STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA SOUFANE (ROOKE), Next Friend of BRYAN ROOKE, a minor,

Plaintiff/Appellant/Cross-Appellee,

v

JUNG WU MD and JUNG WU MD PC,

Defendants/Appellees/Cross-Appellants,

and

ST JOSEPH MERCY HOSPITAL, Doing Business as TRINITY HEALTH ASSOC, otherwise known as MCPHERSON HOSPITAL,

Defendant/Appellant.

UNPUBLISHED
November 12, 2009

No. 279227
Livingston Circuit Court
LC No. 04-020564-NH

CYNTHIA SOUFANE (ROOKE), Next Friend of BRYAN ROOKE, a minor,

Plaintiff/Appellee,

v

JUNG WU MD and JUNG WU MD PC,

Defendants/Appellants,

and

ST JOSEPH MERCY HOSPITAL, Doing Business as TRINITY HEALTH ASSOC, otherwise known as MCPHERSON HOSPITAL,

No. 279325
Livingston Circuit Court
LC No. 04-020564-NH

Defendant.

CYNTHIA SOUFANE (ROOKE), Next Friend of BRYAN ROOKE, a minor,

Plaintiff/Appellee,

v

No. 280937
Livingston Circuit Court
LC No. 04-020564-NH

JUNG WU MD and JUNG WU MD PC,

Defendants,

and

ST JOSEPH MERCY HOSPITAL, Doing Business as TRINITY HEALTH ASSOC, otherwise known as MCPHERSON HOSPITAL,

Defendant/Appellant.

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

This medical malpractice appeal addresses three claims consolidated for appellate review. In Docket No. 279227, plaintiff appeals as of right an "order granting defendants' motion for directed verdict and entry of judgment for defendants." In Docket No. 279325, defendants Jung Wu, MD ("Dr. Wu") and Jung Wu, MD PC appeal as of right an "opinion and order" that in part denied them an award for case evaluation sanctions and costs. In Docket No. 280937, St. Joseph Mercy Hospital, doing business as Trinity Health Association otherwise known as McPherson Hospital ("McPherson Hospital"), appeals as of right an "order denying defendant [hospital's] motion to allow taxed bill of costs and attorney fees." We affirm the trial court's decision granting McPherson Hospital's motion for directed verdict on the issue of agency. We reverse trial court's decision granting defendants' motion for directed verdict on the theory that plaintiff failed to present sufficient evidence of proximate cause. We remand for further proceedings consistent with this opinion.

I. Basics Facts and Proceedings

In April of 1990, plaintiff suspected she was pregnant. She called McPherson Hospital for assistance and later went to McPherson Hospital for urine tests, which confirmed she was pregnant. Plaintiff alleged that a McPherson Hospital employee informed her that Dr. Wu, an obstetrician, was "their doctor" and provided plaintiff with the telephone number and address to Dr Wu's office.

On October 6, 1990, plaintiff visited Dr Wu's office for a regular monthly visit. After an examination, Dr Wu diagnosed plaintiff with a urinary tract infection. Dr. Wu prescribed Macrodantin, a drug that plaintiff began taking two days later. Late in the evening of October 9, 2009, plaintiff felt like a spurt of fluid that she described as "strange." Nonetheless, plaintiff went to bed and the next day she went to work where she called Dr. Wu's office at 8:00 a.m. She allegedly informed Dr. Wu that she "had a spurt – some fluid comin' out, leaking." Although Dr. Wu had not yet testified, Dr. Wu disputed that plaintiff told him that she was leaking fluid or that she had a gush of fluid. Dr. Wu testified at a deposition that plaintiff called to inform him that the Macrodantin was not working and that she was experiencing frequency of urination. Nonetheless, Dr. Wu did tell plaintiff to go to McPherson Hospital for urinalysis.

Plaintiff drove to McPherson Hospital, provided a urine sample, which was received at 1:49 p.m., and returned to work. Plaintiff maintained that she probably told hospital personnel that she was leaking fluid. She continued to have random discharge the rest of the day. She called Dr. Wu later in the day for the test results but the results were not available. Plaintiff continued to have random discharge the next day, but nonetheless went to work. Later that day she began to experience pain near her kidneys. She called Dr. Wu to report her pain and ask whether her urinalysis results were available. Dr. Wu told her to go to the emergency room in Lansing (nearer to where to she worked) or McPherson Hospital. A friend drove plaintiff to McPherson Hospital. Plaintiff remembers little after reaching McPherson Hospital except that she was transferred by ambulance to the University of Michigan Hospital.

Plaintiff arrived at McPherson Hospital's obstetrician unit at 5:00 p.m. At 5:55 p.m., Dr. Wu ordered by telephone that plaintiff begin an IV drip solution. At 6:30 p.m., Dr. Wu performed a vaginal exam on plaintiff. Dr. Wu diagnosed plaintiff with "prematurity and premature ruptured membrane" and arranged for plaintiff to be transferred to the University of Michigan Hospital's "high risk unit." McPherson Hospital commonly sent high-risk pregnancy cases to the University of Michigan Hospital.

Plaintiff arrived at the University of Michigan Hospital around 8:00 p.m. and Bryan Rooke was delivered the next day. Bryan was born premature at 29 weeks, and weighed 1,040 grams at birth, less than the average newborn weight of 3,000 grams. He suffered from respiratory distress syndrome ("RDS"), cerebral palsy and various neurological disabilities, including spastic quadriparesis, intraventricular hemorrhage ("ICH") and periventricular leukomlacia ("PVL"). Bryan remained under treatment at the University of Michigan Hospital until he was released on December 7, 1990.

On March 12, 2004, as Bryan's Next Friend, plaintiff filed a medical malpractice action against Dr. Wu and the hospital, alleging that Dr. Wu was "held out to the public, and particular to the Plaintiff, by Defendant, McPherson Hospital[,] as an employee and/or agent of said hospital" Plaintiff also alleged that Dr. Wu was negligent in "[f]ailing to hospitalize the patient at the first sign of premature rupture of membranes."

On August 29, 2006, Dr. Wu filed a motion for summary disposition asserting that plaintiff could not establish proximate cause. Specifically, Dr. Wu alleged that plaintiff could not establish that she would have been administered steroids had she been transported to the University of Michigan Hospital. Plaintiff responded by offering deposition testimony from Dr. Robert Hayashi, a specialist in maternal fetal medicine. Dr. Hayashi was the head of the University of Michigan at the time of the incident and testified that, within a reasonable degree of medical certainty, the University of Michigan Hospital would have provided plaintiff steroids had she arrived earlier. After a hearing the trial court denied Dr. Wu's motion, finding that a question of fact existed in regard to proximate cause.

The jury trial began on January 31, 2007. To establish legal causation, plaintiff presented evidence from two expert witnesses, Dr. Hayashi and Dr. Carolyn Crawford, M.D., a specialist in neonatal-perinatal medicine. Plaintiff offered these experts to prove that Dr. Wu failed to timely diagnose plaintiff's ruptured membrane/amniotic sac. Plaintiff claimed that had Dr. Wu diagnosis been timely and the high-risk pregnancy recognized, she would have sooner been transferred to the University of Michigan Hospital, which, in 1990, would have provided a controversial (though now standard) steroid treatment that would have delayed labor thereby mitigating the seriousness of the RDS. Further, assuming a milder case of RDS, Bryan then would not have required extensive ventilation that caused him to hyperventilate, which was responsible for the onset and/or seriousness of cerebral palsy and other ailments.

After plaintiff rested, McPherson Hospital[1] moved for directed verdict on three issues: (1) that the evidence plaintiff would have received steroids and antibiotics treatment was too speculative given vast discretion afforded the physicians who treated plaintiff, (2) plaintiff failed to show Dr. Wu was an ostensible agent of McPherson Hospital and, (3) whether the testimony of Dr. Crawford failed to establish proximate cause under *Fulton v William Beaumont Hospital*, 253 Mich App 70; 655 NW2d 569 (2002).

The trial court conducted an extended hearing on the motion on February 20, 2007 and issued an oral opinion on February 22, 2007. The trial court denied the motion in regard to the first issue. The trial court concluded that Dr. Hayashi's testimony was sufficient to show that plaintiff likely would have been administered steroids and antibiotics at the University of Michigan Hospital. The trial court granted the motion in regard to the second issue. The trial court concluded that although plaintiff testified that she believed Dr. Wu was an agent of the McPherson Hospital, her belief was not reasonable and that plaintiff looked to Dr. Wu for her treatment. The trial court granted defendants' motion in regard to the third issue. The trial court concluded that *Fulton* requires that plaintiff show "that there was a reduction in the opportunity to achieve a better result by more than 50 percent." The trial court concluded that plaintiff failed to quantify the percentage of lost opportunity caused by the malpractice and dismissed the case. The trial court entered a judgment in favor of defendants on April 6, 2007.

II. Directed Verdict

[1] Dr. Wu joined McPherson Hospital's motions for directed verdict in regard to issues (1) and (3).

A. Standard of Review

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003); *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). This Court reviews all the evidence presented up to the time of the motion to determine whether a question of fact existed. *Silberstein, supra*. In doing so, this Court views the evidence in the light most favorable to the nonmoving party and resolves any conflict in the evidence in his favor. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005), after rem 274 Mich App 1; 731 NW2d 452 (2007); *Ververis v Hartfield Lanes*, 271 Mich App 61, 63-64; 718 NW2d 382 (2007). Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and we give deference to the factfinder's responsibility to determine the credibility and weight of the testimony. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008). If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Silberstein, supra*.

B. Medical Malpractice Claim

We conclude that the trial court erred in granting defendants' motion for directed verdict based on plaintiff's failure to articulate a percentage of "loss of opportunity." Under *Stone v Williamson*, 482 Mich 144, 753 NW2d 106 (2008) , the instant case is not a "loss of an opportunity" case. Rather, plaintiff alleged direct harm resulting from the failure to diagnose plaintiff's ruptured membranes, which if timely diagnosed the previous day, would have required that plaintiff be hospitalized at a tertiary care center, namely the University of Michigan, whose treatment would increase the likelihood of a better medical outcome, including a reduction of the seriousness of RDS that allegedly caused Bryan's cerebral palsy. Because plaintiff alleges harm directly attributable to defendants' alleged negligence, the trial court erred in requiring that plaintiff "express the decrease in the [loss of] opportunity [to reach a better result] in a manner of percentage points."

MCL 600.2912a(2) provides that:

> 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 MCL 600.2912a(2) is commonly referred to as the lost-opportunity doctrine. See *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997). The lost-opportunity doctrine first arose in *Falcon v Memorial Hosp*, 436 Mich 443, 453-455; 462 NW2d 44 (1990). The basic facts of *Falcon* were that,

> Nena Falcon, a nineteen-year-old woman, gave birth to a healthy baby, Justice Eugene Falcon, in the early morning hours of March 21, 1973. Moments after delivery, Nena Falcon coughed, gagged, convulsed, became cyanotic, and

> suffered a complete respiratory and cardiac collapse. Attempts to revive her were unsuccessful. She was pronounced dead soon thereafter.
>
> The autopsy report indicated that amniotic fluid embolism, an unpreventable complication that occurs in approximately one out of ten or twenty thousand births, was the cause of death. The survival rate of amniotic fluid embolism is, according to Falcon's expert witness, 37.5 percent if an intravenous line is connected to the patient before the onset of the embolism. In this case, an intravenous line had not been established.
>
> Falcon's theory is that had a physician or nurse anesthetist inserted an intravenous line before administering the spinal anesthetic to assist the physician in dealing with any of several complications, the intravenous line could have been used to infuse life-saving fluids into Nena Falcon's circulatory system, providing her a 37.5 percent opportunity of surviving. By not inserting the intravenous line, the physician deprived her of a 37.5 percent opportunity of surviving the embolism.

"The trial court dismissed the complaint because Falcon's evidence did not show that Nena Falcon probably -- defined as more than fifty percent -- would have survived if the procedure had not been omitted." *Id*. at 447. Our Supreme Court reversed the trial court, holding that "a 37.5 percent opportunity of living constitutes a loss of a substantial opportunity of avoiding physical harm." *Id.* at 379. The Court however limited recovery to "37.5 percent times the damages recoverable for wrongful death." *Id*. 471.

There is general agreement that the Legislature responded to the *Falcon* decision by amending MCL 600.2912a(2) to require that "a plaintiff must show that the loss of the opportunity to survive or achieve a better result exceeds 50 percent." *Fulton supra* at 83. However, there is also agreement that the addition generated "a great deal of confusion." *Lanigan v Huron Valley Hosp*, 282 Mich App 558, 565; 766 NW2d 896 (2009).

Although plaintiff did not mention the phrase, "loss of opportunity" in the complaint, the trial court granted defendants' motion for directed verdict, holding:

> there was no testimony by her or anybody else what the likelihood of the child having cerebral palsy would have been without that kind of treatment. We know from the Fulton case that we must be able to quantify it in same manner -- actually, by showing that there was a reduction in the opportunity to achieve a better result by more than 50 percent. Plaintiff argues in the response to this motion for directed verdict that there was a reduction to zero, quote "as he absolutely had it" end quote. And of course, meaning that the proof of a reduction to zero percent was in the fact that he, Bryan, did indeed end up with cerebral palsy. Unfortunately that does not meet the standard [sic] MCL 660.2912(a). Under that statute and the interpretations of the Court of Appeals as to any ambiguities, the court or jury must be able to express the decrease in the opportunity in a matter of percentage points. That cannot be done here.

Plaintiff argues that the trial court erred in granting defendants' motion for directed verdict pursuant to the second sentence of MCL 660.2912(a) because plaintiff did not seek to recover a loss of opportunity. We agree.

At the time the trial court made the above ruling, this Court had previously addressed whether a medical malpractice "complaint stated a cause of action separate from loss of opportunity after plaintiff agreed to strike the paragraph in her complaint that specifically referred to lost opportunity." In *Klein v Kik*, 264 Mich App 682, 686; 692 NW2d 854 (2005), 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 1/2 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*[, *supra*]. [*Klein*, *supra* at 686-687.]

Although not involving death, the instant case is analogous to *Klein*. In asserting that defendants' negligence resulted in cerebral palsy, plaintiff essentially argues that had Dr. Wu sent plaintiff to the University of Michigan Hospital earlier, Bryan would have avoided cerebral palsy. Thus, to say defendants' failure to properly diagnose plaintiff's ruptured membrane and act accordingly caused Bryan's cerebral palsy is to say that the failure deprived Bryan a greater opportunity to avoid cerebral palsy. *Klein*, *supra*. Consequently, under *Klein*, plaintiff's claim can be construed as a claim for a lost opportunity to achieve a better result.

However, while the instant case was pending on appeal, the Michigan Supreme Court issued a plurality opinion in *Stone*, *supra* intended to clarify the meaning of MCL 600.2912a(2). In *Stone*, the plaintiff "suffered the rupture of an abdominal aortic aneurysm that had gone undetected despite physical examinations and testing by a number of physicians." *Id*. at 148. The plaintiff "underwent emergency surgery to repair the rupture, but, in part because of preexisting conditions, amputation of both legs at mid-thigh was ultimately necessary." *Id*. at 149. After surgery, [the] plaintiff continued to experience multiple organ failure and other complications, including acute renal failure, sepsis, rhabdomyolysis, osteomyelitis, recurrent pancreatitis, and depression." *Id*.

The *Stone* plaintiff brought a medical-malpractice suit against the radiologist "on the theory that a negligent diagnosis resulted in the rupture and all resulting harm." *Id*. at 149. The plaintiff presented experts at trial who testified that, "had the aneurysm been properly diagnosed, elective surgery could have been performed . . . [and] would have greatly increased plaintiff's

chance of a better medical outcome, including a reduction of the risk of amputation and other health complications." *Id*.

As in the instant case, the lower court in *Stone* treated the plaintiff's claim "as one for loss of opportunity" even though the plaintiff maintained "that he never pleaded his claim as one for loss of an opportunity; instead, this is a simple case of physical injury directly caused by negligence." *Stone, supra*, at 151. The lead opinion in *Stone* recognized that,"[s]ix of the justices believe that this is not a lost-opportunity case." *Id*. at 164. Only Justice Markman concluded that *Stone* was a lost-opportunity case. Justice Markman defined "a 'lost opportunity' case [as] one in which it is at least possible that the bad outcome would have occurred even if the patient had received proper treatment." *Id*. at 186 (Markman, J. concurring). However, six Justices repudiated Justice Markman's definition of a lost-opportunity case, finding it "overbroad and inconsistent with the common-law meaning at the time MCL 600.2912a(2) was enacted." *Id*. at 152 n 5.

Defendants maintain that *Stone* did not create a clear test to determine whether a medical malpractice case is in fact a "lost-opportunity" case. Plurality opinions in which no majority of the participating justices agree with respect to the reasoning for the holding are not generally considered authoritative interpretations that are binding under the doctrine of stare decisis. See *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976). However a decision of four or more of our Supreme Court justices on a specific point of law is binding upon this Court with regard to that point of law. *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569; 484 NW2d 408 (1992), citing *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).

We agree that *Stone* did not create a single definitive test to determine whether a medical malpractice case is a "loss-opportunity" case. However, we can clearly glean that cases factually similar to *Stone* should be not considered "lost-opportunity" cases. Further, we reject defendants' assertion that cases asserting "active negligence" are "traditional" medical malpractice cases and those cases asserting "passive negligence" are "lost-opportunity" medical malpractice cases. Under this theory all failure to diagnose cases would be "lost-opportunity" cases. However, as noted by plaintiff counsel at oral argument, *Stone* itself was a failure to diagnose claim. Thus, defendants' theory has no legal support.

Here, the sole basis the trial court cited in granting the motion for directed verdict was that plaintiff failed to quantify a percentage of "loss of opportunity" to achieve a better result. However, we conclude the instant case is no more a "loss of opportunity" case than *Stone*. Just as in *Stone*, plaintiff similarly claimed that "had the [ruptured membranes] been properly diagnosed, [steroids] could have been [administered] . . . [and] would have greatly increased plaintiff's chance of a better medical outcome, including a reduction of the risk of [RDS] and other health complications." *Stone, supra* at 149. Simply because plaintiff may have had a "bad result despite being properly treated" does not transform the instant case into a loss of opportunity case. *Id*; see also *Compton v Pass*, ___ Mich ___; ___ NW2d ___ (2009), *Shivers v Schmiege*, ___ Mich App ___; ___ NW2d ___ (2009) and *Velez v Tuma*, 283 Mich App 396, 770 NW2d 89 (2009).

Here, plaintiff presented evidence to establish that a defendant's acts or omission more likely than not caused his injuries.[2] Crawford specifically testified that Bryan "would not have had the degree of respiratory distress syndrome that would require assisted ventilation and would not have been therefore hyperventilated." Further, that Bryan "would have avoided the cerebral palsy that he – had the effects of the cerebral palsy that he has today" and "certainly been a functional human being." Crawford testified that Bryan "would not have been confined to a wheelchair." Crawford confirmed that the above conclusions were "within a reasonable degree of medical certainty." On cross-examination, Crawford added that steroids "markedly" reduce the incidence of respiratory distress syndrome. She again indicated that Bryan would be "ambulatory" and "not mentally retarded." She admitted, "it's possible," that even if Bryan had timely been administered steroids and antibiotics there would be some deficits, but she added there "is such a difference in outcome. There is such a marked reduction that the use of antenatal steroids is to be regarded as routine."

> *Q.* Dr. Crawford, you never testified that Bryan would have a normal life did you?
>
> *A.* I said he'd be a functional human being, he'd be able to work. I think that's pretty normal.
>
> *Q.* So that's what you're referring to as normal?
>
> *A.* I said I think he also – I said that he may have had some minor problems, but I think he'd be functional and he'd be able to work and get around.
>
> *Q.* I think you said that he would have deficits but his deficits –
>
> *A.* Mild –
>
> *Q.* – wouldn't be as severe.
>
> *A.* Well –
>
> *Q.* Do you agree with that?

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[2] "[T]he lost-opportunity doctrine applies 'in situations where a plaintiff cannot prove that a defendant's actions were the cause of his injuries . . . .'" *Stone, supra* at 156, quoting *Vitale v Reddy*, 150 Mich App 492, 502; 389 NW2d 456 (1986) (emphasis added) (opinion by Taylor, C.J.). "[A] case involving a loss of opportunity occurs in very specific circumstances: 'Where a plaintiff cannot prove that the defendant's acts or omission proximately caused his injuries, but can prove that the defendant's acts or omissions deprived him of some chance to avoid those injuries'" *Stone*, *supra* at 151-152 (opinion by Taylor, C.J.). "[A] lost-opportunity plaintiff, by definition, cannot prove that a defendant's malpractice more probably than not caused the patient to suffer physical harm." *Id*. at 171 (opinion by Cavanagh, J.).

A. Well he might have some mild problems but he be, I think more than once I said, functional human being.

Although Crawford admitted on cross-examination that even with perfect treatment that Bryan might have had some "minor" deficits, she consistently maintained that his condition would have been less severe. Indeed, on appeal, plaintiff admits that Crawford's testimony had a degree of "uncertainty," but contends that the uncertainty relates only to the degree of harm. We agree there is authority for the proposition,

> that plaintiff's right to recover will not be denied because of difficulty of accurately measuring his damages or ascertaining the amount thereof with certainty, that the law requires no more proof of the amount of plaintiff's damages than the nature of the case will fairly permit, and that it is enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, even though the result be only approximate, in which case it is competent for the jury or trier of the facts to form such reasonable and probable estimate of the damages as in the exercise of good sense and sound judgment they shall think will produce adequate compensation. [*Meier v Holt*, 347 Mich 430, 447-448; 80 N.W.2d 207 (1956), citing *Allison v Chandler*, 11 Mich 542; *Gilbert v Kennedy*, 22 Mich 117, and *Story Parchment Co v Paterson Co*, 282 US 555; 51 S Ct 248; 75 L Ed 544 (1931).]

In other words, "mere uncertainty as to the amount will not preclude the right of recovery." *Shivers , supra; Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988) (quotation marks and citations omitted). However, a reasonable basis must exist for their computation. *Id*., citing *Berrios v Miles, Inc*, 226 Mich App 470, 478-479; 574 NW2d 677 (1997), and signaling *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 767; 685 NW2d 390 (2004) (a jury's estimation of future economic loss must have support in the record).

Accordingly, we conclude the trial court erred in granting defendants' motion for directed verdict. We reverse the judgment entered by the trial court and remand for further proceedings consistent with this opinion.

C. Agency

Plaintiff next argues that the trial court erred in granting directed verdict to McPherson Hospital on the basis that plaintiff failed to show that Dr. Wu was an ostensible agent of McPherson Hospital. We disagree.

In general, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor to his or her patients. *Grewe v Mt Clemens General Hosp*, 404 Mich 240, 250; 273 NW2d 429 (1978). However, if the individual looked to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found. *Id*.

Three elements are necessary to establish the creation of an ostensible agency: (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must

be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence. *Zdrojewski v Murphy*, 254 Mich App 50, 66; 657 NW2d 721 (2002); *Chapa v St Mary's Hospital of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991).

We conclude plaintiff failed to present evidence to establish that McPherson Hospital's actions or omissions generated a reasonable belief that Dr. Wu was its agent. McPherson Hospital cannot control the location of Dr. Wu's office, documentation at Dr. Wu's office or a reference to McPherson Hospital on a sign outside Dr. Wu's office, the content of which plaintiff cannot remember. And although McPherson Hospital's possession of some of plaintiff's pre-natal medical records may connote a relationship between Dr. Wu and McPherson Hospital, there is no evidence that the paperwork suggest an *agency* relationship. Thus, the only action that plaintiff attributes to McPherson Hospital is that an employee referred plaintiff to "their" doctor and then provided plaintiff with the number and address to Dr. Wu's office.

In *Vanstelle v Macaskill*, 255 Mich App 1; 662 NW2d 41 (2003), this Court implicitly rejected the notion that a hospital's referral for treatment establishes an agency relationship with the health-care provider. In *Vanstelle*, an emergency room physician at St. John Hospital initially referred the plaintiff to an outside doctor for further evaluation, and the plaintiff's wife later called the referral center at St. John Hospital to verify that the outside doctor was a "St. John doctor." *Id*. at 4. Indeed, the call was made to "ensure that [the outside doctor] was a "St. John doctor" because, in her opinion, . . . they were the 'top doctors.'" *Id*. at 4-5. The plaintiff's wife was told the outside doctor was "absolutely" at St. John. *Id*. This Court did not recognize that the initial hospital referral or the later confirmation suggested that the doctor was an agent of the hospital. *Id*. at 14. This Court held that the plaintiffs' belief that the outside doctor was a hospital staff doctor was unreasonable without having been so told. *Id*. Thus, a hospital's referral to an outside doctor, without more, does not establish an agency relationship.

The trial court properly concluded that plaintiff did not reasonably look to McPherson Hospital for treatment. There is no dispute that, before October 11, 1990, plaintiff only received treatment at Dr. Wu's office. On that date, Dr. Wu did not tell plaintiff to go to McPherson Hospital, but allowed plaintiff the choice of two hospitals. There is no dispute that plaintiff, over a five-month period, visited Dr. Wu for treatment six times at Dr. Wu's office, not at McPherson hospital. Plaintiff admitted that she would pay Dr. Wu for services rendered at his office. Dr. Wu's billing statements indicated Jung Wu, M.D., P.C. After plaintiff began treatment with Dr. Wu, she never sought advice and treatment from anyone else. The crux of the instant claim of malpractice concerns a phone call in which plaintiff looked to Dr. Wu, not McPherson Hospital, for medical care. The trial court properly concluded that plaintiff looked to Dr. Wu for treatment, not McPherson Hospital. Accordingly, plaintiff failed to establish that Dr. Wu was an ostensible agent of McPherson Hospital.

Plaintiff also argues that the trial court erred in refusing to admit Dr. Sorokin's deposition testimony to establish the reasonableness of plaintiff's belief that an agency relationship existed between McPherson Hospital and Dr. Wu. Specifically, plaintiff sought to admit Dr. Sorokin's deposition testimony "that other patients (Sorokin's), under the circumstances for this case (hospital referral, hospital locus of related care, hospital staff privileges, and no disavowal of agency would likewise regard the doctor as an agent of the Hospital." Although raised before the trial court, the record does not reflect any statements by the trial court addressing plaintiff's

assertion that Dr. Sorokin's testimony should be admitted.[3] On appeal plaintiff claims that Dr. Sorokin's testimony is admissible pursuant to MRE 803(18), MCR 2.308(A). We disagree.

Although Dr. Sorokin's was qualified as an expert, the testimony plaintiff sought to admit was not "scientific, technical, or other specialized knowledge." MRE 702. Dr. Sorokin testified that "probably [plaintiff] would think I was employed by Hutzel," not by his employer, Wayne State University. Initially, it must be noted that expert testimony is inadmissible to opine on the credibility of witnesses. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Further, nothing in the Dr. Sorokin's statement can be construed as indicating an expert opinion. Rather, Dr. Sorokin is clearly relying on his own personal belief that plaintiff may have believed Dr. Wu was an agent of McPherson Hospital. Moreover, Dr. Sorokin's testimony that plaintiff "probably" had such a belief is not reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004), cert den 546 US 821; 126 S Ct 354; 163 L Ed 2d 63 (2005).

Dr. Sorokin's testimony is also not admissible as lay opinion testimony. MRE 701, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Here, Dr. Sorokin did not see the circumstances that led plaintiff to believe that Dr. Wu was an agent of McPherson Hospital and therefore his testimony was not "based on the perception of the witness." Thus, the trial court did not err in refusing to consider Dr. Sorokin's testimony.

III. Conclusion

Given our resolution of Issue I on appeal, defendants' claim that that the trial court erred in denying defendants' motion for case evaluation is not ripe for review. We reverse in part the judgment of the trial court dismissing plaintiff's complaint. We affirm the trial court's decision dismissing plaintiff's claim Dr. Wu was an agent of McPherson Hospital. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

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[3] Plaintiff claims that the trial court relied on MCR 611(a) in denying admission of Dr. Sorokin's deposition testimony, but fails to cite to the record.