STATE OF MICHIGAN

COURT OF APPEALS

TRENDA JONES, BOOKER T. JONES, and MARGARET A. JONES, Co-Personal Representatives of the Estate of JAMAR CORTEZ JONES, deceased,

Plaintiffs-Appellees/Cross-Appellees,

v

DETROIT MEDICAL CENTER and SINAI-GRACE HOSPITAL,

Defendants-Appellants,

and

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

Defendants-Cross-Appellants

FOR PUBLICATION
May 20, 2010

No. 288710
Wayne Circuit Court
LC No. 03-327528-NH

Advance Sheets Version

Before: HOEKSTRA, P.J., and BECKERING and SHAPIRO, JJ.

HOEKSTRA, P.J. (*dissenting*).

In this medical malpractice action, this Court granted defendants leave to appeal the trial court's order granting summary disposition to plaintiffs on the issue of proximate or legal cause and denying defendants' cross-motion for summary disposition. Because I would conclude that reasonable persons could differ regarding whether the injuries of plaintiffs' decedent, Jamar Jones (hereafter Jones), were legally caused by the alleged negligence, I respectfully dissent.

In a medical malpractice action the plaintiff must establish proximate cause between the defendant's alleged breach of the standard of care and his or her injuries. *Teal v Prasad*, 283 Mich App 384, 391; 772 NW2d 57 (2009). "'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). Proximate cause is generally a question for the jury. *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009). However, "[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 v Tuscola & S B R Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997).

A court must first find that the defendant's actions were a cause in fact of the plaintiff's injuries before it may find that the actions of the defendant were a proximate or legal cause of the injuries. *Craig*, 471 Mich at 87. Cause in fact requires that "but for" the defendant's actions, the plaintiff's injuries would not have occurred. *Martin v Ledingham*, 282 Mich App 158, 161; 774 NW2d 328 (2009). The trial court granted summary disposition to plaintiffs on the issue of cause in fact. Defendants did not appeal this order in their application for leave to appeal; therefore, the issue of cause in fact is not before us. *Jones v Detroit Med Ctr*, unpublished order of the Court of Appeals, entered December 30, 2008 (Docket No. 288710); see also MCR 7.205(D)(4); *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005).

At issue is legal or proximate cause. Legal causation involves "judg[ing] whether the plaintiff's injuries were too insignificantly related to or too remotely effected by the defendant's negligence." *Davis v Thornton*, 384 Mich 138, 145; 180 NW2d 11 (1970). "To find proximate cause, it must be determined that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable." *Helmus v Dep't of Transp*, 238 Mich App 250, 256; 604 NW2d 793 (1999). Our Supreme Court has defined a proximate cause as "a foreseeable, natural, and probable cause of the plaintiff's injury and damages." *Kaiser v Allen*, 480 Mich 31, 38; 746 NW2d 92 (2008) (quotation marks and citation omitted).

The concept of foreseeability pervades any discussion of proximate cause. See, e.g., *id*.; *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997) ("To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct may create a risk of harm to the victim, and . . . that the result of that conduct and intervening causes were foreseeable.") (quotation marks, citation, and alternation omitted); *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) ("[L]egal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences."); *Nielsen v Henry H Stevens, Inc*, 368 Mich 216, 220-221; 118 NW2d 397 (1962) ("To make negligence the proximate cause of an injury, . . . an ordinary prudent person ought reasonably to have foreseen [that the injury] might probably occur as the result of his negligent act.").

However, our Supreme Court has instructed that in a case in which there is no intervening cause, and there is none alleged in the present case, the foreseeability of the plaintiff's injury is not to be used as a test to determine whether proximate cause exists. *McMillian v Vliet*, 422 Mich 570, 576-577; 374 NW2d 679 (1985); *Davis*, 384 Mich at 147.

> "It appears that the modern trend of judicial opinion is in favor of eliminating foreseeable consequences as a test of proximate cause, except where an independent, responsible, intervening cause is involved. The view is that once it is determined that a defendant was negligent, he is to be held responsible for injurious consequences of his negligent act or omission which occur naturally and directly, without reference to whether he anticipated, or reasonably might have

> foreseen such consequences. . . . There is no need for discussing proximate cause in a case where the negligence of the defendant is not established, but when his negligence has been established, the proximate result and amount of recovery depend upon the evidence of direct sequences, and not upon defendant's foresight." [*Davis*, 384 Mich at 147, quoting 38 Am Jur, Negligence, §§ 58, 709, 710.]

Indeed, the Michigan Model Civil Jury Instructions define legal or proximate cause as "a natural and probable result of the negligent conduct." M Civ JI 15.01. The words "natural" and "probable," rather than legal terms of art, are words susceptible of ordinary comprehension and need not be defined for a jury. See *People v Martin*, 271 Mich App 280, 352-353; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). Accordingly, being instructed on proximate cause, jurors would afford the terms "natural" and "probable" their ordinary meanings. In the context of determining proximate cause, "natural" means "in accordance with the nature of things; to be expected," and "probable" means "likely to occur or prove true." *Random House Webster's College Dictionary* (1992).

In the complaint, plaintiffs alleged two distinct acts of negligence. First, plaintiffs claimed that Dr. Danny Watson breached the applicable standard of care by prescribing carbamazepine[1] on the basis of the limited personal medical history provided by Jamar Jones. According to plaintiffs, Watson should not have prescribed carbamazepine without performing additional diagnostic tests to confirm the preliminary diagnosis of a seizure disorder. Second, plaintiffs alleged that Watson breached the applicable standard of care by failing to inform Jones of the possibility of an allergic reaction, the signs of an allergic reaction, and the necessity to immediately seek medical attention for an allergic reaction.

In determining that reasonable minds could not differ that Watson's conduct was a proximate cause of Jones's injuries, the majority focuses on whether the injuries were foreseeable. For example, it reasons that, because Jones died as a result of Stevens-Johnson syndrome, which is a known side effect of taking carbamazepine, and because Jones contracted Stevens-Johnson syndrome from taking carbamazepine, which was prescribed by Watson, the injuries were foreseeable. Respectfully, I disagree with the approach taken by the majority. The issue is not simply whether reasonable minds cannot differ that a straight line can be drawn from point A, the defendant's alleged negligence, to point F, the plaintiff's injuries. Rather, for a plaintiff to prevail on the issue of proximate cause at the summary disposition stage, it must be shown that reasonable minds cannot differ that the injuries were the natural and probable consequence of the defendant's negligence. 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. Further, consideration must also be given to whether the connection between the alleged

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[1] Watson prescribed Tegretol, but the prescription was filled with carbamazepine, the generic form of Tegretol. No allegation has been made, however, that any difference between the drugs is relevant to this case.

negligence and the injuries is of such a nature that it is socially and economically desirable to hold the defendant liable. *Helmus*, 238 Mich App at 256.

Reviewing the trial court's decision de novo and the evidence in the light most favorable to defendants, *Lee v Detroit Med Ctr*, 285 Mich App 51, 58-59; 775 NW2d 326 (2009), I would conclude that this case presents issues that must be resolved at trial. It is undisputed that Stevens-Johnson syndrome is a known, but very rare, side effect of taking carbamazepine. One expert testified that only one in a million of those who take carbamazepine develop Stevens-Johnson syndrome. In addition, there is no claim by plaintiffs that carbamazepine is not an anticonvulsant commonly prescribed for a seizure disorder. Under these circumstances, I am of the opinion that reasonable minds could differ regarding whether Jones's injuries were the natural and probable result of Watson's alleged negligence of failing to perform additional diagnostic tests to confirm the preliminary diagnosis of a seizure disorder. Admittedly, the link between Watson's alleged failure to warn Jones of an allergic reaction to carbamazepine and Jones's injuries is much closer than the link between the injuries and Watson's alleged failure to confirm the preliminary diagnosis. However, given the rarity of Stevens-Johnson syndrome, I believe that even on this claim it was within the province of the jury to determine whether the connection between Watson's alleged negligence and Jones's injuries was of such a nature that it is desirable to hold defendants liable. Accordingly, I would conclude that the trial court erred by granting summary disposition to plaintiffs on the issue of proximate cause.

Defendants also argue that it was error for the trial court to deny their cross-motion for summary disposition. They argue that because Stevens-Johnson syndrome is a rare and unpredictable side effect of taking carbamazepine, plaintiffs cannot establish that taking carbamazepine was a foreseeable, natural, and probable cause of Jones's death. Defendants rely primarily on *Dooley v St Joseph Mercy Hosp*, unpublished opinion per curiam of the Court of Appeals, issued July 7, 1998 (Docket No. 198024). I agree with the majority that *Dooley* is factually distinguishable. In addition, the record shows that although Stevens-Johnson syndrome is a rare side effect, it is a known side effect. Consequently, reasonable minds could differ regarding whether it is a natural and probable consequence that, if a physician prescribes a medication with a known rare side effect, a patient will suffer the side effect. Therefore, I would also conclude that defendants are not entitled to summary disposition.

/s/ Joel P. Hoekstra