PHYSICIANS ASSISTANT PRACTICE AGREEMENT:
DO WE REALLY HAVE TO HAVE THESE?

By: Barbara Hunyady, Attorney
at Cline, Cline & Griffin, P.C.

If you are a PA or work with a PA, do you really need to have a written practice agreement? The answer is a resounding YES. The new law governing physician’s assistants requires all PAs to have a written practice agreement with a physician no later than March 22, 2017. This is the date when the practice agreement must be signed by both the PA and a physician. If you do not have this in place – do it now.

The most common questions we hear from clients who own PCs have been: WHY. Why do we need these? Are there any exemptions? How can we avoid this?

There is no way to avoid the practice agreement requirement. The new law, Public Act 379 of 2016, requires all PAs to have a practice agreement signed with a physician in order to practice. These are mandatory for everyone, even if the PA works within a group practice or hospital.

Why do you have to have these? The short answer is because the new law says so. If that is not a good enough reason for you, then you can try to decipher why our legislature passed the new law. Below is an excerpt from the legislative analysis, which is a document that explains the proposed bill and the reason for it. For this bill, it is a five-page analysis. Under the category titled “The Apparent Problem” it says:

“The Apparent Problem: Michigan, as well as the entire country, is said to be already in the throes of a physician shortage, and many predict the situation to worsen in coming years. Many believe that one way to improve access to quality care, especially in rural areas where the physician shortage is particularly acute, is to allow increased autonomy to physician's assistants. This legislation is offered to ensure that the Public Health Code more accurately describes the relationship between physician and physician's assistant.” House Fiscal Agency Legislative Analysis for House Bill 5533.

The new law removes requirements that PAs practice “under the supervision” or “delegation” of a physician. This has been replaced with language that allows the PA to practice in accordance with the terms of their practice agreement. If there are multiple physicians in a practice who work with the PA, the practice can designate one physician to sign the agreement. The PA is not required to have a signed agreement with every physician in the practice. The new law does not place limits on how many PAs one physician can sign agreements with (hospital, health care facility, professional corporations).

It is worth noting that anytime there is a written document, contract, or agreement that may have to be produced in the event of a lawsuit you should be concerned from a liability standpoint. While I do not see that the change in law increases or decreases liability, the language in a practice agreement could help you or hurt you in the event of a lawsuit. For this reason, your practice agreement needs to be carefully and accurately drafted.
While this article cannot address all of the changes in the law, the basic minimum requirements for a practice agreement are as follows:

1. A process for communication, availability, and decision making between the physician and PA.

2. A protocol for designating an alternative physician when the participating physician is not available.

3. The signature of the PA and the participating physician.

4. A termination provision that requires 30 days’ notice prior to terminating the agreement.

5. The duties and responsibilities of the PA and physician.

6. A requirement that the physician verify the PA’s credentials.

The practice agreement does not have to be filed with the state, but it must be available for inspection.
DEFENDANTS DAVID R. DOBIES, M.D. AND REGIONAL CARDIOLOGY ASSOCIATES, PLC’S MOTION IN LIMINE TO DETERMINE NONECONOMIC DAMAGES

NOW COME Defendants, David R. Dobies, M.D. and Regional Cardiology Associates, PLC, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., and in support of their Motion in Limine to Determine Noneconomic Damages, state as follows:

1. This is a medical malpractice cause of action which was filed on or about October 10, 2014.

2. In addition to pleading medical malpractice, the complaint also asserts a claim under the Michigan Wrongful Death Act.
3. Pursuant to *Jenkins v Patel*, the noneconomic damage caps apply in a wrongful death action when the underlying claim is a medical malpractice cause of action, as is the case in the instant matter.¹

4. Pursuant to MCL 600.1483, the higher noneconomic damage cap applies when one of the following situations exists:

   (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

      (i) Injury to the brain.
      (ii) Injury to the spinal cord.

   (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

   (c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

5. In the instant matter, decedent died from a cardiac tamponade due to a ruptured acute myocardial infarct.²

6. There are no allegations decedent experienced a functional loss of limb or limbs due to an injury to the brain or spinal cord or that decedent experienced loss of or damage to a reproductive organ.

7. Defendants anticipate Plaintiff will attempt to claim the higher noneconomic damage cap applies because decedent suffered permanent cognitive impairment rendering him incapable of making independent life decisions and performing activities of daily living.

² Exhibit 4 – Autopsy Report.
8. Death itself is not a qualifying injury.3

9. Additionally, the fact that decedent may have temporarily or unnaturally experienced a cognitive impairment before his death does not establish the higher noneconomic damage cap applies.4

10. Debra Ramsey’s testimony suggests that on April 19, 2012 and April 20, 2012, prior to Mr. Ramsey being taken to the catheterization lab, he was able to hold a conversation, he was able to express his pain complaints, and he requested Ms. Ramsey go home because he was feeling better.5

11. During preparation for the catheterization lab he was joking and laughing.6

12. Mr. Ramsey signed the consent form for the procedure.7

13. Following the procedure, Ms. Ramsey testified her husband conversed with her, expressed how he was feeling, and instructed her to head home due to the rainy weather and the fact it was getting dark outside.8

14. Based upon the testimony of decedent’s son, Mr. Ramsey knew he was present in the room and was able to answer questions following his surgery on April 20, 2012, albeit one word answers.9 Mr. Ramsey also indicated he planned to watch the Detroit Tigers on TV and try to sleep following Matthew’s departure from the hospital.10

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4 Id. at 81.
5 Exhibit 1 – Deposition Transcript of Debra Ramsey, p. 82, 89, 105.
6 Id. at 118-9.
7 Exhibit 2 – Signed Surgical Consent Form.
8 Id. at 136.
9 Exhibit 3 – Deposition Transcript of Matthew Ramsey, p. 28-9.
10 Id. p. 30.
15. This testimony indicates Mr. Ramsey was not suffering from a permanent cognitive impairment on April 19, 2012 or on April 20, 2012. In fact, Mr. Ramsey was able to make independent life decisions as evidenced by the fact that he signed the consent form for surgery. He was also able to converse with his family, recognize his family, and was acutely aware of his surroundings.

16. On the morning of April 21, 2012, a nurse went into Mr. Ramsey’s room and struck up a conversation with him while drawing blood. The nurse then turned around to get the EKG machine and heard Mr. Ramsey gasp. He immediately went into PEA rhythm.11

17. Clearly, Mr. Ramsey was not suffering from a permanent cognitive impairment given he was able to hold a normal conversation seconds before his death.

18. The autopsy report indicates there were no focal lesions in the white matter and there were no abnormalities in the hippocampi. In fact, no abnormalities in the brain were noted in the autopsy report indicating Mr. Ramsey did not suffer any cognitive impairment prior to his death.12

19. Dr. Cohn, a Board Certified Interventional Cardiologist, testified those who die of a cardiac tamponade due to ruptured myocardial infarct “actually die a very quick death in the overwhelming majority of cases.”13

20. As such, Defendants seek a legal determination from this Court that in the event of any verdict awarding noneconomic damages, the lower of the noneconomic damage caps shall apply.

11 Exhibit 6 - Genesys Regional Medical Center Records, pg. 46.
12 Exhibit 4 – Autopsy Report.
13 Exhibit 5 – Deposition Transcript of Dr. Cohn, p 36-7.
WHEREFORE, the Defendants respectfully request this Honorable Court grant Defendants’ Motion in Limine and enter an order determining the lower noneconomic damage cap applies in this matter in the event of a Plaintiff’s verdict that awards noneconomic damages under MCL 600.1483.

Respectfully submitted,

CLINE, CLINE & GRIFFIN

Dated: May 25, 2017

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

DEBRA RAMSEY, Individually and A Personal Representative of the Estate of LARRY RAMSEY, deceased
Plaintiff,

-vs-

DAVID R. DOBIES, M.D., REGIONAL CARDIOLOGY ASSOCIATES, PLC, A Professional Limited Liability Company, GENESYS REGIONAL MEDICAL CENTER, A Hospital Corporation, and GENESYS HEALTH SYSTEM, an Affiliate of Ascension Health,
Defendants.

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BRIEF IN SUPPORT OF DEFENDANTS DAVID R. DOBIES, M.D. AND REGIONAL CARDIOLOGY ASSOCIATES, PLC’S MOTION IN LIMINE TO DETERMINE NONECONOMIC DAMAGES

NOW COME Defendants, David R. Dobies, M.D. and Regional Cardiology Associates, PLC, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., support their Motion in Limine to Determine Noneconomic Damages as follows:
INTRODUCTION

This matter was filed on or about October 10, 2014 alleging Defendants David R. Dobies, M.D. and Regional Cardiology Associates, PLC, are liable for professional negligence as to the medical care provided to the Plaintiff’s decedent.¹⁴

Mr. Ramsey presented to the emergency department at Genesys Regional Medical Center for treatment on April 19, 2012 just after 5:00 p.m. At that time, he had complaints of chest pain. Mr. Ramsey’s wife, Debra Ramsey, was in the hospital with Mr. Ramsey on April 19, 2012. At that time, she had a conversation with her husband about what had happened.¹⁵ He also made complaints to her regarding how he was feeling at that time.¹⁶

While being treated in the emergency room, an EKG was ordered by the emergency room physician. Dr. David Dobies was the “on call” cardiologist and was requested to review the EKG strips remotely to determine whether the strips required the patient have further cardiac work-up or go to the catheterization lab. The significant and only EKG that was provided to Dr. Dobies is dated April 19, 2012, at 17:13:46 in the late afternoon. Upon review of the EKG, Dr. Dobies determined no further cardiac work-up was required at this time nor should Mr. Ramsey be taken to the catheterization lab. Dr. Dobies was told that the patient was “stable” and did not provide any subsequent care to the patient following his review of the EKG.

Mr. Ramsey continued to be treated by the emergency room physician for the remainder of April 19, 2012 and into April 20, 2012. In the very early morning hours of April 20, 2012 he

¹⁴ These Defendants deny the allegations contained in Plaintiff’s Complaint and affirmatively states Plaintiff’s decedent was provided appropriate medical care and treatment within the applicable standard of care at all times relevant hereto.
¹⁵ Exhibit 1 – Deposition Transcript of Plaintiff, p. 82.
¹⁶ Id. at 89.
was transferred to the CICU. Around 2 a.m. Mr. Ramsey instructed his wife to head home because he was feeling better.\textsuperscript{17}

On April 20, 2012, Ms. Ramsey returned to the hospital sometime after 7:30 a.m. to visit her husband. It was at this time she learned Mr. Ramsey was scheduled to be taken to the catheterization lab. Ms. Ramsey testified prior to being taken to the catheterization lab, and during preparation for the surgery, she was joking with Mr. Ramsey and he was laughing.\textsuperscript{18} Mr. Ramsey also signed the consent form for the surgery.\textsuperscript{19}

Following the surgery, Mr. Ramsey’s son testified he visited his father at Genesys Regional Medical Center. During this visit, Matthew Ramsey testified his father knew who he was and was able to answer his questions, albeit one-word answers.\textsuperscript{20}

Ms. Ramsey also visited with Mr. Ramsey following his surgery. At this time, she testified Mr. Ramsey appeared comfortable and in decent spirits.\textsuperscript{21} She could not think of any interaction where he did not appear to be his normal self.\textsuperscript{22} Furthermore, Ms. Ramsey testified her husband knew it was raining outside and getting dark and he let her know it was ok for her to head home.\textsuperscript{23}

On April 21, 2012, a nursing note indicates a nurse, Tracy Beck, entered Mr. Ramsey’s room early in the morning. While drawing labs, she conversed with Mr. Ramsey. In fact, she described the conversation as being normal.\textsuperscript{24} After she drew labs, she turned around to grab the

\textsuperscript{17} \textit{Id.} at 105.
\textsuperscript{18} \textit{Id.} at 118-9.
\textsuperscript{19} \textit{Id.} at 122.
\textsuperscript{20} Exhibit 3 – Deposition Transcript of Matthew Ramsey, p. 28-9.
\textsuperscript{21} Exhibit 1 – Deposition Transcript of Plaintiff, p. 125-6.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 135.
\textsuperscript{24} Exhibit 6 – Genesys Regional Medical Center Records, pg. 46
EKG machine. Upon turning around, she heard Mr. Ramsey gasp and he immediately went into pulseless electrical activity (PEA) rhythm. Mr. Ramsey was pronounced dead on April 21, 2012 at 6:35 a.m.

Mr. Ramsey’s wife requested an autopsy be performed on her husband. The autopsy report stated the cause of death was a cardiac tamponade due to ruptured acute myocardial infarct. The autopsy report indicated no abnormalities in Mr. Ramsey’s brain. Specifically, the autopsy report states “[t]he white matter is without focal lesion.” In addition, the report indicates there were no abnormalities in the hippocampi.

Additionally, Dr. Cohn, a Board Certified Cardiologist, testified in this matter as follows:

Q. Doctor, the autopsy, under opinion, it reads, "Larry Ramsey died of cardiac tamponade due to ruptured myocardial infarct." Agreed?
A. Yes.
Q. If you can, explain what that is.
A. Your heart lives in a sac and that sac is called the pericardium. And that is a sac that has a small potential space with usually a very small amount of fluid in it. And this gentleman, after occluding his marginal branch of his circumflex, approximately less than 48 hours into the event, ruptured a hole in his posterior wall, lateral wall. That hole allowed blood to freely escape into the pericardium, which is a small space.

It quickly fills the pericardium. The pericardium increases with pressure. As the pericardium increases in pressure, it constricts the inflow to your heart, the right atrium, right ventricle, and you actually die a very quick death in the overwhelming majority of cases. [emphasis added].

As will be discussed below, the facts do not suggest Mr. Ramsey suffered a cognitive impairment prior to his death. As such, the statutory elements required to meet the upper cap do

25 Id.
26 Id.
27 Exhibit 4 – Autopsy Report.
28 Id.
29 Id.
30 Exhibit 5 –Deposition Transcript of Dr. Cohn, p 36-7.
not exist here and this Court should determine as a matter of law that the lower noneconomic damage cap applies to this matter.

**LEGAL ARGUMENT**

Pursuant to Michigan Law, in a medical malpractice action, there is a two tier cap system for noneconomic damages. This two tier system is outlined in MCL 600.1483 and states in pertinent part as follows:

(1) In a claim for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the medical malpractice of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.
(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

...  

(3) As used in this section, “noneconomic loss” means damages or loss due to pain, suffering, inconvenience, physical impairment, or physical disfigurement, loss of society and companionship, whether claimed under section 2922 or otherwise, loss of consortium, or other noneconomic loss.

(4) Beginning April 1, 1994, the state treasurer shall adjust the limitations on damages for noneconomic loss set forth in subsection (1) by amounts
determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, “consumer price index” means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.\textsuperscript{31}

Not only does MCL 600.1483 apply to medical malpractice actions, it also applies to wrongful death actions.\textsuperscript{32} In summary, in order to access the higher noneconomic damage cap, the Plaintiff must establish a permanent functional loss of limb or limbs due to an injury to the brain or spinal cord, a permanent cognitive impairment rendering the person incapable of performing activities of daily living or making independent life decisions, or loss of or permanent damage to a reproductive organ rendering the person unable to procreate.\textsuperscript{33} However, death itself is not a qualifying factor.\textsuperscript{34} Neither is a temporary or unnatural impairment of cognitive capacity shortly before death.\textsuperscript{35}

In the matter at hand, it is well settled Mr. Ramsey did not suffer a permanent injury to his reproductive organ rendering him unable to procreate, nor did he suffer a permanent functional loss of limb or limbs due to an injury to the brain or spinal cord. As such, Defendants anticipate Plaintiff will allege Mr. Ramsey suffered a permanent cognitive impairment and suggesting that the upper noneconomic damage cap applies. As discussed below, Mr. Ramsey did not suffer a permanent cognitive impairment and this Court should render a ruling that the lower noneconomic damages cap applies in this matter.

\textsuperscript{31} MCL 600.1483. It is important to note the noneconomic damage caps in 2017 are $445,500 and $795,500 respectively.
\textsuperscript{33} MCL 600.1483(1).
\textsuperscript{35} \textit{Id.} at 81.
There are simply no facts to suggest Mr. Ramsey suffered a permanent cognitive impairment. First and foremost, the autopsy report states “[t]he white matter is without focal lesion.”\textsuperscript{36} In addition, the report indicates there are no abnormalities in the hippocampi.\textsuperscript{37} Focal lesions and abnormalities of the hippocampi are indicators of possible brain damage. However, in the case at hand, these indicators did not exist. In fact, the autopsy does not list any abnormality in Mr. Ramsey’s brain.\textsuperscript{38} As such, there is no indication that Mr. Ramsey suffered a permanent cognitive impairment prior to his death given that he had a normal brain at the time of autopsy.

Second, Dr. Cohn is a Board Certified Cardiologist who reviewed this matter from a cardiology standpoint. Notably, Dr. Cohn testified those who die of a cardiac tamponade due to a ruptured myocardial infarct “actually die a very quick death.”\textsuperscript{39} Certainly, when a person’s death is quick, they cannot be said to have suffered a permanent cognitive impairment as there would be no time for the brain to suffer injury or damage. Notably, even the discharge summary lists Mr. Ramsey’s death as sudden.\textsuperscript{40} As such, Mr. Ramsey did not suffer a permanent cognitive impairment.

Third, a nursing note contained within the Genesys Regional Medical Center records indicates on April 21, 2012, a nurse entered Mr. Ramsey’s room. At that time, she was able to have a “normal conversation” with Mr. Ramsey while drawing labs.\textsuperscript{41} When she turned around to get the EKG machine, she heard Mr. Ramsey gasp and he immediately went into PEA
rhythm.\textsuperscript{42} This record indicates Mr. Ramsey was able to converse just seconds prior to his death. Certainly a person of impaired cognitive ability would not be able to hold a conversation. Furthermore, the nurse did not note anything abnormal about the conversation indicating Mr. Ramsey was not demonstrating any signs that he was suffering from a permanent cognitive impairment.

Fourth, the testimony of Plaintiff supports the fact that Mr. Ramsey did not suffer a cognitive impairment. Ms. Ramsey testified prior to Mr. Ramsey being taken to the catheterization lab, and during preparation for the surgery, she was joking with him and he was laughing.\textsuperscript{43} Mr. Ramsey also signed the consent form for his own surgery, indicating he was able to make independent life decisions and not suffering from any cognitive impairment.\textsuperscript{44}

Following his surgery, Ms. Ramsey testified Mr. Ramsey appeared comfortable and in decent spirits.\textsuperscript{45} She could not think of any interaction where he did not appear to be his normal self.\textsuperscript{46} Certainly, given they had been married for 31 years, Ms. Ramsey would be the best person to testify as to whether Mr. Ramsey was suffering from a permanent cognitive impairment and thus not acting like his normal self. Furthermore, Mr. Ramsey told Plaintiff to leave the hospital around 8:00 p.m. on the evening of April 20, 2012 given that it was raining outside and it would be dark soon. Mr. Ramsey, at this point, was aware of his surroundings (i.e. the fact he was not at home but rather in a hospital), aware of the weather outside, and aware of the time of day. Prior to her leaving the hospital, Mr. Ramsey expressed his current pain complaints.\textsuperscript{47} Mr. Ramsey would not have been aware of his surroundings, been able to

\textsuperscript{42} Id.
\textsuperscript{43} Exhibit 1 – Deposition Transcript of Plaintiff, p. 118-9.
\textsuperscript{44} Id. at 122.
\textsuperscript{45} Id. at 125-6.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
converse, or been able to express his current complaints if he was suffering from a permanent cognitive impairment.

Finally, Mr. Ramsey’s son, Matthew Ramsey, also came to the hospital to visit with his father on April 20, 2012. Matthew visited his father just after surgery. He testified his father was able to hold a conversation, although he gave one-word answers.\footnote{48 Exhibit 3 – Deposition Transcript of Matthew Ramsey, p. 28-9.} The fact that Mr. Ramsey was able to hold a conversation with his son suggests he was not suffering from a cognitive impairment.

At the absolute most, Mr. Ramsey experienced a temporary loss of cognitive capacity. Pursuant to Michigan Law, a temporary loss of cognitive ability is not enough to establish the upper economic damage cap applies. The evidence in this matter clearly represents that Mr. Ramsey’s death was quick. Not only did his family testify to conversations they had in the days leading up to his death, but a nurse wrote a report indicating she had a conversation with Mr. Ramsey seconds before he died. Mr. Ramsey was not able to be resuscitated. Furthermore, the autopsy report does not indicate any evidence of brain damage. As such, there is simply no evidence to establish a permanent loss of cognitive function and the lower noneconomic damage cap should certainly apply in this matter in the event of a Plaintiff’s verdict awarding such damages.
WHEREFORE, the Defendants respectfully request this Honorable Court grant Defendants’ Motion in Limine and enter an order determining the lower noneconomic damages cap applies in this matter in the event of a Plaintiff’s verdict that awards noneconomic damages under MCL 600.1483.

Respectfully submitted,

CLINE, CLINE & GRIFFIN

Dated: May 25, 2017

__________________________________________
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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

DEBRA RAMSEY, Individually and
A Personal Representative of the Estate of
LARRY RAMSEY, deceased

Plaintiff,

-vs-

DAVID R. DOBIES, M.D., REGIONAL
CARDIOLOGY ASSOCIATES, PLC, A
Professional Limited Liability Company,
GENESYS REGIONAL MEDICAL CENTER,
A Hospital Corporation, and GENESYS HEALTH
SYSTEM, an Affiliate of Ascension Health,

Defendants.

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DEFENDANTS DAVID DOBIES, M.D. AND REGIONAL CARDIOLOGY ASSOCIATES, PLC’S MOTION IN LIMINE TO PRECLUDE TESTIMONY OF PLAINFLII’S EXPERT C. ALAN BROWN, M.D. AT TRIAL

NOW COME Defendants, David Dobies, M.D. and Regional Cardiology Associates PLC, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., and for their Motion in Limine to Preclude Testimony of Plaintiff’s Expert C. Alan Brown, M.D. at Trial, states as follows:

1. Plaintiff filed her complaint on or about October 10, 2014, alleging Defendants David Dobies, M.D. and Regional Cardiology Associates PLC are liable for professional negligence as to the medical care provided to Larry Ramsey.
2. These Defendants deny the allegations contained in Plaintiff’s Complaint and affirmatively state Larry Ramsey was provided appropriate medical care and treatment within the applicable standard of care, at all times relevant hereto.

3. This matter involves an “on call” cardiologist, Dr. Dobies, being forwarded an EKG, which was performed on Mr. Ramsey at Genesys Regional Medical Center on April 19, 2012.

4. Upon receiving the EKG strips, Dr. Dobies was asked to review the results to determine if the results revealed a STEMI or a non-STEMI.

5. Dr. Dobies reviewed the EKG, determined it was a non-STEMI, and opined Mr. Ramsey should not be taken to the catheterization lab and ordered certain medications. Dr. Dobies was to be re-contacted if there was any change in the patient’s condition.

6. Dr. Dobies is a board certified interventional cardiologist with a specialty in STEMI calls.

7. Plaintiff has named Dr. C. Alan Brown as an expert witness in this matter. Although Dr. Brown is a board certified interventional cardiologist, he does not perform STEMI calls.

8. In fact, Dr. Brown, upon request, could not produce one log indicating he had performed a STEMI call at any point during his career. Nor could Dr. Brown produce any record of performing catheterization lab work in 2011 & 2012.

9. Pursuant to MRE 702, the trial court has a “gatekeeper role” which requires it to assess the qualifications of an expert witness prior to allowing that witness to testify at trial.
10. Specifically, MRE 702 states a witness may be qualified as an expert based upon “knowledge, skill, experience or education” and as an expert may provide opinion testimony if the testimony meets the following criteria: (1) it is based upon “sufficient facts or data”; (2) it is based upon reliable methods and principles; and (3) the principles and methods are applied reliably to the matter at hand.\(^1\)

11. When the crux of this matter hinges upon reading an EKG remotely to determine if it was a STEMI or non-STEMI (i.e. a STEMI call), and Plaintiff’s expert has not ever performed a STEMI call, his opinion cannot be based upon “knowledge, skill, experience or training.”

12. Furthermore, during his deposition, Dr. Brown did not mention any published peer review articles upon which he based his opinion.

13. As such, Dr. C. Alan Brown fails to meet the requirements for an expert witness as set forth in MRE 702 and the Court must preclude him from testifying at trial.

14. In the alternative, Defendants would request a Daubert hearing to determine whether or not Dr. Brown is qualified to testify as an expert in this matter.

WHEREFORE, the Defendants respectfully request this Honorable Court grant Defendants’ Motion in Limine and enter an order precluding Dr. C. Alan Brown from testifying as an expert witness at trial, as well as grant any additional relief this Court deems reasonable and just.

Respectfully submitted,

CLINE, CLINE & GRIFFIN

Dated: May 25, 2017

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\(^1\) MRE 702.
STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE  

DEBRA RAMSEY, Individually and  
A Personal Representative of the Estate of  
LARRY RAMSEY, deceased  
Plaintiff,  

-vs-  
DAVID R. DOBIES, M.D., REGIONAL  
CARDIOLOGY ASSOCIATES, PLC, A  
Professional Limited Liability Company,  
GENESYS REGIONAL MEDICAL CENTER,  
A Hospital Corporation, and GENESYS HEALTH  
SYSTEM, an Affiliate of Ascension Health,  
Defendants.  

BRIEF IN SUPPORT OF DEFENDANTS DAVID DOBIES, M.D. AND REGIONAL CARDIOLOGY ASSOCIATES, PLC’S MOTION IN LIMINE TO PRECLUDE TESTIMONY OF PLAIN'T'S EXPERT C. ALAN BROWN, M.D. AT TRIAL  

Defendants, David Dobies, M.D. and Regional Cardiology Associates PLC, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., support their Motion in Limine to Preclude Testimony of Plaintiff’s Expert, C. Alan Brown, M.D. at trial, as follows:
INTRODUCTION / STATEMENT OF FACTS

This matter was filed on or about October 10, 2014 alleging Defendants David R. Dobies, M.D. and Regional Cardiology Associates, PLC, are liable for professional negligence as to the medical care provided to the Plaintiff's decedent.²

Mr. Ramsey presented to the emergency department at Genesys Regional Medical Center for treatment on April 19, 2012. At that time, he had complaints of chest pain. As such, an EKG was ordered by the emergency room physician. Dr. David Dobies was the “on call” cardiologist and was requested to review the EKG strips remotely, without performing a physical bedside examination of Mr. Ramsey, to determine whether the strips required the patient have further cardiac work-up or go to the catheterization lab. Specifically, Dr. Dobies was to review the EKG strips to determine whether there was a STEMI (ST elevation myocardial infarction) or a non-STEMI (non-ST elevation myocardial infarction). ST refers to ST segment which is the part of the EKG heart tracing used to diagnose a heart attack. If there was a STEMI the patient was to have further work-up; if there was a non-STEMI then a stable patient would not be sent to the catheterization lab or for further cardiac work-up.

The significant and only EKG that was provided to Dr. Dobies is dated April 19, 2012, at 17:13:46 in the late afternoon. Upon review of the EKG, Dr. Dobies determined it to be a non-STEMI. He ordered certain cardiac medications but determined, based upon the EKG and Mr. Ramsey’s clinical condition, he was not a catheterization patient at the time. Dr. Dobies indicated at his deposition a non-STEMI typically does not require catheterization because according to the American College of Cardiology, the patient may be harmed with emergent

² These Defendants deny the allegations contained in Plaintiff’s Complaint and affirmatively states Plaintiff’s decedent was provided appropriate medical care and treatment within the applicable standard of care at all times relevant hereto.
As such, Dr. Dobies issued cardiology orders of Effient, Lipitor, and Nitroglycerin, which was consistent with the standard of care for non-STEMI patients. Dr. Dobies was not contacted again by hospital staff regarding Mr. Ramsey’s condition. In fact, Dr. Dobies did not provide any subsequent care to the patient following his review of the EKG, nor was he provided any subsequent communication from any physician or nurse in the emergency room or Coronary Intensive Care Unit.

Dr. David Dobies is a Board Certified Interventional Cardiologist. Currently, Dr. Dobies is a physician at Regional Cardiology Associates, where he specializes in intervention cardiology. In addition to working at Regional Cardiology Associates, Dr. Dobies is the “on call” cardiologist at least one time per week at Genesys Regional Medical Center. When Dr. Dobies is on call, he is required to read EKGs and determine if it is a STEMI or non-STEMI. Dr. Dobies has been performing STEMI calls for several years, including during the 2011-2012 time period.

On the other hand, Dr. C. Alan Brown, a Board Certified Interventional Cardiologist, has no known experience with STEMI calls. In fact, Dr. Brown was asked to provide several documents in response to Defendants Request to Produce, including board certification documents, catheterization lab records, reports of the number of PCI cases he has been involved with, credentialing records, and any logs Dr. Brown may have as they relate to his medical practice. In response to this request, Dr. Brown provided no documentation. In fact, Dr. Brown admitted he did not keep logs for the American Board of Cardiology, an action which is required.

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3 Exhibit 1 - Deposition Transcript of Dr. David Dobies, p. 17-18.
4 Exhibit 2 - Curriculum Vitae of Dr. David R. Dobies.
5 Exhibit 1 - Deposition Transcript of Dr. David Dobies, p. 39-40.
6 Exhibit 3 – Genesys Regional Medical Center On Call Schedule.
7 Exhibit 4 - Plaintiff’s Response to Defendants David R. Dobies, MD and Regional Cardiology Associates, PLC’s 2nd Request for Production of Documents and/or Things.
by the Board to maintain his certification. Notably, Dr. Brown could produce absolutely no records indicating he had ever performed a STEMI call or that he had been in the catheterization lab for any reason during the relevant period (i.e. 2011-2012).

**LAW**

Pursuant to MRE 702, the trial court has a “gatekeeper role” which requires it to inquire into an expert witness’s qualifications prior to allowing testimony at trial. In *Daubert v Merrell Dow Pharmaceuticals, Inc*, the Supreme Court of the United States emphasized the trial court’s “gatekeeper” role in determining whether the reasoning and the methodology behind the expert’s opinion is scientifically valid.\(^8\) The Michigan Supreme Court explicitly adopted the *Daubert* standards in 2004.\(^9\) As such, the Court must ensure that “all expert opinion testimony—regardless of whether the testimony is based on “novel” science—is reliable.”\(^10\)

In *Gilbert v. DaimlerChrysler Corp*, the Michigan Supreme Court adopted the requirements of *Daubert*, concerning the reliability of expert testimony.\(^11\) MRE 702 was then amended, effective January 1, 2004, to particularize the kind of gatekeeper inquiry the trial court is required to make.

The revised language of MRE 702 is as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine fact and 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 principle and methods, and (3) the witnesses apply the principles and methods reliably to the facts of the case.\(^12\)

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\(^8\) *Daubert v Merrell Dow Pharm., Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).


\(^10\) *Id.* at 781(referring to People v Young, 418 Mich 1, 24; 340 NW2d 805 (1983)).

\(^11\) *Gilbert*, 470 Mich 749.

\(^12\) MRE 702. See also MCL 600.2955 which provides further detail as to the Court’s gatekeeper role as well as additional criteria for the Court to consider when determining the reliability of an expert witness.
The trial court can neither abandon the duty nor inadequately perform the duty.\textsuperscript{13} In its role as gatekeeper, the Court must determine the reliability of the experts’ opinions by assessing the underlying data upon which the expert bases his or her theory as well as the methodology the expert uses to draw a conclusion.\textsuperscript{14} The trial court \textbf{must} exclude any unreliable testimony, unproven methodologies, and unproven theories from the jury’s consideration.\textsuperscript{15}

Under \textit{Gilbert}, the trial court must ensure that each aspect of an expert’s proffered testimony is reliable. In doing so, the trial court should conduct a “[c]areful vetting of all aspects of expert testimony… [and] may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule’s standard of reliability.”\textsuperscript{16} However, an expert “must have an evidentiary basis for his own conclusions.”\textsuperscript{17} Thus, an expert’s opinion is not admissible if it is based on “subjective belief or unsupported speculation.”\textsuperscript{18}

It is the Plaintiff’s burden to prove their expert’s testimony meets the requirements as set forth in MRE 702.\textsuperscript{19} Plaintiff must prove his or her expert is qualified under MRE 702 by a preponderance of the evidence. Under MRE 702, it is generally not sufficient to simply point to an expert’s experience and background to argue that the expert's opinion is reliable and, therefore, admissible.\textsuperscript{20} While peer review, published literature is not always required to prove an expert meets the requirements of MRE 702, the lack of any literature to support the expert’s

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{14}] Id. See also Craig ex rel Craig v Oakwood Hosp, 471 Mich 67, 79; 684 NW2d 296 (2004); Clerc v Chippewa Co War Mem Hosp, 477 Mich 1067, 1067–68; 729 NW2d 221 (2007); Gilbert, 470 Mich at 779-783.
  \item[\textsuperscript{15}] See MRE 702, Staff Cmt.
  \item[\textsuperscript{16}] Gilbert, 470 Mich at 782.
  \item[\textsuperscript{18}] People v Unger, 278 Mich App 210, 218 (2008).
  \item[\textsuperscript{19}] Craig ex rel Craig, 471 Mich 67 at 79; Clerc, 477 Mich at 1067–68; Gilbert, 470 Mich at 779-783.
  \item[\textsuperscript{20}] Edry v Adelman, 486 Mich 634, 641–42; 786 NW2d 567, 571 (2010).
\end{itemize}
\end{footnotesize}
opinion coupled with the lack of any other support for the expert’s opinion will render the opinion inadmissible pursuant to MRE 702. 21

In addition to MRE 702, MCL 600.2955 and MCL 600.2169 govern the inquiry into whether expert testimony is reliable. 22

Ultimately, it is the trial court’s decision to exclude an expert’s testimony. 23 For the reasons set forth below, Defendants request this Court exclude Dr. Brown’s testimony in the instant matter for failure to meet the standards as set forth in MRE 702.

ARGUMENT

Michigan Courts have consistently reiterated the fact that to qualify as an expert witness, certain criteria must be met. In a recent case, Elher v. Misra, the Court held that evidence of an expert witness may not be based upon personal beliefs, but must be based upon opinions that are generally accepted and relevant within the expert community, including but not limited to, peer review medical literature. 24 Although not a disputed fact in Elher, the Court did reiterate that for an expert to be qualified, they must meet the standards laid out in the court rules and MRE 702 as well as statutory mandates MCLA 600.2955 and MCLA 600.2169, which relates to licensing and qualifications of experts. 25 When an expert testified based upon his own beliefs rather than generally accepted and relevant practices or opinions within that expert community, then that expert fails to meet the requirements of MRE 702. 26 In Elher, the Court found no evidence to suggest that the expert’s opinion was generally accepted within the relevant expert community.

21 Id.
25 Id.
26 Id.
nor was there any peer review medical literature to support the expert’s opinion, and therefore, he was not qualified as an expert to testify in the matter.27

In the case at hand, Dr. Brown provided no medical journals, peer review articles, or other documentation to suggest he based his testimony on any relevant or generally accepted practice. On the other hand, Dr. Dobies testified he relied upon the American College of Cardiology guidelines when rendering his opinion as to the care that should be provided to Mr. Ramsey.28

Furthermore, given his lack of response to Defendant’s Request for Production of Documents, it is clear Dr. Brown does not have any logs or other documentation which would reveal a background in performing STEMI calls. As such, it must be concluded that Dr. Brown did not have a background in performing STEMI calls, especially not during the relevant time period (2011-2012). Given that Dr. Brown had no experience with STEMI calls, he cannot be said to have based his opinion off of reliable standards within the community or based off of knowledge, skill, or training. As such, it is clear Dr. Brown’s opinions are based on nothing but his own beliefs and thus he fails to meet the requirements of MRE 702.

Another such requirement for assessing the qualifications of an expert is that in the year preceding the date of the incident alleged in the Complaint, the expert must have devoted a majority of his professional time to the same health profession as Defendant, through active clinical practice or teaching students at an accredited school.29 If an expert fails to meet this requirement, they are not able to provide opinion testimony.30

27 Id.
28 Exhibit 1 - Deposition Transcript of Dr. David Dobies, p. 17-18.
30 Id. (holding that the statutory phrase of a “majority of professional time” “requires a proposed expert physician to spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice” and because Plaintiff’s expert only spent approximately 30-40% of his time directly involved
In the case at hand, Dr. Dobies practiced as Regional Cardiology Associates, PLC and was also the “on call” cardiologist at least one time per week at Genesys Regional Medical Center. \(^{31}\) When Dr. Dobies was on call, he was required to read EKGs and determine if it was a STEMI or non-STEMI. Dr. Brown, on the other hand, did not spend a majority of his professional time performing STEMI or on call interpretations of an EKG. Dr. Brown was deposed in the instant matter and during his deposition he failed to testify as to whether or not he had performed a STEMI call in his professional career. In an attempt to clarify the issue, Defendants sent a Request to Produce logs and other documentation which would show STEMI or on call interpretations performed by Dr. Brown. Dr. Brown did not produce any documentation in response to this request. \(^{32}\) While Plaintiff may attempt to argue Dr. Brown taught medical residents, Dr. Brown testified he was not the physician giving the EKG lectures. \(^{33}\) As such, it certainly cannot be stated that Dr. Brown spent a majority of his professional time teaching students about STEMI calls. As such, Dr. Brown was not spending a majority of his professional practice in the same clinical practice as Dr. Dobies.

Along these same lines, Plaintiff has provided absolutely no documentation to suggest Dr. Brown was in the catheterization lab during the relevant time period, or that he performed any interventional procedures during the relevant time period. Dr. Dobies, on the other hand, has performed well over 75 interventional procedures during the relevant time period (2011-2012). \(^{34}\) This only further proves Dr. Brown did not spend a majority of his professional practice, if he spent any time at all, working within the same clinical practice as Dr. Dobies.

\(^{31}\) Exhibit 1 - Deposition Transcript of Dr. David Dobies, p. 39-40.
\(^{32}\) Exhibit 4 - Plaintiff’s Response to Defendants David R. Dobies, MD and Regional Cardiology Associates, PLC’s 2nd Request for Production of Documents and/or Things.
\(^{33}\) Exhibit 5 - Deposition Transcript of Dr. Alan Brown, p. 30.
\(^{34}\) Exhibit 6 – Interventional Procedures Chart for Dr. Dobies from years 2011 and 2012.
Notably, the Plaintiff in this matter bears the burden of proving Dr. Brown meets the standards of MRE 702.\textsuperscript{35} Plaintiff has failed to do so in the instant matter. It is clear that Dr. Brown does not possess the same knowledge, skill, education and practical experience in STEMI calls as Dr. Dobies. As such, Dr. Brown should be precluded from offering expert testimony at the time of trial, namely regarding STEMI v non-STEMI EKG readings as well as the procedures surrounding when a patient should be taken to a catheterization lab. In the alternative, these Defendants would request a \textit{Daubert} hearing. However, given the utter lack of documentation upon which Plaintiff is attempting to support Dr. Brown’s qualifications as an expert witness in this matter, it is doubtful a \textit{Daubert} hearing would be productive

\textbf{WHEREFORE}, the Defendants respectfully request this Honorable Court grant Defendants’ Motion in Limine and enter an order precluding Dr. C. Alan Brown from testifying as an expert witness at trial, as well as grant any additional relief this Court deems reasonable and just.

Respectfully submitted,
CLINE, CLINE & GRIFFIN

Dated: May 25, 2017

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\textsuperscript{35} Craig \textit{ex rel} Craig \textit{v} Oakwood Hosp, 471 Mich 67, 79; 684 NW2d 296 (2004).
STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

NAOMI J. STANFORD, Individually
and as Personal Representative of the
Estate to JEREMIAH
STANFORD, deceased

Plaintiff,

vs.

BOARD OF HOSPITAL MANAGERS
FOR THE CITY OF FLINT, D/B/A
HURLEY MEDICAL CENTER,
LEWIS H. TWIGG, JR., M.D., P.C.
AND LEWIS TWIGG, M.D.
Jointly and Severally

Defendants.

Case No: 14-103152 NH
Hon. Judith A. Fullerton

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Order (1) Granting Defendants' Motion For Partial Summary Disposition As To
Noneconomic Damages In Excess Of The Lower Cap, And For A Ruling That There Will
Be A Setoff, (2) Granting Defendants' Motion For Partial Summary Disposition As To
Economic Damages Other Than Damages For Burial Expenses, And As To Damages For
Loss Of Society And Companionship, and (3) Granting Defendants' Motion For Summary
Disposition As To Any Individual Claim By Naomi Stanford For Failure To State A Claim
And/Or As Barred By The Statute Of Limitations
At a session of said Court held in the
Genesee County Courthouse
City of Flint, County of Genesee, State of Michigan

on _______________________

PRESENT:    Hon. Judith A. Fullerton
Genesee County Circuit Court Judge

Defendants having brought several motions for partial summary disposition in this
medical malpractice/wrongful death action arising out of the stillbirth of Jeremiah Stanford
following an automobile accident, plaintiffs having filed responses, oral argument having been
held, and the Court having rendered an oral decision at the hearing on November 16, 2015;

NOW THEREFORE, in accord with the Court’s rulings at the hearing held on November
16, 2015;

It is ordered that Defendants’ Motion For Partial Summary Disposition As To
Noneconomic Damages In Excess Of The Lower Cap, And For A Ruling That There Will Be A
Setoff, is granted. Summary disposition is hereby entered dismissing all non-economic damages
claimed by the estate of Jeremiah Stanford in excess of the lower cap on noneconomic damages,
MCL 600.1483, for the reason than none of the three exceptions for application of the higher cap
applies. The Court further holds that a setoff of $50,000, representing settlement of the Estate’s
third party no fault claim, is to be applied against any award of noneconomic damages, after
application of the cap.

It is further ordered that Defendants’ Motion For Partial Summary Disposition As To
Economic Damages Other Than Damages For Burial Expenses, And As To Damages For Loss
Of Society And Companionship, is granted for the reason that such damages are entirely
speculative with respect to a stillborn child. Summary disposition is hereby entered dismissing
all economic damages other than burial expenses, including loss of support, loss of services, loss
of earning capacity, and dismissing all noneconomic damages for loss of society and companionship.

It is further ordered that Defendants’ Motion For Summary Disposition As To Any Individual Claim By Naomi Stanford For Failure To State A Claim And/Or As Barred By The Statute Of Limitations is granted. Summary disposition is hereby entered dismissing any individual claim by Naomi Stanford.

Pursuant to MCR 2.602(A)(3), this order does not resolve the last pending claim or close the case.

Dated: 11/25/15

JUDITH A. FULLERTON
P-20455
Honorable Judith A. Fullerton

DET02:2126434.1
Executive Summary

The issue of whether the upper or lower tier of the cap on noneconomic damages will apply will turn on whether plaintiff can establish through expert testimony, and the trial court finds as a factual matter that, prior to the death of Isiah Gonzales in utero, the fetus experienced brain damage that was permanent, and that this brain damage either (1) rendered the fetus “incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living,” or (2) rendered the fetus “hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs.”

The defendants have a strong argument (the strength of which has not yet been addressed by an appellate court) that a fetus who is stillborn logically and medically cannot experience either of the conditions that would support application of the higher cap. To the extent feasible, discovery should focus on demonstrating that plaintiff’s experts cannot (or cannot reliably) opine that the fetus before death was capable of making life decisions, or performing that activities of normal daily living, or that before death he was rendered “hemiplegic, paraplegic or quadriplegic.”

We were able to obtain a ruling on our favor regarding application of a lower birth to a stillbirth in the Genesee County Circuit Court, on the matter of Stanford v Hurley Medical Center on November 25, 2015. (Plaintiff was represented by McKeen’s office.) A copy is attached.

Underlying Facts

This is a wrongful death action arising out of the death, in utero, and subsequent stillbirth, of Isiah Gonzales, at 39 weeks gestation. Prior to the death, the mother, Tresbien Gonzales, was seen in her obstetrician’s office on May 9, 2011 for a routine visit. The fetus was noted to have intermittent heart rate decelerations and was told to go to the hospital. Rather than go immediately to the hospital, the mother and her husband ran some errands. When the mother
arrived at the hospital 3 hours later, there was no fetal movement or heart action, and a diagnosis of intrauterine fetal demise was made.

The fetus was delivered with a cord tightly wrapped around its neck. On autopsy the fetus was normal in physical appearance; it is noted that “A nuchal cord is a rare cause of intrauterine fetal mortality though in the absence of other findings, it likely lead to the fetal demise in this case. Histologic sections of the lungs demonstrated aspiration of meconium and squames which occurs from fetal gasping and an intrauterine state of asphyxia.” (Autopsy report)

Plaintiff has filed a wrongful death action, claiming that there was a breach of the standard of practice in failing to impress upon the mother the urgency of the situation and need to go directly to the hospital. (Complaint)

Analysis

Pursuant to MCL 600.1483, Michigan imposes a cap on the amount of noneconomic damages that all plaintiffs in a medical malpractice case can recover against all defendants. This statute sets forth two separate tiers of recovery, providing for a lower-tier and a higher-tier damages cap. MCL 600.1483. The lower-tier cap applies, unless one of the three exceptions listed in §1483 applies to the facts of the case. MCL 600.1483(1).

MCL 600.1483, as applicable to causes of action, such as this, arising before 2013, provides as follows:

(1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.
(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate. *** [MCL 600.1483 as applicable to this action.]

Thus, the three exceptions to the lower tier cap are (1) injury to the brain or spinal cord, causing total permanent hemiplegia, paraplegia, or quadriplegia, (2) permanent impairment of cognitive capacity “rendering” him or her “incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living,” or (3) permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

The cap applies in wrongful death cases. See Jenkins v Patel, 471 Mich 158, 173; 684 NW2d 346 (2004), Young v Nandi, 276 Mich App 67, 70; 740 NW2d 508 (2007), vacated in part on other grounds 482 Mich 1007 (2008). The question of which cap (higher or lower tier) should properly be applied in any given case is ultimately a matter for the Court, not a jury, to determine. See Young v Nandi, supra at 77, MCL 600.6098(1).

It is the plaintiff’s burden to present “persuasive evidence” to support a finding that the plaintiff suffered one of the injuries set forth in one of the three exceptions to the lower cap. Young, supra, at 78. The test for application of the lower versus higher tier cap to noneconomic damages in wrongful death cases is whether the personal representative can show that the decedent had a qualifying injury at any time before death as a result of negligence. Shinholster v Annapolis Hospital, 471 Mich 540; 685 NW2d 275 (2004), Young v Nandi, 276 Mich App 67 (2007). Death itself is not a qualifying injury. Young v Nandi, 276 Mich App 67, 80; 740 NW2d 508 (2007).

It is not likely that plaintiff will be able to establish, through expert testimony, that the baby here experienced in utero, and before death, any of the three conditions that would support application of the higher cap. The allegations do not suggest that plaintiff will be able to establish the fetus experienced total, permanent “hemiplegia, paraplegia, or quadriplegia” or “permanent loss of or damage to a reproductive organ resulting in the inability to procreate.”

While plaintiff may seek to assert that the fetus had “permanently impaired cognitive capacity” rendering him “incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living” under MCL 600.1483(1)(b), this exception logically and medically should not apply under these circumstances. This conclusion is supported by the cap statute and Young v Nandi, 276 Mich App 67; 740 NW2d 508 (2007).

In Young, the Court of Appeals reversed the trial court’s determination that the higher-tier cap applied, and remanded for imposition of the lower-tier cap. The decedent in that case was on a ventilator and medically sedated before her death as a result of intestinal ischemia. The plaintiff attempted to invoke the exception to the lower-tier cap for a plaintiff who has “permanently impaired cognitive capacity” that renders him or her “incapable of making independent, responsible life decisions” and “permanently incapable of independently performing the activities of normal, daily living.”
The Court in *Young* looked to dictionary definitions to interpret the terms of the cap exception for “permanently impaired cognitive capacity,” and then concluded that plaintiff had not presented evidence sufficient to demonstrate that the decedent suffered permanent damage to or diminishment of her mental abilities that met all of the requirements of the statutory exception. The Court held that the fact that the decedent may have “temporarily or unnaturally experienced impaired cognitive capacity at some point before her death” did not establish entitlement to the higher-tier damages cap. *Id.* at 81.

In order to establish applicability of the exception for permanently impaired cognitive capacity ((1)(b)), the plaintiff must present evidence to establish that, as a result of the negligence of the defendants, the plaintiff has permanently impaired cognitive capacity that “render[ed] him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.”

In order to establish that a case falls within an exception to the lower-tier cap, the Court must determine that every requirement of the applicable exception has been demonstrated by the plaintiff. *Young, supra,* at 80-81.

“[T]o establish this qualifying injury [under the second exception, MCL 600.1483(1)(b),] the plaintiff must suffer damage to or diminishment of his or her mental ability to perceive, memorize, judge, or reason that is permanent ‘rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living,’” and “this permanently impaired cognitive capacity must be ‘the result of the negligence of 1 or more of the defendants . . . .’” *Young* at 80, quoting MCL 600.1483(1)(b).

It can be argued that plaintiff cannot establish applicability of this exception, for several reasons. First, plaintiff cannot establish that “permanently impaired cognitive capacity” as a result of defendants’ claimed negligence “render[ed]” plaintiff’s decedent “incapable of making independent, responsible life decisions” or “permanently incapable of performing the activities of normal, daily living” while in utero. Plaintiff’s decedent never was “capable” of making “independent, responsible life decisions” at any time during the period prior to his death, because he was an infant in utero and thus was “incapable” of making “independent, responsible life decisions,” irrespective of any negligence by defendants.

The requirement that the impaired cognitive capacity must have “render[ed]” the plaintiff incapable of making decisions or performing activities exists in order that the plaintiff can be compensated for having “lost” that capability. It is measured by the loss of that capability; and in death cases, is measured by whether that capability was lost at any time prior to death. Here, because the decedent was a stillborn infant, the alleged malpractice did not “render” him incapable of making independent, responsible life decisions at any time prior to his death.
Second, the plaintiff likely will be unable to provide evidence of “permanently impaired cognitive capacity” or that plaintiff is “permanently incapable of making independent, responsible life decisions.” See Young, supra (mere fact that decedent was on a ventilator before death did not establish that the decedent had permanent damage to her mental abilities, or that the ventilator state was not simply a “cognitive decline” prior to death).

In Estate of Brookshire v Stier, unpublished opinion per curiam of the Court of Appeals, issued Mar 24, 2011 (Docket Nos 291186, 292991), the Court applied Young v Nandi to hold that the lower cap applied where the decedent developed DIC (disseminated intravascular coagulation) and related bleeding before her death that, based on plaintiff’s evidence, was a consequence of untreated lymphoma. While there was evidence that the decedent had impaired cognitive capacity that resulted from the bleeding, and lost the ability to communicate before her death, the only evidence that the impairment became permanent was the evidence that the decedent died. The Court reasoned:

Neither Dr. Singer’s speculation that it “could” have become permanent, nor Dr. Cassin’s testimony regarding how a person in cardiopulmonary arrest progresses towards death when the resuscitative process is unsuccessful establishes the required permanent impaired cognitive capacity. Because the qualifying injury must occur before death (regardless of when death might be formally declared by a doctor) and permanency is part of the qualifying injury, the trial court erred in imposing the higher cap. [Estate of Brookshire v Stier, unpublished opinion per curiam of the Court of Appeals, issued Mar 24, 2011 (Docket Nos 291186, 292991).]

Similarly, in Estate of Needham v Mercy Mem'l Nursing Ctr, unpublished opinion per curiam of the Court of Appeals, issued Oct 3, 2013 (Docket Nos 303999, 304832), the Court, applying the reasoning of the Young Court, held that the trial court erred in applying the upper tier cap. There, the evidence showed brain damage, but not of the specific nature to which the higher tier exception applies:

[T]here is no evidence that Needham suffered permanent damage or diminishment of his mental ability to perceive, memorize, judge, or reason that rendered him incapable of making independent, responsible life decisions and independently performing the activities of normal, daily living. Rather, while the evidence revealed that Needham suffered a brain injury (the loss of brain cells from low blood pressure) and unconsciousness shortly before his death, there was no evidence establishing that had Needham lived, his mental diminishment would have been permanent, and he would not have been able to make independent, responsible life decisions or perform the activities of normal, daily living. [Estate of Needham v Mercy Mem'l Nursing Ctr, Unpublished opinion per curiam of the Court of Appeals, issued Oct 3, 2013 (Docket Nos 303999, 304832) (emphasis added)]
Application of these decisions to the allegations here supports the conclusion that plaintiff probably will not be able to meet his burden of establishing that Isaiah Gonzales experienced permanent brain damage that specifically rendered him permanently incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living. Rather, the allegations likely will establish only a “clinical decline and the associated or necessary medical interventions,” Young, supra.

Accordingly, it is likely that plaintiff will not be able to demonstrate a qualifying injury that would trigger an exception to the lower cap, that should apply to any award of noneconomic damages in this matter. Discovery should be focused on confirming this to be accurate.

SHZ/dgj
STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative
of the Estate of
ISIAH GONZALES, Deceased

v

HSIN WANG, M.D., and
OBSTETRICS AND GYNECOLOGY
ASSOCIATE PHYSICIANS, P.C.,
Jointly and Severally,

Defendants.

Hon. Daniel Patrick O’Brien
Case No.: 16-152833-NH

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Defendants’ First Motion For Partial Summary Disposition: As To Economic Damages
Other Than Burial Expenses, And As To Noneconomic Damages For Loss Of Society And
Companionship, Brief In Support, Exhibits, Notice Of Hearing And Certificate Of Service
NOW COME defendants Hsin Wang, M.D., and Obstetrics and Gynecology Associate
Physicians, P.C., by and through their counsel, KITCH DRUTCHAS WAGNER VALITUTTI &
SHERBROOK, and for their motion for partial summary disposition as to economic damages
other than funeral and burial expenses, and as to noneconomic damages for loss of society and
companionship pursuant to MCR 2.116(C)(8) and (10), state as follows:

1. This is a wrongful death action arising out of the death, in utero, and subsequent
stillbirth, of Isiah Gonzales, at 39 weeks gestation.

2. Plaintiff alleges that Dr. Wang, an obstetrician gynecologist, breached the
standard of practice at a routine prenatal appointment when advising the mother, Tres-Bien
Gonzales, that she needed to go to the hospital for further testing after Dr. Wang noted fetal heart
rate decelerations; plaintiff alleges that defendant failed to convey the seriousness of the problem
and the need for Ms. Gonzales to go directly to the hospital.

3. Plaintiff alleges that if she had been told to go to the hospital immediately, she
would have arrived there sooner, after 4 p.m., rather than at 5:50 p.m., and the baby would have
been delivered before death occurred.

4. Summary disposition should be granted as to any claims by the estate for
economic damages for loss of earning capacity or financial support, as such damages are
nonrecoverable here, as completely speculative.

5. Summary disposition should be granted as to any claims by the estate for medical
expenses, as the expenses would have been incurred for the delivery regardless of the alleged
malpractice.

6. Summary disposition should be granted as to any claims by the estate for
noneconomic damages sustained by family members, such as loss of society and companionship
of a stillborn child, with whom no relationship could have been developed, as completely speculative.

WHEREFORE, defendants Hsin Wang, M.D., and Obstetrics and Gynecology Associate Physicians, P.C., respectfully request that this Honorable Court grant summary disposition as to economic damages other than burial expenses, and as to noneconomic damages of family members such as for loss of society and companionship.

Respectfully submitted,

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

By: /s/ Susan Healy Zitterman
JENNA WRIGHT GREENMAN (P61481)
LINDSAY E. ROSE (P71130)
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Dated: April 28, 2017
BRIEF IN SUPPORT OF MOTION

This is a wrongful death action arising out of the death, in utero, and subsequent stillbirth, of Isiah Gonzales, at 39 weeks gestation on May 9, 2011. That day, the mother, Tres-Bien Gonzales, was seen in the office of her obstetrician, defendant Dr. Wang, for a routine visit at a 3:30 p.m. appointment, having been dropped off by her husband. (Complaint, ¶¶14-15) The fetus was noted to have intermittent heart rate decelerations, and Ms. Gonzales was told to go to the hospital. (Complaint, ¶¶16-17) Ms. Gonzales waited for her husband to pick her up and, it is alleged, left there “shortly after 4 p.m.” (Complaint, ¶20) They dropped their 2-year old son at a family member’s house, went home to gather belongings for a hospital stay, and stopped by their 5-year old daughter’s dance studio to inform her that they were going to the hospital. (Complaint, ¶21)

When Mr. & Mrs. Gonzales arrived at the hospital, at “around 5:50 p.m.,” the nurse informed Ms. Gonzales that she would be sent home if the baby’s heart rate was stable. However, the nurse could not find a heartbeat and, following examination and ultrasound by an obstetrician, a diagnosis of intrauterine fetal demise was made. (Complaint, ¶¶22-28)

Plaintiff has filed a wrongful death action, claiming that there was a breach of the standard of practice in failing to impress upon the mother the urgency of the situation and need to go directly to the hospital. (Complaint, affidavit of merit, exhibit B) Plaintiff’s only expert, Dr. Dein, an obstetrician gynecologist, has indicated in his affidavit of merit that the decelerations seen at Dr. Wang’s office “demonstrated fetal distress due to inadequate blood flow and therefore improper oxygenation,” and that the fetus died from a lack of oxygen. Had there been proper monitoring at the hospital, Dr. Dein asserts that a surgical delivery (C-section) could have been done, and the child delivered alive. (Affidavit of merit)
In the complaint the estate asserts entitlement to damages for medical and hospital expenses, and loss by the surviving kin, of society, companionship, services and support.

(Complaint, ¶¶40, 41) In addition, plaintiff has indicated in response to answers to interrogatories that damages for loss of society and companionship will be sought by TresBien Gonzales, James Gonzales, Gabrielle Gonzales, and Joshua Gonzales; however, when asked to describe the nature and number of contacts with the deceased, it is noted that “plaintiff and other persons were unable to have contacts with the deceased because he passed in utero.”

(Interrogatory answers, exhibit C, number 12)

Although not pled in the complaint, plaintiff has filed answers to interrogatories asserting that economist Michel Thomson, PhD, will offer unquantified testimony regarding the unborn fetus’ “loss of earning capacity.” (Exhibit D) With respect to medical expenses, Blue Care Network did pay claims for the delivery of Isiah Gonzales, but noted that there was no lien with respect to this matter, because Blue Cross “would have had to pay those charges anyway.”

(Exhibit E)

**Argument**

I  Summary Disposition Should Be Granted As To Any Claims By The Estate For Economic Damages, Other Than Burial Expenses, As Such Damages Are Nonrecoverable Here, As Completely Speculative.

There is no common-law right to recover damages for a wrongfully caused death. *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). Instead, the wrongful death act provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death. *Id.*

Under the Wrongful Death Act, the estate is entitled to recover those damages set forth in MCL 600.2922(6). The act provides as follows regarding the type of damages that may be recovered by the personal representative:
In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.... §2922(6).

The Michigan Jury Instruction on wrongful death damages, M Civ JI 45.02 Wrongful Death—Damages, upon which the Michigan Court of Appeals has relied in identifying the damages recoverable in such an action under the Act, Thorn v Mercy Mem'l Hosp Corp, 281 Mich App 644, 661; 761 NW2d 414 (2008), provides that the damages recoverable under the act are:

1. *(reasonable medical, hospital, funeral and burial expenses)

2. *(reasonable compensation for the pain and suffering undergone by [name of decedent] while [he / she] was conscious during the time between [his / her] injury and [his / her] death)

3. *(losses suffered by [name of surviving spouse / name of next of kin] as a result of [name of decedent]'s death, including:
   a. loss of financial support
   b. loss of service
   c. loss of gifts or other valuable gratuities
   d. loss of parental training and guidance
   e. loss of society and companionship. [M Civ JI 45.02.]

Thus, under the language of the death act as applied in the jury instructions, there are three discrete and distinct categories or types of damages recoverable: (1) expenses of the estate: "reasonable medical, hospital, funeral, and burial expenses for which the estate is liable," (2) loses to the decedent while conscious: "reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death," and (3) damages for the loss to the estate beneficiaries resulting from the death of the decedent, including loss of financial support and the loss of the society and companionship of the deceased, and loss of services training, and gratuities.
In the complaint the estate asserts entitlement to damages for medical and hospital expenses, and loss by his surviving kin, of society, companionship, services and support. (Complaint, ¶40, 41) To sustain his burden of proof for claims for damages, and in order to recover damages on the basis of future consequences (here, for example, the assumption that Isiah Gonzales would have been gainfully employed and provided financial support to his family, or services of a particular economic value), plaintiff must establish injury, the appropriate compensation therefore, and that future consequences will occur with “reasonable certainty.”


Here, plaintiff will be unable to create a genuine issue of material fact— to prove with reasonable certainty—any economic losses to the estate, other than burial expenses. All other potential economic damages are patently speculative, given that the child was stillborn, and nothing can be known, or reasonably predicted, with respect to what he probably would have earned, or what economic support or services he would have provided to family members had he survived.

Thus, to the extent plaintiff is claiming plaintiff is entitled to economic damages for the loss of or financial support, this Court should dismiss such claims. The test to determine whether a personal representative may recover for “loss of financial support” is whether the beneficiaries had a “reasonable expectation of support” from decedent in the future. In Thompson v Ogemaw County Board of Road Commissioners, 357 Mich 482; 98 NW2d 620 (1959), the Court found that the parents had a “reasonable expectation of support” from their 15-year-old daughter where she had contributed earnings to the family in the past, and where the decedent’s father testified that she had promised to take her mother’s place as wage earner. In Swartz v Dow Chemical Co,
95 Mich App 328, 335-336; 290 NW2d 135 (1980) rev'd on other gds 414 Mich 433 (1982), the Court held that the parents did not have a “reasonable expectation of support” by their 19-year-old son, where the father testified that decedent had never supported his parents and that the father did not expect to be dependent on decedent.

Here, where plaintiff-decedent was stillborn, plaintiff is unable to show that the parent or sibling beneficiaries had a “reasonable expectation of support” as required by Thomson, supra and Swartz, supra.

Therefore, there is no evidence herein that tends to show with “reasonable certainty” that, but for the alleged malpractice, Isiah Gonzales, who was stillborn, reasonably could have been expected to provide financial support. See Craig v Oakwood Hospital, 249 Mich App 534; 643 NW2d 580 (2002), rev’d on other grounds, 471 Mich 67 (2004) (to conclude that a person injured at birth would have followed any particular career path “but for” the injury is the hallmark of “speculation,” and it is well established that a plaintiff may not recover tort damages that are speculative or contingent); Washington Metropolitan Area Transit Authority v Davis, 606 A2d 165 (DC 1991) (expert’s conclusion that 9 year-old child would attain professional status held to be without sufficient evidence where plaintiff’s expert did not speak with parents, teachers, or review her school reports; C-level grades “hardly offered compelling evidence of intellectual curiosity,” nor was there any indication that anyone in her extended family had completed college); Greater Richmond Transit Co v Wilkerson, 242 Va 65; 406 SE2d 28 (1991) (testimony of future lost income only reliable if “grounded upon facts specific to the individual whose loss is being calculated”).

The possibility that Isiah Gonzales would have earned any particular amount, or provided any particular part of those earnings as support to his parents or family members, is necessarily
pure speculation, requiring summary disposition as to any claim for such damages. In the matter of *Estate of Jeremiah Stanford v Board Of Hospital Managers For The City Of Flint*, Docket No 14-103152, a medical malpractice action arising out of a stillbirth, the Genesee County Circuit Court recently granted the defendants motion for partial summary disposition as to economic damages other than burial expenses, and as to damages for loss of society and companionship “for the reason that such damages are entirely speculative with respect to an unborn child.” (Exhibit F)

See also *Estate of Powers v Troy*, 380 Mich 160, 172; 156 NW2d 530 (1968) (Opinion by Brennan) (“Monetary contributions of a minor child in these times are not to be presumed, and neither are services to be rendered to parents in their old age. In the absence of some specific and unusual circumstances of dependency on the part of the parents, combined perhaps with their inability to have other children, if such were the fact, damages for such items in the case of an infant decedent, are purest speculation.”), *O'Neill v Morse*, 385 Mich 130, 139; 188 NW2d 785 (1971) (“Admittedly in the case of very young or stillborn children, the value of prospective filial service is not easy to prove. But pecuniary injuries are alleged in this cause, and no issue has been made of it in this appeal based upon the motion for summary judgment.”)

Similarly, to the extent that plaintiff may claim entitlement to economic damages for the loss of services, such damages would not be recoverable as being purely speculative. Here, where plaintiff-decedent was stillborn, nothing can be known about what services the unborn child would have provided had he survived. Therefore, any evidence provided by plaintiff regarding what services the unborn child would have provided would be nothing more than rank speculation.
Plaintiff has not in the complaint sought damages for Isiah Gonzales’ lost earning capacity (as contrasted to loss to the estate beneficiaries of support). However, in answers to interrogatories, plaintiff has suggested that he will offer the testimony of an economist to calculate the value of Isiah Gonzales lost earning capacity. To foreclose any attempt to amend the complaint to add this claim as it would be futile, *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697 (1998), the following is set forth to demonstrate that plaintiff cannot state a cognizable claim as such damages. First, as with future loss of financial support from a deceased fetus, any calculation of a stillborn’s lost earning capacity would be so patently speculative as to be nonrecoverable as future damages, if such damages were permitted.

In any event, such damages simply are not recoverable in a wrongful death action. Neither the wrongful death statute nor the jury instruction identifies, and no Michigan decision has ever permitted recovery for, a fourth category of losses personal to the decedent after death—such as loss of earning capacity or loss of the enjoyment of life. Rather, as suggested by the statute, the damages personal to the decedent recoverable by the estate include only losses before death—medical expenses, and “pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death,” MCL 600.2955,“ or as referred to in M Civ JI 45.02(1) and (2) “(reasonable compensation for the pain and suffering undergone by [name of decedent] while [he / she] was conscious during the time between [his / her] injury and [his/her] death).”

Moreover, to allow the estate to recover both for the beneficiaries’ loss of financial support that the decedent would have provided had he lived, and for the loss of earning capacity of the decedent would create a double recovery that is not permitted by Michigan law. The Legislature having expressly allowed recovery by the beneficiaries of loss of financial support, it
could not possibly intended by silence to also have allowed the recovery of loss of earning capacity.

Partial summary disposition should be granted as to economic damages, other than burial expenses.

II Summary Disposition Should Be Granted As To Any Claims By The Estate For Medical Expenses Related To The Delivery, As Those Would Have Been Incurred Regardless Of The Alleged Malpractice.

To recover damages in a medical malpractice action, plaintiff must establish proximate cause. Craig v Oakwood Hosp, 471 Mich 67, 86; 684 NW2d 296 (2004). Plaintiff cannot establish causation with respect to medical expenses, as plaintiff will have no evidence, or expert testimony, that the expenses incurred would not have been incurred had the child been born alive rather than stillborn. With respect to medical expenses, Blue Care Network did pay claims for the delivery of Isiah Gonzales, but noted that there was no lien with respect to this matter, because Blue Cross “would have had to pay those charges anyway.” (Exhibit E) Accordingly, summary disposition as to medical expenses should be granted for the absence of a genuine issue of material fact as to “but for” cause.

The element of proximate cause itself requires proof of two separate elements (1) cause-in-fact; and (2) legal or proximate cause. Craig v Oakwood Hosp, 471 Mich 67, 86; 684 NW2d 296 (2004). To establish cause-in-fact, the plaintiff must present "substantial evidence" that it is more likely than not, i.e., probable, that “but for” the alleged malpractice, the plaintiff's alleged injury would not have occurred. Badalamenti v William Beaumont Hospital-Troy, 237 Mich App 278, 283; 602 NW2d 854 (1999). As the Court summarized in Badalamenti:

In Skinner v Square D Co, 445 Mich 153, 162-170; 516 NW2d 475 (1994), a products liability case, our Supreme Court clarified what is required to establish cause in fact. Referencing Prosser & Keeton, Torts (5th ed), § 41, p 266, the Court stated that “[t]he cause in fact element generally requires showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred.”
Skinner, supra at 163. Our Supreme Court explained that “[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation," Id. and 164, and reaffirmed that “the 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.” Id. at 164-165 (emphasis added). [Badalamenti v William Beaumont Hospital-Troy, 237 Mich App 278, 283; 602 NW2d 854 (1999) (emphasis added.)]

"Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission." Craig, 87.

Plaintiff cannot establish causation with respect to medical expenses, as plaintiff will have no evidence, or expert testimony, that the expenses incurred would not have been incurred had the child been born alive rather than stillborn. Accordingly, summary disposition as to medical expenses should be granted for the absence of a genuine issue of material fact as to “but for” cause.

III Summary Disposition Should Be Granted As To Any Claims By The Estate For Noneconomic Damages Sustained By Family Members, Such As Loss Of Society And Companionship Of A Stillborn Child, With Whom No Relationship Had Been Developed Before Death, As Completely Speculative.

To the extent plaintiff is seeking damages for the loss of society and companionship of Isiah Gonzales, who was stillborn, summary disposition should be granted. Such damages are completely speculative, and there is no basis upon which the trier of fact could reasonably determine the existence of such damages.

In McTaggart v Lindsey, 202 Mich App 612; 509 NW2d 881 (1993), the Court of Appeals addressed the requirements for recovering damages for loss of society and companionship under the Michigan Wrongful Death Act, as follows:

A claim for loss of society and companionship under the wrongful death act addresses compensation for the destruction of family relationships that results when one family member dies. Crystal v Hubbard, 414 Mich 297, 326; 324 NW2d 869 (1982). The only reasonable means of measuring the actual destruction caused is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship. [In re Claim of Carr, 189 Mich App 234, 239; 471 NW2d 637 (1991).]
In McTaggart, the Court of Appeals upheld a trial court’s finding that the father of the two-year-old decedent was not entitled to damages for loss of society and companionship where the father only occasionally visited his daughter during her two-years of life because the father and daughter did not “develop a relationship from which damages for the loss of . . . society and companionship could result.” McTaggart, supra at 616-617.

Here, where plaintiff-decedent was stillborn, plaintiff is unable to show that the parents or sibling estate beneficiaries developed the required relationship from which damages for the loss of society and companionship could result. Indeed, the Estate concedes this in answers to interrogatories, conceding, when asked to describe the nature and number of contacts of the next of kin seeking damages for loss of society and companionship with the deceased, that “plaintiff and other persons were unable to have contacts with the deceased because he passed in utero.” (Interrogatory answers, exhibit C, number 12)

As noted above, in the matter of Estate of Jeremiah Stanford v Board Of Hospital Managers For The City Of Flint, Docket No 14-103152, a medical malpractice action arising out of a stillbirth, the Genesee County Circuit Court recently granted the defendants motion for partial summary disposition as to economic damages other than burial expenses, and as to damages for loss of society and companionship “for the reason that such damages are entirely speculative with respect to an unborn child.” (Exhibit F) Therefore, this Court should dismiss plaintiff’s claims for noneconomic damages for the loss of society and companionship of the deceased, with whom no relationship had yet existed. McTaggart, supra.
WHEREFORE, defendants Hsin Wang, M.D., and Obstetrics and Gynecology Associate Physicians, P.C., respectfully request that this Honorable Court grant summary disposition as to economic damages other than burial expenses, and as to noneconomic damages of family members such as for loss of society and companionship.

Respectfully submitted,

KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK

By:  /s/ Susan Healy Zitterman

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Dated: April 28, 2017
STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative
of the Estate of
ISIAH GONZALES, Deceased

Plaintiff,

v

HSIN WANG, M.D., and
OBSTETRICS AND GYNECOLOGY
ASSOCIATE PHYSICIANS, P.C.,
Jointly and Severally,

Defendants.

/)

NOTICE OF HEARING

TO: All Counsel of record

PLEASE TAKE NOTICE that the attached DEFENDANTS MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO ECONOMIC DAMAGES OTHER THAN FUNERAL AND BURIAL EXPENSES will be brought on for hearing before the Honorable Daniel Patrick O’Brien, in his courtroom, on a date to be determined by the Court, or as soon thereafter as counsel may be heard.

Respectfully submitted,

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

By: /s/ Susan Healy Zitterman

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Dated: April 28, 2017
STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative
of the Estate of
ISIAH GONZALES, Deceased

Plaintiff,

v

HSIN WANG, M.D., and
OBSTETRICS AND GYNECOLOGY
ASSOCIATE PHYSICIANS, P.C.,
Jointly and Severally,

Defendants.

Hon. Daniel Patrick O'Brien
Case No.: 16-152833-NH

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, I electronically filed the foregoing
DEFENDANTS’ FIRST MOTION FOR PARTIAL SUMMARY DISPOSITION: AS TO
ECONOMIC DAMAGES OTHER THAN BURIAL EXPENSES, AND AS TO
NONECONOMIC DAMAGES FOR LOSS OF SOCIETY AND COMPANIONSHIP,
BRIEF IN SUPPORT OF MOTION, EXHIBITS, NOTICE OF HEARING AND
CERTIFICATE OF SERVICE with the Clerk of the Court using the ECF system which will
send notification of same to the attorneys of record.

/s/ Doris G. Jones
Doris G. Jones, Secretary to
Susan Healy Zitterman
STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative
of the Estate of
ISIAH GONZALES, Deceased

Plaintiff,

v

HSIN WANG, M.D., and
OBSTETRICS AND GYNECOLOGY
ASSOCIATE PHYSICIANS, P.C.,
Jointly and Severally,

Defendants.

Hon. Daniel Patrick O’Brien
Case No.: 16-152833-NH

Exhibits To Defendants’ First Motion For Partial Summary Disposition: As To Economic Damages Other Than Burial Expenses, And As To Noneconomic Damages For Loss Of Society And Companionship

Exhibit A Complaint

Exhibit B Affidavit of Merit

Exhibit C Plaintiff’s Answers to Defendants Interrogatories Regarding Wrongful Death Damages

Exhibit D Plaintiff’s Answers to Defendants Interrogatories and Requests for Production of Documents and Things (Economic)

Exhibit E Plaintiff’s Answers to Defendants Interrogatories Regarding Lien Information

Exhibit F Order (1) Granting Defendants’ Motion For Partial Summary Disposition As To Noneconomic Damages In Excess Of The Lower Cap, And for a Ruling That There Will Be A Setoff (2) Granting Defendants’ Motion For Partial Summary Disposition As To Economic Damages Other Than Damages For Burial Expenses, And As To Damages For Loss Of Society And Companionship, and (3) Granting Defendants’ Motion for Summary Disposition As To Any Individual Claim By Naomi Stanford For Failure to State A Claim And/Or As Barred By The Statute of Limitations
EXHIBIT A
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative of the Estate of ISIAH GONZALES, deceased, 2016-152833-NH
Plaintiff,
vs.
No. 16-   -NH
Hon. 

HSIN WANG, M.D., and 
OBSTETRICS AND GYNECOLOGY 
ASSOCIATE PHYSICIANS, P.C., 
Jointly & Severally,

Defendants.

BRIAN J. McKEEN (P34123)
J. KELLY CARLEY (P38892)
McKEEN & ASSOCIATES, P.C.
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PLAINTIFF'S COMPLAINT AND DEMAND FOR JURY TRIAL

There is no other civil action pending, or previously filed and dismissed, transferred, or otherwise disposed of arising out of the transaction or occurrence alleged in the complaint.

NOW COMES Plaintiff, James Gonzales, as Successor Personal Representative of the Estate of Isiah Gonzales, deceased, by and through his attorneys, McKeen & Associates, P.C., and for his Complaint and Demand for Jury Trial hereby states the following:

GENERAL ALLEGATIONS

1. The amount in controversy exceeds Twenty-Five Thousand ($25,000.00) Dollars, excluding costs, interest and attorney fees and is otherwise within the jurisdiction of this court.

2. The cause of action arose in the County of Oakland, State of Michigan.
3. Plaintiff James Gonzales was at all times relevant a resident of the County of Oakland, State of Michigan.

4. Isiah Gonzales, deceased, was at all times relevant a resident of the County of Oakland, State of Michigan.

5. Defendant Obstetrics and Gynecology Associate Physicians, P.C. was at all times relevant hereto a health institution conducting business in the County of Oakland, State of Michigan.

6. Defendant Hsin Wang, M.D. was at all times relevant hereto a licensed and practicing physician, specializing in obstetrics & gynecology, conducting business in the County of Oakland, State of Michigan.

**FACTUAL ALLEGATIONS**

7. Plaintiff realleges paragraphs 1 through 6, as if set forth fully herein.

8. Tres-Bein Gonzales’ prenatal care for the subject pregnancy was with Hsin Wang, M.D. at Obstetrics & Gynecology Associate Physicians, P.C.

9. Mrs. Gonzales’ obstetric history included two previous term pregnancies with spontaneous vaginal deliveries.

10. On May 1, 2011, at week 38 (thirty-eight) of the subject pregnancy, Tres-Bein Gonzales suffered a fall at home.

11. She presented to Huron Valley-Sinai Hospital for treatment.

12. Upon examination, fetal movement was present, and fetal heart tones were reassuring.

13. Tres-Bein was released from the hospital.

14. On May 9, 2011, at 39 weeks and 4 days gestation, Tres-Bein’s husband dropped her off at Dr. Wang’s office for a routine prenatal appointment.

15. Her appointment time was 3:30 pm.
16. During the examination, Dr. Wang noted that there were fetal heart rate decelerations down to approximately 80 beats per minute.

17. It was imparted to Tres-Bein that she needed further testing at Huron Valley-Sinai Hospital.

18. Dr. Wang also instructed Tres-Bein to schedule a follow-up appointment for next week before leaving the office.

19. Unfortunately, despite Dr. Wang’s clinical findings, she failed to communicate the urgency of the situation to Tres-Bein.

20. Tres-Bein waited for her husband to pick her up at Dr. Wang's office, and left there shortly after 4:00 pm.

21. Unaware that their unborn child’s life was in immediate danger, Tres-Bein and her husband dropped their 2-year-old son off at a family member’s house, went home to gather Tres-Bein’s belongings in preparation for her hospital stay, and stopped at their 5-year-old daughter’s dance studio to inform her that they were going to the hospital to have the baby.

22. They then proceeded to drive to the hospital.

23. Upon her presentation to Huron Valley-Sinai Hospital around 5:50 pm, Tres-Bein went straight to the labor and delivery floor.

24. The Labor and Delivery nurse informed Tres-Bein that she would be sent home if the baby’s heart rate was stable.

25. However, the nurse was unable to find a fetal heart rate.

26. The nurse then notified the house obstetrician on call.

27. The obstetrician evaluated Tres-Bein and performed a bedside ultrasound, there was no fetal movement, or fetal heart motion.

28. A diagnosis of intrauterine fetal demise was made.

**COUNT I**

29. Plaintiffs realleges paragraphs 1 through 28 as if set forth fully herein.
30. At all times pertinent hereto, the Defendant, HSIN WANG, M.D., owed to the
  Plaintiffs, Tres-Bein Gonzales and Plaintiff's decedent, Isiah Gonzales, a duty to render
treatment in a reasonable and prudent manner consistent with the applicable standard of care for
physicians specializing in obstetrics and gynecology.

31. Notwithstanding his respective duty the Defendant, HSIN WANG, M.D. was
professionally negligent and breached their duties to the Tres-Bein Gonzales and Plaintiff
decedent, Isiah Gonzales, in the following ways:

   a) By failing to impress upon Tres-Bien Gonzales the seriousness of the fetal
decelerations on May 9, 2011;

   b) By failing to tell Tres-Bien Gonzales to go directly to the hospital for fetal monitoring
and testing on May 9, 2011;

   c) By failing to recognize the serious nature of the fetal decelerations as seen in
her office on May 9, 2011;

   d) By failing to ensure that Isiah Gonzales was delivered timely so as to avoid injury
and/or fetal death.

32. As a direct and proximate result of the above breaches in the standard of care by
Defendant, HSIN WANG, M.D., Plaintiff's decedent, Isiah Gonzales, was allowed to suffer a
severe anoxic-ischemic insult while in utero which ultimately took his life.

33. At all times pertinent to the allegations contained in this Complaint the
Defendant, HSIN WANG, M.D., was an agent (ostensible and/or express) or employee of the
Defendant OBSTETRICS AND GYNECOLOGY ASSOCIATE PHYSICIANS, P.C. who, as a
matter of law, are responsible for her acts of professional negligence and malpractice alleged
herein.

COUNT II

34. Plaintiff realleges paragraphs 1 through 33, as if set forth fully herein.

35. The Defendant OBSTETRICS AND GYNECOLOGY ASSOCIATE
PHYSICIANS, P.C., is responsible as matter of law for the professional negligence and/or
malpractice of its owners, employees, and/or agents (ostensible and/or express), including, but not limited to, the Defendant, HSIN WANG, M.D., as described in Count I.

36. As a direct and proximate result of the above breaches the standard of care by Defendant, HSIN WANG, M.D., Plaintiffs’ decedent, Isiah Gonzales, was allowed to suffer a severe anoxic-ischemic insult while in utero which ultimately took his life.

COUNT III
DAMAGES

37. Plaintiffs realleges paragraphs 1 through 36 as if set forth fully herein.

38. This matter is being brought pursuant to the Michigan Wrongful Death Act, MCL 600.2922(3) and MCL 600.2923.

39. Had the above named Defendants complied with the standard of care for obstetrics and gynecology, Plaintiff’s decedent, Isiah Gonzales would have survived thus making his opportunity to survive far greater than 50%.

40. The Estate of Isiah Gonzales suffered damages for the reasonable medical, hospital, funeral, and burial expenses for which it is liable and damages for Isiah Gonzales pain and suffering while conscious between the time of the malpractice and his death.

41. As a direct and proximate result of Defendants' malpractice, as set forth above, which caused Isiah Gonzales death, his surviving kin, as defined in MCL 600.2922 (3), have suffered and will suffer in the future the loss of Plaintiff's decedent's love, society, companionship, affection, services, and support.

WHEREFORE, the Plaintiffs, THE ESTATE OF ISIAH GONZALES, do hereby demand a judgment in excess of Twenty-Five Thousand ($25,000.00) Dollars, together with costs, interest and attorney fees so wrongfully incurred.
Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

[Signature]

BRIAN J. McKEEN (P34123)
J. KELLY CARLEY (P38892)

Attorneys for Plaintiff

645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: May 4, 2016
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative of the Estate of ISIAH GONZALES, deceased, vs. HSIN WANG, M.D., and OBSTETRICS AND GYNECOLOGY ASSOCIATE PHYSICIANS, P.C., Jointly & Severally,

Defendants.

BRIAN J. McKEEN (P34123) J. KELLY CARLEY (P38892) McKEEN & ASSOCIATES, P.C. Attorney for Plaintiff 645 Griswold St., Suite 4200 Detroit, MI 48226 (313) 961-4400

DEMAND FOR JURY TRIAL

NOW COMES Plaintiff, James Gonzales, as Successor Personal Representative of the Estate of Isiah Gonzales, deceased, by and through his attorneys, McKeen & Associates, P.C., and hereby demands a trial by jury in the above entitled cause of action.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

DATED: May 4, 2016
AFFIDAVIT OF MERIT

STATE OF PENNSYLVANIA

COUNTY OF VILLANOVA

I, ROBERT A. DEIN, M.D., being duly sworn, states as follows:

1. I am a duly licensed and practicing physician, board-certified in obstetrics and
gynecology and licensed to practice in the State of Pennsylvania.

2. I have been in practice since 1987 and have evaluated and treated pregnant women
such as Tres-Bien LaVette Gonzales both before and after May 9, 2011.

3. I have reviewed the Notice of Intent sent out in this matter pursuant to MCL
600.2912(b), MSA 27A.2912(2).

4. I have reviewed Tres-Bien LaVette Gonzales records from Obstetrics and Gynecology
Associates Physicians, P.C. and Huron Valley Hospital.

5. The standard of care applicable in this matter is that of a reasonably prudent
obstetrician/gynecologist.

6. It is my opinion that Dr. Hsin Wang and through her, Obstetrics and Gynecology
Associate Physicians, P.C., breached the applicable standard of care for a reasonably prudent
obstetrician/gynecologist in the following ways:

   a) By failing to impress upon Tres-Bien Gonzales the seriousness of the fetal
decelerations on May 9, 2011;

   b) By failing to tell Tres-Bien Gonzales to go directly to the hospital for fetal monitoring
and testing on May 9, 2011:

   c) By failing to recognize the serious nature of the fetal decelerations as seen in
her office on May 9, 2011;


d) By failing to ensure that Isaiah Gonzales was delivered timely so as to avoid injury and/or fetal death.

7. To have complied with the applicable standard of care Dr. Wang should've done the following:

a) Conveyed the seriousness of the fetal decelerations to Tres-Bien Gonzales on May 9, 2011

b) Told Tres-Bien Gonzales to go directly to the hospital for fetal monitoring and testing on May 9, 2011;

c) To have recognized the serious nature of the fetal decelerations as seen in her office on May 9, 2011;

d) To have ensured that Isaiah Gonzales was delivered timely so as to avoid injury and/or fetal death.

8. As the direct and proximate result of Isaiah Gonzales not being properly monitored and timely delivered he died in utero. The decelerations seen at Obstetrics and Gynecology Associate Physicians, P.C. on May 9, 2011 demonstrated fetal distress due to inadequate blood flow and therefore improper oxygenation to the fetus. Isaiah remained in this hostile environment until he became hypoxic and ultimately died due to a lack of oxygen. Had he been properly monitored a timely C-section could of been done which would have delivered him from the hostile environment and allowed him to breath on his own.

9. This affidavit is filed in accordance with MCL 600.2912d; MSA 27A.2912(4).
Subscribed and sworn to before me this 29th day of January, 2016.

Mary E. Vizzard
NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA

NOTARIAL SEAL
MARY E. VIZZARD, Notary Public
Newtown Twp., Delaware County
My Commission Expires September 19, 2017
STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative of the Estate of ISIAH GONZALES, deceased,

Plaintiff,

vs. No. 16-152833-NH

HSIN WANG, M.D., and Hon. Daniel Patrick O'Brien

OBSTETRICS AND GYNECOLOGY ASSOCIATE PHYSICIANS, P.C.,

Jointly & Severally,

Defendants.

BRIAN J. McKEEN (P34123)
J. KELLY CARLEY (P38892)
McKEEN & ASSOCIATES, P.C.
Attorney for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
(313) 961-4400

JENNA WRIGHT GREENMAN (P61481)
LINDSAY E. ROSE (P71130)
Attorneys for Defendants
KITCH DRUTCHAS WAGNER
VALITUTTI & SHEBROOK
One Woodward Avenue, Suite 2400
Detroit, MI 48226
(313) 965-2944 / (313) 965-7403 (Fax)

PLAINTIFF'S ANSWERS TO DEFENDANTS INTERROGATORIES REGARDING WRONGFUL DEATH DAMAGES

NOW COMES the Plaintiffs, JAMES GONZALES, as Personal Representative of the Estate of ISIAH GONZALES, deceased, by and through their attorneys, McKEEN & ASSOCIATES, P.C., and submit the following Answers to Defendants Interrogatories Regarding Wrongful Death Damages:

1. Please state the name, age, address, telephone number, social security number, and driver's license number of each person who may be entitled to damages under the Wrongful Death Act.
ANSWER:

TresBien Gonzales; 39; 258 Lassiegne, Pontiac, MI; (248) 895-2548; xxx-xx-1725

James Gonzales; 43; 258 Lassiegne, Pontiac, MI; (248) 396-0547; xxx-xx-4212

Gabrielle Gonzales; 258 Lassiegne, Pontiac, MI 10; xxx-xx-8807

Joshua Gonzales; 258 Lassiegne, Pontiac, MI; 7; xxx-xx-7812

2. Please identify each person who responded to the statutory notice required by the Wrongful Death Act. See MCL 600.2922(4).

ANSWER:

TresBien Gonzales

James Gonzales

3. Does plaintiff contend that medical, funeral, and burial expenses were incurred as a result of the alleged malpractice outlined and written in plaintiff's complaint?

ANSWER: Yes

4. If your answer to the preceding interrogatory is in the affirmative please state:

a. The amount of the reasonable medical expenses incurred;

b. The amount of the reasonable medical expenses paid, and the identity of the person or entity who paid them;

c. The amount of the reasonable medical expenses reimbursed by insurance or other source and the identity of the insurer or source;
d. The amount of the reasonable funeral expenses incurred;

e. The amount of the reasonable funeral expenses paid, and the identity of the person or entity that paid them;

f. The amount of the reasonable burial expenses incurred; and

g. The amount of the reasonable burial expenses paid, and the identity of the person or entity that paid them.

ANSWER:

a. To the best of Plaintiff's knowledge, Blue Care Network paid the medical bills. Plaintiff will sign authorizations provided by Defendant for the release of relevant information and billing records.

b. To the best of Plaintiff's knowledge, Blue Care Network paid the medical bills. Plaintiff will sign authorizations provided by Defendant for the release of relevant information and billing records.

c. To the best of Plaintiff's knowledge, Blue Care Network paid the medical bills. Plaintiff will sign authorizations provided by Defendant for the release of relevant information and billing records.

d. The funeral was held at Lynch and Sons Funeral Home in Walled Lake. Plaintiff will sign authorizations provided by the Defendant for the release of relevant funeral information and billing records.

e. The funeral was held at Lynch and Sons Funeral Home in Walled Lake. Plaintiff will sign authorizations provided by the Defendant for the release of relevant funeral information and billing records.

f. The funeral was held at Lynch and Sons Funeral Home in Walled Lake. Plaintiff will sign authorizations provided by the Defendant for the release of relevant funeral information and billing records.

g. The funeral was held at Lynch and Sons Funeral Home in Walled Lake. Plaintiff will sign authorizations provided by the Defendant for the release of relevant funeral information and billing records.

5. Please identify and produce all writings, which relate to the expenses referred to in plaintiff's answers to the preceding interrogatory.

ANSWER: See Answer To Interrogatory # 4
6. Does plaintiff contend that the decedent experienced conscious pain and suffering during the period intervening between the time of the injury and death?

ANSWER: Yes.

7. If your answer to the preceding interrogatory is in the affirmative, please:
   a. State the dollar amount that plaintiff contends constitutes reasonable compensation for the decedent's conscious pain and suffering;
   b. Describe the method used to calculate this amount;
   c. Identify and produce all writings, which relate to the damage referred to in this interrogatory.

ANSWER: Plaintiff objects to this interrogatorily as premature. Plaintiff is in the process of calculating such damages.

8. Does plaintiff contend that the persons who may be entitled to damages under the Wrongful Death Act suffered a loss of financial support from the decedent as a result of the occurrence?

ANSWER: No.

9. If your answer to the preceding interrogatory is in the affirmative, for each person please:
a. State the name of the person;
b. State the dollar amount the person claims to have lost;
c. Describe the method used to calculate this amount;
d. State the amount of monthly support the person received from plaintiff's decedent over each of the twelve months prior to the date of death;
e. Describe the source of the legal obligation of plaintiff's decedent to provide financial support to the individual;
f. State each and every fact upon which plaintiff will rely to prove the person had a reasonable expectation of financial support from plaintiff's decedent; and
g. Identify and produce all writings, which relate to damages in this interrogatory.

ANSWER: N/A

10. Does plaintiff contend that the persons who may be entitled to damages under the Wrongful Death Act suffered a loss of society and companionship of the deceased as a result of the occurrence?

ANSWER: Yes

11. If your answer to the preceding interrogatory is in the affirmative, for each person please:
   a. State the name of the person;
   b. State the dollar amount the person claims as damages;
   c. Describe the method used to calculate this amount;
d. Describe the facts upon which plaintiff bases this claim; and

e. Identify and produce all writings, which relate to the damages referred to in this interrogatory.

**ANSWER:** Plaintiff objects to this interrogatory as premature; discovery is ongoing. Plaintiff is in the process of calculating damages, therefore, an exact amount is not available at this time.

12. If your answer to the preceding interrogatory is in the affirmative, for each person, please state:

   a. The name of the person;

   b. The number of contacts during each year; and

   c. The reason for each contact.

**ANSWER:**

   a. TresBien Gonzales
      James Gonzales
      Gabrielle Gonzales
      Joshua Gonzales

   b. Plaintiff and other persons were unable to have contacts with the deceased because he passed in utero.

   c. Not applicable.

13. Is plaintiff seeking reimbursement for any item of damage resulting from the occurrence that has not specifically been inquired about in these interrogatories?
ANSWER: Plaintiff objects to this interrogatory as premature; discovery is ongoing. 

Plaintiff is in the process of calculating damages, therefore, an exact amount is not available at this time.

14. If your answer to the preceding interrogatory is in the affirmative, please:
   a. Describe the item of damage;
   b. State the amount claimed;
   c. State each and every fact upon which plaintiff will rely to prove such damage; and
   d. Identify and produce all writings, which relate to all damages referred to in this interrogatory.

ANSWER: Plaintiff objects to this interrogatory as premature; discovery is ongoing. 

Plaintiff is in the process of calculating damages, therefore, an exact amount is not available at this time.
I declare that the above statements are true to the best of my knowledge and/or belief.

James Gonzales

Subscribed and sworn to before me
this 11th day of January, 2017

JAMES P. ANDERZAK
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES: APR 14, 2017
ACTING IN COUNTY OF
Proof of Service

The undersigned certifies that a copy of the foregoing instrument was served upon all attorneys of record to the above cause of action by:

____ U.S. Mail  _____ FedEx
_____ Facsimile  _____ E-mail

Other: __ Hand Delivery __

on this 11th January of 2017. I declare that the above statements are true to the best of my information, knowledge and belief.

James Anderzak
McKEEN & ASSOCIATES, P.C.
PLAINTIFF'S ANSWERS TO DEFENDANTS INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS (ECONOMIC)

NOW COMES the Plaintiffs, JAMES GONZALES, as Personal Representative of the Estate of ISIAH GONZALES, deceased, by and through their attorneys, McKEEN & ASSOCIATES, P.C., and submit the following Answers to Defendants Interrogatories and Requests for Production of Documents and Things (Economic):
1. As part of the damages claimed under this Complaint, is plaintiff claiming any economic loss?

**ANSWER:** Yes.

2. If your answer to Interrogatory No. 1 is in the affirmative, please state, as specifically and in detail as plaintiff expects to outline at the time of trial, the amount of money being claimed as economic loss, the method used to calculate said amount, and attach any and all documents supporting said amount.

**ANSWER:** Plaintiff objects to this interrogatory as premature; discovery is ongoing. Plaintiff is in the process of calculating all damages, therefore, an amount cannot be disclosed at this time.

3. Does plaintiff anticipate calling an economic expert(s) to testify as to economic loss in this matter?

**ANSWER:** Yes.

4. If your answer to Interrogatory No. 3 is affirmative, please state the following:
   a. The name;
   b. The address;
   c. Educational background; and
   d. Anticipated opinions of all individuals expected to render economic damages-related testimony at the time of trial.
e. Without a motion to produce, please attach all economic reports, articles, literature, charts and/or other documents that you or your expert(s) intend to rely upon for their testimony.

ANSWER:

a. Michel Thomson, PhD.
b. 2350 Franklin Road, Suite 200, Bloomfield Hills, Michigan 48302
c. See Attached
d. Loss of earning capacity pursuant to the State of Michigan Court of Appeals
e. Unknown at this time.

e. What evidence do you intend to introduce at trial in order to establish your claim for economic loss, including all evidence which links the alleged economic loss to the claims of negligence in this matter. (Your ANSWER should either attach those documents upon which you will rely or specifically outline the information and attach it with supplemental answers once it has been received by you or your attorney’s office).

ANSWER: See answer to Interrogatory No. 4 above.

f. Please provide a specific figure you allege is the economic loss associated with the allegations outlined within the plaintiff’s Complaint. (If you are unable to specifically provide a number, please be as accurate as you can at this time, and outline the steps you intend to take in order to calculate a figure at trial).
ANSWER: Plaintiff objects to this interrogatory as premature; discovery is ongoing. Plaintiff is in the process of calculating all damages, therefore, an amount cannot be disclosed at this time.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

BRIAN J. MCKEEN (P34723)
J. KELLY CARLEY (P38892)
Attorneys for Plaintiff
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: January 11, 2017

Proof of Service

The undersigned certifies that a copy of the foregoing instrument was served upon all attorneys of record to the above cause of action by:

U.S. Mail    FedEx
Facsimile    E-mail

Hand Delivery

on this 11th day of January, 2017. I declare that the above statements are true to the best of my information, knowledge and belief.

James Anderzak
McKEEN & ASSOCIATES, P.C.
CURRICULUM VITAE

MICHAEL H. THOMSON, Ph.D.

ADDRESS
Thomson Econometrics and Employment Research
2350 Franklin Road, Suite 200
Bloomfield Hills, Michigan 48302
Phone: (248) 292-0208
Fax: (248) 292-0211

EDUCATION
1976  B.A., Economics, Kalamazoo College
      Major: Economics
1978  M.A., Economics, Michigan State University
1980  Ph.D., Economics, Michigan State University

Dissertation: Least Squares Estimation
               Subject to Inequality Constraints.

Fields: Econometrics
        Labor Economics
        Statistics

ACADEMIC HONORS

Graduate Fellowship, Michigan State University.

The William G. Howard Memorial Prize in Economics
and graduated Cum Laude with Honors in Economics,
Kalamazoo College.

ACADEMIC EXPERIENCE

1980-1987  Assistant Professor of Economics
          Department of Economics
          Wayne State University

1987-1997  Adjunct Assistant Professor of Economics and
          Associate Member of the Graduate Faculty
          Department of Finance and Business Economics
          Wayne State University

Referee:
        Journal of Macroeconomics, Wayne State University.
        The Journal of Econometrics, University of Southern California.
PROFESSIONAL EXPERIENCE

1990-Present  
Partner,  
Thomson Econometrics and Employment Research II

1980-1990  
Sole Proprietor,  
Thomson Econometrics and Employment Research I

Thomson Econometrics and Employment Research is a firm that provides economic and statistical research services to its clients. We also provide computer programming and data processing services. Research has been conducted relative to a broad range of economic and statistical issues, ranging from sophisticated analyses of employment policies and practices (generally regarding discrimination claims), to economic calculations and projections of past and future damages. Damage calculations have included earnings and fringe benefits losses, pension and structured settlement evaluations, lost sales and profits, business valuations, education valuations, medical expenses, losses due to physical injury and/or disability, and other economic losses. We also provide interested parties with a framework which is useful for evaluating "non-economic" damages, such as pain and suffering, losses of society and companionship, and/or hedonic damages.

PROFESSIONAL MEMBER

The American Economic Association  
The American Statistical Association  
The Econometric Society  
The Society of Labor Economists

REFEREED PUBLICATIONS

"A Note on the Comparison of the MSE of ICLS and other Related Estimators",  


"Computational Issues with Inequality Constraints",  
STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative
of the Estate of ISIAH GONZALES, deceased,

Plaintiff,

vs.

No. 16-152833-NH
Hon. Daniel Patrick O’Brien

HSIN WANG, M.D., and
OBSTETRICS AND GYNECOLOGY
ASSOCIATE PHYSICIANS, P.C.,
Jointly & Severally,

Defendants.

BRIAN J. McKEEN (P34123)
J. KELLY CARLEY (P38892)
McKEEN & ASSOCIATES, P.C.
Attorney for Plaintiff
645 Griswold St., Suite 4200
Detroit, MI 48226
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JENNA WRIGHT GREENMAN (P61481)
LINDSAY E. ROSE (P71130)
Attorneys for Defendants
KITCH DRUTCHAS WAGNER
VALITUTTI & SHEBROOK
One Woodward Avenue, Suite 2400
Detroit, MI 48226
(313) 965-2944 / (313) 965-7403 (Fax)

PLAINTIFF’S ANSWERS TO DEFENDANTS INTERROGATORIES
REGARDING LIEN INFORMATION

NOW COMES the Plaintiffs, JAMES GONZALES, as Personal Representative of the
Estate of ISIAH GONZALES, deceased, by and through their attorneys, McKEEN &
ASSOCIATES, P.C., and submit the following Answers to Defendants Interrogatories
Regarding Lien Information:

INTERROGATORIES

1. Has Plaintiff incurred any medical expenses as a result of injuries allegedly
sustained due to the malpractice outlined within the Complaint? If so, please state:
a. A description of the expense;
b. The date on which the expense occurred;
c. The name and address of each physician, clinic, medical facility, etc. that provided the medical services; and
d. The total amount of the expense.

ANSWER:

a. Medical expenses
b. May 2011
c. Beaumont Hospital
d. Plaintiff does not have an exact amount. Plaintiff will sign authorizations provided by Defendant for the release of medical billing information.

2. If your response to Interrogatory number 1 is in the affirmative, is plaintiff a Medicaid or Medicare recipient; have any funds been expended by Medicaid or Medicare on behalf of Plaintiff, in connection with any of the injuries alleged in the Complaint? If so, please state:
   a. Whether plaintiff’s counsel has placed Medicare / Medicaid on notice of this pending liability claim? If so, when?
   b. Whether plaintiff’s counsel requested current lien amounts? If so, when?

ANSWER: No.

3. If your response to Interrogatory number 1 is in the affirmative, have any funds been expended by any medical insurer or insurance company other than Medicaid or Medicare, in connection with any of the injuries alleged in the Complaint?

ANSWER: Blue Care Network
4. If your answers to Interrogatory 2 and/or 3 is/are in the affirmative, please provide an itemized list of the amount claimed by each institution where Plaintiff was a patient/resident, and indicate the medical insurer or insurance company (Medicaid, Medicare, Blue Cross/Blue Shield, etc.) that paid the expense.

**ANSWER:** Beaumont Hospital, Urgent Care, Psychologist; Blue Care Network

5. Have any liens been asserted by a medical insurer or insurance company (Medicare, Medicaid, Blue Cross/Blue Shield, etc.) pertaining to medical expenses incurred as a result of injuries allegedly sustained by plaintiffs due to the alleged malpractice outlined within the Complaint? If so, please state:
   
   a. The identity of each collateral source;
   
   b. When each lien was asserted;
   
   c. Amount of each lien asserted;

**ANSWER:** Upon information and belief, no. Please see attached.

6. If your response to the previous Interrogatory is in the affirmative, have you or your attorney been in contact with representatives from the medical insurer or insurance companies outlined within your response to the previous Interrogatory? If so, please state, for each:
a. When the first contact was made;

b. How many discussions have taken place;

c. When the last discussion took place;

d. The name of the representative and the collateral source

e. Whether plaintiff's counsel has requested and/or received Medicare's conditional payment letter? If so, when and -- what is the conditional payment amount?

f. Whether plaintiff's counsel has requested and/or received Medicare's final demand letter? If so, when -- and what is the final demand amount?

**ANSWER:** Please see attached. Plaintiff will also sign authorizations provided by Defendant for the release of relevant medical, insurance and billing information.

7. If contact has been made with representatives from medical insurers or companies outlined within Interrogatories 2 and 3, have you or your attorney agreed to a dollar amount settlement of the lien? If so, please state:

a. When the agreement was made; and

b. The amount of the settlement.

**ANSWER:** Please see attached. Plaintiff will also sign authorizations provided by Defendant for the release of relevant medical, insurance and billing information.

---

**REQUESTS FOR PRODUCTION**

- 4 -
REQUESTS FOR PRODUCTION

1. With respect to any claimed liens outlined with the previous Interrogatories, please provide any and all documents that support the claimed liens, as well as any documents regarding settlement of the lien; including, but not limited to:

   a. Correspondence between plaintiffs’ counsel and Medicare, placing Medicare on notice of this pending liability claim;

   b. Medicare’s conditional payment letter(s);

   c. Medicare’s final demand letter.

   d. Documentation of the Itemized amount claimed by each institution where plaintiffs were patients/residents, along with the identity of each medical insurer or insurance company (Medicaid, Medicare, Blue Cross/Blue Shield, etc.) that paid the expense.

RESPONSE: Please see attached.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

[Signature]

BRIAN J. MCKEEN (P34123)
J. KELLY CARLEY (P38892)
Attorneys for Plaintiff
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: January 11, 2017
Proof of Service

The undersigned certifies that a copy of the foregoing instrument was served upon all attorneys of record to the above cause of action by:

_____ U.S. Mail  _____ FedEx
_____ Facsimile  _____ E-mail

Other: _____ Hand Delivery

on this 9th of January, 2017. I declare that the above statements are true to the best of my information, knowledge and belief.

[Signature]

James Anderzak
McKEEN & ASSOCIATES, P.C.
October 12, 2016

Med Lien Solutions
PO Box 687
Southfield MI 48037

Enrollee Name: Tresbien Gonzales
Enrollee ID: 890644749 02
Date of Injury: 05/09/2011

Dear Med Lien Solutions:

Thank you for the information regarding Mrs. Gonzales. According to your letter, it appears the damage claimed is for the death of the newborn.

Blue Care Network did pay claims for the delivery of the child; however, we would have had to pay those charges anyway. As such, we do not have a lien in this matter.

If the damages claimed are for something other than the stillborn, please contact me. I can be reached (616) 285-3023.

Sincerely,

Jamie Madaj
Subrogation Analyst
Fax: 866 672 7047
Email: JMadaj@bcbsm.com

/je

File: Have not paid any claims

ATTN: Subrogation MC G901
611 Cascade W Plwy, SE Grand Rapids MI 49546
Order (1) Granting Defendants' Motion For Partial Summary Disposition As To Noneconomic Damages In Excess Of The Lower Cap, And For A Ruling That There Will Be A Setoff, (2) Granting Defendants' Motion For Partial Summary Disposition As To Economic Damages Other Than Damages For Burial Expenses, And As To Damages For Loss Of Society And Companionship, and (3) Granting Defendants' Motion For Summary Disposition As To Any Individual Claim By Naomi Stanford For Failure To State A Claim And/Or As Barred By The Statute Of Limitations
At a session of said Court held in the
Genesee County Courthouse
City of Flint, County of Genesee, State of Michigan

PRESENT: Hon. Judith A. Fullerton
Genesee County Circuit Court Judge

Defendants having brought several motions for partial summary disposition in this
medical malpractice/wrongful death action arising out of the stillbirth of Jeremiah Stanford
following an automobile accident, plaintiffs having filed responses, oral argument having been
held, and the Court having rendered an oral decision at the hearing on November 16, 2015;

NOW THEREFORE, in accord with the Court’s rulings at the hearing held on November
16, 2015;

It is ordered that Defendants’ Motion For Partial Summary Disposition As To
Noneconomic Damages In Excess Of The Lower Cap, And For A Ruling That There Will Be A
Setoff, is granted. Summary disposition is hereby entered dismissing all non-economic damages
claimed by the estate of Jeremiah Stanford in excess of the lower cap on noneconomic damages,
MCL 600.1483, for the reason than none of the three exceptions for application of the higher cap
applies. The Court further holds that a setoff of $50,000, representing settlement of the Estate’s
third party no fault claim, is to be applied against any award of noneconomic damages, after
application of the cap.

It is further ordered that Defendants’ Motion For Partial Summary Disposition As To
Economic Damages Other Than Damages For Burial Expenses, And As To Damages For Loss
Of Society And Companionship, is granted for the reason that such damages are entirely
speculative with respect to a stillborn child. Summary disposition is hereby entered dismissing
all economic damages other than burial expenses, including loss of support, loss of services, loss
of earning capacity, and dismissing all noneconomic damages for loss of society and companionship.

It is further ordered that Defendants' Motion For Summary Disposition As To Any Individual Claim By Naomi Stanford For Failure To State A Claim And/Or As Barred By The Statute Of Limitations is granted. Summary disposition is hereby entered dismissing any individual claim by Naomi Stanford.

Pursuant to MCR 2.602(A)(3), this order does not resolve the last pending claim or close the case.

Dated: 11/25/15

DET02:2126434.1
STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative
of the Estate of
ISIAH GONZALES, Deceased

Plaintiff,
v
HSIN WANG, M.D., and
OBSTETRICS AND GYNECOLOGY
ASSOCIATE PHYSICIANS, P.C.,
Jointly and Severally,

Defendants.

BRIAN J. McKEEN (P34123)
J. KELLY CARLEY (P38892)
Attorneys for Plaintiffs
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Detroit, MI 48226
(313) 96104400
(313) 961-4400

KITCH DRUTCHAS WAGNER
VALITUTTI & SHEBROOK
JEANA WRIGHT GREENMAN (P62481)
LINDSAY E. ROSE (P71130)
SUSAN HEALY ZITTERMAN (P33392)
Attorneys for Defendants
One Woodward Avenue, Suite 2400
Detroit, MI 48226
(313) 965-2944/(313) 965-7403 (fax)

Defendants’ Second Motion For Partial Summary Disposition: As To Noneconomic
Damages In Excess Of The Cap, And As To Loss Of Society And Companionship, Brief In
Support, Exhibit, Notice Of Hearing And Certificate Of Service
NOW COME defendants Hsin Wang, M.D., and Obstetrics and Gynecology Associate Physicians, by and through their counsel, KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK, and for their motion for partial summary disposition as to noneconomic damages in excess of the cap pursuant to MCR 2.116(C)(8) and (10), state as follows:

1. This is a wrongful death action arising out of the death, in utero, and subsequent stillbirth, of Isiah Gonzales, at 39 weeks gestation.

2. Plaintiff alleges that Dr. Wang, an obstetrician gynecologist, breached the standard of practice at a routine prenatal appointment when advising the mother, Tres-Bien Gonzales, that she needed to go to the hospital for further testing after Dr. Wang noted fetal heart rate decelerations, in that she failed to convey the seriousness of the problem and need to go directly to the hospital.

3. Plaintiff alleges that if she had been told to go to the hospital immediately, she would have arrived there sooner, after 4 p.m., rather than at 5:50 p.m., and the baby would have been delivered before death occurred.

4. This Court should hold that a single, lower tier noneconomic damages cap (currently $445,500) applies to this matter, pursuant to MCL 600.1483, because plaintiff has not alleged, and cannot establish, that any cap exception warranting application of the higher tier cap applies; thus summary disposition should be granted to all noneconomic damages in excess of the lower cap.
WHEREFORE, defendants Hsin Wang, M.D., and Obstetrics and Gynecology Associate Physicians, P.C., respectfully request that this Honorable Court grant summary disposition as to noneconomic damages in excess of the lower cap, pursuant to MCR 2.116(C)(8) and (10), and MCL 600.1483.

Respectfully submitted,

KITCH DRUCHAS WAGNER
VALITUTTI & SHERBROOK

By: /s/ Susan Healy Zitterman
JENNA WRIGHT GREENMAN (P61481)
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Dated: April 28, 2017
BRIEF IN SUPPORT OF MOTION

Statement Of Facts

As set forth in defendants’ first motion for summary disposition, this is a medical malpractice action arising out of the death, in utero, and subsequent stillbirth, of Isiah Gonzales, at 39 weeks gestation. Plaintiff alleges that Dr. Wang, an obstetrician gynecologist, breached the standard of practice at a routine prenatal appointment when advising the mother, Tres-Bien Gonzales, that she needed to go to the hospital for further testing after Dr. Wang noted fetal heart rate decelerations, in that she failed to convey the seriousness of the problem and need to go directly to the hospital. Plaintiff alleges that if she had been told to go to the hospital immediately, she would have arrived there sooner, after 4 p.m., rather than at 5:50 p.m., and the baby would have been delivered before death occurred.

By this motion, defendants request that this Honorable Court grant summary disposition as to noneconomic damages in excess of the lower cap, pursuant to MCR 2.116(C)(8) and (10), and MCL 600.1483.

ARGUMENT

This Court Should Hold That The Lower Tier Noneconomic Damages Cap Applies To This Matter, Because Plaintiff Has Not Alleged, And Cannot Establish That Any Cap Exception Warranting Application Of The Higher Tier Cap Applies.

Defendants ask this Court to grant partial summary disposition as to all noneconomic damages in excess of the lower cap set forth in MCL 600.1483. Pursuant to MCL 600.1483, Michigan imposes a cap on the amount of noneconomic damages that all plaintiffs in a medical

1 A summary disposition motion is a proper vehicle by which to raise the issue of the cap. See e.g., Lewis v Krogol, 229 Mich App 483; 582 NW2d 524 (1998) (Addressing the merits of the granting of a motion for summary disposition as to damages in excess of the cap, but holding an issue of fact existed, precluding the grant of summary disposition).
malpractice case can recover against all defendants. This statute sets forth two separate tiers of recovery, providing for a lower-tier and a higher-tier damages cap. MCL 600.1483. The lower-tier cap applies, unless one of the three exceptions listed in §1483 applies to the facts of the case. MCL 600.1483(1).

MCL 600.1483, as applicable to causes of action, such as this, arising before 2013, provides as follows:

(1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate. *** [MCL 600.1483 as applicable to this action.]

Thus, the three exceptions to the lower tier cap are (1) injury to the brain or spinal cord, causing total permanent hemiplegia, paraplegia, or quadriplegia, (2) permanent impairment of cognitive capacity rendering him or her “incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living,” or (3) permanent loss of or damage to a reproductive organ resulting in the inability to procreate.
The cap applies in wrongful death cases. See *Jenkins v Patel*, 471 Mich 158, 173; 684 NW2d 346 (2004), *Young v Nandi*, 276 Mich App 67, 70; 740 NW2d 508 (2007), *vacated in part on other grounds* 482 Mich 1007 (2008). The question of which cap (higher or lower tier) should properly be applied in any given case is a matter for the Court, not a jury, to determine. See *Young v Nandi*, *supra* at 77, MCL 600.6098(1).

To recover damages in excess of the lower cap, it is the plaintiff’s burden to present “persuasive evidence” to support a finding that the plaintiff suffered one of the injuries set forth in one of the three exceptions to the lower cap. *Young, supra*, at 78. The test for application of the lower versus higher tier cap to noneconomic damages in wrongful death cases is whether the personal representative can show that the decedent had a qualifying injury at any time before death as a result of negligence. *Shinholster v Annapolis Hospital*, 471 Mich 540; 685 NW2d 275 (2004), *Young v Nandi*, 276 Mich App 67 (2007). Death itself is not a qualifying injury. *Young v Nandi*, 276 Mich App 67, 80; 740 NW2d 508 (2007).

Plaintiff in this wrongful death action has claimed that there was a breach of the standard of practice in failing to impress upon the mother the urgency of the situation and need to go directly to the hospital at shortly after 4 p.m., on May 9, 2011, and that this caused the death, in utero, of Isiah Gonzales, at 39 weeks gestation, at some point before 5:50 p.m. (Complaint, affidavit of merit, Exhibit B to first motion for summary disposition) Plaintiff’s only expert, Dr. Dein, an obstetrician gynecologist, has indicated in his affidavit of merit that the fetal decelerations seen at Dr. Wang’s office before 4 p.m. “demonstrated fetal distress due to inadequate blood flow and therefore improper oxygenation,” and that the fetus died from a lack of oxygen. Had there been proper monitoring at the hospital, Dr. Dein asserts that a surgical delivery (C-section) could have been done, and the child delivered alive. (Affidavit of merit)
Plaintiff does not allege, and clearly cannot otherwise establish, that the baby here experienced in utero, and before death, any of the three conditions that would support application of the higher cap. The allegations do not suggest that plaintiff will be able to establish the fetus experienced total, permanent “hemiplegia, paraplegia, or quadriplegia” or “permanent loss of or damage to a reproductive organ resulting in the inability to procreate.” MCL 600.1483(1)(a) or (c).

While defendants anticipate plaintiff may belatedly seek to assert the unpled allegation that Isiah Gonzales had “permanently impaired cognitive capacity” rendering him “incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living” under MCL 600.1483(1)(b), this exception cannot apply under these circumstances. This conclusion is compelled by the plain language of the statute setting forth the noneconomic damages cap, MCL 600.1483, the Court of Appeals holding in Young v Nandi, 276 Mich App 67; 740 NW2d 508 (2007), and plaintiff’s own allegations in the complaint.

In Young, the Court of Appeals reversed the trial court’s determination that the higher-tier cap applied, and remanded for imposition of the lower-tier cap. The decedent in that case was on a ventilator and medically sedated before her death as a result of intestinal ischemia. The plaintiff attempted to invoke the exception to the lower-tier cap for a plaintiff who has “permanently impaired cognitive capacity” that renders him or her “incapable of making independent, responsible life decisions” and “permanently incapable of independently performing the activities of normal, daily living.”

The Court in Young looked to dictionary definitions to interpret the terms of the cap exception for “permanently impaired cognitive capacity,” and then concluded that plaintiff had
not presented evidence sufficient to demonstrate that the decedent suffered permanent damage to or diminishment of her mental abilities that met all of the requirements of the statutory exception. The Court held that the fact that the decedent may have “temporarily or unnaturally experienced impaired cognitive capacity at some point before her death” did not establish entitlement to the higher-tier damages cap. *Id.* at 81.

In order to establish applicability of exception for permanently impaired cognitive capacity ((1)(b)), the plaintiff must present evidence to establish that, as a result of the negligence of the defendants, the plaintiff has permanently impaired cognitive capacity that “render[ed] him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living”:

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

The words of the cap statute are to be interpreted according to their ordinary and generally accepted meaning. *Young, supra,* at 79. In order to establish that a case falls within an exception to the lower-tier cap, the Court must determine that every requirement of the applicable exception has been demonstrated by the plaintiff. *Young, supra,* at 80-81.

“[T]o establish this qualifying injury [under the second exception, MCL 600.1483(1)(b),] the plaintiff must suffer damage to or diminishment of his or her mental ability to perceive, memorize, judge, or reason that is permanent ‘rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living,’” and “this permanently impaired cognitive capacity must be ‘the result of the negligence of 1 or more of the defendants . . . .’” *Young* at 80, quoting MCL 600.1483(1)(b).
Plaintiff cannot establish applicability of this exception, for several reasons. First, plaintiff cannot establish that Isiah Gonzales experienced “permanently impaired cognitive capacity” as a result of defendants’ claimed negligence that “render[ed]” plaintiff’s decedent “incapable of making independent, responsible life decisions” or “permanently incapable of performing the activities of normal, daily living” while in utero. Plaintiff’s decedent never was “capable” of making “independent, responsible life decisions” at any time during the period prior to his death, because he was an infant in utero and thus was “incapable” of making “independent, responsible life decisions,” irrespective of any negligence by defendants.

The requirement that the impaired cognitive capacity must have “render[ed]” the plaintiff incapable of making decisions or performing activities exists in order that the plaintiff can be compensated for having “lost” that capability. It is measured by the loss of that capability; and in death cases, is measured by whether that capability was lost at any time prior to death. Here, because the decedent was a stillborn infant, the alleged malpractice did not “render” him incapable of making independent, responsible life decisions at any time prior to his death.

Second, the plaintiff will be unable to provide evidence of “permanently impaired cognitive capacity” or that plaintiff is “permanently incapable of making independent, responsible life decisions.” See Young, supra (mere fact that decedent was on a ventilator before death did not establish that the decedent had permanent damage to her mental abilities, or that the ventilator state was not simply a “cognitive decline” prior to death).

In the matter of Estate of Jeremiah Stanford v Board Of Hospital Managers For The City Of Flint, Docket No 14-103152, a medical malpractice action arising out of a stillbirth, the Genesee County Circuit Court recently granted the defendants motion for partial summary disposition dismissing all non-economic damages claimed by the Estate of Jeremiah Stanford in
excess if the lower cap on noneconomic damages, “for the reason that none of the three exceptions for application of the higher cap applies.” (Exhibit F to defendants’ first motion for partial summary disposition)

In *Estate of Brookshire v Stier*, unpublished opinion per curiam of the Court of Appeals, issued Mar 24, 2011 (Docket Nos 291186, 292991) (Exhibit A), the Court applied *Young v Nandi* to hold that the lower cap applied where the decedent developed DIC (disseminated intravascular coagulation) and related bleeding before her death that, based on plaintiff’s evidence, was a consequence of untreated lymphoma. While there was evidence that the decedent had impaired cognitive capacity that resulted from the bleeding, and lost the ability to communicate before her death, the only evidence that the impairment became permanent was the evidence that the decedent died. The Court reasoned:

Neither Dr. Singer’s speculation that it “could” have become permanent, nor Dr. Cassin’s testimony regarding how a person in cardiopulmonary arrest progresses towards death when the resuscitative process is unsuccessful establishes the required permanent impaired cognitive capacity. Because the qualifying injury must occur before death (regardless of when death might be formally declared by a doctor) and permanency is part of the qualifying injury, the trial court erred in imposing the higher cap. [*Estate of Brookshire v Stier*, unpublished opinion per curiam of the Court of Appeals, issued Mar 24, 2011 (Docket Nos 291186, 292991)].

Similarly, in *Estate of Needham v Mercy Mem'l Nursing Ctr*, unpublished opinion per curiam of the Court of Appeals, issued Oct 3, 2013 (Docket Nos 303999, 304832) (Exhibit A), the Court, applying the reasoning of the *Young* Court, held that the trial court erred in applying the upper tier cap. There, the evidence showed brain damage, but not of the specific nature to which the higher tier exception applies:

[T]here is no evidence that Needham suffered permanent damage or diminishment of his mental ability to perceive, memorize, judge, or reason that rendered him incapable of making independent, responsible life decisions and independently performing the activities of normal, daily living. Rather, while the evidence
revealed that Needham suffered a brain injury (the loss of brain cells from low blood pressure) and unconsciousness shortly before his death, there was no evidence establishing that had Needham lived, his mental diminishment would have been permanent, and he would not have been able to make independent, responsible life decisions or perform the activities of normal, daily living. [Estate of Needham v Mercy Mem'l Nursing Ctr, Unpublished opinion per curiam of the Court of Appeals, issued Oct 3, 2013 (Docket Nos 303999, 304832) (emphasis added)]

Application of these decisions to the allegations here compels the conclusion that plaintiff cannot meet his burden of establishing that Isiah Gonzales experienced permanent brain damage that specifically rendered him permanently incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living. Rather, the allegations could establish only a “clinical decline and the associated or necessary medical interventions,” Young, supra.

Accordingly, plaintiff’s decedent not having a qualifying injury that would trigger an exception to the lower cap, a single lower cap should be applied by the Court to any award of noneconomic damages in this matter.
WHEREFORE, defendants Hsin Wang, M.D., and Obstetrics and Gynecology Associate Physicians, P.C., respectfully request that this Honorable Court grant summary disposition as to noneconomic damages in excess of the lower cap, pursuant to MCR 2.116(C)(8) and (10), and MCL 600.1483.

Respectfully submitted,

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

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Dated: April 28, 2017
STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative
of the Estate of
ISIAH GONZALES, Deceased

Plaintiff,

v

HSIN WANG, M.D., and
OBSTETRICS AND GYNECOLOGY
ASSOCIATE PHYSICIANS, P.C.,
Jointly and Severally,

Defendants.

NOTICE OF HEARING

TO: All Counsel of record

PLEASE TAKE NOTICE that the attached DEFENDANTS' SECOND MOTION FOR
PARTIAL SUMMARY DISPOSITION: AS TO NONECONOMIC DAMAGES IN
EXCESS OF THE CAP, AND AS TO LOSS OF SOCIETY AND COMPANIONSHIP will
be brought on for hearing before the Honorable Daniel Patrick O'Brien on a date to be
determined by the Court, or as soon thereafter as counsel may be heard.

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

By: /s/ Susan Healy Zitterman
JENNA WRIGHT GREENMAN (P61481)
LINDSAY E. ROSE (71130)
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Dated: April 28, 2017
STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES GONZALES, as Personal Representative
of the Estate of
ISIAH GONZALES, Deceased

Plaintiff,

v

HSIN WANG, M.D., and
OBSTETRICS AND GYNECOLOGY
ASSOCIATE PHYSICIANS, P.C.,
Jointly and Severally,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, I electronically filed the foregoing
DEFENDANTS MOTION FOR PARTIAL SUMMARY DISPOSITION: AS TO
NONECONOMIC DAMAGES IN EXCESS OF THE CAP, AND AS TO LOSS OF
SOCIETY AND COMPANIONSHIP, BRIEF IN SUPPORT OF MOTION, EXHIBIT,
NOTICE OF HEARING AND CERTIFICATE OF SERVICE with the Clerk of the Court
using the ECF system which will send notification of same to the attorneys of record.

/s/ Doris G. Jones
Doris G. Jones, Secretary to
Susan Healy Zitterman
STATE OF MICHIGAN
COURT OF APPEALS

Estate of JEANETTE BROOKSHIRE, by its Personal Representative, RANDALL D. BROOKSHIRE,

Plaintiff-Appellee,

v

NANCYLEE STIER, M.D., and ANN ARBOR INPATIENT PHYSICIANS, P.L.L.C.,

Defendants-Appellants,

and

BHARTIBEN PATEL, M.D., PATEL INTERNAL MEDICINE ASSOCIATES, P.C., KELLY MANDAGERE, M.D., ANN ARBOR ENDOCRINOLOGY AND DIABETES ASSOCIATES, P.C., ROBERT URBANIC, M.D., TRINITY HEALTH-MICHIGAN, d/b/a ST. JOSEPH MERCY HOSPITAL, t/a MERCY HEALTH SERVICES,

Defendants.

Estate of JEANETTE BROOKSHIRE, by its Personal Representative, JEFFREY BROOKSHIRE,

Plaintiff-Appellee,

v

BHARTIBEN PATEL, M.D., PATEL INTERNAL MEDICINE ASSOCIATES, P.C., KELLY MANDAGERE, M.D., and ANN ARBOR ENDOCRINOLOGY AND DIABETES ASSOCIATES, P.C.,

Defendants.

UNPUBLISHED
March 24, 2011
No. 291186
Washtenaw Circuit Court
LC No. 03-000731-NH

No. 292991
Washtenaw Circuit Court
LC No. 03-000731-NH
Defendants - Appellants,

and

NANCYLEE STIER, M.D., ANN ARBOR
INPATIENT PHYSICIANS, P.L.L.C., ROBERT
URBANIC, M.D., and TRINITY HEALTH
MICHIGAN, d/b/a ST. JOSEPH MERCY
HOSPITAL, f/k/a MERCY HEALTH SERVICES,

Defendants.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

In Docket No. 291186, defendants Nancylee Stier, M.D., and Ann Arbor Inpatient Physicians, P.L.L.C. (hereafter referred to individually by name or collectively as the "Stier defendants"), appeal as of right from a judgment, following a jury trial, awarding plaintiff $620,000 in this wrongful death medical malpractice action.\(^1\) A judgment of no cause of action was entered in favor of four other defendants, Bhartiben Patel, M.D., Patel Internal Medicine Associates, P.C., Kelly Mandagere, M.D., and Ann Arbor Endocrinology and Diabetics Associates, P.C. (hereafter referred to individually by name or collectively as the "Patel and Mandagere defendants"). In Docket No. 292991, the Patel and Mandagere defendants appeal as of right from the trial court's order denying their motion for taxable costs. We affirm in part, reverse in part, and remand for further proceedings in Docket No. 291186, and we reverse and remand for further proceedings in Docket No. 292991.\(^2\)

\(^1\) The jury awarded damages of $650,000, but the trial court reduced the jury's verdict by $30,000 to reflect a set off for plaintiff's settlements with two other defendants, Robert Urbanic, M.D., and Trinity Health-Michigan, d/b/a St. Joseph Mercy Hospital, f/k/a Mercy Health Services.

\(^2\) In a prior appeal, this Court upheld the trial court's denial of defendants' motions for summary disposition based on the statute of limitations, Brookshire v Patel, unpublished opinion per curiam of the Court of Appeals issued March 15, 2007 (Docket Nos. 257214; 257629). However, our Supreme Court subsequently reversed this Court's decision, reinstated the trial court's order denying defendants' motions, and "remanded the case for further proceedings not inconsistent with this order and the order in Mullins [v St Joseph Mercy Hosp, 480 Mich 948; 741 NW2d 300 (2007)]." Brookshire v Patel, 480 Mich 980; 741 NW2d 842 (2007).
I. BACKGROUND

On October 16, 2000, the decedent, Jeanette Brookshire, died from complications from a form of lymphoma, which generally involves cancer of the lymph node system. The decedent’s primary care physician in 2000 was Dr. Patel, an internal medicine physician, but she was also referred to Dr. Mandagere, an endocrinologist, for evaluations. Blood testing in 2000 showed that the decedent was anemic. Both a CT scan in May 2000 and an MRI (magnetic resonance imaging) in June 2000 showed an abnormality in the adrenal glands, but the cause was not determined.

On October 5, 2000, the decedent’s husband took the decedent to Saline Community Hospital, where she was admitted for a brief period of time and evaluated by Dr. Mary O’Rourke. The decedent was extremely dehydrated and had other symptoms indicative of an adrenal crisis. According to hospital records, Dr. O’Rourke was concerned that the decedent could have a malignancy, such as aggressive lymphoma or a hepatic malignancy. Later on October 5, the decedent was transferred to St. Joseph Mercy Hospital. Dr. Stier, an internal medicine physician, was the decedent’s treating physician at St. Joseph Hospital until the decedent’s discharge on October 10, 2000, but Dr. Stier also consulted other physicians. The decedent was given a blood transfusion to address low blood counts and fluids to address dehydration. The decedent also received steroids to address her adrenal insufficiency, but no biopsies or other diagnostic tests for cancer were ordered. When the decedent was discharged from the hospital, Dr. Stier gave her a prescription for steroids, but at a lower level than when she was first hospitalized, and directed her to schedule a CT scan. The decedent was also given a “prescription” to get a biopsy.

On October 13, 2000, after collapsing at home, the decedent was again admitted at St. Joseph Mercy Hospital. She had bleeding in her abdominal cavity and died on October 16, 2000. Dr. Badin Cassin, the Washtenaw County Medical Examiner, performed an autopsy of the decedent and took tissue biopsies. He concluded that the decedent suffered from non-Hodgkin’s lymphoma, and that the lymphocyte cell type was probably a B-cell. In addition to the lymph nodes, tumors had infiltrated her heart, lungs, liver, spleen, and possibly other organs and the small intestine.

II. DOCKET NO. 291186

The Stier defendants first challenge the trial court’s denial of their motion for judgment notwithstanding the verdict (“JNOV”). The Stier defendants argue that plaintiff’s malpractice action should be treated as a lost opportunity to survive action under MCL 600.2912a(2), but that even if it is treated as a traditional negligence action, plaintiff failed to prove that Dr. Stier’s alleged negligence was a proximate cause of the decedent’s injuries that resulted in her death.

A motion for JNOV, like a motion for a directed verdict, essentially challenges the sufficiency of the evidence in a civil case. Taylor v Kent Radiology, PC, 286 Mich App 490, 499; 780 NW2d 900 (2009). This Court reviews a trial court’s denial of a motion for JNOV de novo, examining the evidence and all legitimate inferences in a light most favorable to the nonmoving party. Id. “If reasonable persons, after reviewing the evidence in a light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury.” Id. at 500.
We first address the Stier defendants' claim that this case should be treated as a lost-opportunity claim. MCL 600.2912a(2) provides:

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

In O'Neal v St John Hosp & Med Ctr, 487 Mich 485; 853 NW2d 2010, our Supreme Court addressed the burden of proof necessary to establish proximate causation under the first sentence in MCL 600.2912a(2). Justice Hathaway, with the concurrence of Justice Weaver, determined that the first sentence of MCL 600.2912a(2) reiterates the traditional rule for proximate causation. *Id.*, slip op at 8-9, 11 (opinion of HATHAWAY, J.). As such, the plaintiff must show both that the negligent conduct was a cause in fact of the injury and legal causation. *Id.* at 9. The alleged conduct must be “a proximate cause,” not “the proximate cause” of the injury. *Id.* at 10. Justice Hathaway determined that this Court's prior decision in Fulton v William Beaumont Hosp, 253 Mich App 70; 655 NW2d 569 (2002), should be overruled to the extent that it applied the second sentence in MCL 600.2912a(2) to a traditional malpractice claim. *Id.* at 11-12, 19. Justice Cavanagh, joined by Chief Justice Kelly, concurred in the result, stating:

I agree with the majority that the Court of Appeals' judgment in this case should be reversed because the Court erred by treating this case as a loss-of-opportunity case instead of a traditional medical malpractice case and, as a result, erred by requiring plaintiff to meet the requirements in the second sentence of MCL 600.2912a(2). I further agree that Fulton v William Beaumont Hosp, 253 Mich App 70; 655 NW2d 569 (2002), should be overruled to the extent that courts have relied on it to improperly transform what could be traditional medical malpractice claims into loss-of-opportunity claims. *Id.*, slip op at 1 (CAVANAGH, J., concurring).

Plurality opinions in which no majority of the justices agree on the reasoning are not an authoritative interpretation or binding on courts under the rule of stare decisis. Negri v Slotkin, 397 Mich 105, 109; 244 NW2d 98 (1976); Lanigan v Huron Valley Hosp, Inc, 282 Mich App 558, 567; 766 NW2d 896 (2009). But because a majority of the justices in O'Neal agreed that a plaintiff may pursue a traditional malpractice claim, separate and distinct from a lost-opportunity claim, we reject the Stier defendants' argument that plaintiff's claim against Dr. Stier should be treated as a lost-opportunity claim. Although the record shows that plaintiff was unable to avoid a jury instruction that precluded recovery for a “loss of opportunity to survive unless the plaintiff proves that the decedent’s chance of survival fell more than fifty percentage points as a result of the professional negligence,” because plaintiff did not plead a lost-opportunity claim in her
complaint or attempt to present such a claim at trial, we conclude that the lost-opportunity provision in MCL 600.2912a(2) does not apply. 3 Taylor, 286 Mich App at 509-510.

We now turn to the Stier defendants' challenge to the sufficiency of the evidence regarding proximate causation. We disagree with the Stier defendants' argument that the alleged professional negligence must be viewed solely as Dr. Stier's failure to order an adrenal biopsy on October 10, 2000. Although failure to order an adrenal biopsy was part of the professional negligence identified by plaintiff's standard-of-care expert, Dr. Steven Fugaro, Dr. Fugaro also opined that Dr. Stier did not adequately stabilize the decedent and that diagnostic testing, including repeat scans and adrenal and bone marrow biopsies, should have been performed before the decedent's discharge from the hospital and pursued as a matter of urgency. Dr. Fugaro opined that the decedent's high LDH (lactate dehydrogenase) enzyme level, which is often elevated in individuals suffering from lymphoma, would have suggested to any internal medicine physician that there was a need to act quickly to make a diagnosis and that Dr. Stier had the "overall responsibility as the responsible and coordinating attending physician to get these tests done and to make that diagnosis which would have been very easy in those five days." He opined that, while there was evidence that Dr. Stier deferred to a hematologist, Dr. Andrew Eisenberg, in deciding not to request a bone marrow biopsy, "this is a clear example of where you have to say to your consultant you know I'm sorry I want you to do a bone marrow biopsy."

Other witnesses, including plaintiff's causation expert, Dr. Barry Singer, indicated that physicians have the authority to request biopsy results on a "stat" or urgent basis, rather than waiting the normal period for the results. And while Dr. Stier testified that she could not order a bone marrow biopsy, she also testified that she never requested one from Dr. Eisenberg. Further, she testified that she notified her partner, Dr. Perrotta, that she had a patient who might need a bone marrow biopsy, but that she never called on him to do a biopsy based on Dr. Eisenberg's recommendation.

Viewing the evidence in a light most favorable to plaintiff, reasonable persons could find that Dr. Stier, acting with the urgency demanded by the decedent's condition, had the ability to make the lymphoma diagnosis during the decedent's five-day hospital stay. Viewing the Stier defendants' challenge to the sufficiency of evidence regarding causation in this context, we are not persuaded that the trial court erred in denying the motion for JNOV. The cause-in-fact aspect of proximate causation generally requires "substantial evidence from which a jury may conclude that it is more likely than not that, but for the defendant's conduct, the plaintiff's injury would not have occurred." Genna v Jackson, 286 Mich App 413, 418; 781 NW2d 124 (2009).

Plaintiff's causation expert, Dr. Singer, opined at trial that the decedent would be considered a "stage four" patient because she had widespread lymphoma, but that this did not change the prognosis for her in terms of responding to chemotherapy treatment referred to as

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3 At oral arguments in this matter, defense counsel for the Stier defendants recognized that the failure to plead a lost-opportunity cause of action precludes consideration of such a claim. Defense counsel stipulated that a lost opportunity cause of action was not pleaded.
"CHOP." Dr. Singer repeatedly expressed his prognosis for the decedent, with treatment, using a 70 percent overall cure rate, meaning that a person would live for five years without a reoccurrence, or "if they have a recurrence within those five years at the end of the five years, they don't have disease." He gave weight to the decedent's response to steroids that were used to treat her adrenal insufficiency and, in particular, the effect on the decedent's LDH level, to support his opinion that the decedent would fall within the 70 percent cure rate if her treatment began before she suffered a terminal event involving a massive increase in the lymphoma and related complicated. For instance, he testified:

Q. Had she been diagnosed and treated by the time of at least her discharge on October the 10th because we know that's when she was sent home, her outcome?

A. Assuming she wasn't discharged but diagnosed and treated during that time and continued on the steroids and given CHOP again cure at seventy percent.

Q. And the implementation of that treatment could have occurred beyond October the 10th had she been supported at the hospital?

A. On [sic] sure. Because she was doing – again she was doing reasonably well. The falling of the LDH you know that lymphoma is responding to one of the four drugs that we normally use to treat it. So in my mind there would be no question that she, she was responding already to what we call partial chemotherapy.

Even Dr. Samuel Silver, a hematologist and oncologist who was called as an expert witness by the Mandagere defendants, testified that most people with large B-cell non-Hodgkin's lymphoma respond to treatment in some fashion, although, like Dr. Singer, he indicated that the decedent had an explosive growth of her lymphoma before she died.

Although we note that our Supreme Court recently upheld a trial court's exclusion of Dr. Singer's expert testimony in a case involving a plaintiff suffering from sickle cell anemia, on the ground that it did not satisfy the reliability standards for MRE 702, see Edry v Aldelman, 486 Mich 634; 786 NW2d 567 (2010), the Stier defendants in this case have not shown, let alone argued, that they timely moved to exclude Dr. Singer's testimony. The Stier defendants only argue that Dr. Singer gave unreliable expert testimony to support their claim that the trial court erred in denying their motion for JNOV.

As part of the trial court's gate keeping function with respect to the admissibility of expert testimony under MRE 702, a trial court has the obligation to ensure that every aspect of an expert's testimony is reliable before admitting the testimony. Gilbert v DaimlerChrysler Corp, 470 Mich 749, 779-782; 685 NW2d 391 (2004). The proponent of expert testimony in a medical malpractice case must also establish that the expert is qualified under MCL 600.2955 and MCL 600.2169. See Clerc v Chippewa Co War Mem Hosp, 477 Mich 1067; 729 NW2d 221 (2007). An evidentiary hearing is an appropriate means for a trial court to filter out unreliable expert testimony. Chapin v A L Parts, Inc, 274 Mich App 122, 139; 732 NW2d 578 (2007).
But to properly preserve an evidentiary issue, a party must timely object or move to strike the evidence, stating the specific ground for objection. MRE 103(a)(1). However, a court may take notice of plain evidentiary errors affecting substantial rights. MRE 103(d). In general, this Court "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

Because the Stier defendants have not shown that they properly and timely preserved a challenge to the admissibility of Dr. Singer’s testimony, we review their present challenge to the reliability of the testimony for plain error. MRE 103(d). Considering that plaintiff was never given an opportunity at an evidentiary hearing to demonstrate the reliability of Dr. Singer’s opinion through literature or other means, we conclude that no plain error has been shown. Viewing Dr. Singer’s testimony and the other proofs in a light most favorable to plaintiff, the Stier defendants were not entitled to JNOV. Reasonable persons could honestly reach different conclusion as to whether Dr. Stier’s professional negligence was a proximate cause of the terminal event suffered by the decedent, which led to her death. *Taylor*, 286 Mich App at 500. Stated otherwise, plaintiff proved that Dr. Stier’s negligence more probably than not was the cause the decedent’s injury. *O’Neal*, slip op at 20 (opinion of JUSTICE HATHAWAY).

The Stier defendants next argue that the trial court erred by not reducing the jury’s verdict to the lower cap for damages in MCL 600.1483. We agree.

Under MCL 600.6098(1), the trial court was required to set aside any noneconomic damages in excess of the amount specified in MCL 600.1483. In applying the latter statute, a court applies the statutory cap, if at all, at the time the judgment is entered. *Dawe v Dr Reuvan Bar-Levav & Assoc, PC (On Remand)*, ___ Mich App ___, ___ NW2d ___ (Docket No. 269147, issued August 12, 2010), slip op at 15; *Velez v Tuma*, 283 Mich App 396, 401; 770 NW2d 89 (2009). The trial court, not the jury, serves as the finder of fact in determining whether the unique damages necessary to apply the higher cap exist. *Shivers v Schmiege*, 285 Mich App 636, 646; 776 NW2d 669 (2009).

To justify application of the higher cap in this case, it was necessary that the decedent have “permanently impaired cognitive capacity rendering . . . her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.” MCL 600.1483(1)(b). Death itself is not a qualifying injury. *Young v Nandi*, 276 Mich App 67, 80; 740 NW2d 508 (2007), vacated in part on other grounds 482 Mich 1007 (2008). “[T]o establish this qualifying injury the plaintiff must suffer damage to or diminishment of his or her mental ability to perceive, memorize, judge, or reason that is permanent ‘rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.’” and “this permanently impaired cognitive capacity must be ‘the result of the negligence of 1 or more of the defendants . . . .’” *Id.* at 80, quoting MCL 600.1483(1)(b).

In *Young*, 276 Mich App at 80-81, this Court rejected the notion that impairments suffered by an individual in the course of his or her decline to death can satisfy the statute, at least in these circumstances where there is no evidence to suggest that the individual would have suffered the impairment if he of she had lived. The decedent in *Young* died because she was not
properly diagnosed and treated for intestinal ischemia. *Id.* at 70. In remanding the case for imposition of the lower cap for noneconomic damages, this Court stated:

Plaintiff argues on appeal that because Young was on a ventilator and medically sedated, she suffered the requisite impaired cognitive capacity. Plaintiff also appears to argue that, during the course of her decline, Young was not able to make medical decisions on her own behalf, which was evidence of her impaired cognitive capacity. Neither of these arguments tends to establish that Young suffered permanently impaired cognitive capacity within the contemplation of the statute. But for her clinical decline and the associated or necessary medical interventions, the evidence did not suggest that Young suffered damage to or diminishment of her mental ability to perceive, memorize, judge, or reason that was expected to be permanent. For example, there was no evidence to suggest that, if Young had lived, she would have been incapable of making independent, responsible life decisions and that she would have been permanently incapable of performing the activities of normal, daily living. That she may have temporarily or unnaturally experienced impaired cognitive capacity at some point before her death does not establish entitlement to the higher noneconomic damages cap. Therefore, we reverse the trial court’s award that was based on this higher cap and remand the matter for the purpose of imposing the lower cap on the noneconomic damage award pursuant to MCL 600.1483(1). [*Young, 276 Mich App* at 80-81.]

Here, the qualifying injury claimed by plaintiff was the decedent’s development of DIC (disseminated intravascular coagulation) and related bleeding before her death that, based on plaintiff’s evidence, was a consequence of the untreated lymphoma. Although the trial court failed to make any specific findings to support its application of the higher cap, we agree with the Stier defendants’ argument that the evidence did not support the higher cap. Clearly, there was evidence that the decedent had impaired cognitive capacity that resulted from the bleeding. Dr. Cassin opined that even persons with “grossly normal brains” can have impaired functioning. Both Dr. Cassin and Dr. Singer testified that a person’s cognitive functioning would be affected by a lack of blood flow to the brain. Further, there was testimony by lay witnesses that the decedent lost the ability to communicate before her death.

But the only evidence that the impairment became permanent is the evidence that the decedent died. The evidence indicated that the decedent went into cardiopulmonary arrest before she died. Dr. Cassin testified that a resuscitative process is clinically applied to a person who is in arrest and, if the process is unsuccessful, the person is pronounced dead. He did not recall finding any evidence of a brain injury when performing the autopsy. Dr. Singer was specifically asked to address the bleeding sustained by the decedent in the context of the statutory requirement of a permanent injury, but indicated only that it “very well could” have rendered her permanently impaired from making responsible life decisions before her death.

The most that can be said from the evidence is that the decedent had an impaired cognitive capacity before her death. Neither Dr. Singer’s speculation that it “could” have become permanent, nor Dr. Cassin’s testimony regarding how a person in cardiopulmonary arrest progresses towards death when the resuscitative process is unsuccessful establishes the required permanent impaired cognitive capacity. Because the qualifying injury must occur before death (regardless of when death might be formally declared by a doctor) and permanency
is part of the qualifying injury, the trial court erred in imposing the higher cap. Therefore, we reverse the award based on the higher cap and remand this case to the trial court for imposition of the lower cap for noneconomic damages under MCL 600.1483(1).

The Stier defendants next seek a new trial on the basis of two irregularities that allegedly deprived them of a fair trial. Given the Stier defendants’ reliance on MCR 2.611(A) in their argument, we consider this claim as a challenge to the trial court’s denial of their motion for a new trial.

A trial court’s grant or denial of a motion for a new trial under MCR 2.611(A) is reviewed for an abuse of discretion. Gilbert, 470 Mich at 761. “An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.” Barnett v Hidalgo, 478 Mich 151, 158; 732 NW2d 472 (2007). Because the trial court relied on prior rulings to matters raised by the Stier defendants as the basis for its decision to deny the motion for a new trial, it is necessary to consider the trial court’s prior rulings. Examined in this context, the Stier defendants have not established any basis for disturbing the trial court’s denial of their motion for a new trial based on the alleged improper jury instruction and plaintiff’s notice of intent to file a claim (“NOI”).

The trial court gave a jury instruction that explained the delay in this case attributable to the prior appeal and the stay that was in place during the appeal process. A trial court’s instructions on matters not governed by model instructions must be unslanted. MCR 2.516(D)(4). Even where instructions are somewhat imperfect, however, “instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury.” Case v Consumers Power Co, 463 Mich 1, 6; 615 NW2d 17 (2000). Instructional error warrants reversal if it is so unfairly prejudicial to the objecting party that the failure to vacate the verdict would be inconsistent with substantial justice. Ward v Consol Rail Corp, 472 Mich 77, 84; 693 NW2d 366 (2005); see also MCR 2.613(A), and Jimkoski v Shupe, 282 Mich App 1, 9; 763 NW2d 1 (2008).

The record discloses that the jury instruction was prompted by remarks made by attorneys during trial concerning the delay in bringing this case to trial. The Stier defendants have failed to show that the instruction was an unfair response to the remarks. Contrary to what the Stier defendants assert, the instruction does not suggest that any defendant was playing games or pushed a nonmeritorious position during the prior appeal proceedings. Further, considering that the jury found that Drs. Patel and Mandagere were not negligent, it is apparent that the instruction did not improperly influence the jury against the defendants. Dr. Stier cannot show prejudice. There is no basis for disturbing the trial court’s denial of a new trial on this ground.

With respect to the Stier defendants’ claim based on the NOI that plaintiff provided before filing the malpractice action pursuant to MCL 600.2912b, we note that any defect or error in the NOI is subject to MCL 600.2301, which provides that “[t]he court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.” See DeCosta v Gossage, 486 Mich 116, 124; 782 NW2d 734 (2010), and Bush v Shabahang, 484 Mich 156, 177; 772 NW2d 272 (2009). Although the Stier defendants argue on appeal that they were surprised by plaintiff’s presentation of liability theories that allegedly were not identified in the NOI, they have not identified any specific
objection on this basis at trial or provided any supporting citations to the record. “A party may
not leave it to this Court to search for the factual basis to sustain or reject its position, but must
support its position with specific references to the record.” Begin v Michigan Bell Tel Co, 284
Mich App 581, 590; 773 NW2d 271 (2009); see also MCR 7.212(C)(7). Therefore, we consider
this issue abandoned and decline to consider it further. Id. The Stier defendants have not
substantiated their position that the trial court should have ordered a new trial on this ground.

Finally, the Stier defendants challenge the amount of taxable costs and case evaluation
sanctions under MCR 2.403, which the trial court awarded following the entry of the judgment.
We conclude that this Court lacks jurisdiction to consider this issue.

“The question of jurisdiction is always within the scope of this Court’s review . . . .” Walsh v Taylor, 263 Mich App 618, 622; 689 NW2d 506 (2004). This Court has jurisdiction of an appeal as of right filed by an aggrieved party
from a “final judgment or final order . . . .” MCR 7.203(A)(1). MCR 7.202(6)(a)(I) and (iv) defines “final judgment” or “final order” in a civil case as
“the first judgment or order that disposes of all the claims and adjudicates the
rights and liabilities of all the parties,” or “a post-judgment order awarding
or denying attorney fees and costs . . . .” An appeal as of right must be filed within
“21 days after entry of the judgment or order appealed from[,]” MCR
7.204(A)(1)(a). The filing of the claim of appeal and the entry fee vests this
Court with jurisdiction in an appeal as of right. MCR 7.204(B)(1) and (2).
[Mcintosh v Mcintosh, 282 Mich App 471, 483-484; 768 NW2d 325 (2009).]

The first judgment that disposed of all of plaintiff’s malpractice claims was entered on
December 17, 2008. The Stier defendants timely filed a postjudgment motion for JNOV or a
new trial, which thereby allowed them to wait until after the trial court decided the motion before
filing a claim of appeal. MCR 7.204(1)(b). The postjudgment motion was decided on March 6,
2009, but the March 6 order was not itself the final judgment; it merely extended the time in
which plaintiff could file a claim of appeal from the December 17, 2008, final judgment. More
importantly, the separate March 6, 2009, order awarding plaintiff costs and case evaluation
sanctions was a postjudgment order from which the Stier defendants were required to file a
separate appeal. Mcintosh, 282 Mich App at 484; see also John J Fannon Co v Fannon Prod,
LLC, 269 Mich App 162, 165-166; 712 NW2d 731 (2005) (to constitute an appealable final
order, the amount of attorney fees and costs to be awarded must be determined). Because the
Stier defendants failed to file a separate claim of appeal from the March 6, 2009, order awarding
attorney fees and costs, this Court lacks jurisdiction to consider the Stier defendants’ challenge to
that order.

III. DOCKET NO. 292991

The Patel and Mandagere defendants challenge the trial court’s June 22, 2009, order
denying their motion for taxable costs under MCR 2.625. They argue that the trial court
erroneously relied on the case evaluation rule, MCR 2.403(O), to conclude that taxable costs
could not be awarded under MCR 2.625. We agree.

We review a trial court’s interpretation and application of a court rule de novo as a
question of law, applying principles of statutory construction. Henry v Dow Chem Co, 484 Mich
483, 495; 772 NW2d 301 (2009). “The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole.” *Haliv v City of Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005). In determining the meaning of a court rule, a court begins with the plain language of the court rule. **In re KH**, 469 Mich 621, 628; 777 NW2d 800 (2004). An unambiguous rule must be applied as written. *Id.* at 628; see also *Peterson v Fertel*, 283 Mich App 232, 236; 770 NW2d 47 (2009). A provision is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39-40; 761 NW2d 269 (2008).

MCR 2.403 and MCR 2.625 both provide a potential means for a party to recover taxable costs, but they are subject to different procedural requirements. *Badiee v Brighton Area Sch*, 265 Mich App 343, 375-376; 695 NW2d 521 (2005). Because the Patel and Mandagere defendants brought their motion under MCR 2.625, we shall first consider that rule. This court rule does not reward a prevailing party or punish a losing party, but rather constitutes a litigation burden, which is presumably known by the affected party. *Mason v City of Menominee*, 282 Mich App 525, 530; 766 NW2d 888 (2009). MCR 2.625 provides in relevant part:

(A). Right to Costs.

(1) In General. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

***

(B) Rules for Determining Prevailing Party.

***

(2) Actions With Several Issues or Counts. In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.

(3) Actions With Several Defendants. If there are several defendants in one action, and judgment for or dismissal of one or more of them is entered, those defendants are deemed prevailing parties, even though the plaintiff ultimately prevails over the remaining defendants.

It is undisputed that the Patel and Mandagere defendants are prevailing parties under the plain language of MCR 2.625(B)(3), because judgments of no cause of action were entered in their favor on December 17, 2008. In fact, the trial court stated in its written opinion that “the taxation of costs in favor of these defendants would be warranted” under MCR 2.625(B)(3). Thus, looking solely to MCR 2.625, taxable costs should have been allowed unless, pursuant to MCR 2.625(A)(1), the costs were prohibited by statute, rule, or the trial court directed otherwise.
for reasons stated in writing. See also *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 521; 556 NW2d 528 (1996).

MCR 2.403(O), on which the trial court relied to prohibit taxable costs under MCR 2.625, establishes liability for case evaluation sanctions for the purpose of shifting the financial burden of a trial onto a party who insists on a trial by rejecting a case evaluation award. *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006). Case evaluation sanctions are not intended to punish a party, but rather to foster settlement. *Dessart v Burak*, 252 Mich App 490, 498; 652 NW2d 669 (2002). The court rule provides, in part:

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party’s *actual costs* unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to *costs* only if the verdict is more favorable to that party than the evaluation.

***

(4) In cases involving multiple parties, the following rules apply:

(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, *costs* may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover *costs* unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover *costs* unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

***

(6) For the purpose of this rule, *actual costs* are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party. [MCR 2.403(O) (emphasis added).]

Here, there is no dispute that neither plaintiff nor any of the relevant defendants, when evaluated under the “particular pair” standard in the first sentence of MCR 2.403(O)(4)(a) and
the requirements of MCR 2.403(O)(1), are entitled to case evaluation sanctions. MCR 2.403(O)(4)(a), as a whole, protects a party’s right to reject a case evaluation, while at the same time fairly burdening that decision with enough risk to ensure a well-reasoned decision. Ayre v Outlaw Decoys, Inc, 256 Mich App 517, 525; 664 NW2d 263 (2003). “[S]eparately considering the case between each particular pair of parties equitably accomplishes the objective of MCR 2.403(O) to expedite the resolution of cases by only imposing sanctions when they are justified.” Id.

We disagree with the trial court’s determination that the second sentence in MCR 2.403(O)(4)(a) prohibits an award of taxable costs under MCR 2.625, where the aggregate standard is satisfied, because the word “costs” is not expressly modified by the word “actual.” This Court addressed a similar issue in Zalut v Andersen & Assoc, Inc, 186 Mich App 229, 232; 463 NW2d 236 (1990), when considering the consequences of the failure to modify the word “costs” in the second sentence of MCR 2.403(O)(1). In rejecting a claim that only “normal” costs should be allowed, this Court stated:

There is nothing in the history of MCR 2.403(O) which supports the interpretation urged by plaintiffs. The change advocated by plaintiffs is a dramatic change and there is nothing in the published history of the rule to indicate that the failure to include the word “actual” in the last sentence of MCR 2.403(O)(1) was intended to make such a monumental change in the rule. Specifically, neither the staff comments nor the authors’ comment in the leading text on the Michigan Court Rules make any reference to the interpretation advocated by plaintiffs. See 2 Martin, Dean & Webster, Michigan Court Rules Practice, Rule 2.403, pp 432-434, 447. Finally, an examination of the wording of MCR 2.403(O)(1) demonstrates that plaintiffs’ interpretation is incorrect. The first sentence of the rule standing alone would govern this case because it directs the award of “actual costs” whenever a party rejects the evaluation “unless the verdict is more favorable to the rejecting party than the mediation evaluation.” That is what occurred in this case. The next sentence of the rule refers to the situation of the opposing party also rejecting the panel’s evaluation and begins with the word “However.” This appears to modify the first sentence and could not have been intended to exempt from the operation of the rule all cases in which both parties reject the mediation panel’s evaluation. [Zalut, 186 Mich App at 233-234.]

Similarly, in this case, the word “However” in MCR 2.403(O)(4)(a) is properly understood as modifying the first sentence. It provides a means for a plaintiff to avoid liability for case evaluation sanctions that would otherwise be payable by the plaintiff, when the case is evaluated under the “particular pair” standard in the first sentence. Examined in context, the word “costs” was plainly intended to refer to the actual costs payable as case evaluation sanctions. Therefore, the trial court erred as a matter of law in holding that the second sentence of MCR 2.403(O)(4) prohibits the taxation of costs under MCR 2.625.

We find nothing in MCR 2.403(O) that prohibits the taxable costs at issue in this case. At most, the definition of “actual costs” in MCR 2.403(O)(6) contains a provision for determining the prevailing party under MCR 2.625 for purposes of taxable costs. Because
neither plaintiff nor any of the Patel and Mandagere defendants are entitled to case evaluation sanctions, MCR 2.403(0)(6) does not apply.

Contrary to plaintiff’s argument on appeal, this Court’s decision in Forest City Enterprises, Inc v Leemon Oil Co, 228 Mich App 57; 577 NW2d 150 (1998), does not support a conclusion that taxable costs are precluded under the circumstances of this case. The plaintiff in that case sought to be treated as a prevailing party under MCR 2.625(B)(2) because it prevailed in the sense that it recovered a money judgment, even though the defendant was entitled to mediation sanctions. Id. at 80-81. Applying MCR 2.403(0)(6) to these parties, this Court “read MCR 2.625(B)(2) and MCR 2.403(0)(6) together to conclude that the party entitled to actual costs under the mediation rule for a cause of action shall also be deemed the prevailing party under MCR 2.625(B)(2) on the entire record.” Id. at 81. Stated otherwise, the defendant was treated as the party who prevailed on the entire record.

The reasoning in Forest City Enterprises is inapplicable to this case because, unlike this case, the particular pair of parties disputing costs in Forest City Enterprises included a party entitled to mediation sanctions. In this circumstance, it was reasonable to apply MCR 2.403(0)(6) in a manner that reached a harmonious result with the “on the entire record” standard in MCR 2.625(B)(2). Nothing in Forest City Enterprises suggests that a party could rely on an entitlement to case evaluation sanctions against another party under MCR 2.403 to avoid paying taxable costs to a different party under MCR 2.625.

Plaintiff’s reliance on Ivezaj v Auto Club Ins Ass’n, 275 Mich App 349; 737 NW2d 807 (2007), and Brown v Gainey Transp Servs, Inc, 256 Mich App 380; 663 NW2d 519 (2003), is similarly misplaced. Those cases both involved a plaintiff who was attempting to recover taxable costs from a defendant who was entitled to case evaluation sanctions. Because the present case involves multiple defendants, and plaintiff is not entitled to case evaluation sanctions against any of the Patel or Mandagere defendants, the trial court’s denial of their motion for taxable costs under MCR 2.625 was based on an error of law. Therefore, we reverse the order denying the Patel or Mandagere defendants’ motion for taxable costs and remand this case to the trial court for consideration of the motion solely under MCR 2.625.

In Docket No. 291186, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. In Docket No. 292991, we reverse the denial of taxable costs to the Patel and Mandagere defendants and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Henry William Saad
STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF BURR NEEDHAM, Deceased, by
ALAN MAY as Personal Representative,

Plaintiff-Appellee/Cross-Appellant,

v

MERCY MEMORIAL NURSING CENTER, a/k/a
MONROE COMMUNITY HEALTH SERVICES,

Defendant-Appellant/Cross-
Appellee,

and

ARUN GUPTA, M.D., WILLINE BELOW,
L.P.N., RETA OBLINGER, L.P.N., S. SCOTT,
L.P.N., TINA DALE, L.P.N., and JULIE CEBINA,
L.P.N.,

Defendants.

Estate of Burr Needham, Deceased, by
ALAN MAY as Personal Representative,

Plaintiff-Appellee,

v

ARUN GUPTA, M.D.,

Defendant-Appellant,

and

MERCY MEMORIAL NURSING CENTER, a/k/a
MONROE COMMUNITY HEALTH SERVICES,
WILLINE BELOW, L.P.N., RETA OBLINGER,
L.P.N., S. SCOTT, L.P.N., TINA DALE, L.P.N.

-1-
and JULIE CEBINA, L.P.N.,

Defendants.

Before: MURPHY, C.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

In Docket No. 303999, defendant Mercy Memorial Nursing Center a/k/a Monroe Community Health Services, appeals as of right a judgment of no cause of action against defendant Arun Gupta, M.D., and plaintiff Estate of Burr Needham by Alan A. May, personal representative cross appeals. We affirm the jury’s verdict, vacate the jury’s economic damages award, and remand for application of the lower tiered cap to the noneconomic damages. In Docket No. 304832, Gupta appeals as of right the trial court’s order denying case evaluation sanctions and costs. We affirm the trial court’s order in that appeal.

I. FACTUAL BACKGROUND & PROCEEDINGS

In Needham v Mercy Mem Nursing Ctr, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2009 (Docket No. 280174), unpub op, pp 1-2, this Court previously summarized the relevant facts of this case:

Decedent [Burr Needham] fractured his hip on April 24, 2002. He received nonsurgical treatment from the University of Michigan Hospital and was transferred on April 26, 2002, to defendant Mercy Memorial Nursing Center (Mercy Memorial) for rehabilitation. Decedent had not been a candidate for surgical treatment due to existing health problems, which included, in part, diabetes, coronary artery disease, Parkinson’s disease, and orthostatic hypotension. Although decedent was alert and oriented upon admission to Mercy Memorial, his health began to decline fairly rapidly, and he died on May 2, 2002.

When decedent was admitted to Mercy Memorial, he was considered “full code,” meaning that the nursing home should take all possible steps to revive him in an emergency situation. He did not, however, sign the paperwork indicating his resuscitation preferences; rather, “full code” was a default status. Decedent was treated with narcotic medications to ease his pain upon admission to Mercy Memorial and throughout his entire stay. As decedent’s health began to decline, defendant Dr. Arun Gupta\(^1\) recommended that decedent be transferred to a hospital for testing and diagnosis. At around this time, decedent’s wife, Betty Needham, began making healthcare decisions for decedent under a durable power of attorney (DPOA). Mrs. Needham refused to have decedent transferred to a hospital setting for testing, stating that as a Jehovah’s Witness, decedent would not want additional medical procedures to be undertaken.

\(^1\) Dr. Gupta was decedent’s attending physician and the medical director at Mercy Memorial.
Mrs. [Betty] Needham, [decedent’s wife,] while refusing to consent to the decedent’s transfer to a hospital, did permit the nursing home to continue administering pain relief medications to her husband. Mrs. Needham claimed that she was never fully informed about the seriousness of her husband’s condition. Decedent’s condition kept deteriorating, he continued to receive pain medications in the nursing home, and when his health worsened further on May 1, 2002, Dr. Gupta again recommended transfer to a hospital. The doctor stated that decedent would be transferred unless Mrs. Needham produced the DPOA paperwork. Mrs. Needham then brought in the DPOA and continued to refuse to allow for decedent’s transfer. Dr. Gupta prescribed additional pain medications for decedent. Burr Needham died on May 2, 2002, while at Mercy Memorial.

A jury trial eventually began on plaintiff’s allegations of professional negligence against Mercy Memorial and Gupta. Following plaintiff’s presentation of evidence, Mercy Memorial and Gupta filed two motions for directed verdict, both of which the trial court denied. Subsequently, the jury found Mercy Memorial professionally negligent and awarded plaintiff $350,000 in economic damages, $1,500,000 in noneconomic damages for Needham’s conscious pain and suffering, and $3,000,000 in noneconomic damages to Betty for the loss of society and companionship until her death. The jury returned a verdict of no cause of action against Gupta.

On September 2, 2010, the trial court entered an order of judgment against Mercy Memorial only. The trial court reduced the jury’s verdict to present value and awarded plaintiff $451,935 in economic damages (including interest) and $941,316 in noneconomic damages (including interest). In January 2011, after the trial court denied Mercy Memorial’s motion for JNOV or alternatively new trial and remittitur, Mercy Memorial appealed as of right the September 2, 2010, order, and plaintiff cross-appealed (Docket No. 302096).

In February 2011, Gupta filed a motion for entry of judgment. Although plaintiff opposed the motion, on April 20, 2011, the trial court entered a judgment of no cause of action against Gupta. The order stated that the jury found no proximate causation between Gupta’s action and Needham’s injuries. Subsequently, Gupta filed a motion for leave to file a motion for sanctions and costs and a motion for sanctions and costs, which the trial court denied. Thereafter, Gupta appealed as of right the trial court’s order denying case evaluation sanctions and costs (Docket No. 304832). Then, on May 11, 2011, Mercy Memorial appealed as of right the trial court’s April 20, 2011, order of judgment of no cause of action as to Gupta (Docket No. 303999). 1

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1 Plaintiff’s assertion that this Court does not have jurisdiction is without merit. This Court’s June 29, 2011, order accurately concluded that pursuant to MCR 7.202(6)(a)(i), the final order in this case was the April 20, 2011, order because it was the first order that adjudicated the rights and liabilities of all the parties. Needham v Mercy Mem Nursing Ctr, unpublished order of the Court of Appeals, entered June 29, 2011 (Docket Nos. 302096 & 303999).
II. ANALYSIS

A. DOCKET NO. 303999

1. DIRECTED VERDICT & JNOV

Mercy Memorial argues that the trial court erred in denying its motions for a directed verdict or JNOV regarding proximate causation and res ipsa loquitur. The granting or denial of a motion for a directed verdict and a motion for JNOV are reviewed de novo. Sniecinski v Blue Cross & Blue Shield of Mich, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court reviews all the evidence and legitimate inferences in the light most favorable to the nonmoving party, and a motion for a directed verdict or JNOV “should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law.” Id. In determining whether a directed verdict or JNOV is appropriate, the question is for the jury, and the trial court cannot substitute its judgment for that of the jury when the evidence leads reasonable jurors to disagree. Moore v Detroit Entertainment, LLC, 279 Mich App 195, 202; 755 NW2d 686 (2008); Foreman v Foreman, 266 Mich App 132, 136; 701 NW2d 167 (2005).

a. PROXIMATE CAUSATION

“In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury.” Gonzalez v St John Hosp & Medical Ctr, 275 Mich App 290, 294; 739 NW2d 392 (2007) (quotation marks and citation omitted). The applicable standard for proximate causation has been statutorily defined by MCL 600.2912a(2), which provides, in part, that “the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.” In Ykimoff v Foote Mem Hosp, 285 Mich App 80, 87; 776 NW2d 114 (2009), this Court provided the general principles regarding causation in a medical malpractice case:

“Proximate cause” is a term of art that encompasses both cause in fact and legal cause. “Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or ‘but for’) that act or omission.” Cause in fact may be established by circumstantial evidence, but the circumstantial evidence must not be speculative and must support a reasonable inference of causation. “All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty.” Summary disposition[2]

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[2] This Court reviews a motion for directed verdict and/or JNOV under the same standards as a motion for summary disposition because the differences in the motions are merely procedural. Skinner v Square D Co, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994) (“While some of these cases involve a motion for directed verdict, the test regarding the sufficiency of causal proof is
is not appropriate when the plaintiff offers evidence that shows “that it is more likely than not that, but for defendant’s conduct, a different result would have been obtained.” [Quotation marks and citations omitted; footnote added.]

When a plaintiff relies upon circumstantial evidence to establish proximate causation, “the evidence must lead to a reasonable inference of causation and not mere speculation. In addition, the causation theory must demonstrate some basis in established fact.” Ykimoff, 285 Mich App at 87-88. In other words, “when circumstantial evidence is relied on, it must provide a ‘reliable basis from which reasonable minds could infer that more probably than not, but for’ the wrong or negligence an injury would not have occurred.” Id. at 88, quoting Skinner v Square D Co, 445 Mich 153, 170-171; 516 NW2d 475 (1994).

After viewing the evidence and reasonable inferences in the light most favorable to plaintiff, we hold that the trial court properly denied Mercy Memorial’s motion for a directed verdict or JNOV on the causation issue. Plaintiff’s circumstantial evidence admitted through the expert testimony of Dr. Carl Schmidt, a forensic pathologist, provided a reliable basis from which reasonable minds could infer that, more probably than not, but for the negligence of Mercy Memorial employees, Needham’s death would not have occurred. Specifically, Schmidt testified that Needham died of acute morphine intoxication and that the acute morphine intoxication was the result of a large dose of morphine administered within a few hours of Needham’s death. Plaintiff also established that a Mercy Memorial nurse was the only person able to access the morphine when Needham died. In that regard, Nurse Willine Below, Mercy Memorial’s nursing supervisor, testified that all narcotics, including morphine, were locked in the narcotics drawer. The narcotics drawer had a separate key and only the floor nurse on duty, Tina Dale, would have the key to unlock the narcotics drawer. Thus, there is a reasonable inference that but for the actions of Mercy Memorial, Needham would not have died from acute morphine intoxication.

Mercy Memorial erroneously contends that plaintiff’s failure to prove whether the administration of morphine was parenteral3 or oral is fatal to establishing proximate causation. Schmidt testified that Needham received a large dose of morphine shortly before his death. Schmidt also admitted that while the dose was probably administered parenterally, it could have also been administered orally. Because the evidence supports a finding that the morphine was in the exclusive control of Mercy Memorial’s nursing staff, and Needham died from acute morphine intoxication, plaintiff’s inability to prove whether the administration of morphine was parenterally or oral is not fatal to this case. Rather, the circumstantial evidence allows a reasonable inference that a Mercy Memorial nurse negligently administered a large dose of morphine to Needham, and that dose caused his death. The trial court properly denied Mercy Memorial’s motion for a directed verdict and JNOV.

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3 “Parenteral” means the medicine was injected into the patient either intravenously or intramuscularly.
b. RES IPSA LOQUITUR

The doctrine of res ipsa loquitur, which is Latin for “the thing speaks for itself,” is defined as the “[r]es buttable presumption or inference that defendant was negligent, which arises upon proof that the instrumentality causing injury was in defendant’s exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence.” *Woodard v Custer*, 473 Mich 1, 6 n 2; 702 NW2d 522 (2005) (quotation marks and citation omitted). There are four factors needed to establish res ipsa loquitur:

“(1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

(3) it must not have been due to any voluntary action or contribution on the part of the plaintiff”; and

(4) [e]vidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.” [*Woodard*, 473 Mich at 7, quoting *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987) (quotation marks omitted).]

In medical malpractice cases, “the crucial element, and that most difficult to establish, will often be the first factor, i.e., that the event is of a kind that does not ordinarily occur in the absence of negligence. A bad result will not itself be sufficient to satisfy that condition.” *Locke v Pachtman*, 446 Mich 216, 230-231; 521 NW2d 786 (1994) (emphasis deleted). “This does not mean that a bad result cannot be presented by plaintiffs as part of their evidence of negligence, but, rather, that, standing alone, it is not adequate to create an issue for the jury.” *Id.* at 231 (quotation marks and citation omitted). “Something more is required, be it the common knowledge that the injury does not ordinarily occur without negligence or expert testimony to that effect.” *Id.* (quotation marks and citation omitted; emphasis deleted). “Therefore, the fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury.” *Id.*

Mercy Memorial argues that plaintiff failed to satisfy the first element needed to use the res ipsa loquitur doctrine because he was required to provide expert testimony regarding whether acute morphine intoxication can occur in the absence of negligence while a patient is receiving morphine for pain management.4 In *Locke*, 446 Mich at 231-232, the Michigan Supreme Court, 4 As will be discussed in section II.A.2., Mercy Memorial’s argument that res ipsa loquitur cannot be used for an intentional tort is misplaced because plaintiff’s medical malpractice claim was not converted into a battery claim.

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in discussing the first element needed to rely upon the res ipsa loquitur doctrine, concluded that leaving a needle within an incision is carelessness, from which negligence may be easily discerned without expert testimony. But, the Court concluded, a surgeon leaving a needle that broke off during surgery after unsuccessfully looking for the needle tip is an event from which a person could not reasonably ascertain whether the event would occur in the absence of negligence. Id. Similarly, in this case, expert testimony was not needed to establish the first element because it is within the common understanding that the proper administration of prescribed morphine does not lead to death in the absence of negligence. Instead, plaintiff’s circumstantial evidence establishing that Needham died of acute morphine intoxication while under Mercy Memorial’s exclusive care and control was sufficient to create an inference of negligence.

Finally, Mercy Memorial erroneously argues that the third element of res ipsa loquitur was not satisfied because Betty voluntarily contributed to Needham’s injury by refusing to transport him to the hospital. To begin, Betty is not a party in this case, and thus, her actions are not a factor in determining whether to apply the res ipsa loquitur doctrine. Moreover, since Mercy Memorial disputes that Needham’s death was the result of its negligence, it has failed to adequately explain how Betty’s refusal to remove Needham from Mercy Memorial’s care contributed to his death. The trial court properly denied Mercy Memorial’s motion for directed verdict and JNOV.

2. “HOMICIDE” EVIDENCE & JURY INSTRUCTION

Mercy Memorial argues that the trial court erred in allowing the word “homicide” into evidence and in the wording of the curative “homicide” jury instruction. Unpreserved evidentiary issues are reviewed for plain error affecting substantial rights. Lenawee Co v Wagley, 301 Mich App 134, ___; ___ NW2d ___ (Docket No. 311255, issued May 21, 2013), slip op, p 16. The trial court’s denial of a requested special jury instruction is reviewed de novo. Hardrick v Auto Club Ins Ass’n, 294 Mich App 651, 679; 819 NW2d 28 (2011).

Under MRE 402, only relevant evidence is admissible. Wayne Co v Mich State Tax Comm, 261 Mich App 174, 196; 682 NW2d 100 (2004). MRE 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” But, relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice[]” Id. at 196, quoting MRE 403.

Regarding plaintiff’s use of the word “homicide” during his opening statement, it is well-settled that the remarks of counsel during a trial are not evidence. Guerrero v Smith, 280 Mich App 647, 658-659; 761 NW2d 723 (2008). Furthermore, any prejudice resulting from an improper comment or argument is cured by an instruction from the trial court that the statements and remarks of counsel are not evidence. Id. at 659, citing Tobin v Providence Hosp, 244 Mich App 626, 641; 624 NW2d 548 (2001). In this case, the trial court instructed the jury that the attorneys’ statements and arguments were not evidence. Thus, there is no error because plaintiff’s use of the word “homicide” was not part of the evidence, and regardless, any alleged error was cured by the trial court’s instruction.
Mercy Memorial also cites to the testimony of Schmidt, and nurses Julie Cebina and Mary Bold, as prejudicial and inflammatory because their testimonies implied that the alleged negligent act in this case—an overdose of morphine—was intentional, and thus actually a battery. Likewise, Mercy Memorial asserts that it was error for the medical examiner’s death certificate and autopsy reports to be admitted into evidence without the redaction of the references to morphine overdose, injection, and homicide. After reviewing the cited testimony and records, we cannot conclude that this evidence amounted to plaintiff presenting evidence of an intentional tort as opposed to a negligence action. Instead, this evidence highlights that Mercy Memorial committed an error, and that error led to Needham’s death by acute morphine intoxication. While it is true that Mercy Memorial’s nurses administered morphine to Needham, this act alone does not elevate a negligence claim to a battery claim. There is no evidence that a nurse intended to overdose Needham with morphine. Instead, the evidence presented at trial highlights that Mercy Memorial’s nurses made a mistake or error in their record keeping and administering of the morphine, and that error led to Needham receiving more morphine than actually ordered. In other words, the act of administering morphine was not the basis of plaintiff’s claim; rather, plaintiff’s allegation was that Mercy Memorial’s nurses failed to accurately administer the correct amount of morphine. Consequently, and consistent with this Court’s prior opinion, plaintiff presented evidence to support his medical malpractice claim that Mercy Memorial was professionally negligent in the administration of morphine to Needham.

As a corollary argument, Mercy Memorial contends that the trial court erred when it refused to add to the curative instruction that no criminal charges had been filed against Mercy Memorial or its employees. Mercy Memorial argues that without this sentence, the instruction assisted plaintiff in presenting a battery claim.

The trial court has discretion to give additional instructions not covered by the standard jury instructions as long as they are applicable and accurately state the law and are concise, understandable, conversational, unslanted, and nonargumentative. A supplemental instruction need not be given if it would add nothing to an otherwise balanced and fair jury charge and would not enhance the ability of the jury to decide the case intelligently, fairly, and impartially.

On appeal, jury instructions are reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. There is no error requiring reversal, if on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. The trial court’s decision regarding supplemental instructions will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. [Mull v Equitable Life Assurance Society of the United States, 196 Mich App 411, 422-423; 493 NW2d 447 (1992) (citations omitted).]

The disputed sentence, which Mercy Memorial argues that the trial court improperly excluded from the curative instruction, was: “None of the involved nurses or Dr. Gupta were ever charged criminally for the death of Mr. Needham.” The curative instruction read by the trial court to the jury provided:

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Ladies and Gentlemen of the jury, you’re going to be hearing statements or viewing documents using the word “homicide”. In this case homicide has a very specific meaning in the context of autopsies and medical examiner reports. When you hear the word “homicide” it does not mean that this case involves an intentional killing, murder, euthanasia, or other intentional act that resulted in Mr. Needham’s death, because it does not.

This case has been filed as a medical malpractice/wrongful death matter, which involves questions of whether the medical and nursing care breached the standard of care resulting in Mr. Needham’s death.

So homicide in this case means a person caused the death of another person by their actions.

The curative instruction regarding homicide was not inconsistent with substantial justice. The instruction contained the applicable law, and it was fairly and adequately presented to the jury. Moreover, the instruction specifically removed intentional acts from the definition of “homicide” by clearly stating that homicide did not mean an intentional killing, murder, euthanasia, or other intentional act. Consequently, the instruction removed any battery-based associations from the jury’s consideration and assisted the jury in coming to a fair and impartial decision. Thus, the entire instruction was fair, concise, and unslanted. The trial court acted within its discretion in declining to add to the instruction that no criminal charges had been filed against Mercy Memorial or its employees.

3. DPOA EVIDENCE & JURY INSTRUCTION

Mercy Memorial asserts that the trial court erred in ruling that the durable power of attorney (DPOA) was not effective until presented to Mercy Memorial and in instructing the jury on this issue. Preserved evidentiary issues are reviewed for an abuse of discretion, Lenawee Co, 301 Mich App at __ (slip op at 16), and issues of statutory interpretation are reviewed de novo, In re Temple Marital Trust, 278 Mich App 122, 128; 748 NW2d 265 (2008). “Claims of instructional error are generally reviewed de novo on appeal.” Silverstein v Pro-Golf of America, Inc, 278 Mich App 446, 451; 750 NW2d 615 (2008). But, “[t]he determination whether a supplemental instruction is applicable and accurate is within the trial court’s discretion.” Id. Also, an instructional error will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. Guerrero, 280 Mich App at 660.

“A primary purpose of a power of attorney is to evidence the delegation of authority to perform particular legal acts, which the principal could personally perform, to an appointed agent.” Persinger v Holst, 248 Mich App 499, 504; 639 NW2d 594 (2001). MCL 700.5506(3), the statute regarding the designation of a patient advocate, provides:

(3) A patient advocate designation under this section must be in writing, signed, witnessed as provided in subsection (4), dated, executed voluntarily, and, before its implementation, made part of the patient’s medical record with, as applicable, the patient’s attending physician, the mental health professional providing treatment to the patient, the facility where the patient is located, or the
community mental health services program or hospital that is providing mental health services to the patient. The patient advocate designation must include a statement that the authority conferred under this section is exercisable only when the patient is unable to participate in medical or mental health treatment decisions, as applicable, and, in the case of the authority to make an anatomical gift as described in subsection (1), a statement that the authority remains exercisable after the patient’s death. [Emphasis added.]

In this case, Mercy Memorial complains that it was not permitted to elicit testimony from its nursing expert, Bold, regarding whether Mercy Memorial’s nurses violated the standard of care when they did not transfer Needham on April 30, 2002, based on Betty’s wishes. After reviewing Bold’s testimony, we conclude that the trial court did not abuse its discretion in limiting Mercy Memorial’s standard of care questioning to the information available in the chart. As concluded by the trial court, according to MCL 700.5506(3), a DPOA must be presented to a medical provider before it can be implemented. There is no dispute that Betty did not present the DPOA paperwork to Mercy Memorial until the morning of May 1, 2002. Consequently, in determining whether to send Needham to the hospital on April 30, 2002, Mercy Memorial’s nurses were not permitted to rely upon Betty’s authority as the patient advocate through the DPOA.

Nonetheless, Mercy Memorial argues that because Betty was Needham’s next of kin, its nurses were permitted to rely on Betty’s wishes of not transferring Needham to a hospital. Thus, Mercy Memorial erroneously contends that it should have been permitted to introduce evidence through Bold that its nurses also acted within the standard of care in relying on Betty’s wishes and not transferring Needham to the hospital. As noted, Gupta specifically testified that it was because Betty claimed to have DPOA papers (but did not have them with her) that Needham was not transferred to the hospital. Because Mercy Memorial relied upon Betty’s authority under the DPOA, the trial court correctly concluded that it was to decide the issue of when the DPOA was effective as a matter of law. See Reed v Yackell, 473 Mich 520, 528; 703 NW2d 1 (2005) (the interpretation of a statute is a question of law). Consequently, regardless of Betty’s relationship to Needham, according to the statute, Mercy Memorial was required to obtain the DPOA paperwork before implementing Betty’s decisions. MCL 700.5506(3).

4. JURY VERDICT FORM

Mercy Memorial argues that the trial court abused its discretion in declining to individually list Mercy Memorial’s nurses on the jury verdict form. “Claims of instructional

5 For this reason we also reject Mercy Memorial’s corollary argument that the trial court erred in instructing the jury that the DPOA was not valid until Mercy Memorial received the paperwork. The trial court’s jury instruction was: “Now, in this case the Court has previously ruled that a durable power of attorney, sometimes referred to as a DPOA, is not effective for the purposes of providing and/or withholding medical care and treatment until such time it has been given to the pertinent medical provider.” This was a correct statement of the law, and thus, it was properly read to the jury.

In this case, Mercy Memorial argues that *Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 19-22; 651 NW2d 356 (2002), requires each nurse to be individually named on the jury's verdict form in order to hold it vicarious liable. In *Cox*, a baby was born premature. While the baby was in the neonatal intensive care unit, a nurse drew blood from the baby's umbilical arterial catheter and the baby was repositioned. About 20 minutes later, it was discovered that the umbilical arterial catheter had dislodged and the baby had lost half of his blood supply. Efforts were made to stop the bleeding, and a few days later, the baby was transferred to Children's Hospital. Ultimately, the baby was diagnosed with cerebral palsy and mild mental retardation. The plaintiffs sued the defendants, and the jury found in favor of the plaintiffs. *Id.* at 5-7. On appeal, the issue was whether the trial court erred in modifying the standard of care jury instruction by substituting "hospital neonatal intensive care unit" for the specific professions or specialties at issue. *Id.* at 9-10.

The Michigan Supreme Court reversed the trial court's instruction, holding that "in order to find a hospital liable on a vicarious liability theory, the jury must be instructed regarding the specific agents against whom negligence is alleged and the standard of care applicable to each agent." *Cox*, 467 Mich at 15. Specifically, the *Cox* Court concluded:

In other words, the principal "is only [vicariously] liable because the law creates a practical identity with his [agents], so that he is held to have done what they have done." [*Smith v Webster*, 23 Mich 298, 300 (1871).] See also *Ducre v Sparrow-Kroll Lumber Co*, 168 Mich 49, 52; 133 NW 938 (1911).

Applying this analysis, [the] defendant hospital can be held vicariously liable for the negligence of its employees and agents only. The "neonatal intensive care unit" is neither an employee nor an agent of defendant. At most, it is an organizational subsection of the hospital, a geographic location within the hospital where neonates needing intensive care are treated. No evidence in the record suggests that the neonatal intensive care unit acts independently or shoulders any independent responsibilities. Therefore, because no evidence exists that the neonatal intensive care unit itself is capable of any independent actions, including negligence, it follows that the unit itself could not be the basis for defendant's vicarious liability.

The negligence of the agents working in the unit, however, could provide a basis for vicarious liability, provided plaintiffs met their burden of proving (1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury *with respect to*
each agent alleged to have been negligent. The phrase “neonatal intensive care unit” is not mere shorthand for the individuals in that unit; rather, plaintiffs must prove the negligence of at least one agent of the hospital to give rise to vicarious liability. Instructing the jury that it must only find the “unit” negligent relieves plaintiffs of their burden of proof. Such an instruction allows the jury to find defendant vicariously liable without specifying which employee or agent had caused the injury by breaching the applicable standard of care. [Cox, 467 Mich at 11-12 (footnote omitted; emphasis in the original).]

In other words, the Supreme Court found error because “[t]he ‘unit’ instruction failed to ensure that the jury clearly understood 1) which agents were involved, and 2) that it could find professional negligence or malpractice only on the basis of the particular standard of care applicable to each employee’s profession or specialty.” Cox, 467 Mich at 14-15 (footnote omitted).

In this case, the jury’s verdict form did not comply with the Cox Court’s requirements. The jury verdict form stated:

1. Was Defendant Mercy Memorial Nursing Center via its nurses professionally negligent in the care and treatment of Burr Needham in one or more ways claimed by Plaintiff?

While it is true the verdict form only presented one standard of care (nursing), it only generally named the group of agents that were involved in the alleged negligence (Mercy Memorial’s nurses), and therefore, it “allow[ed] the jury to find defendant vicariously liable without specifying which employee or agent had caused the injury by breaching the applicable standard of care.” Cox, 467 Mich at 12 (emphasis added; footnote omitted). Consequently, the verdict form “failed to specify which agents were involved” and thus “effectively relieved [the] plaintiffs of their burden of proof and was not specific enough to allow the jury to decide the case intelligently, fairly, and impartially.” Id. at 15 (quotation marks and citation omitted).6

However, reversal is not required because the error is not inconsistent with substantial justice. Unlike the plaintiff in Cox, plaintiff’s complaint named both Mercy Memorial and five of Mercy Memorial’s licensed practical nurses as defendants, and plaintiff employed the res ipsa loquitur doctrine at trial, thereby raising an inference of negligent conduct on the part of Mercy Memorial through at least one of the five named nurses. See Cox, 467 Mich at 14 n 14. Consequently, because plaintiff presented evidence that Needham died from acute morphine intoxication while under the exclusive care and control of Mercy Memorial, it can be ascertained that the jury found at least one of Mercy Memorial’s nurses professionally negligent and the error is harmless. Id.

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6 The actual jury instructions also did not identify any of the individual nurses whom plaintiff alleged committed the negligent act.
5. REMITTITUR OF ECONOMIC DAMAGES

Mercy Memorial asserts that the trial court erred in denying its motion for remittitur of economic damages. The granting or denial of a motion for new trial or remittitur is reviewed for abuse of discretion. Shaw v Ecorse, 283 Mich App 1, 16-17; 770 NW2d 31 (2009). “An abuse of discretion occurs when a court chooses an outcome that is outside the range of principled outcomes.” Heaton v Benton Constr Co, 286 Mich App 528, 538; 780 NW2d 618 (2009). This Court views the evidence in the light most favorable to the nonmoving party. Silberstein, 278 Mich App at 462. Due deference must be given to the trial court’s decision because of its ability to evaluate the credibility of the testimony and evidence presented to the jury. Unibar Maintenance Serv, Inc v Saigh, 283 Mich App 609, 629-630; 769 NW2d 911 (2009).

Courts should exercise the power of remittitur with restraint. Taylor v Kent Radiology, PC, 286 Mich App 490, 522; 780 NW2d 900 (2009). Thus, the jury’s verdict should not be disturbed when the economic damages award falls within the reasonable range of evidence and it is within the limits of what reasonable minds would consider just compensation. Silberstein, 278 Mich App at 462. “A verdict should not be set aside simply because the method of computation used by the jury in assessing damages cannot be determined, unless it is not within the range of evidence presented at trial[,]” Diamond v Witherspoon, 265 Mich App 673, 694; 696 NW2d 770 (2005), and the highest possible amount that the evidence will support should be awarded on remittitur, Heaton, 286 Mich App at 539, citing MCR 2.611(E)(1). “Further, the certainty necessary to establishing the amount of damages is less once the fact of damages is established.” Unibar, 283 Mich App at 634.

Nevertheless, “appellate review of jury verdicts must be based on objective factors and firmly grounded in the record.” Freed v Salas, 286 Mich App 300, 334; 780 NW2d 844 (2009) (quotation marks and citations omitted; emphasis deleted). “In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented.” Silberstein, 278 Mich App at 462 (citation omitted).

Our Supreme Court has indicated that the [objective] factors that should be considered by this Court are: (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions. [Freed, 286 Mich App at 334 (citation omitted).]

On appeal, Mercy Memorial argues that remittitur is appropriate because there was no evidence establishing the loss of services or the loss of financial support. In looking at the evidence related to economic damages presented at trial, we agree there is not sufficient evidence to support the jury’s verdict of $350,000 for economic damages because the award does not fall “reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation[.]” Silberstein, 278 Mich App at 462.
To begin, as conceded by plaintiff at oral argument, plaintiff waived the loss of financial support as an economic damage. Specifically, about one month before trial, plaintiff’s counsel stated to the court that “we are not going to be asserting a claim for a loss of wages or a loss of earnings.” While plaintiff’s counsel went on to say, “I don’t want to waive all economic damages until I look at it one more time before trial,” he also indicated that “as I sit here before you right now, Judge, I don’t even know of an economic damage that we have.” Thus, although plaintiff did not waive a claim for all economic damages, plaintiff cannot use the loss of wages or earnings as a basis for economic damages because a party is bound by his attorney’s waiver. *Sampeer v Boschma*, 369 Mich 261, 266; 119 NW2d 607 (1963).

The evidence also fails to establish the existence of the loss of services as economic damages. Specifically, Betty and both of her daughters, Joy Peoples and Maria Martin, testified that Betty exclusively maintained the household without Needham’s assistance. And, plaintiff has provided no citation to the record supporting the argument that evidence of economic damages existed.

The jury’s verdict form also indicates that plaintiff sought burial expenses and the loss of gifts or other valuable gratuities as part of economic damages. However, there was no evidence of burial expenses, as Joy and Maria testified that no memorial service was held for Needham. Instead, he was cremated and no evidence of the cost of cremation was admitted. Finally, while the loss of gifts or other valuable gratuities may be considered an economic damage in a medical malpractice case, see *Taylor*, 286 Mich App at 520, quoting MCL 600.2945(c) (there are several types of economic damages available in medical malpractice cases, including “other objectively verifiable monetary losses”), no evidence was presented to support this award. Specifically, while Maria and Joy testified that Needham continuously gave Betty gifts, no numerical figures were provided to allow the jury to perform the calculation of this damage. See *Shivers v Schmiege*, 285 Mich App 636, 643-645; 776 NW2d 669 (2009). The jury’s verdict does not fall within the reasonable range of evidence or within the limits of just compensation. Therefore, the trial court abused its discretion in denying Mercy Memorial’s motion for remittitur regarding economic damages. We vacate the entire economic damages award because plaintiff waived part of the economic damages, and there is no evidence to support the award.

6. STATUTORY CAP ON NONECONOMIC DAMAGES

Mercy Memorial argues that the trial court erred in applying the upper tiered cap of the noneconomic damages cap from MCL 600.1483(1). The interpretation and application of a statute is a question of law that is reviewed de novo. *Shivers*, 285 Mich App at 646. “However, in deciding whether plaintiff’s injuries qualify for the higher cap, ‘the trial court is the finder of fact with regard to these unique elements of damage.’” *Id.* (citation omitted).

“The goal of statutory interpretation is to give effect to the intent of the Legislature.” *Ykimoff*, 285 Mich App at 110. “If statutory language ‘is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.’” *Id.* at 110-111 (citation omitted). “It is a fundamental rule of statutory construction that unless defined in the statute, a word or phrase used in a statute should be accorded its plain and ordinary meaning.” *Shivers*, 285 Mich App at 647.
In a wrongful death medical malpractice action, noneconomic damages are limited by MCL 600.1483. *Jenkins v Patel*, 471 Mich 158, 165-166; 684 NW2d 346 (2004) remanded 263 Mich App 508 (2004) ("[A] wrongful death action grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent."). MCL 600.1483(1) provides:

In a claim for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the medical malpractice of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

Thus, according to the language of the statute, the lower tier cap in MCL 600.1483(1) applies unless the trial court determines that the upper tier cap in MCL 600.1483(1)(a), (b), or (c) applies. See MCL 600.6304(5). In this case, it is clear that MCL 600.1483(1)(a) does not apply because no evidence was presented that Needham’s alleged brain injury caused him to be hemiplegic, paraplegic, or quadriplegic that resulted in the loss of a limb function. See *Shivers*, 285 Mich App at 646-649 (for MCL 600.1483(1)(a) to apply, the plaintiff must show both an injury (being hemiplegic, paraplegic, or quadriplegic) and a symptom (the resulting loss of limb function)). Similarly, there is no evidence suggesting that MCL 600.1483(1)(c) applies, see *Ykimoff*, 285 Mich App at 111-112 (to apply MCL 600.1483(1)(c), the plaintiff must provide

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7 MCL 600.6304(5) provides: “In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.”
evidence of injury to a reproductive organ and an inability to procreate). Therefore, in order for the upper tier cap to apply, there must be evidence that Needham had “permanently impaired cognitive capacity rendering him . . . incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.” MCL 600.1483(1)(b).

This Court has previously examined the requirements of MCL 600.1483(1)(b) and concluded that a plaintiff must present evidence establishing that one’s mental ability has been forever damaged or diminished:

Because the statute does not provide its own glossary, we may consult dictionary definitions for guidance. Koontz v Ameritech Services, Inc, 466 Mich 304, 312; 645 NW2d 34 (2002). First, the meaning of the word “permanent” includes “existing perpetually; everlasting.” Random House Webster’s College Dictionary (1997). The meaning of the word “impaired” includes “weakened, diminished, or damaged.” Id. The meaning of the word “cognitive” includes “of or pertaining to the mental processes of perception, memory, judgment, and reasoning, as contrasted with emotional and volitional processes.” Id. And, the meaning of the word “capacity” includes the “power of receiving impressions, knowledge, etc.; mental ability.” Id.

Considered together, then, the meaning of “permanently impaired cognitive capacity” includes damage to or diminishment of one’s mental ability to perceive, memorize, judge, or reason that is expected to last forever. Turning back to MCL 600.1483(1)(b), to establish this qualifying injury the plaintiff must suffer damage to or diminishment of his or her mental ability to perceive, memorize, judge, or reason that is permanent “rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.” Id. And, this permanently impaired cognitive capacity must be “the result of the negligence of 1 or more of the defendants. . . .” MCL 600.1483 (1).

In this case, plaintiff failed to set forth any evidence establishing that Young [the decedent] suffered permanent damage to or diminishment of her mental abilities to perceive, memorize, judge, or reason that is expected to last forever. Turning back to MCL 600.1483(1)(b), to establish this qualifying injury the plaintiff must suffer damage to or diminishment of his or her mental ability to perceive, memorize, judge, or reason that is permanent “rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living” as the result of the negligence of either or both of the defendant doctors. Although Young died, death itself is not this qualifying injury.

Plaintiff argues on appeal that because Young was on a ventilator and medically sedated, she suffered the requisite impaired cognitive capacity. Plaintiff also appears to argue that, during the course of her decline, Young was not able to make medical decisions on her own behalf, which was evidence of her impaired cognitive capacity. Neither of these arguments tends to establish that Young suffered permanently impaired cognitive capacity within the contemplation of the statute. But for her clinical decline and the associated or
necessary medical interventions, the evidence did not suggest that Young suffered damage to or diminishment of her mental ability to perceive, memorize, judge, or reason that was expected to be permanent. For example, there was no evidence to suggest that, if Young had lived, she would have been incapable of making independent, responsible life decisions and that she would have been permanently incapable of performing the activities of normal, daily living. That she may have temporarily or unnaturally experienced impaired cognitive capacity at some point before her death does not establish entitlement to the higher noneconomic damages cap. Therefore, we reverse the trial court’s award that was based on this higher cap and remand the matter for the purpose of imposing the lower cap on the noneconomic damage award pursuant to MCL 600.1483(1). [Young v Nandi, 276 Mich App 67, 79-81; 740 NW2d 508 (2007) vacated in part on other grounds 482 Mich 1007 (2008) (emphasis added)].

Applying the reasoning of the Young Court, the trial court erred in applying the upper tier cap of noneconomic damages because there is no evidence that Needham suffered permanent damage or diminishment of his mental ability to perceive, memorize, judge, or reason that rendered him incapable of making independent, responsible life decisions and independently performing the activities of normal, daily living. Rather, while the evidence revealed that Needham suffered a brain injury (the loss of brain cells from low blood pressure) and unconsciousness shortly before his death, there was no evidence establishing that had Needham lived, his mental diminishment would have been permanent, and he would not have been able to make independent, responsible life decisions or perform the activities of normal, daily living. Additionally, the evidence that Mercy Memorial’s nurses turned to Betty to make Needham’s medical decisions also does not establish that Needham suffered from a permanent mental inability to perceive, memorize, judge, or reason. Young, 276 Mich App 67, 79-81. Therefore, the lower tier cap on noneconomic damage found in MCL 600.1483(1) should have been applied by the trial court.

7. CONSTITUTIONALITY OF THE STATUTORY CAP

On cross appeal, plaintiff contends that the noneconomic damages cap from MCL 600.1483 violates his constitutional right to trial by jury, equal protection, substantive due process, and the separation of powers. In the alternative, plaintiff asserts that this Court should express disagreement with Jenkins, 471 Mich 158, which held that the damages cap applied to wrongful death claims that are based upon medical malpractice. Preserved constitutional issues are reviewed de novo. Harvey v Michigan, 469 Mich 1, 6; 664 NW2d 767 (2003).

In Zdrojewski v Murphy, 254 Mich App 50, 75; 657 NW2d 721 (2002), we previously upheld this statute against these same constitutional challenges. We held that MCL 600.1483 does not violate the right to a trial by jury:

In sum, we hold that the noneconomic damages limitation of MCL 600.1483 is not a violation of plaintiff’s right to a jury trial because the Legislature has the authority to limit remedies in tort actions, and the limitations of this statute impede neither plaintiff’s ability to present her case to a jury nor the
jury's ability to determine the factual extent of plaintiff's damages. [Zdrojewski, 254 Mich App at 78.]

We likewise held that MCL 600.1483 does not violate equal protection:

The statute at issue here [MCL 600.1483] is rationally related to a legitimate governmental purpose. The 1993 legislation that created the current finite limitation scheme was prompted by the Legislature's concern over the effect of medical liability on the availability and affordability of health care in the state. See House Legislative Analysis, SB 270 and HB 4033, 4403, and 4404, April 20, 1993, pp 1-2. The purpose of the damages limitation was to control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs. Id. Controlling health care costs is a legitimate governmental purpose. By limiting at least one component of health care costs, the noneconomic damages limitation is rationally related to its intended purpose. Because the noneconomic damages cap of MCL 600.1483 is rationally related to a legitimate governmental purpose, the statute does not violate plaintiff's right to equal protection. [Zdrojewski, 254 Mich App at 80-81.]

Additionally, because the test for equal protection and substantive due process are essential the same, and MCL 600.1483 does not violate equal protection, we also held that MCL 600.1483 does not violate due process. Zdrojewski, 254 Mich App at 78 n 12.

Finally we also held that the separation of powers doctrine, derived from Const 1963, art 3, § 2, was not violated by the enactment of MCL 600.1483:

[I]t is apparent that the statutes in question reflect legislative policy considerations other than court practice and procedure. As stated above, these statutes are intended to address perceived crises in the health care system. The purpose of the statutes is to control health care costs by reducing medical malpractice liability. Because the statutes are substantive in nature, rather than procedural, they do not infringe the Supreme Court's rulemaking authority. [Zdrojewski, 254 Mich App at 82.]

Alternatively, plaintiff argues that Jenkins, 471 Mich 158, was wrongly decided and requests that this Court express disagreement with Jenkins. We decline to do so as a plain reading of the statutes reveals that "the medical malpractice noneconomic damages cap does apply to wrongful death actions where the underlying claim is medical malpractice.” Jenkins, 471 Mich at 173 (footnote omitted).

B. DOCKET NO. 304832:

CASE EVALUATION SANCTIONS & COSTS

Gupta argues that the trial court erred in denying his motion for leave to file a motion for case evaluation sanctions and costs. "A trial court’s decision whether to grant case evaluation sanctions presents a question of law, which this Court reviews de novo.” Tevis v Amex

“Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text.” Ligons v Crittenton Hosp, 490 Mich 61, 70; 803 NW2d 271 (2011). When the language of a court rule is clear and unambiguous, this Court must apply the language as written. Id. MCR 2.403(O)(8) provides: “A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment.”

In Braun v York Props, Inc, 230 Mich App 138, 150-151; 583 NW2d 503 (1998), this Court clarified that, for purposes of timeliness under MCR 2.403(O)(8), a party’s period for filing a motion for sanctions and costs begins to run on the day the court enters a judgment adjudicating the rights and/or liabilities of that particular party:

In unambiguous terms, MCR 2.403(O)(8) provides that the period for requesting costs begins on the date the court enters judgment or the date the court enters an order denying a timely motion for a new trial or to set aside the judgment. For purposes of the court rule, the judgment is the judgment adjudicating the rights and liabilities of particular parties, regardless of whether that judgment is the final judgment from which the parties may appeal. See MCR 2.604(A). The court rule includes a provision allowing twenty-eight days after the order disposing of a motion for a new trial or to set aside the judgment in which to request sanctions because these motions may affect whether a party is entitled to the sanctions. When these motions do not pertain to the parties involved in the request for sanctions, extending the period for filing a motion for sanctions would serve no purpose.

In this case, the trial court entered judgment for defendants on plaintiffs Kathy, Thomas, and Bryan Braun’s claims on February 1, 1995, and judgment for plaintiff Nicholas Braun on February 6, 1995. Defendants’ motions for a new trial, judgment notwithstanding the verdict, and remittitur were denied in an order entered March 16, 1995. However, those motions concerned only Nicholas’ claims. Therefore, under MCR 2.403(O)(8), the twenty-eight day period for defendants to request mediation sanctions against Kathy, Thomas, and Bryan Braun commenced on February 1, 1995. Defendants filed their motion for mediation sanctions on April 6, 1995. Accordingly, the trial court properly denied defendants’ motion as untimely. [Emphasis added.]

In this case, the jury rendered a verdict on June 24, 2010. On September 2, 2010, the trial court entered an order against Mercy Memorial only. Thereafter, Mercy Memorial filed a motion for JNOV and/or new trial, which the trial court denied on December 29, 2010. Thus, Mercy Memorial had 28 days after December 29, 2010, to file a motion for sanctions and costs under MCR 2.403(O)(8). However, contrary to plaintiff’s argument, this timeline does not apply to Gupta because, although the jury rendered a verdict regarding Gupta in June 2010, the trial court’s September 2, 2010, order did not adjudicate Gupta’s rights. Rather, the first order
entered by the trial court adjudicating Gupta’s rights occurred on April 20, 2011, when the trial court entered a judgment of no cause of action. See In re Contempt of Henry, 282 Mich App 656, 678; 765 NW2d 44 (2009) (it is well-established that the court speaks through its written orders). Consequently, Gupta had 28 days from April 20, 2011, to file a motion for sanctions and costs under MCR 2.403(O)(8). Gupta filed his motion for sanctions and costs on April 28, 2011, thus, his motion was timely and the trial court should have allowed the motion.

However, as detailed below, we nevertheless affirm the trial court’s order because Gupta is not entitled to case evaluation sanctions or costs under MCR 2.403(O)(4). See Taylor v Laban, 241 Mich App 449, 458; 616 NW2d 229 (2000) (this Court will not reverse a trial court’s order when the right result was reached for the wrong reason).

Although the trial court never addressed whether Gupta was entitled to case evaluation and costs under MCR 2.403(O), we will review this issue because it involves a question of law and all necessary facts for a resolution have been presented. Gen Motors Corp v Dep’t of Treasury, 290 Mich App 355, 387; 803 NW2d 698 (2010). MCR 2.403(O)(1) provides:

If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party’s actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

MCR 2.403(O)(4) applies when a case involves multiple parties, and it provides, in the relevant part:

(4) In cases involving multiple parties, the following rules apply:

(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

The heart of the parties’ dispute centers around whether the second sentence of MCR 2.403(O)(4)(a) applies, which provides, “However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.” Gupta contends that the first part of MCR 2.403(O)(4)(a), which states that “[e]xcept as provided in subrule (O)(4)(b),” applies to all of MCR 2.403(O)(4)(a), and because this case involved joint and several defendants, MCR 2.403(O)(4)(b) applies. In other words, Gupta’s position is that the
individual case evaluation awards should be compared to the individual jury awards. In doing
that, Gupta is clearly the prevailing party and entitled to sanctions and costs.

On the other hand, plaintiff asserts that the phrase “[e]xcept as provided in subrule
(O)(4)(b)” within MCR 2.403(O)(4)(a) only applies to the first sentence of MCR 2.403(O)(4)(a)
because the second sentence begins with the word “however.” Consequently, plaintiff’s position
is that, regardless of whether defendants are jointly and severally liable, the aggregate case
evaluation should be compared to the aggregate jury award. In doing that, plaintiff is clearly the
prevailing party, and Gupta is not entitled to sanctions or costs.

A plain reading of MCR 2.403(O)(4) leads to the conclusion that plaintiff’s argument
regarding MCR 2.403(O)(4)(a) and (b) is accurate. The goal of interpreting a court rule is to
“give effect to the plain meaning of the text.” Ligons, 490 Mich at 70. This Court must apply
the clear and unambiguous language of a court rule as written. Id. In interpretation a court rule,
“common words must be understood to have their everyday, plain meaning.” Marketos v
American Employers Ins Co, 465 Mich 407, 413; 633 NW2d 371 (2001) (quotation marks and
citation omitted). When a word is not specifically defined, this Court may use the dictionary
definition to determine the plain meaning of the term. Wardell v Hincka, 297 Mich App 127,
132; 822 NW2d 278 (2012). Moreover, in construing a court rule, this Court “must avoid
constructions that render any part of a court rule surplusage or nugatory.” Yudashkin v
Linzmeyer, 247 Mich App 642, 652; 637 NW2d 257 (2001). Keeping these rules of
interpretation in mind, MCR 2.403(O)(4)(a) states:

Except as provided in subrule (O)(4)(b), in determining whether the
verdict is more favorable to a party than the case evaluation, the court shall
consider only the amount of the evaluation and verdict as to the particular pair of
parties, rather than the aggregate evaluation or verdict as to all parties. However,
costs may not be imposed on a plaintiff who obtains an aggregate verdict more
favorable to the plaintiff than the aggregate evaluation.

“However” is defined as “nevertheless; yet; on the other hand; in spite of that[.]”
Random House Webster’s College Dictionary (2001). This definition leads to the conclusion
that the second sentence of MCR 2.403(O)(4)(a) applies in spite of the rule provided in the first
sentence. In other words, the first sentence of MCR 2.403(O)(4)(a) provides that the court shall
consider the amount of the evaluation and verdict to the particular parties, except when the
defendants are jointly and severally liable under MCR 2.403(O)(4)(b). But, because the second
sentence begins with “however,” the rule in the second sentence—that costs shall not be imposed
on a plaintiff who obtains a more favorable aggregate verdict than aggregate evaluation—clearly
applies regardless of whether the parties are jointly and severally liable under MCR
2.403(O)(4)(b).

This conclusion is consistent with the 1995 report of the Michigan Supreme Court
Mediation Rule Committee. 451 Mich 1205, 1208 (1995). In discussing the consideration of an
aggregate verdict in a multiple defendant case, the committee provided the following example as
guidance regarding how to apply the second sentence in MCR 2.403(O)(4)(a):
The controversy involves the last sentence. To illustrate, assume that the mediation panel awards $100,000 to Plaintiff against Defendant A and $50,000 against Defendant B. Plaintiff rejects. If at trial Plaintiff recovers a verdict of $200,000 against Defendant A and nothing against Defendant B, Defendant B has certainly obtained a verdict more favorable to it than the mediation award. However, because of the last sentence of subrule (O)(4)(a), Defendant B may not recover costs from Plaintiff. [451 Mich at 1208.]

In this case, a case evaluation awarded plaintiff $45,000 against Mercy Memorial and $5,000 against Gupta. All parties rejected the panel’s awards. Following a jury trial, the jury awarded plaintiff $4,850,000 against Mercy Memorial and found no liability against Gupta. Because the second sentence of MCR 2.043(O)(4)(a) precludes sanctions and costs against a plaintiff regardless of whether joint and several liability applies when the aggregate jury verdict is more favorable than the aggregate case evaluation award, Gupta is not entitled to sanctions and costs under MCR 2.403(O)(4).

III. CONCLUSION

In Docket No. 303999, we affirm the jury’s verdict, vacate the jury’s economic damages award, and remand for application of the lower tier cap to the noneconomic damages. In Docket No. 304832, we affirm the trial court’s order. We do not retain jurisdiction.

No costs to any party, none having prevailed in full. MCR 7.219(A).

/s/ Kathleen Jansen
/s/ Christopher M. Murray