STATE OF MICHIGAN

COURT OF APPEALS

MELISSA LYNN TOWNES,

Plaintiff-Appellant/Cross-Appellee,

v

JASON MICHAEL PERKS and SUE ELLEN PERKS,

Defendants-Appellees/Cross-Appellees,

and

C & B TRANSPORT, BRIAN BRIESE, and GENERAL CAR & TRUCK LEASING,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
February 18, 2000

No. 211829
Kent Circuit Court
LC No. 95-001378 NP

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

In this automobile negligence case, plaintiff appeals as of right, challenging the trial court's order granting a directed verdict in favor of defendants Brian Briese, C & B Transport and General Car & Truck Leasing System, Inc. Plaintiff's motion for a new trial was also denied. Plaintiff also challenges the trial court's pretrial ruling granting summary disposition in favor of defendant Freightliner of Chicago, Inc., which was based on the court's conclusion that Freightliner was not the "owner" of the semi-truck vehicle driven by Briese at the time of the accident. Defendant General Car & Truck has filed a cross-appeal, also challenging the trial court's determination that it, and not Freightliner, was the "owner" of the semi-truck. Defendants Brian Briese and C & B Transport have also cross-appealed, challenging the trial court's rulings to allow Briese's deposition to be used at trial. We affirm.

I.

At around 3:00 p.m. on February 21, 1993, a snowy day which produced some slushy and slippery road conditions, defendant Jason Michael Perks[1] was driving a Ford Tempo on westbound M-57 when he lost control of the vehicle, and slid into the eastbound lane, colliding with a semi-truck cab being driven by defendant Brian Briese. Perks' passenger, fifteen-year-old plaintiff, Melissa Townes, was thrown from the Tempo and sustained severe injuries, causing permanent paralysis from the waist down.

At the time of the accident, Briese was an employee of defendant C & B Transport, which was in the business of moving new and used trucks from dealerships to purchasers. Briese had picked up the semi-truck from Freightliner, a dealer, and was driving it to the facility of defendant General Car & Truck, which had purchased the semi-truck.

Plaintiff filed suit against Jason Perks and his mother, Sue Ellen Perks, who was the owner of the Ford Tempo, as well as Ford Motor Company and Kool Chevrolet (the manufacturer of the Tempo and the dealership from which it was purchased, respectively). Also named as defendants were Briese, C & B Transport, Freightliner and General Car & Truck. Plaintiff settled with Ford Motor Company and Kool Chevrolet prior to trial, and the trial court granted Freightliner's pretrial motion for summary disposition, concluding that, at the time of the accident, Freightliner was not the owner of the semi-truck as a matter of law. The case proceeded to trial against the remaining defendants.

At trial, Perks testified that he did not remember anything about the accident. Plaintiff testified that, while Perks was driving, he lost control of the Tempo, which fishtailed a couple of times and then slid into the oncoming lane in front of the semi-truck. The fishtailing started at the bottom of a hill, before a curve. The car then appeared to straighten, but Perks did not have complete control and plaintiff felt some wobbling and slipping. Plaintiff testified that "it was not an actual fishtail to where the tail end moved a great distance." The semi-truck was a little over fifty yards away when the Tempo began to slide across the centerline. According to plaintiff, Perks was traveling about forty miles an hour at the top of the hill. Plaintiff claimed that, when the Tempo began to slide, the semi-truck did not make any maneuvers to avoid the accident, however, she acknowledged that she was not looking just prior to impact. Plaintiff believed that no more than five or six seconds passed between the time when the Tempo first began fishtailing and the collision with the semi-truck.

At trial, Briese testified that, as he was driving eastbound on M-57, the pavement was visible in the tire tracks on both sides of the road. The pavement was wet where the snow and slush had melted, but not icy. There was no packed snow where he was driving, but there was slush between the tire tracks and on both shoulders. The posted speed limit was fifty-five miles an hour. The police report reflects that Briese had stated that he was traveling approximately forty-five miles an hour, although at trial he estimated his speed at between thirty-five and forty-five miles an hour, a speed at which he felt comfortable driving under the road conditions. Briese claimed that, at all times while driving during the day of the accident, he adjusted his speed based on the road conditions. He agreed there were

"slippery road conditions that day," but contended that he had "quite a bit of traction." At no time was he driving on ice. There were places where he could see both the centerline and the outside fog line. Briese explained that if he had felt the conditions were dangerous, he would have either gotten off the road or slowed down "tremendously more than I had already."

Briese testified that, as he was approaching the curve, he saw the Tempo fishtail twice before reaching the curve. He testified that the Tempo was about an eighth of a mile, or somewhere between 600 and 690 feet ahead when it fishtailed. The Tempo then appeared to regain control as it started around the curve. Briese claimed that the Tempo did not wobble and was proceeding normally after it fishtailed. When he saw the Tempo fishtail, he "probably" lifted his foot off the gas, slowed down a little and coasted until he saw the Tempo regain control. He then put his foot back on the gas. If he had thought that the Tempo was out of control after it fishtailed, he would have left the road and stopped the truck. After about five or six seconds, as the Tempo came around the curve, it lost control and started to slide.

Briese stated, "When they lost control and shot across my lane I did not have 300 feet in which to react." According to Briese, when the Tempo crossed the centerline, he was between fifty and one hundred yards west[2]. He stated there was "no reason" to slow down when he saw the Tempo fishtail, because the driver did not lose control of the Tempo until after the vehicle came around the curve. Briese disagreed with plaintiff's testimony that he took no action, because he took his foot off the gas and moved to the right, giving the Tempo "as much of the road as I could."

Briese testified that when he saw the Tempo go out of control and start to slide across into his lane, he did not have time to safely apply the brakes. Because the Tempo came across the road so fast, if he had slammed on his brakes he probably would have "slid over the top of them." He claimed that the "last thing you would want to do" would be to lock your brakes up. He immediately moved over to the right to give the Tempo as much of the road as possible. At impact, his right tires were off of the shoulder in the snow. Briese stated that if he had not been faced with the sudden emergency of the Tempo coming into his lane, he would have been able to stop his truck within the distance that he could see ahead in his own lane.

In his deposition, Briese had stated, "I might have hit the gas right before they hit me." He explained how that jibed with his statement that he took his foot off the gas:

> When I first seen 'em, I took my foot off the gas. When I realized that they were still gonna hit me, even though I had given them the entire road, I may have hit the gas to try to get a little farther up so that they would maybe hit tires instead of gas tanks and things like that.

Dirk Finkbeiner, an Oakfield Township firefighter, investigated the accident scene. He stated that the two lane highway had been recently plowed and salted. He found the truck on the shoulder of the road. He did not render an opinion as to the cause of the accident.

Greg Gendregske, a Michigan State Police Officer trained in advanced accident investigation, testified that he observed the semi-truck approximately 5-1/2 feet off the road and on the shoulder, which he believed demonstrated an attempt to avoid the accident. Gendregske opined that Perks' loss of control of his vehicle was the cause of the accident, and that the driver of the truck did nothing to cause the accident and was not at fault in any way. No citation was issued to either driver.

Gary Oliver, another state trooper who was at the scene, concluded that Perks, an inexperienced driver, lost control of his vehicle and that Briese did not make any errors in judgment or driving and was not at fault in any way. Oliver explained that he did not issue a citation to Perks out of compassion because he was a new driver, he had received a scar, and the injured passenger was his girlfriend.

Because of discovery violations, the trial court ruled before trial that plaintiff would not be permitted to present expert testimony on issues of negligence, including the standard of care and breach of the standard of care. The court did allow plaintiff to present expert testimony from Donald Holmes on the subject of accident reconstruction. Holmes concluded that the total distance between the two vehicles at the time the Tempo began fishtailing was 1,388 feet. According to Holmes, assuming the two vehicles were 100 yards apart when the Tempo began to slide, with the Tempo traveling at 40 miles per hour and the semi-truck at 45 miles per hour, the vehicles would impact in about 4.8 seconds. The truck would travel 97 feet. Accepting plaintiff's testimony that the distance was 50 yards, not 100 yards, then the time before impact would be cut in half. Holmes believed that the point of impact may have been 50 feet further west. It would take the truck less than a second to travel 50 feet. Holmes explained the inconsistency between Briese's statement and plaintiff's testimony regarding the distance between the two vehicles when the Tempo began to slide over the center line as having to do with the viewer's reference point in relation to the center of the road.

At the close of plaintiff's proofs, the trial court granted a directed verdict in favor of defendants Briese, C & B Transport, and General Car & Truck. The court concluded that, while the police officer's statements were "not a determining factor," there was no evidence presented by anyone who investigated the accident scene that Briese "was in any way responsible for this accident." The court stated, "I do not find . . . that Mr. Briese did anything in this case which caused in any way an injury" or was a proximate cause for the injuries. The court denied a request for directed verdict by defendants Jason and Sue Ellen Perks. Plaintiff subsequently agreed to dismiss the Perks without prejudice, thus concluding this litigation.

II.

On appeal, plaintiff contends that sufficient evidence was presented to cause reasonable jurors to disagree on whether Briese met the standard of due care in light of the appreciated danger and whether he was a proximate cause of her injuries and that, therefore, the trial court erred in granting a directed verdict in favor of Briese, C & B Transport, and General Car & Truck. We disagree.

"This Court reviews de novo the trial court's decision on a motion for a directed verdict." *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 634; 601 NW2d 160 (1999), quoting

Braun v York Properties, Inc, 230 Mich App 138, 141; 583 NW2d 503 (1998). "When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Kubisz*, *supra* at 634-635, quoting *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997) (citations omitted). Directed verdicts are disfavored in most negligence cases. *Vsetula v Whitmyer*, 187 Mich App 675, 679; 468 NW2d 53 (1991).

To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. *MacDonald v PKT, Inc*, 233 Mich App 395, 399; 593 NW2d 176 (1999).

Duty is the obligation that the defendant has to the plaintiff to avoid negligent conduct. Whether a duty exists is a question of law for the court. *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997). As our Supreme Court observed in *McGuire v Rabaut*, 354 Mich 230, 236; 92 NW2d 299 (1958), a driver has a duty to take steps to avoid a collision

> at that point when his continuing observations . . . reveal, or should reveal to the reasonably prudent man, an impending danger. It is at this time that his duty of care with respect to the subordinate driver arises, and his post-observation negligence, or lack thereof, is measured by his actions after this point.

To prove proximate cause, plaintiff had to prove two separate elements: (1) cause in fact and (2) legal cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The cause in fact element generally requires a showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. *Id.*, 163. "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id.* at 164-165, quoting Prosser & Keeton, Torts (5th ed), § 41, p 269.

On the other hand, legal 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. *Skinner*, *supra* at 163. 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." *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977).

Ordinarily, the determination of proximate cause is left to the trier of fact. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). However, if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should decide the issue as a matter of

law. *Vsetula*, *supra* at 682. In this case, we conclude that the trial court did not err in directing a verdict in favor of defendants with respect to plaintiff's claim that Briese was negligent.

We believe the facts presented up to the time of defendants' motion for directed verdict showed that the Tempo appeared to have regained control until just seconds before it crossed the centerline, and that Briese took reasonable steps to avoid the accident. When it became clear to him that the Tempo was going to cross the centerline into his path, Briese's duty to attempt to avoid the impending collision began. *Noyce v Ross*, 360 Mich 668, 678; 104 NW2d 736 (1960). The evidence showed that Briese attempted to avoid the collision and moved the truck off the road onto the snow-covered shoulder. As our Supreme Court has stated, "one who suddenly finds himself in peril without time to consider the best means to avoid impending danger is not guilty of negligence if he fails to adopt what subsequently may appear to have been the better method, unless the emergency is brought about by his own negligence." *Schow v Paugh*, 350 Mich 304, 308; 86 NW2d 261 (1957). We agree with the trial court that there was no evidence that Briese's actions were a proximate cause of plaintiff's injuries.

In light of our ruling, we find it unnecessary to address the additional issues raised on appeal and on cross-appeal.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary G. McDonald

[1] Perks was sixteen at the time of the accident and had received his driver's license only three months earlier.

[2] In his deposition, Briese stated that, when the Tempo began to slide, the distance between the semi-trick and the Tempo was 100 yards. Plaintiff had testified that the distance was 50 yards. At trial, after hearing plaintiff's testimony, Briese stated: "Actually, I don't believe it was 100 yards. When you were all asking me questions in my deposition I said about 100 yards. I didn't have a tape measure. I don't know that it was 100 yards so to assume that is, I don't feel is right. I believe Missy testified 50 yards. So 50 to 100 yards. In that area."