

STATE OF MICHIGAN
COURT OF APPEALS

FAYE ANN DUROCHER and HOWARD
DUROCHER,

UNPUBLISHED
September 17, 1999

Plaintiffs-Appellees,

v

No. 204356
Bay Circuit Court
LC No. 92-003419 NO

CENTRAL MICHIGAN RAILWAY COMPANY,

Defendant-Appellant,

and

STRAITS CORPORATION, D. M. CENTRAL
TRANSPORTATION, WILLIAM EWALD,
MARY EWALD, JEFFREY KUSCH and CAROL
KUSCH,

Defendants.

Before: Markman, P.J., and Griffin and Jansen, JJ.

MARKMAN, P.J. (concurring).

I join fully in sections I and III of the lead opinion but write separately in order to elaborate briefly on the issue addressed in section II. I believe that the trial court would have been better advised to have allowed testimony concerning the history of the boat's prior diesel failures and the various attempts at repair. In addition, I believe that this testimony, along with testimony concerning the stalling of the boat on the evening of the accident, the navigational skills of the boat's owner and operator, the conduct of other passengers in the boat (including the safety procedures which they did or did not undertake), and the navigational progress of other boats on the Saginaw River that evening, were all relevant to the jury's decision in assessing and apportioning responsibility for the injuries suffered by plaintiff, Mrs. Durocher.

I do not consider these to be ‘red herring’ matters, as does plaintiff, but rather indispensable facts to placing this tragedy in its proper context. To suggest that because boats sometimes stall, it is necessarily foreseeable that they will do so, and, therefore, that the negligence of a party (in this case, the owner of a fixed structure in the river) must be assessed without any consideration being given to the negligence of the boat owner is, in my judgment, an unrealistically compartmentalized way of viewing the instant sequence of events, and is not required by law. Although I agree with the lead opinion that a defendant is not relieved of liability where his negligent conduct is joined with the negligent conduct of another to produce an injury, alleged negligence on the part of one defendant is sometimes best evaluated by assessing it in the light of the other party’s conduct. It is one thing to find defendant here negligent when its conduct is viewed in isolation; it may be quite another thing to find defendant negligent where such negligence is predicated upon (as might be determined by the jury): (a) the utilization of a known faulty boat; (b) being operated by an unskilled navigator; (c) during night-time hours; (d) on an extremely heavily-congested river; (e) with specific navigational mistakes being made by the navigator; and (f) with passengers failing to comply with standard rules of boating safety.

“One of the considerations in determining whether negligent conduct is a ‘substantial factor’ in producing an injury is ‘the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it.’” 2 Restatement Torts, 2d, §433 910, p. 432. Thus, in order to determine whether a particular factor was a substantial factor in causing a plaintiff’s injury, a jury should be permitted to weigh evidence of other contributing factors. [*Alar v Mercy Memorial Hospital*, 208 Mich App 518, 537; 529 NW2d 318 (1995) (concurring opinion).]

The extent to which the particular confluence of events occurring here was foreseeable, and the extent to which this foreseeability bore upon the reasonableness of defendant’s conduct, should have been fully considered by the jury, in my judgment.

Whether the trial court reversibly abused its decision to limiting the jury’s access to evidence, as well as in limiting its particular use of such evidence, is not an issue that needs to be finally resolved in view of my concurrence with Part III of the lead opinion. I do not disagree with the lead opinion’s or the trial court’s formal statements of the law. Nevertheless, I would respectfully suggest that, on retrial, the trial court would be better advised to allow the factfinder to consider a broader and more contextual view of the occurrences leading to this accident.

/s/ Stephen J. Markman