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	UNPUBLISHED March 22, 2011 No. 289234 Calhoun Circuit Court LC No. 03-001783-NH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.

BECKERING, P.J. (*concurring*).

I concur in result only in the majority's conclusion that plaintiff's claim is one of traditional malpractice, not lost opportunity, and that the requirements of MCL 600.2912a(2) are satisfied. As noted by the majority, plaintiff pled a traditional malpractice claim. He pursued discovery on a traditional malpractice theory. And he presented at trial an expert witness who testified that defendants' negligence more probably than not caused plaintiff's decedent Therel B. Kuzma's death. It was not until defendants moved for a directed verdict at trial, claiming that plaintiff was pursuing a "classic lost opportunity to survive" claim and had failed to prove that Kuzma lost an opportunity that was greater than 50 percent, that plaintiff's counsel implicitly accepted such characterization of his case.[1]

[1] It should be noted that the applicable statute, MCL 600.2912a(2) (quoted in full in the majority opinion), has had a long and tortuous history in our courts as it pertains to efforts to discern the meaning and proper application of the second sentence in subsection (2) pertaining to lost opportunity cases. The Supreme Court first interpreted the meaning of the statutory language in *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), which was later

Plaintiff's theory of the case is that defendant John D. Koziarski, M.D.'s negligent decision to perform a laparoscopic rather than an open incisional hernia repair more probably than not caused Kuzma's death by way of a foreseeable complication that Kuzma was not healthy enough to endure. Plaintiff's expert witness, John Corbitt, Jr., M.D., testified at trial by way of a de benne esse deposition that had Kuzma undergone an open laparoscopic incisional hernia repair, she would not have developed sepsis and died.[2] As such, Kuzma's injury was not the loss of an opportunity to avoid physical harm or the loss of an opportunity for a more favorable result; rather, she suffered the physical harm in that death resulted from the alleged negligence. Although the majority relies on the Supreme Court's recent order in *Compton v Pass*, 485 Mich 920; 773 NW2d 664 (2009), to conclude that because plaintiff's case is similar to *Compton*, it is not one of lost opportunity, I write separately to note that abundant case law supports the conclusion that plaintiff's claim is one of traditional malpractice because plaintiff is alleging that defendants' negligence more probably than not caused the injury—Kuzma's death. See, e.g., *Stone*, 482 Mich at 164 (six justices concluded that the plaintiff's claim was one of traditional malpractice, not lost opportunity, where he alleged that the defendant radiologist's negligence in failing to diagnose his abdominal aortic aneurysm deprived him of an opportunity to undergo elective repair surgery, which more likely than not caused all the harm he suffered due to the eventual rupture of the aneurysm); *O'Neal*, 487 Mich at 489 (four justices concluded that the plaintiff presented a traditional malpractice claim when he alleged that the defendant's misdiagnosis of his sickle cell anemia deprived him of proper treatment, which led to his suffering a disabling stroke; the plaintiff's experts testified that had the plaintiff received the

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followed by *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008), and *O'Neal v St. John Hosp*, 487 Mich 485; 791 NW2d 853 (2010), wherein a majority of justices have stated, albeit in dicta, that *Fulton* was wrongly decided. While a majority of justices have agreed on what constitutes a traditional malpractice claim, i.e., more-probable-than-not causation of an injury, they cannot come to a consensus on whether and when a lost opportunity claim exists. Given the continued uncertainty as to whether there remains a cause of action for lost opportunity claims, and the fact that the pertinent cases addressing the difference between a traditional malpractice claim and a lost opportunity claim were issued after the August 2008 trial in this case, plaintiff's apparent confusion at the time of trial is certainly understandable.

[2] More specifically, Dr. Corbitt testified that Dr. Koziarski was negligent in choosing to perform a laparoscopic instead of an open incisional hernia repair surgery in this "very, very high risk patient with multiple medical problems," which included abdominal adhesions. According to Dr. Corbitt, a laparoscopic procedure both increases the risk of a bowel perforation and makes it harder to detect such complication, which when undetected leads to peritonitis (an infection due to the spillage of contaminates from the small intestine into the abdominal cavity) causing sepsis (a blood infection) and death. Kuzma was not healthy enough to survive sepsis. Had Dr. Koziarski chosen to perform an open procedure, the risk of Kuzma sustaining a bowel perforation would have decreased, and if it did occur, it could more readily have been detected and corrected at the time of surgery, eliminating Kuzma's chances of developing sepsis. As a result of defendants' negligence, Kuzma underwent a laparoscopic surgery wherein she sustained a bowel perforation and died due to the resulting infection. Dr. Corbitt testified that had Kuzma undergone an open procedure she "certainly would not have" developed the infection that caused her death.

necessary treatment, the stroke more probably than not would have been avoided); *Velez v Tuma*, 283 Mich App 396, 399, 403-405; 770 NW2d 89 (2009) (the plaintiff presented a traditional malpractice claim where she alleged that the defendant's failure to timely and properly diagnose her acute vascular insufficiency "resulted in an actual, physical injury—the loss of her left leg below the knee," which requires more-probable-than-not causation); *Shivers v Schmiege*, 285 Mich App 636, 640; 776 NW2d 669 (2009) (the plaintiff, who underwent bladder removal surgery due to bleeding, pled a traditional malpractice case where he claimed that the defendant's negligence in failing to timely respond to developing post-operative complications caused him to suffer significant neurological deficits; the Court noted: "This case is even less a 'lost opportunity' case than *Stone*, because there, had the plaintiff not sought medical treatment at all, the aneurysm . . . would have ruptured and likely would have killed him. Here, had plaintiff not sought medical treatment, he would have had bloody urine and functional arms."); and *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 99-100; 776 NW2d 114 (2009) (the plaintiff's claim was one of traditional malpractice where he alleged that the defendant's failure to properly monitor and timely respond to the development of a post-operative blood clot in the graft site following an aortofemoral bypass graft more probably than not caused his injuries involving continued difficulty using his legs).

In *Taylor v Kent Radiology PC*, 286 Mich App 490, 506; 780 NW2d 900 (2009), this Court aptly summarized the law with respect to MCL 600.2912a(2) by stating that "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." In this case, Dr. Corbitt testified that Dr. Koziarski's decision to perform a laparoscopic instead of an open incisional hernia repair surgery more probably than not caused Kuzma's death. As such, plaintiff was not required to present evidence concerning the degree by which defendants' malpractice affected Kuzma's opportunity for a better outcome. See *Taylor*, 286 Mich at 510. Instead, plaintiff only had to prove by a preponderance of the evidence that Dr. Koziarski's decision to perform a laparoscopic instead of an open incisional hernia repair proximately caused Kuzma's death. See *id*. As addressed above, Dr. Corbitt testified accordingly. As such, the trial court erred in granting defendants' motion for a directed verdict, requiring reversal.

Further, I concur in the majority's conclusion that the trial court abused its discretion in denying defendants' motion in limine to strike Dr. Corbitt as a witness without first complying with the requirements of his gatekeeping role as set forth in *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067; 729 NW2d 221 (2007), although I believe the court's decision was harmless given Dr. Corbitt's de benne esse deposition testimony, wherein he testified at length to his qualifications and the basis of his opinions. Dr. Corbitt's de benne esse deposition was taken on August 11, 2008. Defendants filed their motion to strike Dr. Corbitt as a witness on August 19, 2008, arguing that: 1) Dr. Corbitt was not qualified to testify regarding laparoscopic incisional hernia repair in accordance with the requirements of MRE 702 and MCL 600.2169; and 2) the literature Dr. Corbitt produced in support of his opinion regarding the increased risk of infection when performing a laparoscopic as compared to an open incisional hernia repair was nothing more than a "throw-away piece" he obtained from the internet, and therefore, his testimony on this issue did not meet the requirements and factors listed in MRE 702 and MCL 600.2955. In support of their motion, defendants attached only a few select portions of Dr. Corbitt's deposition transcript. As the majority points out, defendants filed their motion the day before trial began, leaving plaintiff without a chance to file a written response. On August 20,

2008, before the jury was brought in and sworn, the trial court addressed several motions filed by defendants, including the motion to strike Dr. Corbitt. Plaintiff started to argue in opposition to the motion when the trial court interrupted, verified that Dr. Corbitt was board certified, and denied the motion, with only cursory reference to MRE 702 and 705, and no reference to either MCL 600.2169 or MCL 600.2955. There is no indication in the record that Dr. Corbitt's de benne esse deposition had been filed with the court or reviewed by the judge prior to his ruling on defendants' motion.

Our Supreme Court in *Clerc*, 477 Mich at 1067-1068, set forth the obligations of a proponent of expert testimony, as well as the trial court's gatekeeper role, as follows:

> The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169. The court's gatekeeper role under MRE 702
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> > mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of [an] expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.
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> Consistent with this role, the court "shall" consider all of the factors listed in MCL 600.2955(1). If applicable, the proponent must also satisfy the requirement of MCL 600.2955(2) to show that a novel methodology or form of scientific evidence has achieved general scientific acceptance among impartial and disinterested experts in the field. [Citation omitted.]

"The trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007) (opinion by DAVIS, J.). Rather, "[a]n evidentiary hearing under MRE 702 and MCL 600.2955 is merely a *threshold* inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science." *Id*. at 139. An expert's opinion is not necessarily "unreliable" if it is not shared by all others in the field or if there exists some conflicting evidence.[3] *Id*. at 127. A "trial court does

[3] Assuming the expert testimony passes the gatekeeper's threshold admissibility inquiry, an opposing party's disagreement with an expert's opinion or interpretation of the facts is directed to the weight to be given the testimony and not its admissibility. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401; 628 NW2d 86 (2001); see also *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 788-789; 685 NW2d 391 (2004) ("[I]n some

not abuse its discretion by nevertheless admitting [an] expert opinion, as long as the opinion is rationally derived from a sound foundation." *Id*. The exercise of the trial court's "gatekeeper role" is within its discretion, but the trial court may not abandon its obligation or perform the function inadequately. *Gilbert*, 470 Mich at 780.

Based on my review of Dr. Corbitt's de benne esse deposition, I would find that Dr. Corbitt was qualified to testify in this case and that his opinion testimony regarding there being an increased incidence of infection when performing a laparoscopic versus an open incisional hernia repair was the product of reliable principles and methods that were applied reliably to the facts of this case in accordance with MRE 702 and passed muster under MCL 600.2955(1).[4] That said, because it does not appear that the trial court had any of the information it needed to adequately perform its gatekeeping function at the time of its ruling, e.g., Dr. Corbitt's deposition testimony, I concur that the trial court abused its discretion. On remand, the trial court must comply with *Clerc*. It should be noted that while defendants have every right to demand that the trial court perform its gatekeeping role with respect to plaintiff's expert, defendants' experts are subject to the same scrutiny.

Finally, and for the reasons set forth in the majority opinion, I agree that the trial court did not abuse its discretion in taking judicial notice of plaintiff's proffered mortality tables.

/s/ Jane M. Beckering

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circumstances, an expert's qualifications pertain to weight rather than to the admissibility of the expert's opinion.").

[4] Contrary to defendants' argument, Dr. Corbitt can still be qualified under MCL 600.2955(1) even if he did not produce a peer reviewed publication as described in MCL 600.2955(1)(b). While the trial court must consider all seven factors enumerated in MCL 600.2955(1), "the statute does not require that each and every one of those seven factors must favor the proffered testimony." *Chapin*, 274 Mich App at 137.