STATE OF MICHIGAN

COURT OF APPEALS

RACHEL BALDWIN, Personal Representative of the Estate of ETHAN BALDWIN,

Plaintiff-Appellee,

v

MATTIE M. SCOTT, M.D. and WOMEN'S HEALTH CARE ASSOCIATES, a/k/a HURLEY HEALTH SERVICES,

Defendants-Appellants,

and

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

Defendant-Appellee.

UNPUBLISHED
December 4, 2008

No. 275809
Genesee Circuit Court
LC Nos. 05-081312-NH;
04-079596-NH

RACHEL BALDWIN, Personal Representative of the Estate of ETHAN BALDWIN,

Plaintiff-Appellant-Cross-Appellee,

v

MATTIE M. SCOTT, M.D. and WOMEN'S HEALTH CARE ASSOCIATES, a/k/a HURLEY HEALTH SERVICES,

Defendants-Appellees,

and

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

No. 275830
Genesee Circuit Court
LC Nos. 05-081312-NH;
04-079596-NH

Defendant-Appellee-Cross-
Appellant.

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

In Docket No. 275809, defendants Mattie M. Scott, M.D. (Dr. Scott) and Hurley Health Services (HHS) appeal by leave granted the trial court's January 8, 2007 order granting in part plaintiff's motion for reconsideration. In Docket No. 275830, plaintiff appeals by leave granted the trial court's June 13, 2006 order granting defendants' motions for summary disposition and its January 8, 2007 order to the extent that it limits amendment of her complaint. Defendant Hurley Medical Center (HMC) cross-appeals the January 8, 2007 order, arguing that the trial court erred in allowing plaintiff to amend her complaint. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

This wrongful death action arises out of the death of plaintiff's son, Ethan Baldwin (Ethan), five days after he was born.

On May 29, 2001, Dr. Scott, plaintiff's obstetrician/gynecologist, conducted a non-stress test on plaintiff, who was over her due date; the test revealed some decelerations, so Dr. Scott advised plaintiff that she should be admitted to the hospital for monitoring and possible induction. Plaintiff was admitted to HMC at approximately 6:30 p.m. on May 29, 2001. After her admission, an external fetal monitor was placed to monitor the condition of the fetus during labor and delivery. Plaintiff was effaced but not dilated. She was given Prostagel to see if she would deliver naturally, but it did not happen. On May 30, 2001, she was given Pitocin to induce her labor. Dr. Scott broke plaintiff's water at 11:00 a.m., and plaintiff began pushing around 3:00 p.m. However, there were problems with the delivery: Ethan was in an occiput posterior (face-up) position. A vacuum extraction was attempted unsuccessfully five times.¶

As early as 2:30 or 3:00 p.m., there were signs of fetal distress, including late decelerations, decreased variability, and eventually severe variable decelerations. At approximately 7:00 p.m. on May 30, 2001, Ethan was delivered by caesarean section (c-section). At one minute after delivery, Ethan's Apgar score was one, and at five minutes after delivery, it was three. At birth, Ethan was apneic, bradycardiac, and hypertonic. Plaintiff asserts that these conditions were "directly related to hypoxic ischemia resulting from failure to deliver the child in a timely fashion once signs of fetal distress manifested themselves earlier in the evening."

Ethan was placed on a ventilator after he was delivered. Sometime the following day, he was weaned off the ventilator because he apparently started breathing on his own. But he began to have seizures and was placed back on the ventilator. A physician examined Ethan and identified "profound encephalopathy due to hypoxic ischemic conditions, most likely several hours prior to delivery." The same physician examined Ethan a day later, and it was his

impression that Ethan had "profound diffuse encephalopathy with severe brainstem dysfunction." He believed that the prognosis for significant neurological recovery was poor.[1]

The physician met with Ethan's parents and explained that if Ethan survived there was a high probability of poor neurological sequelae and he would possibly suffer severe cerebral palsy and hearing, visual, and motor impairment. Medical personnel spoke with plaintiff and Ethan's father again, and they presented them with the option of extubating Ethan. This was done, and on June 5, 2001, Ethan died. The death certificate described the cause of death as multiple organ failure and severe respiratory depression at birth.

Plaintiff filed suit against defendants, alleging that Dr. Scott breached the applicable standard of care by failing to properly monitor Ethan during labor and in failing to deliver Ethan by c-section no later than 5:30 p.m. on May 30, 2001. Plaintiff further alleged that Dr. Scott's negligence directly and proximately caused Ethan to suffer "severe hypoxic ischemia resulting in his death." Plaintiff sought damages under the Wrongful Death Act (WDA), MCL 600.2921 *et seq*., "including but not limited to conscious pain and suffering of Ethan Baldwin prior to his death . . . ."

Dr. Scott and HHS moved for summary disposition. HMC concurred in the motion. Defendants argued that to prevail on her claim, brought under the WDA, plaintiff must establish that they caused Ethan's death. Dr. Scott and HHS asserted that plaintiff's causation experts all testified that Ethan died due to the administration of morphine combined with extubation, noting that Ethan could breathe on his own before the administration of morphine. According to Dr. Scott and HHS, plaintiff's experts testified that Ethan did not die as a result of their negligence. Thus, they argued that plaintiff could not establish causation and her action must be dismissed.

Plaintiff responded to the motion for summary disposition. She disagreed in the assessment of her claim made by defendants. She asserted that her experts testified that Ethan would not have died in the absence of defendants' negligence. According to plaintiff's interpretation of the experts' testimony, Ethan suffered brain damage and other injuries as a result of negligence during labor and delivery and that because of this, he died.

In support of their motion for summary disposition, defendants relied on the deposition of Dr. Carolyn S. Crawford. Dr. Crawford testified that in her opinion, at the time that the decision to extubate Ethan was presented to Ethan's parents, there was insufficient information to conclude that Ethan would not survive. She believes that if Ethan had been managed differently, he probably would have survived, although he would have been severely impaired. Dr. Crawford testified:

> So I think that may be where the decision was made by the parents was that I think the mother was told basically he would be a vegetable if he survived and they didn't want that.

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[1] Ethan's parents also sought a second opinion, which was consistent with the original prognosis.

> And he would have been, you know, probably a spastic quadriplegic, severely developmentally delayed, probably with some—with impairment of vision and hearing.
>
> Q. But he would have survived in your opinion, correct?
>
> A. Yes. If the management had been different, I believe he would have survived.

Dr. Crawford explained that Ethan's parents made the decision to terminate life support based on what the physicians told them. She stated that if life support is discontinued on someone who receives morphine every few hours, it is likely that the patient's respiratory status would be compromised and the patient would die.

Another expert relied upon by defendants was Dr. Robert J. Lerer. Dr. Lerer stated that it is possible that Ethan died after his parents permitted the removal of life support because his brain damage increased and affected his respiration. An equally likely explanation, however, is that at that time Ethan was heavily sedated; sedation diminishes respiratory drive. Dr. Lerer further testified: "[I]f the baby had been kept on a ventilator for a more extended period of time, I think the baby eventually could have been weaned off the ventilator, but I think this baby would have had significant brain injury."

> The trial court heard oral arguments on June 5, 2006 and ruled as follows:
> I would agree the wrongful death statute does require that there be evidence of causation as to the cause of death. I think given the expert testimony by the plaintiff's own experts that it's clear that, in this Court's opinion, there was a superseding, intervening cause which brought about the death of the child. The plaintiff's own experts have I believe testified, at least two, that had the child not been reintubated [sic] but had been allowed to be weaned off the ventilator that this child, although it may have had some deficits, would have survived.

In an order entered June 13, 2006, the trial court granted defendants' motion for summary disposition, dismissing the case. Plaintiff moved for reconsideration, arguing that defendants' conduct was a cause in fact of Ethan's injury, and that the experts testified that but for defendants' negligence, Ethan would not have died. She further argued that the intervening negligence of Ethan's subsequent treaters, as well as the decision to discontinue treatment, are reasonably foreseeable intervening acts that do not constitute a superseding cause to relieve defendants of liability. She disagreed with defendants' position that the discontinuation of treatment caused Ethan's death. Plaintiff also argued for amendment of her complaint to assert additional claims of negligence against HMC. Finally, plaintiff argued that she should be permitted to proceed on a survival action for malpractice against defendants.

Defendants responded to plaintiff's motion, asserting that based on the testimony of plaintiff's experts, who stated that Ethan would have survived had plaintiff and Ethan's father not directed termination of treatment, the court correctly dismissed the wrongful-death claim. Defendants further argued that amendment of the pleadings as requested by plaintiff would be futile and prejudicial. Finally, defendants argued that to recover for pain and suffering, plaintiff

would be required to establish causation, which she cannot do. Thus, they asserted, such a claim should not be permitted.

The court held a hearing on plaintiff's motion for reconsideration on July 31, 2006. The court ruled as follows:

> [T]he complaint does, in this Court's opinion, spell out a claim for pain and suffering due to the failure to perform a cesarean section in a timely manner. And I think that [plaintiff] has an obstetrician and expert who supports that and to me that would create a question of fact for a trier of fact as to whether or not the failure to perform the cesarean section in a timely manner had led to the deceased child having gone through pain and suffering. A wrongful death claim, or the death part of the claim which involves the decision to remove the child from the ventilator, later to medicate the child, place the child back on the ventilator, something that apparently, the…doctor or they're not really sure, the neonatologist or someone discussed with the, with the parents, a decision was made, as best I can tell with both, in making that decision and as a result the child expired after being removed from the ventilator and we have experts who later come and the plaintiff's own experts and say well, you know, if the child had not been removed from the ventilator the child probably would have, at least would have, definitely would have survived, certainly would have had neurological deficits. So I . . . don't believe the Court committed a palpable error in ruling that the wrongful death claim was to be dismissed pursuant to summary disposition because of the testimony that has been refuted by the plaintiff's own neonatologist. However, I do agree with the plaintiff that the Court did make a palpable error in the comprehensiveness of its decision because that decision should not have at the same time precluded the plaintiff from going forward on the survival claim involving the claims, well you say not but on the claim involving the failure of the doctor to perform the cesarean section in a timely manner which may have resulted in the deceased child having pain and suffering that the plaintiff believes that they properly pled.

The court entered its ruling in a January 8, 2007 order. It granted plaintiff's motion for reconsideration so as to reinstate plaintiff's survival claim and granted her leave to file an amended complaint alleging neonatology negligence against HMC to state a claim for damages for Ethan's conscious pain and suffering. Plaintiff and defendants applied for leave to appeal, and this Court granted their applications on March 2, 2007. *Baldwin v Scott*, unpublished orders of the Court of Appeals, entered March 2, 2007 (Docket Nos. 275809 and 275830). This Court administratively consolidated these cases on March 7, 2007. *Baldwin v Scott*, unpublished orders of the Court of Appeals, entered March 7, 2007 (Docket Nos. 275809 and 275830).

II. SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition as to her wrongful death claim because there was sufficient evidence to establish a genuine issue of material fact as to causation. We agree.

A. Standard of Review

We review a trial court's decision regarding a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought under MCR 2.116(C)(10) tests the factual support for the claim. *Id*. The moving party has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 63; 744 NW2d 174 (2007). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of material fact exists. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

B. Analysis

The wrongful death act is the exclusive remedy for plaintiffs seeking damages for a wrongfully caused death. *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). MCL 600.2922(1) provides as follows:

> Whenever the death of a person [or] injuries resulting in death . . . shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . .

However, "'[t]he mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called "death act", MCL 600.2922 . . . does not change the character of such actions except to expand the elements of damage available.'" *Jenkins, supra* at 165, quoting *Hawkins v Regional Med Laboratories, Inc*, 415 Mich 420, 436; 329 NW2d 729 (1982). In other words, "a wrongful death action grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent." *Id*. at 165-166.

To establish a prima facie case of medical malpractice, plaintiff must prove the following elements:

> (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care. [*Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004).]

Further, plaintiff has the burden of proving the proximate causation element by a preponderance of the evidence. *Id*. Thus, in order to properly support her medical malpractice claim, plaintiff was required to show that Ethan's death was proximately caused by defendants' breaches of the applicable standards of care. *Id*.

"'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause. " *Id*. This Court recently explained cause in fact as follows:

> "Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission." [*Craig, supra* at 87.] Cause in fact may be established by circumstantial evidence, but the circumstantial evidence must not be speculative and must support a reasonable inference of causation. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). "'All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty.'" *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994), quoting 57A Am Jur 2d, Negligence, § 461, p 442. Summary disposition is not appropriate when the plaintiff offers evidence that shows "that it is more likely than not that, but for defendant's conduct, a different result would have obtained." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 479 n 7; 633 NW2d 440 (2001). [*Robins v Garg*, 276 Mich App 351, 362; 741 NW2d 49 (2007).]

Proximate (or legal) cause, on the other hand, involves the examination of the foreseeability of consequences, and whether a defendant should be found legally responsible for those consequences. *Skinner*, *supra* at 163. It is defined as that which, in natural and continuous sequence, unbroken by any independent, unforeseen cause, produces the injury. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). More than one proximate cause may exist, and if several factors contribute to produce an injury, "one actor's negligence will not be considered the proximate cause of the harm unless it was a substantial factor in producing the injury." *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1998). The determination of proximate cause is a factual issue to be decided by the finder of fact. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

In making its decision that plaintiff could not establish the element of causation because the decision to remove Ethan from life support was an intervening, superseding cause, the trial court relied on the testimony of two of plaintiff's experts, Dr. Crawford and Dr. Lerer. While Dr. Crawford did testify that if Ethan had been managed differently, he probably would have survived, when she made this statement, she was not responding to questions regarding her opinion about the cause of Ethan's death. Rather, she was being asked whether Ethan had any chance of survival if his parents had not decided to extubate him. Further, she did confirm that Ethan suffered from "[h]ypoxia, ischemia, and trauma" caused by "[u]teroplacental insufficiency; injudicious Pitocin; injudicious vacuum use; trauma; wedging; getting the head jammed into the bony pelvis, with repeated contractions. . . ." She also agreed that it is "probably true" that Ethan would have died at birth if he was not resuscitated.

Dr. Lerer's causation testimony is not as clear as Dr. Crawford's. At one point, when asked what caused Ethan's death, Dr. Lerer responded that "this baby had a severe acute brain injury that caused the death." Later, he stated, "I think the cause of death was acute peripartum asphyxia resulting in hypoxic ischemic insult that involved the brain. The degree of brain damage was acute and very severe, and eventually led to the baby's death through a decision to discontinue life support." Dr. Lerer further testified that it is possible that Ethan died after his

parents permitted the removal of life support because his brain damage increased and affected his respiration. But he also noted that an equally likely explanation is that at that time Ethan was removed from life support, he was heavily sedated; and sedation diminishes respiratory drive. Dr. Lerer further testified: "[I]f the baby had been kept on a ventilator for a more extended period of time, I think the baby eventually could have been weaned off the ventilator, but I think this baby would have had significant brain injury." But, again, he was not being questioned about causation, but rather about his opinion as to what life would have been like if Ethan had lived. Still later, he said that Ethan "probably" would have been able to be weaned from the ventilator. Dr. Lerer also opined that Ethan would not have lived after birth without life support.

Finally, Dr. David Burkons, plaintiff's expert obstetrician,[2] testified as to causation as follows:

> *Q.* Now, with regard to any causation opinions you have, are you going to get into opinions about if the baby had been born at such and such time, there would have been different gradations of injuries, or would you defer to the neonatologists or pediatric neurologists?
>
> *A.* What I'm going to say is that anytime thereafter – again, assuming the course that was taken here, Pitocin continued, Pitocin continued after 1600, the baby would have been – probably maybe upto the time of the vacuum the baby might have survived, but there would have been some gradation of deficit.
>
> * * *
>
> *Q.* Let me ask it this way. In your opinion, what was the cause of the baby's death, if you have such an opinion.
>
> *A.* Hypoxia, hypoxemia, asphyxia of the baby that was caused by – it was caused by uteroplacental insufficiency aggravated by excessive Pitocin use and the vacuum extractor.

We conclude that the above testimony creates a question of fact regarding whether defendants' negligence caused Ethan's death, and the trial court erred in granting defendants' motion for summary disposition. At minimum, Dr. Burkons's testimony supports plaintiff's theory that but for defendants' failure to timely delivery Ethan, he would have survived. In other words, that defendants' conduct caused that condition that led to Ethan's death. Further, Dr. Lerer's testimony also lends some support to plaintiff's theory of causation. Therefore, because reasonable minds could differ as to whether "but for" defendants' conduct during labor and

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[2] Dr. Scott and HHS attempt to discredit Dr. Burkons's testimony by stating that he deferred to Dr. Crawford on the issue of causation. However, we find this assertion somewhat disingenuous. At his deposition, Dr. Burkons admitted he was less qualified than a neonatologist to opine on causation, but did not agree to defer on the issue.

delivery, Ethan would have survived, *Robins*, *supra* at 362, and as to whether defendants' conduct was a substantial factor in bringing about Ethan's death, *Brisboy*, *supra* at 547, summary disposition should not have been granted by the trial court.

Moreover, we do not believe that the subsequent medical treatment and eventual decision to discontinue life support are superseding causes that would cut off defendants' liability. An unforeseen intervening cause may break the chain of proximate causation. "An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.'" *McMillian*, *supra* at 576. When a defendant's negligence consisted of enhancing the likelihood that the intervening cause would occur, the intervening cause is considered to be reasonably foreseeable. *Meek v Dep't of Transportation*, 240 Mich App 105, 120-121; 610 NW2d 250 (2000), overruled on other grounds *Grimes v Dep't of Transportation*, 475 Mich 72 (2006). An act of negligence does not cease to be a proximate cause of the injury because of an intervening act of negligence, if the prior negligence is still operating and the injury is not different in kind from that which would have resulted from the prior act." *Taylor v Wyeth Laboratories, Inc*, 139 Mich App 389, 401-402; 362 NW2d 293 (1984). Finally, whether an intervening act constitutes a superseding cause is also typically a question for the factfinder. *Meek*, *supra* at 118.

Again, plaintiff's experts all testified that defendants' conduct during labor and delivery caused hypoxic ischemia, which resulted in Ethan's brain damage and respiratory difficulties. Given Ethan's poor condition at birth, additional medical care and treatment were foreseeable and, therefore, not a superseding cause. Indeed, "negligent medical treatment of an injury is foreseeable and is ordinarily not a superseding cause that cuts off the causal contribution of the act that caused the injury." *Shinholster v Annapolis Hosp*, 471 Mich 540, 573-574; 685 NW2d 275 (2004) (MARKMAN, J. concurring). Likewise, the parents' decision to remove Ethan from life support cannot be considered a superseding cause. Our Supreme Court has approved this Court's holding that a decision to terminate life support is not the cause of a patient's subsequent death; rather, it merely allows the injury or illness to take it's natural course. *People v Bowles*, 461 Mich 555, 560; 607 NW2d 715 (2000). Although *Bowles* is a criminal case, its holding is applicable here, where defendants' alleged negligence necessitated the use of life support in the first place. It seems illogical to relieve defendants of liability when a decision is made to remove the support, and death, which plaintiff's experts testified would have incurred in the first place if it were not for medical intervention, eventually ensues.

For all of these reasons, we conclude that the trial court erred in granting defendants' motion for summary disposition, and its June 13, 2006 order is reversed.[3]

III. AMENDMENT OF COMPLAINT

[3] In light of our conclusion, we need not address the parties' arguments regarding the trial court's reinstatement of plaintiff's survival claim.

Defendants argue that the trial court erred in granting plaintiff's motion to amend her complaint to add claims against Ethan's neonatologists because any such amendment would be prejudicial and futile. Conversely, plaintiff asserts that while the amendment was properly granted, the trial court's limiting of her neonatology claim to a survival claim for pain and suffering damages only was erroneous.

A. Standard of Review

"This Court reviews a trial court's decision to permit a party to amend [its] pleadings for an abuse of discretion." *In re Estate of Kostin*, 278 Mich App 47, 51; 748 NW2d 583 (2008). If the trial court's decision falls within a range of reasonable and principled outcomes, then the trial court has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "The question whether a proposed amendment relates back to the original complaint represents an issue of law that is reviewed by this Court de novo on appeal." *Doyle v Hutzel Hosp*, 241 Mich App 206, 212; 615 NW2d 759 (2000).

B. Analysis

Under MCR 2.118(A)(2), "a party may amend a pleading only by leave of the court . . . Leave shall be freely given when justice so requires." Trial courts have discretion to grant or deny motions for leave to amend, but may deny motions only for particular reasons, such as (1) undue delay (2) bad faith; (3) dilatory motive on the movant's part; (4) repeated failures to cure deficiency by amendments previously allowed; (5) undue prejudice to the opposing party, and (6) futility. *In re Estate of Kostin, supra* at 52.

In regard to undue delay, "[d]elay, alone, does not warrant a denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997) (internal citation omitted). Prejudice "exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost." *Id*. at 659-660.

The statute of limitations for medical malpractice claims is addressed in MCL 600.5852, which states, "[A]n action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run." If, however, the complaint is later amended to add additional claims which arise out of the same conduct or transaction in the original pleading, the amendment relates back to the date of the *original* pleading, and is not considered a separate action for statute-of-limitations purposes. See MCR 2.118(D).

MCR 2.118(D) provides that "[a]n amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth, or attempted to be set forth, in the original pleading." An amended pleading can introduce new facts, new theories, and new causes of action if they arise from the same transactional setting as was set forth in the original pleading.

Doyle, *supra* at 212-213. The purpose of relation back doctrine "as a means of defeating the statute of limitation is the desire of the courts not to have valid claims avoided by legal technicalities." *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996).

As to defendants' argument that the trial court erred in granting plaintiff's motion to amend her complaint, we disagree. Again, leave to amend should be freely given and should only be denied "for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure amendments previously allowed, or futility." *In re Estate of Kostin*, *supra* at 52. Here, none of these reasons apply.

While there was a delay in moving for leave to amend in this case, delay without prejudice will not suffice, *Weymers*, *supra* at 659, and defendants fail to show how they have been prejudiced by the delay in this case. Defendants refer this Court to *Weymers*, *supra* and *Dacon v Transue*, 441 Mich 315; 490 NW2d 369 (1992), to support their contention that leave to amend should have been denied because the addition of the new claim in this case is unduly prejudicial to defendants.

In *Weymers*, *supra* at 659-660, our Supreme Court held that

> a trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery has closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial.

However, *Weymers* and *Dacon* are distinguishable from the instant action because the plaintiffs in those cases sought amendments at a much later, and therefore much more prejudicial, stage in the proceedings—either on the eve of trial (*Weymers*) or at the trial itself (*Dacon*). Further, defendants in this case, while not formally on notice, were aware of the potential for a neonatology claim as early as Dr. Crawford's deposition in March 2006, when she testified that she believed the neonatologists breached the standard of care.

Finally, we reject defendants' argument that plaintiff's request for amendment should have been denied as futile because it appears that plaintiff's claim against the neonatologists would relate back to her original complaint and not be timed barred because even though plaintiff is asserting a new claim, it arises from the same transactional setting as was set forth in her original complaint. *Doyle*, *supra* at 212-213.

Accordingly, because the trial court's decision to grant leave to amend was within the range of reasonable and principled outcomes, the trial court did not abuse its discretion in allowing plaintiff to amend her complaint to add the neonatology claim, and we affirm that portion of its January 8, 2007 order.

Turning now to plaintiff's argument—that the trial court erred in limiting her neonatology claims to pain and suffering damages only—plaintiff has failed to support her argument with any citation to authority. Therefore, her argument is abandoned an appeal. *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008) (noting that a party who fails to cite any supporting legal authority for his position has abandoned the issue on appeal).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette