

STATE OF MICHIGAN  
IN THE SUPREME COURT

JAMES YKIMOFF,

Plaintiff-Appellee,

vs.

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant-Appellant,

and

DR. DAVID EGGERT,

Defendant.

Docket No. 139561

Court of Appeals No. 279472

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

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**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S  
APPLICATION FOR LEAVE TO APPEAL**

139561

**Submitted By:**

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## Counter- Statement of Jurisdiction

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Indeed, this Court has discretionary jurisdiction to grant leave to appeal from the Court of Appeals' July 16, 2009 opinion affirming in part and vacating and remanding in part the \$1,402,601.44 judgment entered in favor of Plaintiff on March 26, 2007. Plaintiff further acknowledges that Defendant filed its Application for Leave to Appeal within forty-two (42) days of the Court of Appeals' opinion and order. Nonetheless, for the reasons set forth in this Response, this Court should decline to exercise jurisdiction over this case.

Counter-Statement of Questions Presented

- I. Whether the Trial Court Erred in Denying Defendant Foote Hospital's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict Where Plaintiff Presented Sufficient Evidence From Which Reasonable Persons Could Reach the Conclusion that, If the Nurses had Contacted Dr. Eggert Earlier, Dr. Eggert Would Have Performed the Second Surgery Sooner and Plaintiff Would Not Have Had Any Residual Neurological or Motor Deficits.**

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

The Trial Court would answer, "No."

The Court of Appeals answered, "No."

- II. Whether the Trial Court Erred in Denying Defendant Foote Hospital's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict Where Plaintiff Plead a Basic Medical Malpractice Negligence Action, Not a Lost Opportunity to Obtain a Better Result, and Plaintiff Presented Sufficient Evidence to Establish that Mr. Ykimoff's Injury was More Probably or Not Caused by Defendant's Negligence.**

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

The Trial Court would answer, "No."

The Court of Appeals answered, "No."

- III. Whether the Trial Court Abused Its Discretion in Permitting Dr. Flanigan to Provide Expert Testimony Based Upon His Years of Education, Training and Experience as a Board Certified Vascular Surgeon Where He Provided Testimony Regarding the Facts and Circumstances Supporting His Expert Opinion and He Did Not Rely on Any Novel Scientific Principles or Methodology in Support of His Opinion.**

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

The Trial Court would answer, "No."

The Court of Appeals answered, "No."

**IV. Whether the Trial Court Abused Its Discretion in Concluding that a Curative Instruction Was Not Warranted Where Defendant’s Own Employee Testified, Without Objection, that Nurses are Required by Law to Record the Medication that They Administer to Their Patients and the Court’s Instructions Properly Apprised the Jury of the Law and Their Duties to Apply the Law to the Evidence.**

Plaintiff-Appellee answers, “No.”

Defendant-Appellant answers, “Yes.”

The Trial Court would answer, “No.”

The Court of Appeals answered, “No.”

**V. Whether the Trial Court Abused Its Discretion In Permitting Rebuttal Testimony That Was Directly Responsive to the Contradictory Evidence Offered by Defendant.**

Plaintiff-Appellee answers, “No.”

Defendant-Appellant answers, “Yes.”

The Trial Court would answer, “No.”

The Court of Appeals answered, “No.”

## Counter-Statement of Material Facts and Orders Appealed From

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This medical malpractice action concerns nursing malpractice that occurred in the post-anesthesia care unit at Foote Hospital. Plaintiff, James Ykimoff (who was 64 years old at the time), had been experiencing pain in his left leg, which caused him difficulty in walking. Diagnostic testing revealed that he was suffering from a complete blockage of the main artery that extended from his abdomen and pelvis into his leg. The blockage did not affect Mr. Ykimoff's right leg at all. In order to restore the blood flow to Mr. Ykimoff's left leg, Dr. David Eggert performed an aorto-femoral bypass graft at Foote Hospital on November 1, 2001. Near the end of the surgery, or immediately thereafter, Mr. Ykimoff developed a blood clot in the right limb of the bypass, which prevented any blood flow through the limb of the bypass graft to the right leg. The blockage caused several identifiable symptoms and manifestations such that the nurses caring for Mr. Ykimoff should have been able to quickly identify a problem and summon the surgeon. Unfortunately, the ominous signs of the vascular emergency were ignored by the nursing staff until such time that James Ykimoff suffered permanent irreversible neurological damage to his lower extremities.

Specifically, Mr. Ykimoff was received by Nurse Piatt in the post-anesthesia care unit ("PACU") at 6:26 p.m. to be monitored during his recovery. Mr. Ykimoff's epidural had been discontinued in the OR. On arrival to the PACU, Mr. Ykimoff was able to wiggle his toes, but he had cool and pale lower extremities and was complaining of pressure in his legs. Nurse Piatt was unable to doppler his dorsalis pedis pulses. At 6:46 p.m., Mr. Ykimoff denied sensation to his L2 dermatome in both legs. At 6:55 p.m., Mr. Ykimoff was no longer able to move his lower extremities. (Medical Records, Defendant's Exhibit A).

Between 6:55 p.m. and the end of Nurse Piatt's shift which was at 7:30 p.m., Nurse Piatt made only two additional notes, one at 7:10 p.m. and the other at 7:25 p.m. Both simply indicate that Mr. Ykimoff still was not able to move his lower extremities. Strangely, an epidural was started for the first time in the PACU at 7:05 p.m., and then it was discontinued at 7:08 p.m. (Medical Records, Defendant's Exhibit A).

The first note made by the next nurse, Marlene Desmarais, was not made until 7:45 p.m. Neither of the nurses were able to explain why no progress notes and/or other substantive information was not written in the record in the interim. Marlene Desmarais' first note at 7:45 p.m. indicated that Mr. Ykimoff had painful hips and legs. The same note indicated that he had no sensation in his legs. The next note was made at 8:15 p.m., at which time the patient was complaining of lateral hip pain. It was noted that Nurse Desmarais contacted Dr. Kode, an anesthesiologist.<sup>1</sup> However, according to the record, no one attempted to contact the surgeon, Dr. Eggert. At 8:30 p.m., Nurse Desmarais noted that Mr. Ykimoff's right leg and foot was covered with mottled skin and his thigh down to his toes was cooler on the right than on the left with his right foot being pale. (Medical Records, Defendant's Exhibit A).

At either 8:40 p.m. or 8:45 p.m. (the time has been written over and changed) Nurse Desmarais notified Dr. Eggert and informed him of the patient's condition. According to the nursing notes, Dr. Eggert arrived at the PACU at 9:12 p.m. At approximately 9:45 p.m., Mr. Ykimoff was returned to the operating room where he underwent surgery by Dr. Eggert to

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<sup>1</sup> There are 2 or 3 references to nurses contacting anesthesiologists beginning with Nurse Piatt's shift. The problem is that the epidural was stopped in the OR and not started again until 7:05 p.m. Therefore, it was not being given when Piatt was making her observations. The second epidural was stopped at 7:08 p.m., which was just 3 minutes after it was started. Nevertheless, the surgeon, not an anesthesiologist, would have been the appropriate person to call.

address the vascular emergency. During the second surgery, Dr. Eggert found and removed the clot that was blocking blood flow to Mr. Ykimoff's lower extremities. (Medical Records, Defendant's Exhibit A).

Mr. Ykimoff remained in Foote Hospital until November 13, 2001, at which time he was transferred to the University of Michigan Hospital. Prior to the transfer, Mr. Ykimoff underwent various exams and consultations. He was noted to have bilateral lower extremity weakness and numbness. Per the neurological consultation, the numbness and weakness in Mr. Ykimoff's right leg was intense. The left leg was noted to be weak in the thigh area.

At U of M, it was determined that Mr. Ykimoff suffered a bilateral lumbar plexopathy, which was caused by ischemia. Mr. Ykimoff underwent extensive rehabilitation and treatment for his injuries. Unfortunately, Mr. Ykimoff suffers tremendous deficits with regard to the use of his legs. Much of the cell death that occurred as the result of lack of blood flow while Mr. Ykimoff was in the PACU following his first surgery was simply irreversible.

On March 12, 2004, Plaintiff commenced this medical malpractice action against Foote Hospital, Dr. David Eggert and Dr. David Prough. Plaintiff's complaint was supported by two affidavits of merit – one from Cynthia K. Hadden, R.N. and one from Dr. Daniel Preston Flanigan, a vascular surgeon. Dr. Flanigan opined, in pertinent part, as follows:

4. It is my opinion that the medical staff physicians and/or interns and/or residents who saw and treated James Ykimoff at Foote Hospital on November 7, 2001 were required to do the following:
  - a. Perform the aortal to femoral bypass graft surgery properly;
  - b. Timely respond to any vascular occlusion in Mr. Ykimoff's legs post-surgery;
  - c. To make sure someone was designated to be available to respond quickly to any problems experienced by James

Ykimoff post-surgery;

- d. To properly communicate with physicians and nurses so as to timely monitor for and respond to any complications or problems experienced by Mr. Ykimoff post-surgery;
- e. To properly respond in a timely manner so as to treat and/or address Mr. Ykimoff's condition so that it would not deteriorate and/or worsen and/or cause permanent injury;
- f. To properly monitor and evaluate Mr. Ykimoff so as to determine if any blockage existed or was forming post-surgery;
- g. To respond in a timely fashion to the signs and symptoms of vascular occlusion;
- h. To properly review, read and consider all exams, studies, lab results, Doppler tests and all other tests;
- i. If contacted by the nurses when the signs of occlusion were present initially, to timely respond to the call and then timely treat Mr. Ykimoff; and
- j. If contacted by the nurses and neither Dr. Eggert or Dr. Prough were available, other physicians within the hospital should have responded so that Mr. Ykimoff would have been seen and evaluated in a timely fashion. [AOM, Dr. Daniel Preston Flanigan.]

Dr. Flanigan opined that the Defendant's breaches of the above standards of care "caused 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." (AOM, Dr. Daniel Preston Flanigan). On March 18, 2005, an order of dismissal as to Dr. Prough, only, was entered.

Following discovery, Dr. Eggert filed a motion for summary disposition asserting that Plaintiff was unable to provide any evidence that Dr. Eggert breached any applicable standards of care. In response, Plaintiff presented evidence and testimony which established a genuine

issue of material fact whether Dr. Eggert was available post-surgery to treat Plaintiff's vascular emergency and whether the nurses tried to contact him by phone and page but that he had turned off both modes of communication. The trial court, however, concluded that the testimony was inadmissible hearsay and, therefore, granted summary disposition in favor of Dr. Eggert.

On August 7, 2006, the jury trial in this matter commenced with regard to Plaintiff's claims against Foote Hospital, which alleged negligence of the PACU nurses, Melinda Piatt, RN and Marlene Desmarais, RN. During trial, Plaintiff's nursing expert, Janet McCoig, testified that Nurse Piatt and Nurse Desmarais breached the nursing standard of care in monitoring Mr. Ykimoff's condition and in failing to report his status and symptoms to Dr. Eggert in a timely manner. In particular, Nurse McCoig opined that Nurse Piatt breached the nursing standard of care by failing to obtain a complete baseline assessment of Mr. Ykimoff following his surgery so that she could recognize the signs and symptoms of a change and notify the appropriate physician. (TR 8/9/06, pp 111-115). Nurse McCoig opined that Nurse Piatt failed to recognize Mr. Ykimoff's symptoms of cool extremities, high level of pain, no dorsalis petus pulses, loss of motor function, loss of sensation, and pale color in legs, all of which were signs of a blockage. (TR 8/9/06, pp 127-128, 133). In addition, Nurse McCoig opined that Nurse Piatt breached the nursing standard of care in her charting by failing to establish the baseline, by failing to chart chronologically, and failing to document many important items (TR 8/9/06, pp 133-137).

Nurse McCoig testified that, in her professional opinion, Nurse Piat failed to recognize the signs of a vascular occlusion, which is a vascular emergency that required her to contact the attending physician or the surgeon immediately (TR 8/9/06, p 137). Nurse McCoig testified

that, at a minimum, the surgeon (Dr. Eggert) should have been called some time between 1810 and 1910 hours. (TR 8/9/06, pp 137-38). Nurse McCoig further opined that Nurse Desmarais violated the standard of practice by failing to recognize Mr. Ykimoff's continuing worsening condition, the modeling in his leg, and only charting one reading of pulses by Doppler (TR 8/9/06, pp 143-47).

Plaintiff's expert, Dr. Flanigan, opined that, based on the subsequent findings and the immediate and severe neurologic deficits that Mr. Ykimoff suffered, the occlusion occurred very rapidly following the surgery and lasted for about 4 ½ hours. Dr. Flanigan's opinion was based on evidence that Mr. Ykimoff had not identifiable dorsalis pedis pulse (in tops of feet) in either foot following the surgery and his legs were cool and pale. Within a half hour of his arrival in the PACU, Mr. Ykimoff lost all motor function in both of his legs, which was followed by a loss of sensation in both legs. As time went on, the pain and pressure continued to worsen in Mr. Ykimoff's legs and hips. Furthermore, there was no detectable blood flow in the right leg during a Doppler ultrasound study (Dep of Flanigan, pp 17, 19-28, Defendant's Exhibit B).

Dr. Flanigan testified that the longer a patient suffers from inadequate circulation to a limb or body part, the greater the damage will be. In fact, a lengthy occlusion can lead to the nerves never working again and/or the muscle tissue dying off without any regeneration. (Dep of Flanigan, p 28). Dr. Flanigan testified that Mr. Ykimoff's blood clot severely impaired the circulation to his right leg, as well as both the right and left side of his pelvis, which led to ischemic damage of the lumbosacral plexus, causing permanent nerve dysfunction (Dep of Flanigan, pp. 30-32, 40). Dr. Flanigan opined that if the signs and symptoms of the occlusion had been recognized by the nurses in a timely fashion and if Dr. Eggert was notified no later

than 7:00 p.m., more likely than not there would have been no residual nerve impairment and Mr. Ykimoff would have been able to ambulate normally. Dr. Flanigan opined that, if Dr. Eggert had been notified by 7:30 p.m., more likely than not Mr. Ykimoff would have suffered only a minimal impairment (Dep of Flanigan, pp 32-34, 57-58, 73-74).

Following the presentation of the proofs by the parties, on August 14, 2006 the jury announced its verdict in favor of Plaintiff Ykimoff and against Defendant Foote Hospital. The unmodified verdict announced in open court was as follows:

- |    |                              |                |
|----|------------------------------|----------------|
| a. | Past Economic Damages :      | \$ 420,000.00  |
| b. | Past Non-Economic Damages:   | \$1,600,000.00 |
| c. | Future Economic Damages:     | \$ 106,000.00  |
| d. | Future Non-Economic Damages: | \$ 300,000.00  |

[TR 8/14/06, pp 7-9]

On March 26, 2007, the trial court entered a Judgment in favor of Plaintiff in the amount of \$1,402,601.44, applying the high cap for non-economic damages for a medical malpractice action. Subsequently, Defendant filed a motion for Judgment Notwithstanding the Verdict and/or New Trial, which the trial court denied. An order denying Defendant's post-judgment motion was entered on July 9, 2007.

Thereafter, Defendant appealed the Order for Judgment on Jury Verdict, as well as the Order Denying Motion for Judgment Notwithstanding the Verdict and/or New Trial. Defendant raised six issues on appeal. First, Defendant asserted that Plaintiff failed to prove cause in fact proximate cause, based on Dr. Eggert's assertion that Mr. Ykimoff's symptoms in the PACU did not indicate a vascular emergency and that, even if the nurses had notified Dr. Eggert of these symptoms earlier, he would not have taken any action or performed surgery earlier. Although Plaintiff only plead a basic negligence action, Defendant further asserted

that Plaintiff failed to prove 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. In addition, Defendant argued that the trial court erred in allowing Plaintiff's vascular surgery expert, Dr. Flanigan, to testify regarding proximate causation because his testimony was allegedly based on speculation. Defendant also asserted that the trial court reversibly erred in failing to instruct the jury that there was no law requiring the nurses to chart in the Medication Administration Record, despite Nurse Piatt's admission that the law *did* require such charting. In its fifth argument on appeal, Defendant claimed that the trial court committed reversible, prejudicial error when it permitted Plaintiff to present rebuttal witnesses to rebut the undercover surveillance video of Mr. Ykimoff that Defendant presented to attack the credibility of Mr. Ykimoff's testimony regarding the extent of his physical impairments. Finally, Defendant argued that the trial court should have applied the lower tier cap on Mr. Ykimoff's noneconomic damages.

Plaintiff cross-appealed the order granting summary disposition in favor of Dr. Eggert, as well as several other issues to be determined only if the Court of Appeals concluded that a new trial was warranted.

On July 16, 2009, the Court of Appeals (Talbot, P.J. and Bandstra and Gleicher, JJ) issued a published opinion and order affirming in part, vacating in part and remanding in part. First, the Court recognized that the parties did not dispute that Mr. Ykimoff experienced a blood clot in the graft site following his initial surgery. Rather, the parties disputed the timing of the formation of the clot and how that clot impacted the residual impairments suffered by Mr. Ykimoff. Acknowledging that this dispute is reliant upon the opinions and credibility of Dr. Flanigan and Dr. Eggert, the Court concluded that this was clearly a question of fact

appropriate for a jury to determine. (Slip Opinion, p. 5). Specifically, the Court held:

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.[Slip Opinion, p. 5]

The Court further rejected Defendant's argument that, based on Dr. Eggert's testimony that he would not have acted any differently or intervened any sooner even if he had been notified or contacted earlier regarding Mr. Ykimoff's condition, the decision in *Martin v. Ledingham*, 282 Mich App 158 (2009) must lead to the conclusion that Plaintiff could not demonstrate that Mr. Ykimoff's injury was "more probably than not" caused by the Defendant's negligence. The Court noted that, in *Martin*, the doctor was apprised of the plaintiff's condition on an ongoing basis and, therefore, his treatment decision would not have changed was based on his *actual* analysis of the presenting situation and subsequent action or inaction – not speculation or hindsight. Conversely, the Court concluded that Dr. Eggert's testimony that he would not have acted differently or intervened sooner contradicted the documented symptoms and his testimony regarding those symptoms and, thus, raised an issue of credibility.(Slip Opinion, pp. 5-7). Specifically, the Court held, "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." (Slip Opinion, p. 8).

The Court of Appeals also rejected Defendant's argument that this matter should be reviewed as a lost opportunity case. The Court held that Plaintiff plead only a basic negligence action and recognized that the jury was not instructed to treat this matter as a lost opportunity

claim. The Court concluded that, as in *Stone v. Williamson*, 482 Mich 144, 163 (2008), “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.” (Slip Opinion, pp. 10-11).

Since this was not a lost opportunity case, the Court held that Defendant’s argument that the trial court erred in permitting Dr. Flanigan to testify regarding the lost opportunity doctrine was moot and further held that “Dr. Flanigan’s testimony was consistent with proofs to establish the elements of negligence.” (Slip Opinion, p. 11). The Court also noted that since Defendant did not dispute Dr. Flanigan’s qualifications pursuant to MCL 600.2169, Defendant’s argument that Dr. Flanigan’s opinion was not admissible under MCL 600.2955 confused the admissibility of the testimony with the weight to be attributed to the expert’s opinion. The Court held that “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 overall qualification.” (Slip Opinion, pp 11-12).

The Court of Appeals also rejected Defendant’s argument that the trial court reversibly erred in allowing lay witnesses to testify regarding Mr. Ykimoff’s integrity or character after Defendant’s showed the jury a surveillance video which suggested that Mr. Ykimoff’s residual injuries were not as extensive or limiting as alleged. The Court noted that both parties were provided the opportunity to present testimony and evidence (such as the surveillance video) to support their arguments and contentions regarding the extent of Mr. Ykimoff’s residual injuries and their impact on his functioning. The Court concluded that, regardless of the testimony regarding Mr. Ykimoff’s integrity, there was sufficient evidence for the jury to

determine the residual impairments and, therefore, any error in permitting the challenged testimony was harmless. (Slip Opinion, pp 12-13).

Finally, the Court of Appeals rejected Defendant's argument that the trial court erred in failing to give a curative instruction regarding an alleged misrepresentation of law by Plaintiff's counsel. The Court noted that plaintiff's counsel questioned Nurse Piatt and Nurse Desmarais with regard to their deficiencies or inconsistencies in their charting with Mr. Ykimoff in order to demonstrate their negligence in failing to recognize the blood clot and to notify Dr. Eggert in a timely manner. The Court concluded that whether the charting deficiencies constituted a statutory violation was irrelevant, stating, "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." (Slip Opinion, p. 15). The Court further held that, since the jurors were instructed to apply the law as instructed and they were instructed that statements by an attorney were not evidence, any failure by the trial court to give a curative instruction was harmless. (Slip Opinion, p. 16).

For the reasons set forth more fully below, the Court of Appeals did not err in affirming the trial court's denial of Defendant's Motion for Directed Verdict, affirming the trial court's denial of Defendant's Motion for Judgment Notwithstanding the Verdict, affirming the trial court's decision to allow Plaintiff's vascular surgery expert to testify regarding proximate causation, and concluding that any failure to provide a curative instruction was harmless.

Law and Argument

**I. The Trial Court Did Not Err in Denying Defendant Foote Hospital’s Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict Where Plaintiff Presented Sufficient Evidence From Which Reasonable Persons Could Reach the Conclusion that, If the Nurses had Contacted Dr. Eggert Earlier, Dr. Eggert Would Have Performed the Second Surgery Sooner and Plaintiff Would Not Have Had Any Residual Neurological or Motor Deficits.**

**A. Standard of Review**

This Court reviews a trial court’s ruling on a motion for Judgment Notwithstanding the Verdict (“JNOV”) de novo. *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 272 (2005). In reviewing a trial court’s denial of a JNOV motion, this Court must examine the testimony and all legitimate inferences from it in a light most favorable to the nonmoving party to determine if there was sufficient evidence presented to create an issue for the jury. *Detroit/Wayne County Stadium Authority v Drinkwater, Taylor and Merrill, Inc*, 267 Mich App 625, 642-643 (2005).

JNOV should be granted only when there is insufficient evidence presented to create an issue for the jury. *Wilson v Gen’l Motors Corp*, 183 Mich App 21, 36 (1990). As long as reasonable jurors could have disagreed, neither the trial court, nor a reviewing court has the authority to substitute its judgment for that of the jury when ruling on a Motion for Judgment Notwithstanding the Verdict. *McAtee v Guthrie*, 182 Mich App 215 (1989). That there may have been other plausible theories of cause and effect does not justify setting aside the determination of the trier of fact. *Vice v Great Atlantic and Pacific Tea Company*, 53 Mich App 140 (1974). Where a jury reached a unanimous verdict based on competent evidence in

favor of a plaintiff, a panel of this Court has held that it was error to grant the defendant's motion for judgment notwithstanding the verdict. *Wamser v N.J. Westron Sons, Inc.*, 9 Mich App 89 (1967). The Court in *Wamser* also found that only under the most extreme circumstances, where reasonable minds could not differ on facts, or inferences to be drawn therefrom, may cases be taken from the jury.

Courts have also been consistent holding that when a trial court is deciding a motion for JNOV, the trial court must review the evidence and all reasonable inferences in a light most favorable to the non-moving party and determine whether the facts presented preclude judgment for the non-moving party; the courts also hold that if evidence is such, that reasonable people could differ, then these questions are properly decided by the jury and J.N.O.V. is improper. *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App 602 (1997); *Rice v ISI Manufacturing, Inc.*, 207 Mich App 634 (1994); *McLemore v Detroit Receiving Hospital and University Medical Center*, 196 Mich App 391 (1992).

#### **B. The Jury's Verdict Was Supported by Competent Evidence**

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In a medical malpractice case, "the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Wischmeyer v Schanz*, 449 Mich 469, 484 (1995); see also *Locke v Pachtman*, 446 Mich 216, 222 (1994). The applicable causation standard for medical malpractice cases is set for in MCL 600.2912a, 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 or not was proximately caused by the negligence of the defendant or defendants."

Proximate cause is a term of art that encompasses both cause in fact and legal cause.

*Craig v. Oakwood Hosp*, 471 Mich 67, 86-87 (2004). These elements have been defined as:

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. [*Skinner v Square D Co*, 445 Mich 153, 162-163 (1994).]

A plaintiff is not required to “prove that an act or omission was the *sole* catalyst for his injuries”; rather, he must simply “introduce evidence permitting the jury to conclude that the act or omission was *a* cause.” *Craig*, 471 Mich at 87 (emphasis original). Cause in fact may be established by circumstantial evidence that supports a reasonable inference of causation.

*Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496 (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*, 445 Mich at 166 (quoting 57 A Am Jur 2d, Negligence, §461, p 442). “[I]f 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.* at 164 (quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422 (1956)).

It is well accepted that, generally, the jury is to decide the question of proximate cause. *Moning v. Alfonso*, 400 Mich. 425 (1977). It is only when reasonable persons could not reach a different conclusion that proximate cause may be taken from the jury. In all other instances, causation is a question of fact for the jury to decide. *Brisbois v. Fibreboard Corp.*, 429 Mich.

540 (1988); *Davis v. Lhim*, 124 Mich. App. 291 (1983), rev'd on other grounds, 430 Mich. 326 (1988).

Here, Defendant asserts that Plaintiff failed to set forth evidence establish that if the nurses had notified Dr. Eggert earlier of Mr. Ykimoff's signs and symptoms, Dr. Eggert would have performed surgery earlier. Defendant maintains that Plaintiff's argument that "but for" the alleged delayed notification Mr. Ykimoff would have had surgery earlier was based on speculation and was not supported by any evidence at trial.

As the Court of Appeals noted, the parties did not dispute that Mr. Ykimoff experienced a blood clot in the graft site following the initial surgery. Rather, the focus of the parties' dispute was on the timing of the formation of the clot as well as its impact on Mr. Ykimoff's residual impairments. (Slip Opinion, p. 5). Plaintiff's expert, Dr. Flanigan, testified that, *without a doubt*, Plaintiff's neurologic deficits were due to lumbar plexus ischemia secondary to occlusion of the right lumbar plexus and, given the timing of the onset of the symptoms, the occlusion most probably occurred in the very early postoperative period. (Dep of Flanigan, pp 19, 23-24, 30-31, Defendant's Exhibit B). He characterized the ischemia as very severe and indicated that the more severe the ischemia, the more severe and permanent the injury will be and rapid restoration of the circulation is required in order to prevent permanent tissue damage (Dep of Flanigan, pp 28-29, 32, 34, 63, 64, Defendant's Exhibit B).

In particular, he testified:

We know that . . . the longer he's in this period of ichemia or inadequate circulation the more damage is building up 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 latter 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, her would probably have not use of his lower extremities. [Dep of Dr.

FLANIGAN, p 34, Defendant's Exhibit B.]

Dr. Flanigan opined that, based on the subsequent findings and the immediate and severe neurologic deficits, the occlusion occurred very rapidly following the surgery and that it was severe as soon as it occurred. He opined that Plaintiff's ischemia lasted for about 4 1/2 hours. He opined that the cause of the neurologic deficit was secondary to occlusion of the right limb of the aorta femoral bypass, and the delay in diagnosis and treatment of it, and that led to ischemic neuropathy of the bilateral lumbar plexus. In order to have avoided the residual injury, Dr. Flanigan opined that if Dr. Eggert was notified no later than 7:00 p.m., it was likely that there would have been no residual nerve impairment. (Dep of Flanigan, pp 26-27, 30-31, 32, 33, 62, 63, 73, Defendant's Exhibit B). In fact, Dr. Flanigan opined that the damage would have been *completely reversible*:

I think that if the signs and symptoms of the occlusion had been recognized in a timely fashion, that Dr. Eggert had been called in a timely fashion, that the circulation could have been restored . . .

\* \* \* \*

[At] 7:00 it would have been completely reversible.

[Dep of Flanigan, pp 32, 33, Defendant's Exhibit B.]

Without a doubt, Dr. Flanigan opined that, if Plaintiff had surgery one hour and 40 minutes earlier, he would not have had *any* residual neurological or motor deficits (Dep of Flanigan, pp 57-58, 73, Defendant's Exhibit B).

The Court of Appeals appropriately concluded that Dr. Flanigan's opinion regarding whether the blood clot caused Mr. Ykimoff's bilateral lumbar plexopathy did not contradict any of the established facts and, therefore was not impermissibly speculative:

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. [Slip Opinion, p. 5.]

Despite the factual issue as to the cause of Mr. Ykimoff's injury, Defendant maintains that Plaintiff failed to present any evidence to establish that "but for" the alleged negligence of Nurse Piatt and Nurse Desmarais in failing to contact Dr. Eggert earlier, Dr. Eggert would have performed Mr. Ykimoff's surgery earlier. Defendant argues that any negligence by the nursing staff in failing to timely identify the signs of a blood clot is irrelevant because Dr. Eggert testified that, even if he had been notified or contacted earlier regarding Mr. Ykimoff's condition, he would not have acted any differently or intervened any sooner.

In support of its argument, Defendant relies on *Martin v Ledingham*, 282 Mich App 158 (2009), wherein a panel of the Court of Appeals (Talbot, PJ, Bandstra and Murray, JJ) upheld the trial court's grant of summary disposition in favor of defendants because the facts did not "support plaintiff's claim that the nurses' failure to report was a cause in fact of the injuries [the plaintiff] suffered as a result of her postsurgical treatment." *Id.* at 163. In *Martin*, the plaintiff alleged that the defendant's nurses were negligent in failing to report her worsening postsurgical condition to the treating physicians and that the nurses' negligence was the proximate cause of the plaintiff's injuries. Following the voluntary dismissal of the defendant doctors from the lawsuit, the defendant hospital moved for summary disposition, arguing that the plaintiff could not establish that the alleged negligence of defendant's nurses was the proximate cause of her injuries. In support of its position, the defendant relied on an affidavit from the plaintiff's surgeon as well as an affidavit from the chair of the hospital's

general surgery section, who both stated that, even if the nurses had made the reports that the plaintiff alleged that they should have, neither of the doctors would not have changed the course of plaintiff's treatment.

On the other hand, the *Martin* plaintiff presented deposition testimony from both a doctor and a nurse suggesting that not only did the standard of care require the nurses to provide earlier and better reports to the operating surgeon and up the chain of command (if necessary), but that if the nurses had properly reported the plaintiff's postsurgical condition, a different course of treatment should have been undertaken, which would have prevented or mitigated the plaintiff's injuries. Based on the affidavits from the treating surgeon and the chair of general surgery, the trial court concluded that the plaintiff could not establish proximate cause and granted summary disposition in favor of the defendant.

The *Martin* Court upheld the trial court's grant of summary disposition. With regard to the deposition testimony of the nurse and doctor that the plaintiff presented, the Court held that the "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. Conversely, the plaintiff's treating surgeon testified that he was aware of post-surgical complications and took steps to address them. While the plaintiff argued that the nurses should have done more to inform the surgeon about further developments in the complications, the surgeon testified in his affidavit:

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. [*Id.* at 162.]

Based on this testimony, the *Martin* Court concluded:

In sum, the facts presented in this case demonstrate that, had defendants nurses made the reports plaintiff alleges they should have, plaintiffs care and treatment would not have been changed whatsoever. Thus, the facts simply do not support plaintiffs claim that the nurses failure to report was a cause in fact of the injuries she suffered as a result of her postsurgical 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. [*Id.* at 163 (citations omitted).]

As the Court of Appeals recognized in this case, *Martin* is factually distinguishable from this matter.<sup>2</sup> Unlike the treating surgeon in *Martin* who testified that he was apprised of the plaintiff’s condition on an ongoing basis, but chose not to intervene or alter the course of her treatment despite this information, Dr. Eggert testified that, if he had been there, he would have recognized that there was an occlusion and *he would have performed the surgery immediately*:

Mr. Giroux: Now, let’s be clear about something. Any time you go to a patient’s bedside and you see what you saw with my client, you recognized right away there is an occlusion, you are going to treat him or her; right?

Dr. Eggert: Yes.

Mr. Giroux: **If it calls for a surgery, you are going to do the surgery right away; right?**

Dr. Eggert: **Yes.**

Mr. Giroux: Because we know that occlusions are very dangerous; right?

Dr. Eggert: Well, it needs to be cleaned out, yes.

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<sup>2</sup> In her concurring opinion, Judge Gleicher disagreed with Judges Talbot and Bandstra, concluding that “[n]o meaningful distinction exists between the causation proofs presented in *Martin* and those introduced during the trial of this case.” (Slip Opinion (Gleicher, concurring), p. 2). Judge Gleicher further opined that *Martin* was wrongfully decided, stating, “Because the affidavits in *Martin* provided opinions rather than fact, the credibility of their signers should have been explored at trial. *Id.* at 3.

Mr. Giroux: Because if you don't clean them out and they are causing a problem with circulation, nerves can die; correct?

Dr. Eggert: Correct.

Mr. Giroux: The leg can die?

Dr. Eggert: Right.

Mr. Giroux: And if it's just let go, the person can die?

Dr. Eggert: Yes.

Mr. Giroux: And so extremely important issue; right?

Dr. Eggert: Yes.

[TR 8/14/06, pp 112-13.]

Dr. Eggert also testified that timing is important as well because the longer an occlusion lasts, the more damage that the patient will suffer (TR 08/14/06, p 115). However, Defendant argues that Dr. Eggert made it clear in his testimony that he would not have performed surgery on Mr. Ykimoff until there was a vascular emergency and, in his opinion, until there was mottling of Mr. Ykimoff's skin, there was no vascular emergency. Defendant maintains that the mottling was noted in the record at 2030, which was just ten minutes prior to the nurses' notification of Dr. Eggert at 2040.

Defendant's arguments ignore Dr. Eggert's testimony that, in addition to the presence of the mottling (which he states made the presence of a vascular condition obvious), there are other signs and symptoms that would indicate a patient is suffering from a vascular condition, including: pain, pressure in the lower legs, loss of sensation, loss of movement, paleness in legs that continues post-surgery, and low blood pressure (TR 08/14/06, pp 95-96, 125-26, 128). The medical records clearly reflect that Mr. Ykimoff exhibited all of these signs of a

vascular condition. At 6:26 p.m., Mr. Ykimoff denied sensation to his L2 dermatome in both legs. At 6:55 p.m., Mr. Ykimoff was no longer able to move his lower extremities and was complaining of pressure in his lower legs. Nurse Piatt's notes at 7:10 p.m. and 7:25 p.m. both indicate that Mr. Ykimoff still was not able to move his lower extremities. Marlene Desmarais' first note at 7:45 p.m. indicated that Mr. Ykimoff had loss of sensation in both of his legs. The Post Anesthesia record reflects that, as early as 6:55 p.m., Mr. Ykimoff consistently reported pain levels of an eight out of ten while he was in the PACU. (Medical Records, Defendant's Exhibit A).

Based on the discrepancies between the documented symptoms and Dr. Eggert's testimony, the Court of Appeals did not err in holding that Dr. Eggert's credibility became an for the jury to determine:

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.

\* \* \* \*

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.

A reasonable juror could conclude from the testimony and evidence in this matter that the acts and/or omissions of Nurses Piatt and Desmarais were the cause of Plaintiff's injury. Both Dr. Eggert and Dr. Flanigan testified that the longer that the occlusion exists, the more serious the injuries. Based on Dr. Eggert's own testimony, an occlusion is a serious condition,

with serious risks and, therefore, immediate surgery is required. Once Dr. Eggert had been made aware of the occlusion, he would have operated. In fact, within one hour of the notification, Dr. Eggert performed surgery to address the vascular emergency. Dr. Flanigan opined that the Plaintiff would not have had any residual neurological or motor deficits if Dr. Eggert had been notified on Plaintiff's condition by 7:00 p.m., as opposed to approximately 1 hour and 40 minutes later as the evidence indicated. Based on the evidence and testimony, a reasonable juror could certainly conclude that, if the nurses had notified Dr. Eggert 1 hour and 40 minutes sooner, he would have performed surgery to address the vascular emergency.

A reasonable juror could conclude from Dr. Eggert's testimony and admissions that, if the nurses had given him better and more complete reporting of Mr. Ykimoff's signs and symptoms, he may have responded more aggressively to the vascular emergency and performed surgery sooner. "[T]he jury is free to credit or discredit *any* testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39 (2001) (emphasis added). As long as reasonable jurors could have disagreed, neither the trial court, nor a reviewing court has the authority to substitute its judgment for that of the jury when ruling on a Motion for JNOV. *McAtee*, 182 Mich App 215. It is well established that a witness's credibility always remains a 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 (1891).]

In Michigan, there is a constitutional right to fact-finding by the jury, Const 1963, art 1, § 14, as well as the evidentiary rule which enforces it, MRE 104(e). This Court has consistently adhered to the principle that every witness's testimony is subject to disbelief by the finder of fact and a court may not usurp the jury's prerogative to accept or reject any testimony. See *Wooden v Durfee*, 46 Mich 424, 427 (1891); *Yonkus v McKay*, 186 Mich 203, 210 (1915); *Arndt v Grayewski*, 279 Mich 224, 231 (1937); *Baldwin v Nall*, 323 Mich 25, 29 (1948). As Justice Cooley explained in *Wooden*, a jury "may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment." *Wooden*, 46 Mich at 427. The question of credibility is generally for the fact-finder to decide. See *Dep't of Community Health v Risch*, 274 Mich App 365, 372 (2007). "[T]he jurors' prerogative to disbelieve testimony, including uncontroverted testimony, is well established." *Taylor v Mobley*, 279 Mich App 309, 314 n5.

Here, the jury had the opportunity to evaluate all of the testimony and evidence, weigh the credibility of the witnesses and, in doing so, it exercised its authority to disbelieve Dr. Eggert's emphatic, unrebutted assertion that he would not have operated on Mr. Ykimoff at 7:00 p.m. irrespective of what he may have learned from the nurses. The jury is free to disregard testimony that "probably ought to have satisfied anyone[.]" *Wooden*, 46 Mich at 427.

As Judge Gleicher eloquently stated in her concurring opinion in this matter:

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 v. St John Hosp*, 160 Mich App 251, 271 (1987)]. 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.

\* \* \* \*

The plaintiffs' expert physicians here and in *Martin* . . . 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.

\* \* \* \*

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. [Slip Opinion (Gleicher, concurring), p. 5 (emphasis in original).]

Accordingly, the trial court did not err in denying Defendant's motion for directed verdict and its motion for JNOV.

**II. The Trial Court Did Not Err in Denying Defendant Foote Hospital's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict Where Plaintiff Plead a Basic Medical Malpractice Negligence Action, Not a Lost Opportunity to Obtain a Better Result, and Plaintiff Presented Sufficient Evidence to Establish that Mr. Ykimoff's Injury was More Probably or Not Caused by Defendant's Negligence.**

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**A. Standard of Review**

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This Court reviews a trial court's denial of a motion for directed verdict, as well as a

motion for JNOV, de novo. *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 272 (2005). See Argument, I.A., *supra*.

**B. This is Not a Lost Opportunity Case**

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Contrary to Defendant’s arguments, this matter is not a lost opportunity case. As the Court of Appeals held, Plaintiff plead only a basic negligence action and the jury was not instructed to treat this matter as a lost opportunity claim. The Court concluded that, as in *Stone v. Williamson*, 482 Mich 144, 163 (2008), “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.” (Slip Opinion, pp. 10-11).

MCL 600.2912a(2) provides that:

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%.

The second sentence of MCL 600.2912a(2) is commonly referred to as the lost opportunity doctrine. See *Weymers v Khera*, 454 Mich 639, 648 (1997). In *Weymers*, this Court stated: “The lost opportunity doctrine allows a plaintiff to recover when the defendant’s negligence *possibly*, i.e. [by] a probability of fifty percent or less, caused the plaintiff’s injury.” *Id.* at 648 (emphasis added). Describing the lost-opportunity doctrine as “the antithesis of proximate cause,” the *Weymers* Court held that, in cases in which the plaintiff alleges that the defendant’s negligence more probably than not causes the injury, the claim is one of simple medical malpractice.” *Id.* at 647-648.

The lost-opportunity doctrine first arose in *Falcon v Memorial Hosp*, 436 Mich 443, 453-55 (1990), which was a wrongful death case in which the decedent, after giving birth, suffered from an amniotic fluid embolism that caused her death. The subsequent medical malpractice case was premised on the fact that, although this complication was unpreventable, the defendants' failure to start an intravenous line to the decedent before the event occurred deprived the decedent of a 37.5 percent chance of surviving the complication. Thus, although the defendants caused the decedent some harm, more probably than not they did not cause her death. She only had a 37.5 percent chance of surviving even if the intravenous line had been placed, i.e., even if the alleged negligence had not occurred. The *Falcon* Court admitted that the plaintiff could not show that the alleged malpractice had more likely than not caused decedent's death, but held that the plaintiff could show that it had cause the decedent to lose a "substantial opportunity of avoiding physical harm." *Id.* at 470. Accordingly, the *Falcon* Court recognized that the loss of a substantial opportunity of avoiding physical harm was actionable and that the loss in that case, of a 37.5 percent opportunity of living, was actionable. *Id.* at 469-470.

Three years after *Falcon*, the Legislature amended MCL 600.2912a(2) to require that a plaintiff must show that the loss of the opportunity to survive or achieve a better result exceeds 50 percent. In *Stone v Williamson*, 482 Mich 144 (2008), Justice Taylor's opinion explained that the lost-opportunity doctrine is available "where a plaintiff cannot prove that a defendant's actions were the cause of his injuries, but can prove that the defendant's actions deprived him of a chance to avoid those injuries." *Id.* at 152 quoting *Vitale v Reddy*, 150 Mich App 492, 502 (1986).

As this Court recognized in *Stone*, the proper interpretation of the second sentence of

MCL 600.2912a(2) is subject to considerable debate. Justice Taylor, joined by Justices Corrigan and Young, would hold: “the first sentence of subsection 2 requires plaintiffs in every medical-malpractice case to show the defendant's malpractice proximately caused the injury while, at the same time, the second sentence refers to cases in which such proof not only is unnecessary, but is impossible.” *Stone*, 482 Mich at 157. On the ground that the two sentences created an incomprehensible paradox, these three justices would hold that the statute was unenforceable as written. *Id.* at 157-159. Justice Cavanagh, joined by Justices Weaver and Kelly, disagreeing with that interpretation of the second sentence, would hold that the statute was enforceable and “merely sets the threshold for invoking the loss-of-opportunity doctrine” that *Falcon* adopted. *Id.* at 172. That is, “[i]t requires that a plaintiff’s premalpractice opportunity to survive or achieve a better result was greater than 50 percent.” *Id.* The lead opinion in *Stone* recognized that, “[s]ix of the justices believe that this is not a lost-opportunity case”; rather, it was a claim of “ordinary” or “traditional” medical malpractice. *Id.* at 164-65 (opinion by Taylor, C.J.).<sup>3</sup>

Indeed, *Stone* did not create a single definitive test to determine whether a medical malpractice case is a “lost-opportunity” case. However, it is clear that cases factually similar to *Stone* should not be considered “lost-opportunity” cases. In *Stone*, the plaintiff “suffered the rupture of an abdominal aortic aneurysm that had gone undetected despite physical examinations and testing by a number of physicians.” *Id.* at 148. The plaintiff “underwent

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<sup>3</sup> Only Justice Markman concluded that *Stone* was a lost-opportunity case. Justice Markman defined “a ‘lost opportunity’ case [as] one in which it is at least possible that the bad outcome would have occurred even if the patient had received proper treatment.” *Id.* at 186 (Markman, J. concurring). However, six Justices repudiated Justice Markman’s definition of a lost-opportunity case, finding it “overbroad and inconsistent with the common-law meaning at the time MCL 600.2912a(2) was enacted.” *Id.* at 152 n 5.

emergency surgery to repair the rupture, but, in part because of preexisting conditions, amputation of both legs at mid-thigh was ultimately necessary.” *Id.* The plaintiff brought a malpractice action against the radiologist “on the theory that a negligent diagnosis resulted in the rupture and all resulting harm.” *Id.* The plaintiff presented experts at trial who testified that, “had the aneurysm been properly diagnosed, elective surgery could have been performed . . . [and] would have greatly increased plaintiff’s chance of a better medical outcome, including a reduction of the risk of amputation and other health complications.” *Id.*

As in *Stone*, Mr. Ykimoff’s injury in this case was not the loss of an opportunity to avoid physical harm or the loss of an opportunity for a more favorable result; instead, Mr. Ykimoff suffered the physical harm, the unfavorable result. The claimed injury here is a physical injury – permanent irreversible neurological damage to Mr. Ykimoff’s lower extremities. This was not a case in which Plaintiff was claiming a loss of opportunity of any kind; rather, Plaintiff claimed that Defendants’ negligence more probably than not directly caused the permanent damage to the muscles and nerves in his legs. In other words, this is a traditional case of malpractice.

At trial, Plaintiff established, as he was required to, the traditional elements of a medical malpractice claim – Defendant’s failure to timely notify Dr. Eggert of Mr. Ykimoff’s postsurgical condition more probably than not caused 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. In particular, Dr. Flanigan testified that, when a limb or a part of the body does not get adequate blood flow for a period of time, the extent of damage increases as more time passes:

Well, if it’s a short period of time . . . not much, probably no residual

damages at all. The longer you – the more time passes where there’s inadequate circulation, you can get more and more damage to the tissues, and if it goes long enough, even to the point that they will never work again, so the nerves will never work again, or the muscle tissue could die and never generate. It’s not just the length of time that the circulation is impaired, but it’s also the severity of the impairment, so it’s a combination of the two.

\* \* \* \*

Well, the cells that make up the nerves and the muscles need nutrients, not the least of which is oxygen, which is carried by the blood, in order to perform their functions, and if they – if they don’t get that, the cells die. Part of the cells’ function is to maintain its integrity, and without the energy sources, it can’t do that. The cells dies and break down; therefore, the tissue that those cells comprise also dies. [Deposition of Dr. Flanigan, pp 28-29, Defendant’s Exhibit B.]

Dr. Flanigan testified that all of the symptoms that Mr. Ykimoff exhibited in the recovery room should have been reversible if Dr. Eggert had been called in a timely fashion. He further testified that, if Mr. Ykimoff’s circulation had been restored sooner than it ultimately was, Mr. Ykimoff should have been able to ambulate normally. (Dep of Flanigan, pp 32-33, Defendant’s Exhibit B). In fact, Dr. Flanigan opined that Mr. Ykimoff’s condition would’ve been completely reversible if Dr. Eggert had been notified by the nurses by 7:00 p.m. (Dep of Flanigan, p 33, Defendant’s Exhibit B). While he was unable to pinpoint precisely how much of Mr. Ykimoff’s condition would’ve been reversible if Dr. Eggert had been called by 7:30 p.m., Dr. Flanigan testified that, given that Mr. Ykimoff’s circulation was ultimately restored, the earlier that the operation occurred, the milder his permanent impairment would have been. (Dep of Flanigan, pp 33-34, Defendant’s Exhibit B). He explained the basis for his conclusion as follows:

We know that there has 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 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. [Dep of Flanigan, p 34.]

Dr. Flanigan *denied* that there was any “guesswork” involved here. Rather, he testified that his opinion was based on his 30 years’ experience as a vascular surgeon and that he has looked at numerous research studies and read numerous books and articles (Dep of Flanigan, p 58, Defendant’s Exhibit B). He emphasized that each case is different and that the time period is dependent not only upon the duration of the ischemia, but on the severity of it as well (Dep of Flanigan, pp 53-54, 63, 64, 65, Defendant’s Exhibit B).

When defense counsel tried to get Dr. Flanigan to pinpoint specific damage that Mr. Ykimoff would’ve suffered if Dr. Eggert had been contacted at 7:30, 7:45 or 8:15, Dr. Flanigan explained:

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.

\* \* \* \*

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 1/60th more damage, but that’s – that’s beyond that.

\* \* \* \*

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. [Dep of Flanigan, pp 61, 62, 63, Defendant’s Exhibit B.]

Certainly, there is no case law requiring Dr. Flanigan to pinpoint the exact extent of deficit at exact time periods along the continuum. Rather, based on his 30 years’ experience

as a vascular surgeon, his review of numerous research studies, books and articles, as well as the duration and severity of Plaintiff's ischemia, Dr. Flanigan opined that *all* residual neurological or motor deficits would have been avoided if Dr. Eggert had been notified by 7:00 p.m.

Clearly, Plaintiff met his burden under MCL 600.2912a and the trial court did not err in denying Defendant's motion for directed verdict and its motion for JNOV. This was not a "lost opportunity" medical malpractice action; thus, *Fulton* and its progeny are not applicable to this case. The burden of proof set forth in the second sentence of MCL 600.2912a(2), as analyzed by *Fulton*, does not apply here. In light of the evidence presented, the jury could have concluded that Mr. Ykimoff suffered a physical "injury that more probably than not was proximately caused by the negligence of the defendant," and would not have occurred absent that negligence. MCL 600.2912a(2); *Stone*, 482 Mich at 163 (opinion by Taylor, C.J.). Thus, this issue is without merit.

**III. The Trial Court Did Not Abuse Its Discretion in Permitting Dr. Flanigan to Provide Expert Testimony Based Upon His Years of Education, Training and Experience as a Board Certified Vascular Surgeon Where He Provided Testimony Regarding the Facts and Circumstances Supporting His Expert Opinion and He Did Not Rely on Any Novel Scientific Principles or Methodology in Support of His Opinion**

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**A. Standard of Review**

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This Court reviews for an abuse of discretion a trial court's determination of the qualifications of a proposed expert to testify. *Woodard v Custer*, 476 Mich 545, 557 (2006). The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations; instead, there may be more than one reasonable and principled outcome.

When the trial court selects one of these principled outcomes, it has not abused its discretion and so the reviewing court should defer to the trial court’s judgment. An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006); *People v Babcock*, 469 Mich 247, 269 (2003).

**B. The Court’s Function as a “Gate-Keeper”**

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Defendant maintains that the trial court erred in allowing Plaintiff’s expert, Dr. Flanigan, to testify regarding the lost opportunity doctrine. Defendant asserts that Dr. Flanigan’s opinion did not meet the reliability criteria of MCL 600.2955 because he allegedly did not cite to or rely on professional treatises or publications. The Court of Appeals disagreed.

Since this was not a lost opportunity case, the Court of Appeals held that Defendant’s argument that the trial court erred in permitting Dr. Flanigan to testify regarding the lost opportunity doctrine was moot and further held that “Dr. Flanigan’s testimony was consistent with proofs to establish the elements of negligence.” (Slip Opinion, p. 11). The Court also noted that since Defendant did not dispute Dr. Flanigan’s qualifications pursuant to MCL 600.2169, Defendant’s argument that Dr. Flanigan’s opinion was not admissible under MCL 600.2955 confused the admissibility of the testimony with the weight to be attributed to the expert’s opinion. The Court held that “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 overall qualification.” (Slip Opinion, pp 11-12).

The admissibility of expert testimony is governed by MRE 702, which was amended

effective January 2, 2004 to conform the rule more closely to FRE 702. It now provides:

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.

The second sentence of the Staff Comment to the amended rule cites to *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 and *Kumho Tire Co. v Carmichael*, 526 U.S. 137 (1999), and states that, “The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony.” *People v Stanway*, 446 Mich 643, 692-693, n 51 (1994).

In *Daubert*, the United States Supreme Court held that general acceptance of scientific evidence in the field to which it belongs was not a precondition to admissibility under FRE 702, thus overruling *Frye v United States*, 54 U.S. App. DC 46, 293 F 1013 (1923).<sup>4</sup> Instead, *Daubert* held that FRE 702 merely requires the trial judge to ensure that an expert’s testimony is relevant to the issues. Pertinent evidence based on scientifically valid principles will satisfy those demands, even if the scientific evidence is not generally accepted in the field. *Daubert* was clearly intended to “allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*.” *General Electric Co. v Joiner*, 522

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<sup>4</sup> In *People v Davis*, 343 Mich 348, 370-371 (1955), this Court adopted *Frye* and applied a “general scientific recognition” test in holding polygraph results inadmissible. The *Davis-Frye* test precluded admission of novel scientific evidence unless the proponent showed it had “gained general acceptance in the scientific community” to which it belonged. *People v Coy*, 258 Mich 1, 9, n 2 (2003). The *Davis-Frye* test was applied only to novel scientific techniques or principles. *Davis-Frye* did not apply to scientific evidence already in the relevant scientific community. *People v Haywood*, 209 Mich App 217, 221-224 (1995).

U.S. 136, 142 (1997) (emphasis added). *Daubert* defined the trial court's special role as a "gatekeeper" with regard to expert opinion testimony and evidence:

The trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. [*Daubert*, 509 US at 589.]

The *Daubert* Court established the following non-exclusive, four-part test to be utilized by trial courts in determining whether the proposed expert testimony or evidence is reliable:

- (1) Can the underlying scientific theory or technique be tested;
- (2) Has the theory or technique been subjected to peer review and publication;
- (3) Is there a known or potential rate of error for the particular scientific technique; and
- (4) Whether the underlying scientific technique has achieved a particular degree of acceptance within the relevant scientific community. [*Id.* at 592-594.]

When the Supreme Court revisited this issue in *Kumho*, it relaxed the emphasis on the four factors suggested in *Daubert*, clearly noting that the above-listed factors are not exclusive and that it is the trial court's function to examine those factors which bear upon the reliability of a particular opinion in light of the circumstances of each particular case. *Kumho*, 119 S Ct at 1175. *Daubert* and its progeny emphasized that expert witness testimony was not to be subjected to an inflexible and unattainable standard. In fact, the Supreme Court explained that scientific testimony must not be "known to a certainty" in order to be admissible. The *Daubert* Court noted:

**Of course it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty. Arguably, there are no certainties in science.** [*Id.* at 590 (emphasis added).]

There is no requirement of “absolute certainty” in the scientific arena. The *Daubert* court emphasized the important role of “inference” in expert scientific testimony and stressed that expert opinions may properly be based upon logical extensions of what is known, stating:

**But in order to qualify as “scientific knowledge”, an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – - i.e., “good grounds”, based on what is known.** In short, the requirement that an expert’s testimony pertain to “scientific knowledge” establishes a standard of evidentiary reliability. [*Id.* at 590 (emphasis added)].

This Court should not confuse scientifically valid “inferences” or “assertions” which have a medical and scientific basis (as in this case) with mere speculation which lacks any scientific or medical foundation. See, e.g., *Jahn v. Equine Services*, 233 F.3d 382 (6<sup>th</sup> Cir 2000) (inferences based upon known scientific principles are admissible into evidence). In fact, trained experts commonly extrapolate from existing data, and may properly do so. See, e.g., *General Electric Co. v. Joiner*, 118 S. Ct. 512, 519 (1997). To extrapolate simply means “to infer from something that is known” or, more scientifically, “to estimate (the value of a variable) outside the tabulated or observed range”. *Random House Websters Unabridged Electronic Dictionary* (1996). This is consistent with the *Daubert* court’s finding that “drawing an inference” from valid data comports with the scientific method and should not be excluded. *Id.* at 590.

In *Gilbert v Daimler Chrysler Corp.*, 470 Mich 749, 781-782 (2004), this Court stated that the amendment of MRE 702 “explicitly” incorporated the *Daubert* standards and replaced the requirement of general recognition with a requirement of scientific reliability, “reached through reliable principles and methodology.” Pursuant to *Daubert*, a court must “exclude junk science” *Gilbert v. DaimlerChrysler Corp* 470 Mich 749, 782 (2004).

Additionally, MCL 600.2955(1) provides that, in a personal injury action, “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.” To make this determination, a court must, in accordance with the statute, “examine the opinion, and the basis for the opinion, . . . 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 subject 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 of the context of litigation. [MCL 600.2955(1)]

However, 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.”

As the Court of Appeals held in *Chapin v A & L Parts, Inc.*, 274 Mich App 122 (2007):

the trial court’s role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes. **The fact that an opinion held by a properly qualified expert is not shared by all others in the field or that there exists some conflicting**

**evidence supporting and opposing the opinion do not necessarily render the opinion “unreliable.”** A trial court does not abuse its discretion by nevertheless admitting the expert opinion, as long as the opinion is rationally derived from a sound foundation.

\* \* \* \*

The fact that two scientists value the available research differently and ascribe different significance to that research does not necessarily make either of their conclusions unreliable. Indeed, science is, at its heart, itself an ongoing search for truth, with new discoveries occurring daily, and with regular disagreements between even the most respected members of any given field. **A *Daubert*-type hearing of this kind is *not* a judicial search for truth.** The courts are unlikely to be capable of achieving a degree of scientific knowledge that scientists cannot. **An evidentiary hearing under MRE 702 and MCL 600.2955 is merely a *threshold* inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science.** The courts are not in the business of resolving scientific disputes. The only proper role of a trial court at a *Daubert* hearing is to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert’s opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation. [*Chapin*, at pp 127, 139(emphasis added; citations omitted).]

In accordance with the above standards, Dr. Flanigan testified with regard to the facts and circumstances supporting his expert opinion, the principles and methodology in support thereof, whether the opinions and their basis have been subjected to scientific testing and replication, whether they have been subject to peer review publication and otherwise provided an objective, rational opinion based upon his years of education, training, experience and review of scientific literature.

Defendant did not present *any evidence* refuting Dr. Flanigan’s testimony that the extent of residual deficits is dependent upon the length and severity of the patient’s ischemia. Notably, Defendant’s expert, Dr. Eggert, also testified that the deficits in Mr. Ykimoff’s legs were due to a cut off of the blood flow, which ultimately led to a lack of oxygen in the limb and cell death in the nerves and muscles. However, Dr. Eggert opined that the aortic clamp

time during the surgery, which cut off the blood flow, was longer than average and was the cause of the deficits to Mr. Ykimoff's legs. (TR 8/14/06, pp 64, 88-89, 93-94, 99, 113, 114-15). Thus, while both experts offered different opinions as to the cause of Mr. Ykimoff's deficits, they both testified that, the longer that the blood flow was cut off, the more severe the deficits.

Defendant's arguments that Dr. Flanigan's testimony was not admissible under MCL 600.2955 confuse the admissibility of the testimony with the weight to be attributed to his opinion. Specifically, as the Court of Appeals recognized in this matter:

[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 v Surman*, 277 Mich App 287, 309-10 (2008) (footnotes and internal citations omitted).]

Dr. Flanigan's testimony was not based on a novel scientific theory or principle; rather, it was based upon well excepted scientific knowledge. Any criticism of Dr. Flanigan's opinion was "more properly confined to challenge during cross-examination rather than attempting to invalidate his overall qualification." (Slip Opinion, p. 12). Accordingly, the trial court did not abuse its discretion in permitting Dr. Flanigan's testimony.

**IV. The Trial Court Did Not Abuse Its Discretion in Concluding that a Curative Instruction was not Warranted Where Defendant's Own Employee Testified, Without Objection, that Nurses are Required by Law to Record the Medication that They Administer to Their Patients and the Court's Instructions Properly Apprised the Jury of the Law and Their Duties to Apply the Law to the Evidence.**

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**A. Standard of Review**

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The determination whether supplemental instructions are applicable and accurate is within the trial court's discretion. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162 (1999). This discretion is to be exercised in the context of the particular case, with due regard for the adversaries' theories of the case and counsels' legitimate desires to structure argument to the jury around anticipated instructions. *Jones v Porretta*, 428 Mich 132, 146 (1987); *Wengel v Herfert*, 189 Mich App 427, 431 (1991).

Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Case v Consumers Power Co*, 463 Mich 1, 6 (2000); *Bachman v Swan Harbour Ass'n*, 252 Mich App 400, 424 (2002). Reversal is not required unless the failure to reverse would be inconsistent with substantial justice. MCR 2.613(A), *Case, supra*. There is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60 (1997); *In re Flury Estate*, 249 Mich App 222, 226 (2002).

**B. Plaintiff's Counsel Did Not Make Any Inaccurate Representations of the Law Nor Was a Curative Instruction Warranted.**

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Contrary to Defendant's assertions, Plaintiff's counsel did not make any misrepresentations about the law or make reference to a "statutory duty" that does not exist.

Rather, Defendant’s own employee, Nurse Piatt, specifically testified at trial that she was “required by law” to record on the medication administration record (“MAR”) any medication that is provided to a patient. (TR 8/8/06, pp 26-27, 140).

Notably, Defense counsel *did not object* to Nurse Piatt’s admission that she had a legal obligation to record a patient’s medication. In fact, it was not until Plaintiff’s expert, Nurse McCoig confirmed this obligation that defense counsel challenged the testimony and, even then, it was based on Nurse McCoig’s qualifications to render such testimony. However, the trial court permitted the testimony to continue without further objection from counsel on that issue or a request for a curative instruction (TR 8/9/06, pp 118-19, 134-35).

On appeal, the Court of Appeals concluded that whether the charting deficiencies constituted a statutory violation was irrelevant, stating:

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. [Slip Opinion, pp 15-16.]

Furthermore, the jury was instructed that it was bound to accept the law as the trial court instructed it, M Civ JI 2.03. The jury was further instructed that it could only consider

the evidence, which included the answers provided by sworn witnesses. In particular, M Civ JI 2.04 provides as follows:

**2.04 Jury Must Only Consider Evidence; What Evidence Is**

Your determination of the facts in this case must be based upon the evidence. Evidence consists of the sworn testimony of the witnesses. It also includes exhibits, which are documents or other things introduced into evidence.

(It may also include some things which I specifically tell you to consider as evidence.)

Questions which the attorneys ask the witnesses are not themselves evidence. It is the answers which provide the evidence.

Jurors are presumed to follow their instructions absent a showing to the contrary. *People v Mette*, 243 Mich App 318, 330-331 (2000). Here, the Defendant's own employee testified, without objection from defense counsel, that nurses are *required by law* to record in the MAR the medication that they administer to their patients. In addition, Plaintiff's nursing expert testified, "At any time that any medication is given, it has to be documented appropriately and at the appropriate times." (TR 8/9/06, p 135). Thus, the evidence was appropriately before the jury for consideration.

The trial court's instructions properly apprised the jury of the law and their duties to apply the law to the evidence. Moreover, the theories of the parties and the applicable law were adequately and fairly presented to the jury. There was absolutely no prejudice to the Defendant in permitting the jury to consider the admission by Defendant's own employee, which was evidence before the court. Accordingly, the trial court did not abuse its discretion in refusing to provide any additional instructions.

**V. The Trial Court Did Not Abuse Its Discretion In Permitting Rebuttal Testimony That Was Directly Responsive to the Contradictory Evidence Offered by Defendant.**

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**A. Standard of Review**

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Admission of rebuttal testimony rests within the sound discretion of the trial court. *Birou v Thompson-Brown Co*, 67 Mich App 502, 510 (1976). In determining the admissibility of evidence, this Court may consider issues in the pleadings and issues injected by evidence already introduced. See 4 Callaghan's Michigan Pleading & Practice (2d ed), § 36.196, p 37, citing *Hart v Walker*, 100 Mich 406, 410 (1894). Where one party has introduced evidence to disprove a certain fact, the other may introduce evidence proving it. This Court may admit evidence offered in rebuttal where it contradicts or negatives evidence offered by the adverse party even though it tends incidentally to show a matter as to which evidence is not usually admissible. Callaghan's, *supra*, § 36.198, p 43. The relevance of such rebuttal evidence should be tested by whether it is justified by the evidence which it is offered to rebut. *Id.* (citing *Edwards v Common Council of the Village of Three Rivers*, 102 Mich 153 (1894)).

**B. The Rebuttal Testimony Was Presented in Response to Defendant's Direct Attack on Mr. Ykimoff's Credibility**

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In this case, Plaintiff presented testimony regarding the extent of his injuries and his residual impairments. Conversely, Defendant presented surveillance video depicting Plaintiff going in and out of his church, as well as his car. In one scene, the video depicted Plaintiff carrying a large box. Clearly, this video was offered to disprove Plaintiff's testimony with regard to the extent of his impairment. Thus, on rebuttal, Plaintiff presented the testimony of

the pastor of his church as well as a fellow churchgoer with regard to their observations as to what Plaintiff could or could not do around the church. Given that the video depicted Plaintiff's activities at the church, the rebuttal witnesses clarified what was depicted in the video. For example, the large box that Plaintiff was carrying was actually filled with very light items and Plaintiff offered the testimony of a fellow churchgoer (who was with the Plaintiff on the day that he was carrying the box) to rebut the characterization in the video.

With the video, Defendant clearly sought to attack not only the testimony regarding Plaintiff's physical abilities, but to impeach Plaintiff's credibility as well. Defendant presented the surveillance video after Plaintiff had presented his case in chief. In fact, Plaintiff strenuously objected to the admission of the video because Defendant had failed to disclose it to Plaintiff. Nevertheless, the trial court permitted the video to be introduced into evidence, after affording Plaintiff's counsel an opportunity to depose the private investigators that filmed the surveillance.

Faced with a direct attack on his credibility, Plaintiff was forced to call the two rebuttal witnesses. Contrary to Defendant's assertions, Plaintiff did not offer the testimony as gratuitous bolstering of the Plaintiff's character; rather, the testimony was directly responsive to the contradictory evidence offered by Defendant. Accordingly, the trial court did not abuse its discretion in admitting the rebuttal testimony.

The Court of Appeals also rejected Defendant's argument that the trial court reversibly erred in allowing lay witnesses to testify regarding Mr. Ykimoff's integrity or character after Defendant's showed the jury a surveillance video which suggested that Mr. Ykimoff's residual injuries were not as extensive or limiting as alleged. The Court noted that both parties were provided the opportunity to present testimony and evidence (such as the surveillance video)

to support their arguments and contentions regarding the extent of Mr. Ykimoff's residual injuries and their impact on his functioning. The Court held that, regardless of the testimony regarding Mr. Ykimoff's integrity, there was sufficient evidence for the jury to determine the residual impairments. (Slip Opinion, p. 12). The Court concluded:

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. [Slip Opinion, pp 12-13.]

**Relief Requested**

Wherefore, Plaintiff requests that this Honorable Court deny Defendant's Application for Leave to Appeal for the reasons set forth above.

Respectfully submitted,



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