STATE OF MICHIGAN

COURT OF APPEALS

DIANE CARPENTER,

Plaintiff-Appellee,

v

GLENN MCTAGGART,

Defendant-Appellant.

UNPUBLISHED
July 23, 1999

No. 208470
Oakland Circuit Court
LC No. 94-478791 NO

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Pursuant to an order of the Michigan Supreme Court, we consider as on leave granted defendant's appeal from a trial court order denying his motion for summary disposition of plaintiff's negligence claims pursuant to MCR 2.116(C)(8) and (10). We reverse and remand.

Plaintiff and defendant were teachers who in 1991 both attended a workshop at the American Wilderness Leadership School in Jackson, Wyoming. Safari Club International conducted the workshop, which was designed to instruct the attendees in methods of teaching students about the environment. Attendees engaged in various activities including white water rafting, archery, rifle shooting and mountain hiking. During one of the conference activities, a demonstration of a game entitled "Oh Deer!", defendant collided with plaintiff, seriously injuring her eye and damaging her cheek. Plaintiff thereafter brought the instant negligence action.

Defendant contends that the trial court erred in denying his motion for summary disposition because plaintiff failed to state a claim when the risk of a collision inhered in the game and plaintiff voluntarily participated in the game. Defendant further argues that the trial court improperly denied his motion for summary disposition because no genuine issue of fact existed regarding whether the danger of collisions represented an inherent risk of the game.

We review de novo the trial court's decision with respect to a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Because the parties rely on documentary evidence beyond the pleadings in support of their arguments, we will proceed under the standards of review applicable to a motion made pursuant to MCR 2.116(C)(10). *Krass v*

Tri-County Security, Inc, 233 Mich App 661, 665; ___ NW2d ___ (1999). A court reviewing a (C)(10) motion considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the action in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek*, *supra*; *Farm Bureau Mutual Ins Co of Michigan v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991). Summary disposition is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

Defendant challenges the duty element of plaintiff's negligence claim. Whether a defendant owes any duty to a plaintiff to avoid negligent conduct in a particular circumstance is generally a question of law for the court to determine. *Hughes v PMG Building, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997). When considering the existence of a duty owed by a defendant to a plaintiff, the court must consider to what extent the plaintiff may have assumed any risks arising from the parties' relationship. *Higgins v Pfeiffer*, 215 Mich App 423, 426; 546 NW2d 645 (1996). In the instant case, plaintiff's injuries occurred during the parties' participation in a game.[1] Participants in and spectators of sporting activities are assumed to be aware of the hazards inherent in the playing of the game and to have consented to the risk of injury inherent in the contest, other than breaches of contest rules designed to protect the safety of the players as opposed to the integrity of the contest. *Id*. at 425. Therefore, a defendant owes no duty to a plaintiff to protect her from injuries that might result from the ordinary and ever present risks of the sport involved, as contrasted with those injuries that might be caused by the defendant's lack of due care. *Schmidt v Youngs*, 215 Mich App 222, 228; 544 NW2d 743 (1996).

Viewing the facts of record regarding the circumstances surrounding plaintiff's injury in the light most favorable to plaintiff, we conclude that based on the nature of the activity in which the parties were involved at the time plaintiff's injury occurred, defendant owed plaintiff no duty to avoid a collision with her. The instructions for the game "Oh Deer!"[2] explain that it aims to teach participants the value of a sustaining habitat in the animal world, and to provide an example of how changing ecosystems cause natural fluctuations in wildlife populations. "Students become 'deer' and components of habitat in *a highly-involving physical activity*." [Emphasis added.] The instructions suggest that the game be conducted with at least fifteen individuals, in an indoor or outdoor area "large enough for students to run; e.g., playing field." "Oh Deer!" then proceeds as follows:

> 2. Ask your students to count off in four's. Have all the one's go to one area; all two's, three's, and four's go together to another area. Mark two parallel lines on the ground . . . ten to 20 yards apart. Have the one's line up behind one line; the rest of the students line up behind the other line.
>
> 3. The one's become "deer." . . . The deer (the one's) need to find food, water, and shelter in order to survive. When a deer is looking for food, it should clamp its hands over its stomach. When it is looking for water, it puts its hands over its mouth. When it is looking for shelter, it holds its hands together over its head. A deer can choose to look for any one of its needs during each round or segment of the activity; the deer cannot, however, change what it is looking for; e.g., when it sees what is available

during that round. It can change again what it is looking for in the next round if it survives.

4. The two's, three's, and four's are food, water, and shelter—components of habitat. Each student gets to choose at the beginning of each round which component he or she will be during that round. The students depict which component they are in the same way the deer show what they are looking for; that is, hands on stomach for food, etc.

5. The game starts with all players lined up on their respective lines . . . and with their backs to the students at the other line.

6. The facilitator . . . begins the first round by asking all of the students to make their signs—each deer deciding what it is looking for, each habitat component deciding what it is. . . .

7. . . . At the count of three, each deer and each habitat component turn to face the opposite group, continuing to hold their signs clearly.

8. *When deer see the habitat component they need, they are to run to it*. Each deer must hold the sign of what it is looking for until getting to the habitat component person with the same sign. Each deer that reaches its necessary habitat component takes the "food," "water," or "shelter" back to the deer side of the line. This is to represent the deer's successfully meeting its needs, and successfully reproducing as a result. *Any deer that fails to find its food, water, or shelter dies and becomes part of the habitat*. That is, in the next round, the deer that died is a habitat component and so is available as food, water, or shelter to the deer who are still alive. *NOTE: When more than one deer reaches a habitat component, the student who gets there first survives*. Habitat components stay in place on their line until a deer needs them. . . .

9. . . . Continue the game for approximately 15 rounds. *Keep the pace brisk*, and the students will thoroughly enjoy it. [Emphasis added.]

"Oh Deer!", apparently a more sophisticated version of tag, clearly involves running and physical contact. Plaintiff and several affiants cited by plaintiff stated that they themselves did not expect, nor was there any reason to expect, the type of serious collision that occurred between the parties. Given the nature of the game, in which deer participants run amongst a large group of players in search of basic necessities to maintain their survival, and which may involve multiple deer participants racing each other to first secure a specific desired necessity, the danger of participants colliding constitutes an inherent risk. Deposition testimony revealed that at the time of the parties' collision, there were approximately twenty or more deer participants seeking out only four or five habitat elements. We find it reasonably foreseeable in this environment that, although perhaps not expected by each individual

participant, an occasional collision accident must inevitably occur irrespective of the participants' exercise of due care.[3]

Therefore, because the risk of collision inheres in this game, defendant owed plaintiff no duty to prevent the accident. *Schmidt*, *supra* at 227-228. While an accident arising from an activity's inherent danger may nonetheless be actionable when the participant causing the injury has acted recklessly or intentionally, *Higgins*, *supra* at 426, this record contains no indication that defendant's conduct rose to this level.[4] By participating in the game, plaintiff is presumed to be aware of and to have consented to the risks of injury inherent in the game. *Higgins*, *supra* at 425.[5] Because defendant owed plaintiff no duty of care to protect her from the game's inherent risks, we conclude that the trial court erred in denying defendant's motion for summary disposition.

Reversed and remanded for entry of a judgment of no cause of action. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

[1] Plaintiff makes much of the fact that the parties had engaged in a *demonstration* of "Oh Deer!" that occasioned her injury, "as opposed to a game or contest." Plaintiff therefore argues that defendant mistakenly relies on cases involving sporting activities. Plaintiff's argument, however, is not persuasive. A review of the game's rules reveals that "Oh Deer!" is clearly intended to be a game, contest or sporting activity. See *Random House Webster's College Dictionary* (1997) at p 532 ("game"), p 286 ("contest"), and p 1248 ("sport"). The instructions describe "Oh Deer!" as a "highly involving physical activity." Regardless of the label plaintiff chooses to apply to the particular event in which she was injured, the participants were apparently acting pursuant to the rules of "Oh Deer!" and thus were engaged in a game, contest or sporting activity.

[2] The parties agree that all conference participants were provided instructions for the game prior to engaging in it.

[3] Plaintiff argues that our determination that a collision is inherent in the game, and therefore reasonably foreseeable, constitutes improper fact finding. Plaintiff correctly raises the proposition that where certain factual circumstances give rise to a duty, and there are disputed facts, a jury must determine whether those factual circumstances exist. *Braun v York Properties, Inc*, 230 Mich App 138, 141; 583 NW2d 503 (1998). As we indicated above, however, we have already construed all available facts in plaintiff's favor. Based on these effectively undisputed facts, we have properly determined as a matter of law that defendant owed plaintiff no duty. *Krass*, *supra* at 666 (The issue of duty is one of law for the court, which must assess competing policy considerations to determine whether the relationship between the parties will occasion a legal obligation to the injured party.).

[4] The only eyewitness to the collision testified at his deposition that defendant and another man were running toward plaintiff in a "good-natured way to try to get to the habitat that they both as deer needed," and opined that defendant certainly did not intentionally run into plaintiff.

[5] Plaintiff suggests that an issue of fact exists with respect to whether she, "by her participation implicitly consented to the risk of injury from the violent collision that occurred." While plaintiff alleges that the record shows she never consented to a collision with defendant, our determination as a matter of law that the risk of a collision was inherent in the game of "Oh Deer!" renders unnecessary that plaintiff have specifically consented to this conduct. As the cases cited above indicate, plaintiff's voluntary participation in the game constitutes a consent to the game's inherent risks. *Higgins*, *supra* at 426; *Schmidt*, *supra* at 227-228. Plaintiff does not allege or cite any evidence tending to establish that her participation in the game was otherwise involuntary. We may therefore conclude as a matter of law that she consented to the risks inherent in "Oh Deer!" and that defendant did not owe her any duty.