In the Supreme Court

Appeal from the Court of Appeals
Honorable William B. Murphy

ESTATE OF BETTY JEAN SHINHOLSTER,
Deceased, by JOHNNIE F. SHINHOLSTER,
Personal Representative,

Docket No. 123720

Plaintiff-Appellee,

v

ANNAPOLIS HOSPITAL, assumed name for
OAKWOOD UNITED HOSPITALS, INC.,
a Michigan Corporation,

Defendants-Appellants,

and

DENNIS ADAMS, M.D.
and MARY ELLEN FLAHERTY, M.D.,

Defendants.

REPLY BRIEF OF APPELLANT ANNAPOLIS HOSPITAL/OAKWOOD UNITED HOSPITAL, INC.

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ARGUMENT

The adoption and amendment of MCL 600.2959 and MCL 600.6304 in 1995 requires that the jury be allowed to determine the fault of all parties, including the decedent, which contributed to the damages alleged by the plaintiff.

As this Court has repeatedly stated, where a statute is clear and unambiguous, the Court can go no further than to apply the statute by its plain and ordinary meaning. People v McIntire, 461 Mich 147, 153; 599 NW2d 102 (1999). MCL 600.2959 clearly and unambiguously provides that in personal injury tort actions and wrongful death actions, the damages will be reduced by "the percentage of comparative fault of the person upon whose injury or death the damages are based." Under MCL 600.6304 (1), the jury is to be instructed to make findings as to the total amount of each plaintiff's damages and "the percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff." MCL 600.6304(8) defines fault as "an act, an omission, conduct, ... that is a proximate cause of damage sustained by a party" (pertinent statutory provisions, including the above statutes, are attached to defendant's appeal brief).

Neither statute, section 2959 or section 6304, contains a statement that the provisions therein do not apply to medical malpractice actions. However, this is the limitation which the plaintiff would like read into the statutory language, and one which the Court of Appeals did in fact adopt in its published decision.[1] The plaintiff (as did the Court of Appeals) bases this conclusion that the scope of sections 2959 and 6304

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[1] These statutes are not even mentioned in the plaintiff's appeal brief until page 30 (and even then MCL 600.2959 is only briefly cited).

should have limits imposed in medical malpractice actions on a Restatement of Torts provision, cases from foreign jurisdictions and Michigan case law decided long before the Legislature adopted, in 1995, the rules for apportionment of fault in sections 2959 and 6304. Without dispute, MCL 600.2959 does not exclude medical malpractice from its provisions.

Under the provisions of MCL 600.2959 and 600.6304 the trial court is required to reduce the award of damages by the percentage of comparative fault of the person upon whose injury or death the damages are based. In this case, the evidence established that the decedent was noncompliant in following her doctor's advice and instructions to control her high blood pressure. Further, the claim pursued by plaintiff is that the decedent's uncontrolled high blood pressure resulted in her stroke and ultimate death. In addition there was expert testimony from Bradford L. Walters, M.D., a board certified emergency medicine specialist, that spikes up and down due to a patient's failure to take his or her blood pressure medication as prescribed, can cause a stroke as the one Mrs. Shinholster suffered (Appendix pp 173A-174A).

As declared by the Legislature in MCL 600.2959 and MCL 600.6304, it was for the jury to decide whether the defendant's experts were correct in their determination that the failure of the decedent to take her medication as prescribed, to return for follow up doctor visits as instructed, and her other noncompliant behavior was a proximate cause of the injuries alleged by plaintiff and, if so, to then determine the percentage of fault to be assigned to the plaintiff, as well as all other parties. However, by removing from the jury's consideration acts which predated April 7, 1995 in the jury instruction, the trial court improperly removed such issues from the jury's consideration.

In the examples presented by the plaintiff, as well as in the cases relied upon by the plaintiff, the alleged negligent acts of the plaintiff caused an injury for which the plaintiff sought treatment. The claim in such situations was that the acts of the health care provider caused further injury. Thus, in such scenarios, the jury would be charged with determining what damages where in fact caused by the health care provider versus the injuries which would result even if proper treatment had been given. The juries in such scenarios would be required to limit any damages recoverable against the healthcare provider to those damages actually caused by the negligence of the doctors. In such cases, if the healthcare provider caused injury because of improper treatment, the plaintiff would recover the damages only proximately caused by the acts or omissions of the defendant. Contrary to plaintiff's claims, this law is not inconsistent with allowing the jury here to consider whether the actions of the decedent contributed to or caused the injuries now alleged by her estate. The plaintiff in a medical malpractice action must establish that there was an act or omission of the defendant which breached the standard of care and that proximately caused the alleged damage. So too must a defendant establish the fault of the plaintiff and that such fault was a proximate cause of the injury alleged.

Further, the out of state cases relied on by plaintiff have not even been shown to come from states which have a statutory scheme similar to or even analogous to that adopted by the Michigan Legislature in 1995. The contributory (not comparative) negligence rule employed in the state of Virginia in Eiss v Lillis, 233 Va 545; 357 SE2d 539 (1987), requires that a finding of contributory negligence bars the plaintiff's claim. Such is evident from the jury instruction given in Eiss. The court in Virginia, as a matter

of case made law, also required that in medical malpractice cases the negligence of the plaintiff must concur with that of the defendant to bar recovery. See 357 SE2d at 547-548 & 552. In Gravitt v Ward, 258 Va 330; 518 SE2d 631 (1999), the Supreme Court of Virginia explained that it was essentially "adopting" the additional requirement, **in medical malpractice cases**, that in order for the patient's negligence to "bar" recovery, the plaintiff's negligence must "concur with that of the defendant." 518 SE2d at 634.

Nonetheless, what must be recognized is that this development in Virginia is one of case law origin, and not statutory enactment. Similarly, in Restatement (Third) of Torts § 7, (which plaintiff relies upon, and the Court of Appeals followed) the commentary suggests that separate and addition rules should be grafted and applied to medical malpractice actions, by the Courts, to the general rule espoused in § 7. However, our Legislature has chosen not to adopt such additional limiting rules. Our Legislature, in contrast, has adopted a statutory scheme which contains no such requirements applicable to only medical malpractice actions. The Michigan Legislature has simply not provided "special" rules for medical malpractice cases. The issue of comparative fault, under our statutorily adopted comparative negligence, is simply one for the jury.

As discussed in defendant's brief, under the principles espoused by this Court when discussing comparative negligence and proximate cause, the Court has recognized that the jury must find that the plaintiff's fault was a proximate cause of the injury, as it must also find that the negligence of the defendant attributed to the injuries

alleged.[2] However, neither has to be the sole proximate cause. As stated in Wiles v New York Cent R Co, 311 Mich 540; 19 NW2d 90 (1945) "the defendant's negligence causes the injury and the plaintiff's negligence contributes to it."[3] Here there was evidence that the decedent's noncompliant behavior and acts caused or contributed to her death. However, the jury was only allowed to decided whether the defendant's acts (except for those acts of the decedent's after April 7, 1995) contributed to the death. This limitation was improper under sections 2959 and 6304.

While the statute, section 6304(8) uses the word "fault" and not "negligence", such fault must still be determined to be a proximate cause.[4] According to the statute (and consistent with the common law), such is a question is for the jury. In Skinner v Square D Co, 445 Mich 153, 162-163; 516 NW2d 475 (1994), this Court stated that proving

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[2] Such is not always the case. See Lamp v Reynolds, 249 Mich App 591; 645 NW2d 311 (2002), lv den 467 Mich 937 (2003) (where plaintiff's injuries arose solely as a consequence of unknown, unexpected, and concealed circumstances, defendants failed to prove that the plaintiff's conduct was a cause in fact of his damages).

[3] In Lowe v Estate Motors Ltd, 428 Mich 439, 455-456; 410 NW2d 706 (1987), this Court explained that the standards in determining the standard of care owed in the context of comparative fault, and so too defendant submits for proximate cause, "while differing in perspective, is theoretically indistinguishable" from the standard applied to determine a defendant's liability. See also Lamp, supra at 317, n 5.

[4] In Lamp v Reynolds, 249 Mich App 591, 602-603; 645 NW2d 311 (2002), lv den 467 Mich 937 (2003), the Court of Appeals concluded that the Legislature's use of the word "fault" and not "negligence" reflected the Legislature intent that all at-fault conduct is within the reach of the comparative fault statutes.

proximate causes “entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also know as “proximate cause”. The Court, in Skinner defined these two elements as follows:

> 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.

Finding that a jury could conclude that the plaintiff’s negligence was a proximate cause of the injury, this Court in Nielson v Henry H. Stevens, Inc, 368 Mich 216, 220; 118 NW2d 397 (1962) held that a contributory negligence instruction was properly given. In Nielson, the plaintiff-minor was injured when he rode his bicycle into the path of a moving van. The plaintiff-minor argued that even if the child’s conduct constituted negligence, his negligence ceased upon his collision with the truck. (The analogous argument here by plaintiff is that the decedent’s negligent non-complaint behavior prior to the treatment with these defendants should not be considered by the jury.) However, this argument was rejected in Nielson. This Court recognized that:

> 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 probably 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. [368 Mich at 220-221.]

As to "causation", this Court in Davis v Thornton, 384 Mich 138, 145; 180 NW2d 11 (1970) quoting from 38 Am Jur, Negligence, s 58, 709-710, stated: "Causation is a process of logical determination, while the significance of the connections – remoteness– is a policy determination." Id. at 146. The Court further held that a "determination of remoteness, however, should seldom, if ever, be summarily determined" and is thus a question for the jury. Id. at 147. The courts have further concluded that a doctor's negligent acts in treating the plaintiff's original injury are considered foreseeable and thus a question for the jury. See Richards v Pierce, 162 Mich App 308, 317-318; 412 NW2d 725 (1987).

That the decedent's failure to follow her doctor's instructions, including taking prescribed medication and following up with doctors as instructed, was without question a "but for" cause of the ultimate stroke and death. Further, the decedent's non-compliant behavior and, thus fault, was a legal cause as well. As the Court of Appeals in this case itself noted:

> Clearly, a person who does not follow her doctor's orders and who therefore maintains a high blood pressure is contributing to her own death. [Appendix p 263A).

Substantial evidence was presented at trial that the decedent failed to heed her doctor's instructions, including the taking of blood pressure medication to control hypertension. Further, there was evidence that the failure to take the medication and failure to follow up with her doctors, were a proximate cause of her stroke and ultimate death. Such non-compliant behavior was a "but for" cause as well as a legal cause. Such non-compliant behavior was a cause which operated to produce the stroke and death, without which the injuries would not have occurred. An ordinary prudent person

ought to reasonably have foreseen that such events would probably occur as a result of such negligent acts. The defendants' acts, if in fact negligent, did not break the causation chain.

As both the case law and the 1995 statutes make clear, the issue was one for the jury. In adopting MCL 600.2959 and 600.6304, our Legislature has decreed that in all tort cases seeking damages for personal injury or wrongful death, the jury is to determine the total amount of each plaintiff's damages and the "percentage of total fault of all persons that contributed to the death or injury, including the plaintiff."[5] Thus, the jury must decide the issues of fault, proximate cause and damage. If the jury finds the plaintiff's acts or omissions to be a proximate cause of the damage sustained, the jury must assign a percentage of fault. Such percentage of fault is then applied under MCL 600.6306 to reduce the total judgment. The trial court improperly refused to place this issue before the trier of fact. A new trial is required.

Defendant has devoted its reply brief to the issue of the comparative negligence instruction. As to the remaining two issues, defendant relies upon its principle brief on appeal, as well as incorporates by reference co-defendants' reply brief filed in Case no. 123721.

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[5] Evidence of a plaintiff's or a plaintiff's decedent harmful living habits would always be relevant to the separate issue of damages. See Chimielewski v Xermac, Inc, 457 Mich 593, 614-616; 580 NW2d 817 (1998). Such relevancy in this context does not preclude it's relevancy in other areas, including as to the issue of proximate cause.

RELIEF REQUESTED

WHEREFORE, Annapolis Hospital, an assumed name for Oakwood United Hospitals, Inc., respectfully requests that this Honorable Court reverse the Court of Appeals' opinion and the trial court's orders and hold that a new trial is required, that any non-economic damages awarded in this case must be reduced to the lower tier cap of MCL 600.1483 and that any future damages awarded in this case must be reduced to their present value pursuant to MCL 600.6306.

Respectfully submitted,

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Dated: May 5, 2004

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