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DIAGNOSING THE CHANGING STATE OF MEDICAL MALPRACTICE & NURSING HOME LIABILITY

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# Michigan Court Of Appeals Applies Loss Of Opportunity Doctrine In A Manner Favorable To Medical Malpractice Defendants

By Jeffrey H. Chilton

On February 2, 2005, the Michigan Court of Appeals issued an opinion which will be of great assistance to health care administrators and practitioners in cases in which a plaintiff claims a lost chance or opportunity.

In *Kuper et.al. v. Metropolitan Hospital* et. al. ____Mich App___ (Docket No 250952, rel'd 2/2/05), the Michigan Court of Appeals applied the doctrine of lost chance or opportunity in a manner favorable to medical malpractice defendants. The focus of plaintiff's complaint involved an alleged failure to timely treat a patient's bacterial endocarditis. Bacterial endocarditis is a life threatening disease characterized by bacterial growth on a patient's heart and its valves. Plaintiff claimed that delay in surgical treatment of the bacterial endocarditis significantly diminished this patient's chance of survival. The plaintiffs sought significant damages based upon the fact that the patient died as a result of bacterial endocarditis prior to surgical intervention.

All of plaintiff's proposed expert witnesses testified that had surgery been performed in a timely manner, this patient's chance of survival would be greater than fifty percent. Following the depositions of plaintiff's proposed expert witnesses, defendant moved for summary disposition which was granted by the trial court. The dismissal of this claim without payment by defendants was upheld by the Court of Appeals in *Kuper*.

The Court of Appeals evaluated the meaning of the medical malpractice proximate cause statute (MCL 600.2912 (a). MCL 600.2912 (a) states, in pertinent part:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the

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This decision provides further support to all health care professionals, hospitals and their counsel in their efforts to dismiss medical malpractice claims. A motion for summary disposition should be seriously considered in any medical management dispute in which the plaintiff argues a lost chance or opportunity. In such cases, defendant should file affirmative defenses based upon the proximate cause statute and interpretive case law of the statute with the first responsive pleadings. Defense counsel should work on developing medical evidence to support such affirmative defenses during a claim's discovery period.

> 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%.

The second sentence of the statute has been interpreted by the Michigan appellate courts to mean that a plaintiff must show that a defendant's negligence caused the probability of survival to decrease by fifty or more percentage points. See *Fulton v. William Beaumont Hospital,* 253 Mich App 70; 655 NW 2d 569 (2000).

In *Kuper,* plaintiff relied on the benefit of hindsight and attempted to argue that the fifty-percent rule was satisfied because the fact that the patient died meant that the patient's survival probability was, of necessity, zero. The Court of Appeals rejected this sophistry. Carefully examining the record, the Court of Appeals indicated that even if surgery was delayed does not mean that surgery was no longer an option. In support of its decision, the Court pointed out the fact that this patient was undergoing a pre-surgical regimen in anticipation of surgical intervention at the time of this patient's demise. Therefore, a dismissal of these claims against the health care providers was logical and appropriate.

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