

IN THE MICHIGAN SUPREME COURT

Marie Huddleston,

Supreme Court Case No. 146041

Plaintiff-Appellee,

Court of Appeals Case No. 303401

v.

Washtenaw County Circuit Court

Case No. GCW 09 657 NH

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.

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

DEFENDANTS-APPELLANTS DR. JOYCE LEON AND IHA OF ANN ARBOR, P.C., d/b/a ASSOCIATES IN INTERNAL MEDICINE – CHERRY HILL, P.C.’S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

146041
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**STATEMENT OF QUESTIONS PRESENTED
BY THE MICHIGAN SUPREME COURT'S APRIL 3, 2013 ORDER**

I. DID THE COURT OF APPEALS ERR WHEN IT CONCLUDED THE PLAINTIFF SUFFERED A COMPENSABLE INJURY

Defendants-Appellants Dr. Leon and IHA answer "Yes"

Defendant-Appellant St. Joseph Mercy Hospital answers "Yes"

Plaintiff-Appellee answers "No"

II. DID THE COURT OF APPEALS MISAPPLY *SUTTER v. BIGGS*?

Defendants-Appellants Dr. Leon and IHA answer "Yes"

Defendant-Appellant St. Joseph Mercy Hospital answer "Yes"

Plaintiff-Appellee answers "No"

III. WAS THE COURT OF APPEALS DECISION CONTRARY TO *HENRY v. DOW CHEMICAL CO*?

Defendants-Appellants Dr. Leon and IHA answer "Yes"

Defendant-Appellant St. Joseph Mercy Hospital answer "Yes"

Plaintiff-Appellee answers "No"

INDEX OF AUTHORITIES

PAGE(S)

CASES:

Berrios v Miles, Inc, 226 Mich App 470; 574 NW2d 677 (1997).....3

Ensink v. Mecosta Co Gen Hosp, 262 Mich App 518; 687 NW2d 143 (2004).....6

Hendricks v. DSW Shoe Warehouse, Inc. 444 F.Supp.2d 775 (2006).....5

Henry v. Dow Chemical, 473 Mich 63; 701 NW2d 684 (2005).....2, 4, 5, 6

Hofmann v. Auto Club Ins. Ass'n, 211 Mich.App. 55, 535 N.W.2d 529 (1995).....3

Price v High Pointe Oil Co, Inc, 493 Mich 238; 828 NW2d 660, 672 (2013).....2

SC Gray, Inc. v. Ford Motor Co., 92 Mich.App. 789; 286 N.W.2d 34 (1979)3

Sutter v. Biggs, 377 Mich 80, 139 NW2d 684 (1966)2, 3, 6

Theisen v. Knake, 236 Mich App 249; 599 NW2d 777 (1999)2, 6

MISCELLANEOUS:

Prosser & Keeton, Torts (5th ed., § 30).....2

SUPPLEMENTAL ARGUMENT IN SUPPORT OF APPLICATION

I. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT PLAINTIFF SUFFERED A COMPENSABLE INJURY

The Michigan Court of Appeals erred by concluding that Plaintiff/Appellee Mrs. Huddleston suffered a compensable injury notwithstanding Mrs. Huddleston's expert's testimony that she suffered no harm, in other words, no present injury. The decision of Court of Appeals is not in conformity with Michigan's common law requiring a Plaintiff to establish damages as an element of a negligence claim. The dissenting opinion properly applied Michigan law to the facts presented.

A. Court of Appeals Opinion is based upon a Question of Fact that Does not Exist

The majority opinion in the Court of Appeals concluded that "there is a question of fact as to whether plaintiff has suffered any damages due to the loss of the organ." This conclusion appears to be based on the Court of Appeals concern about "the potential implication in giving a 'pass' to malpractice that occurs in the case of one of a pair of duplicate organs" and not on any evidence proffered by Mrs. Huddleston.

The undisputed evidence is that Mrs. Huddleston's kidney function is excellent and completely within normal limits (*See*, Deposition of Mrs. Huddleston, p. 57, Exhibit I to Application). Dr. Leon and IHA's motion was also based on the undisputed testimony of Mrs. Huddleston's urology expert, Dr. Steven Jensen. Dr. Jensen testified that Mrs. Huddleston sustained no harm as a consequence of having a total nephrectomy in 2008 rather than a partial nephrectomy in 2003.

Q. So long as Mrs. Huddleston's creatinine values continue to remain within normal limits and there is no clinical sign of renal dysfunction, would you agree with me that there is no harm to Mrs. Huddleston by the fact that she underwent a radical nephrectomy rather than a partial nephrectomy in 2003?

A. Correct, assuming those premises.
(Deposition of Dr. Jensen, pp. 25-26, Exhibit G to Application).

Accordingly, the undisputed evidence and Mrs. Huddleston's own expert's testimony establish that Mrs. Huddleston has not suffered harm as a legal and natural consequence of any alleged negligence.

B. Damages are an Element of Negligence

A plaintiff must prove four elements in a negligence action: "(1) duty, (2) breach, (3) causation, and (4) damages. Although of these four elements, the primary issues are usually the duty, breach, and causation analysis, it has always been implicit in this analysis that in order to prevail, a plaintiff must also demonstrate an actual *injury* to person or property. Indeed, such injury constitutes the essence of a plaintiff's claim." *Henry v. Dow Chemical Co.*, 473 Mich 63, 74; 701 NW2d 684 (2005). "Nominal damages to vindicate a technical right, cannot be recovered in a negligence action, *where no actual loss has occurred.* *Id.*, citing Prosser & Keeton, Torts (5th ed., § 30, p. 165)(emphasis supplied by this Court).

The Court of Appeals decision would permit recovery of damages that are remote, contingent, or speculative in violation of Michigan law. *See, Theisen v. Knake*, 236 Mich App 249, 258; 599 NW2d 777 (1999), citing, *Sutter v. Biggs*, 377 Mich 80, 139 NW2d 684 (1966) The Court of Appeals decision would change Michigan's common law to permit a claim to proceed even when a plaintiff is unable to prove injury. As discussed by this Court in *Price v. High Point Oil Co.*, this Court must address "whether the common law *should* be altered. 'This Court is the principal steward of Michigan's common law....' "[A]lteration of the common law should be approached cautiously and with the fullest consideration of public policy and should not occur through sudden departure from longstanding legal rules." *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 259; 828 NW2d 660, 672 (2013), citing *Henry*, 473 Mich at 83. This Court

should reject the Court of Appeals' suggested deviation from Michigan long-standing principles requiring the proof of damages with reasonable certainty in a negligence action. Proof of damages with reasonable certainty is an essential element of the prima facie case of negligence or malpractice under Michigan law. A party asserting a claim has the burden of proving its damages with reasonable certainty. *Berrios v Miles, Inc.*, 226 Mich App 470, 478; 574 NW2d 677, 680 (1997), citing *SC Gray, Inc. v. Ford Motor Co.*, 92 Mich.App. 789, 801; 286 N.W.2d 34 (1979); *Hofmann v. Auto Club Ins. Ass'n*, 211 Mich.App. 55, 108, 535 N.W.2d 529 (1995). Since Mrs. Huddleston's own expert testified that she suffered no harm, no damages can be proven with reasonable certainty. As such, the Court of Appeals decision is clearly erroneous, conflicts with the decisions of this Court and other decisions of the Court of Appeals, and should be reversed.

II. THE COURT OF APPEALS MISAPPLIED *SUTTER* v. *BIGGS*

While both Plaintiff/Appellee and Defendants/Appellants cited *Sutter*, the general rules articulated in *Sutter* are the most important and applicable precedent. "Remote contingent, or speculative damages are not considered in conformity to the general rule." *Sutter v. Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966). Mrs. Huddleston's expert's testimony was clear that she has suffered no harm. As such, any damages that she claims are remote, contingent, or speculative. There are important distinctions between this case and *Sutter* which bear upon the Court of Appeals' misapplication of *Sutter*. First, in *Sutter*, the plaintiff was subjected to a medical procedure, the removal of one of her fallopian tubes, without her consent. The opinion in *Sutter* makes no reference to any disease or any other reason for the removal. As such, the removal of the first fallopian tube constituted a battery. Nineteen years later, in connection with a surgery to remove the second fallopian tube, it was discovered that plaintiff's first fallopian

tube had been removed. The Court refused plaintiff's requests for instructions regarding the loss of the ability to bear children and plaintiff's claimed associated emotional damages and set forth the rules quoted above. Here, as in *Sutter*, Mrs. Huddleston has presented no evidence of any injuries which are the legal and natural consequences of the alleged wrongful acts of the Defendants/Appellants. Mrs. Huddleston conceded that surgery was necessary, whether done in 2003 or 2008. She further conceded that she was never going to have two normal functioning kidneys. Mrs. Huddleston's claimed emotional damages from fears and concerns regarding theoretical complications such as possible metastasis and loss of cure are not recoverable under Michigan law, as set forth in *Sutter* and *Henry, infra*.

Ironically, the Court of Appeals below concluded that *Sutter* actually supports the proposition that Mrs. Huddleston should be allowed to pursue her claim for damages without evidence of injury because the "*Sutter* jury had to find that the plaintiff was injured in some way . . . to award her damages. (Emphasis added). It is important to note that the *Sutter* decision was based on the unauthorized removal of a completely healthy organ – a battery. Here, it is undisputed that surgery was required to treat Mrs. Huddleston's cancer. To find that Mrs. Huddleston has been injured in some way, the Court of Appeals ignored the testimony of Mrs. Huddleston's expert regarding the absence of any present harm, resulting in a misapplication of *Sutter*. The Court of Appeals' opinion suggests that the common law adapt to allow negligence claims without evidence of harm, apparently due to concerns about giving a "pass." Michigan's common law does not permit a negligence claim unless injury and economic damages can be proven to a reasonable certainty. Mrs. Huddleston's expert specifically denied the existence of a present injury sufficient to support a negligence claim.

III. THE COURT OF APPEALS DECISION IS CONTRARY TO *HENRY v. DOW CHEMICAL CO.*

The decision of the Court of Appeals did not refer to or cite this Court's precedent in *Henry v. Dow Chemical Co.* despite citation to the case by all parties. In *Henry*, this Court addressed the elements of a negligence claim. Most important for this present case, this Court articulated and explained the two-pronged requirement of damages that a plaintiff must prove with reasonable certainty. This Court made clear that "a plaintiff must demonstrate a present physical injury to person or property *in addition* to economic losses that result from that injury in order to recover under a negligence theory." *Henry v. Dow Chemical*, 473 Mich 63, 75-76; 701 NW2d 684 (2005). Mrs. Huddleston's expert testified that she has no harm as a result of the alleged malpractice. Prima facie evidence on the four elements of a negligence claim has not been presented. Quite the contrary, Mrs. Huddleston's own expert testified that she has suffered no harm, in other words, no present injury.

If the Court of Appeals' decision is allowed the stand, a jury will be given the opportunity to award damages in the face of the unrefuted testimony that no harm has occurred. As the District Court of the Western District of Michigan noted, "[T]here is reason to believe that Michigan's highest court would reject a novel legal theory of damages which is based on a risk of injury at some indefinite time in the future." *Hendricks v. DSW Shoe Warehouse, Inc.* 444 F.Supp.2d 775, 783 (2006), citing *Henry* at 692. The testimony offered by Mrs. Huddleston's expert is clear that she has suffered no present harm. As such, all of her alleged damages are based on some fear of future injury. If Mrs. Huddleston's claim is for injuries she may suffer in the future, her "claim is precluded as a matter of law, because Michigan law requires more than a merely speculative injury....It is a *present* injury, not fear of an injury in the

future, that gives rise to a cause of action under a negligence theory.” *Henry* at 74. Adequate proof of damages have not been provided by Mrs. Huddleston.

IV. CONCLUSION

The critical issue is whether Mrs. Huddleston is required to present evidence of the existence of harm or if a jury may speculate what harm may have been caused by an alleged act of negligence. If the reasoning set forth by the Court of Appeals is adopted more broadly, the requirement that a plaintiff prove the existence of damages will be eviscerated. This Court should enforce Michigan’s long-standing requirement that a plaintiff prove damages with reasonable certainty.

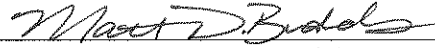
If the interpretation of the Court of Appeals is allowed to stand, plaintiffs in medical malpractice actions, and in tort actions more generally, will be permitted to recover for damages that are remote, contingent, or speculative, in violation of Michigan law. *See, Ensink v. Mecosta Co Gen Hosp*, 262 Mich App 518; 687 NW2d 143 (2004), citing *Theisen v. Knake*, 236 Mich App 249, 258; 599 NW2d 143 (2004) and *Sutter v. Biggs*, 377 Mich 80, 139 NW2d 684 (1966). As such, the Court of Appeals decision should be reversed. Proof of a present injury together with economic losses is necessary to establish damages with reasonable certainty as required by Michigan law.

RELIEF REQUESTED

For all of the foregoing reasons, Defendants-Appellants Dr. Leon and IHA request this Court reverse the Court of Appeals decision dated September 11, 2012 and affirm the Circuit Court’s January 12, 2011 Order Granting Summary Disposition to the Defendants-Appellants, as well as the Orders Denying Motion for Reconsideration of the Court’s Decision entered on March 14, 2011 and March 23, 2011.

Respectfully submitted,

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