STATE OF MICHIGAN

COURT OF APPEALS

STEVE CORRELL,

Plaintiff-Cross-Appellant,

and

DESPINA CORRELL, Individually and as Next Friend of SAMUEL S. CORRELL, Minor,

Plaintiffs-Appellants,

V

ST. JOHN HOSPITAL-MACOMB CENTER, DAVID DENNY and MARY FRIGUGLIETTI,

Defendants-Appellees/Cross-Appellees.

UNPUBLISHED
February 8, 2002

No. 220560
Macomb Circuit Court
LC No. 97-002566-NZ

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants summary disposition. We affirm.

Steve and Despina Correll, who were married at the time this action was commenced,[1] filed a complaint against defendants alleging negligent supervision, violation of patient's rights, sexual relations with a patient, and loss of consortium.[2] These allegations arose out of plaintiff Steve Correll's treatment for alcohol addiction at defendant St. John Hospital – Macomb Center, and his ensuing intimate relationship with his treatment provider, defendant Mary Friguglietti,

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[1] After the action was filed, plaintiffs separated and obtained separate legal counsel.

[2] Despina Correll, as next friend of the couple's minor son, Samuel, later filed an amended complaint adding Samuel as a party plaintiff and seeking damages for "loss of consortium with his parents," as a result of Steve and Despina's separation.

who was supervised at the hospital by defendant David Denny (a/k/a David Verona).[3] Plaintiffs alleged that before ending, Steve's relationship with Friguglietti evolved to include sexual intercourse and the use of both alcohol and illegal drugs.

Although the trial court granted defendants summary disposition on a number of grounds, because we find it to be dispositive, we consider only the trial court's application of the "wrongful-conduct" rule. Plaintiffs argue that the trial court erred in determining that the rule barred Steve Correll's claims and, consequently, any derivative claims set forth by Despina and the couple's minor son. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Although defendants' motion for summary disposition was premised on MCR 2.116(C)(8), the trial court found summary disposition based on the wrongful-conduct rule was appropriate under both MCR 2.116(C)(8) and (10). 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) tests 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 Rehearing)*, 227 Mich App 358, 361-362; 575 NW2d 290 (1998). Like the trial court, we find summary disposition under either subrule appropriate.

The wrongful-conduct rule prohibits a plaintiff from maintaining an action "if, in order to establish his action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party." *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). The rationale behind this rule is that the "courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct." *Id*. at 559. The rule, however, is not without its limitations and exceptions. As explained by the Court in *Orzel*, *supra*, "[t]he mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule." *Id*. at 561. To fall under the bar of the rule, "the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." *Id*. There must also be a sufficient causal nexus between the plaintiff's illegal conduct and the plaintiff's asserted damages. *Id*. at 564. In addition, "[a]n 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." *Id*. at 569.

> 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

[3] Plaintiffs admitted below to wrongly naming David Denny as a party. David Denny was later identified through discovery as David Verona.

> '"under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age . . . ."' [*Id*. (Citations omitted).]

In challenging the trial court's application of the wrongful-conduct rule to dismiss their claims, plaintiffs do not argue that the rule is, in and of itself, inapplicable under the facts of this case. Indeed, such an argument would be disingenuous as the allegations upon which plaintiffs' claimed damages rest stem from plaintiff Steve Correll's knowingly adulterous relationship with defendant Friguglietti, during which the couple engaged in the use of illegal drugs.[4] Rather, plaintiffs argue that Friguglietti's status as Steve's treatment provider warrants application of the "culpability exception" discussed above. We do not agree.

The culpability exception to the wrongful-conduct rule is to be applied only where the case involves a defendant who is "significantly" more culpable than the plaintiff. *Stopera v DiMarco*, 218 Mich App 565, 571 n 5; 554 NW2d 379 (1996). Misuse of the influence that accompanies a position such as that occupied by Friguglietti may, under certain circumstances, result in application of the culpability exception. However, plaintiffs do not allege in their complaint, and the record does not support, that Friguglietti used her position as Steve's treatment provider to exert any undue influence or otherwise coerce him into engaging in an adulterous sexual relationship. In fact, Steve admitted through deposition testimony that he was physically attracted to Friguglietti, and that he voluntarily sought out a personal relationship with her by calling her on the telephone and paging her at work. This belies any argument that Friguglietti was significantly more culpable than Steve in instigating the relationship; at best, the record shows the relationship was mutually sought after and nurtured by both. Whatever ethical strictures Friguglietti may have violated in participating in the illicit relationship, absent any allegation or proof on the record that she misused her position in order to achieve that relationship or to influence Steve's illegal drug use, summary disposition of his claims[5] under MCR 2.116(C)(8) and (10) was appropriate.[6]

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[4] In *Orzel*, *supra* at 561-564, our Supreme Court held that the illegal use of controlled substances is the type of conduct to which the wrongful-conduct rule may be applied. This Court, in *Stopera v DiMarco*, 218 Mich App 565, 569-570; 554 NW2d 379 (1996), similarly held that adultery, although rarely prosecuted, is still recognized as a felony in this state, see MCL 750.30, and that the wrongful-conduct rule may therefore apply to bar a plaintiff who commits adultery from maintaining a cause of action premised on damages arising from such a relationship.

[5] In addition to his claim against defendant Friguglietti for sexual relations with a patient, this includes Steve Correll's claims against the remaining defendants. Even assuming that, as argued by plaintiffs, Denny was aware of the relationship that had developed between Friguglietti and Steve Correll, and that improper conduct related to that relationship took place on hospital grounds, because Friguglietti's activities are not actionable under the wrongful-conduct rule Steve's claims for negligent supervision against the hospital and David Denny must similarly fail. For these same reasons, as well as the fact that MCL 333.20201 does not create a private cause of action, see *Long*, *supra* at 583-584, Steve's claim for violation of patient's rights was also appropriately dismissed.

[6] In reaching this conclusion we recognize that as Steve's treatment provider Friguglietti is arguably somewhat more culpable in that, as a professional addiction counselor with more than twenty years' experience, she should have been better able to control her behavior. However, as

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Moreover, because they are derivative and thus dependent on Steve's claim, dismissal of Despina's claims, both as next friend of their minor child and as Steve's wife, was similarly appropriate. See *Long v Chelsea Community Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996). In reaching this conclusion, we reject Despina's assertion that the trial court erred in determining that her minor child has only a derivative claim based upon the loss of his father's society and companionship.

Despina Correll has misread our Supreme Court's decision in *Berger v Weber*, 411 Mich 1, 16-17; 303 NW2d 424 (1981), as standing for the proposition that a minor child has an independent action for damages as a result of an injury to a parent. It is clear from the decision in *Berger* that the Court only recognized a derivative claim for a child for the loss of society and companionship as a result of an injury to a parent. Such a claim is analogous to one for loss of consortium brought by a spouse and is clearly derivative because, without the injury to the parent and a legal claim brought on the parent's behalf, the child has no right of recovery. *Id*. at 12-15. Although the Court in *Berger* made reference to the child's "independent" claim for damages, it is apparent that the Court recognized that the cause of action could proceed only if there was an injury to a parent. *Id*. at 14, 17. Therefore, because Steve Correll's claim fails, the minor child's claim fails as well. *Long*, *supra*.[7]

We similarly reject Despina's claim that the trial court erred in denying her motion to amend her complaint to allege an independent cause of action. Although a trial court should freely grant leave to amend when justice so requires, MCR 2.118(A)(2), leave to amend may be denied where the amendment would be futile. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). Here, Despina's proposed amendment was futile because the claims that she sought to add would have been barred by MCL 600.2901. See *Cotton v Kambly*, 101 Mich App 537, 539-542; 300 NW2d 627 (1980). See also *Muflahi v Musaad*, 205 Mich App 352, 353; 522 NW2d 136 (1994); *Nicholson v Han*, 12 Mich App 35, 43; 162 NW2d 313 (1968). Moreover, unlike Steve, Despina was not directly involved with defendants and cannot claim that any duty owed directly to her personally, was breached. Cf. *Doe v Samaritan Counseling Center*, 791 P2d 344 (Alas, 1990).[8] See also *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 577-578; 603 NW2d 816 (1999).

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explained above, without more, she could not be found to be "significantly" more culpable in this matter. *Stopera*, *supra*.

[7] Although defendants argue that this Court should hold that a child's claim for loss of society and companionship is not viable, citing *Sizemore v Smock*, 430 Mich 283, 285; 422 NW2d 666 (1988), we decline to do so because *Berger*, *supra*, remains good law.

[8] Doe is also inapposite because Alaska has no statute similar to MCL 600.2901 barring an alienation of affection claim. In addition to *Doe*, Despina cites *Underwood v Croy*, 30 Cal Rptr 2d 504 (Cal App, 1994), and California has such a statute. See California Civil Code § 43.5. However, to the extent that *Underwood* could be construed as support for an independent cause of action by Despina here, we are not bound by the decisions of foreign jurisdictions. *Watson v Bureau of State Lottery*, 224 Mich App 639, 648; 569 NW2d 878 (1997). Further, we note that the California Supreme Court ordered that the opinion in that matter be deleted from the official

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Despina also argues that the trial judge should not have decided her motion for reconsideration because, "based upon information and belief," he had suffered a stroke and was diagnosed with brain cancer before the decision on the motion was issued. This issue was not raised below and it is not apparent from the record that the trial judge was mentally unable to perform the duties of his job at the time the decision denying reconsideration was issued. See MCR 2.630. We likewise find no support in the record for Despina's claim that the trial judge was merely trying to clear his docket.

We affirm.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White

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reports and that its holding is, therefore without precedential value even within that jurisdiction. See California Rules of Court 976, 977; see also *Co of Los Angeles v Surety Ins Co*, 152 Cal App 3d 16, 22; 199 Cal Rptr 351 (1984).