# STATE OF MICHIGAN

# COURT OF APPEALS

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CARL WILKINSON and JEANETTE WILKINSON,

Plaintiffs-Appellees,

v

ANTHONY LEE and GENERAL MOTORS CORPORATION,

Defendants-Appellants.

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UNPUBLISHED
June 15, 1999

No. 203218
Oakland Circuit Court
LC No. 94-487015 NI

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Defendants admitted responsibility for causing an automobile accident on May 20, 1992 (the "1992 accident") between defendant Anthony Lee and plaintiff Carl Wilkinson ("Wilkinson"). The primary issues at trial were whether the 1992 accident proximately caused Wilkinson's alleged injuries and whether the alleged injuries amounted to a serious impairment of bodily function as the phrase was used in MCL 500.3135; MSA 24.13135, as in force at the time of the accident. Following a jury trial, defendants appeal as of right the trial court's denial of their motions for a directed verdict and for a judgment notwithstanding the verdict. We reverse.

## I. Factual Background And Procedural History

Wilkinson testified that the collision in the 1992 accident threw him forward and backward with such force that it caused his seat to break.[1] Wilkinson was taken to the hospital, diagnosed with a neck strain and issued a cervical collar. Wilkinson missed only two days of work, including the day of the accident. Shortly thereafter however, according to Wilkinson, he began experiencing headaches and neck pain. Both Wilkinson and his wife testified that the headaches continued and that Wilkinson became slow-moving, quiet, and fatigued. Wilkinson testified that he experienced none of these symptoms before the accident. In addition, Wilkinson's wife and daughter testified that Wilkinson's physical and mental condition declined drastically after the 1992 accident.

According to Wilkinson, although he sought treatment for these ailments, including physical therapy, his symptoms intensified over the next eighteen to twenty-one months following the 1992 accident, causing nausea, severe headaches, dizziness and double vision. His memory loss grew to the point that he would put a customer in a waiting room, forget they were there and fall asleep. Finally, on January 31, 1994, Wilkinson lost consciousness four or five times and was taken to the hospital, where he was diagnosed as having a meningioma brain tumor. Dr. Murali Guithikonda removed the tumor in February 1994. While most of Wilkinson's previous symptoms ceased after the operation, many persisted.[2]

Dr. Guithikonda testified that a meningioma is a slow-growing tumor that arises from the layers covering the brain, and that it was "quite likely" that Wilkinson had the tumor when the 1992 accident occurred. In addition, defendants' medical expert, Dr. Steven Boodin, testified that the 1992 accident could not cause the tumor and that there was no medical evidence to support the theory that trauma from an accident could cause the growth or acceleration of a tumor. Dr. Guithikonda disagreed, however, testifying that the trauma to Wilkinson's head from the 1992 accident could have precipitated or accelerated the symptoms of the tumor that Wilkinson described.

Plaintiffs ultimately filed this lawsuit in November, 1994, pursuant to MCL 500.3135; MSA 24.13135 and trial was conducted in January 1997. After the trial court instructed the jury, defendants moved for a directed verdict which the trial court denied. Subsequently, the jury returned a verdict in favor of plaintiffs in the total amount of $175,000, $150,000 for Wilkinson and $25,000 for his wife. In March 1997, defendants moved for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial, arguing that the verdict was against the great weight of the evidence. Following plaintiffs' response and a hearing, the trial court denied the motion, noting the heavy burden necessary to remove from the factfinder a decision that it has made and stating that he was satisfied that reasonable minds could differ.

## II. Standard Of Review

We review a trial court's decision not to grant a directed verdict or judgment notwithstanding the verdict de novo. *Hord v Environmental Research Institute of Michigan*, 228 Mich App 638, 641; 579 NW2d 133 (1998), citing *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In reviewing a trial court's denial of such motions, we examine the evidence and all the legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. *Phinney v Perlmutter*, 222 Mich App 513, 524-525; 564 NW2d 532 (1997); *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). In reviewing a motion for a directed verdict, this Court reviews all the evidence presented up to the time the motion is made. *Hord*, *supra*. Neither motion should be granted unless there was insufficient evidence to create an issue for the jury. *Zander*, *supra*. "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Id*. "Directed verdicts are not favored in negligence cases." *Lamson v Martin (After Remand)*, 216 Mich App 452, 455; 549 NW2d 878 (1996).

Similarly, when deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Hord*, *supra*; *Phinney*, *supra* at 524. Only when the evidence fails to establish a claim as a matter of law should JNOV be granted. *Id.* at 524-525.

## III. Motion For Directed Verdict/JNOV

### A. Proximate Cause

Defendants first argue on appeal that the trial court erred in denying their motion for a directed verdict or a JNOV on the issue of proximate cause. We agree.

Here, as in all negligence cases, plaintiffs were required to prove that defendants' negligence was the proximate cause of the alleged injuries. *Stephens v Dixon*, 449 Mich 531, 539-540; 536 NW2d 755 (1995). To establish proximate cause, a plaintiff must prove both a cause in fact and a legal cause of his or her injuries. See *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997), citing *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). To establish cause in fact,

> [t]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Weymers, supra* at 648, quoting Prosser & Keeton, Torts (5th ed), § 41, p 269. See also *Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1996); *Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957).]

To establish legal cause, a 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.'" *Weymers*, *supra* at 648, quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977).

An act can be accepted as the proximate cause of an injury without reference to its separation from the injury in point of time or distance, provided there is a direct, natural, and continuous sequence between the act and the injury. *McKine v Sydor*, 387 Mich 82, 88; 194 NW2d 841 (1972), citing 38 Am Jur, Negligence, § 55, p 703. A defendant may also be held liable for unusual results of personal injuries that are regarded as unforeseeable, including cancer. See generally *Nickola v United Commercial Travellers of America*, 372 Mich 600; 127 NW2d 309 (1964); *Matter of Eliasen's Estate*, 105 Idaho 234, 242-244; 668 P2d 110 (1983); *Heppner v Atchison, Topeka & Santa Fe Railway Co*, 297 SW2d 497, 502-504 (Mo, 1956); Prosser & Keeton, Torts (4th ed) § 43, p 291. A tortfeasor takes a victim as the tortfeasor finds the victim and will be held responsible for the full extent of the injury, even though a latent susceptibility of the victim renders the injury far more serious than

reasonably could have been anticipated. See *Rypstra v Western Union Telegraph Co*, 374 Mich 166, 167-168; 132 NW2d 140 (1965); *Richman v City of Berkley*, 84 Mich App 258, 262; 269 NW2d 555 (1978); 2 Restatement of Torts 2d § 461, p 502.[3]

On the other hand:

> Cause in fact, or "but for" causation, means that if the harmful result would not have come about but for the negligent conduct, then there is a direct causal connection between the negligence and the injury. . . . By contrast, legal or proximate causation involves a determination that the nexus between the wrongful acts (or omissions) and the injury sustained is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. In this sense, proximate causation, and hence liability, hinges on principles of responsibility, not physics. Thus, proximate causation is a determination that must be made in addition to a determination of cause in fact or "but for" causation.
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> While proximate cause is not necessarily the cause nearest the injury, the word proximate indicates a requirement of unbroken causation between an act and injury produced by that act. A cause within this unbroken chain of causation is said to be proximate, and therefore actionable, while a cause not within the chain is said to be remote and thus not actionable. [1 American Law of Products Liability (3rd ed), § 4/2. See also *Adas v Ames Color-File*, 160 Mich App 297, 300-301; 407 NW2d 640 (1987).]

Here, we believe, plaintiffs' claim can survive neither the test of cause in fact nor the test of legal cause.

B. Cause In Fact

Dr. Guithikonda and Dr. Boodin, defendants' expert, who were both familiar with plaintiff's medical history and informed of the circumstances of the accident, testified that the tumor likely pre-existed the accident. Both doctors opined that although an accident could not activate a tumor or cause it to grow, in this case, it was likely that the accident precipitated or triggered the symptoms of the tumor. Dr. Guithikonda explained that in this case, where there is a pre-existing brain tumor, an accident can cause friction between the brain and the tumor, thereby precipitating tumor symptoms. Therefore, the tumor did not grow as a result of the accident, but the symptoms "were precipitated by the accident because [the tumor] was pushing on the brain." Dr. Boodin also testified that based on plaintiff's history of no dizziness, nausea, or loss of consciousness, "my opinion is that [the trauma] probably contributed to those symptoms or perhaps caused them." He further stated that he "could imagine that the trauma could conceivably increase the amount of edema around [the tumor] and precipitate some symptomology." He concluded that the shaking of the head could make the swelling around the tumor increase which, "quite possibly caused the symptoms that he complained of right after the accident."

The evidence in this case, at best, established that the 1992 accident may have *precipitated* Wilkinson's *symptoms.* Clearly and unequivocally, the 1992 accident did not, in fact, cause Wilkinson's underlying brain tumor, the basic "injury" here. Applying the "but for" analysis of factual causation, while it can be said that 1992 accident may have "precipitated," or "triggered"[4] Wilkinson's *symptoms*, it cannot be said that but for the 1992 accident Wilkinson would not have had the brain tumor. It is therefore critical that plaintiffs presented no evidence to prove either that the tumor would not have been removed but for the 1992 accident or that the 1992 accident caused the tumor to be removed sooner than it otherwise would have been. Indeed, as defendants point out, both neurosurgeons testified that Wilkinson's tumor was slow-growing and was large in size at the time it was removed by surgery. Further, it was undisputed that the tumor was removed as soon as it became seriously symptomatic. See *Goggin v Peoples Transport Corp*, 327 Mich 404, 408-409; 41 NW2d 908 (1950) (a plaintiff could not recover damages for injury because the medical testimony established no aggravation of tumor or connection between it and accident).[5]

C. Legal Cause

Although the brain tumor diagnosis came years after the 1992 accident, the mere lapse of time between defendant's negligence and the basic injury will not serve to transform that which otherwise would be a proximate cause into a remote cause excusing defendant from liability. *Parks v Starks*, 342 Mich 443, 447-448; 70 NW2d 805 (1955); *McClaine v Alger*, 150 Mich App 306, 313; 388 NW2d 349 (1986) ("in Michigan, a lapse of time from a tortfeasor's negligence to the time of injury will not protect a wrongdoer from liability").[6] When analyzing legal cause, however, the focus is on the nexus between the wrongful acts and the injury sustained. If that nexus is of such a nature that it is socially and economically desirable to hold the wrongdoer liable, then there is legal cause.

Here, then, there are two questions: whether it was foreseeable that defendants' conduct might create a risk of harm to Wilkinson and whether the results of that conduct were foreseeable. There is no doubt that defendants' conduct created a risk of harm to Wilkinson and, therefore, plaintiffs have met the first prong of the test of legal cause. However, even if we accept for purposes of the analysis of legal cause that the results of defendants' conduct were a precipitation or a triggering of Wilkinson's symptoms, plaintiffs presented no evidence of foreseeability. Simply put, there is no way that defendants could have reasonably foreseen, even when construing all the evidence in a light most favorably to plaintiffs, that the 1992 accident would precipitate or trigger Wilkinson's symptoms, the basic cause of which was a then as yet undiagnosed brain tumor. Thus, in this case, there was no showing that the nexus that may have existed between the 1992 accident and Wilkinson's symptoms was of such a nature that it is socially and economically desirable to hold defendants liable.

D. Serious Impairment Of Bodily Function

Defendants also contend that reasonable minds could not differ on the issue whether Wilkinson's tumor symptoms and neck injuries constituted a serious impairment of body function. As we have found a lack of cause in fact and a lack of legal cause, we do not need to reach the serious impairment issue.

E. Conclusion

We conclude that, at best, the probabilities as to causation were evenly balanced in this case and it was therefore the duty of the trial court to direct a verdict for defendants. We further conclude that plaintiffs' evidence failed to establish a claim as a matter of law and that the trial court should have granted JNOV. We therefore reverse and remand for entry of JNOV in favor of defendants. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William C. Whitbeck

[1] Wilkinson had been involved in another automobile accident in 1983.

[2] We note that in August of 1994, Wilkinson was involved in another automobile accident (the "1994 accident") in which he suffered a broken neck. In 1994 and 1995, Wilkinson sought medical treatment for headaches, dizziness, nausea and arm numbness apparently resulting from the 1994 accident. He apparently also continued to experience head pain. We also note that Wilkinson was involved in automobile accidents in 1983 and 1987 and suffered neck and back injuries, that he had a lumber laminectomy, that he was diagnosed with osteoarthritis of the cervical spine in 1983 and experienced similar headache symptoms in 1987.

[3] See also *Eliasen's Estate, supra* at 120; *Armstrong v State*, 502 P2d 440 (Alas, 1972).

[4] At one point, Dr. Guithikonda stated that an accident like the 1992 accident "can potentially precipitate" symptoms due to the trauma. Such testimony could only allow for speculation or conjecture by the jury that the 1992 accident *may* have triggered Wilkinson's symptoms. It cannot be reasonably said, therefore, that Dr. Guithikonda's testimony allowed a determination that the 1992 accident *more likely than not* caused those symptoms. In fairness, however, we also note that defendants' expert, Dr. Boodin, testified that the trauma "probably contributed to the symptoms and may have caused them." Thus, the testimony of *both* experts allowed for speculation and conjecture by the jury.

[5] We note that even Dr. Guithikonda did not testify that the tumor was caused by the 1992 accident, was "aggravated" by the 1992 accident or was accelerated by the 1992 accident.

[6] We do note, however, that the fact of the 1994 accident and the existence of Wilkinson's other medical problems predating the 1992 accident certainly raise questions as to an "unbroken chain of causation" between the 1992 accident and Wilkinson's symptoms.