STATE OF MICHIGAN

COURT OF APPEALS

PAUL FULTON, Personal Representative of the Estate of JULIE FULTON, Deceased,

Plaintiff-Appellee,

and

ATTORNEY GENERAL, DEPARTMENT OF COMMUNITY HEALTH, and BLUE CROSS BLUE SHIELD,

Intervenors,

v

PONTIAC GENERAL HOSPITAL, d/b/a NORTH OAKLAND MEDICAL CENTERS, and DR. DEBORAH MARGULES ELDRIDGE,

Defendants,

and

WILLIAM BEAUMONT HOSPITAL, DR. T. KUNTZMAN, DR. J. WATTS, and STEPHEN PETERS,

Defendants-Appellants.

FOR PUBLICATION
September 20, 2002
9:00 a.m.

No. 225174
Oakland Circuit Court
LC No. 97-545842-NH

Updated Copy
December 6, 2002

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

TALBOT, P.J.

In this medical malpractice action, defendants[1] appeal by leave granted from the trial court's order denying their motion for summary disposition. We reverse.

I. Facts

On February 15, 1995, Julie Fulton went to see Dr. Deborah Eldridge, a specialist in obstetrics and gynecology, for a prenatal examination. Dr. Eldridge performed an examination and noted that Fulton's cervix was long, closed, thick, and friable, meaning that it bled easily. Dr. Eldridge believed that these conditions were not abnormal for a pregnant woman such as Fulton. Dr. Eldridge also performed a routine pap smear and sent the sample to a Beaumont Hospital laboratory for examination. The cytopathology report from Beaumont stated that the pap smear specimen was "Less Than Optimal," but was within normal limits and contained no cellular abnormalities. Dr. Eldridge did not know what "Less Than Optimal" meant, but she felt that the result of the pap smear was "satisfactory enough to give an overall diagnosis of within normal limits and no abnormal cells." As a result, Dr. Eldridge did not give Fulton another pap smear during her pregnancy.

Fulton delivered her child by cesarean section on July 14, 1995. On July 21, 1995, and July 28, 1995, Fulton visited Dr. Eldridge to ensure that she was healing properly after the childbirth. On both visits, Dr. Eldridge told Fulton to return in approximately four weeks for a standard postpartum pap smear and physical. However, because she was moving, Fulton did not return for the pap smear until November 1, 1995. At that appointment, Dr. Eldridge noticed that Fulton's uterus was enlarged, but she did not perform a pap smear because Fulton's cervix was bleeding too heavily. Dr. Eldridge told Fulton to return for the pap smear when the bleeding ceased or, in any event, to return in no later than three months. Fulton returned to Dr. Eldridge in December 1995 for the pap smear and physical. As a result of the pap smear performed at that time, Fulton was diagnosed with stage IIB cervical cancer.

On June 11, 1997, Julie Fulton and Paul Fulton (plaintiff) filed a medical malpractice action against defendants, alleging that defendants' failure to properly diagnose and treat Fulton resulted in a loss of Fulton's opportunity to survive. On April 5, 1998, Fulton died of complications related to cancer. On November 4, 1999, plaintiff, the personal representative of Fulton's estate, filed an amended complaint accounting for Fulton's death. Blue Cross Blue Shield of Michigan joined the action as an intervening plaintiff to enforce its rights. The Michigan Attorney General and Michigan Department of Community Health also joined the action as intervening plaintiffs.

Plaintiff's expert oncologist, Dr. Robert R. Taylor, testified in his deposition that Dr. Eldridge's observations on February 15, 1995, should have led her to suspect that Fulton may have been in the early stages of cervical cancer. Dr. Taylor interpreted Fulton's "Less Than

[1] Defendants Pontiac General Hospital, doing business as North Oakland Medical Centers, and Dr. Deborah Margules Eldridge did not appeal the trial court's order. However, for ease of reference, this opinion will refer to defendants-appellants William Beaumont Hospital, Dr. T. Kuntzman, Dr. J. Watts, and Stephen Peters as "defendants."

Optimal" pap smear result to mean either that technical errors existed with the sample or that the cells in the sample were obscured by blood cells, bacteria, or other organisms. Dr. Taylor opined that Dr. Eldridge breached the standard of care by failing to order a repeat pap smear for Fulton after the February 1995 examination and by failing to give Fulton a pap smear during her postpartum period. Dr. Taylor testified that a patient with early invasive cervical cancer, such as Fulton had in February 1995, had an eighty-five percent chance to survive. Before her death, Fulton testified that if she had been diagnosed with cervical cancer in February 1995, she would not have begun treating the cancer until after her child was born. However, Dr. Taylor testified that the child could have been safely delivered in early June 1995, and that Fulton's cancer could have been simultaneously removed through a radical hysterectomy. Dr. Taylor testified that Fulton's opportunity to survive did not decrease between February 1995 and June 1995. By the time Fulton's cancer was actually discovered in December 1995, Fulton's condition had progressed to stage IIB cervical cancer and it was too late to perform the radical hysterectomy. Dr. Taylor testified that a patient with stage IIB cervical cancer had a sixty to sixty-five percent chance to survive.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff could not show that their negligence was the cause of Fulton's death. In response, plaintiff submitted an affidavit from Dr. Taylor, opining that if Fulton's cancer had been diagnosed while she was pregnant and if she had been treated after her child was delivered, she would have had an eighty-five percent chance to survive. Dr. Taylor opined that when Fulton was actually diagnosed with cancer, her opportunity to survive had decreased to sixty to sixty-five percent. Therefore, according to Dr. Taylor, Fulton's opportunity to survive the cancer decreased by twenty to twenty-five percent because of defendants' malpractice. In reply, defendants argued that Dr. Taylor's affidavit was improper because it contradicted his deposition testimony and that, in any event, this affidavit was not enough to create a question of fact under MCL 600.2912a(2).

In denying defendants' motion for summary disposition, the trial court concluded that there were three elements that a plaintiff had to show in a loss of opportunity to survive medical malpractice case: (1) the defendant breached the medical standard of care, (2) the plaintiff's injury, the loss of opportunity to survive, was more probably than not caused by the defendant's negligence, and (3) the plaintiff's initial opportunity to survive was greater than fifty percent. The trial court determined that there was no dispute that defendants breached the medical standard of care in failing to timely diagnose and treat Fulton. The trial court also noted that plaintiff had presented evidence that defendants' malpractice more probably than not caused Fulton's injury, her loss of opportunity to survive. Finally, the trial court concluded that MCL 600.2912a(2) only required plaintiff to show that the initial opportunity to survive was greater than fifty percent. Therefore, the trial court ruled that because plaintiff had presented evidence that Fulton's initial opportunity to survive before the alleged malpractice was eighty-five percent, plaintiff had shown a question of fact under MCL 600.2912a(2). The trial court then entered an order denying defendants' motion for summary disposition. This Court granted defendants' application for leave to appeal.

II. Standard of Review

On appeal, defendants argue that the trial court misapplied MCL 600.2912a in denying their motion for summary disposition. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

Similarly, questions of statutory interpretation are reviewed de novo. *Roberts, supra* at 62.

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. *People v Wager*, 460 Mich 118, 123 n 7; 594 NW2d 487 (1999). To do so, we begin with an examination of the language of the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). [*Roberts, supra* at 63.]

"Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Judicial construction is appropriate where reasonable minds can differ regarding the meaning of the statute. *Adrian School Dist v Michigan Public School Employees' Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998).

III. Analysis

MCL 600.2912a(2) governs the burden of proof requirements for actions alleging medical malpractice, and provides:

> 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 issue before this Court is whether the second sentence of the statute requires a plaintiff to show, in order to recover for loss of an opportunity to survive, only that the initial opportunity to survive before the alleged malpractice was greater than fifty percent, as argued by plaintiff, or, instead, that the opportunity to survive was reduced by greater than fifty percent because of the alleged malpractice, as argued by defendants.

This Court previously addressed this issue in *Wickens v Oakwood Healthcare System*, 242 Mich App 385; 619 NW2d 7 (2000), rev'd in part and vacated in part 465 Mich 53; 631 NW2d 686 (2001). In *Wickens*, the plaintiffs' expert witness testified that before the defendants' alleged malpractice, Sandra Wickens' opportunity to survive was fifty-five to seventy percent. *Id.* at 387. When she was diagnosed with cancer, her opportunity to survive was fifteen percent. *Id.* Therefore, her opportunity to survive decreased by forty to fifty-five percent as a result of the malpractice. *Id.* This Court agreed with the plaintiffs' argument that MCL 600.2912a(2) allows for recovery when the initial opportunity to survive before the alleged malpractice is greater than fifty percent. *Wickens, supra* at 390. In doing so, this Court stated that MCL 600.2912a(2) only "requires plaintiffs in medical malpractice actions seeking recovery for loss of an opportunity to survive or an opportunity to achieve a better result to show that, had the defendant not been negligent, there was a greater than fifty percent chance of survival or a better result." *Wickens, supra* at 392.

Our Supreme Court subsequently reversed in part and vacated in part this Court's decision. *Wickens v Oakwood Healthcare System*, 465 Mich 53; 631 NW2d 686 (2001). The Supreme Court held that a living person cannot recover for a loss of an opportunity to survive. *Id.* at 54, 60-62.[2] In so ruling, the Court concluded that "it was unnecessary for the lower courts to have addressed whether plaintiff had a cause of action solely on the basis of the reduction in her ten-year survival rate" and vacated that portion of this Court's opinion. *Id.* at 62.

The same issue is now before us. We decline to follow this Court's reasoning in *Wickens* for two reasons. First, we are not required to do so under principles of stare decisis because a majority of the Supreme Court vacated that portion of this Court's opinion regarding the interpretation of the second sentence of MCL 600.2912a(2) and did not express approval or disapproval of this Court's reasoning on the issue. Therefore, the *Wickens* panel's holding is not precedentially binding. See *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996). Second, this Court in *Wickens* did not acknowledge the ambiguity of MCL 600.2912a(2) or

---

[2] Although Fulton was alive when the original complaint was filed, she died during the pendency of the action and plaintiff subsequently amended the complaint, proceeding as Fulton's personal representative. Therefore, plaintiff 's claim for loss of an opportunity to survive is proper under the rule of law set forth in *Wickens, supra*, 465 Mich 54, 60-62.

address the legislative intent behind the statute in reaching the conclusion that it did.[3] Accordingly, we are not bound by the decision, nor do we find it persuasive.

In examining the second sentence of MCL 600.2912a(2), it is not clear to what the Legislature was referring when it stated that "the opportunity" must be greater than fifty percent. "[T]he opportunity" could either refer to the plaintiff's initial opportunity to survive or achieve a better result before the alleged malpractice or could refer to the plaintiff's loss of opportunity to survive or achieve a better result. In order for the language of MCL 600.2912a(2) to plainly indicate that the former interpretation of the statute was intended, the word "initial" must be inferred to modify "opportunity" where the statute refers to the plaintiff's burden of showing that "the opportunity was greater than 50%." However, for the language of the statute to plainly indicate that the latter interpretation of the statute was intended, the words "loss of" must be inferred to modify "opportunity." Because the statute does not contain either of these modifiers or any other words explaining to which "the opportunity" refers, we believe that reasonable minds can differ regarding the meaning of the statute. Because the second sentence of the statute is ambiguous, judicial construction is appropriate. *Adrian School Dist, supra* at 332.

In attempting to determine the legislative intent regarding MCL 600.2912a(2), we first examine the history behind the statute. Our Supreme Court recognized a cause of action to recover for the loss of an opportunity to survive in wrongful death cases in *Falcon v Memorial Hosp*, 436 Mich 443, 469-470 (Levin, J., lead opinion), 472-473 (Boyle, J., concurring); 462 NW2d 44 (1990), superseded by statute as stated in *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997). In *Falcon*, the plaintiff's decedent died from complications shortly after the birth of her child. *Falcon, supra* at 453-454. The plaintiff's expert witness testified that, absent malpractice on the part of the defendants, the decedent would have had a 37.5 percent chance to survive. *Id.* at 446-447, 454-455. The Supreme Court held that the decedent's loss of this 37.5 percent opportunity was actionable because it constituted a loss of a substantial opportunity of avoiding harm. In doing so, the Court did not focus on the initial opportunity to survive, but focused on whether the decrease in the decedent's opportunity to survive was substantial:

> We are persuaded that *loss of a 37.5 percent opportunity of living* constitutes a loss of a substantial opportunity of avoiding physical harm. We need not now decide what lesser percentage would constitute a substantial *loss of opportunity*. [*Falcon, supra* at 470 (emphasis added).]

---

[3] The dissent disagrees on this point and states that the *Wickens* panel "did examine the legislative intent regarding the enactment of MCL 600.2912a(2)." *Post* at ___. As we have done here, the *Wickens* panel identified the issue by acknowledging the two contrasting statutory interpretations argued by the respective parties. However, the *Wickens* panel gives no further treatment to the defendants' position, and we cannot discern from the panel's analysis any basis for rejecting one interpretation in favor of the other. Although the panel engaged in some analysis of case law preceding the enactment of the statute, the analysis fails to clarify why the panel concluded that the plaintiffs' interpretation was the better one. *Wickens, supra*, 242 Mich App 391-392. For these reasons we do not find *Wickens* to be persuasive in resolving the issue before us.

The Court determined that the 37.5 percent decrease in the opportunity to survive was substantial enough to allow the plaintiff a cause of action.

Yet "[o]ur Legislature immediately rejected *Falcon*" by enacting MCL 600.2912a(2). *Weymers, supra* at 649.[4] Our interpretation of the statute depends on how we view the Legislature's response to *Falcon* and the parameters it intended to set.

Considering the Legislature's immediate action in response to *Falcon*, it is reasonable to conclude that MCL 600.2912a(2) was enacted to codify and increase the requirements for what constitutes a "substantial loss of opportunity." In *Falcon*, the decedent's initial opportunity to survive and the decedent's lost opportunity to survive were the same, 37.5 percent, because in that case the result of the defendants' negligence was certain death. In that context, the *Falcon* plaintiff's claim would be barred under either statutory interpretation because her initial opportunity to survive did not exceed fifty percent, nor did she lose a greater than fifty percent chance to survive. In the instant case, however, Fulton's initial opportunity to survive, eighty-five percent, is not the opportunity that she lost. Plaintiffs' expert opined that defendants' alleged negligence caused her to have a sixty to sixty-five percent chance of survival. She suffered a loss of a twenty to twenty-five percent chance of survival.

The rational interpretation is that the Legislature amended the statute as a rejection of the *Falcon* Court's holding that a 37.5 percent loss of an opportunity was substantial, and therefore actionable. The focus in *Falcon* was the 37.5 percent opportunity as it represented the lost opportunity, not as it represented the initial opportunity to survive.[5] *Falcon, supra* at 453, 461, 467, 470. To adopt plaintiff's interpretation, that the statute requires only that the premalpractice opportunity to survive exceed fifty percent disregards the extent of the loss that was the focus of *Falcon*. To ignore the magnitude of the lost opportunity would be to subvert the Legislature's

---

[4] Because the cause of action in *Weymers* arose before MCL 600.2912a(2) became effective on October 1, 1993, the Court did not analyze the statute. See 1993 PA 78, subsection 4(1); *Weymers, supra* at 649. In *Weymers* the Supreme Court discussed *Falcon* and other possible approaches to lost opportunity cases. It concluded that all approaches were identical to each other to the extent that each allows a plaintiff to recover for injury even though it was more likely than not that the plaintiff would have suffered the injury if the defendant had not been negligent. *Id.* at 651. See also *Theisen v Knake*, 236 Mich App 249; 599 NW2d 777 (1999), and *Dykes v William Beaumont Hosp*, 246 Mich App 471; 633 NW2d 440 (2001), in which this Court applied the statute.

[5] Like the dissent, we recognize that the 37.5 percent lost opportunity in *Falcon* was also the decedent's initial opportunity to survive. However, the *Falcon* Court stated its holding in terms of what was lost: "We are persuaded that loss of a 37.5 percent opportunity of living constitutes a loss of a substantial opportunity of avoiding physical harm. We need not now decide what lesser percentage would constitute a substantial loss of opportunity." *Falcon, supra* at 470. We interpret the Legislature's response as addressing that question.

intent when it amended the statute in response to *Falcon*.[6] Consequently, we conclude that MCL 600.2912a(2) requires a plaintiff to show that the loss of the opportunity to survive or achieve a better result exceeds fifty percent. We believe that this interpretation comports with the language of and the history behind MCL 600.2912a(2).[7]

If we were to adopt plaintiff 's interpretation of MCL 600.2912a(2), that a plaintiff is only required to show that the initial opportunity to survive exceeded fifty percent, irrespective of the magnitude of the lost opportunity, a plaintiff would conceivably be able to recover for a loss of an opportunity to survive or achieve a better result when the decedent's initial survival opportunity of eighty-five percent merely decreased to eighty-four percent as a result of a defendant's negligence.[8] The loss of such a small percentage of an opportunity to survive could hardly be considered a substantial loss of opportunity. Accordingly, such an interpretation of the statute would allow a plaintiff to recover without showing a substantial loss of opportunity to survive or achieve a better result. There is no indication that the Legislature intended to dispense with the substantial loss of opportunity requirement when it enacted MCL 600.2912a(2).

In this case, plaintiff 's expert stated that Fulton's initial opportunity to survive was eighty-five percent and that her opportunity to survive after the alleged malpractice was sixty to sixty-five percent. Therefore, because her loss of opportunity due to defendants' alleged malpractice was not greater than fifty percent, we hold that the trial court erred in denying defendants' motion for summary disposition.

Given our resolution of this issue, we need not address defendants' remaining issues on appeal.

Reversed.

Wilder, J., concurred.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

---

[6] We note that by implication, our interpretation of the statute necessarily requires that a plaintiff 's initial opportunity to survive exceed fifty percent.

[7] In *Theisen, supra* at 259, n 2, this Court noted: "*Falcon, supra*, found that a loss of opportunity to survive was actionable where the loss of opportunity to survive was 37.5 percent. That holding however was superseded by the 'greater than 50%' language of MCL 600.2912a(2)[.]"

[8] As another example of the application of plaintiff 's interpretation of MCL 600.2912a(2), one plaintiff could recover for a loss of an opportunity to survive or achieve a better result when the decedent's initial opportunity to survive was fifty-one percent and decreased to fifty percent as a result of the defendant's malpractice, where another plaintiff could not recover when the decedent's initial opportunity was fifty percent and decreased to zero percent as a result of the defendant's malpractice. We do not believe that the Legislature intended such anomalous results.