STATE OF MICHIGAN

COURT OF APPEALS

JASON LAVERY,

Plaintiff-Appellant,

v

THERESA MARIE GAFKEN and JOHN EDWIN DAWSON II,

Defendants-Appellees.

UNPUBLISHED
April 29, 2021

No. 354053
Saint Clair Circuit Court
LC No. 18-002474-NI

Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Jason Lavery, appeals as of right the trial court's order granting summary disposition to defendants, Theresa Marie Gafken and John Edwin Dawson, II, under MCR 2.116(I)(2). We reverse.

I. BACKGROUND

This case arises from an accident involving a car owned by Dawson that was being driven by Gafken while plaintiff was a passenger. On the day of the accident, Dawson let Gafken use his car to go to visit his sister. Before going to visit Dawson's sister, Gafken received a message from an acquaintance, Michael Scandalito, asking for a ride. Gafken agreed to give Scandalito and plaintiff a ride, so she went to pick them up instead of going to Dawson's sister's. When she met up with Scandalito and plaintiff, however, they were with a third man—Stephen Thomas—who she did not know. The three men got into the car—Thomas sat in the passenger seat, Scandalito sat in the backseat behind Gafken, and plaintiff sat behind Thomas.

While driving through a 25-mile-per-hour zone, Gafken was not paying attention and drove past an officer in a marked patrol car while going about 40-miles per hour. The officer turned on his lights and attempted stop Gafken, but Gafken fled. Gafken claims that she fled because Scandalito held a gun to her head and told her that if she stopped, he would kill her. Scandalito denied doing any such thing, but did say that he and the other passengers told Gafken to "go go go" when the officer tried to pull her over. A gun was found in the car after the accident, which Scandalito acknowledged was his, but he claimed the gun was in his waistband at all times.

Robert Freeman, who was Scandalito's cellmate for a time, signed a handwritten letter wherein Freeman alleged that Scandalito admitted to him that Scandalito did in fact hold a gun to Gafken while she was driving. According to the letter, Scandalito told Freeman that he had robbed a drug dealer before getting in the car with Gafken, and he "put a gun to [Gafken's] back because she wasn't driving fast enough leaving the area," which was "why she was speeding when she passed the police." Scandalito denied ever telling Freeman the things alleged in the letter.

While the police were chasing Gafken, she reached speeds of up to 100 miles per hour. Scandalito claimed that, as Gafken approached a red light, the other passengers told her to stop, but she refused to listen and ran the red, ultimately hitting other cars and killing a woman in a different vehicle. Plaintiff suffered severe injuries in the accident, and stated that he could not remember the accident "at all." Gafken was charged and convicted of second-degree murder for her role in causing the death of the woman in the other vehicle.[1]

On October 16, 2018 plaintiff filed his complaint alleging negligence against Gafken and an accompanying owner's liability claim under MCL 257.401 against Dawson.

On September 9, 2019, Dawson moved for summary disposition, arguing that he was entitled to summary disposition for four reasons. First, Dawson contended that plaintiff's claim was barred by the wrongful conduct rule. Dawson explained that plaintiff and his "accomplices" demanded that Gafken commit a felony by fleeing from the police, which is itself a felony, and therefore triggered the wrongful conduct rule. Second, Dawson argued that plaintiff's claim was barred under the owner's liability statute because he could not establish permissive use. According to Dawson, he gave only Gafken permission to use his car, so once plaintiff and the other occupants "usurped control of the [car]," the vehicle was no longer being used with Dawson's permission. Third, Dawson contended that plaintiff's claim was barred because his carjacking of Dawson's vehicle was an intervening cause of his injuries, which severed Dawson's liability. Lastly, Dawson argued that plaintiff's claim was barred by MCL 600.2955a and MCL 600.2959 because plaintiff was more than 50% at fault for the accident.

The trial court held a hearing on Dawson's motion, after which it denied the motion, reasoning that questions of fact existed for trial.[2]

Before trial, plaintiff moved for partial summary disposition, arguing that Dawson should be precluded from arguing at trial that (1) he did not give Gafken permission to use his vehicle before the accident and (2) plaintiff's recovery was precluded by application of the wrongful conduct rule. In response, Dawson argued that plaintiff's motion should be denied, and summary disposition should be granted to Dawson under MCR 2.116(I)(2) because the wrongful conduct

[1] Gafken's conviction was affirmed by this Court last year. See *People v Gafken*, unpublished opinion of the Court of Appeals, issued June 18, 2020 (Docket No. 345954).

[2] Dawson filed an application for leave to appeal this ruling, but the application was denied. *Lavery v Gafken*, unpublished order of the Court of Appeals, issued February 26, 2020 (Docket No. 351550).

rule did indeed bar plaintiff's recovery based on plaintiff's encouraging Gafken to flee the police and his role as a conspirator in the supposed carjacking of Gafken.

On June 9, 2020, the trial court denied plaintiff's motion for partial summary disposition and granted summary disposition to defendant under MCR 2.116(I)(2). The trial court reasoned that, although Dawson had given Gafken permission to use his vehicle earlier in the day, "at the time of the incident, Ms. Gafken was no [sic] in 'possession' and 'control' of the vehicle" due to her being "carjacked" by plaintiff, Scandalito, and Thomas. The trial court surmised, "Any permission provided to Gafken was cut off . . . when she was carjacked by Plaintiff and his accomplices." The trial court then stated that it was granting Dawson summary disposition based on all the arguments made in his original dispositive motion: "(1) the Wrongful Conduct Rule, (2) Plaintiff's carjacking was a [sic] intervening cause of Plaintiff's injuries, (3) Plaintiff cannot prove the permissive use necessary to sustain a claim under the Owner's Liability Statute, and (4) Plaintiff's Complaint is barred by MCL 600.2955a and MCL 600.2959 [sic]."

Plaintiff now appeals.

II. STANDARD OF REVIEW

On appeal, plaintiff challenges the trial court's decision to grant summary disposition to defendants. Appellate courts review de novo a trial court's grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). Plaintiff moved for partial summary under MCR 2.116(C)(10). In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court explained the standard for a motion under MCR 2.116(C)(10):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The trial court, however, denied plaintiff's motion for summary disposition and granted summary disposition to Dawson under MCR 2.116(I)(2). That rule states, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

III. ANALYSIS

Plaintiff argues that the trial court erred by granting summary disposition to defendants because, contrary to the trial court's reasoning, there was a question of fact whether Gafken was "carjacked" by Scandalito, plaintiff, and Thomas. We agree.

It is well established that when deciding a motion for summary disposition, courts must view the evidence in the light most favorable to the nonmoving party. *Allison*, 481 Mich at 425. Applying this principle here, the trial court was required to view the evidence in the light most favorable to plaintiff before granting summary disposition to defendant. It failed to do so.

The trial court concluded that there was no question of material fact that Gafken was "carjacked" by plaintiff and "his accomplices." While there was evidence to support that Gafken was carjacked—like her testimony and the letter from Freeman—Scandalito denied that he held a gun to Gafken or otherwise used threats to compel Gafken to flee from the police. Scandalito testified that, though he and the other occupants of the car initially told Gafken to "go go go" when they saw the police, they subsequently told her to stop, but Gafken continued to flee on her own volition. Viewing this evidence in the light most favorable to plaintiff, Gafken was not "carjacked," as the trial court concluded, but instead chose to flee from the police of her own free will.

With this view of the evidence, the legal analysis is fairly simple. Plaintiff sought to hold Dawson liable for his injuries under MCL 257.401(1), which states in relevant part, "The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law." It is uncontested that Dawson gave Gafken permission to use his motor vehicle before the accident occurred. When viewed in the light most favorable to plaintiff, the evidence supports that, while driving Dawson's vehicle with his express permission, Gafken—free of any coercion—fled from the police, drove well in excess of the speed limit, ran a red light, and crashed into other cars causing plaintiff's injuries. Gafken's conduct was clearly negligent, both in that it violated the standard duty of care imposed by common law, see *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956) (explaining that a driver owes a duty to exercise reasonable care and caution in the operation of her vehicle), and that it violated statutorily imposed duties, see, e.g., MCL 750.479a(1) (requiring a driver to not flee from police). See also *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964) (explaining that a violation of a statutorily-imposed duty constitutes a prima facie case of negligence). Moreover, even if Gafken's conduct exceeded the bounds of negligence and entered the realm of gross negligence, Dawson would still be liable for Gafken's grossly negligent conduct under MCL 257.401(1). See *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 87-88; 697 NW2d 558 (2005) (holding that an owner's liability under MCL 257.401 is not limited to a driver's "ordinary negligence" but extends to "gross negligence or wilful and wanton misconduct"). Thus, when viewing the evidence in the light most favorable to plaintiff, there was a question of fact whether Dawson was liable under MCL 257.401 for Gafken's conduct while driving his car.

Dawson contends that, accepting as true plaintiff's contention that Gafken was not carjacked, Dawson cannot be liable for Gafken's conduct because that conduct amounted to an intentional tort. See *Berry v Kipf*, 160 Mich App 326, 329-330; 407 NW2d 648 (1987) (holding that an owner cannot be held liable for intentional torts under MCL 257.401). According to Dawson, to accept plaintiff's version of the events means that Gafken was guilty of second-degree murder, as evidenced by her conviction of the same. Dawson seems to contend that, because the jury in Gafken's criminal case found that Gafken's actions demonstrated the intent necessary for second-degree murder, this Court must conclude that Gafken had the intent necessary to commit an intentional tort. If that is so, then, according to Dawson, plaintiff's injury was the byproduct of

Gafken's intentional tort, not Gafken's negligence, and Dawson cannot be liable for an injury that occurred as a result of Gafken's intentional tort.

This argument perhaps has some facial appeal, but when attempting to analyze it, the argument quickly becomes tortured and confusing. In *Berry*—the case upon which Dawson relies—the plaintiff charged the entrusted driver with assault and battery, *id*. at 327, and this Court held that an owner can only be liable for an entrusted driver's negligence, not his or her intentional torts, *id*. at 329-330. This case is not directly analogous to *Berry* because plaintiff here never alleged that his injuries arose out of Gafken's intentional tort; he has always alleged that his injuries arose as a result of Gafken's negligence. Only Dawson has claimed that Gafken committed an intentional tort, but Dawson fails to specify which intentional tort Gafken supposedly committed. Without knowing which intentional tort Gafken supposedly committed, this Court cannot analyze whether Gafken committed that tort as a matter of law.

More generally, Dawson's argument seems premised on his belief that, if Gafken had the intent necessary to commit second-degree murder, she necessarily had the intent necessary to commit an (unidentified) intentional tort. This is incorrect. To convict someone of second-degree murder, the jury must find that the person had one of the following intents: "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Applying these intents to intentional torts, clearly the intent to kill or to cause great bodily harm could satisfy the intent necessary for an intentional tort. Yet the third possible intent—the intent to do an act without regard for its consequences—is not necessarily sufficient to establish the intent necessary for an intentional tort. That "intent" seems more akin to gross negligence, see *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003) (explaining that gross negligence is conduct so reckless that it demonstrates a substantial lack of concern for whether injury results), and would otherwise be insufficient to establish the intent necessary for at least some intentional torts, like battery, see *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991) ("A battery is the wilful and harmful or offensive touching of another person which results from an act *intended to cause such a contact*.") (Emphasis added.) Because it is unclear which "intent" the jury determined that Gafken had when it convicted her of second-degree murder, it is impossible to determine that, as a matter of law, Gafken had the intent necessary to commit an (unidentified) intentional tort.

Lastly, even if (1) the "intent" that the jury determined Gafken had in her criminal case was discernable and (2) that intent was sufficient to conclude that plaintiff was injured as a result of Gafken's intentional tort, Dawson has not identified the legal principle under which Gafken's second-degree murder conviction would establish that she committed an intentional tort as a matter of law in plaintiff's action against Dawson. It is not this Court's role to search for the legal authority to sustain Dawson's argument, and his failure to cite the authority necessary to support his position is tantamount to abandoning the argument on appeal. See *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

For the sake of thoroughness, this Court briefly addresses all four reasons that the trial court stated were the bases for its granting summary disposition to defendants. Three grounds can be easily dismissed. The trial court reasoned that (1) "Plaintiff's carjacking was a [sic] intervening cause of Plaintiff's injuries," (2) "Plaintiff cannot prove the permissive use necessary to sustain a

claim under the Owner's Liability Statute" because that permission was severed by the carjacking, and (3) "Plaintiff's Complaint is barred by MCL 600.2955a and MCL600.2959 [sic]."

Addressing the first basis, as explained above, when viewing the evidence in the light most favorable to plaintiff, there was no carjacking, so that could not have been an intervening cause of plaintiff's injury. Turning to the second basis, it is uncontested that Dawson gave Gafken permission to use the car, and because a reasonable juror could conclude that there was no carjacking such that the car remained under Gafken's control at all times, plaintiff could establish the permissive use necessary to sustain his claim under the owner's liability statute. As for the third basis, neither MCL 600.2955a[3] nor MCL 600.2959[4] barred plaintiff's claim as a matter of law because, when viewing the evidence in the light most favorable to plaintiff, a reasonable juror could conclude that plaintiff was not 50% or more at fault for the accident that resulted after Gafken drove Dawson's car 100 miles per hour while feeling from police, ultimately running a red light and crashing.

The final reason the court gave for granting summary disposition was the wrongful conduct rule, which bars a plaintiff's claim when it "is based, in whole or in part, on his own illegal conduct[.]" *Orzel by Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995). However, "[t]he mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule." *Id*. at 561. "To implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." *Id*. But "where the plaintiff's illegal act only amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe work place,

[3] MCL 600.2955a(1) states,

> It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury

[4] MCL 600.2959 states,

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable, and noneconomic damages shall not be awarded.

the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule." *Id.*

Again, viewing the evidence in the light most favorable to plaintiff, he was not involved in a carjacking of Gafken, so that cannot be a basis to invoke the wrongful conduct rule. Even so, plaintiff engaged in wrongful conduct—it is uncontested that plaintiff initially encouraged Gafken to flee from the police, telling her to "go go go." Thus, plaintiff aided and abetted Gafken in the fleeing and eluding of police officers in violation of MCL 750.479a(1).[5] See *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (listing the elements of aiding and abetting, which include giving "encouragement that assisted the commission of the crime") (quotation marks and citation omitted). Though plaintiff's conduct was unquestionably wrongful, it does not rise to the level of *serious* wrongful misconduct sufficient to bar his cause of action by application of the wrongful-conduct rule. Plaintiff, in the heat of the moment, said three words of encouragement that he retracted shortly thereafter by encouraging Gafken to stop (at least according to Scandalito). This type of wrongful conduct is better addressed using comparative negligence, if it is to be addressed at all. Accord *Orzel*, 449 Mich at 561-562.[6]

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra

[5] MCL 750.479a(1) states,

> An operator of a motor vehicle or vessel who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the operator to bring his or her motor vehicle or vessel to a stop shall not willfully fail to obey that direction by increasing the speed of the vehicle or vessel, extinguishing the lights of the vehicle or vessel, or otherwise attempting to flee or elude the police or conservation officer.

[6] In light of this opinion's conclusion that the trial court erred by granting summary disposition to defendant, we decline to address plaintiff's remaining arguments about whether the trial court could rely on grounds that it previously rejected in granting summary disposition to defendant.