# STATE OF MICHIGAN

# COURT OF APPEALS

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SALINGER ELECTRIC COMPANY, INC.,

Plaintiff-Appellant,

v

MIKE MCAULLIFE SALES, INC.,

Defendant-Appellee.

UNPUBLISHED
August 27, 1996

No. 181560
LC No. 93-465283-NZ

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Before: Sawyer, P.J., and Bandstra and M.J. Talbot,* JJ

PER CURIAM.

Plaintiff filed this action for contribution, indemnity and breach of contract against defendant in response to an underlying personal injury suit filed in another county. The trial court granted summary disposition to defendant pursuant to MCR 2.116(C)(10), and plaintiff now appeals as of right. We affirm.

Plaintiff argues that the trial court erred in finding that defendant's acts were not a proximate cause of the injuries to the underlying plaintiffs, Patycola and Burnham. We disagree. Liability for negligence does not attach unless the plaintiff establishes that the injury in question was proximately caused by the defendant's negligence. *Brisboy v Fibreboard Corp,* 429 Mich 540, 547; 418 NW2d 650 (1988); *Babula v Robertson,* 212 Mich App 45, 54; 536 NW2d 834 (1995). Proximate cause means such cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. *Nielsen v Henry H Stevens, Inc,* 368 Mich 216, 220; 118 NW2d 397 (1962); *Babula, supra,* 212 Mich App 54. When a number of factors contribute to producing injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in bringing about the injury. *Brisboy, supra,* 429 Mich 547-548; *Poe v Detroit,* 179 Mich App 564, 576; 446 NW2d 523 (1989). Factors to be considered in determining whether the negligence is a substantial factor are:

> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

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* Circuit judge, sitting on the Court of Appeals by assignment.

> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
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> (c) the lapse of time. [2 Restatement Torts, 2d, § 433, p 432.]

An intervening cause is "one which comes into active operation in producing harm to another after the negligence of the defendant may relieve a defendant from liability." *Poe, supra,* 179 Mich App 577.

Although it is clear that defendant's employee, Richard Arjewski, was responsible for the incorrect secondary voltage information appearing in the McAuliffe/Heavy Duty quotation, that situation in and of itself was harmless until acted upon by other forces for which defendant was not responsible and could not control. *Id.* After it was determined that McAuliffe/Heavy Duty could not supply the type of transformers requested by 211West Fort Washington Associates ("211"), defendant had no further involvement in the replacement of the transformers at the Comerica Building. It was plaintiff that supplied the incorrect secondary voltage figures to Schiller-McBride, a sales representative for Vantran, another manufacturer of high voltage transformers. Schiller-McBride, without verifying the accuracy of those secondary voltage figures itself, supplied those same figures to Vantran. Vantran then manufactured replacement transformers with a nonconforming secondary voltage of 240/480. When the replacement transformers were delivered to the job site, both 211 and Double Jack, the electrical contractor, realized that the replacement transformers were not the same voltage as the existing transformers. However, in spite of this fact, 211 and Double Jack decided to install the nonconforming replacement transformers anyway. To get the nonconforming transformers to work, Double Jack ran a jumper wire between two terminals. Because of the manner in which the transformer was wired externally by Double Jack, the output of the transformers was in excess of 900 volts, and the test meter exploded when Patycola touched the leads on it. Clearly, it was the intervening acts of plaintiff, Schiller-McBride, Vantran, 211 and/or Double Jack which caused the injuries suffered by Patycola and Burnham.

There were a number of other factors which heavily contributed to the injuries suffered by Patycola and Burnham, and defendant's negligent act was harmless in and of itself. Rather, the injuries are attributable to actions by others, for which defendant was not responsible and could not control. *Poe, supra, 179 Mich App 576-578.* Accordingly, defendant's negligence was not a proximate cause of the injuries suffered by Patycola and Burnham. Although ordinarily the determination of proximate cause is left to the trier of fact, if "reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should rule as a matter of law." *Babula, supra,* 212 Mich App 54. See also *Rogalski v Tavernier,* 208 Mich App 302, 306; 527 NW2d 73 (1995); *Berry v J & D Auto Dismantlers, Inc,* 195 Mich App 476, 481; 491 NW2d 585 (1992). Because reasonable minds could not differ regarding the fact that defendant's actions were not the proximate cause of the injuries to Patycola and Burnham, the trial court properly granted summary disposition in favor of defendant.

Plaintiff's argument that the trial court was not bound by stare decisis, res judicata, or collateral estoppel to follow the other circuit court's decision that defendant's actions were not a proximate cause of the injuries suffered by Patycola and Burnham is moot. The trial court clearly indicated that it was not granting defendant's motion for summary disposition based upon the doctrines of stare decisis, res judicata, or collateral estoppel. The court ruled on the merits of the case and found that defendant's actions were not a proximate cause of the injuries suffered by Patycola and Burnham.

Plaintiff also argues that the trial court erred in granting summary disposition on its breach of the contract claim. We disagree. Initially, we note that defendant timely raised the statute of frauds defense in its first responsive pleading. MCR 2.111(F)(3)(a), MCR 2.116(C)(7) and (D)(2). Further, we hold that the trial court properly concluded that the predominant purpose of any agreement between the parties was the procurement of goods, not services. *Neibarger v Universal Cooperatives, Inc,* 439 Mich 512; 486 NW2d 612 (1992); *Higgins v Lauritzen,* 209 Mich App 266, 269; 530 NW2d 171 (1995). Because this transaction involved the sale of goods valued in excess of $500, a written contract was required. MCL 440.2201; MSA 19.2201. There was no written contract in this case. Therefore, plaintiff's breach of contract claim was barred by the statute of frauds and summary disposition was properly granted on this claim. *Higgins, supra* at 269-270. The quotation rendered by Heavy Duty was insufficient to serve as a contract for the sale of the replacement transformers because it did not indicate that a contract of sale had been made between plaintiff and McAuliffe/Heavy Duty. *Lorenz Supply Co v American Standard, Inc,* 419 Mich 610, 614; 358 NW2d 845 (1984). To the extent that plaintiff claims that MCL 440.2201(3)(a); MSA 19.2201(3)(a) applies, we find that it does not because there is no indication that Heavy Duty had commenced the manufacture of the transformers.

Finally, plaintiff claims for the first time on appeal that defendant should be equitably estopped from raising the statute of frauds defense. Issues raised for the first time on appeal are not preserved for appellate review. *Garavaglia v Centra, Inc,* 211 Mich App 625, 628; 536 NW2d 805 (1995). Hence, we decline to review this issue.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael J. Talbot