STATE OF MICHIGAN

COURT OF APPEALS

RITA COSTIGAN, Individually and as Personal Representative of the Estate of JONATHON ROBERT COSTIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED December 20, 2011
v	No. 298286 Oakland Circuit Court
KEVIN PLETS and CINDY PLETS, Defendants-Appellees/Cross-Appellants,	LC No. 2009-101177-NO
and ANDREW PLETS, Defendant.	

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

In this wrongful death action, plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants Kevin Plets and Cindy Plets[1] pursuant to MCR 2.116(C)(10). Defendants have filed a cross-appeal, raising alternative grounds for affirmance. We affirm.

In May 2008, plaintiff's decedent, Jonathon Costigan, died from an apparent suicide. His body was found hanging from a rafter in a basement workshop in defendants' home. The previous evening, Jonathon and defendants' son Andrew, who were both under the age of 21, were consuming alcohol during a party at defendants' home while defendants were away. Defendants returned home after midnight, discovered that a party had been held at their house

[1] Although plaintiff also named Kevin's and Cindy's son Andrew as a defendant, Andrew was apparently never served with the complaint and is not a party to this appeal. Accordingly, the term "defendants" is used to refer to defendants Kevin and Cindy Plets only.

and that alcohol had been served and consumed without their permission, and reprimanded Andrew and the other boys who were still present. Defendants also called Jonathon's parents to inform them that Jonathon and several others had been drinking at their home without their permission. Because Jonathon was intoxicated, it was decided that he could stay at defendants' house to "sleep it off." The following morning, another boy who spent the night at defendants' house saw Jonathon get up, use the bathroom, and return to the basement where he had been sleeping. Shortly thereafter, some boys discovered Jonathon hanging from a cord in the basement. The medical examiner listed the cause of death as suicide.

Plaintiff subsequently filed this action against defendants, alleging that they negligently allowed underage minors to consume alcohol in their home, and that Jonathon's alcohol consumption was a proximate cause of his suicide. Defendants filed a motion for summary disposition, arguing that there was no evidence that they were aware of or had approved any alcohol consumption at their house, or evidence that they had furnished any alcohol. They further argued that they had no duty to prevent Jonathon's suicide. The trial court agreed and granted defendants' motion pursuant to MCR 2.116(C)(10).

We review de novo the trial court's grant of summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula*, 212 Mich App at 48.

To establish a prima facie case of negligence, a plaintiff must prove (1) a duty owed by the defendant, (2) breach of that duty, (3) causation, and (4) damages. *Haliw v Sterling Hts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Plaintiff argues that the trial court erroneously overlooked evidence that defendants violated state and local laws regulating the consumption of alcohol by underage minors, and that such evidence was sufficient to establish a prima facie case of negligence.

The violation of a statute can establish a prima facie case of negligence. *Dep't of Transp v Christensen*, 229 Mich App 417, 420; 581 NW2d 807 (1998). For example, in *Thaut v Finley (On Rehearing)*, 50 Mich App 611, 613; 213 NW2d 820 (1973), this Court explained that "violation of a statute is negligence per se if the statute was intended to protect a class of persons, including the plaintiff, from the type of harm which resulted from its violation." "This is so, even though the statute does not, as is normally the case, contain a provision respecting civil liability." *Id*. However, the plaintiff must still show that the violation of the statute was the proximate cause of the damages the plaintiff seeks to recover. *Id*. at 613 n 6.

Here, plaintiff contends that she presented sufficient evidence to show that defendants violated both MCL 750.141a and Orion Township Ordinance No. 83.

MCL 750.141a provides in relevant part:

(2) Except as otherwise provided in subsection (3), an owner, tenant, or other person having control over any premises, residence, or other real property shall not do either of the following:

(a) Knowingly allow a minor to consume or possess an alcoholic beverage at a social gathering on or within that premises, residence, or other real property.

* * *

(4) Except as provided in subsection (5), a person who violates subsection (2) is guilty of a misdemeanor punishable by imprisonment for not more than 30 days or by a fine of not more than $1,000.00, or both.

* * *

(6) Evidence of all of the following gives rise to a rebuttable presumption that the defendant allowed the consumption or possession of an alcoholic beverage or a controlled substance on or within a premises, residence, or other real property, in violation of this section:

(a) The defendant had control over the premises, residence, or other real property.

(b) The defendant knew that a minor was consuming or in possession of an alcoholic beverage or knew that an individual was consuming or in possession of a controlled substance at a social gathering on or within that premises, residence, or other real property.

(c) The defendant failed to take corrective action.

For purposes of MCL 750.141a, a "minor" is an individual under the age of 21 years. MCL 750.141a(1)(f). MCL 750.141a(1) also contains the following definitions:

(b) "Allow" means to give permission for, or approval of, possession or consumption of an alcoholic beverage or a controlled substance, by any of the following means:

(*i*) In writing.

(*ii*) By 1 or more oral statements.

(*iii*) By any form of conduct, including a failure to take corrective action, that would cause a reasonable person to believe that permission or approval has been given.

(c) "Control over any premises, residence, or other real property" means the authority to regulate, direct, restrain, superintend, control, or govern the

> conduct of other individuals on or within that premises, residence, or other real property, and includes, but is not limited to, a possessory right.

Similarly, Orion Township Ordinance No. 83 provides in pertinent part:

> An adult having control of any residence shall not allow a house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed at said residence by any minor where the adult knew or reasonabl[y] should have known that an alcoholic beverage or drug was in the possession of or being consumed by a minor at said residence, and where the adult failed to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug at said residence.

Like the statute at issue in *Thaut*, MCL 750.141a(2) prohibits a person from "knowingly allow[ing]" a minor to consume alcoholic beverages. Under MCL 750.141a(1)(b), "allow" means either a written or oral statement giving "permission for, or approval of, possession or consumption of an alcoholic beverage," or "any form of conduct, including a failure to take corrective action, that would cause a reasonable person to believe that permission or approval has been given."

In this case, there was no evidence that defendants gave either written or oral permission for, or approval of, the consumption of alcohol while defendants were away from the house. Nor was there evidence of any conduct by defendants that would have caused a reasonable person to believe that defendants had given permission for, or approval of, the consumption of alcohol at their home while they were away. Plaintiff relies on evidence that defendants were aware that Andrew and his friends had consumed alcohol at their house in the past. However, that evidence also showed that the prior alcohol consumption was not permissive and that defendants took corrective action to prevent the consumption of alcohol in their home by Andrew and his friends. Before defendants left their home on the evening of May 30, 2008, there had not been any alcohol consumption by Andrew and his friends at defendants' home since November 2007. Moreover, there was no evidence that defendants had any knowledge on May 30 that Andrew or his friends had planned to consume any alcohol after defendants left that evening, that Andrew and his friends possessed any alcohol when defendants left the house, or that there were any plans for a gathering at which alcohol would be furnished or consumed. Instead, the evidence showed that the alcohol that was consumed that evening was furnished, without defendants' knowledge, by others who did not arrive until several hours after defendants left the house. When defendants later returned home and discovered that a party had been held without their permission, they became upset, began reprimanding those who were still present, began making everyone clean up, and called other parents to let them know that their children had been drinking without permission. In sum, it was beyond genuine factual dispute that defendants did not engage in any conduct that would cause a reasonable person to believe that they had given permission for, or approval of, the consumption of alcohol at their house while they were away. The evidence did not support a finding that defendants violated MCL 750.141a(2) in this case.

Similarly, the evidence did not support a finding that defendants violated Orion Township Ordinance No. 83. That ordinance is not violated unless an adult "knew or reasonably should have known that an alcoholic beverage . . . was in the possession of or being consumed

by a minor" at the adult's residence, "and where the adult failed to take reasonable steps to prevent the possession or consumption of the alcoholic beverage" at the residence. As explained previously, plaintiff did not produce any evidence that defendants had reason to know that their son and his friends possessed any alcohol, or that any alcohol would be furnished or consumed at their residence when they left for the evening.

Accordingly, plaintiff failed to establish a prima facie case of negligence based on a statutory or ordinance violation.

We also conclude that plaintiff's action was properly dismissed because it was beyond genuine factual dispute that defendants' conduct did not proximately cause Jonathon's suicide. Causation is generally a matter for the trier of fact, but if there is no issue of material fact, then the issue is one of law for the court. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003). Proximate cause, or legal cause, involves examining the foreseeability of consequences and whether the defendant should be held liable for such consequences. *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004). In *Ridley v Detroit*, 231 Mich App 381, 389; 590 NW2d 69 (1998), remanded on other grounds 463 Mich 932 (2000), this Court explained:

> The question whether wrongful conduct is so significant and important as to be considered a proximate cause of an injury depends in part on foreseeability. *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977); *Ross v Glaser*, 220 Mich App 183, 192; 559 NW2d 331 (1996). A proximate cause is one that operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injury would not have occurred. *Id*. at 192-193. The determination whether wrongful conduct may be considered a proximate cause of an injury involves a determination whether the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. *Id*.

A decedent's suicide is generally not actionable because it is considered a superseding cause of the plaintiff's injury. See, e.g., *Cooper v Washtenaw Co*, 270 Mich App 506, 509-510; 715 NW2d 908 (2006). The Restatement of Torts, 2d, § 440, states that "[a] superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." However, a plaintiff may recover damages for a decedent's suicide if the suicide was foreseeable and there was a duty to protect the decedent. See *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 436-440 n 7, 447-448; 487 NW2d 106, amended 440 Mich 1203 (1992). Courts in other jurisdictions have analyzed whether a suicide involved a harm different in kind from that which would otherwise have resulted from the actor's negligence. See, e.g., *Cramer v Slater*, 146 Idaho 868, 877-878; 204 P3d 508 (2009); *Fuller v Preis*, 35 NY2d 425, 434; 322 NE2d 263; 363 NYS2d 568 (1974).

In this case, there was simply no evidence to suggest that it was foreseeable that Jonathon's alcohol consumption would cause him to commit suicide. It is true that plaintiff presented evidence that Jonathon had talked about being depressed and had once reported having a dream about committing suicide. But those events occurred in the past and there was no

evidence that defendants were aware of those occurrences. Moreover, there was no evidence that anyone suspected that Jonathon was suicidal on the night of the party. He was 18 years old and had made plans to attend his high school graduation. In addition, there was no evidence that Jonathon had any mental illnesses or was otherwise disturbed to the extent that he could not realize the consequences of his actions. Suicide is simply not the type of harm that typically results from underage drinking (in contrast, for example, to drunken driving accidents). We conclude that Jonathon's suicide was a superseding cause that precludes plaintiff from establishing the proximate cause element of her negligence action. The trial court did not err by granting defendants' motion for summary disposition.

Plaintiff also argues that the trial court erred by refusing to allow her to amend her complaint to allege an additional theory of liability. We review the trial court's decision for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

When summary disposition is sought under MCR 2.116(C)(10), a court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the evidence then before the court shows that an amendment is not justified or would be futile. MCR 2.116(I)(5); *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001). An amendment is considered futile if it merely restates allegations already made or adds new allegations that fail to state a claim. *Id.*

Plaintiff sought to amend her complaint to add a theory that Andrew Plets had been supervising the party in defendants' absence, and was acting as defendants' agent in allowing the "house party" and the consumption of alcohol for purposes of Orion Township Ordinance No. 83. However, the evidence did not support this agency theory. As previously explained, there was no evidence that defendants were aware of any planned party or that they had approved of the possession or consumption of alcohol while they were away. Because there was no evidence to support a finding that defendants authorized Andrew to supervise the party, to furnish the alcohol, or to allow the consumption of alcohol at their residence, any amendment to allege such a theory would have been futile. Further, as previously explained, regardless of any ordinance violation, plaintiff still would not have been able to establish the proximate cause element of her negligence claim because Jonathon's death was caused by a superseding act of suicide that was not foreseeable. The trial court did not abuse its discretion by denying plaintiff's request to amend her complaint.

Because the trial court properly granted summary disposition in favor of defendants for the foregoing reasons, we need not consider the alternative grounds for affirmance that defendants have raised on cross-appeal.

Affirmed. As the prevailing party, defendants may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens