

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN BENNETT and SANFORD
MANDELL, copersonal representatives
of the estate of JACK E. BOLAND,
deceased,

UNPUBLISHED

Plaintiffs-Appellees,

v

No. 167307
LC No. 91115373 NH

ROBERT J. WITTCHOW, D.O., ALFREDO
LAZO, M.D., RALPH DUMAN, M.D., and
L. REYNOLDS ASSOCIATES,

Defendants-Appellees,

and

FERNDANDO DIAZ , M.D., UNIVERSITY
NEUROSURGICAL ASSOCIATES, P.C., a
Michigan professional corporation, and
HARPER HOSPITAL,

Defendants,

and

HARRY HERKOWITZ, M.D.,

Amicus Curiae.

Before: Marilyn Kelly, P.J., and Taylor and Markey, JJ.

MARILYN KELLY, P.J., (dissenting).

I respectfully dissent.

I believe that plaintiffs can sustain a cause of action for wrongful death. In *Falcon v Memorial Hospital*,¹ a nineteen-year-old patient suffered an amniotic fluid embolism after the birth of her child and died. The plaintiff filed suit against the hospital and the attending physician. She alleged that failure to insert an intravenous line into the patient before the onset of the embolism deprived her of a 37.5 percent chance of survival. *Id.*, at 460-462 (Levin, J.). A four justice majority agreed that a patient's lost opportunity to survive was an actionable injury. *Id.*, at 461-462 (Levin, J.), 472-473 (Boyle, J.). The holding in *Falcon* was limited to situations where the ultimate harm to the victim was death.

The doctrine was extended by this Court in *Weymers v Khera*, 210 Mich App 231; 533 NW2d 334 (1995). There, the Court held

We believe that the arguments for allowing a cause of action for the loss of an opportunity to survive apply equally to allowing a cause of action for the loss of an opportunity to avoid greater physical harm. [*Id.*, at 236-237.]

In *Weymers*, the plaintiff argued that, had the defendants timely and properly diagnosed her condition, she would have had a thirty to forty percent chance of retaining kidney function. This Court noted that the holding was an equitable approach. As stated in *Weymers*, negligent omissions prevent a plaintiff from being able to prove a defendant's liability and destroy "the ability to allow fate to run its course." *Weymers*, at 237. While the plaintiff in *Weymers* might still have lost kidney function, she would have known it was due to a natural progression of the disease and not from the misdiagnosis. *Id.*

The analysis in *Falcon* and *Weymers* should be applied to this case. Even though Boland had terminal cancer, plaintiffs' expert testified at his deposition that a proper diagnosis by defendants could have eased Boland's pain and prolonged his life. Notwithstanding the preexisting cancer, a reasonable trier of fact could conclude that the misdiagnosis was a cause in fact and a proximate cause of Boland's premature death. See *Dedes v Asch*, 446 Mich 99, 106; 521 NW2d 488 (1994).

In holding as it does today, the majority ignores a long line of cases that hold members of the medical profession accountable for medical malpractice resulting in legally cognizable damages to a patient. Patients are entitled to expect reasonably competent medical care and expertise. In this case, that included timely and proper diagnosis and treatment with a concomitant likelihood of a prolonged period of survival. Plaintiffs are entitled to go forward to attempt to show that, but for the doctors' failure to timely diagnose and treat, Boland's anticipated demise was much earlier than it would have been with proper care and treatment.

The trial judge improperly applied the \$225,000 cap and dismissed this action following plaintiffs' settlement with other defendants for noneconomic damages in the amount of \$567,500.

/s/ Marilyn Kelly

¹ 436 Mich 443; 462 NW2d 44 (1990).