# STATE OF MICHIGAN

# COURT OF APPEALS

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| RANDALL CARNELL and SUSAN CARNELL,<br><br>Plaintiffs-Appellants,<br><br>v<br><br>WOLVERINE TRACTOR & EQUIPMENT and CHRIS MICHALAK,<br><br>Defendants-Appellees. | UNPUBLISHED<br>February 8, 2011<br><br>No. 295115<br>Oakland Circuit Court<br>LC No. 2008-096172-NO |

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Randall and Susan Carnell[1] challenge the dismissal of their negligence claim against Wolverine Tractor & Equipment (hereinafter "Wolverine") and its employee Chris Michalak. The trial court ruled that Carnell's theory of causation was based on mere conjecture and that he had not come forward with sufficient evidence to permit a jury to find Wolverine and Michalak liable or negligent. We affirm.

Carnell's employer, Hartman & Tyner, Inc., contracted with Wolverine to repair the hydraulic line of a skid steer. Michalak is an employee of Wolverine and a certified large equipment mechanic. Wolverine dispatched Michalak to Carnell's employment site to effectuate repairs to the equipment. Michalak was on the site for approximately five days. After the repairs were completed, Michalak had Carnell test drive the skid steer. Carnell did not identify any problems following the immediate operation of the equipment and Michalak left the premises. Carnell's co-worker, Mario Aguilar, washed the equipment and it was then driven into a storage garage. Three days later, when Carnell entered the garage he slipped and fell on a puddle of oil. Carnell contends that this hazard was the result of Michalak's negligent repair of the skid steer.[2]

[1] As the claim of loss of consortium by Susan Carnell is derivative of her husband's claim, only Randall Carnell will be directly referenced in this opinion.

[2] Carnell asserts vicarious liability to Wolverine as Michalak's employer.

This Court reviews the grant or denial of a motion for summary disposition de novo.[3] As part of that review, we consider the lower court record "in the light most favorable to the nonmovant to determine whether any genuine issue of material fact exists that precludes entering judgment for the moving party as a matter of law."[4] "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ."[5] Mere speculation and conjecture are insufficient to give rise to a genuine issue of material fact.[6]

At the outset we note that Carnell pleaded both premises liability and ordinary negligence. The trial court correctly determined that Carnell's claims were not based in premises liability and that Wolverine and Michalak were not entitled to summary disposition based on the open and obvious doctrine. "The gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim."[7] The nature of the duty to be attributed to a defendant is premised on the specific theory of liability relied on by the plaintiff.[8] As previously discussed by this Court, "[i]n a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land."[9] In contrast, liability arising from a claim of ordinary negligence originates from the common law rule that "imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others."[10] Because Carnell's claim is based on the conduct of Michalak regarding the repair of the skid steer and not any relationship of Michalak or Wolverine to ownership or possession of the premises or site of the accident, the claim was correctly identified by the trial court as limited to one for ordinary negligence.

The elements that must be proved to establish a prima facie case of negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) causation, and (4)

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[3] *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006).

[4] *Laier v Kitchen*, 266 Mich App 482, 486-487; 702 NW2d 199 (2005).

[5] *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

[6] *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996).

[7] *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (citation omitted).

[8] *Laier*, 266 Mich App at 493.

[9] *Id.*

[10] *Johnson v A & M Custom Built Homes*, 261 Mich App 719, 721; 683 NW2d 229 (2004) (citation omitted).

damages."[11] Carnell contends the trial court erred in finding that he failed to establish sufficient evidence of causation for his claim to survive summary disposition.

To establish proximate cause requires "proof of two separate elements: (1) cause in fact, and (2) legal cause . . ."[12] Specifically:

> 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. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue.[13]

As recounted by the trial court, the evidence showed that Michalak was contracted to repair the hydraulic lines of the skid steer. Although several repairs to the hydraulic lines were performed, the documentation fails to show involvement by Michalak in the inspection or repair of the right rear hub and chain case, which Carnell contends was the source of the oil spill. Michalak acknowledges checking the oil level in the chain case, but did not refill the chain case or add more oil and the invoices and documentary evidence support Michalak's statements.

After completing the hydraulic line repairs Michalak had no further contact with the skid steer and turned the equipment over to Carnell and Aguilar. Aguilar washed the skid steer and it was driven to the storage garage and parked. Carnell's injury did not occur until three days later. As noted by the trial court, "it is equally plausible that someone else damaged the skid steer over the weekend." Because Carnell attributes the cause of his injury to problems with the skid steer that were not part of Michalak's contractual duty to inspect and repair, it is mere speculation to contend that Michalak's repairs were negligent and were the cause in fact of his injuries. Carnell's failure to successfully demonstrate a genuine issue of material fact regarding causation supports the trial court's grant of summary disposition.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Michael J. Kelly

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[11] *Laier*, 266 Mich App at 495 (citation omitted).

[12] *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994) (citations omitted).

[13] *Id*. at 163.