STATE OF MICHIGAN

COURT OF APPEALS

JOY WOOD, Personal Representative of the Estate of ZACHARY WOOD, Plaintiff-Appellee,	UNPUBLISHED December 16, 2008
v	No. 281683 Kent Circuit Court
MATTHEW ALIGHIRE and ROGER ALAN ALIGHIRE, Defendants-Appellants.	LC No. 07-000950-NI

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendants appeal by leave granted the circuit court order striking defendants' affirmative defense under MCL 600.2955a(1) and granting plaintiff's motion for summary disposition with respect to that defense. We reverse and remand. This appeal has been decided without oral argument. MCR 7.214(E).

Plaintiff's decedent, Zachary Wood, and his friend, defendant Matthew Alighire, were out celebrating Zachary's birthday. The celebration involved the consumption of alcohol and smoking marijuana, and both young men became highly intoxicated. Matthew was not concerned about their condition because they were riding with friends and expected to spend the night at one friend's house. When that arrangement did not work out, Matthew, accompanied by Zachary, started driving home in a car owed by his father, defendant Roger Alighire. En route, Matthew ran off the road and into some trees. Zachary was apparently thrown from the vehicle and suffered fatal injuries.

The circuit court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). Statutory interpretation involves questions of law that are also reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

A person is subject to tort liability for automobile negligence if the injured person "suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). However, there are certain exceptions to liability. For example, MCL 500.3135(2)(b) provides that "[d]amages shall be assessed on the basis of comparative fault,

except that damages shall not be assessed in favor of a party who is more than 50% at fault." Similarly, MCL 600.2955a(1) 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.

The circuit court held that defendants could not rely on MCL 600.2955a(1) as a defense to the action absent evidence that Zachary's "intoxication directly and naturally affected the operation of the vehicle, which it did not." We disagree.

The caselaw indicates that when an intoxicated person voluntarily chooses to ride with an intoxicated driver and thereby contributes to his or her own injury, MCL 600.2955a(1) is applicable and the degree of fault attributed to the passenger is a question of fact for the jury. If the jury determines that the passenger was more than 50 percent at fault, recovery is barred. For example, in *Piccalo v Nix (On Remand)*, 252 Mich App 675, 680; 653 NW2d 447 (2002), this Court affirmed a jury determination that the plaintiff was more than 50 percent at fault when she consumed alcohol and chose to ride with a drunk driver in the open cargo area of his van, unprotected from the unrestrained objects that ultimately caused her injury when the van went off the road. Similarly, in *Mallison v Scribner*, 475 Mich 878; 715 NW2d 72 (2006), rev'g 269 Mich App 1 (2005), the degree of the plaintiff's negligence under MCL 600.2955a(1) was an issue of fact for the jury when she chose to ride with a drunk driver, consented to the driver's decision to drive off the road into a ditch, and was injured when the vehicle flipped over.

In the present case, the evidence showed that both Matthew and Zachary were highly intoxicated. Zachary chose to ride home with Matthew, whom he knew had been drinking. Matthew testified at his deposition that he made Zachary put on his seat belt before he started driving and that Zachary put it on but later unfastened it. There are indications that when the car left the road, Zachary was thrown from the vehicle, thereby sustaining fatal injuries. This evidence could permit a rational trier of fact to conclude that Zachary had an impaired ability to function, as a result of which he contributed to, or was to some extent the cause of, the event that resulted in his death. Whether he was to some extent the cause of the event, and whether he was more or less than 50 percent responsible, were questions of fact for the jury. The circuit court erred by striking defendants' affirmative defense.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter