

STATE OF MICHIGAN
COURT OF APPEALS

JOEL KLEIN,

Plaintiff-Appellant,

v

SHAMROCK TAVERN, INC.,

Defendant/Cross-Plaintiff,

and

JASON ZUHLKE,

Defendant/Cross-Defendant-
Appellee.

UNPUBLISHED

May 20, 2008

No. 276840

Barry Circuit Court

LC No. 05-000590-NS

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

Following a jury verdict of no cause of action, plaintiff appeals by right the trial court's denial of his pretrial motion for summary disposition. We affirm.

I. Facts

Plaintiff Joel Klein (plaintiff) was at the Shamrock Tavern with friends on the evening of November 22, 2003. Defendant Jason Zuhlke (defendant) was at the Shamrock Tavern with his wife on that same evening. Plaintiff and defendant have provided somewhat different accounts of what transpired on the evening in question.

A. Defendant's Version of Events

Defendant testified at his deposition that he and his wife were at the Shamrock Tavern for a euchre tournament fundraiser for his wife's niece. Defendant explained that after the tournament was finished, he and his wife walked outside "just to get some fresh air." Plaintiff was also outside the tavern at that time. According to defendant, plaintiff approached and began asking defendant's wife whether she was a "Mexican" or a "pickle factory worker." Defendant testified that he "kind of felt uncomfortable with [the situation]" and that he "took [his wife] back inside." Defendant testified that as soon as he and his wife got back inside, plaintiff entered

the tavern and again “made the comment of her being a pickle packer.” According to defendant, plaintiff then went back outside.

Defendant testified that his wife went outside to check on her brother a few minutes later. Defendant followed behind her. Defendant testified that when he got outside, he heard plaintiff say, “Well, she is a pickle packer.” Defendant testified that plaintiff then exchanged expletives with his wife and “raised his hands towards her.” Defendant testified that he became concerned for his wife’s safety because plaintiff had raised his right arm in a menacing manner and because plaintiff was being “very loud” and “very direct.” Defendant testified, “I didn’t know if [plaintiff] was going to take it one step further or . . . what would have happened.” According to defendant, “that’s when I shoved [plaintiff], and then he hit me, and then I punched him, and he went down.” Defendant testified that he had consumed one beer at the tavern before the incident in question.

B. Plaintiff’s Version of Events

Plaintiff testified at his deposition that he was at deer camp with two friends on the afternoon of November 22, 2003. Plaintiff testified that he and his two friends were at deer camp for “about four or five hours” before leaving for the Shamrock Tavern and that he had consumed “possibly two” beers that afternoon. Sometime between 7:00 and 8:00 that evening, plaintiff and his friends left for the Shamrock Tavern. When plaintiff and his friends arrived, the tavern was “[n]ot real busy,” but there was a fundraiser going on. Plaintiff’s two friends played pool for “an hour-and-a-half, maybe two hours” while plaintiff stayed at the table.

Plaintiff testified that he saw defendant inside the tavern but was not acquainted with him. Plaintiff “figured [that defendant] was one of the family members of the fundraiser.” Plaintiff did not know whether defendant was drinking alcohol at the tavern. As plaintiff’s two friends were finishing their game of pool, plaintiff realized that he had become “a little bit bored and ready to go.”

Plaintiff testified that he consumed only “[t]wo beers” at the Shamrock Tavern that evening. Plaintiff denied that he ever told medical personnel that he had consumed eight beers that evening.

One of plaintiff’s friends left the tavern to walk to a nearby store to purchase some cigarettes. Thereafter, plaintiff and his other friend got ready to leave. As plaintiff and his friend were exiting through the front door, they saw two women—one of whom was defendant’s wife—sitting on a bench in front of the tavern. Plaintiff spoke to one of the women and asked her, “Well, you from around here?” The woman “said something about . . . Imlay City or something like that.” Plaintiff denied that he ever said anything to the woman about being a “pickle picker” or “about there being a lot of pickle pickers around Imlay City.” However, he admitted that he had “[p]erhaps” said something about Mexicans and “pickle pickers” to one of his friends earlier that night. He also admitted that he spoke to the woman about pickles in general upon learning that she was from the Imlay City area.

Plaintiff testified that after he had finished speaking with the woman, he noticed that defendant was “within five feet” of the front door. Plaintiff testified that he told his friend, “Let’s get going,” and that he and his friend never said anything about “pickle pickers.” Plaintiff

testified that his friend walked around to the side of the truck and that defendant then asked him and his friend, “You don’t like Mexicans, do you?” Plaintiff testified that he told defendant, “No, I don’t have anything wrong with Mexicans,” but that defendant kept “haranguing” him and asking, “You don’t like Mexicans, do you?” Plaintiff believed that defendant was “there to pick a fight and give [him] trouble.” Plaintiff testified that he wanted to “feel some pride about myself as an individual and my dignity” and that he “wasn’t going to let this punk run me down.” Plaintiff testified that he “could see [that defendant] was out for blood.”

According to plaintiff, defendant then pointed to the women who were sitting on the bench and said, “Well, what do you think of them?” Plaintiff testified that he attempted to appease defendant but that defendant kept “haranguing” him and “wouldn’t let up.” Plaintiff admitted that he then told defendant that the women would “make a couple of good pickle pickers.” Plaintiff testified that he said these words “sarcastically and with some jest,” but that defendant immediately “c[a]me at [his] face” and “sucker punched” him. Plaintiff could not recall whether he had pushed or punched defendant. Upon being punched, plaintiff fell backward and struck his head on the sidewalk, sustaining injuries.

C. Procedural History

Defendant was arrested and charged with one count of aggravated assault, MCL 750.81a. However, defendant pleaded guilty to a reduced charge of assault and battery, MCL 750.81. The following exchange took place between defendant and the district court:

The Court. Twenty-second of November of 2003, in Barry County, State of Michigan, did you make an assault or battery upon Joel Klein?

Defendant. Yes, your Honor.

The Court. And what was the assault or battery that was—what happened at that time?

Defendant. I pushed him, he punched me, I punched him back.

The Court. I accept your plea of guilty, find [a] factual basis for acceptance of the plea, [and] further determine the plea to be voluntarily, accurately, and knowingly given.

Plaintiff commenced this civil action in November 2005. Plaintiff’s complaint set forth a battery claim against defendant and a dramshop-liability claim against Shamrock Tavern. In December 2005, Shamrock Tavern filed a cross-complaint against defendant, seeking full indemnification under MCL 436.1801(6) for any damages assessed against the tavern in the dramshop-liability matter. Plaintiff’s dramshop-liability claim against Shamrock Tavern and Shamrock Tavern’s cross-complaint against defendant were subsequently dismissed with prejudice.

In January 2007, plaintiff moved for summary disposition. Plaintiff argued that defendant should be judicially estopped from denying liability for the battery in light of his guilty plea entered in the district court. Plaintiff also argued that there was no factual basis for

defendant's anticipated defense that he had acted in defense of his wife when he pushed and punched plaintiff. Plaintiff asserted that he was entitled to judgment as a matter of law because defendant had already admitted liability in the form of his guilty plea and because defendant's anticipated defense was unsupported in this case.

Defendant conceded that evidence of his guilty plea would be admissible at trial, but argued that the plea did not conclusively establish his tort liability in this case. Defendant also asserted that his act of pushing and punching plaintiff was justified under the "defense of others" doctrine because he had acted in defense of his wife.

Following a hearing on plaintiff's motion for summary disposition, the trial court ruled that "under the circumstances and the very cryptic recitation of the actual basis for the guilty plea given by the defendant, I don't believe that the defendant's statement is . . . necessarily inconsistent with the position he's taking in this case as I understand it." Plaintiff then argued that defendant could not escape tort liability by claiming that he had acted in "defense of others" because the evidence showed that defendant had not been in immediate apprehension of harm to his wife. Specifically, plaintiff pointed to defendant's deposition statement that "I didn't know if [plaintiff] was going to take it one step further or . . . what would have happened." Plaintiff asserted that this statement proved that defendant had not been in immediate fear for his wife's safety at the time of the altercation. However, the trial court ruled that "looking at the inferences in the light most favorable to the nonmoving party, it seems to me that creates a jury question." The trial court denied plaintiff's motion for summary disposition.

As noted above, the matter proceeded to trial and the jury returned a verdict of no cause of action. The jury found that although defendant had committed a battery upon plaintiff, defendant had "use[d] such reasonable force as was, or reasonably appeared to him to be necessary to protect his wife from bodily harm in repelling an assault by Mr. Klein."

II. Standards of Review

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Judicial estoppel is an equitable doctrine. *Opland v Kiesgan*, 234 Mich App 352, 365; 594 NW2d 505 (1999). We review de novo a trial court's decision on equitable matters, but review for clear error the findings of fact in support of the equitable decision rendered. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). Whether a particular defense applies in a given case is a question of law. We review de novo questions of law. *Little v Hirschman*, 469 Mich 553, 557; 677 NW2d 319 (2004).

III. Judicial Estoppel

Plaintiff argues that he was entitled to summary disposition in this case because defendant should have been judicially estopped from denying liability for the battery.¹

¹ Summary disposition is properly granted under MCR 2.116(C)(7) when a claim is barred by the (continued...)

Specifically, plaintiff contends that the guilty plea entered in the criminal case was conclusive evidence of defendant's liability for battery, and that defendant was not entitled to take a contrary position in this civil matter.

Judicial estoppel prevents a party from taking a position in a later proceeding that is inconsistent with a position that the party took in a prior proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994); *Lichon v American Universal Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990). However, the party must have "successfully" asserted the inconsistent position in the previous litigation, *id.*, and judicial estoppel only bars a party from asserting a position in the later action that is "wholly inconsistent" with a position taken in the earlier action, *Paschke, supra* at 510. Judicial estoppel is an "extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice," and is "not meant to be a technical defense for litigants seeking to derail potentially meritorious claims." *Opland, supra* at 364 (quotation marks and citations omitted). Judicial estoppel "is applied against litigants because of their 'deliberate manipulation' of the courts." *Id.*

We acknowledge that a guilty plea—as opposed to a plea of *nolo contendere*—is an admission of guilt and that it might therefore be used as substantive evidence to prove any fact essential to the criminal act to which defendant pled guilty. See *Lichon, supra* at 417-419. A guilty plea conviction, however, does not amount to preclusive evidence of any fact in subsequent litigation. *Id.*, citing Advisory Committee Note to FRE 803(22); see also Michigan Evidence Courtroom Manual, Commentary on Rule 803(22) (stating evidence offered pursuant to MRE 803(22) is merely probative, rather than conclusive, of the fact sought to be proved). Defendant has never asserted in this case that he did not batter plaintiff. Indeed, defendant has fully admitted that he battered plaintiff, but has claimed that the battery was justified because he acted in defense of his wife.

As a factual basis for his guilty plea before the district court, defendant stated, "I pushed him, he punched me, I punched him back." The issue of whether defendant acted in defense of his wife was never raised or addressed in the criminal proceeding. We cannot conclude that defendant has taken a "wholly inconsistent" position in this matter, *Paschke, supra* at 510, or that he has attempted to engage in "'deliberate manipulation' of the courts," *Opland, supra* at 364. Nor can we conclude that defendant "successfully" and "unequivocally" asserted an inconsistent position in the criminal case when he pleaded guilty. *Lichon, supra* at 416. Defendant has never denied that he pushed or punched plaintiff, but has merely asserted that he did so in order to protect his wife's safety. Indeed, consistent with defendant's position in both the criminal case and the present action, the jury ultimately determined that defendant *did* batter plaintiff.² The

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doctrine of judicial estoppel. Although plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10) only, this does not affect our review on appeal. Summary disposition under the incorrect subrule is not fatal if the record supports review under the proper subrule. *Detroit News, Inc v Policemen & Firemen Retirement Sys of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002).

² As noted previously, the jury found that although defendant had committed a battery upon plaintiff, defendant's actions were justified because he had "use[d] such reasonable force as was, or reasonably appeared to him to be necessary to protect his wife from bodily harm"

trial court properly found that defendant's position in the instant civil action was not wholly inconsistent with his position taken in the criminal case. *Webb, supra* at 568. Because defendant did not take a position in this case that was "wholly inconsistent" with his position in the criminal matter, *Paschke, supra* at 510, we conclude that the trial court properly declined to invoke the doctrine of judicial estoppel.³

IV. Defense of Others

Plaintiff also argues that he was entitled to summary disposition because the facts in evidence did not support defendant's claim that he acted in defense of his wife when he pushed and punched plaintiff. In particular, plaintiff contends that defendant was not in immediate fear for his wife's safety at the time.

Although there appears to be no model civil jury instruction on point,⁴ the Michigan courts recognize "defense of others" as a defense to the torts of assault and battery. *Sanders v Westin Hotel, Inc*, 172 Mich App 161, 166; 431 NW2d 414 (1988). "A claim of . . . defense of others first requires that a defendant has acted in response to an assault." *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). In the civil context, "[a]n assault is defined as 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." *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991).

Plaintiff argues that defendant could not have been responding to an assault at the time of the altercation because he was not in apprehension of imminent harm to his wife. Plaintiff suggests that this is proven by defendant's statement that "I didn't know if [plaintiff] was going to take it one step further or . . . what would have happened."

We concede that this statement establishes that defendant was not *certain* that plaintiff would imminently strike his wife. However, the definition of an assault does not require total

³ It was suggested below that defendant should also be *collaterally* estopped from denying his liability for the battery. The issue of collateral estoppel is not before us because it has not been raised in plaintiff's statement of the questions presented. MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). At any rate, we note that there was no mutuality of estoppel because plaintiff was not a party, or in privity with a party, to the criminal case. *Monat v State Farm Ins Co*, 469 Mich 679, 683-684; 677 NW2d 843 (2004). Therefore, plaintiff may not collaterally estop defendant from relitigating the issue of his liability in this civil action. *Id.*

⁴ It is clear "defense of others" is a valid defense to assault and battery in the criminal context. CJI2d 7.22; see also *People v Kurr*, 253 Mich App 317, 321, 327-328; 654 NW2d 651 (2002). In the criminal setting, "defense of others" traditionally applied "solely to those persons with whom the defendant had a special relationship, such as a wife or brother." *Id.* at 321. "[H]owever, the defense now makes no distinction between strangers and relatives with regard to its application." *Id.*

and complete certainty of imminent bodily contact. *Id.* Rather, the definition requires only “a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact.” *Id.*

Viewing the record in a light most favorable to defendant, the evidence showed that plaintiff had raised his arm toward defendant’s wife in a menacing manner immediately after addressing her in an untoward and potentially threatening manner. The trial court found that this evidence created a jury-submissible question of fact concerning whether defendant had acted in response to a well-founded apprehension of imminent harm to his wife. In other words, the trial court concluded that it was for the jury to decide whether defendant had acted to repel an assault on his wife, *Smith, supra* at 238, and whether defendant’s actions were justified on this basis. The trial court did not err in this regard.

V. Conclusion

For the foregoing reasons, we conclude that the trial court correctly denied plaintiff’s motion for summary disposition and properly allowed this matter to proceed to trial.

Affirmed.

/s/ Kathleen Jansen

/s/ Brian K. Zahra

/s/ Elizabeth L. Gleicher