

STATE OF MICHIGAN
COURT OF APPEALS

GWENDOLYN NEILL, Personal Representative
of the Estate of WILLIAM JOHN NEILL, IV,

Plaintiff-Appellant,

v

STEEL MASTER TRANSFER, INC.,

Defendant-Appellee,

and

ROZAFI TRANSPORT, INC., and GJERGI
RROGOMI,

Defendants.

UNPUBLISHED
October 21, 2008

No. 279122
Macomb Circuit Court
LC No. 06-000744-NO

GWENDOLYN NEILL, Personal Representative
of the Estate of WILLIAM JOHN NEILL, IV,

Plaintiff-Appellee,

v

STEEL MASTER TRANSFER, INC.,

Defendant,

and

ROZAFI TRANSPORT, INC., and GJERGI
RROGOMI,

Defendants-Appellants.

No. 281057
Macomb Circuit Court
LC No. 06-000744-NO

Before: Meter, P.J., and Talbot and Murray, JJ.

MURRAY, J. (*concurring in part, dissenting in part*).

I fully concur with the majority opinion affirming the granting of defendant Steel Master Transfer's motion for summary disposition in Docket No. 279122. In Docket No. 281057, however, I dissent from the reversal of the order granting plaintiff's motion to dismiss defendants Rozafa Transport, Inc., and Gjergi Rrogomi's notice of nonparty at fault.

In my view, because Steel Master was dismissed for lack of a breach of duty, it cannot be a nonparty at fault. This conclusion is consistent with the clear text of the controlling statute. MCL 600.6304(8) defines "fault" in part as the "breach of a legal duty...that is a proximate cause of damage" sustained, in this case, by plaintiff. Hence, to be potentially considered at "fault" by the jury, one must (amongst other possible ways not relevant here) have breached a legal duty that was also a proximate cause of the injury. And, as our Court noted in *Jones v Enertel, Inc*, 254 Mich App 432, 437; 656 NW2d 870 (2002),¹ this "breach of duty" element is also required to prove a general negligence claim. Because the trial court properly ruled that Steel Master did not breach a legal duty to the plaintiff, it's actions could not be a proximate cause of plaintiff's decedent's injury, and Steel Master cannot be a nonparty at fault.²

/s/ Christopher M. Murray

¹ Although the majority is correct in stating that *Jones* was a case involving a finding of no duty, this does not mean that in only those cases where there is a finding of no duty can the nonparty at fault be dismissed. Such a conclusion seems to me to be inconsistent with the definition of fault, which explicitly includes "breach of a legal duty."

² Defendants' argument that they should be allowed to pursue other theories of fault other than those brought by plaintiff is consistent with the statute, as it allows a party to assert a nonparty is at fault so long as it can be established that the nonparty's act or omission falls within the fault definition found in MCL 600.6304(8). Here, however, defendant's notice of nonparty at fault only contained allegations of negligence, and as noted above, pursuant to *Jones* and the statute, Steel Master cannot be at fault for any injury on a negligence theory.