Don't View *Fulton* as Settled Law

To the Editor:

I was the plaintiff's attorney in *Fulton v William Beaumont Hospital*. I would like to congratulate Dr. Waddell for his excellent mathematical analysis of *Fulton* ("A Doctor's View of Opportunity to Survive: *Fulton*'s Assumptions and Math are Wrong," March 2007). I also want to caution all members of the Bar that *Fulton* should *not* be considered definitive.

Fulton was decided by a two-judge majority of the Michigan Court of Appeals. The dissent eloquently explained why the majority wrongfully interpreted MCL 600.2912(a)(2).

In *Fulton,* defendant made a motion for summary disposition before a conservative judge in Oakland County. Defendant argued that *the loss* of opportunity to survive must be greater than 50 percent. The Oakland County judge ruled the plain meaning of the statute required a greater than 50 percent opportunity to survive at the time of the malpractice. Defendant made a motion for rehearing. The circuit judge unambiguously affirmed his prior decision. The court of appeals granted leave to appeal.

At the time of oral argument, I argued to Judges Talbot and Wilder that they were viewed as strict constructionists. In this case, the statute is clear. The only way defendant could prevail would be by the court adding the words "loss of" to the last phrase in the statute. Judges Talbot and Wilder seemed to agree when they questioned counsel for defense. I obviously misread the words and body language of those two judges.

The Supreme Court accepted application for leave to appeal. In its brief, defendant claimed the court of appeals achieved the right result for the wrong reason. Defendant claimed the proper interpretation of MCL 600.2912(a)(2) required the person go from a greater than 50 percent opportunity to survive to a less than 50 percent opportunity to survive. In other words, if at the time of failure to diagnose, the patient had a 51 percent opportunity to survive and, because of the delay, the patient had only a 49 percent opportunity to survive, then there would be a viable cause of action.

Thus, at the Supreme Court level, both plaintiff and defendant argued that the two-member court of appeals panel had misinterpreted the statute. To put the controversy in context, we now have a two-member appeals panel ruling that a statute is ambiguous. We have both parties arguing that the court of appeals panel misinterpreted the statute. For reasons that are completely inexplicable, the Supreme Court issued an order revoking the previous order granting application for leave to appeal.

In my opinion, the *Fulton* decision and the subsequent Supreme Court action are horrible examples of judicial extremism driven by a political agenda. That agenda is intended to keep deserving victims of malpractice from having their rights adjudicated.

It now seems that the Bar views *Fulton* as settled law. I would urge all attorneys and all judges to carefully read the *Fulton* decision, the dissent, and the statute. Call me crazy, but I believe the Supreme Court will eventually interpret MCL 600.2912(a)(2) according to the clear, unambiguous language of the statute. Unfortunately, it will be too late for the family of Linda Fulton, as well as other victims of two judges of the Michigan Court of Appeals.

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Deny, Defend, and Delay

To the Editor:

Why are insurance companies allowed to "manufacture" a product—auto insurance—that is mandatory for every driver in the state to buy, without any regulation to the cost of rates?

From 1996 to 2006, insurance premiums went up across the board. However, the industry conveniently dropped rates after the *Kreiner* case—a 2004 ruling by the Supreme Court that created a lofty definition of "threshold" that makes it impossible for victims of auto accidents to pursue quality-of-life damages—became an issue in the state legislature this year.

The insurance industry manipulates data in any way it sees fit to protect its billions in profits while paying innocent victims less and less and, in some cases, nothing at all. Deny, defend, and delay—these are the tactics that govern this industry.

When will this unfair, unbalanced, and immoral practice end? It's time for the state legislature to step in and do something about this problem.

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Real Harm Beneath Open and Obvious Humor

To the Editor:

Just how far Michigan courts have strayed from traditional notions of premise liability law is apparent in John Braden's excellent article, "Adventures in OpenandObvious Land," in the March 2007 *Michigan Bar Journal*. Mr. Braden gives a satirical look at the consequences of *Lugo v Ameritech Corp,* 164 Mich 512; 629 NW2d 384 (2001), and the cases that followed it. Mr. Braden's story is hilarious and highlights the absurdity of the law. Underneath the humor, one is compelled to somberly reflect on the catastrophe suffered by the thousands of real people left without remedy against those who created and refused to repair dangerous and defective conditions on their property.

Lugo allows possessors of property to avoid liability for defects that are open and obvious unless "special aspects" make the defect unreasonably dangerous. The court had to conjure up an imaginary "unguarded thirty foot deep pit" to illustrate what would constitute "special aspects." Later cases expanded on this new doctrine to hold almost every conceivable defect to be open

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and obvious, and almost no defect to have those "special aspects" of dangerousness necessary to overcome the defense.

A paradox soon became evident; namely, the worse the condition of the property, the less the liability for the possessor. There was no reward for maintaining and improving property, and no punishment for neglecting it. Proprietors had no legal duty to protect their customers from the foreseeable risk of harm so long as a hypothetical reasonable person could foresee the particular risk at issue. This result is not only counterintuitive but also contrary to public safety.

> The Centers for Disease Control and Prevention reported that falls were responsible for more open wounds, fractures, and brain injuries than any other cause of injury.

The majority in *Lugo* cites section 343A of the *Restatement of Torts, 2d* to support its conception of "special aspects." However, 343A actually finds the possessor liable for open and obvious dangers when she or he "should anticipate the harm despite such knowledge or obviousness." Examples of this are when an invitee's attention is distracted or when the invitee may forget about the condition. It is very clear that 343A does not require anything as dramatic and extraordinary as an "unguarded thirty foot deep pit" to make the possessor liable for a defective condition even when it is open and obvious.

The court's use of open and obvious to preclude liability is contrary to Michigan's adoption of comparative negligence. It should make no difference if the dangerous condition is open and obvious since the plaintiff must prove some negligence by the defendant to prevail.

The rationale for *Lugo* is based not only on a disregard for the common law but a misunderstanding of reality. Justice Clifford Taylor, writing for the majority, takes judicial notice that a person has "little risk of severe harm" tripping over an ordinary pothole. He writes that "[u]nlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." Justice Taylor cites no statistics to support his conclusion.

The fact that serious injuries do not require falling extended distances is universally understood, except by our Supreme Court. Statistics available in 2000, just before Justice Taylor wrote *Lugo,* directly contradict his assertion.

In "The Costs of Fall Injuries Among Older Adults" (2000), the Centers for Disease Control and Prevention reported that falls were responsible for more open wounds, fractures, and brain injuries than any other cause of injury. Further, hospital admissions for hip fractures among people over age 65 increased from 230,000 admissions in 1988 to 340,000 admissions in 1996. The number is expected to exceed 500,000 by 2040, costing insurers an estimated $240 billion.

Ironically, soon after the *Lugo* decision, Katharine Graham (owner of the *Washington Post*), died after tripping on a concrete walkway outside a condominium in Sun Valley, Idaho. Then, Dr. Robert Atkins (the Atkins-diet founder), slipped on ice during a walk, struck his head, and died. Their tragic deaths illustrate how trips, slips, and falls claim victims from every socioeconomic and age group.

Lugo has caused real harm to real people. By disregarding precedent and taking Michigan far outside the mainstream of American legal consensus, as reflected by the judicial opinions in the 49 other states, the Michigan Supreme Court has drawn derision rather than praise. Many have reason to believe that we have arrived at the low-water mark in Michigan jurisprudence.

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