

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
HOEKSTRA, P.J., AND BECKERING AND SHAPIRO, J.J.

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,

Supreme Court
Nos. 141624, 141629

Plaintiffs – Appellees,

Court of Appeals
No. 288710

v

**DETROIT MEDICAL CENTER / SINAI
GRACE HOSPITAL, DANNY F. WATSON,
M.D., and WILLIAM M. LEUCHTER, P.C.,**

Wayne County Circuit Court
No. 03-327528-NH

Defendants–Appellants.

BRIEF OF AMICUS CURIAE
MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

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STATEMENT OF QUESTIONS INVOLVED

- I. **WHETHER THE PROBABILITY OF INJURY IS A PROPER CONSIDERATION IN DETERMINING PROXIMATE CAUSATION.**
- II. **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.**

STATEMENT OF FACTS

The *Amicus Curiae* shall rely upon the Statement of Facts set forth in the Appellants' briefs.

INTEREST OF THE AMICUS CURIAE

This *Amicus Curiae* brief is respectfully submitted by *Amicus Curiae* Michigan Health and Hospital Association in support of the Appellants' appeals from the decision of the Michigan Court of Appeals in this case. The Michigan Health and Hospital Association, formerly known as the Michigan Hospital Association, is one of the largest statewide health care organizations in Michigan. In existence for more than 85 years, the Association represents more than 150 hospitals and health care systems. The Association acts as the principle advocate on behalf of hospitals and health systems committed to improving community health status. Its primary objective is to link patients, communities and providers together for better health.

In its published decision in this case, Court of Appeals majority has created a new standard, contrary to established precedents, which will allow and encourage our courts to find that legal causation has been established as a matter of law in cases such as this, where the injury in question has resulted from a freakish occurrence which could not have been reasonably foreseen due to extreme remoteness of probability, and cannot be fairly characterized as "a natural and probable result" of the allegedly negligent conduct at issue. The majority decision of the Court of Appeals has also inappropriately approved the trial court's grant of partial summary disposition as to proximate causation when no determination has yet been made as to whether there has been any negligence.

The Michigan Health and Hospital Association is deeply troubled by the Court of Appeals decision in this case because it is expected that the erroneous standard established therein will unfairly subject healthcare providers to unwarranted liability, and may also adversely affect patient care in many cases, if allowed to stand as the law of this state. It is

feared that these unfavorable consequences will adversely impact the cost and availability of quality healthcare in Michigan, as discussed in greater detail *infra*. This would do a great disservice to the health care industry and the general public, and it is for this reason that the Michigan Health and Hospital Association now seeks leave to participate as an *Amicus Curiae* to aid the Court's decision making process in this case.

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LEGAL ARGUMENT

I. THE PROBABILITY OF INJURY IS A PROPER AND ESSENTIAL CONSIDERATION IN DETERMINING PROXIMATE CAUSATION.

The tragic death of Jamar Jones from Stevens–Johnson syndrome can be best described as a freakish mishap. Although the development of Stevens–Johnson syndrome is a known possible complication of treatment with carbamazepine, there has been no dispute that the occurrence of this complication is *extremely* rare – approximately one in every million cases. It is also undisputed that there is no way to predict who is likely to develop this admittedly serious complication, and no clear understanding of how, or why, it occurs. Thus, the trial court and the Court of Appeals have been unable to say that Mr. Jones’ unfortunate death from Stevens–Johnson Syndrome in this case could reasonably have been foreseen by Dr. Watson when he prescribed carbamazepine for the suspected seizure disorder, or that his death was a “natural and probable result” of any negligence that the jury might find in this case.

The trial court concluded that other, more predictable, complications could have been foreseen, and thus, it was foreseeable that *some* injury might have resulted from Mr. Jones’ ingestion of carbamazepine. And because Mr. Jones was the one in a million to develop Stevens - Johnson syndrome, the trial court also concluded, without further proof, that he must have had some pre-existing susceptibility to development of that condition. Ultimately, the trial court granted partial summary disposition as to proximate causation based upon its finding that this assumed susceptibility, likened to an “eggshell skull,” was sufficient, together

with Dr. Watson’s ability to foresee that *some* injury might result from Mr. Jones’ ingestion of carbamazepine, to establish the essential element of legal causation as a matter of law.

The Court of Appeals did not address the trial court’s finding of “eggshell skull” susceptibility, nor did it dispute that development of Stevens–Johnson syndrome caused by ingestion of carbamazepine is extremely rare, to the point of being a freak occurrence. Nonetheless, the Court of Appeals majority concluded that the extreme rarity of the fatal complication was irrelevant because the probability of its occurrence was not an issue; the issue, it said, was instead a simple question of whether Dr. Watson should have foreseen the *possibility* that ingestion of carbamazepine presented a *risk* that Mr. Jones might develop the syndrome:

“Defendants argue that the injury in this case, Jamar’s development of Stevens-Johnson syndrome, was not foreseeable because it was rare. All the parties and their experts agree that Stevens-Johnson syndrome is rare. However, the issue is not whether defendants should have foreseen that Jamar would develop this syndrome, but whether they should have foreseen the possibility that as a result of taking this medication, Jamar, like any other patient being prescribed this medication, bore a *risk* of developing the syndrome.” 288 Mich App at 475 (Emphasis in Opinion)

A. UNDER SETTLED AND CONTROLLING PRECEDENTS, ESTABLISHMENT OF LEGAL CAUSATION REQUIRES PROOF SUFFICIENT TO SUPPORT A FINDING THAT THE INJURY SUFFERED WAS A FORESEEABLE, NATURAL AND PROBABLE RESULT OF THE DEFENDANT’S NEGLIGENCE.

With all due respect to the lower courts, the *Amicus Curiae* contends that their respective rationales for finding legal cause established as a matter of law in this matter were fundamentally erroneous. The trial court and the Court of Appeals majority have improperly disregarded the requirement, well established by controlling Michigan authorities and long recognized by respected commentators, that legal causation requires a finding that the injury

suffered was a “natural and **probable** result” of the negligent act or omission. It does not, and should not, suffice to demonstrate a *possibility* of a statistically insignificant *risk* of harm. By ignoring this essential element of legal causation, the lower courts have reduced legal causation to a concept which does not differ in any significant way from the far more expansive concept of cause-in-fact, and in doing so, they have defeated the traditional purpose of the proximate cause requirement – to establish reasonable and socially appropriate limitations upon the scope of liability which may be imposed for a negligent act or omission.

The Defendants have already provided a clear and persuasive showing that probability of the injury suffered **is** a proper, and indeed essential, consideration in determining proximate causation. Thus, it is neither necessary nor appropriate to burden the Court with a second discussion of the numerous authorities accurately cited and discussed in the Appellants’ briefs. The *Amicus Curiae* agrees wholeheartedly with the reasoning which has been so capably expressed by Defendants’ counsel, and will therefore focus its presentation upon a few additional points and provide a brief response to some of the arguments made in the Plaintiffs’ responsive brief.

It is useful, at the outset, to note what has been correctly stated. The Court of Appeals majority has appropriately recognized that proximate cause is generally a question of fact for the jury. *Jones v Detroit Medical Center*, 288 Mich App 466, 474; 794 NW2d 55 (2010) . It has also properly recognized that determination of legal cause “normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.” *Id.*, citing *Skinner v Square D Co.*, 445 Mich 153, 163; 516 NW2d 475 (1995).

Plaintiffs have suggested that foreseeability is relevant only to determination of negligence, and plays no role in determining the existence of legal cause, citing this Court's prior decision in *Davis v Thornton*, 384 Mich 138; 180 NW2d 11 (1970), as support for that proposition. Although it may be acknowledged that *Davis* does include a statement that "[o]nce negligence is determined, foreseeability of harm should not be considered" (384 Mich at 146), Plaintiffs' reliance upon that statement is misplaced for two reasons. First, *Davis* expressly recognized that determination of proximate causation requires a decision as to whether "the injury caused plaintiff was too insignificantly connected to or too remotely effected by the defendant's negligence." 384 Mich at 142 (Emphasis added) The recognition of this important principle suggests a further recognition that if the prospect of the particular injury was too remote to warrant imposition of liability, it was not foreseeable that the injury would result.

Second, as the Defendants have aptly noted, there are several more recent decisions of this Court which have appropriately held, as the Court of Appeals majority acknowledged, that determination of legal or proximate cause "normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co.*, *supra*, 445 Mich at 163-164. *See also*, *O'Neal v St. John Hospital*, 487 Mich 485, 496; 791 NW2d 853 (2010); *Kaiser v Allen*, 480 Mich 31, 37-38; 746 NW2d 92 (2008); *Shinholster v Annapolis Hospital*, 471 Mich 540, 581, 602-603; 685 NW2d 275 (2004); *McMillan v State Highway Commission*, 426 Mich 46, 61-63; 393 NW2d 332 (1986); *Moning v Alfonso*, 400 Mich 425, 439; 254 NW2d 759 (1977).

The Court of Appeals majority correctly cited the time-honored principle stated in *Moning v Alfonso*, *supra*, and reiterated in *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d

647 (1997), that determination of legal cause requires an answer to two questions: 1) whether it was foreseeable that the defendant's conduct "may create a risk of harm to the victim" **and** 2) whether the result of that conduct and intervening causes were foreseeable. 288 Mich App 474-475. But as noted previously, the Court of Appeals majority rejected Defendants' argument that the injury suffered in this case – the development of Stevens– Johnson syndrome – was not foreseeable because it was extremely rare. This argument was directed toward, and relevant to, answering the second of the aforementioned questions, *i.e.*, whether the specific result of the allegedly negligent conduct in question was foreseeable.

The Court of Appeals majority improperly rejected this argument, related to the second prong of the test, by focusing upon the first prong, *i.e.*, whether it was foreseeable that the defendant's conduct "may create a risk of harm to the victim":

"Defendants argue that the injury in this case, Jamar's development of Stevens-Johnson syndrome, was not foreseeable because it was rare. All the parties and their experts agree that Stevens-Johnson syndrome is rare. However, the issue is not whether defendants should have foreseen that Jamar would develop this syndrome, but whether they should have foreseen the possibility that as a result of taking this medication, Jamar, like any other patient being prescribed this medication, bore a *risk* of developing the syndrome." 288 Mich App at 475 (Emphasis in Opinion)

Posing the question in this manner was no different than simply asking whether it was foreseeable that Dr. Watson's conduct might "create a risk of harm to the victim." Thus, the Court of Appeals has determined the existence of legal cause in this case as a matter of law by answering only the first of the two questions posed by the prior decisions of this Court. Plaintiffs, and the Court of Appeals, cannot avoid the second part of the test by avoiding the second question – whether the development of Stevens–Johnson syndrome was foreseeable – simply because the statistically remote possibility of that result was, or should have been known. The Court of Appeals majority's conclusion that the possibility that Mr. Jones would

be subject to a **risk** of developing Stevens-Johnson syndrome can suffice to establish legal cause as a matter of law is clearly inconsistent with the jury instructions, and the reported decisions of this Court upon which those instructions have been based, requiring that the injury suffered be a “natural and probable result” of the negligent conduct.

B. PLAINTIFFS’ ARGUMENTS ARE NOT SUSTAINED BY THE AUTHORITIES CITED IN SUPPORT.

Plaintiffs have suggested that legal cause may be found as a matter of law where it was foreseeable that *some* injury could result, citing this Court’s decision in *LaPointe v Chevette*, 264 Mich 482; 250 NW 277 (1933) in support of that proposition as authority establishing “the modern day rule on proximate cause and foreseeability.” *LaPointe*, however, does not represent the “modern day rule,” nor does it fully reflect the jurisprudence of its time. In that case, a 15-year-old employee of the defendants developed osteomyelitis, a serious infection of the bone in his legs, after the defendant employer caused his prolonged expose to the elements by requiring him to make deliveries in a winter storm without adequate clothing. After a verdict for the plaintiff, the defendants claimed on appeal that the trial court had improperly denied their motion for judgment notwithstanding the verdict because: 1) there was no evidence of negligence on their part; 2) their young employee assumed the risk incident to the service rendered; and 3) the young employee was guilty of contributory negligence as a matter of law. In support of these arguments, the defendants suggested that they could not be held liable because the jury had determined, in response to written questions, that they could not have foreseen that the forced exposure to inclement weather without adequate clothing would bring on an attack of osteomyelitis.

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These arguments were rejected, and with respect to causation, the Court cited its prior statement, in *Baker v Railroad Co.*, 169 Mich 609; 135 NW 937 (1912), that:

“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.” 169 Mich at 618.

It is this statement from *La Pointe* which the Plaintiffs have cited as “the modern day rule on proximate cause and foreseeability.” The Court should note, however, that *LaPointe* did not include the first part of the quoted portion of its prior decision in *Baker*, which emphasized, as the more recent decisions of this Court have, that the plaintiff’s injury 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.”¹

“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. 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. * * * In view of the fact that the agreement was to protect switchmen from injury, it is clear that the injury complained of was such as an ordinarily prudent man ought to have foreseen might probably occur in case of failure to perform.” 169 Mich at 618-619 (Emphasis added, citation omitted)

¹ In *Hunley v DuPont Automotive*, 341 F3d 491, 499 (CA 6, 2003), the Sixth Circuit Court of Appeals declined to follow the language from *LaPointe* quoted on pages 8 and 9 of the Plaintiff’s brief, based upon its finding that prior and more recent decisions of this Court have required that the injury suffered by the plaintiff be a natural and probable result of the defendant’s conduct which should have been foreseen.

Thus, under the standard enunciated in *Baker*, the plaintiff was required to prove that his injury was “the natural and probable consequence” of the allegedly negligent act, regardless of whether or not the specific injury suffered was foreseen. The Court’s Opinion in *LaPointe* contains nothing suggesting disapproval of the above-emphasized portion of the standard previously set forth in *Baker*, and *LaPointe* did not present any issue similar to the issue presented in this case; the defendants in that case did not contend that development of osteomyelitis could not be considered a natural and probable consequence of their negligent act, but claimed, instead, that they could not be held liable because they had not foreseen the specific result.

In this case, there is a legitimate question of fact as to whether the injury suffered – the unfortunate death resulting from the development of Stevens–Johnson syndrome – can be considered a “natural and probable” result of one the alleged breaches of the standard of care. And as noted previously, this Court’s more recent pronouncements require a finding of foreseeability on both counts – 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 – to establish legal causation. *Weymers v Khera, supra*, 454 Mich at 648, 648; *Moning v Alfonso, supra*, 400 Mich at 439.

Plaintiffs’ position is not supported by the other authorities cited in support. On page 11 of their Appellee’s Brief, Plaintiffs have said that this Court has “steadfastly held” that the statistical probability of a particular injury occurring is irrelevant for determining proximate cause, citing this Court’s decision in *Stone v Willimason*, 482 Mich 144; 753 NW2d 106 (2008), as authority for that claim. Plaintiff’s reliance upon *Stone* is misplaced, since the issues presented in that case addressed the standards applicable to determination of cause-in-

fact in cases asserting liability based upon loss of opportunity to achieve a better result. This is not a lost opportunity case, and the questions now before the Court do not involve establishment of but-for causation. Moreover, the decisions of this Court have made it clear that the remoteness of the potential harm is a factor relevant to determination of proximate causation – a factor which “should seldom, if ever, be summarily determined.” *Davis v Thornton, supra*, 384 Mich at 147.

Plaintiffs also cite *Lockridge v Oakwood Hospital*, 285 Mich App 678; 777 NW2d 511 (2009) as authority for their argument that proximate causation is not undermined by statistical improbability. Plaintiffs’ reliance upon *Lockridge* is also misplaced because its pertinent facts are very different from those of the present case. In *Lockridge*, the defendant healthcare providers were held liable for their failure to diagnose an aortic dissection which had brought about the decedent’s death. On appeal, they challenged the trial court’s denial of their motion for judgment notwithstanding the verdict, and the trial court’s decision was upheld for a number of reasons. First, it appears that there was a difference of expert opinion as to whether the standard of care required a chest x-ray to rule out a spontaneous pneumothorax, the most likely cause of the presenting symptoms, and the plaintiff presented an expert opinion that a chest x-ray would have revealed the aortic dissection, providing an opportunity for lifesaving surgery. The Court also noted that all of the experts had agreed that an aortic problem, although unlikely, should have been within the treating physician’s differential diagnosis. 285 Mich App at 687. Thus, the evidence provided an ample basis for a finding that the injury suffered – the fatal aortic dissection – should have been a foreseeable consequence of the defendant physician’s negligent failure to diagnose the problem in time for corrective action. And although the Court’s Opinion stated that “the legal issue is not

whether the patient's actual ailment is foreseeable," it also cited the controlling standard set forth in *Weymers and Moning*, which **does** require a showing that the **result** of the negligent conduct was foreseeable, and correctly noted the requirement that the resulting injury qualify as a "natural and probable result" of the negligent conduct. 285 Mich App at 684, 689.

On page 12 of their Appellee's Brief, Plaintiffs cite *Schultz v Consumers Power Co.*, 443 Mich 445; 506 NW2d 175 (1993) as reaffirming the standard set forth in *Davis*. But *Schultz* is unhelpful because it involved a question of whether a duty was owed, and did not address any issues concerning proximate cause.

C. THE THREAT TO HEALTHCARE PROVIDERS AND PATIENT CARE.

Defendants have expressed justifiable concerns that the open-ended standard created by the Court of Appeals majority decision in this case will unfairly burden the medical profession and adversely affect the availability and affordability of health care in Michigan. These dangers are very real, and should therefore be carefully considered.

As the Defendants have aptly noted, the standards for determination of legal causation have been designed and applied to provide reasonable limitations upon the scope of liability which may be imposed for negligent acts or omissions. If permitted to stand, the new standard created by the Court of Appeals majority in this case will allow and encourage our courts to find that legal causation has been established as a matter of law in cases such as this, where the injury in question has resulted from a freakish occurrence which could not have been reasonably foreseen due to extreme remoteness of possibility, and cannot be fairly characterized as "a natural and probable result" of the allegedly negligent conduct at issue. This, in turn, will present a potential for several serious problems.

Who, in recent times, has watched network television for an hour in the evening without seeing a collection of advertisements for prescription medicines claimed to provide relief from a variety of common ailments? All who have seen them will know that these advertisements typically include a brief description of the potential benefits to be derived from the medication in question, followed by a longer listing of potential side effects and complications which often include the possibility of serious consequences such as heart attack, stroke and even death. Presumably, these warnings are provided so that no one will be able to claim lack of fair warning if one of the listed complications or side effects should happen to materialize, but it is reasonable to assume that the potential for development of the more serious complications is probably remote in most cases. No one would expect a competent healthcare provider to prescribe a medication posing a serious or even marginally significant threat of heart attack, stroke, renal failure, liver damage, or death resulting from any of these, as a remedy for joint pain, toe nail fungus, depression, or acid reflux.

These advertisements stand as a useful reminder that medical interventions are often associated with a broad variety of potentially harmful side effects or complications. The knowledge of such side effects and complications and the need to avoid the harms that they threaten while effectively providing necessary treatments to patients presents a daily conundrum for most healthcare providers. In many cases, physicians must make treatment decisions with the knowledge that the medication or other treatment prescribed may cause potentially harmful side effects or complications. Thus, physicians must often choose between prescribing a potentially beneficial course of treatment and avoidance of potentially harmful side effects or complications. In some cases, the choice is clear, but in others, there are

differences of opinion as to what the applicable standard of care requires in the particular circumstances.

If healthcare providers can now be held liable for remote injuries which could not have been reasonably foreseen and which cannot be fairly characterized as a natural and probable result of negligence on their part simply because a particular complication is known to have occurred in some cases, no matter how infinitesimally small the chance, it may be expected that physicians and other healthcare providers will be unfairly subjected to unwarranted liability, and that patient care may be adversely affected in many cases. It may be expected that exposure to unwarranted liability for remote and unforeseeable consequences will have a serious adverse impact upon the cost of healthcare in Michigan. And if physicians know that they may be subjected to substantial liability for a freakish occurrence of one of many complications “known” to occasionally occur in connection with a particular treatment, their discretion may well be exercised, in many cases, in favor of withholding the potentially beneficial treatment in question or selecting an alternative course which might not serve the patient’s needs as well.² The enhanced potential for liability might also cause physicians to hesitate in emergency situations, when prompt action is needed, out of fear of unwarranted liability for remote consequences.

² In medical malpractice cases, the duty owed is defined by the applicable standard of care, and it is not necessary for the plaintiff to prove that the specific injury suffered was foreseeable to establish the requisite breach of duty; to establish breach of duty, the plaintiff need only establish that some injury to the plaintiff was foreseeable. *Lockridge v Oakwood Hospital, supra*, 285 Mich App at 683, citing *Schultz v Consumers Power Co., supra*, 443 Mich at 452, fn. 7. Thus, the holding of the Court of Appeals majority in this case presents a very real danger that a healthcare provider may now be held liable for injuries resulting from a complication, the possibility of which was so remote as to be statistically insignificant, if there were other, more likely, known complications that did not occur, and a jury concludes that the treatment was inconsistent with the standard of care due to the existence of those other risks.

These costs, both financial and human, are costs which our society can ill afford – costs which can, and should, be avoided by the reversal of the erroneous decision of our Court of Appeals.

II. IT IS INAPPROPRIATE TO GRANT PARTIAL SUMMARY DISPOSITION WITH REGARD TO PROXIMATE CAUSATION WHEN THE NEGLIGENCE OF THE DEFENDANT HAS NOT BEEN ESTABLISHED.

The Court has also asked the parties to brief the question of whether it is appropriate to grant partial summary disposition with regard to proximate causation when the negligence of the defendant has not yet been established. The Defendant healthcare providers have appropriately responded that it is not appropriate to do so.

The most basic response to this question is a matter of simple logic because determining proximate causation as a matter of law before the defendant's negligence has been established is a perfect example of "putting the cart before the horse." As previously discussed, the determination of legal causation requires proof that the plaintiff's injury and damages were a genuinely foreseeable, natural and probable result of the defendant's negligent act or omission. The determination of legal causation is the essential process for establishing a socially appropriate limitation of liability to be imposed for negligence. As such, it requires a determination of whether the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. *Helmus v Transportation Department*, 238 Mich App 250, 256; 604 NW2d 793 (1999); *Ross v Glaser*, 220 Mich App 183, 192-193; 559 NW2d 331 (1996).

Thus, it may be seen that the determination of legal causation must necessarily include an assessment of the Defendant's negligence. It should go without saying that this function

cannot be properly performed until it has been determined that there was, in fact, some negligence to be evaluated, and the evaluation must take into account the nature and quality of the negligence found. Awareness of this obvious truth was presumably the impetus for this Court's observation, in *Davis v Thornton, supra*, that "[l]ogically, the question of liability is always anterior to the question of the measure of consequences that go with liability, and where there is no tort there is no question of remote or proximate cause." 384 Mich at 147, quoting 38 Am Jur, Negligence, §§ 58, 709, 710.

As the Defendants have ably discussed, the Plaintiffs have raised different theories of negligence in this matter, and it cannot be known at this point which, if any, of those theories will be credited by the jury. Plaintiffs have claimed negligent diagnosis, failure to provide adequate warning and instruction as to the potential for development of Stevens– Johnson syndrome and what to do if the symptoms of the condition should appear, and failure to provide appropriate follow-up treatment. Defendants have vigorously disputed all of these theories, and have also suggested that Mr. Jones' unfortunate demise from Stevens– Johnson syndrome might have been avoided if he had sought treatment immediately in accordance with the instructions given at the time of his discharge from the hospital.

Issues of foreseeability and risk of harm are inextricably intertwined, and must be considered with respect to both duty and legal cause. *See, Moning v Alfonso, supra; Lockridge v Oakood Hospital, supra*. Remoteness of the potential harm is relevant to both standard of care and legal causation. These related issues should be considered together to ensure that appropriate and consistent decisions are made with respect to each of them. And as previously discussed, this Court has recognized that remoteness of the potential harm, a factor of

particular importance for determining the existence of legal causation in this case, should seldom, if ever, be summarily determined. *Davis v Thornton, supra*, 384 Mich at 147.

The Defendants have also appropriately noted the danger that the jury's evaluation of the alleged negligence may be unfairly tainted by the trial court's prior decision that the injury in question was proximately caused by whatever negligence the jury might find. It will be difficult to craft jury instructions sufficient to avoid this problem, and thus, the jury may come to suspect that the court has already determined the question of foreseeability in favor of the Plaintiff when that question should be independently evaluated with respect to negligence. Or the jury may be tempted to simply conclude that it is expected to find some negligent act or omission because the court has already found that this tragic and costly injury was caused by Dr. Watson's conduct. Each of these potential scenarios is unfair to the Defendants, and there is no legitimate reason for subjecting them to that danger. If negligence cannot be established as a matter of law, consideration of proximate cause can, and should, be deferred until a finding of negligence has been made.

The lower courts have also overlooked the possibility that their rulings on proximate cause have improperly limited the jury's ability to fully consider the Defendants' claim that the injury was caused by the decedent's comparative negligence. As noted previously, the Defendants have suggested that Mr. Jones' death was caused, in whole or in part, by his failure to seek prompt medical attention, as directed by the discharge instructions, upon the appearance of the symptoms suggesting the possibility of Stevens-Johnson syndrome. It cannot be known, at this time, how the jury will judge this claim, but it is possible that it could decide, under proper instruction, that Mr. Jones' negligence in this regard was the sole proximate cause of his unfortunate demise if allowed to make its own determination of

proximate cause. That possibility has been foreclosed by the lower court rulings that legal cause has been established in this matter as a matter of law. This was a question for the jurors to decide. It should not have been taken from them.

RELIEF REQUESTED

WHEREFORE, *Amicus Curiae* Michigan Health and Hospital Association respectfully requests that the erroneous decisions of the trial court and the Court of Appeals be reversed, and that this Honorable Court declare its holding that: 1) the probability of the injury at issue remains a proper and essential consideration in determining proximate causation; and 2) partial summary disposition should not be granted with regard to proximate causation unless, and until, the negligence of the defendant has been properly established.

Respectfully submitted,

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