STATE OF MICHIGAN

COURT OF APPEALS

JAMES BARTH, Personal Representative of the Estate of JOANNA BARTH, Deceased,

Plaintiff-Appellant,

v

GOAL TENDER SPORTS PUB AND GRILL, a/k/a GOAL POST, a/k/a THE GOAL TENDER; FRANK COOK GRAVELYN; HRM INCORPORATED; and THE ROSEBUD OF GRAND HAVEN, INC.,

Defendants-Appellees.

UNPUBLISHED
September 22, 2005

No. 262605
Ottawa Circuit Court
LC No. 03-047015-NO

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of all defendants and dismissing the case. We affirm.

The case arose when defendant Gravelyn, the decedent, and several of their friends spent the evening at several establishments, including those run by the other defendants, consuming alcohol. At the end of the evening, and under disputed circumstances, Gravelyn ended up driving the decedent's vehicle, with the decedent and one other individual as passengers. At some point thereafter, the vehicle crashed, the decedent was killed, and the other passenger was seriously injured. Plaintiff filed this wrongful death action on the basis of Gravelyn's negligence and the remaining defendants' violation of the Michigan Liquor Control Code of 1998, MCL 436.1101 *et seq*.[1] The trial court concluded that reasonable minds could not differ that decedent had voluntarily given Gravelyn the keys to her vehicle while Gravelyn was visibly intoxicated, thereby contributing to her own death. Therefore, the trial court granted summary disposition pursuant to MCR 2.116(C)(10) on the basis of the "wrongful-conduct rule."

[1] Formerly the Dramshop Act, MCL 436.22.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. A trial court's conclusions of law are also reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

The wrongful-conduct rule bars a claim where "'a plaintiff's action is based, in whole or in part, on his own illegal conduct.'" *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005), quoting *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). In a wrongful death action, the plaintiff, as the representative of the decedent's estate, "has no better claim than the decedent would have had." *Hashem*, *supra* at 88 n 10, citing *Toth v Goree*, 65 Mich App 296, 298; 237 NW2d 297 (1975). Thus, where there is "a sufficient causal nexus between" the decedent's illegal conduct and the decedent's damages, which in this case are her death, the wrongful-conduct rule will bar any recovery by plaintiff. *Hashem*, *supra* at 89. However, the rule will not apply merely because she engaged in illegal conduct, and the rule only applies to some kinds of illegal conduct. *Id*. at 89-91.

At the time of the accident, MCL 257.625(2) provided in relevant part, pursuant to 2000 PA 460, as follows:

> The owner of a vehicle or a person in charge or in control of a vehicle shall not authorize or knowingly permit the vehicle to be operated upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state by a person who is under the influence of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance, who has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or whose ability to operate the motor vehicle is visibly impaired due to the consumption of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.

Plaintiff argues that the above statute is merely a safety statute "not of the type that typically invokes the application of the wrongful-conduct rule." *Hashem*, *supra* at 89-90; *Orzel*, *supra* at 561-562. However, violation of MCL 257.625(2) is a felony punishable by up to five years' imprisonment if the intoxicated driver caused the death of another person. The degree of harm involved and the severity of punishment presented both take this kind of illegality outside the scope of a mere safety statute. See *Orzel*, *supra* at 563. Furthermore, similarly to "transactions involving controlled substances," permitting an intoxicated person to drive a motor vehicle is "almost entirely prohibited." *Id*. Accordingly, a violation of MCL 257.625(2) is of the magnitude to invoke the wrongful-conduct rule.

Plaintiff then urges us to infer that Gravelyn coerced the decedent into giving him the keys. The wrongful-conduct rule excepts circumstances where "the defendant's culpability is greater than the plaintiff's culpability for the injuries, such as where the plaintiff has acted '"under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age . . . ."'" *Orzel*, *supra* at 569, quoting *Pantely v Garris, Garris & Garris, PC*, 180 Mich App 768, 775; 447 NW2d 864 (1989), quoting 1 Story, Equity Jurisprudence (14th ed), § 423, pp 399-400. We cannot draw such an inference from the evidence. There were only four potential witnesses at the time the decedent's role changed from driver to passenger, and of them one is dead, two cannot remember anything about how Gravelyn came to be the driver, and the last was not physically present at the time. This gap in evidence cannot be filled, and even a late-filed affidavit from the fourth witness opining that Gravelyn used coercion fails to articulate any basis for that opinion.[2] The only other evidence is a remark made to the decedent that the witness believed she would be driving, to which she replied, "I guess he is." We decline the invitation to infer anything more from this statement than the obvious: that that Gravelyn would be the driver on the trip home.

We note that the wrongful-conduct rule might not apply if the decedent did not know, or had no way to know, that Gravelyn was under the influence of liquor at the time. However, plaintiff's cause of action is premised on Gravelyn having been visibly intoxicated, and plaintiff argued below and asserts on appeal that Gravelyn was visibly intoxicated. We will not attempt to find otherwise. *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969) (circumstances under which a party's statements may become binding judicial admissions); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002), lv den 468 Mich 852, cert den 540 US 1004; 124 S Ct 538; 157 L Ed 2d 409 (2003) (failing to argue a position on appeal constitutes abandonment).

Plaintiff finally argues that the wrongful-conduct rule does not apply because of MCL 600.2955b(1), which states as follows:

> (1) Except as otherwise provided in this section, the court shall dismiss with prejudice a plaintiff's action for an individual's bodily injury or death and shall order the plaintiff to pay each defendant's costs and actual attorney fees if the bodily injury or death occurred during 1 or more of the following:
>
> (a) The individual's commission, or flight from the commission, of a felony.

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[2] Although the affidavit is ultimately irrelevant, we note that the affidavit was not executed until after the trial court granted summary disposition, so it was not part of the evidence available to the trial court in ruling on the motion and should not be considered. *Quinto v Cross and Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996).

> (b) The individual's acts or flight from acts that the finder of fact in the civil action finds, by clear and convincing evidence, to constitute all the elements of a felony.

However, House Legislative Analysis HB 5232, June 19, 2000, indicates that the statute was not intended to accomplish any more than its plain language suggests:

> the bill would generally require a court to dismiss a plaintiff's civil action for an individual's bodily injury or death with prejudice, where the injury or death occurred during the individual's commission or flight from the commission of a felony or the individual's acts or flight from acts that the finder of fact in the civil action finds, by clear and convincing evidence, constituted all the elements of a felony.

The Legislature was more concerned with "someone who stole a car and wrecked it, for example, then sued the car's owner and her insurer to recover for injuries incurred during the accident" or cases where "homeowners who defended their property during a break-in have been sued by the individuals who committed the burglary." *Id*. Thus, MCL 600.2955b was presumably intended to be limited in scope to different kinds of felonies.

Moreover, the legislative analysis indicates that it was intended to supplement, rather than replace, the common law. This is supported by our Supreme Court's explanation that the wrongful-conduct rule is "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" because otherwise "the public would view the legal system as a mockery of justice." *Orzel*, *supra* at 559-560. Enactment of MCL 600.2955b was clearly not intended by the Legislature to overturn the courts' reluctance to condone, encourage, permit parties to profit from, or permit parties to evade responsibility for wrongdoing. *Id*. Thus, MCL 600.2955b requires claims to be dismissed under certain circumstances of wrongdoing, but does not preclude dismissal under other circumstances of wrongdoing. In any event, because reasonable minds could not differ that the decedent violated MCL 257.625(2), application of MCL 600.2955b would not affect the outcome of this case.

We finally note that the defendants other than Gravelyn raise several issues on appeal that pertain to plaintiff's Liquor Control Code action against them. We need not address these. Plaintiff alleges that they violated MCL 436.1801(2) by serving alcohol to a visibly intoxicated person. Even presuming they did so, MCL 436.1801(7) allows the liquor licensees to assert any defenses available to the allegedly visibly intoxicated person. Because we hold that the wrongful-conduct rule applies to Gravelyn, it also applies to the remaining defendants.

Because there is no genuine dispute of material fact that Gravelyn was visibly intoxicated when he became the driver and that he did not use any coercion to become the driver, the wrongful-conduct rule applies and summary disposition was appropriately granted.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Alton T. Davis