STATE OF MICHIGAN

COURT OF APPEALS

TERESA COX, as Next Friend of BRANDON COX, a minor, TERESA COX and CAREY COX, individually,

Plaintiffs-Appellees/
Cross-Appellants,

v

BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT, d/b/a HURLEY MEDICAL CENTER, a municipal corporation,

Defendant-Appellant/
Cross-Appellee,

and

EDILBERTO MORENO, M.D.,

Defendant.

FOR PUBLICATION
October 27, 2000

No. 205025
Genesee Circuit Court
LC No. 92-12247-NM

ON REMAND

Before: Hood, P.J., and Griffin and Markey, JJ.

GRIFFIN, J. (*dissenting*).

This case returns to us on remand from the Supreme Court for a ruling on the issues "which defendant has properly and persistently raised." *Cox v Flint Bd of Hosp Managers,* 462 Mich 859, 860; 462 NW2d 859 (2000). I would reverse and remand for a new trial.

In the trial court and on appeal, defendant raised two issues of error that require reversal. First, over defendant's objection[1], the trial court gave the jury an instruction regarding

[1] *Mr. Roth* [*defense counsel*]: . . . I would of course preserve my objection in that regard, your Honor, and would request, as I've submitted in my proposed instructions, that it state with regard to a neonatal nurse practitioner of ordinary learning or judgment or skill in this community or similar one. And obviously, based upon my earlier positions as stated on the record, that I believe under *Bahr* [*v Harper Grace Hosp*, 448 Mich 135; 528 NW2d 170 (1995)] and under the statute a local standard is applicable to nurses in this state.

professional negligence/malpractice that substantially departed from SJI2d 30.01. Specifically, the trial court intentionally deleted the crucial phrase "of ordinary learning, judgment, or skill" which limits the duty owed by defendant. The nonstandard jury instruction given by the trial judge in effect imposed strict liability for any wrong committed by defendant's employees irrespective of the standard of care. The following nonstandard instruction was given to the jury for professional negligence or malpractice and defendant's duties:

> When I use the words professional negligence or malpractice with respect to the Defendant's conduct, I mean the failure to do something which a hospital neonatal intensive care unit would do or the doing of something which a hospital neonatal intensive care unit would not do under the same or similar circumstances you find to exist in this case.
>
> It is for you to decide, based upon the evidence, what the hospital neonatal intensive care unit with the learning, judgment or skill of its people would do or would not do under the same or similar circumstances.

The standard jury instruction, SJI2d 30.01, provides:

> When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a _____(*name profession) of ordinary learning, judgment or skill in* [*this community or a similar one /* _____ (name particular specialty)] would do, or the doing of something which a _____ (name profession) of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case.
>
> It is for you to decide, based upon the evidence, what the ordinary _____ (*name profession*) *of ordinary* learning, judgment or skill would do or would not do under the same or similar circumstances. [Emphasis added.]

The majority acknowledges the deviation from the standard jury instruction noting that the trial court omitted the terms "ordinary learning, judgment or skill" from the first paragraph of the instruction that defined defendant's duty. Furthermore, the second paragraph of the nonstandard jury instruction given by the trial judge did *not* include the word "ordinary." The purpose of the "ordinary learning, judgment or skill" standard of duty is explained in Dobbs, The Law of Torts, § 242, pp 631-633:

> *The professional-peer standard*. . . . In the absence of some specific undertaking, the patient normally understands and expects that physicians acting within the ambit of their professional work will exercise the skill, knowledge, and care *normally* possessed and exercised by other members of their profession of the same school of practice in the relevant medical community. Similarly, the physician implicitly undertakes to meet at least such a standard.
>
> * * *

> . . . the professional standard asks the trier [of fact] only to determine whether the defendant's conduct conformed to the medical standard or medical custom in the relevant community. Thus under the traditional rule, as long as a doctor follows the medical standard or custom, he is not negligent, regardless of how risky the custom or how unnecessary. [Emphasis added.]

The deletion of the limitation of duty of "ordinary" care in the nonstandard instruction is inconsistent with Michigan law as set forth in SJI2d 30.01 and numerous cases such as *Johnson v Borland,* 317 Mich 225, 231; 26 NW2d 755 (1947), wherein the Supreme Court reiterated:

> The law is well settled that a patient who is treated by a physician is entitled to a thorough and careful examination, such as the condition of the patient and the attending circumstances will permit, with such diligence and methods of diagnosis for discovering the nature of the ailment as are usually approved and practiced by medical men *of ordinary or average learning, judgment, and skill in that community or similar localities*. [quoting with approval *Fortner v Koch,* 272 Mich 273; 261 NW 762 (1935), quoting from *Ramberg v Morgan,* 209 Iowa 474; 218 NW 492 (1928) (emphasis added).]

In the context of legal malpractice, the Supreme Court in *Simko v Blake,* 448 Mich 648, 656; 532 NW2d 842 (1995), explained that the ordinary care standard is an important limitation on a defendant's duty:

> [A]ccording to SJI2d 30.01, all attorneys have a duty to behave as would an attorney "of *ordinary* learning, judgment or skill . . . under the same or similar circumstances. . . ."
>
> [A]n attorney does not have a duty to insure or guarantee the most favorable outcome possible. An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability *ordinarily* possessed by members of the legal profession. [Emphasis added.]

See also *Cleveland v Rizzo,* 99 Mich App 682, 686; 298 NW2d 617 (1980) ("a medical practitioner warrants that he possesses the professional skill *ordinarily* possessed by medical practitioners . . . "). (Emphasis added.)

In the present case, the nonstandard jury instruction given by the trial court conspicuously omitted in both paragraphs the limitation of the duty of "ordinary" care which is the standard applicable to defendant's employees. The instructional error was critical to a fundamental and material issue in this case. *Kirby v Larson,* 400 Mich 585, 607; 256 NW2d 400 (1977) (opinion by Williams, J.); *Getman v Mathews,* 125 Mich App 245; 335 NW2d 671 (1983). Here, the trial court's violation of MCR 2.516(D)(2)[2] was unfairly prejudicial to defendant to such an extent

[2] MCR 2.516(D)(2) states:

> (2) Pertinent portions of the Michigan Standard Jury Instructions (SJI) must be given in each action in which jury instructions are given if

(continued…)

that to allow the judgment to stand would be "inconsistent with substantial justice. *Johnson v Corbet,* 423 Mich 304, 325-326; 377 NW2d 713 (1985); *Pontiac School Dist v Miller, Canfield, Paddock & Stone,* 221 Mich App 602, 622; 563 NW2d 693 (1977); *Duke v American Olean Tile Co,* 155 Mich App 555, 565; 400 NW2d 677 (1986).

While the instructional error alone compels reversal, in the interest of completeness, I will address defendant's other issues. Defendant argues the trial court committed error requiring reversal by allowing, over defendant's objection, the jury to find that the "neonatal intensive care *unit*" could commit professional negligence/malpractice as opposed to individuals within defendant's neonatal intensive care unit. I agree. As we stated in *Danner v Holy Cross Hosp,* 189 Mich App 397, 398-399; 474 NW2d 124 (1991): "Despite plaintiff's attempt to characterize his claim as one of corporate negligence, his claim is, in fact, one for medical malpractice. * * * *The only way a hospital can render treatment is through its nurses and physicians*." (Emphasis added.) Defendant corporation acts through the conduct, errors, and omissions of its agents and employees. Defendant's liability, if any, arises out of its respondeat superior liability for its employees and agents. Plaintiffs' attempt to depersonalize the alleged malpractice is without authority and contrary to the established law of malpractice. Furthermore, the error of permitting the jury to find the "unit" liable for malpractice was compounded by the trial court's refusal to apply a local standard of care to defendant's nurses. See MCL 600.2912a; MSA 27A.2912(1), *Bahr v Harper Grace Hosp,* 448 Mich 135; 528 NW2d 170 (1995), and *Whitney v Day,* 100 Mich App 707, 710, 712; 300 NW2d 300 (1980) (a nurse anesthetist, possessing greater qualifications than an ordinary nurse, is subject to a local, not national, standard of care).

Next, although not raised or argued by plaintiffs in the lower court or on appeal, the majority sua sponte asserts that defendant "waived" objections to the substance of plaintiffs' experts' testimony by failing to file a motion to strike plaintiffs' experts within a reasonable time after learning the experts' identities and basic qualifications. Again, I disagree.

The sole authority relied on by the majority for its waiver argument is the recently released decision *Greathouse v Rhodes,* ___ Mich App ___; ___ NW2d ___ (Docket No. 214434, issued 8/18/2000). However, *Greathouse* is readily distinguishable and does not support the majority's position. The issues in *Greathouse* were whether the defendant's expert was a qualified specialist as defined by MCL 600.2169(1); MSA 27A.2169(1) and, if not, whether the plaintiff had relinquished her objections to his qualifications by failing to make a timely motion to strike the defendant's expert.

As explained by the *Greathouse* Court:

(…continued)

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party.

> . . . challenges to an opponent's expert under § 2169(1)(a) such as the one plaintiff advanced in this case, generally do not require extensive discovery. A simple interrogatory question, a request for the expert's curriculum vitae, or other basic research would reveal whether the expert satisfies the licensure, specialty or certification requirements set forth in § 2169(1)(a). . . .
>
> . . . It is patently unfair for a party to wait until the brink of trial to challenge the basic qualifications of the opponent's expert, thereby catching the opponent surprised, unprepared, and at an extreme disadvantage. [*Id.* at slip op, p 8.]

Unlike *Greathouse*, in the present case there was no issue that plaintiffs' experts were qualified specialists in their field of expertise. Rather, the objections in the instant case pertained to the substance of the experts' testimony (introducing evidence of a national, as opposed to local, duty of care) not to their basic qualifications. Under our rules of evidence (MRE 103(a)(1)), defendant's objection to the testimony was timely and therefore not forfeited. *In re Weiss*, 224 Mich App 37, 139; 568 NW2d 336 (1997); *Westphal v American Honda Motor Co, Inc*, 186 Mich App 68, 70; 463 NW2d 127 (1990).

Next, without any citation of authority, the majority holds "[w]hile defendant may not have had the burden of proof to demonstrate the standard of care, defendant's failure to present proofs in a separate record that the standard of care is governed by a local standard, precludes any conclusion that the trial court's ruling resulted in prejudicial error." (Majority slip op, p 5.) Because the applicable legal duty is an issue of law, *Moning v Alfono*, 400 Mich 425, 436-437; 254 NW3d 759 (1977), *Papadimas v Mykonos Lounge*, 176 Mich App 40, 45; 439 NW2d 280 (1989), an evidentiary offer of proof is not appropriate or required. See, generally, MRE 103(a)(2). Again, this waiver argument raised by the majority is not supported by our rules of evidence or any authority.

In regard to defendant's final arguments concerning plaintiffs' counsel's closing argument, I agree with and join the majority's opinion.

Finally, the majority disagrees with the Supreme Court's order of remand by holding: "[a]ccordingly, even if we were to conclude that defendant's issues on appeal provided grounds for relief, we would sua sponte apply the unclean hands maxim to allow the trial judgment to stand." (Majority slip op, p 10.) The majority's previous position on the necessity of filing a cross appeal to urge an alternative ground for affirmance has been rejected by the Supreme Court: "[T]he Court [of Appeals] erred in refusing to review four arguments raised by defendant on the erroneous ground that defendant was required to file a cross appeal to raise them. *Middlebrooks v Wayne Co*, 446 Mich 151, 166, n 41; [521 NW2d 774] (1994)." *Cox, supra* at 859-860. Similarly, the majority's resurrected "unclean hands," jurisdictional, and law of the case arguments have been dismissed by the Supreme Court in its order: "In these unique circumstances, it would be unjust for the court to refuse to rule on these issues which the defendant has properly and persistently raised." *Id.* at 860. Because the Supreme Court has ruled that defendant's substantive issues are properly before us, I find the majority's criticism of the procedural history of this appeal to be inappropriate and unwarranted. For the benefit of the

bench and bar, I attach as an appendix our previous unpublished opinion per curiam and dissent *Cox v Bd of Hosp Manager* of the Court of Appeals issued 4/6/99 (Docket No. 205025).

I respectfully dissent. I would reverse and remand for a new and fair trial.

/s/ Richard Allen Griffin

STATE OF MICHIGAN

COURT OF APPEALS

TERESA COX, as Next Friend of BRANDON COX, a minor, TERESA COX AND CAREY COX, individually,

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v

BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT d/b/a HURLEY MEDICAL CENTER, a municipal corporation,

Defendant-Appellant / Cross-Appellee.

And

EDILBERTO MORENO, M.D.,

Defendant.

UNPUBLISHED
April 6, 1999

No. 205025
Genesee Circuit Court
LC No. 92-12247NM

Before: Hood, PJ, and Griffin and Markey, JJ.

PER CURIAM.

Judgment was entered in favor of plaintiffs on June 13, 1994 following a jury trial. Defendant moved for judgment notwithstanding the verdict (JNOV), and in the alternative a new trial or remittitur. The trial court granted defendant a new trial unless plaintiffs were willing to accept remittitur to the amount of $475,000. Plaintiffs appealed and this Court vacated the order granting a new trial. This Court also remanded for reconsideration of the motion for new trial and instructed the trial court to prepare a detailed analysis of economic and non-economic damages if it deemed remittitur appropriate. *Cox v Flint Bd of Hospital Mgrs,* unpublished order of the Court of appeals, entered December 14, 1994 (Docket No. 179366). Subsequently, the trial court entered an order granting defendant JNOV and conditionally granting a new trial if the JNOV was reversed on appeal. In *Cox v. Flint Bd of Hospital Mgrs,* unpublished per curiam opinion of the Court of Appeals, issued November 22, 1996 (Docket No. 184859), this Court reversed the grant of JNOV. In its opinion, the prior panel refused to decide several substantive issues raised by defendant because defendant had failed to file a cross-appeal. After

unsuccessfully attempting to convince this Court to hear its issues relating to the June 13, 1994 judgment[1], defendant had the trial court enter a new order of judgment against it on July 21, 1997. From that order, defendant appeals as of right, raising substantially the same issues as previously briefed for this Court in docket number 184859. Plaintiffs cross-appeal claiming that defendant's appeal should be dismissed because the issues it raises are improperly before this Court. We agree with plaintiffs and dismiss defendant's appeal.

In *Cox, supra* at 3, this Court stated:

> Although defendant asserts in its brief on appeal that other issues warranted a new trial, these claims were not raised by way of a cross-appeal. Accordingly, review of these issues is precluded. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

Defendant filed a motion for rehearing, specifically arguing that this Court should have heard and decided the other issues because they could have warranted a new trial. This Court denied the motion for rehearing on January 14, 1997. Defendant did not appeal that order to the Supreme Court.

> Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. The law of the case mandates that a court may not decide a legal question differently where the facts remain materially the same. The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. The rationale supporting the doctrine is the need for finality of judgment and the want of jurisdiction in an appellate court to modify its own judgments except on rehearing. Two exceptions to the doctrine exist: (1) when the decision would preclude the independent review of constitutional facts and (2) when there has been an intervening change of law. [*Webb v Smith (After Second Remand)*, 224 Mich App 203, 209-210; 568 NW2d 378 (1997) (citations omitted).]

In *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997), this Court recently stated the doctrine as follows:

> The law of the case doctrine provides that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand *or in a subsequent appeal in the same case. This rule applies without regard to the correctness of the prior determination. . . .* (emphasis added).

In docket number 184859, plaintiffs raised the issue of law as to whether defendant's substantive issues relating to the underlying judgment should be reviewed absent a cross-appeal. This Court decided that they should not. *Cox, supra.* This Court reinforced its ruling that a cross-appeal was necessary when it denied defendant's motion for rehearing. In the cross-appeal currently before this Court, we are once again asked to decide whether defendant's substantive

issues relating to the underlying judgment should be reviewed when a cross-appeal was never filed at the time the initial appeal was briefed, argued and decided. We are bound by the prior panel's decision that it was necessary for defendant's to file a cross-appeal, after plaintiffs filed their initial appeal, if it wanted its substantive issues heard. We therefore need not address defendant's arguments that a cross-appeal was not necessary.

We note, however, that there is a conflict regarding whether a cross-appeal to the original appeal was necessary. We believe the prior panel's decision that a cross-appeal was necessary was correct. See *VanderWall v Midkiff,* 186 Mich App 191, 201-203; 463 NW2d 219 (1990) and *Shipman v Fontaine Truck Equipment Co,* 184 Mich App 706, 714; 459 NW2d 30 (1990). In *Shipman,* this Court reversed a grant of JNOV in favor of defendant Fontaine. In its brief on appeal, Fontaine argued, in the alternative, that if this Court reversed the JNOV, a new trial should be granted because plaintiffs failed to supplement discovery responses and because of allegedly improper jury instructions given during trial. The trial court had rejected these alternative arguments. This Court ruled that because the issues were not cross-appealed, they were not properly before this Court and would not be addressed. *Id.* See also 3 Martin, Dean & Webster, Michigan Court Rules Practice, p 230:

> To preserve any issue on appeal, not raised in an appellant's brief, an appellee must file a cross appeal.
>
> While the authors have been unable to find any Michigan case which thoroughly discusses an appellee's obligation to file a cross appeal in Michigan if the appellee merely wishes to defend, and not to enlarge, the judgment below, the purpose for the Michigan rule does appear in St. John v Nichols, 331 Mich. 148, 49 N.W.2d 113 (1951). The court there states that this rule serves the desirable purpose of placing both parties in the same position as relates to the necessity of apprising each other and the court of their claims of error and limiting the scope of their appeals thereto. In other words, it prevents an appellee from raising an issue in his or her brief to which the appellant has no opportunity to respond by way of reply brief[2].

There are, however, cases that have ruled to the contrary, finding that cross-appeals are not necessary where a party is urging alternate grounds to support a trial court's decision. See *ABATE v Public Service Comm,* 192 Mich App 19; 280 NW2d 585 (1991) and *Akyan v Auto Club Ins Ass'n (On Rehearing),* 208 Mich App 271, 274-275 (1994). *In ABATE,* this Court was asked to decide issues relating to a Public Service Commission (PSC) decision in favor of Michigan Consolidated Gas Co. On appeal, the gas company raised an issue, which had been specifically rejected by the PSC, as an alternative means of upholding the PSC decision. This Court stated that "an appellee who has taken no cross appeal may still urge in support of the judgment in its favor reasons that were rejected in the lower court." *Id.* at 24. In *Akyan,* defendant also urged an alternate ground for sustaining a dismissal that was granted in its favor. The alternate ground was raised and apparently rejected by the trial court in granting defendant a dismissal on other grounds. This Court indicated that although it would normally be precluded from hearing the issue because a cross-appeal was not filed, it would hear the issue because the argument was an alternate ground for sustaining the judgment. *Akyan, supra* at 274.

While we acknowledge that there is a conflict in our case law over whether a cross-appeal is necessary, we conclude that the better rule of law is to require a cross-appeal under the circumstances. *Shipman, supra.* Where defendant decided not to file a cross-appeal, it did so at its own peril. Resolution of that conflict, however, is not necessary for a resolution of this case. We reiterate that even if a cross-appeal was not required because an alternate ground was being urged, defendant's claim in this case would nevertheless need to be dismissed. Correctly or incorrectly, this Court already ruled that defendant was required to file a cross-appeal. That decision was never appealed to our Supreme Court and it is the law of the case. *Driver, supra.*

After this Court denied defendant's motion for rehearing in docket number 184859 and defendant decided not to appeal to our Supreme Court, it directly filed a claim of appeal (Docket No. 200943) from the June 13, 1994 judgment entered in plaintiffs favor and attempted to raise the issues that this Court had already precluded from review. This claim of appeal was grossly tardy. It was filed on January 30, 1997, which was well in excess of the twenty-one day time limit set forth in MCR 7.204(A)(1)(a). By January 30, 1997, defendant had also lost the right to have a delayed application for leave to appeal granted on the June 13, 1994 judgment. See MCR 7.205(F)(3), which provides that if an application for leave to appeal is filed more than twelve months *after entry of the order or judgment on the merits, leave to appeal may not be granted* (emphasis added). This Court dismissed defendant's claim of appeal in docket number 200943 without prejudice on June 11, 1997 "for failure to pursue the case in conformity with the rules. MCR 7.216(A)(10)."

Defendant thereafter had the trial court enter a new order of judgment on July 21, 1997. The new order simply that the JNOV order was reversed pursuant to this Court's opinion in *Cox, supra*. It then also mirrored the June 13, 1994 judgment. Defendant appeals this new judgment as of right and again raises the issues that this Court previously precluded from review. The July 21, 1997 order was unnecessary. The prior ruling of this Court in *Cox, supra* intended that the June 13, 1994 judgment be enforced after the JNOV order was reversed. Notably, the prior panel did not remand the case for further proceedings or entry of a *new* judgment.

Moreover, even if the new order was necessary because the prior opinion failed to specify that the June 13, 1994 judgment should be reinstated, there is no authority to support that defendant was entitled to take an appeal as of right from this new judgment, which simply restated or reinstated the prior judgment. If we allowed defendant to appeal as of right from this new order, it would be tantamount to allowing defendant to escape the prior ruling of this Court that defendant was required to file a cross-appeal to plaintiffs' previous appeal. It would also ignore all applicable time limits within the court rules and would flaunt the policies of this Court, which advocate judicial economy and the closure of cases. It would encourage other parties to seek new orders after appeal in order to restart the time limits for filing an appeal and would allow an appeal as of right from an underlying judgment each time a JNOV or new trial order is simply reversed by this Court. For those reasons, we find that defendant did not have an appeal as of right from the July 21, 1997 judgment, which was entered solely for the purpose of providing defendant with an opportunity to appeal the substantive issues from the June 13, 1994 judgment.

Finally, we note that on August 1, 1997, plaintiffs filed a motion to dismiss this appeal for want of jurisdiction. That motion was denied by a panel of this Court without comment on January 28, 1998. The denial of the motion to dismiss does not preclude this Court from deciding the jurisdictional issues, which were first raised in the motion to dismiss and are now raised in plaintiffs' cross-appeal. The denial of a motion to dismiss is a preliminary disposition of the issue. In *DAIIE v McMillan,* 97 Mich. App 687; 296 NW2d 147 (1980), rev'd on other grounds 417 Mich 946, for example, plaintiffs filed a claim of appeal. Defendants filed two motions to "dismiss", which were treated by this Court as motions to affirm the lower court. The motions were dismissed without comment. On appeal, defendants attempted to raise the issues, which were found to be without merit when this Court denied the motions to dismiss. This Court ruled that because no cross-appeal was filed, the issues would not be reconsidered. *Id.* at 695-696.

Michigan Court Rules Practice, Rule 7.211, states, when discussing motions to dismiss and affirm:

> Dismissal may be sought on the grounds that the appeal is not within the Court's jurisdiction, that the appeal was not filed or pursued in conformity with the court rules, or that the appeal is moot. MCR 7.211(2). *To fully preserve an issue raised in a motion to dismiss, however, an appellee may also be required to file a cross appeal*. See *DAIIE v McMillan*…and Author's Comment, MCR 7.204, pint 1. (emphasis added).

The Author's Comment to MCR.704, indicates that both a motion to dismiss raising jurisdictional issues and a cross-appeal raising the same issues may be filed:

> Counsel should note, however, that only the filing of a cross appeal fully preserves the issue for appellate review. An appellee's attempt to raise an issue on appeal found to be without merit in *preliminary orders disposing of a motion to dismiss will not be considered further if a cross appeal is not also filed.* (emphasis added).

It necessarily follows that the ruling of the motion docket panel which denied the motion to dismiss without comment does not constitute "law of the case" with regard to jurisdictional issues and does not preclude our consideration of those issues in plaintiffs' cross-appeal.

Defendant's appeal is dismissed, and the July 21, 1997 judgment is vacated. The trial court should enforce the June 13, 1994 judgment.

/s/ Harold Hood
/s/ Jane E. Markey

STATE OF MICHIGAN

COURT OF APPEALS

TERESA COX, as Next Friend of BRANDON COX, a minor, TERESA COX and CAREY COX, individually,

Plaintiffs-Appellees/
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BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT, d/b/a HURLEY MEDICAL CENTER, a municipal corporation,

Defendant-Appellant/
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and

EDILBERTO MORENO, M.D.,

Defendant.

UNPUBLISHED
April 6, 1999

No. 205025
Genesee Circuit Court
LC No. 92-12247 NM

Before: Hood, P.J., and Griffin and Markey, JJ.

GRIFFIN, J. (dissenting).

The strained, overly technical arguments accepted by the majority to bar defendant from raising its meritorious issues on appeal are unpersuasive particularly when viewed in the overall context of this case. In light of the ambiguities contained in the previous opinion of *Cox v Bd of Hosp Managers for the City of Flint*, unpublished opinion per curiam (after remand) of the Court of Appeals issued 11/22/96 (Docket No. 184859) (herein *Cox* opinion), and our conflicting decisions on the cross appeal rule, I conclude that we should address the merits of defendant's appeal. See, generally, MCR 1.105.[3] After doing so, I would reverse and remand for a new trial.

I

First, I disagree with the majority's selective application of the "law of the case" doctrine. Although plaintiffs' jurisdictional and issue preclusion arguments were previously raised and rejected by our Court when we denied plaintiffs' motion to dismiss (MCR 7.211(C)(2)(a)), the

majority has chosen not to follow our previous ruling. Instead, the majority has revisited these issues and has reversed our decision on plaintiffs' motion to dismiss.

In contrast, the majority has chosen to vigorously apply the law of the case doctrine in regard to the *Cox* opinion.[4] The law of the case doctrine, however, is inapplicable to *Cox*. First, as noted by the majority, the doctrine only applies to "an appellate court *ruling* on a particular issue." Majority opinion, p 2, emphasis added. By the majority's own characterization, the prior *Cox* panel made no rulings on the defendant's issues but rather "[i]n its opinion, the prior panel *refused to decide* several substantive issues raised by defendant because defendant had failed to file a cross appeal." Majority opinion, p 2, emphasis added. Refusing to decide issues is not the equivalent of ruling on the merits. Rather, it is more akin to our Court or the Supreme Court denying leave to appeal for failure to persuade as to the need for immediate appellate review. Such actions are not precedentially binding. For instance, in *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 338-339; 425 NW2d 791 (1988), this Court, when confronted with a similar situation, stated:

> Initially, we must address plaintiff's claim that defendant's appeal is barred by the law of the case. Plaintiff claims that this Court's July 2, 1986, denial of defendant's application for leave to appeal "for lack of merit in the grounds presented" bars the reraising of this issue.
>
> "The term 'law of the case,' as generally used, designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. [*Allen v Michigan Bell Telephone Co*, 61 Mich App 62, 65; 232 NW2d 302, lv den 395 Mich 793 (1975).]"
>
> The only issue raised in defendant's previous application was whether she should have had an appeal as of right; no substantive challenge to the award of exemplary damages was presented. Because this Court did not previously decide the issue of the propriety of the jury instructions on the merits, the doctrine of the law of the case does not preclude defendant's appeal.

In *Gallagher v Detroit-Macomb Hospital Assn*, 171 Mich App 761, 764; 431 NW2d 90 (1988), a medical malpractice action,

> Prior to trial, the court granted defendant's motion to exclude from trial the hospital's internal rules and regulations concerning its nursing personnel. Plaintiff moved for immediate consideration and applied for emergency leave to appeal both in this Court and our Supreme Court. Both courts granted the motion for immediate consideration but denied leave. The issue was raised again at trial and the court sustained the defendant's objection.
>
> Plaintiff's first issue is whether the trial court erred in refusing to admit the internal rules and regulations. Defendant contends that plaintiff is precluded by the doctrine of the law of the case from raising this issue on appeal because of the

> earlier denials of leave. *That doctrine applies only to questions which were actually determined by the appellate court's prior decision and which were necessary to the prior decision. Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 338-339; 425 NW2d 791 (1988). The previous determinations in this case did not rule upon the merits and therefore, having no precedential value, do not preclude our present review. *Jackson, supra*. [Emphasis added.]

The majority concludes that defendant's issues on appeal have been relinquished by operation of the following statement made in the *Cox* opinion:

> Although defendant asserts in its brief on appeal that other issues warranted a new trial, these claims were not raised by way of a cross appeal. Accordingly, review of these issues is precluded. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

The sole authority cited in *Cox* is *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993), which does not support the majority's decision. On the contrary, in *Barnell*, the issue defendant failed to raise on cross appeal and the court did not rule on appeal, was whether plaintiff may recover damages, although plaintiff allegedly failed to mitigate his damages. However, in *Barnell*, this issue was not relinquished, but rather the case was remanded for further proceedings at which time the defendant presumably could reargue the mitigation issue. Accordingly, the result reached by the majority in the present case is not supported by the authority relied on by the prior *Cox* panel.

Next and most importantly, the majority misconstrues our rule on cross appeals. At the present time, despite the resolution of conflicts rule, MCR 7.215(H), the Court of Appeals is hopelessly in conflict on the construction of our rule on cross appeals. MCR 7.207. In view of this abyss, I urge the Supreme Court to grant leave on this case in order to resolve the conflict. Contrary to the majority, I favor construing our cross appeal rule consistently with federal practice and with the practice of nearly all other states. As has been stated by commentators Martin, Dean & Webster, Michigan Court Rules Practice, Rule 7.207, author's comment, p 229:

> In the federal courts and in most state courts an appellee may object to the rulings of the trial court (and to preliminary actions taken by the appellate court, such as accepting a claim of appeal) without cross appealing so long as the appellee does so to preserve, and not to enlarge, rights obtained in the trial court. Thus, in effect, an appellee may claim that the trial court erred on one issue in order to uphold its ruling on another. For example, the appellee may argue an alternative ground for the lower court's ruling, even though the lower court rejected that ground.

Although Martin, Dean & Webster originally opined that Michigan's cross appeal practice was inconsistent with federal practice and with that of nearly all other states, in their supplemental comment, they now conclude:

> There is now, however, some question as to whether or not an appellee must cross appeal before he or she is permitted to argue an alternative ground for affirmance not raised in appellant's brief. [*Id.* at 27.]

An extraordinary plea to resolve the conflict is made by these commentators:

> At present the authors can only state that caselaw on both sides of the issue exists, and that both decisions noted above were released in 1994. For the benefit of all, they suggest that the Court of Appeals examine the issue in depth the next time it is raised. [I*d.* at 27.]

The language and framework of our cross appeal rule runs contrary to the construction adopted by the majority. In particular, MCR 7.207(B) provides that when a cross appeal is filed its form is governed by MCR 7.204(D). MCR 7.204(D) provides that when a claim of appeal is filed, it must specify that "plaintiff or defendant claims an appeal from the judgment or order entered." It is axiomatic that a prevailing party may not appeal from an order or judgment of complete relief in its favor. *Ford Motor Co v Jackson (On Rehearing)*, 399 Mich 213, 225-226; 249 NW2d 29 (1976) (opinion by Coleman, J.). See also, *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994); *Gray v Pann*, 203 Mich App 461, 463-464; 513 NW2d 154 (1994). Accordingly, the case law holding that cross appeals must be made as to "issues" as opposed to claims appears to be inconsistent with our rules.

In addition, MCR 7.207(D) provides that if the appellant abandons the initial appeal or the court dismisses it, the cross appeal may be prosecuted to its conclusion. If cross appeals are issue based rather than claim based, subsection (D) makes no sense because a cross appeal would obviously be moot when the principal appeal has been abandoned or dismissed. See, generally, *Derbeck v Ward*, 178 Mich App 38 (1989), for the claim/theory distinction.

Although the majority acknowledges a conflict in the Court of Appeals regarding the construction of the cross appeal rule, it fails to cite our most recent decision on this issue, *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998), which holds in pertinent part:

> Although a cross appeal is necessary to obtain a decision more favorable than that rendered by the lower tribunal, a cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court. *Middlebrooks v Wayne Co*, 446 Mich 151, 166, n 41; 521 NW2d 774 (1994); *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm*, 192 Mich App 19, 24; 480 NW2d 585 (1991). But see *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

In addition, and most strikingly, the majority fails to acknowledge or follow Supreme Court precedent on this issue which is contrary to their position. In *Middlebrooks v Wayne Co*, 446 Mich 151, 166, n 41; 521 NW2d 774 (1994), our Supreme Court summarized the rule of cross appeals as follows:

> Wayne County has not claimed that this Court should decline to reach the Michigan constitutional issue because Middlebrooks did not cross appeal. A cross appeal was not necessary to urge an "alternative ground for affirmance."
>
> It is well established that an appellee who has taken no cross appeal may still urge in support of the judgment in its favor reasons that were rejected by a lower court. *Burns v Rodman,* 342 Mich 410, 414; 70 NW2d 793 (1955), and authorities cited therein. It is true that an appellee that has not sought to cross appeal cannot obtain a decision more favorable than was rendered by the lower tribunal. *McCardel v Smolen,* 404 Mich 89, 94-95; 273 NW2d 3 (1978). Michigan Consolidated Gas Company does not seek to enlarge the scope of the relief granted by the PSC, but merely argues an alternate ground for affirmance that was rejected by the PSC. [*ABATE v Public Service Comm*, 192 Mich App 19, 24; 480 NW2d 585 (1991).]
>
> Plaintiff appellant claims that defendant appellee, having taken no cross appeal, may not urge in support of the judgment in his favor, reasons rejected by the trial court. However, in favor of the contrary proposition, see [ten citations of decisions of this Court omitted]. [*Burns v Rodman*, 342 Mich 410, 414; 70 NW2d 793 (1955).]
>
> Plaintiffs urge that because the trial judge, after holding plaintiffs were not proper parties plaintiff, nonetheless considered the case on the merits and defendants have taken no cross appeal, they may not now, on appeal, question plaintiffs' capacity to sue. [Three citations of decisions of this Court omitted.] These cases hold, directly to the contrary, that an appellee need not take a cross appeal in order to urge, in support of relief afforded him below, reasons other than those adopted by or those rejected by the lower court. [*Menendez v Detroit,* 337 Mich 476, 483; 60 NW2d 319 (1953).]

For arguable authority supporting a conflict on this issue within the Supreme Court, see *Pulver v Dundee Cement Co*, 445 Mich 68, 70, n 2; 515 NW2d 728 (1994),[5] and *Peters v Aetna Life Ins Co*, 282 Mich App 426; 276 NW 504 (1937).

The majority asserts in footnote two of its opinion that if an appellee were allowed to argue alternative grounds for affirmance, that the appellant would be prejudiced. This argument was previously rejected by the Supreme Court:

> Plaintiff appellant claims that defendant appellee, having taken no cross appeal, may not urge in support of the judgment in his favor, reasons rejected by the trial court. However, in favor of the contrary proposition, see *Grant v Merchants' and Manufacturers' Bank of Detroit,* 35 Mich 515; *Robertson v Gibb,* 38 Mich 165; *Lambert v Griffith*, 44 Mich 65; *Bundy v Youmans*, 44 Mich 376; *Regents of the University of Michigan v Rose,* 45 Mich 284. Also, *Township of Pontiac v Featherstone,* 319 Mich 382; *Morris v Ford Motor Company,* 320 Mich 372; *Fass v City of Highland Park,* 321 Mich 156; *Bostrom v Jennings*, 326 Mich 146; and *Menendez v City of Detroit*, 337 Mich 476.

> While it might simplify the briefs filed in this Court if the appellee had served on the appellant, before the appellant filed his brief, a statement of what reasons rejected by the trial court, if any, the appellee would rely upon to sustain his case in this Court, still we feel constrained to consider appellee's claims in this Court as to matters which were presented to the trial court. [*Burns v Rodman,* 342 Mich 410, 414; 70 NW2d 793 (1955).]

In addition, it should be noted that the ten-page limitation for appellant's reply brief (MCR 7.212(G)) may be waived by this Court in the exercise of its discretion. MCR 7.216(A)(7).

In conclusion, I would follow *In re Herbach Estate*, *supra*, and the Supreme Court precedent as noted in *Middlebrooks, supra*, and hold that "[a]lthough a cross appeal is necessary to obtain a decision more favorable than that rendered by the lower tribunal, a cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court." *In re Herbach Estate, supra* at 284.

II

As an alternative basis for affirmance, the majority has also reconsidered the issue of jurisdiction. Again, plaintiffs' argument that defendant has no appeal as of right was previously raised and decided against plaintiffs when we denied plaintiffs' motion to dismiss. In denying plaintiffs' motion to dismiss on its merits, we were fully informed by the clerk of our Court of her actions as well as the reliance on her directions by defendant. See affidavit of Marc S. Berlin.

The majority, however, has chosen not to afford deference to the clerk of our Court and has disregarded her directions to the parties as to how to proceed. In particular, the majority states "[t]he prior ruling of this Court in *Cox*, *supra*, intended that the June 13, 1994, judgment be enforced after the JNOV order was reversed." Majority op, p 6. The clerk of our Court, however, took the opposite position and advised defense counsel accordingly. The Clerk of the Court of Appeals determined that the *Cox* opinion which simply reversed without direction was not self-executing. Accordingly, Assistant Clerk Linda Sherer advised defense counsel that an order of the trial court reinstating the 1994 judgment was necessary for the filing of an appeal as of right of the judgment. Pursuant to our clerk's direction, the lower court thereafter issued a July 21, 1997, order which reinstated the 1994 judgment. Defendant timely appealed and its appeal was docketed as an appeal of right. Despite this history, the majority concludes "[t]he July 21, 1997, order was unnecessary." I respectfully disagree and will not ignore the history of the case and the involvement of the clerk of our Court.

Additionally, the majority fails to understand that after the trial court entered its order granting judgment notwithstanding the verdict (JNOV), the earlier judgment in favor of plaintiffs was vacated and therefore could not be appealed as of right. After the vacation of the judgment by the order granting JNOV, the only "final judgment or final order of the circuit court," MCR 7.203(A)(1), which was appealable as of right was the JNOV order. Simply put, there was no right (or requirement) to appeal (or cross appeal) the 1994 judgment during the period that it was vacated by the grant of new trial, remittitur, and JNOV. As such, defendant was not required or

permitted to appeal as of right the 1994 judgment until after this Court's decision in *Cox* and after the trial court's order reinstating the judgment.

III

In the trial court and on appeal, defendant raises two issues of error that require reversal. First, over defendant's objection, the trial court gave the jury an instruction regarding professional negligence/malpractice which substantially departed from SJI2d 30.01. Specifically, the trial court deleted the crucial phrase, "of ordinary learning, judgment, or skill" which limits the duty owed by the defendant. The nonstandard jury instruction given by the trial judge in effect imposed strict liability for any wrong committed by defendant irrespective of the standard of care. The jury was instructed:

> When I use the words professional negligence or malpractice with respect to defendant's conduct, I mean the failure to do something which a hospital neo-intensive care unit would do or the doing of something which a hospital neo-intensive care unit would not do under the same or similar circumstances you find to exist in this case.

Conspicuously omitted from the instruction was the limitation "of ordinary learning, judgment, or skill" which is the standard of care applicable to defendant's conduct. The error was critical to a fundamental material issue in the case. See, generally, *Kirby v Larson*, 400 Mich 585, 607; 256 NW2d 400 (1977).

Second, the court erred in allowing the jury to find that a "neonatal intensive care *unit*" could commit professional negligence/malpractice as opposed to individuals within defendant's neonatal intensive care unit. See *Danner v Holy Cross Hosp*, 189 Mich App 397, 398-399; 474 NW2d 124 (1991): "Despite plaintiff's attempt to characterize his claim as one of corporate negligence, his claim is, in fact, one for medical malpractice. * * * The only way a hospital can render treatment is through its nurses and physicians." The error was further compounded by the trial court's refusal to apply a local, as opposed to a national, standard of care to the "unit." See *Whitney v Day*, 100 Mich App 707, 710, 712; 300 NW2d 300 (1980).

The above errors were sufficiently prejudicial that to allow the judgment to stand would be "inconsistent with substantial justice." *Johnson v Corbet*, 423 Mich 304, 326; 377 NW2d 713 (1985). In view of the above errors requiring reversal, I would find it unnecessary to address the additional issues raised by defendant.

I respectfully dissent. I would reverse and remand for a new trial.

/s/ Richard Allen Griffin

[1] Defendant filed a motion for rehearing in docket number 194859 and when that was denied, it filed a severely tardy claim of appeal from the June 13, 1994 judgment, which claim of appeal was dismissed in docket number 200943.

[2] We agree that from a practitioner's standpoint, requiring a cross-appeal is more equitable. An appellant is limited to a ten page reply brief. MCR 7.212(G). If appellee is allowed to file a fifty

page response brief detailing numerous grounds for either sustaining the favorable trial court result or granting a new trial, the appellant is prejudiced in filing a meaningful response to those arguments. Motions for leave to file briefs in excess of page limitations are disfavored by this Court. See MCR 7.212(B).

[3] MCR 1.105 provides:

> These rules [Michigan Court of 1985] are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.

[4] The majority in its attempt to mechanically apply the doctrine fails to recognize its discretionary nature. "Justice Holmes recognized almost a century ago, unlike the later doctrines, the law of the case doctrine 'merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power." *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991).

[5] Since the Constitution of 1963 and establishment of the Court of Appeals, the jurisdiction of the Supreme Court has been largely discretionary. It has become the practice of the Supreme Court not to grant plenary review, but narrow review usually "limited to the issues raised in the application for leave to appeal." MCR 7.302(D)(4)(a). In *Pulver*, *supra*, the Supreme Court refused to consider an alternative basis for affirmance raised by the plaintiff in response to the defendant's appeal. Although the *Pulver* footnote states that the issue "is not properly preserved because plaintiff failed to cross appeal on this issue," a more accurate explanation is that by operation of the Supreme Court's order limiting the grant of appeal to the issues raised in defendant's application, the issue argued by plaintiff was simply not before the Court.