

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

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

139561
PLAEE'S 5-POD

Submitted By:

HEATHER A. JEFFERSON (P54952)
GEOFFREY N. FIEGER (P30441)
ROBERT M. GIROUX, JR. (P47966)
Fieger, Fieger, Kenney, Johnson & Giroux, P.C.
19390 W. Ten Mile Road
Southfield, MI 48075-2463
(248) 355-5555

FILED
JUN 14 2010
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

Table of Contents

Table of Authorities	ii
Introduction	1
Argument	
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	7
A. Standard of Review	7
B. A Jury is Free to Credit or Discredit Any Testimony	8
Relief Requested	14

TABLE OF AUTHORITIES

CASES

<i>Amerisure Ins Co v Auto-Owners Ins Co</i> , 262 Mich App 10 (2004)	8
<i>Baldwin v Nall</i> , 323 Mich 25 (1948)	10
<i>Barnebee v Spense Bros</i> , 367 Mich 46 (1962)	10
<i>Berryman v K mart Corp</i> , 193 Mich App 88 (1992)	8
<i>Caldwell v Fox</i> , 394 Mich 401 (1975)	7
<i>Case v Consumers Power Co</i> , 463 Mich 1 (2000)	10
<i>Central Cartage Co v Fewless</i> , 232 Mich App 517 (1998)	8
<i>Christiansen v Hilber</i> , 282 Mich 403 (1937)	10
<i>Derbajian v S & C Snowplowing, Inc</i> , 249 Mich App 695 (2002)	7
<i>Detroit/Wayne County Stadium Authority v Drinkwater, Taylor and Merrill, Inc</i> , 267 Mich App 625 (2005)	8
<i>Dimick v Schiedt</i> , 293 US 474 (1935)	9
<i>Garg v Macomb County Community Mental Health Services</i> , 472 Mich 263 (2005)	8
<i>Goldman v Phantom Freight, Inc</i> , 162 Mich App 472 (1987)	8
<i>Green v Detroit U R</i> , 210 Mich 119 (1920)	9
<i>Haliw v Sterling Hts</i> , 464 Mich 297 (2001)	10
<i>Hunt v Freeman</i> , 217 Mich App 92 (1996)	8
<i>Kelly v Builders Square, Inc</i> , 465 Mich 29 (2001)	12
<i>Kroes v Harryman</i> , 352 Mich 642 (1958)	10
<i>Lester N. Turner, PC v. Eyde</i> , 182 Mich App 396 (1990)	7
<i>Martin v Ledingham</i> , 282 Mich App 158 (2009)	4, 5, 6, 13, 14

<i>McAtee v Guthrie</i> , 182 Mich App 215 (1989)	13
<i>Meagher v Wayne State Univ</i> , 222 Mich App 700 (1997)	7
<i>Napier v Jacobs</i> , 429 Mich 222 (1987)	10
<i>Peoples Wayne Co Bank v Wolverine Box Co</i> , 250 Mich 273 (1930)	10
<i>Skinner v Square D Co</i> , 445 Mich 153 (1994)	10, 13
<i>Strach v St. John Hosp Corp</i> , 160 Mich App 251 (1987)	10
<i>Taylor v Mobley</i> , 279 Mich App 309 (2008)	10
<i>Vsetula v Whitmyer</i> , 187 Mich App 675 (1991)	8
<i>Wilkinson v Lee</i> , 463 Mich 388 (2000)	7
<i>Wooden v Durfee</i> , 46 Mich 424 (1881)	9
<i>Ykimoff v Foote Mem Hosp</i> , 285 Mich App 80 (2009)	3, 4, 5, 14
<i>Yonkus v McKay</i> , 186 Mich 203 (1915)	9
<i>Zeeland Farm Services, Inc v JBL Enterprises, Inc</i> , 219 Mich App 190 (1996)	7

STATUTES

U.S. Const, Amend VII	9
Const. 1835, art. 1, § 9	8
Const. 1850, art. 6, §27	8
Const. 1908, art. 2, § 13	9
Const. 1963, art. 1, § 14.	9

OTHER

Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), R. 2.515, § 5, p	10
M. Civ. J.I. 15.01	13

Introduction

This medical malpractice action concerns nursing malpractice that occurred in the post-anesthesia care unit at Foote Hospital. Plaintiff, James Ykimoff, 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. 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.

On March 12, 2004, Plaintiff commenced this medical malpractice action against Foote Hospital, Dr. David Eggert and Dr. David Prough,¹ alleging negligent treatment by the doctors and the hospital's nursing staff. 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. The trial court agreed and granted summary disposition in favor of Dr. Eggert.

On August 7, 2006, the jury trial in this matter commenced with regard to Plaintiff's

¹ Dr. Prough was later dismissed based on his lack of involvement in Plaintiff's care.

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. Significantly, 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).

Plaintiff's vascular surgery expert, Dr. Daniel Preston Flanigan, opined that as a result of the delay in treatment, Mr. Ykimoff suffered ischemic damage of the lumbosacral plexus, which caused 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).

Ultimately, the jury returned a verdict in favor of the Plaintiff and, on March 26, 2007, the trial court entered a Judgment in favor of Plaintiff in the amount of \$1,402,601.44, following application of the medical malpractice non-economic damages cap.

Thereafter, Defendant filed a motion for Judgment Notwithstanding the Verdict and/or New Trial, arguing, in pertinent part, that Plaintiff failed to prove cause in fact because Dr. Eggert testified that Mr. Ykimoff's symptoms in the PACU did not indicate a vascular emergency and that, even if the nurses had notified him of these symptoms earlier, he would

not have taken any action or performed surgery earlier. Defendant argued that Dr. Eggert testified that, in his opinion, until there was mottling of Mr. Ykimoff's skin, there was no vascular emergency. Defendant maintained 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.

In response, Plaintiff argued that Dr. Eggert testified that, in addition to the presence of the mottling, 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). Plaintiff referred the trial court to the documentation in the medical records which clearly reflected that Mr. Ykimoff exhibited all of these signs of a vascular condition well before the nurses contacted Dr. Eggert. Plaintiff further asserted that Dr. Eggert admitted that, if he had been there, he would have recognized that there was an occlusion and *he would have performed the surgery immediately* (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).

Given the conflicting evidence and testimony, the trial court concluded that there was sufficient evidence and testimony to submit the issue to the jury and refused to interfere with the province of the jury (TR 06/22/07, p 23). Accordingly, the trial court entered an order on July 9, 2007 denying Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial.

Defendant appealed the jury verdict. 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. *Ykimoff v Foote Mem Hosp*, 285 Mich App 80 (2009).

At the outset, 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. *Id.* at 88-89.

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. In the lead opinion, the Court concluded that Dr. Eggert's testimony in this regard was "speculative at best and self-serving at its worst." *Ykimoff*, 285 Mich App at 91. Demonstrating the self-serving nature of Dr. Eggert's testimony, the lead opinion noted that while Dr. Eggert claimed that a vascular emergency could not be identified until mottling was present, his own testimony demonstrated that the presence of other symptoms observed and documented by the nurses signified the onset of a clot well before the mottling occurred. *Id.* at 92-94. The Court concluded that the contradictions in Dr. Eggert's testimony and the documented symptoms raised an issue of credibility. *Id.* at 93.

The Court held that the matter was properly left to the jury to resolve, stating as follows in the lead opinion:

Dr. Eggert's credibility was not eliminated as an issue; rather it was pushed to the forefront. . . . 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. [*Id.* at 94 (citations omitted).]

Notably, the lead opinion declined to apply the ruling in *Martin* to the facts of the matter at hand, concluding that the weaknesses inherent in Eggert's testimony distinguishes this matter from *Martin*. *Id.* at 94, 99. The lead opinion asserts, "The very fact-intensive nature of the ruling in *Martin* necessarily leads to concern regarding the broader applicability of that decision and the implied effect on legitimate issues pertaining to credibility in determining proximate causation and usurpation of the jury's role." *Id.* at 90.

In recognition of the well-established principle in American jurisprudence that a witness's credibility always remains subject to a jury's consideration, Judge Gleicher rejected the lead opinion's conclusion that the weaknesses inherent in Eggert's testimony distinguishes this case from *Martin*, stating, in pertinent part, as follows in her concurring opinion:

In my view, "the jury is free to credit or discredit *any* testimony." Moreover, I believe that this Court incorrectly decided *Martin*.

* * * *

[D]espite Dr. Eggert's emphatic, unrebutted assertion that he would not have operated on plaintiff at 7:00 p.m. irrespective of what he may have learned from the nurses, the jury possessed the authority to disbelieve every word that Dr. Eggert uttered. . . . [T]he jury can disregard testimony that, in the words of Justice Cooley, "probably ought to have satisfied any one...." Regardless of 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."

* * * *

The central proximate cause question . . . is whether the patient would have benefitted from timely nursing reports to the attending surgeon. A jury soundly rejected Dr. Eggert's contention that he would have ignored earlier information signaling a vascular catastrophe. In a different case, a jury might fully credit a physician's comparable testimony and reject that the physician probably would have adhered to the standard of care described by the plaintiff's expert. Resolution of this question resides solely with the jury. [*Id.* at 121, 127, 134 (Gleicher, concurring) (emphasis in original) (citations omitted).]

Defendant filed an Application for Leave to Appeal from the Court of Appeals' July 6, 2009 Order. Plaintiff filed a detailed responsive brief. On April 2, 2010, this Court issued an Order directing the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. This Court specifically directed "the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument on whether to grant the application in *Martin v. Ledingham* (Docket No. 138636). (April 2, 2010 Order).

Plaintiff relies on all of the facts and arguments set forth in his previously filed Response to Defendant-Appellant's Application for Leave to Appeal, as if set forth herein verbatim, and maintains that 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, or concluding that any failure to provide a curative instruction was harmless.

In light of the fact that this matter will be heard at the same future session of *Martin*, Plaintiff submits this supplemental brief to further highlight and address the facts and legal arguments in support of his assertion that the trial court did not err in denying Defendant's motion for directed verdict and motion for JNOV because 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. 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. Plaintiff respectfully requests that this Honorable Court adopt the scholarly arguments set forth in Judge Gleicher's concurring opinion in this matter and affirm the Court of Appeals' July 6, 2009 order.

Argument

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

A trial court's grant or denial of a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701 (2002). In doing so, this Court must view the testimony and all legitimate inferences from the testimony in a light most favorable to the nonmoving party to determine whether a prima facie case was established. *Wilkinson v Lee*, 463 Mich 388, 391 (2000). A directed verdict is appropriate only when no factual question exists regarding which reasonable minds could differ. *Meagher v Wayne State Univ*, 222 Mich App 700, 708 (1997). An appellate court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony. *Caldwell v Fox*, 394 Mich 401, 407 (1975); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195 (1996); *Lester N. Turner, PC v. Eyde*, 182 Mich App 396, 398 (1990). If reasonable jurors could honestly have reached

different conclusions, the appellate Court may not substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99 (1996). Generally, directed verdicts are viewed with disfavor, especially in negligence actions. *Berryman v K mart Corp*, 193 Mich App 88, 91 (1992); *Vsetula v Whitmyer*, 187 Mich App 675, 679 (1991); *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 477 (1987).

A trial court's ruling on a motion for Judgment Notwithstanding the Verdict ("JNOV") is reviewed de novo. *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 272 (2005). Judgment notwithstanding the verdict should be granted only when there was insufficient evidence presented to create a triable issue for the jury. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 18-19 (2004). In reviewing a trial court's denial of a JNOV motion, the 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). If the evidence is such that reasonable minds could differ, the question is one for the jury and judgment notwithstanding the verdict is improper. *Central Cartage Co v Fewless*, 232 Mich App 517, 524 (1998).

B. A Jury is Free to Credit or Discredit Any Testimony

From the time of statehood, Michigan's Constitution has provided for the right of jury trials. In its earliest form, Const. 1835, art. 1, § 9 expressed the right as follows: "The right of trial by jury shall remain inviolate." The right was slightly changed by Const. 1850, art. 6, § 27: "The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases

unless demanded by one of the parties in such manner as shall be prescribed by law.” This language was unchanged in Const. 1908, art. 2, § 13. The 1963 Constitution did not change the substance of the right, but updated the language, which now reads as follows:

The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. [Const. 1963, art. 1, § 14.]

Similarly, the Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” U.S. Const, Amend VII. As the United States Supreme Court recognized in *Dimick v Schiedt*, 293 US 474, 486 (1935):

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Consistent with this right, it has long been held by this Court that it is for the jury to assimilate the facts presented at trial, draw inferences from those facts, and determine what happened in the case at issue. See, e.g., *Green v Detroit U R*, 210 Mich 119, 129 (1920). A jury is not compelled “to accept as absolute verity every uncontradicted statement a witness may make.” *Yonkus v McKay*, 186 Mich 203, 210 (1915). As Justice Cooley stated in *Wooden v Durfee*, 46 Mich 424, 427 (1881):

[T]he difficulty is that the facts were not conceded or beyond dispute. There was evidence of them which probably ought to have satisfied any one to whom it was addressed; but evidence is for the jury, and the trial judge cannot draw conclusions for them. It is said that on some points there was no evidence of a conflicting nature; but that does not aid the claimant. **A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment.** [emphasis added.]

This Court has long recognized that a jury is charged with resolving disputed facts.

Kroes v Harryman, 352 Mich 642, 648 (1958); *Christiansen v Hilber*, 282 Mich 403, 407 (1937); *Peoples Wayne Co Bank v Wolverine Box Co*, 250 Mich 273, 279 (1930). It is a juror's prerogative to disbelieve testimony, including uncontroverted testimony. *Baldwin v Nall*, 323 Mich 25, 29 (1948); *Taylor v Mobley*, 279 Mich App 309, 314 n 5 (2008); *Strach v St. John Hosp Corp*, 160 Mich App 251, 271 (1987). This Court does not tolerate usurping the role of the jury:

“At best any standard describes an approach or judicial attitude. The dominant characteristics of the approach or attitude in Michigan are that the right to trial by jury must be preserved, and that directed verdicts are drastic steps which should not be taken unless reasonable men could not differ on each and every element of the party's claim.” [*Napier v Jacobs*, 429 Mich 222, 232 (1987), quoting Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), R. 2.515, § 5, p. 229.]

In this case, Defendant argues that the trial court erred in failing to grant its motion for directed verdict or JNOV because Plaintiff failed to present sufficient evidence to establish causation. Proving causation requires proof of both cause in fact and proximate cause. *Case v Consumers Power Co*, 463 Mich 1, 6 n. 6 (2000). “Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct.” *Haliw v Sterling Hts*, 464 Mich 297, 310 (2001). Cause in fact may be established by circumstantial evidence that facilitates reasonable inferences of causation. *Skinner v Square D Co*, 445 Mich 153, 164 (1994). A plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Id.* at 164-165. As this Court observed in *Barnebee v Spense Bros*, 367 Mich 46, 52 (1962), “[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.” (quoting Prosser, Torts (2nd ed), § 50, p 282).

As recognized by the Court of Appeals and cited in Plaintiff's principal brief in response to Defendant's application for leave to appeal in this matter, Plaintiff presented expert testimony at trial establishing that the occlusion occurred very rapidly following the surgery and that it was severe as soon as it occurred. In addition, Plaintiff presented evidence that the nursing staff observed and reported symptoms that signified the onset of a clot well before the Dr. Eggert was contacted. Plaintiff's expert opined that, if Plaintiff had surgery one hour and 40 minutes earlier, he would not have had *any* residual neurological or motor deficits.

On the other hand, Dr. Eggert contended that the clot formed only minutes before Mr. Ykimoff's skin demonstrated mottling and that he was contacted just ten minutes later. Dr. Eggert maintained that any residual impairment suffered by Mr. Ykimoff was due to the necessity of the prolonged clamping of the blood flow during surgery, not the blood clot. However, 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.

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).

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). 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, un rebutted 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. 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 v Guthrie*, 182 Mich App 215 (1989).

In addition to the law and arguments set forth in Plaintiff's principal brief in opposition to Defendant's application for leave to appeal in this matter, as well as those herein, Plaintiff relies on and adopts the eloquent arguments set forth in Judge Gleicher's concurring opinion, which are based on the core principles emanating from the Seventh Amendment to the United States Constitution. Plaintiff further relies on and adopts Judge Gleicher's arguments with regard to the meaning and proximate causation and the proper application of this Court's decision in *Skinner*:

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. While the plaintiffs in *Skinner* entirely lacked evidence that the switch constituted a cause in fact of the decedent's electrocution, the plaintiffs here and in *Martin* produced evidence that the nurses' negligence resulted in patient injury. This evidence established cause in fact.

* * * *

Here and in *Martin*, the plaintiffs presented evidence that supported "a reasonable inference of a logical sequence of cause and effect." 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 the patient's serious postoperative problems will conform his or her 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 ... that the plaintiff's injury ... [was] a natural and probable result of the negligent conduct." M. Civ. J.I. 15.01. In summary, unlike the plaintiffs in *Skinner*, who lacked any factual support for their expert's opinion connecting the switch and the mechanism of

the decedent's death, the medical malpractice plaintiffs here and in *Martin* introduced evidence from which the jury could reasonably infer that earlier surgery, performed in accordance with the standard of care, would have prevented injury. [*Ykimoff*, 285 Mich App at 131-32 (citations omitted) (emphasis in original).]

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,



GEOFFREY N. FIEGER (P30441)
ROBERT M. GIROUX, JR. (P47966)
HEATHER A. GLAZER (P54952)
Attorneys for Plaintiff
19390 W. Ten Mile Road
Southfield, MI 48075
(248) 355-5555

Dated: June 10, 2010