

STATE OF MICHIGAN
COURT OF APPEALS

ARCHIE LEE LLOYD,

Plaintiff-Appellee,

and

MICHIGAN DEPARTMENT OF COMMUNITY
HEALTH,

Intervening Plaintiff,

v

DETROIT MEDICAL CENTER, ROBERT
GILMORE, and JAMES GRAY,

Defendants-Appellants.

UNPUBLISHED

August 16, 2002

No. 230722

Wayne Circuit Court

LC No. 98-835804-NO

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Plaintiff brought this action for assault and battery arising from a shooting at Detroit Receiving Hospital. Defendants claim that plaintiff was shot because he was helping another person steal a car and because he used a second vehicle as a weapon against the security guards during his escape attempt. Defendants relied on the wrongful-conduct rule as an affirmative defense. Before trial, plaintiff moved to strike the wrongful-conduct rule as an affirmative defense and the trial court granted the motion. This Court initially denied defendants' application for leave to appeal. On further application to the Supreme Court, the Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *Lloyd v Detroit Medical Center*, 463 Mich 907; 618 NW2d 379 (2000). We now reverse the trial court's decision to strike defendants' affirmative defense.

Plaintiff sued defendants for assault and battery after plaintiff was shot by defendant security guards. In their answer, defendants asserted the wrongful-conduct rule as an affirmative defense, claiming plaintiff used a vehicle to both avoid arrest and attack the officers. There appears to be no dispute between the parties that plaintiff entered a plea of nolo contendere to attempted felonious assault involving a motor vehicle for his role in this incident.

Plaintiff moved to strike the wrongful-conduct rule as an affirmative defense because, he claimed, self-defense was the only affirmative defense available to assault and battery as a matter of law. In the alternative, plaintiff argued that he could prove his claim without having to rely on any alleged wrongful conduct on his part, also making the defense inapplicable to the facts of this case. The trial court agreed with plaintiff that the defense should not be available in this case given that self-defense was available to defendants.

The wrongful-conduct rule is based on “a fundamental common-law maxim” to generally bar a plaintiff’s claim when it is based on the plaintiff’s own illegal conduct, either in whole or in part. *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995).

“[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.” [1A CJS, Actions, § 29, p 386. See also 1 Am Jur 2d, Actions, § 45, p 752.]

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.” [1A CJS, Actions, § 29, p 388. See also 1 Am Jur 2d, Actions, § 46, p 753.]

We shall refer to these maxims collectively as the “wrongful-conduct rule.” Michigan courts have long recognized the existence of the wrongful-conduct rule. [*Orzel, supra* at 558-559.]

The rule is based on the public policy that courts should not aid plaintiffs in recovering for their own illegal conduct. *Id.* at 559-560. The rule was recently applied by our Supreme Court in *Robinson v Detroit*, 462 Mich 439, 444; 613 NW2d 307 (2000), to bar any claims brought by passengers of a stolen vehicle injured as a result of a police chase, if the passengers could not prove their innocence. Nonetheless, there are limitations and exceptions to the wrongful-conduct rule.¹ *Orzel, supra* at 561.

In order for the wrongful-conduct rule to apply, the plaintiff must have been engaged in activity that was prohibited or almost entirely prohibited by a penal or criminal statute at the time the cause of action arose. *Id.* For instance, violations of safety statutes, such as traffic laws, are not serious enough to support application of the rule. *Id.*

¹ In addition, we acknowledge the recently enacted statute that codifies the wrongful-conduct rule for felonies, MCL 600.2955b, which was not in effect at the time the present action was filed.

Second, to apply the wrongful-conduct rule, there must be a sufficient causal nexus between the plaintiff's illegal conduct and the claimed damages. *Id.* at 564. In *Orzel*, the Court quoted from 1A CJS, Actions, § 30, pp 388-389, in part, as follows:

The fact that a person has been guilty of a wrong in one particular does not make him an outlaw or forfeit his right to legal protection and relief in regard to others, and does not preclude him from maintaining an action based on a separate transaction, as, where the original wrongdoing is consummated, and unrelated to the later and independent wrongdoing of the defendant. . . .

An action may be maintained where the illegal or immoral act or transaction to which plaintiff is a party is merely incidentally or collaterally connected with the cause of action, and plaintiff can establish his cause of action without showing or having to rely upon such act or transaction although the act or transaction may be important as explanatory of other facts in the case. . . . [*Id.* at 564.]

The causation requirement was applied in *Manning v Bishop of Marquette*, 345 Mich 130, 136; 76 NW2d 75 (1956), and the Court followed the passage below from *Meador v Hotel Grover*, 193 Miss 392, 405-406; 9 So 2d 782 (1942):

“For a plaintiff to be barred of an action for negligent injury under the principle of public policy implicit in the maxim *ex dolo malo non oritur actio*, his injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. Where the violation of law is merely a condition and not a contributing cause of the injury, a recovery may be permitted.”

In *Manning, supra* at 132-133, the plaintiff sued the owner of the premises where an illegal bingo game had been held when the plaintiff fell into a hole located on the premises. The plaintiff fell as she was leaving the premises, after the game was over. Because the plaintiff's participation in the illegal bingo game had ended by the time she fell in the hole, the Court concluded that her participation in the illegal game was not a basis for applying the wrongful-conduct rule since there was a lack of any causal connection shown. *Id.* at 136-138.

Furthermore, an exception to the wrongful-conduct rule exists if the parties have varying degrees of culpability. This area was discussed in *Orzel, supra* at 569:

An exception to the wrongful-conduct rule may apply where both the plaintiff and defendant have engaged in illegal conduct, but the parties do not stand in *pari delicti*. In other words, even though a plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff's injuries, a plaintiff may still seek recovery against the defendant if 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. . . .” *Pantely* [*v Garris, Garris & Garris, PC*, 180 Mich App 768; 447 NW2d 864 (1989)] at 775, quoting 1 Story, *Equity Jurisprudence* (14th ed), § 423, pp 399-400. See also 1A CJS, *Actions*, § 29, pp 386-388.

Plaintiff’s argument below was that the wrongful-conduct rule has not been applied to claims for assault and battery. Therefore, he argued that the defense was unavailable and only self-defense can be a defense to assault and battery. We disagree.

In *Galbraith v Fleming*, 60 Mich 403, 405; 27 NW 581 (1886), the plaintiff and the defendant engaged in a physical fight for which the plaintiff suffered more severe injuries. The plaintiff sued the defendant for assault and battery. *Id.* at 404. “The plaintiff’s theory upon the trial was that the assault upon him was causeless and unprovoked, while the defendant maintained that whatever he did was in self-defense, and in justifiable resistance to an attack of plaintiff.” *Id.* at 405. The plaintiff lost his case in the trial court and appealed to the Supreme Court regarding an instruction of the trial court on his voluntary participation in the fight. *Id.* at 407. The Supreme Court held as follows:

The court further instructed the jury that if the plaintiff voluntarily engaged in the fight in the first instance for the sake of fighting, and not as a means of self-defense, he could not recover unless the defendant beat him excessively or unreasonably. This was as favorable to the plaintiff as the law will admit. The law does not put a premium upon fighting, and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong in damages if he come [sic] out second best. While the voluntary act on the part of the plaintiff would not preclude the State from punishing him or the defendant for a breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of law.

In this case the jury found specially that the plaintiff voluntarily engaged in the fight with the defendant; that he used language inviting a fight, and for the purpose of bringing on an attack.

The evidence, in our opinion, justified these findings. The plaintiff’s case was without merit, and the judgment below is affirmed, with costs of both courts. [*Id.* at 407.]

The holding from *Galbraith* supports this Court in concluding that the wrongful-conduct rule is applicable to claims for assault and battery despite the availability of self-defense as a defense. While the *Galbraith* Court did not expressly refer to the wrongful-conduct rule, the analysis in that case is consistent with our Supreme Court’s more recent definitions of the rule. *Orzel, supra*. The *Galbraith* Court clearly held that the plaintiff’s claim for assault and battery was properly barred because of the illegal nature of his participation in the fight. *Galbraith* remains good law to this day. A few other cases from our Supreme Court likewise support the conclusion that the defense can apply to a claim for assault and battery. See *White v Whittal*, 113 Mich 493; 71 NW 1118 (1897); *Smith v Simon*, 69 Mich 481; 37 NW 548 (1888).

On the facts of this case, plaintiff did not properly demonstrate that, as a matter of law, defendants could not rely on the affirmative defenses of self-defense and the wrongful-conduct rule at trial. There is no merit to plaintiff's claim that, if this Court allows the jury to consider the wrongful-conduct rule, it will result in injustice to plaintiff because it would amount to court-sanctioned vigilante justice. If this issue is submitted to the jury, then the jury should decide the relative culpability of each party. If defendants are more culpable for their role in this incident than plaintiff, then as explained above, plaintiff's claim will not be barred by the wrongful-conduct rule. *Orzel, supra* at 569. If defendants used unnecessary or excessive force, it would not bar plaintiff's claim even if the wrongful-conduct rule is an issue at trial.

Plaintiff also claims the trial court properly struck the affirmative defense because he can prove his claim for assault and battery without having to rely on any facts related to the alleged illegal conduct that he was engaged in at the time he was shot. We disagree.

Plaintiff's argument on this point relates to the causation requirement. Even if a plaintiff has violated a statute, his claim is not automatically barred under the wrongful-conduct rule:

In other words, "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." 1 Am Jur 2d, Actions, § 45, p 753. [*Poch v Anderson*, 229 Mich App 40, 49; 580 NW2d 456 (1998).]

This case is not like *Manning, supra*, where the plaintiff's alleged illegal conduct had ended by the time the plaintiff was injured. In the case at bar, viewing the evidence in the light most favorable to defendants, the evidence showed that defendants shot at plaintiff as he was trying to escape while using his vehicle as a weapon. The guards claimed to have shot plaintiff because he used his vehicle as a weapon against the guards while trying to escape capture. The claimed criminal conduct related to plaintiff's escape and the use of his car as a weapon to assault the guards, not his participation in helping to steal a car. In addition, the trial court denied plaintiff's motion in limine regarding his nolo contendere plea to attempted felonious assault. Under MRE 410(2), defendants could offer evidence of plaintiff's conviction on that offense at trial. Defendants should therefore be permitted to establish the defense at trial so that the jury can decide whether plaintiff's claim is barred under the wrongful-conduct rule.

Reversed and remanded for further proceedings on plaintiff's claims. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Michael J. Talbot