

STATE OF MICHIGAN
COURT OF APPEALS

JILL RITCHIE GAMESTER,

Plaintiff-Appellant,

v

HALLEY MANN and K. DOUGLAS MANN II,
as Guardian Ad Litem for HALLEY MANN,

Defendants-Appellees.

UNPUBLISHED

May 9, 1997

No. 194024

Oakland Circuit Court

LC No. 93-448569-NO

Before: Holbrook, Jr., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants in this negligence action. We reverse.

Plaintiff was ice skating at the Berkley Ice Arena during an “open” skating session. Plaintiff was skating with her five-year-old niece, who had never skated before. Plaintiff was holding her niece’s hand and skating at a slow pace. According to plaintiff, they skated four to six feet from the wall in the middle of the crowded rink.

Defendant Halley Mann was skating at the rink with two friends, Christina Scarmeas and Joe Bradshaw. Halley was skating backwards, and Scarmeas and Bradshaw were supposed to let her know if someone was behind her. At some point, either Scarmeas or Bradshaw told Halley to be careful because she was “going to hit someone.” Halley testified that she did a “snow plow stop,” but that she struck plaintiff in the back. Plaintiff fell and injured her knee. Plaintiff filed suit, alleging that Halley was negligent for skating backward without observing where she was skating.¹

Defendant moved for summary disposition under MCR 2.116(C)(10). Following arguments, the trial court entered an order granting defendant’s motion. The court based its ruling on *Overall v Kadella*, 138 Mich App 351, 357; 361 NW2d 352 (1984). The court stated:

The issue before this Court is whether defendant owed a duty to the plaintiff at the time of the accident. The case relied on by the defendant herein is Overall v

Kadella, 138 Mich App 351, to support her position that her sole duty was to refrain from any intentional act. In the Overall case, the Court stated as follows and I quote from page 357:

“Participation in a game involves a manifestation of consent to those bodily contacts which are permitted by the rules of the game. However, there is a general agreement that an intentional act causing injury, which goes beyond what is ordinarily permissible, is an assault and a battery for which recovery may be had.”

Now this was not a game, of course, this was an ice rink. There are analogous cases involving ice and also skiing. Those cases involve engagement in an inherently dangerous sport, where if you’re not extremely careful, somebody could easily get hurt. This Court finds that an ice rink is inherently dangerous. People bump into each other and fall down.

Plaintiff does not deny that skating backwards is acceptable in an ice rink. It’s done all the time. Plaintiff also doesn’t allege that the contact was intentional, but argues that defendant breached her duty of care while skating backwards.

It is clear to the Court that skating backwards is a [sic] recognized as a regular activity in an ice rink and, therefore, this Court finds that defendant’s actions were not contrary to the rules governing skating. I’m going to grant the motion for summary disposition.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. The party opposing the motion has the burden of showing the existence of a genuine issue of material fact. Giving the benefit of any reasonable doubt to the non-moving party, the lower court must determine whether a record might be developed which would leave open an issue upon which reasonable minds could differ. *SCD Chemical Distributors v Medley*, 203 Mich App 374, 378; 512 NW2d 86 (1994). All inferences must be drawn in favor of the non-movant. *Mt. Carmel Mercy Hospital v Allstate Ins Co*, 194 Mich App 580, 585; 487 NW2d 849 (1993). Summary disposition may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dafter Sanitary Landfill v Superior Sanitation Service, Inc*, 198 Mich App 499, 502; 499 NW2d 383 (1993).

A review of the record reveals that plaintiff has alleged negligence by the defendant in that she breached the duty to observe where she was skating while skating backward. Defendant argues that she was relying on her friends to guide her and to inform her if there were any obstacles in her path, that she was looking around, and that it was plaintiff who moved directly into her path. Thus, a classic credibility question is presented.

Although the question whether a defendant owes a duty to a plaintiff to avoid negligent conduct in a particular circumstance is a question of law, the legal question must be in a factual context. Here,

the trial court necessarily had to decide disputed questions of fact (i.e., whether Halley was observing where she was skating, and whether relying on others as guides while skating backwards constitutes ordinary care) before concluding that Halley did not breach her duty of care. Although one may consent to the inherent risks of being a spectator or participant in a sport, one does not ordinarily consent to another's negligence. *Schmidt v Youngs*, 215 Mich App 222; 544 NW2d 743 (1996). For this reason, the grant of summary disposition must be reversed.

Reversed and remanded.

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski

¹ Halley's father, K. Douglas Mann II, was appointed as guardian ad litem on Halley's behalf. Halley was twelve years old at the time of the incident.