STATE OF MICHIGAN

COURT OF APPEALS

SARAH STOLICKER,

Plaintiff-Appellant,

v

KOHL'S DEPARTMENT STORES, INC., and DARRYL DUNCAN,

Defendants-Appellees.

UNPUBLISHED
March 1, 2012

No. 302573
Oakland Circuit Court
LC No. 2010-106938-NO

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motions for summary disposition under MCR 2.116(C)(8) and (C)(10), and dismissing plaintiff's complaint. We affirm.

This lawsuit arose from an altercation between plaintiff and defendant Darryl Duncan, a loss prevention supervisor for defendant Kohl's. Plaintiff shoplifted clothing from Kohl's, and Duncan pursued her into the parking lot. A tussle ensued, during which plaintiff tripped, or fell, or was pushed, and she sustained a broken collarbone. Plaintiff sued defendants for assault and battery, intentional infliction of emotional distress, negligence, and negligent hiring and training.

The trial court determined that the wrongful conduct rule barred plaintiff's claims. The rule is a common law doctrine that precludes a plaintiff from maintaining an action that is based in whole or in part on the plaintiff's wrongful conduct. *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). The rule applies even if the defendant engaged in the wrongful activity: "as between parties in pari delicto, that is [,] equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them." *Id*. at 558, quoting 1A CJS, Actions, § 29, p 388. Proper application of the rule requires consideration of proximate cause: "the wrongful conduct rule only applies if a plaintiff's wrongful conduct is a proximate cause of his injuries." *Cervantes v Farm Bureau Gen Ins Co*, 272 Mich App 410, 417; 726 NW2d 73 (2006). In other words, a plaintiff who has engaged in a wrongful act may be

able to recover if the wrongful act was a "remote link in the chain of causation." *Id*. at 417, quoting *Manning v Bishop of Marquette*, 345 Mich 130, 137; 76 NW2d 75 (1956).[1]

We review de novo the trial court's ruling on the summary disposition motion. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). A motion under MCR 2.116(C)(10) is appropriate if "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a judgment on a (C)(10) motion, we consider the pleadings and the record in the light most favorable to the non-moving party to determine whether any genuine issue of material fact exists to warrant a trial. *Dancey*, 288 Mich App at 7.

Here, the parties stipulated that plaintiff engaged in shoplifting, which is wrongful conduct. See *Bonkowski v Arlan's Dep't Store*, 383 Mich 90, 103-104; 174 NW2d 765 (1970) (shoplifting is a serious crime). Accordingly, the only potential factual issue that could have precluded summary disposition was whether plaintiff's shoplifting was a proximate cause of her injuries. In this regard, plaintiff argues that summary disposition was inappropriate on the ground that her shoplifting was not "the" proximate cause of her injuries.

Plaintiff's argument miscontrues the causation factor of the wrongful conduct rule by blurring the significant distinction between "a" proximate cause and "the" proximate cause. The wrongful conduct rule bars an action if the plaintiff's conduct was *a* proximate cause of the plaintiff's injuries. *Cervantes*, 272 Mich App at 417. Here, to assess whether plaintiff's wrongful conduct was *a* proximate cause of her injuries, the trial court was required to determine whether plaintiff's act of shoplifting contributed to a chain of events that led to her injuries. See *LaMeau v Royal Oak*, 289 Mich App 153, 193-194; 796 NW2d 106 (2010) (Talbot, J., dissenting; reasoning adopted in *LaMeau v Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011)

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[1] The dissent contends that we "misconstrue[d] the underpinnings" of the wrongful-conduct doctrine. Given that the doctrine is so clear, we decline to don the judicial x-ray glasses that are required to join the dissent's crusade in gleaning tactical "underpinnings." The dissent may wish to note our Supreme Court's plain statement that the wrongful conduct doctrine should apply in situations involving flight from illegal activity:

> [A] fleeing driver would nevertheless be barred from seeking to recover for injuries sustained while attempting to evade a lawful order to stop his vehicle under Michigan's wrongful conduct rule. This rule is rooted in the public policy that courts should not lend their aid to plaintiffs whose cause of action is premised on their own illegal conduct. *Robinson v Detroit*, 462 Mich 439, 452 n 10; 613 NW2d 307 (2000).

(applying the phrase "the proximate cause" in MCL 691.1407(2)(c)). The record establishes that the shoplifting contributed to the events that led to plaintiff's injuries.[2]

Plaintiff maintains that her lawsuit should proceed on the ground that there is a question of fact regarding whether the shoplifting was *the* proximate cause of her injuries. In other words, plaintiff maintains that defendants are liable to her unless her shoplifting was the immediate and direct cause of her injuries. See *id*. at 193 (defining "the" proximate cause). We disagree. The record establishes that plaintiff's shoplifting set in motion the chain of events that led to her injuries. Consequently, plaintiff's wrongful conduct was a proximate cause of her injuries, and the trial court properly applied the wrongful conduct rule to dismiss plaintiff's claims.

Plaintiff also argues that MCL 600.2917 presents legal and factual issues that preclude summary disposition. The statute provides in pertinent part:

> In a civil action against a . . . merchant . . . for false imprisonment, unlawful arrest, assault, battery, libel, or slander, if the claim arises out of conduct involving a person suspected of removing or of attempting to remove, without right or permission, goods held for sale in a store from the store . . . and if the merchant . . . had probable cause for believing and did believe that the plaintiff had committed or aided or abetted in the larceny of goods held for sale in the store . . . damages for or resulting from mental anguish or punitive, exemplary, or aggravated damages shall not be allowed a plaintiff, unless it is proved that the merchant . . . used unreasonable force, detained the plaintiff an unreasonable length of time, acted with unreasonable disregard of the plaintiff's rights or sensibilities, or acted with intent to injure the plaintiff.

Plaintiff contends that the statute allows shoplifters to recover against merchants if the merchants' agents act unreasonably. Plaintiff further contends that application of the wrongful conduct rule in this case would "eviscerate" the protections the statute purportedly affords to shoplifters. We disagree. Even assuming that MCL 600.2917 protects admitted shoplifters, as opposed to suspected shoplifters, the statute does not preclude summary disposition in this case. By its terms, the statute does not apply unless a plaintiff has presented a cause of action against a merchant. Here, plaintiff failed to support her cause of action; the record establishes that plaintiff's shoplifting was a proximate cause of her injuries. Absent some evidence that unreasonable conduct by defendants was *the* proximate cause, i.e., the one intervening and most

[2] The dissent questions the analytical distinction between "a" proximate cause and "the" proximate cause. We again refer the dissent to *Robinson*, in which our Supreme Court applied the distinction to analyze the governmental immunity statute. 462 Mich at 458-461. To reiterate, the wrongful-conduct doctrine precludes a plaintiff from recovering unless the undisputed facts establish a break in the causal link between the wrongful conduct and the plaintiff's injury. For an example of the causal break, see *Cervantes v Farm Bureau Ins Co of Mich*, 272 Mich App 410, 417; 726 NW2d 73 (2006) (plaintiff's status as an illegal resident of the United States did not preclude recovery of no-fault benefits).

direct cause of plaintiff's injuries, the statute does not apply to plaintiff's claim. Here, the record contains no such evidence, and the statute does not apply to this case.[3]

Affirmed.[4]

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

[3] According to the dissent, MCL 600.2917(1) creates a cause of action for shoplifters against retail loss enforcement officers. We disagree. The statute neither creates nor limits the type of action a shoplifter may assert. Rather, the statute describes the burden of proof for obtaining aggravated damages. *Mosley v Federals Dept Stores, Inc*, 85 Mich App 333, 337-338; 271 NW2d 224 (1978); see generally *Montgomery v Groulx*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2006 (Docket No. 263397, unpub op p 4).

[4] While not entirely new, the dissent's comparison of the wrongful-conduct doctrine and the tort reform statutes is certainly creative. Creativity, however, has its limits. When a legal theory was not raised in the trial court, or in the appellate briefs, or at oral argument, the application of that theory may saddle the parties or the judiciary with unintended consequences. We need not speculate here as to whether the dissent's theory would require abandonment of other legal doctrines such as the open and obvious rule or the common work area doctrine. The development of the dissent's theory must await full briefing in another case.