

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Hoekstra, P.J., and Beckering and Shapiro, JJ.)

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
CORTEX JONES,

Docket No. 141624

Court of Appeals No. 288710

Wayne County Circuit Court
LC No. 03-327528-NH

Plaintiffs-Appellees,

v.

DETROIT MEDICAL CENTER and
SINAI-GRACE HOSPITAL,

Defendants-Appellants,

and

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

Defendants-Appellees.

[CAPTION CONTINUED ON INSIDE COVER]

**BRIEF AMICUS CURIAE OF MICHIGAN DEFENSE TRIAL COUNSEL, INC.
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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

Defendants-Appellants.

Docket No. 141629

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Wayne County Circuit Court
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STATEMENT OF APPELLATE JURISDICTION

Amicus Curiae Michigan Defense Trial Counsel, Inc. relies on Defendants-Appellants' statement of this Court's jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

In granting leave to appeal in this case, the Court invited Michigan Defense Trial Counsel, Inc. (“MDTC”) to provide input on the following questions:

- (1) “Whether the probability of injury is a proper consideration in determining proximate causation.”

The trial court would presumably answer: No.

The Court of Appeals would presumably answer: No.

The MDTC answers: Yes.

- (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.”

The trial court would answer: Yes.

The Court of Appeals would answer: Yes.

The MDTC answers: No.

STATEMENT OF INTEREST

Michigan Defense Trial Counsel, Inc. (“MDTC”) is a business association organized and existing to advance the knowledge and improve the skills of defense lawyers, to support improvements in the adversary system of jurisprudence in the operation of the Michigan courts, and to address the interests of the legal community in Michigan. The MDTC appears before the Court as a representative of defense lawyers and their clients in Michigan, a significant portion of whom are potentially affected by the issues currently before this Court.

An important aspect of the MDTC’s activities is representing the interests of its members in matters of importance before state and federal courts. Accordingly, the MDTC regularly submits amicus curiae briefs to the Michigan Court of Appeals and this Court advocating the interests of its members. The Court invited MDTC to submit an amicus curiae brief in this matter, and MDTC appreciates the opportunity to assist the Court in addressing this important area of Michigan jurisprudence.

I. STATEMENT OF FACTS

Amicus curiae Michigan Defense Trial Counsel (“MDTC”) relies upon the statement of facts as set forth by Defendants-Appellants.

II. ARGUMENT

A. **The Probability of Injury is a Proper Consideration in Determining Proximate Causation**

The first question posed by the Court is “whether the probability of injury is a proper consideration in determining proximate causation.” The MDTC respectfully submits that the answer to this question is “yes.”

1. **Considering Probability of Injury in Determining Proximate Causation is Consistent With the Court’s Long Held View That Liability Depends on Whether the Plaintiff’s Injury is the “Foreseeable, Natural, and Probable” Result of the Defendant’s Act**

Over the years, this Court has used varying formulations when describing the test for “proximate causation,” i.e., proximate “legal” cause.¹ A common theme, however, emerges: the “foreseeable, natural, *and probable*” causes of a plaintiff’s injury are generally considered to be the “proximate” causes. See *Shinholster v Annapolis Hosp*, 471 Mich 540, 546; 685 NW2d 275 (2004) (defining “a proximate cause” as “a foreseeable, natural, *and probable* cause”) (emphasis added). As this Court explained nearly fifty years ago in *Nielson v Henry H Stevens, Inc*, 368 Mich 216; 118 NW2d 397 (1962):

Proximate cause means such a cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. To make negligence the proximate cause of an injury, *the injury must be the natural and probable consequence of a negligent act or omission, which, under the circumstances, an*

¹ In *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994), the Court explained that “proving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as ‘proximate cause.’” Only “legal cause” is at issue here.

ordinary prudent person ought reasonably to have foreseen might probably occur as the result of his negligent act. [*Id.* at 220-221 (emphasis added).]

In recent years, the Court has continued to define proximate causation in terms of whether the defendant's negligence was the "foreseeable, natural, and probable" cause of the plaintiff's injury. Thus, in *Kaiser v Allen*, 480 Mich 31; 746 NW2d 92 (2008), the Court described proximate cause as being the "foreseeable, natural, and probable cause" of the plaintiff's damages. *Id.* at 37-38, quoting *Shinholster*, 471 Mich at 546. Most recently, in *O'Neal v St John Hosp & Medical Ctr*, 487 Mich 485; 791 NW2d 853 (2010), the Court observed how "[t]he proper interpretation of proximate causation in a negligence action is well-settled in Michigan," and that "[i]n order to be a proximate cause, the negligent conduct must have been a cause of the plaintiff's injury and the plaintiff's injury must have been a natural and probable result of the negligent conduct." *Id.* at 496 (emphasis added).²

"Probability of injury," therefore, has long been part of the proximate cause determination under Michigan law. This makes it difficult, if not impossible, to reconcile Plaintiffs' assertion that "[f]or years, it has been well settled that foreseeability is not a proper consideration to determine whether an act of negligence is the proximate cause of an injury." (Plaintiff's Brief on Appeal at 8).³ In support of their position, Plaintiffs primarily rely on *LaPointe v Chevrette*, 264 Mich 482; 250 NW 272 (1933), where the Court stated:

Where an act is negligent, to render it the proximate cause, it is not necessary that one committing it might have foreseen the particular consequences or injury, or the particular manner in which it occurred. [*Id.* at 491.]

² The Model Civil Jury Instructions, M Civ JI 15.01, similarly define proximate "legal" causation as "a natural and probable result of the negligent conduct."

³ Indeed, such an assertion runs directly contrary to this Court's statement in *Charles Reinhart Co v Winiemko*, 444 Mich 579; 513 NW2d 773 (1994), that "[l]egal cause is often stated in terms of foreseeability." *Id.* at 587, n 13, quoting *Richards v Pierce*, 162 Mich App 308, 316-317; 412 NW2d 725 (1987).

This statement, however, does not somehow render foreseeability irrelevant to the proximate cause determination. Indeed, for support, *LaPointe* relied on *Baker v Michigan Cent R Co*, 169 Mich 609; 135 NW 937 (1912), which, in addition to setting forth the principle cited by *LaPointe*, also stated:

To make such negligence the proximate cause of an injury, it must be the natural and probable consequence of the negligent act, which, under the circumstances, an ordinarily prudent person ought reasonably to have foreseen might probably occur as the result of his negligent act. [*Id.* at 618.]

Thus, *LaPointe* cannot reasonably be relied upon for the notion that foreseeability may not be taken into account in determining proximate cause.⁴ As this Court has consistently reaffirmed, “[t]o establish legal cause, the plaintiff must show that it was foreseeable that the defendant’s conduct ‘may create a risk of harm to the victim, and ... [that] the result of that conduct and intervening causes were foreseeable.’” *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997), quoting *Moning v Alfonso*, 400 Mich 425, 439; 254 NW2d 759 (1977).

Baker’s statement of the test for proximate cause is also helpful because it confirms that, while the Court’s first question in this case specifically asks “whether the *probability* of injury is a proper consideration in determining proximate causation” (emphasis added), there is no material difference between asking whether the plaintiff’s injury was “foreseeable” and whether it was the “probable” (or “natural”) result of the defendant’s conduct. The term “foreseeability” shares a common meaning with the terms “probable” and “natural,” which is why this Court has consistently used them together. Foreseeable means “being such as may reasonably be anticipated.” *Merriam-Webster Online Dictionary*, <www.merriam-webster.com> (accessed

⁴ See also *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997) (“To establish legal cause, the plaintiff must show that it was foreseeable that the defendant’s conduct ‘may create a risk of harm to the victim, and ... [that] the result of that conduct and intervening causes were foreseeable.’”), quoting *Moning v Alfonso*, 400 Mich 425, 439; 254 NW2d 759 (1977).

August 10, 2011). By the same token, natural in this context means “having a normal or usual character,” and probable means “likely to become true or real.” *Id.* While they are defined using slightly different phraseology, these terms share a general meaning. As Dean Prosser explains:

Many courts have said that the defendant is liable only if the harm suffered is the “natural and probable” consequence of the defendant’s act. . . . The phrase . . . appears to come as the equivalent of the test of foreseeability of consequences within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent in the first instance. [Prosser & Keeton, Torts (5th ed), § 43, p 282.]⁵

Thus, as the Court recognized in *O’Neal*, 487 Mich at 496, proximate causation both “relates to the foreseeability of the consequences of the defendant’s conduct” and requires the plaintiff’s injury to have been “a natural and probable result of the negligent conduct.” Or as the Court put it in *McMillan v State Highway Comm’n*, 426 Mich 46, 62 n 6; 393 NW2d 332 (1986), “only acts which are likely to result in injury are compensable. Acts which cause injury but are foreseeable only as remote possibilities, those only slightly probable, are beyond the limit of legal liability.”

This is not to say that an injury must necessarily be *statistically* probable in order to be actionable. At the same time, it is not sufficient that an injury was merely “foreseeable.” Rather, the test is whether the plaintiff’s injury can be considered both reasonably “foreseeable” and a “natural and probable” consequence of the defendant’s act. See *O’Neal*, 487 Mich at 496; *Nash v Mayne*, 340 Mich 502, 508; 65 NW2d 844 (1954) (“In order to constitute proximate cause, it must appear the injury to plaintiff was the natural and probable consequence of the negligence or wrongful act of the defendant, and that it ought to have been foreseen, in the light of the

⁵ See also 57A Am Jur 2d Negligence, § 487 (“The ‘natural and probable consequences’ test has been said to be closely related to the ‘foreseeability test’; the courts often equate what is natural and probable with that which is foreseeable, or should have been anticipated, in effect incorporating ‘foreseeability’ as an integral part of the ‘natural and probable’ test.”).

attending circumstances.”) (citation omitted). As explained in *McMillan*, the purpose of the proximate cause test is to distinguish between “acts which are likely to result in injury” and those “which cause injury but are foreseeable only as remote possibilities.” *McMillan*, 426 Mich 46, 62 n 6.

Plaintiffs also rely on the Court’s decision in *Davis v Thornton*, 384 Mich 138; 180 NW2d 11 (1970), in furtherance of their position that foreseeability is not part of the proximate cause determination, except in cases involving “intervening” causes. *Davis*, however, is questionable in light of case law existing at the time, and is directly contrary to the “well-settled” foreseeability-based test of proximate that the Court has utilized many times over since *Davis*. In addressing proximate causation, the *Davis* Court cited with approval the following passage from the first American Jurisprudence:

It appears 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 to be 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 that a prudent man might reasonably have anticipated; but when negligence is once established, that 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 the 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 defendant’s foresight. [*Id.* at 147, quoting 38 Am Jur, Negligence, §§ 58, 709, 710.]

This approach is known as the “direct-consequences” test of proximate causation, which is followed in some jurisdictions. For example, the Supreme Court of Minnesota has defined the test as follows: “Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.” *Kronzer v First Nat’l Bank*, 305 Minn 415, 426; 235 NW2d 187 (1975) (citation omitted).

The problem with the *Davis* Court’s apparent approval of the direct-consequences test is that it did so without any analysis and without addressing (let alone attempting to reconcile) conflicting decisions such as *Neilson*. Moreover, as commentators note, the direct-consequences test has become “increasingly disfavored.” See Wells, *Proximate Cause and the American Law Institute: The False Choice Between the “Direct-Consequences” Test and the “Risk Standard,”* 37 U Rich L Rev 389, 423 (2003). Finally, and most importantly, it is far removed from the test for proximate cause that this Court has consistently used since *Davis* was decided, i.e., whether the defendant’s act was the “foreseeable, natural, and probable” cause of the plaintiff’s injury.⁶

2. Limiting Liability to the “Foreseeable, Natural, and Probable” Consequences of a Defendant’s Act Comports With Notions of Justice

Aside from being firmly established in the fabric of Michigan law, the requirement that a plaintiff’s injury be the “foreseeable, natural, and probable” consequence of a defendant’s act is

⁶ The direct-consequences test was also cited in *McMillian v Vliet*, 422 Mich 570, 576-577; 374 NW2d 679 (1985), but for support the *McMillian* Court relied solely on *Davis*. Thus, other than *Davis*, there does not appear to be any basis for the Court’s statement in *McMillian* that “[t]his Court has recognized a distinction between direct and intervening causal situations and set forth different tests for determining proximate cause in each.” *Id.* at 576.

consistent with this Court's long-held view that proximate "legal" cause serves as an important limitation on liability as a matter of fundamental fairness. As this Court observed in *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994):

The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. Prosser & Keeton, *Torts* (5th ed), § 41, p 266. *On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.* [*Id.* at 163 (emphasis added).]

The Court similarly emphasized the liability-limiting role of the proximate cause determination in *Charles Reinhart Co v Winiemko*, 444 Mich 579; 513 NW2d 773 (1994), where the Court cautioned that "[t]he question of fact as to whether the defendant's conduct was a cause of the plaintiff's injury *must be separated from the question as to whether the defendant should be legally responsible for the plaintiff's injury.*" *Id.* at 586 n 13 (emphasis added). See also *Moning v Alfonso*, 400 Mich 425, 439; 254 NW2d 759 (1977) ("Proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences.").

Thus, there not only is strong support in this Court's case law for "probability of injury" playing a significant role in the proximate cause determination, but there is also an important policy reason for doing so.

3. The Court of Appeals' Majority Misanalyzed the Proximate Issue and Usurped the Jury's Function By Deciding it as a Matter of Law

Viewing the Court of Appeals' decision in this case in light of this Court's "well-settled" test for proximate causation, *O'Neal*, 487 Mich at 496, it is apparent that the Court of Appeals majority misanalyzed the proximate cause issue and, in doing so, improperly invaded the province of the jury when it decided proximate cause as a matter of law.

The Court of Appeals majority's first mistake was in applying a "mere possibility" standard. The Court stated:

[T]he issue is not whether defendants should have foreseen that Jamar would develop [Stevens-Johnson] syndrome [as a result of taking carbamazepine], but whether they should have foreseen the possibility that as a result of taking the medication, Jamar, like any other patient being prescribed the medication, bore a risk of developing the syndrome. [*Jones v Detroit Medical Center*, 288 Mich App 466, 475; 794 NW2d 55 (2010).]

Contrary to the Court of Appeals majority's assertion, proximate cause is not determined by remote possibility, but by that which is "foreseeable, natural, and probable." *Shinholster*, 471 Mich at 46 (emphasis added). Remote possibilities do not determine proximate causation because they are not "anticipated," "expected," or "likely." *McMillan*, 426 Mich at 62 n 6.

Next, the Court of Appeals majority improperly merged cause-in-fact and proximate "legal" cause when it found proximate cause to be established as a matter of law by virtue of the fact that "the alleged misdiagnosis was the sole cause" of Jamar's injury:

We do not see how a reasonable juror could conclude that an allegedly negligent diagnosis that was the sole cause for prescribing the injury-causing medication was not a proximate cause of the injury. [*Jones*, 288 Mich App at 483.]

While this statement is consistent with the element of "cause in fact" having been met, i.e., "'but for' the defendant's actions, the plaintiff's injury would not have occurred," *Skinner*, 445 Mich at 163, it has nothing whatsoever to do with "legal" cause. As the Court of Appeals dissent properly recognized:

The issue is not simply whether reasonable minds cannot differ that a straight line can be drawn from point A, the defendant's alleged negligence, to point F, the plaintiff's injuries. Rather, for a plaintiff to prevail on the issue of proximate cause at the summary disposition stage, it must be shown that reasonable minds cannot differ that the injuries were the natural and probable consequence of the

defendant's negligence. [*Jones*, 288 Mich App at 488 (Hoekstra, P.J., dissenting).]⁷

The Court of Appeals dissent was also entirely correct when it concluded that the Court of Appeals majority had unduly focused on “whether the injuries were foreseeable.” As the dissent observed:

[The majority] reasons that, because Jones died as a result of Stevens-Johnson syndrome, which is a known side effect of taking carbamazepine, and because Jones contracted Stevens-Johnson syndrome from taking carbamazepine, which was prescribed by Watson, the injuries were foreseeable. [*Id.*]

In taking such an approach, the Court of Appeals majority failed to consider and apply the rest of the proximate cause test, i.e., whether the injuries “were the natural and probable consequence of the defendant’s negligence” (or put another way, whether the injuries were “expected” and “likely to occur), and “whether the connection between the alleged negligence and the injuries is of such a nature that it is socially and economically desirable to hold the defendant liable.” *Id.*, citing *Davis*, 384 Mich App at 145, and *Helmus v Dep’t of Transp*, 238 Mich App 250, 256; 604 NW2d 793 (1999).

Worse still, the Court of Appeals majority’s approach resulted in its disregard of what should have been obvious factual issues to be resolved by the jury. As this Court held in *Barnebee v Spence Bros*, 367 Mich 46; 116 NW2d 49 (1962):

“In any case where there might be reasonable difference of opinion as to the foreseeability of a particular risk, the reasonableness of the defendant’s conduct with respect to it, or the normal character of an intervening cause, the question is for the jury, subject of course to suitable instructions from the court as to the legal conclusion to be drawn as the issue is determined either way. By far the greater number of the cases which have arisen have been of this description; and to this extent it may properly be said that “proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the

⁷ The Court of Appeals majority’s error in conflating cause-in-fact and proximate “legal” cause is further discussed below in connection with the Court’s second question concerning whether it is appropriate to determine proximate cause before the defendant’s negligence has been established.

consideration of the evidence of each particular case.” [*Id.* at 52, quoting Prosser on Torts (2d ed), § 50, p 282.]⁸

The Court of Appeals dissent aptly explained how this case “presents issues that must be resolved at trial,” thus precluding *either side* from being entitled to summary disposition:

. . . It is undisputed that Stevens-Johnson syndrome is a known, but very rare, side effect of taking carbamazepine. One expert testified that only one in a million of those who take carbamazepine develop Stevens-Johnson syndrome. In addition, there is no claim by plaintiffs that carbamazepine is not an anticonvulsant commonly prescribed for a seizure disorder. Under these circumstances, I am of the opinion that reasonable minds could differ regarding whether Jones’s injuries were the natural and probable result of Watson’s alleged negligence of failing to perform additional diagnostic tests to confirm the preliminary diagnosis of a seizure disorder. Admittedly, the link between Watson’s alleged failure to warn Jones of an allergic reaction to carbamazepine and Jones’s injuries is much closer than the link between the injuries and Watson’s alleged failure to confirm the preliminary diagnosis. However, given the rarity of Stevens-Johnson syndrome, I believe that even on this claim it was within the province of the jury to determine whether the connection between Watson’s alleged negligence and Jones’s injuries was of such a nature that it is desirable to hold defendants liable. Accordingly, I would conclude that the trial court erred by granting summary disposition to plaintiffs on the issue of proximate cause.

Defendants also argue that it was error for the trial court to deny their cross-motion for summary disposition. They argue that because Stevens-Johnson syndrome is a rare and unpredictable side effect of taking carbamazepine, plaintiffs cannot establish that taking carbamazepine was a foreseeable, natural, and probable cause of Jones’s death. . . . [T]he record shows that although Stevens-Johnson syndrome is a rare side effect, it is a known side effect. Consequently, reasonable minds could differ regarding whether it is a natural and probable consequence that, if a physician prescribes a medication with a known rare side effect, a patient will suffer the side effect. Therefore, I would also conclude that defendants are not entitled to summary disposition. [*Jones*, 288 Mich App at 489-490.]

* * *

⁸ See also *Davis*, 384 Mich at 145 (“[A]ny doubts about the connections between the causes and the effects, should be resolved by the jury.”); *Samson v Saginaw Prof'l Bldg, Inc*, 393 Mich 393, 409; 224 NW2d 843 (1975) (finding that it was for the jury “to determine the ultimate questions which may impose liability, those of foreseeability, reasonableness and proximate cause”).

For all of these reasons, the MDTC respectfully submits that “probability of injury” is properly taken into account when determining proximate causation (as part of an overall examination of whether the defendant’s act was the “foreseeable, natural, and probable” cause of the plaintiff’s injury), and that doing so leads to the inescapable conclusion that the Court of Appeals’ decision should be reversed.

B. Partial Summary Disposition May Not Be Granted to the Plaintiff With Regard to Proximate Causation Where the Negligence of the Defendant Has Not Been Established.

This Court also asked the parties to address “[w]hether partial summary disposition may be granted to the plaintiff with regard to proximate causation where the negligence of the defendant has not been established.” The MDTC respectfully submits that the answer to this question is “no.”

1. Proximate Causation Is a Tool Designed to Limit Liability Where Negligence and Causation-In-Fact Are Established.

In analyzing this issue of substantive tort law,⁹ it is helpful, as is often the case, to begin with Prosser and Keaton’s leading treatise on torts. Prosser and Keaton explain that “[t]he term ‘proximate cause’ is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established. ...” Prosser & Keaton on

⁹ Plaintiffs have misinterpreted the issue with respect to whether proximate causation may be determined before negligence. According to Plaintiffs, the second question flagged by the Court’s order is a purely procedural one and, thus, that the Court can resolve this issue simply by consulting the Michigan Court Rules. (Plaintiffs’ Brief on Appeal at 13-14). The MDTC submits, however, that the question is better framed as one of substantive law. The question is not whether the trial court had the authority under the Michigan Court Rules to grant summary disposition on the issue of proximate causation. There appears to be no dispute that it had this authority as a *procedural* matter, nor does the MDTC contend that the trial court lacked this authority. The MDTC does submit, however, that this authority was not exercised in accordance with substantive principles of Michigan tort law.

Torts (5th ed), § 42, 272. In other words, proximate causation is used to determine whether liability, once established and linked to the plaintiff's injury, should be limited:

Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury. Unlike the fact of causation, with which it is often hopelessly confused, this is primarily a problem of law. It is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that they depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred. Quite often this has been stated, and properly so, as an issue of whether the defendant is under any duty to the plaintiff, or whether the duty includes protection against such consequences. This is not a question of causation, or even a question of fact, but quite far removed from both; and the attempt to deal with it in such terms has led and can lead to utter confusion. [Prosser & Keaton on Torts (5th ed), § 42.]

Proximate causation, therefore, is distinct from the concept of causation-in-fact. It assumes a causal connection between a negligent act and the plaintiff's injury and asks the factfinder to determine whether this connection is one that should give rise to liability at common law. Again, Prosser and Keaton explain:

The word "proximate" is a legacy of Lord Chancellor Bacon, who in his time committed other sins. The word means nothing more than near or immediate; and when it was first taken up by the courts it had connotations of proximity in time and space which have long since disappeared. It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness. For this reason "legal cause" or perhaps even "responsible cause" would be a more appropriate term. There is, however, no present prospect that long ingrained practice will ever be altered by the substitution of either. [*Id.*]

This description, as shown above and below, is consistent with Michigan law. See, e.g., *Skinner*, 445 Mich at 163 ("[L]egal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.").

This synopsis provides a useful template for understanding Michigan jurisprudence. But it also suggests an immediate answer to the Court's second question: if proximate causation is a tool for determining whether to impose liability where there is a causal link between negligent conduct and the plaintiff's injury, it makes little sense to resolve proximate causation in a plaintiff's favor where there has been no determination as to liability.

2. The Proximate Cause Element of a Negligence Claim Includes Negligent or Wrongful Conduct By Definition and, Therefore, a Plaintiff Cannot Establish Proximate Causation Without Establishing Negligence.

The principles set forth above indicate that the proximate cause element has a particular role to play in a negligence action: it is a tool for determining whether it is appropriate to impose liability on the defendant where there is an establish causal link between the defendant's conduct and the plaintiff's injury. Beyond this conceptual issue, it is erroneous to grant summary disposition on proximate causation where there is a question of fact as to negligence because a proximate cause, by definition, includes negligent or wrongful conduct.

This fact—that negligence or wrongful conduct is inherent in the determination of proximate causation—is evident throughout the Court's negligence jurisprudence. At the turn of the twentieth century, this Court stated, "When a particular consequence results *from a wrong*, it may be said that the wrong is the proximate cause of that consequence, unless there intervenes between the wrong and said consequence something which may properly be denominated a cause." *Iamurri v Saginaw City Gas Co*, 148 Mich 27, 34; 111 NW 884 (1907) (emphasis added). A proximate cause, in other words, is the result of a "wrong." The Court applied a similar definition in *Luck v Gregory*, 257 Mich 562; 241 NW 862 (1932), holding: "In order to constitute proximate cause, it must appear the injury to plaintiff was the natural and probable consequence of the *negligence or wrongful act* of the defendant, and that it ought to have been

foreseen, in the light of the attending circumstances.” *Id.* at 569 (emphasis added). Again, this definition frames the proximate cause inquiry as beginning with a negligent or wrongful act..

Toward the turn of this century, in *O’Neal, supra*, the Court stated: “In order to be a proximate cause, the *negligent* conduct must have been a cause of the plaintiff’s injury and the plaintiff’s injury must have been a natural and probable result of the *negligent* conduct.” *O’Neal*, 487 Mich at 496-497 (emphasis added). Similar approaches are found in, for example, *Nash*, 340 Mich at 508 (applying *Luck*’s definition of proximate cause), and *LaPointe*, 264 Mich at 491 (“*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 consequent or injury”) (emphasis added).

These cases uniformly treat negligent or wrongful conduct as one part of the overall definition of proximate cause, when that term is used as an element of a negligence claim. That is not to say that “proximate cause” cannot be used in a colloquial sense to refer simply to the “immediately preceding or following” cause. *Merriam-Webster Online Dictionary*, <www.merriam-webster.com> (accessed August 15, 2011). Rather, the question addressed in the cases cited above is whether “proximate cause” *as an element of a negligence claim* requires proof of negligence or wrongful conduct. As shown, this Court has repeatedly answered that question in the affirmative.

Secondary authorities are in accord.¹⁰ In *The Law of Torts*, Dobbs put this conclusion bluntly: “The issue of proximate cause does not arise at all unless the defendant is negligent in a

¹⁰ Indeed, even the Plaintiffs in this case are unable to discuss proximate causation without including negligence as part of its very definition. For example, at page 8 of Plaintiffs’ Brief on Appeal, they assert that “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.” (Plaintiffs’ Brief on Appeal at 8) (emphasis added). Given the case law discussed above, this result is not surprising. Proximate causation includes negligent or wrongful conduct in its definition.

way that can be identified.” Dobbs, *The Law of Torts*, § 182, 448 (2001). Similarly, the Restatement (Second) of Torts provides as follows with respect to the elements of a cause of action for negligence:

The actor is liable for an invasion of an interest of another, if:

- (a) the interest invaded is protected against unintentional invasion, and
- (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
- (c) the actor’s conduct is a legal cause of the invasion, and
- (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion. [Restatement 2d of Torts, § 281.]

In the comments that follow, the Restatement provides: “Clauses (a) and (b) state the conditions necessary to make the actor’s conduct negligent. Clauses (c) and (d) state the conditions which are necessary to make *negligent conduct* actionable.” *Id.*, cmt. a (emphasis added). Thus, element (c)—legal or proximate causation—is a condition that applies to “negligent conduct.”

Both this Court and the leading secondary authorities are in agreement: a proximate cause includes negligent or wrongful conduct as part of its very definition. The Court of Appeals opinion and the trial court’s ruling below – holding that proximate cause may be determined as a matter of law *before* negligent or wrongful conduct has been established – are at odds with this principle of common law negligence and should therefore be overturned.

3. A Court Cannot Assume Negligence “Arguendo” In Granting Partial Summary Disposition on Proximate Cause.

Although the Court and leading secondary authorities have repeatedly included negligent or wrongful conduct within the very definition of “proximate cause,” one might argue that this rule does not bar a trial court from determining proximate cause conditionally—that is, from holding that a defendant’s conduct is a proximate cause as a matter of law *if* the factfinder

determines that the conduct is negligent or wrongful. This argument, however, would be incorrect.

In fact, this approach defies logic. Reserving judgment on an issue that is contained within the very definition of proximate cause while deciding proximate causation as a matter of law is akin to concluding that an animal is a Golden Retriever while reserving judgment on whether it is a mammal. A Golden Retriever is, by definition, a mammal. Similarly, if conduct is a proximate cause of the defendant's harm (a Golden Retriever, in this analogy) then it is, by definition, negligent or wrongful conduct (a mammal).

It would make sense to reserve judgment on negligence while deciding proximate cause as a matter of law only if it is possible to hold that *non-negligent* or *non-wrongful* conduct satisfies the proximate cause element of a common law negligence claim—if one could find, to use the analogy, that a Golden Retriever is not a mammal. But just as Golden Retrievers are invariably mammals, it appears that there are no cases in which this Court has held that conduct was the proximate cause of harm without finding that it was negligent or wrongful. Notably, Plaintiffs do not cite a *single* case where non-negligent or non-wrongful conduct was held to be the proximate cause of the defendant's harm, and the MDTC was able to find none. There is no logical way, therefore, to reserve judgment on negligence while deciding proximate causation as a matter of law. A Golden Retriever is always a mammal and conduct is a proximate cause only if it is negligent or wrongful. See, e.g., *O'Neal*, 487 Mich at 496-497.

More importantly, this Court has previously held that proximate causation cannot be resolved unless it is determined that the defendant was breached a duty to the plaintiff. In *Romain v Frankenmuth Mutual Ins Co*, 483 Mich 18; 76 2 NW2d 911 (2009), this Court considered whether an actor's conduct could be a "proximate cause of damage sustained by a

party” under Michigan’s comparative fault statute without the actor owing the injured party a duty. *Id.*, citing MCL 600.6304(8). Although the Court’s analysis concerned MCL 600.6304(8), its reasoning is directly applicable to this case.¹¹

The Court quoted with approval from *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992):

In a common law negligence action, before a plaintiff’s fault can be compared with that of defendant, it obviously must first be determined that the defendant was negligent. It is fundamental tort law that before a defendant can be found to have been negligent it must first be determined that the defendant owed a legal duty to the plaintiff. [*Id.* at 99, quoted in *Romain*, 483 Mich at 21.]

Agreeing with and applying *Riddle*, the *Romain* Court reasoned:

[A] legal duty is a threshold requirement before there can be any consideration of whether a person was negligent by breaching that duty and causing injury to another. Thus, when the Legislature refers to the common-law term “proximate cause” in the comparative fault statutes, it is clear that for claims based on negligence “it must first be determined that the [person] owed a legal duty to the plaintiff.” ... Without owing a duty to the injured party, the “negligent” actor could not have proximately caused the injury and could not be at “fault” for purposes of the comparative fault statutes. [*Id.* at 22.]

Thus, the Court held that a defendant’s conduct could not be the proximate cause of the harm suffered by the plaintiff because the defendant did not owe plaintiffs a duty in the first place. *Id.* at 20. In so holding, the Court affirmed *Jones v Enertel, Inc*, 254 Mich App 432; 656 NW2d 870 (2002), which held that “a duty must first be proved before the issue of fault or proximate cause can be considered.” *Id.* at 437, quoted in *Romain*, 483 Mich at 20.

Romain indicates, therefore, that one cannot address proximate causation without first addressing the questions of duty and breach. This rule is consistent with Prosser and Keaton and

¹¹ Chief Justice Young, joined by Justices Corrigan and Markman, dissented from the majority opinion in *Romain*. The dissent’s analysis is fully consistent with the MDTC’s position, however, because the dissenting opinion in *Romain* concluded that the comparative fault statutes did not limit the concept of “fault” to common-law proximate causation. *Romain*, 483 Mich at 29-30 (Young, J., dissenting). Thus, the dissent disagreed not with the majority’s analysis of the common law but with the majority’s exclusive reliance on the common law.

the Second Restatement of Torts, which, as noted above, provide that legal cause is used to determine whether liability should be imposed for negligent conduct.

As applied to this case, *Romain* establishes that the Court of Appeals and trial court erred as a matter of law in holding that it was appropriate to resolve proximate causation as a matter of law without first determining whether the defendant was negligent in the first place. Not only is negligent or wrongful conduct part of the definition of proximate cause but, according to *Romain*, it is improper to decide proximate cause until it has been determined that the defendant breached a legal duty.¹²

4. The Court of Appeals Erred In Treating Proximate Cause As Little More Than Causation-In-Fact.

The Court of Appeals majority did not expressly address the question of whether the trial court could even reach proximate cause without determining negligence. This omission appears to stem from the majority's conclusion, as discussed above, that proximate cause is little more than a cause-in-fact inquiry, albeit reframed to consider the causal distance between the defendant's conduct and the plaintiff's injury.

The majority concluded that Plaintiffs raised two distinct theories of negligence: (1) that Dr. Watson was negligent in failing to warn Plaintiffs' decedent about Stevens-Johnson syndrome and how to address it and (2) that Dr. Watson was negligent in diagnosing a seizure disorder. As to the first issue, the majority reasoned: "For this theory, the link between the alleged violation of the standard of care and the injury is direct, and we do not believe a

¹² Of course, this is not to say that summary disposition may not be granted in a defendant's favor on the proximate cause issue in an appropriate case. This is because a defendant's liability necessarily depends on proof of *all* of the elements of a negligence claim. Thus, judgment as a matter of law should be granted to the defendant if the plaintiff fails to establish *any* of those elements.

reasonable juror could conclude otherwise. Indeed, one could fairly say that under this theory the issues of cause in fact and proximate cause collapse and are essentially indistinguishable.” *Jones*, 288 Mich App at 481. Thus, the majority expressly concluded that “the issues of cause in fact and proximate cause collapse” into each other and are effectively the same.

But this analysis overlooks the cases cited above and the very rationale for including a proximate cause element. A cause-in-fact is precisely that: a but-for cause of the plaintiff’s injury. Proximate cause, on the other hand, is a tool for determining whether to impose liability where there is an established causal link between *negligent conduct* and the plaintiff’s injury. *O’Neal*, 487 Mich at 496-497. By conflating the two, the Court of Appeals precluded the necessary inquiry into the social and legal policies implicated by the latter, incorrectly assuming that a simple causal link was a sufficient substitute for this analysis.

As for the second theory of liability, the Court of Appeals held:

In the context of this theory, cause in fact and proximate cause do not completely collapse into each other because the alleged negligence does not necessarily cause injury; the prescribing of the medication constitutes an intermediate step without which the alleged misdiagnosis does not cause injury. Further, this intermediate step, i.e., prescribing the medication, is not alleged to be negligent in and of itself. Indeed, it appears to be undisputed that the prescription of carbamazepine for a seizure disorder is well within the standard of care, except perhaps in special circumstances involving a particular patient, and no such claim is made here. Rather, plaintiffs allege that Watson lacked sufficient diagnostic information to diagnose a seizure disorder and that, as a result of that negligent diagnosis, he prescribed a medication and Jamar had a rare and fatal reaction to that medication. We recognize that as the number of intermediate steps increase, and as those steps grow more attenuated from the final risk-creating event, proximate cause becomes more and more tenuous. [*Jones*, 288 Mich App at 482.]

The majority’s mistake here is the same as with the first theory: it confused proximate cause with causation-in-fact, assuming that, if there were few causes-in-fact between the defendant’s conduct and the plaintiff’s injury, no reasonable factfinder could fail to conclude that the conduct was a proximate cause of the plaintiff’s injury. But this approach is not consistent with the more

nuanced analysis that this Court has called for in case after case. Nor is it consistent with the fundamental role of the proximate cause inquiry—determining whether sound public policy justifies imposing liability where there is an established causal link between the defendant’s conduct and the plaintiff’s injury.

Accordingly, the Court of Appeals ruling is contrary to the definition of proximate cause that this Court has used since at least the early twentieth century. The MDTC respectfully submits, therefore, that the Court of Appeals opinion should be reversed.

III. CONCLUSION

In answer to the Court’s first question, the MDTC respectfully submits that the “probability of injury” is a proper consideration in determining proximate causation. Not only is “probability of injury” consistent with the Court’s established view that legal cause depends on a showing that the defendant’s act was the “foreseeable, natural, and probable” cause of the plaintiff’s injury, but requiring such a showing serves as an important limitation on liability in cases where the injury was unlikely and thus could not have reasonably been anticipated.

In answer to the Court’s second question, the MDTC respectfully submits that negligence must be determined before the factfinder can assess whether the defendant’s negligent or wrongful conduct is the proximate cause of the plaintiff’s injury. This rule is consistent with the basic purpose of the proximate cause inquiry in a common law negligence action: that of allowing the factfinder to limit liability to cases where the plaintiff’s injuries are the foreseeable, natural and probable result of the defendant’s conduct. It is also consistent with the definition of “proximate cause” throughout this Court’s negligence jurisprudence and with the Court’s holding in *Romain*.

Respectfully submitted,

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Dated: August 19, 2011

DETROIT 999902-100 1204382v4