

MEDICAL MALPRACTICE UPDATE

October 2009

NEW LIFE FOR LOST CHANCE?

By Brian A. Molde, Attorney

Consider a plaintiff who is alive, but suffering from a disease that went undiagnosed as the result of medical negligence. Assume the plaintiff's 10-year life expectancy decreased from a survival expectancy of 51% to a survival expectancy of 2%. Assume she is 55-years-old.

Now apply the current rules to her lawsuit:

- a) A living plaintiff may not recover for loss of an opportunity to survive on the basis of a decrease in her chances of long-term survival.
- b) MCL 600.2912a (2) requires a plaintiff to show that the loss of the opportunity to survive or achieve a better result exceeds 50%.

As you read this article, Michigan law would likely prevent this lawsuit from proceeding. The plaintiff could not pursue a loss of opportunity to survive claim because she is alive. And, because the opportunity lost was not greater than 50 percentage points ($51 - 2 = 49$), Michigan law would not permit a claim for loss of opportunity to achieve a better result. However, signs from the Supreme Court suggest this scenario may soon find a new path.

The Michigan Supreme Court recently accepted applications for leave to appeal from the Court of Appeals in *Edry v Adelman* and *O'Neal v St. John Hosp & Med Center*, with the Court expressly seeking argument regarding the cases that established the rules in (a) and (b) above.

Predicting how the Supreme Court will decide these two cases is not an easy proposition. However, Justice Cavanagh wrote dissents (which were joined by Justices Kelly and Weaver) in both the *Wickens* and *Stone v Williamson* cases. The addition of Justice Hathaway to the bench in place of Chief Justice Taylor may well give Justice Cavanagh the four votes he needs to author a majority opinion in line with the dissents he wrote in the earlier cases.

If Justice Cavanagh convinces three others to adopt his perspective, what can we expect from the opinions due to be released next year? The *Edry* case may well change the law to allow claims of lost opportunity to achieve a better result based only upon a *decrease* in the chances of long-term survival. In *Wickens*, Justice Cavanagh wrote:

"I believe that a living person may recover for injuries suffered as a result of learning of a reduction in life expectancy as a loss of an opportunity to achieve a better result and that the evidence concerning plaintiff's reduced life expectancy is relevant to whether defendant caused these injuries" [*Wickens*, 465 Mich at 63.]

Justice Cavanagh would have held in that case that the damages arising out of the plaintiff's discovery of her reduced life expectancy (pain and suffering) are recoverable as present compensable injuries. All the justices agreed that damages for the future injury (premature death) were not compensable because that injury

(death) had not yet been suffered by the plaintiff. Thus, while the *Edry* case may change the law to allow a living plaintiff to recover damages for learning of a loss of life expectancy, the recoverable damages will likely be limited to the present injuries suffered rather than for damages which may occur in the future.

A more striking change to the law may result from the Supreme Court's review of the *O'Neal* case, which concerns the broader interpretation of Michigan Compiled Law 600.2912a. Presently, the law requires a simple mathematical formula to determine if a plaintiff may sue for loss of opportunity to survive or to achieve a better result. The reviewing court subtracts the opportunity to survive which remains after the negligence from the opportunity the plaintiff would have had, absent the negligence. If the result is less than fifty percentage points, the claim is barred under current law. That interpretation of the statute has caused a great deal of controversy. The most recent Supreme Court decision was a fractured 3-3-1 decision that kept the law unchanged but left a great deal of doubt regarding its chance of survival. With the recent realignment of the Court, it is not much of a stretch to see Justice Cavanagh's dissent in *Stone* becoming the new majority opinion.

Justice Cavanagh's opinion in *Stone* is that the Legislature intended to create a rule barring claims for lost opportunity *only* if the original opportunity to survive or achieve a better result was less than 50%. In other words, only claims in which the plaintiff's chances to avoid a poor outcome were 'better than even' could create causes of action. Also, Justice Cavanagh's dissenting opinion would re-define the actual injury to be the lost opportunity. By defining the terms in this way, Justice Cavanagh avoids the mathematical formula used in prior cases.

For example, assume that the plaintiff in our hypothetical passes away from her disease. Under current law, her claim would still be barred, because her lost opportunity to survive was only 49% (51% original opportunity, 2%

opportunity after negligence, resulting in a 49% "lost" opportunity). Justice Cavanagh's dissent would have changed the law so that it would only require an original opportunity greater than 50% and proof that medical negligence proximately caused some degree of loss of opportunity. The measure of damages is a 49% decrease in her opportunity to survive. Thus, our hypothetical plaintiff's claim would survive if *O'Neal* is decided consistent with Justice Cavanagh's dissent.

The remaining question is how the Supreme Court will instruct lower courts to calculate damages. In cases like *Wickens*, the measure of damages seems clear – no compensation for future potential injuries, but compensation for emotional damages and any injuries already suffered. Other loss of opportunity claims will likely be compensated by apportionment of the damages based on the opportunity lost. Thus, in our hypothetical, the plaintiff would be able to recover 49% of the damages because that is the injury suffered by the plaintiff. The distinction between this approach to damages and traditional recovery of 100% of the damages lies in the unique nature of a claim for loss of opportunity. Because the loss of opportunity to avoid the result is the injury, (rather than the result itself), full compensation would be inappropriate. Indeed, lost opportunity cases are by definition cases in which a plaintiff cannot prove that the result was more likely than not caused by the negligence. Put another way, they are cases in which a plaintiff can only prove that the negligence more likely than not caused a decreased opportunity to avoid a bad result. The measure of damage is the value of the loss of opportunity.

Exactly how those damages are calculated is likely to be the subject of much argument in the years to come, assuming that Justice Cavanagh's approach prevails in the future.

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CASE LAW UPDATE

April 28, 2009 – October 22, 2009

Edited by: Megan Smith, Summer Associate; Lindsay Weber, Law Clerk;
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Michigan Supreme Court

Wilcox-Bey v. Providence Hospital, July 28, 2009
Plaintiffs' claim related to the care and monitoring received during a mother's rare, high-risk monoamniotic-monochorionic twin pregnancy, which resulted in the death of one twin and severe brain injury to the other. The plaintiffs' expert contended that daily fetal monitoring was the applicable standard of care and would have prevented the poor outcome. The trial court award stipulated damages of \$3 million following a bench trial. On appeal, defendants raised causation and standard of care issues. The Court of Appeals reversed, finding plaintiffs failed to prove causation. The Supreme Court reversed and reinstated the trial court's order denying summary disposition with regard to causation. The Court found that there was sufficient evidence showing daily fetal monitoring is effective in detecting cord compression and fetal distress. The Court remanded the case to the Court of Appeals for consideration of the adequacy of the standard of care proofs. On remand, the Court of Appeals found that Plaintiffs' expert's standard of care testimony satisfied the requirements for admission.

Symons v. Proding, July 28, 2009

In an order in lieu of granting leave to appeal, the Supreme Court reversed the Court of Appeals and reinstated the trial court's order denying Defendant Proding's motion for judgment notwithstanding the verdict. The trial court had instructed the jury that its decision as to physician assistant Defendant Russell's negligence would also determine Proding's responsibility. Since Proding did not object to that jury instruction, he could not disclaim vicarious liability for Russell's negligence. Even though the plaintiff did not plead a cause of action based on vicarious liability against Proding in the complaint, "the Court of Appeals dissent correctly noted that under MCR

2.118(C) (1), issues that are tried by express or implied consent of the parties, even though they are not raised in the pleadings, are treated as if they had been raised by the pleadings."

Bush v. Shabahang, July 29, 2009

In an issue of first impression, the Supreme Court addressed the interpretation of MCL 600.5856(c) and its interrelationship with MCL 600.2912b. The court held that under 5856(c), as amended in 2004, when a notice of intent (NOI) is timely and the plaintiff makes a good-faith effort to conform to the requirements of 2912b, the statute of limitations is tolled despite defects contained in it. The Court reasoned that the purpose of the NOI statute is better served by permitting NOI defects to be addressed in light of MCL 600.2301 allowing "amendment" or "disregard" of "any error or defect" where the substantial rights of the parties are not affected and the cure is in furtherance of justice and on just terms. A cure is in furtherance of justice "when a party makes a good-faith effort to comply with the current requirements of 2912b." Thus, a trial court should only consider dismissal of an action with prejudice where a plaintiff has not made a good-faith attempt to comply with the content requirements of Section 2912b (4). The Supreme Court also held that a plaintiff may take advantage of the 154-day waiting period provided in Section 2912b (8) where a defendant fails to make a good-faith effort to reply to the plaintiff's NOI in compliance with the statutory requirement. However, a plaintiff does so at his or her own peril such that "if a court ultimately determines that the response is not defective, plaintiff's complaint may be deemed untimely." A defendant who makes a good-faith attempt to comply with the content requirements of Section 2912b (7) may avail himself of Section 2301, which allows for

amendment or disregard of defects.

Potter v. McLeary, July 31, 2009

The Supreme Court interpreted the requirements for a notice of intent (NOI) in relation to a medical malpractice claim based on vicarious liability for a professional corporation (PC). A claim against a PC sounds in malpractice when the claim asserted is based on the PC rendering professional services. Therefore, a medical malpractice claimant must provide a timely NOI to a PC before commencing an action where the claims against a PC are predicated on its vicarious liability for a health care provider rendering professional services. Where the only claim asserted against a PC is vicarious liability and no other standard of care claim is being asserted against the PC, the law does not require a claimant to set forth the legal doctrine of vicarious liability or the legal relationship between the named parties in the NOI. An NOI is fully compliant if it names both the PC and provider and it sets forth all the factual and medical information necessary to inform the PC of the nature of the claim being asserted against its alleged employee/agent.

Michigan Court of Appeals

Kiefer v. Markley, April 28, 2009 (published opinion)

The Court of Appeals affirmed the trial court's decision striking the plaintiff's hand surgery expert, citing the unambiguous language of MCL 600.2169(1)(b). The statute requires that an expert witness devote "a majority of his or her professional time" to the relevant specialty. The Court held that devoting a "plurality" of time, here 30-40%, did not meet the statutory threshold for qualification as an expert.

Kidder v. Ptacin, June 2, 2009 (published opinion)

In this wrongful death case, the trial court granted defendant's motion for summary disposition based on the statute of limitations. On appeal, the Court affirmed the dismissal. A new development in case law prompted plaintiff to petition for a reinstatement of her case. The trial court granted plaintiff's motion based on the law authorizing relief from judgment where "a prior judgment on

which it is based has been reversed or otherwise vacated". The Court of Appeals reversed and held that the plaintiff's failure to appeal the initial appellate court decision affirming dismissal made that opinion the law of the case, which the trial court was obligated to follow. The Court of Appeals found that the law "envisions a court relieving a party from its own judgment, not the judgment of a higher authority."

Esselman v. Garden City Hospital, June 4, 2009 (published opinion)

In consolidated appeals, the defendants appealed orders denying their respective motions for summary disposition arguing that plaintiff's notice of intent and affidavits of merit were insufficient. Plaintiff's notice of intent was 14 pages long and included a long factual recitation of the treatment provided by various individuals as well as the act and errors of the individual defendants. In affirming the lower court's denial of summary disposition, the Court of Appeals found that the notice of intent statute requires neither multiple nor particularized standards of care for individual defendants. A notice of intent is sufficient if it provides a statement and notice of what is being claimed against each defendant. The court also held that even if a section of the affidavit of merit does not adequately address proximate cause, "the dispositive question is whether the affidavit as a whole nevertheless explains how the alleged malpractice proximately caused the injury."

Yimoff v. WA Foote Hospital, July 16, 2009 (published opinion)

The plaintiff claimed malpractice based on nursing care received after aortofemoral bypass surgery, and their failure to contact the surgeon regarding signs of vascular emergency. The plaintiff claimed the nursing staff should have alerted the surgeon to the symptoms of a clot and that earlier contact would have avoided or reduced residual impairment. After an adverse verdict, the defendant hospital appealed the trial court denial of their motion for judgment notwithstanding verdict (JNOV) or a new trial based on proximate cause. The defendant asserted the clot formed only minutes before symptoms became evident and that any residual impairment resulted from the necessity of prolonged clamping of blood flow

during surgery due to the severity of the blockage. In a split opinion, the Court of Appeals found that the matter was properly submitted to the jury because proximate cause hinged on the credibility of the treating surgeon's testimony.

Ligons v. Crittenton Hosp., August 18, 2009
(published opinion)

The decedent, 54-year-old woman who had recently undergone a colonoscopy, began experiencing vomiting, diarrhea, chills, and fever. Defendant subsequently treated her for gastroenteritis and dehydration. However, she was later diagnosed with peritonitis, developed sepsis, multiple organ failure, and died. Plaintiff was appointed PR on February 22, 2005. On June 8, 2005, plaintiff served Notices of Intent (NOIs) on defendants. Supplemental NOI's were served on October 21, 2005. Plaintiff filed suit on April 7, 2006. The defendant challenged the sufficiency of the NOI's and the affidavits at the trial court level, and lost. The Court of Appeals agreed that the original NOI's were insufficient but ruled the supplemental NOI's corrected the defects. However, the Court went on to hold that the affidavits of merit were defective and thus dismissal was required. Since the wrongful death saving period was not tolled and because the statute of limitations had since expired, the dismissal was with prejudice.

Shields v. McLachlan, August 18, 2009
(unpublished opinion)

A 66-year-old plaintiff who lived alone had surgery to remove his big toe. Three days after he was discharged home, he fell and broke his hip. Plaintiff's theory was that defendants' failure to conduct proper discharge planning proximately caused his fall and injury. He served a Notice of Intent (NOI) on the hospital and subsequently filed a complaint with an affidavit of merit (AOM). The plaintiff repeatedly referenced the doctor and the ancillary support staff of the hospital, as well as the negligence of the social services and therapy departments in their assessment of plaintiff's home environment. The hospital moved for summary disposition arguing the NOI and AOM did not comply with statutory prerequisites. The

motion was denied. The Court of Appeals affirmed the trial court's ruling as to the hospital and treating physician, but held that plaintiff was precluded from pursuing vicarious liability against the hospital for the conduct of unidentified ancillary staff.

Clemons v. Cairgle, September 24, 2009
(unpublished opinion)

Plaintiff's theory was that during birth, the child suffered a shoulder injury, Erb's Palsy, as a result of shoulder dystocia (SD). Plaintiff argued the defendants' failure to inform her of the option of delivering by C-section proximately caused the child's injury. In granting summary disposition, the trial court held that plaintiff failed to present admissible evidence creating a genuine issue of material fact as to whether injury had actually occurred. The Court of Appeals disagreed, holding that the diagnosis of SD has a subjective component and that on these facts, plaintiff presented sufficient evidence to establish a question as to whether a related injury had occurred.

Shivers v. Schmiede, September 29, 2009,
(published opinion)

Plaintiff was a 70-year-old man who had been admitted to the hospital to have his bladder removed. During surgery a blood vessel was injured. When the patient awoke from the anesthesia he experienced weakness in both his hands. The condition did not improve and the doctors subsequently performed an emergency decompressive cervical laminectomy. Due to these events the plaintiff required significant attendant care. At trial, the jury returned a verdict finding the defendant doctor negligent and found that her negligence was a proximate cause of plaintiff's injuries. The jury awarded past and future economic and non-economic damages totaling \$1,750,500. The trial court denied defendant's request for judgment notwithstanding verdict (JNOV). The Court of Appeals concluded that plaintiff presented sufficient evidence to establish the likelihood of future economic damages; however, he did not present evidence on how to calculate those damages and, therefore, the court vacated the

\$522,000 economic damage award. It also upheld the trial court's ruling that the higher cap applied because the degree of lost extremity use made him a "paraplegic" using the definition that includes "paralysis of both arms."

Lockridge v. Oakwood Hosp., October 8, 2009
(published opinion)

While walking to the bus stop plaintiff's 14-year-old son developed chest pains, had difficulty breathing, vomited, and couldn't maintain balance. At the emergency room, defendant doctor concluded that the boy was suffering from anxiety and hyperventilation, and treated him with medication. The child later died in his sleep, and an autopsy revealed an aortic dissection. Plaintiff's expert opined that, given the boy's symptoms, the defendant doctor was required to order a chest x-ray, which would probably have revealed the presence of an aortic abnormality. The defendant argued that he did not consider that diagnosis because he had never heard of an aortic dissection in a pediatric patient. At trial, the jury returned a verdict in plaintiff's favor, awarding \$150,000 for past damages and \$150,000 for future loss of society and companionship. On appeal, the court concluded that that an unforeseeable diagnosis does not relieve a physician from liability if the patient's actual condition could have been diagnosed had the physician otherwise complied with the standard of care.

Ellout v. Detroit Med. Ctr., October 8, 2009
(published opinion)

The issue in this case was whether plaintiff's suit was barred because the complaint was filed before the end of the 154/182-day no suit period in Section 2912b. Defendant nurse's actions were the basis of the claim against the other defendants. Plaintiff sent defendant nurse a notice of intent (NOI) on July 28, 2006, and filed a complaint against the nurse on December 27, 2006, waiting less than 154 days after sending the NOI. However, plaintiff had previously sent NOI's to the other defendants and the complaint was timely as to them. Plaintiff moved to voluntarily dismiss the nurse, which the trial court denied. The trial court then held that plaintiff's filing against the nurse

prior to the expiration of the 154/182-day period required a dismissal with prejudice as to the nurse, which constituted adjudication on the merits as to the other defendants. The Court of Appeals, based on *Bush*, reversed the trial court's grant of summary disposition to the other defendants, reinstated the complaint, and ordered the trial court to enter an order dismissing the claim against the nurse without prejudice.

Zwiers v. Growney (October 22, 2009)

Plaintiff alleged she sustained injuries due to defendant's negligent placement of a morphine pump. She served her NOI on the defendants on August 30, 2007, and filed her complaint and AOM on February 27, 2008. To comport with MCL 600.2912b(1), the complaint should have been filed on or after February 28, 2008. Defendants moved for summary disposition and the trial court granted their motion. The court of appeals reviewed the Supreme Court decision in *Bush*, which found that "plaintiff's filing suit one day early in no way defeated the purpose and goal of § 2912b to promote settlement." Pursuant to *Bush*, invoking MCL 600.2301 depends on a two-part test: (1) whether a party's substantial right is implicated and (2) whether a cure of the error or defect would further the interests of justice. The Court of Appeals held both parts of the test were satisfied, and reversed the trial court. They ruled that plaintiff's apparent error in filing her complaint and AOM one day before the 182-day notice period elapsed did not affect defendants' substantial rights and did not defeat the legislative purpose behind enactment of the NOI statute.

SMITH HAUGHEY'S MEDICAL MALPRACTICE DEPARTMENT NEWS & SUCCESSES

Carol Carlson recently gave two presentations. The first titled, "Learning to Live in an EMR World," was presented at the ProCare Education Symposium. The second titled, "Preparing for a Deposition: An Ounce of Prevention" was presented at the MSHRM Fall Education Meeting.

Cheryl Chandler successfully defended physicians in three recent medical malpractice trials. In the first trial, she represented a gastroenterologist in Oakland County. In the second trial, she defended an internist in Wayne County in a below the knee amputation case. In the third trial, she represented a psychiatrist in a suicide case in Wayne County

Joe Engel recently gave two presentations to a west Michigan cardiology group, including physicians and managers, on closed claims and risk management issues.

Chris Genter gave a presentation titled, "Legal Consent and Surrogate Decision Makers in Michigan" at a webinar sponsored by MPIE.

Brian Molde and **Jason Sebolt** gave a presentation on charting issues and informed

consent issues to office managers from a local physician's group.

In a six-day trial in Muskegon County, **Paul Oleniczak** successfully defended a general surgeon in a medical malpractice case.

Jason Sebolt was successful in obtaining summary disposition for a hospital client. In this case, the plaintiff had claimed that the hospital was legally responsible for the actions of an independent contractor physician through the legal doctrine of ostensible agency. The Court disagreed and dismissed the case.

Ed Stein and **Jack O'Loughlin** have been selected for inclusion in the 2009 *Michigan Super Lawyers*, which is an annual listing of outstanding lawyers who have attained a high degree of peer recognition and professional achievement.

Rob Tubbs gave a presentation titled "Legal Issues Involving the Care of the Diabetic Patient" to the Munson Family Practice Residency Program.

For the third year in a row, *Best Lawyers in America* has selected Smith Haughey Rice & Roegge as

Michigan's #1 Medical Malpractice law firm.

In addition, the following Smith Haughey attorneys are listed in *Best Lawyers* under the category of medical malpractice law:

Joe Engel • Bill Jack • John Kruis • Jack O'Loughlin • Bud Roegge • Ed Stein

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