ARTICLES

PROMISES, PROMISES![†] PHYSICIANS CONTRACTUAL LIABILITY TO PATIENTS FOR UNFAVORABLE TREATMENT RESULTS — REVISITED

Marc D. Ginsberg[*]

"It is not hard to see why the courts should be unenthusiastic or skeptical about the contract theory. Considering the uncertainties of medical science and the variations in the physical and psychological conditions of individual patients, doctors can seldom in good faith promise specific results. Therefore it is unlikely that physicians of even average integrity will in fact make such promises."[1]

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† Promises, Promises was the name of a musical (https://en.wikipedia.org/wiki/Promises,_Promises_(musical)) and hit song (https://en.wikipedia.org/wiki/Promises,_Promises_(Naked_Eyes_song).

* B.A., M.A., J.D., LL.M (Health Law), Professor of Law, University of Illinois-Chicago School of Law. The author thanks his wife, Janice, and son Brian, for their inspiration and support. The author also thanks his grandson, Dave, for his inspiration. The author thanks his research assistant, Mr. Hudson Cross, for his assistance in proofreading, and citation checking. The author also thanks University of Illinois-Chicago School of Law for its support through a grant for this project.

1 Sullivan v. O'Connor, 296 N.E.2d 183, 186 (Mass. 1973).

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I. INTRODUCTION

It may seem strange to examine or re-examine this topic at this time. It has been many years since historic cases such as *Hawkins v. McGee*[2] and *Sullivan v. O'Connor*[3] were decided, concerning a physician's promise, or alleged promise, to achieve treatment results.[4] These cases, and others, have been addressed in legal scholarship, dating back many years.[5]

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[2] Hawkins v. McGee, 146 A. 641 (N.H. 1929).
[3] *Sullivan*, 296 N.E.2d 183.
[4] *See* discussion *infra* Section II.
[5] *See, e.g.*, J.M. Radin, *Malpractice and Breach of Contract in Medical Practice*, 2 L. & L. NOTES 17 (1947); Arnold J. Miller, *Contractual Liability of Physicians and Surgeons*, 1953 WASH. U. L. Q. 413 (1953); Thomas M. Woodbury, *Physicians and Surgeons – Sullivan v. O'Connor: A Liberal View of*

Have physicians not learned the valuable lesson that promising treatment results or ailment cures may lead to liability in contract?[6] Is this topic still a viable "thing," worthy of exploration? Yes! The context of, and circumstances surrounding these alleged "promises" may have changed,[7] but there are recent examples of contract claims against health care providers which are worthy of discussion.[8]

Perhaps the Supreme Judicial Court of Massachusetts in *Sullivan v. O'Connor*[9] correctly analyzed patient breach of contract claims when it insightfully stated:

> Statements of opinion by the physician with some optimistic coloring are a different thing, and may indeed have therapeutic value. But patients may transform such statements into firm promises in their own minds, especially when they have been disappointed in the event, and testify in that sense to sympathetic juries.[10]

Perhaps the breach of contract claim against a physician is a strategic decision.[11] Contract claims do not implicate the standard of care, may not require expert testimony, and are often subject to longer statutes of limitations than which apply to tort claims.[12]

No matter the explanation, physicians should avoid promises to perform procedures based on detailed explanations and promises to achieve cures and treatment outcomes.[13] Physicians are better served having their "liability . . . governed by general negligence principles."[14] Pursuant to these principles, "[a] physician is [neither] a guarantor of good results, nor is . . .

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the Contractual Liability of Physicians and Surgeons, 54 N.C. L. REV. 885 (1976); Carol B. Bonebrake, *Contractual Liability in Medical Malpractice – Sullivan v. O'Connor*, 24 DEPAUL L. REV. 212 (1974).

6 *See* Miller, *supra* note 5.

7 *See*, *e.g.*, Heneberry v. Pharoan, 158 A.3d 1087 (Md. Ct. Spec. App. 2017) (alleged agreement to properly perform a procedure); *see also* Laurance Jerrold, *Medical Malpractice Or Breach Of Contract,* 157 AM. J. ORTHODON. & DENTO. ORTHO. 278 (2020) (commenting on *Heneberry*, 158 A.3d).

8 *See* discussion *infra* Section III.

9 Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. 1973).

10 *Id.* at 186.

11 *See generally* BARRY R. FURROW ET AL., HEALTH LAW § 3-1, at 75 (3d ed. 2015).

12 *Id.*

13 *Id.*

14 *Id.* § 3-2, at 76.

required to exercise the highest degree of care possible."[15]

Is there some aspect of the physician-patient relationship which might cause the physician to promise treatment results or cures?[16] The relationship is fiduciary in nature, and as a fiduciary, a physician owes a patient the duties of care and loyalty (i.e. avoiding conflicts of interest).[17] These duties would not seem to encourage physician promise making.[18]

In 1992, Drs. Ezekial and Linda Emanuel published "Four Models Of The Physician-Patient Relationship" in the Journal Of The American Medical Association[19] which explained the "paternalistic," "informative," "interpretive," and "deliberative" models.[20] These models, however, focus on the "struggle over the patient's role in medical decision making"[21] and "the physician-patient interaction";[22] not whether physicians should make promises to patients about treatments or outcomes.[23]

Medical literature is replete with scholarship concerning the physician as a patient advocate.[24] Patient advocacy appears to focus on social responsibility of the physician, "not just to respond to individual patient health needs as part of patient care but also to respond to the health needs of the communities they serve, to identify the determinants of health of the population, and to promote health at individual, community, and populations levels."[25] Again, the role of physician as advocate does not explain physician promises to a patient.[26]

Low or limited health literacy—"the ability of patients to find,

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15 FURROW ET. AL., *supra* note 11, § 3-2, at 76.

16 *See* MARK A. HALL & DAVID ORENTLICHER, LAW IN A NUTSHELL: HEALTH CARE LAW AND ETHICS CH. 2, AT 108–09, 130 (4th ed. 2020).

17 *Id.*

18 *Id.*

19 Ezekiel J. Emanuel & Linda L. Emanuel, *Four Models Of The Physician-Patient Relationship*, 267 JAMA 2221 (1992).

20 *Id.* at 2221–222.

21 *Id.*

22 *Id.*

23 *Id.*

24 *See, e.g.*, LeeAnne M. Luft, *The Essential Role of Physician as Advocate: How and why we Pass it on*, 8(3) CANADIAN MED. EDUC. J. 109 (2017); Shafik Dharamsi et al., *The Physician as Health Advocate: Translating the Quest for Social Responsibility into Medical Education and Practice*, 86 ACAD. MED. 1108 (2011); Mark A. Earnest et al., *Perspective: Physician Advocacy: What is it And How Do We Do It?*, 85 ACAD. MED. 63 (2010); James T. C. Li, *The Physician as Advocate*, 73 MAYO CLIN. PROC. 1022 (1998).

25 Dharamsi et al., *supra* note 24, at 1109.

26 Luft, *supra* note 24.

understand, and use health-related information to make good decisions about their medical care and personal health"[27]—arguably, could play a role in a patient's misunderstanding of statements made by the physician, causing a patient to believe that a promise was made.[28] However, the context of health literacy is likely involved with the doctrine of informed consent, not the formation of a contract based upon a physician's promise.[29]

The pronouncement of the Supreme Judicial Court of Massachusetts in *Sullivan v. O'Connor*,[30] referred to earlier in this paper, provides the most likely explanation for the supposed promise—the transformation of the physician's statement into a firm promise in the patient's mind.[31] That is, of course, unless the physician actually promised a cure, an outcome, or treatment details that did not materialize.[32]

While it may be difficult to imagine that physicians are still fending off patient contract claims, these claims are not things of the past.[33] After an examination of two infamous such cases, this paper will focus on recent decisions to explore the popularity and validity of these claims.

II. A BIT OF HISTORY

Prior to a review and discussion of the more recent breach of contract cases, a look to history provides a helpful background and context.[34] For this, an examination of *Hawkins v. McGee*[35] and *Sullivan v. O'Connor*[36] is in order.

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[27] Barry D. Weiss, *How To Bridge The Health Literacy Gap*, 21 FAM. PRAC. MGMT. 14, 15 (2014).

[28] Caroline Bagley et. al., *Patients' Misunderstanding Of Common Orthopaedic Terminology: The Need For Clarity*, 93 ANN. R. COLL. SURG. ENGL. 401, 403 (2011).

[29] Lynn Nielsen-Bohlman et. al., *Health Literacy: A Prescription to End Confusion*, INSTIT. MED. U.S. COMM. ON HEALTH LITERACY (2004).

[30] *See* Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. 1973).

[31] *Id.* at 186.

[32] *See*, *e.g.*, Hawkins v. McGee, 146 A. 641, 643 (N.H. 1929) (noting "if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value . . . [t]he question of the making of the alleged contract was properly submitted to the jury.")

[33] *See infra* Section III.

[34] *See infra* Section II.

[35] *Hawkins*, 146 A. at 641.

[36] *Sullivan*, 296 N.E.2d 183.

A. Hawkins v. McGee

Historical information suggests that Dr. Edward R.B. McGee was a prominent resident of Berlin, New Hampshire—he was a physician who served on the Board of Health and as mayor from 1928-1931.[37] He, reportedly, had been "a U.S. war doctor in Germany during World War I."[38]

Of course, Dr. McGee's legal "claim to fame" derived from the breach of contract lawsuit filed against him by his patient, George Hawkins.[39] Hawkins had suffered "a severe burn [on his right hand] caused by contact with an electric wire, which [Hawkins] received about nine years before the time of the transactions . . . involved."[40] Dr. McGee performed a procedure to remove "scar tissue from the palm of [Hawkins'] right hand and [to graft] skin taken from [Hawkins'] chest in place thereof."[41] The evidence revealed an alleged pre-operative meeting attended by Hawkins, his father, and Dr. McGee, during which Dr. McGee was asked, "How long will the boy be in the hospital?"[42] Dr. McGee apparently replied as follows: "[t]hree or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand."[43] Additionally, it was alleged that Dr. McGee also stated pre-operatively "I will guarantee to make the hand a hundred percent perfect hand or a hundred percent good hand."[44]

Additional evidence reported in the opinion of the New Hampshire Supreme Court is that Dr. McGee "repeatedly solicited from [Hawkins'] father the opportunity to perform this operation, and . . . that he sought an opportunity to 'experiment on skin grafting,' in which he had little previous experience."[45] Additional information, not reported in the New Hampshire Supreme Court opinion, is that Dr. McGee promised the "hundred percent perfect hand because he told [Hawkins' parents] that he had performed [sic] this same operation many

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[37] *Hawkins v. McGee*, BERLIN, N.H. HIST., http://berlinhistory.weebly.com/hawkins-v-mcgee.html (last visited Oct. 10, 2022).

[38] *Id.*

[39] BERLIN, N.H. HIST., *supra* note 37.

[40] *Hawkins*, 146 A. at 642.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 642–43.

[44] *Id.* at 643.

[45] *Id.*

times as a U.S. war doctor in Germany during World War I."[46]

Dr. McGee's defense, "even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering 'into any contractual relation whatsoever [sic]'"[47] was rejected by the New Hampshire Supreme Court.[48] The court stated that if Dr. McGee "spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by [Hawkins] and his father, and there was ample evidence that they were so accepted by them."[49] The jury was entitled to resolve the "question of the making of the alleged contract."[50] A contract of this type would be an express contract.[51]

Contract damages and jury instructions became the focus of allegation for the remainder of the supreme court's opinion.[52] This paper will have more to say about damages in a later section.[53] Essentially, the jury was instructed that Hawkins would be "entitled to recover for what pain and suffering he has been made to endure,"[54] a typical medical negligence component of damages,[55] "and for what injury he has sustained over and above what injury he had before."[56] The supreme court analogized the case "to one in which a machine is built for a certain purpose and warranted to do certain work."[57] The appropriate measure of damages for breach of that warranty "is the difference between the value of the machine, if it had corresponded with the warranty and its actual value, together with such incidental losses as the parties knew, or ought to have known, would probably result from a failure to comply with its terms."[58] The court then pronounced, that in Hawkins' contract claim:

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[46] BERLIN, N.H. HISTORY, *supra* note 37.
[47] *Hawkins*, 146 A. at 643.
[48] *Id.* at 641.
[49] *Hawkins*, 146 A. at 641.
[50] *Id.*
[51] *See* JOSEPH M. PERILLO, CONTRACTS §2, at 31 (7th ed. 2014) (citing Hawkins v. McGee, 146 A. 641, 643 (N.H. 1929)).
[52] *Hawkins*, 146 A. at 643.
[53] *See infra* Section III.
[54] *Hawkins*, 146 A. at 643.
[55] *See* FURROW ET AL., *supra* note 11, § 3-7, at 116.
[56] *Hawkins*, 146 A. at 643.
[57] *Id.*
[58] *Id.*

> The true measure of . . . damage . . . is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract.[59]

The supreme court rejected pain and suffering damages for breach of contract.[60]

B. *Sullivan v. O'Connor*

In *Sullivan v. O'Connor*,[61] the Supreme Judicial Court of Massachusetts reviewed a jury verdict in favor of a patient who had sued a plastic surgeon in contract and tort.[62] Sullivan, "a professional entertainer"[63] engaged the services of Dr. O'Connor to correct the appearance of Sullivan's nose.[64] The alleged agreement contemplated multiple surgical procedures.[65] For the breach of contract claim, Sullivan:

> Alleged that she, as patient, entered into a contract with the defendant, a surgeon, wherein [he] promised to perform plastic surgery on her nose and thereby to enhance her beauty and improve her appearance; that he performed the surgery but failed to achieve the promised result; rather the result of the surgery was to disfigure and deform her nose, to cause her pain in body and mind, and to subject her to other damage and expense.[66]

The medical negligence claim was based on the same facts.[67] Both claims were tried to the jury, which entered a verdict for Sullivan on the contract claim, and for Dr. O'Connor on the medical negligence claim.[68]

The Supreme Judicial Court of Massachusetts focused its attention on contract theory and damages.[69] The court referred to *Hawkins v. McGee*[70] and cases from other jurisdictions in search

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59 *Hawkins*, 146 A. at 644.
60 *Id.*
61 Sullivan v. O'Connor, 296 N.E.2d 183, 186 (Mass. 1973).
62 *Id.* at 183.
63 *Id.* at 184.
64 *Id.* at 183.
65 *Id.* at 185.
66 *Id.* at 184.
67 *Id.*
68 *Id.*
69 *See id.* at 185–87.
70 *See id.*

of the appropriate measure of contract damages.[71]

The court rejected restitution damages as "plainly too meager."[72] "[T]he aim of restitution is to place both of the parties in the position they had prior to entering into the transaction."[73] The court also noted that a *Hawkins v. McGee* type of "expectancy recovery may well be excessive,"[74] stating:

> We should recall here that the fee paid by the patient to the doctor for the alleged promise would usually be quite disproportionate to the putative expectancy recovery. To attempt, moreover, to put a value on the condition that would or might have resulted, had the treatment succeeded as promised, may sometimes put an exceptional strain on the imagination of the fact finder.[75]

On this point, it is clear that the court was concerned about a damage calculation for breach of a contract not entered into in a "business context."[76]

That having been said, the court concluded its damages discussion by determining that Sullivan would be entitled to recover the following contract damage components for: (i) "out-of-pocket expenditures," (ii) "the worsening of her condition," and (iii) "the pain and suffering and mental distress involved in the third operation."[77] "These items were compensable on either an expectancy or a reliance view."[78]

As mentioned earlier, this paper will focus on damages in a later section.[79] At this juncture, however, it seems certain that the application of traditional contract damage components to claims arising out of classic medical negligence contexts is a difficult task.[80]

III. Recent Decisions

This paper now focuses on recent decisions (from the year 2000 to date) involving breach of contract claims by patients against

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[71] *Sullivan*, 296 N.E.2d at 185–87.
[72] *Id.* at 187.
[73] PERILLO, *supra* note 51, §15.1, at 569.
[74] *Sullivan*, 296 N.E.2d at 187.
[75] *Sullivan*, 296 N.E.2d at 188.
[76] *Id.*
[77] *Id.* at 189.
[78] *Id.*
[79] *See infra* Sections III.B, III.P, and IV for a more in-depth discussion on contract damages in medical negligence cases.
[80] *See Sullivan*, 296 N.E.2d at 185–89 (discussing the difficulties associated with applying contract theory to claims for medical negligence).

physicians.[81] As difficult as it is to imagine that these claims persist, they do and therefore this analysis follows.[82]

A. Maryland

In 2017, the Court of Special Appeals of Maryland decided *Heneberry v. Pharoan*,[83] a case concerning an appendectomy.[84] There, the patient alleged "Dr. Pharoan, in performing an appendectomy for acute appendicitis, failed to completely remove her appendix in contravention of his agreement to perform an appendectomy."[85] The patient further claimed that "this failure caused her severe pain and resulted in her having to undergo an additional surgical procedure to remove the remaining appendiceal stump."[86]

Dr. Pharoan's motion to dismiss the contract claim was granted.[87] The medical negligence claim was tried to a jury, which entered a verdict for Dr. Pharoan.[88]

The Court of Special Appeals of Maryland noted that Maryland jurisprudence recognized the contractual nature of the physician-patient relationship and, therefore, the physician "impliedly agrees" to provide care compliant with the standard of care.[89] Yet, under Maryland law, should the physician fail to exercise the necessary care, then tort law—not contract law—is implicated.[90] Contract law would be implicated by a "special agreement" between physician and patient "apart from the physician's agreement to properly perform the procedure."[91] The problem for Heneberry was the lack of any "allegations to establish any special promise or warranty in addition to Dr. Pharoan's agreement to perform an appendectomy."[92] The court, in a footnote, further noted that Heneberry neither "argue[d] that Dr. Pharoan warranted the outcome of the surgery" nor specially

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[81] *See*, *e.g.*, Bobek v. Crystal, 739 N.Y.S. 396 (App. Div. 2002).
[82] *See*, *e.g.*, *id.*
[83] Heneberry v. Pharoan, 158 A.3d 1087 (Md. Ct. Spec. App. 2017).
[84] *Id.* at 1089.
[85] *Heneberry*, 158 A.3d at 1089.
[86] *Id.*
[87] *Id.* at 1089–90.
[88] *Id.* at 1090.
[89] *Id.* at 1094.
[90] *Id.* (citing Benson v. Mays, 227 A.2d 220, 223 (Md. 1967)).
[91] *Id.* (citing Dingle v. Belin, 749 A.2d 157, 167 (Md. 2000)) (additional citations and internal quotations omitted).
[92] *Id.* at 1095.

promised "to cure as is the basis for other breach of contract cases."[93] The requirement of a special promise or warranty was not met.[94] The potential damages for a physician's breach of contract (or warranty) were not addressed by the court.[95]

It should be noted that the Court of Appeals of Maryland, seventeen years before *Heneberry v. Pharoan,*[96] in *Dingle v. Belin*[97] did recognize a contract claim when "Dingle had entered into an oral contract with Belin under which [Belin] had agreed that he would do the identification of the anatomy and the cutting and clipping required during the surgery and not a resident or other assistant."[98] Essentially, this was an agreement "to an allocation of tasks between the physician and other physicians."[99]

B. Minnesota

In *Kaplan v. Mayo Clinic*,[100] the United States District Court for the District of Minnesota considered a breach of contract claim arising from "a surgery performed on . . . Kaplan . . . by a surgeon at Mayo Clinic to treat pancreatic cancer, a condition which post-surgery testing revealed that Kaplan never had."[101]

The procedural history of this litigation was somewhat complicated.[102] The case went to trial on breach of contract and medical negligence claims.[103] The trial court "granted judgment as a matter of law on [the] breach of contract claim."[104] "The jury returned a verdict for [the defendants] on the . . . claim for negligent failure to diagnose, and the court entered judgment on that verdict."[105] "On appeal, the Eighth Circuit reversed as to the breach of contract claim concluding that a reasonable jury could find that [the surgeon] . . . formed a contact with Kaplan when [the surgeon] told Kaplan that he would perform an

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93 *Heneberry*, 158 A.3d at 1095 n.7.
94 *Id.* at 1099.
95 *See id.*
96 *Id.* at 1087.
97 Dingle v. Belin, 749 A.2d 157 (Md. 2000).
98 *Id.* at 160–70.
99 *Id.* at 163.
100 Kaplan v. Mayo Clinic, 947 F. Supp. 2d 1001, 1003 (D. Minn. 2013).
101 *Id.*
102 *See id.*
103 *Id.*
104 *Id.*
105 *Id.* at 1003–04.

intraoperative biopsy to confirm the cancer diagnosis before proceeding with the surgery."[106] The failure to perform the biopsy constituted the contract breach.[107] Upon remand to the district court, the court considered motions in limine to exclude evidence regarding "pain and suffering and emotional damages in support of [the] breach of contract claim,"[108] as well as other evidence.[109]

As to contract damages, the Eighth Circuit identified the necessary proof as: (1) "evidence to support a finding that the intraoperative biopsy results would have been negative for cancer,"[110] (2) "evidence "to establish that [the surgeon] would not have performed [the surgery] if the promised biopsy was negative,"[111] and (3) "evidence of economic damages resulting from that procedure."[112]

Since the contract claim was a "perfectly ordinary, garden-variety contract claim,"[113] expert testimony was unnecessary to support it.[114] Of course, that is one of the basic differences between proof of a medical negligence claim and proof of a breach of contract claim against a physician.[115]

As to recoverable contract damages, the district court referred to Minnesota jurisprudence in generally identifying those damages.[116] The court easily concluded that extra-contractual damages—"those which do not flow naturally from the breach and are not reasonably anticipated by the parties to the contract"[117]—were not recoverable here.[118] The difficulty was the need to determine whether damages for pain and suffering and emotional distress were extra-contractual.[119] Frankly, those damages, along with purely economic loss, are typically recoverable in a medical negligence action.[120]

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[106] *Kaplan*, 947 F. Supp. 2d at 1004.
[107] *Id.* at 1003.
[108] *Id.* at 1006.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] FURROW ET. AL., *supra* note 11.
[115] *Kaplan*, 947 F. Supp. 2d at 1007.
[116] *Id.* at 1008.
[117] *See id.*
[118] *Id.*
[119] See *id.* at 1010.
[120] *Id.* at 1008.

The court noted that "Minnesota law appears to restrict recoverable contractual damages more generally to those that are pecuniary in nature."[121] Significantly, the court, in the current context, was faced with a case of first impression in that "[i]t [did] not appear that the Minnesota Supreme Court ha[d] ever precisely addressed whether pain and suffering and emotional distress damages are recoverable for breach of a contract between a physician and his patient."[122] After an examination of the jurisprudence of Minnesota and other jurisdictions and predicting the eventual approach of the Minnesota Supreme Court, the court concluded that damages for pain and suffering and emotional distress were not recoverable breach of contract damages.[123]

C. Connecticut

In 2005, the Superior Court of Connecticut, in *Surrells v. Belinkie*,[124] considered a medical negligence and breach of contract claim against a plastic surgeon who performed breast reconstruction surgery for Surrells.[125] The gist of the contract claim was as follows:

> The plaintiff alleges . . . that Dr. Belinkie made a specific promise to do left breast reconstruction to improve the plaintiff's appearance . . . . Dr. Belinkie breached this agreement . . . by performing surgery on both breasts to acquire the symmetry which he had promised would be accomplished by surgery solely on the plaintiff's left breast.[126]

The court, referring to the evidence at trial, concluded that Dr. Belinkie made no such promise.[127] The court, after a bench trial, entered judgment for Dr. Belinkie.[128]

It is, of course, significant that the court did not state that Connecticut law would not recognize a breach of contract claim by a patient against a physician.[129] In fact, the court noted that "[t]he elements of breach of contract arising from medical

[121] *Kaplan*, 947 F. Supp. 2d at 1009.
[122] *Id.*
[123] *Id.* at 1010.
[124] Surrells v. Belinkie, No. X07CV020079051S, 2005 WL 247082 (Conn. Super. Ct. Jan. 7, 2005).
[125] *Id.*
[126] *Id.* at *3.
[127] *Id.*
[128] *Id.* at *7.
[129] *Id.* at *3.

treatment are the same as for contracts generally."[130]

D. Mississippi

Very recently, the Supreme Court of Mississippi undertook a review of medical negligence and breach of contract claims brought against a hospital.[131] In *Norman v. Anderson Reg'l Med. Ctr.*,[132] the court examined the propriety of a summary judgment in favor of the hospital arising out of potential complications of a cardiac catheterization.[133] Specifically, Norman suffered a post-procedure stroke which was unknown to Norman's physicians until it was too late to administer a "clot-buster" drug.[134] The unfortunate result was the patient's transfer to rehabilitation and nursing facilities for the remainder of his life.[135]

The essence of the breach of contract claim against the hospital was the following allegation: "Anderson Regional breached its 'Conditions of Admission' to provide 'general duty nursing care' when the nursing staff failed to 'carry out the instructions of [Norman's] physician' to report changes in his condition and to timely assess, recognize, report, diagnose, and treat Norman for a stroke."[136] The alleged contract damages were "the foreseeable consequences of loss of livelihood, pain and suffering, emotional distress, and mental anguish."[137] Again, these alleged damages are similar to those associated with medical negligence claims.[138]

The Supreme Court of Mississippi concluded that "Norman's breach-of-contract claim is nothing more than a medical malpractice claim."[139] The court's conclusion was based on Norman's need to prove causation, an essential element of a medical negligence claim.[140] Specifically, this would encompass "proof that [the hospital's] failure to timely recognize and report the stroke proximately caused Norman's damages."[141]

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[130] *Surrells*, 2005 WL 247082, at *3.
[131] *See generally* Norman v. Anderson Reg'l Med. Ctr., 262 So. 3d 520 (Miss. 2019) (discussed in depth *infra* notes 136–48 and accompanying text).
[132] *Id.*
[133] *Id.* at 523.
[134] *Id.* at 522 (explaining the sequence of events).
[135] *Id.*
[136] *Id.* at 527.
[137] *Id.* at 528.
[138] *See id.* at 529.
[139] *Id.*
[140] *Id.* at 523.
[141] *Id.*

The court's opinion in *Norman* is an excellent example of unmasking a medical negligence claim disguised as a breach of contract claim.[142] The facts revealed no underlying contract-like promises.[143] The gist of the claim was negligently provided medical care.[144]

E. Michigan

In another quite recent opinion, although unpublished, the Court of Appeals of Michigan addressed an unsuccessful effort by a plaintiff to amend a medical negligence claim to include a breach of contract claim.[145] In *Baker v. Beird*,[146] plaintiff alleged medical negligence in connection with a mastectomy, specifically claiming that "defendant breached the standard of care for specialists in plastic surgery by failing to use AlloDerm graft material during the placement of expanders and by overfilling the expanders."[147]Apparently, even through expert testimony, plaintiff could not prove the medical negligence claim.[148] The trial court would not permit an amended compliant to include a breach of contract claim, "noting that the amendment would be futile."[149] The trial court, thereafter, summarily disposed of the litigation.[150]

Plaintiff's theory of support for her breach of contract claim was a combination of "an informed consent form and conversations she had with defendant."[151]

Plaintiff's theory was rejected by the court of appeals.[152] After identifying the fundamental Michigan contract law, the court of appeals held that "[t]he informed consent form signed by plaintiff before her surgery does not support a conclusion that a contract for a specific act was created between the parties."[153] Therefore, in the absence of a "special agreement"[154] or agreement for a

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142 *See Norman*, 262 So. at 523.
143 *See id.* at 520.
144 *See id.*
145 *See infra* notes 146–55 and accompanying text.
146 Baker v. Beird, No. 341707, 2019 WL 1211465 *1, *1 (Mich. Ct. App. Mar. 14, 2019).
147 *Id.*
148 *See id.*
149 *Id.*
150 *See id.*
151 *Id.* at *2.
152 *Id.* at *4.
153 *Id.* at *3.
154 *Id.*

specific act, a physician-patient contract did not exist.[155]

F. Illinois

In *Barron v. Luke*,[156] the Appellate Court of Illinois provided another example of the consideration of a medical negligence claim disguised as a breach of contract claim.[157] Here, the plaintiff alleged the physician's wrongdoing in connection with "treatment of a ballistic chip fracture of the right femur."[158] The "plaintiff sought recovery for: (1) [b]reach of physician fiduciary duty . . . (2) common-law fraud . . . (3) theft . . . and (4) breach of verbal contract."[159] The trial court dismissed the claims for plaintiff's failure to file the appropriate documents required to support a medical negligence claim.[160] The Illinois filing requirements are applicable to any "action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice."[161]

Although this case was disposed of on Illinois procedural grounds at trial and on appeal, the appellate court clearly noted that plaintiff's breach of contract claim was:

> [S]upported by same operative factual allegations that support his claim of breach of fiduciary; namely that Dr. Luke misled him into consenting to surgery, failed to inform him of the extent of the recommended surgery, and never warned him of the potential risks associated with the surgery . . . . [T]hese claims are predicated upon factual allegations and alleged injuries falling within the traditional concepts of medical malpractice.[162]

This language, arguably, suggests that a breach of contract claim, not involving a specific, special promise, would not find favor with an Illinois court.

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[155] *See Baker*, 2019 WL 1211465, at *3.
[156] Barron v. Luke, 2021 IL App (1st) 201144-U ¶ 1 (Ill. App. Ct. June 4, 2021).
[157] *Id.* at ¶ 2.
[158] *Id.* at ¶ 3.
[159] *Id.* at ¶ 5.
[160] *Id. See also* 735 ILL. COMP. STAT. 5/2-622(a) (2021).
[161] 735 ILL. COMP. STAT. 5/2-622(a).
[162] *Barron*, 2021 IL App (1st) 201144-U ¶ 5.

G. Delaware

In *Sipple v. Connections Community Support Programs, Inc.*,[163] the Superior Court of Delaware dismissed the breach of contract claim filed by a former inmate for alleged personal injuries supposedly suffered during his incarceration.[164] The contract theory was based on plaintiff's claim that he was a third-party beneficiary of the contract between the defendant and Department of Corrections, pursuant to which the defendant was obligated to provide health care to inmates.[165] However, plaintiff did not allege the existence of a promise for a cure or specific care.[166]

The court resolved this claim by granting defendant's motion to dismiss.[167] Pursuant to Delaware statutory law,[168] a breach of contract claim based on medical care requires a written contract and "promises of . . . specific medical care . . . [or] promises or assurances that any healthcare treatment would yield a specific result."[169] Therefore, this case represents another unsuccessful effort to disguise a medical negligence claim as a breach of contract claim.[170]

H. Virginia

In *Ogunde v. Prison Health Services, Inc.*[171] —a case which on the surface seems similar to *Sipple v. Connections Community Support Programs, Inc.*[172]— the Virginia Supreme Court held that the trial court improperly dismissed plaintiff's breach of contract claim.[173] The court stated that plaintiff was an intended beneficiary of a contract between the defendant and the Virginia Department of Corrections.[174] There was no discussion regarding the merits of the contract claim.[175]

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163 Sipple v. Connections Cmty. Support Programs Inc., No. CV N17C-11-290 VLM, 2018 WL 3956477 *1, *8 (Del. Super. Ct. Aug. 15, 2018).
164 *Id.* at *1.
165 *Id.* at *2.
166 *Id.* at *5.
167 *Id.* at *8.
168 Del. Code Ann. tit. 18, § 6851 (West 2021).
169 *Sipple*, 2018 WL 3956477 at *7.
170 *Id.* at *8.
171 Ogunde v. Prison Health Services, Inc., 645 S.E.2d 520 (Va. 2007).
172 *See Sipple*, 2018 WL 3956477.
173 *Ogunde*, 645 S.E.2d at 528.
174 *See id.* at 525–26.
175 *See id.* at 526.

I. Iowa

In *Kostoglanis v. Yates*,[176] the Supreme Court of Iowa affirmed an order of summary judgment in favor of a physician and medical spa.[177] Plaintiff asserted "claims for negligent misrepresentation, fraudulent misrepresentation and breach of contract."[178] The claims failed as plaintiff did not file them within "the two-year statute of limitations governing malpractice actions in Iowa Code section 614.(9) (2015)."[179] Without analyzing the merits of the breach of contract claim, the court importantly noted that "[i]t is widely accepted that a plaintiff cannot through artful pleading evade the statute of limitations governing medical malpractice actions."[180] Additionally significant is the following pronouncement of the court: "[plaintiff's] right to bring causes of action for negligent misrepresentation, fraudulent misrepresentation, and breach of contract are not at issue in this case."[181] Since plaintiff's "breach of contract [claim] [was] predicated on injuries arising out of the doctor-patient relationship and the patient care defendants provided or allegedly failed to provide to her . . . [plaintiff] could not establish liability . . . without . . . establishing that . . . [defendant] failed to perform the procedures within the accepted standard of care."[182] Therefore, the claims were time-barred by the applicable medical negligence statute of limitations.[183]

J. New York

In *Ramirez v. Goals Aesthetics & Plastic Surgery*,[184] the appellate court considered and affirmed "the dismissal after trial of [a] small claims action for breach of contract emanating from plaintiff's dissatisfaction with a plastic surgery procedure."[185] In so doing, the appellate court noted that New York law required "an express special promise to effect a cure or accomplish some

[176] Kostoglanis v. Yates, 956 N.W.2d 157 (Iowa 2021).
[177] *See id.* at 162.
[178] *Id.* at 158.
[179] *Id.*
[180] *Id.* at 160.
[181] *Id.* at 161.
[182] *Id.* at 162.
[183] *See id.*
[184] Ramirez v. Goals Aesthetics & Plastic Surgery, 112 N.Y.S.3d 426, 426 (App. Div. 2018).
[185] *Id.*

definite result"[186] to support a breach of contract claim against a physician.[187]

In *Bobek v. Crystal*[188] the appellate court considered an unusual turn of events in a medical negligence claim arising from tendon repair surgery.[189] "During the trial, the [trial court], *sua sponte*, added a cause of action alleging breach of contract."[190] Despite a jury verdict for the defendant, the trial court set the verdict aside and directed the verdict for plaintiff.[191] In reversing this outcome, the appellate court stated that "the trial court erred in creating a cause of action for breach of contract, and then directing a verdict in favor of the plaintiff on that cause of action."[192]

K. California

In *Signal Mutual Indemnity Association v. Dignity Health*,[193] a group self-insurer for a patient's employer brought a claim against health care providers, contesting payments it was required to make in connection with the patient's health care.[194] Among its claims was breach of contract.[195]

The district court had no difficulty disposing of this claim.[196] It cited an older California case for state law authority,[197] stating "[t]o recover for breach of warranty or contract in a medical malpractice case, there must be proof of an express contract by which the physician clearly promises a particular result and the patient consents to treatment in reliance on that promise."[198] The district court noted that Signal could not demonstrate the existence of a promise or that the surgical authorization obtained

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[186] *Ramirez*, 112 N.Y.S.3d at 426 (citing Clarke v. Mikail, 238 A.D.2d 538, 538 (N.Y. App. Div. 1997)).
[187] Bobek v. Crystal, 739 N.Y.S.2d 396 (App. Div. 2002).
[188] *Id.* at 398.
[189] *Id.*
[190] *Id.* at 398
[191] *Id.* at 398.
[192] *Id.* at 399.
[193] Signal Mut. Indem. Ass'n v. Dignity Health, No. 15-CV-03818-HSG, 2017 WL 4176438 *1 (N.D. Cal. Sept. 21, 2017).
[194] *Id.* at *1.
[195] *Id.* at *2.
[196] *Id.* at *7.
[197] *See id.* (citing McKinney v. Nash, 147 Cal. Rptr. 642 (Cal. App. 3d Dist. 1981)).
[198] *Id.* (quoting *McKinney*, 147 Cal. Rptr. at 648–49).

by Signal "was given in reliance on such a promise."[199]

L. Washington State

In *Hansen v. Virginia Mason Medical Center*[200] an interesting case of first impression, the Court of Appeals of Washington confronted the issue of whether a physician's alleged "assurance" provided the basis of a breach of contract claim against a physician and medical center.[201] A brief review of key facts is helpful.

The patient suffered from "neurological dysfunction"[202] which was ultimately diagnosed as "multiple sclerosis with a chronic progressive course."[203] The defendant-physician allegedly told the patient's spouse that the patient "was not terminal within the next year."[204]

Additionally, the defendant-physician's office note revealed the following: "[h]is wife had thought perhaps he was terminal within the next year because of the location of his problems, and I have assured her today this does not seem to be the case."[205] In fact, the patient did succumb within the year to a condition not diagnosed by the defendants.[206] The defendants were sued pursuant to a Washington state statute[207] that provided for a claim when "a health care provider promised the patient or his or her representative that the injury suffered would not occur."[208]

Following a discussion of Washington state common law, which was necessary as this case raised an issue of first impression, the court of appeals held that the defendant-physician did not communicate an actionable promise to the patient's spouse.[209] The state's common law required "medical practitioners [to] expressly promise to obtain a specific result or cure through a course of treatment or a procedure."[210] The court of appeals held that "[t]he statement at issue . . . is not related to a specific

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199 *Signal Mut. Indem. Ass'n*, 2017 WL 4176438, at *3.
200 Hansen v. Va. Mason Med. Ctr., 53 P.3d 60 (Wash. Ct. App. 2002).
201 *See id.* at 61.
202 *Hansen*, 53 P.3d at 61.
203 *Id.*
204 *Id.* at 62.
205 *Id.*
206 *See id.*
207 *See* WASH. REV. CODE ANN. § 7.70.030 (West 2022).
208 *Hansen*, 53 P.3d at 64 (citing § 7.70.030(2)).
209 *Id.* at 65.
210 *Id.* at 64.

undertaking or a specific result or cure through a course of treatment or a procedure.[211] None of the common law cases recognize a claim based on a promise regarding a diagnosis or prognosis."[212] Insofar as "[a]n assurance is not an undertaking or commitment to obtain a specific result,"[213] there was "no evidence of a legally enforceable promise within the meaning of the statute."[214]

M. Massachusetts

In 2006, the Superior Court of Massachusetts recognized that "Massachusetts courts permit plaintiffs to recover breach of contract damages where a doctor expressly promises certain results."[215] The court in *Lee v. Lahey Clinic Medical Center*[216] noted that the claimant simply cloaked the tort duty owed by physicians to patients in a claim urging a breach of a "contractual duty to provide . . . a level of care consistent with Lahey's policies and accepted standards in the Boston medical community."[217] The claimant did "not [prove] the existence of any express or implied contract,"[218] and therefore, no contract claim existed.[219]

It should be noted that a year earlier, in *Morrisey v. Lieberman*,[220] the same court citing *Sullivan v. O'Connor*,[221] emphasized that breach of contract claims against physicians "are considered a little suspect."[222] Massachusetts law required clear proof of a promise of a specific result if a contract claim is pursued.[223]

Recently, the Appeals Court of Massachusetts in *Earley v.*

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[211] *Hansen*, 53 P.3d at 64.
[212] *Id.*
[213] *Id.* at 65.
[214] *Id.* at 65.
[215] Lee v. Lahey Clinic Med. Ctr., No. 05-4473 LEXIS 486, at*13 (Mass. Super. Ct. Oct. 2, 2006) (citing Sullivan v. O'Connor, 296 N.E.2d 183, 186 (Mass. 1973)).
[216] *Id.*
[217] *Id.* at *12–13.
[218] *Id.* at *13.
[219] *See id.*
[220] Morrisey v. Lieberman, No. 00-2561, 2005 Mass. Super. LEXIS 339 *1, *8 (Mass. Super. Ct. July 13, 2005) (citing *Sullivan*, 296 N.E.2d at 185–86).
[221] *Sullivan*, 296 N.E.2d at 185–86.
[222] *Morrisey*, 2005 Mass. Super. LEXIS 339, at *8.
[223] *Id.* at *8–9.

Slavin[224] recognized a breach of contract claim against a plastic surgeon, who, allegedly, promised "to excise excess skin from the plaintiff's chest as part of an elective cosmetic procedure involving the use of liposuction."[225] Insofar as a contract claim was involved, the court noted "that the plaintiff need not present an expert to meet his burden of proof at trial."[226]

Earley v. Slavin provides an important warning to physicians in Massachusetts.[227] Breach of contract claims, unlike medical negligence claims, do not directly implicate the standard of care, and do not require expert witnesses to prove a breach of the standard of care.[228] If the physician promises to undertake a specific treatment or procedure, and does not fulfill the promise, contractual liability may follow.[229]

N. Ohio

In 2005, the Court of Appeals of Ohio recognized a possible breach of oral contract claim against a physician.[230] *Lovely v. Percy*[231] involved this claim against a plastic surgeon.[232] Plaintiff consulted the "plastic surgeon . . . regarding breast augmentation surgery."[233] Plaintiff claimed that the surgeon "assured her that the surgery would accomplish [her] goal."[234] Predictably, the surgeon denied having given "assurances or guarantees regarding breast size."[235] Summary judgment was granted for the surgeon due to the lack of evidence of a guarantee.[236] The patient appealed.[237]

The evidence on which the court of appeals focused was a "paper provided to [plaintiff] regarding the size of bra to purchase post-operatively."[238] The defendant-physician's office

[224] Earley v. Slavin, 190 N.E.3d 538 (Mass. App. Ct. 2022).
[225] *Id.* at 540.
[226] *Id.*
[227] *See id.*
[228] *Id.* at 542.
[229] *Id.* at 543.
[230] See Lovely v. Percy, 826 N.E.2d 909 (Ohio Ct. App. 2005)
[231] *Id.*
[232] *See id.* at 910.
[233] *Id.* at 910.
[234] *Id.* at 911.
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.* at 912.

notes confirmed these instructions.[239] The court of appeals determined that this evidence was sufficient so that "a reasonable juror could find that [the defendant] made an oral promise or contract."[240] Summary judgment on the breach of contract claim was reversed.[241]

O. Pennsylvania

In *Vogelsberger v. Magee-Womens Hospital*,[242] a 2006 decision, the Superior Court of Pennsylvania recognized the potential of a contract to perform a specific procedure.[243] Here, plaintiff's contract claim against the defendant-physician was "premised on his failure to prophylactically remove her ovaries at the time he performed her hysterectomy."[244] Plaintiff's claim was dismissed.[245]

On appeal, the court referred to plaintiff's testimony of a mutual agreement to perform the procedure, the defendant-physician's office note indicating that the procedure would be performed, and the informed consent form referring to the procedure.[246] The court concluded "that there exists a genuine issue of material fact with regard to whether there existed an enforceable contract to perform [the disputed procedure]."[247]

P. New Jersey

Saving the best for last, this paper now addresses the Superior Court of New Jersey, Appellate Division's opinion in *Murphy v. Implicito*.[248] *Murphy* is of interest as it represents a modern appellate opinion which discusses potential contract damages awarded against a physician.[249]

The basic facts of *Murphy* are not complicated.[250] Plaintiff

[239] *See* Lovely, 826 N.E.2d at 912.
[240] *Id.*
[241] *Id.* at 914.
[242] Vogelsberger v. Magee-Womens Hosp., 903 A.2d 540, 542 (Pa. Super. Ct. 2006).
[243] *Id.* at 561.
[244] *Id.* at 542.
[245] *Id.* at 565.
[246] *Id.* at 561–62.
[247] *Id.* at 562.
[248] *See* Murphy v. Implicito, 920 A.2d 678 (N.J. Super. Ct. App. Div. 2007).
[249] *See id.*
[250] *See infra* notes 251–56 and accompanying text.

suffered a work-related back injury, requiring surgery.[251] The surgery involved bone implantation (grafts) in plaintiff's spine.[252] Cadaver bone was used for this purpose, allegedly in breach of the agreement between plaintiff and his surgeon, to utilize pieces of bone from plaintiff's spine for grafting.[253] The surgery was unsuccessful as "[t]he grafted bone did not fuse, and . . . plaintiff remained in pain and continued to be totally disabled."[254] A second surgery, performed by a different surgeon, not utilizing cadaver bone was, similarly, unsuccessful.[255] "[P]laintiff continued to experience pain and remained totally disabled."[256]

The *Murphy* opinion spoke to the appropriate measure of damages occasioned by plaintiff's claim: "that defendants failed to abide by the condition [plaintiff] placed on the surgery—that defendants not use cadaver bone—and that the breach of that condition constituted . . . a breach of contract."[257]

In discussing breach of contract, the appellate division referred to a concept recognized as well in other jurisdictions—"where the doctor has made a special agreement to provide medical services, the action may be for breach of contract."[258] This "special agreement" to support a breach of contract claim is what distinguishes it from a typical medical negligence (tort) claim.[259]

The court then undertook an examination of potentially recoverable breach of contract damages.[260] The central issue here is whether typical tort-based damages for pain and suffering are similarly recoverable in a breach of contract claim against a physician.[261] On this point, the court stated:

> In New Jersey . . . the traditional model for breach of contract damages permits a plaintiff to recover 'for such losses as may fairly be considered to have arisen naturally from the defendant's breach of contract' [internal citation omitted]. And here, because plaintiff's losses from the doctors' alleged breach of contract include personal

[251] *Murphy*, 920 A.2d at 682.
[252] *Id.*
[253] *Id.* at 683.
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.* at 683.
[258] *Id.* at 689.
[259] *Id.*
[260] *Id.* at 690–91.
[261] *Id.* at 690.

> injuries, we see no sound reason to limit his recovery to economic loss.[262]

Significantly, the court was not burdened by the labels of tort or contract.[263] If a breach of a duty defined by tort law or contract law yields personal injury, there is "no material difference [which] exists between [these] claims."[264] If, in fact, these claims are interchangeable under New Jersey law, breach of a special agreement for medical services should require proof similar to or the same as, a medical negligence claim.[265]

IV. INTERMISSION: WHAT THE MODERN CASES TEACH ABOUT BREACH OF CONTRACT CLAIMS

This paper has focused on cases decided since the year 2000.[266] The modern cases resemble neither *Hawkins v. McGee* nor *Sullivan v. O'Connor* insofar as they do not tend to concern promises by physicians to achieve specific results or cures.[267] Perhaps, over time, physicians have learned to avoid those promises.[268]

Murphy v. Implicito highlights one state's approach to damages, essentially equating "special promises" and classic medical negligence claims for the purpose of damages calculations.[269] The proper measure of damages in these contract claims is controversial and has been discussed in scholarly literature.[270] Of course, contract damages are formulaic in nature, as they tend to arise in commercial contexts.[271] Pain and

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[262] *Murphy*, 920 A.2d at 691.

[263] *Id.*

[264] *Id.*

[265] *See id.* at 689.

[266] *See supra* discussion Section III.

[267] *Compare* discussion Section II, *with* Section III.

[268] *See A Look at Specific Promises of Cure Contracts*, LAWS.COM (Dec. 23, 2019), https://malpractice.laws.com/professional-patient-relationship/specific-promises-of-cure ("[A]s the field of medicine is growing . . . the idea of any form of guarantee between doctor and patient is considered unwise.").

[269] *See* CLARK ALPERT, GUIDE TO NEW JERSEY CONTRACT LAW § 12.3 (4th ed. 2016) ("Contract damages for financial or qualitative loss can be awarded where a doctor has made a special agreement to provide medical services to a patient . . . while such claims are usually litigated in tort as medical malpractice claims . . . they can be litigated as breach of contract claims when the doctor has breached his agreement.") (citing Murphy v. Implicito, 920 A.2d 678, 683 (N.J. Super. Ct. App. Div. 2007)).

[270] *See*, *e.g.*, Gary L. Birnbaum, *Express Contracts to Cure: The Nature of Contractual Malpractice*, 50 IND. L. J. 361 (1975).

[271] *See id.* at 380 (referring, for example, to expectancy damages which are

suffering damages (non-economic loss) are not formulaic and the basic guidance given to the jury via instructions is that these damages must be fair and reasonable.[272]

If *Murphy v. Implicito* teaches that breach of the contract or tort duties giving rise to "special promise" or medical negligence claims require the same proof and yield identical damages, the resulting claims are indistinguishable.[273] Other jurisdictions may conclude that breach of contract claims do not implicate the medical standard of care and could dispense with the need for expert testimony to prove the breach.[274]

V. CONCLUSION — PHYSICIAN PROMISES AND MEDICAL EDUCATION

My faculty colleague, Professor Amy Campbell, previously published a superb paper entitled "Teaching Law in Medical Schools: First, Reflect."[275] She notes that "[h]istorically, key legal content areas [in medical education] focused on professional liability and court involvement issues."[276]

Breach of promise contract claims should be discussed in the medical school curriculum to the extent that physicians continue to promise cures or treatment results.[277] Medical students and physicians should be trained to avoid statements to patients which could be interpreted (or misinterpreted) as promises. Depending on the jurisdiction, a breach of contract claim against a physician based on the promise of a cure or treatment result may be less complicated to prove than a typical medical negligence claim insofar as standard of care expert testimony could be unnecessary.[278]

The modern cases examined in this paper favored alleged promises to perform procedures rather than promises of cures or

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"based on commercial considerations").

[272] *See*, *e.g.*, Illinois Pattern Jury Instructions, Civil, No. 30.01 (2021).

[273] Murphy v. Implicito, 920 A.2d 678, 689–92 (N.J. Super. Ct. App. Div. 2007).

[274] *See* FURROW ET. AL., *supra* note 11.

[275] *See* Amy T. Campbell, *Teaching Law in Medical Schools: First, Reflect*, 40 J. L. MED. & ETHICS 301 (2012).

[276] *Id.* at 302.

[277] *See id*. at 307.

[278] *See*, *e.g.*, Kaplan v. Mayo Clinic, 947 F. Supp. 2d 1001, 1006 (D. Minn. 2013) ("The court concluded that expert testimony was unnecessary to support the Kaplans' 'perfectly ordinary, garden-variety contract claim,' and characterized the claim as 'simply that a physician promised to perform a certain procedure and did not do it[.]") (internal citations omitted).

treatment results.[279] In a sense, this may represent progress.[280] Perhaps, physicians have learned to avoid legally enforceable promises.[281] However, even physician-patient communication misunderstandings could lead to a breach of contract claim against a physician based on an alleged promise to perform a procedure.[282] A claim of this type would require the jury to determine which version of a story to believe and could be difficult to defend unless the physician's notes support the position that the physician did not promise to perform a specific procedure in a specific manner.[283] As aptly noted in the British Medical Journal:

> There's already enough misunderstanding, even when experienced clinicians carefully choose and properly communicate their words, without further complication. Careless talk may not cost lives, but it causes real problems. Don't make promises you can't keep. It's less disappointing in the long run to under-promise but over-deliver.[284]

Well stated by Dr. Oliver and fitting final thoughts for this paper.

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[279] *See supra* Section III.

[280] *Compare* Section III (modern cases concerning the promise to perform a procedure), *with* Section II (historical cases concerning the failure to reach a promised outcome of a procedure).

[281] *See generally*, Glen O. Robinson, *Rethinking the Allocation of Medical Malpractice Risks Between Patients and Providers*, 49 L. & COMTEMP. PROBS. 173 (1986) (discussing rationale underlying risk allocation and management for medical providers).

[282] *See, e.g.*, Jerrold Laurance, *Medical Malpractice or Breach of Contract*, 157 AM. J. ORTHODON. & DENTO. ORTHO. 278, 279 (2020) (discussing the importance of teaching dental students to avoid making promises regarding specific treatments outcomes to patients).

[283] *See id.*

[284] David Oliver, *No More Broken Promises*, THE BMJ (Sept. 9, 2016), https://www.bmj.com/content/bmj/354/bmj.i4855.full.pdf.