FILED
SEP 30 1996
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 6-054 / 94-1761

CHERYL ANDERSON, Executor of the Estate of JAY JACOBSEN, Deceased,
Appellant,

vs.

DWAYNE DUDLEY MILLER and **JACK D. MILLER,**
Appellees.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith, Judge

Plaintiff appeals the district court's grant of defendant's motion for summary judgment. **AFFIRMED.**

Joseph B. Reedy, Council Bluffs, for appellant

David F. McCann of Dippel & McCann, P C., Council Bluffs, for appellees

Decided en banc.

HUITINK, J.

Cheryl Anderson appeals the district court's summary judgment ruling dismissing her wrongful death claim against the Millers. We affirm.

Anderson's son Jay Jacobsen died in a one car accident near Council Bluffs on December 24, 1992. Anderson sued Dwayne Miller, another occupant of the car, and Jack Miller, its owner, for damages resulting from Jacobsen's death. In her wrongful death action, Anderson alleged Dwayne Miller was either driving the car while intoxicated at the time of the accident, or he negligently allowed Jacobsen to drive while Jacobsen was intoxicated.

The Millers moved for summary judgment citing the absence of any evidence indicating Dwayne Miller was driving the car involved in this accident. The Millers also argued Anderson's recovery under her negligent entrustment theory was barred by Jacobsen's criminal act of driving while intoxicated.

Anderson resisted, citing deposition testimony indicating investigating officers questioned Dwayne Miller's credibility and a statement by one of Jacobsen's acquaintances that Jacobsen preferred not to drive and often asked others to drive. Anderson also argued that driving while intoxicated is not a criminal act barring recovery for the wrongful death of an intoxicated driver.

The district court concluded that Anderson could not generate a fact issue in the absence of any evidence indicating Dwayne Miller was driving at the time of the

accident. Anderson's assertion that driving while intoxicated is not a criminal act barring recovery was also rejected. Miller's motion for summary judgment was granted and Anderson's claims were dismissed.

On appeal, Anderson argues the circumstantial evidence noted above presents a fact issue concerning the identity of the driver. She also argues Dwayne Miller was the presumptive driver of the car because of his consensual use of the car and because the identity of the driver could not be determined. *See Marean v. Peterson*, 144 N.W.2d 906, 910-11 (Iowa 1966). Lastly, Anderson argues public policy does not bar her negligent entrustment claim simply because she is required to prove Jacobsen was driving while intoxicated.

We review for errors of law. Iowa R. App P.4. Summary judgment is only appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law Iowa R. Civ. P. 237(c). The moving party has the burden to demonstrate the nonexistence of a material fact. *Farm Bureau Mutual Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). If the motion is properly supported, however, the resisting party must set forth specific facts showing that there is a genuine issue for trial. Iowa R. Civ. P. 237(c). A party may not rely on the hope of the subsequent appearance of evidence generating a fact question. *Prior v. Rathjen*, 199 N W.2d 327, 330-31 (Iowa 1972). The court considering a motion for summary

judgment is required to view the evidence in the light most favorable to the resisting party *Thorp Credit Inc. v. Gott,* 387 N.W.2d 342, 343 (Iowa 1986)

We initially note Anderson failed to preserve error on her claim that Dwayne Miller was the presumptive driver of the car involved in this case. Any theory of relief not raised in the district court will not be considered on appeal. *See, e.g., Champlin v. Walker,* 249 N.W.2d 839, 842 (Iowa 1977); *Burr v. Apex Concrete Co.,* 242 N.W 2d 272, 274 (Iowa 1976).

Our review of the summary judgment records leads us to the same conclusion as the district court. The Millers have properly supported their motion with evidence indicating Jacobsen was driving the car when this accident occurred. Dwayne Miller has consistently denied driving, and accident investigators found no evidence contradicting his version. We are also unable to find a fact question resulting from the investigating officer's initial skepticism about Dwayne Miller's version of the accident. This assertion was admittedly subjective, and we find nothing in the record to support the officer's skepticism beyond his personal impressions of Dwayne Miller's demeanor following the accident. Anderson's evidence indicating Jacobsen did not like to drive, and often asked others to drive without more, is also insufficient to generate a fact question concerning the identity of the driver. Anderson has accordingly failed to set forth any specific facts showing there is a genuine issue for trial, and we affirm on this issue.

Finally, we reject Anderson's assertion that driving while intoxicated is not a criminal violation sufficient to bar her recovery for Jacobsen's wrongful death. Generally, a person cannot recover damages resulting from that person's criminal violations. *Cole v. Taylor,* 301 N.W.2d 766, 768 (Iowa 1981). The application of this rule requires Iowa courts to distinguish between lawful activities regulated by statute and activities which are entirely prohibited. *Pappas v. Clarks,* 494 N.W.2d 245, 247 (Iowa App 1982), *citing Borker v. Kallash,* 468 N.E.2d 39, 41 (New York 1984). If a person is injured as the result of entirely prohibited conduct, public policy bars any recovery If the conduct violates a regulatory statute, the violator's conduct implicates established fault principles such as comparative negligence but recovery is not precluded. *Id.* We, contrary to Anderson's argument, hold that Iowa's drunk driving statute is more than statutory regulation of lawful activity. Driving while intoxicated is entirely prohibited in this state. Iowa Code §321J.2(1)(b); see *State v. Conner,* 377 N.W 2d 664, 666 (Iowa 1985). Public policy therefore requires dismissal of Anderson's claim We also affirm on this issue.

AFFIRMED.

All judges concur, except Cady, J , who dissents

CADY, J. (dissenting)

I respectfully dissent.

I believe the majority has resolved this case by assessing the credibility of witnesses and weighing the evidence. These are jury functions, well outside the role of the court in resolving summary judgments. *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-55, 106 S. Ct. 2505, 2512-13, 91 L. Ed. 2d 202, 211-13 (1986).

Summary judgment should be denied when reasonable minds could draw different inferences from the facts. *Tasco, Inc. v. Winkel*, 281 N.W.2d 280, 282 (Iowa 1979). Moreover, I believe the close cases concerning the existence of a factual issue should be resolved against the movant. *See Phoenix Elec. Co. v. National Elec. Contractors Ass'n, Inc.*, 867 F.Supp. 925, 933 (D. Or. 1994). This is one of the close cases.

The evidence reveals Dwayne Miller was the consensual user of the vehicle, Jacobsen preferred not to drive, and Miller's credibility was questioned by an investigating officer. In my judgment, these facts justify a trial, especially considering the inconclusive physical evidence. Moreover, if an investigating officer found Miller's post-accident explanations questionable, perhaps a jury would as well. I would deny summary judgment.