STATE OF MICHIGAN

COURT OF APPEALS

CAROL MACKENZIE, Personal Representative of the Estate of THEREL B. KUZMA, Plaintiff-Appellant/Cross-Appellee, V JOHN D. KOZIARSKI, M.D., F.A.C.S., FAMILY SURGICAL SERVICES, P.C., FAMILY SURGICAL CARE, P.C., and XYZ UNKNOWN CORPORATION, Defendants-Appellees/Cross-Appellants.	UNPUBLISHED March 22, 2011 No. 289234 Calhoun Circuit Court LC No. 03-001783-NH

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of the right the trial court's order granting defendants' motion for directed verdict. We reverse the order granting defendants' motion for directed verdict, vacate the order denying defendants' motion in limine to strike, and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Therel Kuzma was a 70-year-old woman who suffered, among numerous health problems, from a recurrent incisional hernia on her abdominal wall. On October 3, 2000, defendant John D. Koziarski, M.D., performed outpatient laparoscopic surgery on Kuzma to repair the hernia. Two days later, Kuzma appeared at the emergency room with complaints of breathing difficulty. She was admitted to the intensive care unit, where she became hypotensive and increasingly septic. The following day, Koziarski performed exploratory surgery. He discovered a hole in Kuzma's bowel, which he repaired. However, Kuzma's condition deteriorated. Following a third surgery, Kuzma died on October 29, 2000.

Plaintiff sued defendants for medical malpractice. The essence of the complaint was that, given Kuzma's numerous health issues, Koziarski breached the standard of care when he performed a laparoscopic procedure to repair Kuzma's hernia. In the affidavit of merit, John D. Corbitt, Jr., M.D., averred that had Koziarski chosen "a proper procedure" to repair Kuzma's

hernia, he would not have perforated the bowel which resulted in the complications leading to Kuzma's death.

Approximately one month before trial, the parties signed the following stipulation regarding the negligence theory that plaintiff would present at trial:

> IT IS HEREBY STIPULATED . . . that the only theory upon which plaintiff will proceed at the time of trial is plaintiff's theory that it was professionally negligent for John D. Koziarski, MD, . . . to recommend and perform the October 3, 2000 incisional hernia repair laparoscopically as opposed to via an open approach, and that he should have performed said procedure via an open approach. . . .

Plaintiff's counsel presented this theory to the jury during opening argument. Counsel, admitting that Kuzma needed surgery to repair the hernia, stated that the "one single medical issue" was whether the hernia repair should have been done laparoscopically or in an open procedure. Counsel further stated that the case was not about whether Koziarski was negligent in perforating Kuzma's bowel, as bowel perforation was a known complication of an incisional hernia repair. Counsel argued that the standard of care required Koziarski to repair Kuzma's hernia in an open procedure because a perforated bowel would have been discovered and fixed in the procedure.

Corbitt, who was plaintiff's only expert witness, testified that Koziarski perforated Kuzma's bowel during the laparoscopic procedure to repair the hernia. The perforation, which was not discovered for several days, allowed contaminates to leak from Kuzma's small intestine into her abdominal cavity. Corbitt opined that the injury to Kuzma's bowel led to her death.

Corbitt admitted that bowel perforation is a known complication of a surgery, whether done openly or laparoscopically, to repair a hernia. He was not claiming that Koziarski violated the standard of care in perforating Kuzma's bowel. Rather, it was his opinion that Koziarski breached the standard of care when he opted to repair the hernia in a laparoscopic procedure rather than in an open procedure. According to Corbitt, because of Kuzma's health issues, any complication from the surgery, whether laparoscopic or open, would put Kuzma "in a huge amount of trouble" and that any type of infection would "be overwhelming." In his opinion, Kuzma had about a 50 percent chance of surviving any complication.

Corbitt testified that a bowel perforation was less likely to occur when a hernia is repaired in an open procedure than when repaired in a laparoscopic procedure. Moreover, Corbitt claimed that if the bowel is perforated in an open procedure, the injury is easily recognized and can be fixed. He admitted that if the bowel is injured in an open procedure, there can be complications, such as a wound infection. However, Corbitt testified that those complications would not have included peritonitis, which is the spillage of bowel contents into the abdominal cavity. According to Corbitt, it was more likely than not that any complication that Kuzma would have suffered from a perforated bowel in an open procedure would not have been fatal.

Corbitt testified that the risk of bowel perforation in a laparoscopic repair was less than five percent, and he was sure that the risk in an open repair was much less. However, Corbitt stated that the risk for bowel perforation in a laparoscopic repair is five percent "in the general literature." He claimed that because Kuzma had extensive abdominal adhesions, the risk of bowel perforation in a laparoscopic procedure was greater. Corbitt would "bet" that 90 percent of bowel injuries in laparoscopic procedures were to patients who had abdominal adhesions. Nonetheless, Corbitt stated that he did not know the risk of Kuzma's bowel being perforated. When asked if the risk was greater than 10 percent, Corbitt stated that he would not give a percentage. He merely stated that the increased risk should have played a role in determining whether Kuzma's hernia should have been repaired in an open or laparoscopic procedure.

After plaintiff rested, defendants moved for a directed verdict. They claimed that the case was "a classic lost opportunity to survive" case, explaining that plaintiff's claim was not that Koziarski was negligent in performing the laparoscopic hernia repair, but that Kuzma was denied a better chance to survive when Koziarski recommended the laparoscopic procedure. Defendants argued that plaintiff had not shown that Kuzma lost an opportunity that exceeded 50 percent, where plaintiff claimed that Kuzma would not have died absent the bowel perforation and Corbitt testified that there was only a five percent chance of a bowel perforation in a laparoscopic procedure. In response, plaintiff claimed that Corbitt's testimony that it was more likely than not that any complications that Kuzma would have suffered in an open procedure would not have been fatal satisfied the 50 percent requirement.

The trial court granted defendants' motion for directed verdict. It stated that the phrase "more likely than not" was not sufficient to satisfy the requirements for a lost opportunity claim, where case law required specific percentages. The trial court noted that specific percentages showing that Kuzma lost an opportunity greater than 50 percent were not testified to by Corbitt.

II. DIRECTED VERDICT

On appeal, plaintiff argues that her claim is a traditional claim of medical malpractice, rather than a claim for lost opportunity. We agree.

We note that plaintiff's counsel, in responding to defendants' motion for directed verdict, never responded to defendants' assertion that plaintiff's claim was a classic lost opportunity claim. Counsel never argued to the trial court that plaintiff's claim was one of traditional medical malpractice. Generally, an issue that is not raised before, addressed, or decided by the trial court is not properly preserved for appellate review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Thus, the issue whether plaintiff's malpractice claim is one for traditional malpractice rather than one for lost opportunity is not preserved for our review, and we need not address it. *Id.* However, because the issue presents a question of law and the facts necessary for its resolution have been presented, we will ignore the preservation requirements. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237-238; 713 NW2d 269 (2005).

We review de novo a trial court's decision on a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). "We review all the evidence presented up to the time of the motion in the light most favorable to the nonmoving

party to determine whether a question of fact existed." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008).

In a claim for medical malpractice, a plaintiff must establish (1) the standard of care, (2) a breach of that standard, (3) an injury, and (4) proximate causation between the breach and the injury. *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 565; 766 NW2d 896 (2009). MCL 600.2912a governs the standard of proof in medical malpractice cases. *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 494; 791 NW2d 853 (2010) (opinion by HATHAWAY, J.). Subsection (2) of the statute provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

The second sentence of MCL 600.2912a(2) only applies to loss of opportunity claims; it does not apply to traditional medical malpractice claims. *O'Neal*, 487 Mich at 498, 506 (opinion by HATHAWAY, J.), 508 (opinion by CAVANAGH, J.); see also *Taylor v Kent Radiology, PC*, 286 Mich App 490, 506; 780 NW2d 900 (2009) ("[W]hether the second sentence of MCL 600.2912a(2) applies depends on the nature of the claims brought by the plaintiff; if the plaintiff only brought a traditional medical malpractice claim, the second sentence of MCL 600.2912a(2) will not apply and the plaintiff will be left with the traditional burden of proof.").

A cause of action for lost opportunity is a claim separate and distinct from a claim for traditional medical malpractice. *Taylor*, 286 Mich App at 506. The plaintiff's claim is one for traditional malpractice where the plaintiff asserts that the defendant's negligence more probably than not caused the injury. *Stone v Williamson*, 482 Mich 144, 152-153; 753 NW2d 106 (2008) (opinion by TAYLOR, C.J.). "[A] plaintiff need not rely on the lost opportunity cause of action when the plaintiff can show by a preponderance of the evidence that the medical malpractice caused a specific physical harm." *Taylor*, 286 Mich App at 506. A plaintiff has a claim for lost opportunity where he or she "cannot prove that a defendant's actions were the cause of his injuries, but can prove that the defendant's actions deprived him of a chance to avoid those injuries." *Stone*, 482 Mich at 152 (opinion by TAYLOR, C.J.) (quotation marks and internal citation omitted).

This Court has looked to a plaintiff's complaint to determine whether the plaintiff has pleaded a claim of traditional medical malpractice or a claim for loss of opportunity. *Taylor*, 286 Mich App at 507-510; *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 99; 776 NW2d 114 (2009). In *O'Neal*, 487 Mich at 506, Justice HATHAWAY wrote, "[T]he second sentence of § 2912a(2) applies only to medical malpractice cases that plead loss of opportunity and not to those that plead traditional medical malpractice[.]"

Here, plaintiff's complaint did not contain one reference to a lost opportunity to achieve a better result. See *Taylor*, 286 Mich App at 508. While plaintiff did not include an allegation regarding causation in the malpractice count specific to Koziarski, she did allege that "[a]s a

direct result of said acts of negligence of defendants . . . KUZMA died on October 29, 2000, as a result of post-surgical complications." Similarly, in the affidavit of merit, Corbitt averred that Koziarski's decision to repair Kuzma's hernia laparoscopically rather than in an open procedure violated the standard of care for a patient such as plaintiff and that, to a degree of medical certainty, Kuzma died as a result from the complications originating from the laparoscopic procedure. Accordingly, we conclude that plaintiff pleaded a traditional medical malpractice claim.

However, pleadings do not automatically dictate the nature of the claim. Courts should look beyond a plaintiff's label to determine the true nature of an asserted claim. *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 457; 761 NW2d 846 (2008); see also *O'Neal*, 487 Mich at 527 (MARKMAN, J., concurring) (being bound by the plaintiff's choice of label puts form over substance). "The gravamen of an action is determined by reading the claim as a whole." *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). Accordingly, we will examine plaintiff's claim as a whole.

In doing so, we find instructive the Supreme Court's reversal of this Court's decision in *Compton v Pass (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 2009 (Docket No. 260362).

In *Compton*, this Court was tasked by the Supreme Court with determining whether the plaintiff's claim constituted a lost opportunity claim. The *Compton* plaintiff had breast cancer. She alleged that the defendants surgically removed at least 18 of her right axillary lymph nodes as part of a clinical trial without obtaining her informed consent. She further alleged that, had she been properly informed, she would have opted not to participate in the clinical trial and would have chosen to undergo a sentinel node removal. She claimed that as a result of the defendants' failure to provide her with informed consent, she suffered permanent axillary cording and lymphedema. This Court held that plaintiff's claim was one for lost opportunity. It explained:

> At the outset, we recognize that this is an informed consent case, not a case based on breach of the standard of care for performing the axillary lymph node dissection itself. Moreover, the consent in this had to do with an informed choice between two possible surgeries, as opposed to informed consent regarding whether to have a procedure at all.
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> . . . Since [the plaintiff] suffered injury, the analysis turns on proximate cause. In other words, if plaintiff suffered an injury as the result of a procedure to which the plaintiff did not consent, and would not have had surgery at all if adequately informed, the plaintiff would have a traditional malpractice case, i.e., the plaintiff could show that the defendant's action—the surgery itself—more probably than not caused the injury. However, the plaintiff alleges that she would have had a less invasive surgery if adequately informed, which carried the same risk of injury but in significantly fewer cases.
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> It is undisputed that plaintiff was being treated for breast cancer and the plaintiff's complaint indicates that foregoing all surgery was never a contemplated

> option. Rather, the practical choice was between the two surgeries. Thus, the question becomes whether it was more probable than not that plaintiff would have suffered lymphedema and axillary cording from the axillary node dissection surgery, but not from the sentinel node dissection surgery. In other words, the issue is whether, by not being advised that there was an alternative with fewer risk, plaintiff lost an opportunity for a less invasive surgery with a potentially better result. In our opinion, this is a classic lost opportunity case[.] [*Id.* at 6.]

As already stated, the Supreme Court reversed. *Compton v Pass*, 485 Mich 920; 773 NW2d 664 (2009). It held that this Court "erred in analyzing [the] case under the lost-opportunity standard set forth in MCL 600.2912a(2)." *Id.* at 921. According to the Supreme Court, "the evidence [was] sufficient to allow a fact-finder to find that the alleged breach of the standard of care caused the plaintiff to suffer physical injury . . . that more probably than not was proximately caused by the negligence of the defendants. As a result, the requirements of the first sentence of MCL 600.2912a(2) are satisfied, and this is a claim of traditional malpractice." *Id.*

The facts in the present case are not identical to those in *Compton*; the present case does not involve informed consent. But the facts of the two cases are similar. Like *Compton*, the present case does not involve a breach of the standard of care in performing the surgery itself. It involves the practical choice between two surgeries which carried a risk of the same injury. Plaintiff recognizes that a perforated bowel is a complication in any surgery, whether open or laparoscopic, to repair an incisional hernia. However, plaintiff claims that had Kuzma's hernia been repaired in an open procedure, rather than done laparoscopically, the chances of Kuzma's bowel being perforated were smaller and any complications from a perforated bowel would not have been fatal. Thus, it could be said, like it was in *Compton*, that the issue in the present case is whether plaintiff, by having her hernia repaired laparoscopically, lost an opportunity for a better result if her bowel was perforated. Given the similarities between the present case and *Compton*, and the Supreme Court's disagreement with this Court's characterization of *Compton* as a "classic lost opportunity case," we conclude that plaintiff's claim is not one for lost opportunity.

In conclusion, defendant was not entitled to a directed verdict on the basis that plaintiff's claim was a "classic lost opportunity to survive" case. Plaintiff pleaded her claim as one for traditional medical malpractice. In addition, the Supreme Court's reversal of this Court's decision in *Compton* leads us to conclude that plaintiff's claim is not one for lost opportunity. We reverse the order granting a directed verdict to defendants.[1]

III. CROSS-APPEAL

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[1] We do not address the alternative argument raised by defendants that even if plaintiff's claim was one for traditional medical malpractice, they are entitled to a directed verdict because Corbitt's testimony failed to establish that more probably than not Kuzma's death was caused by Koziarski's alleged negligence. This argument, which was first presented on appeal, may be presented to the trial court on remand.

On cross-appeal, defendants raise issues regarding the qualifications and admissibility of Corbitt's expert testimony, and of the admissibility of standard mortality tables. Because these issues are relevant in case of retrial, we address them.

A. EXPERT TESTIMONY

Defendants argue that the trial court erred in failing to strike Corbitt's testimony. According to defendants, Corbitt was not qualified to testify as an expert witness because he was unfamiliar with the laparoscopic procedure performed by Koziarski and he did not have any medical literature to support his opinions.

"The determination whether a witness is qualified as an expert and whether the witness' testimony is admissible is committed to the trial court's sound discretion and therefore is reviewed for an abuse of discretion." *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548 (2001). An abuse of discretion occurs when a trial court selects a decision that is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Corbitt, who was board certified in general surgery, testified that he had been practicing medicine for over 30 years. He had no formal training in laparoscopic surgeries; the surgeries were not taught when he was in medical school or was a resident. However, he was "certainly in on the early parts of laparoscopic surgeries and had a great deal to do with teaching laparoscopic surgery." Until recently, laparoscopic procedures were not taught in medical school, and physicians learned the procedures from him and others who had developed them. He was the course director or a faculty member of numerous laparoscopic surgery symposiums where laparoscopic procedures were taught. He was affiliated with several "laparo endoscopic" associations, served on the editorial board of numerous publications related to laparoscopic surgery, and authored several articles on laparoscopic surgery. He has a couple patents pending on laparoscopic surgery devices or tools.

Corbitt testified that he has probably performed less than 30 laparoscopic incisional hernia repairs. He was not performing the surgery in 2000, and could not remember the last time he had performed the procedure. He does not discuss laparoscopic incisional hernia repairs with patients, and if a patient is interested in the surgery, he refers the patient to one of his partners.[2] Corbitt's specialty was inguinal hernia repairs, and Corbitt explained that the two procedures were closely related and the concept of each surgery was the same. Corbitt did not have any literature to support his opinions that the risk of a bowel perforation was less in an open procedure than in a laparoscopic procedure or that a perforated bowel can be recognized and fixed in an open procedure. His opinions were supported by 30-plus years of experience.

[2] Corbitt had developed a new method of repairing incisional hernias in an open surgery, and he preferred using that method.

Defendants moved in limine to strike Corbitt as an expert witness. Defendants argued that Corbitt was not qualified to give expert testimony under MRE 702 and MCL 600.2169 because Corbitt did not perform laparoscopic incisional hernia repairs in 2000 and could not remember the last time he had performed the procedure. They further argued that Corbitt's opinions were not reliable under MRE 702 and MCL 600.2955 because Corbitt failed to support his opinions with current literature. The trial court denied defendants' motion. It noted that Corbitt was board certified in the same specialty as Koziarski, and that defendant's arguments concerned the "weight," as opposed to the admissibility, of Corbitt's testimony.[3]

In a medical malpractice action, the plaintiff must prove that "in light of the state of the art existing at the time of the alleged malpractice" the defendant failed to provide the plaintiff the recognized standard of practice or care and that, as a result, the plaintiff suffered an injury. MCL 600.2912a(1). Expert testimony is required to establish the standard of care and a breach of that standard, *Decker v Rochowiak*, 287 Mich App 666, 685; 791 NW2d 507 (2010), as well as causation, *Teal v Prasad*, 283 Mich App 384, 394; 772 NW2d 57 (2009). The proponent of expert testimony must establish that the expert is qualified under MRE 702, MCL 600.2955, and MCL 600.2169. *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067; 729 NW2d 221 (2007).

We reject defendants' argument that Corbitt was not qualified under MCL 600.2169. MCL 600.2169(1)(a) provides:

> If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

Both Koziarski and Corbitt are general surgeons. In addition, Corbitt, like Koziarski, is board certified in general surgery. The requirements of MCL 600.2169(1)(a) are satisfied. See *Woodard v Custer*, 476 Mich 545, 561-562; 719 NW2d 842 (2006).

However, MCL 600.2169 "does not limit the power of the trial court to disqualify an expert witness on [other] grounds[.]" MCL 600.2169(3). "In an action alleging medical malpractice, the provisions of [MCL 600.2955] are in addition to, and do not otherwise affect, the criteria for expert testimony provided in [MCL 600.2169]." MCL 600.2955(3). MCL 600.2955, along with MRE 702, governs the inquiry whether expert testimony is reliable. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007) (opinion by DAVIS, J.). A trial court "'must ensure that any and all scientific testimony or evidence admitted is not

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[3] Defendants filed their motion in limine to strike the day before trial began, leaving plaintiff without the opportunity to respond in writing. Defense counsel orally argued the motion the first day of trial and the trial court, for whatever reason, decided the motion without hearing arguments from plaintiff.

only relevant, but reliable.'" *Edry v Adelman*, 486 Mich 634, 640; 786 NW2d 567 (2010), quoting *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"The admission of expert testimony requires that (1) the witness be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man." *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007). "The party presenting the expert bears the burden of persuading the trial court that the expert has the necessary qualifications and specialized knowledge that will aid the fact-finder in understanding the evidence or determining a fact in issue." *Id.*

MCL 600.2955(1) provides:

> In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court *shall* examine the opinion and the basis for the opinion, which basis includes the facts, techniques, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
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> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
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> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. . . .

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation. [Emphasis added.]

The word "shall" constitutes mandatory conduct. *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005).

The trial court, in ruling on defendants' motion in limine to strike, failed to address the reliability of Corbitt's testimony. It failed to consider any of the factors listed in MCL 600.2955(1) even though defendants had requested it, pursuant to its "gatekeeper role under MRE 702 and MCL 600.2955," to "consider all the previously identified factors or requirements to determine if Plaintiff, the proponent of the expert testimony, has satisfied the necessary requirements." "While the exercise of th[e] gatekeeper role is within a court's discretion, a trial judge may neither abandon this obligation nor perform the function inadequately." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004) (quotation marks omitted). Here, the trial court made absolutely no inquiry, let alone a searching inquiry, of the reliability of Corbitt's testimony. *Gonzalez v St John Hosp & Med Ctr (On Reconsideration)*, 275 Mich App 290, 305-306; 739 NW2d 392 (2007). Accordingly, we vacate the order denying defendants' motion in limine to strike and remand for a determination on the reliability of Corbitt's testimony prior to any retrial.

B. MORTALITY TABLES

Defendants allege that the trial court erred in taking judicial notice of plaintiff's proffered mortality tables. We disagree.

The taking of judicial notice is discretionary. *Freed v Salas*, 286 Mich App 300, 341; 780 NW2d 844 (2009), citing MRE 201(c). Thus, we review a trial court's decision on a request to take judicial notice of facts for an abuse of discretion. *Id.*

The trial court took judicial notice of the "United States Life Tables, 2000," which plaintiff proffered to establish Kuzma's life expectancy. Where, as here, a decedent's life expectancy is at issue, mortality tables are admissible. *Little v Bousfield & Co*, 165 Mich 654, 656; 131 NW 63 (1911). On appeal, defendants cite comments from the model civil jury instructions to support their position that the trial court erroneously admitted the "Life Tables" because the parties did not stipulate to their admission.[4] However, there is no such requirement. Mortality tables are controlling "in the absence of evidence tending to show that the deceased had a probability of life greater or less than is shown by the tables." *Id.* Accordingly, the trial

[4] The comments to M Civ JI 53.01 and 53.02 both provide that "[t]he mortality table that was part of MCL 500.834 was deleted by 1994 PA 226" and "[i]n the absence of a stipulation as to the mortality table to be used, testimony may be necessary."

court did not abuse its discretion in taking judicial notice of the mortality tables proffered by plaintiff.

We note that the only testimony regarding Kuzma's life expectancy came from Corbitt, and the testimony was not entirely unfavorable for defendants. Significantly, Corbitt's testimony suggested that Kuzma had outlived her life expectancy. Even where expert testimony suggests that the deceased's life expectancy was shortened by medical conditions, mortality tables may be considered to determine life expectancy. See *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 463; 633 NW2d 418 (2001).

Reversed in part, vacated in part, and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald