

PROXIMATE CAUSE AND CAUSATION ISSUES  
IN MEDICAL MALPRACTICE CASES

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## **INTRODUCTION**

Proximate cause is one of the essential elements of a medical malpractice claim. A plaintiff has the burden of showing that a defendant's breach of the applicable standard of care was a proximate cause of injury to the plaintiff. The Pattern Instructions state, "Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and prudent health care provider could have foreseen would probably produce such [injury] [damage] or some similar injurious result." N.C.P.I.-Civil 809.00A. Establishment of proximate cause often requires expert testimony because specialized knowledge beyond what laypersons know is needed to make the showing. *Cousart v. Charlotte-Mecklenburg Hosp. Auth.*, 209 N.C. App. 299, 302, 704 S.E.2d 540, 543, *disc. review denied*, 365 N.C. 330, 717 S.E.2d 375 (2011).

Judges commonly see causation issues in summary judgment motions, motions in limine, motions for directed verdict, and charge conferences. These issues include whether a plaintiff presented sufficient evidence that an alleged breach of the applicable standard of care proximately caused the plaintiff's injury; whether additional explanation of proximate cause is needed in cases in which delay increased the probability of injury or death or cases in which different treatment would have improved the chances of survival or recovery; and whether the defendant's negligence was insulated by intervening negligence.

## **COMMON ISSUES INVOLVING CAUSATION**

### **A. Sufficient evidence of causation**

In *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 847 S.E.2d 677 (2020), the North Carolina Supreme Court considered whether plaintiff presented sufficient evidence of pain and suffering to survive a motion for directed verdict. Plaintiff's expert

testified, based on an analysis of decedent's symptoms and medical records, decedent more likely than not would have had chest pain again between his emergency room discharge and his death later that evening. The trial court denied the motion for directed verdict, and the Court of Appeals concluded that the expert testimony by itself was insufficient to prove damages because there was other evidence decedent may not have had chest pain, and plaintiff's expert testified there was no direct evidence of chest pain after the emergency room discharge.

The Supreme Court reversed the Court of Appeals' ruling for two reasons. First, it was improper to weigh plaintiff's expert's testimony against conflicting evidence—on motions for directed verdict, a court must disregard conflicting evidence. Second, it was error to require direct evidence of chest pain—damages evidence need provide proof only to a reasonable level of certainty. Competent opinion testimony that decedent more likely than not would have experienced pain before his death satisfied this standard. Moreover, circumstantial evidence can satisfy the reasonable probability standard; direct evidence is not required. Although *Savino* does not specifically mention causation, the evidentiary analysis of the evidence required to establish damages is about causation.<sup>1</sup>

Another 2020 Supreme Court decision also dealt with the sufficiency of evidence of proximate cause. Proximate cause is ordinarily a jury question, and if the complaint and record evidence show there may be multiple proximate causes of a plaintiff's injury, there is a genuine issue of material fact, and summary judgment is not proper. Following these principles, in *Da Silva v. WakeMed*, 375 N.C. 1, 846 S.E.2d 634 (2020), the North Carolina Supreme Court

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<sup>1</sup> *Savino* also contains decisions about whether plaintiff had to plead a separate claim for administrative negligence and whether the trial court erred in directing a verdict on a claim of contributory negligence.

affirmed the Court of Appeals' reversal of the grant of summary judgment for defendants based on the trial court's determination that plaintiff's evidence of proximate cause was insufficient.

The Supreme Court looked at plaintiff's expert's testimony that the prescription of Levaquin caused plaintiff's Achilles tendon to rupture and held that the evidence could allow a jury to find the unsafe prescription of Levaquin by any of the doctors, including defendants, was a proximate cause of plaintiff's injury. The Court stated that even though plaintiff was already prescribed Levaquin before defendants continued the prescription, plaintiff was not required to prove defendants' prescription of Levaquin was the sole or exclusive cause of plaintiff's injury, only that it was a proximate cause. The Court held that a jury could find that the prescription of Levaquin was a cause of plaintiff's injuries and that defendants' continued prescription of the medicine was a contributing cause. Consequently, summary judgment should not have been granted.<sup>2</sup>

In another case, *McDonald v. Saini*, 273 N.C. App. 557, 849 S.E.2d 568 (2020), a patient claimed that after liposuction as part of surgery to revise gynecomastia, he had discolored blisters across his chest that left him with severe scarring that led to injections, laser treatment, and another procedure to reduce the severity of the scarring. The patient sued the plastic surgeon who performed the initial surgery. Plaintiff's expert testified that the excessive scarring outside the surgical field was the result of burns that happened during that surgery, but he could not pinpoint anything the plastic surgeon did to cause the burns or scars. The expert also testified that burns like plaintiff's typically require a heat source, but the expert could not identify the cause of the burns and conceded that it was speculation that plaintiff was burned. The plastic

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<sup>2</sup> *Da Silva* also includes a discussion of Rule 702(b) of the Rules of Evidence in the Supreme Court's analysis of whether plaintiff's expert was qualified to testify about the standard of care. The Court affirmed the Court of Appeals' reversal of the trial court's order disqualifying the expert.

surgeon and her practice moved for summary judgment, asserting plaintiff did not forecast evidence of a breach of the applicable standard of care or that the alleged breach proximately caused his injury. The trial court granted the motion.

The Court of Appeals affirmed because plaintiff's only expert witness could not identify a negligent act that likely caused plaintiff's injury. Although the expert had two theories for the alleged burns, he conceded the theories were based on speculation. Evidence connecting medical negligence to injury must be more than a remote possibility; it must be probable.

In another appeal, the Court of Appeals reversed a grant of summary judgment that was based on a finding that plaintiff had failed to offer sufficient evidence of proximate cause. Plaintiff's claim was that the defendant surgeon had breached the standard of care by not ordering an MRI that would have identified a mass as something other than a lipoma, after which he would not have performed the surgery that left plaintiff with nerve damage. Plaintiff's expert testified it was more likely than not if the defendant surgeon had followed the standard of care, plaintiff would not have nerve damage, which resulted from the surgeon injuring a nerve during surgery. A defense expert disputed plaintiff's evidence of proximate cause and posited different possibilities to explain the injury. The Court of Appeals held the evidence presented disputed issues of fact as to which a jury might reasonably differ about whether the defendant surgeon's conduct was a substantial factor in causing the plaintiff's harm. The differences in the parties' evidence were jury matters going to the weight and credibility of the witnesses or to which of multiple events was more likely than not a proximate cause of plaintiff's injury, so summary judgment was inappropriate. *Seraj v. Duberman*, 248 N.C. App. 589, 789 S.E.2d 551 (2016).

B. More probable than not

Evidence of proximate cause must show a defendant's negligence more likely than not caused a plaintiff's injury. Based on this principle, the North Carolina Supreme Court refused to recognize a new cause of action, loss of a chance for an improved outcome. *Parkes v. Hermann*, 375 N.C. 324, 852 S.E.2d 322 (2020). Plaintiff claimed that due to a delay in diagnosis, the time for time-sensitive treatment for her stroke passed, and she lost an increased opportunity for an improved neurological outcome. Plaintiff's expert testified that there was a 40% chance that defendant's negligence injured plaintiff or, in other words, there was a 40% chance that plaintiff's condition would be better if defendant had correctly diagnosed her and timely treated her stroke. Plaintiff claimed that she had a right to recover for a cognizable and separate injury—her loss of the 40% chance of a better neurological outcome. The trial court granted summary judgment on this claim, the Court of Appeals affirmed, and the Supreme Court held that the loss of a chance for an increased opportunity for an improved outcome is not a cognizable and compensable claim in North Carolina. The Court applied the traditional proximate cause analysis, which allows a negligence claim to proceed when there is evidence the negligence more likely than not caused the injury, and refused to recognize a loss-of-chance claim for the possibility that a defendant's negligence contributed to a plaintiff's condition.

At trial, when evidence shows a negligent delay in diagnosis or treatment likely increased the probability of injury or that a different treatment probably would have improved the chances of survival or recovery, a judge should further explain the traditional proximate cause rule (a plaintiff must show that a defendant's negligence more likely than not caused injury).

N.C.P.I.—Civil 809.00A. The additional instruction is set out in the pattern instruction.

One of the cases cited in that pattern instruction is *Katy v. Capriola*, 226 N.C. App. 470, 742 S.E.2d 247 (2013). In that case, some evidence showed a different outcome probably would have occurred if plaintiff had been hospitalized sooner, and other evidence showed earlier hospitalization possibly would have given plaintiff an increased chance of survival. The trial court refused to give defendants' requested special instruction that plaintiff must prove the alleged delay in hospitalization more likely than not caused her stroke and death. The Court of Appeals held the disputed evidence as to whether or not it was probable that plaintiff's risk of stroke increased due to the delay in her treatment required the trial court to instruct the jury that plaintiff must prove the delay more likely than not caused plaintiff's stroke and death. The trial court was required to make clear to the jury that proximate cause requires more than a showing that different treatment would have improved plaintiff's chance of recovery.

The *Katy* opinion and N.C.P.I.—Civil 809.00A cite *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988), in which the Court of Appeals affirmed a grant of summary judgment for defendant when plaintiff's expert's affidavit stated that an earlier transfer to a neurosurgeon would have increased plaintiff's chances of survival. The Court of Appeals stated a plaintiff must show more than that different treatment would have improved the patient's chances of recovery. The Court held plaintiff had failed to forecast any evidence that if defendant had referred the patient to a neurosurgeon sooner, the patient would not have died, noting that the causation connection between negligence and death must be probable, not merely a remote possibility.

In a more recent unpublished opinion, *Wallace v. Maxwell*, 270 N.C. App. 639, 838 S.E.2d 696, 2020 N.C. App. LEXIS 239, 2020 WL 1275307 (2020) (unpub'd), the Court of Appeals upheld a directed verdict for defendants in a case in which plaintiff claimed that a

surgeon had negligently selected the wrong spine surgery to treat severe back pain and leg weakness. The Court stated plaintiff was required to show she probably would have been better off if the defendant surgeon had treated her with a different procedure. The Court rejected plaintiff's argument she was required to establish only that the surgeon's treatment probably caused her injury. Instead, plaintiff needed evidence it was more probable than not that a different outcome would have occurred with different treatment. Her evidence did not show another procedure would have improved her chances of recovery, and the trial court properly granted directed verdict for defendants.<sup>3</sup>

### C. Insulating/intervening negligence

In *Hampton v. Hearn*, 269 N.C. App. 397, 838 S.E.2d 650, *disc. rev. denied*, 374 N.C. 425, 840 S.E.2d 787 (2020), the Court of Appeals discussed intervening negligence in deciding whether a defendant doctor who claimed another doctor's negligence insulated defendant's negligence had to provide expert testimony of the elements of a medical malpractice claim against the non-party doctor. Intervening negligence, sometimes also referred to as superseding or insulating negligence, is an elaboration of a phase of proximate cause. If evidence warrants an instruction on intervening negligence, the burden of proof does not shift to the defendant. Intervening negligence is an extension of a plaintiff's burden of proof on proximate cause. The pattern instruction is N.C.P.I.—Civil 102.65.

The Court explained intervening cause is a new proximate cause that breaks the connection with the original cause and becomes solely responsible for the result in question. The new cause must be an independent force that entirely supersedes the original action and renders its effect on causation remote. If the original cause remains active, liability for its result is not

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<sup>3</sup> The opinion also upholds the trial court's exclusion of plaintiff's expert witness, with an analysis of Rules 702 and 403 of the Rules of Evidence and the expert's reliance on medical literature that the trial court found unreliable.



shifted. If the intervening responsible cause could not reasonably be anticipated by a prudent person, a defendant is not responsible for damage resulting solely from the intervening cause. An intervening cause may be culpable, intentional, or negligent.

The test for determining whether a defendant's negligence is insulated as a matter of law by the independent negligence of another is reasonable unforeseeability of the subsequent intervening act and resultant injury. To break the sequence of events and insulate the defendant's negligence, the intervening conduct must be such that the defendant had no reasonable ground to anticipate it.

Misconduct by others is not always unforeseeable. A defendant's conduct may create the risk of wrongful conduct by others. If nothing should alert a defendant to the danger of wrongful conduct by others, the law does not require a defendant to anticipate specific acts of negligence by another. Evidence that a defendant could not anticipate someone else's negligent subsequent conduct can justify an intervening negligence instruction. Except when it is so clear that there cannot be two opinions among fair-minded people, the jury should be allowed to determine whether defendant could reasonably have expected the intervening act and resulting injury to occur as a result of the original negligence. When evidence supports either of two theories of proximate cause, a trial court should instruct jurors on intervening negligence so they can determine whether intervening negligence insulated the defendant's original negligence.

An instruction on intervening negligence is proper when there is evidence tending to show an intervening cause broke the connection of the original wrongdoer and evidence that the original wrongdoer had no reasonable ground to anticipate it. A plaintiff's own evidence may reveal that a cause was an intervening cause. If so, an instruction on intervening negligence is proper, as long as the intervening cause is an independent force that entirely supersedes the

original action and renders its effect on causation remote. Even if a third actor is not a party at trial, a court may give an intervening negligence instruction if the evidence shows that the third actor's conduct was a sufficient intervening cause. In a medical malpractice case, there is no requirement that a defendant present expert testimony on the standard of care and breach by the third party to warrant an intervening negligence instruction.

In *Hampton*, defendant placed a stent in a patient at the junction of two cardiac blood vessels. Three days later, another doctor passed a catheter through cardiac vessels and encountered a foreign body—part of the stent defendant had placed, with a fracture on it—and the patient had cardiac complications. Plaintiff's evidence was defendant negligently placed the stent too far into the superior vena cava. Defense evidence was defendant could not anticipate the other doctor's conduct and the fracture of the stent was unforeseeable. The Court of Appeals held that because the parties presented two theories of proximate cause at trial, the trial court properly instructed on intervening negligence.

In an unpublished opinion, the Court of Appeals reviewed a grant of summary judgment for a defendant doctor based on the trial court's determination plaintiff failed to produce evidence of proximate cause. *Monroe v. Rex Hosp., Inc.*, 272 N.C. App. 75, 844 S.E.2d 43, 2020 N.C. App. LEXIS 486 (2020) (unpub'd). The defendant doctor had ordered blood products as a bridge therapy treatment before the initiation of further treatment. Other providers delayed the administration of the blood products, and the patient died. Plaintiff's expert testified that the bridge therapy treatment was a breach of the standard of care, but he acknowledged the patient more likely than not would have survived if the blood products had been timely administered.

The Court of Appeals set out the legal definition of proximate cause and noted that the natural and continuous sequence of causation may be broken by the negligence of a second actor.

If the second actor creates a new cause that intervenes between the original negligence and the injury, breaking the chain of causation started by the original wrongdoer, the second actor is solely responsible for the injury. An intervening cause insulates the original wrongdoer's negligence if the cause is an independent force that redirects the sequence of events started by the original wrongdoer and produces a result that would not have occurred otherwise and could not have been reasonably anticipated. If the evidence shows merely a possibility of proximate cause, the evidence is insufficient for the issue to be left to the jury.

Applying these principles to the evidence, the Court of Appeals stated that no evidence showed the subsequent negligence (delay in administering blood products) was directly related to or dependent on defendant's alleged negligence. Plaintiff's causation expert testified that the negligent delay redirected the sequence of events defendant started when he ordered the blood products, but the delay produced a result that would not have otherwise occurred. According to the expert, it was reasonable for defendant to anticipate the blood products would be timely administered, which the Court said meant the delay was not reasonably foreseeable to defendant. The hospital's failure to administer the blood products was an independent force removed from defendant, such that he could not have foreseen it.

The Court of Appeals noted that North Carolina law did not obligate defendant to anticipate negligent acts by others, and he was entitled to presume others caring for the patient would perform their duties. It was not reasonably foreseeable that the blood products would be delayed, leading to the patient's death. According to the Court, the delay redirected the sequence of events defendant set in motion. Under the circumstances, plaintiff failed to prove proximate cause, and the trial court's summary judgment order was affirmed.

## **CONCLUSION**

Proximate cause analysis is highly fact intensive. As with other negligence issues, it is relatively rare that the evidence is so clear cut that a judge should remove the issue from a jury's consideration by summary judgment or directed verdict. At trial, if any evidence would allow a jury to find intervening negligence, a judge should give an appropriate instruction.