

STATE OF MICHIGAN
COURT OF APPEALS

JAMES IDZIAK,

Plaintiff-Appellant/Cross-Appellee,

v

ROBERT HOLWERDA, D.O.,

Defendant-Appellee/Cross-
Appellant,

and

CUNNINGHAM HOLWERDA MCAVOY DOs,

Defendant.

UNPUBLISHED
October 23, 2012

No. 306750
Kent Circuit Court
LC No. 10-08399-NH

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

In this medical malpractice case defendant physician¹ filed a motion for summary disposition, arguing that plaintiff's suit was barred by the wrongful-conduct rule. The trial court denied the motion. Defendant later filed a second motion for summary disposition based on the statute of limitations, which the trial court granted. Plaintiff now appeals the latter decision and defendant cross-appeals the former. We conclude that the trial court erred in denying the first motion for summary disposition because under *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995), plaintiff's claim is barred by the common law wrongful conduct rule.²

¹ Cunningham Holwerda MacAvoy D.O.s is not a part of this appeal, and in fact it appears that no entity ever existed under that name. We therefore use the term defendant to refer exclusively to Dr. Holwerda.

² Given our ruling as to the first motion for summary disposition, we need not address the issues raised in the second motion.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). We also review de novo issues of law. *People v Steele*, 283 Mich App 472, 482; 769 NW2d 256 (2009).

Plaintiff, a teacher at the time relevant to this case, had been treated by defendant for depression for several years. Plaintiff's complaint references his view that defendant failed to properly treat him for that entire period and broadly alleges damages that occurred over this many year period. However, plaintiff concedes that the only date of treatment that arguably falls within the statute of limitations occurred on March 1, 2008. Thus, it is only damages that flow from that single visit that may be claimed. Since damages relating to that single visit could not have occurred prior to the date of the visit, plaintiff may not seek compensation for any losses that occurred prior to March 1, 2008.

Plaintiff's complaint does assert damages that occurred after March 1, 2008. Specifically, his complaint asserts that as a result of defendant's alleged malpractice, in April, 2008, he "engaged in a high-speed car chase, arrest and conviction, humiliation and severely and irreparably damaged reputation and termination of employment."

It is not disputed that on April 20, 2008, plaintiff got drunk and drove around in his car. When a police car attempted to pull him over, plaintiff tried to flee and led the police on a high-speed chase. As a result of that incident, he was convicted of operating while intoxicated, MCL 257.625(1)(a), and fleeing a police officer in the fourth degree, MCL 750.479a(2). As a result of that event and his conviction, the State Tenure Commission recommended that Mr. Idziak be discharged from his employment and his dismissal was made permanent on 6/11/09 after he withdrew his appeal of the Commission's decision.

Defendant asserts that these claims for damages are barred by the wrongful-conduct rule. This common law principle was most recently discussed by the Supreme Court in *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995) where the Court stated that

[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. [*Id.* (quotation omitted)].

The Court further explained:

To implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. [*Id.* at 561].

The Court then cited cases that applied the wrongful-conduct rule, which involved underlying violations including the operation of an illegal lottery, trespass and gambling, illegal contract, murder, embezzlement, perjury, and arson. *Id.* The Court held that the rule applied to the plaintiff's obtaining, possessing, and using prescription drugs without a prescription, because that conduct was almost entirely prohibited by law and involved a significant degree of harm and punishment. *Id.* at 562-563.

In the present case, plaintiff was convicted of operating while intoxicated (OWI), MCL 257.625(1)(a), a misdemeanor, and fleeing a police officer in the fourth degree, MCL 750.479a(2), a felony. Previous cases have indicated that OWI may not necessarily rise to the level of misconduct serious enough to apply the wrongful-conduct rule, but no court has determined this as a holding in a case. *Orzel*, 449 Mich at 561 (citing *Longstreth v Gensel*, 423 Mich 675; 377 NW2d 804 (1985)). Given the potential harm to others it is a close question whether such a crime, albeit a misdemeanor, falls within the scope of the wrongful conduct rule. However, the felony charge of fleeing a police officer plainly addresses conduct that does rise to the necessary level of seriousness. Indeed, in this case there is evidence that plaintiff nearly hit a bicyclist while traveling at speeds of up to 80 mph. Moreover, fleeing a police officer is barred by the penal code as opposed to the motor vehicle code. Plainly, plaintiff's conduct when fleeing the police was "prohibited or almost entirely prohibited under a penal or criminal statute."

Plaintiff points out that the wrongful conduct rule only applies where the plaintiff engaged in wrongful conduct specifically with the intent to obtain a benefit from it.³ However, this requirement is clearly met under the facts of this case. Defendant fled from the police in order to obtain a very real benefit, i.e., avoiding arrest and prosecution. And in doing so, he did not merely place himself at risk, but placed the lives of everyone else on the road in jeopardy.

The remaining question is whether plaintiff has claimed any damages other than those connected to his illegal conduct. We conclude that he has not. Plaintiff testified as to difficulties he was having at work and at home, but the cited problems all occurred prior to the March 1, 2008 visit at issue in this case. Indeed, many were several years prior to that date. The post-March 1, 2008 claimed damages all concerned his illegal conduct, his arrest and his resulting dismissal from employment. This was confirmed at the motion hearing below, where the only claims of damages not intrinsically connected to the April, 2008 unlawful conduct and arrests were damages that plaintiff's counsel alleged occurred over the several years that defendant treated plaintiff *prior* to March 1, 2008.

As previously noted, defendant is subject to liability here only for damages arising after the March 1, 2008 date of treatment as it is the only date of treatment that falls within the statute of limitations. The record demonstrates that the post-March 1, 2008 damages were his criminal convictions and the loss of his job and the emotional pain and embarrassment associated with those convictions.

Defendant does not refer us to any post-*Orzel* caselaw or statutory changes that would affect the role and scope of the wrongful conduct rule. Here that rule bars plaintiff's suit because

³ See e.g., *Miller v Radikopf*, 394 Mich 83; 228 NW2d 386 (1975) (plaintiff allegedly conspired to sell Irish sweepstakes tickets and then sued his co-conspirator for his share of the profits); *Cook v Wolverine Stockyards Co*, 344 Mich 207; 73 NW2d 902 (1955) (plaintiff and defendant entered into an illegal contract and plaintiff then sued defendant on the contract); *Budwit v Herr*, 339 Mich 265; 63 NW2d 841 (1954) (having murdered his wife, plaintiff's suit to retain all the property they held as tenants by the entirety is dismissed); *Garwols v Bankers' Trust Co*, 251 Mich 420; 232 NW 239 (1930) (son who murdered his mother may not inherit).

the only post-March 1, 2008 damages are all linked to defendant's arrest for his illegal conduct that risked the health and safety of minors, police officers and numerous other drivers.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck