

MEDICAL MALPRACTICE UPDATE

January 2005

THE CONTINUING EVOLUTION OF THE LOST OPPORTUNITY DOCTRINE

By: Mark A. Gilchrist, Attorney

On January 11, 2005 the Michigan Court of Appeals released Klein v Kik, ___ Mich App ___; ___ N.W.2d ___ (2005 WL 49656), adding another opinion to the continually evolving lost opportunity to survive/achieve a better result doctrine. While this doctrine continues as a viable and valuable defense to a plaintiff's allegations of proximate cause within the context of a medical malpractice lawsuit, it is also considered too restrictive by many and remains controversial in both the courts and Legislature.

A. The Lost Opportunity Doctrine

The Legislature codified the lost opportunity doctrine in MCL 600.2912a(2) in response to the Michigan Supreme Court's ruling in Falcon v Memorial Hosp, 436 Mich 443; 462 N.W.2d 44 (1990). As amended, the statute states as follows:

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 initial inquiry, as framed by the Court of Appeals in Fulton v Beaumont Hosp, 253 Mich App 70, 83-84; 655 N.W. 2d 569 (2002), involved whether the second sentence of the statute required only that a plaintiff establish that the lost opportunity prior to the alleged malpractice was greater than fifty percent, or that the lost opportunity was reduced by greater than fifty

percent. According to Fulton, the intent of the Legislature was to require plaintiffs in medical malpractice actions to establish that the reduction of their lost opportunity exceeded 50%.

By way of example, assume that an untimely diagnoses of cancer admittedly reduced a plaintiff's opportunity to survive (or achieve a better result) from 84% to 35%. According to a Fulton analysis, the plaintiff in this scenario could not establish proximate cause as their lost opportunity to survive (or achieve a better result) was only 49%. Change those percentages to 85% and 34% respectively, and the plaintiff can sustain their burden of establishing proximate cause as the lost opportunity now equals 51%.

B. Established Law or Impending Reversal?

The first post-Fulton Court of Appeals panel to address the lost opportunity doctrine in the Court of Appeals cast serious doubt as to the long-term viability of this defense. Specifically, in Ensink v Mecosta County General Hosp, 262 Mich App 518; 687 N.W.2d 143 (2004), the court, while upholding Fulton, made it clear in no uncertain terms that it sought reversal of the Fulton rule. In fact, the rule appeared so tenuous that the Chief Judge of the Court of Appeals polled each judge on the Court to determine if a conflict panel was necessary to revisit the rule outlined in Fulton. The vote apparently ended in a tie and the attempt to amend the lost opportunity doctrine was, at least temporarily, on hold. Ensink v Mecosta County General Hosp, 262 Mich App 801; 687 N.W.2d 901 (2004). The Ensink plaintiff has since appealed the decision to the Michigan Supreme Court. To date, the court has not decided whether it will hear the case.

More recently, the Court of Appeals addressed the lost opportunity doctrine again, however this panel upheld the rule without castigating the Fulton decision. In Klein v Kik, ___ Mich App ___; ___ N.W.2d ___ (2005 WL 49656), the Court held that the alleged malpractice in failing to diagnose, which allowed plaintiff's lung cancer to metastasize unabated for three and one-half months, decreasing the plaintiff's chance of survival from 75% to 30%, was insufficient to establish proximate cause under the lost opportunity doctrine. This decision appears to firmly, if only temporarily, entrench the lost opportunity doctrine as initially offered by the Michigan Court of Appeals in Fulton.

However, in addition to its ongoing appeal in Ensink, there has been activity in the Legislature to amend MCL 600.2912a and eliminate the legal

underpinnings for the Fulton rule. In 2003, Senate Bill No. 633 was introduced, which if passed into law would eviscerate the holding in Fulton by allowing a plaintiff to recover damages in proportion to their lost opportunity to survive or achieve a better result. To date the bill has not reached the Senate floor for vote.

While the lost opportunity doctrine remains as a valuable defense to a plaintiff's allegations of proximate cause it is, without question, controversial and under attack in both the courts and the Legislature. This is certainly an area of the law that remains in flux and, given its importance in defending medical malpractice claims, merits continued close attention by the defense bar.

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CASE LAW UPDATE

Edited by: Robert W. Tubbs, Attorney

AFFIDAVIT OF MERIT/STATUTE OF LIMITATIONS

Miller v Kezlarian, Mich. Ct. App., December 28, 2004 (unpublished). The Court held that where the defendant physician is board certified and the plaintiff's affidavit of merit is signed by a physician who is not board certified, the affidavit is grossly nonconforming to the statutory requirements and, therefore, does not toll the running of the statute of limitations. Plaintiffs' assertion that they reasonably believed the expert to be qualified to give expert testimony was without merit because they had made no inquiry into the expert's qualifications to sign the affidavit of merit. Because the statute of limitations had run at the time plaintiffs re-filed their complaint with a conforming affidavit of merit, defendant was entitled to a dismissal of the action.

GREWE LIABILITY/AFFIDAVIT OF MERIT/ BANKRUPTCY STAY

Putnam v Sezgin, et. al., Mich. Ct. App., December 2, 2004 (unpublished). In its opinion, the Court addressed several issues pertaining to medical malpractice claims. First, the court affirmed summary disposition in favor of defendant hospital on plaintiff's vicarious liability claim. The medical records indicated that plaintiff had established a relationship

with the defendant physician several months before his admission to the hospital. Defendant physician was not an employee of the hospital and plaintiff presented no facts to support a claim that defendant physician was an actual or ostensible agent of the hospital or that by some act or neglect on the part of the hospital he had a reasonable belief that the physician was an agent of the hospital. Second, summary disposition was appropriate for the reason that suit was not properly commenced against defendant hospital. Plaintiff alleged a direct action against the hospital for its failure to adopt and enforce appropriate policies and procedures. These are questions of professional medical management and, therefore subject to the procedural requirements of a medical malpractice claim. Plaintiff failed to file an affidavit of merit setting forth the applicable standards, what standards were breached, the actions that the hospital should have taken to comply with the standards, and the manner in which the breach by the hospital was the proximate cause of plaintiff's injuries. The affidavit addressing the physician's negligence was insufficient against the hospital. Furthermore, the defendant physician was a neurosurgeon and the affidavit of merit was signed by an orthopedic surgeon. Third, during the 182-day notice of intent period, defendant physician filed for bankruptcy. An

automatic stay was issued. During the stay period the statute of limitations expired. However, pursuant to 11 USC 108(c), a medical malpractice claim may be filed if done so within 30 days after notice of the termination of the bankruptcy stay. Plaintiff did not file his complaint within the 30 day period and, therefore, summary disposition was appropriately granted.

AFFIDAVIT OF MERIT/STANDARD OF CARE/ REMITTITUR

DiFalco v Dock, et. al., Mich. Ct. App., December 16, 2004 (unpublished). This was a claim for medical malpractice in which plaintiff alleged that she was required to undergo more extensive chemotherapy due to a delayed diagnosis of her ovarian cancer. The jury returned a verdict in favor of plaintiff in the amount of \$250,000 which was subsequently reduced to \$125,000 by the trial court. Both sides appealed. The Court first held that although the physician who signed plaintiff's affidavit of merit was not actively engaged in the practice of gynecology for the year immediately preceding the alleged malpractice (based on the physician's deposition testimony), the affidavit was not defective because someone (an expert witness consultant) acting on plaintiff's counsel's behalf had made a specific inquiry to the physician as to the nature of his practice and was told that he had continued to practice gynecology two years after the alleged malpractice. Therefore, plaintiff's counsel had a reasonable belief that the physician was qualified to sign the affidavit of merit. Second, although plaintiff's expert testified as to what he himself would have done under the circumstances existing in this case, he also made objective statements as to what the standard of care required and that, unequivocally, it required a timely ultrasound. This was sufficient to allow the issue to go to the jury. Finally, the trial court did not abuse its discretion in granting defendants' motion for remittitur. It was appropriate to conclude that plaintiff should not have been awarded damages for pain and suffering for undergoing any chemotherapy, but only damages caused by the more extensive chemotherapy necessitated by the delayed diagnosis. The judgment of the trial court was affirmed.

CLAIM FOR LOST OPPORTUNITY TO SUE

Federspiel v Endicott, DDS, Mich. Ct. App., December 16, 2004 (unpublished). Plaintiffs claim

they lost the opportunity to file a dental malpractice action because they were not provided copies of their dental records prior to the expiration of the applicable statute of limitations. The trial court denied defendant's motion for summary disposition. In reversing the trial court decision, the Court of Appeals held that the plaintiffs failed to show the records were necessary in order to commence a timely action or file a notice of intent. It was not the failure of defendant to provide that dental records that barred plaintiffs' claims, but rather the plaintiffs' failure to provide the requisite notice of intent. In addition, the plaintiffs did not allege any facts supportive of a successful underlying malpractice action.

STATUTE OF LIMITATIONS

Walno v Asmeh, M.D., et. al., Mich. Ct. App., October 5, 2004 (unpublished). Plaintiff filed a medical malpractice action claiming that her ward suffered damages as a result of the alleged professional negligence of the defendant health care providers. The alleged malpractice occurred on January 28, 1998 and February 7, 1998. The notice of intent was filed on March 8, 2001 and the complaint was filed on September 5, 2001. Defendants' motions for summary disposition were granted on the basis that plaintiff's claims were barred by the statute of limitations. Plaintiff appealed and the Court of Appeals reversed. Although the period of limitations is two years for a claim alleging professional malpractice, if a person is "insane at the time the claim accrues," he shall have one year until after the disability is removed to bring an action. Under this situation, the plaintiff has the burden to present some facts that raise the question of insanity. Here she sufficiently raised an issue as to the ward's ability to comprehend her rights both before and after the surgery on January 28, 1998 and before the surgery on February 7, 1998. Because defendant did not incontrovertibly establish that the ward was not insane, the issue of whether the ward was able to comprehend her rights at the time her claim accrued was one for the jury, and not the judge, to determine.

Ousley v McLaren, ___ Mich App ___ (2004). Plaintiff's decedent died on May 11, 1997. Plaintiff was appointed personal representative of the decedent's estate on April 30, 2002. He subsequently served defendants with a notice of intent on May 2, 2002 alleging that the decedent's death resulted from medical malpractice and filed a summons and

complaint on October 14, 2002. Defendants' motions for summary disposition were granted and the Court of Appeals affirmed. MCL 600.5805 provides that the statute of limitations for claims of malpractice is two years. MCL 600.5852 provides a savings or extension period when a person dies before the period of limitations has run and allows the personal representative to file suit within two years after the letters of authority are issued, but no later than three years after the period of limitations has run. In this case, the complaint had to be filed no later than May 11, 2002. Contrary to plaintiff's assertions, there was no tolling during the pendency of the notice period. MCL 600.5852 is neither a statute of limitations nor repose and, therefore, MCL 600.5856(d), (which tolls the period of limitations or repose during the notice period) did not apply to extend the time limitations in this case.

Rick v Thumb Medical Imaging, P.C., et. al., Mich. Ct. App., October 26, 2004 (unpublished). Plaintiff underwent a mammogram on December 26, 2000 which was positive for a cancerous lesion. On October 8, 2001 she became concerned that a prior mammogram on October 21, 1999 had been incorrectly interpreted. She served defendants with a notice of intent on October 15, 2001, but did not file suit until May 2, 2002. Defendants moved for summary disposition. Plaintiff claimed she did not discover the alleged malpractice until October 8, 2001 and, therefore, the claim was brought within six months of the time she discovered or should have discovered the claim. In affirming the trial court's granting of defendants' motion for summary disposition, the Court of Appeals held that plaintiff should have been aware of her injury and its possible cause no later than December 26, 2000, the day she learned of the positive mammogram, and therefore the claim accrued at that time.

NEWSFLASH

In October 2004, **Chris Genther** and **Bill Henn** obtained summary disposition for a local hospital and family practice physician in Kent County Circuit Court. Plaintiff claimed that defendants' failed to diagnose and treat her impending catastrophic stroke rendering her a quadriplegic at the age of 31. Plaintiff's Affidavit of Merit failed to contain any causation paragraph as required by MCL 600.2912d, however. As a result, her case was dismissed with prejudice as the statute of limitations had expired.

2004 PA 409 took effect on November 29, 2004 which requires Medicaid recipients or their counsel to notify the Department of Community Health (DCH) and, if appropriate, a "Medicaid-contracted health plan" of any claim in which there might be a recovery of expenses paid and gives them first priority on any recovery after expenses and fees. The Act permits DCH or the Medicaid-contracted health plan to file legal action against the recipient or their legal counsel if the notification is not made.

Brian Kilbane has been appointed to the Board of Directors for the Allegan County United Way.

Cara Nieboer has been appointed to the board of directors for the Western Region of the Women's Lawyer Association of Michigan.

WHO WE ARE

A. Joseph Engel, III



Albert J. ("Joe") Engel, III is a shareholder with Smith Haughey Rice & Roegge, and chair of the medical malpractice practice group. Born in Muskegon, Joe is a graduate of Michigan State University and the University of Toledo Law School. He is a seasoned litigator, licensed in both Michigan and Colorado, and focuses his current practice in the areas of physician and institutional medical malpractice defense. Although his 25 years of practice have spanned the breadth of the medical legal spectrum, he has a particular interest in the areas of emergency medicine, radiology, cardiology, and primary care medicine.

Joe is an active member of the American, Michigan, Colorado, and Grand Rapids Bar Associations. He is a Fellow of the Michigan Bar Foundation, and a life member of the Judicial conference for the United States Court of Appeals. His other professional associations include the American Health Lawyers Association, Defense Research Institute (State Representative, 2000-2001), Michigan Defense Trial Counsel (President, 1999-2000), and the American and Michigan Societies for Healthcare Risk Management. Joe serves as a Circuit Court Case Evaluator in four West Michigan counties, and is a past instructor for the Hillman Trial Advocacy program. He is also a frequent lecturer on numerous physician and institutional risk management topics.

Joe is married to Doreen, and they have three sons, Griffin and twins Colin and Ethan. In addition to enjoying his family Joe is a rescue scuba diver, runner, bridge player, soccer referee, and an avid, all-seasons outdoorsman.

Kevin M. Lesperance



Kevin Lesperance was recently made a shareholder with Smith Haughey. Kevin practices in the Grand Rapids office of Smith Haughey, where he specializes in the defense on medical malpractice actions. He is the current Associate Member Director of the Michigan Society of Healthcare Risk Management. He is also an active member of the Valparaiso University School of Law Alumni Board, where he graduated magna cum laude in 1997. Kevin lived in Traverse City, Michigan, before attending the University of Michigan for his Bachelor of Arts degree.

Before joining Smith Haughey in 2001, Kevin practiced with a litigation firm in Chicago, where he also concentrated his practice on the defense of hospitals and healthcare practitioners. He is currently licensed to practice law in Michigan, Illinois, and Indiana, and is a member of the American, Michigan, and Indiana Bar Associations. He has published an article in the Defense Research Institute's national magazine.

Outside of work Kevin enjoys spending time with friends and family.

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