

STATE OF MICHIGAN
IN THE SUPREME COURT

JAMES YKIMOFF,

Plaintiff/Appellee,

Michigan Supreme Court Docket
No. 139561

v.

Court of Appeals Docket No. 279472

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant/Appellant,

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

139561
reply

**DEFENDANT/APPELLANT'S REPLY TO PLAINTIFF/APPELLEE'S
RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
AND AFFIDAVIT OF SERVICE**

~ ORAL ARGUMENT REQUESTED ~

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ARGUMENT

In reply to Plaintiff/Appellee, James Ykimoff's Response to Defendant/Appellant, W.A. Foote Memorial Hospital's Application for Leave to Appeal, Foote Hospital relies on its Brief on Application, but specifically addresses in reply arguments made by Plaintiff Ykimoff in Issues I and II.

- 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.**

In response to Defendant Foote Hospital's Brief on Application, Plaintiff James Ykimoff, agrees that the precedential ruling in *Martin v Ledingham*, 282 Mich 158; 774 NW2d 328 (2009) controls in this case. However, as with the Court of Appeals, Plaintiff attempts to read into *Martin* a credibility test which simply does not exist. On virtually identical facts, the Court of Appeals in *Martin* held:

As cause-in-fact evidence, plaintiff presented deposition testimony from both a doctor and a nurse suggesting that the standard of care required defendant's nurses to provide earlier and better reports regarding plaintiff's postsurgical condition, both to the operating surgeon and up the chain of command beyond that physician if no appropriate action was taken. The doctor further testified that, had that occurred, a different course of treatment should have been undertaken that would have prevented or mitigated plaintiff's injuries.

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. In contrast to that, the real doctors involved with plaintiff's care testified about what they would actually have done had they received the nurse reports plaintiff claims should have been made. Dr. Rynbrandt, who had performed the surgery

on plaintiff, was aware of postsurgical complications shortly thereafter and took steps to address them. Plaintiff's claim is that defendant's nurses should have done more to inform Rynbrandt about further developments in the complications. However, in his affidavit, *Rynbrandt 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 he provided plaintiff.* [Emphasis added.] *Id.* at 161-162.

In the case herein, just as in *Martin*, Mr. Ykimoff's treating physician, Dr. Eggert, testified under oath at trial that if given additional information by the nurses he would not have done anything differently. See Brief on Application for Leave to Appeal, Issue I. Nothing could be more similar to the facts of *Martin*, which in no way raises a test of credibility regarding this straightforward testimony. Where Dr. Rynbrandt in *Martin* averred his belief that he had ample information and therefore would not have done anything differently, Dr. Eggert likewise testified as to his belief that when the signs and symptoms warranted, **he** had ample information and would not have done anything differently. Under *Martin*, Plaintiff herein failed to establish that but for the negligence of Defendant Foote Hospital's nurses, Mr. Ykimoff would not have suffered the injuries alleged.

Additionally, as set forth in Judge Bandstra's concurring opinion in *Ykimoff v W.A. Foote Memorial Hospital*, 285 Mich App 80, 118; ___ NW2d ___ (2009), it is plaintiff's burden of proof to establish proximate causation. Plaintiff herein presented **no** evidence in support of his allegations that but for the nurses' actions, Dr. Eggert would have performed surgery on Mr. Ykimoff earlier, or that if the nurses had followed the chain of command, some other physician would have performed an earlier surgery. In *Martin*, the Court of Appeals was clear that the testimony of experts regarding what the

standard of care required of the treating physician was insufficient because "it only concerned what hypothetical doctors should have done had better reports been provided." Therefore, even if the jury in this case did not believe that Dr. Eggert would have behaved as he testified, the burden remained upon Plaintiff Ykimoff to demonstrate that he would have acted otherwise. Simply to state, as did Plaintiff and the Court of Appeals, that plaintiff sustained his burden of proof because Dr. Eggert operated upon Mr. Ykimoff shortly after his arrival at the hospital is not evidence that Dr. Eggert would have behaved differently if called earlier. Credibility issues aside, Plaintiff Ykimoff did not sustain his burden in this case to present evidence that but for the conduct of the nursing staff at Foote Hospital, Mr. Ykimoff would not have sustained damages.

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 herein alleges that this case cannot be considered as a lost opportunity case because Plaintiff did not plead it as lost opportunity. In *Klein v Kik*, 264 Mich App 682, 686-687; 692 NW2d 854 (2005), the Court of Appeals addressed this issue:

On appeal, plaintiff asserts that her claim is that defendant's negligence caused the decedent's death, with death being the injury. But regardless of plaintiff's word choice, the gravamen of plaintiff's complaint remains a cause of action for lost opportunity to survive brought on the basis of defendant's alleged medical malpractice. The present injury that defendant's malpractice allegedly caused was not the decedent's death per se, as plaintiff argues, but the increased chance of death between

decedent's two visits to defendant's medical office. In other words, plaintiff is not alleging that defendant somehow gave the decedent cancer or acted in some other negligent manner that caused the decedent to die; rather, plaintiff alleges that defendant hastened the decedent's death as a result of the latter being misdiagnosed, which allowed the cancer to metastasize unabated for 3-1/2 months. Plaintiff's attempt to distinguish the decedent's injury from his loss of opportunity to survive is futile because they are one and the same. To say in this case that defendant caused the decedent's injury is to say that defendant's malpractice deprived the decedent of a greater chance to survive, which necessitates application of MCL 600.2912a(2) as interpreted in *Fulton*.

In the case herein, although not involving a death, the facts are analogous to *Klein*. In asserting that the nurses' negligence resulted in injury to Mr. Ykimoff's legs, plaintiff is essentially arguing that had the nurses called Dr. Eggert earlier, Mr. Ykimoff would not have suffered the *extent* of injury to his legs. Therefore, to say that the nurses' treatment allowed a blood clot to cause damage is merely to say that their care deprived Mr. Ykimoff of a greater opportunity to avoid increased damage. Consequently, plaintiff's claim amounts to one of lost opportunity to achieve a better result and MCL 600.2912a(2) is applicable.

In *Stone v Williamson*, 482 Mich 144, 151; 753 NW2d 106 (2008), Justice Taylor agreed with the plaintiff's definition of a loss of opportunity case as one "where a plaintiff cannot prove that the defendant's acts or omissions proximately cause his injuries, but can prove that he defendant's acts or omissions deprived him of some chance to avoid those injuries." The nurses at Defendant Foote Hospital did not perform the original surgery on Mr. Ykimoff which resulted in a blood clot. Notwithstanding the parties' varying contentions as to when the clot occurred, it is undisputed that the nursing actions did not **cause** the clot that led to Mr. Ykimoff's injury. Instead, it is Plaintiff's

contention that the nursing actions deprived Mr. Ykimoff of an opportunity to lessen the amount of damage and to achieve a better result.

Despite plaintiff's protestations to the contrary, as a classic case of lost opportunity, it was mandatory that the testimony of plaintiff's causation expert establish the mandates of MCL 600.2912a(2), which 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%." Plaintiff's proximate causation expert failed to provide this testimony. Therefore, the Trial Court erred in denying Defendant's Motion for Directed Verdict and Judgment Notwithstanding the Verdict, and the Court of Appeals erred in denying Defendant/Appellant's appeal of right as to this issue.

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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