

STATE OF MICHIGAN
COURT OF APPEALS

BASIL ESSHAKI,

Plaintiff-Appellant,

v

SCOTT MILLMAN,

Defendant-Appellee.

UNPUBLISHED

March 17, 2009

No. 283297

Oakland Circuit Court

LC No. 2007-081516-NO

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

In this suit to recover damages arising from an injury sustained during a soccer match, plaintiff Basil Eshshaki appeals as of right the trial court's order granting summary disposition in favor of defendant Scott Millman. On appeal, we must determine whether the trial court properly granted summary disposition of Eshshaki's claims of battery, negligence, and intentional infliction of emotional distress. Because Eshshaki presented sufficient evidence to establish a material question of fact on his battery and negligence claims, we conclude that the trial court erred when it granted summary disposition of those claims in favor of Millman. However, because Eshshaki failed to establish that the alleged attack caused him to suffer severe emotional distress, we conclude that the trial court did not err when it dismissed Eshshaki's intentional infliction of emotional distress claim. For these reasons, we affirm part, reverse in part and remand for further proceedings consistent with this opinion.

I. Basic Facts and Procedural History

Eshshaki and Millman were players on different soccer teams in a league for men who are over age thirty. At the time, Eshshaki was 60 years old and Millman was 36. The teams played six-on-six matches at the Total Sports complex in Wixom, Michigan.

On February 4, 2007, Eshshaki's team played Millman's team. At his deposition, Eshshaki testified that at one point during the match Millman had the ball and began to approach Eshshaki's goal. Eshshaki stated that Millman lost control of the ball as another defender approached. Eshshaki said he then ran up to Millman from behind and "hustled" the ball away from him. Eshshaki testified that Millman became upset and walked right up to him. In response, Eshshaki stated that he put his arms up and held Millman back at the shoulders. Eshshaki testified that, after this, he began to walk by Millman when Millman punched him in the jaw with his fist. Eshshaki admitted that, after being punched, he became angry with Millman and took a swing at

him, but stated that he missed. Esshaki stated that, although his jaw hurt, he did not seek medical treatment until the next day.

At his deposition, Millman testified that the strike to Esshaki's jaw was accidental. Millman stated that, just prior to the incident, the ball play was going on to his front and left. He stated that he attempted to maintain his position in the middle of the field as the play moved from his left to his right. At that point, Esshaki moved up from behind and pushed him. Millman stated that he then turned abruptly to try to make a play on the ball when he inadvertently struck Esshaki with his elbow. Millman testified that, after the incident, Esshaki tried to punch him and they were then both sent to the penalty box for two minutes. After serving their penalty time, Millman stated that they both returned and finished the game.

Esshaki testified that the next day his jaw did not feel right and he went to his doctor. Although an initial x-ray did not reveal a break, Esshaki continued to experience problems and eventually his doctor discovered that his jaw had been broken. Esshaki had to have his jaw wired shut for six to eight weeks and lost the bridge spanning four teeth. The bridge had been fractured and required implants to replace the missing teeth. Esshaki testified that his physicians expected his jaw to be fully healed in six months to a year.

In March 2007, Esshaki sued Millman for battery, negligence, and intentional infliction of emotional distress. Esshaki also asked for exemplary damages.

In November 2007, Millman moved for summary disposition. In his motion, Millman argued that Esshaki assumed the risk of injury when he elected to play soccer—including the risk that he would be injured during a “rule violation.” Millman contended that, in order to be actionable, the conduct at issue had to be extreme or outrageous or amount to gross negligence. Because his actions were not extreme or outrageous and amounted to, at most, ordinary negligence, Millman further argued that summary disposition was appropriate.

In response, Esshaki argued that there was evidence that Millman's actions were not an attempt to make a play on the ball; rather, that Millman deliberately struck him out of anger and did so with the intent to injure. This evidence, Esshaki contended, supported his claim for battery and intentional infliction of emotional distress. Esshaki further argued that the evidence suggested that, at a minimum, Millman's actions were reckless. For these reasons, Esshaki contended that summary disposition was inappropriate.

After holding a hearing on Millman's motion, the trial court concluded that Esshaki's claims should be dismissed. The court indicated that there was no evidence from “anyone other than [Esshaki]” that Millman's “conduct was reckless or anything other than in the normal course of playing soccer.” Accordingly, in January 2008, the trial court dismissed Esshaki's claims against Millman.

This appeal followed.

II. Summary Disposition

A. Standard of Review

This Court reviews de novo a trial court's decision to grant summary disposition. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371; ___ NW2d ___ (2008).

B. Legal Standards

1. Summary Disposition Under MCR 2.116(C)(10)

In this case, the trial court granted summary disposition in favor of Millman because it believed that Esshaki did not present sufficient evidence to establish a question of fact as to whether Millman's conduct was actionable. Thus, although Millman moved for summary disposition under MCR 2.116(C)(8) and (C)(10), the trial court clearly looked beyond the pleadings and granted relief under MCR 2.116(C)(10). Therefore, we shall examine whether the trial court properly granted summary disposition in favor of Millman under MCR 2.116(C)(10). See *DeHart v Joe Lunghamer Chevrolet, Inc.*, 239 Mich App 181, 184; 607 NW2d 417 (1999).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

2. The Standard of Care for Participants in Recreational Activities

"When people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity." *Ritchie-Gamester v Berkley*, 461 Mich 73, 87; 597 NW2d 517 (1999). For that reason, when a participant suffers an injury from a risk that is inherent in the recreational activity, he or she has no grounds for complaint unless the harm was the result of something more than mere carelessness or ordinary negligence. *Id.* at 89, 90. Thus, with regard to injuries unintentionally caused by a coparticipant in the recreational activity, a plaintiff must demonstrate that the defendant's actions amounted to reckless misconduct. *Id.* at 89. In addition to unintentional acts that amount to reckless misconduct, a plaintiff may recover for a coparticipant's "intentional act causing injury" if that act "goes beyond what is ordinarily permissible" within the game. *Overall v Kadella*, 138 Mich App 351, 357; 361 NW2d 352 (1984).

C. Application of the Legal Standards to the Facts

In the present case, Millman moved for summary disposition on the grounds that Esshaki had not demonstrated that Millman's conduct was an intentional act that went beyond what is ordinarily permissible in the game or otherwise amounted to reckless misconduct. Because Esshaki had the burden of proof at trial on these issues, he had an obligation to "go beyond the pleadings to set forth specific facts showing that" Millman's conduct was a qualifying intentional or reckless act. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

1. Battery

At his deposition, Esshaki testified that the incident at issue occurred after he "hustled" the ball from Millman. Esshaki stated that Millman was visibly upset and immediately approached him in a manner that caused Esshaki to raise his arms and hold Millman back by the shoulders. After holding Millman back for a time, Esshaki said he then tried to walk past Millman when Millman punched him in the face with his fist. This testimony clearly establishes a question of fact as to whether Millman intentionally committed an act that went beyond "what is ordinarily permissible" in soccer. *Overall*, 138 Mich App at 357. Even assuming that soccer includes a degree of intentional—and potentially harmful—contact, we conclude that, as a matter of law, a participant's consent to the risks inherent to participating in a soccer match does not include consent to be attacked by a coparticipant. In this case, when viewed in the light most favorable to him, Esshaki's testimony establishes that Millman's intentional contact was not part of the ordinary contacts that accompany playing soccer. Indeed, the testimony suggests that game play had actually stopped and that Millman simply lost his temper and punched Esshaki. See, e.g., *id.* at 358.

On appeal, Millman dismisses Esshaki's testimony as self-serving and concentrates on the fact that the other witnesses, including Millman, indicated that Millman did not punch Esshaki, but instead elbowed him. Although the trial court apparently elected to ignore Esshaki's testimony, courts are not permitted to weigh evidence or assess credibility on summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Thus, we are not at liberty to disregard this testimony—we must consider it and we must consider it in the light most favorable to Esshaki. *Smith*, 460 Mich at 454-455. For that reason, even though we acknowledge that a reasonable jury might find Millman's version of events to be more plausible, we must nevertheless conclude that summary disposition of the battery claim was inappropriate based on Esshaki's testimony alone; a jury must resolve the discrepancies between Esshaki's and Millman's versions of events. Moreover, even if we were to disregard Esshaki's testimony, we would still conclude that summary disposition was inappropriate based on the testimony of the referee who worked the match at issue.

Thomas Caranicolas testified that he was the referee who presided over the match between Esshaki's and Millman's teams. He stated that the incident occurred when Millman had the ball and was dribbling toward Esshaki's goal. He testified that Esshaki pushed Millman from behind, but that he did not blow the whistle. He explained that he did not call a foul because Millman did not lose possession of the ball. However, after a second push, he blew the whistle and gave Esshaki a two-minute penalty because Millman lost the ball. Caranicolas stated "that's when . . . Millman threw his elbow." When asked whether he thought the elbow was intentionally thrown, Caranicolas testified that it was his impression that Millman "threw the

elbow because he was bothered by [Esshaki].” He explained that “[a]n elbow thrown in somebody’s face with a ball on the ground it’s not accidental.” Likewise, when asked whether Millman might only have accidentally struck Esshaki while trying to turn and make a move on the goal, Caranicolas stated that it “looked [like] more than just a turn. I think he was irritated and he threw the elbow to get rid of him.”

Taken in the light most favorable to Esshaki, Caranicolas testimony establishes that Millman deliberately struck Esshaki with his elbow. Further, the testimony indicated that the elbow was not part of a legitimate play on the ball, but was done out of anger or frustration. Indeed, Caranicolas stated that Millman struck Esshaki with his elbow after he already blew the whistle and stopped play. Thus, this testimony established a question of fact as to whether Millman intentionally attacked Esshaki.

Finally, although a participant in a soccer match never consents to be outright attacked by a coparticipant, we acknowledge that, in this case, a reasonable jury could find that Millman intentionally used his elbow during game play, but that it was part of a bonafide attempt to make a play on the ball. Thus, a reasonable jury could conclude that, even though Millman intentionally threw his elbow, that action was nevertheless within the scope of what is ordinarily permissible in soccer. However, a reasonable jury could also conclude that Millman deliberately struck Esshaki with his fist or elbow and that he did so out of anger rather than out of any legitimate attempt to make a play on the ball. Thus, whether Millman attacked Esshaki with his fist or an elbow, or merely used his elbow in a way that is ordinarily permissible in a soccer match are questions that must be resolved by a jury. For that reason, the trial court erred when it granted summary disposition of Esshaki’s claim premised on battery.

2. Intentional Infliction of Emotional Distress

In order to prevail on a claim of intentional or reckless infliction of emotional distress, a plaintiff must prove four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985). “Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.” *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). It is initially the trial court’s duty to determine whether particular conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. *Lewis v LeGrow*, 258 Mich App 175, 197; 670 NW2d 675 (2003). However, where reasonable minds may differ, “whether a defendant’s conduct is so extreme and outrageous as to impose liability is a question for the jury.” *Id.*

As already noted, viewing the evidence in the light most favorable to Esshaki, there is sufficient evidence to establish a question of fact as to whether Millman intentionally struck Esshaki with his fist or elbow. Hence, the only remaining questions are whether that conduct was extreme and outrageous and caused Esshaki to suffer severe emotional distress.

Conduct is extreme and outrageous when “the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’” *Roberts*, 422 Mich at 603, quoting Restatement Torts, 2d, § 46,

comment d, pp 72-73. On appeal, Millman argues that punching and elbowing—indeed fighting in general—are normal parts of the game of soccer. As such, this type of conduct is not the type of conduct that an average citizen would label “outrageous.” We do not agree. Although there was testimony that soccer is a physical sport that involves contact, the testimony also clearly established that “striking” an opponent is unacceptable even during game play. But the evidence does not suggest that Millman’s conduct was the result of aggressive tactics during the course of game play. Rather, the evidence indicates that, after play had stopped, Millman deliberately attacked Esshaki out of anger or frustration. Thus, viewing the evidence in the light most favorable to Esshaki, the conduct at issue was far more egregious than if it had occurred as a component of aggressive game play. Given the evidence that Millman attacked Esshaki out of anger or frustration and that the attack occurred after play had ended, we conclude that reasonable minds might differ as to whether Millman’s conduct—as described by Esshaki and Caranicolas—was extreme and outrageous. *Lewis*, 258 Mich App at 197.

Esshaki also testified concerning the emotional distress that he suffered as a result of the attack; he stated that he has a “fear of soccer now” and that he no longer wants to play. Nevertheless, Esshaki left open the possibility that he might return to play soccer in the future. Although this testimony establishes that Esshaki suffered *some* distress as a result of the alleged attack, it does not establish a question of fact as to whether the attack caused *severe* emotional distress. Because there was no evidence that Esshaki suffered severe emotional distress, Millman was entitled to summary disposition of Esshaki’s intentional infliction of emotional distress claim.

3. Reckless Misconduct

A participant in a recreational activity may also recover for injuries sustained as a result of a coparticipant’s reckless misconduct. *Ritchie-Gamester*, 461 Mich at 87. Reckless misconduct is more than negligent conduct; it is conduct that places the actor in a ““class with the wilful doer of wrong.”” *Behar v Fox*, 249 Mich App 314, 319; 642 NW2d 426 (2002), quoting *Gibbard v Cursan*, 225 Mich 311, 321; 196 NW 398 (1923), quoting *Atchison, T & SF R Co v Baker*, 79 Kan 183, 189-190, 98 P 804 (1908).

“The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not.” *[Id.]*

Although Caranicolas’ testimony clearly supports the conclusion that Millman deliberately threw his elbow in an outright attack, this same testimony could support a finding of reckless misconduct. Caranicolas opined that Millman deliberately threw his elbow at Esshaki based on Millman’s demeanor and actions. Nevertheless, Caranicolas acknowledged that the entire incident occurred rapidly. That is, within seconds, Esshaki pushed Millman twice, Caranicolas blew the whistle, and then Millman threw out his elbow. A reasonable jury could conclude from this testimony that Millman threw out his elbow in frustration rather than with the intent to actually strike Esshaki. But the jury could also conclude that when Millman threw out his elbow in frustration, he had reason to believe that it would strike Esshaki, and he nevertheless

did so out of indifference as to whether it would. Hence, there is also a question of fact as to whether Millman's conduct amounted to reckless misconduct.

D. General Conclusion

Given the parties' submissions, there was a question of fact as to whether Millman's conduct was intentional and, if it was, whether it was outside what is normally permissible in the game of soccer. Likewise, Eshshaki presented sufficient evidence to establish a question of fact as to whether Millman's conduct amounted to reckless misconduct. For these reasons, the trial court erred when it dismissed Eshshaki's battery and negligence claims under MCR 2.116(C)(10). However, Eshshaki failed to present sufficient evidence to create a question of fact as to whether Millman's conduct caused Eshshaki severe emotional distress. Therefore, the trial court did not err in dismissing Eshshaki's claim for intentional infliction of emotional distress. For these reasons, we affirm the trial court's decision to dismiss Eshshaki's intentional infliction of emotional distress claim, but reverse the trial court's grant of summary disposition in favor of Millman on Eshshaki's battery and negligence claims.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As a prevailing party, Eshshaki may tax costs under MCR 7.219(A).

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly