STATE OF MICHIGAN

IN THE SUPREME COURT

JAMES YKIMOFF,

Plaintiff/Appellee,

v.

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant/Appellant,

Michigan Supreme Court Docket No. 139561

Court of Appeals Docket No. 279472

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

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DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF IN APPLICATION FOR LEAVE TO APPEAL AND AFFIDAVIT OF SERVICE

~ ORAL ARGUMENT REQUESTED ~

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MICHIGAN SUPREME COURT

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ARGUMENT

I. **THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 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.**

As set forth in Defendant/Appellant W.A. Foote Memorial Hospital's briefs in Application for Leave to Appeal and in Reply to Plaintiff/Appellee's Response, the jury in the trial of this case was faced with the question whether but for the negligence of Defendant Foote Hospital's nurses, would Plaintiff James Ykimoff have suffered injury. 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 alleged that the call to Dr. Eggert came too late and the call to the anesthesiologists was inappropriate and in violation of the nursing standard of care. Therefore, at trial the jury was faced with the issue whether, if contacted by the nurses earlier, Dr. Eggert would have performed surgery earlier and Mr. Ykimoff would not have suffered damages.

At the time of trial, Dr. Eggert was **not** a defendant in this case. The jury was not faced with a question of the liability of Dr. Eggert and did not need to make any determination whether he **met** the standard of care in his treatment or whether he **did not** meet the standard of care in his treatment. The proximate causation issue before the jury regarding what Dr. Eggert would have done if contacted earlier was not an

objective question regarding what reasonably prudent physicians in the same or similar circumstances would have done. The issue before the jury was a subjective question, concerning only what Dr. Eggert would have done if contacted earlier.

It remains Defendant/Appellant Foote Hospital's position that Dr. Eggert's testimony at trial (that if contacted earlier by the nurses, he would not have taken Mr. Ykimoff to surgery any earlier) was not inconsistent, as found by the Court of Appeals. Defendant./Appellant Foote Hospital has briefed this issue in its Brief on Application. However, Defendant Foote Hospital posits that whether or not Dr. Eggert's testimony is credible and whether or not the jury could disregard his statements is not determinative of the causation question on appeal. Defendant/Appellant Foote Hospital supplements its Application to reinforce its proximate causation argument that Plaintiff/Appellee in this case failed to offer any evidence to support his argument that Dr. Eggert would have taken Mr. Ykimoff to surgery earlier if informed earlier. Therefore, the Trial Court erred in denying Foote Hospital's Motion for Directed Verdict or Motion for Judgment Notwithstanding the Verdict.

The Court of Appeals in this case, (Judge Gleicher in her concurring opinion), cited to *Strach v St. John Hosp Corp*, 160 Mich App 251, 271; 408 NW2d 441 (1987), which held that a jury could disregard a physician's unrebutted 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[.]" See *Ykimoff v W.A. Foote Memorial Hospital*, 285 Mich App 80, 126; 716 NW2d 114 (2009) If, in fact, the jury in this case, for whatever reason, found Dr. Eggert not to be a credible witness and disregarded his testimony, then their ultimate findings on what Dr. Eggert

would have done was based only on speculation and conjecture, as no evidence was offered by Plaintiff/Appellee.

The Court of Appeals in this case (Judges Talbot and Gleicher) rely on the testimony of Plaintiff's vascular surgery expert, Dr. Preston Flanigan, as evidence as to what Dr. Eggert would have done if contacted earlier. See *Ykimoff, supra*, at 88-89; 132. However, as the evaluation of proximate causation by the jury only concerned a *subjective* evaluation of what Dr. Eggert would have done, Plaintiff's expert's opinion is irrelevant to the jury's review and does not constitute either direct or circumstantial evidence. Dr. Eggert was not a party to the case, his care was not subject to a determination as to whether he met the applicable standard of care. Dr. Flannigan's opinion of what a reasonably prudent physician **should** have done under the circumstances could not aid the jury as to what, in fact, this particular physician, Dr. Eggert, **would** have done.

Further, Michigan Rule of Evidence 703, Bases of Opinion Testimony by Experts, states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter." In his trial testimony, Dr. Flanigan was asked by Plaintiff/Appellant's attorney:

> Q. What is your opinion as to what would have occurred had the nurses contacted Dr. Eggert around 7:00?
>
> A. As I said 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. (Emphasis added.)

[See Ex. X, Excerpt of Transcript of Deposition of Dr. Preston Flanigan, p 74, shown by video to the jury on August 10, 2006.]

The **only** basis for Dr .Flanigan's testimony which was ever admitted into evidence was the testimony of Dr. Eggert himself, who clearly stated that he would not have performed surgery earlier, even if contacted by the nurses earlier. Pursuant to MRE 703, Dr. Flanigan's testimony regarding what non-party Dr. Eggert **would** have done was not based on the facts in evidence and could not constitute evidence upon which the jurors in the case could base a finding on proximate causation. As Judge Bandstra stated in his concurring Court of Appeals opinion in this case:

> As in Martin, supra at 161-162, the opinion of plaintiff's expert 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 a 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. *Ykimoff, supra*, at 117.

If the jurors herein chose not to believe Dr. Eggert about what he **would** do, and if Dr. Flanigan's testimony amounted to nothing more than speculation as to what Dr. Eggert **should** do, the jury's ultimate finding of proximate causation was not substantiated by the evidence. As this Court stated in *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 injures 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.]

In this case, where Plaintiff/Appellee proffered no evidence as to what Dr. Eggert would have done if contacted earlier, the Trial Court erred in denying Defendant/appellant's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict.

CONCLUSION AND RELIEF REQUESTED

Defendant/Appellant, W.A. FOOTE MEMORIAL HOSPITAL, respectfully requests that this Honorable Court grant its application for leave to appeal or take such action as it deems appropriate.

Respectfully submitted,

FOLEY, BARON & METZGER, PLLC.

By: Judith A Sherman

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Dated: June 11, 2010

STATE OF MICHIGAN

IN THE SUPREME COURT

JAMES YKIMOFF,

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v.

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant/Appellant,

Michigan Supreme Court Docket No. 139561

Court of Appeals Docket No. 279472

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

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AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
)ss.
COUNTY OF WASHTENAW)

LAURA L. GORING, being first duly sworn, deposed and says that she is employed with the firm of FOLEY, BARON & METZGER, PLLC., and that on the 11th day of June, 2010, she personally served: **DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF IN APPLICATION FOR LEAVE TO APPEAL AND AFFIDAVIT OF SERVICE** upon: **HEATHER A. JEFFERSON (P54952)/ROBERT M. GIROUX, JR. (P47966), FIEGER, FIEGER, KENNEY & JOHNSON, ATTORNEYS FOR PLAINTIFF/APPELLEE, 19390 W. TEN MILE ROAD, SOUTHFIELD, MI** 48075 by having same enclosed in an envelope with postage thereon fully prepaid and deposited in a United States postal receptacle.

Further Affiant saith not.

LAURA L. GORING

Subscribed and sworn to before me on 11TH day of June, 2010.

LISA D. HUSSER, Notary Public
Livingston County, Michigan
Acting in Washtenaw County, MI
My Commission Expires: 1/10/2015

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

JAMES YKIMOFF, Plaintiff, vs. FOOTE HOSPITAL, Defendant.	)	No. 04-2811-NH

VIDEOTAPED DEPOSITION OF

DANIEL PRESTON FLANIGAN, M.D.

ORANGE, CALIFORNIA

AUGUST 2, 2006

Reported by Beth Felix, CSR No. 12766

11:21:30 BY MR. GIROUX:
11:21:32 Q Was is your opinion as to what would have
11:21:35 occurred had the nurses contacted Dr. Eggert around
11:21:36 7:00?
11:21:37 A As I said earlier, I expect that the same
11:21:39 sequence of events would have happened and that the
11:21:43 patient would have had restoration of circulation to
11:21:47 the right leg in the same time frame that he did once
11:21:49 Dr. Eggert was contacted.
11:21:53 Q In other words, would it be normal for him as
11:21:58 opposed to falling downstairs and falling unexpectedly
11:21:58 and having to lock his leg to move?
11:21:59 A Sure.
11:22:03 Q If they called at 7:30, what is your opinion
11:22:06 as to whether or not he would have had only minimal
11:22:07 residuals?
11:22:10 A I think it would have been minimal. There may
11:22:12 have been some.
11:22:14 Q Okay. Let's talk about -- there were a couple
11:22:17 of other issues that were brought up the other side
11:22:20 before I let you go, Doctor, and as I said, the jury
11:22:23 moves onto the next witness. You were asked a lot of
11:22:27 questions about anesthetics and epidurals. Do you
11:22:28 recall that?
A Sure.