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.

GLEICHER, J. (*concurring*).

I concur with the lead opinion that the trial court properly denied defendant W. A. Foote Memorial Hospital's motion for judgment notwithstanding the verdict or a new trial and correctly granted summary disposition to defendant Dr. David Eggert. I further agree that the higher medical malpractice damages cap in MCL 600.1483(1)(c) does not apply to the facts of this case. I write separately to express disagreement with the proposition that this case is logically distinguishable from *Martin v Ledingham*, 282 Mich App 158; __ NW2d __ (2009).

The lead opinion rejects the hospital's contentions that plaintiff failed to create a genuine issue of fact concerning causation, concluding that because the jury remained free to disbelieve Dr. Eggert's testimony, "the matter was properly submitted to the jury for resolution." *Ante* at 8. Judge Bandstra's concurring opinion posits that Dr. Eggert's testimony "was replete with caveats and admissions" that allowed the jury to determine that "better and more complete reporting

might well have led" to more aggressive treatment of plaintiff's problems. *Ante* at 2. Both the lead opinion and Judge Bandstra's concurring opinion assert that the weaknesses inherent in Eggert's testimony completely distinguish this case from *Martin.* I respectfully disagree. In my view, "the jury is free to credit or discredit *any* testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001) (emphasis added). Moreover, I believe that this Court incorrectly decided *Martin*.

I. *Martin*'s Similarity to this Case and its Disregard of the Jury's Fact-finding Prerogative

In *Martin*, this Court confronted a factual situation strikingly similar to the instant case. The plaintiff in *Martin* asserted that the nurses breached the applicable standard of care by failing to apprise the plaintiff's surgeon of her worsening postsurgical condition. The plaintiff's surgeons submitted affidavits in support of summary disposition pursuant to MCR 2.116(C)(10), alleging "that they would not have changed the course of plaintiff's treatment had nurses employed by defendant informed them of plaintiff's condition as plaintiff alleged they should have." *Id*. at 159. The plaintiff submitted evidence "showing that, had the nurses properly reported, a notified doctor would have had the duty to change plaintiff's treatment." *Id.* at 160. In affirming summary disposition for the defendant hospital, the Court in *Martin* considered the surgeons' affidavits and ultimately rejected the notion that a fact-finder could determine that cause in fact existed "merely because the fact-finder disbelieved the doctors involved . . . ." *Id.* at 163. The Court reasoned, "This evidence was insufficient to create a genuine issue on factual causation because it only concerned what hypothetical doctors should have done had better reports been provided." *Id.* at 161-162. According to *Martin, id*. at 163-164, a jury's disbelief of the doctors actually involved in a plaintiff's care would result in an inherently speculative finding of causation, directly contravening our Supreme Court's holding in *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994).

No meaningful distinction exists between the causation proofs presented in *Martin* and those introduced during the trial of this case. I respectfully reject the lead opinion's reasoning that "[i]n *Martin*, the credibility of the treating physician was not called into question both because he was kept apprised of his patient's condition on an ongoing basis and because his actual behavior regarding medical intervention completely coincided with his subsequent assertions." *Ante* at 7-8. In my view, the credibility of the treating physician could be questioned for any reason, regardless of whether his conduct conformed with his words.

In *Martin*, the surgeons' affidavits set forth *opinions* regarding (1) the extent or quantity of their knowledge regarding the plaintiff's condition ("[Dr.] Rynbrandt repeatedly stated that he had *ample* information regarding plaintiff and her situation . . . . ") and (2) the quality of their knowledge ("[H]e reviewed plaintiff's chart and was otherwise *adequately* apprised of developments . . . . "). *Martin*, 282 Mich App at 162 (emphasis added). Dr. Rynbrandt's affidavit further opined that "nothing the nurses could have done differently would have altered the care that he provided plaintiff." *Id*.

The lead opinion asserts, "The very fact-intensive nature of the ruling in *Martin* necessarily leads to concern regarding the broader applicability of that decision . . . ." *Ante* at 6. But *Martin* contains woefully few facts. The lead opinion attempts to distinguish *Martin* by emphasizing that the affiant surgeons in that case actually behaved in accordance with the words

recited in their affidavits. But that is not what the case says, and I am at a loss to read facts into *Martin* that simply do not exist. Had the surgeons in *Martin* been present at the patient's bedside when the plaintiff claimed that intervention should have occurred, I daresay their affidavits would have so reflected. Instead, the affidavits assert the same reasoning adopted by Dr. Eggert: "that they would not have changed the course of plaintiff's treatment *had nurses employed by defendant informed them of plaintiff's condition as plaintiff alleged they should have*." *Martin*, 282 Mich App at 159 (emphasis added). *Martin* neither examined nor referred to the "actual behavior" of the treating physicians. I simply find no basis in *Martin* for the lead opinion's determination that the physician's behavior in that case "completely coincided with his subsequent assertions." *Ante* at 7-8.

According to the lead opinion, "the physician in *Martin*, in averring that the nursing staff could not have done anything differently to affect his treatment decision, was describing his actual analysis of the presenting situation and subsequent action or inaction and was neither speculating nor relying on hindsight." *Ante* at 6. I respectfully disagree. The affidavits submitted in *Martin* embodied opinion testimony addressing the character of the affiants' knowledge and the manner in which they would have responded if the nurses had provided "better reports." *Martin*, 282 Mich App at 161-162. Rather than reporting firsthand knowledge obtained from actual observations of the plaintiff contemporaneous with the nursing observations, the affidavits recited the affiants' speculation about what they would have done under circumstances that did not actually exist. In essence, the surgeons' affidavits qualified as answers to the hypothetical question, What would you have done had the nurses behaved in the manner described by the plaintiff's nursing expert? In my view, this evidence was actually more speculative and less reliable than testimony describing the standard of care, which must conform to the rigorous requirements of MRE 702 and 703. The plaintiff's expert testimony called into question the credibility of the surgeons' affidavits by asserting that the standard of care applicable to the affiants required swifter intervention. If the jury believed the plaintiff's experts in this regard, it should then have determined whether to believe that the surgeons would have breached the standard of care.

Because the affidavits in *Martin* provided opinions rather than facts, the credibility of their signers should have been explored at a trial. It is for this central reason that I disagree with the holding in *Martin* that the affidavits supplied a *factual* basis for summary disposition. Although Judge Bandstra characterizes as "radical" my approach to this issue, *ante* at 3, I propose nothing new. More than a century ago, the United States Supreme Court concisely articulated the foundation for the principle that a witness's credibility always remains subject to a jury's consideration:

> The jury were the judges of the credibility of the witnesses . . . , and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it,

> except in a case of manifest and extreme abuse of their function. [*Aetna Life Ins Co v Ward*, 140 US 76, 88; 11 S Ct 720; 35 L Ed 371 (1891).]

Numerous cases demonstrate that until *Martin*, Michigan's appellate courts had consistently adhered to the core principles, derived from *Aetna Life Ins Co* and similar cases,[1] that (1) every witness's testimony is subject to disbelief by the finder of fact and (2) a court may not usurp the jury's prerogative to accept or reject any testimony.

For example, in *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881), our Supreme Court reversed the grant of a verdict directed by the trial court on the basis of "undisputed" evidence that "probably ought to have satisfied any one . . . ." Writing for a unanimous Court, Justice Cooley explained that despite the absence of any conflicting evidence, the jury "may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment." *Id*. Our Supreme Court again emphasized that a witness need not be believed in *Yonkus v McKay*, 186 Mich 203, 210-211; 152 NW 1031 (1915), stating:

> To hold that in all cases when a witness swears to a certain fact the court must instruct the jury to accept that statement as proven, would be to establish a dangerous rule. Witnesses sometimes are mistaken and sometimes unfortunately are wilfully mendacious. The administration of justice does not require the

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[1] The core principles underpinning the caselaw cited throughout this concurring opinion emanate from the Seventh Amendment of the United States Constitution See also *The Conqueror*, 166 US 110, 133; 17 S Ct 510; 41 L Ed 937 (1897), stating that the "ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinions of scientific witnesses," and *Head v Hargrave*, 105 US 45, 49; 26 L Ed 1028 (1881), stating:

> It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion.

> establishment of a rule which compels the jury to accept as absolute verity every uncontradicted statement a witness may make.

In *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940), the Supreme Court again acknowledged that "[u]ncontradicted testimony may be disentitled to conclusiveness because, from lapse of time or other circumstances, it may be inferred that the memory of the witness is imperfect as to the facts to which he testified, or that he recollects what he professes to have forgotten." *Id*. See also *Arndt v Grayewski*, 279 Mich 224, 231; 271 NW 740 (1937), holding that eyewitness testimony "is not conclusive upon the court or a jury if the facts and circumstances of the case are such as irresistibly lead the mind to a different conclusion."

Citing *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948), this Court held in *Strach v St John Hosp Corp*, 160 Mich App 251, 271; 408 NW2d 441 (1987), that a jury could disregard a physician's unrebutted testimony, reasoning that "a jury may disbelieve the most positive evidence even when it stands uncontradicted, and the judge cannot take from them their right of judgment[.]" More recently, in *Taylor v Mobley*, 279 Mich App 309, 314; 760 NW2d 234 (2008), this Court held that the jury justifiably rejected the plaintiff's uncontradicted and unchallenged testimony regarding her personal pain and suffering after a dog bite. This Court observed that "the jury could have simply disbelieved and discredited plaintiff's testimony regarding pain and suffering." *Id*. The Court referred in a footnote to several additional cases standing for the proposition that "the jurors' prerogative to disbelieve testimony, including uncontroverted testimony, is well established." *Id*. at 314 n 5.

These cases underscore that despite Dr. Eggert's emphatic, unrebutted assertion that he would not have operated on plaintiff at 7:00 p.m. irrespective of what he may have learned from the nurses, the jury possessed the authority to disbelieve every word that Dr. Eggert uttered. The lead opinion asserts that Dr. Eggert's testimony was "speculative at best and self-serving at worst" and thus could be disregarded. *Ante* at 6. But in my view, these characterizations qualify as wholly irrelevant to the requisite focus of the analysis here. The caselaw discussed earlier posits that the jury can disregard testimony that, in the words of Justice Cooley, "probably ought to have satisfied any one . . . ." *Woodin*, 46 Mich at 427. Regardless of whether this Court views the testimony of a treating physician as entirely rational and in accord with the medical records, or completely self-serving and verging on the absurd, a judge cannot remove from a jury its "right of judgment." *Strach*, 160 Mich App at 271. From the time of *Woodin*, through that of *Kelly*, the governing principle in Michigan has been that a jury possesses the freedom to disregard a witness's opinions for any reason, or for no discernible reason. That a jury has exercised this right does not render its proximate cause decision "speculative." Rather, the correct inquiry is whether sufficient record evidence demonstrates that the defendant's negligence was "a cause of plaintiff's injury, and . . . that the plaintiff's injury . . . [was] a natural and probable result of the negligent conduct." M Civ JI 15.01.[2]

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[2] A trial court retains the authority to grant summary disposition if a medical malpractice
(continued…)

II. Improper Fact-finding by the *Martin* Court in the Context of Summary Disposition

This Court's decision in *Martin* contravenes another accepted jurisprudential rule. "It is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted." *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 365; 480 NW2d 275 (1991); see also *Arbelius v Poletti*, 188 Mich App 14, 18-19; 469 NW2d 436 (1991). However, in *Martin* this Court accepted as true the treating physicians' averments describing what they would have done had they been fully advised by the nurses about the plaintiff's condition. The Court rejected the notion that record evidence, including the testimony of the plaintiff's expert witness, sufficed to challenge the veracity of the treating physicians' contentions. Despite the apparent absence of any evidence rebutting the testimony of the plaintiff's expert concerning the standard of care, the Court in *Martin* found as fact that the treating physicians would have violated that standard. *Martin*, *supra* at 161-163. I believe that in light of *SSC Assoc Ltd Partnership* and a related line of established caselaw, this conclusion constitutes legal error and supplies a second ground warranting reconsideration of *Martin*.

III. Causation in *Martin* and This Case

But the most troubling aspect of both *Martin* and this case concerns the meaning of proximate causation and the proper application of our Supreme Court's opinion in *Skinner*. A brief review of *Skinner* reveals that the lead opinion, Judge Bandstra's concurring opinion, and *Martin* have entirely misconstrued the law.

At the time of his death, the decedent in *Skinner* had been operating an electric metal "tumbling machine" of his own design and manufacture. *Skinner*, 445 Mich at 157. The plaintiffs theorized that defendant Square D Company defectively designed a switch that the decedent had incorporated in his tumbling machine. According to the plaintiffs, the "large 'phantom zone'" of the switch sometimes inaccurately signaled that the switch was "off" while power actually continued flowing to the machine. *Id*. at 158. Because no one witnessed the decedent's accident, no direct evidence existed demonstrating any relationship between the switch and the decedent's electrocution. The plaintiffs' case against Square D was entirely circumstantial, predicated on a mere assumption that the Square D switch had played a role in the decedent's death. *Id*. at 163. Furthermore, some of the physical evidence directly contradicted the hypothetical accident scenario proposed by the plaintiffs. *Id*. at 171-172. Square D maintained that even assuming the presence of a defect in its switch, the plaintiffs' circumstantial proofs failed to demonstrate that the decedent "was misled by the switch when he was fatally electrocuted." *Id*. at 158. The Supreme Court agreed, concluding that the record

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(…continued)

plaintiff fails to present evidence documenting what a reasonable physician would have done under the same or similar circumstances or that an alternative course of conduct would likely have altered the plaintiff's outcome. Additionally, a trial court may analyze the evidence under MCR 2.611(A)(1)(e) to determine whether the "great weight of the evidence" supports the jury's proximate cause finding.

contained no direct or circumstantial evidence from which a reasonable jury could infer the mechanism of the decedent's electrocution or whether the switch contributed to the accident. *Id*. at 174. The Supreme Court emphasized in *Skinner* that "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id*. at 164.

Skinner simply has no applicability here or to the situation presented in *Martin*. In both this case and *Martin*, record evidence created a question of fact regarding whether the plaintiffs sustained injury *because they did not receive timely postoperative surgery*; expert testimony in both cases demonstrated that "but for" the absence of timely surgical intervention, the plaintiffs would not have sustained injury. Unlike *Skinner*, in which no direct or circumstantial evidence connected the defect in the switch and the decedent's electrocution, admissible expert opinions in *Martin* and the instant case directly linked the plaintiffs' injuries to a delay in their second operations. And breaches of the nursing standard of care constituted a cause of that delay, according to the plaintiffs' evidence.

The plaintiffs' expert physicians here and in *Martin* thus supported the "but for" causation requirement with their testimony that if the plaintiffs had undergone earlier second surgeries, they would have recovered uneventfully. And most critically, the experts further opined that had the treating physicians been informed of their patients' worsening conditions, the standard of care would have required prompt second operations. A firm factual foundation supported the expert testimony supplied in both cases, providing admissible evidence from which a jury could conclude that a reasonably prudent physician would have taken the patients back to the operating room, thereby preventing injury. While the plaintiffs in *Skinner* entirely lacked evidence that the switch constituted a cause in fact of the decedent's electrocution, the plaintiffs here and in *Martin* produced evidence that the nurses' negligence resulted in patient injury. This evidence established cause in fact. See also *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004):

> Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause.
>
> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." A valid theory of causation, therefore, must be based on facts in evidence. And while "'[t]he evidence need not negate all other possible causes,'" this Court has consistently required that the evidence "'exclude other reasonable hypotheses with a fair amount of certainty.'" [Citations omitted.]

Here and in *Martin*, the plaintiffs presented evidence that supported "'a reasonable inference of a logical sequence of cause and effect.'" *Id.* at 87 (citation omitted). On the basis of that evidence, a jury could reasonably infer that nursing negligence constituted a cause in fact of the plaintiffs' injuries. *It is reasonable to further infer that a doctor informed of the patient's serious postoperative problems will conform his or her conduct to the applicable standard of care.* Speculation and conjecture play no part in the creation of this inference. The expert opinions, premised on actual medical records and provided in accordance with MRE 702 and 703, afford a reasonable basis for a jury's conclusion that the nurses' negligence was "a cause of plaintiff's injury, and . . . that the plaintiff's injury . . . [was] a natural and probable result of the negligent conduct." M Civ JI 15.01. In summary, unlike the plaintiffs in *Skinner*, who lacked any factual support for their expert's opinion connecting the switch and the mechanism of the decedent's death, the medical malpractice plaintiffs here and in *Martin* introduced evidence from which the jury could reasonably infer that earlier surgery, performed in accordance with the standard of care, would have prevented injury.[3]

IV. Additional Concerns With Judge Bandstra's Approach

Judge Bandstra's opinion asserts that 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." *Ante* at 2 n 2. But suppose that Dr. Eggert had testified that if the nurses had notified him of changes in plaintiff's condition, he would have immediately taken plaintiff to the operating room. According to Judge Bandstra's concurring opinion and *Martin*, Dr. Eggert's testimony would necessarily have resulted in summary disposition *for plaintiff* with regard to proximate causation. This result would fly in the face of the overriding rule that a jury may elect to disbelieve Dr. Eggert and reject his testimony for any reason, including that it seems either self-serving or likely false. Alternatively, suppose that Dr. Eggert had remained a codefendant in the instant medical malpractice case. Under Judge Bandstra's reasoning, if Dr. Eggert had testified that he would not have operated until 8:40 p.m. notwithstanding what the nurses told him, this testimony would automatically have relieved the nurses of any liability for their negligence.

With all due respect, Judge Bandstra's analysis is plainly incorrect, not only because the jury has the authority to disbelieve Dr. Eggert, but also because the physician's negligence would constitute merely an intervening cause of the plaintiff's injury. This Court has soundly rejected the notion that intervening negligence eliminates proximate causation by an initial tortfeasor:

> An act of negligence does not cease to be a proximate cause of the injury because of an intervening act of negligence, if the prior negligence is still operating and the injury is not different in kind from that which would have

[3] It bears emphasis that an expert witness's testimony may not be admitted unless the "facts or data in the particular case upon which an expert bases an opinion or inference [are] in evidence." MRE 703.

> resulted from the prior act. The courts of this state have held that whether an intervening negligent act of a third person constitutes a superseding proximate cause is a question for the jury. An intervening cause is not an absolute bar to liability if the intervening event is foreseeable, though negligent or even criminal. [*Taylor v Wyeth Laboratories, Inc*, 139 Mich App 389, 401-402; 362 NW2d 293 (1984) (citations omitted).]

"Consequences of a doctor's negligent acts in treating the plaintiff's original injury are considered foreseeable. Hence, whether the doctor's intervening negligent act constitutes a superseding proximate cause is a question for the jury." *Richards v Pierce*, 162 Mich App 308, 317; 412 NW2d 725 (1987) (citation omitted).

Judge Bandstra would hold, as this Court did in *Martin*, that a trial court *must* accept a physician's hypothetical description of what he would have done had he known the actual facts, even if this testimony is soundly rebutted by competent evidence establishing that in so doing, the physician would have violated the standard of care. Such an approach elevates rank speculation over expert medical opinion. In an analogous setting involving informed consent, the United States Court of Appeals for the District of Columbia explained the reasons that courts should soundly reject this subjective standard of proof:

> In our view, this method of dealing with the issue on causation comes in second-best. *It places the physician in jeopardy of the patient's hindsight and bitterness. It places the factfinder in the position of deciding whether a speculative answer to a hypothetical question is to be credited. It calls for a subjective determination solely on testimony of a patient-witness shadowed by the occurrence of the undisclosed risk*. [*Canterbury v Spence*, 150 US App DC 263, 281-282; 464 F2d 772 (1972) (emphasis added; citations omitted).]

A physician's expressed opinion concerning his hypothetical conduct under different circumstances should face objective testing by a jury. Although a physician's testimony regarding causation is a relevant consideration, neither logic nor law dictates that it should always control the outcome of the causation issue.

V. Conclusion

The central proximate cause question in both this case and *Martin* is whether the patient would have benefited from timely nursing reports to the attending surgeon. A jury soundly rejected Dr. Eggert's contention that he would have ignored earlier information signaling a vascular catastrophe. In a different case, a jury might fully credit a physician's comparable testimony and reject that the physician probably would have adhered to the standard of care described by the plaintiff's expert. Resolution of this question resides solely with the jury. In summary, with the caveats expressed in this opinion, I concur in the lead opinion's affirmance of the trial court's denial of the hospital's motion for judgment notwithstanding the verdict or a new trial, the grant of summary disposition to Dr. Eggert, and the remand for a recalculation of damages.

/s/ Elizabeth L. Gleicher