STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2007
v	No. 272955 Oakland Circuit Court
SANDEEP NARENDRAN SABAPATHY, Defendant-Appellant.	LC No. 2005-201281-FC

Before: Kelly, P.J., and Meter and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur with the majority in result, but write separately to set forth my reasons for doing so, and to emphasize the impact of *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005), on my decision.

Defendant argues on appeal that "[t]his case is [all] about causation." According to defendant, if the trial court improperly admitted the opinion testimony of Officer Schultz that defendant was speeding when the accident occurred, the prosecution has no "alternative theory of causation." Defendant also contends that an inherent and unrecognized problem with the victim's seat belt constituted an intervening proximate cause of her death, and that his trial counsel was ineffective for failing to present this evidence to the jury.

In the context of a prosecution brought under MCL 257.625(4), the Michigan Supreme Court explained in *Schaefer*, *supra* at 435-436, that factual causation is determined by analyzing whether "'but for' the defendant's conduct," the result would have occurred. "If the result would not have occurred absent the defendant's conduct, then factual causation exists." *Schaefer*, *supra* at 436 (footnote omitted). Defendant does not dispute that his decision to drive while intoxicated qualifies as a factual cause of the victim's death, and the law as announced in *Schaefer* requires no additional proof of factual cause. Therefore, it does not matter whether defendant in the instant case was "drag racing" or engaging in "horse play." Nor is the actual speed of defendant's vehicle necessarily relevant to a conviction under the statute.

The Michigan Supreme Court in *Schaefer* also addressed the proximate cause element of the offense of OUIL causing death. Proximate cause, the Supreme Court explained, "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." *Schaefer*, *supra* at 436. If the victim's injury was "'a direct and natural result' of the defendant's actions," proximate causation exists. *Id*.

However, a cause that intervenes and "supercedes" the defendant's conduct may sever the proximate causation link between a criminal act and the victim's injury. "If an intervening cause did indeed *supersede* the defendant's act as a legally significant causal factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injury." *Schaefer*, *supra* at 437 (emphasis in original). Whether an intervening cause truly supersedes generally involves a question of reasonable foreseeability. If the intervening cause or conduct was reasonably foreseeable, it does not supersede the defendant's initial criminal act as a matter of law. *Id*.

Defendant argues that the victim's seat belt either malfunctioned or was defectively designed, and that slack in the belt allowed the victim's head to strike the pavement. According to defendant, the victim would have survived if her seat belt had worked properly, and thus the seat belt malfunction qualifies as an intervening cause that superseded his intoxicated driving, breaking the chain of causation. This argument is unpersuasive, however, because the failure of the victim's seat belt to function properly, whether due to negligence in its design, breach of warranty, or damage, was foreseeable as a matter of law. See *Rutherford v Chrysler Motors Corp*, 60 Mich App 392; 231 NW2d 413 (1975) (observing that injuries caused by a vehicle manufacturer's failure to exercise reasonable care "'are readily foreseeable as an incident to the normal and expected use of an automobile'"), quoting *Larsen v General Motors Corp*, 391 F2d 495, 502 (CA 8, 1968). While some theories of superseding cause may be properly submitted to a jury in a prosecution brought under MCL 257.625(4), an injury or death caused by a malfunctioning seat belt is not one of them. For this reason, a *Ginther*[1] hearing was and is unnecessary.

Defendant's reliance on *People v Moore*, 246 Mich App 172; 631 NW2d 779 (2001), is similarly misplaced. In *Moore*, the defendant's truck was stopped or proceeding very slowly when it was struck by the victim's vehicle, which was traveling at a speed of about 25 miles an hour. The victim, whose blood tested positive for recent marijuana use, lost control of his car, which caromed off the defendant's truck, crossed several lanes of traffic, and hit another car head-on, resulting in the victim's death. *Id*. at 173. The defense expert opined that because the victim was not wearing a seat belt, he was "thrown in his vehicle and struck his head on the window" when he collided with the defendant's truck, causing him to lose control of his vehicle. This Court concluded, "Consequently, such evidence is clearly relevant to whether the decedent's death was the natural and necessary result of defendant's act."[2]

The facts of the instant case are readily distinguishable from those underlying *Moore*. The passenger victim here was wearing a seat belt when defendant lost control, his vehicle became airborne, and rolled several times before landing upright. The victim's seat belt in the instant case did not contribute to defendant's impaired driving or the rolling of his vehicle.

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] Cases decided before and after *Moore* have held that evidence of a victim's failure to use a seat belt was properly excluded. *People v Werner*, 254 Mich App 528, 540-543; 659 NW2d 688 (2002); *People v Richardson*, 170 Mich App 470; 428 NW2d 698 (1988).

While the *Moore* victim's loss of control of his car at a relatively slow speed may have been unforeseeable, the failure of the seat belt to prevent the instant victim's fatal head injury was not. Furthermore, defendant's conduct need only be *a* proximate cause of the victim's death to justify the imposition of criminal liability. *People v Tims*, 449 Mich 83, 99; 534 NW2d 675 (1995). Therefore, *Moore* does not control this case. Because expert testimony regarding the victim's seat belt would have been irrelevant to the jury's determination of defendant's guilt, his claim of ineffective assistance of counsel must fail.

/s/ Elizabeth L. Gleicher