STATE OF MICHIGAN
IN THE SUPREME COURT

TRACEY EDRY,

Plaintiff-Appellant,

v

MARC ADELMAN, D.O. and
MARC ADELMAN, D.O., P.C.,

Defendants-Appellees.

Supreme Court No. 138187
COA No: 279676
Oakland County Circuit Court
Case No: 05-070853-NH
Hon. Rudy J. Nichols

BRIEF OF AMICUS CURIAE
MICHIGAN STATE MEDICAL SOCIETY
FILED PURSUANT TO SUPREME COURT ORDER DATED
SEPTEMBER 30, 2009

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CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus Curiae Michigan State Medical Society refers this Court to the Statement of Material Proceedings and Facts recited in the brief of Defendants-Appellees.

STATEMENT OF INTEREST OF MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association that represents the interests of over 15,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has a continuing interest in issues which affect the medical profession and the patients it serves. Over the course of many years, this Court has graciously allowed MSMS to share its views when legal issues affecting physicians have been presented. MSMS appreciates the Court's invitation to address the issues presented by the Court of Appeals decision in this case. See *Edry v Adelman*, unpublished decision per curiam of the Court of Appeals, issued December 23, 2008 (Docket No. 279676).[1]

Among the issues this Court will consider is whether *Wickens v Oakwood Healthcare System*, 465 Mich 53; 631 NW2d 686 (2001), was correctly decided. In *Edry*, plaintiff alleged that defendant's delay in diagnosing breast cancer decreased her opportunity to survive and subjected her to more extensive and invasive medical treatment. *Id.* at 1. Plaintiff's expert testified that her survival rate would have been 95 percent if she had been earlier diagnosed, but decreased to less than 20 percent by the time the diagnosis was made. *Id.* Defendant's expert testified that plaintiff had a 60 percent chance of survival when she was diagnosed, relying on data published by the American Joint Cancer Commissions. Defendants also argued that the 20 percent survival statistic articulated by plaintiff's expert was not sufficiently reliable to be admitted under MRE 702. *Id.* Consequently, defendant argued, plaintiff failed to show a greater

[1] Unpublished decisions are attached in alphabetical order at Exhibit A.

than 50 percent loss of opportunity to survive. *Id.* The Trial Court determined that the testimony of plaintiff's expert was not sufficiently supported in the scientific community to be reliable under MRE 702, and subsequently granted defendants' motion to dismiss for plaintiff's failure to meet her burden of proof. *Id.* at 2.

On appeal, the Court of Appeals concluded that the trial court did not abuse its discretion in determining that the testimony of plaintiff's expert was inadmissible. *Id.* at 4. Plaintiff was given the opportunity to submit supporting medical literature but did not do so, relying instead on generalized Internet articles that did not clearly support the testimony. *Id.* Without the testimony, plaintiff could not show a loss of opportunity to survive that was greater than 50 percent, and thus could not satisfy the requisite burden the proof. *Id.*

The Court also held that plaintiff's claim failed due to *Wickens*, where the Supreme Court held that a living plaintiff could not recover for loss of an opportunity to survive based on a decrease in long-term survival rates. Because the plaintiff here survived, she could not assert a claim for the loss of an opportunity to survive. *Id.* Plaintiff argued that even if the lost opportunity claim was properly dismissed, her claim that the delayed diagnosis required her to undergo increased medical treatment remained viable. However, plaintiff's oncology expert never testified that plaintiff was required to undergo additional treatment because of the delay in diagnosis, and plaintiff failed to provide an affidavit of what his testimony on the subject might be. *Id.* at 5.

MSMS believes that the Court of Appeals properly resolved the issues raised on appeal in *Edry*, and that *Wickens* properly determined that a claim for loss of an opportunity to survive cannot be asserted by a living plaintiff. There is no reason to overrule *Wickens*, which is firmly

grounded on the plain language of the governing statute. MSMS' views with respect to this issue are set forth in more detail below.

STATEMENT OF QUESTION PRESENTED

Whether *Wickens v Oakwood Healthcare System* correctly determined that a living plaintiff cannot recover for the loss of an opportunity to survive?

STANDARD OF REVIEW

De novo review is accorded to questions of statutory interpretation. *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).

ARGUMENT

I. *Wickens* Properly Decided That a Living Plaintiff Cannot Recover For Loss of An Opportunity to Survive.

To sustain a claim for medical malpractice, the plaintiff must plead and prove that the alleged malpractice was the proximate cause of plaintiff's injury. *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997); *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). This requirement has been codified in Michigan. MCL 600.2912a(1) states:

> Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendants practices or in a similar community, and that ***as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury*.**
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and ***as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.***

Id. (emphasis added). The proximate cause requirement set forth in subsection (1) was further explicated when the Legislature amended the statute in 1993 to add subsection (2). See MCL 600.2912a(2). In keeping with the common law, the first sentence of the section requires that the alleged negligence be "more probably than not" the proximate cause of the alleged injury. The second sentence, however, articulates a specific threshold for cases involving the "loss of an opportunity" to survive or to achieve a better result. This latter provision was enacted to overrule this Court's recognition of a claim for the loss of an opportunity to survive ***that was unlikely to materialize*** even absent the alleged malpractice. In other words, the opportunity to survive was less probable than not. See, *Falcon v Memorial Hosp*, 436 Mich 443, 469-70; 462 NW2d 44 (1990) (superseded by statute).

In *Falcon*, the plaintiff's decedent died of complications suffered during childbirth. An autopsy revealed that the cause of death was an "amniotic fluid embolism," a complication that occurs when fetal skin cells, mucus, and other material are taken into the mother's circulatory system during childbirth and lodge in the lungs, causing injury and death. *Id.* at 454. The embolism resulted in the complete shutdown of Ms. Falcon's respiratory and circulatory system. *Id.* According to the plaintiff's expert, Ms. Falcon would have had a 37.5% chance of surviving the embolism if an intravenous line had been established before the onset of the embolism to allow the attending physicians to inject possibly life-sustaining fluids after the embolism. *Id.* Without the line, however, there was no chance of survival. *Id*. at n 16. Plaintiff thus asserted that the failure to insert the IV line "deprived [Falcon] of a 37.5 percent opportunity of surviving the embolism." *Id*. at 455. Although this meant that Ms. Falcon had less than a 50% chance of survival, and more probably than not, would not have survived even absent the alleged malpractice, this Court held that "loss of a 37.5 percent opportunity of living constitutes a loss of

a substantial opportunity of avoiding physical harm." *Id*. at 470. In reaching this conclusion, the Court rejected defendants' argument that "they should be subject to liability only for acts or omissions likely, to the extent of more than fifty percent, to have caused physical harm." *Id.* at 459.

MCL 600.2912a(2) was enacted as a rejection of *Falcon.* See, *Weymers v Khera*, 454 Mich 639, 649; 563 NW2d 647 (1997) ("our Legislature immediately rejected *Falcon*" in 1993 by amending MCL 600.2912a and adding subsection (2)).[2] Subsection (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%.***

MCL 600.2912a(2) (emphasis added).

At a minimum, MCL 600.2912a(2) establishes three hurdles for a lost opportunity claim. First, the plaintiff must have "suffered an injury." Second, the injury must "more probably than

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[2] As to the impact of *Falcon*, Judge Cavanagh has recently stated:

> *Falcon's* enunciation of the loss-of-opportunity doctrine is significant, because it apparently provoked the Legislature to amend MCL 600.2912a. … The amendment was widely understood to be a direct reaction to the *Falcon* decision. As a majority of this Court noted, after *Falcon* adopted the lost-opportunity doctrine, "[o]ur Legislature immediately rejected *Falcon* and the lost opportunity doctrine. MCL 600.212a(2) …" *Weymers v Khera*, 454 Mich 639, 649; 563 NW2d 647 (1997). I agree that the amendment of MCL 600.2912a(2) was a reaction to *Falcon*, but I would not characterize it as a rejection of the lost-opportunity doctrine entirely. It merely established the threshold for loss-of-opportunity claims.

Stone v Williamson, 482 Mich 144; 753 NW2d 106 (2008) (Cavanagh, J.).

not" have been proximately caused by the negligence of the defendant. And third, the opportunity to survive or to achieve a better result must have been greater than 50 percent.[3]

A. Relying on the Plain Language of the Statute, *Wickens* Properly Determined That a Living Plaintiff Cannot Recover For Loss of an Opportunity to Survive.

In *Wickens*, plaintiff alleged that she could recover under MCL 600.2912a(2) for the reduction in her chances of survival caused by a delay in diagnosing cancer. This Court disagreed, rejecting the contention that a ***living*** plaintiff could recover for the loss of an opportunity to survive because "it is contrary to the Legislature's intent, as evidenced by the statute's plain language." *Wickens*, 465 Mich at 60. This Court explained:

> The plain language of the statute . . . expressly limits recovery to injuries that have already been suffered and more probably than not were caused by the defendant's malpractice. Thus, plaintiff can only recover for a present injury, not for a potential future injury. Plaintiff claims that a living plaintiff who suffers a reduction in chances of long-term survival because of medical malpractice may have a cause of action for loss of an opportunity to survive under the statute. The testimony that plaintiff's chances of surviving for a ten-year period decreased, however, is evidence of a *potential future injury* – death – which is not an injury *already suffered*, as required by the plain language of the statute. Thus, a loss of opportunity to survive claim only encompasses injuries already suffered, which clearly limits recovery to situations where death has already occurred. Because the evidence concerning the reduction in her chances of survival over a ten-year period is relevant *only* to her potential, future death, the living plaintiff in this case may not recover for this "loss of opportunity."

Id. at 60-61 (emphasis in original). See also, *Klein v Kik*, 264 Mich App 682, 687; 692 NW2d 854 (2005) ("Our Supreme Court has clearly stated that a living plaintiff may not recover for loss of an opportunity to survive because the intent of the statute is to allow recovery for a present injury, not a potential one."); *Pickering v Lakeland Regional Health Sys*, unpublished

[3] In applying the second sentence of this statute, courts have wrestled with whether the initial opportunity to survive or achieve a better result must exceed 50 percent, whether the opportunity itself must have decreased by 50 percent as a result of the alleged malpractice (i.e., the extent of the loss of the opportunity) or whether some other application is intended by the 50 percent threshold. See e.g., *Fulton v Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), and *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008).

opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 258143) at 3 ("the 'injury' in a case involving a claimed loss of opportunity to survive occurs at death; until death, there is only a potential future injury."); *Dutko v Rim*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 2006 (Docket No. 259388) (citing *Wickens* for the proposition that "claims based on the loss of an opportunity to survive only encompass injuries already suffered, which limits recovery to situations where death has occurred.").

To the extent *Falcon* permitted the plaintiff to recover for something other than actual (not anticipated) harm proximately caused by defendants' negligence, the plain language of the statute clearly reversed that result by requiring that the claim be for an already "suffered" injury that "more probably than not was proximately caused by the negligence of the defendants."[4] Thus, the holding in *Wickens* correctly applies the statute.

B. *Wickens* Is Consistent With Applicable Law.

The rule articulated in *Wickens* not only effectuates the plain language of the statute, it is also consistent with applicable law. The law of this state has always premised recovery in a negligence suit upon a resulting present physical injury to persons or property. See *Henry v Dow Chemical Co*, 473 Mich 63, 75-77; 701 NW2d 684 (2005); see also *Colbert v Conybeare Law Office*, 239 Mich App 608, 620; 609 NW2d 208 (2000) ("A claim of malpractice requires a showing of actual injury caused by the malpractice, not just the potential for injury."). When MCL 600.2912a(2) was enacted, "the Legislature would have understood that this is what the term 'injury' encompassed." See *Stone*, 482 Mich at 157 (Taylor, J.).

A majority of the Justices presently seated on this Court quite recently recognized the continued vitality of the *Wickens* principles. In *Stone*, Justice Markman observed that the

[4] This is, in part, the "threshold" established by the statute (an additional threshold requirement being the "greater than 50 percent" requirement contained in the second sentence).

statutory requirement that plaintiff can only recover for a present injury, not a potential future injury, is "consistent with the common law." *Stone***,** 482 Mich at 194, n 9 (Markman, J.). Justice Markman also confirmed that "[a] person ***does not suffer a loss of an opportunity to survive until that person ceases to survive***:"

> In *Wickens* …, this Court held that "a living plaintiff may not recover for loss of an opportunity to survive on the basis of a decrease in her chances of long-term survival." . . . This Court relied on the first sentence of MCL 600.2912a(2), which states that a medical-malpractice 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." (Emphasis added.) We held that this provision "expressly limits recovery to injuries that have already been suffered and more probably than not were caused by the defendant's malpractice." *Wickens*, 465 Mich at 60. "Thus, plaintiff can only recover for a present injury, not for a potential future injury." *Id.* [footnote omitted] Because the plaintiff in *Wickens* survived, she had not suffered a loss of an opportunity to survive. *Id.* That is, a person who survives cannot be said to have suffered a loss of an opportunity to survive.

Id. at 193-94 (Markman, J.) In expounding further on the basis for the *Wickens* decision, Justice Markman explained that "a surviving plaintiff cannot recover damages for the possibility that he or she may die sometime in the future. There must be a present injury." *Id.* at 211, n 22. Justice Markman stated:

> Therefore, ***in a "lost opportunity to survive" action, the patient must have failed to survive; and, in a "lost opportunity to achieve a better result" action, the patient must have failed to achieve the better result. Those plaintiffs who survived, and those who achieved the better result, have simply suffered no "lost opportunity" at all, and thus have no grounds on which to seek a recovery***.

Id. (emphasis added).

Justice Cavanagh, in an opinion joined by Justices Weaver and Kelly, paid similar deference to *Stone*, acknowledging that the statute ***does not allow*** recovery "for a 'lost chance alone, without proof of physical injury:'"

> ***By definition, one does not suffer the loss of an opportunity to survive unless death occurs. Otherwise, there would have been no opportunity lost. Similarly, a claim for the loss of an opportunity to achieve a better result does not arise***

> ***unless a plaintiff suffered a verifiable loss. The loss is the injury that the lost-opportunity doctrine recognizes. Typically, proof of an actionable loss will involve actual physical harm suffered by the plaintiff. Defining injury as such will not allow a plaintiff to recover for a potential future injury***.

Id. at 172, n 2 (Cavanagh, J.) (emphasis added).

These principles are driven by the statute, which this Court is not empowered to ignore. To the contrary, this Court must apply the statute as written. Permitting recovery for complications or sequelae which may or may not occur in the future (and doing so by calling them "a present injury") defeats the Legislature's directive that the proximate cause element of loss of opportunity claims be established with a quantifiable degree of certitude.

Further, *Wickens* is grounded in the well-settled principles of causation and resulting harm. To establish that an injury was more probably than not proximately caused by the defendant's negligence, the injury must have materialized. To give effect to that purpose, the loss of opportunity claim can only address harm which has actually occurred.

The Court of Appeals previously confronted this issue in *Compton v Pass*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 2006 (Docket No. 260362), and refused to include the increased risk of generalized morbidity when determining whether the loss of opportunity to achieve a better result exceeded 50 percent. In *Compton,* the Court explained:

> In *Weymers, supra* at 654-658, our Supreme Court held that when a plaintiff alleged kidney injury, she could not recover for pulmonary injury, despite her general allegation of pain and suffering. Here, we have a similar situation in which plaintiff alleged axillary cording and lymphedema and pain and suffering associated with these injuries, yet she relies on statistical evidence to demonstrate that defendants' negligence caused her to suffer arm morbidity generally. ***Because plaintiff's alleged injuries were lymphedema and axillary cording, she must offer proof that defendants' negligence caused these injuries, not morbidity generally, which could constitute any number of various other injuries not alleged or sustained.***
>
> Plaintiff also argues that: "[w]ith respect to the second sentence of § 2912a(2), Plaintiff's claim would be valid because this sentence does not concern itself with the specific injury that Plaintiff already suffered (as Defendants' argument

> suggests), but with the 'opportunity' to achieve a 'better result.'" ***Plaintiff argues that according to this reading of the statute, she need only show that her opportunity to achieve a better result generally exceeded 50 percent and she need not show that her opportunity to avoid the injuries actually suffered exceeded 50 percent. Under plaintiff's interpretation of MCL 600.2912a(2), a plaintiff who alleged specific injuries would never be required to prove that her chance of avoiding the specifically alleged injuries exceeded 50 percent; rather, she would merely have to prove that her chance of avoiding any injury, even one not sustained, exceed 50 percent. However, plaintiff cites no case law supporting her novel interpretation of MCL 600.2912a(2) and we decline to adopt it.***

Id. at 5 (emphasis added).

The second sentence of MCL 600.2912a(2) will provide no proximate cause threshold at all if the recoverable loss and the degree of loss can be measured by potential injuries a plaintiff did not sustain. Indeed, that would turn the whole concept of proximate cause on its head. Other states have refused similar requests. [5]

C. The "Loss of Chance" Theory Has Been Rejected by Other States.

In this case, plaintiff urges the Court to permit recovery for the "increased risk of death" even though death has not occurred. The courts of other states have refused invitations to adopt

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[5] Legislative bills to amend the statute to allow compensation for injuries to be sustained in the future as well as recovery by a living plaintiff for loss of an opportunity to survive were introduced in 2003 and referred to the House and Senate Committees on Judiciary, but were not released. Senate Bill No. 633 and House Bill No. 4980 sought to amend subsections (2) and (3) of MCL 600.2912a in pertinent part as follows:

> (2) In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered or will in the future suffer an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.
>
> (3) In an action alleging medical malpractice, the plaintiff, including a living plaintiff, may recover for loss of an opportunity to survive or an opportunity to achieve a better result. The plaintiff may recover economic and noneconomic damages in proportion to the loss of opportunity to survive or achieve a better result that was caused in whole or in part by the alleged malpractice.

Copies of the bills are attached at Exhibit B.

various formulations of what has become known as the "loss of chance" doctrine. The South Carolina Supreme Court declined to adopt "lost chance" in *Jones v Owings,* 456 SE2d 371 (SC 1995), stating:

> We are persuaded that "the loss of chance doctrine is fundamentally at odds with the requisite degree of medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician." *Kilpatrick,* 868 S.W.2d at 602. Legal responsibility in this approach is in reality assigned based on the mere *possibility* that a tortfeasor's negligence was a cause of the ultimate harm. *Kramer v. Lewisville Memorial Hosp.,* 858 S.W.2d 397, 405 (Tex. 1993). This formula is contrary to the most basic standards of proof which undergird the tort system.

Id. at 374 (emphasis in original). The New Hampshire Supreme Court reached a similar conclusion in *Pillsbury-Flood v Portsmouth Hospital,* 512 A2d 1126, 1130 (NH 1986):

> [W]e conclude that the *Hicks* rule – which allows the trial court to relax the causation requirement and submit the issues to the jury if the defendant's negligence increased the risk of harm – is ill-advised. Causation is a matter of probability, not possibility.

See also, *Gooding v University Hosp Bldg, Inc,* 445 So2d 1015, 1019-20 (Fla 1984) (finding that it could create an injustice for health care providers, "who could find themselves defending cases simply because a patient fails to improve or where serious disease processes are not arrested …"); *Fabio v Bellomo,* 504 NW2d 758, 762 (Minn 1993) (rejecting assertion that plaintiff's increased chance of a recurrence of cancer and her decreased chance of living another 20 years are compensable injuries); *Ladner v Campbell,* 515 So2d 882, 888 (Miss 1987) ("Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery'"); *Fennell v Southern Maryland Hosp Center,* 580 A2d 206, 214-15 (Md 1990) (declining to adopt recovery of loss of chance damages); *Valadez v Newstart, LLC,* unpublished opinion of the Tennessee Court of Appeals, issued Nov. 7, 2008 (Docket No. W2007-01550-COA-C2-CV) at *1 ("Tennessee does not recognize a cause of action for loss of chance"); *Manning v Twin Falls Clinic & Hosp, Inc,* 830 P2d 1185, 1190 (Ida 1992) ("Our review of the

cases that have considered the rationale of the doctrines of 'increased risk of harm' or 'lost chance' convinces us to reject both doctrines"); *Kramer v Lewisville Memorial Hosp*, 858 SW2d 397, 405 (Tex 1993) (rejecting lost chance recovery and stating "[u]nless courts are going to compensate patients who 'beat the odds' and make full recovery, the lost chance cannot be proven unless and until the ultimate harm occurs.").

In *Smith v Parrott*, 833 A2d 843 (Vt 2003), the Supreme Court of Vermont summarized the ramifications of accepting the doctrine and deemed the question to be one for the Legislature:

> Although some of the arguments in favor of the loss of chance doctrine are appealing, we are mindful that it represents ***a significant departure from the traditional meaning of causation in tort law***. Implicated in such a departure are fundamental questions about its potential impact on not only the cost, but the very practice of medicine in Vermont; about its effect on causation standards applicable to other professions and the principles – if any – which might justify its application to medicine but not other fields such as law, architecture, or accounting; and ultimately about the overall societal costs which may result from awarding damages to an entirely new class of plaintiffs who formerly had no claim under the common law in this state. See, e.g., *Crosby*, 48 F. Supp. 2d at 932 (observing that adoption of loss of chance may be "particularly ill-suited" in small, rural states where physicians "cannot make all potentially beneficial tests and procedures available at anything approaching a reasonable cost"); *Fennell*, 580 A.2d at 215 (noting potential impacts of loss of chance doctrine on medical insurance costs); Note, supra, 59 Mo. L. Rev. at 992-93 (noting difficulty of guessing impact of loss of chance doctrine on medical costs, as well as likelihood of efforts to extend doctrine to other areas of negligence, including legal malpractice); *Fischer*, supra, 36 Wake Forest L. Rev. at 606 (noting potential for "exceedingly broad application" of loss of chance doctrine).
>
> In short, we are persuaded that the decision to expand the definition of causation and thus the potential liability of the medical profession in Vermont "involves significant and far-reaching policy concerns" more properly left to the Legislature, where hearings may be held, data collected, and competing interests heard before a wise decision is reached.

Id. at 848 (emphasis added). The same concerns unquestionably exist here. This Court should staunchly reject any request to overturn *Wickens*. A living plaintiff cannot recover for loss of an opportunity to survive. Further, the loss of opportunity to achieve a better result requires actual physical harm – an "already suffered" injury. *Wickens* was properly decided.

RELIEF REQUESTED

For the above reasons, as well as those articulated in the Brief of Defendants-Appellees, Amicus Curiae Michigan State Medical Society respectfully requests that this Court maintain the rule of *Wickens v Oakwood Healthcare System* as properly decided and affirm the result reached by the Court of Appeals.

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