STATE OF MICHIGAN

COURT OF APPEALS

SARAH STOLICKER,

Plaintiff-Appellant,

v

KOHL'S DEPARTMENT STORES, INC., and DARRYL DUNCAN,

Defendants-Appellees.

UNPUBLISHED
March 1, 2012

No. 302573
Oakland Circuit Court
LC No. 2010-106938-NO

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motions for summary disposition under MCR 2.116(C)(8) and (C)(10), and dismissing plaintiff's complaint. We affirm.

This lawsuit arose from an altercation between plaintiff and defendant Darryl Duncan, a loss prevention supervisor for defendant Kohl's. Plaintiff shoplifted clothing from Kohl's, and Duncan pursued her into the parking lot. A tussle ensued, during which plaintiff tripped, or fell, or was pushed, and she sustained a broken collarbone. Plaintiff sued defendants for assault and battery, intentional infliction of emotional distress, negligence, and negligent hiring and training.

The trial court determined that the wrongful conduct rule barred plaintiff's claims. The rule is a common law doctrine that precludes a plaintiff from maintaining an action that is based in whole or in part on the plaintiff's wrongful conduct. *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). The rule applies even if the defendant engaged in the wrongful activity: "as between parties in pari delicto, that is [,] equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them." *Id*. at 558, quoting 1A CJS, Actions, § 29, p 388. Proper application of the rule requires consideration of proximate cause: "the wrongful conduct rule only applies if a plaintiff's wrongful conduct is a proximate cause of his injuries." *Cervantes v Farm Bureau Gen Ins Co*, 272 Mich App 410, 417; 726 NW2d 73 (2006). In other words, a plaintiff who has engaged in a wrongful act may be

able to recover if the wrongful act was a "remote link in the chain of causation." *Id*. at 417, quoting *Manning v Bishop of Marquette*, 345 Mich 130, 137; 76 NW2d 75 (1956).[1]

We review de novo the trial court's ruling on the summary disposition motion. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). A motion under MCR 2.116(C)(10) is appropriate if "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a judgment on a (C)(10) motion, we consider the pleadings and the record in the light most favorable to the non-moving party to determine whether any genuine issue of material fact exists to warrant a trial. *Dancey*, 288 Mich App at 7.

Here, the parties stipulated that plaintiff engaged in shoplifting, which is wrongful conduct. See *Bonkowski v Arlan's Dep't Store*, 383 Mich 90, 103-104; 174 NW2d 765 (1970) (shoplifting is a serious crime). Accordingly, the only potential factual issue that could have precluded summary disposition was whether plaintiff's shoplifting was a proximate cause of her injuries. In this regard, plaintiff argues that summary disposition was inappropriate on the ground that her shoplifting was not "the" proximate cause of her injuries.

Plaintiff's argument miscontrues the causation factor of the wrongful conduct rule by blurring the significant distinction between "a" proximate cause and "the" proximate cause. The wrongful conduct rule bars an action if the plaintiff's conduct was *a* proximate cause of the plaintiff's injuries. *Cervantes*, 272 Mich App at 417. Here, to assess whether plaintiff's wrongful conduct was *a* proximate cause of her injuries, the trial court was required to determine whether plaintiff's act of shoplifting contributed to a chain of events that led to her injuries. See *LaMeau v Royal Oak*, 289 Mich App 153, 193-194; 796 NW2d 106 (2010) (Talbot, J., dissenting; reasoning adopted in *LaMeau v Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011)

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[1] The dissent contends that we "misconstrue[d] the underpinnings" of the wrongful-conduct doctrine. Given that the doctrine is so clear, we decline to don the judicial x-ray glasses that are required to join the dissent's crusade in gleaning tactical "underpinnings." The dissent may wish to note our Supreme Court's plain statement that the wrongful conduct doctrine should apply in situations involving flight from illegal activity:

> [A] fleeing driver would nevertheless be barred from seeking to recover for injuries sustained while attempting to evade a lawful order to stop his vehicle under Michigan's wrongful conduct rule. This rule is rooted in the public policy that courts should not lend their aid to plaintiffs whose cause of action is premised on their own illegal conduct. *Robinson v Detroit*, 462 Mich 439, 452 n 10; 613 NW2d 307 (2000).

(applying the phrase "the proximate cause" in MCL 691.1407(2)(c)). The record establishes that the shoplifting contributed to the events that led to plaintiff's injuries.[2]

Plaintiff maintains that her lawsuit should proceed on the ground that there is a question of fact regarding whether the shoplifting was *the* proximate cause of her injuries. In other words, plaintiff maintains that defendants are liable to her unless her shoplifting was the immediate and direct cause of her injuries. See *id*. at 193 (defining "the" proximate cause). We disagree. The record establishes that plaintiff's shoplifting set in motion the chain of events that led to her injuries. Consequently, plaintiff's wrongful conduct was a proximate cause of her injuries, and the trial court properly applied the wrongful conduct rule to dismiss plaintiff's claims.

Plaintiff also argues that MCL 600.2917 presents legal and factual issues that preclude summary disposition. The statute provides in pertinent part:

> In a civil action against a . . . merchant . . . for false imprisonment, unlawful arrest, assault, battery, libel, or slander, if the claim arises out of conduct involving a person suspected of removing or of attempting to remove, without right or permission, goods held for sale in a store from the store . . . and if the merchant . . . had probable cause for believing and did believe that the plaintiff had committed or aided or abetted in the larceny of goods held for sale in the store . . . damages for or resulting from mental anguish or punitive, exemplary, or aggravated damages shall not be allowed a plaintiff, unless it is proved that the merchant . . . used unreasonable force, detained the plaintiff an unreasonable length of time, acted with unreasonable disregard of the plaintiff's rights or sensibilities, or acted with intent to injure the plaintiff.

Plaintiff contends that the statute allows shoplifters to recover against merchants if the merchants' agents act unreasonably. Plaintiff further contends that application of the wrongful conduct rule in this case would "eviscerate" the protections the statute purportedly affords to shoplifters. We disagree. Even assuming that MCL 600.2917 protects admitted shoplifters, as opposed to suspected shoplifters, the statute does not preclude summary disposition in this case. By its terms, the statute does not apply unless a plaintiff has presented a cause of action against a merchant. Here, plaintiff failed to support her cause of action; the record establishes that plaintiff's shoplifting was a proximate cause of her injuries. Absent some evidence that unreasonable conduct by defendants was *the* proximate cause, i.e., the one intervening and most

[2] The dissent questions the analytical distinction between "a" proximate cause and "the" proximate cause. We again refer the dissent to *Robinson*, in which our Supreme Court applied the distinction to analyze the governmental immunity statute. 462 Mich at 458-461. To reiterate, the wrongful-conduct doctrine precludes a plaintiff from recovering unless the undisputed facts establish a break in the causal link between the wrongful conduct and the plaintiff's injury. For an example of the causal break, see *Cervantes v Farm Bureau Ins Co of Mich*, 272 Mich App 410, 417; 726 NW2d 73 (2006) (plaintiff's status as an illegal resident of the United States did not preclude recovery of no-fault benefits).

direct cause of plaintiff's injuries, the statute does not apply to plaintiff's claim. Here, the record contains no such evidence, and the statute does not apply to this case.[3]

Affirmed.[4]

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

[3] According to the dissent, MCL 600.2917(1) creates a cause of action for shoplifters against retail loss enforcement officers. We disagree. The statute neither creates nor limits the type of action a shoplifter may assert. Rather, the statute describes the burden of proof for obtaining aggravated damages. *Mosley v Federals Dept Stores, Inc*, 85 Mich App 333, 337-338; 271 NW2d 224 (1978); see generally *Montgomery v Groulx*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2006 (Docket No. 263397, unpub op p 4).

[4] While not entirely new, the dissent's comparison of the wrongful-conduct doctrine and the tort reform statutes is certainly creative. Creativity, however, has its limits. When a legal theory was not raised in the trial court, or in the appellate briefs, or at oral argument, the application of that theory may saddle the parties or the judiciary with unintended consequences. We need not speculate here as to whether the dissent's theory would require abandonment of other legal doctrines such as the open and obvious rule or the common work area doctrine. The development of the dissent's theory must await full briefing in another case.

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GLEICHER, P.J. (*dissenting*).

The common-law wrongful-conduct doctrine precludes a plaintiff from grounding her cause of action in her own illegal conduct. Sarah Stolicker's assault and battery claim stems from the conduct of defendant Darryl Duncan. Because Stolicker has not relied on her law violation to establish any of the predicates for her claim, it falls outside the wrongful-conduct doctrine. In holding otherwise, the majority not only misconstrues the underpinnings of the common-law doctrine, but also ignores two Michigan statutes that specifically authorize Stolicker's claim. More fundamentally, the Legislature has abrogated the wrongful-conduct rule, and it no longer applies in Michigan. For these reasons, I respectfully dissent.

I. FACTS AND PROCEEDINGS

Sarah Stolicker and her friend selected some clothing from a rack at Kohl's Department Store and entered a fitting room. There, they ripped the tags from the items and placed the clothing in Stolicker's purse. The pair then exited the store. Duncan, a Kohl's loss prevention officer, observed Stolicker behaving suspiciously. He confirmed with a sales associate that Stolicker and her friend had removed clothing from a fitting room without paying for it, and confronted Stolicker in the parking lot. According to Stolicker, Duncan failed to disclose his identity as a Kohl's employee. She ignored his effort to speak with her and resisted when he attempted to grab her purse. Stolicker described that Duncan "tackled me to the ground and pushed me into my car door[.]" She emerged from the fray with a fractured collarbone. The prosecutor charged her with third-degree retail fraud, MCL 750.356d(4), and assault and battery, MCL 750.81(1). Stolicker pleaded guilty to the retail fraud charge and was sentenced under the Holmes Youthful Trainee Act, MCL 762.14. The prosecutor dismissed the assault and battery count.

Stolicker then sued Duncan and Kohl's, asserting claims for common-law assault and battery, unreasonable use of force in violation of MCL 600.2917, intentional infliction of emotional distress, negligence, and negligent hiring and training. Duncan and Kohl's moved for summary disposition under MCR 2.116(C)(8) and (10), contending that the common-law wrongful-conduct rule barred Stolicker's claims. The circuit court granted summary disposition, adopting defendants' wrongful-conduct arguments.

The majority holds that because Stolicker admitted to shoplifting, "the only potential factual issue that could have precluded summary disposition was whether plaintiff's shoplifting was a proximate cause of her injuries." *Ante* at 3. According to the majority, because "plaintiff's shoplifting set in motion the chain of events that led to her injuries," the circuit court correctly applied the wrongful-conduct rule in dismissing her lawsuit. *Ante* at 4.

II. ANALYSIS

The majority's expansive application of the wrongful-conduct rule ignores that Stolicker's shoplifting did not cause her injury. Rather, a separate and distinct cause existed: Duncan's allegedly tortious behavior. The wrongful-conduct rule lacks relevance where a plaintiff's wrongdoing merely occasions an injury, rather than directly causes it. Furthermore, two Michigan statutes prove the inapplicability of the wrongful-conduct rule under the circumstances of this case. MCL 600.2917 explicitly recognizes a cause of action against a merchant for using unreasonable force in apprehending a shoplifter. MCL 600.2955b permits a person committing a felony to maintain a cause of action when injury results from a defendant's use of unreasonable force. But most critically, I believe that the wrongful-conduct rule no longer exists in Michigan. Our Legislature's enactment of comparative fault principles in MCL 600.2958 and MCL 600.6304 have displaced the common-law on this subject.

A. THE MAJORITY'S MISINTERPRETATION OF THE WRONGFUL-CONDUCT RULE

Our Supreme Court scrutinized the common-law underpinnings of Michigan's wrongful-conduct rule in *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). In *Orzel*, the plaintiff sued a pharmacy, claiming that it had negligently supplied him with a controlled substance. The plaintiff admitted that he had illegally purchased the drug from the pharmacy. *Id.* at 554-555. The Supreme Court held that the plaintiff's illegal conduct barred his claim. *Id.* at 576-577. In reaching this result, the Supreme Court methodically explored the common-law roots of the doctrine, as well as its "limitations and exceptions." *Id.* at 561.

At common law, a person could not maintain an action if its establishment required reliance "'in whole or in part, on an illegal or immoral act or transaction to which he is a party.'" *Id.* at 558, quoting 1A CJS, Actions, § 29, p 386. "[A] similar common-law maxim, known as the 'doctrine of in pari delicto,'" also bars claims made by a plaintiff "'equally in the wrong'" as the defendant. *Id.*, quoting 1A CJS, Actions, § 29, p 388. Taken together, these common-law principles form Michigan's wrongful-conduct rule.

One important limitation on this judge-made rule involves the "causal nexus" between the plaintiff's illegal conduct and her asserted damages. *Id.* at 564. In *Orzel*, 449 Mich at 565, the Supreme Court explained that the wrongful-conduct rule incorporates the causation requirement set forth in *Manning v Bishop of Marquette*, 345 Mich 130; 76 NW2d 75 (1956). In

that case, the plaintiff played an illegal game of bingo and fell into a hole while leaving the premises, sustaining injury. *Id.* at 132. The *Manning* Court rejected the defendant's argument that, because the plaintiff's participation in an illegal bingo game proximately caused her fall, the wrongful-conduct rule barred her claim:

> "[The plaintiff's] injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. Where the violation of law is merely a condition and not a contributing cause of the injury, a recovery may be permitted." [*Orzel*, 449 Mich at 565 (alteration in original), quoting *Manning*, 345 Mich at 136.]

In *Orzel*, the Supreme Court observed that the Court in *Manning* "emphasized that [the plaintiff's] participation in the illegal bingo game had ended by the time she fell into the hole." *Orzel*, 449 Mich at 565.[1]

I cannot meaningfully distinguish *Manning* from this case. The *Manning* plaintiff's attendance at an illegal bingo game "contributed to a chain of events that led to her injuries." *Ante* at 3. Stolicker's shoplifting similarly set in motion a chain of events resulting in the confrontation with Duncan. While today we regard shoplifting as far more morally reprehensible than bingo-playing, both plaintiffs suffered injury while departing from "the scene of the crime." The plaintiff in *Manning* had finished her game when she fell in the hole, and Stolicker had completed the retail fraud when she walked to her car outside Kohl's. The Supreme Court aptly explained in *Manning*, "[I]n the case at bar the game is over. The evening has come to a close and the day's pursuits, wicked or pure, are over." *Manning*, 345 Mich at 134. As in *Manning*, Stolicker's crime "served as an occasion" for the tort that allegedly followed, *Orzel*, 449 Mich at 568, citing *Manning*, 345 Mich at 136, but both miscreant plaintiffs relied on acts other than their illegal conduct to prove the defendants' torts. Thus, the majority's discourse on the difference between "a" proximate cause and "the" proximate cause entirely misses the point. Stolicker's claim that Duncan assaulted and battered her does not hinge on her shoplifting. Her proofs would be the same even had she been innocent of the charge. Simply put, Stolicker's shoplifting is not "an essential part" of her case. See *Miller v Radikopf*, 394 Mich 83, 88; 228 NW2d 386 (1975).[2]

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[1] The majority quotes *Manning* for the proposition that "[A] plaintiff who has engaged in a wrongful act may be able to recover if the wrongful act was a 'remote link in the chain of causation'" *Ante* at 2. The *Manning* Court actually stated, "It is not enough, then, to bar a plaintiff's recovery, that some illegal act be a remote link in the chain of causation." 345 Mich at 137.

[2] The majority asserts that the wrongful conduct doctrine "is so clear, we decline to don the judicial x-ray glasses that are required to join the dissent's crusade in gleaning tactical 'underpinnings.'" *Ante* at 2 n 1. While the precise meaning of this sentence eludes me, it seems preferable to analyze caselaw wearing x-ray glasses rather than blinders. The majority's

(continued…)

Aside from the majority's incorrect proximate cause analysis, application of the wrongful-conduct rule under these circumstances cannot be harmonized with two statutes recognizing Stolicker's ability to maintain a cause of action premised on the use of excessive force, and two more that entirely eliminate the wrongful-conduct doctrine.

B. MICHIGAN RECOGNIZES A CAUSE OF ACTION FOR UNREASONABLE FORCE

The majority's incorrect interpretation of the wrongful-conduct rule relieves Duncan and other security guards of legal responsibility for the use of excessive force when confronting shoplifters. This holding directly conflicts with MCL 600.2917(1), which codifies the common-law shopkeeper's privilege and provides in relevant part as follows:

> In a civil action against a . . . merchant . . . for false imprisonment, unlawful arrest, assault, battery, libel, or slander, if the claim arises out of conduct involving a person suspected of removing or of attempting to remove, without right or permission, goods held for sale in a store from the store . . . and if the merchant . . . had probable cause for believing and did believe that the plaintiff had committed or aided or abetted in the larceny of goods held for sale in the store . . . damages for or resulting from mental anguish or punitive, exemplary, or aggravated damages shall not be allowed a plaintiff, unless it is proved that the merchant . . . used unreasonable force, detained the plaintiff an unreasonable length of time, acted with unreasonable disregard of the plaintiff's rights or sensibilities, or acted with intent to injure the plaintiff.

This statute contemplates that a civil action may arise from conduct "involving a person suspected of removing or of attempting to remove" goods from a store, despite that "probable cause" exists for believing that the plaintiff committed a larceny. The shopkeeper's privilege codified in the statute permits a security guard such as Duncan to use reasonable methods in detaining and investigating suspected shoplifters. "[Section] 2917 has a protective purpose; it in effect allows storeowners who suspect individuals of shoplifting to detain them without fear of a recovery of exemplary damages or damages beyond the purely compensatory, at least where the storeowner acted with probable cause." *Mosley v Federals Dep't Stores, Inc*, 85 Mich App 333, 337; 271 NW2d 224 (1978). The statute "conditions a plaintiff's recovery upon proof of the storeowner's unreasonableness." *Id.* The Legislature clearly contemplated that even a *guilty* shoplifter could bring a claim for assault and battery if she proved that the merchant used "unreasonable force." Section 2917 embodies the dual principles that Duncan had a duty to act

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(…continued)

repetitive citations to *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), demonstrate the folly in disregarding the law. Contrary to the majority's view that "the wrongful conduct doctrine should apply in situations involving flight from illegal activity," *ante* at 2 n 1, MCL 600.29455b(2) permits a person injured while in flight from a felony to bring a cause of action if the injury resulted from unreasonable force. Regardless of the *Robinson* dicta, our Legislature has defined a cause of action that the wrongful conduct rule cannot override.

reasonably in response to Stolicker's criminal conduct, and any use of excessive force would expose him to liability for certain damages.[3]

In 2000, our Legislature enacted MCL 600.2955b, which lends additional support to my analysis. This statute requires a court to dismiss with prejudice a plaintiff's tort action if bodily injury or death occurred during "[t]he individual's commission, or flight from the commission, of a felony." MCL 600.2955b(1)(a). However, the statute does not apply unless the court finds that the defendant "[u]sed a degree of force that a reasonable person would believe to have been appropriate to prevent injury to the defendant or to others." MCL 600.2955b(2)(a). With this qualification, the Legislature specifically preserved the viability of certain excessive force claims brought against law enforcement officers or security guards – even when a plaintiff has committed a felony or is "in flight" from the commission of a felony.

In this case, Stolicker committed a misdemeanor. But it stretches credulity to conclude that misdemeanants should be treated more harshly than convicted felons. It is even more far-fetched to assume that the Legislature lacked awareness of the wrongful-conduct rule. "The Legislature is presumed to know of the existence of the common law when it acts." *Wold Architects & Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006). These statutes stand for the proposition that claims premised on excessive force, including those brought by felons, do not offend public policy. On the contrary, it is the public policy of this state to allow redress to the courts when unreasonable force has been used to apprehend even guilty transgressors.

C. THE WRONGFUL-CONDUCT RULE HAS BEEN LEGISLATIVELY OVER-RULED

In 1996, one year after the Supreme Court's decision in *Orzel*, the Legislature comprehensively reformed Michigan's tort law. Integral to the reforms, MCL 600.2958 provides, "Subject to section 2959, in an action based on tort or another legal theory seeking damages for personal injury, property damage or wrongful death, a plaintiff's contributory fault does not bar that plaintiff's recovery of damages."[4] MCL 600.6304(8) defines the term "fault," as "an act, an omission, conduct, including *intentional conduct*, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." (Emphasis added). Assuming that the majority has correctly characterized Stolicker's shoplifting as "a" proximate cause of her injuries, her action falls squarely within the definition of "fault" set forth in the statute. But in language that could not be more straightforward, our Legislature has declared that "a plaintiff's

[3] The majority contends that MCL 600.2917(1) "neither creates nor limits the type of action a shoplifter may assert," but instead "describes the burden of proof for obtaining aggravated damages." *Ante* at 5 n 3. Why would the Legislature set forth a mechanism for obtaining aggravated damages if no underlying cause of action existed? Perhaps the majority's blinders have again impeded thoughtful analysis.

[4] MCL 600.2959 provides for the reduction of damages by the percentage of fault attributable to the plaintiff, and bars recovery for noneconomic damages if the plaintiff's fault exceeds the aggregate fault of the other parties and nonparties to the action.

contributory fault does not bar that plaintiff's recovery of damages." This contributory negligence framework supersedes the common-law wrongful-conduct rule.[5]

"It is axiomatic that the Legislature has the authority to abrogate the common law." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 389; 738 NW2d 664 (2007), and that "the Legislature is the superior institution for creating the public policy of this state[.]" *Woodman v Kera LLC*, 486 Mich 228, 245; 785 NW2d 1 (2010). Our Supreme Court reaffirmed in *Woodman* that, "'As a general rule, making social policy is a job for the Legislature, not the courts.'" *Id.*, quoting *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999). Thus, "if a statutory provision and the common law conflict, the common law must yield." *Trentadue*, 479 Mich at 389.

The wrongful-conduct rule finds its genesis in public policy: "The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct." *Orzel*, 449 Mich at 559. Application of the common-law doctrine would abrogate the legislatively-mandated fault analysis applicable to tort claims such as Stolicker's. In essence, the majority has relieved Duncan of any obligation to use reasonable care when confronting shoplifters, a result directly conflicting with statutory comparative fault principles embodied in MCL 600.2958.

"MCL 600.6304 generally provides that the trier of fact in a tort action shall determine by percent the comparative negligence of all those who are a proximate cause of the plaintiff's injury and subsequent damages." *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004). "Subsection 6304(1)(b) is unambiguous and calls for the trier of fact to assess by percentage 'the total fault of all persons that contributed to the death or injury, including each plaintiff,' as long as that fault constituted a proximate cause of the plaintiff's injury and subsequent damage." *Shinholster*, 471 Mich at 551 (emphasis omitted). By specifically including "intentional conduct" within MCL 600.6304(8)'s definition of fault, the Legislature signaled that the conduct of *all* contributors to an event must be considered. The majority's application of an extrastatutory rule in avoidance of the plain language of the statute offends the public policy of this State as expressed by our Legislature.

In *Trentadue*, 479 Mich at 407, our Supreme Court emphasized, "Statutes lose their meaning if an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity. Significantly, such unrestrained use of equity undermines consistency and predictability for plaintiffs and defendants alike." (Quotation marks and citation omitted). The plain language of MCL 600.2958 and MCL 600.6304(8) renders meaningless the majority's moral judgments concerning shoplifters. The Legislature has decreed its intent that a shoplifter's

[5] While the wrongful-conduct rule focuses on the plaintiff's fault and excludes consideration of the defendant's wrongful acts, the Legislature has declared that the fault of *all* potential tortfeasors must be assessed by the factfinder. Read *in pari materia*, MCL 600.6304(8) and MCL 600.2958 demand consideration of Duncan's fault as well as Stolicker's.

conduct must be factored into a larger analysis of fault that does not include judge-made equitable dodges. On this ground alone, I would reverse the trial court.[6]

[6] I concur with the majority that the parties did not address the affect of tort reform legislation on the wrongful-conduct doctrine. *Ante* at 5 n 4. However, the deficiencies of a party's argument should never constrain our analysis such that we are forced to issue a legally flawed opinion.