

IN THE MICHIGAN SUPREME COURT

MARIE HUDDLESTON,

Plaintiff-Appellant,

v

TRINITY HEALTH MICHIGAN d/b/a SISTERS OF MERCY HEALTH CORPORATION and/or ST. JOSEPH MERCY HOSPITAL - ANN ARBOR; IHA OF ANN ARBOR, P.C., d/b/a ASSOCIATES IN INTERNAL MEDICINE - CHERRY HILL, ASSOCIATES IN INTERNAL MEDICINE - CHERRY HILL, P.C., and DR. JOYCE LEON,

Defendants-Appellees,

and

HURON VALLEY RADIOLOGY, P.C. and DR. DAVID E. BAKER,

Defendants.

UNPUBLISHED

September 11, 2012

No. 303401

Washtenaw Circuit Court

LC No. 09-000657-NH

Defendant-Appellee
M. M...
and

C.,

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JUDGMENT OR ORDER APPEALED FROM AND RELIEF SOUGHT

This is an application for leave to appeal a decision issued by the Michigan Court of Appeals in a per curiam opinion issued on September 11, 2012. Judge Talbot issued an opinion concurring in part, but dissenting as to the majority's determination that Plaintiff Mrs. Huddleston suffered a compensable injury, the issue set forth in this application. (A copy of the Court of Appeal's decision and Judge Talbot's opinion are attached as Appendix AA.) This application is timely as it is being filed within 42 days after the filing of the Court of Appeals opinion. MCR 7.302(C)(2)(b).

Defendants-Appellants Joyce Leon, M.D. and IHA of Ann Arbor, P.C. – Cherry Hill apply for leave to appeal and request that this Court affirm the decision of the trial court and reverse the decision of the Court of Appeals. The trial court reviewed the testimony of Mrs. Huddleston's own expert and appropriately granted summary disposition concluding that Mrs. Huddleston presented no valid claim for a compensable injury. (A copy of the trial court's orders and transcript from the motion hearing are attached as Appendix BB). In this case, Plaintiff-Appellee Mrs. Huddleston's own expert testified that Mrs. Huddleston suffered no harm as a result of any action or inaction on the part of the Defendant-Appellants.

This case involves legal principles of major significance to the jurisprudence in the State of Michigan. The critical issue is whether a plaintiff is required to present evidence of the existence of harm or is a jury left to speculate what harm may have been caused by an alleged act of negligence. If the reasoning set forth by the Court of Appeals is adopted more broadly, the requirement that a plaintiff prove the existence of damages will be eviscerated. Moreover, the varied interpretations of this Court's decision in *Sutter v. Biggs*, 377 Mich 80, 139 NW2d 684 (1966), a case involving duplicative organs, requires clarification by this Court in

light of the issues presented in this case. The decision of the Court of Appeals appears to have been motivated by concern with “the potential implications in giving a ‘pass’ to malpractice that allegedly would occur in the case of one of a pair of duplicative organs” rather than a proper interpretation of Michigan law requiring a plaintiff to present a “reasonable basis for computation” of damages to prevail. *Ensink v. Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). Defendants-Appellants submit that the dissenting opinion of Judge Talbot correctly reflects this State’s jurisprudence as to the requirement to prove damages.

If the interpretation of the Court of Appeals is allowed to stand, plaintiffs in medical malpractice actions, and in tort actions more generally, will be permitted to recover for damages that are remote, contingent, or speculative, in violation of long-standing principles of law in this State. *See, Ensink, supra, citing Theisen v. Knake*, 236 Mich App 249, 258; 599 NW2d 143 (2004) and *Sutter v. Biggs*, 377 Mich 80, 139 NW2d 684 (1966). As such, the Court of Appeals decision is clearly erroneous, conflicts with the decisions of this Court and other decisions of the Court of Appeals, and will cause material injustice to the Defendants-Appellants in this case. Without correction, plaintiffs may be permitted to pursue litigation when no harm whatsoever is shown merely because of the concerns about giving “a pass” to alleged malpractice. This position is contrary to Michigan law. Proof of damages with reasonable certainty is required.

For these reasons, Defendants-Appellants Joyce Leon, M.D. and IHA of Ann Arbor, P.C. – Cherry Hill request this Court grant Defendants-Appellants’ application for leave to appeal, reverse the Court of Appeals decision dated September 11, 2012 and affirm the Circuit Court’s January 12, 2011 Order Granting Summary Disposition to the Defendants-Appellants, as

well as the Orders Denying Motion for Reconsideration of the Court's Decision entered on March 14, 2011 and March 23, 2011.

STATEMENT OF QUESTION PRESENTED FOR REVIEW

I. DID THE TRIAL COURT PROPERLY CONCLUDE THAT PLAINTIFF-APPELLEE MARIE HUDDLESTON'S CLAIMED DAMAGES ARE REMOTE, CONTINGENT, AND/OR SPECULATIVE AND THAT PLAINTIFF-APPELLEE HAS NO VALID CLAIM FOR COMPENSABLE INJURY

Defendants-Appellants Dr. Leon and IHA answer "Yes"

Defendant-Appellants St. Joseph Mercy Hospital answers "Yes"

Plaintiff-Appellee answers "No"

The trial court answered "Yes"

The Court of Appeals answered "No"

Judge Talbot answered "Yes"

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STATEMENT OF MATERIAL FACTS AND PROCEDURAL HISTORY

A. Factual Background

Dr. Leon was Mrs. Huddleston's primary care physician. In 2003, Dr. Leon ordered CT scans of Mrs. Huddleston's chest and abdomen for an evaluation of chest pain and to rule out aortic aneurysm dissection (Exhibit A). The CT scans were performed on June 9, 2003 at a St. Joseph Mercy Hospital facility (Radiology Exam Report, Exhibit B). Although the chest CT scan report was delivered to Dr. Leon, the abdominal CT scan report, which showed a lesion on the left kidney, was not received by Dr. Leon¹ (Deposition of Dr. Leon, p. 42, Exhibit C; Acute Office Visit Form, Exhibit D).

In June of 2008, Mrs. Huddleston, while being evaluated at the St. Joseph Mercy Hospital emergency room in Ann Arbor, had a CT scan of her abdomen performed, which showed the lesion on Mrs. Huddleston's left kidney (Radiology Results, Exhibit E). After a diagnosis of renal cancer, Mrs. Huddleston underwent surgery to remove the left kidney (Operation Report, Exhibit F). Mrs. Huddleston asserts that she could have undergone a partial nephrectomy in 2003 rather than a total nephrectomy actually done when the cancer was diagnosed in 2008.

It is undisputed that Mrs. Huddleston would have required a surgical procedure to remove a part or all of her kidney to address the renal cancer whether that procedure occurred in 2003 or 2008. Notwithstanding the surgery she underwent, Mrs. Huddleston's kidney function

¹ Mrs. Huddleston asserts that there is a factual dispute as to whether or not the report of the CT of the abdomen was ever delivered to Dr. Leon's office. (See, Mrs. Huddleston's Brief to the Court of Appeals, p. 3.) Dr. Leon testified that she did not receive the report. Nonetheless, even if there is a factual dispute regarding delivery of the report, such dispute was not material to the trial court's determination that Mrs. Huddleston did not suffer a compensable injury. Similarly, any factual dispute regarding delivery of the report is not material for purposes of this appeal. Viewing the facts in the light most favorable to Mrs. Huddleston, the trial court determined that, even if one or all of the Defendant-Appellees were negligent, which has been expressly denied, Mrs. Huddleston did not suffer a compensable injury.

today is excellent and completely within normal limits, and, consequently, Mrs. Huddleston's urological expert, Dr. Steven Jensen, testified that Mrs. Huddleston sustained no harm as a consequence of having a total nephrectomy in 2008 rather than a partial nephrectomy in 2003 (Deposition of Dr. Jensen, pp. 25-26, Exhibit G).

Although Mrs. Huddleston claims that she was upset and concerned because of the presence of the tumor in her body and a fear that the cancer had spread, Mrs. Huddleston's fears were not substantiated and, therefore, speculative because the cancer was still confined to the kidney with no metastatic disease when diagnosed in 2008.

Mrs. Huddleston was also evaluated for a suspected gastric nodule in October, 2009. As confirmed by Mrs. Huddleston's physicians and admitted in Mrs. Huddleston's filings, this suspected gastric nodule was not related to her renal cell carcinoma in any way (Plaintiff-Appellant's Brief to the Court of Appeals, p. 5). As such, any claim for damages regarding the gastric nodule are equally speculative and are not related to the alleged failure to diagnose Mrs. Huddleston's kidney cancer in 2003.

B. Proceedings

On June 5, 2009, Mrs. Huddleston filed her complaint against the Defendants-Appellants including Joyce Leon, M.D., IHA of Ann Arbor, P.C. – Cherry Hill, and St. Joseph Mercy Hospital – Ann Arbor. Following discovery, Defendants-Appellants Joyce Leon, M.D. and IHA of Ann Arbor, P.C. – Cherry Hill moved for summary disposition on the basis of the testimony of Dr. Jensen, Mrs. Huddleston's expert. He testified that Mrs. Huddleston sustained no harm. On November 12, 2012, St. Joseph Mercy Hospital – Ann Arbor concurred in the motion and further asserted that Mrs. Huddleston had not established a breach of the standard of care by the hospital through appropriate expert testimony. As admitted by Mrs. Huddleston's

expert, Dr. Jensen, Mrs. Huddleston has suffered no harm as a result of the alleged failure to diagnose kidney cancer in 2003. While there are several factual disputes, none of them were material to the trial court's January 12, 2011 ruling that Mrs. Huddleston's damages were remote, contingent, and/or speculative and not recoverable under Michigan law. Plaintiff-Appellee timely tiled a motion for reconsideration. Thereafter, the trial court denied the motion on March 14, 2011. The Court filed an amended order and opinion on March 23, 2011 denying Plaintiff-Appellee's motion for reconsideration.

Following denial of the motion for reconsideration, Mrs. Huddleston timely filed a claim of appeal with the Court of Appeals. On September 11, 2012, following review of the parties' briefs and having heard oral argument, the Court of Appeals issued a per curiam opinion. Judge Talbot issued a separate opinion concurring in part and dissenting in part. Judge Talbot dissented with the Court of Appeals opinion regarding the existence of a compensable injury. (The Court of Appeals Opinions are attached as Appendix AA).

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT MRS. HUDDLESTON'S CLAIMED DAMAGES ARE REMOTE, CONTINGENT, AND/OR SPECULATIVE AND MRS. HUDDLESTON HAS NO VALID CLAIM FOR COMPENSABLE INJURY. THE COURT OF APPEALS DECISION IS ERRONEOUS AND NOT BASED ON MICHIGAN LAW

A. Mrs. Huddleston's Own Expert Testified That She Has Suffered No Harm

Mrs. Huddleston claims that her damages are based on the total loss of her left kidney (Plaintiff-Appellant's Brief, pp. 17, 20). It is undisputed that Mrs. Huddleston would have lost at least a portion of her kidney if a diagnosis of kidney cancer had been made in 2003 (Transcript of Motion for Summary Disposition Hearing, p. 13, Exhibit H). While Dr. Leon and IHA deny that Mrs. Huddleston would have been a candidate for a partial nephrectomy in 2003 or that the Defendant-Appellees were negligent, the trial court was required to accept the facts in the light most favorable to Mrs. Huddleston. Nonetheless, Mrs. Huddleston did not and cannot prove that she suffered any harm as a result of any action or inaction of the part of Dr. Leon and IHA.

The undisputed evidence is that Mrs. Huddleston's kidney function is excellent and completely within normal limits (Deposition of Mrs. Huddleston, p. 57, Exhibit I). Dr. Leon and IHA's motion was also based on the undisputed testimony of Mrs. Huddleston's urology expert, Dr. Steven Jensen. Dr. Jensen testified that Mrs. Huddleston sustained no harm as a consequence of having a total nephrectomy in 2008 rather than a partial nephrectomy in 2003.

Q. So long as Mrs. Huddleston's creatinine values continue to remain within normal limits and there is no clinical sign of renal dysfunction, would you agree with me that there is no harm to Mrs. Huddleston by the fact that she underwent a radical nephrectomy rather than a partial nephrectomy in 2003?

A. Correct, assuming those premises.
(Deposition of Dr. Jensen, pp. 25-26, Exhibit G).

Although Dr. Jensen recognized the possibility that Mrs. Huddleston could develop poorly controlled diabetes or hypertension which could harm her kidney, or that she could sustain trauma to the kidney from an automobile accident, Dr. Jensen also recognized that these are only theoretical complications (Deposition of Dr. Jensen, pp. 21-22, Exhibit G). Moreover, Dr. Jensen recognized that diseases which are potentially harmful to the kidneys can very well cause kidney failure in patients with two kidneys (Deposition of Dr. Jensen, p. 23, Exhibit G). Accordingly, the undisputed evidence and Mrs. Huddleston's own expert's testimony establish that Mrs. Huddleston claimed damages are not the legal and natural consequence of any alleged negligence.

B. Mrs. Huddleston Is Not Entitled To Damages For Theoretical Complications

As to the theoretical complications, Michigan case law is quite clear that Mrs. Huddleston is unable to recover damages for theoretical complications which have not occurred. *Sutter v. Biggs*, 377 Mich. 80, 139 NW2d 684 (1966). Allegations concerning the risk of disease or corresponding fear of contracting an illness are not recoverable. "[I]f the alleged damages cited by plaintiffs were incurred in anticipation of possible future injury rather than in response to present injuries, these pecuniary losses are not derived from an injury that is cognizable under Michigan tort law." *Henry v. Dow Chemical*, 473 Mich 63, 73, 701 NW2d 684 (2005). Mrs. Huddleston's counsel conceded the issue of potential future damage to her remaining kidney. (See, Plaintiff-Appellant's Response to Defendants-Appellees' Motion for Summary Disposition, p. 9.) Mrs. Huddleston's counsel also confirmed at the hearing that damages for "what the future might hold" are not recoverable.

MR. BRAZEAU:

* * *

The most prominent point, I guess, to start with is that there's no dispute from what I could read from the plaintiff's brief that as to damages based upon what the future might hold in terms of that something could happen to this other kidney or that she may, in the future, not have a normal kidney function because of trauma or whatever it may be, based upon the Sutter (ph) case which as [sic] been extensively discussed in the briefs, there's no basis for recovery. And, I believe if you read the plaintiff's brief they concede as much.

THE COURT: That's what I – do you agree counsel?

MR. SCHREIER: I'm looking at page nine of the brief and I hasten to add that I happened to write this page, and in there I talk about Sutter and conclude with the comment that would be consistent with what Mr. Brazeau just said.

THE COURT: All right. So, that's no longer an issue.
(Transcript of Motion for Summary Disposition Hearing, p. 5).

C. Mrs. Huddleston Required Surgery

Mrs. Huddleston claims that she “has experienced the loss of her left kidney as well as the mental anguish as a result of the delay in the diagnosing of kidney cancer and fear of metastasis from the unrelated stomach tumor” (Plaintiff-Appellant's Brief to the Court of Appeals, p. 15). It is critical to note that Mrs. Huddleston was never going to have two normal kidneys. Even if the kidney cancer had been diagnosed in 2003, surgery to remove at least part of the kidney was required. Moreover, there has been no evidence offered by Mrs. Huddleston that the delay in treatment of the kidney cancer had affected her probability of cure or of a causal connection between the stomach tumor and the kidney cancer. On the contrary, Mrs. Huddleston's brief acknowledges that she “learned that it was not metastatic renal cell carcinoma” (Plaintiff-Appellant's Brief to the Court of Appeals, p. 5). Mrs. Huddleston must show a causal connection between the alleged breach of the standard of care and the claimed

damages. In this case, Mrs. Huddleston's unrealized fears allegedly causing mental anguish are not causally connected to the alleged negligence and, therefore, constitute remote, contingent, or speculative damages, which are not recoverable under Michigan law.

D. Sutter v. Biggs

Mrs. Huddleston, IHA of Ann Arbor, P.C. – Cherry Hill and Trinity Health-Michigan d/b/a Sisters of Mercy Health Corporation and/or St. Joseph Mercy Hospital – Ann Arbor all relied heavily on the *Sutter* case in support of their arguments regarding summary disposition and at the Court of Appeals. *Sutter v. Biggs*, 377 Mich. 80, 139 N.W.2d 684 (1966). Nonetheless, there are important distinctions between this case and *Sutter*. First, in *Sutter*, the plaintiff was subjected to a medical procedure, the removal of one of her fallopian tubes, without her consent. The opinion in *Sutter* makes no reference to any disease or any other reason for the removal. As such, the removal of the first fallopian tube constituted a battery. Nineteen years later, in connection with a surgery to remove the second fallopian tube, it was discovered that plaintiff's first fallopian tube had been removed. The Court refused plaintiff's requests for instructions regarding the loss of the ability to bear children and plaintiff's claimed associated emotional damages.

The general rule, expressed in terms of damages, and long followed in this State, is that in a tort action, the tortfeasor is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated. Remote contingent, or speculative damages are not considered in conformity to the general rule.

Sutter v. Biggs, 377 Mich. 80, 86, 139 N.W.2d 684, 686 (1966) (citations omitted).

Here, as in *Sutter*, Mrs. Huddleston has presented no evidence of any injuries which are the legal and natural consequences of the alleged wrongful acts of Dr. Leon, IHA of Ann Arbor, P.C. – Cherry Hill and Trinity Health-Michigan d/b/a Sisters of Mercy Health Corporation and/or St. Joseph Mercy Hospital – Ann Arbor. Mrs. Huddleston conceded that surgery was necessary, whether done in 2003 or 2008, and she was never going to have two normal functioning kidneys. Mrs. Huddleston’s claimed emotional damages from fears and concerns regarding theoretical complications such as possible metastasis and loss of cure are not recoverable under Michigan law, as set forth in *Sutter*.

Ironically, the Court of Appeals below concluded that *Sutter* actually supports the proposition that Mrs. Huddleston should be allowed to pursue her claim for damages without evidence of injury because the “*Sutter* jury had to find that the plaintiff was injured in some way . . . to award her damages. (Emphasis added). Notwithstanding that the Court of Appeals recognized that removal of the duplicative organ in *Sutter* was done without consent, the Court of Appeals failed to observe that the damages award without evidence of injury in *Sutter* was legally sound in that a battery claim requires no actual evidence of injury to sustain the cause of action. 1 *Michigan Civ Jur Assault and Battery* §17 Harm of Injury.

E. *McClain v. Univ. Of Mich. Brd. Of Regents*

Mrs. Huddleston first relied upon *McClain v. University of Michigan Hospital* in support of her arguments to the Court of Appeals.² *McClain v. Univ. of Mich. Brd. of Regents*, 256 Mich. App. 492, 665 N.W.2d 484 (2003). Even if this Court were to consider the *McClain* case, *McClain* is clearly distinguishable from the facts of Mrs. Huddleston’s case. The Court in

² Plaintiff-Appellee has attempted to improperly expand the record. As such, the Court of Appeals’ review was limited to the record established by the trial court, and a party may not expand the record on appeal. *Reeves v. Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

McClain recognized that Michigan law holds that “a miscarriage caused by another person’s negligence, e.g., medical malpractice, constitutes an injury to the mother for which recovery may be had in a tort action.” *Id.* at 496. In this case, Mrs. Huddleston has experienced no harm whatsoever from the delay in the diagnosis of her kidney cancer as recognized by her own expert, who testified as to the lack of harm and the fact that the patient does not appreciate that she only has one kidney (Deposition of Dr. Jensen, pp. 25-26, Exhibit G). As such, Mrs. Huddleston cannot and did not point to any damages that are the natural and legal consequence of the alleged negligence.

F. The Court of Appeals Decision Based on Concerns of “The Potential Implications in Giving a ‘Pass’ to Malpractice that Occurs in the Case of One of a Pair of Duplicative Organs” is Clearly Erroneous and Will Cause Material Injustice. The Court of Appeals Decision Ignores Mrs. Huddleston’s Expert’s Testimony that She Suffered No Harm.

The Court of Appeals majority opinion failed to mention Dr. Jensen’s testimony that Mrs. Huddleston suffered no harm as a result of any alleged malpractice. While Dr. Leon and IHA vehemently deny the allegations of any malpractice, even if Mrs. Huddleston could prove a breach of the standard of care, she presented no evidence of a reasonable basis for the computation of damages. As Judge Talbot correctly recognized:

Here, the testimony of Huddleston’s own urology expert, Steven Jensen, M.D., establishes that Huddleston’s damages are speculative, and thus she is not entitled to recovery....

The evidence supports that after the total nephrectomy, Huddleston was cancer free and her remaining kidney was functioning within normal limits....Jensen advised that Huddleston had not suffered any harm, but could suffer harm in the future because she had one kidney....

Additionally, Huddleston’s argument that the alleged delay in diagnosis caused her to suffer mental anguish lacks merit. There was no evidence presented that the mental anguish Huddleston

allegedly experience was proximately caused by the negligence claimed in this case and not by the diagnosis of cancer itself.
(Dissenting Opinion of Judge Talbot, p. 2-3, *citing, Pennington v. Longabaugh*, 271 Mich App 101, 104, 719 NW2d 616 (2006))

On the other hand, the majority opinion of the Court of Appeals permits Mrs. Huddleston to present evidence of speculative damages based on “the potential implications in giving a ‘pass’ to malpractice that occurs in the case of one of a pair of duplicate organs.” The majority opinion permits recovery of damages that are remote, contingent, or speculative in violation of Michigan law. *See, Theisen v. Knake*, 236 Mich App 249, 258; 599 NW2d 777 (1999), *citing, Sutter, supra*. As such, the Court of Appeals decision is clearly erroneous, conflicts with the decisions of this Court and other decisions of the Court of Appeals, and will cause material injustice to the Dr. Leon and IHA. Proof of damages with reasonable certainty is an essential element of the prima facie case of negligence or malpractice under Michigan law. The Court of Appeals majority decision does not require Mrs. Huddleston to provide any evidence to survive a summary disposition motion.

RELIEF REQUESTED/CONCLUSION

For all of the foregoing reasons, Defendants-Appellants Dr. Leon and IHA request this Court reverse the Court of Appeals decision dated September 11, 2012 and affirm the Circuit Court's January 12, 2011 Order Granting Summary Disposition to the Defendants-Appellants, as well as the Orders Denying Motion for Reconsideration of the Court's Decision entered on March 14, 2011 and March 23, 2011.

Respectfully submitted,

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