STATE OF MICHIGAN

COURT OF APPEALS

JACQUELINE ANN RECKLING,

Plaintiff-Appellant,

v

PONTIAC 358 INC. d/b/a THE ULTIMATE SPORTS BAR AND GRILL,

Defendant-Appellee.

UNPUBLISHED
January 5, 1999

No. 205581
Oakland Circuit Court
LC No. 96-516529 NO

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm.

I. Basic Facts And Procedural History

Plaintiff participated in an arm wrestling contest sponsored by defendant. Defendant hired the referee, a patron, paid him $50 and provided him with free drinks. On the night in question, plaintiff arm wrestled two women. Plaintiff defeated her first opponent, possibly suffering some muscle stress in the process. Plaintiff's second opponent, however, was muscular and two inches taller than plaintiff. During the second match, plaintiff's opponent allegedly stepped on the lower supports of the wrestling table and moved her shoulders across the centerline of the table. After her opponent raised herself out of her chair for a few minutes, plaintiff's humerus bone broke.

Plaintiff filed a premises liability lawsuit for personal injuries against defendant, alleging the individual who defendant chose to referee the contest failed to stop, prevent or otherwise intervene in the arm wrestling match when the referee should have known to do so. Pursuant to the discovery order, discovery closed in April of 1997. Defendant filed its motion for summary disposition in May of 1997. During oral argument on the motion, the trial court asked if both parties were satisfied with their briefs. In response to defendant's counsel's request, the trial court allowed defendant to file a supplemental brief. Defendant filed its supplemental brief in June of 1997, and attached to its supplemental brief, the affidavit of a purported expert on arm wrestling and a list entitled "Armsports

Rules and Regulations." In the affidavit, the purported expert averred that if a competitor lifts her feet from the ground during an arm wrestling match, the competitor is violating a rule intended solely to preserve the integrity of the game and not to protect the safety of the competitors. Plaintiff filed a supplemental reply brief in June of 1997 in which she asserted that she did not believe the assertions contained in the purported expert's affidavit. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) in July of 1997.

II. Standard of Review

A. Discovery Violations

This Court reviews for an abuse of discretion the trial court's decision whether to impose sanctions for discovery violations. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 618; 550 NW2d 580 (1996).

B. Summary Disposition Under MCR 2.116(C)(8)

MCR 2.116(C)(8) permits summary disposition when the "opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim to determine whether the opposing party's pleadings allege a prima facie case. *Smith v Kowalski*, 223 Mich App 610, 612-613; 567 NW2d 463 (1997). This Court reviews a motion under MCR 2.116(C)(8) de novo to determine if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Smith, supra*. In a negligence action, summary disposition under MCR 2.116(C)(8) is appropriate if it is determined that, accepting the alleged facts, the defendant did not owe a duty to the plaintiff as a matter of law. *Smith, supra* at 613.

C. Summary Disposition Under MCR 2.116(C)(10)

MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party, to determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ. *Portelli v I. R. Const Products Co, Inc*, 218 Mich App 591, 596; 554 NW2d 591 (1996). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence available to it. *Foster v Cone-Blanchard Machine Co*, 221 Mich App 43, 48; 560 NW2d 664 (1997). This Court reviews the grant of summary disposition pursuant to MCR 2.116(C)(10) de novo. *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996).

III. Discovery Violations

Plaintiff alleges on appeal that the trial court should not have considered the affidavit and list of rules in ruling on defendant's motion for summary disposition. We disagree. During the two-week

period following the filing of defendant's supplemental brief, plaintiff could have noticed the deposition of the purported expert prior to the summary disposition hearing, requested an adjournment of the summary disposition hearing until the purported expert's deposition was completed or found her own arm wrestling expert to dispute defendant's expert's claims. However, plaintiff took none of these actions. Rather, plaintiff merely made the bare assertion in her reply to defendant's supplemental brief that she did not believe the assertions contained in defendant's expert's affidavit. Therefore, we find no merit in this issue, and no abuse of discretion by the trial court. *Beach*, *supra*.

IV. Summary Disposition Under MCR 2.116(C)(8)

A. Introduction

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition based on MCR 2.116(C)(8). We again disagree.

B. The Elements Of Negligence

Plaintiff stated in her complaint that defendant was negligent in failing to hire a referee who could have prevented plaintiff's broken humerus. Plaintiff must prove four elements to prevail on her negligence claim: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) the plaintiff suffered damages; and (4) the defendant's breach was the proximate cause of the damages suffered. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993); *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997).

C. Duty

"Duty is a legally recognized obligation to conform to a particular standard of conduct toward another." *Halbrook v Honda Motor Co, Ltd*, 224 Mich App 437, 440-441; 569 NW2d 836 (1997). If, as a matter of law, a defendant owes no duty to a plaintiff, summary disposition is properly granted under MCR 2.116(C)(8). *Halbrook*, *supra* at 441.

Duty is a "question of whether the defendant is under any obligation for the benefit of the particular plaintiff and concerns the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other." *Id.* at 441-442 (citations omitted). Plaintiff argues that the following paragraphs in her complaint specifically allege defendant's duty:

> 8. That Defendant selected and employed personnel to act as referee(s) to protect the safety of the participants, maintain the integrity of the contest and ensure that the rules of the contest were followed.
>
> 9. That the personnel that Defendant selected and employed to act as referee(s) of said contest failed to stop, prevent or otherwise intervene in the match between Plaintiff and the other as yet unidentified individual when the necessity of doing so was known or should have been known to said personnel.

We find that plaintiff failed to establish in these paragraphs that defendant owed her a duty. Plaintiff consented by her participation in the arm wrestling match to the risk of events such as a broken arm, which are known, apparent and are reasonably foreseeable. Defendant did not have a duty to ensure that plaintiff's humerus did not break. Plaintiff did not allege that her opponent engaged in criminal activity. In fact, plaintiff testified that her opponent was not trying to injure her. Therefore, defendant did not have a duty to protect plaintiff from the events leading to her broken humerus.

D. Assault And Battery

Plaintiff argues that her opponent committed assault and battery. Merchants can be liable in tort for failing to take reasonable measures to protect their invitees from harm caused by the criminal acts of third parties. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 393; 566 NW2d 199 (1997). "The harm must be foreseeable to an identifiable invitee and preventable by the exercise of reasonable care." *Id.* To show assault and battery in this context, plaintiff must also show that defendant intended to injure her. See CJI2d 17.2. This is a specific intent crime. *People v Lardie*, 452 Mich 231, 264; 551 NW2d 656 (1996). There is no showing, circumstantial or otherwise, that plaintiff's opponent intended to break plaintiff's arm or otherwise injure her. Merely because her opponent may have leaned over the centerline of the table or raised her feet from the ground, without more, does not show that she intended to physically harm plaintiff.

Moreover, participants may be held to have consented, by their participation, to injury-causing events which are known, apparent or reasonably foreseeable. *Higgins v Pfeiffer*, 215 Mich App 423, 426; 546 NW2d 645 (1996). However, they are not deemed to have consented to acts which are reckless or intentional. *Id.* Here, plaintiff was an adult and was not compelled to enter the arm wrestling contest for work or for any other overriding or substantial motivation. She chose to participate in a sport where the risk of an arm injury is inherent.

E. Amendment Of The Complaint

Plaintiff contends that she should have been allowed to amend her complaint in the lower court, even though no request was made. In our opinion, amendment of the pleadings would be futile since no factual development could establish the claim and justify recovery. Even if the trial court had allowed plaintiff to amend her complaint to allege that her opponent committed a criminal activity and defendant had a duty to protect her from it, the amendment would be futile since there is no factual evidence to support it.

V. Summary Disposition Under MCR 2.116(C)(10)

Plaintiff asserts that there were genuine issues of material fact that the trial court should have allowed to go to the jury. Once again, we disagree. Even assuming that the referee had a duty toward plaintiff to enforce the rules of arm wrestling by requiring plaintiff's opponent to remain seated, plaintiff did not produce any evidence to demonstrate that this was the proximate cause of her broken humerus. The only evidence that has been produced in the lower court was from defendant and this evidence showed that plaintiff's broken humerus was unrelated to plaintiff's opponent placing her feet on the table

support. Moreover, even if defendant had provided a referee that would have instructed plaintiff's opponent to return to her seat the moment plaintiff's opponent raised herself off her chair, it is pure speculation as to whether plaintiff's opponent actually would have returned to her seat prior to breaking plaintiff's humerus.

> An event may be one without which a particular injury would not have occurred, but if it merely provided the condition or occasion affording opportunity for the other event to produce the injury, it is not the proximate cause thereof. Negligence which merely makes possible the infliction of injuries by another, but does not put in motion the agency by which the injuries are inflicted, is not the proximate cause thereof. Causes of injury which are mere incidents of the operating cause, while in a sense factors, are so insignificant that the law cannot fasten responsibility upon one who may have set them in motion. [*Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 145 (Weaver, J., joined by Boyle and Riley, JJ.), 146 (Mallett, C.J., joined by Brickley and Cavanagh, JJ.) (agreeing with this part of Justice Weaver's opinion); 565 NW2d 383 (1997), quoting 57A Am Jur 2d, Negligence, § 473, pp 454-455.]

Therefore, the competency, or the lack thereof, of the referee provided by defendant was not a proximate cause of plaintiff's broken humerus.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck