STATE OF MICHIGAN

COURT OF APPEALS

JAMES YKIMOFF,

Plaintiff-Appellee/Cross-Appellant,

v

W. A. FOOTE MEMORIAL HOSPITAL,

Defendant-Appellant/Cross-Appellee,

and

DAVID EGGERT, M.D.,

Defendant-Cross-Appellee,

and

DAVID PROUGH, M.D.,

Defendant.

FOR PUBLICATION
July 16, 2009

No. 279472
Jackson Circuit Court
LC No. 04-002811-NH

Advance Sheets Version

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

BANDSTRA, J. (*concurring*).

I concur with the lead opinion and write separately to explain my conclusion that this case is factually different from *Martin v Ledingham*, 282 Mich App 158; ___ NW2d ___ (2009), as well as my firm disagreement with the approach advocated in Judge Gleicher's concurring opinion.

The record in this case establishes clearly that before his decision to undergo the bypass graft surgery, plaintiff was fully informed by Dr. David Eggert that the procedure was a serious matter that could well result in negative consequences no matter how carefully it was conducted. Nonetheless, plaintiff decided to take the risks necessarily attendant to the surgery and, as alleged in his complaint, he experienced postsurgical problems that have led to this lawsuit.

Of course, the mere fact of injury does not suffice to impose liability against the hospital (defendant) in this malpractice lawsuit. Instead, plaintiff must establish that his injuries "were the proximate result" of defendant's failure to comply with an appropriate standard of care. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). As part of this required "proximate cause" proof, plaintiff had to come forward with evidence showing that "[a]s a matter of logic, . . . defendant's negligence was a cause in fact of . . . plaintiff's injuries . . . ." *Id.* at 87.

Much like *Martin*, this case involves the allegation that, had defendant's nurses better informed Eggert regarding plaintiff's postoperative condition, he would have taken different actions, which would have mitigated plaintiff's injuries. In *Martin*, we properly concluded that the plaintiff had failed to come forward with sufficient evidence that the nurses' alleged failure to report to the doctors was, as a matter of logic, a cause in fact of any injury to the plaintiff. To the contrary, the only evidence pertaining to that logical connection directly refuted it. The doctors unequivocally stated that even if the nurses had made the reports that the plaintiff claimed were appropriate, they would have not altered their treatment of the plaintiff in response. Notwithstanding Judge Gleicher's complaints, *Martin* did nothing more than recognize that the plaintiff had the burden to establish a logical connection between the alleged negligence and the alleged injury. The plaintiff having failed to do so, *Martin* naturally concluded that summary disposition was warranted.

In the case before us today, evidence was presented from which a rational fact-finder could conclude that there was a logical connection between the alleged negligence and the alleged injury. As did the doctors in *Martin*, Eggert stated that had he received better and more complete reports from defendant's nurses regarding plaintiff's postoperative condition, he would not have altered his treatment in response. Nonetheless, as explained in the lead opinion, Eggert's testimony was replete with caveats and admissions from which the jury could reasonably conclude that, in fact, better and more complete reporting might well have led him to respond more aggressively to plaintiff's problems.[1] In that sense, the burden of proving a possible logical cause-in-fact connection between the nurses' reports and plaintiff's injury was satisfied.[2]

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[1] The evidence of a logical cause in fact here was certainly not strong; it merely rose minimally to a level where a genuine issue was presented for the fact-finder's determination.

[2] As in *Martin*, *supra* at 161-162, the opinion of plaintiff's expert here about what Eggert should have done had he received better reports from the nurses is irrelevant. The logical cause-in-fact element of plaintiff's claim can be satisfied only by evidence showing what Eggert would, in fact, have done had different reports been provided, without regard whatsoever to any hypothetical obligations he may have had under an applicable standard of care. Such a standard of care evidence would, of course, be relevant in a different case—if Eggert, having received better reports from the nurses, was being sued for failing to undertake a different treatment in response.

Judge Gleicher's opinion seems to completely absolve a plaintiff from any burden to come forward with affirmative cause-in-fact evidence in support of a malpractice claim. As I understand the argument, liability could be imposed even though all the evidence presented directly refutes a logical finding of cause in fact because that evidence is subject to disbelief by the finder of fact. In other words, as Judge Gleicher would have it, a plaintiff could bring a case to the fact-finder without any evidence to support a logical finding of cause in fact, merely in the hope that the fact-finder would disbelieve evidence establishing that no logical cause in fact existed.

That would certainly be a novel approach inconsistent with the usual understanding of a plaintiff's burden of proof. It would also subvert the usual summary disposition rule that protects a defendant from litigation if "there is no genuine issue" on an element of a plaintiff's claim. MCR 2.116(C)(10). Even if the only available evidence undermines a plaintiff's claim, Judge Gleicher would still apparently find a genuine issue arising from the possibility that the fact-finder could disbelieve that evidence.

The radical approach advocated by Judge Gleicher would be directly contrary to the long stated rule that "it is not a legitimate inference to draw from testimony denying the existence of a fact sought to be proved, that such denial is evidence that the fact exists." *Quinn v Blanck*, 55 Mich 269, 272; 21 NW 307 (1884). Judge Gleicher selectively quotes from a number of Michigan precedents that are portrayed as being contrary to this commonsensical *Quinn* rule. However, none of those precedents allowed a plaintiff merely to rely on evidence contrary to a proposition in order to establish that proposition. Instead, each case involved factual disputes based on contradictory evidence and, unremarkably, those disputes were allowed to go to the fact-finder for determination.[3]

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[3] In *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881), only "most of" the facts surrounding the execution of a bond were undisputed. The rest of the facts, apparently to be deduced from the testimony of seven people involved in the execution of the bond, "were not conceded or beyond dispute." *Id.* While the Supreme Court opined that the account of the bond's execution favoring the claimant "probably ought to have satisfied any one," it further concluded that this determination was properly in the hands of the jury considering the apparently varying evidence. *Id.* Similarly, in *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940), the Supreme Court determined that a factual question existed for jury determination when testimony by a person that he had mailed a notice, while "not directly contradicted," was inconsistent with evidence from a principal of the person's employer concerning the manner in which the notice had been sent, as well as evidence that various recipients of the notice had complaints regarding the receipt of the notice. Again, in *Arndt v Grayewski*, 279 Mich 224, 230; 271 NW 740 (1937), the Supreme Court unremarkably concluded that a factual question existed for jury determination when the testimony of an eye-witness to an accident was "disputed by the physical facts, and seriously questioned by the testimony of one of the defendants . . . ." *Morgan v Engels*, 372 Mich 514; 127 NW2d 382 (1964), involved a routine malpractice suit dispute between a doctor who claimed he had not violated any standard of practice and an expert witness

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Further, the most recent of these precedents, *Taylor v Mobley*, 279 Mich App 309, 313; 760 NW2d 234 (2008), was not a case like the present one, in which a plaintiff burdened with the responsibility to present evidence in support of a claim arguably failed to do so. The plaintiff in *Taylor* presented her own testimony in support of the contested noneconomic damages element of her claim. Accordingly, *Taylor* did not present any argument similar to the one we address here about a failure to properly shoulder a burden of proof; *Taylor* is completely inapposite.

And, finally, Judge Gleicher's "additional concerns" with this opinion are simply unfounded. *Post* at 8. They are based on a failure to recognize that my analysis rests on the fact that our law places a burden of proof on a plaintiff seeking to recover damages. Thus, a plaintiff failing to come forward with any evidence in support of an element of a claim is properly subject to summary disposition for failing to shoulder that burden of proof. In other words, a plaintiff is penalized for failing to come forward with evidence precisely because the law imposes a burden of proof on a plaintiff.[4] That same analysis does not apply to a party on which no burden of proof is imposed. And thus, Judge Gleicher's conclusion that the rule requiring a plaintiff to present evidence in support of a claim means that a plaintiff who does so is entitled to summary disposition is logically unfounded.

/s/ Richard A. Bandstra

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who testified that he had. In *Strach v St John Hosp Corp*, 160 Mich App 251, 270-271; 408 NW2d 441 (1987), a factual question was presented when a doctor's testimony that he had informed the plaintiffs that he was an independent contractor was contradicted by the plaintiffs' testimony that they did not recall so being told. And, finally, in *Taylor v Mobley*, 279 Mich App 309, 313; 760 NW2d 234 (2008), our Court held that a jury could disbelieve a plaintiff's account of extreme pain and suffering where there was "countervailing evidence that undermined plaintiff's credibility," testimony that "plaintiff appeared to be only in 'a little bit of pain' immediately after" the dog bite giving rise to the action, and other contradictory evidence.

[4] Of course, this same analysis applies to any party, not just a plaintiff, who bears a burden of proof. For example, in many areas of our law, the burden of presenting proof of a defense is imposed on a defendant once a plaintiff presents a prima facie case in support of a claim. If a defendant fails to come forward with any evidence in support of a defense to the claim, the plaintiff is entitled to summary disposition.