STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND O'NEAL,

Plaintiff-Appellee,

v

ST. JOHN HOSPITAL & MEDICAL CENTER and RALPH DILISIO, M.D.,

Defendants,

and

EFSTATHIOS TAPAZOGLOU, M.D.,

Defendant-Appellant.

UNPUBLISHED
November 4, 2008

No. 277317
Wayne Circuit Court
LC No. 05-515351-NH

RAYMOND O'NEAL,

Plaintiff-Appellee,

v

ST. JOHN HOSPITAL & MEDICAL CENTER and RALPH DILISIO, M.D.,

Defendants-Appellants,

and

EFSTATHIOS TAPAZOGLOU, M.D.,

Defendant.

No. 277318
Wayne Circuit Court
LC No. 05-515351-NH

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

In these consolidated appeals, defendants, St. John Hospital & Medical Center (St. John), Dr. Ralph DiLisio and Dr. Efstathios Tapazoglou, appeal as on leave granted[1] the trial court's order denying their motions for summary disposition and denying their request for a *Daubert*[2] hearing to determine the admissibility of the expert witness testimony proffered by plaintiff. We reverse and remand for entry of summary disposition in favor of defendants.

I. Facts

This case arises out of a stroke that plaintiff, who suffers from sickle cell anemia, developed after being misdiagnosed with pneumonia rather than acute chest syndrome ("ACS").[3] While plaintiff was later provided with a blood transfusion, plaintiff presented expert testimony concluding that plaintiff would more likely than not have avoided a stroke had he been properly diagnosed and provided with a timely "aggressive" transfusion or an exchange transfusion.[4]

II. Lost Opportunity Doctrine

On appeal, defendants argue that plaintiff's expert witnesses could not establish that defendants' failure to provide more aggressive blood transfusions or exchange transfusions increased his risk of having a stroke by more than 50 percentage points. We agree.

This Court reviews a lower court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34

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[1] This Court initially denied defendants' applications for leave to appeal in Docket Nos. 274570 and 274573, because it was not persuaded of the need for immediate review. *O'Neal v St John Hosp & Med Ctr*, unpublished order of the Court of Appeals, entered February 8, 2007 (Docket No. 274570); *O'Neal v St John Hosp & Med Ctr*, unpublished order of the Court of Appeals, entered February 8, 2007 (Docket No. 274573). However, in lieu of granting leave to appeal, the Supreme Court remanded to this Court "for consideration as on leave granted." In doing so, the Supreme Court also imposed a stay of the trial court proceedings. *O'Neal v St John Hosp & Med Ctr*, 477 Mich 1087; 729 NW2d 241 (2007). This Court then consolidated the appeals. *O'Neal v St John Hosp & Med Ctr*, unpublished order of the Court of Appeals, entered April 27, 2007 (Docket Nos. 277317, 277318).

[2] *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 469 (1993).

[3] ACS is a generic term for any sickling complication in the lung.

[4] Plaintiff's expert, Dr. Richard Stein, explained that an "aggressive" transfusion in this case consisted of providing plaintiff seven units of blood over a three day period, while an exchange transfusion consisted of removing blood containing sickle cell hemoglobin from plaintiff and replacing it with blood without sickle cell hemoglobin.

(2001). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald*, *supra* at 332. If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth documentary evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A plaintiff may not oppose summary disposition on the basis of unsupported speculation. *Id.* This Court also reviews underlying issues of statutory construction de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

"In a medical malpractice case, the plaintiff must establish: (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005) (quotation and citation omitted). With regard to these requirements, MCL 600.2912a(2) elaborates:

> 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 second sentence of this section is commonly referred to as the lost-opportunity doctrine which has been described in *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997) as "the antithesis of proximate cause." See also *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008) (describing this characterization of the doctrine as apt).

As a preliminary matter, plaintiff contends that the lost-opportunity doctrine is inapplicable because plaintiff's injury was not death. We disagree. In making his argument, plaintiff relies upon the *Weymers* Court's holding that no cause of action exists "for the loss of an opportunity to avoid physical harm less than death." *Weymers*, *supra* at 653. However, this Court determined that because the *Weymers* Court did not base this holding on a reading or analysis of § 2912a(2), but rather, on whether the holding in *Falcon v Memorial Hosp*, 436 Mich 443; 462 NW2d 44 (1990),[5] should be extended, the *Weymers* Court's holding on this issue is not controlling. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 530 n 9; 687 NW2d 143 (2004).[6] Further, subsection (2) plainly distinguishes between loss of opportunity to survive and loss of opportunity to achieve a better result. As the *Ensink* Court explained, "the latter, in our opinion, applies to physical harm less than death." *Id*.

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[5] The Supreme Court noted that the Legislature overruled *Falcon* in amending § 2912a. *Stone, supra.*

[6] The cause of action in *Weymers* arose after *Falcon* but before the effective date of § 2912a(2). *Ensink*, *supra* at 530 n 9. The legislature amended section 2912a and added subsection (2), effective October 1, 1993. 1993 PA 78, § 3.

Also, plaintiff asserts that because he alleged a direct injury, i.e., that he suffered a stroke because of defendants' negligence, rather than a lost opportunity to achieve a better result, the lost-opportunity doctrine is inapplicable. This argument fails. In *Klein v Kik*, 264 Mich App 682, 686; 692 NW2d 854 (2005), the plaintiff argued that the defendant's negligence caused the decedent's death. This Court held:

> regardless of plaintiff's word choice, the gravamen of plaintiff's complaint remains a cause of action for lost opportunity to survive brought on the basis of defendant's alleged medical malpractice. The present injury that defendant's malpractice allegedly caused was not the decedent's death per se, as plaintiff argues, but the increased chance of death between decedent's two visits to defendant's medical office. In other words, plaintiff is not alleging that defendant somehow gave the decedent cancer or acted in some other negligent manner that caused the decedent to die; rather, plaintiff alleges that defendant hastened the decedent's death as a result of the latter being misdiagnosed, which allowed the cancer to metastasize unabated for 3 ½ months. Plaintiff's attempt to distinguish the decedent's injury from his loss of opportunity to survive is futile because they are one and the same. To say in this case that defendant caused the decedent's injury is to say that defendant's malpractice deprived the decedent of a greater chance to survive, which necessitates application of MCL 600.2912a(2) as interpreted in *Fulton* [*v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002)]. [*Klein*, *supra* at 686-687.]

Although not involving death, the instant case is analogous to *Klein*. In asserting that defendants' negligence resulted in a stroke, plaintiff essentially argues that had defendants ordered a transfusion sooner, plaintiff would have avoided a stroke. Thus, to say defendants' failure to apply proper treatment caused the stroke is to say that this failure deprived plaintiff a greater opportunity to avoid the stroke. Consequently, plaintiff's claim amounts to one of lost opportunity to achieve a better result, and § 2912a(2) is applicable.

In *Fulton*, this Court set forth the formula by which to calculate whether the opportunity to achieve a better result was greater than 50 percent – specifically, the Court must "subtract[] the plaintiff's opportunity to survive after the defendant's alleged malpractice from the initial opportunity to survive without the malpractice." *Ensink*, *supra* at 531. This Court in *Ensink* (involving a plaintiff's lost opportunity to achieve a better result), applied the *Fulton* formula as follows:

> Plaintiff's expert witness testified that, without administration of t-PA [tissue plasminogen activator], twenty percent of stroke victims would achieve a full cure. According to the expert, administration of t-PA would increase the "full cure" recovery rate to the range of thirty or thirty-one to fifty percent. Thus, under the *Fulton* majority's approach, the actual lost opportunity to achieve a full cure is obtained by subtracting plaintiff's likelihood of a cure without t-PA (twenty percent) from the likelihood of a cure with t-PA (thirty to fifty percent); this would result in an eleven to thirty percent better opportunity of a full cure with t-PA. Plaintiff was therefore unable to show a lost opportunity to achieve a full cure that was greater than fifty percent. [*Ensink*, *supra* at 531.]

Assuming the expert testimony was properly admitted under MRE 702 and MCL 600.2955, application of the *Fulton* formula to the expert testimony presented in the instant case bars plaintiff's recovery. While Dr. Richard Stein testified that pediatric exchange transfers have a 90 percent reduction rate in the rate of stroke and that the likelihood of plaintiff avoiding a stroke with proper treatment was greater than 50 percent, Stein could not provide a percentage comparison of plaintiff's opportunity to avoid a stroke with and without proper treatment. Similarly, although Dr. John Luce believed that it was "probable that [plaintiff] would not have [suffered a stroke]" had defendants provided proper treatment, Luce could not provide a percentage of the likelihood of plaintiff avoiding stroke even if defendants had provided proper treatment. Thus, both Stein and Luce failed to establish a plaintiff had a greater than 50 percent opportunity to achieve a better result under *Fulton*.

The testimony of plaintiff's third expert, Dr. Griffin Rodgers, also failed to establish plaintiff's required showing. Rodgers estimated that plaintiff, as a sickle cell patient with ACS, had a 10 to 20 percent chance of developing a stroke without treatment, but that a timely exchange transfusion would have reduced plaintiff's risk of stroke "by at least half and probably greater than half, so more likely than not." In making this conclusion, Rodgers explained that likelihood of a stroke with proper treatment would have been reduced to five to ten percent or less. However, applying *Fulton* to Rodgers's percentages reveals that plaintiff had, at best, a 20 percent greater chance of avoiding a stroke had defendants applied proper treatment.[7] Therefore, plaintiff may not recover under *Fulton*.

Plaintiff argues that *Fulton* is not binding precedent because the *Fulton* Court merely applied the plaintiff's method of calculating lost opportunity and did not address this issue of how to properly calculate lost opportunity. This argument is unavailing, however, given this Court's consistent application of the *Fulton* Court's formula for calculating lost opportunity. See, e.g., *Ensink*, *supra* at 531.

Also, plaintiff asserts that testimony that he would have more likely than not avoided a stroke with proper treatment satisfies the requirements of MCL 600.2912a(2). However, the *Klein* Court explained that merely stating that a decedent would "more likely than not" survive with a proper diagnosis did not mean that the decedent's opportunity for survival decreased by more than 50 percent as a result of the alleged malpractice. *Klein, supra* at 688. This is because the "more likely than not" standard could not be compared to the 30 percent figure of the decedent's worst chance of survival after misdiagnosis and subsequent discovery in that case. *Id*. Applying *Klein* here, Stein's and Luce's testimony that plaintiff would have "more likely than not" avoided the stroke with proper treatment cannot be compared to Rodgers's assertion that plaintiff had a 10 to 20 percent chance of developing a stroke without proper treatment. In any event, even a 10 to 20 percent chance of developing a stroke without proper treatment means it is still "more likely than not" that plaintiff would not have a stroke. Therefore, expert testimony

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[7] This number is the difference between the highest chance plaintiff had of developing a stroke without proper treatment (i.e., 20 percent) and the lowest chance of developing a stroke with proper treatment (i.e., less than five percent, or in the light most favorable to plaintiff, zero percent).

that plaintiff "more likely than not" would have avoided a stroke with proper treatment was insufficient to avoid summary disposition.

Finally, plaintiff asserts *Fulton* was wrongly decided.[8] However, although critical of *Fulton*, our Supreme Court recently asserted: *"Fulton's* approach remains undisturbed as the method of analyzing lost-opportunity cases." *Stone*, *supra* at n 14 of Chief Justice Taylor's opinion, and see also n 26 of Justice Markman's opinion.[9] In addition, this Court declined as recently as 2004 to convene a conflict panel following the *Ensink* Court's application of *Fulton*. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 801; 687 NW2d 901 (2004). "[U]nder the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996) (quotation and citation omitted) overruled on other grds *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200; 731 NW2d 41 (2007). Thus, plaintiff's argument fails, and the court erred in denying defendants' motions for summary disposition.

In light of our resolution of this issue, it is unnecessary for us to address defendants' remaining issue on appeal.

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Kurt T. Wilder
/s/ Donald S. Owens

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[8] In making this argument, plaintiff essentially adopts the conclusions of Roy W. Waddell, M.D.'s "A Doctor's View of Opportunity to Survive: *Fulton's* Assumptions and Math are Wrong," published in the March, 2007 edition of the Michigan Bar Journal. The article criticizes *Fulton's* formula for calculating lost opportunity because it fails to distinguish "survival rate" from "opportunity to survive" and erroneously confuses a *50 percentage point* differential with a *50 percent* opportunity to achieve a better result.

[9] In *Stone*, *supra*, our Supreme Court issued a split decision addressing the law to be applied in "loss of opportunity" cases. Six of seven Justices applied two different tests and concluded that *Stone* was not a "loss of opportunity" case. However, because our Supreme Court issued three different opinions advocating three different tests for the "loss of opportunity" doctrine, *Stone* does not provide this Court with a new test, rather it reaffirms the application of the *Fulton* test.