IN THE COURT OF APPEALS OF IOWA

No. 8-247 / 07-1333
Filed October 1, 2008

BENJAMIN FELD, LARRY FELD,
and JUDITH FELD,
Plaintiffs-Appellants,

vs.

LUKE BORKOWSKI,
Defendant-Appellee.

Appeal from the Iowa District Court for Carroll County, Dale E. Ruigh, Judge.

The plaintiffs appeal from the district court's order granting summary judgment in favor of the defendant. **AFFIRMED.**

Gregory J. Siemann of Green, Siemann and Greteman, P.L.C., Carroll, and Dan Connell of Dan Connell, P.C., for appellants.

Joel T. S. Greer of Cartwright, Druker & Ryden, Marshalltown, for appellee.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

HUITINK, P.J.

The plaintiffs, Benjamin Feld, Larry Feld, and Judith Feld, appeal from the district court's order granting summary judgment in favor of the defendant, Luke Borkowski. We affirm.

I. Background Facts and Prior Proceedings

During the summer of 2005, a group of male high school students formed a team to participate in an intramural slow pitch softball league. The group of friends held weekly practices to prepare for the games. During a typical practice, they each took turns hitting the ball. One person pitched the balls to the batter, while the rest of the players fielded the batted balls. Because nobody played catcher, the batter generally tried to hit all of the balls that were pitched his way.

On June 2, 2005, the teammates got together to practice for an upcoming game. When Luke entered the batter's box for his turn to hit the ball, Benjamin was playing first base, standing approximately sixty feet away. After a few pitches, Luke swung at a pitch that was "a little outside" and the ball flew foul towards third base. As he swung, the aluminum bat came out of his hands and flew through the air towards Benjamin. The bat flew parallel to the ground and hit Benjamin in the head, knocking him unconscious.

On February 14, 2006, the Felds[1] filed the present petition seeking damages against Luke under the theory of negligence, invoking the doctrine of res ipsa loquitur. Luke answered the petition by raising numerous affirmative defenses, including the contact sports exception and assumption of the risk.

[1] The parents sought damages for medical expenses and other expenses associated with caring for an injured minor child and for the loss of services from their child.

During discovery, the parties deposed Benjamin, Luke, and two other members of the team—Jason Soyer and Wade Handlos.

Benjamin stated that he had always played first base ever since he was a young child. He also stated Luke was not engaged in horse play at the time of the incident, there was no animosity between himself and Luke, and he knew Luke did not intend to hit him with the bat. Benjamin described how he saw Luke swing and hit the ball towards third base. Because he was watching the ball, he did not know the bat had left Luke's hands and he had no time to react. Benjamin also stated he had lost the eyesight in left eye because of the incident.

Jason was in the outfield at the time of the injury. He stated there was nothing unusual about the way Luke was positioned in the batter's box. He also indicated there was nothing unusual about Luke's stance, the way he gripped the bat, or anything else he was doing before the pitch. Jason saw Luke swing and hit the ball. Once the ball was hit, Jason looked straight up in the air to watch the ball. Jason did not see the bat leave Luke's hands. When Jason heard Luke yell Benjamin's name, he looked toward Benjamin and saw him fall to the ground.

Wade was playing second base at the time of the injury. Wade saw the pitch and watched the ball fly off Luke's bat towards third base. Wade heard Luke yell Benjamin's nickname and turned to look at Benjamin. Wade saw Luke's bat flying six feet in the air a split-second before it hit Benjamin in the head.

Luke was the only player who could describe what happened to the bat after the ball was hit. When responding to the deposition questions, he stated:

> Q. Why did the bat leave your hands? A. I don't know. I had sweaty hands and – I don't know.
>
> Q. Did the ball – Excuse me, did the bat leave your hands before you made contact with the ball or after you made contact with the ball? A. I don't know. Maybe at the same time or a little after.
>
> Q. When you say a little after, you mean that the ball was struck first and then the bat left your hands? A. Yes.
>
> Q. Had you ever had that occur before? A. No, I hadn't.
>
> . . . .
>
> Q. Now, have you ever had a bat come out of your hand before? A. Yes, I have, but it was usually on my backswing – or after – the bat was behind me.

When he was asked if, after he hit the ball, he swung completely around and then released the bat, Luke answered "No." He also stated that he did not intentionally throw the bat after he hit the ball.

After the parties completed discovery, Luke filed a motion for summary judgment arguing the case should be dismissed as a matter of law under the contact sports exception. Luke pointed out that under the contact sports exception, a participant in a contact sport may only bring suit for injuries received during the game "for acts of another participant done to intentionally inflict injury or done in reckless disregard for the safety of the other participant." *Leonard ex rel. Meyer v. Behrens*, 601 N.W.2d 76, 78 (Iowa 1999). Luke argued there was no evidence to prove he had done anything in reckless disregard for the safety of the other participants. The Felds resisted the motion by presenting an affidavit from Ed Servais—an expert witness who had coached college baseball at the collegiate level for twenty-four years. The affidavit stated, in pertinent part:

> 2. . . . From my observations, batters rarely lose control of the bat in such a way that it flies out of their hands. When a batter does lose control of the bat is [sic] usually ends up going to the pull side of the batter. For example, when a right-hand hitter loses

> control of the bat, the bat will end up on the third base side of the field and vice-versa for a left-hand hitter.
>
> 3. In all my years of experience, I have never seen a right hand batter lose control of the bat where the bat ended up on the first base side of the field some sixty feet away from the batter. I have never seen or heard of a 1st baseman being struck by a right-handed batter who let go of a bat.
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> 4. In order for a right-hand batter to lose control of the bat and for the bat to end up on the first base side of the field, the batter would have to over swing and get his body out of control in order for the bat to end up at first base.
>
> . . . .
>
> 6. I have attempted to duplicate the incident as described by Luke Borkowski in his deposition. I found it impossible for the bat to strike the ball towards third base and come out of my hands and be thrown toward first base.
>
> 7. It is my opinion that Luke Borkowski swung at a pitch and hit underneath the ball which resulted in a high foul ball outside the third base line. It is my further opinion that Luke Borkowski followed through and rotated around after striking the foul ball and deliberately threw the bat or let go of the bat in such a way that it was flung with considerable force through the air towards the first base position where Benjamin Feld was positioned.
>
> 8. It is my opinion that had Luke Borkowski not rotated around, after striking the ball and let loose of his bat, Benjamin would not have been struck by the bat. Luke's conduct was reckless.

On July 10, 2007, the district court entered an order granting Luke's motion for summary judgment. In doing so, the court concluded as a matter of law that softball was a "contact sport." The court also noted the Felds "filed no claims asserting liability for reckless or deliberate conduct" and

> [n]othing indicates that, after swinging the bat at a pitch, [Luke] threw the bat in anger, out of disgust, or for any other reason. Nothing in the existing record suggests that [Luke] lost the grip on the bat while acting outside the normal course of playing softball.

On appeal, the Felds challenge the court's conclusion that softball is a "contact sport." They also contend that, even if softball is a contact sport,

(1) Benjamin did not assume the risk of being injured in such a manner and (2) Luke's action in "throwing" the bat was reckless.

II. Standard of Review

We review a district court's ruling on a motion for summary judgment for correction of errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). Summary judgment is available only when there is no genuine issue of material fact. *Id.* "A 'genuine issue' of material fact exists if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party." *Baratta v. Polk Co. Health Serv.*, 588 N.W.2d 107, 109 (Iowa 1999). The burden of showing the nonexistence of a material fact is on the moving party, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. *Buechel*, 745 N.W.2d at 735. An inference is legitimate if it is "rational, reasonable, and otherwise permissible under the governing substantive law." *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994). An inference is not legitimate if it is "based upon speculation or conjecture." *Id.*

III. Merits

A. Is Softball a Contact Sport?

Leonard ex rel. Meyer v. Behrens is the only Iowa case that addresses the contacts sports exception to the general rule of negligence. In *Leonard*, the district court utilized the contact sports exception in a lawsuit where one participant in an informal paintball game was struck in the eye by a capsule fired from another participant in the paintball game. 601 N.W.2d at 78. On appeal, the supreme court analyzed whether to adopt the contact sports exception by

balancing the "interest in promoting vigorous athletic and sporting competition" against "the interest in protecting those who participate in those events." *Id.* at 79. When considering the balance, the court noted the "possible flood of litigation that might result from adopting simple negligence as the standard of care to be utilized in sporting contests." *Id.* at 80. Ultimately, the court concluded that personal injury cases arising out of a contact sport must be predicated on reckless disregard of safety because such a "standard is necessary to preserve vigorous and active participation in contact sports without fear of liability for merely negligent bodily contact." *Id.* Otherwise,

> [i]f simple negligence were adopted as the standard of care, every punter with whom contact is made, every midfielder highsticked, every basketball player fouled, every batter struck by a pitch, and every hockey player tripped would have the ingredients for a lawsuit if injury resulted.

Id. (quoting *Jaworski v. Kiernan*, 696 A.2d 332, 338 (Conn. 1997)).

Once the court adopted the contact sports exception in Iowa, it turned to the question of whether paintball was a contact sport. After noting that two other states had concluded paintball qualified under the contact sport exception, the court determined paintball was a contact sport under Iowa law because:

> [a]lthough paintball is not as widely recognized, traditional, or organized as baseball or basketball, the facts in this case clearly show the children were involved in an informal contact game in which each player consented to being shot with the paint balls.

Id. at 81. The court also went on to state that "[i]n games in which physical contact is inherent, indeed, the very purpose of the game as in paintball, rules infractions and mishaps are virtually inevitable and justify a different standard of care." *Id.*

We find the language used in the *Leonard* opinion, when combined with our review of case law from other jurisdictions, clearly establishes that softball is a contact sport.

The *Leonard* decision makes three references to baseball, a sport we find to be sufficiently similar to softball. First, the court discusses the case of *Dudley v. William Penn College*, 219 N.W.2d 484, 485 (Iowa 1974), where a college baseball player who was struck by a foul ball while sitting on the players' bench sued his coach and his college. *Leonard*, 601 N.W.2d at 79. Although the *Dudley* decision did not address the liability of the individual who struck the foul ball, the *Leonard* decision used the *Dudley* decision to point out that "a participant in an athletic event assumes certain risks normally associated with the activity" and that most sports injuries "result from the rough and tumble of the game itself." *Leonard*, 601 N.W.2d at 79 (quoting *Dudley*, 219 N.W.2d at 486). The *Leonard* decision also referred to baseball when it discussed why it was necessary to adopt the recklessness standard in contact sports: "If simple negligence were adopted as the standard of care . . . every batter struck by a pitch . . . would have the ingredients for a lawsuit if injury resulted." 601 N.W.2d at 80. Finally, the court referred to baseball for a third time when it found paintball was still a contact sport, even though it was a not a recognized, traditional, and organized sport like baseball or basketball. *Id.* at 81. We find the *Leonard* decision implies that baseball—which for our purposes is the same as softball—is a contact sport.

Our review of case law from other jurisdictions confirms that softball is, as a matter of law, a contact sport necessitating a "reckless" standard. *See*

Landrum v. Gonzalez, 629 N.E.2d 710, 715 (Ill. App. 1994) ("We agree with the trial court's determination that, unlike downhill skiing or golf, physical contact is part of the game of softball."); *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982) (church softball game); *Crawn v. Campo*, 643 A.2d 600, 601 (N.J. 1994) (pickup softball game); *Obert v. Baratta*, 729 A.2d 50, 51 (N.J. Super. App. Div. 1999) (informal intra-office softball game); *Kiley v. Patterson*, 763 A.2d 583, 584 (R.I. 2000) (recreational, coed-softball-league game). Also, as specifically stated in 65 C.J.S. *Negligence* § 78, at 384 (2000):

> Between players in sporting events, such as informal softball games, only those injuries caused by intentional conduct or by acting in reckless disregard of the safety of others will give rise to a cause of action; liability will not be found to exist where ordinary negligence caused injuries, since physical contact is part of the game of softball, regardless of its informal nature.

Accordingly, we find the district court properly concluded softball is a contact sport for purposes of the contact sport exception to the general rule of negligence.

B. Did Benjamin Assume the Risk of Being Hit by a Bat?

The Felds also claim that, even if softball is a contact sport, the exception does not apply because Benjamin did not "assume the risk" of being struck by Luke's bat because a first baseman being struck by a bat wielded by a right handed hitter "is not inherent or virtually inevitable" in the game of softball.

We first reject the Felds' claim that *Leonard* requires the specific incident or injury to be "virtually inevitable" in order to qualify under the contact sports exception. The only instance in which the phrase "virtually inevitable" is used in the *Leonard* decision is within the following sentence: "In games in which

physical contact is inherent, indeed, the very purpose of the game as in paintball, rules infractions and mishaps are virtually inevitable and justify a different standard of care." *Leonard*, 601 N.W.2d at 81. This sentence does not require the court to find that the particular incident involved in the claim was "virtually inevitable." On the contrary, this sentence indicates that in games in which physical contact is inherent, *rules infractions and mishaps are virtually inevitable*. Accordingly, we will focus our attention on whether physical contact is "inherent" in softball, and not consider whether it was "virtually inevitable" that he would be hit by a bat while playing first base.

As noted above, physical contact is a part of the game of softball. Runners are "tagged" by opposing players. *Landrum*, 629 N.E.2d at 715. Fielders sometimes collide when pursuing a ball, and players are occasionally struck with an errantly thrown ball. *Id.* At times, base runners and fielders collide. *Id.* Undoubtedly, participants in a baseball or softball game are also at risk of being hit by a bat. *See generally Ratcliff v. San Diego Baseball Club*, 81 P.2d 625, 627 (Cal. App. 1938) ("It further appears that not infrequently a bat so slipping from the hands of the player goes a distance of ninety feet or more."); *Gaspard v. Grain Dealers Mut. Ins. Co.*, 131 So. 2d 831, (La. App. 1961) ("Both boys are alert intelligent youngsters and both seemed to fully understand the dangers inherent in the great American pastime of baseball of being struck by flying balls or bats."). There is no question that physical contact is "inherent" in softball. *See Crawn*, 643 A.2d at 601 (noting there are "limitless kinds of physical contact" that can occur in the course of a softball game).

However, the Felds claim the contact sports exception is limited to situations where the specific type of physical contact prompting the cause of action is "inherent" to the contact sport. They argue Benjamin did not subject himself to this particular risk because, according to his expert witness, he was standing in a spot in which he could not have anticipated being hit by a bat wielded by Luke, a *right-handed* hitter. Even if we assume, arguendo, that the contact sports exception is subject to such a limitation, we still find, under the facts of this case, that Benjamin assumed the risk that led to his injury.

When Benjamin chose to play softball on June 2, 2005, he subjected himself to the risk of being struck by a flying bat. As stated by the Felds' expert witness, "when a right-hand hitter loses control of the bat, the bat will end up on the third base side of the field and vice-versa for a left-hand hitter." Under this rationale, Benjamin, as the first baseman, was susceptible to being hit by a bat whenever a left-handed hitter stepped to the plate, but he was not susceptible to being hit by a bat whenever a right-handed hitter stepped to the plate. We find this distinction meaningless. An occasional flying bat is part of the "rough and tumble" of the game of softball. Benjamin subjected himself to this risk when he stepped onto the field as a participant. The contact sports exception applies to this claim.

C. Did Luke Act with Reckless Disregard for the Safety of Benjamin?

Under the contact sports exception a participant in a contact sport may only bring suit for injuries received during the game for acts of another participant done to intentionally inflict injury or done in reckless disregard for the safety of the other participants. *Leonard*, 601 N.W.2d at 80.

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id. (quoting Restatement (Second) of Torts § 500, at 587).

The Felds argue there was sufficient evidence to preclude summary judgment in this case because there was "a genuine issue of material fact concerning whether Luke's conduct subjected Benjamin to an unreasonable risk of harm." The Felds point to their expert witness who concluded Luke was reckless because he over swung, got his body out of control, rotated around after striking the ball and deliberately threw the bat or let go of the bat in such a way that it was flung with considerable force through the air.

In essence, the Felds argue the fact finder, taking the evidence in the light most favorable to the nonmoving party, must adopt their expert's opinion as to how the bat came loose from Luke's hands, and then adopt his inference that this behavior was reckless. The flaw in this argument is that the expert's opinion is nothing but pure speculation. No one testified that Luke over swung at the ball, that he used any amount of force inappropriate for a normal swing, that his body was out of control at the time he hit the ball, or that, after he made contact with the ball, he rotated around and somehow flung the bat towards first base. On the contrary, Benjamin testified there was no horseplay going on at the time of the event, and Jason testified there was nothing unusual about Luke's stance, the way he gripped the bat, or anything else he was doing before he hit the pitch. An inference is not legitimate when it is based on pure speculation or conjecture.

Smith v. Shagnasty's, Inc., 688 N.W.2d 67, 71 (Iowa 2004). Because there is not one scintilla of evidence that Luke did anything out of the ordinary when he swung at that fateful pitch, we find there can be no legitimate inference that his actions constituted reckless conduct.[2]

We have viewed this summary judgment record in the light most favorable to the Felds and accorded them every legitimate inference that is reasonable under this record. Because we cannot conclude Luke's conduct was reckless without relying on speculation or conjecture, we find the district court properly granted Luke's motion for summary judgment. Having considered all issues raised on appeal, whether or not specifically addressed in this opinion, we affirm the district court's decision.

AFFIRMED.

[2] At best, the evidence in this case might support a res ipsa loquitur instruction. However, the "doctrine of res ipsa loquitur is not applicable where it is necessary to show that defendant was guilty of active or gross negligence, willful misconduct, recklessness, or the like." E. T. Tsai, Comment Note, *Applicability of Res Ipsa Loquitur Where Plaintiff Must Prove Active or Gross Negligence, Willful Misconduct, Recklessness, or the Like*, 23 A.L.R.3d 1083 (1969); *see also Kulish v. Ellsworth*, 566 N.W.2d 885, 892 (Iowa 1997) ("Because the discussion above establishes that these defendants are immune from suit for any claims of negligence, plaintiffs are necessarily barred from pursuing their claims under a res ipsa theory.").