[J-38-2021] [MO: Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DALE E. ALBERT INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF CODY M. ALBERT, DECEASED,	:	No. 5 MAP 2021
Appellant	:	Appeal from the Order of the Superior Court dated June 30, 2020 at No. 853 MDA 2019 Affirming the Order of the Lackawanna County Court of Common Pleas, Civil Division, dated April 25, 2019 at 2016-5903.
v.	:	
SHEELEY'S DRUG STORE, INC. AND ZACHARY ROSS,	:	ARGUED: May 19, 2021
Appellees	:	

DISSENTING OPINION

JUSTICE DOUGHERTY **DECIDED: December 22, 2021**

The issue presented is whether the common law wrongful conduct rule applies to preclude a tort recovery under the particular facts of this case. The rule generally bars recovery by a plaintiff who was injured while engaged in illegal conduct.[1] The majority

[1] Some jurisdictions refer to the wrongful conduct rule as the *in pari delicto* doctrine, among other names. *See, e.g.*, James W. Sprague, *The Fault in in Pari Delicto: How Illegality Bars and Moral Culpability Collide with Tort Law*, 10 WAKE FOREST L. REV. ONLINE 107, 111 (2020) ("While the definition of *in pari delicto* has remained relatively consistent in contract law . . ., its definitions and applications in tort are inconsistent and confused.") (footnotes omitted); Brian A. Blum, *Equity's Leaded Feet in a Contest of Scoundrels: The Assertion of the* in Pari Delicto *Defense Against a Lawbreaking Plaintiff and Innocent Successors*, 44 HOFSTRA L. REV. 781, 795 (2016) ("In the context of tort law, the *ex turpi causa* principle is manifested in the wrongful conduct rule (also known as the 'unlawful acts' or 'unlawful conduct' rule, or the 'outlaw' doctrine)[.]") (footnotes omitted). But as the majority cogently observes, the "in equal fault" concept embodied by the *in pari delicto* doctrine "seems most apt when the plaintiff and the defendant commit a crime together — as, for example, when two parties enter into an illegal contract." Majority Opinion at 4

applies the rule to the following facts:[2] Appellee Sheeley's Drug Store ("Sheeley's") released a Fentanyl prescription intended for April Kravchenko, a cancer patient, to her son, Zachary Ross, even though the pharmacy knew Ross was a drug addict and Kravchenko's prescription was listed in Sheeley's computer system with an express restriction against releasing it "to anyone but April." Deposition of Donato Iannielli, 9/12/2017 at 55. In addition, the prescription bag given by Sheeley's to Ross clearly stated "[d]o not give to son." Deposition of Zachary Ross, 7/19/2018 at 24. Appellant's decedent Cody Albert, a self-described drug addict, ingested some of Kravchenko's Fentanyl patch at Ross's house later that night, in violation of 35 P.S. §780-113(a)(16),[3] and died. According to the majority, this illegal conduct by decedent precludes tort recovery against Sheeley's by his estate and heirs. Because I do not believe the policies underlying the wrongful conduct rule are served by extending it to the present facts, and, moreover, because I question the rule's continued viability in the tort law arena given Pennsylvania's adoption of comparative negligence principles, I respectfully dissent.

A.

I begin by highlighting a critical difference between the majority's holding and that of the Superior Court panel below. In affirming the trial court's grant of summary judgment to Sheeley's, the panel reasoned as follows: "By participating in the scheme to obtain the Fentanyl, and by illegally possessing the Fentanyl at Ross's house in violation of 35 P.S.

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n.2. Since that is not the situation presently before us, I prefer the phrase "wrongful conduct rule."

[2] In this appeal from the grant of summary judgment, we view the facts in the light most favorable to appellant as the non-moving party. *E.g.*, *Bourgeois v. Snow Time, Inc.*, 242 A.3d 637, 650 (Pa. 2020).

[3] Section 780-113(a)(16) prohibits "[k]nowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act . . . unless the substance was obtained directly from, or pursuant to, a valid prescription order[.]" 35 P.S. §780-113(a)(16).

§780-113(a)(16), the [d]ecedent was an active, voluntary participant in the wrongful conduct or transaction(s) for which [a]ppellant seeks redress and bears substantially equal or greater responsibility for the underlying illegality as compared to Sheeley's." *Albert v. Sheeley's Drug Store, Inc*., 234 A.3d 820, 824 (Pa. Super. 2020) (internal quotations, citation, and brackets omitted). In other words, part of the panel's rationale for applying the wrongful conduct rule was its apparent belief decedent was a "participant" in the "scheme" or "transaction" to obtain the Fentanyl that ultimately contributed to his death. *Id*.

Significantly, the majority does not endorse this rationale. *See* Majority Opinion at 8 ("[I]t remains somewhat open to interpretation whether [decedent] knew [Ross] had deceived [Sheeley's] into releasing Kravchenko's [F]entanyl prescription."). The hesitation is understandable. But I would go further and explicitly reject the Superior Court's assessment in this regard, because the record plainly fails to support it. The panel recounted the evidence as follows:

> Decedent had a history of abusing drugs together with Ross. On the day of [d]ecedent's death, Ross telephoned Sheeley's and ordered Fentanyl by pretending to be his mother, who had a prescription for Fentanyl due to her bout with multiple myeloma. Decedent and Ross communicated about Ross's need to get to the pharmacy by 9:00 to obtain this prescription. Decedent then drove Ross to Sheeley's and waited in the car while Ross obtained the Fentanyl inside the pharmacy.

Albert, 234 A.3d at 824. The panel then abruptly concluded, "[t]his evidence demonstrates that [d]ecedent took part in Ross's scheme to obtain this deadly controlled substance." *Id*. I cannot agree.

The Superior Court's conclusion decedent was an active participant in the scheme to fraudulently procure Kravchenko's Fentanyl prescription, or that he was even aware of what Ross had done, is untenable on this record and given the applicable standards. As appellant forcefully argues, "[t]here is not a single citation from the record [demonstrating]

that [d]ecedent knew Ross was procuring the prescription illegally." Appellant's Brief at 10. Rather, appellant correctly observes, the panel appears to have taken an inferential leap by presuming that because decedent and Ross had previously taken drugs together and decedent agreed to drive Ross to the pharmacy that day, he must have been aware of Ross's criminal plan. The problem with this theory, however, is that it draws "the exact opposite inferences" that are permissible at the summary judgment stage. *Id*. *See, e.g.*, *Bourgeois*, 242 A.3d at 650 ("trial court must evaluate all the facts and make reasonable inferences in a light most favorable to the non-moving party" and "resolve any doubts as to the existence of a genuine issue of material fact against the moving party"). Thus, concerning the first issue presented, I would hold the Superior Court undoubtedly erred to the extent it concluded there is "evidence in the record that the decedent participated in the scheme to procure the prescription drugs illegally." *Albert v. Sheeley's Drug Store, Inc.*, 243 A.3d 1293 (Pa. 2020) (*per curiam*).

B.

In the absence of any evidence showing decedent's involvement in or knowledge of Ross's plot, the majority is forced to look elsewhere for some action on decedent's part that might trigger the wrongful conduct rule. To that end, the majority shifts its focus to events occurring several hours after Sheeley's alleged negligence had already occurred, and settles on the fact decedent ingested the Fentanyl, which was not prescribed to him, at some later point in the evening. *See* Majority Opinion at 9, *citing* Appellant's Brief at 19, 23-25. The majority then concludes: "[T]he trial court correctly applied the [wrongful conduct rule] because it is undisputed [decedent] committed a crime that directly caused his death when he possessed (and then ingested) a controlled substance that was not prescribed to him." *Id*. at 8, *citing* 35 P.S. §780-113(a)(16). Again, I cannot agree.

"Virtually no courts have suggested that the [wrongful conduct rule] should automatically preclude recovery by every victim whose injury arises out of criminal conduct." Joseph H. King, Jr., *Outlaws and Outliers Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1070 (2002). Yet, that is what the majority's holding essentially does; it declares that any plaintiff who "seeks recovery for injuries caused by his own criminal act" — no matter the degree or seriousness of the illegality — is barred from bringing suit against a putative tortfeasor. Majority Opinion at 12. Even those jurisdictions that have applied the wrongful conduct rule in similar circumstances involving drug users have required far more than the bare fact of the plaintiffs' illegal drug use before invoking the rule. *See* Appellant's Brief at 19-20 (distinguishing cases relied on by Superior Court on the basis that, in those cases, "it was the plaintiff who had an active role in **procuring** the illegal prescriptions") (emphasis added). Similarly, the few cases in this Commonwealth where the court applied the rule also appear to have involved more than just the identification of some illegal conduct by the plaintiff in the abstract; typically, the operative illegality involved a fraudulent or deceitful intent on the plaintiff's part from which he might profit if his civil claims were permitted. *Accord Ritchie v. Summers*, 3 Yeates 531, 538 (Pa. 1803) ("The rule *in pari delicto* is . . . chiefly confined to cases of illicit trade, and transactions running counter to the statute law and general national policy[.]"), *rev'd on other grounds*, 30 Pa. 145 (Pa. 1858). *See, e.g.*, *Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Rsch. Found. v. PricewaterhouseCoopers, LLP*, 989 A.2d 313, 316 (Pa. 2010) (*in pari delicto* defense asserted where plaintiffs, who were officers of corporation, had allegedly engaged in the same fraud at issue in the suit by providing false financial statements to defendants); *Pinter v. James Barker, Inc.*, 116 A. 498, 498 (Pa. 1922) (where "father acquiesced in his minor son's unlawful employment by defendant," he was "*in pari delicto* with the latter"

and could not recover for injuries alleged to have been negligently inflicted upon his son by defendant corporation); *Joyce v. Erie Ins. Exch.*, 74 A.3d 157, 163 (Pa. Super. 2013) (applying *in pari delicto* where plaintiff's "claims in his complaint were based upon payment of insurance proceeds that [he] acquired through his illegal conduct"); *Feld and Sons, Inc., v. Pechner, Dorfman, Wolfee, Rounick & Cabot*, 458 A.2d 545, 548 (Pa. Super. 1983) (where plaintiffs were convicted of perjury, *in pari delicto* precluded multiple civil claims against lawyers who advised plaintiffs to commit the perjury).

But, as discussed above, this case is different. The record here does not support the notion decedent was an active participant in Ross's fraudulent scheme to obtain the Fentanyl — he merely ingested the drugs later and accidentally overdosed. The majority's holding that this type of simple (albeit illegal) drug possession is sufficient to trigger the wrongful conduct rule and forever close the courthouse doors to an overdose victim's heirs, is a breathtaking proposition. It bears repeating that few courts have drawn the type of absolutist line the majority establishes here with respect to criminal conduct, and the results in those cases, like the result here, are as striking as they are unforgiving. *See, e.g.*, *Symone T. v. Lieber*, 613 N.Y.S.2d 404, 406 (N.Y. App. Div. 1994) (approving application of the bar to a medical malpractice claim by a twelve-year-old rape victim who underwent an abortion if it were established that "she willfully submitted to an abortion which she knew to be illegal"); *Zysk v. Zysk*, 404 S.E.2d 721, 722 (Va. 1990) (wife's participation in crime of fornication with her husband shortly before their marriage, during which she contracted herpes, barred her recovery in tort action against husband; "[t]he very illegal act to which the plaintiff consented and in which she participated produced the injuries and damages of which she complains"); *see also Robinson v. City of Detroit*, 613 N.W.2d 307, 314 n.10 (Mich. 2000) (holding there is no duty owed to passengers injured

in a vehicle fleeing a police pursuit if it is ultimately determined that those passengers were themselves also wrongdoers).

The majority candidly acknowledges the "harsh" consequence of its holding. Majority Opinion at 12. For my part, though, I respectfully fail to understand what compels the majority to expand this common law rule so drastically and with such disregard for matters of public policy implicated by the opioid epidemic. *Cf. Official Comm. of Unsecured Creditors*, 989 A.2d at 330 (rule "is subject to appropriate and necessary limits" and "permits matters of public policy to be taken into consideration in determining the defense's availability in any given set of circumstances"). Precedent surely doesn't require it. This Court has never decisively explained how, if at all, the wrongful conduct rule applies in the modern-day negligence setting, *see id.* at 328 n.17, let alone considered a factual scenario remotely like this one. And, as noted, most authority from other jurisdictions that could serve as persuasive guidance on this issue is largely off base because the plaintiffs in those matters engaged in subterfuge to obtain the illegal drugs that caused their harm; other courts have held the exact opposite of today's majority. *See, e.g.*, *Wiest v. Breslaw*, 8 A.D.3d 202, 203 (N.Y. App. Div. 2004) (decedent's unlawful possession and ingestion of ecstasy at nightclub "not the type of offensive conduct that would preclude recovery under the *in pari delicto* doctrine," especially where defendant had, *inter alia*, "countenanc[ed] drug abuse on the premises") (italics added); *Vincent v. Quality Addiction Mgmt., Inc.*, No. 11-C-205, 2013 WL 5372336, at *5 (E.D. Wis. Sept. 24, 2013) ("While the exchange of the methadone for money and other drugs violated state criminal laws, [decedent]'s death was not the intended consequence of the drug transaction . . . [and t]here is no allegation that [he] intended to overdose or to commit suicide by taking the methadone."). Absent factually similar guidance to support its

draconian expansion of the wrongful conduct rule, the majority has nothing left to fall back on but public policy. But that proves even less helpful to the majority's position.

In *Official Comm. of Unsecured Creditors*, *supra*, Justice Saylor, writing for a unanimous Court, astutely observed "the recognition of a common-law *in pari delicto* defense is, in the first instance, a reflection of the judicial implementation of social policy." 989 A.2d at 331. As such, the defense is not "to be woodenly applied and vindicated in any and all instances in which the culpability of the plaintiff can be said to be at least equal to that of the defendant." *Id*. at 330; *see also id*. at 328 ("the just application of the broader maxim and its derivatives are integrally dependent on the setting"); *id*. at 331 n.21 (cautioning against "drawing broader-scale conclusions" from the Court's *in pari delicto* jurisprudence). Instead, "the judicious consideration of competing policies which may be implicated in the extension of the defense to novel settings remains within the appropriate purview of our courts." *Id*. at 331; *see also* Blum, *supra*, at 784 ("the widely-variant factual situations to which it is applied allow courts considerable discretion to apply the rule in a way that best achieves the goals that it is meant to serve").

Bearing these concepts in mind, I cannot support the majority's unwarranted expansion of the wrongful conduct rule, which serves none of the rule's traditional policy aims in this instance. As the majority explains, "[t]he theory underlying this rule is that allowing such suits to proceed to trial would: (1) condone and encourage illegal conduct; (2) allow wrongdoers to receive compensation for, and potentially even profit from, their illegal acts; and (3) lead the public to 'view the legal system as a mockery of justice.'" Majority Opinion at 7, *quoting Orzel v. Scott Drug Co.*, 537 N.W. 2d 208, 213 (Mich. 1995); *see also Official Comm. of Unsecured Creditors*, 989 A.2d at 329 ("*in pari delicto* serves the public interest by relieving courts from lending their offices to mediating disputes

among wrongdoers, as well as by deterring illegal conduct"). Although these justifications are beyond reproach, they lack any persuasive force here.

First, applying the wrongful conduct rule in the present context actually "undercuts the 'condoning and encouraging' argument, as it allows those parties who have acted wrongfully in facilitating the addiction of another to escape liability entirely for the damage they have helped cause[.]" Samuel Fresher, *Opioid Addiction Litigation and the Wrongful Conduct Rule*, 89 U. COLO. L. REV. 1311, 1328 (2018). And that damage is significant: we have recognized that "[o]pioid addiction has reached a crisis level in the United States, and Pennsylvania has not been immune from its effects." *Int. of L.J.B.*, 199 A.3d 868, 870 n.2 (Pa. 2018). In fact, the situation has gravely worsened since we made this observation only three years ago.[4]

Of course, the primary focus of the "condoning and encouraging" justification is on the plaintiff's behavior, and I do not dispute that addicts are known to engage in illegal conduct to support their addiction, as decedent did here. But we should not forget that narcotic addiction is "an illness which may be contracted innocently or involuntarily." *Robinson v. California*, 370 U.S. 660, 667 (1962).[5] For these reasons, I am persuaded that "[t]he neurological status and self-defeating aims of drug-addicted individuals

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[4] *See* Roni Caryn Rabin, *Overdose Deaths Reached Record High as the Pandemic Spread*, THE NEW YORK TIMES, Nov. 17, 2021, available at https://www.nytimes.com/2021/11/17/health/drug-overdoses-fentanyl-deaths.html ("In the 12-month period that ended in April [2021], more than 100,000 Americans died of overdoses . . ., mark[ing] the first time the number of overdose deaths in the United States has exceeded 100,000 a year, more than the toll of car crashes and gun fatalities combined."). Data available at https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.

[5] *See also* U.S. Dep't of Health and Human Services, *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health*, (2016), available at https://addiction.surgeongeneral.gov/executive-summary.pdf (explaining that addiction is a chronic "brain disease that requires medical intervention, not moral judgment").

undermines the application of wrongful conduct defenses in the context of opioid abuse as a means of altering behavior." Fresher, *supra*, at 1328; *see id*. at 1329 (it is clear "drug abusers lack the sophistication and legal knowledge of the medical providers [ ] that share fault for the opioid epidemic[,]" rendering the latter group "more responsive to attempts at behavioral modification than individual plaintiffs").

This case serves as a stark example. Practically speaking, decedent accidentally overdosed, so the only conduct the majority's ruling could conceivably influence would be that of other would-be drug users. But even with respect to that group, I am skeptical they would be deterred from accidentally overdosing on illegal drugs if they knew their heirs' civil claims would be barred should they succumb to their addiction. The reason is simple: most addicts have no intention of overdosing. Even more broadly, if one accepts that addiction is a disease and the illegal conduct that occurred here is at least partially symptomatic of that disorder, it makes little sense to expect our ruling to impact drug users' behavior in any significant way. *Accord* Fresher, *supra*, at 1328-29 ("One may question whether such a rational thought process can be expected from a neurologically compromised plaintiff engaging in such a manifestly self-defeating endeavor[.]"). In short, although the deterrence justification is an indisputably legitimate objective of the rule, it would be irrational to ignore the reality that its impact on those suffering from addiction will be marginal at best.[6]

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[6] Along these lines, I note some jurisdictions recognize a "culpability" exception to the wrongful conduct rule, which permits a plaintiff who has engaged in illegal conduct to "still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries, such as where the plaintiff has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age[.]" *Orzel*, 537 N.W.2d at 217 (internal quotations and citations omitted). This Court appears to have embraced a similar exception. *See Peyton v. Margiotti*, 156 A.2d 865, 868 (Pa. 1959) ("The general doctrine is subject to a qualification or exception . . . that, where the parties are not in equal fault . . ., and where there are elements of public policy more outraged by the conduct of one than the other, then relief in equity may

Turning next to the "profiting wrongdoer" justification, it too is a poor fit when it comes to the type of negligent tort alleged in this case. The rationale makes perfect sense when applied, for example, to a gambler who sues to recover his winnings in an illegal gambling transaction, or where one thief sues another to recover his share of the stolen loot. In those cases it is clear the plaintiffs seek to profit from their own criminal wrongdoing — something the law in this Commonwealth has never tolerated. *See, e.g.*, *Comm. v. Ohio & P.R. Co.*, 1 Grant 329, 354 (Pa. 1856) ("But if profit and advantage . . . are to result to the perpetrator of the fraud, surely, the law is not to be an instrument in his hands to enable him to reap the fruits of his iniquity."). Here, however, neither appellant nor his son sought to "profit" from the illegal overdose in the same way as the gambler and thief from their illegal actions. This is because "[i]n torts cases . . . plaintiffs are not seeking profit, but compensation for losses they have suffered." Sprague, *supra*, at 116 (internal quotations and citation omitted); *see id*. at 115-16 (while the "profiting" rationale "may make sense in contracting or antitrust cases . . . it certainly betrays a misunderstanding about the tenets of tort laws"). Put simply, decedent is not the type of

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be granted to the less guilty."); *Palmer v. Foley*, 157 A. 474, 476 (Pa. 1931) ("Where there are different degrees of guilt as between the parties to the fraudulent or illegal transaction, as when one party acts under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate, the court will grant relief, as an exception to the general rule."); *Thomas v. Shoemaker*, 6 Watts & Serg. 179, 183 (Pa. 1843) ("That money obtained by oppression and by taking advantage of the distresses of others, in violation of laws made for their protection, may be recovered back in an action for money had and received, seems to be well settled; because in such case the parties are not *in pari delicto*.") (emphasis omitted). I believe there is a colorable argument that drug-addicted plaintiffs like decedent are not on equal footing with those in the healthcare industry whose allegedly negligent (or even intentional) actions exacerbate the addict's condition, thereby potentially qualifying for the "culpability exception" to the rule, but appellant has presented no such argument here.

"profiting wrongdoer" the rule historically has been concerned with in this Commonwealth.[7]

The only justification that remains for applying the wrongful conduct rule here is the "public's perception of the legal system." Majority Opinion at 12. At most, however, this factor presents a mixed bag. *See generally* Blum, *supra*, at 788 ("where the parties' guilt is more evenly balanced, the violation of the law is less outrageous, and the public interest in the refusal or denial of relief is more equivocal, the degree to which a particular resolution might advance respect for the law and public policy becomes less clear"). On the one hand, I recognize "some might recoil at the sight of courts granting relief to plaintiffs whose actions contributed so directly to their own harm." Fresher, *supra*, at 1329-30. But others might be equally or more offended by the majority's rule, which seemingly penalizes drug addicts while potentially "relieving bad actors in the healthcare industry of civil liability for their wrongs[.]" *Id*. at 1330. As appellant aptly observes, in light of "the opioid epidemic and knowing what we know about addiction in today's society, addiction is not a question of morality anymore." Appellant's Brief at 24. Given this development, I believe this case presents "elements of public policy more outraged by the conduct of" Sheeley's, which allegedly released someone else's deadly Fentanyl prescription to a known drug addict despite explicit instructions not to do it, than decedent,

[7] Perhaps recognizing appellant does not stand to "profit" in the traditional sense even if his lawsuit against Sheeley's succeeds, the majority subtly but massively broadens the rule's policy aims to also guard against plaintiffs who seek nothing more than "to receive compensation for" injuries caused by a defendant's negligence. Majority Opinion at 7, *citing Orzel*, 537 N.W. 2d at 213. However, the state supreme court from which the majority borrows this language expressly acknowledged that "in Michigan, the principle that one may not profit from his own wrong has been extended to tort actions where plaintiffs seek compensation for injuries resulting from their own illegal activities." *Orzel*, 537 N.W. 2d at 213 n.9; *see id*. (collecting cases). Notably, the majority fails to point to a similar common law development of this principle in this Commonwealth.

whose only crime was accidentally overdosing on the drug in the throes of his own addiction. *Peyton*, 156 A.2d at 868. Indeed, I am reluctant to believe the public would "view the legal system as a mockery of justice" if we permitted appellant's claims to move forward under these circumstances. Majority Opinion at 7 (internal quotations and citation omitted).[8]

I conclude neither precedent nor the policies underlying the wrongful conduct rule — deterring illegal conduct, preventing wrongdoers from profiting from their crimes, and protecting the perception of the courts — carry much weight in this context. Had the evidence demonstrated decedent's involvement in Ross's scheme to procure the release of the Fentanyl prescription, the scales would tip in favor of applying the rule. But that is not the case. Accordingly, I would resolve the second question presented in this appeal by holding the Superior Court erred when it "improperly expand[ed] the doctrine . . . to preclude [appellant]'s recovery" on the sole basis that "[d]ecedent was in possession of a controlled substance that was not his." *Albert v. Sheeley's Drug Store, Inc.*, 243 A.3d 1293 (Pa. 2020) (*per curiam*). As the majority reaches the opposite conclusion, I respectfully dissent.[9]

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[8] In contrast, the majority's holding may invite litigants to advance precisely the kind of moralistic attack against addicts that should be disfavored. This case is a perfect example. In its brief, Sheeley's goes to great lengths to paint decedent as a generally unsavory character not worthy of protection by the legal system. *See* Appellee's Brief at 6 (citing a text message sent a week before decedent's death in which he apologized for being a "drug addict with no money"); *id*. (highlighting three failing grades from decedent's college transcript and asserting he "was struggling in his second semester as a transfer student"); *id*. at 11 (asserting decedent lied to his parents about returning to college); *id*. at 15 (noting decedent had watched "episodes of the infamous television series *Breaking Bad*"). I fear the majority's rule will encourage even more defendants to engage in similarly irrelevant and improper character vilification in the hopes of securing summary judgment.

[9] Although it is academic given the majority's extension of the wrongful conduct rule to any plaintiff who "seeks recovery for injuries caused by his own criminal act[,]" Majority Opinion at 12, I note that, if left to my own devices, I would favor refining the common law

C.

Notwithstanding my dissent for the reasons outlined above, another aspect of this case warrants discussion. Exactly four times in his brief appellant passingly refers to "comparative negligence" to support his two discrete claims of Superior Court error. *See* Appellants Brief at 22 ("The Superior Court, in essence, expanded the doctrine of comparative negligence to . . . bar almost any recovery."); *id*. at 23 ("The Superior Court's analysis sounds like comparative negligence, not *in pari delicto*."); *id.* at 24 ("Here, it seems that the Superior Court is engaged in a comparative negligence analysis which is strictly left for the province of the [j]ury."); *id*. at 25 ("Decedent did ingest the fatal drug, but this is an issue of comparative negligence, not an absolute bar to recovery."). These fleeting references are taken verbatim from appellant's petition for allowance of appeal, *see* PAA, 7/28/2020, at 18, 20-21, which notably lacks a standalone question relative to comparative negligence. Nevertheless, the majority interprets this handful of statements as raising a separate issue, and it then proceeds to decide that purported issue. *See* Majority Opinion at 11 (rejecting any claim that comparative negligence has displaced *in*

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rule and requiring "the question of illegality [to] go beyond the simple determination of whether the transaction violates the law to consider whether that violation should result in the consequence of denial of remedy." Blum, *supra*, at 791. In this regard, I believe "[t]he degree and seriousness of the illegality" should have some bearing on the decision whether to apply the rule, as should the presence or absence of some fraudulent or deceitful intent to profit on the plaintiff's part. *Id*. These limits, taken together, would ensure the wrongful conduct rule is applied only in those appropriate situations where its laudable policy aims would be furthered rather than frustrated. *Cf.* Majority Opinion at 10 n.7 (suggesting my position "offers no clear limiting principle to distinguish drug overdose deaths from other criminal acts that result in death"). So, for example, the rule would not apply here because the illegality was relatively minor (simple drug possession) and there was no fraudulent or deceitful transaction involving the decedent from which he sought to profit. In contrast, the rule would apply in situations where the illegality is more serious or the plaintiff engages in some fraudulent conduct. *See, e.g.*, *Oden v. Pepsi Cola Bottling Co.*, 621 So.2d 953, 955 (Ala. 1993) (where decedent was killed by a vending machine that fell on him while he was stealing drinks from it, his estate's negligence claim was barred by wrongful conduct rule because suit was "a direct result of [decedent]'s knowing and intentional participation in a crime involving moral turpitude").

pari delicto as it applies to torts based on this Court's statement in *dicta* that the doctrine "'retain[s] relevance' in 'cases involving intentional wrongdoing on the part of a plaintiff'"), *quoting Official Comm. of Unsecured Creditors*, 989 A.2d at 329 n.17.

Initially, I conclude this distinct issue, which we did not grant allowance of appeal to consider and which is not fairly subsumed by those questions we did agree to hear, is not properly before us. *See Commonwealth v. Metz*, 633 A.2d 125, 127 n.4 (Pa. 1993) ("on appeal we are limited to the issues as [they are] framed in the petition for allowance of appeal"), *citing, inter alia*, Pa.R.A.P. 1115(a)(3) ("Only the question set forth in the petition [for allowance of appeal], or fairly comprised therein, will ordinarily be considered by the court in the event an appeal is allowed."). Even if it was, I find the majority's brief analysis to be suspect on several fronts.

First, the majority's quotation above from *Official Comm. of Unsecured Creditors* is incomplete. Footnote 17 actually states:

> As PwC develops, ***in pari delicto*** **has also been referenced by courts in the negligence setting, for example, in cases involving personal injury or property damage. In this class of cases at least, however, the comparative negligence and contribution statutes serve to cover much of the ground formerly traveled by reference to the common-law maxim.** *See* 42 Pa.C.S. §7102(a) (prescribing, in such scenarios, "contributory negligence shall not bar a recovery by the plaintiff or his legal representative *where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought*, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff" (emphasis added)); 42 Pa.C.S. §8324(a) ("The right of contribution exists among joint-tortfeasors."). Thus, where these statutes are applicable, it is only in unusual cases involving intentional wrongdoing on the part of a plaintiff in which *in pari delicto* may retain relevance.

989 A.2d at 329 n.17 (bolded emphasis added). The majority emphasizes the second half of the final sentence while failing to mention the rest of the passage. In my view, however, there is obvious tension between the majority's preferred language and the remainder of the paragraph, particularly the bolded part above, which clearly states that

"in the negligence setting . . . in cases involving personal injury . . . the comparative negligence and contribution statues serve to cover much of the ground formerly traveled by reference to the common-law maxim." *Id*. Moreover, the majority omits the word "may" from the sentence it quotes. *Cf. id*. ("it is only in unusual cases involving intentional wrongdoing on the part of a plaintiff in which *in pari delicto* **may** retain relevance") (emphasis added). The use of the word "may" here suggests one of two things: (1) the issue of whether *in pari delicto* retains relevance concerning intentional wrongdoing on the part of a plaintiff remains unsettled; or (2) there are certain situations where a plaintiff's wrongdoing, even if intentional, does not trigger the rule. Either interpretation casts doubt on the majority's position.

Also at odds with the majority is a growing number of courts and commentators that view the wrongful conduct rule as incompatible with contemporary principles of comparative fault. *See, e.g.*, *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cty.*, 773 S.E.2d 627, 635 (Va. 2015) ("[T]his Court finds that our system of comparative negligence offers the most legally sound and well-reasoned approach to dealing with a plaintiff who has engaged in immoral or illegal conduct. We find that in cases where a plaintiff has engaged in allegedly immoral or criminal acts, the jury must consider the nature of those actions, the cause of those actions, and the extent to which such acts contributed to their injuries, for purposes of assessment of comparative fault."); *Dugger v. Arredondo*, 408 S.W.3d 825, 832 (Tex. 2013) ("We find no [ ] indication that the Legislature intended a plaintiff's unlawful conduct to be treated differently from the other common law defenses under the former contributory negligence scheme, or that the Legislature intended it to be an exception to proportionate responsibility. We hold that the unlawful acts doctrine fits within the categories of former common law defenses that are now exclusively controlled by [the] proportionate responsibility scheme."); *Greenwald*

v. Van Handel, 88 A.3d 467, 483-85 (Conn. 2014) (Eveleigh, J., dissenting) (arguing tort law should focus on the defendant's duty of care, not the plaintiff's wrongful conduct, and the wrongful conduct rule undermines comparative negligence principles and resuscitates the older doctrine of contributory negligence, under which the plaintiff was barred from recovery if his negligence contributed to the injury); *Stolicker v. Kohl's Dep't Store, Inc.*, 2012 WL 676391 at *6-7 (Mich. Ct. App. Mar. 1, 2012) (Gleicher, P.J., dissenting) (noting the wrongful conduct rule was abrogated when the legislature abolished contributory negligence in favor of comparative negligence); 1 Dan B. Dobbs, *et al*., *The Law of Torts* §228, p.816 (2011) ("After the adoption of comparative negligence . . . a rule that bars the claim of the immoral plaintiff potentially conflicts with the comparative negligence system of apportionment, which would only reduce damages."); King, *supra*, at 1022 ("[M]any jurisdictions adopting comparative fault have opted for a modified version under which a plaintiff whose fault crosses a specified threshold is completely barred, thus obviating the need to invoke an independent serious misconduct bar to achieve a clean kill of the plaintiff's claim.").

The majority does not address these persuasive insights; it simply claims appellant "misunderstands the relationship between comparative negligence and *in pari delicto*." Majority Opinion at 11. According to the majority, "[c]omparative negligence principles apply whenever a plaintiff is contributorily negligent, while *in pari delicto* applies whenever a plaintiff engages in in criminal conduct that directly causes the harm for which he or she seeks redress." *Id.* (emphasis and footnote omitted). As additional support, the majority asserts "nothing in Pennsylvania's comparative negligence statute suggests that the General Assembly intended to abolish the common law *in pari delicto* defense[.]" *Id*. at 12. I am not convinced.

Regarding the first point, in my respectful view, the majority's "logic seems little more than a stealth version of comparative fault, but with the court in control rather than the jury." King, *supra*, at 1055. As to the latter point, I note that, because appellant did not actually raise this issue, he naturally has not presented the Court with argument pertaining to Pennsylvania's comparative negligence statute, 42 Pa.C.S. §7102(a). But this does not mean there is no viable argument to be made in this regard should the Court agree to consider the issue in an appropriate case. *See, e.g.*, *Dugger*, 408 S.W.3d at 832 (concluding state statutory proportionality scheme "controls over the unlawful acts doctrine" because "the statute indicates the Legislature's desire to compare responsibility for injuries rather than bar recovery, even if the claimant was partly at fault or violated some legal standard"). In any event, as the question of whether Pennsylvania's adoption of comparative negligence principles has displaced the common law wrongful conduct rule is not squarely presented, I would not decide it here.

Justice Donohue joins in the result of this dissenting opinion.