STATE OF MICHIGAN

COURT OF APPEALS

LEONARD TANIKOWSKI,

Plaintiff-Appellant,

v

THERESA JACISIN and CHRISTOPHER SWITZER,

Defendants-Appellees.

UNPUBLISHED
August 9, 2016

No. 325672
Macomb Circuit Court
LC No. 2013-004924-NI

Before: JANSEN, P.J., and FORT HOOD and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). On appeal, plaintiff argues that the trial court erred in granting summary disposition and in concluding that plaintiff failed to establish a question of fact whether defendants' alleged negligence was a proximate cause of plaintiff's injury. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a motor vehicle accident that occurred on November 4, 2012, in the eastbound center lane of I-696, near the Hoover Road exit, in Macomb County. The relevant portion of I-696 is a three-lane highway. Defendant Theresa Jacisin was driving a motor vehicle owned by defendant Christopher Switzer and struck the rear of an SUV. After the collision, Jacisin's vehicle came to a stop in the center lane of I-696, and the SUV overturned and landed in the center lane just east of Jacisin's vehicle. Upon approaching the accident, plaintiff attempted to maneuver around the wreckage, and then back into traffic; his vehicle ultimately collided with the overturned SUV.

II. STANDARD OF REVIEW

We review de novo the trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). "[A] motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint [.]" *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). Summary disposition under MCR 2.116(C)(10) is proper when "[e]xcept as to the amount of damages, there is no genuine

issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." We review the pleadings, affidavits, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

III. ANALYSIS

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on the ground that plaintiff could not establish a genuine issue of material fact concerning whether Jacisin's conduct was a proximate cause of plaintiff's accident and injury. We disagree.

To establish a prima facie claim of negligence, plaintiff must prove that: (1) defendant owed plaintiff a duty, (2) defendant breached that duty, (3) the breach was a proximate cause of plaintiff's injury, and (4) plaintiff suffered damages. *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 162; 809 NW2d 553 (2011). Here, the trial court held that plaintiff had failed to establish that defendants' alleged negligence was a proximate cause of plaintiff's injury. Defendants do not dispute the existence of defendants' duty, a subsequent breach of that duty, or that plaintiff sustained damages. Instead, on appeal, both plaintiff and defendants focus on whether proximate cause existed.

"Proximate cause incorporates two separate elements: (1) cause in fact and (2) legal or proximate cause." *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009).

> 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. *Craig v Oakwood Hosp*, 471 Mich 67, 86-87; 684 NW2d 296 (2004), citing *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994).

"As a matter of logic, [we] must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries." *Craig*, 471 Mich at 87 (citation omitted). Here, there is no dispute over factual cause. Rather, the dispute centers on the existence of legal or proximate cause.

Proximate cause is "such cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). "To find proximate cause, it must be determined that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable." *Helmus v Mich Dep't of Transp*, 238 Mich App 250, 256; 604 NW2d 793 (1999). Proximate cause is usually a factual issue to be decided by the trier of fact, but if the facts bearing on proximate cause are not disputed and if reasonable minds could not differ, the issue is one of law for the court. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

The defendant does not have to be the sole cause of the plaintiff's harm—there can be more than one proximate cause. *O'Neal v St John Hosp*, 487 Mich 485, 496-497; 791 NW2d 853 (2010). When a number of factors contribute to producing an injury, one actor's negligence can still be a proximate cause if it was a substantial factor in bringing about the injury. *Skinner*, 445 Mich at 165 n 8. Considerations relevant to whether a factor was substantial include: (1) the number of other factors and the extent of the effect that they had in producing the harm, (2) whether the actor's conduct created a force or series of forces that were in continuous and active operation up to the time of the harm, or whether the actor created a situation harmless until affected by other forces not the responsibility of the actor, and (3) the lapse of time. *Poe v Detroit*, 179 Mich App 564, 576-577; 446 NW2d 523 (1989).

Plaintiff argues that the trial court erred when it found that no reasonable jury could find that plaintiff's accident was part of an uninterrupted chain of events that began with the first accident. Essentially, plaintiff maintains that a reasonable jury could find that Jacisin should reasonably have foreseen that plaintiff would weave his way around and between her vehicle and another vehicle disabled by a collision, attempt to merge back into traffic, and clip the second, overturned vehicle with his own as he did so. Based on our review of the record, including plaintiff's own testimony, we disagree.

Aware of an accident ahead, plaintiff slowed his vehicle to 5-10 miles per hour. He was positioned in the center lane of a three-lane highway, as were both of the vehicles involved in the accident. While the traffic to his left continued to move, the vehicles to his right had also slowed or stopped, as they were backing up to exit the highway. Rather than stopping his own vehicle, or merging with those exiting to his right, plaintiff instead opted to maneuver his vehicle between the disabled vehicles and merge back into the oncoming traffic that was passing the accident to the left. Plaintiff testified that he was "trying to clear" the accident, and that he "wanted to get around the car and get around the whole accident." He had been driving for 36 hours, stopping a few times to eat and take "power naps." At the time of the accident, he "was getting very anxious to get to a room so [he] could spend the night and get some rest." It was 6:25 a.m. on a Sunday.

So, instead of stopping, plaintiff first veered to his right to get around defendants' vehicle, traveling "just fast enough so [he] could clear the one car." He then saw the second, overturned vehicle, also in the center lane, approximately one and one-half to two car lengths ahead of the first vehicle. Another vehicle had stopped up ahead and had parked in the right-hand lane; its driver was assisting the people involved in the accident. Instead of stopping, plaintiff veered back to his left, and attempted to get around the second, overturned vehicle. After traversing between the two vehicles, essentially bisecting the center lane between the two disabled vehicles, plaintiff then attempted to merge back into oncoming traffic. In doing so, turning to the right while looking left toward the traffic, he struck the overturned SUV with his right, front fender.

Based on the evidence presented, we conclude that the trial courtwas correct. No reasonable factual dispute exists regarding whether Jacisin's conduct produced plaintiff's injury as part of continuous sequence that was unbroken by an intervening cause. *Babula*, 212 Mich App at 54. Rather, and as a matter of law, plaintiff's conduct in attempting to maneuver through and around the wreckage, and back into traffic, could not reasonably have been anticipated or

foreseen. Regardless of any negligence on Jacisin's part with regard to the initial accident, plaintiff's conduct caused an entirely separate and distinct accident, breaking the chain of causation. See *Helmus*, 238 Mich App at 256. This was not a "chain reaction" or "domino"-type accident, in which the second accident arises naturally out of the first, such that they are properly considered as one accident. See *Hastings Mut Ins Co v State Farm Ins* Co, 177 Mich App 428, 435; 442 NW2d 684 (1989); see also *Richards v Sch Dist of Birmingham*, 348 Mich 490, 530; 83 NW2d 643 (1957), rev'd in part on other grounds by *Williams v Detroit*, 364 Mich 231, 247-248; 111 NW2d 1 (1961). While the occurrence of the first accident (and any negligence giving rise to it) was certainly a "but for" cause of the second accident, no reasonable jury could find that it was a "proximate" cause of plaintiff's injury. See *Deaton v Baker*, 122 Mich App 252, 258; 332 NW2d 457 (1982) (noting that mere "but for" causation was insufficient to establish proximate cause of a second accident).

Affirmed.

/s/ Kathleen Jansen
/s/ Mark T. Boonstra

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Before: JANSEN, P.J., and FORT HOOD and BOONSTRA, JJ.

Fort Hood, J. (*dissenting*).

I respectfully dissent. I believe the trial court erred when it found that reasonable minds could not differ as to whether defendant Theresa Jacisin's negligent conduct was the proximate cause of plaintiff's injury.

As the majority explained, proximate or legal cause, at issue in this case, is a cause that, "in a natural and continuous sequence, unbroken by new and independent causes, produces [an] injury." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003), citing *McMillan v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). I would hold that the events could be found to be an uninterrupted sequence of events. Here, plaintiff was driving eastbound in the center lane of I-696. It was early in the morning, dark, and the traffic was unusually heavy. Plaintiff encountered Jacisin's vehicle parked without any lights on in the center lane, which blocked plaintiff's mode of travel. Jacisin had been involved in a two-car collision that occurred 30 seconds to two minutes before plaintiff came upon the scene. Vehicles in the left lane were still traveling 70 miles per hour, and there was a long line of vehicles in the right lane attempting to exit the interstate.

Plaintiff testified that he felt the best way to react when he encountered Jacisin's vehicle was to slow down to 5 to 10 miles per hour, and swerve right to avoid striking Jacisin's vehicle and to avoid potentially getting rear-ended by vehicles rapidly approaching behind him. After swerving right, plaintiff suddenly saw the second vehicle, which was an overturned black SUV, without its lights on. Plaintiff testified that he changed direction to avoid hitting the overturned SUV. Plaintiff then drove left between the two wrecked vehicles, but it was dark, and the SUV was black. As plaintiff had his head turned to the left in an attempt to re-enter moving traffic in the left lane, he struck the corner of the overturned SUV. Plaintiff presented additional evidence

that supported his testimony. Natasha Emerson, who was an eyewitness at the accident scene, testified that it was dark when the accident occurred, and that it appeared there was no way for plaintiff to avoid the collision.

Based on the evidence presented, I believe a factual dispute exists whether plaintiff's harm was "a natural and continuance sequence, unbroken by new and independent causes," of Jacisin's negligence. *Wiley*, 257 Mich App at 496. Given the circumstances surrounding the accidents—two vehicles immobilized on the highway, in the dark, without lights—it was foreseeable that another vehicle would encounter the accident, especially with the amount of traffic on the road. Further, only a small amount of time had passed and plaintiff's accident was directly caused by the first accident, as opposed to an intervening event or act. While the majority concludes that plaintiff's conduct constituted an intervening act, which broke the chain of events, I believe a reasonable jury could also find that plaintiff's conduct was reasonable, particularly in light of the witness testimony he presented corroborating his position, as well as the short lapse in time that occurred between accidents.

Indeed, the trial court's decision and the majority opinion focus on plaintiff's fault or reasonableness in how he reacted to the initial collision. While plaintiff's decision to drive through two wrecked vehicles was arguably questionable with respect to his reasonableness, Jacisin's negligent conduct remains a substantial factor in plaintiff's resulting harm. *O'Neal v St John Hosp*, 487 Mich 485, 496-497; 791 NW2d 853 (2010). Jacisin cannot avoid liability for her negligence merely because plaintiff may have also been negligent in how he reacted to the initial collision. While comparative fault does require that every actor exercise reasonable care, *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 33; 761 NW2d 151 (2008), reasonableness is not an element of proximate cause and as such, would not negate a finding of proximate cause. Ultimately, though, even if plaintiff was more than 50% at fault, he may not be denied the opportunity of the jury first deciding the issue of proximate cause. Therefore, I would hold that the trial court erred when it granted defendants' motion for summary disposition.

I would also conclude that *Derbeck v Ward*, 178 Mich App 38, 42; 443 NW2d 812 (1989), and *Deaton v Baker*, 122 Mich App 252, 254; 332 NW2d 457 (1982), two cases on which the trial court relied, were factually and legally distinguishable from the present case. Besides the fact that these cases are not binding, MCR 7.215(J)(1), and analyze cause in fact ("but for" cause), as opposed to legal, or proximate, causation, *Craig v Oakwood Hosp*, 471 Mich 67, 86-87; 684 NW2d 296 (2004), there were also significant factual distinctions. Significantly, there was a larger time lapse between accidents in those cases. In addition, both the plaintiffs in *Deaton* and *Derbeck* were involved in the first accident, and had actually exited their vehicles. *Deaton*, 122 Mich App at 254; *Derbeck*, 178 Mich App at 42-43. Although the majority does not rely on these cases in making their decision, I note that I would hold that these cases were distinguishable.

Additionally, I would also conclude that there was a question of fact whether Jacisin's post-accident conduct constituted negligence. Both the *Derback* and *Deaton* Courts remanded for consideration of whether the negligent party's post-accident actions constituted negligence, such as failing to activate emergency lights and leaving a disabled vehicle in the roadway. *Deaton*, 122 Mich App at 254; *Derbeck*, 178 Mich App at 45. Here, plaintiff amended his complaint to include allegations that Jacisin failed to activate her emergency flashers, failed to

remove the vehicle from the center lane, and failed to alert oncoming motorists of the overturned vehicle ahead of her. The trial court found that plaintiff failed to establish a question of fact regarding these allegations. The court held that "there is no testimony that [Jacisin] had any time to remove the vehicle from the center lane before plaintiff arrived at the scene." Here, Jacisin did not have lights, emergency or otherwise, activated, despite the fact that her vehicle was immobilized in the highway and it was dark. While, as the trial court held, there was no evidence that Jacisin had time to remove her vehicle, there was also no evidence that Jacisin did not have time to remove her car or activate her lights, an allegation unaddressed by the trial court. Thus, viewing the evidence in the light most favorable to plaintiff, I would conclude that there was a question of fact whether Jacisin's post-accident conduct constituted negligence.

/s/ Karen M. Fort Hood