

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MAJLINDA PREKA THOM and JAMES THOM,
as Co-Personal Representatives of the ESTATE
OF DENIS PREKA, Decedent,

Case No. 20-004100-NO

Hon. Susan L. Hubbard

Plaintiff,

-v-

NICHOLAS MAXMILLIAN REMINGTON,
PAUL ROBERT WIEDMAIER, and
CONNOR RAYMOND GIBARATZ,

Defendants.

OPINION AND ORDER

At a session of said Court held in the Coleman A.
Young Municipal Center, Detroit, Wayne County,
Michigan,
on this: 2/2/2023

PRESENT: Hon. Susan Hubbard
Circuit Judge

This civil matter is before the Court on a motion for summary disposition filed by Defendant Paul Robert Wiedmaier and a motion for summary disposition filed by Defendant Connor Raymond Gibaratz. Defendant Nicholas Maximillian Remington has also filed concurrences in both Wiedmaier's motion and Gibaratz's motions. For the reasons stated below, the Court denies the motions.

I. BACKGROUND

Plaintiffs, Majlinda Preka Thorn and James Thom, are co-personal representatives of the Estate of Denis Preka, who is deceased. They filed a complaint against Nicholas Maxmillian

Remington, Paul Robert Wiedmaier, and Connor Raymond Gibaratz alleging the wrongful death of Denis Preka. Preka and Defendants were senior students at University of Detroit Mercy at the time of the incidents alleged in the complaint.

Plaintiffs amended their complaint on March 17, 2020, which included six counts: (1) assault and battery against Remington; (2) intentional infliction of emotional distress against all three defendants; (3) negligence, gross negligence, willful and wanton misconduct against all three defendants; (4) fraud against all three defendants; (5) silent fraud against all three defendants; and (6) civil conspiracy against all three defendants.

The amended complaint arises out of Preka's death due to a drug overdose. The undisputed facts of the case are that Preka went with Wiedmaier to Wiedmaier's family home in Novi, Michigan on November 18, 2019 to study for a college examination, which was scheduled for the following morning. Wiedmaier's parents were out of town at the time.

Evidence offered by the parties includes depositions of the three defendants, various photographs, Snap Chat videos, a police report, and two affidavits executed by friends of Defendant Gibaratz.

Preka asked Wiedmaier if he had any Adderall/Ritalin to keep him awake for studying for the examination. Preka believed that Wiedmaier had a prescription for the drug. However, Wiedmaier did not have any Adderall/Ritalin at that time.

Later the same evening around 10 p.m., Defendants Remington and Gibaratz arrived at Wiedmaier's home. Wiedmaier told them that Preka had requested Adderall/Ritalin. Plaintiffs allege that the three defendants agreed to give Preka MDMA, which is also known as ecstasy or molly. Remington allegedly then gave Preka a pill from a plastic bag and told Preka that the pill would help him study. Thereafter, Preka began to act strangely by mumbling and bumping into

walls. Remington then began to record Preka's response to the drug and shared the recording on Snap Chat.

According to Wiedmaier, Preka's drug-induced behavior continued until sometime between 1:00 and 2:00 a.m. on March 19. At that time, Defendants placed Preka on the floor near the front door of the home. According to Gibaratz, Preka was shaking and sweating profusely. When Preka began to vomit, Defendants propped him up against a gas can and a speaker. They claim they gave him water. A Snap Chat video shows water being "dumped" on his face and Defendants laughing. Wiedmaier stated that Preka began shaking and moving back and forth at approximately 3:00 a.m. He went upstairs to bed and left Gibaratz to watch over Preka. At 9:00 a.m., Wiedmaier came back downstairs and noticed that Preka was unresponsive and seemed not to be breathing. He then called 911. Gibaratz left before the emergency services arrived.

When police arrived, they determined that Preka was dead. During the police investigation of Preka's death, the police reviewed several Snap Chat videos taken by Remington the night Preka died. An autopsy and toxicology testing were performed on Preka. The autopsy showed that he died due to drug intoxication with severe edema and congestion of the brain and lungs. MDMA and MDA were specifically found in Preka's toxicology screen.

Now before the Court are motions for summary disposition filed by Defendants Wiedmaier and Gibaratz as well as Remington's concurrence in both motions.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

Defendants base their motions on MCR 2.116(C)(10).¹ In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v*

¹ Defendant Remington bases his concurrences on MCR 2.116(C)(7), (C)(8), and (C)(10).

Detroit Bd of Ed, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817(1999). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “Courts are liberal in finding a factual dispute sufficient to withstand summary disposition.” *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018), quoting *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

The moving party has the initial burden of supporting its position through documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party “. . . may not rest on the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116 (G)(4). If the opposing party fails to do so, the motion for summary disposition is properly granted. *Id.*; *Quinto, supra* at 363. Finally, a “reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.” *Maiden, supra* at 121.

III. DISCUSSION

In support of his motion, Wiedmaier argues that Plaintiffs’ claims are barred by the “wrongful conduct rule.” He also contends that Plaintiffs have not identified any illegal conduct on the part of Wiedmaier. In response, Plaintiffs assert that summary disposition is premature because discovery is incomplete on the disputed issues in this case.

Under Michigan’s “wrongful conduct rule,” a plaintiff’s claim is barred when the action is based on illegal conduct. *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005). “To implicate the wrongful conduct rule, the plaintiff’s conduct must be prohibited, or almost entirely prohibited, under a penal or criminal statute. It is also necessary that the plaintiff’s injury was suffered while and as a proximate result of committing an illegal act.” Mich. Pl. & Pr. § 6:3 (2d ed.)[Footnotes omitted].

“This maxim, known as the wrongful-conduct rule, has its exceptions.” There must “be a sufficient causal nexus between the plaintiff’s illegal conduct and the plaintiff’s asserted damages.” [Citations omitted] *Poch v Anderson*, 229 Mich App 40, 44; 580 NW2d 456 (1998). As it relates to the case at bar, “[a]nother possible exception to the wrongful conduct rule is where both the plaintiff and the defendant have engaged in illegal conduct, but the defendant’s culpability for the damages is greater than the plaintiff’s culpability. This may occur, for example, where the plaintiff has acted ‘under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age.’” *Id*, quoting *Orzel v Scott Drug Co*, 449 Mich 550, 570; 537 NW2d 208 (1995).

Wiedmaier claims that Preka’s desire to ingest Adderall/Ritalin was the wrongful conduct barring Plaintiffs’ recovery. However, as Plaintiffs suggest, requesting an illegal drug is not wrongful in itself. Providing an illegal drug to him is, however, illegal and wrongful. Wiedmaier contends that Preka violated the Public Health Code, specifically MCL 333.7403, because Adderall/Ritalin is a controlled substance under MCL 333.7212(1)(c), citing *People v Xun Wang*, 505 Mich 239, 246, fn 4; 952 NW2d 334 (2020). However, MCL 333.7403(1) provides in relevant part:

A person shall not knowingly or intentionally possess a controlled substance, ... unless the controlled substance, ... was obtained directly from, or pursuant to, a valid prescription ...

[Emphasis added].

Thus, to be in violation of the statute, it must be established that the person knowingly and intentionally possessed the substance without a valid prescription. There is clearly a question of material fact as to whether Preka knowingly ingested MDMA. Nevertheless, even assuming asking for Adderall/Ritalin is wrongful, there is a question of whether Defendants' culpability for damages, based on providing to Preka MDMA, is greater than Preka's culpability for voluntarily ingesting an illegal drug he thought was Adderall/Ritalin.

Wiedmaier contends that he did not provide the drug to Preka and that Plaintiffs admit that Remington alone was the one who provided the drug to Preka. Depositions were taken of all three defendants. All three defendants invoked the Fifth Amendment in response to any questions involving illegal drugs and drug usage. They also invoked the Fifth Amendment when questioned about the events that occurred on the night and morning when Preka died. Hence, no evidence or testimony was elicited from any of the defendants regarding the events leading up to Preka's death.

As to Defendants' invocation of the Fifth Amendment, an individual may decline to answer questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *Huntington Nat'l Bank v. Ristich*, 292 Mich App 376, 384; 808 NW2d 511 (2011). An individual may invoke the Fifth Amendment even if criminal proceedings have not been instituted or planned. *Id.* The privilege against self-incrimination may not be used to deprive a plaintiff of his constitutional right to his day in court. *Id.* "However, a party to a civil action who invokes his Fifth Amendment privilege does so to the peril of his claim." *Allen v Michigan Basic Prop Ins Co*, 249 Mich App 66, 74; 640 NW2d 903 (2001). "[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause." *Phillips*

v Deihm, 213 Mich App 389, 400; 541 NW2d 566 (1995)[Citation omitted] See also *Bank of Am, NA v Fid Nat Title Ins Co*, 316 Mich App 480, 511; 892 NW2d 467 (2016) (In a civil action, a party's invocation of the Fifth Amendment privilege against compulsory self-incrimination gives rise to a legitimate inference that the party was engaged in criminal activity.).

Because the Fifth Amendment “does not forbid adverse inferences against” a party to a civil action, the Court may find that a genuine issue of material fact exists as to liability for the claimed damages. Therefore, Wiedmaier's motion is denied. The Court also finds that the “wrongful conduct rule” does not bar the instant action against Wiedmaier.

As to Plaintiffs' contention that summary disposition is premature, discovery closed on July 16, 2021. The parties have submitted numerous exhibits, taken depositions, and offered affidavits. In the Court's view, there is sufficient evidence upon which the Court may decide the instant motions. Further discovery does not stand “a fair chance of uncovering factual support for” furthering Plaintiffs' position. *Dept of Soc Services v Aetna Cas & Sur Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). Here, there is no reasonable chance that Defendants' decisions to invoke of their Fifth Amendment privileges against self-incrimination will change with further discovery. Hence, Plaintiffs' assertion that the motions are premature is without merit.

Regarding Gibaratz's motion, he too asserts that Plaintiffs' claim for damages is precluded by the “wrongful conduct rule.” As noted above, Gibaratz also invoked the Fifth Amendment privilege against self-incrimination. *Phillips, supra*. The Court, therefore, may infer that a genuine issue of material fact exists as to liability against Gibaratz and that Gibaratz may be more culpable than Preka. *Poch, supra*.

Gibaratz also contends that he had no duty to render aid at the time of Preka's death. Plaintiffs argue, however, that Gibaratz and Remington were in special relationships with Preka, which imposed a duty upon them to render aid to Preka.

Under Michigan law, a “duty” may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another and the existence of such a duty is a question of law for the court.” *Dumka v Quaderer*, 151 Mich App 68, 72; 390 NW2d 200 (1986). The duty to render aid to a person in peril is explained in *Farwell v Keaton*, 396 Mich 290–291, 240 NW2d 217 (1976) as follows:

Courts have been slow to recognize a duty to render aid to a person in peril. Where such a duty has been found, it has been predicated upon the existence of a special relationship between the parties; in such a case, if defendant knew or should have known of the other person's peril, he is required to render reasonable care under all the circumstances.

[Footnotes omitted][Emphasis added].

Regarding a general duty to aid a person in peril, “there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse.” *Id* at 287.

In *Farwell*, the court also stated:

Farwell and Siegrist were companions on a social venture. Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself. Siegrist knew or should have known when he left Farwell, who was badly beaten and unconscious, in the back seat of his car that no one would find him before morning. Under these circumstances, to say that Siegrist had no duty to obtain medical assistance or at least to notify someone of Farwell's condition and whereabouts would be ‘shocking to humanitarian considerations’ and fly in the face of ‘the commonly accepted code of social conduct.’

Id at 291-292 [Footnotes omitted][Emphasis added].

As the *Dumka* court stated:

Implicit in a social venture is the understanding that one will render assistance to the other when he is in peril if one can do so without endangering himself. In *Farwell* the defendant and the injured person were social companions. This special relationship spawned a duty to render aid.”

Dumka, supra at 73 [Citation omitted].

Here, based on their friendships and social nature of their relationships, a special relationship existed between Preka and all three defendants, which “spawned a duty to render aid.” *Id.* Rendering aid to Preka would not have endangered any of the defendants. *Id.* Finally, Gibaratz “knew or should have known” that Preka was suffering when Preka vomited, shook and sweated profusely, and was incoherent and unresponsive. Moreover, Gibaratz recognized Preka’s distress when he propped Preka on a gas can and speaker. *Farwell, supra*. Therefore, because special relationships existed between Preka and Defendants at the time of the incidents surrounding Preka’s death, Gibaratz and the other two defendants had an affirmative duty to render aid to Preka. Failure to do so flies “in the face of ‘the commonly accepted code of social conduct.’” *Id.* Moreover, by leaving Preka to struggle, Defendants breached their duty to avoid affirmative acts that worsened Preka’s condition. *Farwell, supra* at 287. Thus, summary disposition on the basis that there was no duty to render aid to Preka is inappropriate under the present facts and circumstances before this Court.

IV. CONCLUSION

Because the Fifth Amendment “does not forbid adverse inferences against” a party to a civil action, the Court finds that a genuine issue of material fact exists as to all three defendants’ liability for the claimed damages. MCR 2.116(C)(10). The Court also finds that the “wrongful conduct rule” does not bar the instant action against Defendants. In addition, there is a question of material fact as to whether Defendants’ culpability is greater than Preka’s. *Poch, supra*. Finally, given the “special relationship” between Preka and the three defendants, Defendants had a duty to render aid to Preka. Accordingly, the motions for summary disposition filed by Wiedmaier and Gibaratz are denied.

On the basis of the foregoing Opinion,

IT IS ORDERED that the motion for summary disposition filed by Defendant Paul Robert Wiedmaier is hereby **DENIED**;

IT IS FURTHER ORDERED that the motion for summary disposition filed by Defendant Connor Raymond Gibaratz is hereby **DENIED**;

IT IS FURTHER ORDERED that this **DOES NOT** resolve the last pending claim and **DOES NOT CLOSE** the case.

/s/ Susan Hubbard 2/2/2023

Circuit Judge