

STATE OF MICHIGAN
IN THE SUPREME COURT

TRENDA JONES, Successor Personal
Representative and Co-Personal Representative,
BOOKER T. JONES, Co-Personal Representative,
and MARGARET A. JONES, Co-Personal
Representative, of the ESTATE OF
JAMAR CORTEZ JONES,

Plaintiffs-Appellees

v

DETROIT MEDICAL CENTER and
SINAI-GRACE HOSPITAL,

Defendants-Appellants

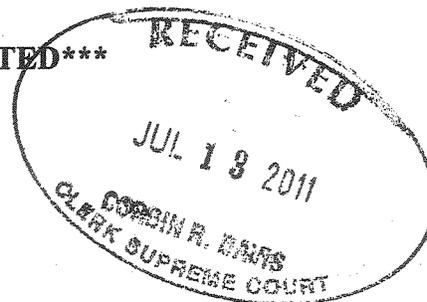
and

DANNY F. WATSON, M.D., WILLIAM M.
LEUCHTER, P.C.,

Defendants-Appellees,

PLAINTIFFS'-APPELLEES' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED



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COUNTERSTATEMENT OF JURISDICTION

Plaintiffs partially accept the jurisdictional statements in Appellant's-Detroit Medical Center/Sinai-Grace Hospital's brief. However, Appellants-Watson/Leuchter, P.C. raise the issue of whether the trial court erred in relying on the case of *Wilkinson v Lee*, 463 Mich 388 (2000), by finding that decedent was an "eggshell plaintiff" (Defendant Watson/Leuchter Brief on Appeal, pg. 11). This issue wasn't raised in Appellants' application for leave to appeal. Pursuant to MCR 7.302(H)(4)(a), appeals to this Court are limited to the issues raised in the application for leave to appeal. Therefore, the abovementioned issues should be excluded from this Court's consideration.

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. SHOULD THIS COURT AFFIRM THE LOWER COURT’S RULING THAT THE PROBABILITY OF AN INJURY IS NOT A PROPER CONSIDERATION IN DETERMINING PROXIMATE CAUSATION?

Defendants-Appellants answer “No”

Plaintiffs-Appellees answer “Yes”

The trial court did not answer this question.

The Michigan Court of Appeals answers “Yes”

- II. SHOULD THIS COURT AFFIRM THE LOWER COURT’S DECISION TO GRANT PARTIAL SUMMARY DISPOSITION TO THE PLAINTIFF WITH REGARD TO PROXIMATE CAUSATION WHERE THE NEGLIGENCE OF THE DEFENDANT HAS NOT YET BEEN ESTABLISHED?

Defendants-Appellants answer “No”

Plaintiffs-Appellees answer “Yes”

The trial court answers “Yes”

The Michigan Court of Appeals answers “Yes”

COUNTERSTATEMENT OF FACTS AND PROCEEDINGS

INTRODUCTION

Plaintiffs' decedent, twenty-two (22) year-old Jamar Jones, tragically died on October 21, 1999 from Stevens-Johnson syndrome, complicated by pneumonia. Stevens-Johnson syndrome, or Toxic Epidermal Necrosis (TEN), is a prescription drug-related condition that "causes erosions of the mucous membranes, extensive detachment of the epidermis and severe constitutional symptoms."

Plaintiffs' theory in this case is that Mr. Jones' fatal case of Stevens-Johnson syndrome was the result of Defendant Dr. Watson's negligent prescription of the anticonvulsant Tegretol (generic form, carbamazepine) on September 24, 1999 when Mr. Jones was examined by Dr. Watson at Defendant Detroit Medical Center/Sinai-Grace Hospital. Plaintiffs assert that Dr. Watson did not have sufficient information for his diagnosis of partial complex seizure disorder, a form of epilepsy. In reaching his diagnosis, Dr. Watson relied exclusively on the clinical history provided by Mr. Jones. Furthermore, all tests administered to Mr. Jones, including an EEG, were normal and showed no indications to support Dr. Watson's diagnosis. Plaintiffs further assert that Dr. Watson negligently failed to inform Mr. Jones of the adverse effects of Tegretol, the warning signs of such, and failed to advise Mr. Jones to seek immediate medical attention in the event that Jamar experience any such effects.

This proceeding arises from Defendants' appeal of the May 20, 2010, decision by the Court of Appeals, which affirmed the trial court's grant of Plaintiffs' motion for partial summary disposition regarding proximate legal causation. Plaintiffs submit that the Court of Appeals properly determined proximate legal cause as a matter of law. Therefore, this Court should vacate this Court's Order granting Defendants' application for leave to appeal, or alternatively affirm the judgments of the lower courts.

A. Synopsys of the Facts

On September 23, 1999, Plaintiffs' 22-year-old decedent was driving home to have lunch with his mother when he rolled his vehicle as he was exiting the highway (**Appellants' Joint Appendix**, p. 51a). Mr. Jones was transported by ambulance to the Detroit Medical Center/Sinai-Grace Hospital with contusions and lacerations to his nose and forehead, but was otherwise uninjured (**Appellants' Joint Appendix**, p. 51a). Mr. Jones was admitted and treated for his abrasions.

Pursuant to an emergency department referral, on September 24, 1999, Defendant Danny Watson, M.D., a neurologist, examined Mr. Jones in the emergency room (**Appellants' Joint Appendix**, p. 51a). Based solely upon the history Jamar allegedly reported to him, Dr. Watson concluded that he had “[p]robable partial complex seizure disorder” (**Appellants' Joint Appendix**, p. 52a). Watson prescribed the anticonvulsant Tegretol and ordered an electroencephalogram (EEG), which was performed the same day and was reported as normal (**Appellants' Joint Appendix**, p. 52a).

Jamar immediately had the prescription filled and began taking the generic form of Tegretol - - carbamazepine¹, as prescribed (**Appellants' Joint Appendix**, p. 52a). Even though both the original EEG and a subsequent EEG performed by Watson on October 8, 1999 were normal, Watson concluded that, at that time, one “cannot exclude a seizure disorder” and he continued Jamar on the anticonvulsant (**Appellants' Joint Appendix**, p. 52a).

On October 11, 1999, Mr. Jones woke up with bloodshot eyes. His father drove him to work, but had to return to pick him up about an hour later because Jamar told him

¹The evidence indicates that Dr. Watson did not write “dispense as written” or “d.a.w.” on the prescription. Pursuant to MCL 333.17755, the pharmacy was at liberty to fill the prescription with the generic carbamazepine.

that he could not see. A rash and several blisters began to develop on Mr. Jones' face and upper body. His father took him to the emergency room on October 12, 1999 (**Appellants' Joint Appendix**, p. 53a). Upon admission, Mr. Jones reported that he had been suffering from a sore throat and had been unable to swallow because of the pain, that his lips and mouth were swollen, and that he suffered from a tactile fever.

The Hospital held him overnight and transferred him to the burn unit of Detroit Receiving Hospital on October 13, 1999 (**Appellants' Joint Appendix**, p. 53a). Physicians there determined that he was suffering an allergic reaction from the Tegretol, which they diagnosed as Stevens-Johnson syndrome. Jamar tragically died of Stevens-Johnson syndrome complicated by pneumonia on October 21, 1999 (**Appellants' Joint Appendix**, p. 53a).

B. The Court Proceedings From 2003 through 2008

Along with the August 19, 2003 Complaint, the Estate filed the Affidavit of Merit ("AOM") of Dr. Jon Glass, a board certified neurologist, that Dr. Watson breached the standard of care because there lacked sufficient indication of a seizure disorder to prescribe Tegretol to the decedent. Dr. Glass also stated that the applicable standard of care required Dr. Watson to warn Mr. Jones of the potential allergic reactions associated with Tegretol and that in the event that there are any signs of an allergic reaction, that Mr. Jones must immediately contact his physician or the hospital.

The claims against Leuchter and the Hospital are based on vicarious liability for Dr. Watson's alleged malpractice. On March 11, 2005, pursuant to the Estate's motion for partial summary disposition, the trial judge entered an order holding that when Dr. Watson treated Mr. Jones, he was acting as an ostensible agent of the Hospital. This ruling is not challenged on appeal.

Plaintiffs also sought partial summary disposition on both cause-in-fact and

proximate legal causation. On March 18, 2005, the trial judge granted the motion with respect to factual causation and, that same day, he entered an Order stating that “the taking of Tegretol and/or carbamazepine which was prescribed by Watson was the cause in fact of the development by Plaintiff’s decedent Jamar Jones of the condition known as Stevens-Johnson syndrome” (**Appellants’ Joint Appendix**, pp. 217-225a, 242a). Defendants have never sought leave to appeal from this Order.

As to legal causation, the judge stated that he was taking that issue under advisement and would later issue a decision (**Appellants’ Joint Appendix**, pp. 241-242a, 251a). Before he could rule however, Defendants filed interlocutory applications asserting that the statute of limitations had expired under *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004) and that the AOM had not been properly notarized under *Apsey v Memorial Hospital*, 266 Mich App 666 (2005) rev’d 477 Mich 120 (2007). The applications were granted and the appeals were consolidated (Nos. 262343; 262347; 263259). After the Court of Appeals reversed the trial court’s denial of Defendants’ motion based on *Waltz*, Plaintiffs sought Supreme Court leave, and on December 14, 2007, in lieu of granting the application, the Supreme Court reversed the Court of Appeals pursuant to its modification of *Waltz* in *Mullins v St. Joseph Mercy Hospital*, 480 Mich 948 (2007), and remanded to the trial court (S. Ct. Nos. 133626, 133627).

On remand, the Estate renewed its motion for partial summary disposition on proximate legal causation. Three hearings were held on this motion (**Appellants’ Joint Appendix**, pp. 316a, 340a, 366a). At the October 2, 2008 hearing, the trial judge granted summary disposition to Plaintiffs regarding legal causation. The judge recognized that Plaintiffs’ theory is that Dr. Watson misdiagnosed a seizure disorder and wrongly prescribed Tegretol, which led to the decedent’s “very rare but known reaction” that developed into Stevens-Johnson syndrome and this resulted in Mr. Jones’ death

(Appellants' Joint Appendix, pp. 373-374a).

As the judge said, Plaintiffs' argument and theory is that the misdiagnosis of seizure disorder and improper prescription of Tegretol violated the standard of care and led to Mr. Jones' foreseeable injury/death because of the Mr. Jones' unusual susceptibility to Stevens-Johnson syndrome **(Appellants' Joint Appendix, pp. 376-377a)**. The judge reasoned that the issue of whether Dr. Watson breached the standard of care and therefore was negligent would be decided by the jury, but that legal cause was capable of determination, and was in fact determined, as a matter of law in favor of Plaintiffs **(Appellants' Joint Appendix, pp. 378-380a)**. The Order pursuant to these rulings was entered on October 14, 2008 **(Appellants' Joint Appendix, p. 383a)**

C. The 2008 - 2010 Appellate Proceedings

DMC/Sinai-Grace again sought interlocutory leave, this time on the proximate cause ruling only. After the Court of Appeals granted leave, Dr. Watson cross-appealed.

Following briefing and argument, the Court of Appeals affirmed the decision of the trial court (Slip Opinion). In an opinion issued on May 20, 2010, authored by Judge Shapiro, the Court of Appeals agreed that the trial court properly ruled on the issue of proximate cause because, under both Plaintiffs' misdiagnosis theory and failure-to-advise theory, a reasonable juror could not find a failure of proximate legal cause:

The direct undisputed cause of death was the prescribing of drug, by the defendant physician, which was a standard treatment in the face of a seizure diagnosis. The diagnosis was not merely an event in a chain of events that eventually led to the prescription; it was the final and apparently sole reason the medication was prescribed. While it is well-recognized that an event need not be the sole or final cause of injury to be a proximate cause, in this case, the alleged misdiagnosis was the sole cause and, if not the final cause of injury, the final cause of the injury-causing prescription. In these circumstances, summary disposition on causation was appropriate. We do not see how a reasonable juror could conclude that an allegedly negligent diagnosis that was the sole cause of or prescribing the injury-causing medication was not a proximate cause of the injury. (Slip Opinion, pp 8-9).

The majority further added:

Furthermore, because the evidence is undisputed that, although Stevens-Johnson syndrome is rare, it is well-known that it can occur from taking tegretol, and in this case did so occur, the trial court properly decided, as a matter of law, that Watson's alleged lack of advice regarding signs of a reaction was a proximate cause of Jamar's development of the disease. Finally, since the sole reason the medication was given was because of a diagnosis that plaintiffs assert was negligent and erroneous, the trial court properly decided, as a matter of law, that the allegedly negligent misdiagnosis was a proximate cause of Jamar's development of the disease. (Slip Opinion, p 9).

In so ruling, the majority also correctly recognized that Defendants' arguments about the rarity of the reaction to Tegretol and the difficulty of determining which patients will suffer such a reaction were relevant at trial, but to the jury's determination of whether

Watson violated the standard of care and not to determine proximate legal causation. (Slip Opinion, 9).

The Hospital then sought a rehearing, asserting that the panel should adopt Judge Hoekstra's dissent and hold that the jury should determine proximate legal cause. Following the July 9, 2010 reconsideration denial, Defendants filed separate leave applications. On February 4, 2011, this Court issued an order granting the applications and directed the parties to include among the issues to be briefed:

(1) whether the probability of injury is a proper consideration in determining proximate causation, and (2) whether partial summary disposition may be granted to the plaintiff with regard to proximate causation where the negligence of the defendant has not been established.

LAW AND ARGUMENT

I. The probability of occurrence of a particular injury is not a proper consideration in determining proximate causation.

Michigan follows the black-letter rule on proximate cause first articulated in *Palsgraf v Long Island R Co*, 248 NY 339 (1928). *Palsgraf* famously stated that “the fact that [an] injury occurred in a different manner than that which might have been expected does not prevent [negligence] from being the cause in law of the injury.” *Id* at 355.

In *LaPointe v Chevrette*, 264 Mich 482 (1933), the Michigan Supreme Court articulated the modern-day rule on proximate causation and foreseeability. There, a 15-year-old plaintiff brought an action to recover damages after his employer required him to walk four miles in a snowstorm without proper clothing. Plaintiff became seriously ill as a result. On appeal, defendant employer urged non-liability because a reasonable person could not have anticipated plaintiff would resultantly contract plaintiff's particular illness, osteomyelitis. The Court disagreed and held:

Where an act is negligent, to render it the proximate cause, it is not necessary that

the one committing it might have foreseen the particular consequence or injury, or the particular manner in which it occurred, if by the exercise of reasonable care it might have been anticipated that some injury might occur. (internal citations omitted).

Proximate causation does not require foretelling the exact type of injury sustained, the Court held, as long as reasonable care foretells some injury will result. *Id*

For years, it has been well settled in Michigan that foreseeability is not a proper consideration to determine whether an act of negligence is the proximate cause of an injury. Rather, proximate cause bears on the connection between the negligent conduct and the injury that results from that conduct. Proximate cause looks to the relationship between the negligent conduct and the resulting injury.

The Michigan Supreme Court in *Davis v Thornton* 384 Mich 138 (1970) described the role that foreseeability plays in an action for negligence. *Davis* involved a defendant that left his car unattended with the keys inside and the doors unlocked. This was a violation of an ordinance that prohibited doing so. The car was then stolen by a group of minors who later struck the plaintiffs with the stolen car.

This Court in *Davis* directed that foreseeability should be considered when determining whether an act was negligent. This consideration specifically deals with whether a defendant “should have reasonably foreseen that what he was doing...might cause harm – if so, he was negligent. Once negligence is determined, foreseeability of harm should no longer be considered.” *Id* at 146.

Defendants’ arguments about the rarity of the reaction to Tegretol and the lack of foreseeability as to which patients will suffer such a reaction are relevant at trial to the jury’s determination of whether Watson violated the standard of care. Proximate cause, however, is a separate and independent determination that excludes foreseeability.

According to this Court in *Davis*, foreseeability can also be relevant when

establishing proximate cause in intervening causal situations. However, in direct causal situations, as in this case, foreseeability is not relevant when evaluating proximate cause.

The defendant in *Davis* argued that an intervening event (the theft) had broken the causal connection between his negligent conduct, leaving the keys in the car unattended, and the injuries to the plaintiff. In intervening cause situations, the Court concluded that the proper test for proximate cause is to determine whether the intervening cause and the consequences of such were foreseeable to the defendant. The Court concluded that, given the enactment of the ordinance that prohibited leaving keys in a car unattended, it was foreseeable that the car may be stolen and that “leaving the keys in the ignition under these conditions was not too remote a cause of plaintiff’s injuries and that the joy riders’ intervention did not sever the causal connection.” *Id*

Davis differentiated between situations in which the negligent conduct is the direct cause of the injury and those in which there is an intervening event that causes the injury. In the former situation, foreseeability is not a consideration for determining proximate cause. Rather, proximate cause is established in these situations if the injury is a “direct and natural result” of the negligent conduct.

This case, as recognized by the Court of Appeals, deals with a direct causal situation. As Judge Shapiro noted in his opinion:

The direct undisputed cause of death was the prescribing of drug, by the defendant physician, which was a standard treatment in the face of a seizure diagnosis. The diagnosis was not merely an event in a chain of events that eventually led to the prescription; it was the final and apparently sole reason the medication was prescribed. While it is well-recognized that an event need not be the sole or final cause of injury to be a proximate cause, in this case, the alleged misdiagnosis was the sole cause and, if not the final cause of injury, the final cause of the injury-causing prescription.

Furthermore, two of Defendants’ experts, Dr. Edward Domino and Dr. Paul Cullis have acknowledged that Stevens-Johnson syndrome is a known side effect associated with

Tegretol. Dr Domino, a board-certified clinical pharmacology expert, testified that:

- Q. Doctor, would you agree that the medication Tegretol has been linked to causing Stevens-Johnson syndrome in some patients who have taken it?
- A. Very extremely rarely, **the answer is yes.**
- Q. And would you agree that Tegretol has also been linked with causing toxic epidermal necrolysis in some patients who have taken it?
- A. That is correct.
- Q. Carbamazepine is the active ingredient in Tegretol, correct?
- A. That is the active, pharmacologically active anticonvulsant in Tegretol.
- Q. And it's believed that it's the active ingredient that caused, in those patients who have developed Stevens-Johnson syndrome, it's generally believed it's the active ingredient carbamazepine that has caused it, correct?
- A. That's generally what is believed.
- ***
- Q. You know of no studies that contraindicate [sic] the conclusion that carbamazepine is the active ingredient that's causally related to Stevens-Johnson syndrome in those patients who develop it after taking Tegretol?
- A. That is correct. [**Appellants' Joint Appendix**, p. 72a, emphasis added.]

Dr. Cullis similarly testified that Steven-Johnsons syndrome is a known effect of Tegretol:

- Q. But you do know that one of the potential side effects of Tegretol or Carbamazepine is Steven-Johnson, right?
- A. **Yes, I understood that.** []. [**Appellants' Joint Appendix**, p. 193a, emphasis added]

A defendant's conduct is the proximate cause of, and he is thus responsible for, "injurious consequences of his negligent act or omission which occur *naturally and directly* without reference to whether he anticipated, or reasonably might have foreseen such consequences." *Id* at 147 (emphasis added). Thus, in cases such as this, upon a finding of negligence, proximate cause depends on "the evidence of direct sequences and not upon the defendant's foresight." *Id*

Defendants' board-certified clinical pharmacology expert Dr. Edward Domino conceded that, "from all the evidence, it appears that [Jamar's development of Stevens-Johnson syndrome] is due to the [tegretol]," an opinion that Defendants' neurology expert Dr. Paul Cullis held as well. (Slip Opinion, pp 5-6). As Judge Shapiro stated:

As it appears undisputed that Jamar died as a result of Stevens-Johnson syndrome, which he contracted from taking tegretol, and he

took the tegretol only because he was directed to do so by Watson, all of the evidence supports the conclusion that Watson's conduct was a proximate cause of Jamar's Stevens-Johnson syndrome and resulting death. (Slip Opinion, p 7).

On pages 30-33 of its brief, Defendant DMC presents testimony from numerous doctors regarding the statistical probability of Stevens-Johnson syndrome occurring as a result of taking Tegretol. Defendant is suggesting that the statistical rarity of a particular injury should be considered for purposes of establishing proximate cause. However, as this Court has steadfastly held, the statistical probability of a particular injury occurring is irrelevant for determining proximate causation.

In *Stone v Williamson*, 482 Mich 144 (2008), this Court held that the proper consideration for determining proximate causation is the relation between the negligence and the resulting injury and not the statistical probability of the injury. Writing for this Court in *Stone*, Justice Taylor recognized that, based on his proofs, the plaintiff could prevail on his medical malpractice claim, stating, "the jury could have concluded it was *more likely than not that the amputations and other injuries were caused by the defendant's negligence* and would not have occurred absent the negligence." *Stone*, 482 Mich 163 (emphasis added). The "more likely than not" inquiry spoke to the causation of the injury from the negligence, and not to the probability of the occurrence of the particular injury.

Applying *Davis*, the Court of Appeals has similarly rejected the notion that statistical probability plays a role in proximate causation. *Lockridge v Oakwood*, 825 Mich App 678 (2009). *Lockridge* dealt with a situation in which a child was admitted to an emergency room with chest pains and shortness of breath. *Lockridge*, 825 Mich App at 680. The treating physician failed to order a chest X-ray to rule out potential causes and prescribed only pain medication. *Id.* The child died later that night. Later, it was

determined that the cause of death was a aortic dissection which is very rare in children. *Id.* The jury found for the plaintiffs and the defendants filed a motion for JNOV arguing that they should not be liable because the condition that lead to the child's death was so rare and unforeseeable. *Id.* at 682. The trial court denied this motion and the Court of Appeals affirmed. *Id.*

The Court of Appeals in *Lockridge* decided the issue of proximate causation based not on foreseeability or statistics, but on the connection between the doctor's negligent conduct and the resulting harm. Although aortic dissections were found to be statistically rare in children, the doctor's failure to order a chest X-ray to detect it was the proximate cause of the child's death from a condition that a chest X-ray would detect.

Similarly, in this case, although statistically rare, Steven-Johnson syndrome is a known adverse effect of Tegretol. Defendant Watson nevertheless failed to warn Mr. Jones of the indications of Steven-Johnson syndrome, and this was a proximate cause of Mr. Jones' death.

In *Schultz v Consumers Power Co*, 443 Mich 445 (1993), the Michigan Supreme Court reaffirmed the standard set forth in *Davis*. There, plaintiff's estate sued defendant power company after its uninsulated wires electrocuted plaintiff's decedent while he was painting his home. The Court held defendant utility company liable for plaintiff's decedent's electrocution because it was reasonably foreseeable that frayed electric wire posed a risk of harm to one painting his house. The test of foreseeability, the Court held, was whether a reasonable person could anticipate *some injury* from a corroded electric wire. The Court noted that the test of "foreseeability" did not require:

[T]he company have anticipated the particular act from which the injury resulted, but [that] it have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure. *Id.* at 453 (quoting *LaPointe*, 264 Mich at 491).

Based on these authorities and the record before the court, it was proper for the trial court to hold that Plaintiffs' decedent's injuries were a "natural and direct" result of Defendants' actions, and the judgments of the lower courts should be affirmed.

II. It was proper to grant summary disposition with regard to proximate causation where the negligence of the defendants has not yet been established.

Summary disposition may be granted to a plaintiff with regard to proximate causation where the negligence of the defendant has not yet been established. This issue is a matter of procedural law, governed specifically by the Michigan Court Rules. Furthermore, the denial of availability of partial summary disposition regarding proximate causation to plaintiffs, while continuing to avail the same to defendants, fails to afford plaintiffs equal protection under the law, which violates both the United States and Michigan Constitutions.

A. The rules regarding summary disposition are governed by the Michigan Courts Rules, which place no limitations on the granting of summary disposition to plaintiffs

At the core of the question before this Court lies a critical consideration of procedural law. The rules of practice and procedure, as formulated by this Court, are governed by the Michigan Court Rules. Under Const. 1963, art 6, § 5, the Supreme Court is given exclusive rulemaking authority in matters of practice and procedure, and accordingly this Court promulgates court rules to carry out its constitutional duty. *McDougall v Schanz*, 461 Mich 15 (1999). Specifically relevant here is the procedural rule regarding summary disposition, Michigan Court Rule 2.116. *See Shopshire v Laidlaw Transit, Inc*, 550 F 3d 570 (6th Cir 2008)("[s]ummary judgment is a procedural device for deciding a case without the necessity of a full-blown trial.")

Nowhere in MCR 2.116 is there a limitation on the availability of summary disposition to a particular party. The rule states "[a] party may move for dismissal of or

judgment on all or part of a claim...” MCR 2.116(B)(1). Clearly stated, any party to a civil action may move for summary disposition.

Furthermore, the rule does not limit the availability of summary disposition regarding proximate causation. MCR 2.116(C) provides the grounds on which a motion for summary judgment may be based. “Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10). The rule specifically mentions the amount of damages as an exception to the subject matter under which summary disposition may be granted. If this Court wishes to exclude proximate causation from summary disposition, or otherwise alter the procedure regarding the sequence of summary disposition, whether in a negligence claim or otherwise, the Court must do so by amending Rule 2.116.

Nevertheless, this Court should affirm the lower court’s decision to grant partial summary disposition. As the Court of Appeals majority recognized, the question of whether Watson’s conduct was a proximate cause of Jamar’s injury is separate from the issue of whether his conduct breached a duty to Mr. Jones. His conduct was the proximate cause of Jamar’s development of Steven’s-Johnson syndrome even if he properly prescribed the medication. If he did properly prescribe the medication, then he may not be deemed legally liable for doing so, even though his conduct was a proximate cause of Jamar’s death.

Thus, whether Watson did or did not breach the standard of care does not affect the analysis of whether his conduct was or was not a proximate cause of Jamar's death. Assuming that he did breach the standard of care, therefore, does not violate the requirement that the evidence be construed in the light most favor to Defendants, since the determination of proximate cause is the same in either case. Plaintiffs agree that whether Watson was professionally negligent is an issue in dispute that can only be decided by the jury.

Whether Watson was negligent cannot be resolved without a trial does not mean that the trial court could not determine in advance of the trial whether his conduct was the proximate cause of Jamar Jones' death. Even if the jury determines that Watson did *not* breach the standard of care by prescribing Tegretol to Jamar Jones, it will not mean that Watson's conduct was *not* the cause in fact and the proximate cause of Jamar Jones' developing Stevens-Johnson syndrome. It will just mean that Watson did not breach the standard of care and is therefore not liable for having prescribed the Tegretol, even though it was foreseeable that the prescription could cause a rash that could develop into Stevens-Johnson syndrome.

The determination of causation is independent of the determination of whether there was a breach of duty. If it was foreseeable that Jamar Jones could have an adverse reaction to the Tegretol and develop a rash that could, in turn become Stevens-Johnson syndrome, then Watson's prescription of Tegretol was the proximate cause of Jamar Jones' developing Stevens-Johnson syndrome, regardless whether by prescribing Tegretol Watson did nor did not breach the standard of care. The fact that we presently do not know what the jury will decide regarding whether Watson breached the standard

of care did not preclude the trial court from determining whether it was foreseeable that the prescription could cause Jamar to develop a rash which, in turn, could become Stevens-Johnson syndrome, and that the prescription was therefore the proximate cause of him developing Stevens-Johnson syndrome.

Therefore, in determining that Watson's conduct was a proximate cause of Jamar's development of Stevens-Johnson syndrome, and granting the Estate's motion, the lower courts did not fail to comply with the requirement that it construe the evidence in the light most favorable to the Defendants. The conclusion is the same regardless whether one does or does not assume that Watson breached the standard of care.

For this reason, the lower court's decision to grant partial summary disposition was proper and should be upheld.

B. The denial of summary disposition to plaintiffs would violate the Equal Protection Clause of both the Michigan and United States Constitutions

To the extent that Defendants suggest that this Court adopt a rule that would deny the availability of partial summary disposition with regards to proximate causation to plaintiffs, such a proposed rule would violate both the Michigan and United States Constitutions.

The Equal Protection Clause of the Michigan Constitution states "[n]o person shall be denied the equal protection of the laws..." Const. 1963, art.1, § 2. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution similarly requires that "no state shall...deny to any person within its jurisdiction the equal protection of the laws." The unequal treatment of adverse parties to a civil action, plaintiffs and defendants, would violate these provisions without any rational basis in law. Even assuming, *arguendo*, that there is a rational basis to deny to plaintiffs the

option of seeking partial summary disposition, to retroactively apply such a rule in direct contravention to MCR 2.116 would amount to the denial of Plaintiffs' constitutional right to due process.

For this reason, the Court should decline Defendants' invitation to carve out an unconstitutional application of this Court's summary disposition rules.

CONCLUSION AND RELIEF REQUESTED

As the lower courts held, the law in Michigan (and every other jurisdiction) is well settled that proximate cause does not require foretelling the exact type of injury as long as reasonable care foretells some injury will result. In this case, the record establishes, by testimony of both plaintiff and defense experts, that Tegretol was the proximate cause of the claimed injuries. Because there was no genuine issue of material fact as to proximate cause, the lower court properly granted to Plaintiff partial summary disposition consistent with MCR 2.116.

Accordingly, this Court should vacate its Order granting leave to appeal, or alternatively affirm the judgments of the lower courts.

Respectfully submitted by:

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