

STATE OF MICHIGAN
IN THE SUPREME COURT

ESTATE OF JAMAR CORTEZ JONES,
by Margaret Jones, Booker Jones and Trenda Jones,
Co-Personal Representatives,

Plaintiffs-Appellees,

v.

DETROIT MEDICAL CENTER/SINAI-
GRACE HOSPITAL

Defendants-Appellants,

and

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

Defendants-Appellants.

141629
Supreme Court No. ~~141624~~

Court of Appeals No. 288710

Wayne County Circuit Court

Case No. 03-327528-NH

Hon. Robert L. Ziolkowski

**BRIEF ON APPEAL – DEFENDANTS-APPELLANTS DANNY F. WATSON, M.D. and
WILLIAM M. LEUCHTER, P.C.**

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PROBABILITY OF INJURY IS A PROPER AND NECESSARY CONSIDERATION IN DETERMINING PROXIMATE CAUSATION?

Defendants-Appellants answer "Yes"

Plaintiffs-Appellees answer "No"

The trial court did not answer this question.

The Michigan Court of Appeals' majority answers "No"

II. WHETHER THE TRIAL COURT ERRED IN RELYING ON THE CASE OF *WILKINSON V LEE* AND FINDING THAT DECEDENT WAS AN "EGGSHELL PLAINTIFF" WHERE THE CROSS-APPELLEES COULDS NOT IDENTIFY THE CONDITION THAT MADE DECEDENT UNUSUALLY SUSCEPTABLE TO THE INJURY SUSTAINED?

Defendants-Appellants answer "Yes"

Plaintiffs-Appellees answer "No"

The trial court answers "Yes"

The Michigan Court of Appeals' majority answers "No"

III. WHETHER PARTIAL SUMMARY DISPOSITION MAY BE GRATED TO THE PLAINTIFF WITH REGARD TO PROXIMATE CAUSATION WHERE THE NEGLIGENCE OF THE DEFENDANT HAS NOT BEEN ESTABLISHED?

Defendants-Appellants answer "No"

Plaintiffs-Appellees answer "Yes"

The trial court answers "Yes"

The Michigan Court of Appeals' majority answers "Yes"

STATEMENT OF FACTS

Defendants appeal the May 20, 2010 published split decision of the Court of Appeals (J.J. Shapiro and J. J. Beckering, with P.J. Hoekstra dissenting), upholding the trial court's granting of Plaintiff's motion for partial summary disposition on the issues of cause-in-fact, and legal causation. (Court of Appeals 5-20-2010 Opinion, Apx 385a; Trial Court 10-14-08 Opinion, Apx 383a.)

Underlying Facts

Jamar Jones was involved in a one-vehicle automobile "roll over" accident on September 23, 1999. Mr. Jones was transported to the emergency room at Sinai-Grace Hospital, Detroit, Michigan. Neurologist, Danny Watson, M.D., saw Mr. Jones on September 24, 1999. According to Dr. Watson's charting in the medical record, Mr. Jones told him that could not recall how the accident had occurred, and said 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." Dr. Watson suspected Mr. Jones had a seizure while driving, and diagnosed a probable partial complex seizure disorder and minor closed head injury. Dr. Watson prescribed Tegretol, which is an anti-seizure medication, and recommended further tests including a brain MRI and EEG. Mr. Jones took the prescription to Arbor Drugs, where it was filled with Tegretol's generic equivalent, carbamazepine.

According to the Plaintiff, on or about October 9, 1999, Mr. Jones began experiencing a sore throat and had trouble swallowing food. His mother noticed that his eyes were red and he was developing a rash over his face and upper body, which worsened over the next two days. Mr. Jones went to the Sinai-Grace Hospital emergency room on October 12, 1999, and was admitted

to the hospital with a diagnosis of Stevens-Johnson syndrome.¹ He expired on October 21, 1999. An autopsy determined that the cause of death was Stevens-Johnson syndrome, complicated with pneumonia.

Plaintiffs allege that Dr. Watson breached the standard of care in three ways. One, Before Dr. Watson could diagnose seizure disorder that would warrant the prescription of Tegretol more tests were required for confirmation. Two, Dr. Watson failed to inform Mr. Jones of the possibility of an allergic reaction to the medication. Three, Dr. Watson failed to provide proper follow-up care. All allegations are denied by the Defendants, and they remain questions of fact.

Experts testifying on behalf of each party have testified that carbamazepine more likely than not caused the onset of Stevens-Johnson syndrome. However, while carbamazepine is a known cause of Stevens-Johnson, the experts further testified that the likelihood of carbamazepine causing Stevens-Johnson syndrome is very rare. Plaintiff's expert, James O'Donnell, Pharm.D., testified the chance of contracting Stevens-Johnson syndrome after taking carbamazepine was one in one million, and that the likelihood of carbamazepine causing death was one in two million. (O'Donnell dep., p 92-93, Apx p 179a – 180a.) There is no dispute that Stevens-Johnson syndrome is listed by the drug's manufacturer on the package insert as a rare side effect.

Brief Summary of Underlying Motions Giving Rise to this Appeal

Plaintiff moved for summary disposition on the issues of cause-in-fact and proximate cause. The trial court held that as a matter of law, carbamazepine was the cause-in-fact of the

¹ *Steadman's Medical Dictionary*, p 1741 (26th ed, 1995) Stevens-Johnson syndrome is "a bullous form of erythema multiforme [rash-like eruption] which may be extensive, involving the mucous membranes and large areas of the body; it may produce serious subjective symptoms and may have a fatal termination."

Stevens-Johnson syndrome that led to Mr. Jones's death. That ruling was not challenged on appeal by the defendants.

The trial court additionally held that as a matter of law, if defendants were determined by the jury to be negligent, the jury must find that the negligence proximately caused Mr. Jones's death. The trial court held that because the serious reaction suffered by Mr. Jones after ingesting carbamazepine is so uncommon, Mr. Jones had to have been unusually susceptible to carbamazepine, and therefore was an "eggshell plaintiff." According to the trial court, cause-in-fact is traditionally the function of the jury, while legal cause is a question of law. (10-2-08 Hearing Trans, Apx p 379a.) Once cause-in-fact was established, the eggshell condition established proximate causation as a matter of law. (10-2-08 Hearing Trans., Apx p 368a.) The court of appeals upheld the trial court resulting in the current appeal.

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Questions of law are likewise reviewed *de novo* on appeal. *Al-Shimmari v The Detroit Medical Center*, 477 Mich 280; 731 NW2d 29 (2007).

ARGUMENT

I.

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

Proximate causation has two distinct elements: 1. cause-in-fact, and 2. that the injury was of a type that was the natural and probable result of the negligent conduct. M Civ JI 15.01. The cause-in-fact element is straight forward and requires a link from negligence to the injury. The second element cannot be said to be simply a repeat of the first, i.e., because the conduct

caused the injury, the conduct was the proximate cause. Instead, the second element allows the jury to weigh the action against the foreseeability of the gravity of the consequences to determine whether the defendant, albeit negligent in some fashion, should be responsible for the injury at issue.

Historically, in a negligence action, Michigan law has required that the Plaintiff must prove duty, breach of duty, proximate cause and damages. Generally, all persons are under a duty to use ordinary care of a reasonably careful person. *Detroit & M R Co v Van Steinburg*, 17 Mich 99 (1868); *Knarian v South Haven Sand Co*, 361 Mich 631, 643; 106 NW2d 151, 157 (1960); and *Ryder v Murphy*, 371 Mich 474, 478; 124 NW2d 238, 240 (1963). Thus, when the jury is asked whether this duty of ordinary care was breached, there is a risk benefit analysis required to determine whether the risk of any harm by the defendant's actions under the particular circumstances was reasonable or unreasonable based on the foreseeability of a harm to the plaintiff.

In a medical malpractice case, however, duty is further defined as the standard of care expected of the particular professional alleged to have committed malpractice² under the particular circumstances.³ The standard of care under the circumstances and whether it was breached, as a general rule, must be proven through expert testimony. *Locke v Pachtman*, 446

² "M Civ JI 30.01 Professional Negligence and/or Malpractice. When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a [Name profession.] of ordinary learning, judgment or skill in [this community or a similar one / [Name particular specialty.]] would do, or the doing of something which a [Name profession.] of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case.

"It is for you to decide, based upon the evidence, what the ordinary [Name profession.] of ordinary learning, judgment or skill would do or would not do under the same or similar circumstances."

³ In the present case, the issue would be whether a person with a suspected seizure disorder should be prescribed a medication to prevent seizures until confirming tests can be performed given the all known possible risks of the medication, versus risk additional seizures during that period.

Mich 216; 521 NW2d 786 (1994). To determine breach, the jury is asked to determine whether under the circumstances, in regard to possible harms from the action to the plaintiff, the defendant's actions were reasonable or not reasonable.⁴

In addition to duty and breach of the standard of care, the plaintiff must also prove proximate causation. M Civ JI 30.03.⁵ The second element, whether the injury sustained was of the type that was natural and probable result, has been dubbed "legal causation." Though, commonly called "legal" cause, it remains an element of proof, and is not typically a question of law for the court. *O'Neal v. St. John Hosp & Med Ctr*, 487 Mich 485, 496-497; 791 NW2d 853 (2010), held as follows:

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." See *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994); *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966); *Glinski v Szylling*, 358 Mich 182; 99 NW2d 637 (1959). 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." *Skinner*, 445 Mich at 163. [*Emphasis added.*]

⁴ "M Civ JI 10.02 Negligence of Adult—Definition: Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful *person would use. Therefore, by "negligence," I mean the failure to do something that a reasonably careful *person would do, or the doing of something that a reasonably careful *person would not do, under the circumstances that you find existed in this case.

"The law does not say what a reasonably careful *person using ordinary care would or would not do under such circumstances. That is for you to decide."

⁵ M Civ JI 30.03 Burden of Proof . The plaintiff has the burden of proof on each of the following:

- a. that the defendant was professionally negligent in one or more of the ways claimed by the plaintiff as stated in these instructions
- b. that the plaintiff sustained injury and damages
- c. that the professional negligence or malpractice of the defendant was a proximate cause of the injury and damages to the plaintiff

In regard to whether probability is a proper consideration in determining proximate cause, *O'Neal* has already ruled that it is. "The foreseeability of the consequences," is distinctly different than "foreseeability of consequences," as the former statement requires probable consequences, and the latter statement requires possible consequences. The court of appeals held that the second element of proximate causation meant the latter - only foreseeability of consequences is required to prove the second element, thus removing the probability element and ignoring the ruling in *O'Neal*. As *O'Neal* lessened the plaintiff's burden of proof as it relates to proximate causation, the Court's language confirms that in other circumstances probability was still considered to be an important element of proximate causation.

The plain and ordinary meaning of "foreseeable," per *Merriam Webster's Collegiate Dictionary*, p 457 (10th ed, 1993), is: "Being such as may be reasonably anticipated (~problems)." This definition is distinctly different from "Being such that may be possible." "Possible" is defined by *Webster's* as "being within the limits of ability, capacity, or realization; Being something that may or may not occur." *Id.* p 909.

O'Neal followed Michigan precedent in regard to the burden of proof of proximate causation in standard medical malpractice cases, which is that the second element means that the injury was a probable or foreseeable consequence. In *Kaiser v Allen*, 480 Mich 31, 37-38; 746 NW2d 92 (2008), this Court defined the legal element of proximate cause as "a foreseeable, natural, and probable cause" of the plaintiff's injury and damages. In two earlier cases, this Court likewise used words of ordinary comprehension - "might probably occur," *Nielson v Henry H. Stevens, Inc*, 368 Mich 216; 118 NW2d 397 (1962), and "reasonably anticipated" to occur, *VanKeulen & Winchester Lumber Co v Manistee Lumber Co v Manistee & N R Co*, 222 Mich

682; 193 NW 289 (1923). The Court of Appeals has also defined the legal element of proximate cause as follows: “probable, reasonably anticipated, and natural consequence,” *McLean v Rogers*, 100 Mich App 734, 736; 300 NW2d 389 (1980); “Might probably occur,” *Grof v State*, 126 Mich App 427, 437; 337 NW2d 345 (1983); “Probable, reasonably anticipated, and natural consequence,” *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997). These holdings all clearly distinguish the first element of proximate cause that the action more probably than not, in fact caused the injury, from the second, which is that the injury was a foreseeable and probable result of the action.

The importance of the “legal causation” nexus between the probability of the injury sustained and the action taken has been an underlying premise of primary tort doctrines,⁶ as well as the proposed *Restatement of Torts 3rd*.⁷ Foreseeability has been argued to actually have no place in the determination of breach of duty, and instead should be entirely within the determination of legal causation to make sure the decision remains in the realm of the jury.⁸

Judge Hoekstra, consistent with *O’Neal*, stated in his dissenting opinion in this case that the terms “natural” and “probable” are not terms of art. Instead, they “are words susceptible of

⁶ See, i.e., Robert E. Keeton, *Legal Cause in the Law of Torts* p 9 – 10 (1963), “An actor’s liability is limited to those physical harms that result from the risks that make the actor’s conduct tortuous.” Prosser & Keeton, *Torts*, note 27, § 45, p 321. Restatement (Second) of Torts, § 281 (1965). Oliver Wendell Holmes, Jr., *The Common Law*, p 92-95 (1881): “The difference taken . . . is not between results which are and those which are not the consequences of the defendant’s acts: it is between consequences which he was bound as a reasonable man to contemplate, and those which he was not.”

⁷ Similarly, the proposed Restatement (Third) of Torts, § 29 (Proposed Final Draft No 1, 2005) favors the scope-of-the-risk rule. Comment *d* proposes:

When defendants move for a determination that plaintiff’s harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant’s conduct that the jury *could* find as the basis for determining that conduct tortuous. Then the court can compare the plaintiff’s harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.

⁸ John Cardi, *Purging Foreseeability*, 58 Vanderbilt L R 923 (2005).

ordinary comprehension, and need not be defined for a jury.” *People v Martin*, 271 Mich App 280, 352-53; 721 NW2d 815 (2006), aff’d 482 Mich 851; 752 NW2d 457 (2008). Looking to the *Random House Webster’s College Dictionary* (1992) for assistance in giving these terms their ordinary meaning, Judge Hoekstra noted that “natural” means “in accordance with the nature of things; to be expected,” and “probable” means “likely to occur or prove true.” (Opinion 5-20-10, Apx p 396a.) Judge Hoekstra concluded that the jury would have to consider whether the “injuries were ‘expected’ and ‘likely to occur.’” (Opinion 5-20-10, Apx p 397a.)

The Court of Appeals’ opinion that the foreseeability of the consequences as a natural and probable result of the action is not part of the determination of proximate causation has far reaching consequences.⁹ Specifically, when there is no intervening cause, a plaintiff will have only to prove negligence, cause-in-fact and damages. This formula is essentially what was proposed by Judge Andrews in the dissenting opinion in *Palsgraf v Long Island RR*, 248 NY 339; 162 NE 99 (1928), and Judge Friendly, *In re Kinsman Transit Co*, 338 F2d 708, 725, (2nd Cir 1964), both of whom argued that all harms from an act of negligence are foreseeable and the probability of the specific harm should not be considered. Clearly these philosophical options have been available for this Court’s consideration for nearly a century, and they have never been adopted. The reason, though not specifically stated in Michigan case law, is that left unchecked by the requirements of probability and specificity, any action found to be a breach of duty can

⁹ The majority stated:

[H]owever, the issue is not whether defendants should have foreseen that Jamar would develop this syndrome, but whether they should have foreseen the possibility that as a result of taking the medication, Jamar, like any other patient being prescribed the medication, bore a risk of developing the syndrome.

We conclude that the question is not whether one can predict which incident of such negligence will cause an accident, but whether there is something innate about the negligence that naturally and probably gives rise to the risk of an accident, i.e., harm.” (Opinion 5-20-10, Apx p 385a.) [Emphasis added.]

ultimately be related to a subsequent harm and therefore, liability. Clearly, there is a balance that must be reached, and this was pointed out by Judge Hoekstra in his dissenting opinion, wherein he argued that “[c]onsideration must 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.” (Dissenting Opinion, Apx, p 396a, quoting *Helmus v Dep’t of Transp*, 238 Mich App 250, 256; 604 NW2d 793 (1999)).

The open-ended ramifications of the open “possible risk” interpretation has been a subject of concern by numerous authors, and is unjust.¹⁰ There needs to be a limiting actor where “the harm that resulted from the defendant’s negligence is so clearly outside the risks created that it would be unjust or at least impractical to impose liability.”¹¹

The comment accompanying M Civ JI 15.01 addresses the same concerns, stating that proximate cause is intended to impose some practical limitation between the alleged negligent and the alleged injury. The comment, however, leads to confusion as it is self-contradictory.

¹⁰ For example, W. Page Keeton et al., *Prosser and Keeton On The Law Of Torts* §41, p 266 (5th ed 1984).

It should be quite obvious that, once events are set in motion, there is, in terms of causation alone, no place to stop. The event without millions of causes is simply inconceivable; and the mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those who are to be held legally responsible.

¹¹ Dan B. Dobbs, *The Law of Torts*, note 2, § 180, p 443 (2000). See also, Ben Zapurski, “*Foreseeability in Breach, Duty, and Proximate Cause*,” Wake Forrest L.R., vol 44, p 1248 (2009).

From Holmes through the *Wagon Mound* court to works by Stephen Perry, there are powerful arguments for a proximate-cause notion rooted in foreseeability. The basic idea is that it is unfair to impose liability for an injury unless the defendant may cogently be said to be responsible for bringing about the injury. *D*’s conduct being a cause in fact of *Y*’s injury is not sufficient for saying that *D* is responsible for bringing about *Y*’s injury; *D* cannot be said to be responsible for *Y*’s injury if the action of *D* that caused *Y*’s injury is one with respect to which *Y*’s injury was an unforeseeable consequence. These propositions, put together, yield the conclusion that it is unfair to impose liability on *D* for *Y*’s injury if that injury was merely an unforeseeable consequence of *D*’s action. That is one of the most basic arguments underlying the foreseeability criterion for proximate cause.”

Proximate cause, at the minimum, means a cause in fact relationship. *Glinski v Szylling*, 358 Mich 182; 99 NW2d 637 (1959). In addition, the causal connection between the defendant's conduct and the occurrence which produced the injury must have some practical limitation, variously expressed in terms such as "natural," "probable," "direct," or "reasonably anticipated." See *VanKeulen & Winchester Lumber Co v Manistee & N R Co*, 22 Mich 682; 193 NW 289 (1923); *Woodyard v Barnett*, 335 Mich 352; 56 NW2d 214 (1953); and *Fisk v Powell*, 349 Mich 604; 84 NW2d 736 (1957), all approved in *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966). The exact damages need not have been foreseen so long as the results are a natural and probable consequence of the defendant's conduct. It is sufficient that the ordinary prudent person ought to have foreseen or anticipated that damage might possibly occur. *Luck v Gregory*, 257 Mich 562; 241 NW 862 (1932); *Clumfoot v St Clair Tunnel Co*, 221 Mich 113; 190 NW 759 (1922).

The comment thus recognizes a need for a limitation of liability through the determination of the legal cause, but then cites *Luck* and *Clumfoot*, which set forth the broad foreseeability of a harm standard used in determining breach of duty, and not the limiting foreseeability of the harm standard used in determining legal cause.

Judge Hoekstra's reasons for limitations were taken from *Davis*.

The issue is not simply whether reasonable minds cannot differ that a straight line can be drawn from point A, the defendant's alleged negligence, to point F, the plaintiff's injuries. Rather, for a plaintiff to prevail on proximate cause at the summary disposition stage, it must be shown that reasonable minds cannot differ that the injuries were the natural and probable consequence of the defendant's negligence. In other words, reasonable minds could not differ that the injuries were "expected" and "likely to occur" or on whether the injuries were too insignificantly related or too remotely affected by the alleged negligence. *Davis*, 384 Mich at 145.

(Dissenting Opinion, Apx p 396a)

According to Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 La L R note 11, p 1513 (1993), proximate cause is "really a way of deciding whether society ought to hold this defendant, whose negligent acts were a cause-in-fact of the plaintiff's damages, liable under these circumstances, to this plaintiff . . . or to sever the chain of causation."

In conclusion, Michigan law has always weighed the balance of liability for negligence with the remoteness of the consequences. Even in what would be *negligence per se* in other states for a statutory violation linked to an injury, in Michigan it is a rebuttable presumption as to whether the violation was the proximate cause to be decided by the jury. *Zeni v Anderson*, 397 Mich 117; 243 NW2d 270 (1976). Foreseeability of the consequence, in terms of proximate cause does not determine whether the defendant's actions were unreasonable or not. It allows the jury to decide whether the actual consequences were so unpredictable, unusual, unlikely or far-removed from the risks that made the conduct negligent in the first place, that the defendant should not be held liable. Accordingly, the Court of Appeals and trial court should be reversed, and the issue of proximate causation returned to the jury.

II.

THE TRIAL COURT ERRED IN RELYING ON THE CASE OF *WILKINSON V LEE* AND FINDING THAT DECEDENT WAS AN "EGGSHELL PLAINTIFF" WHERE THE CROSS-APPELLEES COULD NOT IDENTIFY ANY CONDITION THAT MADE DECEDENT UNUSUALLY SUSCEPTABLE TO STEVENS-JOHNSON SYNDROME.

The eggshell plaintiff rule is an exception that applies only to persons who have an objectively provable underlying condition that makes them unusually susceptible to the damages. The trial court improperly used the "eggshell plaintiff" rule to find that the second element of proximate cause was met as a matter of law. The trial court's conclusion was based on an assumption that because Mr. Jones was one of 1 million to develop Stevens-Johnson syndrome after taking the drug, he must have been unusually susceptible, and pursuant to *Wilkinson v Lee*, 463 Mich 388; 617 NW2d 305 (2000), summary disposition on proximate causation was appropriate. Hence the trial court gave a medical opinion for which there is no foundation.

There is no evidence that a drug reaction leading to Stevens-Johnson syndrome is caused by an underlying condition. In *Wilkinson* the plaintiff had an objectively evident underlying condition – a brain tumor - that was aggravated by injuries sustained in an automobile accident. *Id.* at 390. The Court relied on the Restatement (Second) of Torts, as follows:

As the comment to § 461 states: The rule stated in this Section applies not only where the peculiar physical condition which makes the other's injuries greater than the actor expected is not known to him, but also where the actor could not have discovered it by the exercise of reasonable care, or, indeed even where it is unknown to the person suffering it or to anyone else until after the harm is sustained. A negligent actor must bear the risk that his liability will be increased by reason of the actual physical condition of the other toward whom his act is negligent. *Id.* [*Emphasis added.*]

This Court thus looked to the presence of an actual physical condition . . . “a pre-existing brain tumor.” *Id.* p 309. Had there been no tumor, there could have been no assumption that just because the plaintiff had an extreme reaction the plaintiff was unusually susceptible, or that there was an underlying pre-existing condition that caused it.

Plaintiff's own expert, James O'Donnell, Pharm.D., testified that it was the drug carbamazepine itself that turns toxic, not an underlying susceptibility that causes a reaction:

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 creating a toxic reaction. Primarily in the skin but not limited to the skin.

(Dr. James O'Donnell, Deposition p 70, Apx p 174a.) Experts on both sides of this case have testified that it is not medically known why anyone gets Stevens-Johnson syndrome. Plaintiffs therefore cannot identify a “latent susceptibility” for Decedent because there are no predicting factors or tests that can be done to confirm this “susceptibility.”

Defendant's pharmacology expert, Dr. Edward Domino, M.D., Ph.D., likewise agreed that the triggering factor for Stevens-Johnson syndrome is unknown:

Q Now, to the extent that Tegretol has been linked with both Stevens-Johnson syndrome and TEN, it's by virtue of the pharmacokinetic actions of the carbamazepine in the Tegretol, correct?

A It's not due to the pharmacokinetic actions.

Q What is it due to?

A We don't know. It's something to do with – we don't know the mechanism by which the carbamazepine or Tegretol produces TENs. That's true of every drug that ever produced TENs. We are ignorant. And the same with Stevens-Johnson. As physicians, we are ignorant of the mechanisms by which these drugs produce these diseases.

(Dr. Edward F. Domino, Deposition p 27-28, Apx p 73a.)

There is no evidence that Mr. Jones was different than anyone else who walks into a hospital for treatment in terms of susceptibility to carbamazepine poisoning. All of the experts agree that carbamazepine becomes toxic for reasons unknown. Therefore, there is no evidence that Mr. Jones was more probably than not unusually susceptible to being poisoned when the carbamazepine became toxic.

Under the theory espoused by Plaintiffs, every person in the world who has a rare reaction to a medication would necessarily be "unusually susceptible," and therefore be able to avoid proof of both elements of proximate causation. The "egg shell plaintiff" rule is an exception for persons who have objective underlying physical or psychic conditions, such as fragile bones, and it has been long recognized by the courts that persons should not escape liability for the excess damages that occur from injuries to such people. This rule should not be expanded to cover persons who may possibly have an underlying condition that cannot be

verified, as that could be everyone. Accordingly, the trial court should be reversed on this ruling, and the matter returned for trial on the elements of breach, the second element of proximate cause and damages.

III.

NEGLIGENCE MUST BE DETERMINED AS A MATTER OF LAW, OR BY THE JURY BEFORE PROXIMATE CAUSATION IS DETERMINED.

By ruling on legal causation as a matter of law, the trial court and Court of Appeals have taken a key element of negligence away from the jury. Typically, the issue of duty is the only element decided by the court.¹² The trial court held that in instances in which cause-in-fact is established, it is proper to grant summary disposition on the issue of proximate cause, reasoning that if negligence were to be proven, reasonable minds could not differ as to whether the negligent action was the legal cause of the injury. This ruling changes the elements of proof, as any time cause-in-fact is proven the Plaintiff will be relieved from the burden of also proving “legal causation.”

“Legal causation,” as discussed above in this brief, is entirely different from cause-in-fact, as well as from foreseeability issues used to establish breach of duty. It is, as noted by Judge Hoekstra, a control left to the jury; a consideration based on, in part, economic and social desirability. Determination of “legal causation” serves as a limitation on the liability for consequences. *Prosser & Keeton, Torts*, note 27, § 45 at 321. “The consequences of an act to go forward to eternity, . . . any attempt to impose responsibility upon such a basis would ‘set society on edge and fill the courts with endless litigation’.” *Id.*, § 41, p 64, quoting *North v Johnson*, 59 NW 1012 (Minn. 1894).

¹² Restatement (Second) of Torts § 328B (1965). See also, Dobbs, *supra*, note 2, § 149, p 355 (2000).

Without sending the issue of “legal causation” to the jury, foreseeability in and of itself is “so open-ended that it can be used to explain any decision.”¹³ Ruling as a matter of law before negligence is decided that there was “legal causation” presumes the court is a better arbiter than the jury. The question of proximate causation before the defendant’s jury of peers is whether, even though the act in and of itself was negligent, liability should be imposed for damages that were at the end of the spectrum of possible outcomes. It is for that reason that the jury must be asked first if there was negligence, or at least presented with a ruling that there was negligence, and allowed to determine legal causation. It may be that the jury would not find the injury to be a probable and natural result of what the jury believed was negligence.

Michigan law has held that the court may determine proximate causation where reasonable minds could not differ. *Paddock v Tuscola & S B R Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997), held “[w]hen the facts bearing upon proximate cause are not in dispute and reasonable persons could not differ about the application of the legal concept of proximate cause to those facts, the court determines the issue.” *Paddock*, however, dealt with the issue of cause-in-fact. In *Paddock* the trial court ruled that the plaintiff, as a matter of law, could not establish “proximate causation” regardless of whether the defendant was or was not negligent. The facts in *Paddock* were that every day for years the decedent left his house and crossed railroad tracks at a crossing marked only by a cross buck. Usually the plaintiff’s decedent slowed to nearly a stop before proceeding, but one day he did not and was killed by an oncoming train. The court found that even if the railroad had breached a duty to paint pavement markings warning of the railroad tracks, under the circumstances in which the decedent clearly knew about the tracks and crossed them frequently, the plaintiff could not prove the lack of the markings

¹³ Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Deceptive Theory and the*

“proximately caused” the decedent not to slow down or stop before entering the crossing. *Id.* p 537-538. Because Plaintiff could not prove the first element of proximate causation, the second element was moot.

This Court has held that a defendant’s negligence must be established before any discussion about proximate cause can begin. *Davis v Thornton*, 384 Mich 138; 180 NW2d 11 (1970). In *Davis*, defendant Williams was driving his employer’s vehicle. He parked the car, left the keys in the ignition, failed to lock the door and may have left the motor running while engaged in business for the employer. A group of minors took the car for a “joyride” and collided with plaintiff’s vehicle, killing one and severely injuring the other occupants in plaintiff’s vehicle. *Id.* at 141. The defendant moved for summary disposition on the issue of proximate cause because the City of Detroit had adopted an ordinance prohibiting the operator of a vehicle from leaving a motor unattended without shutting off the motor and locking the doors. The trial court granted the motion holding that a motor vehicle driver has no duty to protect others from the actions of thieves who steal his car with the use of the driver’s own keys. *Id.*

In reversing the trial court’s grant of summary disposition, this Court set forth the underlying philosophy on the ability of the jury versus that of the court by quoting Justice Cooley from *Detroit & M R Co v Van Steinberg*, 17 Mich 99 (1868):

The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility. For, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff’s conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that, if the same question of prudence were submitted to a jury collected from the different occupations of society, and

Rule of Law, 54 Vanderbilt L R 1039, 1046 (2001).

perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care.

Id. at 120.

Further, this Court found that the determination of remoteness should almost always be left to the jury.

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.

Davis supra, at 148 (quoting *Detroit & M R Co supra*, at 122.) While this ruling focused more on the issue of breach, the Court's reliance on the jury for issues of prudence, are equally applicable to issues of reasonable foreseeability of the consequences.

Contrary to the majority's opinion in the current case, even if the jury determined negligence, the jury still may determine that the risks of Stevens-Johnson syndrome were so remote, akin to winning the lottery, the harm was not a natural and probable result of the action.

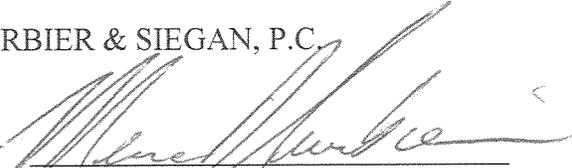
Based on the foregoing, the Court of Appeals erred in upholding the trial court's grant of summary disposition on the issue of proximate cause and must be reversed.

REFLIEF REQUESTED

WHEREFORE, Defendants-Appellants Danny F. Watson, M.D. and William M. Leuchter, P.C. request that the opinion of the Court of Appeals be reversed and the matter returned to the trial court for trial on all elements other than cause-in-fact.

Respectfully submitted,

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