

STATE OF MICHIGAN
COURT OF APPEALS

KRISTINA L. TIMRECK,
Plaintiff-Appellant,

UNPUBLISHED
April 17, 2007

v

NICHOLAS J. WAHL and DONALD WAHL,
Defendants-Appellees,

No. 273500
Livingston Circuit Court
LC No. 05-021367-NO

and

FARM BUREAU MUTUAL INSURANCE
COMPANY OF MICHIGAN,
Defendant.

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff filed this action to recover both first-party¹ and third-party benefits after sustaining injury in a motor vehicle accident. The trial court granted summary disposition in favor of defendants Wahl in an order dated February 16, 2006. We reverse and remand.

On February 27, 2004, defendant Nicholas J. Wahl (“Nick”) drove a motor vehicle owned by defendant Donald Wahl (“Donald”) off the shoulder of East Sibley Street and into the rear of a motor vehicle parked on the shoulder of the road. Donald had given Nick permission to operate the motor vehicle. Plaintiff was a passenger in the vehicle at the time of the accident and sustained injury.

On April 12, 2005, plaintiff commenced this action seeking first-party insurance benefits from defendant Farm Bureau Mutual Insurance Company (the insurer of the motor vehicle) and

¹ The first-party action against defendant Farm Bureau was dismissed by stipulation of the parties in an order dated September 14, 2006. Thus, the appeal pertains only to the third-party action.

third-party benefits against defendants Wahl. Plaintiff sought to recover against Nick for his negligent driving and against Donald under the Michigan Owner's Liability Act, MCL 257.401.

Defendants Wahl moved for summary disposition on the grounds that plaintiff's acceptance of a ride from Nick while she was intoxicated barred her action under MCL 600.2955a and that, because the claim against Donald was derivative of the claim against Nick, the derivative claim failed when the negligence claim failed.

At a hearing on December 22, 2005, the trial court denied the motion for summary disposition without prejudice to allow defendants Wahl to amend their affirmative defenses to add the defense that the action was barred by MCL 600.2955a and to allow plaintiff to amend her complaint to add a count of negligent entrustment. Defendants Wahl subsequently filed a renewed motion for summary disposition pursuant to MCR 2.116(C)(10) raising the identical grounds advanced in their first motion for summary disposition.

Plaintiff responded that on the facts of this case plaintiff could not be shown to have been 50% or more the cause of the accident and, therefore, MCL 600.2955a did not apply. Plaintiff further responded that summary disposition was improper because a genuine issue of material fact existed with regard to whether Nick was intoxicated. Plaintiff added that defendants Wahls' reliance on a police report to establish intoxication constituted inadmissible hearsay that could not support a motion for summary disposition.

Following a hearing on the motion on February 2, 2006, the trial court granted the motion, opining:

This is a motion for summary disposition under the statute alleging that the Plaintiff knew of the intoxication of the Defendant driver and voluntarily accepted a ride from that driver.

I am going to grant the Motion for Summary Disposition both as to the driver. As to what I consider to be a derivative claim under the owner's liability statute. If there's no liability against the - - the driver there's no liability against the owner. There is sufficient evidence in the record to indicate that the Plaintiff knew of the drinking and intoxication of the Defendant. And further there was a guilty plea to the misdemeanor motor vehicle violation, which the Court finds are not hearsay to the extent that would preclude this Court's consideration of them for purposes of this motion with reference to a finding of - - that the intoxication existed given the Plaintiff's - - well given the statements - - statements by the Defendant driver at the time of his plea.

This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Similarly, issues of statutory interpretation are questions of law that are reviewed de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

At issue in this case is the interpretation and application of MCL 600.2955a(1), which 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.

In *Piccalo v Nix*, 246 Mich App 27; 630 NW2d 900 (2001), the plaintiff brought an action against the defendant alleging that, as a result of the defendant's negligence, she sustained an injury in an automobile accident on her way home from a party hosted by the defendant. The plaintiff and others, including Michael Burnham, had attended a party at the defendant's home and had left in a vehicle driven by Burnham. The plaintiff sustained an injury when the vehicle left the roadway and struck a tree. The plaintiff alleged that persons who, like the plaintiff and Burnham, were below the legal drinking age had access to beer and narcotics at the party, that police officers who responded to a complaint by one of the defendant's neighbors had warned the defendant that Burnham was intoxicated, and that the defendant had assured the police that intoxicated guests would not be allowed to drive away from the party.

The trial court entered a judgment of no cause of action after a jury found the defendant nineteen percent negligent, Burnham twenty-eight percent negligent, and the plaintiff fifty-three percent negligent. On appeal, this Court reversed and remanded for a new trial, holding that the trial court erred in allowing the defendant to raise MCL 600.2955a(1) as a defense. The majority held that the impairment defense did not apply because it would be inconsistent with the purposes and policies underlying the defense and it would lead to an absurd and unjust result to allow the person who caused or created the impairment to benefit from the defense. *Id.* at 34-35.

The Supreme Court, in lieu of granting leave to appeal, vacated this Court's decision in *Piccalo* and remanded for reconsideration. *Piccalo v Nix*, 466 Mich 861 (2002). The Supreme Court instructed this Court to construe MCL 600.2955a(1) in light of *People v McIntire*, 461 Mich 147, 155-156, no 2; 599 NW2d 102 (1999) (rejecting the so-called "absurd result" rule of statutory construction), and *Gilbert v Second Injury Fund*, 463 Mich 866; 616 NW2d 161 (2000) (citing proper rules of statutory construction), and to determine whether there was sufficient evidence to show that the plaintiff was fifty percent or more the cause of the accident or event that resulted in the injury.

On remand, this Court held that there was sufficient evidence from which the jury could conclude that the plaintiff was fifty percent or more the cause of the event that resulted in the injury and that the defendant was entitled to the judgment of no cause of action. *Piccalo v Nix (On Remand)*, 252 Mich App 675; 653 NW2d 447 (2002), lv den 468 Mich 926 (2003). Specifically, this Court stated:

Given this broad definition [of the word "event"], there was evidence from which the jury could conclude that plaintiff was fifty percent, or more, the cause

of the “event” that resulted in the injury. Plaintiff, who was over eighteen years of age but under the legal drinking age of twenty-one, elected to consume alcohol and become intoxicated. Plaintiff freely chose to accept a ride home from an intoxicated driver. Plaintiff also chose to ride in an automobile that did not have proper seating or restraints in the rear compartment and was filled with unrestrained materials including a tire and several tools. Under these circumstances, defendant was entitled to the absolute defense of impairment, and the judgment of no cause of action must be affirmed.

In *Mallison v Scribner*, 269 Mich App 1; 709 NW2d 227 (2005), the plaintiff brought a negligence action against Randy Scribner and Dorothie R. Lack. The plaintiff had been injured while she was Lack’s passenger in an automobile owned by Scribner. At the time of the accident, the plaintiff and Lack had blood alcohol levels above the legal limit. The defendants asserted the defense of plaintiff’s impairment, MCL 600.2955a(1). The trial court denied the plaintiff’s motion for partial summary disposition and granted summary disposition to the defendants.

On appeal, this Court held that the trial court properly granted summary disposition for the defendants. Citing *Piccalo (On Remand)*, *supra* at 680, this Court 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).” *Mallison*, *supra* at 5. This Court then determined:

In the present case, the evidence shows that Mallison voluntarily became intoxicated, had a blood alcohol level of 0.229 grams per 100 millileters,⁴ voluntarily chose to ride with Lack when she knew Lack had been drinking, and voluntarily chose to participate in the “four-wheeling” that resulted in the accident. Accordingly, the trial court properly found that there was no genuine issue of material fact regarding whether Mallison was 50 percent or more the cause of the accident that gave rise to her injuries.⁵ As a result, we find that the trial court properly granted summary disposition to defendants pursuant to MCR 2.116(I)(2). [*Id.*]

⁴At this level, MCL 257.625a(9)(c) raises a presumption that Mallison was under the influence of intoxicating liquor at the time of the accident. See also MCL 600.2955a(2)(b).

⁵ MCL 600.2955a(1).

The Supreme Court, in lieu of granting leave to appeal, reversed this Court’s judgment and remanded the case to the trial court for further proceedings. *Mallison v Scribner*, 475 Mich 878 (2006). 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).” It is reasonable to conclude from the Supreme Court’s order that a jury may find an intoxicated passenger negligent for riding with an intoxicated driver, but that it is within the

province of the jury to determine the degree of negligence *under the circumstances of the case*. See also *Piccalo, supra*, where the Supreme Court instructed this Court to determine whether there was sufficient evidence to support the *jury's* finding that the plaintiff was fifty percent or more the cause of the accident or event that resulted in the injury.² (Emphasis supplied.) It is also reasonable to conclude that the Supreme Court disagreed with this Court's holding in *Mallison* that the fact that a plaintiff chooses to drink and become intoxicated, and chooses to ride with an intoxicated driver, without more, is 50 percent or more the cause of the accident or event that causes injury as a matter of law. Rather, a jury must determine, based on all the facts of the case, whether the plaintiff was 50% or more the cause of the accident or event that caused the plaintiff's injury. Under the circumstances of this case, where defendants Wahls' defense was based simply on the allegations that plaintiff was intoxicated and that she chose to ride with an intoxicated driver, the trial court erred in finding, as a matter of law, that plaintiff was 50% or more the cause of the accident that resulted in her injuries.³

Reversed and remanded. Jurisdiction is not retained.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

² The *Piccalo* Court's holding that the evidence was sufficient to support the jury's finding that the plaintiff was more than 50% or more the cause of the event that resulted in her injury did not rest solely on the evidence that the injured under-age plaintiff voluntarily chose to become intoxicated and to ride with an intoxicated driver. The Court cited additional evidence, namely that the plaintiff chose to ride in an automobile that did not have proper seating or restraints in the rear compartment and was filled with unrestrained materials including a tire and several tools.

³ Further, viewed in a light most favorable to plaintiff, the evidence creates a genuine issue of material fact with regard to whether plaintiff *chose* to drive with an intoxicated driver. Although plaintiff testified that she knew Nick had been drinking during some periods of the day, she also testified that he did not have anything to drink after leaving the Eagles Club between 5:00 and 6:00 p.m. and that she did not feel he was intoxicated before the 11:40 p.m. accident. Defendants did not present any evidence to support a finding that plaintiff knew that Nick was intoxicated at the time plaintiff chose to ride with him.