

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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## Intoxication defense is not absolute.

By Lauren Frederick

In *Cole v Henry Ford Health System*, unpublished, the Michigan Court of Appeals affirmed the trial court's decision that an issue of fact remained as to whether Plaintiff (with a claimed .14 to .168 BAL) had an impaired ability to function from intoxication, which would provide Defendant with an absolute defense pursuant to MCL 600.2955(a).

In *Cole*, Plaintiff claimed he injured his ankle after he slipped and fell on black ice on Defendant's premises. Plaintiff was on the premises as a business invitee in the course of his employment to repair an elevator. It was undisputed that Plaintiff had a blood-alcohol level of .14 a few hours after the accident. Defendant moved for summary disposition pursuant to MCR 2.116 (C)(10), asserting that Plaintiff's claims should be dismissed pursuant to MCL 600.2955(a), because Plaintiff had an impaired ability to function and was 50% or more the cause of the accident, as evidenced by his blood-alcohol level. The trial court denied Defendant's motion, finding that Plaintiff's blood-alcohol level only created a *presumption* of impairment, and Plaintiff presented evidence to rebut this presumption.

On appeal, Defendant argued that the trial court erred by denying summary disposition, because the evidence showed that Plaintiff had an impaired ability to function, and as a result, was 50% or more the cause of the accident. Defendant presented expert evidence that at the time of the accident, Plaintiff's blood-alcohol level would have been between .160 and .168, which was twice the legal limit to drive a car. Further, Defendant's expert opined that this would have caused Plaintiff to have impaired fine and gross motor skills, decreased reaction times, and blurred vision. Defendant also noted that the security guard who came to Plaintiff's aid at the time of the accident noted Plaintiff's intoxication.

### SECRET WARDLE NOTES:

A drunk plaintiff is not necessarily a negligent plaintiff. For instance, if a plaintiff is passed out drunk in his apartment, and the roof falls on him, his intoxication had nothing to do with the accident or his injury. Mere intoxication is not enough. There must be a causal connection between the intoxication and the injury for MCLA 600.2955(a), or any comparative negligence defense, to be triggered.

This issue is typically a fact question for the jury, but evidence could develop in certain cases to eliminate any "genuine issues of material fact" and make it a legal question for the judge to decide.

## CONTINUED...

However, Plaintiff presented evidence to show that the alcohol did not impair his ability to function. Specifically, Plaintiff noted that neither the maintenance worker, who was the first to render Plaintiff aid, nor Plaintiff's supervisor detected that Plaintiff had consumed alcohol. Additionally, Plaintiff's supervisor indicated that Plaintiff was able to follow protocol and inform him of the accident as soon as possible. Plaintiff also gathered his tools, drove himself to the hospital, and walked to the entrance without incident. The Court of Appeals noted that the defense expert's opinion that Plaintiff would have been impaired was based on the effect alcohol would have had on the average person and not actual observations of Plaintiff.

The Court of Appeals opined that for Defendant to successfully avail itself of the absolute defense of impairment, Defendant must establish that (1) Plaintiff had an impaired ability to function due to the influence of alcohol, and (2) because of that impaired ability, Plaintiff was 50% or more the cause of the accident that resulted in his injury.

The Court held that with regard to the second statutory requirement—whether due to Plaintiff's intoxication, Plaintiff was 50% or more the cause of the accident—the only evidence Defendant relied on to support this was Plaintiff's blood-alcohol level and its expert's affidavit. However, because Plaintiff presented evidence to show that his ability to function was not impaired, the evidence Defendant relied upon was insufficient, according to the Court, to prove that Plaintiff was 50% or more at fault as a matter of law. The issue was littered with fact and credibility questions which a jury would need to decide. Therefore, the trial court properly denied summary disposition.

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