

IN THE SUPREME COURT

Appeal from the Court of Appeals
Honorable Joel P. Hoekstra, P.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,

Plaintiffs-Appellees,

vs.

DETROIT MEDICAL CENTER and
SINAI-GRACE HOSPITAL,

Defendants-Appellants,

and

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

Defendants-Appellees.

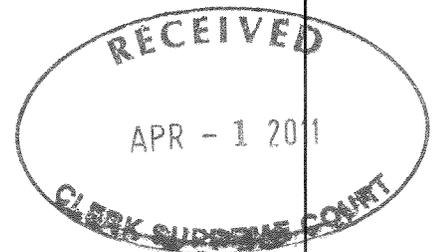
Supreme Court No. 141624

Court of Appeals No. 288710

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

**BRIEF ON APPEAL - APPELLANTS
DETROIT MEDICAL CENTER/SINAI-GRACE HOSPITAL**

*****ORAL ARGUMENT REQUESTED*****



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JURISDICTIONAL STATEMENT

Plaintiffs filed a motion for partial summary disposition on the element of proximate cause before Wayne County Circuit Court Judge Robert Ziolkowski, submitting that the legal cause aspect of proximate cause was established as a matter of law in this case (Appendix p 35a). Judge Ziolkowski granted the motion by order entered on October 14, 2008 (Appendix p 383a). Defendants Detroit Medical Center/Sinai-Grace Hospital filed an application for leave to appeal with the Court of Appeals on November 4, 2008 (Appendix p 40a). The Court of Appeals granted the application by order entered December 30, 2008 (Appendix p 41a). After briefing and oral argument, the Court of Appeals issued, on May 20, 2010, a published opinion authored by Judge Douglas B. Shapiro, and joined by Judge Jane M. Beckering, affirming the trial court's order granting partial summary disposition to plaintiff (Appendix p 385a). Judge Joel P. Hoekstra dissented (Appendix p 394a). Defendants Detroit Medical Center/Sinai-Grace Hospital filed a motion for reconsideration, that was denied by order entered July 9, 2010 (Appendix p 398a). Defendants timely filed an application for leave to appeal with this Court, which was granted by order entered on February 4, 2011 (Appendix p 399a). This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302.

STATEMENT OF QUESTIONS PRESENTED

- I. Whether partial summary disposition was improperly granted to plaintiffs with regard to proximate causation where the negligence of the defendants has not been established?

- II. Whether the probability of an injury is a proper component to be considered in deciding proximate cause?

- III. Whether testimony and evidence regarding the rarity and unpredictability of Stevens-Johnson syndrome should be presented to the jury for use in its determination of whether any claimed act of negligence is the legal cause of the alleged injury?

STATEMENT OF FACTS

Introduction

In this medical malpractice/wrongful death action, defendants appeal from the Court of Appeals' opinion affirming the trial court's order granting partial summary disposition to plaintiffs as to the "legal cause" aspect of the element of proximate cause.

Defendants submit that, under the facts and circumstances presented in this case, at a minimum, reasonable minds could differ regarding whether defendants should have foreseen the risk of harm to the decedent. The issue should not have been summarily decided and should have been submitted to the jury for decision.

A. Complaint Allegations.

In the complaint, plaintiffs claim that the decedent, Jamar Cortez Jones, was involved in a one-vehicle automobile accident on September 23, 1999, wherein he sustained "contusions and lacerations" and was transported via ambulance to Sinai-Grace Hospital for treatment (see Appendix p 51a, ¶¶10-11). Mr. Jones was referred by the emergency clinic that day to co-defendant Dr. Danny Watson, a neurologist (Appendix p 51a, ¶12). As stated in the complaint, Dr. Watson saw Mr. Jones on September 24, 1999 (Appendix p 51a, ¶12). Dr. Watson recorded in his notes that Mr. Jones "reported that he could not recall how the accident occurred" (Appendix p 51a, ¶12). Further, Dr. Watson noted that Mr. Jones stated that "over the last few months family members had told him that on approximately three occasions he was seen staring blankly and that he was not easily aroused from these spells" and that he seemed "out of contact with the environment" (Appendix p 51a, ¶12). Based on this information, and after conducting a neurological examination and a CT scan of Mr. Jones' head, Dr. Watson diagnosed a "probable partial complex seizure disorder" (Appendix pp 51a-52a, ¶¶13-14). Dr. Watson prescribed the medication Tegretol (an anticonvulsant) and recommended further tests (Appendix p 52a, ¶15). The complaint stated that Mr. Jones was again seen by Dr. Watson for follow-up on October 6, 1999 and October 8, 1999 (Appendix p 52a, ¶¶18-19).

According to the complaint, on October 9, 1999, Mr. Jones began to experience a sore throat, trouble swallowing food, red eyes and a rash over his face and upper body, which worsened over the next two days (Appendix pp 52a-53a, ¶20). Mr. Jones presented to the emergency room on October 12, 1999, where he was diagnosed with Stevens-Johnson syndrome, and was later transferred to the burn unit of Detroit Receiving Hospital for treatment (Appendix p 53a, ¶¶21-22). Stevens-Johnson syndrome is “a rare, serious disorder in which [the] skin and mucous membranes react severely to a medication or infection. Often, Stevens-Johnson syndrome begins with flu-like symptoms, followed by a painful red or purplish rash that spreads and blisters, eventually causing the top layer of [the] skin to die and shed” (see MayoClinic.com <<http://www.mayoclinic.com/health/stevens-johnson-syndrome/DS00940>> (accessed March 28, 2011)). Mr. Jones died on October 21, 1999, “of Stevens-Johnson syndrome, complicated with pneumonia” (Appendix p 53a, ¶23).

Plaintiffs allege in the complaint that Dr. Watson breached the applicable standard of care in prescribing the medication Tegretol to Mr. Jones, in allegedly failing to inform Mr. Jones regarding a possible allergic reaction to Tegretol, and in allegedly failing to provide proper follow-up care (Appendix pp 57a-58a, ¶45). The complaint states that the alleged negligence led to the decedent’s death (Appendix p 58a, ¶47). Plaintiffs claim that, at all pertinent times, Dr. Watson was acting as an agent of the Detroit Medical Center/Sinai-Grace Hospital (Appendix pp 55a-56a, ¶39).

B. Trial Court Proceedings.

On or about June 27, 2008, plaintiffs filed a “renewed” motion for partial summary disposition as to the issue of proximate cause (see plaintiffs’ renewed motion).¹ In pertinent part,

¹ A motion raising similar issues was previously filed, but not fully decided, in 2005. At the time the prior motion was filed, the trial court determined that the prescription of Tegretol was the “cause-in-fact” of the claimed injuries (see 03/18/05 trial court order). However, due to the pendency of prior appeals involving application of the decisions in Apsey v Memorial Hospital (On Reconsideration), 266 Mich App 666; 702 NW2d 870 (2005) and Waltz v Wyse, 469 Mich 642; 677 NW2d 813 (2004), the trial court did not at that time decide the issue of whether the prescription of Tegretol was the “legal cause” of the claimed injuries. After the conclusion of the prior appeals and the return of the case to the trial court, the trial court directed

(continued...)

plaintiffs argued that, although the possibility that the decedent would develop Stevens-Johnson syndrome was “remote, rare and unpredictable”, it was nonetheless foreseeable and, thus, the legal cause component of proximate cause was met (see plaintiffs’ brief in support, pp 23-24).

Defendants Detroit Medical Center/Sinai-Grace Hospital filed a response to plaintiffs’ motion submitting that plaintiffs could not establish as a matter of law the “legal cause” component of proximate causation where defendants could not have reasonably known that the decedent would develop Stevens-Johnson syndrome, since all of the experts in this case, both plaintiff and defense, testified that Stevens-Johnson syndrome is an exceedingly rare reaction and that there is no method to predict who will develop this condition (response, pp 5-10).²

The motion was discussed in the trial court over several different days (see Appendix pp 214a-382a, Trs 03/15/05, 04/01/05, 05/16/08, 08/22/08, 09/12/08 and 10/02/08). In addition, the parties filed several additional replies/supplements addressing the issues (see defendants’ supplement, defendants’ second supplement and plaintiffs’ reply briefs). At the final hearing held on October 2, 2008, the trial court initially indicated that it was inclined to deny plaintiffs’ motion on the basis that the issue presented a question of fact for the jury (Appendix p 378a). However, the trial court ultimately decided to grant plaintiffs’ motion, indicating that the only issue to be tried was whether there was a breach in the standard of care (Appendix p 379a-380a). The trial court granted defendants’ oral request for a stay to allow an appeal (Appendix p 380a). An order reflecting the trial court’s decision was entered on October 14, 2008 (Appendix p 384a).

¹(...continued)

the parties to refile their pleadings on the proximate cause issues. References in this statement of facts are to the renewed pleadings filed in 2008. Defendants reserve the right, if necessary, to appeal the “cause-in-fact” determination at the conclusion of this case.

² As originally presented to the trial court in the response to plaintiffs’ motion and to the Court of Appeals, defendants submitted that, not only should partial summary disposition in plaintiffs’ favor have been denied, but that summary disposition in defendants’ favor was appropriate. In their application for leave to appeal to this Court, defendants focused only on the former issue, submitting that summary disposition in plaintiffs’ favor on the issue of legal cause was improper and, at a minimum, the issue should have been decided by the jury.

C. Appellate Proceedings.

On appeal by leave granted, after briefing and oral argument, the Court of Appeals issued a 2-1 published opinion affirming the trial court in all respects. Jones v Detroit Medical Center, 288 Mich App 466; ___ NW2d ___ (2010) (Appendix pp 385a). The majority opinion, authored by Judge Douglas B. Shapiro, held that, since the development of Stevens-Johnson syndrome is a “known” risk of Tegretol, “albeit a small one”, that the development of the same was foreseeable and such was all that plaintiffs need show to establish in their favor, as a matter of law, the legal cause component of proximate cause. 288 Mich App at 475, 483-484 (Appendix pp 389a, 393a).

Judge Joel P. Hoekstra dissented, finding “that reasonable persons could differ regarding whether the injuries of plaintiffs’ decedent, Jamar Jones, were legally caused by the alleged negligence”. 288 Mich App at 484 (Appendix p 394a). Judge Hoekstra would have found that the legal cause determination (particularly in the context of a summary disposition motion) does not focus solely on whether the claimed injury was a “known” possibility. 288 Mich App at 488 (Appendix p 396a). Rather, according to Judge Hoekstra, reasonable minds could differ regarding whether the claimed injuries were “expected” and “likely to occur”, reasonable minds could differ on whether “the injuries were too insignificantly related or too remotely affected by the alleged negligence” and reasonable minds could differ regarding whether it is “socially and economically desirable” to hold defendants liable. 288 Mich App at 488 (Appendix p 396a).

Defendants filed a motion for reconsideration with the Court of Appeals, which was denied in a 2-1 order entered July 9, 2010 (see Appendix p 398a). Defendants’ subsequent application for leave to appeal to this Court was granted by order dated February 4, 2011, in which this Court directed the parties to include briefing on two specific issues:

(1) whether the probability of injury is a proper consideration in determining proximate causation, and (2) whether partial summary disposition may be granted to the plaintiff with regard to proximate causation where the negligence of the defendant has not been established. [Appendix p 400a.]

SUMMARY OF ARGUMENTS

This appeal involves the interpretation and application of the “legal cause” component of proximate cause. Specifically at issue is whether the defendants’ alleged actions were, as a matter of law, the legal cause of the decedent’s development of Stevens-Johnson syndrome and death after taking the prescribed medication Tegretol. The trial court granted plaintiffs’ motion for partial summary disposition as to the legal cause component of proximate cause (after having previously granted plaintiffs’ motion to find that defendants’ actions were the cause-in-fact of the decedent’s development of Stevens-Johnson syndrome). Defendants submit that this determination was improper for several reasons.

First, it was improper to reach the issue of legal cause before negligence was established. For purposes of deciding plaintiffs’ motion, the facts and evidence should have been construed in a manner most favorable to defendants, meaning that defendants must be assumed not to have been negligent. Determinations regarding negligence and proximate (legal) cause are intertwined in such a way that a proximate cause finding depends, in part, on the specific finding of negligence that is made, if any. In this particular case, there are several theories of negligence in play, along with the potential comparative negligence of the decedent in failing to follow his discharge instructions. Depending on the jury’s findings with regard to these competing issues, even with a finding of negligence, a finding in favor of plaintiffs as to the issue of proximate cause is by no means assured. Yet the Court of Appeals’ majority opinion simply assumed that plaintiffs would prevail on all negligence theories, ignoring the possibility of a split verdict or the impact of the decedent’s own negligence.

Second, in formulating its definition of legal cause, the Court of Appeals considered only the fact that Stevens-Johnson syndrome is a “known” potential side effect of the medication Tegretol. Thus, the court essentially found it irrelevant in making its legal cause determination that the development of Stevens-Johnson syndrome is exceedingly rare (occurring in approximately one in a million patients), as well as completely unpredictable (it is undisputed that there is no test that can

be administered in advance to determine if a particular patient will experience this reaction). If the rarity and unpredictability of the condition is considered, at a minimum, a question of fact is presented regarding whether the decedent's development of this condition should have been foreseen. In addition to considering the likelihood of injury, a legal cause determination should also consider whether it is "socially and economically desirable" to hold the defendants liable for the alleged negligence. By improperly ignoring all of these factors that comprise legal cause, the Court of Appeals majority improperly reduced the legal cause determination to a simply cause-in-fact determination.

As properly applied, the legal cause determination is intended to impose a "practical limitation" on liability. In determining the extent of such limitation, the trier of fact should consider, in the context of the specific negligence findings that are made, the likelihood of injury, probability that the alleged harm will occur, scope of the risk, and any public policy considerations. The removal of all of these factors (as the Court of Appeals majority did in this case) moves the action closer to a strict liability standard, essentially removing any limitation on liability simply because a particular harm is "known" to occur.

A grant of partial summary disposition in plaintiffs' favor as to the proximate (legal) cause element was improper. The issue, including all relevant evidence regarding the rarity and unpredictability of Stevens-Johnson syndrome, should be presented to the jury for determination.

STANDARD OF REVIEW

Review of a trial court's summary disposition decision is de novo. Weymers v Khera, 454 Mich 639, 647; 563 NW2d 647 (1997).

Where a motion is brought pursuant to MCR 2.116(C)(10), “[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” Brown v Brown, 478 Mich 545, 552; 739 NW2d 313 (2007). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” West v General Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003).

ARGUMENTS

I. Partial summary disposition was improperly granted to plaintiffs with regard to proximate causation where the negligence of the defendants has not been established.

As the second issue in its order granting leave, this Court has directed the parties to brief the issue of “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.” As this issue impacts the presentation of the remaining issues, defendants will address the same first in their brief on appeal.

As defendants have maintained, for purposes of deciding plaintiffs’ motion for partial summary disposition, defendants are the non-moving party and, thus, the facts and evidence should have been construed in a manner most favorable to defendants. Under this standard, where it must be assumed that defendants were not negligent and at all times acted within the standard of care, it is improper to even reach the issue of proximate cause. This conclusion is supported by case law and legal analysis finding that the issues of negligence and proximate cause are intertwined and, thus, should be decided by the trier of fact, with proximate cause addressed only if a specific finding of negligence is first made. The actual conclusions reached by the Court of Appeals in its decision illustrate the danger in deciding proximate cause in a plaintiff’s favor in isolation before a finding of negligence is made. The court assumed that plaintiffs here would prevail in each of their claims of negligence, failing to account for the possibility that the jury may accept some claims and reject others, and/or failing to consider that the decedent’s own comparative negligence may impact the proximate cause analysis.

Properly presented, the jury should make its factual findings regarding negligence, if any. If negligence is established, the jury should next determine whether that particular act of negligence is the proximate (legal) cause of the specific claimed injury. However, as the case now stands, the jury will presumably be issued the confusing instruction that the trial court has already determined that the defendants’ actions were the factual and legal cause of the decedent’s injuries (meaning that

the injuries were foreseeable), but that the jury should determine if those actions were negligent. Applying the rationale stated in the Court of Appeals' majority opinion, the determination of negligence by the jury will include whether the risk of injury is so small that the defendants' actions did not constitute a breach in the standard of care. In all likelihood, defendants will be prejudiced by this presentation to the jury. If the jury is informed that "proximate cause", including "foreseeability", has been decided against the defendants by the trial court, the jury's deliberations and decision on the "foreseeability" aspect of negligence will, without doubt, be clouded and impacted. An instruction cannot be crafted to prevent the prejudicial impact of the jury's knowledge that "foreseeability" has already been decided against defendants in the context of proximate cause.

The issue of proximate (legal) cause was improperly and prematurely decided in plaintiffs' favor. This issue should have been submitted to the jury for decision, but only if plaintiffs first prevail in establishing some specific negligence on behalf of defendants.

A. In deciding plaintiffs' motion for partial summary disposition, defendants are assumed not to have been negligent and, thus, the issue of proximate cause should not have been reached.

It is well-established that, in deciding motions for summary disposition, the facts and evidence must be evaluated in a light most favorable to the non-moving party. See Smith v Globe Life Instructions Co, 460 Mich 446, 454; 597 NW2d 28 (1999) *quoting* Quinto v Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996). Further, all factual disputes for purposes of deciding the motion are to be resolved in the non-movant's favor. Jeffrey v Rapid American Corp, 448 Mich 178, 184; 529 NW2d 644 (1995).

In the instant case, for purposes of plaintiffs' motion for partial summary disposition, defendants were the non-moving party. In addition to denying plaintiffs' claims of negligence, defendants submitted evidence that they complied with the standard of care in the form of the deposition testimony of defendants' neurology expert, Paul Cullis, M.D. (Appendix p 190a). Dr. Cullis testified that defendants' actions and, in particular, co-defendant Dr. Watson's actions in his treatment of the decedent, were in all respects proper and within the standard of care:

A. I know that for a good portion of 24 hours that a heart monitor was on Jamar Jones, that it was normal, that there's an EKG that doesn't explain his syncope and, therefore, given that and given the history, the overwhelming likelihood from the facts presented to Dr. Watson was that Mr. Jones was having complex partial seizures. Dr. Watson made a good call about the diagnosis. I would have done the same thing. Most other practicing neurologists would have done the same thing. I commend his treatment of Mr. Jones. The cardiac syncope had effectively been ruled out. We did not know with 100 percent certainty that Mr. Jones had seizures, but it was extremely likely, and the treatment given was appropriate given the situation, and cardiac syncope had effectively been ruled out as a likely diagnosis. [Appendix p 203a.]

* * *

Q. Doctor, if additional tests had been administered, including a sleep-deprived EEG, which let's assume would have been normal, if that had been normal, MRI was normal, CAT scan was normal, video monitoring was normal, and the EEG itself at issue was normal, is it your position that under those circumstances it would have been within the standard of care to diagnose partial complex seizure disorder based on the clinical history that was given?

A. Yes.

Q. And with those other tests being normal and just the clinical history alone, it would have been within the standard of care to prescribe Tegretol?

A. Yes. [Appendix pp 208a-209a.]

More specifically addressing plaintiffs' claim that defendants failed to warn of a possible allergic reaction to Tegretol, the testimony of plaintiffs' neurology expert, Dr. Jon Glass, in fact supports the conclusion that proper warnings were given. Dr. Glass testified that the standard of care does not require a physician to specifically inform a patient that he may contract Stevens-Johnson syndrome. Rather, Dr. Glass stated that he typically advises a patient that there are potential serious complications associated with medication and that the patient should return to his physician or the emergency room if the patient experiences a "peeling rash" or "wet" rash (Appendix pp 133a-134a). Dr. Glass then acknowledged that the decedent had received and signed discharge instructions that specifically advised him of potential allergic reactions and also instructed him to return to the hospital at the first sign of any kind of rash, allergy symptom, or any other problem:

Q. Also, I saw in your records, the aftercare instructions given to Mr. Jones and signed by Mr. Jones dated September 24th, 1999, at 12:23 p.m.?

A. Yes.

Q. And did you see in there where it listed Tegretol, which indicates that among other things, that the most common side effect is drowsiness, and for this reason, avoid driving or operating heavy machinery while taking this medicine. Other possible side effects are dizziness, nausea and vomiting. These usually go away after several days. Allergy is rare. **It would show up as wheezing or shortness of breath, rash and itching. If you develop any symptoms of allergy or any new or serious problems – and then in bold capital letters – call your doctor right away. Did you see that?**

A. Yes.

Q. Is that appropriate advice?

A. Again, that excludes the one thing that I tell patients, for anybody who's particularly on anticonvulsants, if there is a rash that looks like it is peeling or, you know, flaking, is a word I use sometimes, or looks wet, to – that is a serious – a very rare allergic reaction and to proceed to the emergency room if that happens.

Q. Well, whether –

A. That does not mention that there.

Q. **Whether it's a wet rash or dry rash, these instructions just indicate if you have a rash, period, that you should be in contact with your doctor right away; is that fair to say?**

A. Yes.

Q. **And would reference to a rash, in your view, cover any type of rash, either a wet or dry?**

A. **That's a general term, so I would say yes.** [Appendix p 134a, emphasis added.]

Despite Dr. Cullis' and Dr. Glass' testimony, for purposes of deciding plaintiffs' motion for partial summary disposition in the instant case, rather than construing the facts and evidence in a light most favorable to defendants (as the non-movants with respect to plaintiffs' motion), both the Court of Appeals and the trial court construed the facts and evidence in a light most favorable to

plaintiffs. The Court of Appeals specifically assumed that plaintiffs would completely prevail in their claims of negligence:

Because there was no dispute about causation in fact, no material dispute of fact, and reasonable jurors could not find a lack of proximate cause on the basis of these facts, we conclude that the trial court properly determined the issue of proximate causation as a matter of law. Furthermore, because the evidence is undisputed that, although Stevens-Johnson syndrome is rare, it is well known that it can occur from taking carbamazepine, and in this case did so occur, the trial court properly decided, as a matter of law, that Watson's alleged lack of giving advice regarding signs of a reaction was a proximate cause of Jamar's development of Stevens-Johnson syndrome. Finally, because the sole reason the medication was given was because of a diagnosis that plaintiffs assert was negligent and erroneous, the trial court properly decided, as a matter of law, that the allegedly negligent misdiagnosis was a proximate cause of Jamar's development of the syndrome. [Jones, supra, 288 Mich App at 483-484, citation omitted (Appendix p 393a).]

Again, utilizing the accepted standards, for purposes of deciding *plaintiffs'* motion for partial summary disposition, it must be assumed that defendants were not negligent. Without an actual determination that defendants were negligent in some specific way, it was improper to reach the issue of proximate cause at all. As this Court has stated, "[t]here is no need for discussing proximate cause in a case where the negligence of the defendant is not established". Davis v Thornton, 384 Mich 138, 147; 180 NW2d 11 (1970), *quoting* 38 Am Jur, Negligence, §§ 58, 709, 710. This maxim is also supported by numerous well-known legal treatises:

Proximate cause rules are among those rules that seek to determine the appropriate scope of a negligent defendant's liability. The central goal of the proximate cause requirement is to limit the defendant's liability to the kinds of harms he risked by his negligent conduct. Judicial decisions about proximate cause rules thus attempt to discern whether, in the particular case before the court, the harm that resulted from the defendant's negligence is so clearly outside the risks he created that it would be unjust or at least impractical to impose liability. The proximate cause issue, in spite of the terminology, is not about causation at all but about the appropriate scope of responsibility. **The issue does not arise until negligence and causation in fact have been proven.** [Dobbs, *The Law of Torts*, § 180, p 443, emphasis added, footnotes omitted.]

Again, in Dobbs, it is noted that proximate cause issues arise only after a finding of negligence is made:

The issue of proximate cause does not arise at all unless the defendant is negligent in a way that can be identified. [Dobbs, *The Law of Torts*, § 182, p 448.]

Stated in a slightly different manner, Prosser & Keeton note that, without negligence, there can be no liability:

Negligence, it must be repeated, is conduct which falls below the standard established by law for the protection of others against unreasonable risk. It necessarily involves foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger. **If one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in the light of what one could anticipate, there would be no negligence, and no liability.** [Prosser & Keeton, *Torts* (5th ed), § 43, p 280, emphasis added.]

See also, 57A Am Jur 2d, *Negligence*, § 420 (“‘Proximate cause’ or ‘legal cause’ analysis need only be undertaken if the court finds that the defendant has been negligent.”)

This general rule is supported by this Court’s long recognition of the fact that the determination of negligence, and the effects of the claimed negligence, are issues that are inextricably intertwined, with the consideration of the same best left to the jury as the trier of fact:

The question as to the existence of negligence, or a want of ordinary care, is one of a complex character. The inquiry not only as to its existence, but whether it contributed with negligence on the part of another to produce a particular effect, is much more complicated. As to both, they present, from their very nature, a question, not of law, but of fact, depending on the peculiar circumstances of each case, which circumstances are only evidential of the principal fact – that of negligence or its effects – and are to be compared and weighed by the jury, the tribunal whose province it is to find facts, not by any artificial rules, but by the ordinary principles of reasoning; and such principal fact must be found by them, before the court can take cognizance of it, and pronounce upon its legal effect. [*Detroit & MR Co v Van Steinburg*, 17 Mich 99, 122 (1868), quoting *Park v O’Brien*, 23 Conn 339, 347 (1854).]

The instant case provides a compelling rationale for why proximate cause in plaintiffs’ favor should not have been decided before negligence was established. Plaintiffs have alleged multiple theories of negligence and the decedent’s own comparative negligence in failing to timely seek treatment when his symptoms first appeared is at issue. Nonetheless, the Court of Appeals in its

decision ignored any possible combination of findings other than that plaintiffs would completely prevail on every negligence issue.

B. In deciding proximate (legal) cause in favor of plaintiffs, the Court of Appeals failed to consider that the jury may not accept all of plaintiffs' theories and/or that the decedent's own negligence may impact proximate cause.

Given the multiple factual findings as to the negligence issues that could impact proximate cause, the instant case provides a compelling example of the danger in prematurely deciding legal cause before a specific finding of negligence has been made. This danger is illustrated by the Court of Appeals' assumptions purporting to establish the legal cause connection between the alleged negligence and the claimed injury. The Court of Appeals construed plaintiffs' claims in the complaint as two separate theories of negligence, specifically, a claim that there was an insufficient basis to prescribe Tegretol and a claim that insufficient warnings had been given regarding possible allergic reactions (Appendix p 386a).³

Addressing what was construed by the Court of Appeals as a "failure to warn" claim, the Court of Appeals stated that the alleged failure to warn of the signs of Stevens-Johnson syndrome and the actions the decedent should have taken in the event of such signs, presents a theory where cause-in-fact and proximate cause are "essentially indistinguishable" (Appendix p 392a). However, in this case, it is certainly possible that a jury could find that the risk of developing Stevens-Johnson syndrome was *not* the legal cause of the alleged failure to warn since the condition can continue even if the suspected toxic agent is eliminated. Such is supported by the testimony of plaintiffs' pharmacist expert, Dr. James O'Donnell, who testified that even if the decedent ceased taking the Tegretol at the first sign of a rash and/or immediately sought treatment, a fatal case of Stevens-Johnson syndrome could still have developed. Given this testimony, even assuming that appropriate warnings were given, resulting in the decedent ceasing taking the Tegretol at the first sign of a rash

³ The Court of Appeals did not address in its opinion the third specific claim of negligence contained in the complaint, that Dr. Watson allegedly failed to provide proper follow-up care (Appendix p 57a, ¶45(c)).

and/or immediately seeking treatment, a fatal case of Stevens-Johnson syndrome could still have developed.

Q. Now, I may be asking the wrong question entirely because – Is a body reaction dependent on the half life or is it simply dependent on some perhaps finite amount of molecules residing from a particular drug which causes a reaction?

A. All of the above. With TEN [toxic epidermal necrolysis]⁴ or SJS [Stevens-Johnson syndrome], it's – It requires the drug to be present initially, but the reaction can begin after the drug is cleared from the body; and that's because there is some type of toxic nexus or toxic lesion or toxic focus in the tissue that becomes self-propagating; and that's why you see the reaction continue even after the drug is stopped. Even after the drug would be expected to be eliminated from the body.

Q. Do you know what the physiologic basis for that is?

A. Well, we don't know why the individual – what the actual mechanism is, but the physiologic description is very well articulated in the literature, the dermatologic literature, pathology literature, burn literature.

It's not unlike someone getting burned, taking the heat source away and then seeing the tissue die after you remove the heat, the heat which forms – which is traumatic to the tissue. So, the exposure to the toxic substance acts a lot like a heat burn or an acid burn that is very vivid, and people seem to understand.

If I burn my finger, that's going to look red. The next day it's going to look white. Two or three days later it may be black, depending on the degree of the burn.

With a TEN, it's from the inside out. With a burn it's from the outside in, but the treatment is indeed the same. [Appendix p 176a.]

Plaintiffs' expert, Dr. O'Donnell, further testified that a Stevens-Johnson reaction can be fatal even if the suspected toxic agent is immediately removed at the first sign of a symptom

Q. Even if the agent that can cause TEN or SJS is stopped at the earliest sign of a rash, let's say, can the patient still go on to develop a fatal case of TEN or SJS?

A. Yes.

⁴ Toxic epidermal necrolysis (TEN) is a condition similar to Stevens-Johnson syndrome and the terms were at times used interchangeably by the experts.

Q. And why is that? Do you know why that is?

A. That's the way it happens. [Appendix p 183a.]

Dr. O'Donnell also testified that a Stevens-Johnson reaction can occur even after a single dose of medication:

Q. Did you answer – Were you asked this already, can one dose of carbamazepine⁵ or Tegretol or any of the other drugs listed in the list of associated – drugs associated with TEN or SJS, can one dose cause TEN or SJS?

A. I wasn't asked. It can. One dose can. [Appendix p 188a.]

Viewing in particular plaintiffs' claim, as formulated by the Court of Appeals, that defendants "failed to advise [the decedent] of the warning signs of Stevens-Johnson and what action to take should those warning signs occur", given Dr. O'Donnell's testimony, it is certainly possible that the jury could conclude that an alleged failure to warn did nothing to enhance or create the probability that the decedent may contract Stevens-Johnson syndrome. Rather, according to Dr. O'Donnell, even assuming that all possible warnings were given, resulting in the decedent ceasing taking the Tegretol and/or immediately seeking treatment at the first sign of a rash, a fatal case of Stevens-Johnson syndrome could still have developed. Thus, far from presenting a theory where cause-in-fact and proximate (legal) cause are "essentially indistinguishable", in this context, to determine legal cause, including whether the result was foreseeable and whether the defendants "should be held legally responsible for such consequences", the jury must determine whether the alleged failure to warn created or increased the risk to the decedent of developing Stevens-Johnson syndrome. Dr. O'Donnell's testimony, at a minimum, establishes that a question of fact exists regarding whether the "failure to warn" was a proximate cause (i.e. the legal cause) of the decedent's development of Stevens-Johnson syndrome and his eventual death since, even with proper warnings, a fatal case of Stevens-Johnson syndrome could have developed.

⁵ Carbamazepine is a generic version of Tegretol. See MayoClinic.com <<http://www.mayoclinic.com/health/drug-information/DR600349>> (accessed March 28, 2011).

Alternatively, turning to the plaintiffs' theory that defendants allegedly negligently misdiagnosed a seizure disorder and that Tegretol should not have been prescribed, even if the jury concludes that defendants based the diagnosis on insufficient data (as alleged by plaintiffs), it is possible that the jury could conclude that adequate warnings of the potential side effects were given. If so, the prescription of the medication may not be the legal cause of the injury, meaning that the probability of developing Stevens-Johnson syndrome was not enhanced or created by the prescription of Tegretol alone. Rather, the jury may conclude that the risk or probability of developing Stevens-Johnson syndrome was enhanced or created instead by the decedent's negligent delay in seeking treatment at the first sign of a rash, contrary to the instructions he had received to immediately return to Dr. Watson or the hospital when any symptoms of an allergic reaction, including a rash, first developed.⁶ Plaintiffs' expert, Dr. Jon Glass, testified that it is incumbent upon a patient to follow his discharge instructions (Appendix p 135a). Further, Dr. Glass testified that the decedent's Stevens-Johnson syndrome symptoms may have been mitigated if the decedent had returned to the emergency room upon the first sign of a rash, as his discharge instructions directed him to do:

Q. And by the information here, it would be incumbent, in following the doctors instructions and the instructions written here in his aftercare instructions, as soon as he got that rash, to call his doctor right away and/or go to the hospital right away –

MR. SUSSELMAN: Objection to form.

Q. – is that fair to say?

[Objection omitted.]

A. Yes.

Q. And as a physician, you can only tell your patient what to do, but you cannot control them like a marionette and make them do things that you tell them to do; right?

A. That's correct. [Appendix p 135a.]

⁶ The complaint states that the decedent began experiencing symptoms, including trouble swallowing, red eyes and a rash, on October 9, 1999, but did not present to the emergency room for treatment until October 12, 1999, three days later (Appendix pp 52a-53a, ¶¶20-21).

* * *

Q. Now, from the testimony given to us in the records at Sinai-Grace Hospital, they record Mr. Jones' first symptoms as occurring on Saturday, October 9th of 1999. He did not go to the hospital until, I believe, Tuesday, October 12th of 1999.

If Mr. Jones disregarded his instructions to return to Dr. Watson immediately or to the hospital immediately upon the first signs of symptoms and delayed for – from October 9th until October 12th, might that have affected the severity of his Stevens-Johnson syndrome?

[Objection omitted.]

A. Okay. What you're asking is would the symptoms have been – would it have been mitigated if he presented to the emergency room or had called the physician early on with the rash?

Q. Yes. Is it possible that that would have changed the scenario for him?

A. It's – it's possible. You know, it's possible that it may have. I will – I will state that the half-life of – or the life of Tegretol in the body, how long, you know, measured in – is measured in days, and as long as he had that exposure to Tegretol, the symptoms would have progressed, but it's possible that the symptoms would have been mitigated.

Q. Do you know if he continued to take the Tegretol after his symptoms changed?

A. I believe –

Q. Or when his symptoms began, let's put it that way.

A. I believe he – excuse me. I believe he was still on Tegretol at the time he presented to the ER.

Q. Okay. Might that worsen his condition or make it more serious?

A. To continue to take Tegretol, yes. [Appendix p 136a.]

Given such testimony, the jury could conceivably conclude that defendants took all necessary steps to minimize the risk of foreseeable harms by providing adequate warnings of the actions a patient must take upon the first sign of an adverse reaction and, thus, defendants' alleged negligence in diagnosing a seizure disorder and in prescribing Tegretol was not the proximate (legal) cause of the decedent's development of Stevens-Johnson syndrome. Rather, the jury could reasonably

conclude that the decedent's failure to return to Dr. Watson or to the emergency room at the first sign of a rash (contrary to his discharge instructions), while continuing to take the Tegretol over the subsequent three day period, was the proximate (legal) cause of his development of a very severe case of Stevens-Johnson syndrome and subsequent death.

These are by no means the only possible factual conclusions or the only possible combination of findings that a jury could make. Plaintiffs have also alleged in the complaint that defendants "failed to provide proper follow-up care" to the decedent (Appendix p 57a, ¶45(c)). This theory of negligence was not even considered by the Court of Appeals in its decision, which limited its proximate cause analysis to the claims of misdiagnosis of a seizure disorder and the "failure to warn" theory. As demonstrated by the alternative legal cause findings that could be made based on whether the jury accepts one or the other of the theories articulated by the Court of Appeals, and taking into account the decedent's comparative negligence, the jury's finding as to this separate theory could also impact the determination regarding proximate (legal) cause.

Yet the Court of Appeals in its decision considered only the possibility that the jury would find a breach in the standard of care as to all of plaintiffs' theories, ignoring any other possibilities, including potential comparative negligence by the decedent himself, that may impact the proximate (legal) cause determination. Indeed, the Court of Appeals' conclusions depend on a finding that plaintiffs will completely prevail on all theories of negligence (an improper assumption in itself where, for purposes of deciding plaintiffs' motion, defendants must be assumed not to have committed any negligence). However, as demonstrated above, there are several other possible conclusions that could be reached by a reasonable juror and such conclusions could greatly impact the proximate (legal) cause determination. Reasonable minds could differ regarding whether any claimed act of negligence was the "legal cause" of the alleged injuries.

Further, the trial court's decision finding in favor of plaintiffs on the proximate cause issue, in advance of any finding of negligence, would undeniably serve to unfairly prejudice defendants when the remaining issues are submitted to the jury. The Court of Appeals stated that evidence

regarding the rarity and unpredictability of Stevens-Johnson syndrome could be presented to the jury in the context of the standard of care:

Defendants can properly argue that the risk of developing Stevens-Johnson syndrome when taking carbamazepine is so small that it could be prescribed even in the absence of conclusive diagnostic evidence of a seizure disorder. Similarly, defendants can properly argue that the risk is so small that the standard of care did not require discussing the possibility of the reaction with the patient or directing the patient what to do in the event signs of a reaction appeared. However, these arguments relate to standard of care, not proximate cause. [Jones, supra, 288 Mich App at 477-478 (Appendix p 390a).]

Thus, the jury will be asked to decide whether or not the risk of developing Stevens-Johnson syndrome is so small that the standard of care does not require conclusive evidence of a seizure disorder or for the patient to be informed of this risk while, at the same time, the jury will be instructed that it need not address proximate cause since the trial court has already decided that the risk of developing Stevens-Johnson syndrome is foreseeable. At a minimum, the jury would be confused by this instruction; at worst, the jury could conclude that foreseeability in the context of the duty element has already been decided.

For all of these reasons, the issue of legal cause should have been left for the jury to decide, in conjunction with its determination of negligence, if any. The issues of negligence and proximate cause are inextricably intertwined and a request for a ruling in favor of plaintiffs as to proximate cause, in particular, cannot be decided in isolation and certainly should not have been decided on a summary basis.

II. The probability of an injury is a proper component to be considered in deciding proximate cause.

Regardless of whether the issue of legal cause is summarily addressed (contrary to the above argument that it was improper to address the issue summarily) or submitted to the jury for consideration, the probability of the alleged harm is a proper consideration in deciding this element. Legal cause is intended to operate as a limit on the extent of liability. Both the scope of the anticipated risk and foreseeability favor a limitation to those injuries that the defendant could have reasonably anticipated. A jury could certainly conclude that an injury that occurs so infrequently as to be statistically remote could not be reasonably anticipated.

A. Legal cause is generally intended to limit liability to foreseeable consequences.

It should first be noted that the concept of “legal cause”, and how this concept should be applied, has long vexed both commentators and the courts. While various formulations of legal cause have been proposed, as noted by Prosser & Keeton, no single theory has been adopted in all jurisdictions beyond the general concept that legal cause is intended to impose some limit on liability:

It seems evident that in all of these proposed rules and formulae the courts and the writers have been groping for something that is difficult, if not impossible, to put into words: **some method of limiting liability to those consequences which have some reasonably close connection with the defendant’s conduct and the harm which it originally threatened, and are in themselves not so remarkable and unusual as to lead one to stop short of them.** It may be questioned whether anyone has yet succeeded in devising terminology that, as a way of expressing the idea of such a reasonably close connection, will ever achieve greater acceptance in courtrooms than the despised word “proximate.” [Prosser & Keeton, Torts (5th ed), § 43, p 300, emphasis added.]

This Court has recognized that the “legal cause” aspect of proximate cause involves examination of several factors, including an examination of the foreseeability of the claimed injury. Defining proximate cause in Skinner v Square D Co, 445 Mich 153, 162-163; 516 NW2d 475 (1994), this Court stated that proving proximate causes “entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as “proximate cause”. The legal cause element

includes foreseeability and a determination of whether legal responsibility should attach to the defendant's alleged actions:

The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred. 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.** A plaintiff must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue. [445 Mich at 163, citations omitted, emphasis added.]

Subsequently, in Weymers v Khera, 454 Mich 639; 563 NW2d 647 (1997), this Court again noted that the legal cause component of proximate cause involves examining the foreseeability of the alleged consequences:

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." [Id. at 648, quoting Moning v Alfonso, 400 Mich 425, 439; 254 NW2d 759 (1977).]

This Court used a similar definition in Shinholster v Annapolis Hosp, 471 Mich 540; 685 NW2d 275 (2004), in addressing the issue of whether a patient's pre-treatment negligence could be admitted in a medical malpractice action. This Court in the majority opinion found that such evidence was admissible if the patient's own negligence could have been "a foreseeable, natural, and probable cause" of the claimed injury:

[W]e hold that a trier of fact is permitted in "personal injury, property damage, [and] wrongful death" tort actions, which necessarily include medical malpractice actions, to consider a plaintiff's pre-treatment negligence in offsetting a defendant's fault where reasonable minds could differ with regard to whether such negligence constituted "a proximate cause" – a foreseeable, natural, and probable cause – of the plaintiff's injury and damages. [Id. at 546.]

One of the partial concurrence/dissents in Shinholster, authored by Justice Weaver (and joined, in this section, by Justice Kelly), also defined proximate (legal) cause as operating as a limitation on liability. Quoting with approval from Prosser & Keeton, Torts (5th ed), § 41, p 264, Justice Weaver noted that proximate cause involves examining where to set the "boundary" for liability, based on "some social idea of justice or policy":

“Proximate cause” – in itself an unfortunate term – is merely the limitation which the courts have placed upon the actor’s responsibility for the consequences of the actor’s conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would “set society on edge and fill the courts with endless litigation. As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy. [471 Mich at 602-603.]

Further, this Court in Brown v Brown, 478 Mich 545, 556; 739 NW2d 313 (2007) emphasized that foreseeability (albeit in the context of the duty element) should not be determined in hindsight:

[W]e will not transform the test of foreseeability into an “avoidability” test that would merely judge in hindsight whether the harm could have been avoided.

The Moning decision, relied upon by the Weymers Court, recognized that duty and proximate cause both involve an examination of foreseeability, although foreseeability is applied in slightly different ways to these elements:

The questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability – whether it is foreseeable that the actor’s conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable. [Moning, supra, 400 Mich at 439.]

With foreseeability uniformly included in the determination of legal cause, the analysis then turns to what is meant by “foreseeable”. In the context of legal cause, “foreseeable” includes, among other considerations, a determination of whether the claimed injury is a probable result of the claimed negligence.

B. In determining those consequences that are “foreseeable”, the probability of the claimed harm is a proper consideration.

As defined by this Court, the “foreseeability” aspect of legal cause includes a determination that the claimed injury is the “natural and probable” result of the claimed negligence, as well as knowledge by the alleged negligent party that an injury “might probably occur” as a result of the defendant’s actions:

We turn now to the phrase “proximate cause” and its meaning. 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 consequences of a negligent act or omission, which, under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as the result of his negligent act.** [Nielsen v Henry H. Stevens, Inc, 368 Mich 216, 220-221; 118 NW2d 397 (1962), emphasis added.]

This Court in McMillan v State Highway Commission, 426 Mich 46; 393 NW2d 332 (1986), included probability in its formulation of legal cause, acknowledging the limitations imposed by the legal cause component of proximate cause and finding that legal cause is established only if an alleged negligent act is “likely to result in injury”, thereby excluding those injuries that are only “slightly probable”:

We believe that the analysis in Speigel [v Southern Bell Telephone & Telegraph Co, 341 So 2d 832 (Fla App, 1977)] is correct because courts must place limits on foreseeability. Clearly, it is foreseeable in the practical sense that planes and cars will crash or encounter emergencies. However, **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.** [National Airlines, Inc v Edwards, 336 So 2d 545 (Fla, 1976). [McMillan, 426 Mich at 62 n 6, emphasis added.]

The foreseeability aspect of proximate (legal) cause is also reflected in the standard jury instructions. Proximate cause is defined at Mi Civ JI 15.01 (most recently amended in June 2010), which instructs the jury that the plaintiff must establish that the injury was the “natural and probable” result of the alleged negligence:

When I use the words “proximate cause” I mean first, that the negligent conduct must have been a cause of plaintiff’s injury, and second, that the plaintiff’s injury must have been of a type that is a natural and probable result of the negligent conduct.

While this Court has employed the “natural and probable” language in defining legal cause, as with the concept of “legal cause” itself, there are potentially differing interpretations of the phrase “natural and probable” and this Court does not appear to have adopted a specific definition of “natural and probable”. However, a reasonable interpretation of the “natural and probable” consequences in the context of proximate cause, consistent with this Court’s use of the phrase, would be to include those consequences that could be anticipated as likely to occur, meaning that the probability of the claimed injury should be considered:

Natural and Probable Consequences. To some extent there are difficulties of language. 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. These words frequently appear to have been given no more definite meaning than “proximate” itself. Strictly speaking, all consequences are “natural” which occur through the operation of forces of nature, without human intervention. But the word, as used, obviously appears not to be intended to mean this at all, but to refer to consequences which are normal, not extraordinary, not surprising in the light of ordinary experience. **“Probable,” if it is to add anything to this, must refer to consequences which were to be anticipated at the time of the defendant’s conduct. The phrase therefore appears to come out 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, footnotes omitted, emphasis added.]

Thus, the “probable” inquiry turns back to foreseeability and includes the “likelihood” of the claimed harm. As formulated by Dobbs, foreseeability in the context of proximate (legal) cause means foreseeability of the kind of harm that in fact occurred:

If the defendant is negligent, that necessarily means he should have foreseen some harm, of some kind, to some person or property. **The foreseeability question left to be determined under the proximate cause rules is whether he should have foreseen the kind of harm that in fact resulted** and whether the plaintiff was within the class of persons to whom such harm might foreseeably befall. [Dobbs, The Law of Torts, § 182, p 448, emphasis added.]

However, under the Dobbs formulation, liability is not automatically applied simply because a harm may be foreseeable. For liability to attach, the harm must be a kind that the defendant should have avoided or the defendant's actions must have presented an unreasonable risk of harm. The rationale for such a rule is that there are risks that can be foreseen but, nonetheless, would not be avoided by a reasonable person:

Professional usage almost always reduces proximate cause issues to the question of foreseeability. The defendant must have been reasonably able to foresee the kind of harm that was actually suffered by the plaintiff (or in some cases to foresee that the harm might come about through intervention of others). For the ordinary case, the principles behind proximate cause limitations can be implemented quite well by use of this language. However, the term foreseeability is itself a kind of shorthand. The defendant is not liable merely because he could foresee harm; the harm must be the kind that he should have avoided by acting more carefully. That is what is meant by saying that the harm suffered by the plaintiff must have been within the scope of the risk the defendant negligently created. **Risks that the defendant could foresee but that are risks reasonably taken are no more a basis for finding proximate cause than for finding negligence.** [Dobbs, *The Law of Torts*, § 181, p 447, emphasis added.]

The phrase "natural and probable" in the context of proximate cause has been defined in an analogous manner in *Corpus Juris Secundum*, to mean those consequences that occur so frequently that they can be anticipated:

The "natural and probable consequences" of defendant's negligence are those that human foresight can foresee because they happen so frequently that they may be expected to happen again. [65 CJS, *Negligence*, § 215, p 563, footnotes omitted.]

However, the phrase does not include those consequences that are not within the realm of probability:

A person, however, is not responsible for injuries that do not flow naturally from his or her negligence, or for **merely possible consequences of such negligence, since consequences that are merely possible cannot be regarded as either probable or natural.** No one is bound to prevent consequences that are beyond the range of probability and to the extent that damages are surprising, unexpected, or freakish, they may not be the natural and probable consequences of a defendant's actions under the proximate cause test for negligence. [65 CJS, *Negligence*, § 215, p 563, footnotes omitted, emphasis added.]

Anticipation of the harm that actually occurred under the given set of circumstances (i.e. the probability of the harm suffered) appears to generally be the definition adopted by the United States Supreme Court, in application of a “natural and probable” result rule. The Court’s decision in Milwaukee & S. P. R. Co v Kellogg, 94 US 469; 24 L Ed 256 (1877), a case involving litigation that arose after the plaintiff’s saw mill and lumber were destroyed by fire, represents the apparent first use of this phrase. The fire at issue appears to have originated on the defendant’s steamboat, traveled to the defendant’s elevator built of pine lumber that was situated on the banks of the river, and then, due in part to an unusually strong wind that was blowing, ignited the plaintiff’s saw mill and lumber located some distance away from the elevator. After judgment for the plaintiff, the defendant appealed, raising a number of issues, including the trial court’s instruction on proximate cause. The Supreme Court held that the issue of proximate cause is normally one for the jury, to be decided based on all the available evidence and the circumstances that existed at the time of the alleged negligence:

[I]t is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, **it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.** These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. [94 US at 475, emphasis added.]

In that case, the United States Supreme Court held that the issue of proximate cause was properly submitted to the jury, who was properly charged with determining whether the claimed injury “naturally and probably” followed the claimed negligent acts:

We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. **In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.** [94 US at 475-476, emphasis added.]

Cited within CJS are several more recent cases illustrating these points. In Maier v Serv-All Maintenance, Inc., 124 Ohio App 3d 215; 705 NE2d 1268 (1997), the Ohio Court of Appeals found that the decedent's murder was not foreseeable. The decedent had been employed by a building owner and had been killed by an employee of a separate company hired to clean the building. The employee of the cleaning company who committed the murder admitted to drinking and smoking crack on the day of the murder. The plaintiff argued that the attack on the decedent was foreseeable because the businesses located within the building had experienced a rash of petty thefts, that theft may provoke violent confrontations, and the employee responsible for the attack had been intoxicated in the past. The Court held that such factors "only show an assault was possible, not probable or likely." 124 Ohio App 3d at 222.

The Supreme Court of Missouri considered the probability of consequences and found a lack of causation in its decision in Missouri Highway and Transportation Commission v Dierker, 961 SW2d 58 (Mo, 1998). There, the decedent had been killed when an individual, Shawn Twine, dropped a piece of concrete onto the decedent's car as the decedent drove under an overpass. In the suit against the road commission, the plaintiff argued that the negligent maintenance or construction of the overpass was a proximate cause of the decedent's death:

According to the plaintiffs, the Commission by its negligence armed Twine with a piece of concrete, permitted him to hide in the darkness, and built a fence so low that he could hurl the concrete over it. As the circuit court found, these conditions "had some connection to the incident leading to [the decedent's] death." [961 SW2d at 61.]

The Missouri Supreme Court, however, found that these conditions were only "in some remote way" connected to the decedent's death and, thus, were not the "natural and probable" result of the alleged negligence in maintaining the overpass. Id.

Viewing the legal authorities and case law in totality, the concept of legal cause, thus, includes foreseeability. In turn, foreseeability in the context of legal cause has been defined to include those injuries that are the "natural", "probable", "likely", and "frequent" results of the claimed negligent acts. In contrast, injuries that are merely the "possible", "remote", "surprising, unexpected, or freakish" result of those same actions are not foreseeable. The concept of probability plays into the determination of what is a "natural and probable" result of the alleged negligent conduct and what is not. This determination should properly be made by the jury, considering all of the available evidence and testimony regarding whether the claimed injury could have been foreseen.

Thus, where probability is a proper consideration in the context of determining legal cause, testimony and evidence regarding the probability of the claimed injury suffered by the decedent in this case should be presented to the trier of fact.

III. Testimony and evidence regarding the rarity and unpredictability of Stevens-Johnson syndrome should be presented to the jury for use in its determination of whether any claimed act of negligence is the legal cause of the alleged injury.

As correctly applied, as a “practical limitation” on liability, legal cause analysis extends beyond what is simply identified as a “known” possible harm, and should include rarity of the claimed injury, likelihood of harm and/or the predictability of the claimed injury. That is, legal cause properly incorporates the concepts of probability and the reasonable anticipation or foreseeability of the claimed injury by a reasonably prudent person. In the instant case, the undisputed evidence establishes that the claimed injury, development of Stevens-Johnson syndrome leading to the decedent’s death, is very rare and unpredictable. Such evidence should be presented to the jury for its determination of whether any negligence that it may find is the legal cause of the claimed harm.

A. As presented in this case, the undisputed evidence establishes that the claimed injury is both rare and unpredictable.

In this case, it is undisputed that the development of Stevens-Johnson syndrome is an exceedingly rare and completely unpredictable event. Such is supported by the testimony of plaintiffs’ own experts. Specifically, plaintiffs’ neurology expert, Dr. Jon Glass, testified in his deposition that the incidence of Stevens-Johnson syndrome (SJS) is “extremely rare” and it is impossible to predict who will develop the condition:

Q. Do you know how often Stevens-Johnson syndrome occurs in patients that are on medications?

A. The instance is extremely rare for people who are on anticonvulsant medications. Even in a medication which is the prototype for this, Dilantin, the incidence is less than, I believe, 1 percent, much less than 1 percent. In – it’s the same with Tegretol and I think some – phenobarbital it’s less common.

Q. And do you know, is it possible to predict if somebody’s going to have Stevens-Johnson syndrome in reaction to a drug?

A. No. [Appendix p 136a, emphasis added.]

Similarly, plaintiffs' pharmacist expert, Dr. James O'Donnell, also testified in his deposition about the rarity of Stevens-Johnson syndrome and the similar condition, toxic epidermal necrolysis (TEN).

Q. In general, I mean apart from all of the relative risks that are rated here, is there a commonly used or reflected upon risk ever seen having Stevens – a Stevens Johnson reaction or a TEN reaction for drugs in general?

A. Well, if they are considered rare or very rare, usually in the range of between – usually in the range of one in a million to one in a hundred thousand. That would fit the definition of very rare. Rare would be considered one in a thousand. [Appendix p 170a, emphasis added.]

* * *

Q. You said that TEN or Stevens-Johnson syndrome is in the category of very rare because it may occur in one in a million patients?

A. One in a hundred thousand to one in a million would meet that criteria for very rare. Frequently, the literature will say very rare or one in a million or one in several hundred thousand exposures.

Q. One of the first papers you found authoritative is entitled Toxic Epidermal Necrolysis, A Review, indicates that cases of one in a million are reported?

A. Yes, sir.

Q. Is that your understanding?

A. Yes, sir.

Q. As well?

A. Yes, sir.

Q. Is it even rarer for a patient to die from TEN or Stevens-Johnson syndrome? I mean, are the odds even greater than one in a million?

A. Well, if it's one in a million that it's contracted, the mortality is – used to be 80 percent. Now with good care it's 50 percent. **So, now we are one in two million.** [Appendix pp 179a-180a, emphasis added.]

Plaintiffs' expert Dr. O'Donnell also testified that it is impossible to predict who will develop Stevens-Johnson syndrome and/or toxic epidermal necrolysis as a reaction to a given medication.

Q. . . . are there any predictive factors as to who may get a reaction of SJS or TEN from any given drug or antibiotic or what have you?

A. **The only predictive factor that I am aware of is the prior allergic history.** Those patients would have a greater risk for developing TEN or SJS; **but absent that, no, there is no predictor.** [Appendix p 166a, emphasis added.]

* * *

Q. So, apart from having a known allergy to a drug or a classification of a drug, are there any other predictive factors that you are aware of?

A. For the patient, no. [Appendix p 167a.]

* * *

Q. **Is it also fair to say that there is no type of testing for either the drugs in this case, or really any of the other drugs that are listed that are identified as being involved with either SJS or TEN to determine if a person will react to that particular drug if they have no known allergy?**

A. **Correct, there is none.** [Appendix p 176a, emphasis added.]

In fact, Dr. O'Donnell testified that it is unknown why or how a Stevens-Johnson syndrome or toxic epidermal necrolysis reaction occurs.

Q. In your knowledge base, is it known why or how a drug causes either SJS or TEN?

A. No. The toxic mechanism has not been elucidated. There are some theories, but nothing has been proven.

It's not strictly an allergic reaction. It's not immunologically based where there would be a response with neutrophils or leukocytes. It's described as the agent itself created a toxic reaction. Primarily in the skin but not limited to the skin. [Appendix p 174a.]

Finally, Dr. O'Donnell testified that the development of Stevens-Johnson syndrome and/or toxic epidermal necrolysis can be due to a variety of causes, including medications, viruses, chemicals, and infection. In many cases, no cause is identified (Appendix pp 175a, 183a-184a).

Defendants' pharmacology expert, Dr. Edward F. Domino, confirmed the testimony of plaintiffs' experts regarding the rarity of Stevens-Johnson syndrome and toxic epidermal necrolysis, as well as the impossibility of predicting which patient may develop the condition:

Q. Doctor, **do you know what percentage of people that take Tegretol develop Stevens-Johnson syndrome?**

A. **About one in a million.**

Q. And is that in literature that you've –

A. For all – the answer is yes.

Q. One in a million for those who take Tegretol. Do you know what it is in the general in the population for those who take anything?

[Objection omitted.]

Q. It's my understanding you understand or believe that there are lots of things that cause Stevens-Johnson syndrome, not just Tegretol.

A. Yes.

Q. My first question was with regard to the population that has taken Tegretol, do you know what percentage contracts Stevens-Johnson syndrome?

A. As I sit here, I don't know.

Q. Okay. Your answer one in a million was in the population generally as to those who contract it generally, it's one in a million?

A. That's my understanding.

Q. Okay.

A. **With anticonvulsants. I think, depending on where you read, it may be five out of a million or one out of a million, but it's extremely rare fortunately which is why we're having trouble understanding it.** [Appendix p 104a, emphasis added.]

Further, Dr. Domino also testified that Stevens-Johnson syndrome could be caused by other medications, or by no medication at all (Appendix p 108a). Dr. Domino additionally testified that there is no way to predict who will develop this reaction to any particular medication:

Q. Okay. Is it the prescribing of the medication that causes Stevens-Johnson syndrome or is it this inability to predict which patient would be allergic to it?

A. Well, the inability to predict is the key issue. [Appendix p 108a.]

The Court of Appeals' conclusion that a "known" possible reaction to medication is always foreseeable and that legal cause is therefore established, ignores the fact that Stevens-Johnson

syndrome is an extremely rare and unpredictable reaction to many medications, as well as many other substances. (In approximately fifty percent of all cases of Stevens-Johnson syndrome, no cause can be identified. See, e.g., testimony of plaintiffs' pharmacist expert, Dr. James O'Donnell, Appendix pp 183a-184a, pp 107-109.) Further, it is undisputed that no test exists which can be administered in advance of prescribing medication to determine if a particular patient may suffer a Stevens-Johnson reaction. Given such evidence, regardless of the "legal cause" formulation, whether the claimed injuries were the "natural and probable" result of an alleged negligent act, or whether "an ordinary prudent person ought reasonably to have foreseen" the injuries "might probably occur", or whether the alleged negligence was a "foreseeable, natural, and probable cause" of the alleged injuries, reasonable minds could differ in this case. The issue of legal cause, at a minimum, should have been decided by a jury.

B. Ignoring the rarity and unpredictability of Stevens-Johnson syndrome, the Court of Appeals incorrectly determined that legal cause was established simply because this reaction is "known" to occur.

The Court of Appeals majority viewed the "foreseeability" aspect of legal cause as a simple determination of whether a particular result is "known" to occur, regardless of the rarity of the result or whether there is any method to predict the outcome. However, as set forth above, the "legal cause" aspect of proximate cause, is designed to impose some "practical limitation" on liability. This limitation includes foreseeability, probability, likelihood of the result and other factors. Nonetheless, the Court of Appeals majority's formulation of "legal cause" incorrectly imposes absolutely no limitation on liability.

The lack of any limitation is illustrated by the analogy employed by the Court of Appeals majority to support its conclusions. Specifically, to support its decision in the instant case, the Court of Appeals majority used an analogy of a speeding car to demonstrate its rationale for finding that a "known" potential outcome is always foreseeable. The court theorized that, since speeding is "known" to cause accidents, reasonable jurors could not conclude that a speed-related accident was

not foreseeable. The court applied this reasoning to reach the conclusion that a “known” possible reaction to medication is also always foreseeable and that legal cause is, therefore, established:

While in the great majority of cases, speeding on the highway does not cause an accident, we accept as a matter of course that if the speeding resulted in an accident, the proximate cause threshold can be met.

* * *

. . . speeding during the commute, while it may never cause an actual accident, “naturally and probably” gives rise to the risk of an accident and, absent special circumstances, a reasonable juror could not conclude that a speed-related accident was not, at least in part, proximately caused by the actions of the speeding driver.

* * *

Therefore, if a physician prescribes a medication, reasonable minds could not differ that it is reasonably foreseeable that doing so could cause the patient to have one of the *known* reactions to that medication. [*Jones, supra*, 288 Mich App at 476-477, emphasis in original (Appendix pp 389a-390a).]

The flaw in the majority’s reasoning is that a particular accident is not always foreseeable simply because an individual may have been negligently speeding, even if the negligent speeding could be considered a cause-in-fact of the accident, nor is foreseeability in this context limited to a simple determination of whether the outcome is a “known” possibility.

Demonstrating the use of foreseeability to limit the scope of risk in this context (as well as the interrelationship between negligence and proximate cause) is an example used in *Dobbs, The Law of Torts*, §187, p 463, which illustrates the point that a “known” potential outcome may not be foreseeable (emphasis added):

Some harms that are entirely foreseeable are nevertheless not harms a reasonable and prudent person would seek to avoid. The point of limiting the defendant’s liability under proximate cause rules is to make the defendant’s liability coextensive with his negligence. Consequently, the defendant is not liable even for foreseeable harms if he was not negligent in failing to minimize those harms.¹

Perhaps the easiest illustration is the kind of case in which the defendant is negligent in driving a vehicle at high speed and because of the speed arrives at a spot just in time to be struck by a large tree that falls or an airplane that crashes. An injured passenger can

certainly assert that falling trees or crashing airplanes are foreseeable. Nevertheless, the defendant's speed does nothing to create or increase the risk of such an incident. Falling trees are foreseeable, but not a greater risk to those who drive fast than to those who drive slowly. Consequently, the defendant is not liable for injuries resulting in this manner. **When courts say that such a risk is unforeseeable what they mean is that it is not a risk enhanced or created by the defendant's conduct.**

¹ **A more accurate statement would be that the defendant is not liable for foreseeable harms unless the risk of such harms was one of the reasons for judging him to be negligent in the first place.**

One case relied upon by this treatise to support this point, Berry v Sugar Notch Borough, 191 Pa 345; 43 A 240 (1899), involved an appeal of a judgment rendered in favor of the plaintiff, who had been injured when a tree fell on his car during a windstorm. The plaintiff alleged that the defendant municipality was negligent in allowing the tree to remain in an alleged decayed and rotted condition. The defendant argued that the plaintiff's own negligent speeding caused the accident, as the plaintiff would not have been in the path of the tree at the precise instant that it fell but for his speeding. On appeal, the Court rejected the defendant's argument, finding that the falling tree could not have been foreseen:

Nor can it be said that the speed was the cause of the accident, or contributed to it. It might have been otherwise if the tree had fallen before the car reached it; for in that case a high rate of speed might have rendered it impossible for the plaintiff to avoid a collision which he either foresaw or should have foreseen. Even in that case the ground for denying him the right to recover would be that he had been guilty of contributory negligence, and not that he had violated a borough ordinance. The testimony however shows that the tree fell upon the car as it passed beneath. With this phase of the case in view, it was urged on behalf of the appellant that the speed was the immediate cause of the plaintiff's injury, inasmuch as it was the particular speed at which he was running which brought the car to the place of the accident at the moment when the tree blew down. This argument, while we cannot deny its ingenuity, strikes us, to say the least, as being somewhat sophistical. That his speed brought him to the place of the accident at the moment of the accident was the merest chance, and a thing which no foresight could have predicted. The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety. [*Id.* at 348-349.]

In the second case cited by Dobbs, Doss v Big Stone Gap, 145 Va 520; 134 SE 563 (1926), the Court found a lack of proximate cause related to the alleged negligence of the defendant town in routing a detour through the end of a park used as a landing field for airplanes. The plaintiff's decedent had been killed when an aviator, attempting to land his plane in the park, struck the decedent's car. The Court found a lack of proximate cause insofar as the defendant town could not have foreseen that the detour would have led to the decedent's death as such was not "the natural and probable consequence" of the alleged negligence:

The death of the plaintiff's intestate was not "the natural and probable consequence" of the alleged negligence or wrongful act of the town. It could not have been foreseen that an injury to any one would probably have been suffered as a result of the alleged negligent acts of the town complained of. Not merely the particular injury, but any injury. [Id. at 525.]

A similar point was made by this Court in its decision in McMillan v State Highway Commission, 426 Mich at 62 n 6, wherein this Court stated, "[c]learly, it is foreseeable in the practical sense that planes and cars will crash or encounter emergencies. However, only acts which are likely to result in injury are compensable." Thus, by extension, it may not always be foreseeable that a particular patient will develop a particular rare (i.e. one in a million chance) side effect to medication, although the rare side effect may be known, if the result is not likely to occur (i.e. that the result is not probable).

In the instant case, the Court of Appeals' majority opinion appears to conclude that, since it is "known" that speeding can lead to an accident, a particular accident where speed is a factor is always foreseeable. The majority then applies this conclusion by analogy to the instant case, essentially finding that since medication can lead to known but very rare and unpredictable side effects, the development of a particular very rare and unpredictable side effect in a particular patient is always foreseeable. As demonstrated by the Berry case and by this Court's statements in McMillan, such may not always be true and, thus, summary disposition in plaintiffs' favor on this element was improper. Using the Court of Appeals' analogy, although speed may arguably play a factor in an accident, it is possible that the particular accident that occurred, involving a falling tree

(or a crashing airplane), is so rare, unpredictable and/or unlikely to occur as to be unforeseeable, although a falling tree (as well as a crashing airplane) is obviously a “known” possibility. Similarly, a particular reaction to medication may be so rare, unpredictable and/or unlikely to occur as to be unforeseeable. This formulation of legal cause, evaluating the likelihood of the claimed injury resulting from the claimed negligence, is the formulation that has been endorsed and applied by this Court. The refusal to examine such factors leads to an improper expansion of liability.

C. The failure to allow testimony and evidence regarding the rarity and unpredictability of reactions such as Stevens-Johnson syndrome in the context of proximate cause would move medical malpractice actions closer to a strict liability standard.

The practical impact of the Court of Appeals’ decision in this case is to move medical malpractice actions closer to a strict liability standard. As the Sixth Circuit Court of Appeals stated, “[a] party *strictly liable* is a virtual insurer against all injuries proximately caused by his actions; reasonableness plays no role in the analysis.” Cook v American S.S. Co, 53 F3d 733, 741 (CA 6, 1995), emphasis in original. By removing from the jury any consideration of whether the decedent’s development of a rare and unpredictable reaction such as Stevens-Johnson syndrome reasonably could have been foreseen by defendants in this action, the Court of Appeals’ decision reduces the causation analysis to a simple cause-in-fact determination. Indeed, the Court of Appeals’ majority opinion explicitly stated that cause-in-fact and legal cause in this case were “indistinguishable” or virtually so. 288 Mich App at 481-482 (Appendix p 392a).

However, this Court in Brown, supra, disapproved of a standard that would eliminate consideration of foreseeability of injury (albeit in the context of the duty element), in a case involving a plaintiff’s claims against the defendant company for the criminal actions of its employee, noting that the removal of foreseeability would result in the imposition of strict liability. 478 Mich at 556 n 25. In the context of medical malpractice actions, the Court of Appeals in Ayyash v Henry Ford Health Systems, 210 Mich App 142; 533 NW2d 353 (1995) has already rejected a strict liability

standard, persuasively reasoning on public policy grounds that the same would place an undue burden on health care providers and, ultimately, operate to the detriment of all patients:

Because the primary function of physicians and hospitals is to provide care, not to manufacture or distribute products, those economic theories that underlie the imposition of strict liability upon makers and sellers of products do not justify the extension of strict liability to those who provide medical services. It is reasonable to conclude that the vast majority of patients would bear the increased costs associated with such an impractical imposition of liability upon the medical profession for the benefit of a few who for some reason (here bankruptcy) may not be able to obtain recovery from the manufacturer of the defective product. This Court would be remiss if it failed to express its compassion for plaintiff, and others like her, who may be left without a remedy for injuries caused by a defective medical implant. However, this Court should not and will not let its compassion in this case persuade it to adopt a rule of law that would likely cause greater long-term harm to more patients and the medical profession by an ill-advised adoption of strict liability against health care providers. [210 Mich App at 146.]

In the instant case, public policy considerations in the context of legal cause were noted as a consideration by the Court of Appeals' dissent that had been ignored by the majority. The dissent would have found that "consideration must also be given to 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." 288 Mich App at 288 (Appendix p 396a). There are a variety of public policy considerations that can generally impact the legal cause determination of whether it is "socially and economically desirable to hold the defendant liable", some of which are cited in *Corpus Juris Secundum*, including:

(1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; (4) because allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point. [65 CJS, Negligence, § 202, p 547, footnotes omitted.]

Imposition of a strict liability or near-strict liability standard in cases such as the instant case would impact several of these policy considerations, including imposing a high degree of culpability

on the alleged negligent tortfeasor for highly extraordinary injuries, increasing the burden on alleged negligent tortfeasors and opening the door to potentially fraudulent claims without limitation. Some of these policy considerations were cited by the Court of Appeals of California in Tangora v Matanky, 231 Cal App 2d 468; 42 Cal Rptr 348 (Cal App, 1964), in its refusal to apply res ipsa loquitur to a claim of medical malpractice that arose out of the decedent's death caused by anaphylactic shock following an injection of penicillin. Imposition of such a standard could ultimately result in the limitation of medical procedures that involve inherent risks:

To permit an inference of negligence under the doctrine of res ipsa loquitur solely because an uncommon complication develops would place too great a burden upon the medical profession and might result in an undesirable limitation on the use of operations or new procedures involving an inherent risk of injury even when due care is used. [231 Cal App 2d at 473, quoting Siverson v Weber, 57 Cal 2d 834, 839; 372 P2d 97; 22 Cal Rptr 337 (1962).]

Considerations similar to those cited in Ayyash and Tangora are at issue here. Finding as a matter of law that legal cause is established where a patient suffers one of the "known" side effects of medication, regardless of the rarity of the particular side effect and regardless of the fact that there is no method to determine in advance which patient will experience such side effects, greatly increases the burden on the medical profession.

IV. Conclusion.

The issue of legal cause was improperly removed from consideration by the jury. As a procedural matter, it must be assumed for purposes of plaintiffs' motion for partial summary disposition that defendants were not negligent in this action. In the absence of a specific finding of negligence, it is improper to address proximate cause. Further, even assuming that a finding of negligence has been made, it is the province of the jury to determine whether the specific act of negligence is the legal cause of the claimed injury. In making this determination, the jury should be permitted to consider all the relevant evidence and testimony that impacts the question of whether the claimed injury was foreseeable, including that Stevens-Johnson syndrome is a "known" but extremely rare reaction and that the reaction cannot be predicted in advance (i.e. factors impacting

the probability of the same). The jury must also consider related issues that impact legal cause, including the decedent's comparative negligence and public policy considerations that impact the imposition of liability.

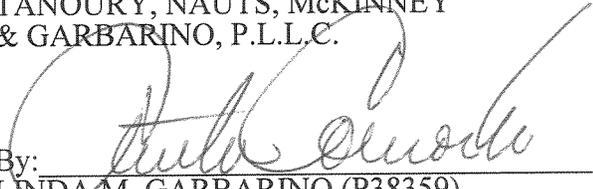
The Court of Appeals' majority opinion removed all of these relevant considerations from its formulation of legal cause, essentially reducing legal cause to a simple cause-in-fact determination. Such was improper. The Court of Appeals' decision should be reversed and the issue of legal cause, with all of its essential components, returned to the jury for decision.

RELIEF REQUESTED

WHEREFORE, defendants-appellants, DETROIT MEDICAL CENTER/SINAI-GRACE HOSPITAL, respectfully request that this Honorable Court reverse the Court of Appeals' May 20, 2010 opinion, which affirmed the trial court's order granting plaintiffs' motion for partial summary disposition as to the issue of legal cause, the Court of Appeals July 9, 2010 order denying reconsideration and the trial court's October 14, 2008 order granting plaintiffs' motion for partial summary disposition as to the issue of legal cause. These defendants further request costs and attorney fees as allowed by statute and court rule.

Respectfully submitted,

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& GARBARINO, P.L.L.C.

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