

# RECONSIDERING THE SUPERSEDING CAUSE DEFENSE IN FAILURE-TO-DIAGNOSE CASES

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INTRODUCTION.....	529
I. THE CONCEPT OF CAUSATION .....	533
A. Causation-in-fact .....	534
1. The But-for Test .....	534
2. The Substantial Factor Test.....	536
B. Proximate Causation .....	539
1. Intervening and Superseding Causation .....	541
2. The Medical Malpractice Complications Rule.....	544
II. SUPERSEDING CAUSATION IN FAILURE-TO-DIAGNOSE CASES .....	545
A. Cases Allowing the Superseding Causation Defense in the Failure-to-diagnose Context .....	546
B. Cases Forbidding the Superseding Causation Defense in the Failure-to-diagnose Context .....	550
III. NEGLIGENT MEDICAL PROFESSIONALS WHO FAIL TO DIAGNOSE SHOULD BE BARRED FROM ASSERTING A SUPERSEDING CAUSE DEFENSE WHEN A SUBSEQUENT ACT OF MEDICAL NEGLIGENCE ALSO CAUSALLY CONTRIBUTES TO A PATIENT’S INJURY .....	555
A. Adverse Effect on Goals of the Tort System: Loss Distribution, Plaintiff Recovery, and Malpractice Deterrence .....	556
B. A Regression to the Much Criticized Last Wrong-doer Rule.....	558
C. Application of the Medical Malpractice Complications Rule.....	560
D. Resolution of Superseding Cause as a Matter of Fact Poses the Threat of Jury Confusion.....	561
IV. RECOMMENDATION AND CONCLUSION .....	563

## INTRODUCTION

The following fact pattern is not an uncommon scenario and often, when it occurs, gives rise to litigation: a patient goes to his medical practitioner complaining about chest pains. The medical practitioner examines the patient. Perhaps she conducts a diagnostics test or orders the patient to undergo a cardiac MRI. After examining the results, the medical

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† Grant would like to thank Professor Marley Weiss for her guidance throughout the writing process. He would also like to thank the staff members of *Vermont Law Review* for their assistance in preparing this Article for publication.

practitioner determines that nothing is wrong with the patient. She releases him with a clean bill of health. Several days later, the patient suffers a heart attack and eventually dies. Following the patient's death, an autopsy reveals a significant plaque buildup in his arteries, which caused the heart attack and subsequent death.<sup>1</sup>

In the above fact pattern, the medical practitioner's failure to discover the health problem would be actionable in a negligence suit (assuming that the practitioner breached her standard of care).<sup>2</sup> The legal community refers to negligence of this sort as a failure to diagnose.<sup>3</sup> It is a subset of medical negligence and is applicable to any type of failed medical diagnosis.<sup>4</sup> Failure to diagnose need not be the failure to make any diagnosis; rather, the term also encompasses misdiagnoses.<sup>5</sup> For purposes of this Article, "failure to diagnose" is therefore shorthand for "failure to diagnose or make an accurate diagnosis."

Medical negligence (and, more specifically, failure to diagnose) causes of action consist of the same elements as a basic negligence cause of action: duty, breach, causation, and harm.<sup>6</sup> A medical practitioner has a duty to perform in conformity with the requisite standard of care.<sup>7</sup> "A common articulation of the standard of care for a doctor states that a physician must act with the degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession

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1. For a similar fact pattern, see *Vucinich v. Ross*, 893 So. 2d 690, 691 (Fla. Dist. Ct. App. 2005) (describing a case where a medical professional failed to diagnose a heart disease, and the decedent's estate sued).

2. *See id.* at 695–96 (describing how a breach of the standard of medical care is actionable in a negligence suit).

3. *See, e.g., Dambro v. Meyer*, 974 A.2d 121, 132 (Del. 2009) (explaining that the "failure to diagnose" breast cancer led to the "injury," a metastasized tumor); *Wilson v. Ramirez*, 2 P.3d 778, 784 (Kan. 2000) (analyzing cases where failure to diagnose a medical issue led to subsequent harms and concluding a "failure to diagnose" is an "injury"); *Fiore v. Galang*, 478 N.E.2d 188, 189 (N.Y. 1985) (holding a claim for medical malpractice for "failure to diagnose" requires expert witnesses).

4. 5 ATLA'S LITIGATING TORT CASES § 61:26 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003) ("One of the most frequent areas of medical negligence is the failure to diagnose a problem.").

5. *See generally id.* (stating that failure to diagnose a problem "may be related to . . . the failure to order appropriate testing or the failure to properly interpret testing which is ordered" and providing illustrative examples); DAVID M. HARNEY, *MEDICAL MALPRACTICE* 284 (1973) (discussing scenarios where doctors can be held liable for failing to establish an accurate diagnosis).

6. *See, e.g., Toogood v. Owen J. Rogal, D.D.S., P.C.*, 824 A.2d 1140, 1145 (Pa. 2003) ("[T]o prevail in a medical malpractice action, a plaintiff must establish a duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of the harm." (internal quotation omitted)); *Franklin v. Toal*, 19 P.3d 834, 837 (Okla. 2000) (listing the elements of negligence and describing the duty element of medical negligence); *Hare v. Wendler*, 949 P.2d 1141, 1145 (Kan. 1997) (concluding the elements of a medical negligence claim are the same as a negligence claim).

7. DOMINICK VETRI ET AL., *TORT LAW AND PRACTICE* 316 (4th ed. 2011).

practicing” in the same class to which the physician belongs.<sup>8</sup> A medical practitioner breaches her duty when she fails to live up to this standard of care.<sup>9</sup> In most cases, a plaintiff must provide testimony from a medical expert to articulate the standard of care and prove that it was breached.<sup>10</sup> After establishing duty and breach, the plaintiff must prove that he suffered an injury and is entitled to damages.<sup>11</sup> Finally, a plaintiff must link this injury to the medical practitioner’s breach of duty—the causation element.<sup>12</sup>

Determining causation for failure to diagnose follows the same analysis as it would in any other negligence suit.<sup>13</sup> One issue that arises repeatedly, however, occurs when a medical practitioner’s failure to diagnose is followed by the negligence of a subsequent medical practitioner that also prevents the patient from receiving proper (or any) treatment.<sup>14</sup> In

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8. *Id.*

9. See *Toogood*, 824 A.2d at 1145 (explaining the medical standard of care and how a breach of such standard constitutes a breach of duty); *Franklin*, 19 P.3d at 837 (“A medical provider has a duty to exercise ordinary care in delivery of professional services.”); *Hare*, 949 P.2d at 1145 (stating a medical negligence case does not differ from a non-medical negligence case in that the plaintiff must show there was a breach of duty).

10. See *VETRI ET AL.*, *supra* note 7, at 168 (“In the overwhelming majority of malpractice cases, the plaintiff has to provide expert testimony to show both the customary practice and the professional defendant’s deviation from that customary practice.”); see also *Hare*, 949 P.2d at 1145 (“Expert testimony is ordinarily required to show that the doctor breached the standard of care.”).

11. See, e.g., *Toogood*, 824 A.2d at 1145 (explaining a plaintiff’s burden of proof to establish harm); *M.A. v. United States*, 951 P.2d 851, 856 (Alaska 1998) (holding there were no “damages” for raising a healthy child born after failure to diagnose a pregnancy); *Locke v. Pachtman*, 521 N.W.2d 786, 789 (Mich. 1994) (stating a plaintiff must demonstrate injury, as well as duty and breach, to prove a medical malpractice claim).

12. See, e.g., *Ehlinger v. Sipes*, 434 N.W.2d 825, 828 (Wis. Ct. App. 1988) (stating plaintiffs have a cause of action only for negligent diagnoses that substantially contributed to their injuries); *Hare*, 949 P.2d at 1145 (“[T]he plaintiff’s duty to show causation in medical malpractice cases . . . [requires] a causal connection between the negligent act and the injury or that the act caused or contributed to the injury.”); *Sherer v. James*, 351 S.E.2d 148, 151 (S.C. 1986) (declining to relax plaintiff’s burden of proof on proximate cause in medical malpractice cases as compared to other negligence actions).

13. See, e.g., *Wilson v. Ramirez*, 2 P.3d 778, 785 (Kan. 2000) (identifying the cause of the plaintiff’s injury as failure to diagnose); *M.A.*, 951 P.2d at 856 (“[A] claim of medical malpractice involving negligent failure to diagnose . . . may result in recovery of ordinary tort damages for proximately caused injuries . . . .”); *Herskovits v. Grp. Health Coop. of Puget Sound*, 665 P.2d 474, 477 (Wash. 1983) (holding where defendant’s negligence heightened the risk of harm to the plaintiff, a jury may find such negligence caused plaintiff’s injury in failure to diagnose cases). See *infra* Part I for an in-depth discussion of causation.

14. See *infra* Part II (discussing examples of subsequent negligence after a failure to diagnose). Also, note that layered acts of negligence are not the only issues that complicate the causation analysis in failure-to-diagnose cases. For example, sometimes a failure to act, as opposed to an affirmative act, complicates proving causation. This requires proving the counterfactual, which is more difficult to prove. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM, § 26 cmt. e (AM. LAW INST. 2010) (“In other cases . . . in which the actor failed to take a precaution that would have reduced the risk to another . . . the counterfactual inquiry may pose difficult problems of proof.”).

this scenario, some courts have permitted the first medical practitioner to assert a superseding causation defense, arguing that she is not liable because the negligent act of the second medical practitioner broke the chain of causation between the original failure to diagnose and the injury.<sup>15</sup> Allowing a superseding causation defense (or even allowing a jury to decide it as a question of fact) in these cases is improper.<sup>16</sup> It unfairly absolves a negligent practitioner of liability, puts a larger financial burden on the back of the subsequent medical practitioner, jeopardizes full recovery of losses for the injured victim, and turns the legal issue of causation into a game of hot potato.<sup>17</sup>

This Article argues that, as a matter of law, superseding causation is an inappropriate defense in failure-to-diagnose cases when the failure to diagnose is followed by another act of medical negligence. In order to reach a fair method of determining causation in these situations, this Article examines the legal concepts of causation and superseding causation and assesses how these concepts have been misapplied in such cases. Specifically, Part I of this Article will provide the legal framework of causation. Part I.A will delve into causation-in-fact, and Part I.B will explain proximate causation. Part I.B will also examine doctrines arising out of proximate causation: superseding and intervening causation, and the medical malpractice complications rule. Part II will discuss cases in which courts have considered superseding cause as a defense against liability for failure to diagnose, setting forth the courts' justifications for either permitting or rejecting the defense. Part III will assert reasons why failure to diagnose cases fall outside of the superseding causation schema and why it is inappropriate to put the issue to a trier of fact in these cases. Finally, Part IV will propose a better method to determine causation in cases where a failure to diagnose is followed by other acts of medical negligence. Under this method, a fact finder would only consider whether a patient's resulting injury was a foreseeable consequence of the original failure to diagnose.<sup>18</sup>

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This Article, however, assumes that the plaintiff could prove causation in order to more clearly focus on the separate issue of superseding causation.

15. See *infra* Part II.A (citing *Copsey v. Park*, 137 A.3d 299 (Md. Ct. Spec. App. 2016); *Siggers v. Barlow*, 906 F.2d 241 (6th Cir. 1990); *Amu v. Barnes*, 650 S.E.2d 288 (Ga. Ct. App. 2007)) (showing use of the superseding causation defense).

16. See *infra* Part II.B (citing *NKC Hosps., Inc. v. Anthony*, 849 S.W.2d 564 (Ky. Ct. App. 1993); *Fish v. L.A. Dodgers Baseball Club*, 128 Cal. Rptr. 807 (Cal. Ct. App. 1976); *Looney v. Davis*, 721 So. 2d 152 (Ala. 1998)) (discussing cases that have rejected the superseding causation defense in failure-to-diagnose cases).

17. See *infra* Part III (detailing argument in favor of prohibiting the superseding causation defense in failure-to-diagnose cases).

18. See *infra* Part IV (advocating for the foreseeable harm test as a replacement to the superseding causation defense in failure-to-diagnose cases).

## I. THE CONCEPT OF CAUSATION

Causation is a vital element in a negligence cause of action because, in order to hold one liable, a plaintiff must prove that one's negligence *caused* the injury for which compensation is sought.<sup>19</sup> Black's Law Dictionary defines "cause" as "[s]omething that produces an effect or result."<sup>20</sup> Causation in the negligence context, however, has a more specific application. While a plaintiff in a negligence suit tries to prove that the tortfeasor "produced the effect" (i.e., the injury), the plaintiff must also prove that the tortfeasor is legally responsible for the injury.<sup>21</sup> In other words, one who technically causes an injury may not be legally responsible for compensating a tort victim.<sup>22</sup>

Legal scholars and practitioners generally refer to the two components of causation as causation-in-fact and proximate causation.<sup>23</sup> Both components must be satisfied before a tortfeasor will be held liable for an act of negligence.<sup>24</sup> One state's highest appellate court described this double-barreled process as follows: "The first step in the analysis to define [the causal] relationship is an examination of causation-in-fact to determine who or what caused an action. The second step is a [proximate causation] analysis to determine who should pay for the harmful consequences of such an action."<sup>25</sup>

This Part parses out and explains the components of causation. Part I.A discusses causation-in-fact and sets forth the two tests used to establish its existence. Part I.B examines proximate causation and methods of proving/avoiding legal liability, including an analysis of intervening and superseding causation and the medical malpractice complications rule.

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19. See HARRY SHULMAN ET AL., *CASES AND MATERIAL ON THE LAW OF TORTS* 247 (5th ed. 2010) (discussing "the necessity of proving a link between the defendant's wrongful act [and] the injuries suffered by the plaintiff").

20. *Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014).

21. Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1742 (1985).

22. *Id.* at 1741 ("Causation is *not* equivalent to responsibility.").

23. See SHULMAN ET AL., *supra* note 19, at 247. Note: various jurisdictions use the terms "cause-in-fact" and "proximate cause" differently. The RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, ch. 6, intro. note (AM. LAW INST. 2010), uses the terms "Factual Cause" and "Scope of Liability," respectively. This Article, however, will use the terms "cause-in-fact" and "proximate cause."

24. See Wright, *supra* note 21, at 1741–42 (describing the two necessary components of causation and how most scholars tend to conflate the two).

25. *Pittway Corp. v. Collins*, 973 A.2d 771, 786 (Md. 2009).

*A. Causation-in-fact*

A negligent act is a cause-in-fact of an injury “if, in the absence of the act, the outcome would not have occurred.”<sup>26</sup> The causation-in-fact prong of the causation inquiry is considered straightforward and easily resolved.<sup>27</sup> While this may be true in some cases (e.g., A hits B, B suffers injury), there are other instances where causation-in-fact is difficult to prove (e.g., cases involving multiple causes, or causes that increase the risk of injury).<sup>28</sup> Indeed, causation-in-fact “has resisted all efforts to [be] reduce[d] . . . to a useful, comprehensive formula and has been the subject of widely divergent views concerning its nature, content, scope, and significance.”<sup>29</sup> Generally speaking, however, two tests have emerged as means of determining whether causation-in-fact exists: the but-for test and the substantial factor test.<sup>30</sup>

## 1. The But-for Test

The but-for test of causation is what it sounds like: “[A]n act is a [cause-in-fact] of an outcome if, in the absence of the act, the outcome would not have occurred.”<sup>31</sup> To state it another way, the negligent act “must have been a necessary condition for the occurrence of the injury.”<sup>32</sup> Essentially, a factfinder who is tasked with determining whether something is a cause-in-fact under this test will need to consider what hypothetically would have happened if the negligence had not occurred.<sup>33</sup> The but-for test

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26. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM, § 26 cmt. b (AM. LAW INST. 2010).

27. See Erik S. Knutsen, *Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach*, 38 TEX. INT’L L.J. 249, 252 (2003) (“[M]any torts scholars and fact finders agree that cause-in-fact is a straightforward question of common sense.”).

28. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM, § 26 cmt. e (AM. LAW INST. 2010) (noting cause-in-fact may be difficult to prove in cases where negligent conduct merely increases risk of harm); *id.* § 27 cmt. b (stating the but-for test is inadequate if an outcome had multiple significant causes).

29. Wright, *supra* note 21, at 1737.

30. See Knutsen, *supra* note 27, at 252 (noting most common law courts apply either the but-for test or the substantial factor test).

31. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM, § 26 cmt. b (AM. LAW INST. 2010).

32. Wright, *supra* note 21, at 1775.

33. VETRI ET AL., *supra* note 7, at 354.

is far from scientific,<sup>34</sup> but it is an effective test to use for simple fact patterns that involve only one negligent act.<sup>35</sup>

An example of the but-for test arose in *City of Jackson v. Spann*.<sup>36</sup> There, two policemen were in a patrol cruiser pursuing a fleeing automobile and travelling at a high rate of speed.<sup>37</sup> The cruiser went through an intersection where it struck another automobile.<sup>38</sup> The force of the collision caused the cruiser to bounce off and strike another automobile, which Spann, the plaintiff, was driving.<sup>39</sup> The second collision injured Spann, and he sustained damages related to medical costs and lost wages.<sup>40</sup> The *Spann* court upheld the trial judge's decision that the negligence of the police officers was a cause-in-fact of the plaintiff's injuries.<sup>41</sup> Specifically, the court reasoned that "[b]ut for the high-speed pursuit and the manner in which the Officers proceeded into the intersection, the accident would not have occurred."<sup>42</sup> As one can see through *Spann*, the but-for cause inquiry can be obvious.

It is important to note, however, that just because the but-for test is straightforward, that does not mean that it will always be satisfied. In fact, there are many cases in which a person acted negligently, but avoided liability because the negligence was not a but-for cause.<sup>43</sup> In *New York Central Railroad Co. v. Grimstad*, a man fell from the defendant's boat and drowned.<sup>44</sup> The jury found that the defendant was negligent in not equipping the boat with life buoys, and that such negligence caused the man to drown.<sup>45</sup> The Second Circuit, however, reversed the decision, asserting that (even if the defendant had been negligent by not equipping the boat

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34. See RESTATEMENT (SECOND) OF TORTS, § 433B(1) cmt. b (AM. LAW INST. 1965) ("The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise.").

35. See VETRI ET AL., *supra* note 7, at 356 (explaining the but-for test does not work well in multiple cause situations, but works well in single cause situations). Note, however, that the but-for test is still applied in multiple cause cases in some jurisdictions. See *generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM, § 27 cmt. b (AM. LAW INST. 2010) ("[M]ost jurisdictions do not have a separate model jury instruction to be employed when multiple sufficient causes exist.").

36. *City of Jackson v. Spann*, 4 So. 3d 1029, 1033 (Miss. 2009).

37. *Id.* at 1031.

38. *Id.*

39. *Id.*

40. *Id.* at 1031–32.

41. *Id.* at 1033.

42. *Id.*

43. See DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 186 (2d ed. 2011) (discussing multiple cases that failed the but-for test).

44. *N.Y. Cent. R.R. Co. v. Grimstad*, 264 F. 334, 334 (2d Cir. 1920).

45. *Id.* at 335.

with life buoys) the defendant was not liable because the plaintiff failed to show that the man would have been saved if life buoys had been on board.<sup>46</sup> In other words (in that hypothetical but-for universe where negligence did not exist and the life buoys were present), the court presumed that the man still would have drowned because the plaintiff had failed to show that somebody would have thrown the man a life buoy in time to save his life.<sup>47</sup>

*Grimstad* shows that even the straightforward but-for test is not always infallible; different factfinders could reach varying results in their hypotheticals.<sup>48</sup> Unfortunately, the causal inquiry becomes even more uncertain when more than one negligent act is added to the equation.<sup>49</sup> In order to determine causation-in-fact in cases that involve multiple potential causes, a majority of jurisdictions favor the substantial factor test.<sup>50</sup>

## 2. The Substantial Factor Test

The alternative method of testing for causation-in-fact is determining whether a negligent act was “a substantial factor in bringing about the harm . . . .”<sup>51</sup> This is known as the substantial factor test.<sup>52</sup> The meaning of “substantial” is set forth in the *Restatement (Second) of Torts*: “‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause,” and “using [cause] in the popular sense, . . . there always lurks the idea of responsibility . . . .”<sup>53</sup> The *Restatement* also enumerates several considerations one should reference when deciding whether an act is a substantial factor:

- (a) [T]he number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless

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46. *Id.*

47. *Id.*

48. *See id.* at 335 (presenting hypotheticals that cast doubt on whether a life buoy would have saved the man’s life).

49. *See* VETRI ET AL., *supra* note 7, at 356.

50. *Id.*

51. RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW INST. 1965).

52. *See* *Pittway Corp. v. Collins*, 973 A.2d 771, 786–87 (Md. 2009) (comparing the but-for test with the substantial factor test).

53. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (AM. LAW INST. 1965).



unless acted upon by other forces for which the actor is not responsible; [and] (c) lapse of time.<sup>54</sup>

Some jurisdictions that apply the substantial factor test include a but-for inquiry as one of the substantial factor considerations.<sup>55</sup>

As mentioned above, courts primarily use the substantial factor test as a means to determine causation-in-fact when the acts of more than one negligent actor combine to cause an injury.<sup>56</sup> One commentator has remarked that the substantial factor test is preferred in this scenario because “[i]t is circular for a court to ask whether or not ‘but for’ one cause the plaintiff would not be injured because the other existing cause is still sufficient to have resulted in the injury.”<sup>57</sup> Whereas the but-for test is framed in a binary yes/no manner, the substantial factor test allows a factfinder to analyze the facts of a case and wrestle with the gray area.<sup>58</sup>

There are two broad types of multiple causation-in-fact cases: cases in which causation is overdetermined, and cases in which causation is underdetermined.<sup>59</sup> Overdetermined causation occurs when two or more tortfeasors each commit a negligent act that produces the same harm, and each negligent act alone would have sufficed to cause (or causally contribute to) the injury.<sup>60</sup> In *Rudeck v. Wright*, for example, the Supreme Court of Montana examined multiple negligent acts to determine which ones were a cause-in-fact of a hospital patient’s death.<sup>61</sup> The decedent underwent a hernia operation, which the defendant surgeon performed.<sup>62</sup>

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54. *Id.* § 433.

55. See VETRI ET AL., *supra* note 7, at 358 (citing *Mitchell v. Gonzales*, 819 P.2d 872, 878 (Cal. 1991)) (showing some jurisdictions incorporate the but-for test into the substantial factor test).

56. See, e.g., *Pittway Corp.*, 973 A.2d at 787 (“When two or more independent negligent acts bring about an injury . . . the substantial factor test controls.”); *City of Jackson v. Spann*, 4 So. 3d 1029, 1033 (Miss. 2009) (“If the plaintiff’s injuries are brought about by more than one tortfeasor, cause in fact is based upon whether the negligence of a particular defendant was a substantial factor in causing the harm.”); see also VETRI ET AL., *supra* note 7, at 356 (stating the substantial factor test is the appropriate test to use in multiple cause cases). Note, however, that some jurisdictions apply the but-for test in multiple cause cases. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM, § 27 cmt. b (AM. LAW. INST. 2010) (“[M]ost jurisdictions do not have a separate model jury instruction to be employed when multiple sufficient causes exist.”).

57. Knutsen, *supra* note 27, at 253.

58. See VETRI ET AL., *supra* note 7, at 356.

59. See *id.* (discussing these theories of causation using the terms over-inclusive and under-inclusive, respectively).

60. *Id.* A common example of overdetermined causation is the following scenario: A and B negligently light fires, which merge and burn down C’s property. The conduct of both A and B clearly caused the harm to C. Samuel Ferey et al., *Overdetermined Causation Cases, Contribution and the Shapley Value*, 91 CHI. KENT L. REV. 637, 642 (2016).

61. *Rudeck v. Wright*, 709 P.2d 621, 627–28 (Mont. 1985).

62. *Id.* at 623.

The defendant had two surgical nurses assisting him.<sup>63</sup> During the operation, the defendant placed surgical gauze inside of the decedent's abdominal cavity, which he and the two nurses forgot to remove before closing the incision.<sup>64</sup> The decedent started to experience gradual complications after the operation due to the foreign object, and by the time it was discovered that there was gauze in his abdomen, the decedent was too weak to undergo surgery to remove it.<sup>65</sup> He died shortly thereafter, and his spouse filed a wrongful death and survival action against the defendant surgeon (amongst others).<sup>66</sup> The *Rudeck* Court explained that the substantial factor test was the appropriate test in this situation because there were multiple negligent actors (the defendant and two nurses) who each individually contributed to the gauze being left in the decedent's abdomen.<sup>67</sup> *Rudeck* demonstrates overdetermined causation because each of the defendants' acts contributed to the harm.

Underdetermined causation, on the other hand, occurs when there are two or more potential tortfeasors who each perform negligent acts, but not all of the negligent acts could have produced the harm.<sup>68</sup> The seminal case involving underdetermined causation is *Summers v. Tice*.<sup>69</sup> The plaintiff in *Summers* was struck in the eye by a single birdshot, which came from a shotgun fired by one of two defendants.<sup>70</sup> The defendants were hunting for quail and shot toward the plaintiff—despite knowing the plaintiff was there.<sup>71</sup> The *Summers* court upheld the trial court's finding that both defendants were a cause-in-fact of the harm, even though only one technically caused the harm.<sup>72</sup> In this situation, if the defendants' bullets could not be identified, the but-for test would have been unworkable because it would be impossible to prove which defendant injured the plaintiff's eye. This failure of proof would unfairly absolve both defendants. Thus, the *Summers* court (after discussing the substantial factor test) adopted a rule of alternative liability, which allows plaintiffs in this situation to hold both defendants jointly liable and shift the burden to them

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 628–29 (“The ‘substantial factor’ rule was developed primarily for cases in which application of the ‘but for’ rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result.”).

68. See VETRI ET AL., *supra* note 7, at 356 (discussing how multiple acts can cause an accident, but then are not “but for” causes of the accident).

69. *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

70. *Id.* at 2.

71. *Id.*

72. *Id.*

to prove which one actually caused the harm.<sup>73</sup> Cases like *Summers* and *Rudeck* illustrate that the issue of causation-in-fact cannot always be resolved with one consistent test.

### B. Proximate Causation

As explained at the beginning of this Part, just because one proves that a defendant is a cause-in-fact of an injury, that does not necessarily mean that the defendant will be liable for the injury that he caused.<sup>74</sup> In order for liability to stick, both causation-in-fact and proximate causation are required.<sup>75</sup> Proximate causation, also known as the scope of liability,<sup>76</sup> is set by public policy.<sup>77</sup> Simply put, if a person's action causes a series of events, responsibility for the original action must cease somewhere along the line—liability could otherwise be limitless. Proximate causation thus only allows liability for a negligent act to extend to a reasonable limit.<sup>78</sup>

Depending on which jurisdiction they sit in, courts implement different tests to determine whether or not a negligent act proximately caused an injury (i.e., whether or not a tortfeasor should have to pay for an injury he or she caused-in-fact).<sup>79</sup> This Article will only discuss the most prominent of these tests: the foreseeability test.<sup>80</sup> The foreseeability test inquires “whether the harm that occurred was within the scope of foreseeable risk created by the defendant's negligent conduct.”<sup>81</sup> Courts generally apply the

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73. *Id.* at 5.

74. See *supra* Part I.A (explaining the nuances of causation).

75. See Wright, *supra* note 21, at 1741–42 (describing the two necessary components of causation).

76. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM ch. 6, intro. note (AM. LAW INST. 2010).

77. See VETRI ET AL., *supra* note 7, at 445 (“If liability is extended too far, then goals like deterrence and corrective justice become extremely diluted. Also, insurance availability and affordability are critical concerns. Extending liability too far afield from the primary risks of the negligent conduct makes actuarial insurance rate setting more difficult and can lead to overly high premiums for productive activities and even unavailability of insurance.”).

78. Rory A. Valas, Note, *Toxic Palsgraf: Proving Causation When the Link Between Conduct and Injury Appears Highly Extraordinary*, 18 B.C. ENVTL. AFF. L. REV. 773, 785 (1991).

79. One test, for example, is the substantial factor test. The RESTATEMENT (SECOND) OF TORTS § 435 (AM. LAW INST. 1965) provides that “[i]f the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.” Another test of proximate causation comes from the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010), which provides that “[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.”

80. See VETRI ET AL., *supra* note 7, at 445 (“The foresight test is now the all but universal conceptual test for determining scope of liability in the United States . . .”).

81. *Demers v. Rosa*, 925 A.2d 1165, 1169 (Conn. App. Ct. 2007) (quoting *Malloy v. Town of Colchester*, 858 A.2d 813, 818 (Conn. App. Ct. 2004)).

test objectively<sup>82</sup> (i.e., would a reasonable person have foreseen the risk of this general sort of harm?) and retroactively,<sup>83</sup> as opposed to asking if the tortfeasor actually foresaw the harm occurring before acting negligently. Another way to frame the foreseeability test is to ask if the harm caused by the tortfeasor is a natural and probable result of the negligent act.<sup>84</sup> While some jurisdictions treat the natural and probable consequence test differently from the foreseeability test, most courts recognize that the two tests are very similar and often merge the two inquiries.<sup>85</sup> For example, the Michigan Supreme Court has stated, “[a] proximate cause’ is ‘a foreseeable, natural, and probable cause’ of ‘the plaintiff’s injury and damages.’”<sup>86</sup>

In a recent case, *Demers v. Rosa*, the Connecticut intermediate appellate court had occasion to consider proximate causation.<sup>87</sup> A concerned citizen called the police after finding a dog that belonged to the defendant roaming freely.<sup>88</sup> Two police officers arrived to the scene shortly thereafter, and one of them put the dog in his cruiser.<sup>89</sup> The second officer went to the window of the first officer’s cruiser to talk to him, but fell and injured himself due to icy conditions.<sup>90</sup> The second officer sued the owner of the dog, alleging that the owner was negligent by allowing the dog to roam freely and that such negligence caused him to injure himself.<sup>91</sup> The trial court sided with the police officer and held the dog owner liable, but the appellate court reversed.<sup>92</sup> The *Demers* court explained “[t]he general foreseeability of a weather related accident, however, does not, by itself,

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82. See, e.g., *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995) (“Foreseeability, the other aspect of proximate cause, requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission.”); *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991) (describing the foreseeability test).

83. See, e.g., *In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation*, 415 F.Supp. 2d 261, 273 (S.D.N.Y. 2005) (applying “hindsight” to the foreseeability inquiry); *Bd. of Cty. Comm’rs v. Bell Atlantic-Maryland, Inc.*, 695 A.2d 171, 183 (Md. 1997) (finding, “in retrospect,” defendants should have known their failure to act was likely to bring harm); *Piesel v. Stamford Hosp.*, 430 A.2d 1, 15 (Conn. 1980) (holding foreseeability may only consider the harm “[u]nusual or bizarre” if “with the benefit of hindsight it appears highly extraordinary” that the tortfeasor’s act led to the harm).

84. D. E. Buckner, Annotation, *Comment Note. Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2d § 5[b] (1965).

85. See *id.* (“[T]he ‘natural and probable consequences’ test is closely related to and frequently stated in combination with the ‘foreseeability’ test.”).

86. *Kaiser v. Allen*, 746 N.W.2d 92, 95 (Mich. 2008) (quoting *Shinolster v. Annapolis Hosp.*, 685 N.W.2d 275, 278 (Mich. 2004)).

87. *Demers v. Rosa*, 925 A.2d 1165, 1167 (Conn. App. Ct. 2007).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1171.

make *this particular accident* foreseeable . . . [The roaming dog] can be viewed only as a ‘remote or trivial’ cause . . .”<sup>93</sup> As such, the roaming dog, while a cause-in-fact for putting the plaintiff in the position where he fell, was not a proximate cause of his injury.<sup>94</sup> The defendant was therefore not liable for the plaintiff’s injuries.<sup>95</sup>

While foreseeability remains the polestar of the proximate causation inquiry in most jurisdictions, courts have developed several related doctrines. Two of the more common doctrines that arise in the failure to diagnose context are: (1) intervening and superseding causation; and (2) the medical malpractice complications rule.<sup>96</sup> Both of these doctrines are discussed below.

### 1. Intervening and Superseding Causation

As shown in Part I.A.2, multiple negligent acts can combine to lead to an injury.<sup>97</sup> Negligent acts that occur after the original act of negligence are called intervening causes.<sup>98</sup> Intervening causes “actively operate[] in producing harm to [the tort victim] after the [original] actor’s negligent act or omission has been committed.”<sup>99</sup> An example of intervening cause arose in *Liney v. Chestnut Motors, Inc.*<sup>100</sup> The defendant in *Liney* was a garage that repaired automobiles.<sup>101</sup> A customer dropped his automobile off at the garage for repairs, and the defendant’s employee left the automobile parked in the street with its keys in the ignition.<sup>102</sup> Soon after, a thief stole the customer’s car and began driving it recklessly.<sup>103</sup> The thief rode up on a sidewalk and struck the plaintiff, causing her serious injuries.<sup>104</sup> The plaintiff filed suit against the garage, asserting that its employee’s negligent

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93. *Id.* at 1170–71.

94. *Id.* at 1171.

95. *Id.*

96. See VETRI ET AL., *supra* note 7, at 482–83 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 35 cmt. b (AM. LAW. INST. 2010)) (explaining the “medical malpractice complications rule”); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 34 cmt. a, § 35, § 35 cmt. a (AM. LAW. INST. 2010) (describing courts’ treatment of intervening acts, superseding causes, and “enhanced harm . . . due to the efforts of third persons to render aid”).

97. See *supra* Part I.A.2 (discussing overdetermined and underdetermined causation).

98. SHULMAN ET AL., *supra* note 19, at 344.

99. RESTATEMENT (SECOND) OF TORTS § 441 (AM. LAW INST. 1965).

100. *Liney v. Chestnut Motors, Inc.*, 218 A.2d 336, 338 (Pa. 1966).

101. *Id.* at 337.

102. *Id.*

103. *Id.*

104. *Id.*

act of allowing the car to be easily stolen caused her injuries.<sup>105</sup> While the employee was negligent, the thief also committed a negligent act, which caused the plaintiff's injuries.<sup>106</sup> The thief's negligence was therefore an intervening cause.

Sometimes intervening causes operate to absolve the original tortfeasor from liability.<sup>107</sup> When this happens, intervening causes are referred to as superseding causes.<sup>108</sup> "A superseding cause is an act of a third person or other force which by its intervention prevents the [original] actor from being liable for harm to another . . . ."<sup>109</sup> Superseding cause, in other words, breaks the chain of causation between the original act of negligence and the victim's injury.<sup>110</sup> Turning back to *Liney*, the Pennsylvania Supreme Court held that the thief's intervening cause was also a superseding cause, and thus the defendant garage could not be held liable.<sup>111</sup> The court justified its holding by explaining that "it is clear that the defendant could not have anticipated and foreseen that this carelessness of its employees would result in the harm the plaintiff suffered. . . . This being so, the plaintiff was not harmed by the defendant's negligence."<sup>112</sup> In short, the thief's negligence severed the chain of causation between the garage's negligence and the plaintiff's injury.<sup>113</sup>

The obvious question surrounding superseding causation is: when does an intervening cause become a superseding cause?<sup>114</sup> Because superseding causation is a product of proximate cause, foreseeability is the foundation of the superseding causation inquiry.<sup>115</sup> Specifically, courts generally find that an intervening cause becomes a superseding cause after considering: (1) the foreseeability of the harm suffered by the tort victim; and (2) the foreseeability of the intervening act's occurrence.<sup>116</sup> The more

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105. *Id.*

106. The *Liney* Court assumed that this was true. *Id.* at 337–38.

107. RESTATEMENT (SECOND) OF TORTS § 440 (AM. LAW INST. 1965).

108. *Id.*

109. *Id.*

110. Charles Lattanzi, *Doctors, Nurses and Superseding Cause: The Demise of the Last in Time Defense*, 9 J.L. & HEALTH 303, 305 (1995) (citing *Berdyck v. Shinde*, 613 N.E.2d 1014, 1025 (Ohio 1993)).

111. *Liney*, 218 A.2d at 338 ("Under the circumstances, the thief's careless operation of the automobile was a superseding cause of the injury suffered, and defendant's negligence, if such existed, only a remote cause thereof upon which no action would lie.").

112. *Id.* at 337–38.

113. *Id.* at 338.

114. SHULMAN ET AL., *supra* note 19, at 344.

115. *Id.* ("[M]ost courts today talk about the foreseeability of the intervention as the factor that makes it non-superseding.").

116. *See Pittway Corp. v. Collins*, 973 A.2d 771, 792 (Md. 2009) (considering "both the foreseeability of the harm suffered . . . as well as the foreseeability of intervening acts").

unforeseeable the harm and the other acts are, the more likely courts are to hold that the intervening act is superseding.<sup>117</sup> The *Restatement (Second) of Torts* presents multiple factors one may consider when determining the foreseeability of the harm<sup>118</sup> and the intervening acts.<sup>119</sup>

The *Restatement (Second) of Torts* also provides additional qualifications that one should consider when determining whether an intervening cause is superseding. Section 442B provides that when one's negligent act "creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability . . ."<sup>120</sup> "This is to say that any harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always 'proximate,' no matter how it is brought about . . ."<sup>121</sup> Thus, while foreseeability of the intervening act is a material consideration when

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117. See *id.* at 790 (explaining a high level of unforeseeability is relevant to a finding of superseding cause).

118. See the RESTATEMENT (SECOND) OF TORTS § 442 (AM. LAW INST. 1965), which states:

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
- (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
- (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

119. See *id.* § 447, which states:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

- (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
- (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
- (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

120. *Id.* § 442B.

121. *Id.* § 442B cmt. b.

determining superseding causation, foreseeability of the harm seems to be dispositive under section 442B.<sup>122</sup>

While section 442B expands the potential number of liable parties, section 452 limits that scope.<sup>123</sup> Under section 452, an original tortfeasor may avoid liability if the duty to prevent harm to the victim has shifted to a third party.<sup>124</sup> In this instance, “the failure of the third person to prevent such harm is a superseding cause.”<sup>125</sup> A third person’s duty to prevent harm may arise “because of lapse of time or otherwise . . . .”<sup>126</sup> An example of “otherwise” is a contract or express agreement.<sup>127</sup> In some situations, section 452 conflicts with section 442B.<sup>128</sup> For instance, it is not outlandish to imagine a situation in which a tortfeasor acts negligently (thereby increasing the risk of injury to a tort victim), but is able to argue superseding cause when a third party fails to prevent the harm that the tortfeasor set in motion. Should section 442B or section 452 apply? Assuming the original tortfeasor can make a passable argument regarding lapse of time or contract, both are arguably applicable. As Part II of this Article will show, this conflict comes to a head in failure-to-diagnose cases that involve subsequent acts of negligence.<sup>129</sup>

## 2. The Medical Malpractice Complications Rule

Another doctrine that has arisen out of proximate causation is the medical malpractice complications rule.<sup>130</sup> Under this rule, intervening acts of medical negligence that enhance a tort victim’s original injury are foreseeable as a matter of law.<sup>131</sup> This means that, when a tortfeasor acts negligently and, as a result, the victim requires medical care, the tortfeasor will also face liability for any enhanced injuries the victim received from

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122. *Id.*

123. *Id.* § 452.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* § 452 cmt. e (“One way in which the responsibility may be shifted is by express agreement between the actor and the third person.”).

128. Compare *id.* § 452 (stating failure to prevent harm can be a superseding cause if “the duty to prevent harm” has shifted), with *id.* § 442B (indicating an intervening force—like a third person’s failure to prevent harm—generally does not relieve the original actor of liability).

129. See *infra* Part II (detailing cases applying or rejecting the superseding causation defense in failure-to-diagnose negligence suits).

130. See VETRI ET AL., *supra* note 7, at 482 (introducing the medical malpractice complications rule and rationales behind the rule).

131. *Id.* at 483.



subsequent medical malpractice.<sup>132</sup> For example, in *Association for Retarded Citizens-Volusia, Inc. v. Fletcher*, the intermediate Florida appellate court upheld the trial court's decision to bar an argument for intervening medical negligence.<sup>133</sup> There, a community center (which had negligently monitored a disabled person who drowned in its pool) sought to argue that the paramedics who transported the victim to the hospital were also negligent and worsened his injury.<sup>134</sup>

While proximate causation often involves a fact-intensive inquiry, courts are satisfied noting that medical malpractice, no matter how prevalent, is a foreseeable incident.<sup>135</sup> Courts and legal scholars also assert that there are policy considerations (in addition to foreseeability) that justify the existence of the medical malpractice complications rule.<sup>136</sup> These considerations include the fact that the rule "avoids the administrative costs of litigating the collateral issue of medical malpractice every time a [party] might claim such enhanced injury."<sup>137</sup> "Proving medical malpractice is [after all] a difficult and expensive burden."<sup>138</sup> The medical malpractice complications rule therefore created a blanket rule for a common fact pattern, which has helped ease the burden on plaintiffs by simplifying the proximate causation inquiry and avoiding unnecessary medical malpractice litigation.<sup>139</sup>

## II. SUPERSEDING CAUSATION IN FAILURE-TO-DIAGNOSE CASES

Some jurisdictions have considered the issue of whether superseding causation should be a permissible defense in cases where a failure to diagnose is followed by another form of medical negligence that also acts a

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132. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 35 (AM. LAW INST. 2010) ("An actor whose tortious conduct is a factual cause of harm to another is subject to liability for any enhanced harm the other suffers due to the efforts of third persons to render aid reasonably required by the other's injury, so long as the enhanced harm arises from a risk that inheres in the effort to render aid."); see also *id.* § 35 cmt. a ("Negligence in medical treatment of a tortiously caused injury is the most common invocation of the rule in this Section.").

133. *Ass'n for Retarded Citizens-Volusia, Inc. v. Fletcher*, 741 So. 2d 520, 523–24 (Fla. Dist. Ct. App. 1999).

134. *Id.* at 521–24.

135. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 35 cmt. b (AM. LAW INST. 2010) ("The predictable incidence of medical malpractice, however prevalent as a cause of enhanced injury, has often led courts to note its foreseeability.").

136. See VETRI ET AL., *supra* note 7, at 482 (discussing how courts use procedural and fairness grounds as policy considerations to justify the medical malpractice complications rule).

137. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 35 cmt. b (AM. LAW INST. 2010).

138. See VETRI ET AL., *supra* note 7, at 482.

139. *Id.*

cause of a patient's injury.<sup>140</sup> These jurisdictions have reached inconsistent decisions.<sup>141</sup> Part A will discuss cases that have allowed superseding causation to be used as a defense in these situations, and will examine the rationale used by the courts. Part B will do the same for cases that have held superseding causation to be impermissible in such situations.

*A. Cases Allowing the Superseding Causation Defense in the Failure-to-diagnose Context*

The first case that this Article will examine is *Copsey v. Park*.<sup>142</sup> There, Mr. Copsey fell and injured his head.<sup>143</sup> While he did not lose consciousness, he suffered from ongoing nausea and headaches.<sup>144</sup> He saw a series of doctors following the fall, but his symptoms worsened.<sup>145</sup> Eventually, Mr. Copsey's primary care physician conducted a neurologic consultation and neuroradiologic evaluation and, upon discovering abnormalities, ordered Mr. Copsey to undergo a head CT scan.<sup>146</sup> The defendant, Dr. Park, interpreted the CT scans as normal.<sup>147</sup> Nevertheless, Mr. Copsey's adverse conditions continued, and a few days after the CT scan, another medical doctor ordered he undergo an MRI.<sup>148</sup> Dr. Viswanathan, who interpreted the MRI results, found abnormalities, but failed to give a timely report of his findings—despite the request for an urgent callback.<sup>149</sup> Early the next morning, Mr. Copsey suffered an acute stroke.<sup>150</sup> He passed away three days later.<sup>151</sup>

The decedent's estate sued all of the involved medical professionals and institutions, including Drs. Park and Viswanathan, but dismissed or settled with all of the defendants except Dr. Park.<sup>152</sup> At trial, the judge allowed the issue of superseding causation to be considered by the jury,

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140. See *infra* Parts II.A, II.B (comparing cases from Maryland, Georgia, and the Sixth Circuit, with cases from Kentucky, California, and Alabama).

141. Compare *infra* Part II.A (discussing cases where the court permitted superseding causation arguments), with *infra* Part II.B (discussing cases where the court found superseding causation arguments impermissible).

142. *Copsey v. Park*, 137 A.3d 299 (Md. Ct. Spec. App. 2016).

143. *Id.* at 301.

144. *Id.*

145. *Id.* at 302.

146. *Id.*

147. *Id.*

148. *Id.* at 303.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 303–04.

which returned a verdict in favor of Dr. Park.<sup>153</sup> The intermediate appellate court upheld the trial court's decision to allow the superseding cause defense to be put to the jury.<sup>154</sup> The *Copsey* court explained that the "liability of the initial treating physician can be cut off if subsequent negligence by another physician constitutes a superseding cause."<sup>155</sup> The court went on to explain that the superseding causation instruction was appropriate because juries usually consider issues of proximate cause.<sup>156</sup> In short, the court was satisfied that it remained an open question as to whether Dr. Viswanathan's negligence superseded Dr. Park's, despite the fact that a proper diagnosis by Dr. Park would have likely saved the plaintiff.<sup>157</sup>

The *Copsey* court cited approvingly to an earlier case decided by the Sixth Circuit, *Siggers v. Barlow*.<sup>158</sup> The plaintiff in *Siggers* injured his arm after a parachute jump mishap and was taken to the hospital for x-rays.<sup>159</sup> The physician at the hospital, Dr. Barlow, examined the plaintiff's x-rays and decided that the injury was a wrist sprain—in reality, the plaintiff had a wrist fracture.<sup>160</sup> Later that day, a radiologist also examined the plaintiff's x-rays, and noted to the emergency room physician Dr. Robertson that there was a fracture.<sup>161</sup> Based on hospital policy, Dr. Robertson attempted to reach the plaintiff to inform him of the original misdiagnosis, but never reached him.<sup>162</sup> In fact, the plaintiff only learned of the injury more than a month after the misdiagnosis, when he sought medical care for the unbearable pain in his wrist.<sup>163</sup> The plaintiff eventually received surgery on his wrist—nearly two months after the injury.<sup>164</sup> However, the wrist was permanently impaired because of the late treatment, forcing the plaintiff to medically retire from the Army.<sup>165</sup>

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153. *Id.* at 305. The jury determined that Dr. Park was not negligent because he did not breach the requisite standard of care. *Id.*

154. *Id.* at 310. The intermediate appellate court, however, still determined that it was appropriate to consider the superseding causation question because the plaintiff asserted that the inclusion of the superseding cause defense to the jury infected its negligence decision. *Id.* at 305.

155. *Id.* at 308.

156. *Id.* at 309.

157. *Id.* at 310.

158. *Id.* at 309–10 (citing *Siggers v. Barlow*, 906 F.2d 241 (6th Cir. 1990)).

159. *Siggers*, 906 F.2d at 242.

160. *Id.*

161. *Id.* at 242–43.

162. *Id.* at 243.

163. *Id.*

164. *Id.*

165. *Id.*

The plaintiff sued Dr. Barlow and, following trial, a jury ruled for the plaintiff.<sup>166</sup> The trial judge, however, rendered a judgment notwithstanding the verdict in Dr. Barlow's favor.<sup>167</sup> The appellate court upheld the district court's decision, reasoning that the *Restatement (Second) of Torts* section 452 demanded the application of superseding causation.<sup>168</sup> The *Siggers* court explained that the duty to prevent further harm to the plaintiff shifted to Dr. Robertson, thereby severing the chain of causation between Dr. Barlow's negligence and the plaintiff's injury.<sup>169</sup> The court found that there was an implied contract between the doctors that shifted the duty to prevent harm to Dr. Robertson.<sup>170</sup> The court based its implied contract holding on hospital procedure that required the on-staff emergency physician to inform patients of misdiagnoses.<sup>171</sup> The court was satisfied that this hospital procedure shifted the duty because there was a sufficient amount of time (7–14 days) for the on-staff physician to correct Dr. Barlow's negligence.<sup>172</sup> Thus, Dr. Barlow was absolved from liability, even though the plaintiff's wrist would have made a full recovery "but-for" his negligence.<sup>173</sup>

In *Amu v. Barnes*, the Georgia intermediate appellate court upheld a jury verdict against a doctor—who argued that superseding causation protected him from liability for a failure to diagnose—and ruled that the issue of superseding causation had been properly put to the jury.<sup>174</sup> Mr. Barnes went to see Dr. Amu because he was experiencing rectal bleeding.<sup>175</sup> Without examining the patient, Dr. Amu diagnosed him with hemorrhoids, and provided him with a suppository to help with the discomfort.<sup>176</sup> He thought no more of the issue after meeting with Dr. Amu.<sup>177</sup> A couple of years later, Mr. Barnes began seeing a new primary care physician, but never told him about the rectal bleeding.<sup>178</sup> Because of this, the new physician never examined his colon.<sup>179</sup> Four years after Dr.

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166. *Id.*

167. *Id.*

168. *Id.* at 244; *see also supra* notes 123–28 and accompanying text (discussing the RESTATEMENT (SECOND) OF TORTS § 452 (AM. LAW INST. 1965)).

169. *Siggers*, 906 F.2d at 245.

170. *Id.*

171. *Id.*

172. *Id.* at 245–46.

173. *Id.*

174. *Amu v. Barnes*, 650 S.E.2d 288, 295 (Ga. Ct. App. 2007).

175. *Id.* at 290.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

Amu diagnosed him with hemorrhoids, Mr. Barnes began experiencing abnormal cramping and nausea.<sup>180</sup> His new physician referred him to a gastroenterologist, who discovered that he had a malignant tumor in his colon that had spread to his lymph nodes and liver.<sup>181</sup> Mr. Barnes had a diminished chance of survival because of the cancer's progress.<sup>182</sup>

After learning about the cancer, Mr. Barnes and his wife immediately filed suit against Dr. Amu.<sup>183</sup> At trial, Dr. Amu argued that he should not be liable because the second physician did not conduct a colonoscopy, even though Mr. Barnes was over 50 years old.<sup>184</sup> The trial judge agreed to put the issue of superseding cause to the jury, but the jury nevertheless found for the plaintiff.<sup>185</sup> The appellate court upheld the jury verdict.<sup>186</sup> The *Amu* court rejected Dr. Amu's argument that the *Restatement (Second) of Torts*, section 452, protected him from liability as a matter of law.<sup>187</sup> The court explained that nothing in the facts suggested an explicit or implied contract that would have shifted the duty to prevent harm from Dr. Amu to the second physician.<sup>188</sup> Instead, the court noted, "malpractice by one or more successive physicians does not constitute an intervening cause as a matter of law that cuts off the original physician's liability."<sup>189</sup> Still, the *Amu* court found it appropriate to put the issue of superseding cause to a factfinder.<sup>190</sup> Thus, under the holding in *Amu*, a case with the same facts could have reached a different outcome depending on the members of the jury.

In sum, courts have held that a failure to diagnose can be superseded by subsequent acts of negligence on two grounds: (1) that the issue of superseding causation is a factual question for a jury (*Amu* and *Copsey*); or (2) that an implied or explicit contract between two medical professionals can sever the chain of liability between the initial negligent doctor and the victim under the *Restatement (Second) of Torts*, section 452 (*Siggers*).<sup>191</sup>

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180. *Id.*

181. *Id.* at 290–91.

182. *Id.* at 291.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 296.

187. *Id.* at 295–96.

188. *Id.*

189. *Id.* at 295.

190. *Id.* at 296 (“[T]he jury was entitled to hear and resolve whether Dr. Ramsdell’s acts or omissions were the intervening cause of [the plaintiff’s] injury.”).

191. *Id.* at 396; *Copsey v. Park*, 137 A.3d 299, 309 (Md. Ct. Spec. App. 2016); *Siggers v. Barlow*, 906 F.2d 241, 244–45 (6th Cir. 1990); see also RESTATEMENT (SECOND) OF TORTS § 452 (AM. LAW. INST. 1965) (“Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor’s negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.”).

*B. Cases Forbidding the Superseding Causation Defense in the Failure-to-diagnose Context*

Not all courts allow medical professionals to use superseding causation as a defense when their failure to diagnose causes injury to a plaintiff, even when a subsequent medical professional had an opportunity to save the plaintiff. The Kentucky intermediate appellate court in *NKC Hospitals, Inc. v. Anthony*,<sup>192</sup> for example, prohibited the superseding causation defense in such a case. There, a pregnant Mrs. Anthony went to the defendant hospital after experiencing severe nausea.<sup>193</sup> An intake nurse treated her and then called Mrs. Anthony's primary doctor, Dr. Hawkins, who was handling her pregnancy.<sup>194</sup> Dr. Hawkins arrived soon thereafter and ordered several tests.<sup>195</sup> During her time at the hospital, Mrs. Anthony began to experience significant pain, but Dr. Hawkins suspected that she only had a urinary tract infection, and ordered the hospital to discharge her.<sup>196</sup> Staff members at the defendant hospital were concerned about discharging Mrs. Anthony because of her pain, but allowed her to go without being clinically examined by another physician.<sup>197</sup> Mrs. Anthony returned to the hospital four hours later and was transferred to the intensive care unit, where the doctors discovered (several days later) that she had appendicitis.<sup>198</sup> Because of this delay, Mrs. Anthony died from adult respiratory distress syndrome.<sup>199</sup>

The decedent's husband sued the hospital and Dr. Hawkins individually and as a representative of the decedent's estate.<sup>200</sup> At trial, an expert testified that the decedent would still be alive had the appendicitis been identified earlier.<sup>201</sup> The jury found that both defendants were negligent and liable to the plaintiff. However, the hospital appealed the verdict, arguing that the negligent discharge by Dr. Hawkins functioned as a superseding cause.<sup>202</sup> The *NKC Hospitals* court disagreed.<sup>203</sup> It explained that "it is clear that foreseeability by the original or antecedent actor (herein the hospital) negates an otherwise superseding cause (Dr. Hawkins), which

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192. *NKC Hosps., Inc. v. Anthony*, 849 S.W.2d 564, 569 (Ky. Ct. App. 1993).

193. *Id.* at 565.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 565–66.

198. *Id.* at 566.

199. *Id.*

200. *Id.* at 564.

201. *Id.* at 566.

202. *Id.* at 567.

203. *Id.* at 568.

means the hospital is left on the liability hook.”<sup>204</sup> Thus, the court followed the rationale of the *Restatement (Second) of Torts*, section 442B,<sup>205</sup> and held that superseding cause was not a proper defense because the decedent’s injury was foreseeable.<sup>206</sup> In fact, the court opined that, under these circumstances, “[s]uperseding causation . . . is never submitted to the jury.”<sup>207</sup>

The California Court of Appeals for the Second District reached a similar decision in *Fish v. Los Angeles Dodgers Baseball Club*.<sup>208</sup> In *Fish*, a 14-year-old boy attended a Los Angeles Dodgers baseball game and was struck in the head with a foul ball.<sup>209</sup> Shortly thereafter, he was escorted to a first aid station in the ballpark where Dr. Jones examined him.<sup>210</sup> Dr. Jones released the boy, and told him that he could carry on with his normal activities.<sup>211</sup> The boy stayed to watch the rest of the game, and even ran around, but as he left the stadium, he began shaking and had difficulty talking.<sup>212</sup> Eventually, the boy’s parents took him to a hospital.<sup>213</sup> His condition began to deteriorate, and a doctor at the hospital, Dr. Johnson, obtained his parents’ consent to perform a craniotomy.<sup>214</sup> Nine hours later, before undergoing the surgery, the boy suffered a serious convulsion that rendered him decerebrate and led to his death.<sup>215</sup> An autopsy on the boy revealed that the foul ball caused a hairline fracture in his skull, which in turn severed a small artery in his brain.<sup>216</sup> The brain began to bleed almost immediately after the accident, and experts opined that he would have survived if the doctors had discovered the fracture or intracerebral hemorrhage earlier.<sup>217</sup> Experts further opined that the boy may have recovered spontaneously—and would not have required emergency surgery—if Dr. Jones had immobilized him.<sup>218</sup>

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204. *Id.*

205. *Id.* at 569; see also *supra* notes 120–28 and accompanying text (discussing in detail the RESTATEMENT (SECOND) OF TORTS § 442B (AM. LAW INST. 1965)).

206. *NKC Hosps., Inc.*, 849 S.W.2d at 569 (“Our conclusion is that § 442 B. of the *Restatement of Torts, Second* satisfies our inquiry whether to hold the hospital liable.”).

207. *Id.*

208. *Fish v. L.A. Dodgers Baseball Club*, 128 Cal. Rptr. 807 (Cal. Ct. App. 1976).

209. *Id.* at 810.

210. *Id.* at 811.

211. *Id.*

212. *Id.*

213. *Id.* at 812.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 812–13.

218. *Id.* at 813.

The boy's parents initiated a wrongful death suit against Dr. Jones and the Dodgers.<sup>219</sup> At trial, the court gave an instruction to the jury regarding cause, which stated: "[a] legal cause of a death is a cause which is a substantial factor in bringing about the death," but denied the plaintiffs' request to also include an instruction that informed the jury that there might be more than one cause of an injury.<sup>220</sup> The jury, which seemed to not understand the meaning of substantial factor,<sup>221</sup> rendered a verdict in favor of the defendants.<sup>222</sup> The plaintiffs appealed, arguing that the trial court erred by not providing the instruction they requested, and the intermediate appellate court agreed and reversed.<sup>223</sup> In its opinion, the *Fish* court examined the facts of the case and determined that superseding causation could not apply in this situation.<sup>224</sup> First, the court noted the general rule that the failure to prevent harm by a third person is not sufficient to sever the liability of the original tortfeasor.<sup>225</sup> Next, the court examined the exception to this general rule set forth in the *Restatement (Second) of Torts*, section 452(2) which permits a third person's negligence to function as a superseding cause when the duty to protect shifts from the original tortfeasor to the third person.<sup>226</sup> Ultimately, the *Fish* Court held that subsection (2) was improper in this case because "to apply the exception . . . would be in effect to destroy the rule."<sup>227</sup> As a result, Dr. Jones's "wholly untenable" argument that he could not be the proximate

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219. *Id.* at 810.

220. *Id.* at 815.

221. *Id.* (displaying a note from the jury to the judge asking for "a clearer definition of the term 'Substantial Factor'").

222. *Id.* at 817.

223. *Id.*

224. *Id.* at 818–21.

225. *Id.* at 819 (quoting RESTATEMENT (SECOND) OF TORTS § 452(1) cmt. b (AM. LAW INST. 1965)). Section 452(1) provides: "Except as stated in Subsection (2), the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm." RESTATEMENT (SECOND) OF TORTS § 452(1) (AM. LAW INST. 1965).

226. *Fish*, 128 Cal. Rptr. at 820–21 (quoting RESTATEMENT (SECOND) OF TORTS, § 452(2) cmt. d (AM. LAW INST. 1965)). Section 452(2) provides: "Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause." RESTATEMENT (SECOND) OF TORTS § 452(2) (AM. LAW INST. 1965). This is also the provision that the *Siggers* court relied on when it held that, as a matter of law, the subsequent act of medical negligence by a doctor, who worked at the same hospital as the original negligent doctor, cut off the original doctor's liability. *Siggers v. Barlow*, 906 F.2d 241, 244 (6th Cir. 1990); see also *supra* notes 159–73 and accompanying text (discussing *Siggers* in detail); *supra* notes 123–28 and accompanying text (discussing in detail RESTATEMENT (SECOND) OF TORTS § 452 (AM. LAW INST. 1965)).

227. *Fish*, 128 Cal. Rptr. at 821.



cause of the boy's death because of the subsequent negligence was rejected.<sup>228</sup>

The Supreme Court of Alabama ruled similarly to both *NKC Hospitals* and *Fish* in *Looney v. Davis*.<sup>229</sup> In that case, Mrs. Davis went to her dentist, Dr. Looney, complaining of significant pain in her right molar.<sup>230</sup> After an initial intake, Dr. Looney removed the tooth.<sup>231</sup> The next day, Mrs. Davis returned to the office because she continued to bleed from the site of the tooth extraction, and Dr. Looney put a suture over the cut and gave her penicillin.<sup>232</sup> A more thorough investigation into her medical background, however, would have revealed that she had difficulty with blood coagulation.<sup>233</sup> The day after she received the suture, Mrs. Davis went to the hospital after passing out.<sup>234</sup> The hospital staff gave her gauze and told her to bite down on it, and the attending doctor told her that she would need to call her dentist.<sup>235</sup> Mrs. Davis's family called Dr. Looney, who told them that he could not help because he was not on staff at that hospital.<sup>236</sup> The hospital released her without further treatment and instructed her to keep applying pressure on the extraction site with gauze.<sup>237</sup>

Mrs. Davis started experiencing more complications after returning home, so her family called an ambulance that took her to a different hospital.<sup>238</sup> At this new hospital, she was given a shot of penicillin and told to bite down on tea bags, which would help with coagulation.<sup>239</sup> She showed signs of improvement and was told to return home and see her dentist the next day.<sup>240</sup> Unfortunately, Mrs. Davis was found semi-conscious and delirious early the next morning.<sup>241</sup> An ambulance rushed her to the hospital, and she soon received a blood transfusion and underwent treatment.<sup>242</sup> Mrs. Davis, however, did not survive the treatment.<sup>243</sup> The doctors determined that her blood would not clot because of sepsis, liver

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228. *Id.*

229. *Looney v. Davis*, 721 So. 2d 152, 161–62 (Ala. 1998).

230. *Id.* at 154.

231. *Id.*

232. *Id.* at 155.

233. *Id.* at 154–55.

234. *Id.* at 155.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 156.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

disease, and anemia.<sup>244</sup> The decedent's husband filed a survival action for medical malpractice against Dr. Looney and all of the other subsequent medical providers.<sup>245</sup>

At the end of the trial, the jury returned a verdict against the defendants.<sup>246</sup> Dr. Looney appealed, arguing that the trial judge erred by denying his motion for a directed verdict.<sup>247</sup> Specifically, Dr. Looney asserted that he did not proximately cause the decedent's death because the acts of subsequent doctors were superseding causes.<sup>248</sup> The Alabama Supreme Court disagreed, explaining that the issue of whether an intervening cause becomes a superseding cause is intertwined with proximate causation, and thus "hinges on foreseeability."<sup>249</sup> The *Looney* court relied, in part, on the medical malpractice complications rule: "That an injured party will receive negligent medical care is always foreseeable."<sup>250</sup> The court also rejected the defendant's plea to follow *Siggers*,<sup>251</sup> and adopt that court's interpretation of the *Restatement (Second) of Torts*, section 452.<sup>252</sup> In the end, the *Looney* court held that it would apply "the general rule that subsequent negligent medical care is foreseeable and therefore is not regarded as a superseding cause of injury."<sup>253</sup>

These three cases, *NKC Hospitals*, *Fish*, and *Looney*, are examples of where courts reject the notion that a doctor who fails to diagnose a patient may avoid liability by pinning blame on a subsequent doctor, who also negligently prevents the patient from receiving proper treatment.<sup>254</sup> Simply put, these courts found the superseding causation defense inappropriate in such situations.<sup>255</sup> All three courts harkened back to the traditional theory underlying proximate cause, and decided that foreseeability was the best

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244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 156–57.

248. *Id.* at 159.

249. *Id.* (quoting *Springer v. Jefferson Cty.*, 595 So. 2d 1381, 1384 (Ala. 1992)).

250. *Id.*

251. *Id.* at 161–62 (citing *Siggers v. Barlow*, 906 F.2d 241, 247 (6th Cir. 1990)). Indeed, the *Looney* court stated that the holding from and rationale in *Siggers* was "questionable." *Id.* at 161; see also *supra* notes 159–73 and accompanying text (discussing *Siggers* in detail).

252. *Looney*, 721 So. 2d at 161–62.

253. *Id.* at 161.

254. *NKC Hosps., Inc. v. Anthony*, 849 S.W.2d 564, 569 (Ky. Ct. App. 1993); *Fish v. L.A. Dodgers Baseball Club*, 128 Cal. Rptr. 807, 820–21 (Cal. Ct. App. 1976); *Looney*, 721 So. 2d at 161–62.

255. See *NKC Hosps., Inc.*, 849 S.W.2d at 569 (upholding the trial court's ruling that superseding causation did not apply); *Fish*, 128 Cal. Rptr. at 820–21 (rejecting a doctor's superseding cause defense); *Looney*, 721 So. 2d at 161–62 (declining to overrule precedent that "subsequent negligent medical care . . . is not regarded as a superseding cause").

tool to use when determining causation in the failure-to-diagnose context.<sup>256</sup> One case, *NKC Hospitals*, specifically relied on the *Restatement (Second) of Torts*, section 442B, and the other two, *Fish* and *Looney*, explicitly rejected section 452.<sup>257</sup> It is also important to note that none of the three courts put the superseding causation issue to a jury.<sup>258</sup>

### III. NEGLIGENT MEDICAL PROFESSIONALS WHO FAIL TO DIAGNOSE SHOULD BE BARRED FROM ASSERTING A SUPERSEDING CAUSE DEFENSE WHEN A SUBSEQUENT ACT OF MEDICAL NEGLIGENCE ALSO CAUSALLY CONTRIBUTES TO A PATIENT'S INJURY

This Article argues that, as a matter of law, courts should bar medical professionals who negligently fail to properly diagnose from availing themselves of a superseding causation defense—even when another act of medical malpractice also causally contributes to the patient's injury. In other words, courts should follow the rationale and holdings of *NKC Hospitals*, *Fish*, and *Looney*, as opposed to the rationale and holdings of *Copsey*, *Siggers*, and *Amu*.

In support of this argument, this Article offers four justifications. First, prohibiting the superseding causation defense in these situations furthers the goals of tort law. Specifically, this prohibition will yield a greater distribution of loss, provide a better opportunity to make plaintiffs whole, and better deter medical negligence. Second, the superseding causation defense in the failure-to-diagnose context is akin to the last wrong-doer rule, which courts have universally rejected.<sup>259</sup> Third, application of the superseding causation defense in these situations is inconsistent with the medical malpractice complications rule. Fourth, the issue of superseding

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256. See *NKC Hosps., Inc.*, 849 S.W.2d at 569 (“The hospital . . . could readily foresee that injury would directly flow from Dr. Hawkins’ negligent conduct . . .”); *Fish*, 128 Cal. Rptr. at 820–21 (finding that, absent exceptional circumstances, the court should apply principles of foreseeability); *Looney*, 721 So. 2d at 161 (“[T]he general rule [is] that subsequent negligent medical care is foreseeable . . .”).

257. Compare *NKC Hosps., Inc.*, 849 S.W.2d at 569 (“Our conclusion is that § 442 B. of the *Restatement of Torts, Second* satisfies our inquiry . . .”), with *Fish*, 128 Cal. Rptr. at 820–21 (considering RESTATEMENT (SECOND) OF TORTS § 452(2) and rejecting it based on the facts), and *Looney*, 721 So. 2d at 161–62 (following the reasoning in *Fish* and holding inapplicable RESTATEMENT (SECOND) OF TORTS § 452(2) (AM. LAW INST. 1965)).

258. See *NKC Hosps., Inc.*, 849 S.W.2d at 569 (holding that “[s]uperseding causation . . . is never submitted to the jury”); *Fish*, 128 Cal. Rptr. at 821–22 (finding superseding causation did not apply as a matter of law); *Looney*, 721 So. 2d at 161–62 (reaffirming that subsequent negligent medical care is not a superseding cause).

259. See SHULMAN ET AL., *supra* note 19, at 344–45 (providing an in-depth discussion of the last wrong-doer rule).

causation in the failure-to-diagnosis context should not even be a question for a jury, as it risks jury confusion.

*A. Adverse Effect on Goals of the Tort System: Loss Distribution, Plaintiff Recovery, and Malpractice Deterrence*

In addition to compensating the victim of a tortious act, the tort system attempts to distribute loss when possible and deter acts of negligence.<sup>260</sup> Permitting a negligent doctor to use a superseding cause defense in the failure-to-diagnose context is therefore counterintuitive because: (1) it allows one tortfeasor to avoid liability while increasing other joint tortfeasors' risks of liability; (2) it shrinks the pool of damages that is available to the victim; and (3) it does less to deter failure to diagnose than if a superseding causation defense was impermissible.

Legal scholars have remarked that the distribution of tortfeasor loss is an important consideration in torts jurisprudence.<sup>261</sup> While this topic usually arises in discussions regarding social insurance programs,<sup>262</sup> the general principle remains the same in cases involving multiple tortfeasors: the more tortfeasors that pay, the more the loss between them will be spread and therefore reduced. As Judge Calabresi has explained, "if losses are broadly spread—among people . . . —they are least harmful."<sup>263</sup> Thus, a negligent doctor who manages to avoid liability for a failed diagnosis is not only escaping liability to his or her victim; he or she is also placing a much larger financial burden on the backs of the other negligent medical professionals. The result is objectively unfair.<sup>264</sup>

It is also important not to lose sight of the financial harm that the tort victim could incur by releasing a tortfeasor from liability. "The resources available to accident victims should be sufficient to enable them to obtain

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260. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500–01, 517, 530, 533 (1961) (examining justifications for tort liability, including "loss spreading" and "deterrence"); see also STEVEN E. PEGALIS, 1 AMERICAN LAW OF MEDICAL MALPRACTICE 3d § 1:4 (2005) ("The negligence system makes a great deal more sense if it is understood primarily as a means to deter careless behavior . . .").

261. See Calabresi, *supra* note 260, at 517 (discussing the spreading of losses).

262. See Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964, 966–67 (1959) (stating that advocates of loss distribution believe that society should widely distribute casualty losses through comprehensive social insurance, insurance companies, or large self-insurers).

263. Calabresi, *supra* note 260, at 517.

264. See VETRI ET AL., *supra* note 7, at 13 ("Justice or fairness must be an integral, overarching component in accident law. . . . In the final analysis, no other objective, no matter how salient, can dominate the [tort] system if the public views the operative results it produces as fundamentally unfair.").

present and future necessary medical and rehabilitative care[, as well as] lost earnings and impairment[s] of future earning[s] . . . .”<sup>265</sup> While adding another tortfeasor to the mix may not increase the award of damages, it does increase the pool from which those damages can be collected.<sup>266</sup> For example, if X receives a judgment against Y for damages in the amount of \$5,000,000, X may realistically only be able to collect \$3,000,000 of the award if that is the extent of Y’s liability insurance coverage. While X would still have a legal claim to the remaining \$2,000,000, Y could effectively be judgment proof if he has insufficient assets. If Z were included as a joint tortfeasor, however, X would have more security. X could now collect from Z and Z’s liability coverage, as well. Therefore, when a negligent medical professional who fails to diagnose a plaintiff succeeds on a superseding causation defense, the plaintiff may collect less than if both Y and Z were held liable.

Finally, society as a whole suffers if doctors can easily sidestep liability through a superseding causation defense. Admittedly, most doctors do not maliciously seek to commit malpractice on their patients, but the threat of a lawsuit and losing money provides an incentive to comply with the appropriate standard of care.<sup>267</sup> “The liability malpractice tort system is an integral part of the[] forces” that “positively influence the quality of patient care.”<sup>268</sup>

Medical professionals may argue that eliminating a superseding causation defense offers no extra incentive; they would be taking a risk to rely on the defense because it is impossible to predict the occurrence of future negligent acts. While this argument has some merit, it is problematic to extend the rationale to the failure-to-diagnose context. First, when a doctor fails to diagnose a patient, that patient will likely need to see other medical professionals in the future as his or her health problems persist. Indeed, as the cases in Part II illustrate, a patient could present symptoms to a subsequent doctor in an emergency situation where the need for medical intervention is heightened.<sup>269</sup> One misstep by the subsequent doctor could lead to severe consequences for the patient. The entire situation, however, could have been avoided if the original doctor had correctly diagnosed the patient. Thus, taking away the prospect of a superseding causation defense

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265. *Id.* at 12.

266. Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 ENVTL. L. 549, 569 (1995).

267. See PEGALIS, *supra* note 260, § 1:4 (“Quality medical care will not be maintained on its own initiative.”).

268. *Id.*

269. See *supra* Part II.B (discussing in detail *Fish v. L.A. Dodgers Baseball Club* and *Looney v. Davis*).

in this context provides a further incentive for doctors to accurately diagnose a patient in the first place.

Second, the *Restatement (Second) of Torts*, section 452, is especially problematic because, as interpreted by some courts, it allows medical professionals to knowingly pass on a patient, via an express contract or otherwise, and wash their hands of all potential liability.<sup>270</sup> In *Siggers*, for example, the original doctor who misread the x-ray could never be held liable because a subsequent medical professional would always have the responsibility to correct the error.<sup>271</sup> Section 452, therefore, has the perverse outcome of fostering a “not my patient, not my problem” mindset.<sup>272</sup> If one goal of medical malpractice litigation is truly to deter future acts of medical malpractice,<sup>273</sup> then courts should avoid the *Siggers* application of section 452 in the failure-to-diagnose context.

### *B. A Regression to the Much Criticized Last Wrong-doer Rule*

Allowing an act of medical negligence that contributes to an injury to supersede the original failure to diagnose is akin to the last wrong-doer rule. The last wrong-doer rule is “an archaic notion that there can be only one ‘proximate’ cause of an event and that it should be the one nearest in time to that event.”<sup>274</sup> This rule effectively “eras[ed] the potential liability of the earlier wrongdoer[s] whose wrongful acts had also contributed to [the] plaintiff’s loss.”<sup>275</sup>

The last wrong-doer rule has been heavily criticized and flat out rejected by commentators and courts alike.<sup>276</sup> Opponents have explained that:

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270. See RESTATEMENT (SECOND) OF TORTS § 452 cmt. e (AM. LAW INST. 1965) (explaining the original actor may be “relieved of his obligation” through a contract “or by fair implication from what is agreed”).

271. *Siggers v. Barlow*, 906 F.2d 241, 245 (6th Cir. 1990).

272. See, e.g., *id.* at 244–45 (quoting RESTATEMENT (SECOND) OF TORTS § 452 (AM. LAW INST. 1965)) (shifting responsibility for a misdiagnosis from the original doctor to a subsequent on-duty physician).

273. See PEGALIS, *supra* note 260, § 1:4 (“[L]itigation . . . signals potentially negligent [individuals] that it will cost them more to be careless than to invest in an appropriate level of prevention. Damages awarded to a victim induce potentially negligent [individuals] to compare the cost of avoiding an injury with the cost of paying for it.” (quoting WILLIAM B. SCHWARTZ & NEIL K. KOMESAR, DOCTORS, DAMAGES AND DETERRENCE: AN ECONOMIC VIEW OF MEDICAL MALPRACTICE 3–4 (1978))).

274. SHULMAN ET AL., *supra* note 19, at 344–45.

275. *Id.* at 345.

276. *Id.* (“The last wrongdoer rule never commanded wide support as a test for limiting defendant’s liability in ordinary negligence cases.”).

The last wrongdoer rule is subject to criticism wherever it is invoked. It reflects no vital modern policy but only earlier mechanistic notions. And it is irreconcilable with large bodies of existing case law. . . . At best the last wrongdoer test yields a “correct” result only by chance.<sup>277</sup>

The “modern policy” that the last wrong-doer rule ignored was the concept of proximate causation.<sup>278</sup> Essentially, the last wrong-doer rule turned what should be a question of foreseeability<sup>279</sup> into a question of chronology when determining the scope of liability.<sup>280</sup> The superseding causation defense has the same effect in failure-to-diagnose cases where the injury that occurs is the same type of injury that would be expected to occur.<sup>281</sup> In these cases, foreseeability of the injury does not seem to be the primary consideration.<sup>282</sup>

Courts should therefore forbid superseding causation defenses in the failure-to-diagnose context, as it resembles the last wrong-doer rule more than it does the well-accepted foreseeability test for proximate causation.<sup>283</sup> There is no good reason to sacrifice fairness for simplicity. After all, causation does not cease to exist merely because of a subsequent negligent act.<sup>284</sup>

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277. 4 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 20.6(5) (3d ed. 2007).

278. Langsing S. Hoskins, Comment, *Principal and Agent: Collateral Fraud by Agent: Proximate Cause*, 4 CORNELL L.Q. 216, 220 (1919) (“There are . . . cases involving two wrongdoers, both of whom may be sued by the injured party, and both being the legal cause of the damage. Th[e last wrongdoer] rule has been criticised on the[se] grounds . . .”).

279. See *supra* Part I.B (introducing the foreseeability test).

280. See SHULMAN ET AL., *supra* note 19, at 344–45 (noting that the last wrong-doer rule called for “the latest wrongdoer in the chain of events to be regarded as the sole proximate cause of the harm”).

281. See, e.g., *Siggers v. Barlow*, 906 F.2d 241, 242–43 (6th Cir. 1990) (analyzing a suit wherein failure to diagnose a broken wrist led to extensive wrist impairment).

282. See, e.g., *id.* at 245 (placing weight on an implied contractual agreement between physicians); *Copsey v. Park*, 137 A.3d 299, 309 (Md. Ct. Spec. App. 2016) (placing weight on evidence of subsequent negligence without considering the foreseeability of said negligence); *Amu v. Barnes*, 650 S.E.2d 288, 296 (Ga. Ct. App. 2007) (holding it was a question for the jury whether a lapse of time or a contractual agreement between physicians merited a superseding cause defense); see also *supra* Part II.A (discussing these cases in detail).

283. See *supra* Part I.B (outlining proximate causation).

284. Terry Christlieb, *Why Superseding Cause Analysis Should Be Abandoned*, 72 TEX. L. REV. 161, 185 (1993).

[C]auses do not really supersede or absorb each other. Particular conduct either plays a causal role or it does not. Even in the case of the ameliorative doctrines, it is a fiction to suppose that the nature of one of the causes somehow erases the existence or effect of another. One cause does not obliterate the other. Rather, we simply decide to ignore one of the causes that we know played a role. But the term “superseding cause” carries the idea that we are looking for a quality or

*C. Application of the Medical Malpractice Complications Rule*

As explained above, under the medical malpractice complications rule, medical malpractice that follows a negligent act is foreseeable as a matter of law when it exacerbates the original injury.<sup>285</sup> The majority of jurisdictions, if not all, apply this rule.<sup>286</sup> If the medical malpractice complications rule applies in all instances of negligence, then it should also apply in medical malpractice cases.<sup>287</sup> To hold otherwise would be arbitrary.

In *Modave v. Long Island Jewish Medical Center*, Judge Friendly explained that the medical malpractice complications rule is also applicable when medical malpractice causes an injury and subsequent malpractice enhances that injury:

A hypothetical will make this clear. A plaintiff who has suffered a stroke is brought to a hospital where he is given an overdose of medicine, which results in permanent damage to his eyesight. He is then transferred to a second hospital, which has better facilities for stroke victims. The staff of the second hospital negligently fails to recognize the seriousness of his condition, and, as a result, he suffers brain damage. Plainly the first hospital is liable only for the injury to the plaintiff's eyesight, and the second is liable only for the brain damage. *If the malpractice of each had contributed substantially to the same brain injury, both would probably be liable for all the damages attributable to that injury.* This, however, would be because it would be impossible for the jury rationally to apportion each tortfeasor's contribution to the single indivisible injury, not because, as counsel insists, the first hospital's malpractice automatically becomes 'an original injury'

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characteristic of some causes which gives them a unique causal relationship to the damages.

*Id.*

285. See *supra* Part I.B.2 (outlining the medical malpractice complications rule).

286. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 35 cmt. a (AM. LAW INST. 2010) ("This Section reiterates [the medical malpractice complications rule adopted in the Restatement (Second) of Torts § 457], which retains virtually unanimous acceptance, and expands it to cover other tortious conduct.").

287. Indeed, the Alabama Supreme Court used this rationale in *Looney* when it barred a negligent medical professional from asserting a superseding cause defense. *Looney v. Davis*, 721 So. 2d 152, 161–62 (Ala. 1998).



as to the second hospital in any case involving successive acts of malpractice.<sup>288</sup>

Judge Friendly's rationale applies to medical malpractice cases in which a failure to diagnose leads to an injury, even when the injury could have been avoided "but-for" another subsequent act of negligence. An example of this arose in *Fish*.<sup>289</sup> There, the victim died because of a brain injury, but the injury could have been avoided if the first doctor had correctly diagnosed the patient, or if the second doctor had acted more urgently in treating the patient.<sup>290</sup> The negligence of both therefore caused the same injury. Thus, if the first doctor in *Fish* could have used the superseding causation defense (as the doctors in *Copsey*, *Siggers*, and *Amu* did),<sup>291</sup> he would have been in conflict with the universally accepted medical malpractice complications rule.<sup>292</sup>

In short, if courts wish to apply the medical malpractice complications rule consistently, then they should apply the rule in the failure-to-diagnose context when the failed diagnosis is followed by another act of medical negligence that prevents the patient from receiving proper treatment. When both of these negligent acts cause the same injury, which proper medical practice by either doctor could have prevented, both tortfeasors should be held liable.<sup>293</sup>

#### *D. Resolution of Superseding Cause as a Matter of Fact Poses the Threat of Jury Confusion*

Some courts have decided to resolve the issue of superseding causation in the failure-to-diagnose context as a question of fact that is best left for

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288. *Modave v. Long Island Jewish Med. Ctr.*, 501 F.2d 1065, 1073 n.8 (2d Cir. 1974) (emphasis added).

289. See *Fish v. L.A. Dodgers Baseball Club*, 128 Cal. Rptr. 807, 813–14 (Cal. Ct. App. 1976) (quoting expert testimony revealing negligence during both diagnosis and treatment).

290. *Id.*

291. Compare *id.* at 821 (rejecting the superseding cause defense), with *Copsey v. Park*, 137 A.3d 299, 309 (Md. Ct. Spec. App. 2016) (permitting the superseding cause defense), *Siggers v. Barlow*, 906 F.2d 241, 247 (6th Cir. 1990) (permitting the superseding cause defense), and *Amu v. Barnes*, 650 S.E.2d 288, 291 (Ga. Ct. App. 2007) (permitting the superseding cause defense).

292. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 35 cmt. a (AM. LAW INST. 2010).

293. Note that this Article does not argue that all subsequent acts of medical malpractice cause the same injury. The proposed resolution that this Article offers only seeks to hold medical professionals liable for the injuries that they *proximately* cause. See *infra* Part IV (proposing a new "foreseeable harm test" as a solution to this issue).

the jury.<sup>294</sup> This, however, carries the risk of jury confusion and arbitrary, unfair verdicts.<sup>295</sup> As the Kentucky Supreme Court explained in *House v. Kellerman*:

Considering the complexity and abstract nature of the various criteria for intervening and superseding causation, exemplified in the Restatement, Torts 2d, §§ 440–453, the disposition of this court to treat the question as a legal rather than a factual issue reflects the inevitable vicissitudes of life. It is enough to tax jurors with the problems of what an “ordinarily prudent person” would have done under similar circumstances, and whether a party’s failure to meet that standard was a “substantial factor” in causing the accident, without requiring it to answer such abstruse inquiries as whether the consequences of an intervening force or circumstance “appear after the event to be extraordinary rather than normal,” or “highly extraordinary.”<sup>296</sup>

Thus, the *House* court held that the issue of superseding causation should be determined as a matter of law.<sup>297</sup>

The rationale in *House* makes sense. Causation is one of the more difficult topics in tort jurisprudence and can even prove a challenge for judges and lawyers.<sup>298</sup> It may therefore be naïve to believe that a collection of jurors, with no formal legal training, will oftentimes correctly resolve the issue of causation—particularly when they are inundated with a collection of phrases like “superseding and intervening cause,” “foreseeability,” and “proximate cause.” The term “superseding cause” is especially dangerous because it could cause a jury to focus less on foreseeability and more on the

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294. See, e.g., *Copsey*, 137 A.3d at 310 (concluding superseding causation is best left to the jury); *Amu*, 650 S.E.2d at 296 (holding whether the negligence of a second doctor was an intervening cause is a question for the jury to resolve).

295. Jury confusion is a potential issue in any jury trial and is something that courts should always try to avoid. Cf. FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by . . . confusing the issues . . .”).

296. *House v. Kellerman*, 519 S.W.2d 380, 382 (Ky. 1974) (quoting RESTATEMENT (SECOND) OF TORTS §§ 442, 447 (AM. LAW INST. 1965)).

297. *Id.* Other courts have ruled similarly. See *Hibma v. Odegaard*, 769 F.2d 1147, 1156 (7th Cir. 1985) (holding the court should determine “the existence or extent of the tort-feasor’s liability” when presented with undisputed facts); see also RESTATEMENT (SECOND) OF TORTS § 453 cmt. b (AM. LAW INST. 1965) (“If the facts are undisputed, it is usually the duty of the court to apply to them any rule which determines the existence or extent of the negligent actor’s liability.”).

298. Christlieb, *supra* note 284, at 161. “The problems surrounding the notion of ‘causation’ have occupied the efforts of some of history’s greatest thinkers, and the complexities of the topic generate a steady stream of scholarly articles and books . . . . It is not surprising, then, that causation continues to confuse lawyers, judges, and jurors, who have to apply causal concepts in the context of actual litigation.” *Id.*

fact that a negligent tortfeasor can be absolved by later acts of negligence.<sup>299</sup>

Prohibiting negligent doctors from availing themselves of a superseding causation defense in the failure-to-diagnose context, however, would not mean that the doctors are *per se* liable for all subsequent acts of medical malpractice. Rather, a factfinder would be asked to determine if the original failure to diagnose was a proximate cause of the injury.<sup>300</sup> Superseding causation, after all, is essentially only a reformulation of proximate cause.<sup>301</sup> “There is really no need to multiply terminology in order to have a special name for these subclasses of cause-in-fact and proximate cause, especially when the subclasses are merely descriptive groupings that are not functionally distinct.”<sup>302</sup> Framing the question of causation solely as one of proximate cause encourages a jury to hone in on the relationship between the original act of malpractice and ultimate injury—rather than be distracted by intervening acts of medical malpractice.<sup>303</sup>

#### IV. RECOMMENDATION AND CONCLUSION

This Article asserts that a doctor who negligently fails to diagnose a patient should not be able to avoid liability (for an injury that could have been prevented had the doctor rendered a correct diagnosis) on the basis that a subsequent act of medical malpractice also causally contributed to (or could have prevented) the patient’s injury. Allowing the original doctor to evade liability in this situation not only unfairly harms injured patients and subsequent medical professionals,<sup>304</sup> but runs counter to the concept of proximate causation and foreseeability.<sup>305</sup> Instead of framing causation as

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299. *Id.* at 184 (“[T]he notion of a superseding cause probably hinders clear thinking about causation . . . [I]t gives prominence to temporal order as a key to liability.”).

300. This Article argues that this issue of superseding cause is not appropriate for a jury to consider in the failure-to-diagnose context. This does not mean, however, that the ultimate issue of whether the original malpractice is a proximate cause of the injury should be removed from the jury. *See Pittway Corp. v. Collins*, 973 A.2d 771, 792 (Md. 2009) (“[T]he determination of proximate cause . . . is for the jury.” (quoting *Caroline v. Reicher*, 304 A.2d 831, 835 (1973))).

301. *See* Christlieb, *supra* note 284, at 184.

302. *Id.* at 183.

303. *Id.* at 186 (“Superseding cause analysis impedes the search for the important factors in a situation. For that reason, it would be better to cast discussions in terms of proximate cause . . . exclusively, eliminating the use of the term ‘superseding cause’ and its equivalents.”).

304. *See supra* Part III.A (discussing the adverse consequences of superseding causation in the failure-to-diagnose context).

305. *See* Christlieb, *supra* note 284, at 185 (describing how it is misleading to attribute causation to a single temporal chain); *see generally supra* Parts I.B, III.B, & III.C (explaining proximate cause and foreseeability).

an issue regarding superseding causation, courts should implement a pure proximate causation test. Specifically, this test would ask: “was the injury that the patient sustained a foreseeable consequence of the failed diagnosis?”<sup>306</sup> For the sake of clarity, this Article refers to this test as the “foreseeable harm” test, even though it is actually the basic test for proximate causation.

The foreseeable harm test differs from the current superseding cause test, which some courts apply in the failure- to-diagnose context in two important ways. First, it does not use the term “superseding cause,” which may potentially confuse or mislead the jury.<sup>307</sup> Second, the test allows a jury to consider only the foreseeability of the harm, as opposed to considering both the foreseeability of the harm and the intervening act.<sup>308</sup> Indeed, under the medical malpractice complications rule, the intervening medical malpractice is already foreseeable as a matter of law.<sup>309</sup>

The foreseeable harm test that this Article proposes also helps protect doctors who fail to diagnose from unforeseen consequences. For example, if Dr. X negligently fails to diagnose patient Y’s appendicitis, Dr. X will not be liable if Dr. Z performs surgery on patient Y the next day to remove the appendix, but ends up removing one of Y’s feet instead.<sup>310</sup> Losing feet is not a foreseeable consequence of failing to diagnose appendicitis. If, however, Dr. X negligently fails to diagnose patient Y’s appendicitis, and patient Y dies from adult respiratory distress syndrome because Dr. Z negligently fails to perform a timely surgery after the appendicitis is discovered, then Dr. X would be liable under the foreseeable harm test. Adult respiratory distress syndrome is a foreseeable consequence of not treating appendicitis.<sup>311</sup> It does not matter that Dr. Z could have saved patient Y, because Dr. X also could have saved her if he correctly diagnosed the appendicitis.

This Article, therefore, recommends that courts abandon the superseding causation defense when a medical professional negligently fails to diagnose a patient and seeks to avoid liability because a subsequent

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306. This test is consistent with the RESTATEMENT (SECOND) OF TORTS § 442B (AM. LAW INST. 1965) (indicating that an intervening force “does not relieve the [original] actor of liability” for foreseeable consequences).

307. *See, e.g.,* *NKC Hosps., Inc. v. Anthony*, 849 S.W.2d 564, 569 (Ky. Ct. App. 1993) (holding superseding causation should not be submitted to the jury, though its elements may be incorporated into comparative fault).

308. *See supra* Part I.B.1 (discussing the foreseeability of intervening actions).

309. *See* VETRI ET AL., *supra* note 7, at 483 (showing how additional harm suffered in rendering medical aid is foreseeable).

310. This example is a tweaked version of the fact pattern in *NKC Hosps., Inc.*, 849 S.W.2d at 565–66.

311. *Id.* at 566.

medical professional also committed an act of medical malpractice. In its stead, courts should implement the foreseeable harm test to determine whether the original negligent medical professional should be held liable for the injury suffered by the patient. This test effectively pins liability on those responsible for an injury, but does not create an overly broad scheme in which the original negligent medical professional is liable for every adverse outcome that the patient suffers.