

STATE OF MICHIGAN
COURT OF APPEALS

DONALD L. FICK, as Independent Personal
Representative of the Estate of SUSAN LYNN FICK,
Deceased,

UNPUBLISHED
November 21, 1997

Plaintiff-Appellant/
Cross-Appellee,

v

No. 198026
Oakland Circuit Court
LC No. 94-471089-NH

DAVID LUSTIG, D.O., P.C. and DAVID LUSTIG,
D.O.,

Defendants-Appellees,

and

MEDICAL CENTER EMERGENCY SERVICES,
P.C. and CAROL L. CLARK, M.D.,

Defendants-Appellees/
Cross-Appellants,

and

NANCY KABALKA,

Defendant.

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants Lustig, Clark, and Medical Center Emergency Services (Medical Center) in this wrongful death action. We affirm.

Approximately three weeks after decedent gave birth to her third child, she decided to stop breast feeding and to obtain medication to stop the lactation process. Her obstetrician/gynecologist refused to issue decedent a prescription for medication to stop the lactation process. Decedent subsequently obtained the medicine from a friend, Nancy Kabalka, who was the office manager for a physician. Although she was not authorized to prescribe medications, Kabalka called in a prescription to a pharmacy for the drug Parlodel for decedent. Decedent picked up the medication from the pharmacy and began taking it.

The day after decedent obtained the Parlodel, she had a seizure and was taken to Crittenton Hospital emergency room, where Dr. Carol L. Clark treated her. After performing a physical examination and ordering various lab tests, Dr. Clark discharged decedent with a prescription for an anti-seizure medication. The following day, decedent was examined by Dr. David Lustig, a neurologist who had treated her for seizures associated with a previous closed head injury. The evening after she saw Dr. Lustig, decedent collapsed and was taken to the emergency room in cardiopulmonary arrest. She did not survive.

Plaintiff subsequently filed this wrongful death claim, alleging defendants' negligence and medical malpractice led to decedent's death. Among other things, plaintiff alleged in his complaint that defendants were negligent in failing to advise decedent to stop taking the drug Parlodel. Plaintiff further alleged that the injuries leading to decedent's death, including "seizures, coronary spasm and myocardial infarction," were the result of her ingestion of Parlodel. Defendants Lustig, Clark, and Medical Center moved for summary disposition, arguing decedent's wrongful conduct in illegally obtaining the Parlodel barred her claims against them. The trial court agreed and granted defendants' motions.

On appeal, plaintiff argues the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. We disagree. A trial court's grant of summary disposition is reviewed de novo on appeal. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) is properly granted when, except with regard to damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*, 646-647. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

The party moving for summary disposition initially has the burden of supporting its position with affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the party opposing the motion to establish the existence of a genuine issue of disputed fact. *Id.* If the burden of proof on a dispositive issue rests on the nonmoving party at trial, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing there is a genuine issue for trial. *Id.* Speculation and conjecture are insufficient to meet this burden. *Libralter Plastics, Inc v Chubb Group of Ins Co*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

First, plaintiff argues summary disposition was improper because a question of fact existed regarding whether decedent in fact engaged in illegal conduct. We disagree. Defendants allege

decedent violated MCL 333.17766(e); MSA 14.15(17766)(e) by knowingly obtaining the drug Parlodel as a result of a false prescription.¹ Plaintiff argues there was no evidence decedent knew Kabalka was not authorized to call in the prescription for her; therefore, she did not possess the requisite intent to be guilty of illegally obtaining the drug. However, defendant produced evidence that decedent requested medication to stop the lactation process from her obstetrician/gynecologist and was denied, from which it can be inferred that decedent knew the medication required a prescription from a doctor. Moreover, defendant produced evidence that decedent telephoned Kabalka at her home and asked her to call in a prescription for Parlodel for decedent. Plaintiff admits decedent knew Kabalka was not a doctor. From this evidence, it can be inferred that decedent knew she was obtaining the drug through a false prescription. Our examination of the record reveals that in response to defendant's properly supported motion, plaintiff did not adduce evidence creating a genuine issue of material fact whether decedent knowingly obtained the Parlodel through a false prescription. Accordingly, the trial court did not err in failing to find an issue of material fact.

Plaintiff further contends even if decedent violated MCL 333.17766(e); MSA 14.15(17766)(e), her conduct was not the type that implicates the wrongful-conduct rule. Instead, plaintiff argues decedent's conduct constituted a violation of a mere safety statute. We disagree.

Michigan has long recognized the existence of the wrongful-conduct rule. *Orzel v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995). The wrongful-conduct rule precludes a plaintiff from recovering where the claim is based on the plaintiff's own illegal conduct. *Id.* To implicate the wrongful-conduct rule, plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. *Id.*, 561. If a plaintiff's illegal act only amounts to a violation of a safety statute, the illegal act does not rise to the level of serious misconduct sufficient to support the wrongful-conduct rule. *Id.* Moreover, in order to bar recovery, the plaintiff's wrongful conduct must be a proximate cause of the injuries suffered. *Id.*, 564, 566-567.

Although the statute at issue in this case, MCL 333.17766; MSA 14.15(17766), is not part of the Penal Code, it provides that any person who violates its provisions is guilty of a misdemeanor. Therefore, the statute is a penal statute. See *Longstreth v Gensel*, 423 Mich 675, 692; 377 NW2d 804 (1985). Furthermore, decedent's conduct in this case, illegally obtaining prescription drugs, is entirely prohibited under this penal statute. MCL 333.17766(e); MSA 14.15(17766)(e). Decedent's illegal acquisition and possession of prescription drugs is an offense that is punishable by up to ninety days in jail and a \$100 fine. MCL 333.17766; MSA 14.15(17766); MCL 750.504; MSA 28.772. For these reasons, we find decedent's illegal conduct is sufficiently serious to trigger the wrongful-conduct rule in this case. *Orzel, supra* at 561-564; Cf. *Stopera v DiMarco*, 218 Mich App 565, 569; 554 NW2d 379 (1996).

Under plaintiff's own theory, decedent's ingestion of the Parlodel is the proximate cause of her death. Because plaintiff's action arises out of decedent's wrongful conduct of illegally obtaining the Parlodel, the trial court did not err in finding that the wrongful-conduct rule operates to bar the claim.

Defendants Medical Center and Dr. Clark argue on cross-appeal that plaintiff cannot demonstrate a causal relationship between decedent's alleged consumption of Parlodel and Clark's

alleged failure to recommend discontinuation of the Parlodel. However, because of our disposition of this case, we need not address this issue.

Affirmed.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald

¹ MCL 333.1766(e); MSA 14.15(17766) provides, in relevant part:

[A] person who does any of the following is guilty of a misdemeanor:

(e) Knowingly attempts to obtain, obtains, or possesses a drug by means of a prescription for other than a legitimate therapeutic purpose, or as a result of a false, forged, or altered prescription.