STATE OF MICHIGAN

COURT OF APPEALS

RONALD FELLOWS and STACY FELLOWS, Plaintiffs-Appellants, v PAUL STAUTENBERG, Defendant-Appellee.	UNPUBLISHED January 27, 2004 No. 244080 Wayne Circuit Court LC No. 01-129931-NO

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in defendant's favor. We affirm.

I. Facts

The incident giving rise to this action occurred at a birthday celebration hosted by plaintiff.[1] After dinner, plaintiff and defendant decided for amusement to discharge "potato launchers" also known as "spud guns" in the front yard. A potato launcher is a handmade device derived from approximately forty inches of PVC pipe. The user can discharge a potato inserted into the tube by igniting the hairspray filled chamber. Plaintiff and defendant both fired the potato launcher with varying results, one potato hit the ground, another disintegrated, others traveled in unpredictable directions. At some point, the parties decided that one would launch a potato while the other stood "down range" attempting to catch or deflect a launched potato with something like a garbage can lid. After loading the gun for defendant, plaintiff stood approximately forty to fifty yards from defendant holding the lid. Defendant launched a potato that hit plaintiff squarely in the face before he even saw it coming. As a result, plaintiff suffered personal injuries including fractures to his forehead, nose, and cheekbones and permanent blindness in both eyes.

[1] Because plaintiff Stacey Fellows' claim is derivative of plaintiff Ronald Fellows', we refer to Ronald Fellows as "plaintiff" from this point forward.

Plaintiff filed a complaint against defendant alleging that his negligent use of the potato launcher caused plaintiff's injuries. Defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (10). Under MCR 2.116(C)(8), defendant argued that because the incident occurred during a recreational activity, the standard of care is one of recklessness, not negligence; therefore, plaintiff failed to state a claim upon which relief could be granted. Under MCR 2.116(C)(10), defendant argued that even if plaintiff amended the complaint to allege recklessness, there was no genuine issue of fact as to whether defendant's behavior was reckless.

Plaintiff answered defendant's motion arguing that the negligence standard applied because the risk of being hit was not one inherent in the activity. Plaintiff also argued that the activity was not a sport or game with rules, but rather, more akin to a firearms accident.

At the hearing on this motion, the trial court determined that the recklessness standard applied because the evidence showed that the object of the activity was to shoot the potato while another person tried to "gather the potato" with a lid. The trial court determined that a reasonably foreseeable risk of this activity was being struck with a potato. The trial court also determined that there was no genuine issue of fact as to whether defendant recklessly operated the potato launcher. The trial court granted summary disposition under MCR 2.116(C)(8) and (10).

II. Analysis

Plaintiff argues that the trial court erred in granting summary disposition in defendant's favor. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). Because the court looked beyond the pleadings in deciding the motion, this Court reviews the motion as having been granted pursuant to MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). "Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed is viewed 'in the light most favorable to the party opposing the motion.'" *Id.* "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

Plaintiff argues that the trial court erred in applying the recklessness standard instead of the negligence standard in granting summary disposition. Whether a negligence standard applies in a case is a question of law for the court to decide. *Hughes v PMG Building, Inc*, 227 Mich

App 1, 5; 574 NW2d 691 (1997). We review a trial court's conclusions of law de novo. *Gumma v D & T Constr Co,* 235 Mich App 210, 221; 597 NW2d 207 (1999).

Plaintiff argues that the trial court erred in ruling that recklessness rather than negligence is the correct standard to apply in this case. The trial court's ruling was based on *Ritchie-Gamester v Berkley*, 461 Mich 73; 597 NW2d 517 (1999), in which the plaintiff was injured while ice skating during open skating when another skater, who had been skating backwards, collided with her causing her to fall. The plaintiff filed a complaint against the skater alleging negligence. Our Supreme Court affirmed the trial court's dismissal of the case pursuant to MCR 2.116(C)(10), holding that "coparticipants in a recreational activity owe each other a duty not to act recklessly." *Id.* at 95. The Supreme Court so held, in part, because people who engage in recreational activities temporarily adopt a set of rules applicable to the particular pastime or sport and, by the nature of the activities, inherent risks of harm are foreseeable. *Id.* at 86, 88.

Plaintiff argues that this standard does not apply here because the activity was not, in the strict sense, a "game" with rules or competition. But based on *Ritchie-Gamester*, the activity need not have a formal set of rules to be subject to the recklessness standard. The activity need only be one in which the activity by its nature have inherent risk of foreseeable harm. As defendant points out, there are no more rules in open skating than there were in the potato launching activity.

Plaintiff also argues that the trial court erred in ruling that being struck with a potato was a risk inherent in the activity because that issue involves questions of fact for the jury. Although whether an activity inherently involves a certain risk may depend on questions of fact, summary disposition is appropriate if there is no genuine issue of material fact. Here, there were no genuine issues of fact with regard to the potato launching activity. In the light most favorable to plaintiff, the evidence indicates that one party fired potatoes from a potato launcher while another party stood "down range" holding a lid for the purpose of either catching or deflecting the potato or potato pieces. Based on these facts, the trial court did not err in ruling that the risk of being struck with a potato was an inherent and foreseeable risk of the potato launching activity. A potato fired from the potato launcher could obviously travel in any direction or strike anything in the near vicinity, including a person.[2]

Nor did the trial court err in finding no genuine issue of fact as to whether defendant was reckless in operating the potato launcher.[3] Reckless misconduct is the same as wilful and wanton

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[2] Plaintiff notably asserts that "The correct standard of care is negligence because the situation was like a firearms accident, for which the standard of care is negligence." Plaintiff, however, did not plead the claim as one involving a firearm nor does he address this issue on appeal beyond the quoted assertion. Therefore, we have not addressed whether a potato launcher is a firearm. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

[3] Plaintiff does not argue that the trial court erred in this respect, but the ruling is addressed in defendant's brief on appeal.

misconduct. The conduct is not wilful in the sense that there is actual intent to harm but is instead the functional equivalent thereof: it shows such indifference to whether harm will result as to be the equivalent of a willingness that it does. *Jennings v Southwood,* 446 Mich 125, 140; 521 NW2d 230 (1994), quoting *Burnett v City of Adrian,* 414 Mich 448, 455; 326 NW2d 810 (1982).

Here, plaintiff has presented no evidence showing that defendant behaved recklessly in firing the potato launcher. Plaintiff instructed defendant on how to fire the potato launcher. The parties had fired the potato launcher several times in the way that defendant instructed. More than once, the party who was not firing the potato laucher stood "down range" with something like a garbage can lid. The results varied with each firing, but in every case the potato was ejected. When defendant fired the potato launcher and plaintiff stood "down range" in the same way as the parties had previously, the potato likewise ejected, but tragically hit plaintiff in the face. There is no evidence that the manner in which defendant operated the potato launcher was reckless. Inasmuch as firing the potato launcher is obviously reckless in and of itself, this supports our conclusion that the risk of being struck with a potato is an inherent risk in this activity.

Therefore, the trial court did not err in granting summary disposition in defendant's favor.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly