STATE OF MICHIGAN

COURT OF APPEALS

DEBBIE KLINE,

Plaintiff-Appellant,

v

SKATEMORE, INC., d/b/a ROLLHAVEN SKATING CENTER, and DANIEL K. BROWN,

Defendants-Appellees.

UNPUBLISHED
December 22, 2009

No. 288141
Genesee Circuit Court
LC No. 07-087121-CZ

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff contends that the trial court erred by dismissing her complaint under the Roller Skating Safety Act of 1988 (RSSA), MCL 445.1721 *et seq.*, because she was not truly engaged in the activity of mere roller skating, as contemplated by the act, at the time of her injury. Plaintiff testified at her deposition that she attended a class on April 30, 2007, at defendant Rollhaven Skating Center (hereinafter "Rollhaven") to receive lessons with respect to the sport of roller derby. While plaintiff knew that the sport itself involved physical contact, she testified that she had no idea that the first day of lessons would involve actual drills leading to potential physical contact. Another skater testified that she was instructed to act as a "jammer," which position sometimes involved physically breaking through other skaters if unable to pass them without contact. This "jammer" skater crashed into plaintiff, who was acting as a "blocker," causing plaintiff to fall and strike her head on the floor. Plaintiff testified that defendant Brown instructed her to block other skaters who were attempting to pass her, although she did not expect contact because she assumed the other skaters would try to avoid her. Plaintiff alleged that she suffered, among other injuries, a closed-head injury.

The complaint alleged counts of negligence, breach of contract, nuisance, and assault and battery. Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court ruled:

> We are where we started and that is that this roller skating is roller skating. This is roller skating. The statute embodies and embraces all various counts as pled. All counts are dismissed. Motion for summary disposition is granted.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "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). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

The following sections of the RSSA are relevant to a proper analysis of the issues presented on appeal:

> Each roller skating center operator shall do all of the following:
>
> (a) Post the duties of roller skaters and spectators as prescribed in this act and the duties, obligations, and liabilities of operators as prescribed in this act in conspicuous places.
>
> (b) Comply with the safety standards specified in the roller skating rink safety standards published by the roller skating rink operators association, (1980).
>
> (c) Maintain roller skating equipment and roller skating surfaces according to the safety standards cited in subdivision (b).
>
> (d) Maintain the stability and legibility of all required signs, symbols, and posted notices. [MCL 445.1723 - § 3 of the RSSA.]
>
> * * *
>
> While in a roller skating area, each roller skater[1] shall do all of the following:

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[1] Under the RSSA, a "roller skater" is defined as "a person wearing roller skates while that person is in a roller skating center for the purpose of roller skating." MCL 445.1722(c). We reject plaintiff's argument that she was not a "roller skater" for purposes of the RSSA. The evidence established that plaintiff fit the statutory definition.

(a) Maintain reasonable control of his or her speed and course at all times.

(b) Read all posted signs and warnings.

(c) Maintain a proper lookout to avoid other roller skaters and objects.

(d) Accept the responsibility for knowing the range of his or her own ability to negotiate the intended direction of travel while on roller skates and to skate within the limits of that ability.

(e) Refrain from acting in a manner which may cause injury to others. [MCL 445.1724 - § 4 of the RSSA.]

* * *

Each person who participates in roller skating accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries that result from collisions with other roller skaters or other spectators, injuries that result from falls, and injuries which involve objects or artificial structures properly within the intended travel of the roller skater which are not otherwise attributable to the operator's breach of his or her common law duties. [MCL 445.1725 - § 5 of the RSSA.]

* * *

A roller skater, spectator, or operator who violates this act shall be liable in a civil action for damages for that portion of the loss or damage resulting from the violation. [MCL 445.1726 - § 6 of the RSSA.]

Convened as a special panel to resolve a conflict between a prior vacated opinion in *Dale v Beta-C, Inc*, 223 Mich App 801; 566 NW2d 640 (1997) (*Dale I*), and *Skene v Fileccia*, 213 Mich App 1; 539 NW2d 531 (1995), this Court in *Dale v Beta-C, Inc*, 227 Mich App 57; 574 NW2d 697 (1997) (*Dale II*), addressed the RSSA and interpreted the sections quoted above. The *Dale II* special panel began by discussing the purpose of the RSSA, stating:

> The RSSA was enacted to address the concerns with the increasing frequency of lawsuits filed against skating rink operators and the corresponding rise in insurance premiums for such facilities. The roller rinks sought legislation "that would clarify that skaters have certain duties and must assume the risks inherent in the sport, while rinks have certain duties to observe safety standards." House Legislative Analysis, SB 134, November 29, 1988. [*Dale II, supra* at 65.]

Sections 3 and 6 of the RSSA indicate, however, that the Legislature did not intend to provide absolute immunity to rink operators. *Id.* at 66. This Court, in order to preserve the legislative purpose underlying the RSSA, stated that "the assumption of risk provision of § 5 must be read in conjunction with the duties of operators set forth in § 3 and the creation of civil liability for operators as set forth in § 6." *Id.* at 67. The *Dale II* special panel held:

> Reconciliation of these provisions leads us to hold that a skater does not assume the risk of an operator violating the duties prescribed under the act. If a violation of § 3 of the RSSA is alleged and proved, then pursuant to § 6 the operator "who violates this act shall be liable in a civil action for damages for that portion of the loss or damage resulting from the violation." [*Id.*]

This Court then drew § 5 of the RSSA into the equation, ruling:

> [Pursuant] to § 5, a participant assumes the risks of obvious and necessary dangers inherent in the sport of roller skating. However, the skater does not assume the risk of an operator violating the prescribed duties under [§ 3 of] the act. With the exception of injuries that involve objects or artificial structures properly within the intended travel of the roller skater, the skater's assumption of risk is neither limited nor nullified by an operator's breach of a common-law duty. Finally, a participant's sole recourse against a roller-skating rink operator is pursuant to the RSSA.

This conclusion was predicated in part on the Court's determination that § 5's clause referencing injuries "not otherwise attributable to the operator's breach of his or her common law duties" modified only that language in § 5 speaking of injuries involving objects or artificial structures, not injuries resulting from collisions or falls. *Dale II, supra* at 68-70 ("modifying clause is confined to the last antecedent unless a contrary intention appears").

Turning to the case at bar, review of plaintiff's complaint and her appellate brief reveals that she makes no claim whatsoever that defendants violated any of the duties of a roller skating center operator outlined in § 3 of the RSSA. In regard to § 5, in part, plaintiff has not made any claim that the injuries involved objects or artificial structures properly within plaintiff's intended travel; therefore, defendants' possible breach of any common-law duty would appear irrelevant. Under the RSSA, the only arguable avenue for plaintiff to proceed with the litigation arises from the first sentence in § 5, which provides that "[e]ach person who participates in roller skating accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary." The next sentence in § 5 dictates that those dangers include "injuries that result from collisions with other roller skaters[.]" Under the plain language of § 5, an inherent danger of roller skating, for which a roller skater assumes the risk, necessarily includes a collision with another skater.[2] Here, plaintiff's injuries were the result of a collision with another roller skater. The question becomes whether the fact that roller derby lessons were being given somehow alter the application of § 5. As opposed to the danger of collisions that inhere in the course of roller skating under normal conditions, which typically result from an accident or even possibly an intentional act not directed by the rink operator, the roller derby lessons, sponsored and taught by defendants, gave rise to the potential for purposeful or intentional collisions between skaters as directed by defendants. The Legislature certainly did not intend to protect a rink operator from

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[2] The *Dale II* panel, while partially rejecting the opinion in *Skene*, did hold that "[t]he *Skene* Court properly found that collisions among roller skaters are obvious and necessary dangers assumed by a roller skater pursuant to § 5 of the RSSA." *Dale II, supra* at 65.

liability in a scenario in which, by way of example, the operator skated into a rink and intentionally and unexpectedly collided into another skater at full force intending to cause injury, thereby committing a criminal act, despite the fact that it could be viewed as simply a collision with another skater encompassed by § 5. Such an act would not be a risk assumed by the harmed skater when choosing to roller skate. But we do not have any evidence of this kind of egregious conduct in the case before us today.

Because the Court in *Dale II* restricted the § 5 clause referring to breach of common law duties to injuries involving objects or artificial structures and not collisions, roller skating collisions caused by negligence, which cause of action requires the existence and breach of a duty, *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000), would not appear to give rise to liability under the RSSA. This is unless of course a separate duty arose under § 3 of the RSSA, which has not been argued or alleged here. Ultimately, we need not take a definitive position because, assuming that engaging in the sport of roller derby does not equate to roller skating as contemplated by the RSSA, thereby removing the case from the RSSA, simple negligence does not suffice, where plaintiff was injured while participating in a recreational activity. Our Supreme Court has formally adopted a "reckless misconduct" standard as the minimum standard of care for participants engaged in recreational activities; carelessness or ordinary negligence cannot serve as a basis for liability. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 89-90; 597 NW2d 517 (1999). Accordingly, plaintiff's negligence claim fails. Furthermore, viewing the evidence in a light most favorable to plaintiff, we conclude that defendants did not engage in reckless misconduct.

Plaintiff also alleged an assault and battery claim, along with claims of nuisance and breach of contract. We find that the nuisance and breach of contract claims, as alleged, are actually in the nature of claims of negligence. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007), citing *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006). Moreover, plaintiff's appellate arguments concerning the nuisance and breach of contract claims are insufficiently briefed. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

With respect to assault and battery, assuming that the RSSA would allow such a claim against a rink operator under the circumstances presented, we find that, as a matter of law, no cognizable cause of action for assault and battery arose in the case at bar. In *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991), this Court stated:

> An 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. A battery is the wilful and harmful or offensive touching of another person which results from an act intended to cause such a contact. Protection of the interest in freedom from unintentional and unpermitted contacts with the plaintiff's person extends to any part of his body . . . . [Citations omitted.]

However, there is no assault and battery if a recipient consented to the contact, unless the consent was coerced or fraudulently obtained. *People v Starks*, 473 Mich 227, 234; 701 NW2d

136 (2005). Participation in a recreational activity entails a manifestation of consent to bodily contacts that are permitted by the game. *Ritchie-Gamester*, *supra* at 79. "'[A]n intentional act causing injury, which goes beyond what is ordinarily permissible, is an assault and battery for which recovery may be had.'" *Id.* (citations omitted). The *Ritchie-Gamester* Court stated:

> No matter what terms are used, the basic premise is the same: When people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity. When one of those risks results in injury, the participant has no ground for complaint. [*Id.* at 87.]

Here, plaintiff understood that she was taking lessons to learn the sport of roller derby, which is a contact sport, and while plaintiff testified that she did not expect the lesson to include full-contact drills, she voluntarily chose to participate in a drill before the accident occurred after being asked to act as a "blocker." Plaintiff specifically testified that she recognized that blocking could involve a collision with another skater. Indeed, plaintiff testified that she prepared herself to block other skaters by extending her arms and also braced herself against possible impact. She also testified that she was free to leave the skate class at any time. To the extent that an assault and battery could potentially be attributed to defendants, and not the "jammer" skater alone who struck plaintiff, and again assuming that the RSSA would allow the claim, we hold that, as a matter of law, plaintiff consented to participating in the roller derby drill, knowing that contact was possible. And we cannot conclude that the contact went beyond that ordinarily permissible in the context of roller derby. Accordingly, there was no assault and battery. Additionally, with respect to assault and battery, the evidence reflected that the contact between plaintiff and the "jammer" was inadvertent and not intentional, and an assault, as well as a battery, requires an intentional and willful act. *Espinoza*, *supra* at 119. In sum, reversal is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra