

ORIGINAL

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

(Cavanagh, P.J., and Owens and M.J. Kelly, JJ.)

JEFFREY CULLUM,

Plaintiff-Appellee,

v

FREDERICK LOPATIN, D.O.,

Defendant-Appellant,

and

DEARBORN EAR, NOSE AND THROAT  
CLINIC, P.C.,

Defendant.

SC No. \_\_\_\_\_  
COA No. 313739  
LC No. 10-007013-NH  
(Wayne County Circuit Court)

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**NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL**

**NOTICE OF HEARING**

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**APPLICATION FOR LEAVE TO APPEAL**

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## STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to consider and resolve this Application pursuant to MCR 7.301(A)(2) (review by appeal a case after decision by the Court of Appeals) and 7.302(H)(1) (the court may grant or deny the application, enter a final decision, or issue a peremptory order). This Court's jurisdiction has been timely and properly invoked, as evidenced by the following:

- July 10, 2014 Opinion of the Michigan Court of Appeals (**Exhibit B**); and
- August 21, 2014 filing of the instant Application for Leave to Appeal and accompanying documents (within the 42-day time frame of MCR 7.302(C)(2)(b)).

**STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM AND  
INDICATING THE RELIEF SOUGHT**

This is a medical malpractice action in which Plaintiff-Appellee Jeffrey Cullum claims generally that his treating physician, Defendant-Appellee Frederick Lopatin, D.O., committed professional negligence in the prescription of corticosteroids over a two-month period which, according to Plaintiff, caused the development of avascular necrosis of the bone in his right hip, which manifested months later. Defendant challenged the reliability and sufficiency of Plaintiff's expert testimony on the question of causation. The trial court determined that such expert testimony was unreliable, speculative, and unsupported, and thus granted summary disposition (**Exhibit A**, Opinion and Order Granting Defendant's Motion for Summary Disposition, dated November 19, 2012). Plaintiff appealed by right. The Michigan Court of Appeals reversed in a July 10, 2014 unpublished opinion (**Exhibit B**, Court of Appeals Opinion). The Court of Appeals reasoned that the trial court abused its discretion when finding unreliable the causation opinion of Plaintiff's expert witness, and further erred by determining that, if reliable, Plaintiff's causation testimony was speculative and therefore did not create a genuine issue of material fact of causation.

Defendant requests this Court peremptorily reverse the Court of Appeals July 10, 2014 Opinion, and reinstate the trial court's grant of summary disposition. In the first alternative, Defendant requests this Court grant leave to appeal, consider this case on a calendar basis, and issue the same relief as the trial court. In the second alternative, Defendant requests this Court allow oral argument on this Application, and then issue the same relief as the trial court. Defendant also requests the recovery of all costs and attorney fees so wrongfully sustained on appeal.

**STATEMENT OF QUESTIONS PRESENTED**

I.

DID THE TRIAL COURT ABUSE ITS DISCRETION BY FINDING DR. MCKEE'S CAUSATION OPINION UNRELIABLE AND UNSUPPORTED UNDER MRE 702?

Defendant-Appellant says "No."

Plaintiff-Appellee says "Yes."

The trial court says "No."

The Michigan Court of Appeals says "Yes."

II.

DID THE TRIAL COURT ERR BY GRANTING SUMMARY DISPOSITION WHERE THE ONLY ADMISSIBLE EVIDENCE SUBMITTED BY PLAINTIFF ON CAUSATION WAS SPECULATIVE AND THE AVASCULAR NECROSIS WAS LEGALLY UNFORESEEABLE IN THESE CIRCUMSTANCES?

Defendant-Appellant says "No."

Plaintiff-Appellee says "Yes."

The trial court says "No."

The Michigan Court of Appeals says "Yes."

## INTRODUCTION

“Ultimately, the goal of the trial court’s gate-keeping function is to ensure ‘that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work.’ The personal opinion of an expert witness, no matter how impressive his or her credentials may be, is inadmissible under Federal Rule of Evidence 702... [A] trial court must ‘determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.”

*Group Health Plan, Inc v Philip Morris, Inc*, 188 F Supp 2d 1122, 1131 (D Minn 2002)  
(citations omitted).

This Application presents two important and recurrent issues in Michigan law. The first is the proper interpretation and application of MRE 702 and its progeny to determine whether a proffered expert opinion on causation is reliable. The Honorable Kathleen Macdonald of the Wayne County Circuit Court determined that Plaintiff’s causation expert, Dr. Michael McKee, M.D., failed to provide reliable testimony to establish his thesis of a connection between short-course steroid therapy and the avascular necrosis (“AVN”) complained-of by Plaintiff. Specifically, Dr. McKee, did not present supporting scientific literature or peer-reviewed information that dealt with short-course steroid administration resulting in AVN. Nor did Dr. McKee account for other acknowledged causes of the AVN (other than his own personal opinion that the steroid exposure was more probably the cause than the Plaintiff’s excessive alcohol consumption, earlier and post-incident steroid use, and smoking a pack of cigarettes a day). The Michigan Court of Appeals reversed upon finding an abuse of the trial court’s discretion, notwithstanding that Dr. McKee’s opinion was based primarily upon Dr. McKee’s own research, namely his own case reports (with only one similarly-situated patient), and his own clinical experience. In the place of reliably applying the science to the case, the Court of Appeals accepted the *ipse*

*dixit* causation opinion of Dr. McKee, placing great weight in Dr. McKee's acknowledgment that his opinion was based "primarily upon his own clinical experience with similar cases" and "his examination of how plaintiff's symptoms developed," and "his 2001 study... ." (Court of Appeals Opinion, p 7) (Emphasis supplied). Nothing in MRE 702 requires or remotely encourages the trial court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. Yet that is the result created by the Court of Appeals' reversal here. The Court of Appeals excused Plaintiff from demonstrating that this causation opinion was reliably applied to the facts of this case, where the patient underwent short-course steroid therapy over a couple of months and who also had a history of high amount of alcohol consumption and smoking. The Court of Appeals also paid little heed to Dr. McKee's conclusion in his own paper that this series of 15 case reports "does not provide conclusive proof that there is a cause-effect relation between short-course steroid therapy and osteonecrosis." The trial court understood, and Dr. Lopatin demonstrated on appeal, that Dr. McKee had failed to take into account these factors, the Court of Appeals erred because Plaintiff's expert acknowledged these factors, in and of themselves, could result in the very condition complained-of by Plaintiff. The Court of Appeals compounded its error by allowing Plaintiff to rely on "articles," which are simply case reports, never referenced by Dr. McKee or Dr. Mayo in their discovery or their trial depositions (the latter of which were taken after the Defendant had initially challenged the reliability of the expert testimony). Finally, the Court of Appeals granted little deference to the trial court's analysis and decision as the gatekeeper, stating in mere boilerplate fashion that it was applying the "abuse of discretion" standard.

On the second major issue presented, the Court of Appeals failed to properly apply this Court's law which prevents speculative opinions from being presented to the jury. *Skinner v Square D Company*, 445 Mich 153, 166-167; 516 NW2d 475 (1994). Plaintiff's expert could not "exclude other reasonable hypotheses with a fair amount of certainty," *Skinner*, 445 Mich at 166-167, critical and necessary here because there was substantial and significant evidence of alternative causes for plaintiff's claimed condition, such as post-incident steroid ingestion and, as mentioned, significant alcohol ingestion. Michigan law is legion that a plaintiff must present "substantial evidence" from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. Where a plaintiff's evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, liability cannot attach. In like fashion, the Court of Appeals failed to properly apply Michigan law of legal causation when ignoring statistics demonstrating that the complained-of avascular necrosis was not legally foreseeable here, with low dose/short-course steroid therapy.

Correction of either of these major points requires reinstatement of the trial court's order granting summary disposition in favor of the defense.

### **STATEMENT OF FACTS**

#### **A. Plaintiff's allegations.**

Jeffrey Cullum ("Plaintiff" or "Mr. Cullum") asserts that the prescription of corticosteroids in January and February of 2008<sup>1</sup> by Frederick L. Lopatin, D.O.,

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<sup>1</sup> The steroids came in the form of Medrol Dosepaks, containing methylprednisolone, also referred to in Plaintiff's Complaint as prednisone. **Exhibit C**, ¶¶ 8 & 20(a)-(d).

("Defendant" or "Dr. Lopatin"), an otolaryngologist ("ENT"),<sup>2</sup> constitutes professional negligence and caused him to developed avascular necrosis of bone in his right hip, as diagnosed many months later through an MRI examination performed on October 10, 2008 (**Exhibit C**, Plaintiff's Complaint, ¶¶ 7-9, 11, 13-21, and attached Affidavits of Merit signed by two purported experts, Michael D. McKee, M.D., an orthopedic surgeon, and Clifton R. Hood, D.O.).

**B. Dr. Lopatin's first motion for summary disposition.**

Discovery commenced. Following the depositions of Plaintiff's affiants, Drs. McKee and Hood (Plaintiff's causation and standard of care experts, respectively), Dr. Lopatin filed his first motion for summary disposition. (WCCC Docket entry, 12/9/11). Dr. Hood had admitted in his Affidavit of Merit that while there *could* be a causal connection between the prescription of steroids and the onset of AVN, he did not claim special expertise on the issue and would defer as to whether there was a reasonable medical certainty that the steroids, more likely than not, caused Plaintiff's AVN. (**Exhibit C**, Affidavit of Hood, D.O., ¶ 12). Consistent with his Affidavit, Dr. Hood could not state with a reasonable degree of medical probability that the administration of steroids was a cause of the Plaintiff's AVN, as opposed to Plaintiff's excessive alcohol consumption. (**Exhibit D**, Deposition of Hood, D.O., p 11). In Dr. Hood's opinion, it would be rare for AVN of the hip to be caused by the administration of steroids. (*Id.* p 7). Other potential causes could include trauma, smoking and alcohol. (*Id.* p 12). Plaintiff was a long-time smoker, and drank to excess. (*Id.* pp 12,

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<sup>2</sup> The Complaint also named Dearborn Ear, Nose and Throat Clinic, P.C. as a defendant. This entity was dismissed by stipulation. (WCCC Docket entry, 03/10/11).

25-26, 31, 44). Neither Dr. Hood nor his partners had ever seen anyone develop AVN after the prescription of steroids. (*Id.* pp 27-28).

Dr. McKee does not treat patients with steroids. (**Exhibit E**, Deposition of McKee, M.D., p 15). He nevertheless opined that there is a causal connection between the prescription of steroids and the onset of Plaintiff's AVN. When asked if there was any independent literature available that he deemed authoritative which would support his opinion, Dr. McKee acknowledged that there was none. (*Id.*, p 33). He further offered that:

[T]he field of literature on this topic is quite controversial and it is **not entirely evidence based**, so increasingly in medicine in general and orthopedics in particular, we try and be as scientific and evidence based as possible. Unfortunately **this condition does not lend itself well to that kind of study.**

(*Id.*) (emphasis supplied).

Dr. McKee did reference his own "research letter" as medical literature in support of his opinion.<sup>3</sup> (**Exhibit E**, pp 40-41; **Exhibit F**, Michael D. McKee, *Osteonecrosis of the femoral head in men following short-course corticosteroid therapy: a report of 15 cases* (2001 Canadian Medical Association)). His study states that it was not conclusive:

Our series does not provide conclusive proof that there is a cause-effect relation between short-course steroid therapy and osteonecrosis.

(*Id.*: **Exhibit E**, p 98). The study involved only 15 patients between 1986 and 1996; 13 of these patients had been treated with prednisone; 2 had been treated with dexamethasone; and 2 patients were noted as having a high alcohol intake. (*Id.*: **Exhibit E**, pp 88-90 & 100).

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<sup>3</sup> The "research letter" refers to a paper of 15 case reports he wrote and letter which was published in the Canadian Medical Association Journal. (**Exhibit E**, p 10; **Exhibit F**).

The paper itself recognizes that it is open to criticism because there may be unknown causes, or other causes, including alcohol. (*Id.* **Exhibit E**, pp 92-93).

Dr. McKee agreed that AVN can be caused by alcoholism. (**Exhibit E**, p 10). He was not aware that Dr. Mayo (Plaintiff's subsequent treating physician) had noted that Mr. Cullum had a significant alcohol history. (*Id.*, p 13). There are apparently "a number of papers" that draw an association between excessive alcohol use and AVN. (*Id.*, p 29). It is possible that a person who drank as much alcohol as Plaintiff would develop AVN. (*Id.* p 70). Dr. McKee himself found references to Plaintiff's alcohol consumption significant, as he made his notes, while reviewing Plaintiff's medical records. (*Id.* pp 72-73). Unlike Dr. Hood, who was aware that Plaintiff had received an injection of steroids from a family physician shortly before being diagnosed with AVN, Dr. McKee did not recall this injection in the medical records. (**Exhibit D**, p 50; **Exhibit E**, p 25). Dr. McKee opined that whether that injection was a precipitating factor would "depend" on the route and amount of medication administered - again, unknown to Dr. McKee. (**Exhibit E**, pp 24-25).

Given this testimony, Dr. Lopatin argued that any opinion by Dr. Hood as to causation was speculative since he acknowledged a lack of medical probability. The opinion of Dr. McKee - that there *might* be a causal connection between the administration of steroids and Plaintiff's AVN - was both speculative ***and*** without sufficient scientific basis pursuant to MRE 702 and/or MCL 600.2955. Dr. Lopatin contended that with causation speculative, there was no genuine issue of fact as to causation and summary disposition was appropriate.

Plaintiff responded that Dr. McKee testified that Dr. Lopatin's alleged negligence was both the cause in fact and proximate cause of Plaintiff's injuries, and, that Dr. McKee's

testimony was thus admissible, reliable and created a question of fact. (WCCC Docket entry, 01/05/12).

In reply, Dr. Lopatin stressed the testimony of Dr. Hood, who could not state with a reasonable degree of medical probability that steroids were a cause of Plaintiff's AVN, as opposed to Plaintiff's excessive alcohol consumption. (WCCC Docket entry, 01/10/12; **Exhibit D**, Deposition of Hood, p 11). Given Dr. McKee's equivocal testimony, his conclusion as to causation was speculative. At best, Dr. McKee provided a causation opinion consistent with his incomplete understanding of Mr. Cullum's life-style choices and medical treatment. The conclusion that Plaintiff's claimed AVN resulted from the subject short-term steroid therapy is not deducible from the material facts. Thus, it does not rise to the level of a reasonable inference, and not substantial evidence from which a jury could conclude that, more likely than not, but for Defendant's conduct, Plaintiff's injuries would not have occurred. Finally, given Dr. Hood's testimony, Dr. McKee's speculative conclusion would not be foreseeable to an ENT physician.

The trial court heard argument on January 13, 2012. Defense counsel summarized the causation arguments in the context of both cause in fact and proximate cause. (**Exhibit G**, Tr. 1/13/2012, pp 3-6). The trial court was concerned that the testimony suggested Dr. Lopatin should have taken a more thorough medical history with respect to Plaintiff's alcohol consumption. (*Id.*, pp 5-6). Plaintiff's counsel expressed surprise that any foreseeability argument was being raised, but addressed the issue, stating that "the problem" with this case is that ENTs (such as Dr. Lopatin) do not know how and why AVN works, which is in the field of orthopedic surgeons - hence the need for two experts. (*Id.*, p 8). With reference to Dr. McKee, Plaintiff's counsel offered that the pending matter was

"really" a *Daubert* motion. (*Id.*, p 10). At that time, the trial court would not disagree with the proposition that Dr. McKee was qualified to offer expert testimony, and considered the arguments of counsel as going to the weight to be given Dr. McKee's opinion. (*Id.*, p 15). The trial court stated that it was not in a position to grant Dr. Lopatin's motion, and it was accordingly denied from the bench without entry of an opinion or order. (*Id.*, p 15).

**C. The trial depositions and Dr. Lopatin's second motion for summary disposition.**

Given the trial court's ruling, the parties prepared for trial, including the video depositions to be used at trial of Plaintiff's causation expert witnesses. The depositions of Plaintiff's treating orthopedic surgeon, David B. Mayo, M.D., and Dr. McKee, were taken on May 8, 2012 and May 14, 2012, respectively.

Dr. Mayo is board certified in orthopedic surgery. (**Exhibit H**, David B. Mayo, M.D. Trial Deposition, p 7). In Dr. Mayo's opinion, Plaintiff was drinking a lot of alcohol, which increased his risk of AVN, and ultimately the alcohol caused Plaintiff's AVN. (*Id.*, p 20). He opined that there is probably not a significant additive effect if alcohol is combined with steroids. (*Id.*, p 89). The small number of cases studied makes a statistical determination difficult. (*Id.*).

Putting "risk" in perspective, Dr. Mayo testified that the risk of developing AVN, with no alcohol, is 1 in 100,000. (*Id.* p 80)(0.001%). Dr. Mayo had a patient handout indicating that there are only 15,000 cases of AVN per year, and estimated the population in this

country at 250 million. (*Id.*) Accordingly, even with the presence of risk factors, it is only a small number of people who develop AVN. (*Id.* p 81).<sup>4</sup>

Dr. McKee is not an ENT specialist, but rather an orthopedic surgeon called to testify strictly as to causation issues in this case. (**Exhibit I**, p 31). AVN takes up approximately 5% of his practice, while 95% of his practice is in the area of traumatic injury. (*Id.*, pp 31-32). He acknowledged that millions of people are prescribed steroids in small dosages in the United States and Canada and throughout the world and that developing AVN is a rare occurrence. (**Exhibit I**, p 41). This is consistent with the testimony of Dr. Hood, Plaintiff's standard of care expert. In Dr. Hood's opinion, it would be rare for AVN of the hip to be caused by the administration of steroids. (**Exhibit J**, p 7). Neither Dr. Hood nor his partners ever had anyone develop AVN after the prescription of steroids. (*Id.* pp 27-28).

Dr. McKee estimated that there are approximately 1,500 to 2,000 cases of AVN a year in Canada, with a population of 30,000,000. (**Exhibit I**, p 44). Even assuming 2,000 cases,  $2,000/30,000,000 = 0.000067$ , or 0.0067% of Canadians could expect to develop AVN from all causes. Nevertheless, while Dr. McKee conceded that it is possible that

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<sup>4</sup> Dr. Lopatin observed in his brief that in fact, census data indicates that the population of the United States in 2012 was 308,745,538. See:

<http://quickfacts.census.gov/qfd/states/00000.html>

Fifteen thousand cases of AVN in a population of 308,745,5380 means that only .0049% of the population would develop AVN from all causes. The risk of developing AVN in conjunction with alcohol intake is substantially greater than low doses of steroids. (**Exhibit H**, p 17). Dr. Mayo testified that if total steroid exposure is 3 grams in 3 months or less, the risk is 0.6 percent. (*Id.*). Three grams is far more than the 315 milligrams at issue, even assuming that Plaintiff took all the steroids prescribed. In any event, 0.6% of 0.0049% would mean that the risk of developing AVN from exposure to 3 grams of steroids in 3 months or less is 0.000029%.

alcohol abuse could have been the cause of Plaintiff's AVN, he thought the balance of probabilities tended toward steroid administration. (*Id.*, p 46).

This causal relationship between the low doses of steroids prescribed to Plaintiff and his AVN was justified by Dr. McKee primarily with reference to a "study" he himself conducted in 2001 involving 15 patients, only one of which implicated a low dosage approximating the dose at issue - one in 30,000,000, over ten years ago. Dr. McKee acknowledged that he was also familiar with the 2006 Journal of Bone and Joint Surgery article "*Non-traumatic Osteonecrosis of the Femoral Head Ten Years Later*" which indicated that dosages of corticosteroids considered to be associated with osteonecrosis are typically greater than 2 grams of prednisone or its equivalent. (*Id.*, pp 62-63). That was the only article he referenced in his trial testimony.

At the time of his video trial deposition, Dr. McKee had not read the transcript of the deposition of Plaintiff's girlfriend, in which she testified about Plaintiff's history of alcohol consumption and her recollection of events. (**Exhibit I**, p 33). He had not read the transcript from the video trial deposition of Dr. Mayo. (*Id.*). Dr. McKee conceded that Dr. Mayo, the treating orthopedic surgeon, would certainly be in a better position to have analyzed Plaintiff in terms of potential causes and etiology of his symptoms. (*Id.*, p 34). Dr. McKee acknowledged medical records that showed Mr. Cullum's alcohol consumption of a case of beer per week/six beers per day, and a 10-15 year history of smoking a pack of cigarettes per day. (*Id.*, 48-50). Again, in Dr. Mayo's opinion, Plaintiff was drinking a lot of alcohol, which increased his risk of AVN, and ultimately the alcohol was the cause of Plaintiff's AVN. (**Exhibit H**, p 20).

Following these depositions, Dr. Lopatin filed his second motion for summary disposition. (WCCC Docket Entry, 05/25/12). Dr. Lopatin argued that the trial depositions of Dr. McKee and Dr. Mayo left no dispute as to any material fact that Plaintiff's AVN was not a foreseeable, natural, and probable cause of low dose steroid administration. As a matter of law, therefore, Plaintiff's allegations of professional negligence failed to establish any act or omission of Dr. Lopatin that may be deemed a proximate cause of Plaintiff's alleged injury. Dr. Lopatin further maintained that Plaintiff's cause in fact theory would impermissibly require a jury to speculate.

Plaintiff's Response to Dr. Lopatin's second motion for summary disposition criticized the Motion as a "rehash" of the challenge to the basis of Dr. McKee's opinion, and argued with reference to the modern trend of focusing on cause in fact and not foreseeability. (WCCC Docket entry, 06/08/12, Brief, p 6). It also included attachments that were previously not submitted to the trial court and has not been produced at deposition.

In reply, Dr. Lopatin argued that these attachments were not substantively admissible on the question of foreseeability to an otolaryngologist such as Dr. Lopatin in January and February of 2008, or for the proposition that AVN would develop as a result of steroid administration in the low doses at issue. (WCCC Docket entry, 06/12/12). None of the attachments was produced or relied upon by Plaintiff's experts. Accordingly, Dr. Lopatin argued that the attachments were hearsay pursuant to MRE 801(c), not offered for impeachment pursuant to MRE 707, and not established as a reliable authority by any of the several experts called to testify during discovery. Dr. Lopatin submitted that Plaintiff could not create a question of fact by submitting obscure irrelevant articles or attachments after discovery has closed.

**D. The hearing on Dr. Lopatin's second motion for summary disposition.**

The trial court heard arguments on Dr. Lopatin's second motion for summary disposition on June 15, 2012. (**Exhibit J**, Tr. 6/15/2012).<sup>5</sup> Defense counsel noted that the motion was premised on the video trial depositions of Dr. McKee, and Plaintiff's treating physician. (*Id.*, pp 3-4). Defense counsel posited that, given the miniscule chance that the small dosages at issue would have caused Plaintiff's AVN, the result was not foreseeable, and further noted that Plaintiff's own treating physician believed that Plaintiff's AVN was caused by Plaintiff's alcohol consumption as opposed to steroids and there was no additive risk by taking the amount of steroids at issue. (*Id.*, pp 5-6).

Plaintiff's counsel discounted Dr. Mayo's credentials when compared to Dr. McKee's. (*Id.*, pp 7-8). The trial court noted that nobody was arguing about Dr. McKee's credentials. (*Id.*, pp 8-9). Plaintiff's counsel stated that the foreseeability argument was really a standard of care question, which should be left to a jury, and directed the court's attention to additional documentation, such as an Arthroscopy Journal article which suggested a link between steroids and AVN. (*Id.*, pp 13-14). The trial court rightly queried how counsel proposed to get the journal article into evidence if 1) Plaintiff's expert did not rely upon it and 2) there was no testimony accepting it as authoritative. (*Id.*, pp 14-15). Plaintiff's counsel acknowledged that if that was the case, he would need to rely upon the deposition testimony of Dr. McKee. (*Id.*, pp 14-15).

Defense counsel argued that each of the articles submitted by Plaintiff in opposition to the Motion, along with a PDR [Physician's Desk Reference] disclosed just prior to the

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<sup>5</sup> Also pending were Plaintiff's motion to file an amended Affidavit of Merit and motions *in limine*.

hearing, was hearsay. (*Id.*, p 15). None of these articles was established as authoritative by Dr. McKee. (*Id.*, p 15). With respect to foreseeability, defense counsel noted that there was no response to the testimony of Dr. Mayo or Dr. McKee, who spoke in terms of slight risk in patients only at much higher doses than those at issue. (*Id.*, p 16).

The trial court stated on the record that it was inclined to grant the Motion, but wanted to read the entire trial depositions of Dr. Mayo and Dr. McKee before making a ruling. (*Id.*, p 16; *See Exhibit H*, Trial Deposition of Dr. Mayo; *Exhibit I*, Trial Deposition of Dr. McKee).

**E. The trial court's Opinion and Order.**

The trial court's Opinion and Order granting summary disposition was entered on November 19, 2012. (**Exhibit A**). After noting the four elements a plaintiff must prove to prevail in a malpractice case, the trial court acknowledged the testimony of Dr. McKee that Dr. Lopatin's maximum prescription of 315 milligrams of steroids caused Plaintiff's AVN. (*Id.*, pp 1-2). The trial court found it significant that Dr. McKee relied upon his own study conducted in 2001, which included only 15 patients and only one of those 15 received a dose as low as the dose Dr. Lopatin prescribed to Plaintiff. (*Id.*, p 3). That paper itself acknowledged that the series did not provide conclusive proof that there is a cause effect relationship between short-course steroid therapy and AVN ("[o]ur series does not provide conclusive proof that there is a cause-effect relationship between short-course steroid therapy and osteonecrosis" (**Exhibit F**)). (**Exhibit A**, p 3). There was no other literature or studies presented to support his conclusions. (*Id.*). By contrast, Plaintiff's treating orthopedic surgeon, Dr. Mayo testified that, given the amount of alcohol being consumed by Plaintiff at the time, the alcohol was ultimately the primary cause of Plaintiff's AVN. (*Id.*, p

3). Dr. Hood (Plaintiff's standard of care expert) and Defendant's expert agreed that AVN is a disease of unknown etiology. (*Id.*). The trial court concluded that "[a]fter reviewing the pleadings and depositions it is clear that Plaintiff's expert's opinion on causation is speculative and unsupported." (*Id.*). The motion for summary disposition was therefore granted. (*Id.*, p 4).

Plaintiff did not file a motion for reconsideration with respect to the trial court's grant of summary disposition or otherwise complain that the trial court failed to give Plaintiff an opportunity to address the issues raised in the Opinion and Order.

**F. The Michigan Court of Appeals Opinion.**

In an Opinion dated July 10, 2014, the Michigan Court of Appeals reversed and remanded for further proceedings (**Exhibit B**, Opinion) (Cavanagh, P.J. and Owens and M.J. Kelly, JJ.). On the reliability issue, the Court of Appeals acknowledged that "Dr. McKee testified that his opinion was based primarily on his own clinical experience with similar cases and his examination of how plaintiff's symptoms developed; his 2001 study was only 'one portion' of the basis for opinion." (*Id.* at p 7) (emphasis supplied). The "other portion" was Dr. McKee's testimony "that he was personally 'aware' of other literature indicating that short-course steroid therapy could cause AVN," to which he cited. The Court of Appeals did not appreciate that these "other studies" were only case reports, not relied upon by Dr. McKee, and submitted only by Plaintiff's counsel upon the Defendant's second motion for summary disposition. Instead, the intermediate appellate court found sufficient that Dr. McKee's own experience with similar cases he had seen was sufficient to establish causation. (*Id.* at p 7). The Court of Appeals cited from pages 21-27 of Dr. McKee's trial deposition that he had reviewed the patient's medical chart and "possible factors" involved

in the etiology of the Plaintiff's avascular necrosis, that Plaintiff's case was consistent with other cases that Dr. McKee had seen with short-course oral corticosteroids and the development of avascular necrosis, and that Plaintiff's history was consistent with the type of condition "induced by a steroid medication." (*Id.*). On this basis, Dr. McKee opined, and the Court of Appeals found sufficient as reliable, the statement that the steroid prescription in this case was a probable cause of the Plaintiff's condition. The Court of Appeals analyzed no other expert causation testimony – just that of Dr. McKee.

Notably, the Court of Appeals did not cite, let alone explain, the evidence that Mr. Cullum had otherwise received steroids near the time period in question (i.e., unrelated to this instance), before the alleged manifestation of his AVN, and had a significant history of alcohol consumption and smoking, which Plaintiff's experts readily agreed could be the cause of Plaintiff's AVN. The Court of Appeals topped off its analysis by reasoning that the trial court "improperly weighed the relative value of testimonial evidence provided by each party and inappropriately made credibility determinations in reaching its decision to exclude Dr. McKee's causation testimony." (*Id.* at p 8).

At pages 9-10 of its Opinion, the Court of Appeals rejected Defendant's claim that summary disposition was justified on the independent basis that the causation testimony proffered by Plaintiff was speculative. With respect to the requirement under *Skinner* and *Craig* that Plaintiff exclude other reasonable hypotheses with a fair amount of certainty, the Court of Appeals found sufficient Dr. McKee's subjective testimony that Plaintiff's alcohol consumption may have predisposed him to develop AVN, rather than causing it, was sufficient. "Again, as I stated before it's my firm belief that had he not taken those corticosteroids, he would not have developed osteonecrosis of the hip." (*Id.* at p 9)

(Emphasis supplied). The appellate court also rejected Defendant's claim of lack of legal causation, noting that Plaintiff presented sufficient evidence to create a question of fact regarding whether the development of AVN was a "natural and probable result of defendant's allegedly negligent conduct." (*Id.* at p 11).

This Application followed.

## THE NEED FOR SUPREME COURT REVIEW

Under MCR 7.302(A), it is incumbent upon the Applicant to demonstrate grounds justifying this Court's review and resolution of the issues presented. This case presents two issues of enormous practical significance for civil litigants. The first is the proper role and responsibility of the trial court as the reliability "gatekeeper" and the amount of deference to be afforded to the gatekeeping decision. There are four specific interrelated justifications for Supreme Court review of the reliability issue. *First*, the Court of Appeals upset the existing legal jurisprudence of the State of Michigan governing reliability of expert testimony, retreating from science-based evidence, and returning to a prior time when admissibility was more liberally defined in both the state and federal systems. Michigan has moved beyond this outdated legal environment, necessarily so. The American legal system does not limit the ability of a civil litigant to choose the expert witness of choice. Naturally, such experts are chosen whose views match the litigant's theory of the case, plaintiff or defendant. Prior to the advent of present-day MRE 702 and its progeny (as derived in part from the federal counterparts), if the expert was qualified, and the testimony was relevant, it was presented to the jury. Flaws in the expert's testimony were considered to be of weight, not of admissibility. In turn, the courtroom was often the place for scientific guesswork, and prior to the advent of present MRE 702, it was the jury that decided problems with the expert's methodology or reasoning. The result was adversarial experts whose opinions inevitably were decided by the jury, through liberal admissibility rules. As one court put it, "[T]he fact that science would require more evidence before conclusively considering the causation question resolved is irrelevant." *Ferebee v Chevron Chemical Company*, 736 F2d 1529, 1536 (DC Cir 1988).

The 1993 decision of *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993) cured the laxity of certain courts in admitting unreliable testimony. *Daubert* required trial judges – not juries – to adopt the “gatekeeping role” to ensure that expert testimony be both relevant and reliable before admission. This gatekeeping function underlies present FRE 702, to which MRE 702 conforms. See Staff Comment to 2004 Amendment to MRE 702. The Court of Appeals’ Opinion retreats from these modern bedrock principles and procedures of reliability.

Second, the Court of Appeals’ Opinion here is contrary to the cornerstone principles of reliability. The trial court as the gatekeeper need not admit opinion evidence “which is connected to the existing data only by the *ipse dixit* of the expert.” *Joiner v General Electric Co*, 522 US 136, 146 (1997). Here, the Court of Appeals reversed the trial court upon reasoning that the primary authority for Dr. McKee’s opinion, namely Dr. McKee himself, through his letter, his “study,” and his clinical experience, was enough. The fact that the Court of Appeals referred to three other articles (really only single-patient case reports) to which Plaintiff’s counsel (and only one of which Dr. McKee) referred – but which were not relied upon by Dr. McKee and not mentioned in his trial deposition – is similarly infirm and thus legally insufficient.

There was no showing that Dr. McKee had applied principles and methods he propounded as reliable to the very facts of this case. See MRE 702; *Daubert, supra*; *Kumho Tire Company v Carmichael*, 526 US 137 (1993). This omission manifests itself in two distinct fashions. Dr. McKee acknowledged but could not explain away the fact of Mr. Cullum’s excessive alcohol intake, while still acknowledging that this could be a cause of the AVN. Nor did Dr. McKee know of Mr. Cullum’s prior history when questioned during the

course of his trial deposition, including his post-incident steroid use. Finally, and perhaps most importantly, the “authority” tendered on behalf of Dr. McKee for his opinions is scant, if at all, with respect to AVN resulting from short-course steroid treatment. Plaintiff fails to demonstrate how the “patients” in studies other than Dr. McKee’s are similarly situated as Mr. Cullum here, and Dr. McKee’s only study portrays at best only one of the scant 15 case reports as remotely similar to Mr. Cullum’s case.

Third, when reversing the trial court’s decision, the Court of Appeals recited but failed to apply the required and most deferential standard of review, abuse of discretion. The Court of Appeals failed to appreciate that the concept of discretion denotes the absence of a single correct result, and that in many cases, a trial court does not abuse its discretion by either granting or denying the relief requested. Part of proper appellate review is to make certain that the expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Kumho Tire*, 526 US at 152. Where the trial court correctly determines as the gatekeeper that the courtroom is not the place for scientific guesswork, recognizing that expert testimony has the potential to be both powerful and quite misleading, and correctly notes that the *sine qua non* of the expert opinion is his own thoughts, studies, and clinical experience (the “*ipse dixit*”), the appellate court may disagree but cannot reasonably find that the trial court reached a decision outside of principled outcomes. Both judge and lawyer knows that the abuse of discretion standard is a verbal code of many colors, and is oftentimes recited as mere boilerplate. Yet the rule of deference is crumbling at its edges where, as here, the trial court has explained an evidenced-based reason for its decision, but the appellate court simply disagrees.

Fourth, Plaintiff was allowed to rely upon authority which Dr. McKee did not identify in his trial deposition, and certainly did not demonstrate reliance upon that material. Where the material which supposedly creates a scientific connection for the causation link at issue is not shown to be relied upon by the expert, but rather is information the expert is simply aware of, that expert is not opining from or extrapolating by reason of existing data known to him. This necessarily creates “too great an analytical gap” between the data and the opinion proffered. *Joiner*, 522 US at 146.

The second major issue presented is more particular to Michigan law than the *Daubert* issue. This Court has always adhered to the requirement that the plaintiff must demonstrate something more than a mere possibility to have a causation opinion presented to the jury. Plaintiff’s expert must present reliable testimony that “but for” the Defendant’s actions, Plaintiff’s outcome would not have occurred. In fact, in *Skinner*, this Court placed an affirmative burden upon the plaintiff to exclude with reasonable certainty other hypotheses for a plaintiff’s condition. Here, it is stunning that Dr. McKee did not know the totality of Mr. Cullum’s prior medical history, and accordingly could not intelligently opine – and thus eliminate with “reasonable certainty” – other possible causes of his AVN. Reminiscent of how it handled the reliability question, the Court of Appeals erred by simply punting on this question by stating that Dr. McKee himself thought that steroid exposure was more probably the “but for” reason for Plaintiff’s AVN than the other causes, and this was sufficient. Where a witness is relying primarily upon experience, that witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reasonably applied to the facts (this third factor being relevant on reliability). See *O’Connor v*

*Commonwealth Edison Company*, 13 F3d 1090, 1105-1107 (CA 7, 1994) (where an expert's testimony is based on subjective methodology, it is properly excluded); *Lake Michigan Contractors v Manitowoc Co*, 225 F Supp 2d 791 (WD Mich 2002) (barring expert who could not explain how he arrived at his conclusions except by his "experience" in his industry and by reason of his "professional judgment").

Under *Skinner*, where there are other possible causes (here, alcohol consumption, cigarette smoking, and post-incident steroid use), the plaintiff need not negate these causes, but the evidence must exclude such causes "with a fair amount of certainty." The Court of Appeals did not hold Plaintiff's expert to this standard, but rather cited the *ipse dixit* of Dr. McKee's testimony that "rules out alcohol as a possible cause with reasonable certainty." This was simply his opinion, not an opinion that was shown consistent with the material facts, nor shown reliable with relevant, peer-reviewed scientific literature. Similarly, the Court of Appeals curiously deferred to the subjective opinion of Dr. McKee when deciding the legal question of foreseeability.

On a closing note, because expert testimony on causation is required before a medical malpractice action may be submitted to the jury, and the opinions here are unreliable and thus inadmissible, Plaintiff will be unable to establish a necessary element of her case, cause-in-fact, and therefore cannot establish a *prima facie* case. In turn, the case cannot be submitted for jury resolution. It would be a significant loss of private and public resources to have the appellate court again review this threshold issue regarding reliability and admissibility after the time of trial. Jurors should not be subjected to sitting through weeks of testimony based on "junk science." MRE 702; MCL 600.2955; *Craig v Oakwood*

*Hospital*, 471 Mich 67, 80; 684 NW2d 296 (2004); *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1993).

## ARGUMENT I

### THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN FINDING DR. MCKEE'S CAUSATION OPINION UNRELIABLE AND UNSUPPORTED UNDER MRE 702.

#### **A. Standard of review and supporting authority.**

This Court reviews *de novo* a motion to the grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court reviews evidentiary determinations for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004); *People v Lavher*, 364 Mich 756, 761; 631 NW2d 281 (2000). More specifically, a trial court's exercise of its role as a gatekeeper under MRE 702 is also within its discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d (2004). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). The trial court's error when admitting or excluding evidence warrants relief where a failure to afford the party relief would be inconsistent with substantial justice, or if the error affected a substantial right of the party. *Craig, supra*; MCR 2.631(A); MRE 103.

#### **B. Plaintiff's burden of proof in a medical malpractice action.**

To establish a prima facie case of medical malpractice to be submitted to the jury, the plaintiff must present admissible evidence on each of the four elements: (1) the applicable standard of care; (2) breach of that standard of care by the defendant; (3) injury; and (4) proximate causation between the alleged breach and the injury. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). Failure to support and prove any one of these elements is fatal to

the claim. *Wischmeyer, supra*. This burden of proof in a medical malpractice action is codified in MCL 600.2912a, which provides in pertinent part:

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** ....

MCL 600.2912a(2) (emphasis added).

In a medical malpractice action “expert testimony is essential to establish a causal link between the alleged negligence and the alleged injury.” *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006).

### **C. Plaintiff’s burden of proof on the reliability of the expert testimony.**

The burden of persuasion<sup>6</sup> for reliability under *Daubert* is different than what is required to “survive” a motion for summary disposition. Whereas a plaintiff facing a motion for summary disposition needs to show only by admissible evidence that there exists a question of material fact to have the case submitted to a jury, *Maiden, supra*, to show reliability under *Daubert*, the party proffering the expert testimony must establish by a preponderance of the evidence<sup>7</sup> that the theory plaintiff is advancing is both reliable and scientifically sound. The proponent of the expert testimony bears the burden of

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<sup>6</sup> When considering the respective burdens on the parties, it is useful to distinguish the burden of *production* from the burden of *persuasion*. To meet HIS burden of *production*, Plaintiff must offer evidence sufficient to make out a *prima facie* case of admissibility. MRE 104(a). It then remains for Plaintiff to carry the burden of *persuasion*, which remains with the party asserting the claim. *Straith v Straith*, 355 Mich 267; 93 NW2d 893 (1959); *In re Conan Estate*, 130 Mich App 493; 343 NW2d 593 (1983). Here, Plaintiff has the burden of *persuasion* for all elements necessary to establish his cause of action, and admissibility of the evidence alleged in support thereof, and this burden does not shift. See generally *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976).

<sup>7</sup> *In re Paoli RR Yard PCP Litigation*, 35 F3d 717, 743 n9 (CA 3, 1994) (preponderance is the proper level of proof).

establishing relevancy and admissibility. *Craig*, 471 Mich at 80 (“the proponent of expert testimony bears the burden of proving general acceptance under this standard,” citing *People v Young (After Remand)*, 425 Mich 470, 475; 391 NW2d 270 (1986));<sup>8</sup> *Gilbert*, 470 Mich at 781; *People v Crawford*, 458 Mich 376, 388 n 6; 586 NW2d 785 (1998) (describing this rule as “basic hornbook law”). The defendant need not produce or provide any “evidence” in a *Daubert* hearing. Here, the burden of proof is entirely on the plaintiff to prove that his theory being advanced applies to the facts at issue, is scientifically reliable and sound and warrants consideration by a jury. MRE 702; MCL 600.2955.

**D. Governing law on reliability.**

The proponent of the expert testimony has the burden of establishing that the expert is qualified and that the expert's opinion is reliable under MRE 702 and MCL 600.2955. *Clerc v Chippewa County War Mem Hosp*, 477 Mich 1067; 729 NW2d 221 (2007). An expert's opinion that is admissible under one rule or statute may be inadmissible under another. *Edry, supra* at 642 n 7. MRE 702 provides that:

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.

MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert*; *Edry, supra*

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<sup>8</sup> In *Craig*, the trial court erroneously assigned the burden of proof to the defendant, the party opposing the admission of the testimony, to show that the testimony lacked general acceptance.

at 639.<sup>9</sup> Under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 US at 640 (quoting, *Daubert, supra* at 589). For example, the lack of supporting literature is an important factor in determining the admissibility of expert witness testimony because an expert's reliance on his or her own hypothetical depiction of an event may be speculative, and therefore inadmissible under MRE 702. *Edry, supra*. Whether there is peer-reviewed and published literature on a theory is also a "pertinent consideration" because "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Edry, supra* (quoting, *Daubert*, 509 US at 593). Even if peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702 if there is a lack of supporting literature. *Edry, supra* at 641. Further, under MRE 702, it is generally insufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible. *Edry, supra* at 642. The court's gatekeeper role under MRE 702:

[M]andates 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).

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<sup>9</sup> MRE 702 is identical to Federal Rule of Evidence 702, except for the addition after the word "If" of the phrase "the court determines that recognized." It is appropriate to look to federal cases interpreting federal rules for guidance where the Michigan rule is "virtually identical" to the federal rule. *Powers v City of Troy*, 28 Mich App 24; 184 NW2d 340 (1970). Therefore, throughout this Brief, Defendants cite federal court authority to this Court, as well as referring to the reliability question as "*Daubert*."

The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.

*Clerc, supra* at 1067-1068 (quoting, *Gilbert*, 470 Mich at 782).

Consistent with the gatekeeper role, a trial court shall consider all of the factors listed in MCL 600.2955(1),<sup>10</sup> and if applicable, the proponent of the opinion must also

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<sup>10</sup> MCL 600.2955 provides in pertinent part that:

(1) 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, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:

(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.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(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.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

MCL 600.2955(1) & (2)(emphasis added).

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. *Clerc*, 477 Mich at 1068.

**E. Argument: Dr. McKee's opinion was not reliable as applied to the facts and could not be said to be generally accepted.**

**1. Dr. McKee's causation opinion is primarily *ipse dixit* and thus fatally unreliable.**

Dr. McKee's opinion is based on his own experience and case studies, which are disconnected from the facts at issue. His "study" was not conclusive. (**Exhibit E**, p 98). The study involved only 15 patients between 1986 and 1996; 13 of these patients had been treated with prednisone; 2 had been treated with the steroid here, dexamethasone; and only 2 patients were noted as having a high alcohol intake. (*Id.*, pp 88-90 & 100; **Exhibit F**). Dr. McKee acknowledged that he was also familiar with the 2006 Journal of Bone and Joint Surgery article "Non-traumatic Osteonecrosis of the Femoral Head Ten Years Later" which indicated that dosages of corticosteroids considered to be associated with osteonecrosis are typically greater than 2 grams of prednisone or its equivalent (**Exhibit E**, pp 62-63; **Exhibit F**). Again, assuming that Plaintiff had taken all of the 315 milligrams at issue, 2 grams is more than six times the amount of corticosteroids prescribed by Dr. Lopatin to Mr. Cullum. This is "too great an analytical gap" to allow the case to proceed to the jury:

[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. See *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (C.A.6), cert. denied, 506 U.S. 826, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992). That is what the District Court did here, and we hold that it did not abuse its discretion in so doing.

*Joiner*, 522 US 136, 146 (1997). Here, Dr. McKee's paper is self-labeled as a "Research letter." It consists of a mere two pages. **(Exhibit F)**. It addresses only one patient with a total dosage at or below the total maximum possible dosage here, 315 milligrams of Prednisone (which is a different steroid than used here) (Case No. 10). The remaining 14 of the 15 case reports are dissimilar to Mr. Cullum's case. The use of the paper based on these 14 cases is not a principle or method reliably applied *to the patient at issue*. For this reason alone, the McKee study is dramatically insufficient to establish reliability.

And there is more. Dr. McKee acknowledges that his chosen series of case reports "does not provide conclusive proof that there is a cause-effect relation between short-course steroid therapy and osteonecrosis." **(Exhibit F)**. Even assuming *arguendo* all 15 patients come into play notwithstanding their dissimilar situations, Dr. McKee states, at best, there is only "strong *presumptive* evidence that *some* association exists." (*Id.*) (emphasis supplied). "Presumptive," "some," and "association," are *not* descriptors that rise to the level of reliability to create causation.<sup>11</sup>

The Court of Appeals deferred to Dr. McKee's personal experience, clinical experience, and 15 case report article, which is stark error: "Thus, Dr. McKee testified that his opinion was based primarily upon *his* own clinical experience with similar cases" and "*his* examination of how plaintiff's symptoms developed," and "*his* 2001 study... ." (Court of Appeals Opinion, p 7) (emphasis supplied). Nothing in MRE 702 requires or remotely

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<sup>11</sup> To "presume" means to "suppose to be true without proof." "Some" means "an unknown, undetermined, or unspecified unit or thing." To "associate" means to connect, and "association" is merely a connection. Merriam Webster 2014.

encourages the trial court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. As noted in one case:

A witness who invokes "my expertise" rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term. Shapiro may be the world's leading student of MMDS services, but if he could or would not explain how his conclusions met the Rule's requirements, he was not entitled to give expert testimony. As we so often reiterate: "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir.1989). See also, e.g., *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 933 (7th Cir.2003); *Huey v. United Parcel Service, Inc.*, 165 F.3d 1084, 1087 (7th Cir.1999); *Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc.*, 135 F.3d 526, 530-31 (7th Cir.1998); *Navarro v. Fuji Heavy Industries, Ltd.*, 117 F.3d 1027, 1031 (7th Cir.1997); *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 537-38 (7th Cir.1997); *Braun v. Lorillard Inc.*, 84 F.3d 230, 235 (7th Cir.1996). WH-TV observes that experts sometimes must extrapolate from existing data, as Shapiro did, but this cannot justify his lack of discipline. "[E]xperts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *General Electric*, 522 U.S. at 146, 118 S.Ct. 512. That's a fair description of Shapiro's proposed testimony.

*Zenith Electronics Corp v WH-TV Broad Corp*, 395 F3d 416, 419-20 (CA 7, 2005) (emphasis supplied).

In the trial court and the Michigan Court of Appeals, Plaintiff stressed Dr. McKee's curriculum vitae ("CV") as evidence of the reliability of his causation opinion (Plaintiff's Brief in Opposition, Exhibit 3; Plaintiff's appellate court Exhibit 8, sub-exhibit 3). Relying on his CV is simply an element of bolstering Dr. McKee's expertise, which does not constitute reliable principle or method. *Zenith Electronics Corp v WH-TV Broad Corp*, 393

F3d 416, 418 (CA 7, 2005) (industry expertise, awareness, and CV do not constitute a method); *McMahon v Bunn-O-Matic Corp*, 150 F3d 651, 658 (CA 7, 1998); *Rosen v Ciba-Geigy Corp*, 78 F3d 316, 319 (CA 7, 1996).<sup>12</sup>

**2. Dr. McKee did not reliably apply his causation opinion to the facts of this case.**

MRE 702 is expressly directed at assuring that expert opinion is grounded on facts or data and applied "reliably to the facts of the case." *Id.* A corollary is seen in the holding that "an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts." *Badalamenti v William Beaumont Hospital*, 237 Mich App 278, 286; 602 NW2d 854 (1999). By way of example, where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony. *Id.* When an expert ignores posited alternative causes for an injury, and his theories are unsupported by published literature and do not enjoy general acceptance, his testimony is properly excluded as unreliable. *Marsh v W R Grace & Company*, 80 Fed Appx 883 (CA 4, 2003) (unpublished), *cert denied* 543 US 810 (2004); *Cooper v Smith & Nephew, Inc*, 259 F3d 194 (CA 4, 2001).

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<sup>12</sup> When finding the trial court abused its discretion when ruling Dr. McKee's causation opinion was unreliable, the Court of Appeals relied in part on Dr. McKee's "practical experience." (**Exhibit B**, p 6). This is not supported by Dr. McKee's testimony. He spent only 50% of his professional time devoted to patients with AVN (**Exhibit I**, p 31). The vast majority of his practice is devoted to the treatment of traumatic injuries (*Id.* at 31-32), not involved here. Most importantly, he does not treat patients with steroids because "it would be rare for an orthopedic surgeon to use these medications in their clinical practice." (**Exhibit E**, p 15).

Dr. McKee's opinion was not applied reliably to the facts of this case - he simply did not gather or consider existing facts before opining in this case. At his first deposition, Dr. McKee was not aware, until he was shown, that Plaintiff's treating orthopedic surgeon, Dr. Mayo, had noted a significant alcohol history. (**Exhibit E**, p 13). Unlike Dr. Hood, who was aware that Plaintiff had received a shot of steroids from a family physician shortly before being diagnosed with AVN, Dr. McKee did not recall the shot in the medical records. (**Exhibit D**, p 50; **Exhibit E**, p 25). Dr. McKee opined that whether that shot was a precipitating factor would "depend" on the route and amount of medication administered. (**Exhibit E**, pp 24-25). Presumably, this is information that he could have received from Plaintiff's counsel in order to consider it when forming his opinion. At the time of his video trial deposition, Dr. McKee had not read the transcript of the deposition of Plaintiff's girlfriend in which she testified about Plaintiff's history of alcohol consumption and her recollection of events. (**Exhibit I**, p 33). He had also not read the deposition transcript of Dr. Mayo. (*Id.*). Dr. McKee conceded that Dr. Mayo, as the treating orthopedic surgeon, would certainly be in a better position to have analyzed Plaintiff in terms of potential causes and etiology of his symptoms. (*Id.*, p 34). In Dr. Mayo's opinion, Plaintiff was drinking a lot of alcohol, which increased his risk of AVN, and ultimately the alcohol was the cause of Plaintiff's AVN. (**Exhibit H**, p 20).

A court properly excludes expert testimony on the basis of reliability where the expert fails to consider variables which are relevant. *Amorgianos v National RR Passenger Corp*, 303 F3d 1256 (CA 2, 2001). By ignoring certain well-established variables while propounding a theory inconsistent with those variables, and then citing to bits and pieces of articles for the variables he wishes to apply, Dr. McKee is simply picking and choosing

the science and the support he deems appropriate, without regard to an in-context analysis of the medicine or the science. This approach has been rejected on several occasions. *In re: Ruzulin Products Litigation*, 369 F Supp 2d 398, 421 (SD NY 2005) (“to warrant admissibility... it is critical that an expert’s analysis be reliable at every step... In deciding whether a step in an expert’s analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.”); *Amorgianos*, 303 F3d at 267; accord *In re Paoli RR Yard PCP Litigation*, 35 F3d 717, 743-745 (CA 3, 1994).

Although this Court is not bound by a Court of Appeals opinion, a good case law example exists of how that court should require the expert’s opinion to fit the facts of the case. In *Goldberg v Wlezniak, MD*, Court of Appeals Docket No. 301439, *rel’d* June 21, 2012 (unpublished); 2012 WL 2302481; *lv den* 439 Mich 929 (2013) (**Exhibit K**), the Court reversed the trial court’s refusal to strike plaintiff’s expert standard of care opinion that t-PA, a clot-busting drug, should have been administered to the patient. The Court of Appeals reasoned that the expert did not reliably apply the science and methodology to the facts of the case, where the patient had sustained only a mild stroke. “[P]laintiffs failed to provide any medical literature purporting that the administration of t-PA is the standard of care in mild stroke cases and plaintiffs admit that Edward Goldberg had a mild stroke.” (*Id.* at \*3) (emphasis supplied).

In the instant case, the Michigan Court of Appeals did just the opposite of the panel in the *Goldberg* case. Rather than requiring the proffered expert to reliably apply the science and methodology to the facts of the case (in *Goldberg*, a patient with a mild stroke),

here the Court of Appeals excused Dr. McKee from the very same requirement (he did not have to show how his opinion was consistent with short-course steroid administration with this particular steroid, dexamethasone, and did not have to account for the alternative causes for the AVN). To admit his testimony with this obvious failure is error.

**3. The case reports of which Dr. McKee was “aware” do not support reliability and do not satisfy MRE 702.**

When reversing the trial court’s finding of no reliability, the Court of Appeals sought to escape the “*ipse dixit*” prohibition in Michigan and federal law by reasoning that Dr. McKee was “personally aware of other literature indicating that short-course steroid therapy could cause AVN” and his citation to three such studies. (**Exhibit B**, Court of Appeals Opinion, pp 6-7)(emphasis added); (**Exhibit I**, McKee trial deposition, p 35). The intermediate appellate court concluded that the trial court abused its discretion by failing to take into account Dr. McKee’s testimony regarding these other studies, since “his 2001 study was only one portion of the basis for his opinion.” (**Exhibit B**, p 7). Plaintiff’s lower court argument in this regard is found as **Exhibit L**, consisting of pages 11-12 of his Brief in Opposition to Defendant’s Motion for Summary Disposition. **Exhibits M-P** are the four “studies” discussed by Plaintiff in the lower court.<sup>13</sup> The Taylor, Fast, and O’Brien Reports

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<sup>13</sup> The “studies” are as follows:

- L.J. Taylor, *Multifocal Avascular Necrosis after Short-Term High-Dose Steroid Therapy*, 66-B J. Bone & Joint Surg. British 431, 431 (1984) (“Taylor Report”) (**Exhibit M**);
- Avital Fast et al., *Avascular necrosis of bone following short-term dexamethasone therapy for brain edema*, 61 J. Neurosurg. 983, 983 (1984) (“Fast Report”) (**Exhibit N**);
- Thomas J. O’Brien et al., *Multifocal Osteonecrosis After Short-Term High-Dose Corticosteroid Therapy*, 279 Clin. Orthopaedics & Related Research 176, 176 (1992) (“O’Brien Report”) (**Exhibit O**); and

(cont’d next page)

do not help Plaintiff because they deal with mere anecdotal information. For example, the Taylor Report<sup>14</sup> deals with only three patients. The Fast Report<sup>15</sup> deals with one patient who Plaintiff contends is similarly situated. The O'Brien Report<sup>16</sup> identifies "yet another patient" who developed AVN following short-term corticosteroid administration. That's it. Between these three reports, the Court is presented with, at best, five case reports, out of the thousands and thousands of short-course steroidal administrations throughout Canada and the United States. Moreover, these reports do not claim that steroids caused AVN, but merely that AVN occurred in certain patients. They are observational only. This is clearly insufficient to establish a firm scientific and thus reliable basis for Dr. McKee's causation opinion.

**4. Case reports, including Dr. McKee's "article," do not establish reliability.**

Dr. McKee's paper is simply 15 case reports, only one of which approaches the facts of this case. The Taylor, Fast, and O'Brien papers are self-labeled as "case reports." These are not "studies" in any sense of the word. Courts repeatedly have excluded general causation opinions based on case reports. *See, e.g., Soldo v Sandoz Pharms Corp*, 244 F Supp 2d 434, 537, 539 (WD Pa 2003) (concluding "that expert opinion based on [adverse event

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*(cont'd from previous page)*

- Robert N. Richards, *Short-Term Corticosteroids and Avascular Necrosis: Medical and Legal Realities*, 80 *Cutis* 343 (2007) ("Richards Report") (**Exhibit P**).

<sup>14</sup> In the Taylor Report, it is literally subtitled a "Report of Three Cases," and in its text it refers to "case reports." (*Id.* at 431).

<sup>15</sup> In the Fast Report, it is specifically identified as a "Case report." (*Id.* at 983).

<sup>16</sup> As with the prior documents, the O'Brien Report is specifically identified as a "Case Report" in the subtitle and in the text.

report's and anecdotal case reports is not admissible" and stating that "[t]his Court notes that its conclusion is consistent as well with that of numerous other federal courts which have also rejected general causation opinions based on AERs and case reports") (citation omitted); *Newton v Roche Labs, Inc*, 243 F Supp 2d 672, 680 (WD Tex 2002) (noting that the "Fifth Circuit and many other courts have soundly rejected case reports as an acceptable basis for causation"); *Siharath v Sandoz Pharms Corp*, 131 F Supp 2d 1347, 1361 (ND Ga 2001) (stating that case reports "cannot establish general causation"), *aff'd sub nom. Rider v Sandoz Pharms Corp*, 295 F3d 1194 (CA 11, 2002); *Glastetter v Novartis Pharms Corp*, 107 F Supp 2d 1015, 1028 (ED Mo 2000) ("At the outset, the Court notes that plaintiffs' experts' reliance on case reports is not sufficient to make their causation opinions reliable under *Daubert*"), *aff'd*, 252 F3d 986 (CA 8, 2001).

Dr. McKee's paper is especially inadequate because there is only one patient who is arguably similarly situated to Mr. Cullum, by reason of short-course steroidal treatment and the total maximum dosage. The paper is essentially a case report, which is insufficient under this authority.

It is also telling that Plaintiff never claims that these three reports were reviewed or relied upon by Dr. McKee, the proponent of the causation opinion at issue. In fact, Plaintiff makes clear that it is only the fourth report, the Richards Report, that Dr. McKee cited and relied upon in his pretrial deposition (**Exhibit E**, pp 63-64) (see Plaintiff's Brief below, page 12). And what did Dr. McKee state about this article in his deposition? Richards pointed out warnings about the potential risks of prescribing *high-dose* (vs. the low-dose here) short-term corticosteroids for patients because "he points out that serious side-effects,

though uncommon, can occur, and they can be devastating for the patient.” (*Id.* at 64) (emphasis supplied).

The Richards Report also concedes that the relationship between STP (short-term Prednisone) and AVN is “scientifically controversial” and that the references cited by Richards indicate “there is substantial evidence to explain their association.” (**Exhibit P**, page 345 of the article)(emphasis added). These concessions are noteworthy. If the relationship is “scientifically controversial,” then by definition it cannot be reliable. If there is only an established “association” between short-course steroid therapy and AVN, that also is not reliable. “Law lags science; it does not lead it,” and the courtroom “is not the place for scientific guesswork, even of the inspired sort.” *Rosen v Ciba-Geigy Corp*, 78 F3d 316, 319 (CA 7, 1996). Thus, the last of Plaintiff’s “articles” – apparently the only one cited to and ostensibly relied upon by Dr. McKee – supports the Defendant’s position and the trial court’s finding of lack of reliability.

**5. The Court of Appeals erred by finding the trial court abused its discretion under MCL 600.2955 and MRE 702.**

The Court of Appeals premised in part its finding of abuse of discretion on the trial court’s failure to specifically analyze in its Opinion and Order the seven factors of MCL 600.2955. This is wrong because the opinion of Dr. McKee, even if based on reliable principles and methods (tested by the 2955 factors), was not reliably applied to the circumstances of this case (under *Joiner, supra*), independent of the 2955 factors. “[A]ny step that renders the analysis unreliable... renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.” *In re Paoli RR PCB Litig*, 35 F3d at 745.

Plaintiff faults the trial court for failing to articulate in its Opinion an analysis with reference to each and every factor of MCL 600.2955. In doing so, Plaintiff again references articles and exhibits which were not relied upon by Dr. McKee in his video trial deposition as the basis of his opinion, or established as a reliable authority by any of the several experts called to testify during discovery, and are therefore inadmissible for consideration in opposition to summary disposition. *Maiden, supra* at 121; *Ziginow v Redford Jaycees*, 133 Mich App 259, 266-267; 349 NW2d 153 (1983) (content of books was hearsay absent testimony as to accuracy); *Rosario v New York City Health & Hospitals Corp*, 87 AD2d 211; 450 NYS2d 805 (1982) (admission into evidence of the Physicians Desk References (PDR) pages was error because they were hearsay). During the hearing on Dr. Lopatin's second motion for summary disposition, the trial court specifically queried how counsel proposed to get journal articles into evidence if Plaintiff's expert did not rely upon them and there was no testimony accepting them as authoritative. (**Exhibit J**), pp 14-15). Plaintiff's counsel acknowledged that if that was the case, he would need to rely upon the deposition testimony of Dr. McKee. (*Id.*, pp 14-15). Plaintiff's exhibits suffer the same infirmities on appeal as they did in the trial court. The trial court did not abuse its discretion in observing that there was no other literature or studies presented to support Dr. McKee's conclusions. (**Exhibit A**).

In the same way that MRE 702 may be seen as applying opinion to the specific facts of a given case, the sub-paragraphs of MCL 600.2955 direct the inquiry to the "relevant expert community." As noted by the trial court, Dr. McKee's paper itself acknowledged that the series did not provide conclusive proof that there is a cause effect relationship between short-course therapy and osteonecrosis. (**Exhibit A**, p 3; **Exhibit E**, p 98; **Exhibit F**). The

letter recognizes that it is open to criticism because there may be unknown causes, or other causes, including alcohol. (**Exhibit F; Exhibit E**, pp 92-93). Plaintiff's treating orthopedic surgeon opined that given the amount of alcohol being consumed by the Plaintiff at the time, the alcohol was ultimately the primary cause of Plaintiff's AVN. (*Id.*). Dr. Hood and Defendant's expert agreed that AVN is a disease of unknown etiology. (*Id.*). Neither Dr. Hood, nor his partners, ever had anyone develop AVN after the prescription of steroids. (**Exhibit D**, pp 27-28). As Dr. McKee himself testified:

[T]he field of literature on this topic is quite controversial and it is **not entirely evidence based**, so increasingly in medicine in general and orthopedics in particular, we try and be as scientific and evidence based as possible. Unfortunately **this condition does not lend itself well to that kind of study**.

(**Exhibit E**, p 33) (emphasis supplied). As noted above, an expert's opinion that is admissible under one rule or statute may be inadmissible under another. *Edry, supra* (declining to consider the admissibility of an opinion under MCL 600.2955 having found the opinion inadmissible under MRE 702).

#### **6. Plaintiff's case law authority is inapposite.**

In the Court of Appeals, Plaintiff relied heavily on the case of *Board of Public Works v Greener*, 2005 WL 1249039 (Superior Court Delaware, May 25, 2005), a decision arising from an appeal of the Industrial Accident Board's decision granting a worker additional compensation benefits. In *Greener*, the Administrative Board concluded that the worker had met his burden of showing a causal connection between AVN and steroids taken to treat a lung injury. At issue was whether there was "substantial evidence" to support the Board's decision that steroid treatment for the lung injury caused the worker's AVN. The expert witness for the worker relied primarily upon Dr. McKee's paper submitted in this

case. (**Exhibit F**). The Board accepted that testimony. On appeal, the Superior Court employed a standard dissimilar to that employed by the Court of Appeals here (abuse of discretion), and explained: “Is the agency’s decision supported by ‘substantial evidence.’” Under this standard, the Court found Dr. McKee’s testimony sufficient, indicating that the Board below was “swayed by the fact that the plaintiff’s expert based his opinion “on a peer-reviewed article.” (*Id.* at \*5). All the while, the *Greener* court noted that, “These questions have not been definitively answered in such a way that the medical community is in complete agreement.” (*Id.* at \*4).

*Greener* is distinguishable on several points. First, it employed a different standard of review (“substantial evidence” versus “abuse of discretion”). Next, the Court noted that a single study was sufficient. The Court apparently found that all 15 of the subjects in the report were similar to the worker in *Greener*. Not so in this case. Finally, the *Greener* court acknowledged that the question of whether AVN was related to short-course steroid treatment had not been definitively answered in the medical community, which was not in full agreement. (*Id.* at \*4). *Greener* thus provides little support for Plaintiff’s position.

## **7. Conclusion.**

The Advisory Committee notes commenting on the 2000 Amendments to FRE 702 are apropos:

If the witness is relying solely or primarily on experience, then the witness must *explain* how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and *how* that experience is *reliably applied* to the facts. The trial court’s gatekeeping function requires more than simply “taking the expert’s word for it.”

(Emphasis supplied). Plaintiff proposed to go to trial with the video deposition of Dr. McKee as the sole expert testimony on causation. Since the trial court properly ruled that Dr. McKee's opinions were unreliable and did not create a jury submissive issue of fact, summary disposition was proper and should be reinstated.

## ARGUMENT II

THE TRIAL COURT CORRECTLY GRANTED SUMMARY DISPOSITION WHERE THE ONLY ADMISSIBLE EVIDENCE SUBMITTED BY PLAINTIFF ON CAUSATION WAS SPECULATIVE AND THE AVASCULAR NECROSIS WAS LEGALLY UNFORESEEABLE IN THESE CIRCUMSTANCES.

### **A. Standard of review and supporting authority.**

The Court is referred to the corresponding section in Argument I. This Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 118. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden, supra*. In evaluating a motion for summary disposition brought under sub-rule (C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* at 119-120 (citing, MCR 2.116(G)(5)). If proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120. Only substantively admissible evidence is available and it is insufficient to stave off summary disposition by the mere possibility or promise that the claim might be supported by evidence produced at trial. *Id.* at 121.

A party opposing summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact. *Skinner v Square Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. *Id.* at 164. Speculation or conjecture is

insufficient to raise a genuine issue of material fact. *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977). Ultimately, where a reasonable jury could not find that a plaintiff's proofs are sufficient to establish a prima facie case, then summary disposition is appropriate. See e.g., *Quinto v Cross & Peters Co*, 451 Mich 358, 370-371; 547 NW2d 314 (1996).

**B. Governing law.**

Establishing proximate cause requires proof of two separate elements: (1) cause in fact; and (2), legal cause, also known as "proximate cause." *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997); *Craig, supra* at 86. A medical malpractice plaintiff must prove cause in fact by showing the injury more probably than not was caused by the negligence of the defendants. *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994); *Derbeck v Ward*, 178 Mich App 38, 44; 443 NW2d 812 (1989); MCL 600.2912a. Plaintiff must "present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Weymers v Khera*, 454 Mich 639,647-648; 563 NW2d 647 (1997). Under *Skinner*, "[t]he evidence need not negate all other possible causes, but such evidence must exclude other hypotheses with a fair amount of certainty,' which does not occur where "evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses." 445 Mich at 166 (emphasis supplied). Liability cannot attach where plaintiff is unable to meet his burden to establish that defendant's conduct was a proximate cause of damage. *Brisboy v Fibreboard Corp*, 429 Mich 540, 546; 418 NW2d 650 (1988).

A mere possibility of causation is not enough. *Id.* When probabilities are at best

evenly balanced, or causation is speculative or conjectural, "it becomes the duty of the court to direct a verdict for the defendant." *Id.* Speculation "is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id.* at 164.

Correlation is not causation. *Craig, supra* at 93. Accordingly, it is error to infer that A causes B from the mere fact that A and B occur together. *Id.* Where the connection between a defendant's alleged negligent conduct and a plaintiff's alleged injuries is speculative, or merely a possibility, the plaintiff does not establish a *prima facie* case of negligence. *Id.*; see e.g., *Dykes v William Beaumont Hosp*, 246 Mich App 471, 478; 633 NW2d 440 (2001) (affirming summary disposition where plaintiff's expert witness acknowledged that it was not possible to state within a reasonable degree of medical certainty that another course of action would have made any difference); *Pennington, supra* at 105 (affirming summary disposition for the defendants where plaintiff's expert could not state the medical probability of the cause of a stroke or whether earlier diagnosis would have altered her outcome); *Nicholson v Children's Hospital of Michigan*, 139 Mich App 434, 437-438; 363 NW2d 1 (1984) (evidence was insufficient to show a causal connection between the hospital's alleged failure to monitor an IV site and deterioration of the patient's condition where there was no evidence that anything could have been done during the relevant time period to prevent formation of a blister, and there was some evidence indicated that plaintiff's mother had failed to regularly soak the foot, apply medication, or change the dressing).

A finding of causation must not be based on mere conjecture, but rather must be based on reasonable inferences from the evidence. *Nicholson, supra* at 438; *Craig, supra*

(trial court erred in denying defendant's motion for JNOV where any causal connection between plaintiff's cerebral palsy and the events described by the expert had to be supplied *ex nihilo* by the jury).

**C. A jury would be left to speculate as to cause in fact.**

Plaintiff's proofs do not survive the *Skinner* tests of "substantial evidence" and "exclude other hypotheses with a fair amount of certainty." Dr. McKee's own paper acknowledged that the series did not provide conclusive proof that there is a cause-and-effect relationship between short-course therapy and osteonecrosis. (**Exhibit A**, p 3). Plaintiff's treating orthopedic surgeon, Dr. Mayo testified that, given the amount of alcohol being consumed by the Plaintiff at the time, the alcohol was ultimately the primary cause of Plaintiff's AVN. (*Id.*, p 3). Both Dr. Hood and Defendant's causation expert agreed that AVN is a disease of unknown etiology. (*Id.*).

Dr. Hood admitted in his Affidavit of Merit that while there could be a causal connection between the prescription of steroids and the onset of AVN, he does not claim special expertise on the issue and would defer to a person who does as to whether there was a reasonable medical certainty that the steroids, more likely than not, caused the Plaintiff's AVN. (**Exhibit C**, Affidavit of Hood, D.O., ¶ 12). Consistent with his Affidavit, Dr. Hood testified at deposition that he cannot state with a reasonable degree of medical probability that steroids was a cause of the Plaintiff's AVN, as opposed to Plaintiff's excessive alcohol consumption. (**Exhibit D**, p 11). Other potential causes could include trauma, smoking and alcohol. (*Id.*, p 12). It is undisputed that Plaintiff has chronically abused alcohol and cigarettes for many years. (*Id.* pp 12, 25-26, 31, 44).

Dr. McKee agreed that it is possible that a person who drank as much alcohol as Plaintiff would develop AVN. (**Exhibit E**, p 70). He further opined that whether the shot of steroids Plaintiff received from a family physician shortly before being diagnosed with AVN was a precipitating factor would “depend” on the route and amount of medication administered. (*Id.*, pp 24-25). He never asked for information that could have answered that question. Indeed, Dr. McKee conceded that Dr. Mayo, as the treating orthopedic surgeon, would certainly be in a better position to have analyzed Plaintiff in terms of potential causes and etiology of his symptoms. (**Exhibit I**, p 34). In Dr. Mayo's opinion, Plaintiff was drinking a lot of alcohol, which increased his risk of AVN, and ultimately the alcohol was the cause of Plaintiff's AVN. (**Exhibit H**, p 20). Dr. Mayo testified that there was probably not a significant additive effect if alcohol is combined with steroids. (*Id.*, p 89).

Based upon the admissible facts, there is not *substantial evidence* from which a jury could conclude that, more likely than not, but for Defendant's conduct, Plaintiff's injuries would not have occurred. The jury would be left to speculate along with the experts. Under these circumstances, the trial court did not err in granting Dr. Lopatin summary disposition.

**D. AVN is not a foreseeable, natural, and probable cause of low-dose steroid administration.**

A court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that a defendant's negligence was the proximate or legal cause of those injuries. *Craig, supra* at 87. Legal or proximate cause examines the foreseeability of consequences to determine whether a defendant should be held legally responsible for such consequences even assuming a negligent act or omissions. *Craig, supra* at 87; *Skinner, supra* at 163. To establish legal cause, a plaintiff must show that it was foreseeable that the

defendant's conduct could create a risk of harm, and that the result of that conduct and intervening causes were foreseeable. *Weymers, supra* at 648. Proximate cause must be a foreseeable, natural, and probable cause. *Nielsen v Stevens*, 368 Mich 216, 220; 118 NW2d 397 (1962) ("To make negligence the proximate cause of an injury, the injury must be the natural and probable consequence of a negligent act or omission, which, under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as the result of his negligent act.").

Plaintiff concedes that in the medical malpractice context, foreseeability is properly considered with reference to the standard of care. (See, **Exhibit J**, pp 13-14). In this respect it is telling that Plaintiff's counsel explained that two experts were needed due to "the problem" that ENTs [such as Dr. Lopatin] do not know about the way AVN works and why it works, which is in the field of orthopedic surgeons. (**Exhibit G**, p 8).

The testimony presented to the trial court demonstrates that it would be only an incredibly remote possibility, and not a natural and probable consequence, that avascular necrosis could develop as a result of the milligrams/doses at issue. Dr. Mayo testified that if total steroid exposure is 3 grams in 3 months or less, the risk is 0.6 percent. (**Exhibit H**, p 17). Three grams is over nine times more than the 315 milligrams at issue, even assuming that Plaintiff took all the steroids prescribed. In any event, 0.6% of 0.0049% (the portion of the population who develop avascular necrosis *from all causes*) would mean that the risk of developing avascular necrosis from exposure to 3 grams of steroids in 3 months or less is 0.000029% in the United States.

In his trial deposition, Dr. McKee acknowledged that millions of people are prescribed steroids in small dosages in the U.S. and Canada and throughout the world and

that developing avascular necrosis is a rare occurrence. (**Exhibit I**, p 41). Dr. Hood, Plaintiff's standard of care expert, also opined that it would be rare for avascular necrosis of the hip to be caused by the administration of steroids, and in fact, neither Dr. Hood, nor his partners *ever* had *anyone* develop avascular necrosis after the prescription of steroids. (**Exhibit D**, pp 7 & 27-28). Plaintiff's entire theory on the dose amounts at issue rests on one case in a population of 30,000,000 Canadians over 10 years ago.

Given the facts and testimony in this case, Plaintiff's reliance upon *Lockridge v Oakwood Hosp*, 285 Mich App 678; 777 NW2d 511 (2009) for the proposition that a question of fact remained as to whether AVN was a natural and probable consequence of the prescription of the amount of steroids at issue is unavailing. Plaintiff cannot say that Dr. Lopatin has mischaracterized the testimony of any experts. Compare, *Id.* at 686. Nor did all the experts agree that Dr. Lopatin should have contemplated the development of AVN as a natural and probable consequence. Compare, *Id.* at 687. To the contrary, Dr. Hood and Defendant's expert agreed that AVN is a disease of unknown etiology. (**Exhibit A**, p 3). The balance of the testimony supports the proposition that any possible connection between the development of AVN and the administration of steroids would be an incredibly remote possibility and then only when much higher doses are involved.

Summary disposition is appropriate where an alleged injury cannot be said to be a foreseeable, natural, and probable result of a defendant's conduct. See e.g., *Groncki v Detroit Edison Co*, 453 Mich 644; 557 NW2d 289 (1996) (summary disposition was appropriate because it was not foreseeable that a worker would reverse around a pile of debris and bring a 29-foot high uncollapsed scaffold into contact with its electric wire); *Hammonds v United States*, 418 Fed App 853; 2011 US App LEXIS 5883 (CA 11, 2011) (summary

judgment affirmed where even if a properly administered prophylactic antibiotic might have prevented the infective endocarditis, that injury was one that could not have been foreseen).

On the admissible facts, Plaintiff's AVN cannot be said to be the natural and probable consequence of the prescription of the low dose of steroids at issue which a prudent ENT ought to have reasonably foreseen. Under these circumstances, the trial court correctly granted Dr. Lopatin summary disposition.

**CONCLUSION AND RELIEF REQUESTED**

WHEREFORE, Defendant-Appellant Frederick L. Lopatin, D.O. requests this Court issue an order which peremptorily reverses the Court of Appeals July 10, 2014 Opinion, and reinstate the trial court's grant of summary disposition. In the first alternative, Defendant requests this Court grant leave to appeal, consider this case on a calendar basis, and issue the same relief. In the second alternative, Defendant requests this Court allow oral argument on this Application, and then issue the same relief. Defendant also requests the recovery of all costs and attorney fees so wrongfully sustained on appeal.

Respectfully submitted,

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