

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LISA ANN ROSENICK, a/k/a LISA ANN  
KRZYWDZINSKI,

UNPUBLISHED  
January 16, 2001

Plaintiff-Appellant,

v

No. 214298  
Wayne Circuit Court  
LC No. 97-710506-NH

SATISH K. CHAM and DEARBORN MEDICAL  
WALK-IN CLINIC,

Defendants-Appellees.

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Before: Neff, P.J., and Talbot and J.B. Sullivan,\* J.J.

PER CURIAM.

In this claim for medical malpractice, plaintiff appeals as of right from an order granting defendants' motion for summary disposition based on the wrongful-conduct rule. We reverse.<sup>1</sup>

Plaintiff's complaint alleges that, in 1989 or 1990, she began a physician-patient relationship with defendant when she sought treatment for various medical conditions. In July 1994, defendant began providing her psychiatric counseling for marital problems and also hired plaintiff to work for him as an office manager. In September 1994, plaintiff and defendant began a sexual relationship while defendant continued to provide psychiatric counseling and also act as her employer. During this time, defendant adversely counseled plaintiff's husband to withhold financial support from her, gave plaintiff money to fund her living expenses, loaned her a vehicle, paid the legal fees for her divorce, and allegedly gave plaintiff drugs, including Prozac and Lithium, for which he did not write a prescription or keep records.

Defendants filed two separate motions for summary disposition. The first, which was denied (and not appealed), was based on no genuine issue of material fact regarding either the

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<sup>1</sup> Plaintiff's claim against defendant Dearborn Medical Walk-In Clinic is based upon respondeat superior. Unless otherwise indicated, the term "defendant" shall refer to defendant Dr. Cham only.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

existence of a physician-patient relationship during the relevant period or that any form of sexual contact or impropriety occurred with plaintiff. The second motion argued that, assuming plaintiff's allegations to be true, her claim was barred by the wrongful-conduct rule because she participated in an adulterous relationship contrary to MCL 750.30; MSA 28.219. Relying on *Stopera v DiMarco*, 218 Mich App 565; 554 NW2d 379 (1996), the trial court agreed, albeit without stating the basis, and granted defendants' second motion for summary disposition.

Plaintiff argues that the trial court erred in applying the wrongful-conduct rule to bar her claim because the culpability exception to the rule is applicable. We agree. This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant's second motion for summary disposition was brought pursuant to MCR 2.116(C)(8) (failure to state a claim for which relief can be granted) and (10) (no genuine issue of material fact and movant is entitled to judgment as a matter of law). A motion under MCR 2.116(C)(8) is tested on the pleadings alone; all factual allegations contained in the complaint must be accepted as true, and the motion should be granted only if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). A motion under MCR 2.116(C)(10) test the factual support for a claim; the trial court must consider the pleadings, affidavits, depositions and other documentary evidence, and give the benefit of any reasonable doubt to the nonmoving party. *Smith v Union Charter Twp (On Reh)*, 227 Mich App 358, 361-362; 575 NW2d 290 (1998).

Michigan has long recognized the wrongful-conduct rule. *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). The rule encompasses two common law maxims. *Id.* First, when a plaintiff's action is based on his own illegal conduct, he "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." *Id.* Second, if the plaintiff's claims are based on his own illegal actions and the defendant has participated equally in the illegal activity, "the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them." *Id.* In Michigan, the principle that one may not profit from his own wrong has been extended to tort actions where plaintiffs seek compensation for injuries resulting from their own illegal activities. *Id.*, at 559, n 9.

The wrongful-conduct rule has limitations and exceptions. *Orzel, supra*, at 561. In order to implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited, or almost entirely prohibited, under a penal or criminal statute, e.g., illegal lottery, murder, illegal contract, perjury or arson. *Id.* While violations of traffic laws, licensing statutes or labor safety statutes "do[] not rise to the level of serious misconduct sufficient to bar a cause of action," *id.*, this Court has found that adultery does warrant the application of the rule. See, *Stopera, supra*, at 569-570. The rule also requires that there must be a sufficient causal nexus between the plaintiff's illegal conduct and the asserted damages; even one guilty of an illegal act does not forfeit his right to legal protection if his cause of action can be established without relying on his illegal act. *Orzel, supra*, at 564.

An exception to the rule exists where the plaintiff alleges that the defendant violated a statute that specifically allows the plaintiff to recover for injuries suffered because of the

violation. *Id.* at 570-571. Another exception exists where both parties, although having engaged in illegal conduct, do not stand *in pari delicto* because the defendant's culpability is greater than the plaintiff's culpability, such as where the plaintiff has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age. *Id.*, at 569, citing *Pantely v Garris, Garris & Garris, PC*, 180 Mich App 768, 775; 447 NW2d 864 (1989).

In this case, under either MCR 2.116(C)(8) or (10), the trial court's grant of summary disposition was error. As noted, a (C)(8) motion should be granted only if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Simko, supra*. Here, the wrongful-conduct rule's culpability exception clearly could be factually developed so as to justify recovery, thereby rendering a grant of summary disposition improper. Similarly, the granting of a (C)(10) motion was precluded by disputed material facts regarding which actor was more culpable since defendant denied the existence both of a physician-patient relationship and of sexual impropriety. *Smith, supra*.

Before discussing the applicability of the culpability exception to this case, we find that the causation requirement arguably has not been met. Notwithstanding plaintiff's adulterous relationship with defendant, her alleged damages stem primarily from defendant's acts of alleged medical malpractice. Indeed, defendants successfully disposed of additional counts for breach of fiduciary duty, breach of contract and intentional interference with marital relations by so arguing. Medical malpractice involves "the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science." *Cotton v Kambly*, 101 Mich App 537, 540-541; 300 NW2d 627 (1980), citing *Kambas v St Joseph's Mercy Hospital*, 389 Mich 249; 250 NW2d 431 (1973).

In support of her malpractice claim, plaintiff presented the affidavits of Drs. Elizabeth Alexander and Frank Ochberg, who claimed that defendant seriously deviated from the acceptable standard of care for a medical doctor not only by unethically engaging in a sexual relationship with his patient during the time he was providing medical care and marital counseling to plaintiff and her husband, but also by providing significant financial support to his patient while under his care; by failing to refer his patient, who had been diagnosed with a major mental illness, to a qualified and objective psychiatrist; by taking advantage of the trust plaintiff had placed in him as her physician, a violation of his fiduciary duty to his patient; by violating standards of confidentiality in the physician-patient relationship without a signed release from plaintiff; and by treating a patient with medications for psychiatric conditions without adequate evaluation, a clinical record, or a careful plan with the patient for follow-up. Moreover, most of plaintiff's damages (loss of consortium with her former and current husbands, the destruction of her marriage to her former husband and the loss of the possibility of reconciling with him, severe emotional trauma and distress, medical bills, loss of wages, and loss of the enjoyment of life) were proximately caused not by plaintiff's adultery but by defendant's acts of malpractice as set forth in the affidavits. Because plaintiff can establish her claim for medical malpractice, see MCL 600.2912a; MSA 27A.2912(1), without relying on her adultery, that adultery arguably is not causally connected but rather is "merely incidentally or collaterally connected" to plaintiff's

claim, thereby precluding the application of the wrongful-conduct rule. *Orzel, supra*, at 564; *Manning v Noa*, 345 Mich 130, 135-136; 76 NW2d 75 (1956).

In any event, assuming that the causation requirement has been met and that the wrongful-conduct rule may properly be applied to plaintiff's medical malpractice claim, we find that the culpability exception to the rule applies to this case. In *Stopera, supra*, relied on by the trial court in granting summary disposition to defendant, the single, female plaintiff had a sexual relationship with the married, male defendant, and contracted a sexually transmitted disease. The plaintiff alleged that the defendant knew that he was infected with the disease and had a duty to inform her. *Id.* at 567-568. This Court held that summary disposition based on the wrongful conduct rule was improper because of the defendant's greater culpability. This Court noted that, while both parties had engaged in illegal conduct, only the defendant did so with the knowledge of his condition but without telling the plaintiff who thereby suffered under "circumstances of . . . great inequality of condition." *Id.*, at 570-571.

We also find that *Stopera* actually favors plaintiff, whose adultery does not relieve defendant of his greater culpability because the adulterous relationship occurred within the context of a physician-patient relationship. We reject defendant's argument that either *Glazier v Lee*, 171 Mich App 216; 429 NW2d 857 (1988) or *Pantely, supra*, support the trial court's decision. *Glazier* is distinguishable because the defendant did not participate in the illegal activity and the plaintiff was attempting to profit from his crime at the expense of an innocent defendant; this Court found that public policy banned such a lawsuit. In the present case, both parties participated in the alleged illegal activity but plaintiff alleged wrongdoing by defendant beyond adultery; in this context, public policy mitigates against granting summary disposition to defendant. *Pantely, supra*, is also distinguishable because the plaintiff committed a separate, independent wrong from that of the defendants. *Pantely* does not dictate that we find the parties in this case equally culpable because plaintiff's wrong was dependent on defendant's wrong; additionally, as noted, plaintiff damages stem from defendant's alleged acts of medical malpractice, not solely from her adulterous conduct.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff  
/s/ Michael J. Talbot  
/s/ Joseph B. Sullivan