STATE OF MICHIGAN

COURT OF APPEALS

BRIAN LEGGERT,

Plaintiff-Appellee,

v

RICK REWEKANT and KELDAN INCORPORATED, d/b/a SOUTH LYON HOTEL,

Defendants-Appellants.

UNPUBLISHED
July 16, 1999

No. 204658
Oakland Circuit Court
LC No. 96-515791 NO

Before: Doctoroff, P.J., Markman and J.B. Sullivan*, JJ.

MARKMAN, J. (concurring in part and dissenting in part).

Although I agree with the majority that summary disposition was properly granted with respect to defendant South Lyon Hotel, I respectfully disagree that summary disposition should be reversed with respect to defendant Rewekant. Therefore, I would affirm the trial court in all respects.[1]

I have no disagreement with the majority's formulation of the law of torts arising in the course of sporting activities. Although participants in sporting activities are assumed to be aware of the hazards "inherent" in such activities, and to have consented to the risk of injuries arising out of such hazards, *Higgins v Pfeiffer*, 215 Mich App 423, 425; 546 NW2d 645 (1996), those acting negligently or recklessly on the sporting field are not immunized from all responsibility for the consequences of their conduct. However, I would construe more broadly than my colleagues what constitutes an "inherent" hazard of competitive softball. In my judgment, collisions between infielders and baserunners, even collisions occurring outside the basepath, are an "inherent" hazard of the game.[2] Since most collisions outside the basepath between an infielder and a baserunner will entail some degree of negligence, or even recklessness, on the part of the baserunner, the majority's analysis would seem to suggest that summary disposition is generally inappropriate where an injury arises in this circumstance.

I understand the 'sporting activity' exception differently. While not all negligent or reckless conduct occurring on the sporting field is exempt from legal recourse, at least some such conduct is.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The 'sporting activity' exception does not only immunize incidents on the sporting field which are inadvertent or unavoidable; indeed, there would be little need for the exception if this were the case since there would be little recourse in the first place under traditional tort law for injuries arising out of such incidents. Rather, in recognizing that individuals are more likely to act in an aggressive and vigorous manner-- sometimes inevitably in an overly-aggressive and vigorous manner-- in the course of athletic competition than at other times, the 'sporting activities' exception is intended to insulate from lawsuit some forms of behavior that would not be insulated if they occurred outside the boundaries of athletic competition. Some athletic injuries which might have been avoided through more prudent behavior on the part of a competitor will fall within the scope of the 'sporting activities' exception, including some resulting from instances of negligent or reckless behavior. If this were not the case, then virtually any injury arising out of a foul in basketball, a penalty in football or ice hockey, or an illegal pitch in baseball, would potentially expose a competitor to tort liability. At the very least, the injured party would be entitled to have the matter heard before a jury or other factfinder.

The injury suffered here by plaintiff, in my judgment, was a typical competitive softball or baseball injury and was a part of the "inherent" hazards risked by a competitor of these games. The "Official rules of Softball", see note 2 *supra*, expressly anticipate the specific kind of physical contact that led to plaintiff's injury and set forth specific sanctions when such contact occurs under the most egregious circumstances. While I am not prepared to say that no basepath collision can ever lead to tort liability, I am persuaded that there was nothing about the instant collision so exceptional that the general rule of separation between sporting event and tort action ought to be vitiated here.

To the extent that plaintiff's suit is predicated, not upon negligence or recklessness, but upon the intentional or purposeful conduct of defendant, there is simply insufficient evidence to sustain this suit. Plaintiff himself has stated in this regard:

> I don't know what he was thinking. I mean, I don't know, I don't know if he was confused in what he was doing . . . . I'm not saying he did it intentionally or he didn't do it intentionally. Let's put it that way. He just crushed me. It's like a quarterback getting hit. You get crushed, you're on your way down.

Beyond this, there was not a single witness among the players on either team, or the spectators of the game, who indicated that defendant Rewekant's conduct was either intentional or purposeful-- or indeed even reckless. Moreover, the game's umpire, who testified that a player may be ejected if he tries to hurt another player or if his actions are "flagrant . . . in the eyes of the umpire," did not eject defendant from the game. He stated instead, "I don't think he was intentionally going after [plaintiff] but again I don't remember." The umpire also acknowledged that he could have "ejected a player even after the game was over."[3] Neither the umpire nor plaintiff (nor plaintiff's team) ever reported the incident to league authorities. While not every instance of ejectionable conduct will expose an offender to tort liability, the corollary would seem more likely to be true, i.e., that non-ejectionable conduct will only very rarely subject an offender to tort liability.[4]

Although I appreciate that a fine line may sometimes have to be drawn between sporting injuries that can and cannot be legally redressed, I believe that the majority would intrude the tort system too

deeply into the sporting process. Absent either evidence that plaintiff's injury arose out of a hazard that was not truly an "inherent" part of the sport of competitive softball, or that the injury occurred as the result of intentional or purposeful behavior on defendant's part, plaintiff's cause of action should not be sustained. Because, in my judgment, there are no genuine issues of material fact outstanding with regard to either of these matters, I would affirm the trial court.

/s/ Stephen J. Markman

[1] I also disagree with the majority that the trial court reached the "right result for the wrong reason" with respect to defendant South Lyon Hotel. Because I agree with the court's analysis concerning defendant Rewekant, I also agree with its derivative analysis concerning defendant South Lyon Hotel.

[2] The "Official Rules of Softball," presented to this Court by plaintiff, state:

> When the defensive player has the ball and the runner remains on his feet and deliberately, with great force, crashes into the defensive player, EFFECT: the runner is out, the ball is dead, and the other runner must return to the last base touched at the time of the interference. NOTE: if the act is determined to be flagrant, the offender shall be ejected.

Plaintiff apparently deduces from this rule that an injury may be legally actionable if it occurs in the course of a "flagrant" collision. However, the rule is equally susceptible to an interpretation by this Court that even a collision occurring with "great force" and done "deliberately" is contemplated as a part of softball, i.e., as a hazard "inherent" in softball. Indeed, even if the collision is "flagrant," the "NOTE," at least arguably, is consistent with the notion that ejection, rather than tort action, is the appropriate sanction for such conduct. In contrast and to recall other notable on-the-field baseball injuries, one would hardly expect the "official rules" of the game to specify the appropriate sanctions for one ballplayer clubbing another over the head with a baseball bat, or to expressly prohibit a pitcher from purposely throwing a baseball at the head of an unsuspecting player practicing his swing in the on-deck circle.

[3] Plaintiff's injury occurred on the final play of the game between his and defendant's teams.

[4] Obviously, the jury, not the umpire or referee, is the final factfinder in matters of legal negligence or recklessness. However, in the context of injuries arising out of a sporting contest, the assessment of the propriety of a player's conduct by a reasonably experienced umpire or referee would seem to be a relevant consideration. The umpire here was highly experienced in this activity, having umpired between 300-350 games alone in the season in which plaintiff was injured.