

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY RUMFIELD, Personal Representative
of the ESTATE OF DANIEL RUMFIELD, and
Conservator/Co-Guardian of JEFFREY
RUMFIELD,

Plaintiff-Appellee,

v

MATTHEW HENNEY,

Defendant/Cross-Defendant,

and

BRIAN HENNEY,

Defendant,

and

KELLY FUELS, INC., d/b/a WOODLAND
EXPRESS MART,

Defendant/Cross-Plaintiff-Appellant.

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Defendant Kelly Fuels appeals from a judgment of the circuit court entered in favor of plaintiff on a jury verdict on plaintiff's claim under the dramshop act. We reverse and remand.

Matthew Henney was nineteen years old at the time of the accident and was driving a pickup truck owned by his father, Brian Henney. The accident occurred when the Henney vehicle struck the rear-end of the pickup truck driven by Jeffrey Rumfield, who was seriously injured in the accident. The passenger, Daniel Rumfield, was killed in the accident.

Matthew Henney had purchased beer that evening from the convenience store operated by defendant Kelly Fuels. The clerk at store, Brandy Cade, testified that Matthew Henney had

shown her identification at the time of the purchase, which indicated he was over twenty-one years of age. Although Henney admitted to purchasing the beer and having consumed a few beers that night, he denied being intoxicated at the time of the accident. Henney's blood-alcohol level at the time of the accident is unknown as he left the scene of the accident and went to a friend's nearby house, where he stayed for a few hours. By the time Henney was taken to the hospital and his blood-alcohol level tested, no alcohol was detected in his system. Plaintiff did offer the opinion of an expert toxicologist who opined that, based upon the consumption of five or six beers over the time frame indicated, Henney's blood-alcohol level would have been in the range of 0.047 g/dl at the time of the accident. While plaintiff attributes the accident to Henney's intoxication, Henney attributes it to the Rumfield vehicle being driven without its lights on and, due to foggy conditions, Henney was unable to see the vehicle in time to stop.

Defendant first argues on appeal that the trial court erred in granting plaintiff's motion in limine to exclude the testimony of two other clerks at defendant's store, Christine Randall and Diamond Moody, that they had on previous occasions sold alcohol to Matthew Henney and that on those prior occasions he had produced identification indicating that he was over twenty-one years of age. We agree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion.¹

Defendant argues that the testimony of the two clerks is relevant to its defense under MCL 436.1801(7). The trial court concluded that whether Henney had shown ID on previous occasions was irrelevant because the statute requires that identification be shown at each sale and, therefore, would only provide a defense if Henney showed identification to Cade on the day in question. The trial court further rejected defendant's argument that the testimony was relevant to Henney's credibility in his denial of possessing a false identification.

MCL 436.1801(7) provides as follows:

All defenses of the alleged visibly intoxicated person or the minor shall be available to the licensee. In an action alleging the unlawful sale of alcoholic liquor to a minor, proof that the defendant retail licensee or the defendant's agent or employee demanded and was shown a Michigan driver license or official state personal identification card, appearing to be genuine and showing that the minor was at least 21 years of age, shall be a defense to the action.

Defendant advances three theories as to why the testimony of Randall and Moody would be relevant: (1) the showing of identification on a prior occasion satisfies the requirements of MCL 436.1801(7) and, therefore, if Henney had show identification to Randall or Moody which showed him to be over twenty-one then defendant has a complete defense to the claim, (2) Randall and Moody's testimony would refute Henney's testimony that he did not possess a false identification and, therefore, could not have shown one to Cade on the day in question as she claims, and (3) the fact that Henney was able to successfully make a purchase with the false

¹ *Chmielewski v Xernmac, Inc.*, 457 Mich 593, 614; 580 NW2d 817 (1998).

identification from other clerks would support defendant establishing its burden to show that the identification appeared to be genuine.

Defendant's first argument, that the statutory defense was triggered when Henney showed a false identification to a different clerk on a prior occasion and, therefore, evidence that such an event occurred is relevant, presents an interesting question of statutory interpretation. The statutory language is less than clear on when the identification must be produced. And both sides present strong policy reasons for their respective positions. Ultimately, however, we need not decide this issue as we believe the testimony of Randall and Moody was clearly admissible under defendant's other two arguments.

Both in his deposition testimony and at trial, Henney specifically denied being asked to show any identification at the time of the purchase and further testified that the only identification he possessed was his actual driver's license. He denied possessing any false identification. Cade's testimony directly contradicted this as she testified that she asked to see identification when prompted by the cash register to do so and that Henney produced what appeared to be genuine identification.

The trial court rejected defendant's argument that the testimony of Randall and Moody would be relevant regarding Henney's credibility on this point, concluding that it was only marginally probative and that the probative value was outweighed by its prejudicial effect. We disagree. First, we find the evidence highly probative. Henney specifically denies possession of false identification, claiming he could not have shown a false ID to Cade because he had none to show. Testimony that on prior occasions he had done just that directly refutes his claim that he had no false ID to show. Second, we fail to see what undue prejudice this testimony would create. It would not inflame the passions of the jury on an irrelevant matter. Rather, it would directly establish a point critical to a statutory defense.

The trial court also appears to reject defendant's argument on the basis that the testimony would be impeachment on a collateral matter. We disagree with that point as well. With defendant pursuing the false identification defense and with Henney denying the possession of any false identification, whether Henney did in fact possess false identification is not a collateral matter. We addressed this issue in *People v Spanke*²:

Although MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters, a party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness' statements.

We are satisfied that the testimony of Randall and Moody would serve the purpose of refuting Henney's claim that he did not possess any false identification.

² 254 Mich App 642, 644-645; 658 NW2d 504 (2003).

We also agree with defendant's argument that the testimony of Randall and Moody would provide evidence in support of fulfilling its burden to prove that Henney's false identification appeared to be genuine.³ Part of plaintiff's cross-examination of Cade was devoted to challenging not only whether Cade had requested to see Henney's identification, but also how well she inspected that identification. Counsel asked such questions as whether Cade held the identification to see if it felt authentic, whether she held it up to Henney's face to compare the picture, whether she checked the expiration date, etc. Because plaintiff challenged not only whether Cade asked to see identification at all, but also whether it was reasonable to accept as genuine the identification which was offered made the testimony of Randall and Moody relevant on this point. That is, testimony that two other clerks on prior occasions had requested to see identification and, based upon the identification provided, made a sale to Henney would support the argument that Henney's false identification appeared genuine and that it was reasonable for Cade to accept it as such with respect to the sale in question.

Finally, plaintiff argues that even if the trial court erred in denying the admission of Randall and Moody's testimony, any error was harmless because the jury had the opportunity to review the security surveillance video to determine on their own whether Cade requested to see identification. Plaintiff bases its argument on the jury answer "no" to question two on the verdict form after viewing the surveillance video. But that question not only asked whether defendant's employee requested to see identification, but also whether she was shown an identification which appeared to be genuine. It is speculative whether the jury answered this question "no" because (1) it did not believe that Cade had requested to see and was shown an identification or (2) it did believe that Cade was shown identification, but that she did not adequately inspect it to determine whether it appeared genuine. We cannot say with the degree of certainty required to rule the error harmless that the jury's conclusion on this point would not have been influenced by the testimony of Randall and Moody. That is, had the trial court allowed Randall and Moody to testify about having previously seen a false identification provided by Henney and having made a sale to him based upon that identification, it is reasonable to conclude that the jury may have come to a different conclusion. The jury may have concluded that Henney was not credible in his denial of showing a false identification to Cade and that it was reasonable for Cade to accept the identification offered as genuine.

For the above reasons, we conclude that the trial court erred in excluding the testimony of Randall and Moody and that such error denied defendant a fair trial. Accordingly, defendant is entitled to a new trial.

In light of our conclusion on the above issue, we need not address defendant's arguments that the trial court erred in denying a new trial based upon a juror failing to disclose his educational background and in the trial court's award of case evaluation sanctions as those issues may not recur on remand. But two other issues raised by defendant, whether the trial court erred in instructing the jury that the driver's comparative negligence for failure to wear a safety belt was limited to five percent and in deny an instruction on whether the passenger, Daniel

³ See M Civ JI 75.11(e).

Rumfield, was comparatively negligent by riding with an intoxicated driver, will likely recur on remand and therefore we will address them.

With respect to the issue of the five-percent limit on comparative negligence for failure to wear a safety belt, we agree with defendant that the trial court erred in so instructing the jury. MCL 257.710e(6) provides that failure to comply with the mandatory safety belt statute may, with restriction, be considered evidence of negligence:

Failure to wear a safety belt in violation of this section may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle. However, such negligence shall not reduce the recovery for damages by more than 5%.

Defendant argues that, because its liability arises under the dramshop act⁴ and not the no-fault act⁵ the five-percent limitation does not apply to it in this case. We agree. The Supreme Court in *Mann v St Clair Co Rd Comm*⁶ considered the question whether the five-percent limitation applied to an action brought against a county road commission under the highway exception to governmental immunity⁷. The Supreme Court concluded⁸ that MCL 257.710e(6) only applies to actions brought under the no-fault act and not to any other action:

We hold that the safety belt statute's cap on the reduction of damages is applicable only to tort actions brought under the no-fault act, MCL 500.3101 *et seq.*

By its own terms, § 710e(6) is limited to “damages arising out of the ownership, maintenance, or operation of a motor vehicle.” A loss involving the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle is a “motor vehicle accident” under the no-fault act. Tort liability arising from the ownership, maintenance, or use of a motor vehicle within Michigan has been abolished, allowing for certain exceptions within MCL 500.3135(3). Thus, the cap on reduction of damages for failure to wear a safety belt, § 710e(6), can only apply in those limited tort suits allowed under the no-fault act. As Justice Boyle stated in her concurrence in *Klinke [v Mitsubishi Motors Corp, 458 Mich 582, 594; 581 NW2d 272 (1998)]* “[t]he fact that the safety belt statute tracks the language of the no-fault act demonstrates the Legislature’s clear intent to apply the five-percent limitation on reduction of damages for a plaintiff’s negligence within the context of the no-fault act.”

⁴ MCL 436.1801 *et seq.*

⁵ MCL 500.3101 *et seq.*

⁶ 470 Mich 347; 681 NW2d 653 (2004).

⁷ MCL 691.1402.

⁸ *Id.* at 352-354.

The question in this case is whether the safety belt statute's cap on the reduction of damages applies when suit is brought against a county road commission under the highway exception to governmental immunity. We hold that because plaintiff's suit was not brought under the no-fault act, the safety belt statute's cap on the reduction of damages, § 710e(6), does not apply. [Footnotes omitted.]

Similarly, plaintiff's action against defendant in the case at bar was brought under the dramshop act. Because, as the Supreme Court held in *Mann*, the five-percent limitation only applies to actions under the no-fault act; the limitation does not apply to this action brought under the dramshop act.

The trial court agreed with plaintiff's argument that, in light of *Jenkins v Patel*,⁹ the five-percent cap applies. But we fail to see any possible relevance of *Jenkins* to the case at bar. *Jenkins* was a wrongful death case arising out of medical malpractice. At issue was whether the statutory limitation on damages in medical malpractice actions¹⁰ applies in wrongful death actions where the underlying claim is for medical malpractice. Not only does plaintiff's argument that *Jenkins* is relevant here overlook the fact that *Jenkins* involved neither the no-fault act nor the dramshop act, but it also overlooks the fact *Jenkins* is also based upon the conclusion that a wrongful death action retains the underlying theory of liability. The *Jenkins* Court¹¹ opined as follows:

Clearly, the wrongful death act is not the only act that is pertinent in a wrongful death action. "The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called 'death act', MCL 600.2922; MSA 27A.2922, does not change the character of such actions except to expand the elements of damage available." *Hawkins* [*v Regional Medical Laboratories, PC*, 415 Mich 420, 436; 329 NW2d 729 (1982)]. That is, a wrongful death action grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent.

Plaintiff attempts to apply *Jenkins* to dramshop actions by making the unsupported claim that, just as claims involving death are filtered through the "death act" without changing the underlying theory of liability as suggested by *Hawkins*, claims against retailers of alcoholic beverages are filtered through the dramshop act without changing the character of the underlying action. But this involves an unsupported assumption: that the dramshop act creates no liability claim itself. The basis of the decision in *Hawkins*, and by extension, that of *Jenkins*, is that the wrongful death act does not create a separate cause of action, but rather allows recovery of

⁹ 471 Mich 158; 684 NW2d 346 (2004).

¹⁰ MCL 600.1483(1).

¹¹ *Supra* at 165-166.

damages for death against “the person who . . . would have been liable . . . if death had not ensued”¹²

The dramshop act, however, is not analogous to the wrongful death act. While the wrongful death act premises liability on the underlying cause of action—i.e., the action that would have been brought had the decedent not died—the dramshop act directly creates a cause of action. MCL 436.1801(3) provides in pertinent part as follows:

Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death.

Thus, there is no “filtering through the dram shop act” as plaintiff suggests. Unlike the wrongful death act, the dramshop act does not merely alter the remedies available for claims premised on some other underlying theory liability. Rather, the dramshop act itself creates the theory of liability. In this respect, it is more analogous to the *Mann* case where the theory of liability was the highway exception to governmental immunity.

Accordingly, the trial court erred in instructing the jury that the limitation does apply. On retrial, the trial court shall not apply the limitation in § 710e(6) or instruct the jury that it applies.

The final issue that we need to address is whether the trial court erred in denying defendant’s request for a jury instruction that the passenger’s decision to ride with an intoxicated driver may be considered negligent in assessing the passenger’s own comparative negligence. Specifically, defendant argues that the trial court should have given the following non-standard instruction:

A passenger in a motor vehicle is deemed not to have exercised that care for his/her own safety which a reasonably prudent person would exercise, and his/her conduct would be negligent where: (1) the driver was under the influence of intoxicating liquor; (2) the passenger knew or should have known that the driver was under the influence of intoxicating liquor; and (3) the passenger voluntarily rode with the driver even [sic—though?] the passenger knew or had reason to know the driver was under the influence of intoxicating liquor.

¹² MCL 600.2922(1).

Although the trial court confirmed that it had in chambers ruled against defendant's request, it also confirmed that defendant was free to argue that Daniel Rumfield was comparatively negligent. To this end, the trial court did instruct the jury in pertinent part as follows:

It was the duty of the plaintiff, or plaintiffs in connection with this occurrence to use ordinary care for his own safety and the safety of his property

* * *

A minor is not held to the same standard of conduct as an adult. When I use the words ordinary care with respect to Daniel Rumfield I mean that degree of care which a reasonably careful minor of the age, mental capacity, and experience of Daniel Rumfield would use under the circumstances which you find existed in this case. It is for you to decide what a reasonably careful minor would do or would not do under such circumstances.

* * *

The total amount of damages that the plaintiff would otherwise be entitled to recover shall be reduced by the percentage of plaintiff's negligence that contributed as a proximate cause to his injury. This is known as comparative negligence.

The plaintiff however is not entitled to non-economic damages if he is more than fifty percent at fault for his injury.

The trial court then instructed the jury that it is unlawful for a minor to consume alcohol or for anyone to operate a motor vehicle while intoxicated or visibly impaired. It then instructed the jury as follows:

If you find that the plaintiffs violated this statute before or at the time of the occurrence you may infer that the plaintiff was negligent. You must then decide whether such negligence was a proximate cause of the occurrence.

* * *

It has been claimed that all three individuals had been drinking alcoholic beverages. According to the law one who voluntarily impairs his or her abilities by drinking is held to the same standard of care as a person whose abilities have not been impaired by drinking. It is for you to decide whether any of the individual's conduct was in fact affected by drinking and whether as a result he failed to exercise the care of a reasonably careful person under the circumstances which you find existed in this case.

Later in the instructions, the trial court specifically instructed the jury regarding Daniel Rumfield's own negligence arising from the consumption of alcohol:

If you find at the time of this accident that the plaintiff, Daniel Rumfield, had an impaired ability to function due to his consumption of intoxicating liquor

and that as a result of that impaired ability Daniel Rumfield was fifty percent or more the cause of this accident you must award him no damages.

If you find that Daniel Rumfield was so impaired but that his impaired ability resulted in his being less than fifty percent the cause of this accident you must reduce any award of damages to Daniel Rumfield by that percentage.

We are satisfied that the instructions given by the trial court more accurately state the law than does the instruction requested by defendant. The two Michigan cases relied upon by defendant are not on point. In *Clark v City of Flint*¹³ this Court concluded that the trial court erred in admitting the results of blood-alcohol tests because the foundation for the admission of the tests was inadequate. The only relevance to this case is that the defendant in *Clark* wanted to use the blood-alcohol test results to support its argument that the deceased passenger was contributorily negligent by riding with an intoxicated driver. But *Clark* did not address the question whether such a theory is sound, limiting its analysis to the question whether the test results met the evidentiary standards for admission. Even if we accept an implication from *Clark* that a passenger's choice to ride with an intoxicated driver may constitute comparative negligence by the passenger, that does not support defendant's requested instruction. The instruction requested by defendant was not that the jury could conclude that Daniel Rumfield's decision to ride with an intoxicated driver constituted comparative negligence, but that the jury must reach such a conclusion. That is, defendant's instruction directs the jury to find the passenger negligent if he knew or should have known that the driver was intoxicated. We see nothing in *Clark* that supports essentially directing a verdict on this point. On the other hand, the instructions which were given by the trial court are in line with any implication in *Clark* that riding with an intoxicated driver may be considered negligence. The instructions as given certainly allow the jury to reach such a conclusion and defendant was free to argue to the jury that they should reach that conclusion.

Although not directly on point, we do find persuasive the Supreme Court's recent order in *Mallison v Scribner*¹⁴ which reversed our decision in that case.¹⁵ In our decision, we held that "if a plaintiff chooses to drink and become intoxicated, and chooses to ride with an intoxicated driver, the plaintiff is 50 percent or more the cause of any accident that occurs, and the defendant is entitled to the absolute defense provided by MCL 600.2955a(1)."¹⁶ In reversing, the Supreme Court stated that the "Court of Appeals and the Gogebic Circuit Court erred in finding, as a matter of law, that as a result of plaintiff's impaired ability to function due to the influence of intoxicating liquor, she was 50% or more the cause of the accident that resulted in her injuries and that she is barred from recovery under MCL 600.2955a(1)."¹⁷ While defendant's instruction

¹³ 60 Mich App 364, 367; 230 NW2d 435 (1975).

¹⁴ 475 Mich 878; 715 NW2d 72 (2006).

¹⁵ 269 Mich App 1; 709 NW2d 227 (2005).

¹⁶ 269 Mich App at 5.

¹⁷ 475 Mich at 878.

in this case did go as far as our decision in *Mallison* would have permitted, we find the Supreme Court’s conclusion instructive. It is reasonable to conclude from the Supreme Court’s order that a jury may find a passenger negligent for riding with an intoxicated driver, but that it is within the province of the jury to determine the degree of negligence. In the case at bar, the verdict form reflects that, while the jury did find Daniel Rumfield to be negligent, that negligence did not contribute at all as a cause of the accident.

The other Michigan case defendant relies upon, *Hemington v Hemington*¹⁸ is only slightly more helpful to defendant. In *Hemington*, the Court did make the statement that their “attention is directed to cases of intoxicated drivers where it has been held that it is contributory negligence to continue to ride with such a person after knowledge of his condition and with opportunity to leave the car” and noting that “no one with sense will submit to the peril of riding with such a person.”¹⁹ But *Hemington* did not involve a passenger riding with an intoxicated driver, but rather a passenger riding with a driver who “drove at an unlawful and reckless rate of speed” causing an accident when she “was putting on the brakes, under a speed of 45 miles per hour, to avoid a horse and buggy crossing the road at an intersecting highway.”²⁰ After noting that their attention was directed to the intoxicated driver cases, the Court merely noted that it could not make the facts of *Hemington* fit those cases.²¹ Thus, any comment by *Hemington* on the contributory negligence of riding with an intoxicated driver is at most eighty-five-year-old dicta. And any value of that dicta is further diminished when the Supreme Court overruled *Hemington* in *Felgner v Anderson*,²² stating that the *Hemington* Court “demonstrates its confusion of assumed risk with contributory negligence, while declining to apply either doctrine”

We review claims of instruction error de novo.²³ In our review, we look at the instructions as a whole to determine if reversal is required. Even if imperfect, instructions do not constitute error requiring reversal if, on balance, they fairly present the parties’ theories and the applicable law to the jury. We will reverse only if failure to do so would be inconsistent with substantial justice.²⁴ For the above reasons, we conclude that the instructions given by the trial court fairly presented the parties’ theories and the applicable law. Defendant’s requested instruction was not entirely consistent with the law. Therefore, the trial court did not err in declining to give the instruction requested by defendant.

¹⁸ 221 Mich 206; 190 NW 683 (1922).

¹⁹ *Id.* at 209.

²⁰ *Id.* at 207-208.

²¹ *Id.* at 209.

²² 375 Mich 23, 48, 56-57; 133 NW2d 136 (1965).

²³ *Case v Consumers Power Co*, 463 Mich 1, 8; 615 NW2d 17 (2000).

²⁴ *Id.*

The judgment of the circuit court is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ David H. Sawyer