ORAL ARGUMENT – 09/03/03
01-0926
IHS CEDARS V. MASON, ET AL.

FRASER: Respondent, Jody Mason, was injured in a one car accident when the driver used faulty, evasive action to avoid a dog in the road, 40 miles from Cedars Hospital, 28 hours after her discharge. This court should reinstate the petitioner's summary judgments on the following grounds: First, their health care was too attenuated to Mason's injuries to have caused it, that is that no legal cause exist as a matter of law between their conduct and her injuries. Secondly, Dr. Ramos owed Mason no duty to protect her from the conduct of third persons, not his patient under these facts and circumstances.

PHILLIPS: If this accident had happened ten minutes and 1 mile away from the time and place of her discharge, would the situation be different?

FRASER: The legal cause possibly. But the legal cause analysis contains several considerations: temporal and geographical being two of them as this court held in Bosley(?). But the mechanism, the immediate cause of her injury was the car accident. The mechanism was evasive action that was negligent in avoiding a dog in the road. So if it were closer in time and closer in distance, we believe that the conclusion would not be any different because of the mechanism in causing her injury.

O'NEILL: Don't we have to presume for purposes of this record on summary judgment that it was not the dog that caused the injury, but a psychotic episode?

FRASER: No. We believe that that inference that the CA used was unreasonable because the affidavit testimony that she had a psychotic episode was conclusery and purely speculative.

O'NEILL: Let's presume that it was not. Let's presume that it was competent summary judgment proof and we had to take as true. I understand you contest the underlying basis for it. But let's say we had to take as true that she did have a psychotic episode. Would your argument be different?

FRASER: No. There would still be no legal cause for this reason. First of all, that affidavit — let's assume that that affidavit is competent evidence. When you see Dr. Kramer's affidavit, he said that her angry rage that Mason, the passenger noted, was consistent with a psychotic episode. And then Mason says she accelerated and then took the evasive action. He doesn't go further. He just says that that psychotic episode was foreseeable. But he never opines or gives any statement in his affidavit that that psychotic episode was a cause in fact of Mason's injuries. So first of all, even if we take his conclusion as being probative, which we argue it is not, he doesn't go the step further and say that it was a cause in fact. But secondly, what's critical, what's

absent from this record is Mason's mental state. Did it cause her injury? For them to prevail they have to show that we discharged a patient that was mentally ill and that it was her illness that caused her injury. There was no evidence in this record of her state of mind when she got into the car. There was no statement in her affidavit that she knew she was in harm's way, she expected to be injured, that she had some thinking in her mind that when she got into the car with Thomas at the wheel, that she was in danger, that she was acting out her supposed passive suicide that was indicated in her medical records early after her admission.

So the absence of that evidence coupled with Dr. Kramer's affidavit not going further into cause in fact still supports our argument that there was no evidence, no fact issue on proximate cause.

PHILLIPS: Is it possible that Cedars Treatment Center and the nurse might be negligent when neither one of the doctors were? That is that each doctor only had a duty to know about their own patient, but that the treatment center itself might have a duty to know about the interrelationship between these patients.

FRASER: There are cases where hospitals have a duty to protect their patients when they are in their care, custody and control. That is the law in Texas and elsewhere. But the negligent act that Mason is asserting in her petition was the discharge. And of course the physicians discharged the patient. Dr. Ramos discharged Jody Mason and Dr. Meyer, who is not before the court now, discharged _____. So that call is made by the physicians.

This court of course has held that a person is not responsible for the remote results of his wrongful conduct. And, therefore, there is a boundary, a line separating cases where legal cause may exist and where it cannot exist as a matter of law. And this case presents the court with the opportunity to define that line and legal cause. And that is a legal question that the TC can make. They argue that the affidavits usurp, take away that ability. And that when you have medical malpractice cases in which affidavits are necessary or expert opinion is necessary that you can't have legal cause. And that's just not correct. Because in that instance any expert could say, Well let's say the accident was 3 months later, and I think it was foreseeable. A court can say no, the ripples of someone's conduct even though they continue on their effect has to stop at some point in time, or else we could always responsible.

JEFFERSON: Isn't there evidence that Dr. Ramos knew that there was a destructive relationship between Mason and Thomas? And isn't there evidence that he also knew that they were planning to spend time together? Can't that lead to at least an inference, and maybe not direct evidence that knowing that they were going to spend time together and that both of them had mental problems that could have led to harm to Mason without respect to what kind of harm it would be?

FRASER: As to the first, the medical records show that there was a roommate or someone, that there was an inappropriate relationship as nurse Marx opined or stated. And that she feared someone. Dr. Ramos was not told that they would be going out together. She mentioned a

Cindy to him. But no one knew really, or Dr. Ramos didn't know that they would be going out together. And the nurse knew that they would be spending some time together.

But that does not change our facts. Because Dr. Ramos as far as he is concerned did not know that they would be spending time together. He did not know a Cindy Thomas. She was not his patient. And Nurse Marx knew that they would be spending some time together.

JEFFERSON: Isn't there evidence that Nurse Marx told Ramos that they would be spending time together?

FRASER: She said in her deposition testimony in the record that she told Dr. Ramos that Mason will be spending some time with a Cindy. And Dr. Ramos said, I didn't know who Cindy was. Again, we go to, Is there evidence that the mental conditions of both patients were a cause in fact of this injury? If you assume Dr. Kramer's affidavit is probative on that point, the evidence doesn't reach that far.

WAINWRIGHT: Assuming Dr. Kramer's opinions are competent summary judgment evidence, do you lose necessarily?

FRASER: No. Because even if competent on the issues he addressed, he did not address cause in fact. And secondly, he did not address nor did any other person address Mason's mental condition at the time she got into the car. That she got into the car because of her mental illness. They just skirt that issue. They don't address it. There's no evidence of that. And they have to have that evidence. Their position is, we discharged a mentally ill patient. And Dr. Kramer says if she was so bad off that she should have been committed under state court ordered committed proceedings. So letting this adult woman with a child, who had voluntarily admitted herself into the unit, even though he diagnosed her as being non-suicidal. As she was okay, he wanted her to stay but he felt he couldn't discharge her. Notwithstanding all of that, that he lets her out and he's not responsible for her conduct. But even assuming she was ill, and she did get out there has to be evidence that that illness, which is the reason why they claim she shouldn't have been discharged in the first place, was intimately related to her injury.

O'NEILL: So if she herself had been driving and had a psychotic episode, you would say there would be liability here?

FRASER: It would be a closer call. She's not in the direct care and custody and control of Dr. Ramos. The cases that talk about protecting people from their own harm as well as the harm they may cause others deal with a right of control if they are in like common carriers, innkeepers, patients who are inside the hospital. That would be a different case, not this case. But it could be a closer argument of liability if it was in fact her mental injury that caused the accident.

This case is just as attenuated if Mason were walking down the street and a

wayward car hit her. She was out. Yes. But for her discharge she would not have been there. But that of course is just sitting up the condition. And their position is, and you can see Dr. Kramer's affidavit it's all about she would not have been in the car. She would have been inside. In fact on page 35 of Mason's brief, she says that if we had discharged her after 96 hours, then there would be no cause in fact, and there would probably be no negligence.

WAINWRIGHT: Which goes to the point of one of respondent's arguments, which is that Dr. Ramos is at least in part responsible is the argument, because he discharged Mason at the same time as Thomas. And as I read the briefing and some parts of the record, it does seem to indicate that Dr. Ramos did not know that the two were being discharged at the same time. But he also as I recall testified in his deposition that it would have been appropriate for him and he had a duty to learn that or to know that didn't he?

FRASER: He said that if the two patients were suicidal and were going to kill themselves, that it would be something that he obviously would want to know about. That's what his testimony is in his deposition. And he did say that he didn't think it would be appropriate for any pier to be discharged at the same time. Of course he did not know that they were discharged at the same time.

WAINWRIGHT: The point I just raised is one of the two reasons why you argue Dr. Kramer's opinion even if legitimate summary judgment evidence does not end the case against you. The other is that there was no testimony from Dr. Kramer that any of the conduct of your client, Dr. Ramos, was the cause in fact. As I read it, Dr. Kramer says that based on reasonable medical probability the forementioned breaches of the standard of care constituted negligence and were a proximate and foreseeable cause of the injuries suffered. Are you saying that that statement does not touch on cause in fact?

FRASER: No. It's a conclusery statement. Just like in ____ v. Yellen(?) and Earl v. Ratliff, a conclusery statement that here is the negligence. It was a proximate cause. Is not probative. He never ties in how he can make a diagnosis of a psychotic event based upon angry rage.

WAINWRIGHT: Let's assume that it's not a conclusery statement and it is permissible summary judgment evidence. And let's assume that your issue about no testimony from Dr. Kramer, no expert opinion about Mason's illness leading to the accident is a non issue. So again let's assume Dr. Kramer's expert opinions are admissible. Is there any basis for considering that an expert's opinion, even if admissible on a causation, may still be too remote to make causation established or to raise a fact on causation?

FRASER: Yes. Our position is is that notwithstanding expert testimony, even if the court considers it, this is a question of law that remoteness -it's too remote. You can have expert opinions all day long but if the facts are undisputed about the cause of the injury verses the discharge, they are too remote, they are too distant, they are too attenuated, then the expert evidence,

the expert affidavit is just not material. It's a question of law. So even if the court considers his affidavit as probative evidence, otherwise competent, it's still legal cause and it's not material.

This is a car wreck case. Expert opinions do not impact this.

WAINWRIGHT: Would this be the first time a Texas court has said that? If we say that in fact, that even with competent expert testimony that causation exist, that a court may say that there still is too much attenuation between the incident and the injury for there to be causation?

FRASER: No. Park Place v. Milo. There was an expert affidavit that opined a reasonable medical probability regarding the cause of death. And this court held in that case that notwithstanding that affidavit, which was otherwise probative or competent to meeting all the standards of an expert affidavit, still did not determine causation. Because the other evidence in the case supported the fact that the patient only had a 40% chance of survival. So in Park Place v. Milo, _____ v. Ratliff, the expert just went on about negligence and it was not probative. So there are two other cases.

WAINWRIGHT: In those two cases did the expert opine that there was causation?

FRASER: In Park Place v. Milo, yes. In Ratliff, that was primarily - I think it was also causation, but the court went off primarily on its conclusery as to the standard of care.

WAINWRIGHT: So it's your position that Dr. Kramer's testimony is not admissible, not competent evidence and you win. In the alternative even if Dr. Kramer's expert opinions are competent to be considered, you believe there's still room for you to win?

FRASER: Yes. Because it does not usurp the court's ability to make determination as a matter of law that the injuries are too remote from the conduct of petitioners.

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RESPONDENT

MCGARRY: This court has held repeatedly that it will not amend or revise the rules of civil procedure by opinion. And yet that is exactly what the petitioners in this case are asking this court to do.

Rule 166(a)(c) clearly says that as to any subject matter concerning which the trier of fact must be guided solely by the opinion and testimony of experts, its summary judgment may be granted only on the uncontroverted testimonial evidence of an expert witness. The same rule also says that summary judgment may be based on the testimony of an interested witness only if that testimony is free, clear from inconsistencies positive and direct and could have been readily controverted. This is exactly that type of case. We're dealing with proximate causation in a medical malpractice case, which must be guided by expert testimony. The only expert testimony that the

defendants offered in this case was their own affidavits. They did not hire experts.

Their own expert affidavit testimony was purely conclusery. They both deny causation and foreseeability, but they themselves did not state any reason why it was not foreseeable, or why there was no causation. Their own opinions were far more conclusery than anything, any standard they asked this court to hold our witnesses to.

O'NEILL: Does your case depend on some proof of a psychotic episode? In other words, if she had been in the car with Thomas who had just swerved to avoid a dog and had the accident, you wouldn't have a case. Right?

MCGARRY: I think that's right. I think that's an important part of this case because in fact the eyewitness testimony in this case, and I think Judge you are right in that they are misapplying the proper standard of review in assisting on a version of facts that is favorable to their motion, which is completely contrary to the proper standard of review that this court must accept the facts most favorable to the nonmovant. And the facts in this case are based on the only eyewitness testimony available, which is that the driver, Ms. Thomas, went into an uncontrollable angry rage as a result of Ms. Mason's affections expressed towards the third passenger, Mr. Cleveland, that that set off the driver. The fact that she went into this uncontrollable rage is completely consistent with the long documented medical history of this patient, Ms. Thomas.

O'NEILL: And presuming that being the case, what if Ms. Thomas had not been a patient at IHS, had just been a friend from outside. Does your claim also depend upon the fact that Thomas was subject to some supervision at the same facility?

MCGARRY: I'm not prepared to say that that would destroy the case, but it would certainly make it far weaker.

O'NEILL: Weaker in terms of attenuation.

MCGARRY: Yes. Well weaker in terms of foreseeability. Because what we have here, and what I think is important for this court to remember, is that every single psychiatrist who testified in this case, including Dr. Ramos himself, testified that under the facts it was not proper to discharge these two patients together. Dr. Ramos said that if I had known of their relationship, and if I had know they were being discharged together, I would not have discharged her.

PHILLIPS: And did he have any duty to know of their relationship?

MCGARRY: Yes, for two reasons. First, because it was in the medical history. The medical history reflected an unhealthy relationship that Ms. Mason had with another patient. The nurse in this case, Nurse Marx, knew of the relationship. In fact the thing to remember is that Ms. Mason and Ms. Thomas were roommates. They were roommates at this hospital.

PHILLIPS: But is a doctor charged with knowing who his/her patients roommates are?

MCGARRY: Dr. Ramos originally filed the summary judgment affidavit in this case in which he had contended that this discharge was against medical advice. The proper protocol when the discharge is against medical advice, is to have a personal interview with the patient to discover the circumstances of the discharge. And he did not follow that protocol. He didn't even so much as ask to talk to Ms. Mason on the phone even though Ms. Mason was standing right by the nurse when the nurse called this in.

HECHT: But if he had, you would still have a case?

MCGARRY: Well he says that if he had there would be no discharge. The inference there is that if he had she would not have been discharged. The cause in fact in this case couldn't be clearer. And I think Mr. Fraser misrepresented the law or misstated the law. Our expert in this case, Dr. Kramer, did not say that commitment proceedings were necessary or advisable. The governing statute at the time made the 96 hour hold automatic. No legal procedures were required. Every doctor in that circumstance who determines that a patient is at risk has the authority to hold that patient against their will for 96 hours. In addition to the statute the contract that Ms. Mason and all the patients sign when they admit themselves voluntarily to this hospital grant that power contractually to the hospital and to the doctors to hold them against their will for 96 hours.

OWEN: But at some point he's got to let her go. She's going to be responsible for her own actions isn't she?

MCGARRY: Everybody says in this case, and again, including Dr. Ramos, if you knew the facts you had a duty not to discharge her and to do the 96 hour hold. The purpose of the 96 hour hold is to allow time to begin the legal proceedings necessary for an involuntary commitment for a greater period of time.

O'NEILL: Do you agree with the statement that in order to recover you have to show that Mason's mental illness caused her injury?

MCGARRY: No. I think that's a part of it, but I don't think that's exactly what we have to show. I don't think that's necessary. In this case the danger was the circumstance under which she was being released. And in fact, I think the evidence does show that her mental illness played a large role in the danger that all the doctors foresaw. Now you have to remember that the definition of a discharge against medical advice "AMA" is that the doctor reaches a conclusion that the patient is a danger to herself or to others. And so for Dr. Ramos to say this was an AMA discharge, he is admitting that Ms. Mason at that point in time was a danger to herself.

O'NEILL: Because she's mentally ill.

MCGARRY: Because she's mentally ill.

O'NEILL: Don't you have to connect those dots between her mental illness and the injury?

MCGARRY: It was. And I tell you exactly how it was. You have to remember what all the experts in this case said: it was the joint discharge. It was two factors which by themselves may not have caused the injury, but when combined were certain to cause the injury. What you had here, and this is all documented in the medical records, is you have a patient Ms. Mason who was diagnosed with severe depression to the point where she lacked any ego whatsoever.

OWEN: What if this had been her husband? What if there were documentation in her record that she had had arguments with her husband over the last 5 years. And she asked to be discharged. Her physician discharged her and then she and her husband got into a fight and he wrecked he the car. Would this be any different?

MCGARRY: The immediacy might be slightly different. But, no. The analysis is basically the same. A doctor who is discharging somebody in the circumstances of against medical advice has a duty to learn the circumstances of the discharge: who is the patient being discharged to? Is the patient being discharged into a safe environment, or into a dangerous environment? And if the dangerous environment is at home and it's the husband coming to pick her up, I think that's just as dangerous as discharging her in the company of a psychotic. We have a more extreme case in this case. We have a discharge into the care and custody of a dangerously delusional psychotic.

OWEN: What evidence is there that Dr. Ramos knew that she was being discharged into the custody of someone who was mentally ill?

MCGARRY: The evidence is that he should have. Now there is controverting evidence. And this is the main point I wanted to start with. 166(a)(c) says that their expert testimony has to be free from inconsistencies and it has to be readily controvertible before you even start looking at the respondent's evidence in this case. And their evidence was wholly inconsistent. Dr. Reynolds contradicted himself. But he and Nurse Marx contradicted each other on all of the facts regarding this discharge. Dr. Ramos said it was AMA. Nurse Marx said it wasn't. Then Dr. Ramos starts to try to retract his prior testimony that it was AMA. The medical records in this case were authored. The original medical record chart entry regarding the discharge says discharge pursuant to patient request and doctor order. The part regarding doctor order was crossed out.

Finally, the witnesses contradicted each other on what Dr. Ramos was told. Nurse Marx said, I told him that she was being discharged with Cynthia Thomas. And Dr. Ramos said, I didn't put two and two together. That didn't register to me. I had no idea who that was. Well he had a duty to ask. That was his duty. He failed to do it. He should have known. Nurse Marx said he did know. He denied it.

O'NEILL: What if the accident had happened three weeks later?

MCGARRY: I think cause in fact depends in large part on the fact that the accident occurred within 96 hours. Which goes to the whole remoteness issue. Remoteness has to be measured in context. If we're talking geological issues you could have something happen 10, 20, 100 years away, but geologically it's not remote. Here in this particular case, I think the standard of remoteness is the 96 hours that these doctors had a duty to hold this patient for.

OWEN: What if they discharged them 8 hours apart, and the accident happened 98 hours after Mason was discharged?

MCGARRY: I think the cause in fact would be much weaker because it wasn't beyond the 96 hours. As to whether the discharge was negligent because it was separate by 8 hours or whether it was not negligent would depend on the other facts of that situation. Who was she being discharged to?

OWEN: Wouldn't you be saying that he should have voluntarily committed her? Every step we go, your argument basically is it's saying if you've got someone who has voluntarily committed themselves, a physician unless they are absolutely sure they are not a danger to themselves or others should move for voluntary commitment to protect themselves...

MCGARRY: Absolutely not. Dr. Ramos admitted that he should have committed her. He said if I had known about their relationship and if I had know they were being discharged together, she shouldn't have been discharged. End of story.

OWEN: That's different from all involuntary commitment. Basically you're saying anytime you've got a patient who's depressed or who has a history, to protect yourself as a physician don't you have to ultimately seek involuntary commitment just to make sure that you're...

MCGARRY: During that 96-hour period you have to. But for the 96 hours you don't need to do anything. The doctor has unilateral authority both under the statute and...

OWEN: But if you let her go at the end of the 96 hour period, you are still liable if you didn't seek involuntary commitment.

MCGARRY: It depends on the patient's circumstance. And the thing you have to remember is that these opinions - Dr. Ramos's opinion, Dr. Kramer's opinion are based on the medical history of these specific patients. And what you have to remember is that the medical records for Jody Mason showed that in the hours and days immediately preceding her discharge, she suffered significant deterioration in her mental capacity. I mean that's documented in her medical records. She was going downhill at the exact moment of her discharge and her doctor knew that. It was in her chart.

And so that was why he admitted so freely that I shouldn't have discharged her given that she was in a deteriorated state had I known that she was being discharged with

somebody who would take advantage of that deteriorating state. And that's exactly what happened.

WAINWRIGHT: If Dr. Ramos had held Ms. Mason for 96 hours and then discharged her, and assume all the other facts of this case are the same, would there or would there not be liability?

MCGARRY: It would depend on Ms. Mason's state at the moment of discharge 96 hours later. He had assessed her...

WAINWRIGHT: Let's assume that the discharge then was valid and supportable based on reasonable medical probability after 96 hours.

MCGARRY: She would have had to have experience significant marked improvement in her condition in those 96 hours, plus the circumstances of the discharge would have to be different. I don't think it still wouldn't fly if she was being discharged with somebody who was dangerous. She was being discharged to a dangerous person.

WAINWRIGHT: Assuming all the other facts of this case are the same, so Thomas was discharged under my example 96 hours before Mason. And assume Dr. Ramos made a personal inspection or evaluation of Ms. Mason at the 95th hour, and then discharged her. And all the other facts were the same. Liability or not?

MCGARRY: Much weaker liability case. Again, I can't speculate how it would be viewed under that alternate scenario, but it would be obviously a much weaker liability case because we are in fact relying on the fact of her mental condition at the moment of discharge in this case and the circumstances of the discharge in this case.

WAINWRIGHT: And we do have an important obligation as a court to resolve this case. We also have to look at the affects of this case and the causation arguments that both sides are making here. In fact where do we draw the lines? And that's what I'm asking you to help us do. So where do we draw the line?

MCGARRY: I think one of the important issues in this case that Cedars raised in its brief that I actually agree with is that the substantial factor analysis that this court engaged in in the Union Pump case and its progeny created a lot of confusion for the bench and bar, because I think the bench and bar remain uncertain as to the relationship between the substantial factor analysis and the traditional foreseeability analysis. And to resolve that confusion, I would submit to this court that it should accept J. Cornyn's concurring opinion in Union Pump that these concepts are in fact one in the same. That if you look at the history of proximate causation, the notion of foreseeability was added to the notion of legal proximate causation in the _____ Graff(?) case going back 75 years to address the very same issue of remoteness that the court sought to address with the substantial factor analysis in the Union Pump case.

Just as a matter of theory construction using _____ Razor - it's just bad theory

construction to use two different concepts to address the same problem when one concept will do.

WAINWRIGHT: Does that resolve your problem? You're saying have the same standards but instead of a two-prong test, a one-prong test. We still have to deal with attenuation, whether the incident was complete and where we draw the lines here between an act and causation with the accident. So isn't what you're saying really begging the question?

MCGARRY: To that extent it does. In this particular case where you draw the line is that if there is competent expert testimony on the issue of causation and foreseeability that's admitted into evidence, that that is the line, that the court must be guided by that expert testimony

WAINWRIGHT: Was this expert challenged in the Havener hearing?

MCGARRY: No. And that would have been the proper procedure to follow if somebody thought this expert's opinion was completely off the wall and unsupportable based on the psychiatric science available. That would have been the proper procedure. It was not done in this case.

WAINWRIGHT: Are you saying that if an expert who's qualified and there's a reliable basis in fact for their opinion and they have sound methodology that courts of the State of Texas are bound to accept their expert opinion on causation?

MCGARRY: Absolutely. And this court has held that consistently for over 50 years dating back to the...

OWEN: Let's test that. What if this accident occurred three months after the discharge. And you found an expert who would say that a reasonable medical probability had you not discharged them together on that day this accident three months down the road would never have occurred. Are courts bound by that?

MCGARRY: The remedy is a Havener hearing. If you think the opinion is that off the wall, the remedy is a Havener hearing.

OWEN: He's got the credentials. He says that this is my opinion based on treating all of these patients, all of these years, three months down the road this was foreseeability.

MCGARRY: Yes. And I think that's necessarily true. There is so many fields of science and expertise. For a judge to say well that's just too off the wall for me, I can't buy that, puts you in the position of being a super expert. And some of the examples I've provided again in the field of geology. If somebody drills a gas well and the issue is was that a substantial factor in destroying a geyser that's 100 miles away 6 months later? Well how is a judge going to decide that based on the judge's knowledge and experience. Why doesn't the judge have to be guided by expert testimony on something that a lay person may think there's no connection whatsoever but to an expert there is a clear connection. A judge is not qualified to supersede an expert on those issues.

O'NEILL: In addressing the causation piece. In order to address that do we have to know how the duty is being defined? In other words, it strikes me from your argument that you're defining this duty as the duty to protect someone from dangerous third parties. And that seems to me as though it would lead down one path to review the evidence on causation. But if you define the duty as to not release a mentally ill patient, to protect her from injuries that might be caused by her own mental illness would be another path. And that strikes me from your argument, you're not going to the latter route because you would concede her own mental illness did not cause her injury.

MCGARRY: I think you have to accept the duties laid out by the experts. Because 1), the TC specifically denied summary judgment on those issues.

O'NEILL: I'm not saying - I'm trying to define the duty in terms of how we proceed with the causation piece. I understand if you've got a doctor who testifies you should not release a mentally ill patient, and you should have known about this interrelationship between the two. But if the duty is not to release a mentally ill patient, then in order to address the causation piece we would have to look at evidence that her mental illness caused the injury.

MCGARRY: It was a contributing factor which I think all of the expert testimony admits that just because of her interrelationship with the other patient. Her particular mental illness rendered her particularly susceptible to being injured by others. Her illness was a lack of ego and an acceptance of the risk of being injured by others.

O'NEILL: My understanding is there is no evidence that she did anything as a result of her mental illness that caused the accident.

MCGARRY: Her mental illness is the reason she wanted to go with Cynthia Thomas. She was bonded to her. She was following her like a slave.

O'NEILL: But no evidence that her mental illness caused the automobile accident?

MCGARRY: No. But I don't think we have to show that. We have to show that her mental illness caused her to be in that car.

WAINWRIGHT: Does the fact that this is a medical negligence case in your opinion change any of our analysis about causation when we have Union Pump and Siegler and other cases that lay a framework for considering causation?

MCGARRY: I think Union Pump did not change any of the analysis as to cases on which the trier of fact must be guided by expert testimony. If you look at the substantial factor analysis that's laid out in Union Pump, substantial factor is defined from the point of view of a reasonable man. Just like it is in every normal negligence case. Substantial factor in whose judgment? Well in the normal judgment of a reasonable man as found by the trier of fact. Where it recognizes that there are some cases in which reasonable fact finders couldn't disagree. However, when you're

dealing with a case in which the issue of causation must be governed by expert testimony, the substantial factor analysis can't be judged from the point of view of a reasonable man. It must be judged from the point of view of a reasonably prudent expert. Just as foreseeability in these cases must be judged from what is foreseeable to a reasonably prudent expert. And so the Union Pump analysis has to be modified to change the point of view of who's measuring substantial factor? Just like to whose foreseeability is important? And in these cases it is the foreseeability to the expert and substantial factor opinion of the expert that must be controlled.

WAINWRIGHT: If Dr. Kramer's pertinent expert opinions are excluded do you lose?

MCGARRY: No. Because again of the inconsistencies and conclusery nature of the defendant's own expert. They had the burden of proof. This was a traditional motion for summary judgment and they just simply didn't carry their burden.

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REBUTTAL

LAWYER: Legal cause goes beyond cause in fact. It goes beyond foreseeability. Legal cause has policy implications involved in it. Other factors that are the province for the court. Who is better qualified? I asked the court rhetorically to judge a question of law that we find in Union Pump, that we find in Lier Siegler, that we find in Milo(?). Who draws the line? A paid expert...

O'NEILL: Does the duty drive the analysis? In other words, if we were to hold that the doctor did have a duty to protect her from dangerous third parties, then it strikes me that there could be causation. But if you define the duty as not to release a mentally ill patient, there is no evidence that the mental illness caused the injury. So do we first have to address the duty question in order to evaluate the causation piece?

LAWYER: I don't think they are inextricably linked in the same way that I think there can be findings that something is foreseeable, but yet not sufficient to constitute legal cause. I think it's the same analysis. The duty issue is tied in. Perhaps it's tied in to foreseeability. But for instance we can have a case where something could be foreseeable. Or we could get an expert to say something is foreseeable. But yet that does not constitute legal cause. And in this case the fallacy is saying that the court has to be guided by expert opinion. At first we were told this is a medical malpractice case, but then as in the briefing and as opposing counsel stated in his argument, it could be a geologist. It could be an atomic physicist. It could be any subject that we could have a retained expert that could invade the province of the court, which is to answer questions of law. There is no case that says legal cause has now become a question of fact where the court must be guided by expert testimony. In fact the Milo case that the court discussed earlier in petitioner's presentation proved exactly the opposite. The court did not need to accept expert testimony. And the important factor on causation in looking at this case is that foreseeability is only one of the elements. Even if you accept the medical evidence offered by Dr. Kramer on foreseeability, there is no a shred, a scintilla of evidence that ties the evasive action to any psychotic episode. The only eyewitness, and

we do have an eyewitness in the record - Ernie Dillard, the police report said they took evasive action to avoid a dog and over-corrected the steering of the Corvette.

JEFFERSON: While they were going over 100 mph.

LAWYER: Absolutely. They were speeding. That doesn't link up a mental disability, particularly with Jody Mason. There is no link in showing that because of her mental state, she was involved in this car wreck. In fact, if you accept opposing counsel's comments, because of her weakened ego, because of her passive suicide tendencies, her exposure to anybody whether it be her husband who is in the clinic suffering from certain drug dependencies, whether it be to any person with a strong personality, any exposure at all is going to put her in harms way. And that does not satisfy the concept of justice in equity that this court cited when it was talking about causation. I would refer to an interesting case - Kramer v. Lewisville Memorial Hospital. This court quoted CJ Riley from the Michigan SC and said, To protect the integrity of our goal of arriving at the truth, there must be some degree of certainty regarding causation. Kramer is instructive because this court also said there is no reason to treat healthcare providers any differently. It said to dispense with this requirement this court said is to abandon the truth seeking function of the law.

WAINWRIGHT: Why did we use the term legal cause instead of proximate cause?

LAWYER: I believe that the concepts are distinct. I believe that the traditional concept - in my mind they are distinct because legal cause has a component of public policy element. It has a component of fairness of equity that there is no doubt that the traditional elements of proximate cause, foreseeability and cause in fact that those go into the analysis of legal cause in determining remoteness. But I do believe the legal cause analysis is broader. Now whether that's a threshold step, or just a portion of the analysis in the overall proximate cause, I suppose it's semantic. But I do think the concept of legal cause is broader because of the policy implications that are referenced in the cases, because the analysis for remoteness, and because the fundamental fairness that underlies the concept of holding people liable only for what they should properly be held liable for.

WAINWRIGHT: Do you read Union Pump in a legal cause in a broader sense? proximate cause sense? or something narrower?

LAWYER: I read Union Pump in a traditional _____ graph as using legal cause at least in a broader sense. I don't know if it's specifically defined as distinct from proximate cause, but I do think it has broader concerns.