18-P-322 Appeals Court

DANIEL J. BORELLA vs. H. LARUE RENFRO[1] & others.[2]

No. 18-P-322.

Middlesex. April 2, 2019. - December 2, 2019.

Present: Rubin, Henry, & Wendlandt, JJ.

Negligence, Athletics, Hockey stick, Gross negligence. Wilful, Wanton, or Reckless Conduct. Evidence, Opinion. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on October 29, 2014.

The case was heard by Christopher K. Barry-Smith, J., on motions for summary judgment.

Dallas W. Haines, III, for the plaintiff.
Kevin D. McElaney for Julion Scott Lever.
Michael E. Barris for Bernard J. Brun.
Michael R. Byrne for Daniel J. Mahoney, Sr.
Jennifer C. Sheehan for H. Larue Renfro & others.

[1] Individually and as an officer of Quad Enterprises, Inc., and as trustee of the Donald Lynch Blvd. Realty Trust.

[2] H. Wesley Tuttle, individually and as manager of New England Sports Center; New England Sports Management Corporation; Daniel J. Mahoney, Sr.; Steven M. Lerner; Julion Scott Lever; Christopher M. Kanaly; Justin Grevious; and Bernard J. Brun.

WENDLANDT, J. In a game where the players wear sharpened steel blades on their feet and are garbed in protective gear from head to toe, the playing field is a glossy ice rink, checking not only is allowed but a fundamental aspect of the way the game is played, and the object of the game is to put a puck into a goal (or to prevent the same), the plaintiff, seventeen year old Daniel J. Borella, was cut on the wrist by one of the blades worn by the defendant, Julion Scott Lever, in what Borella acknowledges was a "freak accident" occurring moments after Lever checked Borella hard from behind into the boards and took the puck away. Borella appeals from the decision of the Superior Court judge granting summary judgment in favor of the defendants, pursuant to Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002).

The Supreme Judicial Court has held that participants in sporting events owe each other a duty to not engage in "reckless" misconduct. Gauvin v. Clark, 404 Mass. 450, 451 (1988). Reckless conduct, in turn, is defined as "intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another." Commonwealth v. Welansky, 316 Mass. 383, 399 (1944). In this case, we apply that standard to the game of ice hockey in which physical contact between players standing on two thin metal blades atop a

sheet of ice is not simply an unavoidable by-product of vigorous play, but is a fundamental part of the way the game is played. We hold that where, as here, the record is devoid of evidence from which a jury rationally could conclude that the player's conduct is extreme misconduct outside the range of the ordinary activity inherent in the sport, there is no legal liability under the recklessness standard. For that reason, we affirm summary judgment in favor of Lever. Because, in addition, no rational view of the evidence would permit finding a causal nexus between Borella's injury and any breach by the other defendants -- coaches, referees, rink manager, and owners -- of their respective duties of care to Borella, we affirm.

Background. We set forth the facts in the light most favorable to Borella, the nonmoving party. See Mass. R. Civ. P. 56 (c); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711-712 (1991). On July 14, 2013, Borella was injured during an ice hockey game between his[3] team, the New England Renegades (a Massachusetts-based team coached by the defendant Bernard Brun, a parent volunteer) and Lever's team, Team Kanaly (a Pennsylvania-based team coached by the defendant Justin Grevious). Both teams were in the Midget Major division for

[3] Borella, who had played ice hockey since he was two years old and had been playing year round for at least three years leading up to the incident, was invited to play for the Renegades during the tournament, and agreed to do so.

high school players aged seventeen to nineteen years old -- a division where checking was allowed.

The game was part of "The Boston Selects 2013 AAA Tournament of Champions," a tournament hosted and organized by the New England Sports Center (sports center), and occurred at a rink in Marlborough owned and managed by the defendants, H. Larue Renfro, New England Sports Management Corporation (NESMC), and H. Wesley Tuttle (collectively, rink defendants). The tournament was one of many tournaments that Team Kanaly attends routinely in an effort to showcase its players to recruiters and scouts.

Like Borella, Lever was seventeen years old. Both boys were approximately five feet, eight inches in height, with Lever weighing between 165 and 170 pounds and Borella between 150 and 160 pounds. Each player had played ice hockey for over a decade at the time of the incident, was familiar with the rules of hockey, and understood that physical contact (including penalties therefor) was an inherent aspect of the game.

The defendants, Daniel J. Mahoney, Sr., and Steven M. Lerner, were the referees for the game.[4] Mahoney was refereeing his eighth game of the day, and Lerner was refereeing his fifth game of the day. They called eight penalties during the course

[4] Mahoney was paid $33.25 to referee the game.

of the game in question -- five against the Renegades, and three against Team Kanaly.

Prior to the injury, both teams engaged in verbal jousting, which referee Mahoney described as "pretty typical for this age group." The referees cautioned both coaches to instruct their players to stop the taunting, and both coaches did so. The referees were unbiased in their officiating; however, some Renegades team spectators believed that the referees did not control the game and failed to call some rule violations.[5] There was no evidence as to which particular calls were missed, and nothing tying Lever or Borella to any missed call.

The score was tied after the first period.[6] After two periods, Team Kanaly led by a score of four to three. In the third and final period, Team Kanaly pulled ahead eight to three.[7]

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[5] One spectator -- the grandparent of a Renegades team player -- explained that he believed that, at this age level, there should be three officials, and for that reason believed the game was poorly officiated.

[6] In the parties' undisputed statement of facts, they agree that the score was one to one after the first period. The score sheet, however, shows the score was one to zero, in favor of Team Kanaly. The difference is immaterial to our analysis.

[7] The winner of the tournament was determined by a combination of factors, including the number of games won and the total number of goals scored by each team. The tournament rules included a "[m]ercy" rule whereby, inter alia, a game could be ended, at the discretion of the coaches and referees, if one team led by ten goals at any time during the third period.

With two minutes left on the clock, Borella received the puck at approximately mid-rink, near the boards, turned and was skating towards Team Kanaly's goal in possession of the puck. Lever, who was near the Renegades' goal, skated towards Borella at a "[h]igh rated speed" without slowing down.[8] Catching Borella, who was still close to the boards, Lever checked him hard, propelling Borella into the boards.

A parent of a Renegades player (who watched the game from the stands near center ice) described the hit as a "smash" and a "tremendous hit" with Lever hitting Borella with his "whole front side." The parent opined that the hit was a "charge" in violation of the rules of hockey.[9] Another Renegades parent, who was also in the stands, described that Lever's shoulder hit Borella's back; she testified that she would have called a

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[8] One Renegades parent -- who also opined that Lever's check was a hitting from behind penalty, see infra -- described that Lever was skating at a "rapid speed," which she described as "between a nine and ten" on a ten-point scale. The grandparent of a Renegades player, see note 5, supra, described Lever's speed prior to the check as a "[t]en" and noted that Lever "was intent on getting there pretty quick."

[9] The modified National Collegiate Athletic Association (NCAA) rules, which were in effect for the tournament, describe that "[c]harging" is "the action of a player, who as a result of distance traveled, checks an opponent violently in any manner from the front or side." Charging is a minor or major penalty at the referee's discretion.

"hitting from behind" penalty.[10] See note 8, supra. A fifteen year old Renegades player described that Lever hit Borella with his shoulder with a force he pegged as a "[t]en"[11] on a ten-point scale; this same teammate opined that the hit was with "intent to injure." A grandparent of a Renegades player, see note 5, supra, characterized the check as "a deliberate hit."[12]

As a result of the check, Borella fell to the ice onto the puck. Lever continued to battle for the puck, and though the details are murky in part because Borella temporarily lost consciousness,[13] Borella's wrist was sliced by one of the blades Lever wore on his feet in what Borella acknowledges was a "freak

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[10] The NCAA rules describe that "[h]itting from behind into the side boards, end boards or goal cage is a flagrant violation." The referee has the discretion to call a "[m]ajor and game misconduct or disqualification."

[11] Mahoney described the hit as a "solid eight."

[12] We recite the witnesses undisputed relationship to Borella's team for context; on summary judgment, we do not assess their credibility and instead view the evidence in the light most favorable to Borella, the nonmoving party. See Drakopoulos v. U.S. Bank Nat'l Ass'n, 465 Mass. 775, 787-788 (2013).

[13] At his deposition, Borella testified that he temporarily lost consciousness at some point after he was checked. In his affidavit, Borella stated: "I recall getting up [after the check] to some extent and realizing that I was bleeding and had an opening in my arm. The next thing I recall is being off the ice and on the mat, on my back and people pulling my skates off, and hearing my father's voice and seeing him among the people that were around me."

accident." Mahoney called a minor penalty for "boarding,"[14] sending Lever into the penalty box.[15] Borella, who was bleeding from the laceration, was carried from the ice, and the game ended before the official game clock had run. The injury resulted in the permanent partial loss of the use of Borella's dominant hand.

Borella filed an action against multiple defendants. Against Lever, he asserted claims for negligence and alternatively for battery, alleging that Lever violently struck him from behind and into the boards in violation of the rules and in reckless disregard for his safety. Against the referees, Mahoney and Lerner, Borella asserted claims for negligence and gross negligence for failing to control the game and failing to end the game prior to the injury. Against Brun, Grevious, and

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[14] "Boarding" is defined as a hit from "the front or side in such a manner that causes the opponent to be thrown violently into the boards." The referee has the discretion to call a minor or major penalty for boarding based on the "degree of violence of the impact with the boards. A game misconduct or disqualification may [also] be assessed at the discretion of the referee."

[15] According to Mahoney, the check by Lever was a clean check, shoulder to shoulder, and within the rules of hockey. Lever also described the check as shoulder to shoulder. Mahoney explained that, had the check occurred earlier on in the game, he would not have called a penalty; however, he called a minor penalty as a matter of "game management" to temper the players' behavior and to control the game. On summary judgment, however, we view the evidence in the light most favorable to the nonmoving party. See Drakopoulos, 465 Mass. at 788.

Christopher M. Kanaly (another Team Kanaly coach who was not coaching the team during the game at issue), Borella asserted claims for negligence, gross negligence, and recklessness for failing to protect the players on the ice from injury. Finally, as against the rink defendants, Borella asserted claims for negligence and gross negligence for failing to maintain a safe environment, as well as claims for negligent hiring and supervision of the referee defendants.

The judge granted summary judgment in favor of the defendants. This appeal followed.

Discussion. "We review the allowance of a motion for summary judgment de novo to determine whether the moving party has established that, viewing the evidence in the light most favorable to the opposing party, 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Scarlett v. Boston, 93 Mass. App. Ct. 593, 596-597 (2018), quoting Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016). See Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991); Mass. R. Civ. P. 56 (c). "Conclusory statements, general denials, and factual allegations not based on personal knowledge [are] insufficient to avoid summary judgment" (citation omitted). See Cannata v. Berkshire Natural Resources Council, Inc., 73 Mass. App. Ct. 789, 792 (2009).

Usually, negligence and recklessness involve questions of fact left for the jury. See Manning v. Nobile, 411 Mass. 382, 388 (1991); Doe v. Boston Med. Ctr. Corp., 88 Mass. App. Ct. 289, 291 (2015). However, where no rational view of the evidence would permit a finding of negligence or recklessness, summary judgment is appropriate. See Manning, supra at 388-389; Roderick v. Brandy Hill Co., 36 Mass. App. Ct. 948, 949 (1994). See, e.g., Gray v. Giroux, 49 Mass. App. Ct. 436, 440 (2000) (affirming summary judgment in favor of defendant golfer who struck golf ball injuring plaintiff in head as she searched for ball in woods).

1. Participants in contact sports. We begin with Borella's claims against Lever. At the onset, it is clear that summary judgment in Lever's favor properly entered with regard to Borella's negligence claim. As set forth in Gauvin, "participants in an athletic event owe a duty to other participants to refrain from reckless misconduct."[16] Gauvin, 404 Mass. at 451, citing Restatement (Second) of Torts § 500 (1965).

With regard to Borella's recklessness claim, the question with which we are faced is how that standard applies to the game

[16] For this reason, inter alia, Borella's reliance on a case from the Superior Court of Canada, Province of Quebec, is misplaced. In that case, the Canadian court declined to adopt a recklessness standard set forth in Gauvin, supra. See Zaccardo v. Chartis Ins. Co. of Canada, 2016 QCCS 398 (Can.), affirmed, Chartis Ins. Co. of Canada v. Zaccardo, 2016 QCCA 787 (Can.).

of ice hockey in which aspects fundamental to the manner in which the game is played arguably are, by definition, "intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another." Welansky, 316 Mass. at 399 (defining reckless conduct). See Karas v. Strevell, 227 Ill. 2d 440, 455-456 (2008) ("Even a cleanly executed body check, performed according to the rules of ice hockey, evinces a conscious disregard for the safety of the person being struck. . . . This conduct is an inherent, fundamental part of the sport").

As was the court in Gauvin, we are guided in our analysis by our sister States, which have held that reckless conduct, for purposes of contact sports such as ice hockey, is extreme misconduct outside the range of the ordinary activity inherent in the sport. Id. at 454-455. See Karas, 227 Ill. 2d at 459, and cases cited; Knight v. Jewett, 3 Cal. 4th 296, 318 (1992), citing Gauvin.[17] These courts "all draw a line in a way that

[17] Other State courts have adopted similar formulations of this standard. See, e.g., Mark v. Moser, 746 N.E.2d 410, 422 (Ind. Ct. App. 2001) ("liability will not lie where the injury causing action amounts to a tactical move that is an inherent or reasonably foreseeable part of the game and is undertaken to secure a competitive edge"); Schick v. Ferolito, 327 N.J. Super. 530, 534 (2000) (recklessness does not encompass those risks of injury that are "an inherent or integral part of the game" [citation omitted]); Turcotte v. Fell, 68 N.Y.2d 432, 441 (1986) (liability will lie for "flagrant infractions unrelated to the normal method of playing the game and done without any competitive purpose").

permits recovery for extreme misconduct during a sporting event that causes injury, while at the same time foreclosing liability for conduct which, although it may amount to an infraction of the rules, is nevertheless an inherent and inevitable part of the sport." Karas, supra. See Knight, supra at 319 (recognizing that, although rule violation "may subject the violator to internal sanctions prescribed by the sport itself, imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule").

Applying the recklessness standard in this manner is faithful to the two principles underlying the court's holding in Gauvin. First, "[v]igorous and active participation in sporting events should not be chilled by the threat of litigation" (citation omitted). Gauvin, 404 Mass. at 454. Holding a player liable based on conduct inherent in the manner the sport is expected to be played runs counter to this policy. Second, "reasonable controls [must] exist to protect the players and the game" (citation omitted). Id. Thus, recklessness must be broad enough to capture conduct that cannot be considered an inherent aspect of the sport being played.

Accordingly, on summary judgment, we examine the record to determine whether it includes evidence from which the jury

rationally could conclude that the player in a contact sport engaged in extreme misconduct outside the range of the ordinary activity inherent in the sport. See, e.g., Gauvin, 404 Mass. at 452, 457 (evidence that hockey player "butt-end[ed]"[18] opposing player in abdomen after face-off as puck slid away and down ice, after players were no longer competing for puck, sufficient to allow jury to find he acted recklessly); Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 519, 525 (10th Cir. 1979) (football player reckless where he struck opposing player in neck from behind after play was over); Nabozny v. Barnhill, 31 Ill. App. 3d 212, 214-216 (1975) (soccer player reckless where he continued to charge at goalie, who had possession of ball in penalty zone, kicked goalie in head, and made no attempt to avoid contact); Mark v. Moser, 746 N.E.2d 410, 422 (Ind. Ct. App. 2001) (reckless conduct includes baseball player who flipped bat at dugout in fit of anger, or football player who

[18] "Butt-ending is the practice of taking the end of the [hockey] stick which does not come into contact with the puck and driving this part of the stick into another player's body." Gauvin, 404 Mass. at 452. Notably, the butt-ending in Gauvin and the check here are not comparable. The former was "unexpected" and, unlike checking, not an inherent aspect of the game; and, unlike the check at issue in this case, the butt-ending did not occur "in the course of playing the puck," having as its apparent purpose to injure the player in the abdomen after the face-off -- that is, at a time when he no longer carried the puck. Id.

punches another player after tackle).[19] Application of the foregoing requires consideration of the nature of the sport itself. See Knight, 3 Cal. 4th at 316-317; Bentley v. Cuyahoga Falls Bd. of Educ., 126 Ohio App. 3d 186, 189 (1998).

Here, viewed in the light most favorable to Borella, seventeen year old Lever skated quickly to catch seventeen year old Borella, who at the time possessed the puck near the boards at mid-rink and was headed towards Team Kanaly's goal. Lever "deliberate[ly]" checked him hard ("[t]en" on a ten-point scale) in the back, and took the puck at a time when Team Kanaly was

[19] See generally Griggas v. Clasuson, 6 Ill. App. 2d 412, 415, 419 (1955) (upholding liability of player who assaulted player on opposing team out of apparent frustration with progress of game); Bourque v. Duplechin, 331 So. 2d 40, 41-42 (La. Ct. App. 1976) (affirming judgment imposing liability for injury incurred during baseball game when defendant baserunner, in ostensible attempt to break up double play, ran into plaintiff second baseman at full speed, without sliding, after second baseman had thrown ball to first base and was standing at least four feet away from second base towards pitcher's mound); Archibald v. Kemble, 971 A.2d 513, 516-517, 521 (Pa. Super. Ct. 2009) (summary judgment improper where evidence included that defendant deliberately "slew-footed" plaintiff in "nonchecking" hockey league).

ahead by five goals.[20] Borella fell to the ice, and his wrist was sliced in what he agrees was an accident.[21]

No rational view of this record supports a finding that Lever's conduct was reckless -- that is, extreme misconduct outside the range of the ordinary activity inherent in ice hockey. The game of hockey at the level at issue in this case -- seventeen to nineteen year old high school Midget Major division players -- involves, as the parties agree, "a lot of body contact, which requires a player to be aggressive and physical." Checking (and even checking hard and deliberately) is not only allowed, but "is an inherent, fundamental part of the sport."[22] Karas, 227 Ill. 2d at 456. Both Lever and Borella

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[20] Borella argues that, because Team Kanaly had essentially won the game at the time of the check, Lever's conduct -- continuing to play competitively to score or prevent Borella from doing so -- was reckless. Yet, the winner of the tournament was, in part, determined by score differential and the "mercy" rule for the tournament was triggered only if one team led by ten goals by the third period.

[21] As set forth infra, Borella's recklessness claim centers on his allegations regarding the check he received; he does not contend, and the record does not support, that Lever's postcheck conduct -- accidentally cutting Borella with his skate -- was itself reckless conduct.

[22] Because the evidentiary principle permitting lay opinion testimony "does not permit a witness to express an opinion about what someone was intending or planning to do based on an observation of the person," the dissent, see post at , is incorrect to rely on the inadmissible lay opinion of Borella's teammate that Lever checked Borella with intent to injure. Mass. G. Evid. § 701 note, at 239 (2019). See Commonwealth v.

had been playing ice hockey for years, and both were well acquainted with the fact that an inherent part of the sport involves physical contact, such as checking (whether within the rules or in violation thereof), and the potential for injury from the same.

That, while vying for the puck, Lever aggressively engaged in conduct that constituted a penalty (such as boarding, charging, or hitting from behind) does not alter the analysis. See, e.g., Karas, 227 Ill. 2d at 460 (affirming dismissal of

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Jones, 319 Mass. 228, 230 (1946), citing Smith v. Commonwealth, 113 Ky. 19, 25 (1902) (bystander's testimony as to his belief as to victim's intent incompetent and thus inadmissible). See also Commonwealth v. Espinal, 482 Mass. 190, 205 n.19, quoting Commonwealth v. Millyan, 399 Mass. 171, 183 (1987) (2019) ("The general rule is that a witness may testify only to facts that he observed and may not give an opinion on those facts"); Mattoon v. Pittsfield, 56 Mass. App. Ct. 124, 137 (2002), citing Olson v. Ela, 8 Mass. App. Ct. 165, 167 (1979) ("Generally, a witness may testify to facts observed by him and may not give an opinion based on those facts"); Commonwealth v. Carver, 33 Mass. App. Ct. 378, 383 (1992) (witness cannot provide "mere opinion or speculation as to another person's state of mind" [citation omitted]); Commonwealth v. Tiexeira, 29 Mass. App. Ct. 200, 202 (1990) ("Ordinarily, a witness may testify only to what she observed and may not state an inference or opinion based upon those facts"); Sereni v. Star Sportswear Mfg. Corp., 24 Mass. App. Ct. 428, 433 (1987) (expressions of belief do not rise to personal knowledge required by rule 56 [e]); Commonwealth v. Rodriguez, 17 Mass. App. Ct. 547, 554-555 (1984) (witness's opinion as to defendant's state of mind inadmissible). The witness's opinion is not rationally based on the witness's perception of facts, is not a "shorthand expression" to describe his perception, and therefore does not qualify as lay opinion testimony. Commonwealth v. Tracy, 349 Mass. 87, 95-96 (1965), cert. denied, 384 U.S. 1022 (1966). Such inadmissible testimony is unavailing on summary judgment. See Mass. R. Civ. P. 56 (e).

complaint where plaintiff alleged he was hit from behind in ice hockey game in violation of safety rule). As Borella acknowledges, a violation of a safety rule alone cannot establish recklessness. "Some injuries may result from such violations, but such violations are nonetheless an accepted part of any competition." Jaworski v. Kiernan, 241 Conn. 399, 408 (1997) ("That is why there are penalty boxes, foul shots, free kicks, and yellow cards"); Cole v. BSA, 397 S.C. 247, 253 (2011) ("If no one ever violated the rules, then there would be no need for penalty shots in basketball, a penalty box in hockey, or flags on the field in football"). Here, there is no dispute that, at the time of the check, Borella had possession of the puck and was skating towards Team Kanaly's goal. Compare Gauvin, 404 Mass. at 451-452 (violation of rule against butt-ending where players were no longer battling for puck could form basis for finding of recklessness). Unlike the butt-ending in Gauvin, see note 18, supra, Lever's conduct directly related to obtaining a competitive advantage (stripping Borella of the puck and stopping his progress towards the Team Kanaly goal) and is not the type of extreme misconduct that a jury could rationally find was outside the range of the ordinary activity inherent in a competitive hockey game at this level. See Knight, 3 Cal. 4th at 318; Karas, 227 Ill. 2d at 459-460. In these circumstances, although the subsequent injury to Borella's wrist is

lamentable,[23] summary judgment in favor of Lever was proper. See Karas, supra at 461.

2. Referees. Borella's negligence and gross negligence claims against the defendant referees also fail. We need not determine whether referees have a "special relationship" with Borella and thus owe him a duty of care to protect him from the misconduct of a third party and, if such a duty exists, whether the standard of care is negligence or recklessness. See Kavanagh v. Trustees of Boston Univ., 440 Mass. 195, 202 n.6 (2003) (declining to address whether our common law would recognize "special relationship" between players and referees). Here, nothing in the record supports a finding of a causal nexus between any action or inaction by either Mahoney or Lerner and Borella's injury. See Glick v. Prince Italian Foods of Saugus, Inc., 25 Mass. App. Ct. 901, 901-902 (1987) (summary judgment proper when plaintiff failed to show causal nexus between

[23] In assessing recklessness, the focus necessarily is on the conduct of the defendant, not the resultant harm to the plaintiff. See Commonwealth v. Hardy, 482 Mass. 416, 423 (2019) ("in all cases . . . we must look at the conduct that caused the result to determine whether it was wanton or reckless, not the resultant harm"). See also Commonwealth v. Bouvier, 316 Mass. 489, 495 (1944) ("whether the conduct of the defendant was wanton or reckless must be determined by the conduct itself and not by the resultant harm"). For this reason, Borella correctly does not rely on his injury (either his temporary loss of consciousness or his laceration) in his brief. Further, there is no evidence in the record that the harm suffered by Borella -- a laceration on the wrist -- is the type of harm that one would foresee from a hard check.

defendant's conduct and plaintiffs' injuries); Mass. G. Evid. § 701 (2019). See also Pape v. State, 90 A.D.2d 904, 904-905 (N.Y. App. Div. 1982).

At best, the evidence was that a few Renegades fans and one Renegades player believed that the referees missed calls and opined that the game was not controlled. However, there was no evidence of either any particular missed call or anything to suggest that any missed call affected Lever or Borella. The conclusory statements of witnesses about how the referees should have called more penalties, without providing any further evidence of what type of conduct warranted these penalties or what penalties should have been called, cannot defeat summary judgment. See Cannata, 73 Mass. App. Ct. at 792.

Indeed, the undisputed record is that multiple penalties were called during the game, on both sides, and the referees cautioned both teams against verbal taunting. Prior to the injury, there had been no conflicts involving either Borella or Lever, and neither player had a penalty. There was no evidence of any animosity between them, and no basis to conclude that the referees should have ejected either player from the game. On this record, there is no rational basis upon which a jury could conclude that more penalty calls would have, in any way, affected Lever's conduct, and summary judgment in favor of the referees was proper.

3. Coaches. Borella's negligence, gross negligence, and recklessness claims against the defendant coaches fare no better. To begin, because the court in Kavanagh, 440 Mass. at 205, held that, at most, a coach's duty of care is governed by the recklessness standard, summary judgment properly entered in favor of the three coaches on the negligence and gross negligence claims.

Borella's claim against the Team Kanaly coaches and the Renegades coach, Brun, falters on the additional ground that the Supreme Judicial Court has held that, in order to impose liability on a coach for the conduct of a player, there must be, at the least, evidence of "specific information about [the] player suggesting a propensity to engage in violent conduct, or some warning that [the] player . . . appeared headed toward such conduct as the game progressed." Kavanagh, 440 Mass. at 203 (holding that for purposes of contact sports, foreseeability "must mean something more than awareness of the ever-present possibility that an athlete may become overly excited and engage in physical contact beyond the precise boundaries of acceptably aggressive play"). Here, the undisputed record shows that Lever had been involved in no penalties prior to the check at issue, and there was no evidence that Lever was prone to violent behavior.

With regard to Borella's claim that Kanaly was reckless, Borella contends that a jury could find Kanaly reckless based on an inference that Kanaly condoned intentional violations of the rules because Kanaly's affidavit is silent as to whether he taught players the rules of hockey and the importance of fair play. Such speculation is insufficient to defeat summary judgment. See Benson v. Massachusetts Gen. Hosp., 49 Mass. App. Ct. 530, 532-533 (2000). Borella next points to evidence that, during a different game[24] played by a different Kanaly team earlier in the tournament, Kanaly players (not including Lever) were penalized for multiple penalties (i.e., tripping, checking, boarding, fighting, high sticking, crosschecking, and roughing). Borella also argues that Kanaly knew that his teams would dominate the tournament and should have prevented mismatching between his teams and others. This evidence does not rationally permit a finding that Kanaly was reckless. Indeed, the Supreme Judicial Court has held that "[i]t is not up to a coach to remove a player who may, conformably with the rules of the sport and the judgment of the referees, remain in the game despite the infractions allegedly committed." Kavanagh, 440 Mass. at 206. Yelling encouragement and even praising aggressive play of

[24] The only admissible evidence shows indisputably that Kanaly was not coaching the game during which Borella suffered the injury.

players committing fouls does not, the court held, amount to reckless conduct. Id. On this record, there is no basis from which a jury could conclude that Kanaly encouraged or incited Lever's conduct during the game, much less that he did so recklessly.

Similarly, Grevious's conduct in the game cannot support a finding of recklessness. The undisputed evidence was that the coaches (Brun and Grevious) were responsive to a request from the referees to warn the players about verbal taunting. There is nothing in the record to support Borella's speculation that Grevious recklessly encouraged aggressive play without regard to injuries others might suffer. See Benson, 49 Mass. App. Ct. at 532-533. Indeed, even if there were evidence that Grevious aggressively encouraged his players (including those who committed fouls), such conduct is not reckless. See Kavanagh, 440 Mass. at 206.

With regard to Brun, Borella asserts that he was reckless because he failed to appreciate (i) the size differential between the players on the Renegades and those on Team Kanaly and (ii) that retaliation was occurring. The record does not support Borella's assertions. Borella and Lever were not substantially differently sized, and even if some of the Team Kanaly players were physically larger than the Renegades players, Brun was not reckless in allowing the Renegades

players, who were only down by one goal through two periods, to play the game. The undisputed evidence was that Brun advocated a "good clean game," that he told the players to "play smart; focus on your job; play under control; don't let anybody get into your head on the ice." Nothing in the record would support a finding that this conduct was reckless.

4. Rink defendants. Borella's claims against the rink defendants for negligence[25] also lack support in the record. He first asserts the rink defendants negligently allowed the referees to officiate too many games. Contrary to this claim, there is nothing in the record to suggest that (i) the referees missed any particular calls, (ii) any purported missed calls were caused by fatigue from officiating too many games, or (iii) there is any causal nexus between any missed calls and Lever's conduct and the injuries Borella sustained. See Glidden v. Maglio, 430 Mass. 694, 696 (2000).

Next, Borella asserts that the rink defendants failed to catalog prior injuries at the sports center and mislabeled the tournament advertisement as an event sanctioned by "USA Hockey," but again provides no causal link between this conduct, Lever's actions, and his injuries. See id. Borella also asserts that

[25] As with the referee defendants, see supra, we need not decide whether the standard of care for the rink defendants is negligence because the record fails to support a causal nexus between the rink defendants' actions and Borella's injuries.

the rink defendants negligently scheduled the Renegades to play against Team Kanaly despite their disparate skill levels and failed to adopt a code of conduct for the tournament. Yet, the evidence was that both teams were Midget Majors, and the game score and penalties assessed against each team fail to support Borella's assertions. Indeed, it is undisputed that the tournament was governed by the modified NCAA rules. As set forth supra, these rules established a "[m]ercy" rule whereby if the skill level between two teams was disparate and one team led another by ten goals by the third period, the game would end. See note 7, supra. Thus, the rink defendants are entitled to summary judgment.[26,27]

Conclusion. The summary judgment in favor of the defendants is affirmed.

So ordered.

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[26] On appeal, Borella does not address the judge's grant of summary judgment as to the claims for negligent hiring and supervision of the referees. Accordingly, he has waived any argument that these claims were improperly dismissed. See Mass. R. A. P. 16 (a) (9) (a), as appearing in 481 Mass. 1628 (2019).

[27] Borella also argues that because the criteria of Mass. G. Evid. § 702 were met, the judge should not have allowed the defendants' motion to strike the affidavit of proposed expert witness Ronald Kramer. In allowing the motion the judge properly applied the factors set forth in Mass. G. Evid. §§ 702, 703. See Simon v. Solomon, 385 Mass. 91, 105 (1982).

RUBIN, J. (dissenting). Thirty years ago, in Gauvin v. Clark, 404 Mass. 450, 454 (1989), the Supreme Judicial Court held that when a tort claim "aris[es] out of an athletic event," there a college ice hockey game, liability will be imposed "in cases of reckless disregard of safety." The court today improperly and without authority replaces that test with the one utilized by courts in States that have rejected the recklessness standard articulated by the Supreme Judicial Court and applicable here. See Karas v. Strevell, 227 Ill. 2d 440, 456-459 (2008) (court concluded that, because "imposing liability under the conscious disregard of safety standard would have a pronounced chilling effect on full-contact sports[,] . . . a participant breaches a duty of care to a coparticipant only if the participant intentionally injures the coparticipant or engages in conduct 'totally outside the range of the ordinary activity involved in the sport'"); Knight v. Jewett, 3 Cal. 4th 296, 320 (1992) (liability may be imposed only if participant "intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport" [emphasis added]). Treating its heightened standard as though it is a gloss on Gauvin, the court holds that no jury question about reckless disregard of safety is

raised when a high-school aged hockey player undertakes a "tremendous," "ferocious," full-speed, illegal, blind hit from behind that renders another child unconscious and causes serious injury. In doing so, it strips children who play competitive sports of the protections against reckless violence to which they are entitled, and with which the decision of the Supreme Judicial Court in Gauvin has for thirty years provided them. That the court does so in the name of not "chill[ing]" "[v]igorous and active participation in sporting events," ante at , -- a view apparently based on an erroneous conclusion that some reckless violence is "fundamental" to "the game of ice hockey," ante at -- is particularly ironic. The recklessness standard that the Supreme Judicial Court adopted was explicitly designed to foster such participation. See Gauvin, supra ("Precluding the imposition of liability in cases of negligence without reckless misconduct furthers the policy that '[v]igorous and active participation in sporting events should not be chilled by the threat of litigation'" [citation omitted]). And the history of the past thirty years demonstrates that it does so. Rather than preserving competitive youth sports in this Commonwealth, I fear that today's decision, which may leave children at the mercy of reckless and

violent players with whom they come in contact, will instead lead both to serious injuries, and to some responsible parents withdrawing their children from competitive sports, diminishing rather than encouraging them. Because the court does not adhere to the precedent by which we are bound, under which reversal is required, I must respectfully dissent.

Discussion. The legal standard for a tort claim "arising out of an athletic event" has been well settled for thirty years. Gauvin, 404 Mass. at 454. Indeed, it was settled in a case involving amateur ice hockey, there at the collegiate level. Id. at 451-452, 454. Liability may be imposed "in cases of reckless disregard of safety." Id. at 454. For purposes of summary judgment, we must take the facts in the light most favorable to the nonmoving party, here the plaintiff. Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). Summary judgment may be allowed only if there is no genuine issue of material fact and the defendants are entitled to judgment as a matter of law. Valente v. TD Bank, N.A., 92 Mass. App. Ct. 141, 144-145 (2017). Our review is de novo. Id. at 144.

Stripped of all the countervailing facts and descriptive language included in the majority opinion, the facts, in the light most favorable to the plaintiff, are

simply as follows. During a Midget Major division youth hockey game for high school players, the seventeen year old plaintiff, Daniel J. Borella, had the puck. Defendant Julion Scott Lever, another seventeen year old on the opposing team, skated at a high rate of speed toward Borella without slowing down, and checked him hard from behind. Borella was smashed into the boards.[1] Lever's hit knocked him unconscious.

Borella fell to the ice where, foreseeably, all the parties agree, his forearm was sliced on the underside by Lever's skate. Far from a mere "cut on the wrist," ante at , Lever's skate severed various blood vessels, nerves and tendons. The result of the injury was the permanent partial loss of the seventeen year old's dominant hand, which one of the referees of the game, defendant Steven M. Lerner, testified was probably "the most severe injury [he has] seen as a referee."

In a deposition, one witness described the hit as a "smash" and a "tremendous hit." Another witness described

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[1] The "boards" are a "low wooden wall enclosing a hockey rink," often on top of which are panes of shatterproof glass. Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/board?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [https://perma.cc/3VWA-S7RA]. Together, the boards and the glass amount to a solid wall taller than the players.

the hit as "ferocious." Two witnesses testified in that it was a "[t]en" out of ten. One witness testified that due to "the force of [the hit], where [Borella] was hit, [and] how [Borella] was hit," he concluded that defendant Lever hit Borella with "intent to injure."

Defendant Lever, in his deposition, agreed that he was "aware at the time that a check to someone in the boards, an opposing player in the boards from behind could result in an injury." He also testified that hits from behind "can be dangerous." In fact, hits from behind have no place in amateur hockey. They are illegal and dangerous. As a former member of the NCAA hockey rules committee said in 2006, "[t]his has to be something that our players have to understand, and that is that you do not hit from behind. Because of the strict enforcement, there will be situations where there will be questionable calls. However, one person being paralyzed is too many" (emphasis added). Indeed, even with respect to the professional game, no lesser an authority than Bobby Orr himself stated in a 2013 interview, "[W]hat we've got to do in our game: stop . . . hitting from behind."[2] To the extent the court would

[2] Ken MacQueen, Bobby Orr; How we're killing hockey (MacLeans, October 17, 2013), https://www.macleans.ca/sports/on-being-left-broke-and-

distinguish Gauvin on the ground that a hit from behind is an "inherent aspect of the game," ante at n.18, it is clearly mistaken.

The evidence in the summary judgment record, then, is that the defendant Lever skated hard and at full speed at Borella, hitting him from behind in a "ferocious" hit, a ten out of ten, undertaken with intent to injure, knocking him unconscious and foreseeably causing serious injury.[3]

Quite obviously, not every rule violation in youth hockey is a reckless act that might lead to tort liability; presumably almost none ever are. But the evidence in this case and the reasonable inferences that can be drawn therefrom can clearly support a finding that Borella's injury was a result of Lever's reckless disregard of safety, just as the evidence of "butt-ending," hitting another player with the butt-end of one's hockey stick, also a violation of the rules that warrants a penalty,

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betrayed-pushy-rinkside-parents-and-the-future-of-the-game/ [https://perma.cc/VJS2-MHYP].

[3] The court is of course correct that the focus of the recklessness question is the defendant's conduct, not the resultant harm. See ante at n.23. But whether conduct is reckless depends on the extent of the harm that likely would result from the defendant's conduct, see Commonwealth v. Welansky, 316 Mass. 383, 399 (1944), and the evidence in the summary judgment record would support a finding that Lever's conduct was likely to cause a serious injury, as in fact it did.

Gauvin, 404 Mass. at 452, was held sufficient to support a claim for recklessness in Gauvin. Id. at 457.

Of course concluding that the evidence raises a jury question is not to say that Lever did act in reckless disregard of safety, or that the evidence compels such a finding. There is countervailing evidence, and questions of credibility -- some implied by the court in its characterization of witnesses -- that would have to be considered before a finder of fact could make that determination. But we are not permitted at this stage in the proceeding to weigh the evidence or to make credibility determinations. The question of reckless disregard is one for the jury, as, the court acknowledges, it ordinarily is. See Manning v. Nobile, 411 Mass. 382, 388 (1991). Summary judgment against Lever thus should be reversed.

In a footnote, the court says that the witness's statement that the hit was undertaken with intent to injure is not admissible. Ante at note 22. Even without that witness statement the evidence is sufficient to go to the jury on recklessness. But it plainly is admissible. There is no evidentiary principle in Massachusetts that "does not permit a witness to express an opinion about what someone was intending or planning to do based on an observation of the person," ante at n.22, quoting from Mass. G.

Evid. § 701 note, at 239 (2019).[4] Lay opinions are admissible when "(a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge." Commonwealth v. Canty, 466 Mass. 535, 541 (2013), quoting Mass G. Evid. § 701 (2013).[5] The witness's opinion here, which was based on his observation and description of "the force of [the hit], where [Borella]

[4] The only case on which the court would rely for that proposition, Commonwealth v. Jones, 319 Mass. 228 (1946), doesn't say there is. It is a self-defense case, in which a lay witness's opinion that the victim was about to do the defendant serious harm was held "immaterial" to the question before the court, which was whether the defendant (reasonably) believed this. Id. at 230. It does not say opinions about intent are incompetent. The court cites a single 1902 Kentucky case, taken from the middle of a string cite of ten out-of-State cases contained in that 1946 Supreme Judicial Court case, that used the word "incompetent" to describe an opinion on the victim's intent. Smith v. Commonwealth, 67 S.W. 32, 34 (Ky. 1902). But an examination of the Kentucky case, another self-defense case that was on all fours with Jones, demonstrates that it meant only that the opinion was incompetent because it was immaterial to the legal question before the court, i.e., the accused's belief about the victim's intent. See Smith, supra at 33-34.

[5] And, of course, "[p]rovided that a witness does not directly offer an opinion regarding the defendant's guilt or innocence in a criminal case, . . . we have no rule in Massachusetts prohibiting an opinion that touches on an ultimate issue." Canty, 466 Mass. at 543.

was hit, [and] how [Borella] was hit," though, plainly satisfies these criteria for admissibility.[6]

The court majority concludes that the evidence does not suffice to raise a jury question about recklessness only by improperly raising the standard for liability, and misdescribing the nature of youth ice hockey. The consequence is the essential immunization from liability in competitive youth sports of at least all reckless violence "related to obtaining a competitive advantage" when those acts of violence, like this one, also violate the rules of the game. Ante at . But of course, while the fact that an action results in a penalty is plainly insufficient for it to warrant legal liability even when it causes

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[6] The only cases the court cites in which material opinion evidence on intent was excluded were cases in which the opinion was not rationally based on the witness's own perception and amounted to nothing more than expressions of speculation or belief. See Commonwealth v. Carver, 33 Mass. App. Ct. 378, 383 (1992) (witness cannot provide "mere opinion or speculation as to another person's state of mind"); Sereni v. Star Sportswear Mfg. Corp., 24 Mass. App. Ct. 428, 433 (1987) ("Expressions of belief, of course, do not rise to the personal knowledge required by Mass.R.Civ.P. 56[e]"). Commonwealth v. Rodriguez, 17 Mass. App. Ct. 547, 554-555 (1984), which the court describes as holding that a "witness's opinion as to defendant's state of mind" was "inadmissible," ante at n.22, actually holds that testimony about the reasonableness of a witness's state of mind is inadmissible. In any event, again, the opinion there was based entirely on hearsay.

injury, the fact that a recklessly violent act may incur such a penalty plainly cannot immunize it from liability. Indeed, in Gauvin, the court concluded that an incident of butt-ending in reckless disregard of safety that caused serious injury could properly serve as a basis for legal liability even though it also could warrant a penalty during play. Gauvin, 404 Mass. at 452, 457.

The court alters the standard for liability from the recklessness standard utilized by the Supreme Judicial Court in Gauvin to one that it purports to adopt from "our sister States," that conduct can only be actionable if it is "extreme misconduct outside the range of the ordinary activity inherent in the sport." Ante at . This standard has no basis in Massachusetts law. The Gauvin standard, articulated by the Supreme Judicial Court in a youth hockey case, which allows "the imposition of liability in cases of reckless disregard of safety," 404 Mass. at 454, is the one that applies, and is one that must be applied by the court in assessing the claim in this case. Although the court incorrectly says that courts in other States have used the test the court today adopts to define "reckless conduct," as described at the outset, that test is in fact taken from cases that explicitly reject the Gauvin recklessness standard and utilize the "extreme

misconduct outside the range of the ordinary activity inherent in the sport" test instead of it. Ante at . See Knight, 3 Cal. 4th at 318; Karas, 227 Ill. 2d at 459. That the court is altering the standard is clear from the absence of any argument that all conduct that constitutes "reckless disregard of safety," Gauvin, supra, is "extreme misconduct outside the range of the ordinary activity inherent in the sport," or, indeed, any argument, independent of this new standard, that, viewing the evidence in the light most favorable to Borella, Lever's act was not performed with reckless disregard for Borella's safety.

As the majority opinion makes clear, the court's new standard requires more than reckless disregard of safety. Rather, it amounts to a rule of immunity for almost all reckless violence in youth sports. The court first states that "[r]eckless conduct . . . is defined as 'intentional conduct . . . involv[ing] a high degree of likelihood that substantial harm will result to another.'" Ante at , quoting Commonwealth v. Welansky, 316 Mass. 383, 399 (1944). The court then goes on to say, that "aspects fundamental to the manner in which" ice hockey is played "arguably are, by definition, 'intentional conduct . . . involv[ing] a high degree of likelihood that

substantial harm will result to another.'" Ante at , quoting Welansky, supra. That is, it concludes that youth ice hockey, at least arguably, inherently involves recklessness. Indeed, Karas, on which the majority opinion would rely, says it does.

But reckless disregard of safety is not an inherent part of the game of hockey, as Gauvin makes clear and as any youth hockey coach must know. "The speed, skill, finesse, athleticism, and teamwork in hockey set [it] apart."[7] Indeed, according to a USA hockey publication, "USA Hockey has identified potentially dangerous actions like charging, boarding, checking from behind and hits to the head as 'point of emphasis'" in the effort to reduce injuries, which USA Hockey's chief medical officer, Dr. Michael Stuart, has attributed in part to being "young, active and fearless" and failure to "follow[] . . . existing rules of the game."[8] And as USA Hockey manager of player safety, Kevin Margarucci, said, "If we teach our kids sportsmanship, mutual respect and good ethics, we

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[7] Steamboat Springs Youth Hockey, https://www.steamboatyouthhockey.com/ [https://perma.cc/775Z-7KTM].

[8] Dave Pond, Changing the dangerous play culture (USA Hockey, March 15, 2018), https://www.usahockey.com/news_article/show/898148 [https://perma.cc/AJN7-74FR].

could eliminate some of the unnecessary and dangerous plays that occur during a game."[9]

The court next holds that liability can be imposed only for "extreme misconduct" which is "outside the range of the ordinary activity inherent in the sport." Ante at . It then explicitly immunizes reckless violence in violation of safety rules -- explicitly including all "aggressive[] . . . boarding, charging, or hitting from behind," ante at -- at least when that reckless violence was "related to obtaining a competitive advantage," ante at , as, of course, most often, it will be. And, though of course such conduct is within the terms of the scope of the protection afforded by Gauvin, it then holds that the evidence in this case doesn't even raise a genuine issue of material fact under its new standard, apparently because Borella had the puck. Ante at & n.23. But the children here were supposed to be playing ice hockey, not "kill the kid with the puck."

The court claims that its newly minted standard is "faithful," ante at , to the principles underlying Gauvin -- if not to Gauvin itself -- partly because it is necessary to insure "[v]igorous and active participation in

[9] See note 9, supra.

sporting events." Ante at , quoting Gauvin, 404 Mass. at 454. This is indisputably false. Gauvin itself, a case which, it bears emphasizing, was decided in the context of collegiate ice hockey, imposed the recklessness standard, the standard the court now abandons, precisely to promote "[v]igorous and active participation in sporting events." Gauvin, supra, quoting Kabella v. Bouschelle, 100 N.M. 461, 465 (1983), and it has self-evidently done so. Indeed in Quebec, the courts have utilized an ordinary negligence standard in assessing tortious conduct on the ice. See Zaccardo c. Chartis Ins. Co. of Canada (2016), 2016 QCCS 398 (Can.). If the youth hockey system in such a regime can produce a hockey player like Ray Bourque, the court's newly heightened immunity for reckless violence standard is hardly necessary to insure vigorous competition.

The court does twice tell us that what happened here was a "freak accident," ante at & , but if that is a concern, the remedy the court fashions to avoid a trial is badly mismatched with the problem. Freak accidents are not actionable because they are not foreseeable. Perhaps this one was not, but the defendants have not argued that this injury was not foreseeable. Indeed, they agree that it was. But if foreseeability is

the issue, raising the bar of liability to immunize reckless violence even when it results in unconsciousness is the wrong way to address it since it will encourage and prevent redress for serious injuries that are not as unusual as the one here.

Indeed, as a result, the majority's opinion, which states it is designed to enhance competitive athletics, may well lead to their substantial diminishment. Some responsible parents will not allow their children to play sports if those children must fend for themselves in the face of reckless violence by other players. This is particularly true against the backdrop of parents' increasing insistence on improvements in safety in children's competitive sports at all levels, a trend this court today bucks. "More than half . . . of parents said they have or would prevent their child from participating in a sport because of concerns about the risks [of injuries]."[10] Indeed, participation rates in youth hockey

[10] National Athletic Trainers' Association, Parents, Fearing Injury, May Keep Kids from Playing Sports: National Survey Suggests Many May Not Know Steps to Keep Kids Safely in the Game (June 26, 2018), https://www.nata.org/nr06262018 [https://perma.cc/TV4C-36DC].

even in Canada are falling. "The decline has been attributed in large part to parents' fears of injuries."[11]

If the facts in this case don't raise a jury question about recklessness, it is hard to imagine what will. Because the majority's opinion is not consistent with the precedent by which we are bound, and because it may both place children who play sports needlessly in danger's way, and lead some responsible parents to withdraw their children from youth sports, respectfully, I dissent.

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[11] Jeff Z. Klein, Citing Costs, N.H.L. Injury Study Urges More Safety, (N.Y. Times, January 29, 2014), https://www.nytimes.com/2014/01/20/sports/hockey/citing-costs-nhl-injury-study-urges-more-safety.html [https://perma.cc/GYY4-7JA4].