STATE OF MICHIGAN

COURT OF APPEALS

GREGG TUTTLE, Plaintiff-Appellant, v YAMAHA MOTOR CORPORATION, U.S.A., YAMAHA MOTOR MANUFACTURING CORPORATION OF AMERICA, and IRON MOUNTAIN POWER SPORTS, L.L.C., Defendants-Appellees.	UNPUBLISHED October 23, 2012 No. 301776 Schoolcraft Circuit Court LC No. 2008-004092-NI

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff Gregg Tuttle appeals as of right the trial court's order granting summary disposition in favor of defendants Yamaha Motor Corporation, U.S.A., Yamaha Motor Manufacturing Corporation of America (collectively "Yamaha"), and Iron Mountain Power Sports, L.L.C. ("IMPS"). We reverse and remand for further proceedings.

This is a products liability case involving a 2006 Rhino 660, a four-wheel-drive recreational vehicle, that was designed, manufactured, and distributed by Yamaha and purchased by Tuttle from IMPS in 2006. Tuttle fractured his left leg when the Rhino tipped on its side as Tuttle was negotiating a turn moments after accelerating from a stopped position with the steering wheel cranked all the way to the right. As the Rhino was tipping over, Tuttle's left leg protruded from the vehicle. When asked at his deposition whether he put his leg out to stop the Rhino from tipping over, Tuttle responded, "I don't know if I put it out or if it fell out." Tuttle indicated that if he had extended his leg outward, it would have been consistent with his training and years of experience relative to operating motorcycles and preventing them from tipping over.

Tuttle testified that it would have almost been instinctive to use his leg as a brace or to extend it for support.[1]

Tuttle's expert testified that, based on personal experience, extending one's leg outward when a machine or vehicle is tipping over is an automatic, involuntary act. A Yamaha internal memo from August 2001 indicated that accidental injuries will most likely result from rollovers and tipovers, and it specifically identified injuries to arms/wrists and ankles/lower legs based on belted occupants' attempts to support themselves. Yamaha's Takanori Suzuki, a project leader on the Rhino, testified in a 2007 case concerning the Rhino that two employees had been injured in Rhino rollovers, including a Yamaha president in France. Suzuki stated that a foot guard was considered, but ultimately rejected as a potential tripping concern. After its president of the French division of Yamaha was injured in the rollover, which occurred on level ground, Yamaha in France started adding a bar to keep legs in and branches out. Suzuki, however, ordered the division to stop making the modification. In May 2009, in cooperation with the U.S. Consumer Product Safety Commission, Yamaha implemented a free repair program for Rhinos manufactured between 2004 and 2009, which included adding spacers in the rear to broaden the base, removing the rear anti-sway bar, and encouraging the installation of free doors, passenger handholds, and an updated warning.

In his complaint, Tuttle proffered three theories of liability with respect to his claim that the Rhino was unreasonably dangerous: (1) its design made it unstable when making turns at low speeds; (2) it lacked a guard or door to protect legs in a tipover situation; and (3) the warnings were inadequate in regard to making turns at even low or reasonable speeds. Yamaha filed a motion for summary disposition under MCR 2.116(C)(10), maintaining (1) that the proximate causal relationship between Tuttle's injuries and the alleged defects was speculative, and (2) that the accident arose out of the unforeseeable misuse of the Rhino by Tuttle. With respect to causation, Yamaha argued that Tuttle's action required proof that his leg left the interior of the Rhino inadvertently or reflexively and that the evidence was speculative on that point. According to Yamaha, the evidence suggested that Tuttle stuck his leg out intentionally.[2] In a written opinion and order issued by the trial court following the motion hearing, the court granted defendants' motions for summary disposition, reasoning as follows:

> Plaintiff's depositional testimony indicates that the Plaintiff, of his own accord, may very well have intentionally stuck his foot out in order to lessen the

[1] The warning label inside the Rhino instructed drivers, in part, to keep "hands and feet inside the vehicle at all times" and to never "make sharp, high-speed turns" because "the vehicle could roll over or go out of control."

[2] IMPS joined in Yamaha's motion for summary disposition, but had previously filed its own motion for summary disposition, arguing that it had no prior knowledge of the alleged defects and did not modify the Rhino. That motion was denied, and the trial court's ruling on the motion is not at issue in this appeal.

> impact of his fall. This possibility makes the presence of a safety device more or less irrelevant.
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> * * *
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> Despite what the Court believes is an inadequate warning on the Rhino 660, the proximate causational relationship between the accident and the Plaintiff's injuries are unclear. Plaintiff's depositional testimony reveals that the Plaintiff does not know if he put his foot outside the Rhino when tipping to possibly brace or soften the landing, or if it just inadvertently fell out. Such a lack of causational proof contributing to the injury is fatal.

On appeal, Tuttle first argues that "but for" the Rhino's instability when making sharp turns at low to moderate speeds, "but for" the lack of adequate warnings or instructions, and "but for" the absence of a door or protective guard to keep Tuttle's leg in the Rhino when it tipped, Tuttle would not have made the turn, there would have been no tipover, he would not have extended his leg in an attempt to minimize injury, and there would have been no injury. Tuttle contends that instinct to protect oneself is not the same as intent to subject oneself to harm. Tuttle maintains that it is irrelevant whether he intentionally extended his leg to brace himself or to soften his landing, as there nonetheless existed a logical sequence of cause and effect between his injuries and defendants' conduct. Tuttle argues that any contribution he made to his injury bears on the issue of comparative negligence. Defendants maintain that because Tuttle's deposition testimony did not exclude the possibility that he intentionally extended his leg, causation cannot be established and is merely speculative. Yamaha asserts that if Tuttle's actions were inadvertent, then a jury question on causation may exist, "[b]ut if it was [Tuttle's] own choice to disregard warnings and voluntarily stick his leg out, then this *choice* was the 'operating cause' of the accident, and the alleged instability or failure to warn is merely a 'condition or occasion affording opportunity for . . . [Tuttle's] voluntary extension of his own leg . . . to produce injury.'"

"It is well settled under Michigan law that a prima facie case for products liability requires proof of a causal connection between an established defect and injury." *Skinner v Square D Co*, 445 Mich 153, 159; 516 NW2d 475 (1994). A plaintiff, while having the burden of proof to establish causation, "is not required to produce evidence that positively eliminates every other potential cause." *Id.* The evidence is sufficient when it "'establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support.'" *Id.* at 159-160 (citation omitted). Proximate cause must be proven under products liability law, and proximate cause encompasses two distinct elements: "(1) cause in fact, and (2) legal cause, also known as 'proximate cause.'" *Id.* at 162-163, citing *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). In general, cause in fact requires a "showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner*, 445 Mich at 163. "[W]here several factors combine to produce an injury, and where any one of them, operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions, more likely than not, were a 'substantial factor' in producing a plaintiff's injuries." *Id.* at

165 n 8. Proximate cause is "'a foreseeable, natural, and probable cause' of 'plaintiff's injury and damages.'" *Kaiser v Allen*, 480 Mich 31, 37-38; 746 NW2d 92 (2008), quoting *Shinholster v Annapolis Hosp*, 471 Mich 540, 546; 685 NW2d 275 (2004).[3]

The issue of causation here did not focus on whether the alleged defective design of the Rhino caused it to tip over and produce an injury, on whether the alleged inadequacy of the warnings caused the Rhino to tip over and produce an injury because of Tuttle being unaware that his operation of the vehicle when turning was dangerous, or directly on whether the lack of a door, upon tipover, caused Tuttle's leg to become exposed and injured. Instead, at the heart of defendants' argument is that Tuttle cannot establish that he inadvertently extended his leg outside of the Rhino, leaving the possibility that he did so intentionally, and that intentional conduct on Tuttle's part would be the controlling cause of his injury under tort law and not defendants' conduct. Yamaha's appellate argument quoted by us above essentially concedes, for purposes of summary disposition and the causation matter at issue, that the alleged defects and negligence resulted in a situation in which the Rhino began to tip over or left the driver unprotected; however, any liability would be cut off if Tuttle intentionally extended his leg. Again, Yamaha indicates that if the evidence showed, absent speculation, that Tuttle inadvertently extended his leg, causation should probably be resolved by a jury. This is an

[3] This case concerns a summary disposition motion brought under MCR 2.116(C)(10), which provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto*, 451 Mich at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto*, 451 Mich at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). For purposes of a motion for summary disposition under MCR 2.116(C)(10), including motions entailing causation matters, "the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner*, 445 Mich at 161. A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

acknowledgment that "but for" Yamaha's actions or omissions, Tuttle's injury would not have occurred, or at least there exists a jury question on the matter limited to our particular causation dispute, assuming no consideration is given to the possibility that Tuttle acted intentionally. Accordingly, defendants' position, more accurately framed, is that there were multiple causes of Tuttle's injuries, but an intentional act of extending his leg would be a superseding cause, disrupting the chain of causation and entirely negating any liability by defendants.

In *Hickey v Zezulka*, 439 Mich 408, 436-438; 487 NW2d 106 (1992), amended 440 Mich 1203 (1992), the Michigan Supreme Court observed:

> A superseding cause is one that intervenes to prevent a defendant from being liable for harm to a plaintiff that the defendant's antecedent negligence is a substantial factor in bringing about. We have previously held that in order to be a superseding cause, thereby relieving a negligent defendant from liability, an intervening force must not have been reasonably foreseeable.
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> While a defendant will not be liable for injury caused by an intervening force that was not reasonably foreseeable,
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> "[i]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."
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> This statement has also been made with regard to the acts of a *plaintiff* in relation to a defendant's negligence:
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> "Generally, where the defendant's negligence has created a stimulus for the plaintiff's act there is no break in the chain of events which would prevent the negligent defendant's liability."
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> This is so because, "[i]f the acts of the plaintiff are within the ambit of the hazards covered by the duty imposed upon the defendant, they are foreseeable and do not supersede the defendant's negligence." Thus, where the defendant's negligence consists in enhancing the likelihood that the intervening cause will occur, or consists in a failure to protect the plaintiff against the very risk that occurs, it cannot be said that the intervening cause was not reasonably foreseeable. [Citations omitted; alterations in original.]

Similarly, in the landmark case of *Moning*, 400 Mich at 441, our Supreme Court stated that when "'the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances, he may be negligent, among other reasons, because he has failed to guard against it; or he may be negligent only for that reason.'" (Citation omitted.)

Here, we first find that, minimally, a genuine issue of material fact existed regarding whether Yamaha's actions or omissions, as alleged by Tuttle, were a "substantial factor" in bringing about the harm that he suffered. Furthermore, minimally, a genuine issue of material fact existed concerning whether Tuttle's actions, if intentional, constituted an intervening, superseding cause of his injuries. One could logically conclude that defendants' conduct set in motion the events that led to Tuttle being forced to react to the tipping Rhino, that defendants' conduct enhanced the likelihood that the intervening cause would occur, that it is reasonably foreseeable for a person in those circumstances to intentionally extend a leg to brace against a fall or tipover, and that, assuming an intentional act, Tuttle's response was one which in ordinary human experience is reasonably to be anticipated. We recognize that the warnings advised drivers or occupants to keep their hands and feet inside the vehicle at all times. Nevertheless, a reasonable juror could conclude that it is reasonably foreseeable and reasonable to anticipate that an operator, in a moment of extreme stress and anxiety as the Rhino is tipping over, would naturally extend his or her leg without having the time or ability to carefully scrutinize options such as keeping the leg inside the vehicle.[4]

We would rule differently if, for example, Tuttle had intentionally put his leg out while operating the Rhino and then ran into something causing the injury, or, if the evidence revealed that he stuck his leg out during the tipover with the intent of injuring himself, rather than protecting himself, of which there is no evidence. But to allow the human instinct of self-preservation to completely negate liability for negligence as defendants ask would effectively eviscerate tort law. Both Tuttle's reaction in extending his leg, if intentional, in response to the incident, along with the type of injury, a broken leg, could reasonably be found as being foreseeable and not different than would be expected in a tipover accident, as evidenced by Yamaha's internal memo and Suzuki's deposition testimony.[5] Any act by Tuttle to extend his leg did not start the sequence of events that led to his injury—the Rhino tipped over in spite of his leg.

We do note that the issue of Tuttle's fault – if any – seems more a matter of comparative negligence that could serve to potentially reduce an award as opposed to barring recovery completely. See MCL 600.2958 to 600.2960.

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[4] While we are tempted to find as a matter of law that intentionally extending a leg in the situation that confronted Tuttle would not be a superseding cause, we believe it best to allow the jury to resolve that issue after consideration of all the surrounding circumstances. See *Barnebee v Spence Bros*, 367 Mich 46, 51; 116 NW2d 49 (1962) ("we can only say that the issue of causal connection . . . was 'for the jury upon all the facts'").

[5] Yamaha suggests that Tuttle would not have suffered the injuries he did if he had been wearing a seatbelt at the time of the accident as he claimed; however, the internal memo predicting leg and ankle injuries in the event of a tipover specifically referenced "belted occupants."

Given our ruling, it is unnecessary to address Tuttle's secondary argument and, as to defendants' alternative argument in support of affirming the trial court's ruling predicated on unforeseeable misuse, we decline to address the matter as the trial court failed to reach the issue. Defendants are of course free to pursue that argument on remand.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, Tuttle is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra