STATE OF MICHIGAN

IN THE SUPREME COURT

CARL STONE and
NANCY STONE,

Plaintiffs/Appellees,

vs.

DAVID A. WILLIAMSON, M.D.,
JACKSON RADIOLOGY CONSULTANTS,
P.C., and W.A. FOOTE MEMORIAL HOSPITAL,
jointly and severally,

Defendants/Appellants.

Supreme Court Case No.: 133986

Court of Appeals Docket Number: 265048

Jackson County Circuit Court
Case No: 03-1912 NH

BRIEF OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

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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 provided in Defendants-Appellants' Brief on Appeal.

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 to this Court. MSMS appreciates the Court's invitation to address the issues presented by the pending appeal of *Stone v Williamson,* unpublished decision per curiam of the Court of Appeals issued April 17, 2007 (Docket No. 265048).[1]

Stone involves the application of MCL 600.2912a(2), which prohibits recovery "for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." In *Fulton v Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), the Court of Appeals held that this provision requires a plaintiff to show that the opportunity to survive or achieve a better result was *reduced by greater than fifty percent* because of the alleged malpractice. *Id.* at 83. MSMS agrees with this interpretation of the statute, and further asserts that computation of the loss of opportunity should only consider those risks and complications which materialized for the patient; conceivable risks which did not occur and did not contribute to plaintiff's loss are not relevant to the calculation. MSMS' views regarding the questions posed by this Court's September 26, 2007 Order granting leave to appeal are set forth below.

[1] Unpublished decisions are attached in alphabetical order at Tab 1.

STATEMENT OF QUESTIONS PRESENTED

This Court has directed the parties to address the following questions:

1. Whether the requirements set forth in the second sentence of MCL 600.2912a(2) apply in this case.

2. If the requirements set forth in the second sentence of MCL 600.2912a(2) apply in this case, whether the "loss of an opportunity to survive or an opportunity to achieve a better result" should be determined by considering the aggregate increased risk posed by the alleged malpractice, including risks associated with injuries that the patient did not suffer and any increased risk or death, or whether the only consideration should be the increased risk of the specific risk of injury or injuries suffered by the patient.

3. Whether *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), was correctly decided, or whether a different approach is required to correctly implement the second sentence of § 2912a(2), such as that described in Roy W. Waddell, M.D.'s *A Doctor's View of Opportunity to Survive: Fulton's Assumptions and Math are Wrong,* published in the March, 2007 edition of the Michigan Bar Journal at 32.

4. Whether the Court of Appeals erred when it determined that the plaintiffs met the requirements of § 2912a(2).

ARGUMENT

The present case is governed by the second sentence of MCL 600.2912a(2) but it was not properly applied in this case. In concluding that Plaintiffs' loss of opportunity to achieve a better result was greater than 50 percent, the Court of Appeals improperly considered the risk of complications that did not materialize and did not contribute to the loss.

The Court of Appeals articulated the proper interpretation of MCL 600.2912a(2) in *Fulton v Beaumont Hospital.* Dr. Roy Waddell's criticism of *Fulton* is not well-taken; his alternative proposal is needlessly complex and will lead to inconsistent and unintended results.

This Court should adopt the *Fulton* rule but not as applied by the Court of Appeals' in *Stone*. The computation of Plaintiffs' lost opportunity to achieve a better result should consider only those complications which led to the loss. Considering the risk of complications which are irrelevant to the result defeats the statutory purpose of insuring that the alleged lost opportunity was, more probably than not, proximately caused by the defendant's negligence.

I. The Standard of Review is De Novo

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

II. The Second Sentence of MCL 600.2912a(2) Applies to This Case.

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 is quantified in Subsection (2), which requires that the alleged negligence be "more probably than not" the proximate cause of the alleged injury and which articulates a specific threshold for cases involving the "loss of an opportunity" to survive or to achieve a better result. MCL 600.2912a(2) states:

> 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%.*

Id. (emphasis added).

This 50% threshold requirement was properly invoked in *Stone*, where Plaintiffs alleged that Defendants' failure to timely detect the presence of an abdominal aneurysm resulted in rupture of the aneurysm, emergency surgery, and the ultimate amputation of Mr. Stone's legs. "Opportunity" is "a favorable or advantageous combination of circumstances" and a "suitable occasion or time." *The American Heritage Dictionary of the English Language, New College Edition* (1981). Here, Plaintiffs asserted that if the aneurysm had been properly identified, "elective surgery could have been performed greatly increasing Carl's potential for a better medical outcome, including the reduction of risk for amputation and other health complications." *Stone* at 3. In other words, Plaintiffs malpractice theory is that Defendants' alleged negligence

reduced Mr. Stone's opportunity to avoid the ensuing injury. The greater than 50 percent loss requirement applies under such circumstances. In *Klein v Kik*, 264 Mich App 682; 692 NW2d 854 (2005), the Court of Appeals explained:

> [R]egardless of plaintiff's word choice, the gravamen of plaintiff's complaint remains a cause of action for lost opportunity to survive brought on the basis of defendant's alleged medical malpractice. The present injury that defendant's malpractice allegedly caused was not the decedent's death per se, as plaintiff argues, but the ***increased chance*** of death between decedent's two visits to defendant's medical office. In other words, plaintiff is not alleging that defendant somehow gave the decedent cancer or acted in some other negligent manner that caused the decedent to die; rather, plaintiff alleges that defendant ***hastened the decedent's death as a result of the latter being misdiagnosed***, which allowed the cancer to metastasize unabated for 3 ½ months. Plaintiff's attempt to distinguish the decedent's injury from his loss of opportunity to survive is futile because they are one and the same. ***To say in this case that defendant caused the decedent's injury is to say that defendant's malpractice deprived the decedent of a greater chance to survive, which necessitates application of MCL 600.2912a(2) as interpreted in Fulton.***

Id. at 686-687 (emphasis added). The same analysis applies here. The second sentence of MCL 600.2912a(2) governs Plaintiffs' claim.

III. Only the Risk of the Specific Injuries Sustained by Plaintiff Should Be Considered in Calculating the Plaintiff's Loss of an Opportunity to Survive or to Achieve a Better Result.

The Court of Appeals erred in considering, as part of the *Fulton* calculation, the risk of a complication – specifically death, that Mr. Stone did not sustain. Absent the increased risk that death would result from rupture and emergency surgery, as opposed to elective surgery, Mr. Stone's experts testified that his loss of opportunity to achieve a better result was less than 50%.[2]

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[2] *Stone* describes the testimony as follows:

> Plaintiffs' medical experts testified that a patient having elective surgery to repair an aortic aneurysm has a 95 percent [sic] of attaining a good result, which includes the potential to survive the rupture as well as avoiding additional medical complications. In contrast, misdiagnosed patients whose aneurysms rupture have only a ten percent chance to achieve a good result. Specifically, Drs. Eggert, Casey, Flanigan and Rimar all opined that 80 percent of patients with aortic

Under the second sentence of MCL 600.2912a(2), his claim should have been barred. However, the Court of Appeals erroneously considered the aggregate risks posed by the alleged delay in diagnosis, including death, because "[a]ny other outcome would fail to recognize the actual risks confronted because of the malpractice and would penalize plaintiff for surviving the rupture." *Stone* at 6. The Court of Appeals reasoned:

> The trial court properly recognized that the myriad of complications and risks, including the potential for death, comprise a patient's "opportunity to achieve a better result." The trial court correctly permitted comparison of the difference in all risk factors faced by Carl between elective and emergency surgery, including the risk of death and other medical complications, in determining his "opportunity to achieve a better result." A good result in this case is inextricably tied to the possibility of death and the difference between the risks inherent in elective surgery versus emergency surgery. In accordance with *Fulton*, the trial court was required to determine the difference between the overall risks faced by Carl from the ruptured aneurysm as compared to the risk of undergoing elective surgery had the malpractice not occurred. In either situation, the potential to die was a risk that had to be included in the comparison between surgical procedures. Any other outcome would fail to recognize the actual risks confronted because of the malpractice and would penalize plaintiff for surviving the rupture.

Id. at 5-6.

Stone's result-driven analysis should not be adopted by this Court. First, it conflicts with the language of the statute, which distinguishes between the loss of an opportunity to survive and

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> aneurysm ruptures die, typically en route to obtain medical care. Of those patients that successfully reach the hospital, 60 percent die during the surgery. Of the 20 percent of patients who rupture that manage to survive, 40 to 50 percent have some form of complication contrasted to those who undergo elective repair, who face less than a five percent risk of dying or suffering serious complications. Notably, Dr. Flanigan also opined that Carl's chance of amputation was less than one percent with an elective repair compared to the actual risk of amputation of 100 percent, which occurred due to the rupture. Defendants contend that the testimony is insufficient to meet the requirements of MCL 600.2912a(2), because if the risk of death is factored out, Carl's chance of realized complications resulted in only a loss of opportunity for a better result of 35 percent, thus failing to meet the 50 percent threshold.

Stone at 5.

the loss of an opportunity to achieve a better result. The statute states that a 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%*" (emphasis added). The Legislature's use of the disjunctive term "or" refers to alternatives. *See Webster's Ninth New Collegiate Dictionary* (1987), stating that "or" is "used as a function word to indicate an alternative," quoted in *People v Thompson,* 477 Mich 146, 163-164; 730 NW2d 708 (Corrigan, J., concurring in part and dissenting in part). *See also, In re Certified Question*, 420 Mich 51, 64; 359 NW2d 513 (1984)(Boyle, J. concurring)("We conclude that use of the disjunctive "or" in the statute suggests strongly that open exposure and indecent exposure are distinctly different kinds of behavior and that the Michigan Legislature understood each to define different conduct."); *People v Gatski*, 472 Mich 887, 888-889; 694 NW2d 57 (2005)(Taylor, C.J., dissenting)("Given that the statute makes sense when 'or' is read in the disjunctive, the Court of Appeals had no ground to read 'or' as if it said 'and.'")

Stone purports to dismiss this language differentiation by asserting that "the 'loss of an opportunity to survive' has been specifically interpreted to mean a reduction in life expectancy and not to exclusively encompass the risk of death" and concluding that "the risk of death is separate and distinguishable from the 'loss of an opportunity to survive.'" *Stone* at 5. This is incorrect. Indeed, this Court reached precisely the opposite conclusion in *Wickens v Oakwood Healthcare System*, 465 Mich 53, 54, 60-62; 631 NW2d 686 (2001), holding that a living person could not recover for a loss of an opportunity to survive. *See also, Klein v Kik, supra* at 687 ("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.")

Second, consideration of complications which did not result in loss defeats the Legislature's directive that the proximate cause element of loss of opportunity claims be established with a quantifiable degree of certitude. To give effect to that purpose, the loss of opportunity calculation should only consider complications which actually contribute to Plaintiff's loss.

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.

The second sentence of MCL 600.2912a(2) will provide no proximate cause threshold at all if the degree of loss can be measured by potential injuries a plaintiff did not sustain. That is not how the current statute should be read. Adoption of the Court of Appeals' formula turns the whole concept of proximate cause on its head and should be rejected by this Court.[3]

IV. *Fulton v William Beaumont Hospital* Was Correctly Decided.

Fulton v William Beaumont Hosp, 253 Mich App 70, 83; 655 NW2d 569 (2002), appeal denied 469 Mich 964 (2003), articulates the proper interpretation of MCL 600.2912a(2). *Fulton* involved a claim for negligent failure to diagnose cancer. Plaintiff alleged that defendants' failure to properly diagnose and treat plaintiff's decedent resulted in plaintiff's decedent's loss of an opportunity to survive. Plaintiff's proximate cause expert testified that if the cancer had been properly diagnosed after a February 1995 examination, plaintiff's decedent had an eighty-five percent chance of survival. The survival rate at the time the diagnosis was made was sixty to sixty-five percent.

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[3] 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 have not been 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 Tab 2.

Defendants moved for summary disposition because the decreased opportunity to survive did not exceed fifty percent. However, the trial court concluded that MCL 600.2912a(2) only required plaintiff to show that the *initial opportunity* to survive was greater than fifty percent. On appeal, the Court of Appeals summarized the issue as "whether the second sentence of [MCL 600.2912a(2)] requires a plaintiff to show, in order to recover for loss of an opportunity to survive, only that the initial opportunity to survive before the alleged malpractice was greater than fifty percent, as argued by plaintiff, or, instead, that the opportunity to survive was reduced by greater than fifty percent because of the alleged malpractice, as argued by defendants." *Id.* at 77-78. The Court of Appeals held that MCL 600.2912a(2) required plaintiff to establish that the opportunity had been reduced by a number greater than fifty percent due to defendant's negligence. *Id.* at 83. Because the opportunity was reduced by less than fifty percent in *Fulton* - from eighty-five to sixty or sixty-five percent - the Court held that summary disposition should have been granted.

In reaching this conclusion, the *Fulton* court considered, but did not follow, the Court of Appeals' decision in *Wickens v Oakwood Healthcare System*, 242 Mich App 385; 619 NW2d 7 (2000), rev'd in part and vacated in part 465 Mich 53; 631 NW2d 686 (2001), which had held that MCL 600.2912a(2) only requires a plaintiff to show that, "had the defendant not been negligent, there was a greater than *fifty percent chance of survival or a better result." Wickens, supra at 392.* Rather, the *Fulton* Court concluded the language of the statute was ambiguous on this point, *Id.* at 80, and considered the "history behind the statute" in an effort to determine its intent. *Id.*

The *Fulton* Court's analysis began with this Court's decision in *Falcon v Memorial Hosp,* 436 Mich 443, 469-470 (Levin, J., lead opinion), 472-473 (Boyle, J., concurring); 462 NW2d

647 (1990), superseded by statute, *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997). In *Falcon*, plaintiff's expert testified that the decedent, who died from complications shortly after the birth of her child, would have had a 37.5 percent chance to survive. This Court held that this loss of opportunity was actionable "because it constituted a loss of a substantial opportunity of avoiding harm." 436 Mich at 470.

Although in *Falcon*, the initial opportunity to survive and the lost opportunity to survive were the same – 37.5 percent – the *Fulton* court noted that the holding in *Falcon* was stated *in terms of what was lost.* The *Fulton* court noted that this Court's conclusion in *Falcon* "did not focus on the initial opportunity to survive, but focused on whether the decrease in the decedent's opportunity to survive was substantial," relying upon the following language from *Falcon*:

> We are persuaded that *loss of a 37.5 percent opportunity of living* constitutes a loss of a substantial opportunity of avoiding physical harm. We need not now decide what lesser percentage would constitute a substantial *loss of opportunity*. [*Falcon, supra* at 470 (emphasis added).]

Fulton, 253 Mich App at 81. The *Fulton* court then noted that the Legislature "'immediately rejected *Falcon*'" by enacting MCL 600.2912a(2). *Id.* (quoting *Weymers, supra* at 649) observed that its "interpretation of the statute depends on how we view the Legislature's response to *Falcon* and the parameters it intended to set." *Id.* The *Fulton* court thus concluded:

> The rational interpretation is that the Legislature amended the statute as a rejection of the *Falcon* Court's holding that a 37.5 percent loss of an opportunity was substantial, and therefore actionable. The focus in *Falcon* was the 37.5 percent opportunity as it represented the lost opportunity, not as it represented the initial opportunity to survive. *Falcon, supra* at 453, 461, 467, 470. To adopt plaintiff's interpretation, that the statute requires only that the premalpractice opportunity to survive exceed fifty percent disregards the extent of the loss that was the focus of *Falcon*. To ignore the magnitude of the lost opportunity would be to subvert the Legislature's intent when it amended the statute in response to *Falcon*. Consequently, we conclude that MCL 600.2912a(2) requires a plaintiff to show that the loss of the opportunity to survive or achieve a better result exceeds fifty percent. We believe that this interpretation comports with the language of and the history behind MCL 600.2912a(2).

Fulton, 253 Mich App at 82-83 (footnotes omitted).[4]

Although subsequent Court of Appeals' panels have differed in their views of *Fulton*, it was correctly decided and should be adopted by this Court. The *Fulton* formula fairly implements the language of the statute, which provides that a 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 last clause, "unless the opportunity was greater than 50%," clearly refers back to the "loss of an opportunity" for which recovery is sought. The statute therefore commands that the *loss of opportunity*, not just the initial opportunity, exceed 50%.

As *Fulton* directed, the loss of opportunity is properly computed by subtracting the opportunity to survive or achieve a better result *with* the alleged malpractice from the opportunity to survive or achieve a better result that would have existed *without* the alleged malpractice. This method credibly measures the injury, i.e. the loss of opportunity caused by the malpractice, and provides a means of determining whether the loss has the certitude that the Legislature intended for claims of this nature. The "greater than 50%" threshold is consistent

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[4] Although not determinative, the *Fulton* Court's analysis is supported by the House Legislative Analysis of Senate Bill 270, which describes the loss of opportunity to survive provision as follows (with emphasis added):

> Lost opportunity to survive. A plaintiff would be barred from recovering for a lost opportunity to survive. (This would override the 1990 decision of the Michigan Supreme Court in Falcon v Memorial Hospital, 436 Mich. 443. In that case, the court held that in medical malpractice actions, loss of an opportunity to survive is compensable in proportion to the extent of the lost opportunity, even though the opportunity was less than fifty percent and it was not probable that an unfavorable result would or could have been avoided. *Under this decision [sic], the plaintiff must establish that the defendant more probably than not reduced the opportunity of avoiding harm.)*

The House Legislative Analysis is attached at Tab 3.

with the requirement that plaintiff prove that his injury "more probably than not was proximately caused by the negligence of the defendant..." MCL 600.2912a(2).

For reasons more fully explained in Defendants-Appellants' Brief on Appeal and the briefs of Defendants' amici, MSMS urges this Court to reject the method proposed by Dr. Roy Waddell in his article, *A Doctor's View of "Opportunity to Survive" Fulton's Assumptions and Math are Wrong*. Dr. Waddell's proposal is not consistent with the language of the statute, is needlessly complex, and would allow recovery for very slight losses. It is reasonable for this Court to assume that when the Legislature used the words "loss of opportunity" in the second sentence of MCL 600.2912a(2), in response to this Court's decision in *Falcon*, it intended "loss of opportunity" to have the meaning applied in *Falcon*. There is nothing in the statute to support Dr. Waddell's apparent assumption that the Legislature, in addition to rejecting *Falcon*'s finding that a 37.5% loss of opportunity to survive was substantial, also intended to alter the manner in which loss of opportunity was to be defined and calculated.

Further, in stating that what "is wrong with *Fulton*" is its effect "of wrongfully excluding a whole range of situations in which the survival rate 'point spread' is less than 50, but the denominator is relatively low (which raises the 'opportunity')," Dr. Waddell fails to acknowledge that his formula is over-inclusive, allowing recovery for even a slight reduction in untreated survival rates. For example, if the treated survival rate is 99% and the untreated survival rate is 97%, the lost opportunity to survive, using Dr. Waddell's equation, is 67%, allowing recovery for this two percentage point decline in the opportunity to survive. Given the Legislature's rejection of *Falcon*'s 37.5% reduction as insubstantial, it is highly unlikely that Dr. Waddell's formula is what the Legislature had in mind when it enacted the second sentence of MCL 600.2912a(2).

RELIEF REQUESTED

Amicus Curiae Michigan State Medical Society respectfully requests that this Court conclude: (1) that the second sentence of MCL 600.2912a(2) applies to Plaintiffs' claims; (2) that *Fulton* represents the proper method of calculating whether the loss of opportunity to survive or the loss of opportunity to achieve a better result exceeds 50%; and (3) that only the risk of injury actually sustained by the Plaintiffs, rather than the aggregate increased risk posed by the alleged malpractice, should be considered when calculating the loss of opportunity.

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