

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RUTH ALDRICH, as Personal Representative of  
the Estate of STEVEN ALDRICH, Deceased,

UNPUBLISHED  
September 22, 2009

Plaintiff-Appellant/Cross-Appellee,

v

MID MICHIGAN MEDICAL CENTER,  
ROBERT GENOVESE, M.D., and RODNEY  
DIEHL, D.O.,

No. 281553  
Midland Circuit Court  
LC No. 03-006551-NH

Defendants-Appellees/Cross-  
Appellants.

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Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

In this medical malpractice cause of action, plaintiff Ruth Aldrich appeals as of right from the trial court's grant of summary disposition in favor of defendants Mid Michigan Medical Center, Robert Genovese, M.D., and Rodney Diehl, D.O. Plaintiff asserts that the trial court erred in granting defendants summary disposition after concluding that plaintiff's notice of intent and affidavits of merit were statutorily deficient. Plaintiff further asserts that the trial court erred in denying plaintiff's motion to disqualify the trial court. Additionally, Mid Michigan Medical Center, Dr. Genovese and Dr. Diehl cross-appeal the trial court's denial of their earlier motions for summary disposition, which alleged that plaintiff failed to establish proximate causation. We hold that although the trial court erred in concluding that plaintiff's notice of intent and affidavits of merit were deficient, defendants are entitled to partial summary disposition because plaintiff failed to establish that defendants proximately caused decedent Steven Aldrich to lose sexual function. However, plaintiff's cause of action should not have been dismissed with prejudice where her claim relating to decedent's pain and suffering has not yet been resolved.

I. Factual Premise

This cause of action arises out of decedent's February 14, 2001, visit to the emergency room at Mid Michigan Medical Center. Decedent was admitted to the emergency room upon complaining of chest pains. He was placed on a saline, nitroglycerine and heparin drip at approximately 3:15 a.m. At approximately 5:00 a.m., decedent developed an erection. He did not initially inform hospital personnel about the condition. However, decedent met with Dr. Genovese around 9:00 a.m. to discuss his chest pains. Dr. Genovese concluded that a cardiac

catheterization needed to be performed. Shortly after the 9:00 a.m. meeting, decedent called Dr. Genovese back to his room to tell him about the erection. Consequently, Dr. Genovese ordered the nitroglycerine drip to be stopped.

Dr. Diehl performed the cardiac catheterization at approximately 10:50 a.m. While Dr. Diehl testified that he was unaware of the erection at the time of the procedure, there is evidence in the record that indicates the nursing staff commented on the erection while they were preparing decedent for the catheterization. However, nothing was done to treat the condition until approximately 8:00 p.m., when Dr. Diehl ordered the application of a cold compress. By 9:30 p.m. the condition had not subsided and the hospital staff contacted Dr. Richard Mills, a urologist. Dr. Mills subsequently performed an aspiration procedure to drain the penis of blood, which he hoped would relieve the erection. That procedure proved ineffective. Consequently, Dr. Mills performed a shunt procedure at 4:30 p.m. on February 15, 2001. As a result of that procedure, it appears that decedent lost all sexual function of his penis. He died a short time later from an unrelated condition.

## II. Statutory Sufficiency of the Notice of Intent and Affidavits of Merit

Plaintiff first contends that the trial court erred in determining that her notice of intent was statutorily deficient. We agree. This Court reviews a trial court's decision regarding summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court's review is limited to the evidence that was presented to the trial court. *Pena v Ingham Co Road Commission*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Furthermore, this Court must review the evidence in the light most favorable to the non-moving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

The trial court determined that plaintiff's notice of intent was deficient where it failed to adequately set forth the applicable standard of care and where it failed to explain how the alleged breach of that standard proximately caused decedent's injuries. Pursuant to MCL 600.2912b(1), a party must send a notice of intent to any healthcare facility or professional at least 182 days before it commences any action for medical malpractice. Furthermore, MCL 600.2912b(4) sets forth a number of requirements with which the notice of intent must comply. Specifically, it states:

- (4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
  - (a) The factual basis for the claim.
  - (b) The applicable standard of practice or care alleged by the claimant.
  - (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
  - (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim. [MCL 600.2912b(4).]

Plaintiff's notice of intent was approximately five pages long. It began with a brief recitation of the factual basis for the claim. It then contained a section to address each of the statutory requirements. Regarding the standard of practice of care, the notice of intent provided the following:

The standard of care required the treating physicians to be aware of, and monitor the condition of Plaintiff throughout his hospital stay, and the treatment that was being provided to him by the various specialists who had been called in to treat Mr. Aldrich. It was the admitting doctor's responsibility, Dr. Hill, to be aware of the overall condition of the patient and the needs of the patient and to supervise the consultants and to obtain appropriate and as needed care for Mr. Aldrich and his priapism condition. However, the admitting physician neither supervised nor obtained a consult during the entire course and development of the priapism.

The standard of care also requires the nurses who were attendant to the Plaintiff upon his admission and thereafter, throughout the course of his hospitalization along with the individuals who were involved in the catheterization and Dr. Diehl, to obtain the proper expertise to understand the problem and treat the problem. The standard of care required the nurses to recognize that a cardiologist would not be able to treat such a problem, and were required to bring this to the attention of the attending physician, and/or an appropriate specialist. The standard of care required them to notify the attending doctor and a specialist in light of the priapism condition. Furthermore, the standard of care would require them to take the condition seriously, and not to take a cavalier attitude concerning this most serious condition, which is what occurred during the course of the hospitalization.

It was further the standard of care for the attending cardiologist, Dr. Genovese, to recognize immediately the problem, and further recognize the nitroglycerine would not be the cause of the problem.

The standard of care further required him to recognize that he was not in a position to diagnose the cause of the priapism, and was also not in a position to treat the priapism. The standard of care further required him to notify the attending physician of the problem immediately or call a specialist to treat the problem.

In granting the motion for summary disposition, the trial court declared that the notice of intent failed to provide a particularized standard of care for each defendant. While it is true that case law requires the provision of a particularized standard of care for each defendant, this Court

concludes, for the reasons stated below, that the trial court erred in concluding that the above standard of care statement was deficient.

Defendants support their contention that the notice of intent must include a specific standard of care for each named individual by citing to *Roberts v Mecosta Co Hosp*, 470 Mich 679; 684 NW2d 711 (2004) (also known as *Roberts II*). In *Roberts II*, the plaintiff had complications while pregnant and was diagnosed as having experienced a spontaneous abortion. *Id.* at 687. A D & C procedure was to be performed. *Id.* Following the procedure, the plaintiff continued to experience pain. *Id.* Upon returning to her doctor, it was revealed that she did not have a spontaneous abortion, but had experienced an ectopic, or tubal, pregnancy that caused her fallopian tube to burst. *Id.* She subsequently had her fallopian tubes removed and was no longer able to have a child. *Id.*

The plaintiff in *Roberts II* subsequently sent a notice of intent to a variety of parties that included a doctor, a physician assistant and a medical facility. *Roberts II, supra* at 687. Her theory was essentially that she was misdiagnosed and, as a result, she lost her ability to have children. *Id.* at 690. Regarding the applicable standard of care, the plaintiff stated that the named individuals were required to “provide the Claimant with the services of competent, qualified and licensed staff of physicians, residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case and to render same in accordance with the applicable standard of care.” *Id.* at 689. In finding that the plaintiff’s standard of care was deficient, the Court first explained that because the notice of intent is sent prior to any discovery, the standard of care provided in that document need not prove to be legally correct in order to be sufficient. *Id.* at 691. The Court then stated, “[h]owever, what is required is that the claimant make a good-faith effort to aver the specific standard of care that she is claiming to be applicable to each particular professional or facility that is named in the notice.” *Id.* at 691-692. The Court further observed:

Here, several different medical caregivers were alleged to have engaged in medical malpractice. Yet, rather than stating an alleged standard of practice or care for each of the various defendants—a hospital, a professional corporation, an obstetrician, a physician’s assistant, and an emergency room physician—plaintiff’s notices of intent allege an identical statement applicable to all defendants. [*Id.* at 692.]

The Court noted that the standard of care in a medical malpractice cause of action might be derived from statute or from common law. *Id.* at 692 n 8. It further stated that the standard of care that applies to one medical professional would not likely be the same as the standard that applies to a different type of professional. *Id.* The Court ultimately concluded that the notice of intent was deficient regarding the statement of the standard of care. *Id.* at 694-695.

This Court applied the *Roberts II* decision in *Gawlik v Rengachary*, 270 Mich App 1; 714 NW2d 386 (2006). In *Gawlik*, the plaintiff’s notice of intent stated the following regarding the standard of care:

The applicable standard of care required is that of reasonably prudent physicians and surgeons and medical care providers in the same or similar circumstances as those who were conducting surgical procedures, and caring for

the patient, Cynthia Gawlik, from the time of her admission on November 30, 1999, and subsequent surgeries, including the ACDF by Dr. Rengachary from neurosurgery on December 1, 1999, and post operative care through discharge on January 12, 2000.

Pursuant to MCL 332.21513 entitled “Duties and Responsibilities of Owner, Operator or Governing Body of the Hospital,” the owner, operator and governing body of a hospital licensed under this Article (A) are responsible for all phases of the operation of the Hospital, selection of the medical staff, and quality of care rendered in the Hospital. Defendant DMC and Harper Hospital had this statutory duty in addition to its responsibly to act reasonably under the circumstances which existed in this case. [*Id.* at 4.]

Upon noting that the notice of intent presented one short and broad standard of care for all the potential defendants and failed to present a standard for the treating hospital, the Court stated that the notice was deficient. *Id.* at 10-11.

In both *Roberts II* and *Gawlik*, the standard of care section in the notice of intent was extremely short and general. In the present case the standard of care section was fairly lengthy and detailed. Rather than simply state that the same standard of care applied to each medical professional, the notice of intent referenced people by name and made a good faith effort to state what the standard required each particular person to do. Therefore, the concerns in *Roberts II* and *Gawlik* simply do not exist in this case. The trial court erroneously concluded (with very little explanation) that the notice of intent was deficient regarding the standard of care section. Therefore, the grant of summary disposition was improper to the extent that it was dependant on this particular point of law.

In addition to concluding that the notice of intent failed to provide a particularized standard of care, the trial court also concluded that the notice failed to explain how the alleged breach of the standard of care proximately caused decedent’s injuries. Regarding proximate causation, the notice of intent provided:

As a result of all the breaches of the standard of care as indicated above, i.e., the failure to take any action or to notify the proper persons, and in failing to properly diagnose the problem caused the serious injuries and damages to the Plaintiff including severe pain for the rest of his life, and impotency. Further, their failure to take action promptly did require later shunting and operation.

In granting summary disposition, the trial court concluded that the above statement was deficient where it merely concluded that the breach was the proximate cause of the injury but did not explain *how* the breach caused the injury. By way of example, the proximate cause language of the NOI against the nursing staff stated:

“That as a direct and proximate result of Mid Michigan Medical Center, through its nursing staff’s, negligent acts and/or omissions, as set forth above, the Claimant has suffered continuing pain, permanent scarring, impotence, and permanent loss of the sexual function of his penis. **He was also subjected to more intrusive surgical intervention than would have been required if the**

**priapism had been diagnosed and treated earlier.”** [Affidavit of Merit of Jennifer David, volume I of the lower court file.]

*Roberts II* also addressed the level of specificity that was required in the proximate causation section of a notice of intent. In explaining that the plaintiff's notice of intent was deficient regarding the proximate causation statement, *Roberts II* stated:

Plaintiff's notices of intent state that “as a result of [defendants'] negligence ..., [plaintiff] is now unable to have any children.” At first blush, this may appear to satisfy the proximate causation requirement of § 2912b(4)(e). However, it is not sufficient under this provision to merely state that defendants' alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the manner in which it is alleged that the breach was a proximate cause of the injury. [*Roberts II*, supra at 699 n 16.]

Unlike the proximate causation statement in *Roberts II*, plaintiff's proximate causation statement adequately communicated the manner in which the alleged malpractice proximately caused injury. The proximate causation statement initially appears to merely conclude that the malpractice caused injury without stating the manner in which the injury was caused. However, the second sentence of the statement clearly communicates that plaintiff theorized that because of the delay in treatment, medical professionals had to resort to performing a shunting operation. Taken as a whole, the proximate causation statement apprised each defendant of plaintiff's theory: pain and injury resulted from the shunting procedure, which was the direct result of defendants' delay in treatment. Consequently, plaintiff's notice of intent was statutorily sufficient and the trial court erred in granting defendants summary disposition.

### III. Statutory Sufficiency of the Affidavits of Merit

Like the trial court's determinations regarding the notice of intent, the trial court also concluded that the affidavits of merit were deficient where they failed to provide individualized standards of care and where they failed to adequately explain how the breaches of the standards of care proximately caused decedent's injuries. Pursuant to MCL 600.2912d, a plaintiff in a medical malpractice cause of action must submit an affidavit of merit with the complaint. The affidavit must be signed by a healthcare professional that could reasonably qualify as an expert witness. MCL 600.2912d(1). The affidavit must set forth the following:

- (a) The applicable standard of practice or care.
- (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
- (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
- (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1)]

Plaintiff submitted several affidavits of merit with the complaint. We will first address whether those affidavits successfully established the particularized standards of care.

Dr. Kenneth A. Brown submitted the first affidavit of merit. The affidavit began with an explanation of Dr. Brown's qualifications. It then contained a section that stated that Drs. Diehl and Genovese and Mid Michigan Medical Center deviated from the standard of care by failing to obtain a timely urological consultation. This section adequately communicates the standard of care that is alleged. If it is a deviation from the standard of care to fail to obtain a urologic consultation, it naturally follows that the standard of care requires obtaining a timely urologic consultation. Similarly, the next section of the affidavit states that in order to avoid breaching the standard of care, a timely consultation should have been secured. The affidavit then moves on to discuss proximate cause. It appears, therefore, that rather than include a separate section to identify the applicable standard of care, Dr. Brown's affidavit of merit references the standard of care while specifically addressing the other statutory criteria (such as in the sections dedicated to manner of breach and result of breach).

The trial court found that the affidavit of merit failed to even allege an applicable standard of care. In so concluding, it appears that the trial court essentially held that the affidavit of merit needed to contain a separate section to address each of the statutorily required elements of MCL 600.2912d(1). That legal principle was addressed in *Roberts II*, although that case was discussing a notice of intent rather than an affidavit of merit. At issue in *Roberts II* was the notice of intent's sufficiency in addressing the manner in which the standard of care was breached. *Roberts II, supra* at 695-696. The notice indicated that paragraph 2 of the notice would address that subject. *Id.* However, paragraph 2 did not address the manner of breach. *Id.* The Court of Appeals found that the notice of intent was sufficient where the manner of breach could be ascertained after consulting other portions of the notice of intent. *Id.* In so concluding, the Court held that the statute did not require a notice of intent to provide information in any particular format. *Id.* The Supreme Court disagreed. In reversing this Court, the Supreme Court explained:

“We agree that nothing in § 2912b(4) requires that the notice be in any particular format. The statute does, however, clearly require the claimant to provide “a statement” of each of the enumerated categories of information, and we disagree with the panel's conclusion that the required information need not be “separately ... identified.” Certainly, the statement must identify, in a readily ascertainable manner, the specific information mandated by § 2912b(4).” [*Id.* at 696.]

In the present case, Dr. Brown's affidavit of merit concluded that the standard of care required the ordering of a timely urological consultation. The alleged standard of care is identified in a readily ascertainable manner. *Roberts II* requires nothing more.

Plaintiff's complaint also contained an affidavit of merit from Dr. Bryant W. Pierce, who is an emergency care physician. Dr. Pierce's affidavit discussed the standard of care when describing the manner in which the standard was breached and how the breach could have been avoided. Each of those sections provide that Drs. Genovese and Diehl and Mid Michigan Medical Center should have “diagnosed the priapism, expeditiously treated the priapism and obtained an early urologic consultation.” Like Dr. Brown's affidavit, Dr. Pierce's affidavit set

forth the standard of care in a readily ascertainable manner. The affidavit was not contrary to the principles set forth in *Roberts II*.

In addition to concluding that the above-discussed affidavits of merit failed to adequately state a standard of care, the trial court also concluded that none of the affidavits adequately communicated a theory of proximate causation. Dr. Brown's affidavit of merit stated the following regarding proximate causation:

That as a direct and proximate result of Dr. Rodney Diehl and Mid Michigan Medical Center's negligent acts and/or omissions, as set forth above, the Claimant did not receive a timely urologic consultation.

Dr Pierce's statement of proximate causation stated:

That as a direct and proximate result of Dr. Robert Genovese, Dr. Rodney Diehl, Dr. Jeffrey Eschbach, and Mid Michigan Medical Center's negligent acts and/or omissions, as set forth above, the Claimant has suffered continuing pain, permanent scarring, impotence and permanent loss of the sexual use of his penis. He was also subjected to more intrusive surgical intervention than would have been required if the priapism had been diagnosed and treated earlier.

Similarly, Nurse Jennifer David's statement of proximate cause stated:

That as a direct and proximate result of Mid Michigan Medical Center, through its nursing staff's negligent acts and/or omissions, as set forth above, the Claimant has suffered continuing pain, permanent scarring, impotence and permanent loss of the sexual use of his penis. He was also subjected to more intrusive surgical intervention than would have been required if the priapism had been diagnosed and treated earlier.

Pursuant to *Roberts II*, the above quoted sections adequately explained a theory of proximate causation. As stated in regard to the notice of intent, *Roberts II* held that a statement of proximate causation had to do more than conclude that the breach of the standard of care caused the plaintiff's injuries. Under the statute and the *Roberts II* standard, each affidavit of merit is sufficient. First, Dr. Brown's affidavit of merit, which is certainly the least detailed, still sets forth that as a result of the allegedly negligent conduct, a timely urologic consultation never occurred. This statement adequately places defendants on notice that plaintiff theorizes that if it was not for the failure to order a timely urologic consultation, plaintiff would have avoided the pain, suffering and injury that he experienced. Similarly, the Dr. Pierce and Nurse David affidavits, which are certainly more detailed than Dr. Brown's affidavit, adequately communicate the theory of proximate causation. Those affidavits explain the manner in which the alleged negligence caused the resulting injuries. Specifically, as a result of the unnecessarily intrusive surgical procedure, plaintiff experienced pain, scarring and permanent impotence. Because this

proximate causation statement was statutorily sufficient, it was improper for the trial court to grant summary disposition on this basis.<sup>1</sup>

#### IV. Motion to Disqualify

Finally, plaintiff contends that the trial court erred in denying her motion to disqualify. We disagree. When reviewing a ruling on a motion to disqualify, the factual findings of the lower court are reviewed for an abuse of discretion, while the court's application of law to the facts is reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503 and n 38; 548 NW2d 210 (1996). The abuse of discretion standard recognizes that the lower court should not be reversed unless its holding falls outside the range of principled and reasonable outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Furthermore, "the interpretation and application of court rules and statutes presents a question of law that is reviewed de novo." *Staff v Johnson*, 242 Mich App 521, 527; 619 NW2d 57 (2000).

Plaintiff first argues that MCR 2.003(B)(4) mandated judicial disqualification. MCR 2.003(B)(4) provides:

"(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

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(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years."

MCR 2.003(B)(4) indicates that it requires disqualification in three distinct situations. The first two situations are not at issue in this case. The parties disagree regarding the meaning of the third scenario highlighted by MCR 2.003(B)(4). Plaintiff asserts that the language of the court rule means that a judge must disqualify himself if the judge's former law firm, whom he worked for in the last two years, has, at any time, represented one of the parties to the litigation. Under this interpretation, Judge Lauderbach would have to disqualify himself because Currie Kendall, his former law firm, had represented Mid Michigan Medical center within two years of Mid Michigan Medical Center appearing before Judge Lauderbach. We disagree with Plaintiff's interpretation. MCR 2.003(B)(4) unambiguously requires disqualification of a judge who, within the last two years, was a member of a law firm that is representing a party before the court. Currie Kendall, the only law firm that Judge Lauderbach had been a member of in the two years prior to plaintiff's motion, was not representing any of the parties in this litigation. Therefore,

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<sup>1</sup> Because we find that both the notice of intent and the affidavits of merit were adequate, we need not address whether the trial court erred in holding that defendants did not waive their affirmative defenses relating to the notice of intent and affidavits of merit. Likewise, we need not address whether the trial court erred in denying plaintiff's motion for reconsideration or in failing to apply principles of equity.

MCR 2.003(B)(4) did not require Judge Lauderbach to disqualify himself. Plaintiff's motion for disqualification was properly denied.

Plaintiff also asserts that disqualification was required in this case pursuant to the Michigan Code of Judicial Conduct, Canon 2, which is entitled "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." According to plaintiff, Judge Lauderbach's various connections to Mid Michigan Medical Center created an appearance of impropriety. Among other things, plaintiff cites the fact that Currie Kendall was closely affiliated with Mid Michigan Medical Center, that one of Judge Lauderbach's former partners was a board member of the hospital, and that Judge Lauderbach's parents had apparently donated money to Mid Michigan Medical Center at some point.

According to plaintiff, in order to comply with Canon 2, a judge is required to disqualify himself if a failure to do so would create an appearance of impropriety. This question has been discussed by our Supreme Court in *Adair v Michigan*, 474 Mich 1027, 709 NW2d 567 (2006), in which the Court discussed whether Canon 2 controlled in such a situation or whether MCR 2.003(B) required a party to show that a trial judge demonstrated actual bias. We find it unnecessary to determine whether Canon 2 indicates that a trial judge should be disqualified even where he has not demonstrated actual bias because we conclude that Judge Lauderbach's involvement in this case did not even create an appearance of impropriety. In arguing that there was an appearance of impropriety, plaintiff essentially engaged in a game of six-degrees of separation and sought to name every tenuous connection between Judge Lauderbach and Mid Michigan Medical Center. Judges are typically individuals who are active in their communities and have developed many professional and personal connections during the courses of their careers. To disqualify a judge on the basis of such tenuous connections would create a great hurdle for the judiciary. The trial court therefore properly denied the motion for disqualification where its connections with Mid Michigan Medical Center were not deep enough to create a true appearance of impropriety or to demonstrate actual bias.

#### V. Causation

Next, defendants assert that the trial court erred in determining that plaintiff established that defendants proximately caused decedent to lose his opportunity to retain sexual function. We agree. However, defendants were only entitled to partial summary disposition because plaintiff clearly alleged damages in the form of pain and suffering and those allegations were not resolved in any of the motions for summary disposition.

In a medical malpractice cause of action, the plaintiff has the burden of establishing that the defendant's negligent action proximately caused the plaintiff's injury. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). Proximate causation is composed of both cause in fact and legal cause. *Id.* In the present case, defendants allege that plaintiff's two causation experts failed to establish factual causation. To establish factual causation, the plaintiff must present evidence that would cause a jury to conclude that it was more probable than not that the defendant's actions were the cause of the injury. *Id.* Furthermore, this cause of action is partially based on a theory of lost opportunity for recovery, as plaintiff alleges that because defendants failed to treat decedent's priapism in a timely manner, decedent lost his opportunity to retain the sexual function of his penis. Pursuant to MCL 600.2912a(2), "[i]n 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 order to establish proximate cause, plaintiff relied on the testimony of Dr. Mills. An examination of Dr. Mills’s testimony reveals that the testimony was initially lacking in clarity and specificity. Dr. Mills testified that there are two types of priapisms: high-flow and low-flow. While he did not state what the window of opportunity was for a high-flow priapism, he stated that the window of opportunity for a low-flow priapism, at six to eight hours, was the shorter of the two windows. However, he stated that he could not say which type of priapism decedent was suffering from because he was displaying symptoms of each type. When asked if he could have saved the sexual function of the penis had he been informed of the priapism earlier than he was, Dr. Mills stated, “[w]ell, logic tells me if it had been identified an hour after it started that you probably, you could effectively reverse the process through whatever means necessary, including surgery.”

In denying the motion for summary disposition that was filed by defendants in response to Dr. Mills’s testimony, the trial court explained that because the testimony was confusing, it was not clear how long of a window of opportunity Dr. Mills believed existed. Thereafter, defendants contacted Dr. Mills and asked him to issue an affidavit that clarified his deposition testimony. The resulting affidavit clearly established that Dr. Mills was of the opinion that there was only a one-hour period in which it was more probable than not that treatment of the priapism would have resulted in the restoration of sexual function. Dr. Mills further stated that he would not testify that if he had been able to meet with decedent sooner, it was more probable than not that a shunt procedure could have been avoided.

In response to Dr. Mills’s affidavit, defendants filed a motion for reconsideration of their summary disposition motions. In response, plaintiff filed a motion to add another expert witness, Dr. Mike Siroky, to establish causation. In addressing these motions, the court acknowledged that Dr. Mills’s subsequent affidavit clarified his deposition testimony, but expressed concern that the clarification was the product of ex parte communication. Though the trial court did not ultimately find that the ex parte communication was impermissible, the court determined that it was appropriate to add Dr. Siroky because an additional urologist would be of value. The trial court consequently denied defendants’ motion for reconsideration and granted plaintiff’s request to add Dr. Siroky as an expert witness. We now hold that the trial court erred in granting the motion to add a new expert witness and erred in denying defendants’ motion for reconsideration. Upon receiving the affidavit of Dr. Mills, the trial court should have entered summary disposition in favor of defendants where there was no genuine issue of material fact regarding causation and where there was no legal justification for adding a new expert witness.

First, we determine that the trial court erred in granting the motion to add a new expert witness. This Court reviews a trial court’s decision to permit a witness to testify for an abuse of discretion. *Carmack v Macomb County Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993). The abuse of discretion standard recognizes that the lower court should not be reversed unless its holding falls outside the range of principled and reasonable outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

According to plaintiff, the trial court's decision to permit the addition of Dr. Siroky was justified pursuant to MCR 2.612(C), which governs relief from a prior judgment or order. MCR 2.612(C) provides:

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

The above court rule is obviously fairly broad. Subsection (c) permits relief from a prior order on the basis of misconduct of an adverse party, subsection (e) allows for a previous order to be overturned where it is no longer equitable and subsection (f) allows relief for any other reason that justifies it. The trial court therefore had broad discretion in reversing its prior order and allowing Dr. Siroky to be added as a witness. The court found that defense counsel's contact with Dr. Mills was not improper and that it did not violate the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d et seq. It further found that the contact resulted in the production of an affidavit that clarified a deposition that was originally confusing and demonstrated that Dr. Mills did not believe plaintiff could demonstrate causation. The record also does not indicate that Dr. Mills changed his position after being deposed. Subsections (c), (e) and (f), as broad as they are, do not permit a court to grant relief of judgment merely on the basis of a need for clarification of another witness testimony. Dr. Siroky should not have been permitted to testify in this cause of action.

We note that plaintiff asserts that the trial court's action was justified because defendants violated HIPAA by engaging in ex parte communication with a treating physician. In support of this contention, plaintiff cites to *Croskey v BMW of America*, unpublished opinion of the Federal District Court for the Eastern District of Michigan, issued November 10, 2005. To begin, the decision of the Eastern District of Michigan is not binding on this Court. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Furthermore, even if we were to agree with *Croskey* regarding the requirements of HIPAA and were to hold that defendant improperly contacted Dr. Mills, it does not automatically follow that adding a new expert is the appropriate cure where there is no record evidence to support the assertion that the health care professional's

professional responsibility was compromised by the contact. Dr. Siroky should not have been added as an expert witness. We hold that such a remedy was improper in this case where there is no indication that the ex parte communication resulted in Dr. Mills changing his position regarding causation.

In addition to holding that the trial court abused its discretion in granting the motion to add Dr. Siroky, we also determine that the trial court erred in denying defendants' motion for reconsideration. "We review a trial court's decision on a motion for reconsideration for an abuse of discretion." *Woods v SLB Property Management, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). As stated above, the abuse of discretion standard recognizes that the lower court should not be reversed unless its holding falls outside the range of principled and reasonable outcomes. *Maldonado, supra* at 388. Pursuant to MCR 2.119(F)(3):

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

At the hearing on the motion for reconsideration, the trial court did not adequately explain why the motion was denied. The affidavit submitted by Dr. Mills is certainly compelling evidence as it indicates that plaintiff's own expert witness is incapable of establishing that causation exists in this case. The court acknowledged that this new information clarified its previous misunderstandings of the deposition testimony. However, it then focused on whether it was improper for defendants to engage in ex parte communication with Dr. Mills. Despite finding that the communication was not improper and did not violate HIPAA, the trial court denied the motion for reconsideration and allowed plaintiff to add Dr. Siroky as an expert witness.

As required by MCR 2.119(F)(3), defendants' motion for reconsideration was filed to correct an error that had misled the court and the parties. Specifically, the error was the notion that Dr. Mills felt he had six to eight hours in which he could have successfully treated the priapism. Defendants also demonstrated that the correction of the error mandated a different disposition of the motion. At the time the motion for reconsideration was filed, Dr. Mills was plaintiff's sole expert witness on causation. Summary disposition became proper under MCR 2.116(C)(10) after plaintiff's sole causation witness submitted an affidavit that indicated the window of opportunity for treatment closed before decedent told any medical professionals about the priapism. Without the trial court permitting plaintiff to add another causation expert, plaintiff would have been incapable of establishing causation at trial and this case could not have proceeded to a jury.<sup>2</sup> Therefore, the trial court abused its discretion in denying the motion for reconsideration.

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<sup>2</sup> We note that even if the court had been justified in permitting Dr. Siroky's addition, defendants would still have been entitled to summary disposition. Plaintiff was not capable of establishing  
(continued...)

The trial court erred in granting the motion to add a new expert witness and erred in denying defendants' motion for reconsideration. Because the affidavit of Dr. Mills clearly demonstrated that plaintiff could not establish causation, and because plaintiff should not have been permitted to add a new expert witness, partial summary disposition became proper pursuant to MCR 2.116(C)(10). However, despite defendants' assertions to the contrary, plaintiff's failure to establish a genuine issue of material fact related to causation did not render each of her claims meritless. Plaintiff clearly pled in her complaint that decedent incurred significant pain and suffering because of the delay in treatment. Plaintiff maintained this argument throughout the hearing on the summary disposition motions relating to causation. While we acknowledge that plaintiff's brief on appeal does not address the validity of the pain and suffering claims, MCR 7.216(A)(7) permits this Court to enter any judgment that the case may require. It would be improper to dismiss plaintiff's case in its entirety where the initial summary disposition motion only addressed the lost opportunity claim. Therefore, this action must be remanded for further proceedings to determine the validity of plaintiff's claims relating to pain and suffering.

## VI. Conclusion

The trial court erred in granting defendants' motions for summary disposition after improperly holding that the notice of intent and affidavits of merit were statutorily deficient. The trial court improperly denied defendants' motion for reconsideration after Dr. Mills clarified his deposition testimony and established that plaintiff failed to show a genuine issue of material fact regarding proximate causation. Defendants were entitled to summary disposition regarding plaintiff's loss of opportunity claim. However, because plaintiff's claim regarding decedent's pain and suffering has not yet been resolved, defendants were only entitled to partial summary disposition.

Affirmed in part and remanded for further proceedings relating to plaintiff's claim of pain and suffering. We do not retain jurisdiction.

/s/ David H. Sawyer  
/s/ Christopher M. Murray  
/s/ Cynthia Diane Stephens

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(...continued)

any genuine issue of material fact related to causation where both Dr. Siroky and Dr. Mills indicated that a urologist would not have likely treated decedent's priapism until after consulting with a cardiologist. Based on the windows of opportunity indicated by Dr. Mills and Dr. Siroky, there was simply not enough time to obtain a cardiology consultation and treat the priapism in a timely fashion.