STATE OF MICHIGAN

COURT OF APPEALS

THOMAS R. KALINOWSKI, Plaintiff-Appellant, v ROBERT THOMAS MCALESTER, Defendant, and J & R TRUCKING, LLC, Defendant-Appellee.	UNPUBLISHED November 19, 2013 No. 313481 Bay Circuit Court LC No. 10-003260-NI

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's November 2, 2012, order dismissing his negligence claim against defendant J & R Trucking LLC. We affirm.

I. FACTS AND PROCEEDINGS

Plaintiff purchased an unassembled carport from Menards. Menards hired defendant to deliver the carport to plaintiff's residence, which is located along M-13, which is purportedly "a heavily traveled 4-lane highway." On November 28, 2009, defendant sent its driver, George Sloas, to make the delivery. Sloas arrived at about noon and stopped the tractor-trailer he was driving on the east (northbound) side of the road, across the road from plaintiff's residence, which was on the west (southbound) side. Sloas then exited the tractor, placed three orange cones behind the trailer, walked up to plaintiff's residence, and identified himself as having a delivery for plaintiff. Plaintiff and his brother-in-law, Jonathan Forro, were present. All three then headed towards the tractor-trailer, with Sloas approximately ten feet ahead of the others.

Sloas crossed the road, unstrapped the load, lowered the landing gear on the front of the trailer, pulled the fifth wheel pin, and unhooked the airline.[1] While Sloas was unstrapping the load, plaintiff crossed the road and began to talk to Sloas about unloading the carport materials at a parking lot further down the road. Sloas explained:

> I came back out to the truck, grabbed my bar, walked to the other side of the truck, the east side—west side. Passenger side of the truck. I undid the straps. When I walked around the truck he was standing there, the customer, Mr. Kalinowski. I grabbed the straps and threw them over the trailer. I lowered the landing gear down. We were talking then. I was lowering the landing gear down. I pulled the pin. Somewhere between the time I lowered the landing gear and pulled the pin is where there was the discussion about going down to the Ford dealership. I told him it wouldn't be safe. I also told him, the cars went by us at that time, I told him watch yourself, sometimes people don't pay attention. He said: "Yeah, I know." That's when I walked up and got in the truck.

Sloas observed plaintiff "walking towards the back of the trailer behind the truck," "standing on the white line" within a foot of the lane of travel, and explained that a collision occurred immediately thereafter:

> I got in the truck. I looked in the mirror real quick. I looked in the mirror quick. I [saw plaintiff] walking back this way. I already hit the dump valve to dump the air on the ground. It lets air go out of the truck. So the landing gear goes down to the ground. And I put the truck in gear. I started pulling forward. When I did that I [saw] the cone fly up in the air out of the corner of my eye. I looked back and the car hit and in a matter of seconds it hit me. And I didn't see [plaintiff].
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> The only time I [saw] the car is when the cone flew and I was doing stuff over here in my truck, putting it in gear. I looked back in the mirror. About that time I [saw] the cone fly and within a second later [the car] hit the trailer and spun around and hit the semi. At that time it did another like almost 180 and stopped.

The car was driven by defendant Robert McAlester, who undisputedly had fallen asleep at the wheel. According to Forro, the passenger-side, front of the car struck plaintiff and the rear, driver's-side corner of trailer at the same time, and plaintiff was facing away from the car, "next to the wheel at the rear corner of the trailer." One of the tandem wheels on the driver's side rear corner of the trailer was ripped from the trailer. Forro watched the trailer move during the collision. The trailer tires left skid marks. Forro opined that the "trailer was . . . in the roadway" when the collision occurred. Forro formed this opinion after the accident occurred

[1] Sloas's tractor doubled as a fork-lift. Sloas intended to use the tractor/forklift to move the carport materials, which consisted of sheet metal estimated by Sloas to be 16 to 18 feet in length. The sheet metal was placed on 2 x 4s so that they could be lifted by the forks.

based on where the trailer skid marks began. Weldon Greiger, an accident reconstructionist, opined that "the trailer involved in this crash was parked over the fog line into the northbound driving lane of M13."[2]

This negligence lawsuit followed. Defendant moved for summary disposition which, after a hearing, the trial court granted. The trial court first stated that there is no duty to aid or protect another absent a "special relationship," such as between a common carrier and passenger, or parent and child. It then held, in pertinent part:

> Under the facts and circumstances of this case, viewed in the light most favorable to Plaintiff, this Court finds that no legal duty existed between J & R Trucking and Plaintiff. Since there was no legal duty, a discussion of whether J & R Trucking was negligent in any way is not appropriate. In addition, the Court finds that Plaintiff was injured due to an intervening and superseding cause; that is, he was struck by a car driven by Defendant Robert T. McAlester after McAlester had fallen asleep at the wheel. There is no genuine issue of material fact that Plaintiff's injuries were the proximate result of any conduct of J & R Trucking. Therefore, J & R Trucking's Motion for Summary Disposition is granted.

The trial court entered a final order dismissing the suit on November 2, 2012. This appeal followed.

II. ANALYSIS

Plaintiff challenges the trial court's order granting defendant's motion for summary disposition. The trial court granted the motion pursuant to MCR 2.116(C)(10), which tests the factual sufficiency of the complaint. In evaluating the motion, a court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted in the light most favorable to the nonmoving party. Where the evidence fails to establish a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). This Court will review de novo a decision on a motion for summary disposition. *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207, 212; 696 NW2d 621 (2005).

"In order to establish a prima facie negligence claim, a plaintiff must prove four elements: (1) duty, (2) breach of the duty, (3) causation, and (4) damages." *Seldon v Suburban Mobility Auth for Regional Transportation*, 297 Mich App 427, 433; 824 NW2d 318 (2012).

A. DUTY

Defendant asserts that it had no duty to plaintiff because the two do not have a "special relationship." The trial court appears to have agreed with this argument because in its opinion it

[2] A fog line is the line at the side of the road marking the edge of the drivable portion.

set forth the rule that there is no duty to aid or protect another absent a "special relationship" and then "f[ou]nd that no legal duty existed between J & R Trucking and Plaintiff."

"Whether a duty exists is a question of law for the court to decide." *Seldon*, 297 Mich App at 433. "[C]ourts have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498; 418 NW2d 381 (1988). With respect to nonfeasance, there is no legal duty that obligates a person to aid or protect another. *Id*. at 498-499. An exception has developed where a "special relationship" exists between the persons. *Id.* at 499 (noting that because of the "special relationship[,]" "a common carrier may be obligated to protect its passengers, an innkeeper his guests, and an employer his employees").

Defendant's allegedly negligent act of stopping the tractor-trailer with the trailer partially protruding into the travel lane rather than in a safer location does not concern nonfeasance. Rather, it concerns active misconduct; i.e., misfeasance. Thus, the "special relationship" requirement that is only applied to a claim of nonfeasance has no relevance in the instant case. See *Graves v Warner Bros*, 253 Mich App 486, 507; 656 NW2d 195 (2002) ("[P]rinciples regarding the duty to protect another . . . and the necessity of a special relationship do not apply in cases of misfeasance.").

"Generally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law[.]" *Hill v Sears, Roebuck and Co*, 492 Mich 651, 660-661; 822 NW2d 190 (2012). Additionally, "[e]very person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others." *Id.* at 660.

For two reasons we conclude that defendant had a duty to refrain from stopping the tractor-trailer with the trailer partially protruding into the travel lane. First, there is a duty at common law to use reasonable care so that a stopped vehicle does not constitute a source of danger to others.[3] *Reed v Ogden & Moffett*, 252 Mich 362, 364-365; 233 NW 345 (1930) ("It was [defendant's] duty to use reasonable care, that the truck-trailer, so stopped in the highway, did not constitute a source of danger to other users of the highway."). Second, the factors relevant to the determination of whether a legal duty exists support the duty. See *Hill*, 492 Mich at 661, quoting *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505–506; 740 NW2d 206 (2007) ("Factors relevant to the determination whether a legal duty exists include . . . 'the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.'"). The parties had a deliverer-deliveree and driver-pedestrian relationship; the possibility of harm from stopping a tractor-trailer with the trailer partially protruding into the travel lane was substantial; the burden of stopping a tractor-trailer so that the trailer is not partially protruding into the travel lane when the

[3] This common-law "stopping" duty is merely the duty to use due care or to not unreasonably endanger the person or property of others applied to the specific context of stopping a vehicle on a road.

shoulder is available was minimal; and the significant risk presented by stopping a tractor-trailer with the trailer partially protruding into the travel lane is self-evident to anyone who has driven or been a passenger in a vehicle.

Accordingly, the trial court erred in holding that "no legal duty existed between" defendant and plaintiff because there was no special relationship. Defendant had a common law duty to stop the tractor-trailer so as not to constitute a source of danger to others.

B. BREACH OF THE DUTY

"The question whether a defendant has breached a duty of care is ordinarily a question of fact for the jury and not appropriate for summary disposition." *Latham v Nat'l Car Rental Sys, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000). "However, when the moving party can show either that an essential element of the nonmoving party's case is missing, or that the nonmoving party's evidence is insufficient to establish an element of its claim, summary disposition is properly granted[.]" *Id.*

Here, plaintiff presented sufficient evidence to create a genuine issue of material fact that defendant breached its duty to stop the tractor-trailer so as not to constitute a source of danger to others. In particular, plaintiff submitted an affidavit from an accident reconstructionist who opined that "the trailer involved in this crash was parked over the fog line into the northbound driving lane of M13." Forro also testified that the tractor-trailer was in the roadway. This evidence was sufficient to create a genuine issue of material fact.

III. CAUSATION

However, although plaintiff created an issue of material fact on the duty element and on whether defendant breached that duty, under the undisputed facts, plaintiff cannot establish that the alleged breach of duty proximately caused his injuries.

"Proximate cause is a question of fact for the jury unless reasonable men would not differ as to whether defendant's alleged breaches of duty were not the cause of plaintiffs' injuries or were too insignificantly connected to or too remotely affected by defendant's breaches of duty." *Mills v White Castle Sys, Inc*, 167 Mich App 202, 209; 421 NW2d 631 (1988). "There may be more than one proximate cause of an injury, and a defendant cannot escape liability for its negligent conduct merely because the negligence of others may also have contributed to the harm caused." *Id*. "Proving proximate cause actually entails proof of two separate elements: (1) cause in fact and (2) legal cause, also known as 'proximate cause.'" *Helmus v Michigan Dep't of Transp*, 238 Mich App 250, 255; 604 NW2d 793 (1999). "'The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.'" *Id.*, quoting *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). If there is more than one possible cause to an accident, "one actor's negligence will not be considered a proximate cause . . . unless it was a substantial factor in bringing about the injury." *Poe v City of Detroit*, 179 Mich App 564, 576; 446 NW2d 523 (1989).

Here, there is no need to address whether McAlester's negligence was an intervening or superseding cause, because plaintiff cannot show that his injuries would not have occurred "but for" defendant's alleged breach of duty (i.e., stopping the tractor-trailer with the trailer partially protruding into the travel lane). That is, plaintiff's injury would have occurred even if the tractor-trailer *was not* partially protruding into the travel lane. McAlester did not swerve to avoid the trailer before hitting plaintiff. His vehicle did not ricochet off the trailer and strike plaintiff. Rather, McAlester struck the trailer and plaintiff at the same time; and the vehicle struck the trailer and plaintiff because McAlester fell asleep behind the wheel, not because the tractor-trailer was stopped with the trailer partially protruding into the travel lane. Plaintiff, therefore, cannot establish the causation-in-fact prong of the proximate cause analysis. Having reached that conclusion, we need not assess the legal causation prong. Accordingly, defendant was entitled to summary disposition because there was no evidence to support a finding that defendant's alleged breach of duty was a proximate cause of plaintiff's injuries.[4] This Court will affirm a trial court's decision if it reached the right result, even if it does so for the wrong reasons. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra

[4] Courts from other states have likewise held that an actor's negligence in placing the victim in the location where the accident occurred is not a substantial factor of the injury when the actor who hit the plaintiff fell asleep while driving a car. See, e.g., *Lear Siegler Inc v Perez*, 819 SW2d 470, 471-472 (Tx, 1991); *Saviano v City of New York*, 5 AD3d 581, 582; 774 NYS2d 82 (2004); *Tennyson v Brower*, 823 F Supp 421, 423-424 (EDKy, 1993).