suffered the injuries alleged, and where defense witness, Dr. David Eggert testified that the timing of his surgery would not have been altered even if the nurses had contacted him earlier .....	5
II.   Defendant's motion for directed verdict and for judgment notwithstanding the verdict should have been granted where plaintiff failed to provide, through the testimony of his proximate causation expert, Dr. Daniel Preston Flanigan, or otherwise, that Mr. Ykimoff suffered a greater than 50% opportunity to achieve a better result if surgery had been performed one hour and forty minutes earlier, as required by MCL 600.2912a.....	15
III.  The trial court erred in allowing plaintiff's expert, Dr. Daniel Preston Flanigan to testify regarding lost opportunity to achieve a better result without a hearing on the admissibility of his testimony, as the testimony did not meet the requirements/ qualifications of MRE 702 & MCL 600.2955 .....	24
IV.  The trial court committed prejudicial and reversible error by failing to give a curative jury instruction regarding plaintiff's counsel misrepresentation of Michigan law .....	31
V.   The trial court committed reversible, prejudicial error when it allowed plaintiff's rebuttal witnesses to testify to Mr. Ykimoff's integrity .....	41
CONCLUSION AND RELIEF REQUESTED .....	45
AFFIDAVIT OF SERVICE .....	46

## INDEX OF EXHIBITS

*(Bound Separately)*

### Exhibit

- A Medical Records – Foote Hospital
- B Trial Testimony of Dr. Flanigan
- C Trial Transcript 1, August 7, 2006, pp 151-156
- D Trial Transcript 1, August 7, 2006, pp 151, 164
- E *French v Gowda* Opinion
- F Trial Transcript 6, August 14, 2006, pp 96-98
- G Trial Transcript 3, August 9, 2006, p 127
- H Trial Transcript 8, August 16, 2006, pp 10-11
- I Motion in Limine
- J Transcript of August 4, 2006 hearing, p 10
- K Epidural Orders
- L Trial Transcript 2, August 8, 2006, pp 26-32
- M Trial Transcript 2, August 8, 2006, pp 207-208
- N Trial Transcript 3, August 9, 2006, pp 194-195
- O Trial Transcript 6, August 14, 2006, pp 13-18
- P Trial Transcript 8, August 16, pp 110-111
- Q Transcript of Hearing, June 22, 2007
- R Trial Transcript 3, August 9, 2006, pp 251-253
- S Video/DVD
- T Trial Transcript 7, August 15, 2006, pp 108-109
- U Trial Transcript 7, August 15, 2006, pp 115-116
- V Complaint
- W Trial Transcript 6, August 14, 2006, pp 126-127

INDEX OF AUTHORITIES

<u>CASE</u>	<u>PAGES(S)</u>
<i>Bogosian v Mercedes-Benz of North America, Inc.</i> , 104 F3d 472 (CA1 1997) .....	28
<i>Bordeaux v Celotex Corp.</i> , 203 Mich App 158; 511 NW2d 899 (1993).....	31
<i>Braun v Lorillard, Inc.</i> , 84 F3d 230 (CA 7 1996) .....	28
<i>Bryant v City of Chicago</i> , 200 F3d 1092 (CA7 2000) .....	28
<i>Craig v Oakwood</i> , 471 Mich 67; 684 NW2d 296 (2004).....	6, 29
<i>Daubert v Merrell Dow Pharmaceuticals, Inc.</i> , 43 F3d 1311 (CA9 1995)(on remand).....	27
<i>Daubert v Merrell Dow Pharmaceuticals, Inc.</i> , 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993) .....	25, 26, 27, 28
<i>Diaz v Johnson Matthey, Inc.</i> , 893 F Supp 358 (D NJ 1995).....	28
<i>Ensink v Mecosta County General Hospital</i> , 262 Mich App 518; 687 NW2d 143 (2004).....	20, 21
<i>Forge v Smith</i> , 458 Mich. 198; 580 NW2d 876 (1998) .....	5, 15
<i>French v Gowda</i> , 2000 WL 33538554 (Mich App 2000) .....	8
<i>Fulton v William Beaumont Hospital</i> , 253 Mich App 70; 655 NW2d 569 (2002).....	21
<i>Garabedian v William Beaumont Hosp.</i> , 208 Mich App 473; 528 NW2d 809 (1995).....	8
<i>General Electric Co v Joiner</i> , 522 US 136; 118 S Ct 512, 519; 139 L Ed 508(1997) .....	27, 28
<i>Gilbert v Daimler Chrysler Corp.</i> , 470 Mich 749; 685 NW2d 391 (2004).....	27, 31

<i>Greathouse v Rhodes</i> , 242 Mich App 221; 618 NW2d 106 (2000), <i>rev'd on other grds</i> , 465 Mich 885 (2001), <i>on remand</i> , 248 Mich App 698; 650 NW2d 351 (2001).....	26
<i>Kumho Tire Co, Ltd v Carmichael</i> , 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999) .....	25, 26, 27, 28
<i>Locke v Pachtman</i> , 442 Mich 216; 521 NW2d 786 (1994) .....	5
<i>Martin v Ledingham</i> , 282 Mich App 158; ___ Nw2d ___ (2009) .....	11, 12, 13, 14
<i>Mid-State Fertilizer Co. v Exchange Nat'l Bank</i> , 877 F2d 1333 (7 <sup>th</sup> Cir, 1989).....	29
<i>Minasian v Standard Chartered Bank, PLC</i> , 109 F3d 1212 (CA7 1997) .....	27
<i>Orzel v Scott Drug Co</i> , 449 Mich. 550; 537 NW2d 208 (1995) .....	5, 15
<i>People v DeLano</i> , 318 Mich 557; 28 NW2d 909 (1947).....	41
<i>People v Figgures</i> , 451 Mich 390; 547 NW2d 673 (1996).....	44
<i>People v Pesquera</i> , 244 Mich App 305; 625 NW2d 407 (2001).....	44
<i>Porter v Whitehall Laboratories</i> , 9 F3d 607 (CA7 1993) .....	28
<i>Seatrax, Inc. v Sonbeck Int'l, Inc.</i> , 200 F3d 358 (CA5 2000) .....	28
<i>Shreve v Leavitt</i> , 51 Mich App 235; 214 NW2d 739 (1974).....	40
<i>Skinner v Square D Co</i> , 445 Mich 153; 516 NW2d 475 (1994) .....	6, 7
<i>Smith v Jones</i> , 246 Mich. App. 270; 632 NW2d 509 (2001).....	5, 15

<i>Stone v Williamson</i> , 482 Mich 144; 753 NW2d 106 (2008) .....	16, 21
<i>Sturgis Bank &amp; Trust v Hillsdale Comm Health Center</i> , 479 Mich 854; 735 NW2d 206 (2007) .....	6
<i>United States v Cunningham</i> , 194 F3d 1186 (CA 11 1999) .....	28
<i>Vitale v Reddy</i> , 150 Mich App 492; 389 NW2d 456 (1986) .....	17
<i>Weymers v Khera</i> , 454 Mich 639; 563 NW2d 647 (1997) .....	6, 16, 17
<i>Wilkinson v Lee</i> , 463 Mich. 388; 617 NW2d 305 (2000) .....	5, 15
<i>Woodard V Custer</i> , 476 Mich 545; 710 NW2d 842 (2006) .....	24
<i>Ykimoff v Eggert</i> , ___ Mich App ___; ___ NW2d ___ (2009), .....	12, 13

**STATUTES, COURT RULES AND OTHER AUTHORITIES**

M Civ JI 2.03 .....	39
MCL 600.2912a .....	viii, 6, 15, 16
MCL 600.2912a(2) .....	29
MCL 600.2955 .....	viii, 24, 25, 30
MCR 2.516(C) .....	39
MCR 7.215 (C)(2) .....	11
MCR 7.215 (J)(1) .....	11
MCR 7.301(A)(2) .....	vii
MCR 7.302(C)(2)(a) .....	vii
MRE 608(a) .....	44
MRE 702 .....	viii, 24, 25, 26, 27

## JURISDICTIONAL STATEMENT

On July 16, 2009, the Court of Appeals issued its Opinion and Order denying in part, and vacating and remanding in part Defendant/Appellant, W.A. Foote Memorial Hospital's Appeal as a right of judgment in favor of Plaintiff, James Ykimoff, following the trial court's denial of its Motion for New Trial or For Judgment Notwithstanding the Verdict (JNOV) in this medical malpractice action. Defendant/Appellant has filed this application within 42 days of the opinion and Order. This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2)(a).

**STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

- I. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE PLAINTIFF FAILED TO PROVE CAUSE IN FACT PROXIMATE CAUSATION BY PRESENTING NO EVIDENCE AT TRIAL TO ESTABLISH THAT BUT FOR THE NEGLIGENCE OF DEFENDANT FOOTE HOSPITAL'S NURSES, PLAINTIFF JAMES YKIMOFF WOULD NOT HAVE SUFFERED THE INJURIES ALLEGED, AND WHERE DEFENSE WITNESS, DR. DAVID EGGERT TESTIFIED THAT THE TIMING OF HIS SURGERY WOULD NOT HAVE BEEN ALTERED EVEN IF THE NURSES HAD CONTACTED HIM EARLIER.**

Plaintiff/Appellee Answers: No..

Defendants/Appellants Answer: Yes.

The Trial Court Answers: No.

- II. DEFENDANT'S MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD HAVE BEEN GRANTED WHERE PLAINTIFF FAILED TO PROVIDE, THROUGH THE TESTIMONY OF HIS PROXIMATE CAUSATION EXPERT, DR. DANIEL PRESTON FLANIGAN, OR OTHERWISE, THAT MR. YKIMOFF SUFFERED A GREATER THAN 50% OPPORTUNITY TO ACHIEVE A BETTER RESULT IF SURGERY HAD BEEN PERFORMED ONE HOUR AND FORTY MINUTES EARLIER, AS REQUIRED BY MCL 600.2912a.**

Plaintiff/Appellee Answers: No..

Defendants/Appellants Answer: Yes.

The Trial Court Answers: No.

- III. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF'S EXPERT, DR. DANIEL PRESTON FLANIGAN TO TESTIFY REGARDING LOST OPPORTUNITY TO ACHIEVE A BETTER RESULT WITHOUT A HEARING ON THE ADMISSIBILITY OF HIS TESTIMONY, AS THE TESTIMONY DID NOT MEET THE REQUIREMENTS/QUALIFICATIONS OF MRE 702 & MCL 600.2955.**

Plaintiff/Appellee Answers: No..

Defendants/Appellants Answer: Yes.

The Trial Court Answers: No.

**IV. THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR BY FAILING TO GIVE A CURATIVE JURY INSTRUCTION REGARDING PLAINTIFF'S COUNSEL MISREPRESENTATION OF MICHIGAN LAW.**

Plaintiff/Appellee Answers: No..

Defendants/Appellants Answer: Yes.

The Trial Court Answers: No.

**V. THE TRIAL COURT COMMITTED REVERSIBLE , PREJUDICIAL ERROR WHEN IT ALLOWED PLAINTIFF'S REBUTTAL WITNESSES TO TESTIFY TO MR. YKIMOFF'S INTEGRITY.**

Plaintiff/Appellee Answers: No..

Defendants/Appellants Answer: Yes.

The Trial Court Answers: No.

**STATEMENT OF MATERIAL FACTS AND ORDERS APPEALED FROM**

This is a medical malpractice action brought by 69-year-old James Ykimoff against W.A. Foote Memorial Hospital for the care of two of its nurses, Melinda Piatt and Marelene Desmarais, involving a November 7, 2001 elective aortofemoral bypass graft surgery performed by Dr. David Eggert. The bypass was scheduled to alleviate Mr. Ykimoff's history of severe claudication of the left hip and buttock area, which caused him significant pain and difficulty in walking.

Dr. Eggert commenced the surgery at 2:10 p.m. at Foote Hospital. During surgery, Mr. Ykimoff's aorta was found to be rock-hard through most of its length below the renal arteries. In order to place the graft, Dr. Eggert had to totally clamp off the blood flow to Mr. Ykimoff's legs. Once flow was established through the graft around the blocked portions of the arteries, Dr. Eggert evaluated Mr. Ykimoff and determined that there was marked improvement in circulation. The operation was concluded. [See Ex. A, Medical Records of Foote Hospital.]

Following the surgery, Mr. Ykimoff was taken to the PACU, or recovery room at 6:26 p.m. On initial examination by PACU Nurse Melinda Piatt, RN, Mr. Ykimoff was able to wiggle his toes bilaterally and had post-tibial pulses audible by Doppler examination, indicating the presence of blood flow to his lower extremities. After an hour in the recovery room, Mr. Ykimoff's condition improved, such that his post-tibial pulses were identifiable by palpation by hand, which is less sensitive than Doppler evaluation. An epidural was started for post-operative pain control; however, Mr. Ykimoff began to complain about pressure in his lower legs, became unable to wiggle his left foot, and starting experiencing a loss of sensation to his legs bilaterally. Nurse

Piatt contacted Dr. Garcia, the anesthesiologist, the physician in charge of the PACU, to assess the patient. Dr. Garcia decided to put the epidural on hold and to administer morphine for pain. [See Ex. A.]

At 7:45 p.m., the medical records reflect that Mr. Ykimoff's condition had improved, so that he was able to slightly move his left leg, but was still experiencing diminished sensation in his lower legs. The nursing notes reflect that Mr. Ykimoff was given morphine to manage his pain, and Nurse Marlene Desmarais, RN, (coming on duty after Mr. Ykimoff's arrival in the PACU) was closely monitoring Mr. Ykimoff's condition throughout the evening. [See Ex. A.]

At 8:30 p.m., Mr. Ykimoff experienced a decrease in blood pressure and the onset of mottled skin in his right leg, and his right leg became cooler than the left leg. Anesthesiologist, Dr. Aruna Kode, was called in to see the patient. At 8:40 p.m., Dr. Eggert was notified by Nurse Desmarais of Mr. Ykimoff's condition. At 8:50 p.m., Dr. Freeman, a neurologist, was consulted regarding Mr. Ykimoff's condition. At this time, Mr. Ykimoff was able to bend his left leg, but was unable to move his right leg and had no sensation to his right leg. [See Ex. A.]

Dr. Eggert arrived at the hospital to examine the patient at 9:12 p.m. and made the decision to return Mr. Ykimoff to the operating room. At 9:45 p.m., Dr. Eggert commenced an exploratory surgery to evaluate blood flow in the graft. Dr. Eggert found that there was thrombus (or clot) in the graft site, and performed a thrombectomy of the right limb of the aortofemoral graft, removing the blockage to the blood supply to Mr. Ykimoff's lower extremities. Plaintiff believes that this clot formed in the graft site

immediately after the first surgery. [See Ex. A; and Ex. B, Trial Testimony of Dr. Flanigan, pp 17-19.]

Following the thrombectomy and his discharge from Foote Hospital, Mr. Ykimoff experienced weakness and diminished sensation in his lower extremities. While the area affected shrank over time, ultimately Mr. Ykimoff's improvement plateaued.

Plaintiff, James Ykimoff, filed a lawsuit in March of 2004. [See Ex. V, Complaint.] The trial of this matter was conducted over two weeks, from August 7, 2006 through August 17, 2006. Although Dr. Eggert was initially named as a defendant, he was dismissed pursuant to motion for summary disposition prior to trial. At trial, Plaintiff alleged that Foote Hospital, through its nurses, Melinda Piatt, RN, and Marlene Desmarais, RN, breached the nursing standard of care by improperly assessing Mr. Ykimoff upon his arrival in the PACU, as evidenced by their improper charting. [See Ex. C, Trial Transcript 1, August 7, 2006, Opening Statement by Plaintiff, pp 151-165.] Plaintiff also alleged that the call to Dr. Eggert should have been made one hour and forty minutes earlier, at 7:00 p.m., rather than 8:40 p.m.; and/or another surgeon should have been consulted. It was Plaintiff's assertion that the nurses' reliance upon the anesthesiologists was insufficient and medically negligent. [See Ex. C.]

At trial, Plaintiff James Ykimoff, his wife of 49 years, Margaret Ykimoff, and three of their eleven children testified regarding Mr. Ykimoff's present condition; describing how he walks, looks, functions. Nurses Piatt and Desmarais and Dr. Eggert testified. Plaintiff also presented two experts: Janet McCoig, RN, who testified regarding the nursing standard of care, and Dr. Daniel Preston Flanigan who offered testimony regarding proximate causation. Defendant's two nursing experts, Kathryn MacInnis and

Carol Spinweber testified that the nurses met the nursing standard of care. In addition, there was testimony by the two anesthesiologists who cared for the patient; neurologist, Dr. Freeman; physical therapist, Mark Beissel; and Mr. Ykimoff's family physician, Dr. Dana Dewitt. In addition, a video tape, taken by private investigator, Steven Bibler, was shown by defendants to give a visual aid to Mr. Ykimoff's damages; and rebuttal witnesses to that video tape were allowed: Pastor Richard Green and church organist, Ethel Bartlett.

On August 17, 2006, a verdict was returned for the plaintiff. In post-trial motions, the Trial Court applied the upper tier cap on non-economic damages. On March 26, 2007, an order for judgment on jury verdict was entered for \$1, 402,601.44. Defendants filed a motion for Judgment Notwithstanding the Verdict and/or New Trial, which was denied by the Trial Court on July 9, 2007. An appeal to the Michigan Court of Appeals was taken from the March 26, 2007 Order for Judgment on Jury Verdict and July 9, 2007 Order Denying Motion for Judgment Notwithstanding the Verdict and/or New Trial. Plaintiff cross-appealed on the issue of Dr. Eggert's dismissal pursuant to Motion for Summary Disposition and issues dependent on the Court of Appeal's determination that a new trial was warranted.

On July 16, 2009, the Court of Appeals issued its opinion and order denying in part, but vacating and remanding in part as to the issue of the proper application of the lower tier cap on non-economic damages.

This appeal is taken from the Court of Appeal's July 16, 2009 Order.

## ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE PLAINTIFF FAILED TO PROVE CAUSE IN FACT PROXIMATE CAUSATION BY PRESENTING NO EVIDENCE AT TRIAL TO ESTABLISH THAT BUT FOR THE NEGLIGENCE OF DEFENDANT FOOTE HOSPITAL'S NURSES, PLAINTIFF JAMES YKIMOFF WOULD NOT HAVE SUFFERED THE INJURIES ALLEGED, AND WHERE DEFENSE WITNESS, DR. DAVID EGGERT TESTIFIED THAT THE TIMING OF HIS SURGERY WOULD NOT HAVE BEEN ALTERED EVEN IF THE NURSES HAD CONTACTED HIM EARLIER.

### A. STANDARD OF REVIEW

Defendant/Appellant contends that the Trial Court erred by denying its motion for directed verdict or JNOV. The Trial Court's denial of both motions are reviewed de novo on appeal. *Forge v Smith*, 458 Mich. 198, 204; 580 NW2d 876 (1998); *Smith v Jones*, 246 Mich. App. 270, 273-274; 632 NW2d 509 (2001). A motion for directed verdict or JNOV should be granted if the evidence viewed in a light most favorable to the nonmoving party fails to establish a claim as a matter of law. *Wilkinson v Lee*, 463 Mich. 388, 391; 617 NW2d 305 (2000); *Forge, supra* at 204, quoting *Orzel v Scott Drug Co*, 449 Mich. 550, 557; 537 NW2d 208 (1995).

### B. INTRODUCTION

In a medical malpractice action, a plaintiff must demonstrate (1) the applicable standard of care, (2) breach of that standard by the defendant; (3) injury to the plaintiff, and (4) proximate causation between the alleged breach and the injury. *Locke v Pachtman*, 442 Mich 216, 222; 521 NW2d 786 (1994). The elements of standard of care and proximate cause must be established through qualified expert testimony. *Id.*;

*Sturgis Bank & Trust v Hillsdale Comm Health Center*, 479 Mich 854, 856; 735 NW2d 206 (2007).

The statutory requirements regarding the burden of proof in a medical malpractice case are set forth in MCL 600.2912a, which provides in pertinent part:

(2) ... In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%....

Proximate cause itself requires proof of two separate elements: (1) cause in fact, and (2) legal or proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The Michigan Supreme Court has defined these elements as follows:

The cause in fact element generally requires showing that “but for” the defendant’s actions, the plaintiff’s injury would not have occurred. On the other hand, legal cause or “proximate cause” normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Id.* at 163; and see *Craig v Oakwood*, 471 Mich 67; 684 NW2d 296 (2004).

### **C. ARGUMENT**

A court must find that the defendant’s negligence was a cause in fact of the plaintiff’s injuries before it can hold that the defendant’s negligence was the proximate or legal cause of those injuries. To establish cause in fact, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s alleged injury would not have occurred.

*Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997); *Skinner*, *supra* at 164-165. Further, the *Skinner* Court stated that negligence is not established if the

evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses. *Skinner* at 165.

Plaintiff/Appellee in this case claims that Foote Hospital Nurses Piatt and Desmarais, “Didn’t do something which an ordinary nurse -- a nurse with ordinary judgment, skills, learning and experience would do,” which plaintiff has defined as making a call to the surgeon, Dr. Eggert, to come and examine the patient; or to follow a chain of command to reach another surgeon. [See Ex. D, Trial Transcript 1, Plaintiff’s Opening Statement, pp 151, 164, and Ex. V, Complaint.] Although Nurses Piatt and Desmarais contacted Dr. Eggert as well as the anesthesiologists in charge of the PACU where Mr. Ykimoff was recovering from his surgery, Plaintiff alleges the call to Dr. Eggert came too late and the call to the anesthesiologists was inappropriate and in violation of the standard of care. Plaintiff/Appellee asserts that “but for” the alleged negligence of the nurses:

1. Plaintiff’s surgery would have occurred earlier; and
2. Earlier surgery would have given plaintiff a greater than 50% chance for a better result.

However, Plaintiff/Appellee failed to offer any proof in his case in chief at trial that if notified earlier, Dr. Eggert would have performed surgery earlier or that the “chain of command” would have led to another surgeon who would have performed earlier surgery. Without one piece of evidence for evaluation, the jury could only speculate as to what would have occurred. Therefore, Plaintiff/Appellee failed to set forth evidence which would prove that it was more likely than not that the actions or omissions of Nurses Piatt and Desmarais were the proximate cause of Plaintiff/Appellee’s alleged

injuries. See e.g. *Garabedian v William Beaumont Hosp*, 208 Mich App 473; 528 NW2d 809 (1995).

In the unpublished case of *French v Gowda*, 2000 WL 33538554 (Mich App 2000), the Court of Appeals held that plaintiff had not established a case of negligence based upon a logical sequence of cause and effect where plaintiff's allegations were that defendant Dr. Gupta failed to make a proper consult request to defendant Dr. Gowda, who failed to respond to the consult request. [See Ex. E, *French v Gowda* Opinion.] The *French* Court stated as follows:

[t]o adequately show proximate cause, a plaintiff's proofs must facilitate reasonable inferences of causation, not mere speculation. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995). **In this case, plaintiff's argument rests entirely on speculation without any evidentiary support as to what Dr. Gowda might have done had Dr. Gupta personally contacted him for a consult.** In the absence of particular evidence linking Dr. Gupta's failure to personally make the consult request to Dr. Gowda's decision not to respond to the consult, and in the absence of any evidence connecting both of these factors to the decedent's death, plaintiff's attenuated theory of causation cannot reasonably support a conclusion that Dr. Gupta's conduct more likely than not caused the decedent's death. Because the record lacks any evidence to create a factual dispute as to whether Dr. Gupta's failure to personally contact Dr. Gupta contributed to the decedent's death, summary disposition was proper. *Id.* at 3. (emphasis added). [See Ex. E.]

The facts of the *French* case are analogous to those in this matter as to Nurses Piatt and Desmarais. Here, Plaintiff/Appellee's theory of causation is that the nurses didn't do something which the standard of care required them to do: Evaluate the patient sufficiently so as to make a call to the surgeon, Dr. Eggert, or to another surgeon in a more timely manner so that the second surgery would have been performed earlier. For plaintiff to have prevailed on this theory, he simply **must prove** that if Dr. Eggert or another surgeon had been contacted earlier, surgery on Mr. Ykimoff would have been

performed earlier. Plaintiff/Appellee did not call Dr. Eggert as a witness in this case; nor did he call any other surgeon to testify that he may have responded to a nurse's earlier phone call. In addition Plaintiff/Appellee's expert vascular surgeon, Dr. Daniel Flanigan was questioned about this issue:

Q. What is your opinion as to what would have occurred had the nurses contacted Dr. Eggert around 7:00?

A. As I stated earlier, I expect that the same sequence of events would have happened and that the patient would have had restoration of circulation to the right leg in the same time frame that he did once Dr. Eggert was contacted. [See Ex. B, Trial Testimony of Dr. Flanigan, p 74.]

Clearly, Plaintiff/Appellee's theory that "but for" the alleged delayed notification Mr. Ykimoff would have had earlier surgery is **rank speculation**. It is not supported by any evidence offered at trial. Plaintiff has built an attenuated theory of causation identical to that disallowed by the Court of Appeals in *French*. Plaintiff's theory of causation does not establish a reasonable basis for concluding that "it is more likely than not that conduct by [Nurses Piatt and Desmarais] was the cause of plaintiff's injury." *Garabedian, supra* at 476. Because there was no evidence before the jury which would permit it to find that Plaintiff/Appellee had proven that his injuries were proximately caused by the nurses' alleged delay in contacting Dr. Eggert, Defendant/Appellant's Directed Verdict Motion should have been granted.

Furthermore, in its case, Defendant/Appellant **did** present Dr. Eggert's testimony and questioned him extensively regarding what would have happened if the nurses had called him earlier. Dr. Eggert made it clear that he would not have performed surgery until **he determined that there was a vascular emergency and that in his opinion, a vascular emergency did not occur until there was mottling of Mr. Ykimoff's skin,**

which is noted in the record at 2030 (8:30 p.m.), just ten minutes prior to Dr. Eggert's notification at 2040 (8:40 p.m.) [See Ex. A, Medical Records of Foote Hospital.]

Q. With regard to the need for vascular surgery, would there need to be surgical intervention prior to the time that the graph [sic] occludes?

A. No.

Q. And from your review of this material, and your knowledge of doing surgeries on both sides, your opinion regarding the graph occlusion relative to when the modeling [sic] occurred is what?

A. Minutes. And it also – it corresponded actually to a point where there was a drop in blood pressure also, within a – I don't know, 10, 15 minutes of that time is when symptoms were – er, when findings were apparent. And I – and that would be a known reason to have a clot occur if the cardiac output is down or the blood pressure is low. That's one of the precipitating factors. There's actually a general tendency of clotting to occur after major surgery just because – and that's the reason why we put people on (inaudible) heparin or on lovanox, that's another kind of heparin, after major surgeries. Orthopedics does it routinely just because there's an incidence of clotting just because of the stress of surgery. And so you have to try to protect against that if you can. So in a case where the blood pressure crops or the cardiac output drops, that's just one other thing that could cause a clot.

Q. Now, relative to the time that the patient's leg became modeled, given what you've just said about when the occlusion occurred, would there be need for a vascular surgery prior to the patient's leg becoming modeled?

A. No.

Q. I'm going to move this around a bit. Now I'm just going to put together a quick hypothetical here. Doctor, we've heard testimony concerning what Nurse Piatt had – this one – at seven o'clock. Okay. Here, assume these facts that patient comes in the PACU at 6:26. At seven o'clock, the nurse has a patient who now can't wiggle his left foot. He's got left and right foot and legs pale, left and right foot and legs cool. There's a present posterior tibial pulse, (inaudible) dorsalis petus. The patient is complaining of pressure in legs. The L2 dermatome, there's no sensation, and this is bilateral. And then the patient is complaining of ache and pain.

Now given those signs and symptoms, doctor, do you have an opinion as to whether this represents a vascular crisis?

A. No, it doesn't at all, I don't think.

Q. Now with those types of findings, would that mandate a performance of any type of vascular surgery?

A. No.

\* \* \*

Q. Now again, the modeling occurred at 8:30 as noted in the record. Would the clot in the right graph even be appearing at eight – er, at 7:45?

A. I don't think so. I think it would be a sudden onset so. In minutes rather than half hours or more.

Q. If there's no vascular crisis here, would vascular surgery intervention be necessary?

A. No. [See Ex. F, Trial Transcript 6, August 14, 2006, pp 96-98.]

As set forth above, at no time during the trial of this case did Plaintiff/Appellee present any evidence to establish factual causation proximate cause. In fact, the only evidence elicited was that of Dr. Eggert, by Defendant/Appellant.

Just prior to oral argument at the Court of Appeals on this matter, the opinion in *Martin v Ledingham*, 282 Mich App 158; \_\_\_ Nw2d \_\_\_ (2009), was released.<sup>1</sup> The factual background of *Martin* is identical to the case herein. In *Martin*, the plaintiff alleged that the defendant nurses were negligent in their failure to report the patient's worsening post-surgical condition to physicians, and that their negligence was the proximate cause of the plaintiff's injuries. *Id.* at p159. Relying on affidavits from the physicians stating that they would not have changed the course of plaintiff's treatment

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<sup>1</sup> Leave to appeal to the Michigan Supreme Court has been filed in *Martin*. However, as a published decision, the application does not diminish the precedential effect of *Martin* at the Court of Appeals or at the Trial Court. Rather, the *Martin* decision is controlling precedent unless reversed by this Court. See MCR 7.215 (C)(2) and (J)(1).

had the nurses informed them of the plaintiff's condition, as the plaintiff alleged they should have, summary disposition was granted. *Id.*

On appeal in *Martin*, the plaintiff asserted that summary disposition was inappropriate because she had produced expert testimony showing that had the nurses properly reported, a notified doctor would have had the duty to change plaintiff's treatment. *Id.* at 160. The plaintiff claimed that defendant nurses should have done more to inform the physician about further developments in the complications. However, in his affidavit, the physician repeatedly stated that he had ample information regarding plaintiff and her situation throughout the period during which plaintiff alleges care was deficient; that he reviewed plaintiff's chart and was otherwise adequately apprised of developments; and that nothing the nurses could have done differently would have altered the care that the physician provided. *Id.* at p162. The Court of Appeals in *Martin* affirmed the trial court's grant of summary disposition, stating:

In sum, the facts presented in this case demonstrate that, had defendant's nurse made the reports plaintiff alleges they should have, plaintiff's care and treatment would not have been changed whatsoever. Thus, the facts simply do not support plaintiff's claim that the nurses' failure to report was a cause in fact of the injuries she suffered as a result of her post-surgical treatment. The facts did not establish a 'reasonable inference of causation,' and a finding of causation from these facts would be 'mere speculation' at best. We note that courts in other states have similarly concluded that liability can be imposed for a failure to adequately report to a physician only if the physician would have, in fact, altered a diagnosis or treatment had a better or earlier report been received.

Despite the factual similarity and applicability of *Martin* to the case herein, the Court of Appeals here, in *Ykimoff v Eggert*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2009), (Judges Talbot and Bandstra) distinguished *Ykimoff* from *Martin* by reading into Dr. Eggert's testimony a lack of credibility, stating his averment that he would not have

performed surgery earlier, if notified by the nurses, to be “speculative at best and self-serving at worst.” *Id.* at 14. The Court provided no basis for finding Dr. Eggert’s testimony to be “self-serving.” As Dr. Eggert was no longer a party to the action at the time of his trial testimony, his self-interest was arguably **less** than that of the defendant physicians whose statements formed the basis of the ruling in *Martin*, where testimony in support of their actual actions would serve as a defense in their behalf..

Further, the Court in *Ykimoff* held that Dr. Eggert’s undisputed testimony regarding **what he would have done if notified earlier** was not credible based upon what the Court interpreted as inconsistencies in his trial testimony. *Ykimoff, supra* at 14-15. However, although Dr. Eggert testified at trial that certain symptoms could be indicative of a clot, what the Court of Appeals ignored was the consistent and unequivocal testimony that it was Dr. Eggert’s opinion that these symptoms alone did not constitute a vascular emergency such that surgery was warranted:

Q. Okay. Now can – can an occlusion, a clot, cause loss of sensation?

A. Yes.

Q. Okay. Can an occlusion cause loss of movement?

A. Yes.

Q. And in a circumstance like Mr. Ykimoff, you believe that it could be caused by anesthesia or a clot, right?

A. It’s isn’t caused by a clot because a lot of these things are bilateral and he doesn’t have a clot on the left side. So the surmise is that this is not a – it’s something to be thought about. It’s not – given the circumstances, the left side looks normal as far as circulation, it has the same symptoms as the right side, that doesn’t add up to vascular to me.

Q. Okay. I understand your opinions. But if you have changes in sensation and changes in movement, can you think of any other causes besides an occlusion or anesthesia?

A. Those are the two things to think about –

Q. Okay –

A. Plus a neurologic injury. [See Ex. W, Trial transcript 6. August 14, 2006, pp 126-127.]

The issue is not what Dr. Eggert **should** have done, but what he **would** have done, and similar to the unrefuted testimony in *Martin*, Dr. Eggert could not have been more clear that even if contacted by the nurses earlier, the timing of his surgery would not have changed.

Finally, Judge Gleicher, in her concurrence, stated that she concurred with the Court's affirmance of the Trial Court's denial of Defendant/Appellant's Motion for Judgment Notwithstanding the Verdict or a new trial, but wrote separately to express disagreement with the proposition that this case is logically distinguishable from *Martin*. *Ykimoff, supra*, at 60. Judge Gleicher found that "[n]o meaningful distinction exists between the causation proofs presented in *Martin* and those introduced during the trial of this case." *Id.* at 61. Defendant/Appellant Foote Hospital agrees, and asserts that pursuant to *Martin, supra*, the Court of Appeals should have reversed the Trial Court's denial of Defendant/Appellant's Motion for Judgment Notwithstanding the Verdict and held that Plaintiff/Appellee had failed to establish proximate causation.

**II. DEFENDANT'S MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD HAVE BEEN GRANTED WHERE PLAINTIFF FAILED TO PROVIDE, THROUGH THE TESTIMONY OF HIS PROXIMATE CAUSATION EXPERT, DR. DANIEL PRESTON FLANIGAN, OR OTHERWISE, THAT MR. YKIMOFF SUFFERED A GREATER THAN 50% OPPORTUNITY TO ACHIEVE A BETTER RESULT IF SURGERY HAD BEEN PERFORMED ONE HOUR AND FORTY MINUTES EARLIER, AS REQUIRED BY MCL 600.2912a.**

**A. STANDARD OF REVIEW**

Defendant/Appellant contends that the Trial Court erred by denying its motion for directed verdict or JNOV. The Trial Court's denial of both motions are reviewed de novo on appeal. *Forge v Smith*, 458 Mich. 198, 204; 580 NW2d 876 (1998); *Smith v Jones*, 246 Mich. App. 270, 273-274; 632 NW2d 509 (2001). A motion for directed verdict or JNOV should be granted if the evidence viewed in a light most favorable to the nonmoving party fails to establish a claim as a matter of law. *Wilkinson v Lee*, 463 Mich. 388, 391; 617 NW2d 305 (2000); *Forge, supra* at 204, quoting *Orzel v Scott Drug Co*, 449 Mich. 550, 557; 537 NW2d 208 (1995).

**B. ARGUMENT**

In his Complaint, Plaintiff/Appellee, James Ykimoff, identified a cause of action based on a lost opportunity to achieve a better result. In Paragraphs 20 – 24, Plaintiff alleged:

“20. Mr. Ykimoff voiced various ominous complaints and exhibited various ominous signs such that the nurses at Foote Hospital should have contacted a medical doctor (surgeon) immediately so as to effectuate curative measures as soon as possible.

21. The nurses did not timely contact a physician (surgeon) who could and would treat Mr. Ykimoff so as to cure the occlusion, restore blood flow and correct he damage in at timely fashion.

22. Alternatively, the nurses attempted to contact or contacted physicians (surgeons) who could have treated Mr. Ykimoff but the physician(s) failed to do so in a timely manner.

23. Alternatively, there was a break down in communication between the doctors and the nurses, no one was timely contacted, no one timely responded to the medical emergency (occlusion), and no one was available to timely respond to the medical emergency. Mr. Ykimoff, for a long period of time, continued to lay in Foote hospital following surgery where he continued to deteriorate as a result of the occlusion which formed at the end of or immediately following the subject surgery.

24. The symptoms experienced and exhibited by Mr. Ykimoff became greater over time as the structures in his legs such as the muscles and nerves continued to suffer damage from the lack of blood flow." [Ex. V, p. 5.]

However, Plaintiff/Appellee's proximate causation expert, Dr. Daniel Preston Flanigan, failed to offer testimony to establish that Mr. Ykimoff had a greater than 50% opportunity to achieve a better result if surgery had been performed one hour and forty minutes earlier. With no other evidence offered, Plaintiff/Appellee failed to prove proximate causation.

MCL 600.2912a provides that "[i]n an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." Case law interpreting this statute has made it clear that **the language requires plaintiff to prove that the loss of the opportunity itself be greater than 50%**. This Court, in *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008), has addressed this statutory scheme. In doing so, the Court considered *when* a claim actually constitutes lost opportunity, stating:

'The lost opportunity doctrine allows a plaintiff to recover when defendant's negligence possibly, i.e., [by] a probability of fifty percent or less, caused the plaintiff's injury.' *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1977) (emphasis added.) The *Weymers* Court aptly described the lost-opportunity doctrine as 'the antithesis of proximate cause.' *Id.* In cases in which the plaintiff alleges that the

defendant's negligence more probably than not caused the injury, the claim is one of simple medical malpractice. *Id.* at 647-648. [Footnotes omitted.]

In other words, the lost opportunity theory is available in situations where a plaintiff cannot prove that a defendant's actions were the actual cause of the plaintiff's injuries, but will attempt to prove that the defendant's actions deprived him of a chance to avoid those injuries. *Vitale v Reddy*, 150 Mich App 492, 502; 389 NW2d 456 (1986). In this case, where Plaintiff/Appellee has alleged that the nursing inactions deprived him of a chance to obtain earlier surgery, thereby avoiding his injuries, Plaintiff/Appellee has stated a classic case of lost opportunity.

In the case herein, Plaintiff/Appellee's proximate causation expert, Dr. Flanigan, was asked to explain what the difference in outcome would have been if Mr. Ykimoff's second surgery had occurred earlier. Keep in mind that Plaintiff/Appellee's nursing expert, Janet McCoig, RN, testified that a violation of the standard of care occurred when the nursing staff at Foote Hospital did not contact Mr. Ykimoff's surgeon, Dr. Eggert (or another surgeon), regarding Plaintiff/Appellant's condition at 7:00 p.m., instead waiting until 8:40 p.m. to make the call. [See Ex. G, Trial Transcript 3, August 9, 2006, p 127] Further keep in mind that Dr. Flanigan testified that he believed Dr. Eggert lived ten minutes away from the hospital. [See Ex. B, p. 33.] Therefore, if the nurses had complied with the standard of care, as identified by Plaintiff/Appellee's experts, Dr. Eggert could have arrived at the hospital no earlier than 7:10 p.m., with the second surgery to begin thereafter.

Dr. Flanigan testified as follows:

BY MR. GIROUX:

- Q. Okay. Let's say we know that there's motor-function changes at about 1856 according to Piatt both in her testimony and in her charting – maybe 1855. Had he been called – let's say – 1855 is 6:55 p.m. Had he been called at 7 o'clock or so, would that have, in your opinion, made a difference?
- A. Yes.
- Q. Okay. Tell the jury how much of a difference it would have made, or do you think it would have been reversible at that point?
- A. I think at 7:00 it would have been completely reversible.
- Q. Okay. Let's talk about 7:30. Are you able to go through and identify at each minute how reversible or not this condition is going to be?
- A. No, but we can say that we know for sure that – well, first of all, because he didn't have – he didn't end up with complete paralysis. We know that there had to be some reversibility still left or potential for reversibility still left when he actually did get his circulation restored. He was in that period. He never got to the point where he had no reversibility whatsoever. We know – so he's in that period. We know that what's happening is the longer he's in this period of ischemia or inadequate circulation the more damage is building up to those – to those nerves, and in the early part of that period, there's either going to be complete reversibility, or he'd only end up with mild ongoing impairment for the rest of his life. In the later part of that reversible period – I shouldn't call it reversible. In the later part of that period, he's going to have much more severe, permanent injury because of the lack of irreversibility, and had that been carried on even longer, he would probably have no use of his lower extremities.
- Q. Okay. Let's take then 7:30 as a time. If the nurses had called at 7:30 knowing everything else we know in the chart, do you believe there would have been insignificant or minor residuals? Do you have an opinion as to what residuals he would have in that time frame, 7:00, 7:30?
- A. It's hard to say exactly what they would have been. It's easier to talk about the severity of them. I'm assuming, from what we know they turned out to be, that they would have been similar but to a much lesser degree, so I think he would have had minimal impairment, basically, is what I'm saying. [See Ex. B, Trial Testimony of Dr. Flanigan, pp. 33-35.]

Dr Flanigan further testified:

BY MR. METZGER:

- Q. Now, if – if Mr. Ykimoff had surgery one hour earlier, similarly, no one can say what his neurological deficit would be; correct?
- A. One hour earlier than he did?
- Q. Yes.
- A. No one could say exactly what it would be. Right.
- Q. Now, if Dr. Eggert was contacted at 7:45 and the surgery was performed in the same time frame that it was here in this case, can you tell me what neurological deficits that this patient would be – would have?
- A. Not exactly. I can tell you that it's a continuum, and the longer the time period before revascularization occurs the more likely he is to have permanent damage.
- Q. You can't tell me how much that would be?
- A. Not exactly at 7:45, no.
- Q. And if Dr. Eggert was contacted at 8:15 versus when he was contacted at 8:40, so 30 minutes earlier, could you tell me if there would be any difference in having, perhaps, surgery a half an hour earlier than it occurred?
- A. I think so.
- Q. There would be a difference?
- A. Yeah. As I said before, I think we're still in a period where there is, at least, some reversibility because he didn't up with completely paralyzed lower extremities. So any point beyond which – any point in that continuum compared to a point further along in the continuum, he's going to have less damage than he is later on – less permanent damage.
- Q. But you can't tell me how much less at any point – how much less damage? At each point you can't tell me how much?

A. I think what would be reasonable to do, although it's not perfect, would be to assume that it's probably not perfectly linear, but assume that if there's X amount of damage, just for example, say in a 60-minute period, then you can – you can assume that each minute there's going to be 160<sup>th</sup> more damage, but that's – that's – beyond that.

Q. That's guessing? Isn't that, essentially?

A. No, it's not really guessing. You can – you get to – you, obviously, have incomplete ischemia here, or you would have – you wouldn't have any reversibility, so I think it's quite valid to say that the longer you're within that period of ischemia the more likely you are to have irreversible damage.

Q. But you can't say how much less that damage would be; is that correct?

A. From exactly one point in the period to another point in the period?

Q. Yes.

A. Only roughly, as I've described. [See Ex. B, Trial Testimony of Dr. Flanigan, pp. 61-63.]

Dr. Flanigan never testified as to what time the second surgery would have begun if in fact Dr. Eggert had been contacted by 7:10, as identified by plaintiff's nursing expert as the latest time for Dr. Eggert to be contacted for the nurses to be acting within the nursing standard of care. He never identified where on the continuum of reversibility Mr. Ykimoff was when the second surgery was actually performed. As he was unable to opine when irreversible damage began, clearly Dr. Flanigan's trial testimony demonstrates that he had no basis upon which to testify that at some point within the period of time alleged to be in violation of the standard of care Mr. Ykimoff's chance for a better opportunity was greater than 50%.

The Michigan Court of Appeals visited this very issue in the case of *Ensink v Mecosta County General Hospital*, 262 Mich App 518; 687 NW2d 143 (2004). In

*Ensink*, plaintiffs alleged that administration of t-PA therapy to plaintiff *Ensink* would have had “some” effect on plaintiff’s condition. However, when questioned at deposition regarding his opinion, the *Ensink* plaintiff’s expert stated:

[i]t appears that at least 50 percent, if not more, of patients in the trial had some improvement with TPA, whether it’s a mild improvement or moderate or severe – not severe, but great improvement, so anywhere from some improvement to a little....

This answer was followed-up with this colloquy:

Q. So based on that study – I want to make sure I understand you correctly – you’re staying that at least 50 percent of the people who had TPA who are appropriate candidates for TPA had some type of improvement?

A. Right, or it could be just a little bit.

Q. It wasn’t broken down as to what kind of improvement or to what extent?

A. The only kind we quantify, the only amount we quantify is getting back to a zero or one or a near cure at three months. *Ensink* at 533-534.

Applying the principles set forth by the Court of Appeals in *Fulton v William Beaumont Hospital*, 253 Mich App 70; 655 NW2d 569 (2002)<sup>2</sup>, the *Ensink* Court found that the plaintiff had not established that he had lost an opportunity to achieve a better result greater than fifty percent and affirmed the trial court’s decision to grant summary disposition to the defendants. *Id.*, at 525. As in *Ensink*, plaintiff herein failed at trial to support his assertion with any precision whatsoever that with earlier surgery, Mr. Ykimoff would have had a 50% greater opportunity to achieve a better result.

However, despite Defendant/Appellant’s assertion that Dr. Flanigan’s testimony was speculative and insufficient to quantify the amount of Mr. Ykimoff’s lost opportunity

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<sup>2</sup> In *Stone, supra*, this Court confirmed that at this time, the principles for analyzing a loss of opportunity claim are as set forth in *Fulton*. *Stone, supra* at 20.

to achieve a better result, at the time of Defendant/Appellant's Motion for Directed Verdict, Plaintiff/Appellee's counsel relied upon Dr. Flanigan's testimony that a potentially reasonable way to assess the amount of loss would be to assume that, in a linear fashion, the longer Mr. Ykimoff's limbs were deprived of oxygen, the longer he was harmed, giving an example of for an hour of deprivation, harm could be assessed as progressing on a 1/60<sup>th</sup> per minute basis. In fact, in closing argument, Plaintiff/Appellee's attorney laid out the time line for the utilization of Dr. Flanigan's formula. In closing argument Mr. Giroux stated:

Now, what happened in the PACU is that there was a serious problem. There was in my mind no doubt that there's negligence, and I'm going to walk over that what I believe to be the evidence in this case in a few minutes. And as a result of this long delay of not getting blood to a certain part of my client's body, which is called the lumbar plexus, where that's located is going to be very important, and I'll explain that because it relates to proximate cause. And I'll explain why he has significant symptoms on one side and mild symptoms on the other. But because of that negligence, because of that delay in getting blood to that lumbar plexus area, and we're not talking about a delay for 20 minutes, we're not talking about a delay for even an hour, remember the clamp time on the surgery was an hour and 45 minutes which is according to Doctor Eggert pretty normal. We can have a clamp time of an hour and 40 minutes, two hours. According to Doctor Flanigan, and the whole industry, this is what you do, you're not expecting to have any problems from this. So we have clamp time for an hour and 45 minutes. Then the clot occurs, according to my expert. And I'll explain to you in a little while with his testimony why we're certain it occurs at this point.

Then it's 45 minutes to close up my client. So it's an hour 45, plus 45. We are now at two and a half hours. Then he goes to the PACU. The nurses don't do anything. At seven o'clock, we know there's a problem. Before seven o'clock, we know that's a problem. But now that's another 45 minutes. We are now into three hours, over three hours, that there's been no blood or little blood to that lumbar plexus area. And it needs the blood for those nerves, that nerve bundle, to (inaudible), to be alive, to function his lower extremities.

And it's not just three hours and 15 minutes or three hours and 30 minutes now because the nurses don't call at seven or 7:15. They don't call until

8:40. So now we are in to four hours, five hours, that he's denied that blood supply. And because of that, he has suffered injuries that you cannot dispute. Defendant's cannot dispute. [See Ex. H, Trial Transcript 8, pp 10-11.]

Whether it be from clamping during surgery or from a blood clot, Plaintiff/Appellee's expert opines that deprivation of oxygen begins a continuum of damage. He states that it is a linear progression of damage, which goes from completely reversible to mild, moderate and severe. Taking as an example one hour of oxygen deprivation, Dr. Flanigan asserts that the damage worsens at the rate of 1/60<sup>th</sup> per minute. However, Dr. Flanigan's "proposed formula," taken in conjunction with the standard of care testimony offered by Plaintiff/Appellee's nursing experts, is meaningless with respect to the issue of proximate cause. Dr. Flanigan is simply unable, under any circumstances, to say **when** Mr. Ykimoff's damages became irreversible and how far along on the continuum Mr. Ykimoff had traveled before there was a breach in the standard of care. Identifying a four or five hour period of a linear progression of damage, acknowledging that there was no breach of the standard of care by the nurses for the first three hours, and unable to state when the progression of damages became irreversible, Dr. Flanigan has no basis for opining that based on the negligence of Defendant/Appellant, Mr. Ykimoff lost a greater than 50% opportunity to achieve a better result. Dr. Flanigan's testimony says it all:

Q. There's a point where the damages sustained by Mr. Ykimoff are no longer reversible?

A. Correct.

Q. Would you agree that no one can know the exact point when that would occur – the exact time when that would occur?

A. Yes. [See Ex. B, p 61.]

The trial court erred in denying Defendants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict, and the Court of Appeals erred in denying Defendant/Appellant's Appeal of Right as tot his issue.

**III. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF'S EXPERT, DR. DANIEL PRESTON FLANIGAN TO TESTIFY REGARDING LOST OPPORTUNITY TO ACHIEVE A BETTER RESULT WITHOUT A HEARING ON THE ADMISSIBILITY OF HIS TESTIMONY, AS THE TESTIMONY DID NOT MEET THE REQUIREMENTS/QUALIFICATIONS OF MRE 702 & MCL 600.2955.**

**A. STANDARD OF REVIEW**

A trial court's determination to qualify as an expert a proposed witness is reviewed for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 710 NW 2d 842 (2006).

**B. ARGUMENT**

Prior to the start of trial, the de bene esse trial deposition was taken of Plaintiff/Appellant's proximate causation expert, Dr. Daniel Preston Flanigan. Based on the testimony given by Dr. Flanigan, on August 4, 2006, Defendant/Appellant moved to bar Plaintiff/Appellee from arguing a loss of opportunity to achieve a better result as speculative damages, or in the alternative to have a hearing on the admissibility of the testimony. [See Ex. I, Motion in Limine.] Defendant/Appellant argued that Dr. Flanigan was unable to support his hypothesis that there was a loss of opportunity with any literature or treatises. The Trial Court ruled:

Based upon his testimony, and his years of experience, and the way that he's answered the questions in the deposition here that certainly at this point his testimony is sufficiently supported by his experience and having

years being involved in these type of cases, and is reliable enough that it's submitted to the jury as a question of the credibility to be decided by the trier of fact. Motion denied. [See Ex. J, Transcript of August 4, 2006 hearing, p 10.]

The January 1, 2004 amendment to MRE 702 provides that expert testimony is admissible only if the trial court determines that "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The staff comment to the 2004 amendment of MRE 702 states that:

The **new language requires trial judges to act as gatekeepers** who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration. (Emphasis added)

MCL 600.2955 provides more specific requirements for the admissibility of "a scientific opinion rendered by an otherwise qualified expert" in personal injury actions:

- (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
  - a. Whether the opinion and its basis have been subjected to scientific testing and replication.
  - b. Whether the opinion and its basis have been subjected to peer review publication.
  - c. The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

- d. The known or potential error rate of the opinion and its basis.
- e. The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
- f. Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
- g. Whether the opinion or methodology is relied upon by experts outside the context of litigation.

This statute was the subject of analysis by the Court of Appeals in *Greathouse v Rhodes*, 242 Mich App 221, 238; 618 NW2d 106 (2000), *rev'd on other grds*, 465 Mich 885 (2001), *on remand*, 248 Mich App 698; 650 NW2d 351 (2001), where the Court said:

The plain language of the statute establishes the Legislature's intent to assign the trial court the role of determining, pursuant to the *Daubert* criteria, whether proposed scientific opinion is sufficiently reliable for jury consideration.

Further, the heart of the rationale behind the 2004 amendment to MRE 702 and behind *Daubert* is a "special obligation imposed on a trial judge to 'ensure that any and all scientific testimony ... is not only relevant but reliable.'" *Kumho Tire Co., supra*, 1999 S Ct at 1174. A court's "gatekeeping obligation" requires that the proponent of evidence present a sufficient basis for finding that "... the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert, supra*, 113 S Ct at 2786.

*In Kumho Tire Co., supra*, 119 S Ct at 1174, the Supreme Court clarified the gatekeeping role of the trial court:

It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Moreover, *Kumho Tire* expressly held that the gatekeeping inquiry applies when an expert relies “on experience-based observation,” rejecting an argument that a *Daubert* analysis is only required when an expert “relies on the application of scientific principles.” (*Id.* at p 1176) Additionally, the Court ruled that the standard applies not only to the general methodology used by an expert, but also to the particular method of analyzing the data to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant. *Id.* at p 1176-1177.

Opinion evidence should not be admitted when it is supported “only by the *ipse dixit* of the expert.” *General Electric Co v Joiner*, 522 US 136; 118 S Ct 512, 519; 139 L Ed 508(1997). “An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.” *Minasian v Standard Chartered Bank, PLC*, 109 F3d 1212, 1216 (CA7 1997). A court should not admit expert opinions that are “lacking in ‘visible means of support.’” *Daubert v Merrell Dow Pharmaceuticals, Inc*, 43 F3d 1311, 1320 (CA9 1995)(on remand).

These principles were embraced by this Court in *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004):

This gatekeeper role applies to all stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.

**Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation.** The United States Supreme Court's caveat in [*General Electric Co. v Joiner*, 522 US 136, 142, 118 S Ct 512, 139 L Ed2d 508 (1997)] is persuasive:

**[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert.** A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. (Emphasis added)

Under *Daubert* and *Kumho Tire*, courts have applied the "intellectual rigor" standard and required experts to be as careful in their litigation role as they would be in professional practice. *Braun v Lorillard, Inc.*, 84 F3d 230, 234-235 (CA 7 1996); *Bryant v City of Chicago*, 200 F3d 1092, 1098 (CA7 2000); *Seatrax, Inc. v Sonbeck Int'l, Inc.*, 200 F3d 358, 372 (CA5 2000); *United States v Cunningham*, 194 F3d 1186, 1997 (CA 11 1999). As a result, courts have excluded testimony from experts who rely only on their own experience with patients or whose opinions are unsupported by the relevant medical literature. *Porter v Whitehall Laboratories*, 9 F3d 607, 614 n 6 (CA7 1993)(excluding testimony of physician who had seen only five relevant cases in career and whose opinion was not supported by an studies in the literature); *Diaz v Johnson Matthey, Inc.*, 893 F Supp 358, 372-373 (D NJ 1995)(no experience with particular condition and no supporting literature). An expert who is well qualified in the subject area may still lack reliable opinions as to particular issues where he or she lacks specific experience. *Bogosian v Mercedes-Benz of North America, Inc.*, 104 F3d 472, 476-477 (CA1 1997) (excluding testimony of an automobile mechanic/consultant who, although well experienced in automotive repair, was not qualified to opine on the issue of transmission defects).

In *Mid-State Fertilizer Co. v Exchange Nat'l Bank*, 877 F2d 1333, 1339 (7<sup>th</sup> Cir, 1989), the court gave a practical example of how to apply the "intellectual rigor" standard, finding that the expert "would not accept from his students or those who submit papers to his journal an essay containing neither facts nor reasons; why should a court rely on the sort of exposition the scholar would not tolerate in this professional life?"

In *Craig, supra*, 471 Mich at 86-93, the Court held that the plaintiff failed to establish that the defendants' breach of the applicable standard of care proximately caused his cerebral palsy. The Court discussed the requirement that "the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." MCL

600.2912a(2)

***It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant may have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation.*** Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." A valid theory of causation, therefore, must be based on facts in evidence. And while "[t]he evidence need not negate all other possible causes," this Court has consistently required that the evidence "exclude other reasonable hypotheses with a fair amount of certainty." *Id.*, 471 Mich at 86-88. (Emphasis added)

In this case, Plaintiff/Appellee has asserted that if Dr. Eggert had been called at or around 7:00 p.m., then he would have operated on Mr. Ykimoff one hour and 40 minutes earlier, and that consequently Mr. Ykimoff would have had a greater than 50 percent opportunity to achieve a better result. However, Dr. Flanigan does not have

any authority to support this position. When questioned in his trial testimony, Dr.

Flanigan stated:

Q. Now with regard to those types of opinions, have you done any research or reviewed any journals, textbooks, articles, peer-review studies at all?

A. Specifically, for this case?

Q. Yeah.

A. No.

Q. Now, have you been able to identify any peer-reviewed publications to support your conclusions about what Mr. Ykimoff's residuals would be if the surgeon had been contacted at 7:00 or 7:30?

A. I don't believe it would be any.

Q. Have you attempted to look for any?

A. No, I haven't. I wouldn't need to.

\* \* \*

Q. You have nothing with you today that you could show us that would support any of your opinions that if the surgeon had been contacted at 7 o'clock, he would have no residual impairment, and if he had been contacted at 7:30, he would have minimal?

A. You mean, in terms of a book or article?

Q. Or a peer-review study, anything.

A. No, I don't have anything available right here.

Plaintiff/Appellee's expert's opinions do not meet the admissibility requirements of MCL 600.2955. The Trial Court refused to comply with its gatekeeping role and assertion of the basis of Dr. Flanigan's opinions. Therefore, the Trial Court abused its discretion in allowing Dr. Flanigan to testify as to proximate cause.

**IV. THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR BY FAILING TO GIVE A CURATIVE JURY INSTRUCTION REGARDING PLAINTIFF'S COUNSEL MISREPRESENTATION OF MICHIGAN LAW.**

**A. STANDARD OF REVIEW**

An issue regarding the Court's determination to give or not give a jury instruction is reviewed for an abuse of discretion. *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004).

**B. ARGUMENT**

During the course of trial, Plaintiff/Appellee's counsel asserted that Nurses Piatt and Demarais were negligent by violating a "law" that requires nurses to chart medications on the Medication Administration Record (MAR). Upon extensive questioning regarding medication administered by the nurses, it became apparent that the medications administered to Mr. Ykimoff were charted in multiple locations in the medical record. [See Ex. K, Medications Records.] Plaintiff/Appellee attempted to create an improper impression in the minds of the jury that the nurses were required by law to chart the medication in the MAR and, accordingly, that any mention of medications charted in other locations were irrelevant to compliance with the "law." However, **there is no law** requiring charting in the Medication Administration Record, as evidenced by Plaintiff's refusal to identify the "law" when identification was requested by the Trial Court.

Plaintiff began to establish this impression during his questioning of Nurse Piatt regarding her administration of an epidural narcotic, which she charted in the Pain Control Flow Sheet but not on the MAR.

Q: And what this is is whenever you give a medication to the patient, in this case Mr. Ykimoff, you are required by law to write it down in this medication record?

A: Yes. [Ex. L, Trial Transcript 2, August 8, 2006, pp 26]

\* \* \*

Q. Okay. Looking at the anesthetic record, no one filled out this bottom section, did they?

A. No.

Q. And that's required to be filled out –

A. After you started it –

Q. Right –

A. But not initially. The epidural was not on –

Q. Take a look at this document, Nurse Piatt.

A. Yes.

Q. This is where I think Nurse Desmarais and Nurse Holmes are working after the second surgery. Do you see how this first time is a little bit after midnight?

A. Yes.

Q. Do you see how this first time is exactly the same time?

A. Yes.

Q. No one did that kind of documentation on your record, did they?

A. No. [See Ex. L, Trial Transcript 2, August 8, 2006, pp 30-31.]

\* \* \*

Q. Thank you So putting all this together again, if Doctor Garcia spoke to you at 18:55, meaning 6:55 p.m., and said give the morphine and you did give it at 6:55, that would make sense why this was never

given and this was never filled out at the bottom, do you agree -- does that make sense to you?

A. Yes, but where's -- you're not looking at all of my charting.

Q. And we can agree -- we're going to get to all of your charting, I can promise. And we can agree -- I mean I don't believe that this was ever given, but let's assume it was just for the sake of argument, we can agree that three minutes of this anesthetic is not going to have an effect on Mr. Ykimoff?

A. Likely, no. No.

Q. It's not going to, correct? Correct?

A. I don't know that for a fact, but no.

Q. To your knowledge, to your belief, it's not going to have an effect on him, correct?

A. No.

Q. Correct?

A. Yes.

Q. I'm sorry for asking it over and over again --

A. I see how we're screwing up here. [See Ex. L, Trial Transcript 2, August 8, 2006, pp 31-32.]

Having created the impression in the jurors' minds that Nurse Piatt's charting was in violation of the law, Plaintiff/Appellee's attorney continued his attack on her credibility when questioning Nurse Desmarais:

Q. Did you see anywhere in the MAR where an anesthetic agent had been given to Mr. Ykimoff prior to you getting him?

\* \* \*

A. There's no evidence on the MAR that there's any epidural infusion going. And with an epidural bolus going in the operating room, they don't chart on the MAR when medication is given in the operating room.

Q. I just asked you if you saw the epidural medication on here, I didn't ask you yet about the bolus. Do you see anywhere on –

A. Well –

Q. -- the epidural medication going through that epidural catheter while he's in the PACU at any time?

A. No, not on that MAR.

Q. Okay. So on the official medication administration report which you had access to when you started your shift, it appears that he did not get any anesthetic through that epidural catheter before your arrival, do you agree?

A. I want to disagree with that somewhat –

Q. I know, I know. But could you –

A. It's not on the MAR for an epidural infusion. [See Ex. M, Trial Transcript 2, August 8, 2006, pp 207-208.]

Plaintiff/Appellee also raised this issue during the direct examination of his nursing expert, Janet McCoig:

"Q: Are nurses required to put in the MAR the medications by law?

A: Yes, sir.

MR. METZGER: Objection, I don't know what law we are. Does she know what law it is? If she doesn't know what – she's never practiced in the State of Michigan, so I object to that. Legal. Without – he has never identified the law.

JUDGE GRANT: I guess maybe ask her if she knows what law you're talking about and then we'll all know.

MR. GIROUX: Actually, Nurse Piatt admitted it two or three times. We don't have to worry about it.

MR. METZGER: We didn't know what law she was talking about either.

JUDGE GRANT: That's for argument and we're not to final argument now. Let's see if we can get through actually the testimony before we get to the closing arguments.

[See Ex. N, Trial Transcript 3, August 9, 2006, pp 194-195.]

On August 14, 2006, **prior to the jury being brought into the courtroom**, arguments were heard on Defendant/Appellant's motion regarding the violation of "law":

MR. METZGER: I did have another motion that I filed. It's with regard to this sort of unknown issue on this state law of nursing that the nurses violated because they didn't record the medications in the MAR. I haven't – and I asked Mr. Giroux what law is this that applies to nursing. I haven't gotten a response. There's nothing in the records or pleadings that talk about some statutory or regulatory violation by the nurses. We're working in a vacuum here. And frankly, I have quizzed my nursing experts and they have no idea what MAR law there is – er, excuse, me, what law there is that requires the nurse to document in the MAR. So I'm trying to find out what this is. I mean it certainly wasn't pled in any case. It wasn't brought up at any time until the middle of Nurse Piatt's testimony.

THE COURT: Is there such a statute or administrative rule or something of this nature that –

MR. GIROUX: Well, there's a couple of statutes –

THE COURT: (inaudible) –

MR. GIROUX: There's a couple of statutes that apply to truth in the medical records and that you are required –

THE COURT: Just give us a copy of whatever it is that you think applies.

MR. GIROUX: Well, Judge, please, I don't understand. Nurse Piatt, their employee, testified that she was required to put down the medications by law, that it was a requirement of her. Why do I have to do anything more than that?

THE COURT: Well because I would like to advise the jury as to what the law is. Somebody can testify this is the law, that

doesn't necessarily mean that that's the law, particularly if it's the nurses testify.

MR. GIROUX: Don't --

THE COURT: I have attorneys who sometimes don't know what the law is.

MR. METZGER: Right.

MR. GIROUX: Your Honor, may I talk about something?

MR. METZGER: Well, have we finished with the motion?

THE COURT: Listen to what he's got to say here.

MR. METZGER: Okay.

THE COURT: We want to get moving here petty quick.

MR. METZGER: Yes, I do.

MR. GIROUX: Judge, I don't know how to say this. I have perceived some interference by the Court in the presentation of my case the first day of full testimony when Nurse Piatt was on the stand, you yelled at me pretty significantly, you addressed [sic] me down twice in front of the jury. There were other things. And then on Friday, I got Doctor Garcia to agree that she would never give any advice at all to the nurses, and then you changed her testimony and made it medical advice when that's not what she told me under oath in her deposition. Now I've got Nurse Piatt, an employee of theirs, admitting that it is absolutely required of her that she be accurate in the records and that she put down the medications if they are in fact given. They can put on whatever proofs they want. I've all ready put on my proofs. Now I'm being told that there's some sort of requirement that I have to bolster the testimony of their witness because she made an admission that's binding on them on the record. Your Honor, I'm just asking that I be able to put on my case in an unfettered matter as long as this Court feels it's fair and that I've not been rude or disrespectful to anybody. And I really don't think I have been at any point.

THE COURT: No, I don't think anybody thinks that you've been anything but professional and gentlemanly. But the Court of course has the right to ask questions. And if I'm confused, then I lead to the conclusion that maybe the jurors are confused. So I ask questions to try to clarify some of this, and I have every right to do so. If you don't feel like you can or want to produce something in particular with the law, and we all understand what the testimony of the witness is, I'm not sure what I do if the jury then asks well what is the law, because I'm assuming that this is going to come up in argument. You know, one person says this is the law, the other person says it's not, and I'm under an obligation to tell them what the law is –

MR. GIROUX: Well,

THE COURT: If I don't have it and they ask me, I guess I'm just at a loss and I guess we can cross that bridge when we get there.

MR. GIROUX: Well –

THE COURT: And as far as my addressing you down I guess is the word you used, I told you how we were going to proceed and then you went ahead and did the same thing again. I have to do something because the final answer here is that I'm in charge and I'm running the Courtroom, and I'm the one that's going to run it. Whether you like it or you don't like it, that's unfortunate. But you know we lay down the rules. And I try to be gentle the first time but I'm not going to put up with it a second or third time. And if indeed it happens in front of the jury, so be it. All right.

MR. GIROUX: Well, Your Honor, what I submit or propose is that they can put on their proofs from their experts. They have two nursing experts who can talk about the existence or non-existence of any laws. And I guess then they can just say that Nurse Piatt was wrong. I believe that she was right. You know, but I'm done with my proofs.

THE COURT: You see, that's the part that we have a problem on or I'm going to anticipate that we're going to have a

problem sooner or later, maybe while the jury is thinking it over. Everybody's got a different opinion apparently as to what the law is or maybe we'll hear that they have a different opinion, if I had something – you know, usually we have a negligence case, or an automobile, here's the statute, to stop with a clear distance ahead, you're suppose to stop at a stop sign, make sure traffic is clear or whatever, and there's usually a statute that I an read. If there is something that applies there that's a rule, that would be helpful. If you know there isn't one or nobody has one, then I'll have to go from there and we'll cross that bridge if the jury has a question I guess. And I'm anticipating that there's going to be a question if in argument we're going to hear this at the end of the case. You're saying, well, you know testify and here's the law, and he's going to argue –

MR. BLANKENSHIP: where is it –

THE COURT: my way – I'm anticipating that his witness is going to say I'm not aware of any such statute or administrative rule. You know, we can all anticipate, can't we? The jurors are going to be somewhat perplexed and then they come to me. If I had something, I could tell them, because I don't know what it is either off the top of my head. All right.

MR. METZGER: And that's the only thing, Your Honor. You know, the question was is there a law that requires a nurse to chart medications in the MAR, which is what I'm trying to find out –

THE COURT: And the nurses –

MR. METZGER: because I can't find anything.

THE COURT: Well, we'll go from there. If we don't have it, we don't have it and I guess I'll tell the jury if they ask I don't know.

MR. METZGER: Okay, well –

THE COURT: Maybe by then I'll know.

MR. METZGER: Well, I mean I'll certainly ask for a curative instruction if we can't come up with this law, or some jury instruction. [Ex. O, Trial Transcript 6, August 14, 2006, pp 13-18.]

In fact, Defense counsel did ask for a curative instruction pursuant to MCR 2.516(C), asking that the jury be informed there is no law requiring the nurse to chart in the Medication Administration Record. The request again took place outside of the jury's hearing which the Court denied Defendant/Appellant's request, although it acknowledged that no law had been provided by Plaintiff/Appellee and stated that if the jurors were confused they could ask the Court for further instruction . [Ex. P, Trial Transcript 8, August 16, 2006, pp 110-111.]

Michigan law holds that the giving of a specific jury instruction is discretionary with the Court. Michigan law further holds that under *general* circumstances, when a party makes reference to "the law" incorrectly, the basic instruction that the court determines what the law is (M Civ JI 2.03), is usually sufficient to cure the situation. However, in this unique case, where Plaintiff/Appellee made reference to a statutory duty requiring a nurse which simply does not exist, the general jury instruction that jurors are only to accept the statement of the law as given to it by the court was not enough to overcome the prejudicial impact of Plaintiff/Appellee's attorney's false, misleading and pervasive statements.

It is obvious through the colloquy at the August 14<sup>th</sup> hearing, that the Trial Court recognized the potential prejudice that Plaintiff/Appellee's misrepresentation had created when he stated that if he was confused, then the jury, too, was likely confused. It is also obvious that in denying the curative instruction, the Trial Court simply incorrectly recalled that the conversation was held outside of the presence of the jury.

At the time of its denial of the curative instruction, the Trial Court believed that the colloquy had been **in the jurors presence**, which he stated would be incentive for them to ask him, at the time of deliberations, if they were confused by what “law” the nurses had allegedly violated in caring for Plaintiff/Appellee Ykimoff:

THE COURT: Concerning as to whether there’s law concerning medical records and that they’ve got to be kept accurate, I’m satisfied, based upon the testimony of the nurse, that, you know, she thought they had to be kept accurate. And I don’t think it’s a big issue that there has to be accurate records here, and whether she got flim-flammed into agreeing with Mr. Giroux that, “Gee, there must be some law,” the necessity of keeping accurate records, I think, is obvious to everybody, including the jurors in this matter. And I do remember ruling and we allowed both parties to argue whatever it is that they wished to say in front of the jurors.

**It seems to me – and I don’t remember seeing this in the transcripts or whatever – but it seems to me that this issue came up in front of the jurors, and I think I questioned Mr. Giroux and I said, “If you’ve got something, go ahead and bring it in.” I think I said that in front of the jurors and I think – I remember there was a couple of times that Mr. Giroux was rather put out with the Court and I think maybe that was one of the times.** [Ex. Q, Transcript of Hearing of Defendant’s Motion for Judgment Notwithstanding the Verdict. June 22, 2007, pp 24-25.]

The Trial Court acknowledged the prejudicial impact of the “law” misrepresentation, but thought it had been rendered harmless by conversations in front of the jury. Those conversations, in fact, took place outside of the jury’s presence. Therefore, the Trial Court abused its discretion in denying Defendant/Appellant’s request.

In *Shreve v Leavitt*, 51 Mich App 235; 214 NW2d 739 (1974), the Court of Appeals held that the trial court’s failure to correct a misstatement of the law was sufficient to merit a reversal of the verdict and a new trial, where the trial court confused an instruction on whether plaintiff was “a” proximate cause or “the” proximate cause of the defendant’s injuries. The *Shreve* court held that “in light of the close and confusing

factual question presented to the jury regarding the issue of proximate cause, we are **unable to conclude** that the erroneous instruction did not prejudice the plaintiffs.” In our case, similarly, the Trial Court’s failure to correct the Plaintiff/Appellee’s assertions that there were violations of some legal duty owed by the nurses to the Plaintiff/Appellee created a prejudice to the defense of this matter which pervaded their deliberations.

**V. THE TRIAL COURT COMMITTED REVERSIBLE , PREJUDICIAL ERROR WHEN IT ALLOWED PLAINTIFF’S REBUTTAL WITNESSES TO TESTIFY AS TO MR. YKIMOFF’S INTEGRITY.**

**A. STANDARD OF REVIEW**

Admission of rebuttal testimony is reviewed for an abuse of discretion.

*People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947).

**B. LEGAL ARGUMENT**

Mr. Ykimoff’s present condition and physical abilities were at issue during the course of this trial. Plaintiff/Appellee claimed that as a result of the alleged malpractice, Mr. Ykimoff was unable to work, and needed to hang onto something to perform volunteer work at his church. Further, plaintiff asserted that Mr. Ykimoff was unable to walk normally, without “locking his right leg” to avoid falling. During the trial of this matter, the jury observed Mr. Ykimoff coming into and out of court with difficulty, requiring the use of the railing and counsel table, and in fact during the examination of Mr. Ykimoff’s legs, the Trial Court asked the bailiff to assist Mr. Ykimoff up and down from the witness stand. In addition, Mr. Ykimoff, his wife, and three of his children testified that he walked with difficulty, often bruising his legs in car doors, etc. [See Ex. R, as an example, Trial Transcript 3, pp 251-253.]

Defense counsel retained a private investigator to take surveillance video of Mr. Ykimoff to allow the jury to have a visual aid of Plaintiff/Appellee's condition as described. In the course of that video, Mr. Ykimoff was seen to be walking, pruning bushes, entering and exiting his automobile, loading and unloading boxes. [See Ex. S, Video tapes.] The videotape was played, **without comment** to the jury in an effort to portray Mr. Ykimoff's complete physical status.

Following the presentation of the video of Mr. Ykimoff, Plaintiff/Appellee introduced two "rebuttal" witnesses. Plaintiff/Appellee's "rebuttal" witnesses were Mr. Ykimoff's pastor, Reverend Richard Green, and Ms. Ethel Bartlett, the church organist. After questioning regarding their observations of Mr. Ykimoff's abilities, Rev. Green and Mrs. Bartlett were then asked about Mr. Ykimoff's character.

Ethel Bartlett, Church Organist, testified:

Q: Okay. The last question I want to ask you, Ms. Bartlett, is describe for the jury Jim's character?

MR. METZGER: Well, Your Honor, is this appropriate?

THE COURT: Well, I don't know, rebuttal –

MR. METZGER: Yeah –

THE COURT: character witness –

MR. METZGER: Right –

MR. GIROUX: That was the whole point of his video that he's not being honest. I mean absolutely.

THE COURT: He's got a point there. You played the video and you're putting his character based upon his prior testimony into evidence. We'll allow it. Repeat the question however –

MR. METZGER: (inaudible) –

THE COURT: answer.

By MR. GIROUX:

Q: Describe for the jury – you know what’s going on, I mean you heard the testimony. Describe for the jury as best as you can about this person’s character?

MR. METZGER: Well, Your Honor, just one thing before we go here, just for the record, was that the video purpose was to describe his abilities and to show the jury what his abilities are. And that’s all we have done. I haven’t asked him any questions about his character or anything else. I showed the video. I showed –

THE COURT: I understand. But the whole idea does go to his character so we’re going to allow it. Go ahead. Answer his question please.

THE WITNESS: Jim is a man of integrity. As I say, I’ve known him for 15 to 20 years. I’ve always known him to be an honest man, loving, caring, do anything for anyone within his ability and means, honest. As I say, he has just extremely high integrity, a man of high integrity. [See Ex. T, Trial Transcript 7, August 15, 2006, pp 108-109.]

Richard Green, Church Pastor, testified:

Q: Okay. And describe for the jury please what you believe to be based upon your observations this man’s integrity and character? Tell them please because they want to know.

MR. METZGER: Your Honor, I’ll just make the same 608 objection for the record.

THE COURT: All right. It’s preserved. Answer the question.

THE WITNESS: Well first of all, let me state Jim is a volunteer. He is not paid in any way, shape, or form, nor is there any gratuity provided. The man does it simply out of commitment to his faith, to his local church fellowship. He has a large family and I don’t know them all. But those are important things to in Jim’s life. I know that Jim comes to work on a daily basis because he has told me that if I do not continue to work and put forth the effort I’ll freeze up, quote unquote. He is a man who is if concerning the issue of integrity, he comes to me on a regular basis as a volunteer to inform me of the status of projects that are under way. He comes to me at the end of almost every day to determine, first of all, if there’s anything that needs to be taken care of or just to say I’ve finished and I’m on my way for the day. That’s a regular occurrence. I’d also like to point

out that last week during the trial we had a funeral, a sudden death of a member of our church, and it was following a full day in Court, that Jim thought he should come over to the church to make sure that the wash rooms were suitable for the funeral that was being held either the next day or the day after that. Honesty, commitment, integrity, no question.

MR. GIROUX: No more. [See Ex. U, Trial Transcript 7, August 15, 2006, pp 115-116.

The impact of the testimony of Mr. Ykimoff's pastor and organist was highly prejudicial, obviously apparently designed to portray Mr. Ykimoff as a God-fearing man who would not lie, misstate or exaggerate his condition. Contrasted to the nurses, who were misleadingly portrayed by the Plaintiff/Appellee, as willful violators of the law, this testimony was highly improper.

Rebuttal evidence is admissible to explain, contradict, or otherwise refute an opponent's evidence. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). A party may not introduce evidence during rebuttal unless it is properly responsive to evidence introduced or a theory developed by the opponent. *Id.*; *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001). Inasmuch as rebuttal evidence is only admissible to contradict evidence presented by the opposing party, the rebuttal testimony herein was improper as it was designed to bolster Mr. Ykimoff's reputation for truthfulness before any such assailing of that reputation had occurred, is contrary to MRE 608(a). MRE 608(a) states that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." No such attack on Mr. Ykimoff's character was ever made. Therefore, the Trial Court clearly abused its discretion in allowing this highly prejudicial rebuttal tests.

**CONCLUSION AND RELIEF REQUESTED**

Defendant/Appellant, W.A. FOOTE MEMORIAL HOSPITAL, respectfully requests that this Honorable Court grant its application for leave to appeal.

Respectfully submitted,

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Dated: August 27, 2009

STATE OF MICHIGAN  
IN THE SUPREME COURT

JAMES YKIMOFF,

Plaintiff/Appellee,

v.

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant/Appellant,

Michigan Supreme Court Docket  
No. \_\_\_\_\_

Court of Appeals Docket No. 279472

Jackson County Circuit Court  
Case No.: 04-2811-NH

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**JULY 16, 2009 ORDER OF THE COURT OF APPEALS**

STATE OF MICHIGAN  
COURT OF APPEALS

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JAMES YKIMOFF,  
Plaintiff-Appellee/Cross-Appellant,

v

W. A. FOOTE MEMORIAL HOSPITAL,  
Defendant-Appellant/Cross-  
Appellee,

and

DAVID EGGERT, M.D.,  
Defendant-Cross-Appellee,

and

DAVID PROUGH, M.D.,  
Defendant.

FOR PUBLICATION  
July 16, 2009  
9:00 a.m.

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

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

TALBOT, P.J.

Defendant, W. A. Foote Memorial Hospital (“Hospital”) appeals as of right a judgment in favor of plaintiff, James Ykimoff, following the trial court’s denial of its motion for new trial or for judgment notwithstanding the verdict (“JNOV”) in this medical malpractice action. Plaintiff cross appeals the trial court’s order granting partial summary disposition resulting in the dismissal of plaintiff’s malpractice claims against his surgeon, Dr. David Eggert. We affirm in part and vacate and remand in part.

I. Facts and Procedural History

On November 7, 2001, because of circulation problems in his left hip resulting in claudication and pain, plaintiff underwent an aortofemoral bypass graft. Dr. Eggert performed the surgery at Foote Hospital. Reportedly, the duration of the surgery was prolonged due to the severity of the blockages in plaintiff’s aorta below the renal arteries, which were described as

being “rock-hard.” During the procedure, Dr. Eggert was required to completely clamp off blood flow to plaintiff’s legs. Surgery was initiated at 2:10 p.m. and plaintiff was not received in the Post-Anesthesia Care Unit (PACU) for monitoring until 6:26 p.m. Initially, when Nurse Melinda Piatt received plaintiff in the PACU, Doppler could detect post-tibial pulses and plaintiff demonstrated an ability to move his lower extremities.<sup>1</sup> However, shortly thereafter, plaintiff began to report consistent and severe pain, the loss of sensation in his legs and pressure in both his pelvis and lower extremities. Plaintiff’s blood pressure was low when transferred to the PACU and dropped while in that unit. Plaintiff’s legs were also observed to be pallid and cool while in the Unit. At approximately 8:40 p.m., when the skin of plaintiff’s right leg began to demonstrate mottling, the nursing staff contacted Dr. Eggert. Dr. Eggert returned to the hospital and was examining plaintiff by 9:12 p.m., at which time he determined that plaintiff would return to the operating room. At 9:45 p.m., Dr. Eggert commenced an exploratory surgery to evaluate blood flow and found a clot in the graft site. A thrombectomy of the right limb of the aortofemoral graft was performed, removing a blockage to the blood supply to plaintiff’s lower extremities.

Following the second surgery, plaintiff experienced bilateral lower extremity weakness and numbness. He remained a patient at the Foote Hospital until November 13, 2001, when he was transferred to the University of Michigan Hospital (U of M) for further care and treatment. While at U of M, plaintiff was diagnosed with bilateral lumbar plexopathy due to ischemia or lack of blood flow. Although plaintiff’s condition improved over time and with rehabilitation, he continues to report residual effects involving “tremendous deficits relative to the use of his legs.”

On March 12, 2004, plaintiff filed this action alleging medical malpractice against the hospital and Drs. Eggert and Prough. While Dr. Prough was dismissed based on his lack of involvement in plaintiff’s care, plaintiff alleged negligent treatment by both Dr. Eggert and the nursing staff of the hospital. With his complaint, plaintiff filed an affidavit of merit by Dr. Daniel Preston Flanigan to support his assertions of negligence and breach of the applicable standard of care. Specifically, Dr. Flanigan opined that defendants, while caring for plaintiff after the initial surgery, permitted “the vascular occlusion to exist for an extended period of time such that the lack of blood flow caused ischemia and the prolonged ischemia caused cell death and permanent damage to the muscles and nerves.” The hospital and Dr. Eggert successfully obtained partial summary disposition regarding the claims against the surgeon based on deposition testimony by Dr. Flanigan that Dr. Eggert had not breached any applicable standards of care during his treatment of plaintiff.

A jury trial proceeded on the remainder of plaintiff’s claims against the hospital, which alleged negligence of the PACU nurses, Piatt and Desmarais, in monitoring plaintiff’s condition and failing to report his status and symptoms to Dr. Eggert in a timely manner. The jury found in favor of plaintiff and an order for judgment on the jury’s verdict in the amount of

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<sup>1</sup> Nurse Marlene Desmarais assumed primary nursing responsibility for plaintiff in the PACU at 7:45 p.m., even though Piatt remained in the unit until approximately 8:05 p.m. to complete charting and assist with patient care.

\$1,402,601.44 was entered on March 26, 2007, following application of the medical malpractice non-economic damages cap. The trial court subsequently denied defendant's motion for JNOV or new trial and this appeal ensued.

## II. Synopsis of Claim

The claims of malpractice raised by plaintiff are premised on the care received in the hospital's PACU by assigned nursing staff, Melinda Piatt and Marlene Desmarais, and their failure to contact Dr. Eggert regarding signs of a vascular emergency, which delayed surgical intervention for a blood clot. Plaintiff's expert contends that the blood clot began to form immediately following the first surgery and that the symptoms displayed by plaintiff in the PACU should have alerted nursing staff to the condition and the need to contact the treating physician. Plaintiff's expert contends that earlier contact and resultant intervention would have either avoided any residual impairment now experienced by plaintiff or would have substantially reduced its severity.

In contrast, relying on testimony by Dr. Eggert, defendant asserts that the blood clot formed only minutes before plaintiff's skin demonstrated mottling and that any residual impairment is neurological in nature and derived from the necessity of prolonged clamping of blood flow during the surgery due to the severity of the blockages. Defendant further contends that liability against the hospital is precluded due to the inability to establish proximate causation based on Dr. Eggert's assertion that the symptoms demonstrated by plaintiff in the PACU did not indicate a vascular emergency and that, even if contacted and informed of these symptoms earlier by the nursing staff, he would not have taken any action or surgically intervened.

## III. Standard of Review

This Court reviews de novo both a lower court's decision on a motion for summary disposition, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), and the grant or denial of a motion for JNOV, viewing "the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004). JNOV is properly granted only if the evidence fails to establish a claim as a matter of law. *Id.* Because issues of statutory interpretation involve questions of law, they are also subject to de novo review. *Eggelston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

A trial court's denial of a request for a curative instruction is reviewed for an abuse of discretion. *Schutte v Celotex, Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992). Similarly, preserved evidentiary issues are reviewed for an abuse of discretion, *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006), while unpreserved evidentiary issues are reviewed for plain error affecting plaintiff's substantial rights, *Hilgendorf v St. John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001); MRE 103(a)(1).

## IV. Analysis

### A. Negligence and Proximate Cause

The primary contention regarding whether plaintiff can establish his claim of malpractice centers on the issue of proximate cause. Our Legislature has defined the applicable causation standard for medical malpractice cases in MCL 600.2912a(2), which provides in relevant part: “In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.” The general principles pertaining to causation in an action for medical malpractice were recently reviewed by this Court in *Robins v Garg (On Remand)*, 276 Mich App 351, 362; 741 NW2d 49 (2007):

“Proximate cause” is a term of art that encompasses both cause in fact and legal cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). “Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or ‘but for’) that act or omission.” *Id.* at 87. Cause in fact may be established by circumstantial evidence, but the circumstantial evidence must not be speculative and must support a reasonable inference of causation. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). “All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty.” *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994), quoting 57A Am Jur 2d, Negligence, § 461, p 442. Summary disposition is not appropriate when the plaintiff offers evidence that shows “that it is more likely than not that, but for defendant’s conduct, a different result would have been obtained.” *Dykes v William Beaumont Hosp*, 246 Mich App 471, 479 n 7; 633 NW2d 440 (2001).

If circumstantial evidence is relied on to establish proximate cause, the evidence must lead to a reasonable inference of causation and not mere speculation. In addition, the causation theory must demonstrate some basis in established fact. *Skinner, supra* at 164. As further guidance, our Supreme Court has stated:

“As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but non deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. [*Id.*, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).]

In summary, when circumstantial evidence is relied on it must provide a “reliable basis from which reasonable minds could infer that more probably than not, but for” the wrong or negligence an injury would not have occurred. *Skinner, supra* at 170-171.

Defendant contends proximate cause cannot be established because Dr. Eggert definitively indicated he would not have intervened sooner even if nursing staff had contacted him regarding changes in plaintiff’s condition while in the PACU. In contrast, plaintiff argues that his expert’s opinion regarding onset of the clot and breach of the applicable standard of care comprised a genuine issue of material fact pertaining to the issue of causation that was appropriately submitted and resolved by the jury. At the outset of analyzing this issue, it should be noted that the parties do not dispute that plaintiff experienced a blood clot in the graft site following the initial surgery. Rather the parties disagree regarding the timing of the formation of the clot and its resultant impact on the residual impairments claimed by plaintiff. In the most basic sense, this dispute, which is reliant on the opinions and credibility of plaintiff’s expert and surgeon, clearly comprises a question of fact appropriate for a jury determination. Although Dr. Flanigan disagreed with Dr. Eggert regarding the onset or timing of the formation of the clot and the impact of delay in diagnosis and treatment, such disagreement did not contradict any of the established facts and, therefore, the opinion of plaintiff’s expert was not impermissibly speculative. Flanigan’s opinion created a question of fact regarding whether the blood clot caused plaintiff’s bilateral lumbar plexopathy, which was solely within the purview of the trier of fact to resolve.

Although plaintiff has established a factual issue pertaining to the cause of his alleged injury, it remains incumbent on him to further demonstrate that the injury incurred was “more probably than not” caused by defendant’s negligence. MCL 600.2912a(2). In this case, defendant contends that any negligence by the nursing staff in failing to timely identify the signs of a blood clot is irrelevant and cannot lead to an imposition of liability because proximate cause cannot be established based on Dr. Eggert’s unequivocal assertion that even if he had been notified or contacted earlier regarding plaintiff’s condition he would not have acted any differently or intervened any sooner. In asserting this position, defendant relies on this Court’s recent decision of *Martin v Ledingham*, 282 Mich App 158; \_\_\_ NW2d \_\_\_ (2009), which in turn cites to case law from Illinois<sup>2</sup> and Ohio<sup>3</sup>, determining “that liability can be imposed for a failure to adequately report to a physician only if the physician would have, *in fact*, altered a diagnosis or treatment had a better or earlier report been received.” *Id.* at 163 (emphasis added). Similar to the case now before this Court, in *Martin* the plaintiff alleged that the nursing staff was negligent in failing to report the plaintiff’s worsening post-surgical condition to the treating physician and that such negligence comprised the proximate cause of her injuries. The treating physician in *Martin* averred:

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<sup>2</sup> *Seef v Ingalls Mem Hosp*, 311 Ill App 3d 7; 724 NE2d 115 (1999).

<sup>3</sup> *Albain v Flower Hosp*, 50 Ohio St 3d 251; 553 NE2d 1038 (1990) overruled on other grounds by *Clark v Southview Hosp & Family Health Ctr*, 68 Ohio St 3d 435 (1994).

that he had ample information regarding plaintiff and her situation throughout the period during which plaintiff alleges care was deficient, that he reviewed plaintiff's chart and was otherwise adequately apprised of developments and that nothing the nurses could have done differently would have altered the care that he provided to plaintiff. [*Id.* at 162.]

This Court upheld the trial court's grant of summary disposition in favor of defendants, "because there was no evidence showing that plaintiff's treatment would have been changed if better reporting occurred." In explaining the reasoning for this holding, the Court indicated:

[T]hat a Fact-finder's [sic] determination that there was cause in fact merely because of a disbelief of the doctors involved would be exactly the kind of speculation *Skinner* disapproved, in the absence of any affirmative cause in fact proof advanced by plaintiff. [*Id.* at 163.]

The very fact-intensive nature of the ruling in *Martin* necessarily leads to concern regarding the broader applicability of that decision and the implied impact on legitimate issues pertaining to credibility in determining proximate causation and usurpation of the jury's role. Thus, we are required to cautiously evaluate the applicability of *Martin* to the factual circumstances of this case.

It is important to recognize that the factual circumstances comprising *Martin* are distinguishable from those of plaintiff. In *Martin*, the treating physician was apprised of his patient's condition on an ongoing basis, but elected not to intervene or alter the course of treatment despite having this information. Consequently, the physician in *Martin* in averring that nursing staff could not have done anything differently to impact his treatment decision is describing his actual analysis of the presenting situation and subsequent action or inaction, and is neither speculating nor relying on hindsight. His verbal assertions are consistent with his actual behavior. Therefore, based on the documented factual history, the physician's assertion is not subject to a credibility determination.

In contrast, Dr. Eggert's assertion that he would not have acted differently or intervened sooner, despite the fact he was not kept informed of plaintiff's changing condition or symptoms, is speculative at best and self-serving at its worst. Although Dr. Eggert acknowledged that given the protracted length of plaintiff's surgery that it was "critical to follow" his condition, given the potential for the formation of an occlusion or clot, he contends that until plaintiff evidenced mottling of the skin that the various symptoms he was demonstrating in the PACU did not point to a vascular emergency. Specifically, Eggert testified that until a full clot was formed the mottling would not appear. He asserted that the mottling would probably occur within five to ten minutes of the formation of the clot, suggesting very limited lead-time to discern the need for intervention.

While testifying at trial, Dr. Eggert characterized the existence of mottling as an "obvious" and "dramatic" finding (i.e., "not subtle"), implying that other signs or symptoms should have been detected earlier. Because the mottling was "clearly recognizable" when Dr. Eggert returned to the hospital, he immediately prepared plaintiff for a follow-up surgery. However, contrary to Dr. Eggert's own testimony that until the presence of the mottling a vascular condition could not be identified, the physician also testified that plaintiff's inability to

use his leg or foot, coupled with the mottling, alerted to the presence of a vascular condition. Notably, nursing staff observed and documented changes in plaintiff's ability to move his legs and have sensation in those extremities as early as 7:45 p.m., approximately one hour before Dr. Eggert was contacted by the PACU nurses.

The record clearly evidences the ongoing observation and consistent report of symptoms such as pain, pressure in the lower legs, lack of movement, sensation and pulses and problems with blood pressure reported almost from the moment of plaintiff's acceptance into the PACU. A review of Dr. Eggert's testimony demonstrates that the presence of these symptoms signified the onset of a clot detected earlier and consistently by PACU nurses before the "dramatic" and definitive symptom of mottling occurred. Specifically, Dr. Eggert acknowledged that an occlusion could cause pain. As early as 6:55 p.m., plaintiff consistently reported pain levels of eight on a scale of one to ten while in the PACU. Dr. Eggert also acknowledged that an occlusion could cause loss of sensation and movement. Nursing records indicate plaintiff was having difficulty moving his legs and experienced a loss of sensation as early as 6:55 p.m.<sup>4</sup> Dr. Eggert also agreed that an occlusion could cause legs to look pale longer after post-surgery. Nursing notes and testimony indicate plaintiff's legs were both pallid (more on right than left) and cool and did not demonstrate significant improvement while in recovery. In response to questioning, Dr. Eggert also acknowledged that pressure in the lower legs could be a sign of an occlusion. This is a symptom documented by PACU nurses around 7:00 p.m. Dr. Eggert mistakenly believed that the feeling of pressure was exclusively in plaintiff's pelvis rather than his lower legs. In addition, Dr. Eggert opined that blood pressure; specifically a low blood pressure constitutes "one of the precipitating factors" in determining the existence of a clot. Plaintiff's blood pressure was low when received in the PACU. In fact, nursing staff could not administer an epidural in accordance with the anesthesiologist's orders due to plaintiff's blood pressure initially being at too low a level. A review of the PACU record shows a significant drop in plaintiff's blood pressure at 8:10 p.m., but nursing staff acknowledged plaintiff was having blood pressure problems as early as 7:55 p.m.

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

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<sup>4</sup> Changes in plaintiff's ability to move his lower extremities were noted in the PACU record at least as early as 7:10 p.m.

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

This cautionary approach in evaluating averments such as those made by Dr. Eggert, is supported by analyzing other "failure to inform cases," such as those relied on in *Martin*. In *Albain v Flower Hosp*, 50 Ohio St 3d 251; 553 NE2d 1038 (1990) overruled on other grounds by *Clark v Southview Hosp & Family Health Ctr*, 68 Ohio St 3d 435 (1994), the defendant was found not to be liable based on the failure of nursing staff to fully inform the staff physician regarding the condition of the patient. A pregnant woman presented to the hospital with a bloody vaginal discharge. She was admitted and after an initial examination by a resident, it was determined that the on-call staff obstetrician should be contacted. At the time, the obstetrician was seeing private patients at a site away from the hospital but was informed of the patient's condition and provided orders for her care. The obstetrician was updated approximately 90 minutes later and based on the information received indicated she would come to the hospital by 5:30 p.m. at the conclusion of her office hours. The obstetrician did not finish at her office until 6:00 p.m. and, instead of proceeding directly to the hospital, went home to eat dinner. Staff again contacted the obstetrician at home at 7:00 p.m. and additional tests were ordered. The obstetrician did not examine the patient until 8:00 p.m. Following a consult with another physician, it was determined that the patient should be transferred to another hospital. By the time the patient was transferred and evaluated an emergency caesarean section was performed but the baby died of "complications of neonatal asphyxia." *Id.* at 253.

In *Albain*, the expert opined that medical intervention to avoid the injury was required to occur between 4:00 p.m. and 5:00 p.m. *Id.* at 265. Although the nursing staff failed to inform the on-staff obstetrician of the vaginal bleeding, the obstetrician indicated that if she has been apprised of the bleeding she would have come to the hospital sooner, around 5:30 p.m., but would not have altered the course of treatment. Importantly, this assertion is verified by the fact that even when the physician arrived at the hospital at 8:00 p.m. she did not diagnose the condition or ascertain any imminent danger to the child. Hence, this situation is factually similar to *Martin* because the determination that "even if the nurses were so negligent, such negligence was not the proximate cause of the terrible loss suffered" is based on the actual behavior of the physician, not speculation. *Id.* at 266.

*Albain* is particularly instructive with regard to its discussion regarding the necessity of expert testimony to demonstrate proximate cause. Specifically, the opinion demonstrates the interrelationship between the standard of care and proximate cause, indicating, in relevant part:

[A]ccepted standards of nursing practice include a duty to keep the attending physician informed of a patient's condition so as to permit the physician to make a proper diagnosis of and devise a plan of treatment for the patient.

This duty, and an alleged breach thereof, raise issues of proximate cause. Even assuming that a nurse breached this duty to inform the attending physician of a patient's condition, it must further be shown that such breach was the proximate cause of the patient's injury before the hospital will be held vicariously liable therefore. Thus, a plaintiff must prove that, had the nurse informed the attending physician of the patient's condition at the proper time, the physician would have altered his diagnosis or treatment and prevented the injury to the patient. The trier of fact must be provided expert testimony that the injury was more likely than not caused by the nurse's negligence. [*Id.* at 265 (internal citations omitted).]

In a subsequent case, *Gill v Foster*, 157 Ill 2d 304; 626 NE2d 190 (1993), the Supreme Court of Illinois ruled that "even assuming the nurse had breached a duty to inform the treating physician of the patient's complaint, this breach did not proximately cause the delay in the correct diagnosis of the plaintiff's condition." In *Gill*, the plaintiff was hospitalized and surgery was conducted to correct his reflux esophagitis. Post-surgery progress notes by the physician indicate that plaintiff complained of chest pain. The physician determined the pain to be related to the surgery and a possible muscle pull from vomiting. The plaintiff continued to complain of chest pain during his discharge, but was advised by the nurse to seek follow up care with his family doctor. Ultimately, the plaintiff was diagnosed with a herniation of the stomach into the chest, which occurred before his discharge from the hospital. Importantly, the condition was deemed to have occurred before the physician's progress note indicating he had evaluated the plaintiff but did not diagnose this condition. As such, the holding in *Gill* was contingent on the factual record established that the "treating physician had repeated contacts with plaintiff . . . and failed to properly diagnose the problem." *Id.* at 310.

*Rampe v Comm Gen Hosp of Sullivan Co*, 660 NYS 2d 206; 241 AD2d 817 (1997), involved a case of fetal monitoring and distress. The treating physician was apprised of changes in fetal heart rate, but did not immediately undertake to perform a caesarean section. The court rejected plaintiff's contention "that an additional phone call would have caused [the physician] to act with greater celerity." *Id.* at 208. However, there was neither a demonstration that the physician was not informed of the condition nor expert testimony to support that repetitive contact would have altered the physician's response. Consequently, the trial court determined that the nursing staff and hospital could not be found liable because proximate cause could not be established.

The decision in *Seef v Ingalls Mem Hospital*, 311 Ill App 3d 7; 724 NE2d 115 (1999), is also factually distinguishable. In *Seef*, a pregnant woman was admitted to the hospital and placed on a fetal monitor. The treating physician came to the hospital and examined the patient. The physician monitored the printout for approximately 15 to 20 minutes but indicated he did not interpret the existence of a problem. The physician retired to the doctor's lounge while the patient remained on the monitor and under the observation of nursing staff. The physician was awakened by a call from nursing staff and, at that time, found abnormalities in the monitoring strips sufficient to raise concerns. On further evaluation, the physician performed an emergency caesarean section. Unfortunately, the infant was stillborn.

Once again, the physician testified, "even if he had seen the monitor strips prior to 3:05 a.m., he would not have done anything differently." *Id.* at 10. Notably, in this instance, the physician's indication that he would not have intervened sooner is not subject to an attack on the

basis of credibility because his statement “was neither self-serving nor hypothetical. Rather, [the doctor] made an inculpatory, unequivocal statement regarding his mental state at the time of the incident. He took full blame for the baby’s death by admitting that, based upon the state of his knowledge at the time, he misapprehended the seriousness of the situation. He admitted that, in hindsight, the baby should have been delivered sooner.” *Id.* at 16. The court further found that the obligation of the nurses to notify a supervisor was too speculative based on the failure to first notify the treating physician and the absence of expert testimony to provide an opinion regarding what another physician might have done, if the treating physician had been notified and failed to act.

Finally, in *Suttle v Lake Forest Hosp*, 315 Ill App 3d 96; 733 NE2d 726 (2000), the court distinguished *Gill*. In *Suttle*, a factual issue was found to exist regarding what the physician would have done had he been aware of the patient’s condition. Specifically, *Gill* was determined to be “inopposite” because:

In this case there was a factual issue as to what Dr. Salter would have done had he known of the condition of the placenta. In *Gill*, there was no factual dispute concerning what the doctor would have done had he known of the plaintiff’s chest pains, because in fact he did know. In the instant case, there is testimony that Dr. Salter diagnosed Diana as suffering from respiratory distress syndrome, rather than hypovolemic shock, because he was *unaware* of Ms. Suttle’s velamentous insertion. It is undisputed that evidence which shows to a reasonable degree of certainty that negligent delay in diagnosis or treatment lessened the effectiveness of treatment is sufficient to establish proximate cause. [*Suttle, supra* at 104 (emphasis in original).]

This survey of case law serves to illustrate that a determination regarding the presence or absence of proximate cause is highly fact dependent and that these determinations, by their very nature, do not lend themselves to an overly broad formulation. Because *Martin* and other such cases should be construed very narrowly it is not applicable to the facts of this case.

#### B. Lost Opportunity Doctrine

Contrary to defendant’s argument on appeal, there is no basis for this Court to review this matter as a lost opportunity case, pursuant to MCL 600.2912a(2). A review of the lower court file, particularly the complaint and affidavit of merit, plead only a basic negligence action and not a lost opportunity to obtain a better result. “A plaintiff’s theory in a medical malpractice case must be pleaded with specificity and the proofs must be limited in accordance with the theories pleaded.” *Badalamenti v Beaumont Hosp*, 237 Mich App 278, 284; 602 NW2d 854 (1999), citing MCR 2.111(B)(1). Further, the trial court specifically denied defendant’s request and did not instruct the jury to treat this matter as a lost opportunity claim.

As noted by our Supreme Court in *Stone v Williamson*, 482 Mich 144, 152; 753 NW2d 106 (2008), the lost opportunity doctrine is not applicable in this case as the “theory is potentially available in situations where a plaintiff cannot prove that a defendant’s action were the cause of his injuries, but can prove that the defendant’s actions deprived him of a chance to avoid those injuries.” In this instance, as in *Stone*, “it is clear from the way the instructions were given that the jury found that the traditional elements were met: defendants’ negligence more

probably than not caused plaintiff's injuries. Thus, . . . the jury properly found that plaintiff had satisfied the causation and injury elements." *Id.* at 163.

On appeal, defendant raises a related issue pertaining to the trial court permitting plaintiff's expert to testify regarding the lost opportunity doctrine asserting Dr. Flanigan's opinion did not meet the reliability criteria of MCL 600.2955 because he does not cite to or rely on professional treatises or publications. In part, we need not address this issue because it is rendered moot by the very fact that the case did not proceed under the loss of opportunity doctrine and Dr. Flanigan's testimony was consistent with proofs to establish the elements of negligence.

MRE 702 governs the admission of expert testimony, stating:

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

This Court, in *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2008), identified the criteria for the admission of expert testimony as including:

(1) the witness be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man. The party presenting the expert bears the burden of persuading the trial court that the expert has the necessary qualifications and specialized knowledge that will aid the fact-finder in understanding the evidence or determining a fact in issue. A witness may be qualified as an expert by knowledge, skill, experience, training, or education. [Footnotes omitted.]

Defendant does not dispute Dr. Flanigan's qualifications pursuant to MCL 600.2169. MCL 600.2955(3) specifically indicates that the provisions of § 2955 "are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169." (Footnote omitted.)

Ostensibly, by suggesting that Dr. Flanigan's opinion is not admissible under MCL 600.2955, defendant is confusing the admissibility of the testimony with the weight to be attributed to the expert's opinion. Specifically:

[W]hen determining whether a witness is qualified as an expert, the trial court should not weigh the proffered witness's credibility. Rather, a trial court's doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of facts, present issues regarding the weight to be given the testimony, and not its admissibility. "Gaps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility." The extent of a witness's expertise is usually

for the jury to decide. [*Surman, supra* at 309-310 (footnotes and internal citations omitted).]

Hence, defendant's criticism regarding the scientific or theoretical basis for Dr. Flanigan's opinion is more properly confined to challenge during cross-examination rather than attempting to invalidate his overall qualification.

### C. Evidentiary Errors

Defendant contends the trial court erred in permitting lay witnesses to testify regarding plaintiff's integrity or character. Plaintiff responds that admission of the testimony was necessary and responsive to a surveillance video submitted into evidence by defendant, which implied that plaintiff was not truthful regarding the impact of his alleged injuries.

Specifically, MRE 608(a) provides:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may only refer to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

At trial, defendant offered a surveillance video, without testimony or commentary, showing plaintiff engaged in certain activities. Purportedly, the video demonstrated that, contrary to plaintiff's assertions, he was capable of engaging in certain activities and was not as physically limited as alleged in his complaint. The video impliedly impugned plaintiff's truthfulness as it suggested plaintiff's residual injuries were not as extensive or limiting as alleged. MRE 608(a)(1) permits opinion testimony regarding a plaintiff's character for truthfulness in accordance with MRE 608(a)(2) "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence *or otherwise*." (Emphasis added.) In this instance the testimony went beyond plaintiff's reputation for truthfulness and encompassed plaintiff's overall "integrity."

Although the trial court erred in permitting this testimony, we find that any such error was harmless. "Error in the admission of evidence is not cause for reversal unless it affects a substantial right of the party opposing admission." *Stitt v Holland Abundant Life Fellowship*, 243 Mich App 461, 469; 624 NW2d 427 (2000); MRE 103(a). Notably, the issue in dispute was the extent of plaintiff's residual injuries and their impact on his functioning. Both parties had the opportunity through testimony and other evidence, such as the surveillance video, to support their arguments and contentions. Hence, there existed sufficient evidence for the jury to determine plaintiff's residual impairments irrespective of testimony regarding plaintiff's integrity. In addition, much of the testimony elicited from these witnesses was factual regarding their observations of plaintiff while volunteering at the church, which served as the background for part of the surveillance video. These witnesses were able to provide some context or explanation for the images submitted by defendant. When considered in conjunction with the instructions to the jury admonishing them to determine the credibility and weight to be afforded

any witness' testimony "and the reasonableness of the testimony considered in the light of all of the evidence," any error in permitting the challenged testimony was harmless.

On cross-appeal, plaintiff challenges the trial court's grant of partial summary disposition in favor of Dr. Eggert. Specifically, plaintiff contends the trial court erred in dismissing the claims following the refusal to consider testimony by various members of plaintiff's family that nursing staff had indicated that Dr. Eggert had been unresponsive to their calls and pages in violation of the standard of care. Defendant asserts the trial court properly excluded this testimony as inadmissible hearsay and based on the absence of any documentation or testimony indicating such evidence would impact or alter the opinion of plaintiff's expert regarding Dr. Eggert's breach of the standard of care.

The claims against Dr. Eggert were dismissed based on plaintiff's expert, Dr. Flanigan, opining that the surgeon had not breached the applicable standard of care regarding the treatment provided. Dr. Flanigan did indicate that the only possible breach by Dr. Eggert would be if he did not respond in a timely manner to a communication by the nursing staff. Subsequently, depositions were conducted of plaintiff's wife, son and daughters and they recalled comments by PACU nursing staff after the first surgery, suggesting they encountered difficulties in reaching or communicating with Dr. Eggert regarding plaintiff's condition while in the Unit. Specifically, plaintiff's son recalled the nursing staff indicating they were trying to reach Dr. Eggert, but could not recall a time frame between these comments and the physician's arrival at the PACU. Plaintiff's daughters testified in a similar manner, asserting the nursing staff indicated they were experiencing difficulty in contacting Dr. Eggert regarding control of plaintiff's pain and that, the day after the second surgery, one of the nursing staff indicated when trying to contact Dr. Eggert she received a busy signal and had to request the operator to "break on the line for an emergency." Plaintiff's wife testified in a similar manner but reported that the comments by the nurses occurred at approximately 8:00 p.m. and that Dr. Eggert appeared in the PACU within 30 minutes of these comments. Contrary to this testimony, all of the nursing staff involved and Dr. Eggert denied encountering any delay in reaching him. They specifically disavowed having to use a telephone operator to break into his phone line and there was no commensurate documentation indicating either the need for ongoing efforts or difficulty in contacting the physician. Defendant further asserted that even if plaintiff were able to demonstrate the nursing staff encountered difficulty in contacting Dr. Eggert there is an absence of proof regarding the amount of time involved sufficient to establish a breach of the standard of care.

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible except as delineated within the rules of evidence. MRE 802. While the alleged statements by the nurses unquestionably comprise hearsay, plaintiff contends it was admissible pursuant to either MRE 803(1), as a present sense impression, or MRE 803(3), as a statement of a then existing mental, emotional, or physical condition.

A present sense impression, defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is not precluded by the hearsay rule. MRE 803(1). The availability of this exception relies on the trustworthiness of the statement based on the substantially contemporaneous nature of the statement with the underlying event. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). For hearsay evidence to be admissible under this exception, three criteria

must be met: “(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be ‘substantially contemporaneous’ with the event.” *Id.* at 236. Contrary to plaintiff’s contention, it is not clear from the record that the alleged statements by the nursing staff were made substantially contemporaneous with the purported difficulties encountered in contacting Dr. Eggert. Specifically, the comments made the day following the second surgery are clearly precluded due to the failure to establish temporal proximity with the alleged events. In addition, in order to establish the foundation for the admission of a hearsay statement pursuant to the present sense impression exception, other evidence corroborating the statement must be brought forth to assure its reliability. *Id.* at 238. In this instance, there is neither documentary evidence nor verbal testimony to corroborate the alleged statements.

Plaintiff further contends the alleged statements are alternatively admissible pursuant to MRE 803(3), which provides:

A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

Although plaintiff contends that MRE 803(3) is applicable, he fails to cite to any law or expound on his assertion. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority.” *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). Because plaintiff failed to properly address the merits of his assertion of error regarding this evidentiary provision, we consider the issue abandoned. *Id.* at 339-340.

Despite plaintiff’s failure to properly present this issue for appellate consideration, we note, “[t]he scope of MRE 803(3) is very narrow . . . .” *Int’l Union, United Automobile, Aerospace and Agricultural Implement Workers of America and United Broadcasting Network, Inc v Dorsey*, 273 Mich App 26, 38; 730 NW2d 17 (2007). Because the alleged statements are not reflective of the declarants’ statement of mind, but merely serve to explain a past sequence of events or behavior, the statements are specifically excluded from the exception and not admissible.

#### D. Curative Instruction

Defendant contends the trial court erred in failing to give a curative instruction regarding a misrepresentation of law by plaintiff’s counsel. Specifically, defendant argues that while questioning Nurse Piatt and nursing expert, Janet McCoig, plaintiff’s counsel improperly implied to the jury that nursing staff had violated statutory law in failing to document the administration of certain medications on the Medication Administration Record (MAR). The challenged exchange pertaining to Nurse Piatt focused on the failure to document administration of an epidural narcotic on the MAR, was comprised of the following:

Q. And what this is is whenever you give a medication to the patient, in this case Mr. Ykimoff, you are required by law to write it down in this medication record?

A. Yes.

Plaintiff's counsel continued to challenge both Nurse Piatt and Nurse Desmarais regarding deficiencies or inconsistencies in their charting with this patient. However, defendant did not object to the testimony until plaintiff's counsel questioned Janet McCoig and elicited the following:

Q. Are nurses required to put in the MAR the medications by law?

A. Yes, sir.

Subsequently, extended discourse occurred between counsel and the trial court, outside the presence of the jury, seeking to clarify the "law" being referenced, which plaintiff's counsel never identified or provided to the trial court. Defense counsel sought a curative instruction, pursuant to MCR 2.516(C), which the trial court denied based, in part, on the mistaken belief that the discussion regarding the status or existence of such a law had occurred in the presence of the jury.

MCR 2.516(C) provides:

A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

Properly preserved assertions of instructional error are reviewed de novo. *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 8; 651 NW2d 356 (2002). "[A] verdict should not be set aside unless failure to do so would be inconsistent with substantial justice. Reversal is not warranted when an instructional error does not affect the outcome of the trial." *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

The focus of questioning by plaintiff's counsel was to demonstrate negligence by the nursing staff in failing to recognize the post-surgery formation of a blood clot and to notify the surgeon in a timely manner. To this end, counsel intensely questioned nursing staff regarding their charting of plaintiff's condition and treatments administered in an effort to demonstrate their awareness of various symptoms indicating the formation of a clot at various temporal points during plaintiff's stay in the PACU. Whether the charting deficiencies by the nurses comprised a statutory violation was irrelevant. The references to legal requirements for charting medications were cursory and constituted only a very small part of plaintiff's argument, making it unlikely that these references influenced or caused the jury's verdict against defendant. Defendant's reliance on *Shreve v Leavitt*, 51 Mich App 235; 214 NW2d 739 (1974), is misplaced. In *Shreve* the misstatement of law pertained to the issue of proximate cause and impacted a crucial

question confronted by the jury. *Id.* at 241. In this instance, whether failure to document or chart medication on a particular form was violative of a law or nursing regulation was not integral to demonstrating defendant's negligence or proximate cause.

Further, the trial court instructed the jury, "The law that you are to apply to this case is contained in these instructions and it is your duty to follow them" and that statements by the attorneys did not comprise evidence and that the jury "should disregard anything said by an attorney that is not supported by evidence . . . ." Because jurors are presumed to follow their instructions, any failure to provide a curative instruction was harmless. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993).

#### E. Noneconomic Damages Cap

In a medical malpractice action, MCL 600.1483 controls an award of noneconomic loss damages. Specifically, MCL 600.1483(1) provides:

In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants shall not exceed \$280,000.00 unless, as a result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed \$500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

For purposes of this case, only the trial court's determination that MCL 600.1483(1)(c) was applicable is being considered.

The trial court permitted use of the upper tier of the damages cap based on plaintiff's claim that he suffered from erectile dysfunction as a result of defendant's negligence, which resulted in his "inability to procreate." Defendant contends that plaintiff's erectile dysfunction was a condition that pre-existed the surgery and points to the lack of medical evidence to support this claim. Resolution of this matter turns on both the statutory language of the damages cap

provision and the failure of plaintiff to come forward with any medical evidence to support its application under the circumstances of this case.

The goal of statutory interpretation is to give effect to the intent of the Legislature. *Diamond v Witherspoon*, 265 Mich App 673, 684; 696 NW2d 770 (2005). If statutory language “is clear and unambiguous, judicial construction is neither required nor permitted, and the courts must apply the statute as written.” *Id.* (internal quotation marks omitted.) “[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 649; 761 NW2d 414 (2008) (citation omitted). MCL 600.1483(1)(c) requires, for application of the upper tier damages cap, that “permanent loss of or damage to a reproductive organ resulting in the inability to procreate” must have occurred. Procreate is defined in *Random House Webster’s College Dictionary* (1997) as follows: “1. to beget or generate (offspring). 2. to produce; bring into being. 3. to beget offspring.” In contrast, the definition of erectile dysfunction is “chronic inability to achieve or maintain an erection satisfactory for sexual intercourse.”<sup>5</sup> Significantly, the definition for erectile dysfunction does not equate with a level of impairment sufficient to meet the statutory requirement of “inability to procreate” for application of the higher damages cap. While the level or severity of plaintiff’s condition may interfere with his ability to engage in sexual intercourse, there is no demonstration that this condition precludes his ability to “beget offspring.” In addition, the statute specifically requires “permanent loss of or damage to a reproductive organ.” Plaintiff does not assert damage to a reproductive organ. Rather, he asserts ischemic damage to the lumbosacral plexus nerves, impacting the pelvic area, which has allegedly resulted in the loss of sensation and inability to achieve or maintain an erection. While the alleged injury may impact the ability to engage in sexual intercourse, by definition plaintiff’s claim does not encompass the “permanent loss of or damage to a reproductive organ” as required by MCL 600.1483(1)(c).

Notably, the only testimony elicited regarding plaintiff’s condition came from plaintiff and his wife. There was no definitive medical evidence, which linked plaintiff’s alleged condition to the surgery and also served to verify an inability to procreate. In fact, plaintiff acknowledged that he suffered from erectile dysfunction for a period of time before the surgery, albeit to a lesser degree. Although plaintiff previously consulted with a physician regarding medical intervention for this condition, he ultimately declined recommended treatments or pharmaceutical options. In addition, the presence of other pre-existing medical conditions, such as high blood pressure and diabetes, and how they may have contributed to plaintiff’s condition, were not addressed as factors in this diagnosis. Although plaintiff’s wife testified that intimate relations with her husband were impacted, we find it contradictory that a claim for loss of consortium did not accompany this complaint. There is evidence that plaintiff enjoyed the ability to procreate earlier in his life, having fathered 11 children. However, no commensurate medical evidence was proffered to establish that his ability to procreate was absolutely precluded

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<sup>5</sup> *Merriam-Webster’s Medical Dictionary* <<http://www.merriam-webster.com/medical>> (accessed March 20, 2009).

as the result of this surgery. As such, the trial court erred in using this exception in the calculation of noneconomic damages.

In addition, plaintiff has raised several additional issues on cross appeal, dependent on this Court's determination that a new trial is warranted. Because we do not find it necessary to remand this matter for a new trial, this Court need not address these remaining issues.

#### V. Response

I understand the divergent perspectives of my colleagues regarding the application of *Martin*, but believe it is imperative that we not unnecessarily confuse the issue in this case and make a concerted effort to provide as clear of a rule or guidance as possible to courts facing similar issues. Although I agree with concerns regarding the potential for oversimplification and improper application of this Court's ruling in *Martin*, I feel similarly burdened that the concurring opinions in this matter may serve to unnecessarily complicate rather than define the factors to be used by courts in making determinations in cases involving similar issues.

Specifically, I disagree with Judge Gleicher's statement that "the credibility of the treating physician could be questioned for any reason, regardless of whether his conduct conformed with his words." Although I concur that a jury may accept or disregard testimony as the ultimate fact finder, I do not agree that the fact finder can ignore uncontroverted facts establishing the actual conduct or behavior of the physician. Further, I take issue with Judge Gleicher's contention that this lead opinion has "entirely misconstrued the law" with regard to proximate cause as elucidated in *Skinner*. Judge Gleicher asserts that in *Martin* and this case "record evidence created a question of fact regarding whether the plaintiffs sustained injury *because they did not receive timely postoperative surgery.*" (Emphasis in original.) Merely because plaintiff's proffered expert testimony provides a possible explanation for the injury suffered, is insufficient by itself to meet plaintiff's burden with regard to proximate causation. Consequently, I believe the reasoning delineated in this majority opinion is consistent with *Skinner*, and that Judge Gleicher's suggestion that we permit a jury to accept or reject as credible an expert's opinion, irrespective of a factual demonstration that a physician's "conduct conformed with his words" violates the proscriptions of *Skinner* against speculation and conjecture and does not address the issue at hand.

Finally, while I agree that the inclusion of a more extensive factual history in *Martin* would have been helpful in avoiding its potential misapplication, I disagree with the distinctions Judge Gleicher attempts to draw between *Martin* and this case. While *Martin* heavily references the affidavits provided by the physicians in its ruling, there does exist in *Martin* uncontroverted factual averments that the treating physician had not only reviewed the patient's chart but "was otherwise adequately apprised of developments." Hence, the failure of the physician in *Martin* to act, given the availability of information regarding his patient's condition, is distinguishable from the absolute absence of such information by Dr. Eggert. Hence, Dr. Eggert's subsequent averments regarding his inaction and denial of an earlier basis for intervention comprise mere speculation and conjecture. I would emphasize that the focus in these types of cases is not merely on the predictable existence of conflicting expert opinions. Rather, it is the existence of uncontroverted facts detailing the actual behaviors of the physicians and their consistency or inconsistency with regard to the timing and receipt of information related to their patient's condition that permits a court to evaluate their subsequent averments pertaining to the impact or

absence of treatment or interventions provided in determining whether a genuine issue of fact and proximate cause are established.

#### VI. Conclusions

We affirm the trial court's denial of defendant's motion for new trial or JNOV and the grant of partial summary disposition in favor of Dr. Eggert. We vacate that portion of the judgment pertaining to the award and remand to the trial court for recalculation of damages pursuant to the proper provision of the medical malpractice damages cap. Pursuant to MCR 7.219(A), we find neither side has sufficiently prevailed for purposes of taxation of costs. We do not retain jurisdiction.

/s/ Michael J. Talbot

STATE OF MICHIGAN  
COURT OF APPEALS

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JAMES YKIMOFF,

Plaintiff-Appellee/Cross-Appellant,

v

W. A. FOOTE MEMORIAL HOSPITAL,

Defendant-Appellant/Cross-Appellee,

and

DAVID EGGERT, M.D.,

Defendant-Cross-Appellee,

and

DAVID PROUGH, M.D.,

Defendant.

FOR PUBLICATION  
July 16, 2009

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

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

BANDSTRA, J. (*concurring*).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/s/ Richard A. Bandstra

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(...continued)

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

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

STATE OF MICHIGAN  
COURT OF APPEALS

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JAMES YKIMOFF,

Plaintiff-Appellee/Cross-Appellant,

v

W. A. FOOTE MEMORIAL HOSPITAL,

Defendant-Appellant/Cross-  
Appellee,

and

DR. DAVID EGGERT,

Defendant-Cross-Appellee,

and

DR. DAVID PROUGH,

Defendant.

FOR PUBLICATION  
July 16, 2009

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

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

GLEICHER, J. (*concurring*).

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

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

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

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

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

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

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

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

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

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

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

The jury were the judges of the credibility of the witnesses ... and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case ... belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and, so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function. [*Aetna Life Ins Co of Hartford v Ward*, 140 US 76, 88; 11 S Ct 720; 35 L Ed 371 (1891).]

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

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

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

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

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

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

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

These cases underscore that despite Dr. Eggert’s emphatic, un rebutted assertion that he would not have operated on plaintiff at 7:00 p.m. irrespective of what he may have learned from the nurses, the jury possessed the authority to disbelieve every word that Dr. Eggert uttered. The lead opinion asserts that Dr. Eggert’s testimony was “speculative at best and self-serving at its worst,” and thus could be disregarded. *Ante* at 9. But in my view, these characterizations qualify as wholly irrelevant to the requisite focus of the analysis here. The case law discussed above posits that the jury can disregard testimony that, in the words of Justice Cooley, “probably ought to have satisfied anyone[.]” *Wooden, supra* at 427. Regardless whether this Court views the testimony of a treating physician as entirely rational and in accord with the medical records, or completely self-serving and verging on the absurd, a judge cannot remove from a jury its “right of judgment.” *Strach, supra* at 271. From the time of *Wooden, supra*, through *Kelly, supra*, the governing principle in Michigan has been that a jury possesses the freedom to disregard a witness’s opinions for any reason, or for no discernible reason. That a jury has exercised this right does not render its proximate cause decision “speculative.” Rather, the correct inquiry is whether sufficient record evidence demonstrates that the defendant’s negligence is “a cause of plaintiff’s injury, and ... that the plaintiff’s injury . . . [is] a natural and probable result of the negligent conduct.” M Civ JI 15.01.<sup>2</sup>

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

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

This Court's decision in *Martin* contravenes another accepted jurisprudential rule. "It is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted." *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 365; 480 NW2d 275 (1991); see also *Arbelius v Poletti*, 188 Mich App 14, 18-19; 469 NW2d 436 (1991). However, in *Martin*, this Court accepted as true the treating physicians' averments describing what they would have done if fully advised by the nurses about the plaintiff's condition. The Court rejected the notion that record evidence, including the testimony of the plaintiff's expert witness, sufficed to challenge the veracity of the treating physicians' contentions. Despite the apparent absence of any evidence rebutting the plaintiff's expert concerning the standard of care, the Court in *Martin* found as fact that the treating physicians would have violated that standard. *Id.* at 161-163. I believe that in light of *SSC Assoc Ltd Partnership* and a related line of established case law, this conclusion constitutes legal error and supplies a second ground warranting reconsideration of *Martin*.

## III. Causation in *Martin* and this Case

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

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

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(...continued)

proximate cause finding.

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

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

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

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

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

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

#### IV. Additional Concerns with Judge Bandstra's Approach

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

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

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

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

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

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

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

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

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

#### V. Conclusion

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

/s/ Elizabeth L. Gleicher

STATE OF MICHIGAN  
IN THE SUPREME COURT

JAMES YKIMOFF,

Plaintiff/Appellee,

v.

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant/Appellant,

Michigan Supreme Court Docket  
No. \_\_\_\_\_

Court of Appeals Docket No. 279472

Jackson County Circuit Court  
Case No.: 04-2811-NH

GEOFFREY N. FIEGER (P30441)  
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(734) 742-1820

**JULY 9, 2007 ORDER DENYING DEFENDANT'S MOTION FOR  
JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE  
ALTERNATIVE FOR A NEW TRIAL**

PIEGER, FIEGER, KENNEY, JOHNSON & GIROUX • A PROFESSIONAL CORPORATION • ATTORNEYS AND COUNSELORS AT LAW • 19391 WEST TEN MILE ROAD • SOUTHFIELD, MICHIGAN 48075-2463 • TELEPHONE (248) 355-5555 • FAX (248) 355-5148

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

JAMES YKIMOFF,

Plaintiff,

-VS-

FOOTE HOSPITAL and  
DR. DAVID EGGERT,

Defendants.

Case No. 04-2811-NH

Hon. Edward J. Grant

**TRUE COPY  
OF ORIGINAL FILE**

**JUL 09 2007**

JACKSON CO. CIRCUIT COURT  
AMANDA L. RISKAL CO. CLERK

\_\_\_\_\_  
GEOFFREY N. FIEGER (P-30441)  
ROBERT M. GIROUX, JR. (P-47966)  
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19390 West Ten Mile Road  
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\_\_\_\_\_  
CLYDE M. METZGER (P-31040)  
Attorney for Defendants  
2929 Plymouth Road, Suite 250  
Ann Arbor, MI 48105  
(734) 332-6010

**ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT  
NOTWITHSTANDING THE VERDICT OR IN THE  
ALTERNATIVE FOR A NEW TRIAL**

At a session of said Court held in Jackson  
County, City of Jackson, State of Michigan  
on: June 29, 2007

PRESENT: HON: \_\_\_\_\_  
CIRCUIT COURT JUDGE

This matter having come on for hearing on Friday, June 22, 2007, before  
the Honorable Edward J. Grant on Defendant's Motion for Judgment

Notwithstanding the Verdict or in the Alternative for a New Trial; the Court having read the briefs and having heard oral argument and being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is DENIED for the reasons stated on the record.

IT IS SO ORDERED.

Hon. Edward J. Grant

P14272

CIRCUIT COURT JUDGE

I hereby stipulate to entry of the above order without further notice or hearing; Approved as to form:

GEOFFREY N. FIEGER (P-30441)  
ROBERT M. GIROUX, JR. (P-47966)  
Attorneys for Plaintiff

  
CLYDE M. METZGER (P-31040) 6/25/07  
Attorney for Defendants

TRUE COPY  
OF ORIGINAL FILE

JUL 09 2007

JACKSON CO. CIRCUIT COURT  
AMANDA L. RISKAL CO. CLERK

FIGER, FLEGER, KENNY, JOHNSON & GIROUX • A PROFESSIONAL CORPORATION • ATTORNEYS AND COUNSELLORS AT LAW • 1000 WEST TEN MILE ROAD • SOUTHFIELD, MICHIGAN 48033-463 • TELEPHONE (248) 358-5555 • FAX (248) 358-5148

Notwithstanding the Verdict or in the Alternative for a New Trial; the Court having read the briefs and having heard oral argument and being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is DENIED for the reasons stated on the record.

IT IS SO ORDERED.

\_\_\_\_\_  
CIRCUIT COURT JUDGE

I hereby stipulate to entry of the above order without further notice or hearing; Approved as to form:

\_\_\_\_\_  
GEOFFREY N. FIEGER (P-30441)  
ROBERT M. GIROUX, JR. (P-47966)  
Attorneys for Plaintiff

  
\_\_\_\_\_  
CLYDE M. METZGER (P-37040)  
Attorney for Defendants

STATE OF MICHIGAN  
IN THE SUPREME COURT

JAMES YKIMOFF,

Plaintiff/Appellee,

v.

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant/Appellant,

Michigan Supreme Court Docket  
No. \_\_\_\_\_

Court of Appeals Docket No. 279472

Jackson County Circuit Court  
Case No.: 04-2811-NH

GEOFFREY N. FIEGER (P30441)  
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(734) 742-1820

**MARCH 26, 2007 ORDER FOR JUDGMENT ON JURY VERDICT**

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

JAMES YKIMOFF,

Plaintiff,

-vs-

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant.

Case No. 04-2811-NH

Hon. Edward J. Grant

GEOFFREY N. FIEGER (P-30441)  
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TRUE COPY  
OF ORIGINAL FILE

MAR 27 2007

JACKSON COUNTY CIRCUIT COURT  
SANDRA L. CROWLEY, CO. CLERK

ORDER FOR JUDGMENT ON JURY VERDICT

At a session of said Court held in the City of  
Jackson, County of Jackson, State of Michigan  
on March 24, 2007

PRESENT: HONORABLE \_\_\_\_\_  
CIRCUIT COURT JUDGE

This matter having come on before the court and a duly impaneled jury;  
the issues having been answered by the jury on August 14, 2006 as shown in  
the record;

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiff, James Ykimoff, recover from Defendants, Foote Hospital and Dr. David Eggert, the following sums of money:

A. Past economic damages	\$ 367,383.23
B. Past non-economic damages (pursuant to the Court's decision that the higher statutory cap applies)	\$ 704,000.00
C. Future economic damages	\$ 106,000.00
D. Future non-economic damages	\$ capped
E. Interest on past damages through 3/23/07	\$ 164,351.83
F. Taxable and allowable costs	<u>\$ 60,866.38</u>
<b>TOTAL DUE JAMES YKIMOFF</b>	<b><u>\$1,402,601.44</u></b>

Further, the parties having filed briefs on the applicability of statutory limits on non-economic damages and the Court having considered the parties briefs, having heard oral argument of counsel in open Court on November 17, 2006, and the Court being fully advised in the premises;

IT IS THEREFORE ORDERED AND ADJUDGED that the Court finds the Plaintiff has sustained a permanent loss of or damage to a reproductive organ resulting in the inability to procreate, and therefore, pursuant to MCL 600.1483, the higher cap on non-economic damages applies.

IT IS FURTHER ORDERED AND ADJUDGED that Judgment interest shall run on the entire amount of the judgment and will begin to accrue as of March 23, 2007.

IT IS FURTHER ORDERED AND ADJUDGED that this Order for Judgment on Jury Verdict resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Hon. Edward J. Grant  
P14272

\_\_\_\_\_  
CIRCUIT COURT JUDGE

I hereby stipulate to entry of the above Order without further notice or hearing; Approved as to Form;

*Robert N. Fieger*  
\_\_\_\_\_  
GEOFFREY N. FIEGER (P-30441)  
ROBERT GIROUX (P-47966)  
Attorneys for Plaintiffs

*Clyde M. Metzger w/consent*  
\_\_\_\_\_  
CLYDE M. METZGER (P-81040) 3/23/07  
Attorney for Defendant

TRUE COPY  
OF ORIGINAL FILE

MAR 27 2007

JACKSON COUNTY CIRCUIT COURT  
SANDRA L. CROWLEY, CO. CLERK

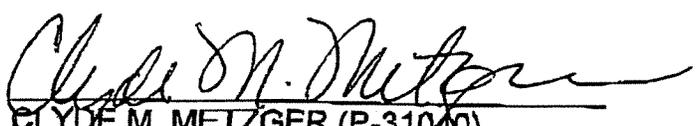
IT IS FURTHER ORDERED AND ADJUDGED that this Order for Judgment on Jury Verdict resolves the last pending claim and closes the case.

IT IS SO ORDERED.

\_\_\_\_\_  
CIRCUIT COURT JUDGE

I hereby stipulate to entry of the above Order without further notice or hearing; Approved as to Form:

\_\_\_\_\_  
GEOFFREY N. FIEGER (P-30441)  
ROBERT GIROUX (P-47966)  
Attorneys for Plaintiffs

  
\_\_\_\_\_  
CLYDE M. METZGER (P-31040)  
Attorney for Defendant

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