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

REPLY BRIEF - APPELLANTS
DETROIT MEDICAL CENTER/SINAI-GRACE HOSPITAL

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

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ARGUMENTS

I. Properly defined, proximate (legal) cause is intended to limit liability to foreseeable consequences.

The primary issue presented in this appeal is what factors should be considered in deciding proximate (legal) cause, including the meaning of foreseeability, particularly in the context of a ruling by the trial court as a matter of law on the element of proximate cause. Yet for the first time in this litigation, plaintiffs argue in their brief that proximate cause "excludes foreseeability" (plaintiffs' brief, p 8). Such is contrary to the arguments presented by the parties below and the conclusion reached by the lower courts. Indeed, the Court of Appeals and the trial court both considered foreseeability in their formulations of proximate cause. See Jones v Detroit Medical Center, 288 Mich App 466, 742-745; 794 NW2d 55 (2010).

Regardless, the authorities cited by plaintiffs in fact use foreseeability, albeit in various ways, in the formulation of proximate (legal) cause. Plaintiffs cite and rely on what plaintiffs characterize as the "black-letter rule on proximate cause" set forth in Palsgraf v Long Island R Co, 248 NY 339; 162 NE 99 (1928). Both the majority and dissenting opinions in Palsgraf used foreseeability in their analysis. The Palsgraf decision involved an appeal by the defendant railroad company from a verdict in favor of the plaintiff. The incident at issue in Palsgraf occurred when a passenger had jumped aboard a moving train and appeared unsteady, as if he was about to fall. One of the defendant's employees pushed this passenger from behind and in so doing dislodged a package the passenger was carrying. The package turned out to contain fireworks, although there was no outward indication from the package that it contained fireworks. The fireworks exploded, causing a scale on the platform to fall over onto the plaintiff, injuring her. The majority opinion in Palsgraf, authored by Judge Cardozo, reversed the decision for the plaintiff and held that the case should have been dismissed, finding that there was no duty and, thus, no negligence towards the unforeseeable plaintiff. In contrast, the dissent would have decided the case on a proximate cause analysis, including what could be foreseen.

The particular portion of the Palsgraf opinion cited and relied upon by plaintiffs in their brief

is actually from the dissent, authored by Judge Andrews. The plaintiffs cite only one sentence from this portion of the dissent, yet the full passage in which that sentence is contained explicitly states that foreseeability should be considered in the context of proximate cause and liability ceases with "what might ordinarily be expected" to follow the alleged negligence:

> "The fact that the injury occurred in a different manner than that which might have been expected does not prevent the chauffeur's negligence from being in law the cause of the injury." **But the natural results of a negligent act – the results which a prudent man would or should foresee – do have a bearing upon the decision as to proximate cause. We have said so repeatedly. What should be foreseen?** No human foresight would suggest that a collision itself might injure one a block away. On the contrary, given an explosion, such a possibility might be reasonably expected. I think the direct connection, the foresight of which the courts speak, assumes prevision of the explosion, for the immediate results of which, at least, the chauffeur is responsible.
>
> It may be said this is unjust. Why? In fairness he should make good every injury flowing from his negligence. Not because of tenderness toward him we say he need not answer for all that follows his wrong. We look back to the catastrophe, the fire kindled by the spark, or the explosion. **We trace the consequences – not indefinitely, but to a certain point. And to aid us in fixing that point we ask what might ordinarily be expected to follow the fire or the explosion.** [Palsgraf, 248 NY at 355, emphasis added.]

Applying this rationale to the facts of the Palsgraf case, the dissent would have held that the issue was properly submitted to the jury. Accepting plaintiffs' argument that this is a "black-letter rule" on proximate cause, the portion of the Palsgraf opinion cited by plaintiffs in fact supports the defense position in the instant appeal. The relief requested by defendants in the instant case, submission of the issue of proximate (legal) cause to the jury, with the jury considering all factors to determine if the claimed injury in this case was foreseeable, was the proper course according to the Palsgraf dissent.

Plaintiffs' attempted exclusion of foreseeability from proximate cause analysis is also inconsistent with the definition of proximate cause repeatedly set forth by this Court. In Skinner v Square D Co, 445 Mich 153, 163; 516 NW2d 475 (1994), this Court specifically stated that "legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and

whether a defendant should be held legally responsible for such consequences." Again, in Weymers v Khera, 454 Mich 639, 648; 563 NW2d 647 (1997), this Court noted that "[t]o establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct 'may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable.'" More recently, this Court in O'Neal v St John Hosp & Med Ctr, 487 Mich 485, 496; 791 NW2d 853 (2010), again defined proximate cause to include foreseeability:

> The proper interpretation of proximate causation in a negligence action is well-settled in Michigan. In order to be a proximate cause, the negligent conduct must have been a cause of the plaintiff's injury and the plaintiff's injury must have been a natural and probable result of the negligent conduct. These two prongs are respectively described as "cause-in-fact" and "legal causation." While legal causation relates to the foreseeability of the consequences of the defendant's conduct, the cause-in-fact prong "generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred."

This line of cases arises from this Court's decision in Moning v Alfono, 400 Mich 425; 254 NW2d 759 (1977), wherein this Court noted the interrelationship between duty and proximate cause, both of which include questions of foreseeability:

> Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. Proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences. In the Palsgraf case, the New York Court of Appeals, combining the questions of duty and proximate cause, concluded that no duty is owed to an unforeseeable plaintiff.
>
> 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. [400 Mich at 438-439.]

As this Court recognized in Moning, although interrelated, the foreseeability tests for duty and proximate cause are not identical. The distinction between the two tests was succinctly articulated in a law review article published the same year as Moning:

> Many, if not most, proximate cause jurisdictions use foreseeability as the prime jury test to determine the legal cause aspect of proximate cause. To construct anything resembling a rationale system, the developers had to make certain that the foreseeability test for negligence differed from the foreseeability test for legal cause. To ask the jury to apply the same test twice would make no sense at all. The difference in the tests is that the focus of the legal cause inquiry is shifted from foreseeability of risks of harm of some kind to foreseeability of the risk of harm of the kind received by plaintiff and the manner in which it occurred. [Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Function Between Judge and Jury*, 1 Utah L R 1, 20 (1977).]

Nonetheless, the test of foreseeability in the context of duty and the test of foreseeability in the context of proximate cause have at times been erroneously used interchangeably. Indeed, plaintiffs make this error in their brief on appeal, citing to cases articulating the foreseeability test in the context of the duty element as the test to be applied in deciding proximate cause. Plaintiffs' citation to this Court's decision in Schultz v Consumers Power Co, 443 Mich 445; 506 NW2d 175 (1993) is one such example. At issue in Schultz was "whether defendant Consumers Power Company owed a duty of care to Duane Schultz to reasonably inspect, repair, and install its electric conductors." Id. at 447. This Court found that the duty element was fulfilled where it was foreseeable to the defendant power company that someone could be injured by a dilapidated wire hung close to a residence. Such a finding fulfilled the *duty* requirement, as articulated in Moning, that it was "foreseeable that the actor's conduct may create a risk of harm to the victim". There is no analysis of proximate (legal) cause in the opinion.

Similarly, the portion of the Court of Appeals' opinion in Lockridge v Oakwood Hosp, 285 Mich App 678; 777 NW2d 511 (2009) cited and relied upon by plaintiffs in their brief addresses foreseeability in the context of the duty element. The Lockridge case involved the death of a 14-year old patient from an aortic dissection. Plaintiff cites to that portion of the opinion wherein the Court of Appeals found, in part, that the duty element was established where it was foreseeable that "some injury" was to be anticipated if the defendant physician failed to comply with the standard of care. Id. at 682-682.

The portion of the Lockridge opinion where the court actually addressed proximate cause is

distinguishable from the instant case and involves a multitude of factors. Most importantly, the Lockridge court found that legal cause was established where, despite the rarity of an aortic dissection in minors, the plaintiff's expert testified that the decedent's aortic dissection was foreseeable and all the experts agreed that an aortic dissection should have been included in the defendant physician's differential diagnosis. Id. at 686-687.[1] In addition, a simple chest x-ray would likely have diagnosed the aortic dissection and the plaintiff's experts testified that the standard of care required a chest x-ray. Thus, the court noted that "an unforeseen diagnosis does not relieve a physician from liability if the patient's actual condition would have been diagnosed naturally and probably had the physician complied with the standard of care." Id. at 689.

In contrast, in the instant case, no expert has testified that defendants should have foreseen that the decedent would develop Stevens-Johnson syndrome. Rather, the experts have stated that the development of this condition is exceedingly rare and unpredictable. Further, in contrast to Lockridge, there is no method to determine, in advance of prescribing any medication, whether a particular patient will develop this reaction to that medication.

Finally, plaintiffs' reliance on Davis v Thornton, 384 Mich 138; 180 NW2d 11 (1970) is misplaced. The Davis decision focused on the foreseeability of intervening causes. While this interpretation of proximate cause has not been applied by later decisions of this Court (including Moning, Skinner and Weymers, supra, all cited above), even assuming that foreseeability should be considered only if there is an intervening cause, such intervening causes are at issue in this case. A Stevens-Johnson reaction itself could be an intervening cause as it is unknown how or why the reaction occurs.[2] Further, as defendants submitted in their brief on appeal, the decedent's own negligence is at issue in this case, including but not limited to, his failure to follow his discharge

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[1] It should be noted that the Court of Appeals' analysis in this regard was made in the context of reviewing the trial court's decisions on the defense motions for a new trial or judgment notwithstanding the verdict (JNOV). Thus, the evidence was viewed in a light most favorable to the non-moving party (i.e. the plaintiff in Lockridge). See 285 Mich App at 681.

[2] See, e.g., testimony of plaintiffs' expert, Dr. James O'Donnell (Appendix p 174a).

instructions, his failure to seek medical attention at the first sign of a rash, and his continuation of the medication after first exhibiting symptoms of a reaction. As this Court held in Shinholster v Annapolis Hosp, 471 Mich 540, 552; 685 NW2d 275 (2004), pursuant to MCL 600.6304, "if a defendant presents evidence that would allow a reasonable person to conclude that a plaintiff's negligence constituted a proximate cause of her injury and subsequent damage, the trier of fact must be allowed to consider such evidence in apportioning fault." Where intervening causes are at issue, and the foreseeability of such intervening causes was not considered by the trial court or the Court of Appeals, partial summary disposition in plaintiffs' favor on the element of proximate (legal) cause was improper, even accepting plaintiffs' formulation of proximate cause.

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

Defendants submitted in their brief that partial summary disposition in plaintiffs' favor was improper where, for purposes of deciding plaintiffs' motion, the facts and evidence must be evaluated in a light most favorable to the non-moving party (here, defendants). See Smith v Globe Life Insurance Co, 460 Mich 446, 454; 597 NW2d 28 (1999), Quinto v Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996) and Jeffrey v Rapid American Corp, 448 Mich 178, 184; 529 NW2d 644 (1995). Under this standard, it must be assumed that defendants were *not* negligent in their care and treatment of the decedent. Where negligence has not been established, it is improper to reach the issue of proximate cause. In response, plaintiffs assert the puzzling argument that acceptance of this position would somehow result in a violation of both the Michigan and United States constitutions. Yet plaintiffs' own brief supports the proposition that negligence must first be established before proximate cause is addressed. On page 8 of their brief, plaintiffs state that "proximate cause bears on the connection between **negligent conduct** and the injury that results from that conduct. Proximate cause looks to the relationship between the **negligent conduct** and the resulting injury" (emphasis added). Again, at page 9, plaintiffs state that "proximate cause is established in these situations if the injury is a 'direct and natural result' **of the negligent conduct**"

(emphasis added). This is the argument that defendants have asserted. A finding of negligent conduct is essential before proximate cause can be addressed, since the proximate cause finding is a determination that there is a connection between an injury and *negligent* conduct. This is particularly true in a case such as this where plaintiffs have alleged several different theories of negligence and the decedent's own comparative negligence is at issue. As defendants set forth in their brief, a jury may accept some theories of negligence and reject others. Such findings would impact the determination of whether a particular alleged negligent act led to any injury.

Further, far from subjecting plaintiffs to "unequal treatment", acceptance of defendants' argument places the parties on equal footing. Where a defendant seeks summary disposition on the element of proximate cause, it is assumed for purposes of the motion that the plaintiff will prevail on his negligence theory. See, generally, Heitsch v Hampton, 167 Mich App 629, 631; 423 NW2d 297 (1988) ("For purposes of the motion, defendant admitted its negligence in disconnecting decedent's telephone line from service. Defendant contended, however, that the disconnected telephone line was not a proximate cause of decedent's death.") Thus, where a plaintiff seeks summary disposition, the converse must be assumed, that plaintiff will *not* prevail on his negligence theory. This is simply the expected result of viewing the facts and evidence in a light most favorable to the non-moving party. Without a finding of negligence, proximate cause need not be addressed.

Regardless, even assuming that the parties are subject to unequal treatment, plaintiffs' argument fails to appreciate that adverse parties are not identically situated in litigation. See, generally, Kowalski v Fiutowski, 247 Mich App 156, 165; 635 NW2d 502 (2001) (noting that "the defendants in a medical malpractice case are not in the same situation as the plaintiffs"). More specifically, in a medical malpractice action, it is the plaintiff who has the burden of proof to establish (1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation. See Cox v Board of Hospital Managers for the City of Flint, 467 Mich 1, 12; 651 NW2d 356 (2002), MCL 600.2912a and M Civ JI 30.03. Thus, where a defendant files a motion for summary disposition, the same should be granted if the plaintiff will be unable to meet the burden

of proof as to one of these required elements. See Davis, supra, 384 Mich at 142. In contrast, a motion for summary disposition filed by a plaintiff must establish not only that the plaintiff will meet his initial burden of proof, but that all reasonable persons would agree that there is no merit in the defenses.

In addition, this Court has recognized differing positions of the litigants in the presentation of a motion for summary disposition. Where a party had the burden of proof at trial, that party has heightened obligations in responding to such a motion:

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. Neubacher v Globe Furniture Rentals, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Id. **Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.** McCart v J Walter Thompson, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. McCormic v Auto Club Ins Ass'n, 202 Mich App 233, 237; 507 NW2d 741 (1993). [Smith, supra, 460 Mich at 454-455, emphasis added.]

Defendants' argument is that the issues of negligence and proximate cause are intertwined and, thus, it is improper to decide proximate cause without first finding negligence. This position is reflected in commentaries on the subject of proximate cause:

> 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.]

Finding in favor of plaintiffs on the issue of proximate cause before the jury makes its findings on the issue of negligence improperly removes from the jury numerous crucial considerations, including whether the harm was within the scope of risk that the defendant created, whether the risk would have been accepted by decedent (i.e., whether the decedent would have accepted the very small risk of developing Stevens-Johnson syndrome in order to avoid further seizures), as well as the issues of intervening and superceding causes. 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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Dated: July 21, 2011

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