

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,

Supreme Court No. 141624
Court of Appeals No. 288710
Wayne County Circuit Court
Case No. 03-327528-NH
Hon. Robert L. Ziolkowski

v.

DETROIT MEDICAL CENTER/SINAI-
GRACE HOSPITAL

Defendants-Appellants,

And

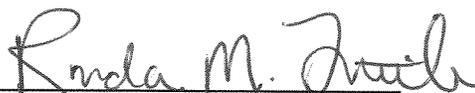
DANNY F. WATSON, M.D., and
WILLIAM M. LEUTCHER, P.C.

Defendants-Appellants.

**BRIEF *AMICUS CURIAE* ON BEHALF OF
THE MICHIGAN ASSOCIATION FOR JUSTICE**

PROOF OF SERVICE

Respectfully Submitted,



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STATEMENT OF QUESTIONS PRESENTED

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

Amicus Curiae answers "Yes."

II. SHOULD THIS COURT AFFIRM THE LOWER COURTS' 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?

Amicus Curiae answers "Yes."

INTEREST OF AMICUS

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in trial litigation work. MAJ consists of member attorneys dedicated to advocating for the interest of the public and protecting the integrity of the judicial system. MAJ recognizes an obligation to assist this Court on significant issues of law that would affect substantially the orderly administration of justice in the trial courts of this state. MAJ supports the Plaintiff-Appellee in urging this Court to affirm the decisions of the Trial Court and the Court of Appeals.

STATEMENT OF FACTS

Amicus curiae, the Michigan Association for Justice, hereby adopts the Counter-Statement of Material Facts and Proceedings as found in Plaintiff-Appellee's Response to Defendants-Appellants' Brief on Appeal.

LAW AND ARGUMENT

I. THE PROBABILITY OF INJURY IS NOT A PROPER AND NECESSARY CONSIDERATION IN DETERMINING PROXIMATE CAUSATION.

This Court has consistently held that a defendant is responsible for the harm caused, not the harm anticipated. The foreseeability, or probability, of a particular injury, is not the test of proximate cause. *Davis v Thorton*, 384 Mich 138; 180 NW2d 11 (1970), *McMillian v Vliet*, 422 Mich 570, 374 NW2d 679 (1985). A plaintiff does not have to show that he/she suffered the most statistically likely harm. *Lockridge v Oakwood*, 285 Mich App 678; 777 NW2d 511 (2009). Rather, once an injury occurs, the focus is on the nexus between the injury and the defendants' conduct and not on

the probability of a particular injury. *Stone v Williams*, 482 Mich 144, 753 NW2d 106 (2008). Defendants are responsible for the harm caused if their negligence, more likely than not, was a cause of the injury (cause in fact), and if the injury was a “natural and direct” consequence of the negligence (proximate cause). *Davis* at 147.

In the instant matter, the trial court granted summary disposition to the Plaintiff on cause-in-fact, i.e., the Defendants’ conduct, more likely than not, caused Stevens Johnson Syndrome. Defendants did not appeal this holding, thereby conceding and/or waiving any issues relating to cause in fact. The issue on appeal concerns proximate cause only. The Defendants contend that they should not be responsible for the harm caused by Defendant Watson’s prescription of Tegretol based on the claimed unforeseeability of Stevens Johnsons Syndrome. However, foreseeability is not the test of proximate cause. Instead, Defendants are responsible for injuries which occur “naturally and directly” without reference to whether the defendant anticipated or foresaw the consequences.

In this case, reasonable minds could not differ that Decedent’s Stevens Johnsons Syndrome was a “natural and direct” consequence of the medication prescribed. Since cause and effect are not in dispute, summary disposition was appropriate.

The leading case on the interplay between foreseeability and proximate cause is *Davis v Thorton*, 384 Mich 138; 180 NW2d 11 (1970). In *Davis*, the defendant left his keys in the ignition of his unlocked car and may have left the motor running. The defendant’s actions were in violation of a Detroit city ordinance. Minors stole the car and while “joyriding” struck plaintiffs’ vehicle, killing one and severely injuring others. Plaintiffs filed a negligence action against the defendant, claiming the defendant’s

negligence was a proximate cause of their injuries. The trial court granted defendant's summary disposition motion holding defendant had no liability for failing to protect others from the actions of thieves. The Michigan Supreme Court reversed the trial court and remanded the case for trial, holding a jury may conclude the joy riders' conduct did not sever causation.

In reaching their decision, the *Davis* Court undertook an extensive discussion of proximate cause and "the proper role of foreseeability" in a negligence action. The Court instructed that while foreseeability of harm has a bearing on the issue of negligence and is relevant when evaluating intervening causal situations, in a direct causal situation (such as the instant case); foreseeability is not to be used as a test for whether proximate cause exists. With regard to the evaluation of negligence, the Court stated in pertinent part:

Foreseeability of any harm is one of the factors a jury may consider in determining if the defendant acted reasonably under all the circumstances. Such a determination can best be made by considering only those facts existing up to the time of injury – should the defendant have reasonably foreseen that what he was doing or had done up to then might cause harm - - if so, he was negligent. Once negligence is determined, foreseeability of harm should no longer be considered. *Id* at 146.

The Court recognized that while many decisions speak of "foreseen or foreseeable consequences as the test of proximate cause," those decisions were speaking of *liability for negligence* and failed to distinguish between duty and proximate cause. Foreseeability is relevant to duty; it is not relevant to proximate cause.¹ Proximate cause looks at the connection between a defendant's conduct and the injury and

¹ Foreseeability of a harm, not foreseeability of a specific harm, is the test for duty. *LaPointe v Chevrette*, 264 Mich 482, 250 NW 272 (1933). See also *Koski v Automatic Heating Service*, 75 Mich App 180, 254 NW 2d 836 (1977), and *Schultz v Consumer Power Co*, 443 Mich 445, 506 NW 2d 175 (1993).

imposes liability for those injuries which occur “naturally and directly, without reference to whether (the defendant) anticipated, or reasonably might have foreseen such consequences.” *Davis* at 147. This Court in *Davis* stated in pertinent part:

It appears that that the modern trend of judicial opinion is in favor of eliminating foreseeable consequences as a test of proximate cause, except where an independent, responsible, intervening cause is involved. The view is that once it is determined that a defendant was negligent, he is held 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.

Apparent inconsistencies between this view and the language of former decisions has been explained on the ground that while in many instances the decisions have spoken of foreseen or foreseeable consequences as a test of proximate cause, what the court really had in mind was liability for negligence without differentiating between the original question of whether there was a breach of duty to use due care and the question of proximate cause. Logically the question of liability is always anterior to the question of the measure of the consequences that go with liability, and where there is no tort there is no question of remote or proximate cause.

On the question of what is negligence, it is material to consider the consequences of what a prudent man might reasonably have anticipated; but when negligence is once established, the consideration is wholly immaterial on the question of how far it imposes liability. There is no need for discussing proximate cause in a case where the negligence of defendant is not established, **but when his negligence has been established, the proximate result and amount of recovery depend upon the evidence of direct sequences and not upon the defendant’s foresight.** *Id.*

Using “natural and direct” as the proximate causation test and requiring “evidence of direct sequences” places practical limits on a defendant’s liability. Proximate cause will not be found, and a defendant will not be liable, if the harm is too remote in the causal sequence from the negligent conduct. However, when there is a direct link between the injury and the defendant’s negligence, such as in this case,

proximate cause is established and the defendant is liable for the injurious consequences of his act.

While foreseeability is not the test of proximate cause in direct causal situations, the *Davis* Court noted foreseeability is relevant in intervening causal situations. An intervening cause which is unforeseeable breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability. An intervening cause which is foreseeable does not break the causation chain.

In *Davis*, there was an intervening cause (the joy riders) and hence, the Court held the proximate cause test was whether reasonable men could find the theft, and consequences of the theft, foreseeable. The Court noted that the ordinance, which prohibited leaving keys in an unlocked car, was passed in an effort to deter theft and to protect the public from the high rate of accidents associated with stolen vehicles. The Court therefore concluded "reasonable men might have concluded leaving the keys in the ignition under these conditions was not too remote a cause of the plaintiff's injuries and that the joy riders' intervention did not sever the causal connection."

Fifteen years later, the proximate cause analysis of *Davis*, was followed by the Michigan Supreme Court in *McMillian v Vliet*, 422 Mich 570; 374 NW2d 679 (1985). In *McMillian*, the defendant police officer accidentally shot and killed plaintiff's decedent during the course of an arrest. Initially, the officer had drawn and cocked his revolver when the driver emerged from his car. After the officer determined the driver was not armed, he failed to uncock his gun. The officer had the gun in his hand as he proceeded with this arrest. The driver moved unexpectedly and the officer's gun accidentally discharged, thereby killing the suspect.

After a two day bench trial, the *McMillian* trial court concluded the decedent's conduct was the sole proximate cause of his death and found no liability. The Court of Appeals affirmed finding the suspect's action to be an intervening cause which presented an issue of foreseeability for the trial court. The Michigan Supreme Court reversed holding it was not clear that the trial court recognized and properly applied the rules on proximate causation as set forth in *Davis*, and the Court remanded the case to the trial court for proceedings consistent with the opinion.

Citing *Davis* with approval, the Michigan Supreme Court in *McMillian* reaffirmed the rule that foreseeability is not the test of proximate cause in a direct negligence situation. The Court noted foreseeability is only relevant in intervening causal situations. Therefore, the Court concluded "proper analysis of a proximate cause question frequently will turn on accurately determining whether the facts in the case present a situation involving direct causality or intervening causality." The Court noted the fact there is more than one cause is not determinative. Two causes can operate concurrently so that both constitute a direct proximate cause of the resulting harm. An intervening cause is distinguishable from a concurrently operating cause in that it involves an intervening cause or act which begins operating after the actor's negligent conduct has been committed.

In *McMillian*, the Court concluded it was not clear what analysis was used by the trial court in concluding that the officer's negligence was not a proximate cause of the harm and the case was remanded for further proceedings consistent with the proximate cause rules articulated.

The proximate cause principles established in *Davis* and *McMillian*, have been further examined and applied by the Court of Appeals. In *Adas v Ames Color-File*, 160 Mich App 297; 407 NW2d 640, lv to app denied 429 Mich 870 (1987), the Court stated “there are countless variations on the definition of proximate causation; however, the prominent theory which has been adopted in Michigan states that **a defendant is responsible for the injurious consequences of his negligent act . . . which occur naturally and directly.**” Citing *Davis*. The Court further noted that proximate cause looks at the nexus between the negligent conduct and the injury. When there is unbroken causation between an act and injury produced by that act, a cause is said to be proximate and, therefore, actionable.

Applying the proximate cause rules in a medical malpractice case, the Court of Appeals in *Lockridge v Oakwood*, 285 Mich App 678; 777 NW2d 511 (2009), held an unforeseen diagnosis does not relieve a defendant of liability. The Court stated “the legal issue is not whether the patient’s actual ailment is foreseeable, but whether the patient’s injuries and damages arising from the missed diagnosis qualify as a “natural and probable result” of the defendant’s negligent conduct.

Factually, in *Lockridge*, plaintiff’s decedent, a 14 year old boy developed chest pain and shortness of breath. He was taken to the emergency department of the defendant hospital where the defendant physician diagnosed him with anxiety and hyperventilation. The physician ordered Valium and Toradal, a pain medication. No chest imaging was obtained to rule out other potential causes. The child died in his sleep that evening. Autopsy revealed that the cause of death was an aortic dissection,

which is rare in children. At trial, plaintiff's experts testified that the standard of care required that the physician undertake a chest x-ray to evaluate for both common and uncommon etiologies and, if this had been done, the chest x-rays would have been abnormal, prompting further work-up and diagnosis. The jury returned a verdict for the plaintiff. The defendant filed a motion for JNOV contending that they had no liability for the death as a matter of law given the rarity, or unforeseeability, of aortic dissections in children. The trial court denied defendant's motion and the Court of Appeals citing *Davis*, affirmed holding proximate cause depends upon the evidence of direct sequences and not upon the defendants' foresight.

The *Lockridge* decision recognized that once you have an injury, statistics are irrelevant. The focus once injured is on the connection between the injury and the defendant's conduct and the relevant inquiry is whether plaintiff's injury was a natural and probable result of the negligent conduct. This analysis is consistent with a plaintiff's burden of proof as set forth in M Civ JI 30.03, which provides:

- The plaintiff has the burden of proof on each of the following:
- (a) that the defendant was professionally negligent in one or more of the ways claimed by the plaintiff as stated in these instructions.
 - (b) that the plaintiff sustained injury and damages.
 - (c) that the professional negligence or malpractice of the defendant was a proximate cause of the injury and damages to the plaintiff.

For proximate cause, a plaintiff must show a nexus between the harm actually suffered and the defendant's negligence. A plaintiff does not have to show that they developed the most statistically likely harm. The Court in *Lockridge* stated in pertinent part:

According to defendants' argument, if a physician considered one diagnosis and failed to rule it out, he or she would have no liability if the patient actually had a different and rare disease. In other words, whether a plaintiff proved proximate cause would entirely depend on the patient's most likely diagnosis. If the defendant negligently failed to investigate the

patient's most probable condition and the patient actually had an alternative, rare problem, he or she would have no liability. Defendants' theory would signify, for example, that if a physician suspected that a patient had a stroke but failed to order a CT scan, he or she would have no liability if the patient actually had a rare brain tumor that also would have been revealed by a CT scan. This reasoning is inconsistent with the diagnostic process, which inherently assumes that one test like a chest x-ray or CT scan may reveal information relevant to a variety of other diagnoses.

Furthermore, the legal issue is not whether the patient's actual ailment is foreseeable, but whether the patient's injuries and damages arising from the missed diagnosis qualify as a "natural and probable result of" the defendant's negligent conduct. M Civ JI 15.01. The diagnostic process may yield unexpected results, as in this case. But an unforeseen diagnosis does not relieve a physician from liability if the patient's actual condition would have been diagnosed naturally and probably had the physician complied with the standard of care. *Id* at 688-689.

As this Court recognized in *Stone v Williams*, 482 Mich 144, 753 NW2d 106 (2008), in a traditional medical malpractice case, where the plaintiff has suffered an actual harm, a plaintiff only needs to establish that it is more likely than not that the injury was due to the malpractice of the defendant. In *Stone*, Six Justices agreed that pre-injury statistics have no role in the proximate cause analysis of a traditional malpractice case. In *Stone*, the plaintiff contended that the defendants' malpractice caused a particular physical injury - - the amputations of both of his legs. In the opinion by Justice Taylor, he found the plaintiff has submitted proofs necessary to prevail on his claim for the following reason: "plaintiff suffered amputations and other injuries, and from the testimony presented, 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 that negligence." *Stone* at 163. Six

Justices in *Stone*, held this causation testimony was sufficient to satisfy the first sentence of MCL 600.2912a(2) which requires that an injury “more probably than not was proximately caused by the negligence of the defendant or defendants.” As *Stone* makes clear, the “more likely than not” inquiry examines the causation between the injury and the defendant’s conduct, and not the probability of a particular injury.

Applying the above holdings to this case, the first question to be addressed is whether the facts of this case present a direct or an intervening causal situation? In this case, it is a direct causal situation, i.e., there are no claims of an intervening cause. As noted by Judge Hoekstra in his dissent, when there are no intervening causes, foreseeability is not the test for proximate cause.

The concept of foreseeability pervades any discussion of proximate cause. However, our Supreme Court has instructed that in a case where there is no intervening cause, and there is none alleged in the present case, the foreseeability of the plaintiff’s injury is not to be used as a test to determine whether proximate cause exists. Citations omitted. (Dissent Slip Opinion, p.2)

Rather, in a direct causal situation, the test is whether the plaintiff’s injuries are a “natural and direct” result of the defendant’s negligence.

II. SUMMARY DISPOSITION ON PROXIMATE CAUSE WAS APPROPRIATE

In this case, as noted by Judge Shapiro in the majority opinion, even Defendants’ experts agree that the decedent’s development of Stevens Johnson syndrome was a natural and direct consequence of taking the Tegretol.

Defendants’ expert, Dr. Edward Domino, who is board certified in clinical pharmacology, indicated that he did not dispute that Jamar developed Stevens-Johnson syndrome as a result of taking tegretol or that Jamar’s death resulted from his developing Stevens Johnson syndrome. Dr. Domino also stated that “from all of the evidence, it appears that [Jamar’s development of Stevens Johnson syndrome] is due to the [tegretol].” Defendant’s other expert, Dr. Paul Cullis, a neurologist, similarly testified

that he had “no reason to dispute” that Jamar’s taking of tegretol caused his development of Stevens Johnsons syndrome. (Slip Opinion, pp. 6-7).

No one claimed the harm could not be linked to the negligence, which is the test of proximate cause. Rather, the Defendants claim they should not be liable given the unforeseeability of Stevens Johnson syndrome. However, as recognized by this Court foreseeability is not the proper test of proximate cause in a direct causal situation. Rather, once injured, the test under *Davis* is whether the harm is a “natural and direct” consequence of negligence. Utilizing this test, reasonable minds could not differ that proximate cause has been satisfied. As this Court recognized in *Davis*, “of all the elements necessary to support recovery in a tort action, causation is the most susceptible to summary determination for it usually amounts to a logical connection of cause to effect.”

III. DEFENDANT BEARS THE RISK OF HARM TO AN “EGG SHELL PLAINTIFF”

If a defendant’s wrongful conduct is proved by a preponderance of the evidence to be a proximate cause of the aggravation of a latent disability, he is liable for such aggravation. *McNabb v Green Real Estate Company*, 62 Mich App 500, 519; 233 NW2d 811 (1975) lv den, 395 Mich 774 (1985), citing *Schwingschlegl v City of Monroe*, 113 Mich 683; 72 NW 7 (1897). In *Wilkinson v Lee*, 463 Mich 388; 617 NW2d 305 (2000), the Michigan Supreme Court examined this well-established principle, also known as the “eggshell plaintiff doctrine,” and reaffirmed that a defendant is responsible for the harm caused, not the harm anticipated.

Factually in *Wilkinson*, the defendant rear-ended the plaintiff. After the accident, the plaintiff developed nausea, severe headaches, dizziness, double vision, and

memory loss. Thereafter, it was determined that the plaintiff had an underlying brain tumor, which the experts testified may have made the plaintiff more likely to suffer neurologic symptoms. The jury returned a verdict for plaintiff but the Court of Appeals reversed concluding that the defendants were entitled to a JNOV on causation. The Michigan Supreme Court reversed the Court of Appeals holding the evidence was sufficient to permit the jury to find proximate cause.

The Michigan Supreme Court began by citing the long established principle that a defendant takes the plaintiff as he finds him.

The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct. 2 Restatement Torts, 2d section 461, p. 502.

The Court noted a negligent actor “bears the risk” of increased liability due to a victim’s susceptibility. This principle is in accordance with the general proximate cause rule that a negligent party is responsible for the harm caused whether he foresaw the harm or not.

The Michigan Supreme Court refused to modify traditional proximate cause analysis based on “social and economic desirability.”

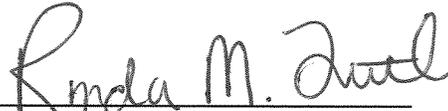
The Court of Appeals uses language suggesting that in order for the driver’s action to be a legal cause, the nexus between the wrongful acts and injuries sustained must be “of such a nature that is socially and economically desirable to hold the wrongdoer liable. That phrasing appears in a series of Court of Appeals cases. . . . There is no reason to resort to a wide ranging policy inquiry in this case. The facts presented fall squarely within the long-established principles” and supported a finding of proximate cause.

As in *Wilkerson*, in this case, the Defendant is responsible for the harm caused even though the harm was increased due to the plaintiff's latent susceptibility. As the "egg shell plaintiff" doctrine demonstrates, proximate cause is not limited to expected consequences. Rather, "the proximate result and amount of recovery depend upon the evidence of direct sequences and not upon defendant's foresight." When a defendant acts negligently, he (not the injured party) bears the risk of unexpected harm.

CONCLUSION

This Court should affirm the decisions of the Trial Court and the Court of Appeals and affirm the grant of summary disposition for Plaintiff on proximate cause.

Respectfully Submitted,



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Dated: July 20, 2011

Proof of Service

The undersigned certifies that on July 20, 2011, two copies of the foregoing Amicus Brief on Behalf of the Michigan Association for Justice was served, via First Class U.S Mail, upon all attorneys of record in the above captioned action.



Ronda M. Little