

STATE OF MICHIGAN
COURT OF APPEALS

JESSICA ROCKMAN,

Plaintiff-Appellant/Cross-Appellee,

v

SUSAN D. MASAK, personal representative of
the estate of CASEY MASAK,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED
September 25, 2014

No. 314810
Genesee Circuit Court
LC No. 11-096159-NI

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

In the main appeal, plaintiff appeals as of right from the jury verdict of no cause of action in her suit for negligence against defendant's estate, and the trial court's denial of her motion for a new trial. In the cross-appeal, defendant appeals from the denial of her motions for summary disposition and directed verdict. Because we hold that the trial court erred in submitting to the jury the legal question of whether to apply the "wrongful-conduct rule" (so as to bar plaintiff's claim), we vacate the jury verdict in the instant case, and reverse the trial court's denial of plaintiff's motion for a new trial. We affirm the trial court's denial of defendant's motions.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a one-car accident on Southbound US 23 near Grand Blanc Road in Mundy Township. The driver, Casey Masak, was killed. Plaintiff, a passenger in the vehicle, was seriously injured, including sustaining fractures of the hip, spine, and knee. The vehicle driven by Masak struck a guardrail in two places before rolling into a ditch and striking one or more trees. Information recovered from the air sensor or "CDR" box contained in the car indicated that the car was travelling 90 miles per hour when it first hit the guardrail, and that the brakes were not applied until several seconds after the first collision.

Plaintiff admitted to having a heroin addiction. She stated that she regularly used heroin with Masak, and that, usually, Masak would call and arrange for them to meet. Masak would then pick up plaintiff and drive to Flint to obtain heroin. They would inject the heroin, and Masak would drop plaintiff off at her home. On the day of the accident, plaintiff testified that Masak called her and wanted to go to Flint to purchase heroin. Plaintiff, Masak, and another passenger named Peggy Fiorello drove to Flint to buy heroin from a person named "Bam" who

was known to plaintiff. On the way home, they stopped at a McDonald's on US 23 and Hill Road to prepare and use the heroin. Plaintiff and Masak injected themselves in the parking lot.¹ Then they got on the expressway and the accident happened. Plaintiff testified that Masak previously had not driven recklessly, even after using heroin.

Fiorello testified in her deposition that she had just met Masak a week or two before the accident. She had known plaintiff for six or eight months, and knew that plaintiff used substances, including heroin, Vicodin, Xanax, Ritalin, Klonopin, alcohol, and marijuana. Plaintiff used heroin daily, and Fiorello sometimes joined her in doing so. She testified that "[e]ither one of us" would provide the drugs on these occasions. On the night of the accident, plaintiff talked to Masak about picking her up, and asked Fiorello to go along. Fiorello had the impression that Masak did not know the person from whom they were going to buy the heroin. Plaintiff knew him, as did Fiorello. She had the impression that Masak provided the money to purchase the heroin.

When they left the McDonald's parking lot, Fiorello testified, Masak "started speeding up quickly and I yelled and I remember [plaintiff] yelling and I remember putting my seat belt on." Masak did not respond. Fiorello saw the speedometer, and they were "getting close to ninety" before the crash.

A witness to the crash testified that he did not see the car's brake lights engage and that it appeared the driver had fallen asleep. Masak's cause of death was listed as "Blunt Force Injuries Associated with Heroin Intoxication." Masak also tested positive for diazepam (Valium), orazepam and nordiazepam (anti-anxiety medications), temazepam, (sleeping medication), alprazolam (Xanax), and morphine.

Plaintiff brought this action seeking to recover from defendant's estate for her injuries.² Plaintiff alleged that the accident was caused by Masak's negligence, including careless driving, speeding, and being under the influence of drugs or alcohol. The case was referred to mediation on September 28, 2011 and mediated on April 11, 2012. Defendant filed a motion for summary disposition on April 9, 2012, arguing that the wrongful-conduct rule barred plaintiff's claims because plaintiff would not have been injured but for her illegal conduct in setting up the deal to buy heroin, using the heroin, and staying in the car while Masak drove. Plaintiff argued that her claim was not based on drug use, but instead on negligent operation of the car, and also that Masak's culpability outweighed plaintiff's. Plaintiff further argued that comparative negligence should apply. The court denied summary disposition, finding factual issues regarding proximate

¹ Plaintiff testified that Fiorello also injected herself with heroin, while Fiorello denied using any of the purchased heroin, but admitted to using heroin earlier that day.

² Susan Masak, the owner of the car as well as personal representative of Casey's estate, was originally named in her individual capacity but was later dismissed.

cause. Defendant applied to this Court for leave to appeal this interlocutory order, which this Court denied.³

At the close of proofs at trial, both parties moved for a directed verdict. Plaintiff sought a directed verdict on the issue of whether the “serious impairment of bodily function” threshold had been met, which the trial court granted. Defendant sought a directed verdict based on the wrongful-conduct rule, arguing that all of the evidence pointed to plaintiff’s illegal purchase and ingestion of heroin as the cause of the car accident. Plaintiff countered that her wrongful conduct was completed by the time of the accident and her use of drugs was not a proximate cause of Masak’s negligent driving. The Court denied the motion, stating that there was an issue of whether plaintiff’s wrongful conduct was a proximate cause of the accident and that the jury should decide. The court added that defendant (and presumably plaintiff) could argue both comparative negligence and wrongful conduct to the jury.

During a discussion with the trial court regarding jury instructions, plaintiff presented a proposed non-standard jury instruction regarding the “wrongful-conduct” rule, which her counsel had drafted, for use if the court did not agree to instruct on traditional comparative negligence. Defendant also presented a proposed non-standard “wrongful-conduct” jury instruction. The trial court opted to use defendant’s proposed instruction. The trial court also gave an instruction on comparative negligence, as well as instructions on several statutes, the violation of which could lead to an inference of negligence.

The jury returned a special verdict. The jury answered “Yes” to questions about whether (1) Masak was negligent, (2) Masak’s negligence was a proximate cause of plaintiff’s injuries, and (3) the wrongful-conduct rule applied. The jury was instructed that, if it answered “Yes” to the latter question, it was not to answer any further questions. Thus, the jury did not answer the remaining questions on the verdict form, which inquired into whether plaintiff was negligent, whether her negligence was a proximate cause of her injuries, the amount of damages, and comparative negligence as between plaintiff and defendant.

Plaintiff moved the trial court for a new trial, arguing that the court erred in giving defendant’s wrongful-conduct instruction rather than plaintiff’s, and in giving any wrongful-conduct instruction where the decedent’s culpability was so much greater than the plaintiff’s. The trial court denied the motion.

This appeal followed. Defendant filed a cross-appeal alleging that the trial court erred in failing to grant defendant summary disposition or a directed verdict.

II. STANDARD OF REVIEW

We review questions of law, such as the application of the wrongful-conduct rule, de novo. See *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995); *Washington v*

³ *Jessica Rockman v Estate of Casey Masak*, unpublished order of the Court of Appeals, entered July 13, 2012 (Docket No. 310623).

Sinai Hosp, 478 Mich 412, 417; 733 NW2d 755 (2007). Instructional error claims are also reviewed de novo, *Cox v Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), including a trial court's decision to give or reject non-standard jury instructions, *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 679; 819 NW2d 28 (2011). Instructional error warrants reversal if it affects the outcome of the trial. *Id.* at 680.

III. APPLICATION OF THE WRONGFUL-CONDUCT RULE

In the main appeal, plaintiff argues that (1) the trial court erred in giving a wrongful-conduct rule instruction, (2) even if an instruction on the rule was to be given, the trial court erred in giving defendant's proposed jury instruction, and (3) the verdict form erroneously interposed the wrongful-conduct rule before questions related to comparative negligence. In the cross-appeal, defendant argues that the trial court should have granted her either summary disposition or a directed verdict on the ground that plaintiff's claim is barred by the wrongful-conduct rule. The central issue is thus whether the wrongful-conduct rule applies to bar plaintiff's claim. We conclude that it does not, and further that the trial court erred in submitting the issue of the application of the rule to the jury.

When a plaintiff's action is based, in whole or in part, on his own illegal conduct, a fundamental common-law maxim generally applies to bar the plaintiff's claim:

[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party.

When a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity, a similar common-law maxim, known as the "doctrine of in pari delicto" generally applies to also bar the plaintiff's claim:

[A]s 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. [*Orzel*, 449 Mich at 558, quoting 1A CJS Actions, § 29, p 386; see also *Cervantes v Farm Bureau Ins Co*, 272 Mich App 410, 416-417; 726 NW2d 73 (2006).]

The wrongful-conduct rule applies only if a sufficient causal nexus exists between the illegal conduct and the plaintiff's damages. *Cervantes*, 272 Mich App at 417. The injury "must be traceable to [the plaintiff's] own breach of the law and such breach must be an integral and essential part of [the plaintiff's] case." *Id.*, quoting *Manning v Bishop of Marquette*, 345 Mich 130, 136; 76 NW2d 75 (1956) and *Meador v Hotel Grover*, 9 So 2d 782, 785 (Miss, 1942). The party seeking application of the rule must not be more at fault than the other party. See *Pantely v Garris, Garris & Garris, PC*, 180 Mich App 768, 774-776; 447 NW2d 864 (1989).

This Court finds instructive *Poch v Anderson*, 229 Mich App 40; 580 NW2d 456 (1998). In *Poch*, the plaintiff was injured in an accident while a passenger of a drunk driver. The plaintiff had bought some of the alcohol the driver-defendant consumed. The defendant was

charged with minor in possession and operating a vehicle under the influence of alcohol (OUIL). The circuit court granted summary disposition on the grounds that the wrongful conduct rule applied to bar plaintiff's claim. *Id.* at 45. This Court reversed for three reasons. First, the Court held that plaintiff's violation of the statute prohibiting the furnishing of alcohol to minors, MCL 436.33(1), should not bar his claim because "if a complete cause of action can be shown without the necessity of proving the plaintiff's illegal act, the plaintiff will be permitted to recover notwithstanding that the illegal act may appear incidentally and may be important to the explanation of other facts in the case." *Id.* at 49, quoting 1 Am Jur 2d, Actions, § 45, p 753. Thus the violation of MCL 436.33(1) did not bar his lawsuit because "plaintiff need not prove his violation of the statute to fully plead his cause of action" since the lawsuit was based on the defendant's alleged negligent acts of driving an automobile, including but not limited to driving under the influence of intoxicating liquor or drugs. *Id.* at 50-51. Second, the statute violated by plaintiff was not "of the type that typically invokes the rule and bars a plaintiff's cause of action" because MCL 463.33 was a "safety statute." *Id.* at 50; see also *Orzel*, 449 Mich at 561 ("In contrast, where the plaintiff's illegal act only amounts to a violation of a safety statute . . . 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."). Finally, this Court held that the owner's liability act, MCL 257.401(1), specifically provided for plaintiff's recovery. *Id.* at 53.

The latter two reasons stated by this Court in *Poch* are not applicable to the instant case.⁴ However, as in *Poch*, plaintiff in the instant case could prove a complete cause of action without proof of her own illegal conduct, "notwithstanding that the illegal act may appear incidentally and may be important to the explanation of other facts in the case." *Id.* at 49, quoting 1 Am Jur 2d, Actions, § 45, p 753. Defendant's negligent operation of the car itself, regardless of any intoxication, could provide for recovery by plaintiff. Further and more importantly, even if plaintiff needed to prove that defendant used heroin to prove her claim, she did not need to prove her own illegal conduct in facilitating the transaction by which defendant obtained the heroin. The instant case thus differs significantly from *Orzel*, where the plaintiff necessarily needed to prove that he illegally obtained controlled substances in order to prove his case against the defendant, the pharmacist who illegally filled his prescriptions, when he asserted damages resulting from amphetamine psychosis. *Orzel*, 449 Mich at 556; see also *Miller v Radikopf*, 394 Mich 83, 88-89; 228 NW2d 386 (1975) (holding that judicial enforcement of an agreement to split funds was required, notwithstanding that the funds were obtained by virtue of an illegal lottery, because "Miller's and Radikopf's collateral agreement to divide their prospective winnings was not an essential part of their sale and distribution of those tickets."). Plaintiff did not allege that she was injured as a result of her purchase and use of heroin. She alleged that she

⁴ With regard to plaintiff's violation of statutes prohibiting the purchase, possession, and use of controlled substances, our Supreme Court has found that a plaintiff's violation of several provisions of the controlled substances act can be the type of illegal conduct that merits application of the wrongful-conduct rule, because "[t]he significant degree of harm and punishment associated with such violations, as well as the number of times he committed them, makes his conduct distinguishable from a violation of a safety statute." See *Orzel*, 449 Mich at 562.

was injured in an automobile accident because Masak negligently operated his vehicle. Under these circumstances, we conclude that the wrongful-conduct rule does not apply to bar her claim.

Further, the trial court erred in submitting to the jury the question of whether the wrongful-conduct rule applied. In *Orzel*, 449 Mich at 576, our Supreme Court upheld the trial court's grant of judgment notwithstanding the verdict (JNOV) wherein the trial court applied the wrongful-conduct rule to bar the plaintiff's claim. To grant a JNOV, a trial court must determine that the evidence, viewed in the light most favorable to the nonmoving party, fails to establish a claim *as a matter of law*. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). In *Poch*, 222 Mich App at 43, this Court examined the application of the wrongful-conduct rule in the context of a motion for summary disposition pursuant to MCR 2.116(C)(10), which also concerns the issue of whether the moving party is entitled to judgment *as a matter of law*. Questions of law are ordinarily for a court, not the jury to decide. See *Charles Reinhart Co v Winiemko*, 444 Mich 579, 605; 513 NW2d 773 (1994); see also *Gottesman v Fay-Bea Const Co*, 355 Mich 6, 8; 94 NW2d 81 (1959) (the court has a duty to instruct the jury concerning the applicable law).

The trial court denied defendant's motion for summary disposition, making reference to both *Poch* and *Orzel*:

If the wrongful conduct rule applies one could look at *Orzell* [sic] [*Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995),] and one could say that plaintiff's ingestion of drugs did not cause the car to drive into the tree. Another reason that the Court can deny the motion is because *Poch* [*v Anderson*, 229 Mich App 40; 580 NW2d 456 (1998)] says that the wrongful conduct does not apply anyway, that it's been replaced by comparative negligence. Another reason that the Court denies the motion is because it could be argued here that the drugs by themselves, the illegal drugs by themselves did not set in motion the chain of events causing the defendant to drive. There's—one could say that there's a fact issue there. There's a fact issue about what is the proximate cause. So the motion's denied.

The trial court also denied defendant's motion for a directed verdict, noting that "what [defendant is] trying to do is transfer the wrongful conduct from the getting high to the driving." However, when it came time to instruct the jury, the trial court opted, notwithstanding its prior rulings, to allow the jury to decide the issue of law of whether the wrongful-conduct rule applied. We conclude that the trial court thus erred by abdicating its responsibility to decide with finality this issue of law. Because the jury verdict form instructed the jury to answer no further questions if they determined the wrongful-conduct rule applied, it was not allowed to assess plaintiff's negligence, whether her negligence was a proximate cause of her injuries, or the comparative negligence between plaintiff and defendant, issues that the jury should have been allowed to consider. We therefore cannot conclude this error did not affect the outcome of the trial. *Hardrick*, 294 Mich App at 680.

For these reasons, we vacate the jury verdict in the instant case and remand for further proceedings consistent with this opinion. In the event that plaintiff pursues her claim in a new trial, the jury should be given the opportunity to consider the relative culpability of the parties by

assessing their comparative negligence.⁵ In the cross-appeal, we affirm the trial court's denial of defendant's motions for summary disposition and directed verdict. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto

⁵ MCL 600.2955a(1) provides:

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. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

Thus, if plaintiff is found to have been 50% or more at fault, she would be barred from recovering damages for her claims against defendant, as plaintiff conceded in her acceptance of the trial court's instructions on comparative negligence. Otherwise, damages should be adjusted based on the percentages as determined by the jury.