STATE OF MICHIGAN

COURT OF APPEALS

INDUSTRIAL QUICK SEARCH, INC., MEIRESONNE & ASSOCIATES, INC., and MICHAEL MEIRESONNE, Plaintiffs-Appellants/Cross-Appellees,	UNPUBLISHED February 11, 2010
v	No. 284163 Kent Circuit Court
CHRISTOPHER M. TERRYN, Defendant-Appellee/Cross-Appellant.	LC No. 07-011074-CZ

Before: Talbot, P.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right the trial court's order granting summary disposition in favor of defendant, Christopher M. Terryn, and dismissing plaintiffs' complaint. Defendant cross-appeals as of right the same order. We affirm.

A brief summation of the factual and procedural history of this litigation is particularly relevant to our analysis. We adopt the description of the proceedings leading up to this appeal from the trial court's opinion:

> On August 3, 2006, Judge Robert Owen of the United States District Court for the Southern District of New York entered a default judgment on the issue of copyright infringement against this case's plaintiffs, who were the defendants there, in *Thomas Publishing Co v Industrial Quick Search, Inc*, Docket No. 02-CIV-3307(RO). He did so because he found that Industrial Quick Search, Inc., and its principals (hereinafter collectively "IQS") had directed Mr. Terryn, its then-employee, and had shown him how, to plagiarize for its commercial benefit valuable materials copyrighted by the Thomas Publishing Company and by

[1] Industrial Quick Search, Inc. (hereinafter IQS), Meiresonne & Associates, Inc. and Michael Meiresonne (hereinafter collectively referred to as "plaintiffs").

> Product Information Network, Inc. (hereinafter collectively "TPC"); that Mr. Terryn had followed the instructions given to him; and that, to thwart discovery, IQS had deliberately destroyed numerous documents critical to determining the scope and effect of its plagiarism. In other words, Judge Owen found so-called "spoliation" which was severe enough to warrant the sanction of a default judgment.
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> A year later, IQS filed this case here, claiming that Mr. Terryn had defamed it by falsely reporting to TPC that his plagiarism had occurred at the direction of IQS. An e-mail by Mr. Terryn had prompted the New York case, and he testified in it. This case seeks indemnification or contribution from Mr. Terryn. After Judge Owen's spoliation ruling, IQS had settled the New York case for $2.5 million. IQS also seeks consequential damages. In lieu of an answer, Mr. Terryn filed a motion to dismiss, in actuality, a motion for summary disposition. He contends that, in light of the finding in New York that he had been directed by IQS to plagiarize TPC's material, the doctrine of collateral estoppel precludes this case. IQS responds that collateral estoppel is not available for a variety of reasons.

In addition, following our review of the record, we note as pertinent the fact that Terryn, while a paid employee, was only retained for a two-month period, working as a college intern in April and May 2001 with plaintiffs. Further, given the allegations in this action, we find it suspect that plaintiffs never sought, in the preceding federal district court action, to either join Terryn as a party or identify him as a non-party at fault. When Terryn agreed to provide testimony for TPC in the original federal district court action, TPC provided him with a waiver or release of any liability for his involvement in the acts of plagiarism by plaintiffs and agreed to indemnify him. Consequently, it appears to this Court that plaintiffs are attempting, in a convoluted manner, to collaterally attack the federal court ruling of liability and are brazenly seeking compensation for their own wrongdoing from the victim of their plagiarism, through TPC's indemnification agreement with Terryn. Such an abuse of the legal process cannot be sanctioned or tolerated. While we do not specifically disagree with the lower court's reasoning, based on the principle of Occam's razor[2], we believe it is only necessary to consider plaintiffs' own wrongful conduct in justifying the dismissal of this action.

> As a starting point for our analysis:
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> [W]e note the legal context that gives rise to the question. In Michigan, it is an established principle that "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982); see also *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 512; 303 NW2d 234 (1981) ("Entry of a default is equivalent to an admission by the defaulting party as

[2] Also referred to as the law of parsimony; usually interpreted to mean the simpler the explanation, the better.

> to all well-pleaded allegations.") In other words, where a trial court has entered a default judgment against a defendant, the defendant's liability is admitted and the defendant is estopped from litigating issues of liability. [*Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78-79; 618 NW2d 66 (2000).]

This is true even when, such as in this case, the basis for entry of the default is "as a sanction for discovery abuses." *Id.* at 79. Because plaintiffs' liability has been conclusively established by the default judgment entered in the underlying action in federal district court, they have lost their "standing to contest the factual allegations" set forth by TPC, *Ackron Contracting Co v Oakland Co*, 108 Mich App 767, 775; 310 NW2d 874 (1981), and are, therefore, properly subject to the wrongful conduct rule and dismissal of their claims against Terryn.

We review a trial court's grant or denial of a motion for summary disposition de novo. *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 287; 731 NW2d 29 (2007). In accordance with the wrongful conduct rule, a plaintiff's claims are generally precluded if they are based on conduct by the plaintiff that is "prohibited or almost entirely prohibited under a penal or criminal statute." *Orzel v Scott Drug Co*, 449 Mich 550, 561; 537 NW2d 208 (1995).

At the outset, we note that the wrongful conduct rule is construed to be an affirmative defense because it does not rebut a plaintiff's prima facie case. Instead, the wrongful conduct rule serves to preclude or foreclose a plaintiff from proceeding for reasons which are unrelated to their prima facie case. *Campbell v St John Hosp*, 434 Mich 608, 615-616; 455 NW2d 695 (1990). Although typically the burden is on a defendant to establish the existence of an affirmative defense, *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643, 646; 482 NW2d 474 (1992), when a complaint demonstrates on its face that relief is barred by an affirmative defense, a trial court can enter a dismissal based on the failure to state a claim on which relief may be granted, *Glazier v Lee*, 171 Mich App 216, 219-220; 429 NW2d 857 (1988).

The basic premise underlying the wrongful conduct rule is that a plaintiff's claim will be barred if it is based, either in whole or in part, on the plaintiff's own illegal conduct. *Orzel*, *supra* at 558. The rule is applicable even when the defendant has been an equal participant in the illegal activity or conduct. *Id.* Our Supreme Court elucidated the rule in *Manning v Bishop of Marquette*, 345 Mich 130, 133; 76 NW2d 75 (1956), stating in relevant part: "Our doors are open to both the virtuous and the villainous. We do not, however, lend our aid to the furtherance of an unlawful project, nor do we decide, as between 2 scoundrels, who cheated whom the more." (Citation omitted.) In *Orzel*, the Court elaborated on the public policy considerations supporting the wrongful conduct rule, explaining,

> If courts choose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. [*Orzel, supra* at 559-560 (citations omitted).]

We find the underlying rationale for the wrongful conduct rule particularly apt given the factual and procedural history of this litigation.

Application of the wrongful conduct rule is subject to two identified limitations. First, a plaintiff's conduct is required to be mostly or entirely prohibited by a penal or criminal statute and must be "serious in nature." *Hashem v Les Stanford Olds*, 266 Mich App 61, 89; 697 NW2d 558 (2005), citing *Orzel, supra* at 561. Second, "a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id.* at 564. We can easily address and dispense with these limitations.

It is undisputed that plaintiffs were found to be liable of all claims included in Thomas Publishing's underlying complaint through the default judgment. Plaintiffs' conduct in plagiarizing material constituted a violation of 17 USC 506(a)(1), which precludes copyright infringement, and a person who violates that section shall be imprisoned for not more than 5 years if the copyrighted works have a total retail value of more than $2,500 (1 year imprisonment for copyrighted works with lesser value). 18 USC 2319(b)(1) and (3). As such, plaintiffs' conduct is clearly prohibited by a criminal or penal statute. In addition, a sufficient nexus exists between plaintiffs' breach of the law and the losses incurred. Plaintiffs' illegal conduct in plagiarizing material from TPC, combined with efforts to conceal the conduct through establishment of a "shadow" corporation and subsequent destruction of discovery materials, was the cause of the losses incurred. In other words, plaintiffs' claims are both directly and causally related to their decision to plagiarize TPC's material and not accept responsibility for that behavior.

In addition to the limitations applicable to the wrongful conduct rule, there exist two recognized exceptions that will serve to preclude its application. The first exception is referred to as the differing degrees of culpability exception. This is described as where the "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 . . . ." *Orzel, supra* at 569. The second exception, identified as the statutory basis for recovery exception, is deemed to be applicable when a plaintiff contends that the defendant violated a statute, which implicitly or explicitly permits the plaintiff to recover for injuries suffered as a result of that violation. *Id.* at 570. Again, we find these exceptions inapplicable to the facts and circumstances of this case.

First, plaintiffs suggest that Terryn was the more culpable party. The requirements to meet this exception were discussed by this Court in *Stopera v DiMarco*, 218 Mich App 565, 571-572 n 5; 554 NW2d 379 (1996), which provided in relevant part:

> In its discussion of the applicability of the exception, the *Orzel* Court listed only situations where a defendant was egregiously more at fault than a plaintiff, *Orzel, supra* at 569, without suggesting that a slight difference in the degree of culpability would be sufficient for its application. Further, to apply the culpability exception in cases where a defendant is only slightly more blameworthy would likely eviscerate the wrongful conduct rule entirely; presumably, a plaintiff will almost always be able to argue that, if the allegations of a complaint are proved, a defendant's misconduct will be shown to be at least somewhat greater than the plaintiff's . . . . Hence, in order for plaintiffs to assert this exception, defendants

must be significantly more culpable than plaintiffs for the losses suffered by plaintiffs.

It cannot seriously be maintained that Terryn, a part-time intern for the limited period of two months employment, could be more culpable than plaintiffs who initiated the illegal copying of TPC's materials a month before Terryn was formally engaged, with the continuation and substantial expansion of the improper conduct into September 2001, four months after Terryn left his job with plaintiffs. Further, to suggest that an intern was responsible for the initial decision to plagiarize documents and the continuation of that conduct even after his absence from plaintiffs' employment is disingenuous at best and completely incredible at worst. Clearly, any decision to continue and expand the practice of plagiarizing TPC's materials is directly attributable to plaintiffs, since it is plaintiffs that received the commercial and monetary benefit and not Terryn. As such, there is no factual development that would serve to demonstrate or lead this Court to conclude that Terryn was significantly more culpable than plaintiffs.

The remaining recognized exception to the wrongful conduct rule requires plaintiffs to establish that Terryn violated a statute, which would permit them to recover for injuries they suffered as a consequence of Terryn's violation. *Orzel*, *supra* at 570. While Terryn also violated copyright laws, any recompense available from violation of the statute would inure to TPC and not plaintiffs. As such, this exception is clearly inapplicable.

Consequently, we affirm the dismissal of plaintiffs' complaint because this Court cannot permit plaintiffs to recover given their own culpability and involvement in illegal conduct and their subsequent attempts to conceal their behavior. To allow them to proceed with their claims against Terryn would be contrary to, and seriously undermine, the wrongful conduct rule, which is designed to avoid the condoning of criminal behavior and to preclude wrongdoers from shifting the blame for their own illegal conduct onto others. We, therefore, affirm the trial court's dismissal of plaintiffs' action, albeit for a different reason.

Because we affirm the trial court's ruling, we need not address the merits of the issues raised by Terryn. Nevertheless, we conclude plaintiffs' claims for contribution and indemnification cannot prevail. Plaintiffs are not entitled to contribution from Terryn, since he was not a party to the federal court action or the settlement agreement and the settlement agreement does not extinguish his potential liability. Other than plaintiffs' self-serving assertions, there exists no support in the record that Terryn was afforded a meaningful opportunity to participate in the settlement negotiations. MCL 600.2925a(3)(a) and (c). Further, plaintiffs are not entitled to indemnification from Terryn, because plaintiffs are not free from liability. *Paul v Bogle*, 193 Mich App 479, 491; 484 NW2d 728 (1992).

Finally, we note that on cross-appeal, Terryn argues that he is entitled to sanctions, because plaintiffs' claims are frivolous. Although Terryn has abandoned this argument by failing to brief the merits of his allegation of error, *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003), this Court, *sua sponte*, orders actual and punitive damages against plaintiffs and in favor of defendant in an amount to be determined by the trial court in accordance with our authority pursuant to MCR 7.216(C)(1)(a), (2).

Affirmed and remanded to the trial court for the determination of damages in accordance with MCR 7.216(C)(2). We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Donald S. Owens