

STATE OF MICHIGAN
COURT OF APPEALS

TAMMIE HENRY, Personal representative of the
Estate of LARRY L. HENRY, deceased,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 184867

JOEL WEBSTER,,

Emmet Circuit Court

LC No. 93-002155-NO

Defendant-Appellee.

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

MARKEY, J. (dissenting).

I would reverse and remand.

Plaintiff argues that the trial court erred in denying her motion for judgment notwithstanding the verdict. I agree.

In reviewing a motion for JNOV, this Court views the evidence presented in a light most favorable to the nonmoving party, and if reasonable jurors could honestly have reached different conclusions, the jury's verdict must not be disturbed. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

Here the jury found defendant was negligent, but that the negligence was not a proximate cause of Henry's death. Plaintiff argues that because reasonable minds could not differ that defendant's established negligence was a proximate cause of Henry's death, the trial court erred in denying her request for JNOV. Ordinarily, the determination of proximate cause of injury is left to the trier of fact, but if reasonable minds could not differ regarding the proximate cause of injury, the court should rule as a matter of law. *Babula v Robertson*, 212 Mich App 45, 53-54; 536 NW2d 834 (1995). In addition, "[w]here there is more than one possible cause of an injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury." *Vsetual v Whitmyer*, 187 Mich App 675, 682; 468 NW2d 53 (1991). Factors to be considered in determining whether the negligence is a substantial factor are 1) the number of other factors that contribute to producing the harm and the extent of the effect they have in producing it, 2) whether the

actor's conduct created a force or series of forces that 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, and 3) the lapse of time. *Poe v City of Detroit*, 179 Mich App 564, 576-577; 446 NW2d 523 (1989) (citing 2 Restatement of Torts, 2d, § 433, p 432). Foreseeability is also relevant with regard to the issue of proximate cause. *Babula, supra* at 53.

In reviewing defendant's established negligence under the Restatement factors embraced in *Poe*, I conclude that, this is one of the rare situations where, as a matter of law, reasonable minds could not differ that defendant's act of bringing a loaded weapon out to show Henry, knowing that they were both intoxicated, and knowing that the gun did not have a safety device and could be discharged in either the cocked or uncocked position, was a substantial factor in Henry's death. *Poe, supra* at 576-577. In addition I conclude, as a matter law, that it was reasonably foreseeable that such an act would result in the type of harm sustained: Henry's fatality. *Babula, supra* at 53. Therefore, because reasonable minds could not differ, I would find that, as a matter of law, defendant's established negligence was a proximate cause of Henry's death, and the trial court erred in denying plaintiff's motion for JNOV. *Babula, supra* at 53.

/s/ Jane E. Markey