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.

UNPUBLISHED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 In light of the ambiguities contained in the previous opinion of *Cox v Bd of Hosp Managers for the City of Flint*, unpublished opinion per curiam (after remand) of the Court of Appeals issued 11/22/96 (Docket No. 184859) (herein *Cox* opinion), and our conflicting decisions on the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.[1] 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.[2] 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),[3] 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] 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.

[2] 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).

[3] 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.