

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN M. SWANNER,

Plaintiff-Appellee,

v

THOMAS LAZAR, P.C., a Michigan professional
corporation and THOMAS LAZAR, Jointly and
Severally,

Defendants-Appellants.

UNPUBLISHED

March 27, 1998

No. 189516

Oakland Circuit Court

LC No. 93-464530-NM

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment on a jury verdict in favor of plaintiff in this legal malpractice action. We affirm.

Defendants first contend the trial court erred by denying their motion for directed verdict because plaintiff's action was barred by the doctrine of in pari delicto. Defendants argue that because plaintiff engaged in wrongful, illegal conduct that was equally or more culpable than defendants' misconduct, she is precluded from asserting a claim against them. We disagree.

This Court reviews the grant or denial of a directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700; 565 NW2d 401 (1997), lv pending. When reviewing a motion for directed verdict, this Court views the evidence and all legitimate inferences arising from the evidence in a light most favorable to the non-moving party, plaintiff in this case. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997).

The common law doctrine of in pari delicto is also known as the wrongful-conduct rule. The rule precludes recovery where the plaintiff's damages arise out of his or her own illegal conduct. *Orzel v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995). In order for the rule to be implicated, the plaintiff's conduct must be considered sufficiently serious to trigger the rule when the conduct is prohibited or almost entirely prohibited under a penal or criminal statute. *Id.* at 561. Moreover, the plaintiff's illegal conduct must be a proximate cause of the asserted damages. *Id.* at

564-567. Even if these requirements are satisfied, a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's. *Id.* at 569; *Pantely v Garris, Garris and Garris, PC*, 180 Mich App 768, 775-777 (1989); 447 NW2d 864. In *Pantely, supra* at 776, this Court explained that it could "readily envision legal matters so complex and ethical dilemmas so profound that a client could follow an attorney's advice, do wrong and still maintain suit on the basis of not being equally at fault."

In this case, defendants first argue plaintiff's claim is barred by *in pari delicto* because she engaged in wrongful conduct when she signed the divorce complaint that falsely alleged she had resided in Michigan for 180 days. We disagree. Plaintiff's complaint was verified pursuant to MCR 2.114(B)(2)(b) with a declaration that its contents were true to the best of her "information, knowledge, and belief." We acknowledge that MCR 2.114(B)(2)(b) provides that "a person who knowingly makes a false declaration under subrule (B)(2)(b) may be found in contempt of court." However, plaintiff did not sign the complaint under penalty of perjury and did not lie to the court while under oath as the plaintiff did in *Pantely*. Accordingly, we find that plaintiff's signing of the divorce complaint containing the false allegation is not sufficiently serious to trigger the wrongful-conduct rule.

Defendants also argue the doctrine of *in pari delicto* bars plaintiff's claim because plaintiff removed her child from North Carolina in violation of two orders entered in North Carolina, which resulted in plaintiff pleading guilty to a three-year felony. Again, we disagree. Assuming, without deciding, that plaintiff's conduct was sufficiently serious to trigger the wrongful-conduct rule and that it was the proximate cause of plaintiff's damages, we find that the exception articulated in *Pantely, supra* at 776, applies to this case. We find that the priority of competing child custody orders entered in two different states is a legal issue so complex that plaintiff could rely on defendant's advice to remove the child in violation of the North Carolina order and still maintain her action. Accordingly, plaintiff is not considered to be *in pari delicto* with defendant, and the trial court did not err in denying defendants' motion for directed verdict.

Defendants next argue the trial court should have granted their motion for directed verdict because there were one or more superseding, intervening causes for plaintiff's damages; therefore, defendants' conduct was not the proximate cause of her injuries. We disagree.

The issues of proximate cause and superseding or intervening cause in a negligence action are generally questions of fact for the jury. *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992). However, where the facts bearing on proximate cause are not disputed and if reasonable minds could not differ, then the issue is one of law for the court. *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995).

Proximate cause is defined as that which, in a natural and continuous sequence, unbroken by new and independent causes, produced the injury. *McMillan v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). After it has been established that the defendant's action was a cause in fact of the alleged injury, the concept of proximate cause determines whether the defendant should be held legally responsible for the plaintiff's injury. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 584, 586 n 3; 513 NW2d 773 (1994). Proximate cause is often stated in terms of foreseeability. *Id.* at 586 n 3.

An intervening cause is one which operates to produce the harm after the negligent conduct of the defendant. *Poe v Detroit*, 179 Mich App 564, 576-577; 446 NW2d 523 (1989). Under certain circumstances, an intervening cause can relieve a defendant from liability. *Id.* However, simply because an intervening act is negligent does not, alone, make it a superseding cause. *Arbelius v Poletti*, 188 Mich App 14, 20; 469 NW2d 436 (1991). For an intervening cause to be a superseding cause, and thereby relieve the negligent defendant of liability, it must not have been a foreseeable consequence of the negligent conduct. *Id.* at 20, quoting 2 Restatement Torts, § 447, p 1196.

In this case, we are persuaded that reasonable minds could differ on whether it was readily foreseeable that defendant's failure to recognize that the court's temporary ex-parte order was void for lack of jurisdiction over the divorce proceeding and his insistence that the order was valid proximately caused plaintiff substantial harm. Reasonable jurors also could conclude plaintiff was relying upon defendant's advice and guidance, and defendant should have anticipated that she would continue to follow his directive even when she contacted him from North Carolina. Although defendants argue there were other events and circumstances that contributed to plaintiff's damages, reasonable jurors could find it was defendant's negligent conduct that set those events in motion. Therefore, when considering all of the evidence presented in the light most favorable to plaintiff, we find the issue of causation was properly left to the jury.¹

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski

¹ We note that the jury found plaintiff 35% at fault for the damages and defendant 65% at fault.