STATE OF MICHIGAN

COURT OF APPEALS

MARICEL PAGAN, Personal Representative of the ESTATE OF KEVIN FLEMINGS,

Plaintiff-Appellant,

v

GRAND RAPIDS PUBLIC SCHOOL DISTRICT, SUSAN PORTER, JEANA YOUNG, IRMA BENETES, VARIETY CHILDREN'S CHARITY OF WESTERN MICHIGAN, INC., d/b/a VARIETY CLUB OF GRAND RAPIDS d/b/a VARIETY CLUB,

Defendants-Appellees.

UNPUBLISHED
July 19, 2002

No. 229947
Kent Circuit Court
LC No. 99-003511-NO

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motions for summary disposition. We affirm.

This case arises from the events leading to the death of plaintiff's son, a physically and mentally disabled eight-year-old boy, who choked on a rubber ball and died in January 1999. The child had attended a defendant Grand Rapids Public School District's school for special needs children. At a school-sponsored Christmas party, each child received a "treat bag" from defendant Variety Club. According to plaintiff, she discovered the treat bag in the child's backpack when he returned home from school that day. The bag contained, among other things, the rubber ball.[1] Plaintiff believed that the ball was too small to give to either of her children. However, instead of throwing the ball away, she left the ball in the bag and placed the bag on top of the refrigerator, which she believed was out of the reach of both of her children. Approximately three weeks later, she heard the child making choking sounds and discovered the ball lodged in his throat. After attempting to dislodge the ball, she called 911 and continued to try to dislodge the ball until emergency personnel arrived. The emergency personnel were able

[1] The record reveals that the rubber ball was slightly larger than a golf ball.

to remove the ball from the child's throat before taking him to the hospital in an ambulance. After two days, the child was removed from life support and died.

On appeal, plaintiff argues that the trial court erred in granting summary disposition in favor of defendants with respect to her amended complaint, in which she alleged negligence, gross negligence and willful and wanton misconduct, all forms or degrees of negligence, on the part of defendants. Specifically, plaintiff disagrees with the trial court's conclusion that any chain of proximate cause between defendants' acts or omissions and the child's death was broken by an intervening superseding cause. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In order to establish a prima facie case of negligence, a plaintiff must prove: "(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). The element of causation requires the existence of both cause in fact and proximate cause. *Id.* at n 6; *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). "Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999), citing *Ross v Glaser*, 220 Mich App 183, 192-193; 559 NW2d 331 (1996). Without the existence of proximate cause, liability does not attach. *Helmus, supra* at 255.

"An intervening cause, one which actively operates to produce harm to another after the negligence of the defendant, may relieve a defendant from liability." *Meek v Dep't of Transportation*, 240 Mich App 105, 120; 610 NW2d 250 (2000). "An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.'" *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). An intervening superseding cause need not be a negligent act. See *Dunn v Lederle Laboratories*, 121 Mich App 73, 84; 328 NW2d 576 (1982) (many unforeseeable intervening forces destroy causation and negate liability, including non-tortious forces).

First, we note that proximate cause, while usually a factual issue to be decided by a trier of fact, *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998), may be an issue of law for the court to decide "[i]f the facts bearing upon proximate cause other than causation in fact are not in dispute and if reasonable minds could not differ about applying the legal concept of proximate cause to those facts," *id.*; *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995). Here, the material facts are not in dispute. Thus, the trial court was correct to decide the issue as a matter of law. *Rogalski, supra*.

Having reviewed the record before us and the applicable law, we conclude that the trial court did not err in granting summary disposition in favor of defendants. We agree with the trial court's analysis that an intervening third party removed the danger, i.e., the ball, and that there was a supervening cause. Thus, any potential negligence by defendants was cut off by the intervening and superseding cause. Regardless of whether the child's parent's actions were

negligent,[2] plaintiff removed the ball from the child's possession and placed it out of reach of the child, thus breaking the chain in any proximate cause connection between defendants' action and the child's death. Plaintiff admitted that she has no idea how the child regained possession of the ball, and thus the intervening force or act was neither anticipated nor reasonably foreseeable. Under these circumstances, defendants were entitled to judgment as a matter of law.[3]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

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[2] We need not reach the cases on which plaintiff relies concerning parental negligence such as *Wymer v Holmes*, 144 Mich App 192; 375 NW2d 384 (1985), because the trial court in the present case clearly recognized that in order to apply its intervening superseding cause analysis, it did not have to resolve whether the child's parents were at fault. The trial court stated that although under certain circumstances parental negligence can serve to be an intervening or superseding cause, "that was [not] the case here, because I believe that the mother may very well have acted in a way that she deemed to be reasonable, and so it's not based on negligent conduct, it's based on this superseding and intervening cause coming about."

[3] To the extent that plaintiff argues that the trial court erred in its determination that remoteness in time acted to sever any proximate causation between plaintiffs and defendants, we find this argument without merit. Contrary to plaintiff's contention, remoteness in time, while not dispositive, is indeed a factor relevant to proximate cause analysis. *Poe v City of Detroit*, 179 Mich App 564, 576-577; 446 NW2d 523 (1989). Moreover, the trial court made only passing reference to the time frame of events in the instant action, and nowhere in its opinion does it indicate that remoteness in time was a factor in its ultimate conclusion.