

STATE OF MICHIGAN  
IN THE SUPREME COURT

LEWIS MATTHEWS, III AND  
DEBORAH MATTHEWS,

Supreme Court Case No. 130912

Plaintiffs-Appellees,

Court of Appeals No. 251333  
Lower Case No. 97-717377-NF

v

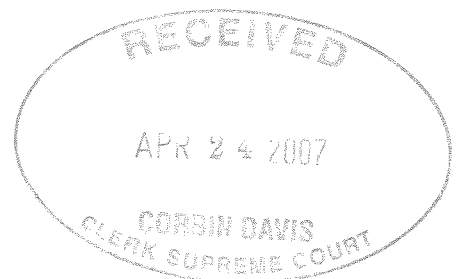
REPUBLIC WESTERN INSURANCE CO.,

Defendant-Appellant.

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**REPUBLIC WESTERN INSURANCE COMPANY'S**  
**REPLY BRIEF ON APPEAL**

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## I. INTRODUCTION

The rule that governs this appeal is both narrow and straightforward: When, as here, a plaintiff's only basis for claiming Michigan no-fault benefits is the aggravated, criminal act of driving on a suspended license, the plaintiff's claim is barred by the wrongful-conduct rule. Here, Mr. Matthews was not an insured under the subject policy, or the spouse of an insured, or a relative domiciled with one. Instead, his putative claim for benefits is based entirely on his criminal act of choosing to drive on a license that had been suspended at least 28 times, when he had already been cited at least 16 times for committing the same crime.

The wrongful conduct rule applies here. All of the rule's requirements are met: Mr. Matthews' conduct was sufficiently wrongful, because it rendered him eligible for a year's imprisonment; his conduct was a proximate cause of his injuries, because those injuries were the actual and foreseeable result of his conduct; and the culpability of Republic Western Insurance Company ("RWI") did not exceed that of Mr. Matthews with respect to his injuries—because RWI's conduct was not culpable at all. Moreover, the rule's purposes are profoundly implicated by Plaintiffs' claims. Allowing Plaintiffs to recover would only encourage the kind of criminal conduct that Mr. Matthews engaged in here, thereby undermining the statute that proscribes that conduct. And the public would view a legal system that permitted such a recovery as a mockery of justice.

Plaintiffs, as shown below, refute none of these points in their brief to this Court.

## II. ARGUMENT

### A. Mr. Matthews' Conduct Was Sufficient To Trigger Application Of The Rule

#### 1. *Mr. Matthews' Conduct Was Sufficiently Wrongful*

As RWI demonstrated in its Opening Brief, Mr. Matthews' decision to drive on his suspended license yet again—conduct for which he was eligible for a year's imprisonment under MCL § 257.904(3)—was sufficiently wrongful to trigger application of Michigan's wrongful-conduct rule. Nothing in Plaintiffs' Brief refutes this point.

Plaintiffs assert that Michigan's Motor Vehicle Code is a "safety statute," and that "any and all violations under the Code are unequivocally exempted from the Wrongful Conduct Rule." Plaintiffs' Brief at 16. Plaintiffs therefore conclude that Mr. Matthews' conduct in driving on a license that had been suspended at least 28 times—which, of course, constituted a violation of the Motor Vehicle Code—is "exempted" from this rule.

This Court's precedent shows otherwise. As an initial matter, as RWI again demonstrated in its Opening Brief at 12 n 2, the so-called "safety statute exception" to the wrongful-conduct rule is not, in fact, an independent exception to rule. Instead, a careful reading of this Court's opinion in *Orzel v Scott Drug Co.*, 449 Mich 550; 537 NW2d 208 (1995), reveals that this "exception" merely describes certain cases in which "the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule." *Id* at 561. Thus, in other words, this "exception" applies where the conduct at issue does not meet the rule's requirements in the first place—which is to say that it is not really an exception at all.

The determination whether a plaintiff violated a "safety statute," therefore, does not have talismanic significance in the wrongful-conduct analysis. Instead, the relevant question is simply

whether the plaintiff's conduct is sufficiently wrongful to implicate the rule's purposes, thereby warranting application of the rule. And for that determination, *Orzel* lays down a clear test: "the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." *Id.*

That test is met here. A statutory provision whose violations are misdemeanors is considered "to be a penal statute." *Longstreth v Gensel*, 423 Mich 675, 692; 377 NW2d 804 (1985). That is true even if the provision is not "part of the Penal Code[.]" *Id* at 692 n 9. And that is specifically true of misdemeanor provisions found within the Motor Vehicle Code. *See id* ("That penal statute was part of the Motor Vehicle Code").

Here, as noted above, Mr. Matthews' conduct rendered him eligible for a year's imprisonment. A provision whose violation may land the offender in prison for a year is a "penal statute." *Id.* That is particularly true when the plaintiff's "illegal conduct is even more egregious because he violated these provisions not just once, but repeatedly." *Id* at 563. Mr. Matthews' conduct, therefore, is easily wrongful enough to warrant application of the rule here.

2. *The No-Fault Act Does Not Create A Statutory Exception To The Wrongful-Conduct Rule As Applied To Plaintiffs Here*

Plaintiffs are likewise incorrect to assert that the Michigan No-Fault Act creates a statutory exception to the wrongful-conduct rule as applied to Mr. Matthews' conduct. The question here is "whether the Legislature *clearly intended* persons similarly situated as the plaintiff to be entitled to seek recovery." *Orzel*, 449 Mich at 570 (emphasis added). This question, *Orzel* makes clear, is answered at a very high level of specificity. In *Orzel*, the Court determined that there was "no evidence to suggest that the Legislature intended to confer special protection on persons like John Orzel, who *repeatedly and fraudulently* engage in the illicit use of drugs." *Id* at 574 (emphasis added). Similarly, in this case, the question is whether the

Legislature “clearly intended” to afford no-fault benefits to person like Mr. Matthews, who repeatedly and egregiously violated the proscription against driving on a suspended license, and whose claim for benefits is based entirely on such a violation.

This question is a very narrow one, given its highly specific nature. And the answer to it is plain. There is no evidence that the Legislature intended—much less “clearly intended,” *Orzel*, 449 Mich at 570—to afford no-fault benefits to a person whose only claim to them is based upon a repeated violation of MCL § 257.904. It is important to be clear on this point. Matthews himself was not a named insured under the subject policy, or a spouse or relative or an insured. Instead, his only claim to such benefits is his criminal act in choosing to drive on his suspended license yet again. That, as RWI demonstrated in its Opening Brief, is not the “fault” referred to in MCL § 500.3105(1). *See id* (benefits are due “for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . without regard to fault”). The “fault” referred to by the statute instead encompasses the risks of “accidental bodily injury” inherent in driving a motor vehicle, including the risk of a driver’s own negligence. But it does not extend to criminal conduct by which a recidivist outside of the no-fault system seeks to leverage his way inside it. That is a different kind of “fault” altogether.

This conclusion is not altered by the fact the MCL § 500.3113 expressly bars certain enumerated persons from claiming no-fault benefits. Plaintiffs assert that this enumeration implies that persons *not* included in MCL § 500.3113 may recover such benefits. But “statutes are not presumed to make any alteration of the common law, further or otherwise than the act expressly declares.” *Garwols v Bankers Trust Co*, 251 Mich 420, 425; 232 NW 239 (1930); *see also, e.g., Koenig v City of South Haven*, 460 Mich 667, 677 n 3; 597 NW2d 99 (1999) (“statutes in derogation of the common law must be strictly construed, and will not be extended by

implication to abrogate established rules of common law”) (emphasis added; brackets and internal quotation marks omitted). And the enumeration in §500.3113 does not purport to be exclusive. Moreover, “[i]n the enactment of this law it was unnecessary for the Legislature to contemplate that an emergency such as is here presented should arise concerning which provision should be made.” *Garwols*, 251 Mich at 427. That the Legislature did not catalogue every conceivable type of wrongful conduct that could preclude an entitlement of no-fault benefits, therefore, does not mean that § 500.3113 affords recovery to every wrongful actor not enumerated in that section.

The *Orzel* Court indeed rejected an argument virtually identical to the one Plaintiffs make here. The Court noted that “[t]he plaintiffs regard as significant the fact that the Legislature did not explicitly exclude illicit drug users from those entitled to restitution under the amendments” to a statute at issue there. 449 Mich at 576 n 29. The Court then observed that “[t]he Legislature is presumed to know the recognized rules of the common law in effect when it drafts statutes.” *Id.* And the Court therefore held that, “[a]bsent an indication that the Legislature sought to abrogate the common law when it drafted the amendments, the amendments will be read in light of the previously established wrongful-conduct rule[.]” *Id.* The same reasoning applies here, with the result that Plaintiffs’ claim for benefits is barred by the wrongful-conduct rule.

B. Mr. Matthews’ Conduct Had A Sufficient Causal Connection To His Injuries

In its Opening Brief, RWI demonstrated that Mr. Matthews’ aggravated, criminal conduct in driving on his suspended license was a but-for cause of his injuries. Opening Brief at 15-17. RWI further demonstrated that those injuries were a “foreseeable consequence[.]” of his wrongful conduct, *Orzel*, 449 Mich at 568, particularly given the nature of his driving record. *See also Matthews v. Republic Western Insurance Co.*, 465 Mich 853, 853; 629 NW2d 926 (2001)

(Markman, J., dissenting) (it should “be presumed foreseeable that an individual, whose license has been suspended for the reasons here, is not only more likely to become involved in an accident injuring another, but is also more likely to become involved in an accident injuring himself”). The reality is that bad things happen when a driver with a record like that of Mr. Matthews chooses to drive yet again on his suspended license; and that is precisely what happened here.

Nothing in Plaintiffs’ Brief refutes this point either. Plaintiffs assert that Mr. “Matthews’ unlicensed status in no way contributed to either the accident or to Matthews’ claims or serious injuries[.]” Plaintiffs’ Brief at 23. But this assertion reflects the same mistake that the Court of Appeals made in the first appeal in this case. Namely, the wrongful conduct at issue is not merely Mr. Matthews’ “status” as a driver whose license had been suspended; rather, it was his decision *to drive* yet again on that suspended license. And because of the wrongful nature of *that* conduct, the foreseeable nature of the injuries that followed, and the direct causal connection between the conduct and the injuries, the wrongful-conduct rule’s causation requirement is met in this case.

The Court of Appeals’ decision in *Cervantes v Farm Bureau General Insurance Co. of Michigan*, 272 Mich App 410; 726 NW2d 73 (2007), is not to the contrary. The plaintiffs in *Cervantes* were illegal aliens who sought recovery of no-fault benefits after being injured in a car accident. The Court held that the plaintiffs’ conduct in entering the country illegally did not bar their claim. *Id* at 417. But rather than support Plaintiffs’ claim for benefits here, *Cervantes* is a foil for it. In *Cervantes*, the plaintiffs’ act of entering the country illegally had ended long before the subject accident, and was therefore “such a remote cause” of their injuries that the wrongful-conduct rule did not apply. *Id*. Here, in contrast, Mr. Matthews was actively engaged in the

wrongful conduct of driving the subject vehicle at the time of the accident. The causal connection between his wrongful conduct and his injuries is therefore much more direct than was the connection between the conduct and injuries at issue in *Cervantes*. The cases are easily distinguished on this ground. See *Orzel*, 449 Mich at 566 (distinguishing *Manning v Bishop of Marquette*, 345 Mich 130; 76 NW2d 75 (1956), because “Mrs. Manning’s participation in the illegal bingo game had ended by the time she fell into the hole”).

C. The “Greater Culpability” Exception To The Wrongful Conduct Rule Does Not Apply Here

Under the “greater-culpability” exception to the wrongful-conduct rule, “a plaintiff may still seek recovery against the defendant if *the defendant’s* culpability is greater than the plaintiff’s culpability for the injuries[.]” *Orzel*, 449 Mich at 569 (emphasis added). Plaintiffs contend this exception applies here because, they say, the other driver involved in the subject accident, Mr. Wyant, was more responsible for the accident than Mr. Matthews was.

The problem with this contention is that Mr. Wyant is not “the defendant[.]” *id*, in this case—RWI is. And *Orzel* makes plain that “the defendant” whose culpability is compared to that of the plaintiff is not some third party to the litigation, but rather *the defendant from whom the plaintiff seeks recovery*. Here, that defendant is RWI. Mr. Wyant’s culpability is therefore irrelevant to whether Plaintiffs can assert a claim against RWI.

Impliedly recognizing this fact, Plaintiffs assert—without any support whatever—that RWI somehow “stands in the shoes” of Mr. Wyant for purposes of this analysis. Plaintiffs’ Brief at 28. This assertion is not even colorable. RWI was not Mr. Wyant’s insurer, and otherwise had no agency or contractual relationship with him. There is no basis, therefore, to attribute Mr. Wyant’s culpability to RWI.

RWI's refusal to pay Plaintiffs upon demand is not conduct sufficiently "culpable" to outweigh the culpability of Mr. Matthews. RWI's conduct in this regard was not "culpable" at all. Were it otherwise, the wrongful-conduct rule would not apply in cases where the defendant refused to pay the plaintiff upon demand—which is to say, it would not apply in any litigated cases at all.

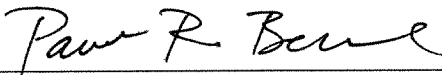
This case illustrates that the wrongful-conduct rule strikes an appropriate balance. Under *Orzel*, the rule distinguishes between defendants for purposes of the greater-culpability exception. Claims against an innocent defendant are barred, but those against a highly culpable defendant might not be, even if they arise out of the same occurrence. Here, the rule might not have barred Plaintiffs' tort claims against Mr. Wyant; and in fact Plaintiffs recovered a \$1.3 million settlement from him. But the rule most certainly does bar a claim against an innocent defendant—RWI—based on Mr. Matthews' own criminal conduct. Plaintiffs therefore cannot obtain a second recovery here.

**III. CONCLUSION**

The judgment below should be reversed, and judgment rendered in favor of RWI.

Respectfully submitted,

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