STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF CLIFFORD PROCTOR and PAULA PROCTOR,

Plaintiffs-Appellees,

v

FORREST AGGREGATE, LLC,

Defendant,

and

C. FORREST AGGREGATES, INC.,

Defendant-Appellant.

UNPUBLISHED
September 15, 2015

No. 322467
Lapeer Circuit Court
LC No. 12-044999-NO

Before: MURRAY, P.J., and METER and OWENS, JJ.

PER CURIAM.

In this negligence action, defendant, C. Forrest Aggregates, Inc.[1] appeals as of right from a lower court judgment in favor of plaintiffs following a jury trial. The Estate of Clifford Proctor was awarded $390,818.39 in economic and noneconomic damages, which included interest and costs, and Paula Proctor was awarded $140,636.48 in economic and noneconomic damages, which included damages for loss of companionship, interest, and costs, for injuries Clifford Proctor sustained while working within defendant's gravel mine. We affirm.

On October 7, 2011, Proctor was injured while driving a Moxy machine[2] at a gravel mine owned by defendant and during the course of his employment as a commercial truck driver with

[1] Defendant, Forrest Aggregate, LLC, was dismissed from the lower court action and is not a party to this appeal. Therefore, "defendant" refers to C. Forrest Aggregates only.

[2] A Moxy machine is a six-wheel off-road dump truck typically used to haul earthen materials.

B.J. Forrest Trucking, Inc.[3] Proctor was hauling dirt from one location in the mine to another. As he made his fourth trip up one of the hills in the mine, the transmission allegedly failed to shift, which caused the machine to roll backward. Proctor testified that he applied the brakes, but they failed to stop the machine, which rolled down the hill and over a berm. At the time, he was hauling wet dirt, whereas the first three loads were dry. Proctor was thrown around in the cab of the machine resulting in injuries to his ribs, lung, and back.

Proctor initiated this negligence action in March 2012, but passed away on March 7, 2013; therefore, his estate continued the litigation on his behalf. In addition to his estate being substituted as a party, his wife, Paula Proctor, also joined the action, asserting a claim for loss of consortium.

Plaintiffs alleged that defendant had a duty to use ordinary care so that the equipment used in the gravel mine operation was kept in proper repair or withdrawn from service until any dangerous defects were cured. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (citation omitted). Because defendant was licensed under the Federal Mine Safety and Health Administration (MSHA), there are several regulations that govern the standard of care in mining operations. At minimum, the owner of the mine has the duty to ensure that all self-propelled mobile equipment is "equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." 30 CFR 56.14101(a)(1). The owner must also maintain all braking systems installed on the equipment in "functional condition." 30 CFR 56.14101(a)(3). Further, "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 CFR 56.14100(b).

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected. [30 CFR 56.14100(c).]

Defendant does not contest on appeal the fact that it owed a duty to Proctor based on the referenced MSHA regulations or that it breached that duty.[4] Rather, defendant argues that there

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[3] William Forrest owns B.J. Forrest Trucking, Inc., and manages C. Forrest Aggregates, Inc., which is owned by his wife, Carolyn Forrest.

[4] We note that evidence presented shows that defendant owed a duty to Proctor and breached that duty. Specifically, Ronald Baril, a retired federal mine safety inspector, clearly testified at his deposition and at trial that the referenced federal regulations imposed a duty on mine owners to ensure the equipment used in the mine is safe. This includes taking a machine with known defects out of service until it is inspected and repaired. Because Nathan Forrest, a supervisor at defendant's mine, admitted that he knew the brakes were bad, defendant was required to inspect the machine before having Proctor operate it. Its failure to do so was a breach of its duty

was insufficient evidence, both at the summary disposition stage and the directed verdict stage, to prove its negligence caused Proctor's accident. Therefore, the issue before this Court is whether there is a casual connection between defendant's failure to inspect the Moxy machine and make any necessary repairs before requiring Proctor to operate it fully loaded on an incline and the resulting accident.

We review de novo a trial court's decision on a motion for summary disposition and a motion for a directed verdict. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012); *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In reviewing the motion, we consider "the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is properly granted "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

In reviewing a motion for a directed verdict, we review all evidence presented up to the time of the motion in a light most favorable to the nonmoving party to determine whether a question of fact exists. *Diamond*, 265 Mich App at 681-682. "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ." *Id.* at 681.

Causation requires proof of both cause in fact and legal, or proximate, cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

> 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. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. [*Id.* at 163 (internal citations omitted).]

Reaffirming the principles in *Skinner*, our Supreme Court stated in *Craig v Oakwood Hosp*, 471 Mich 67; 684 NW2d 296 (2004),

> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a

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imposed by the MSHA regulations. See *Douglas v Edgewater Park Co*, 369 Mich 320, 328; 119 NW2d 567 (1963) (stating that violations of duties imposed by administrative rules and regulations issued under statutory authority, such as the MSHA regulations, is evidence of negligence).

> plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. A valid theory of causation, therefore, must be based on facts in evidence. And while [t]he evidence need not negate all other possible causes, this Court has consistently required that the evidence exclude other reasonable hypotheses with a fair amount of certainty. [*Id.* at 87-88 (emphasis in original) (quotation marks and citations omitted).]

Further, "Where the connection between the defendant's negligent conduct and the plaintiff's injuries is entirely speculative, the plaintiff cannot establish a prima facie case of negligence." *Id.* at 93.

The deposition testimony submitted by the parties in support and opposition of summary disposition was substantially the same as the testimony the witnesses gave at trial. Ronald Baril, the retired safety inspector testified that under the MSHA regulations, defendant was required to remove a machine with known defects from service until it could be inspected and repaired. Even William Forrest, the mine manager, acknowledged that it is defendant's responsibility to maintain the brakes on a machine so that it can stop and hold on the steepest grade the machine is working on. Nathan Forrest, a supervisor at the mine, testified that the owner of the Moxy machine told him to "watch the brakes." He understood this warning to mean that there might be a little air in the brake system. Although the owner of the Moxy machine did not recall this conversation, the evidence must be viewed in a light most favorable to plaintiffs and questions of material fact are reserved for the jury to decide.

Further, Proctor testified that when he was driving the machine to the gravel mine, the brakes felt "spongy," meaning that the brakes did not "take right a hold" and he had to push them to the floor. He further testified that he pushed the brakes all the way to the floor when the machine began rolling down the hill at the mine, but the brakes did not take hold. Kevin Borgen, the certified mechanic who serviced the machine after the accident, and Cristian Nederveld, plaintiffs' mechanical expert, testified that "spongy" brakes indicate that there is air in the brake lines, and Borgen testified that he in fact bled air out of the brakes. Although Borgen could not recall how much air he bled out, Nederveld testified that any amount of air in the brake lines is an issue.

Moreover, although Borgen could not recall if the brake fluid was low, he testified that if he had to add fluid he would have charged for it on the invoice, and the invoice stated that Borgen charged for one gallon of brake fluid. According to Nederveld, the one reservoir, or master cylinder, only holds a pint of fluid, so if Borgen used a gallon then this indicates that there was excessive air in the lines. However, it was unclear whether Borgen actually used the entire gallon or simply charged for the entire gallon because he had to open it. Again, this creates a question of fact for the jury to decide.

Additionally, there was an issue with whether Borgen conducted a thorough inspection after the accident. According to Nederveld, the machine has two master cylinders, which hold the brake fluid, that run separate brake lines. But Borgen testified that there was only one master cylinder. Borgen also testified that he was not able to identify the source of the leak that was letting the air in. Therefore, Nederveld opined that Borgen likely failed to check the other master

cylinder, which could have been the source of the leak. Further, although Borgen tested the brakes before and after servicing the machine and did not notice a difference in the performance, Nederveld noted that the tests were conducted on flat ground when the machine was empty. Nederveld and Baril testified that the brakes need to be tested when the machine is fully loaded and parked on an incline. According to Nederveld, because Borgen tested the machine on flat ground without a load, he probably would not have noticed a difference in how the brakes performed before and after he bled the brake lines.

Although, as defendant notes, Nederveld testified that other conditions could affect brake performance, including weather, site conditions, material weight, steepness of the grade, maintenance history, and wet brake pads, there was no evidence presented regarding these other conditions. Therefore, while it is reasonable to assume that these other conditions could lead to brake failure, based on the evidence presented, they could be excluded as a cause in this case with a fair amount of certainty. Finally, Baril testified that, in his opinion, Proctor would not have been injured had defendant tagged the machine out and parked it until a mechanic could look at it, as required by the MSHA regulations.

When viewed in a light most favorable to plaintiffs, there is a genuine issue of material fact whether the accident could have been avoided had defendant, who was warned that the brakes were bad, inspected the Moxy machine before requiring Proctor to operate it fully loaded on an incline. Therefore, the trial court properly denied defendant's motion for summary disposition and a directed verdict.[5]

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens

[5] We note that in the trial court the parties also focused their attention on the fact that the transmission may have failed. However, this is irrelevant for the causation analysis because the main issue is that the brakes failed to hold the machine when it began rolling down the hill.