

STATE OF MICHIGAN
IN THE SUPREME COURT

Marie Huddleston

Supreme Court Case No.: 146041

Plaintiff-Appellee

Court of Appeals Case No. 303401

vs.

Trinity Health-Michigan d/b/a Sisters of Mercy
Health Corporation and/or St. Joseph Mercy Hospital
– Ann Arbor, IHA of Ann Arbor, P.C., d/b/a
Associates in Internal Medicine-Cherry Hill,
Associates in Internal Medicine-Cherry Hill, P.C. and
Dr. Joyce Leon,

Defendants-Appellants.

146041

AMICUS CURIAE BRIEF
ON BEHALF OF THE MICHIGAN ASSOCIATION OF JUSTICE
IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

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FILED

OCT 8 2013

LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

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STATEMENT OF QUESTIONS PRESENTED

- I. **Should the Court Deny Leave to Appeal Where the Court of Appeals Properly Applied Michigan Precedent in Determining that Plaintiff Suffered a Compensable Injury as A Result of the Defendants' Negligence?**

Plaintiff-Appellee's Answer.....YES

Defendants-Appellants' AnswerNO

**STATEMENT OF BASIS OF JURISDICTION AND
ORDER INVITING FILING OF *AMICUS BRIEF***

On April 3, 2013, the Michigan Supreme Court entered an order pursuant to MCR 7.302(H)(1) directing the clerk to schedule oral argument on whether to grant the application or take other action in this matter. The order of the Court further provided that:

The Michigan Association of Justice and Michigan Defense Trail Counsel, Inc. are invited to file briefs *amicus curiae*. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs *amicus curiae*.

This *amicus curiae* brief is filed on behalf of the Michigan Association of Justice pursuant to the Court's invitation.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Michigan Association of Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The Michigan Association of Justice recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this State. Because, many of the clients represented by MAJ member attorneys are individuals seeking redress for injuries suffered from medical malpractice, that obligation extends to matters directly concerning the legal rights and obligations relating to the litigation of medical malpractice claims in this State. The issues raised in the case at bar regarding what constitutes a compensable injury within the context of a medical malpractice action is a fundamental issue relevant to all medical malpractice litigants and as such is of significant interest to the Michigan Association of Justice and their clients.

STATEMENT OF FACTS

This is medical malpractice arises out of the Defendant, Dr. Joyce Leon's failure to properly diagnose and treat Plaintiff, Ms. Marie Huddleston's cancerous lesion resulting in the loss of her left kidney. On May 23, 2003, Ms. Huddleston was seen by Dr. Leon, her primary care physician, who ordered a chest and abdominal CT scan to rule out an aortic aneurysm based on Ms. Huddleston's presenting complaints and family history. The CT scan of the abdomen with contrast was taken on June 9, 2003 and revealed a cystic lesion on the left kidney measuring 2.7 cm by 2.5 cm. Further evaluation was recommended by Dr. Baker, but none was performed.

In June of 2008, Ms. Huddleston presented to the emergency room at St. Joseph Mercy Hospital in Ann Arbor complaining of chest pain. A CT angiography of the thoracic and abdominal aorta which again revealed a mass on her left kidney, but it now measured 5.2 cm by 4.4 cm. It was determined that the cystic lesion first visualized in 2003 was malignant. After her diagnosis with renal cancer, Ms. Huddleston underwent a left total nephrectomy for removal of the cancerous kidney.

Ms. Huddleston filed a medical malpractice suit seeking to recover non-economic damages against various Defendants arising out of their 2003 malpractice in failing to advise her of a cancerous lesion. The Complaint was accompanied by an affidavit of merit signed by Dr. Steven Jenson which stated, in part, that had Plaintiff's condition been diagnosed in 2003, she could have treated with a wedge resection removing only 10-20% of Plaintiff's kidney. This would have essentially resulted in Plaintiff having two functioning kidneys. (Plaintiff-Appellee's Exhibit B, ¶ 3).

After the parties had conducted discovery included taking the depositions of lay and expert witnesses, Defendants Leon filed a motion for summary disposition, arguing that Plaintiff had not suffered an injury as a result of the delay in diagnosis and as such, her claim must fail.

On November 12, 2010, St. Joseph Mercy Hospital concurred in Defendants Leon and IHA's motion, as well as asserted that Plaintiff had not established a breach of the standard of care by St. Joseph Mercy Hospital. The trial court, agreeing with the Defendant, granted summary disposition and dismissed Plaintiff's claim.

Plaintiff appealed the trial court's decision to the Michigan Court of Appeals. The Court of Appeals reversed the trial court finding that Plaintiff had sustained a compensable injury. The Court of Appeals, specifically identifying the compensable injury, stated:

Here, the injury claimed is more extensive surgery, i.e., the removal of Huddleston's entire kidney rather than removal of only part of her kidney. There is no question that there was significant growth of the cancerous tumor on her kidney between when it was initially revealed in June 2003 (but not reported to her) and June 2008 when another scan showing the tumor was reported to Huddleston and addressed. The 2003 report notes a 2.7 x 2.5 cm lesion. The 2008 report notes a 5.2 x 4.4. cm lesion. Dr. Michael Sarosi, who read the 2008 radiology report notes: "This lesion has enlarged significantly since the prior study. Opinion (Defendants' Application Exhibit AA).

Defendants filed an application for leave to appeal to this Honorable Court. On April 3, 2013, the Michigan Supreme Court entered an order pursuant to MCR 7.302(H)(1) directing the clerk to schedule oral argument on whether to grant the application or take other action in this matter. The Court specifically requested briefing on the issue of whether the Court of Appeals erred when it concluded that Plaintiff suffered a compensable injury; whether it misapplied *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966); and whether its decision was contrary to *Henry v Dow Chemical Co*, 473 Mich 63; 473 Mich 63 (2005).

ARGUMENT

I. The Court Should Court Deny Leave To Appeal Where The Court Of Appeals Properly Applied Michigan Precedent In Determining That Plaintiff Suffered A Compensable Injury As A Result Of The Defendants' Negligence.

The Michigan Supreme Court has defined damages as pecuniary compensation recoverable in the courts by "any person who has suffered, loss, detriment or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another." *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525, 540 n. 17, 447 NW2d 691(1989), subsequent opinion, 436 Mich 372, 461 NW2d 666 (1990). Thus, in order to recover damages, a Plaintiff must have suffered an injury as a result of the Defendant's negligence. An injury sufficient to trigger a right to recover damages has been defined by this Court as a "physical injury or physical consequences" resulting from the Defendant's negligence. *Daley v LaCroix*, 384 Mich 4; 179 NW2d 390 (1970). Where a physical injury or consequence occurs, the injured party can recover damages for non-economic losses including: pain, suffering, inconvenience, physical impairment, physical disfigurement, denial of social pleasure and enjoyment, embarrassment, humiliation, and mental anguish. See MCL 600.1483(3) and M Civ JI 50.02.

The law recognizes a wide range of physical injuries or physical consequences for which damages may be sought. Various jurisdictions have recognized that the continued growth of a cancerous mass is a physical consequence compensable under the law. See *Evers v Dollinger*, 95 NJ 399, 408; 417 A2d 405 (1984); *Cloys v Turbin*, 608 SW2d 697, 701 (Tex Civ App 1980).

Indeed, in *Wickens v Oakwood Healthcare System*, 465 Mich 53; 631 NW2d 686 (2001), this Court recognized that where a Defendant's negligence results in progression of a disease process, the Plaintiff was entitled to recover damages for associated "injuries." In *Wickens*, the

Defendant's negligence resulted in a year delay in the diagnosis of Plaintiff's breast cancer. As a result, the cancer advanced, her prognosis worsened, and she required more extensive treatment. *Id.* at 59-61. While the Court did not allow Plaintiff to recover for a loss of opportunity to survive, the Plaintiff was allowed to recover for the "other injuries" suffered, specifically:

(1) the more invasive medical treatments caused by the one-year delay in her diagnosis, (2) the emotional trauma attributable to her unnecessarily worsened physical condition, and (3) the pain and suffering attributable to her unnecessarily worsened physical condition. *Id.* at 61-62.

These recognized injuries are identical to those suffered by Plaintiff Marie Huddleston in the case at bar. Ms. Huddleston's cancer went undiagnosed and treated for a period of five years. As a result of the delay in diagnosis, Ms. Huddleston's cancerous mass almost doubled in size, and she suffered emotional trauma, pain, and suffering due to her worsened condition. Further, Ms. Huddleston required more extensive treatment for her condition due to the Defendants' negligence.

In addition to these recognized injuries, in *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966), this Court has expressly recognized that the loss of a reserve organ is a compensable injury. In *Sutter*, when the plaintiff was 10 years old, she underwent an appendectomy performed by the defendant. Plaintiff claimed that during this procedure, the defendant also removed her right fallopian tube and ovary without authority or consent. Subsequently, nineteen years later when plaintiff underwent a procedure to remove a cyst on her left fallopian tube, it was discovered that her right fallopian tube and ovary were missing. Given that plaintiff had not undergone any procedures between 1940 and 1959, plaintiff filed a medical malpractice action against the physician who performed the 1940 appendectomy claiming damages for the loss of her right ovary and fallopian tube as well as the loss of the ability to bear children. *Id.* at 83-84.

While the Court in *Sutter* ruled that the Plaintiff was precluded from recovering for her inability to have children, the Court held that the Plaintiff was permitted to recover for the loss of

her “reserve” fallopian tube. The Court reasoned that “[b]y wrongfully excising Miss Sutter’s right fallopian tube, defendant deprived her of her fertility reserve provided by nature. For this, he may be held liable in damages.” *Id.* at 93 (emphasis added). The Court noted that recovery was not precluded simply because the female body is able to perform the same function with one fallopian tube as it can with two:

The situation is, of course, unusual, simply because there are not many instances in which the body is provided with two means of performing the same function, either of which will completely fulfill that function in the absence of the other. A situation somewhat analogous to the loss of one fallopian tube is the loss of one eye, and in such a case the language used by some courts indicates that the jury, in determining damages, may consider the fact that plaintiff has been deprived of a reserve eye. *Id.*

Additionally, the Court stated that the difficulty in assessing the value of the loss of a reserve organ will not preclude a potential recovery. *Id.* at 93. Michigan common law recognizes the principle that mere uncertainty as to the amount of damages does not impede a claimant’s right to recovery. *Shivers v Schmiede*, 285 Mich App 636; 776 NW2d 669 (2009). “It is not the privilege of him whose wrongful conduct caused the loss, to hide behind the uncertainties inherent in the very situation his wrong has created.” *Wycko v Gnodtke*, 361 Mich 331, 340; 105 NW2d 118 (1960). If uncertainty exists, it is better that the claimant recover more than he or she is entitled to rather than less and that the risk of any uncertainty be cast on the wrongdoer rather than the injured party. *See Hayes-Albion v Kuberski*, 108 Mich App 642; 311 NW2d 122 (1981), *rev’d in part on other grounds*, 421 Mich 170; 364 NW2d 609 (1984).

In the case at bar, the Court of Appeals again properly applied Michigan law and concluded that Plaintiff Marie Huddleston sustained a compensable injury. As a result of the Defendants negligence, Ms. Huddleston’s cancerous kidney mass almost doubled in size which necessitated the complete removal of Ms. Huddleston’s left kidney. Although earlier diagnosis would have required the removal of 10-20 % of her kidney, the remaining 80-90% of her kidney would have

allowed the kidney to fully function. As such, Plaintiff would have had two functioning kidneys. Thus, as in *Sutter*, Ms. Huddleston has suffered the loss of a reserve organ at the hands of Defendant Leon.¹

In reaching this decision, the Court of Appeals properly recognized that the Courts should take caution in allowing physicians a pass on acts of negligence:

Nature has provide the human body with two kidneys and simply because the body can survive and adapt without one does not negate a doctor's responsibility to timely diagnose disease concerned with one of the pair. The human body also has two lungs, two eyes, two ears and other sets of organs which, it could be argued, are not required to perform in pairs to serve their intended purposes. We are highly concerned, however, with the potential implications in giving a "pass" to malpractice that occurs in the case of one of a pair of duplicate organs. Opinion (Defendants' Application Exhibit AA).

Defendants have made a number of unavailing arguments in their Application for Leave to Appeal pertaining to the Court of Appeals' reliance on *Sutter*. Defendants' purport that *Sutter* is distinguishable from the case at bar, because the procedure in *Sutter* was not necessitated by way of a disease. Rather, Defendants argue, the removal of the plaintiff's first fallopian tube in *Sutter* constituted a battery. Plaintiff in *Sutter*, however, did not make a claim for battery or any other intentional tort. *Sutter* was analyzed by the Supreme Court simply through the lens of a medical malpractice action. The fact that the plaintiff may or may not have also had a claim for an intentional tort is irrelevant since plaintiff's claim was advanced only on a medical malpractice theory of liability. Nowhere in the *Sutter* opinion is the presence or absence of plaintiff's consent determinative of the damages recoverable, other than it establishes a breach of the standard of care. Stated another way, nowhere in the *Sutter* opinion did the Court place limits on the circumstances in which the loss of a "reserve organ" will be deemed recoverable.

¹ Moreover, unlike an ovary, a person cannot live without at least one kidney. As such the loss of a vital organ will impose upon the individual certain life style changes and/or precautions to avoid any injury or compromise to the remaining functioning organ. This alone will create emotional distress and concern for the remaining organ.

Additionally, the Court of Appeals decision in the case at bar is not contrary to the Michigan Supreme Court's decision in *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005). In *Henry*, the plaintiffs were 173 individuals who resided in the Tittabawasee flood plain who sought a court-supervised program of medical monitoring for the possible negative health effects of dioxin² discharged from Defendant Dow Chemical Company's plant³. In a traditional toxic tort case, the Court stated, the plaintiff alleges that he or she developed a disease as a result of exposure to a toxic substance negligently released by the defendant. In *Henry*, however, plaintiffs' did not claim a present physical injury, rather, plaintiffs' theory was that as a result of Dow's negligence, "plaintiffs' *might* incur costs of intensive medical monitoring for the possible health effects of elevated exposure to dioxin." *Id.* at 71. In dismissing plaintiff's cause of action, the Supreme Court held that plaintiff's had failed to demonstrate a present physical injury to person or property necessary to state a cause of action under a negligence theory.⁴ *Id.* at 75-76. In doing so the Court remarked on the differences between "damages" and "injury", declaring that a plaintiff must satisfy both in order for recovery:

While the courts of this state may not have always clearly articulated this injury requirement, nor finely delineated the distinction between an "injury" and the "damages" flowing there from, the injury requirement has always been present in our negligence analysis. **It has simply always been the case in our jurisprudence that plaintiffs alleging negligence claims have also shown that**

² Dioxin is a hazardous chemical believed to cause a variety of health problems such as cancer, liver disease, and birth defects. *Henry v Dow Chem Co*, 473 Mich 63, 69; 701 NW2d 684, 687 (2005).

³ *Henry, supra* at 63. "The 173 plaintiffs in this matter have asked to represent a putative class of thousands in an action against defendant, The Dow Chemical Company. Their core allegation is that Dow's plant in Midland, Michigan, negligently released dioxin, a synthetic chemical that is potentially hazardous to human health, into the Tittabawasee flood plain where the plaintiffs and the putative class members live and work."

⁴ The necessary elements to state a cause of action under a negligence theory are:

1. the existence of a legal duty by defendant toward plaintiff;
2. the breach of such duty;
3. the proximate causal relation between the breach of such duty and an *injury* to the plaintiff; and
4. the plaintiff must have suffered *damages*. [*Lorencz v Ford Motor Co.*, 439 Mich 370, 375, 483 NW2d 844 (1992) (citations omitted; emphasis added).]

their claims arise from present physical injuries. We are not aware of any Michigan cases in which a plaintiff has recovered on a negligence theory without demonstrating some present physical injury. Thus, in all known cases in Michigan in which a plaintiff has satisfied the “damages” element of a negligence claim, he has also satisfied the “injury” requirement. *Henry, supra* at 75 (emphasis added).

The claimed injury in *Henry* is distinguishable from that suffered by Ms. Huddleston. The plaintiffs’ in *Henry*, had no apparent injury to person or property, only the possibility of a future physical injury. In fact, in *Henry*, it was undisputed that the plaintiffs did not suffer a physical injury, because the plaintiffs expressly denied having any present physical injuries. *Henry, supra* at 73. As such the Defendant’s negligence had not manifested into a physical harm to the plaintiffs.

Unlike the plaintiff’s in *Henry*, Ms. Huddleston does not admit that she did not suffer a physical injury. The records establish that under Michigan law, Ms. Huddleston had a presently realized physical injury. Ms. Huddleston’s cancer advanced, her tumor grew, she lost a kidney, and she suffered pain, suffering, and emotional distress; all injuries for which Michigan law recognizes a right to compensation.

Furthermore, pursuant to *Henry*, an analysis of the reasons why Michigan law requires a present physical injury supports a finding that the loss of a kidney is a compensable injury. In *Henry*, the Court enumerated three reasons why the legal system requires the presence of a present physical injury. First, the requirement clearly defines who possess a cause of action by “allowing recovery only to those who have actually suffered a present physical injury, the fact-finder need not engage in speculations about the extent to which a plaintiff possesses a cognizable legal claim.” *Id.* at 76. Second, the present physical injury requirement limits the risk of fraud, by “setting a clear minimum threshold” before a plaintiff can proceed on a claim, thus preventing frivolous or unfounded suits. *Id.* Lastly, the requirement “avoids compromising the judicial power.” *Id.* at 77. “The present physical injury requirement establishes a clear standard by which judges can determine which plaintiffs have stated a valid claim, and which plaintiffs have not. *Id.* Thus, the

requirement of a physical injury clearly defines who is permitted to recover as a result of a defendant's negligence, and eliminates the Court's need to answer abstract and unascertainable questions relating to an action's proper claimants:

"In the absence of such a requirement, it will be inevitable that judges, as in the instant case, will be required to answer questions that are more appropriate for a legislative than a judicial body: How far from the Tittabawassee River must a plaintiff live in order to have a cognizable claim? What evidence of exposure to dioxin will be required to support such a claim? What level of medical research is sufficient to support a claim that exposure to dioxin, in contrast to exposure to another chemical, will give rise to a cause of action?" *Id.*

In the instant case, none of the *Henry* Court's concerns relating to an endless class of claimants exists. Clearly, negligence resulting in the loss of an organ will only give rise to a cause of action for that individual. As is the case with any other medical malpractice action, the judge and/or the trier of fact will not be faced with the difficult questions described in *Henry* as to the identity of the proper party entitled to relief. Additionally, a finding that the loss of a kidney is a compensable injury will not invite fraud or other illegality. The loss of an organ is the clear minimum threshold. The only individual with the ability to show standing in this case is Ms. Huddleston. Analyzing the reasons for which a physical injury is required under Michigan law supports a finding that Ms. Huddleston has in fact suffered a compensable injury.

CONCLUSION

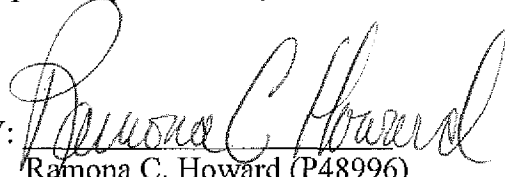
Defendants' Application for Leave to Appeal in this matter should be denied. The ruling of the Michigan Court of Appeals in the case at bar is consistent with Michigan law; specifically this Court's rulings in *Sutter v Biggs, supra* and *Henry v Dow Chemical Co, supra*. As a result of the Defendants' negligence Ms. Huddleston suffered present physical injuries and/or physical consequences in the form of advancement of her disease (increase in tumor size), the need for more extensive treatment, the loss of a reserve organ, and pain, suffering and emotional distress. As such, the Court of Appeals properly determined that Ms. Huddleston suffered a compensable injury.

RELIEF REQUESTED

For these reasons, *Amicus curiae* joins with Plaintiff-Appellee, Marie Huddleston, in her request that this Honorable Court deny the Defendants' Application for Leave to Appeal.

Respectfully submitted,

BY:



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Dated: October 1, 2013