STATE OF MICHIGAN

COURT OF APPEALS

RYAN RICHARD LACKIE,

Plaintiff-Appellant,

v

MATT FULKS, and BRETT RICCINTO, and SEAN FITZGERALD, Jointly and Severally,

Defendant-Appellees.

and

CITY OF DETROIT

Defendant.

UNPUBLISHED
June 11, 2002

No. 231479
Wayne Circuit Court
LC No. 99-922599-NO

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting all three defendants summary disposition. We affirm in part and reverse in part.

I. Basic Facts and Procedural History

On October 7, 1998, plaintiff, Ryan Lackie, was at the 4-M Lounge in the city of Detroit. Three off-duty police officers, defendants herein, were also present at the bar. In addition, David Copland, a long time acquaintance of defendants Fulks and Fitzgerald was also at the 4-M Lounge that evening and observed the incident giving rise to the instant litigation. Copland, however, was not familiar with defendant Brett Riccinto, the third individual in Fulks and Fitzgerald's company.

Plaintiff does not recall any of the events which he claims culminated in his extensive personal injuries. Consequently, what plaintiff knows about the events of that evening derive from what other individuals told him occurred. That said, according to plaintiff's version of the incident, plaintiff was sitting at the bar having a drink with an acquaintance, "Fat Jerry" (hereinafter referred to as Jerry). One of the three off-duty police officers "suddenly" and without provocation, approached him, struck him in the jaw with such force that he toppled over in his bar stool, hit the floor and was rendered unconscious. No one at the bar could positively

identify Brett Riccinto as the individual in defendants Fulks' and Fitzgerald's company who delivered the blow. Notwithstanding, in his answers to interrogatories, defendant Riccinto placed himself at the bar on the night of the incident and further solidified Fulks' and Fitzgerald's presence.

After plaintiff was knocked to the floor, the individual that struck plaintiff grabbed him by the shirt collar and dragged him outside of the bar and into the parking lot. Copland got up to see what was going on. He grabbed defendant Fulks by the arm and said, "no," further advising that dragging plaintiff out into the parking lot was not right, to which Fulks assured Copland, "[d]on't worry about it. Nothing's going to happen." Fulks further advised that they were not going to harm plaintiff; they were merely escorting him out of the bar and that everything was under control. Copland testified that when he attempted to follow plaintiff outside into the parking lot, defendant Fitzgerald blocked the doorway and would not let him exit the building. Accordingly, he remained inside while Fulks and the individual that struck plaintiff went outside into the parking lot. Copland testified in his deposition that part of his reason for not going outside or otherwise calling for assistance was that he knew that defendants Fulks and Fitzgerald were both police officers. Copeland did not observe any injuries or blood on plaintiff.

Approximately ten or fifteen minutes later, the individual that struck plaintiff and Fulks came back inside of the bar. Plaintiff did not follow. There are no witnesses who could specifically testify as to what transpired outside in the parking lot. In his deposition, plaintiff indicated that he has no recollection of any of the events that occurred that evening because he was knocked out from behind. According to plaintiff, when he regained consciousness, he was in Jerry's vehicle and he had a bloody nose along with cuts and abrasions on his face. Plaintiff testified that Jerry told him that the three off-duty police officers at the bar were the individuals that "assaulted" plaintiff.

Eventually, plaintiff returned home and slept for thirty-six hours before a friend drove him to the hospital to receive medical attention. The injuries that plaintiff claims that he sustained from a beating in the parking lot of the 4-M Lounge included several fractures of the various bones located in the face requiring surgery to correct, a closed head injury causing "cognitive defects," along with fractures in several of his teeth. Plaintiff claims that as a result of the injuries sustained in the beating, he underwent reconstructive sinus surgery with cranial bone graft, implantation of six skull plates and a second surgery for displacement of a surgical pin from a previous hand fracture.

Plaintiff filed an assault and battery suit against all three defendants seeking damages for his extensive injuries. Finding no genuine factual issues, the trial court granted summary disposition as to all three defendants.

II. Standard of Review

This court reviews decisions on motions for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of plaintiff's complaint. *Int'l Brotherhood of Electrical Workers, Local 58 v McNulty*, 214 Mich App 437, 443-444; 543 NW2d 25 (1995). Where plaintiff's claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery," summary disposition in accord with (C)(8) is appropriate. *Id*.

When a trial court rules on this motion, it may only consider the pleadings and may not consider affidavits, depositions or any other documentary evidence. MCR 2.116(C)(G)(4).

Conversely, a motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the underlying complaint. The inquiry relative to a (C)(10) motion is whether, looking at all of the evidence in a light most favorable to the nonmoving party, there are genuine factual issues presented upon which reasonable minds may differ. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

In this case, the trial court did not indicate upon which court rule it relied to grant defendants' motions. A review of the lower court record, however, reveals that the trial court went beyond the pleadings when considering defendants' respective motions for summary disposition. Accordingly, the trial court granted all three defendants' respective motions in accord with MCR 2.116(C)(10) finding no genuine factual issues upon which reasonable minds could differ thus entitling defendants' to judgment as a matter of law.

III. Plaintiff's Claims for Assault and Battery

Plaintiff filed suit against all three defendants alleging assault and battery. Although related, these are separate and distinct causes of action. Under the circumstances of this case, each must be addressed separately.

A. Assault

This Court has recently explained: "An assault is `any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998) (citing *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991)).

Since the tort of assault compensates a plaintiff for the fear or apprehension generated by an imminent battery, to recover for an assault, a plaintiff must experience the fear or apprehension prior to experiencing the battery. In the Restatement of Torts, Prossor explained:

> In the ordinary case, both assault and battery are present; it is an assault when the defendant swings his fist to strike the plaintiff, *and the plaintiff sees the movement*, a battery when the fist comes into contact with the plaintiff's nose. The two terms are so closely associated in common usage that they are generally used together, or regarded as more or less synonymous. [I]t is not accurate to say that "every battery includes an assault," but in practice the difference between the two is often entirely ignored." (Footnote omitted.) 2 Restatement Torts, 2d § 21, p. 41. (Emphasis added.)

In the case at bar, plaintiff repeatedly testified that his assailant struck him from behind and that prior to being knocked unconscious, he did not see anyone approach him. Because plaintiff was struck from behind, he did not see his assailant preparing to effectuate contact with his person. Considering plaintiff's own version of the events, plaintiff did not see the attack coming and thus never experienced any apprehension immediately preceding the actual contact.

Accordingly, plaintiff's claim for assault fails as a matter of law and the trial court did not err by granting all three defendants summary disposition as to the assault.

B. Battery

Conversely, a battery is "`the willful and harmful or offensive touching of another person which results from an act intended to cause such contact.'" *Smith, supra* at 260 (citation omitted.) In accord with this definition, the battery is complete once the perpetrator makes contact with the person of the plaintiff. In the case at bar, plaintiff does not recall the contact that rendered him unconscious inside of the bar.

David Copland, however, testified in his deposition that prior to the incident, he observed plaintiff arguing with defendants Fulks and Fitzgerald and a third person with whom he was not personally familiar but was sitting with the other two defendants. According to Copland, the argument culminated with the third individual, with whom Copland was not familiar, punching plaintiff in the jaw thereby knocking him completely out of his bar stool and then grabbing him by the shirt collar and dragging him out of the bar.

In his answers to interrogatories, defendant Riccinto admits that he was at the bar on the night of the incident. Defendant Riccinto also places defendants Fulks and Fitzgerald at the scene. Aside from being present at the bar on the night that the incident occurred, defendant Riccinto disavows any involvement in the incident resulting in plaintiff's harm.

Although Copland could not identify defendant Riccinto by name, his testimony unequivocally establishes that the individual in the company of Fulks and Fitzgerald was the individual that struck plaintiff in the jaw which knocked him out of his bar stool and which caused plaintiff to come into contact with the floor thereby rendering plaintiff unconscious and who thereafter physically dragged plaintiff out of the establishment and into the parking lot. Considering that Riccinto was present at the bar along with defendants Fulks and Fitzgerald and Copland observed all three sitting together and arguing with plaintiff, reasonable minds could find that defendant Riccinto was indeed the third unidentified individual with defendants Fulks and Fitzgerald who approached plaintiff, knocked him out of his stool and dragged him outside of the bar. Accordingly, we find that a genuine factual issue exists as to whether defendant Riccinto is the individual that initially battered plaintiff sufficient to preclude judgment as a matter of law on plaintiff's claim for battery.

Furthermore, taken in the light most favorable to plaintiff, we find genuine issues of material fact are present as to whether defendants Riccinto and Falks battered plaintiff in the parking lot. Copeland testified that both defendants were outside with plaintiff. He did not observe any injuries or blood on plaintiff when he was dragged outside. When plaintiff awoke he was bloodied and suffered injuries. This presents a sufficient question of fact to preclude summary disposition. Consequently, we reverse the trial court's decision in that regard.

IV. Plaintiff's Concert of Action Theory

Similarly, we find that genuine factual issues exist regarding whether Fulks and Fitzgerald participated in the events that resulted in plaintiff's injuries. Plaintiff argues that even though all three defendants may not have physically touched plaintiff's person, all three

defendants are nevertheless responsible for the whole of plaintiff's injuries because all three defendants acted in concert and in accord with a common understanding or design to accomplish the battery.

To proceed upon a concert of action theory, a plaintiff must establish that "all defendants acted tortiously pursuant to a common design." *Abel v Eli Lilly & Co*, 418 Mich 311, 338; 343 NW2d 164 (1984). If plaintiff satisfies these two elements, then a legal fiction is created whereby *all defendants* are found to be the cause in fact of plaintiff's injury although only one may have actually struck plaintiff. *Id*. Stated another way, "[e]ven if a particular defendant caused no harm himself, that defendant is liable for the harm caused by the others because all acted jointly." *Holliday v McKeiver*, 156 Mich App 214, 218; 401 NW2d 278 (1986). For a plaintiff to establish concerted action, plaintiff need not establish that the defendants had an express agreement; a tacit understanding or agreement will suffice. *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985).

In the instant case, plaintiff alleges that all three defendants acted in concert to accomplish the battery inflicted upon him. Plaintiff argues that defendant Riccinto actually made the contact thus completing the battery, defendant Fulks assisted Riccinto in dragging plaintiff out of the bar and into the parking lot, while defendant Fitzgerald remained in the bar to stop anyone from rendering assistance or otherwise witnessing what transpired outside. Consequently, plaintiff argues these facts create a reasonable inference for a jury to find that all three defendants acted together, pursuant to a common design, to complete the battery thus rendering all three defendants the cause in fact of plaintiff's extensive injuries. We agree.

In his deposition, Copland testified that after plaintiff was knocked out of his bar stool and dragged outside, he attempted to tell Fulks that what they were doing was not right whereupon Fulks advised, "don't worry about it. Nothing's going to happen." Fulks counseled further that "they" were not going to harm plaintiff; "they" were simply removing him from the bar and that everything was under control. A reasonable fact finder could conclude that Fulks' use of the word "they" suggests that all three defendants were acting together according to some unspoken plan to accomplish some end known to all three.

Additional evidence of a common scheme or plan is Fulks' statement upon returning from the parking lot, that "it" was "taken care of" and that plaintiff was "all right." This testimony implies that Riccinto, Fulks, and Fitzgerald all knew what "it" was. That is, they all knew what they wanted to accomplish and they all assumed their appropriate role toward accomplishing the ultimate end which a reasonable fact finder could conclude was to remove plaintiff from the bar, drag him into the parking lot and physically accost him. Based on Copland's testimony, there are genuine factual issues regarding whether all three defendant's working "in concert," inflicted plaintiff's extensive injuries thereby rendering all three defendants jointly responsible for plaintiff's damages and thereby precluding judgment as a matter of law.

On appeal, defendant Fulks argues that joint and several liability predicated upon a concert of action theory is no longer viable in light of the statutory changes brought about by the 1995 tort reform legislation. We do not agree.

As this Court recently noted:

> [a]s part of its tort reform, the Michigan Legislature abolished and replaced joint and several liability with `fair share liability.' The significance of the change is that each tortfeasor *will pay only that portion of the total damage award that reflects the tortfeasor's percentage of fault. . . . not the entire damage award as would have been the case under the former joint and several liability* (Emphasis added.) *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001).

In accord with the reform, a plaintiff's recovery against multiple defendants is limited to the percentage of fault that the finder of fact ascribes to each participating defendant. See *Kokx v Bylen*ga, 241 Mich App 655, 663; 617 NW2d 368 (2000). Stated otherwise, several liability precludes a plaintiff from seeking compensation for the entire amount of damages from only one tortfeasor. Pursuant to several liability, each individual tortfeasor is only accountable for the amount of damages directly proportionate to his or her assessed percentage of fault *Smiley, supra* at 53 and the right of contribution only exists in favor of the tortfeasor that paid more than his or her pro rata share of the common liability. *Kokx, supra* at 662; see also MCL 600.2925a(2).

Simply put, multiple tortfeasors, acting in concert and pursuant to a common design that cause a single harm, can be jointly liable for the damages caused but will only have to *pay* that part of the total damages award directly attributable to that specific tortfeasors' assessed percentage of fault. Indeed, all joint tortfeasors are *jointly liable* for the injury, but a plaintiff cannot collect the entire amount of the damages awarded from only one of the tortfeasors thus mandating that plaintiff collect, from each of the tortfeasors individually, in accord with their ascribed percentages of fault. Hence, the term "fair share liability." *Smiley, supra* at 55. Accordingly, defendant Fulks' position that the 1995 tort reform legislation abrogated plaintiff concert of action theory is without merit.

V. Propriety of Granting Plaintiff Cross-Summary Disposition.

As a final matter, plaintiff contends that he is entitled to cross-summary disposition in accord with the provisions contained in MCR 2.116(I)(2). We do not agree.

Plaintiff failed to raise this issue in the trial court. Indeed, issues raised for the first time on appeal are not properly preserved and, thus, "[n]ot subject to review" save for "exceptional circumstances." Upon review of the record in the in case at bar, we do not discern the requisite "extraordinary circumstances" to abandon this cardinal rule. See *Booth Newspapers, Inc. v. Univ. of Michigan Bd. of Regents*, 444 Mich 211, 234, n 23; 507 N.W.2d 422 (1993) (stating that the Court "has repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims.") Accordingly, we decline to address this issue.

However, because we find that genuine factual issues remain as to all defendants premised upon a concert of action theory, we find that the trial court improvidently granted defendants summary disposition. Accordingly, we reverse the trial court's decision and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed, in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly