



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

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MICHAEL BENIGNI, as Personal Representative  
of the Estate of PATRICIA BENIGNI, deceased

Plaintiff,

-vs-

Case No. 19-001198-NH  
HON. MICHAEL L. WEST

SAMIR ALSAWAH, M.D., and HURON MEDICAL  
CENTER, PC, jointly and severally,

Defendants.

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**OPINION AND ORDER**

Before this court is Defendants Motion for Summary Disposition. Oral argument was heard on March 15, 2021. This is a loss of opportunity medical malpractice case. Defendants argue that because Plaintiff has not shown that her loss of opportunity to survive her recurrent metastatic colorectal cancer was diminished by 50%, summary disposition is warranted. Plaintiff argues that reasonable minds could differ as to the meaning of the survival statistics that apply to this case and thus the question of whether or not Plaintiff suffered a loss of opportunity sufficient to withstand MCL 600.2912a(2) is a question for a jury.

**Factual Background**

Patricia Benigni (Plaintiff) was first diagnosed with stage III colorectal cancer in 2012. Dr. Alsawah (Defendant) began treating Plaintiff's cancer in November 2012. Plaintiff received chemotherapy treatments and had a surgical resection in February 2013. After her surgery and chemotherapy treatments,

Plaintiff would see Defendant for cancer surveillance. During office visits, Defendant would conduct physical examinations and order lab work. In June 2014, Plaintiff had a normal colonoscopy. Plaintiff had CT scans that were negative for cancer recurrence once a year from 2013-2016. In 2017, a CT scan revealed a large heterogeneous mass on Plaintiff's liver which was suspicious for metastatic disease. Metastatic disease was confirmed with a PET scan and biopsy. Plaintiff was referred to a surgeon to discuss the potential for surgical resection. Dr. Raofi, Plaintiff's surgeon, noted that surgery was technically feasible but not recommended due to Plaintiff's poor performance status. Plaintiff did not have further treatment and died in February 2018.

At issue in this case is Plaintiff's rising CEA levels in her blood work. Plaintiff argues that the rising CEA levels in her bloodwork should have prompted Defendant to investigate the cause of the rising levels and that if Defendant had done further investigation Plaintiff's metastatic cancer would have been diagnosed earlier and her opportunity to survive would have been increased through having more treatment options. Throughout 2013, Defendant monitored Plaintiff's CEA levels every 4-6 weeks. Plaintiff's levels ranged from 1.6 to 4.4ng/ml. In a non-smoker, a normal CEA level is less than 2.5ng/ml. In 2015 Plaintiff's CEA levels began to increase. On January 21, 2015, her CEA measured 24.2. On November 17, 2015, her CEA measured 38.6. On May 17, 2016, her CEA measured 59.3. On August 23, 2016, her CEA measured 78.5. On February 23, 2017, her CEA measured 175.9. As stated above Plaintiff's CT scans during this time did not reveal any metastatic disease until a scan on August 14, 2017.

Plaintiff also had a history of pre-existing conditions which likely contributed to the fact that her surgeon found her to not be a good candidate for surgery. Plaintiff had a history of hypertension, diabetes, hyperlipidemia, and a benign brain tumor which was removed in 2005. After the removal of the tumor, Plaintiff had a stroke and suffered from memory loss and had to re-learn to speak. Plaintiff also began to suffer from seizures following the stroke.

Law and Analysis

Both parties are in agreement in the law that applies to this case. The law that applies is MCL 600.2912a(2) which states:

(2) 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%.

The parties agree that *Fulton v. William Beaumont Hosp.*, 253 Mich. App. 70, 83 (2002) is the controlling interpretation of MCL 600.2912a(2). *Fulton* held that the plaintiff only had to show that his opportunity to survive had been reduced by a number greater than 50% due to defendant's negligence regardless of what plaintiff's initial opportunity to survive was. Both parties agree and recognize that *Fulton* has been strongly criticized by the Michigan Supreme Court but that it is still the law that applies to this case. Therefore the question in this case is whether an alleged delayed diagnosis of Plaintiff's metastatic cancer decreased her opportunity to survive by more than 50%.

The parties agree on the law in this case but they disagree on the application of the relevant statistics. Defendants argue that there is no evidence that Plaintiff's opportunity to survive would have been improved at all if her cancer had been discovered in 2015 as opposed to 2017. Plaintiff argues that if the cancer had been diagnosed in 2015 she would have been in a more favorable category for successful treatment.

The survival statistics gathered from SEER and AJCC show that the 5-year survival rate for metastatic colorectal cancer was between 14-16% for 2015. Plaintiff's expert, Dr. Gordon, testified in his deposition that these statistics are applicable to "all-comers" and don't necessarily account for all individual attributes of a given patient. Plaintiff then argues that a peer-reviewed study indicates that the five-year survival rate for colorectal cancer after a surgical resection ranges from 24 to 58%. Plaintiff further argues that if the cancer had been diagnosed earlier she would have had a better opportunity for surgery and that this delay essentially reduced her opportunity for curative surgery from 100% to 0%. In response to the argument regarding loss of opportunity for surgery, Defendant argues that Plaintiff never would have fallen into the category of patients to whom the post-surgery survival rates apply. Defendant argues that the article itself states that the majority of patients with metastatic disease are not surgical candidates.

Plaintiff does not argue that Defendant could have prevented her from getting metastatic colorectal cancer. Rather, Plaintiff is arguing that a delay in diagnosis decreased her opportunity to survive. The survival rate for metastatic

colorectal cancer is about 15%, therefore pursuant to *Fulton*, Defendant must have reduced Plaintiff's 15% chance of survival or opportunity for a better outcome by 50%. Dr. Gordon in his deposition stated that Plaintiff was not a good candidate for surgery in 2017 because at the time the cancer was diagnosed the disease had already spread beyond the liver, so surgery in the liver would not have done anything (Dr. Gordon deposition, page 98). Dr. Gordon further testified that Plaintiff would have had a better opportunity in 2015 to have been a candidate for surgery as opposed to in 2017 (Dr. Gordon deposition, page 105).

Whether or not Plaintiff would have been a better candidate for surgery in 2015 is speculative. The article "Management of potentially resectable colorectal cancer liver metastases" which Plaintiff relies on for survival statistics with surgical resection states that the majority of patients with metastatic disease are not candidates for surgery. The article states that patients with comorbidities have higher-procedure related mortality and worse long term outcomes. Plaintiff had many significant comorbidities. It is impossible to know whether Plaintiff would have been a better candidate for surgery in 2015 because even assuming that the cancer could have been detected in 2015, it is impossible to know what the extent of the spread would have been at the time of diagnosis and how that would have impacted Plaintiff's performance status for surgery. It is also unknown how Plaintiff's significant comorbidities would have affected her ability to survive post-surgery.

Dr. Gordon states that if Plaintiff had been diagnosed in 2015 "it is more likely Mrs. Benigni would have had an option for curative-intent surgery, as well

as additional treatment modalities.” This statement is based on the premise that in 2015 the cancer would have been confined only to the liver and without a spread to the adrenal glands which was found in 2017. Dr. Gordon testified that he would have expected the cancer to access the adrenal glands at a time after it had accessed the liver (Dr. Gordon deposition, page 100.) However, Dr. Gordon also testified that it was possible the cancer could have accessed the liver and adrenal glands at the same time (page 101). Therefore, it is speculative to guess what the state of Plaintiff’s cancer was in 2015 and how that would have impacted her ability to have surgery.

Plaintiff is required to show that her opportunity to survive or achieve a better outcome was reduced by 50%. Because there is so much speculation involved in this case, there is no evidence from which a jury could make that determination. The extent of Plaintiff’s cancer in 2015 is unknown, it is unknown whether she would have been a better candidate for surgery in 2015, and it is unknown what impact Plaintiff’s comorbidities would have on her chance of survival post-surgery. Plaintiff is also assuming that the cancer could have been detected in 2015 if Defendant had done a more thorough evaluation. These unknowns are all key factors in determining by how much, if at all, Plaintiff’s opportunity to survive was reduced. With all of these unknowns it would be impossible for a jury to make a determination that Plaintiff’s loss of opportunity to survive was reduced by 50%.

Plaintiff argues that this case is similar to *Lanigan v. Huron Valley Hosp., Inc.*, 282 Mich. App. 558 (2009) in that because there is conflicting interpretation

of statistics in this case, a genuine issue of fact exists. This court disagrees. The problem for Plaintiff in this case is not conflicting interpretation of statistics, it is that there is a lack of evidence from which a jury could apply any statistics. In *Lanigan*, it was alleged that a failure to timely diagnose a heart attack led to the plaintiff having to have a heart transplant as opposed to receiving cardiac bypass surgery. There was conflicting evidence of whether a plaintiff had a better chance of survival with a heart transplant compared to bypass surgery. Further, the court found that because of defendant's negligence the ability for plaintiff to maintain her own heart was reduced from 100% to 0%.

In *Lanigan*, there were questions of fact to put before a jury. There was a question of whether or not plaintiff's failure to timely diagnose a heart attack led to her needing a heart transplant as opposed to bypass surgery. If the jury found there was negligence in failing to diagnose a heart attack, the jury could then compare survival statistics between patients who had heart transplants and those who had bypass surgery to determine if there was a loss of opportunity to survive. Unlike *Lanigan*, even if Defendant was found to be negligent in failing to timely diagnose Plaintiff's metastatic cancer, it is unknown and speculative to say Plaintiff could have been a candidate for surgery because it is unknown what Plaintiff's cancer looked like in 2015. *Lanigan* involved comparing two clear paths of treatment. If diagnosed timely, plaintiff could have received bypass surgery, since she was not, she had to have a heart transplant. In this case, it would be speculative to argue that another treatment option existed for Plaintiff in

2015 that wasn't available to her in 2017. Therefore, because of that unknown there is no question of fact to put before a jury.

Plaintiff in *Lanigan* also made a sufficient showing that her opportunity for a better outcome was decreased by 50% as she provided statistics that showed patients that timely received bypass surgery had a 60% chance of surviving 25 years or more while those with heart transplants only had a 10% chance.

Defendant in *Lanigan* could dispute those statistics, but it was a question for the jury to determine if those statistics applied. In this current case, the parties agree that patients with stage IV colorectal cancer have about a 15% survival rate.

Plaintiff argues that with surgery, her ability to survive would have increased.

However, a jury could not even begin determining whether Plaintiffs had a loss of opportunity to survive without first determining if she would have been a candidate for surgery and the answer to that question is simply unknowable.

Therefore, there are no applicable statistics that indicate Plaintiff had a loss of opportunity to survive or achieve a better outcome by more than 50% and summary disposition must be granted.

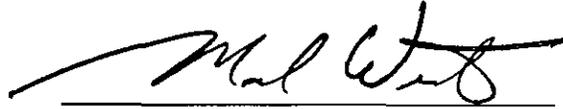
#### Conclusion

There is no evidence that Plaintiff's opportunity to survive or achieve a better result was reduced by 50% as a result of Defendant's negligence. Plaintiff's argument that she would have had a better opportunity for surgery in 2015 compared to 2017 is speculative as the state of her cancer at that time is unknown. Therefore, a jury would have no ability to determine if she suffered a loss of

opportunity to survive greater than 50% and the Motion for Summary Disposition is GRANTED.

IT IS SO ORDERED.

April 12, 2021



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HON. MICHAEL L. WEST  
Circuit Court Judge