STATE OF MICHIGAN

COURT OF APPEALS

RONALD BOREK,

Plaintiff-Appellant,

v

JAMES ROBERT HARRIS and SWIFT TRANSPORTATION, INC.,

Defendants-Appellees.

UNPUBLISHED
September 29, 2011

No. 298754
Monroe Circuit Court
LC No. 09-027763-NI

Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this automobile negligence case. We reverse and remand.

At approximately 4:00 a.m. on September 4, 2008, plaintiff, in the course of his employment, was driving a truck and two trailers that were loaded with scrap metal. After a brief stop, as plaintiff was travelling in the right traffic lane, his vehicle was struck from behind by a truck owned by defendant Swift Transportation, Inc., and driven by defendant James Harris. Debris from plaintiff's truck was scattered throughout the roadway. Plaintiff left his vehicle to check on Harris. Plaintiff climbed up onto defendants' truck, knocked on the side window, and spoke briefly to Harris. Plaintiff then got down and walked a few steps away, at which point he was struck in the leg by a piece of metal that was propelled by another oncoming car. The trial court determined that defendant Harris's alleged negligent driving was not the proximate cause of plaintiff's injury from the flying debris and granted defendants' motion for summary disposition.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."

The present case involves the issue of proximate cause and the related concepts of intervening and superseding cause. "Proximate cause is a question for the jury to decide unless reasonable minds could not differ regarding the issue." *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009). Generally, when there are no policy considerations

involved, the question whether an intervening cause should be deemed a superseding cause, thus relieving the original actor of liability, is a question for the factfinder. *Coy v Richard's Indus, Inc*, 170 Mich App 665, 669; 428 NW2d 734 (1988). "Proximate cause incorporates two separate elements: (1) cause in fact and (2) legal or proximate cause." *Lockridge*, 285 Mich App at 684.

Viewed in the light most favorable to plaintiff, the evidence showed that the collision was the cause in fact of plaintiff's injury. The evidence established that the collision caused scrap metal from plaintiff's vehicles to disperse over the roadway. According to a responding officer, Deputy Scott Sergent, the debris field was "heavy" and "difficult to maneuver through[.]" Although plaintiff was uncertain about the object that struck him, Harris testified that plaintiff was struck by the debris. The circumstantial evidence also supported plaintiff's theory that he was struck by debris from the accident; one need not resort to speculation to conclude that the source of the debris that struck plaintiff was the collision.

"Legal or proximate cause normally involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for them. To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable." *Lockridge*, 285 Mich App at 684 (citations and internal quotations omitted). "When a number of factors contribute to producing injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in bringing about the injury." *Poe v Detroit*, 179 Mich App 564, 576; 446 NW2d 523 (1989). The Restatement of Torts contrasts a cause that is a substantial factor from one that has "merely a negligible effect in bringing about the plaintiff's harm." See Restatement Torts, 2d § 431, comment b, p 429. The determination that the defendant's act is a substantial factor in bringing about the harm is not conclusive of liability because other rules "operate to relieve a negligent actor from liability because of the manner in which his negligence produces it, even though his negligent conduct is a substantial factor in bringing it about." Restatement Torts, 2d, § 431, comment d, p 429-430. These other rules include rules addressing intervening and superseding causes.

An "intervening cause" is "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985), adopting the definition in Restatement Torts, 2d § 441, p 465. An intervening cause may relieve a defendant from liability for his antecedent negligence. *Meek v Dept' of Transp*, 240 Mich App 105, 120; 610 NW2d 250 (2000), overruled in part on other grounds in *Grimes v Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006). The term "superseding cause" is used to refer to an intervening cause that has this effect. *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 436 (BRICKLEY, J.), 447 (RILEY, J.); 487 NW2d 106 (1992), amended 440 Mich 1203 (1992).

"'The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.'" *Bunda v Hardwick*, 376 Mich 640, 669-670, 673; 138

NW2d 305 (1965),[1] adopting Restatement Torts, 2d § 443. The word "normal" as used in § 443 is not used

> "in the sense of what is usual, customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary. It means that the court or jury, looking at the matter after the event, and therefore knowing the situation which existed when the new force intervened, does not regard its intervention as so extraordinary as to fall outside of the class of normal events." [*Moning v Alfono*, 400 Mich 425, 442 n 17; 254 NW2d 759 (1977), quoting Restatement, § 443, comment b, pp 472-473.]

In a portion of § 443 of the Restatement not quoted in *Moning*, comment b continues:

> When a negligently driven automobile hits a cow, it is scarcely to be regarded as usual, customary, or foreseeable in the ordinary sense in which that word is used in negligence cases, that the cow, after lying stunned in the highway for five minutes, will recover, take fright, and make a frantic effort to escape, and that in the course of that effort it will charge into a bystander, knock him down, and injure him. But in retrospect, after the event, this is not at all an abnormal consequence of the situation which the driver has created. It is to be classified as normal, and it will not operate as a superseding cause which relieves the driver of liability. [Restatement Torts, 2d, § 443, comment b, p 473.]

"The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurred was one of the kind of consequences which might reasonably be foreseen." *Comstock v Gen Motors Corp*, 358 Mich 163, 180; 99 NW2d 627 (1959) (manufacturer's failure to warn of defective brakes was a proximate cause of injuries sustained when a service manager who was aware, but momentarily forgot, that the brakes on a vehicle were inoperable drove it into the plaintiff).

The lapse of time between a defendant's negligence and a plaintiff's injuries does not mean the defendant's act is not a proximate cause of the harm or that an intervening cause should be deemed as a superseding cause. Lapse of time is a relevant consideration in determining whether negligent conduct is a "substantial factor" is bringing about the harm. Restatement Torts, 2d, § 433, p 432. "[W]here it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of the other's harm." Restatement Torts, 2d, § 433, comment f, p 434. The defendant's act may be seen as "still operating," as with General Motors's failure to warn of the defective brakes in *Comstock*.

[1] The lead opinion in *Bunda* is a dissent by Justice Souris, joined by two other justices. Three other justices joined Justice Souris's opinion except with respect to part I-D, which concerned an incident in the jury room.

In some instances, however, the "defendant creates a risk from particular forces and those forces have been spent, [] the risk has 'terminated' and the plaintiff's injury results from a new force that is outside the original risk." 1 Dobbs, Law of Torts, § 193, p 483. "[O]nce an impact is over and the plaintiff drives on down the road, it is possible to think of the risk as being terminated and the situation stabilized." *Id*.

In this case, the trial court granted summary disposition because plaintiff's injuries occurred after the accident between plaintiff's vehicle and Harris's vehicle "really had been completed." The risk occasioned by Harris's alleged negligence, however, was ongoing. The vehicles were disabled in the roadway. The roadway was strewn with debris. The ongoing threat posed by the debris was recognized by law enforcement officers who closed the roadway. Thus, the risk caused by Harris's alleged negligence was still ongoing at the time that plaintiff was injured.

Our Supreme Court's decision in *Bunda*, 376 Mich 640, demonstrates that a driver may be liable for his victim's injuries when they occur as the result of a series of events set in motion by the defendant. In *Bunda*, the plaintiff's decedent Bunda drove his vehicle into a vehicle driven by Michael Rycerz. Neither was injured. Bunda's vehicle was disabled in the roadway. While Bunda was in the roadway by the disabled car, he was struck by another vehicle driven by defendant Hardwick. At that point, Bunda was still alive. However, defendant Brown then ran over Bunda, killing him. The jury returned a verdict finding Hardwick liable for Bunda's death. The Supreme Court upheld the verdict and explained:

> The jury was entitled to find that the injuries resulting in Mr. Bunda's death were caused by Mr. Hardwick even if Mr. Bunda would not have died as the result of injuries directly incurred in the Hardwick-Bunda collision. Section 443 of Restatement, Torts 2d (1965) states the correct rule:
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> "The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about." [*Bunda*, 376 Mich at 669-670.]

Just as the negligence of the driver of the first vehicle that struck the plaintiff's decedent in *Bunda* could be the proximate cause of the fatal injuries sustained in the subsequent collision, a jury may determine that Harris's negligence was a proximate cause of plaintiff's injuries, even though the plaintiff's injuries were not sustained in the initial collision. "'A peril produced in part, at least, by defendant's negligence does not excuse the negligence.'" *Hickey*, 439 Mich at 440, quoting *Adelsperger v Detroit*, 248 Mich 399, 402; 227 NW 694 (1929).

Accordingly, the trial court erred in granting defendants' motion for summary disposition. The issue whether the third party's conduct of striking the debris and propelling it into plaintiff was a superseding cause that absolved defendants of liability should be decided by the trier of fact.

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly