STATE OF MICHIGAN

COURT OF APPEALS

LINDA S. BUTTS as Next Friend of FREDERICK J. SIERADZKI, IV, a Minor,

Plaintiff-Appellant,

v

JAMES WHITTON,

Defendant-Appellee,

and

MT. HOLLY RESORT,

Defendant.

UNPUBLISHED
May 26, 2011

No. 296574
Oakland Circuit Court
LC No. 2009-100038-NO

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

In this general negligence case, plaintiff appeals as of right from the trial court's order granting defendant James Whitton's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff was 13 years old when he was injured during a snowboarding lesson taught by defendant. Defendant was teaching plaintiff and another boy, Austin, how to do traverses and turns across the ski hill. Defendant demonstrated the move across, then stopped and turned around toward where the boys were waiting. Defendant waved Austin to cross the hill, and the boy did so without incident. Defendant then signaled plaintiff to cross the hill. Plaintiff was about halfway across when a downhill skier, Nicholas Sparaga, ran into him, fracturing plaintiff's leg. Plaintiff sued, alleging that defendant was liable in general negligence for "failing to use ordinary care in conducting himself as a snowboard instructor" and that Mt. Holly Resort was liable under a theory of vicarious liability. Mt. Holly Resort was dismissed by stipulation after it was discovered that the snowboard school was operated independently from the resort. Defendant moved for summary disposition, arguing that he owed no duty to plaintiff and, moreover, the deposition testimony was consistent in proving plaintiff's injury was caused by the reckless skiing of Sparaga, not from any action by defendant.

The trial court agreed with defendant. The court noted defendant's testimony that he looked up the hill to make sure it was safe and that Sparaga "admittedly was racing at a very fast speed, not watching where he was going, and [was] violating the rules of the ski facility." The court found that no special relationship giving rise to a duty existed because there was no evidence that plaintiff "entrusted himself to Defendant to the extent that Plaintiff was incapable of caring for himself." The court also found that, even if there was a duty owed, "there's insufficient evidence that would support a finding of probable [sic] cause, even when viewed in the light most favorable to Plaintiff." Thus, defendant's motion for summary dismissal was granted.

On appeal, plaintiff argues that the trial court erred both in finding defendant did not owe him a duty and in finding plaintiff had not created a question of fact that defendant's actions were the proximate cause of the accident. After de novo review of the decision to grant the motion for summary disposition, we disagree. See *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In negligence actions, a plaintiff must establish that a defendant owed the plaintiff a duty. *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8; 492 NW2d 472 (1992). Generally, there is no duty to protect against the acts of a third person absent a special relationship between the defendant and the plaintiff. *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 25-26; 780 NW2d 272 (2010). This "special relationship" has been described as follows:

> In a special relationship, one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is in the best position to provide a place of safety. Thus, the determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself. [*Gus Macker Enterprises, Inc*, 196 Mich App at 9 (citations omitted); see, also, *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997).]

In this case, we agree with the trial court's conclusion that the evidence failed to establish the requisite special relationship between defendant and plaintiff. Even if plaintiff did entrust himself to the control and protection of defendant, there was no "consequent loss of control to protect himself." That is, there is no evidence that, because of his relationship with defendant, plaintiff lost the ability to protect himself. However, even if duty was established, we would affirm the trial court's conclusion that plaintiff failed to establish a genuine issue of material fact on the issue of causation.

To establish a prima facie case of negligence, a plaintiff must prove causation. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Proof of causation requires both cause in fact and proximate cause. *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001). Generally, cause in fact is established if a jury could conclude that, more likely than not, but for the defendant's conduct, the plaintiff's injury would not have occurred. *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 150; 687 NW2d 380 (2004). And a proximate, or legal, cause is a cause that, "in a natural and continuous sequence, unbroken by any new, independent cause,

produces the injury." *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985) (citation omitted). An intervening, independent and efficient cause severs whatever connection there may be between the plaintiff's injuries and the defendant's negligence unless the intervening act was reasonably foreseeable. *Davis v Thornton*, 384 Mich 138, 148; 180 NW2d 11 (1970). An intervening act of negligence is reasonably foreseeable if the actor at the time of his negligent conduct should have realized that a third person might so act, or a reasonable person knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted. *Id*. at 149, quoting 2 Restatement Torts, § 447, p 1196.

In this case, defendant testified that he looked to see if the hill was sufficiently clear for plaintiff to cross. He judged it to be so. He did not see Sparaga until the skier was only seconds away from impact. Nothing in the allegations or the testimony indicates that defendant should have seen Sparaga in time, or saw him but misjudged the timing. When defendant did see Sparaga, his testimony was that he thought Sparaga would turn and avoid plaintiff. Sparaga himself testified that he would have seen plaintiff if he "had been looking," instead of "paying attention to my friend who was carving next to me" to avoid colliding with him. Plaintiff presents no evidence that a reasonable person would have expected someone to race down the hill without looking, and to fail to avoid another skier. Thus, there is no evidence of legal causation.

Moreover, there is no evidence that the injury would not have occurred "but for" defendant's act. If the students had decided for themselves when to cross, it is likely that plaintiff would have been hit anyway. Even if he had seen Sparaga coming down the hill, he would not have known that Sparaga was not looking where he was going, and he would likely have thought that Sparaga would avoid him. In short, there is simply no evidence that defendant could or should have acted differently and avoided the collision.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens