IN THE COURT OF APPEALS OF IOWA

No. 8-435 / 07-1328
Filed October 29, 2008

JEREMY A. BROKAW, JOEL BROKAW and KARMA BROKAW,
Plaintiffs-Appellants/Cross-Appellees,

vs.

WINFIELD-MT. UNION COMMUNITY SCHOOL DISTRICT and ANDREW MCSORLEY,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Henry County, John G. Linn, Judge.

The plaintiffs appeal from the judgment entered following trial on their claims of battery and negligent supervision. **AFFIRMED.**

Martin A. Diaz, Iowa City, for appellants.

William J. Bush of Buch, Motto, Creen, Koury & Halligan, P.L.C., Davenport, and Steven Ort, New London, for appellee-Andrew McSorley.

Steven E. Ort of Bell, Ort & Liechty, New London, for appellee-Winfield-Mt. Union School District.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

Jeremy Brokaw and his parents, Joel and Karma Brokaw, appeal from the judgment entered following trial on their battery claim against Andrew McSorley and their negligent supervision claim against Winfield-Mt. Union Community School District (WMU). They contend the court erred in awarding inadequate compensatory damages against McSorley, in denying their claim for punitive damages, and in dismissing their claim against WMU. On cross-appeal, WMU contends the court erred in overruling its motion for summary judgment. We affirm.

I. Background Facts and Proceedings. Jeremy Brokaw was a junior at Iowa Mennonite School (IMS) and a starting guard for the IMS varsity basketball team on January 13, 2004, in their game against WMU. During the third quarter of the game, Andrew McSorley, a WMU senior and also a starting guard, struck Jeremy in the head with his elbow, causing Jeremy to fall to the floor. The referee called a technical foul on McSorley and ejected him from the game. McSorley later received a one-game suspension in accordance with the rules of the Iowa High School Basketball Association. WMU imposed a suspension of an additional five games for violating its good-conduct policy for athletes.

On July 6, 2005, Jeremy and his parents filed a petition against WMU and McSorley. It alleged McSorley had struck him with his fist and sought damages for assault and battery, including punitive damages. The petition further alleged WMU knew McSorley was an aggressive player and failed to take adequate

steps to prevent such physically aggressive behavior. Judgment was sought against WMU for negligent supervision of McSorley.

On July 29, 2005, WMU filed a motion to dismiss for failure to state a claim upon which relief may be granted. It argued there was no action at common law arising from mere negligence against a school district for injuries sustained in an assault between sports participants during the course of a sporting event. It also alleged it was immune from liability pursuant to Iowa Code section 670.4(3) (2005). On August 30, 2005, the court denied the motion.

On April 27, 2006, WMU filed a motion for summary judgment raising the same issues, which the court denied on January 26, 2007. WMU filed a motion for interlocutory appeal, which was denied.

The matter came to trial in April 2007. On July 13, 2007, the court entered its ruling. It found the plaintiffs had proved McSorley committed a battery and awarded Joel and Karma Brokaw damages in the amount of $13,000 in damages and Jeremy Brokaw $10,000 in damages. The court denied the plaintiffs' claim for punitive damages against McSorley, finding his act did not rise to the level of willful or reckless disregard of Jeremy's rights. The court found the Brokaws failed to prove WMU was negligent in supervising McSorley and dismissed their claim for negligent supervision. On August 2, 2007, the Brokaws appealed. WMU cross-appealed on August 6, 2007.

II. Scope and Standard of Review. This is an appeal from a court order in a civil lawsuit; our scope of review of the district court's decision is for correction of error. Iowa R. App. P. 6.4. Under this scope of review, the trial

court's findings of fact have the force of a special verdict and are binding on us if they are supported by substantial evidence. *Jones v. Lake Park Care Ctr., Inc.*, 569 N.W.2d 369, 372 (Iowa 1997). We view the evidence in the light most favorable to the trial court's judgment. *Miller v. Rohling*, 720 N.W.2d 562, 567 (Iowa 2006).

III. Damages for Battery. The Brokaws first contend the compensatory damages the court awarded on their battery claim against McSorley are not supported by the evidence and that the court misapplied the law. They also contend the court erred in concluding they failed to prove entitlement to punitive damages.

A. Compensatory Damages. An inadequate damage award merits a new trial as much as an excessive one. *McHose v. Physician & Clinic Servs., Inc.*, 548 N.W.2d 158, 162 (Iowa Ct. App. 1996). We review this question to correct an abuse of discretion. *Id*. The question of whether damages in a particular case are inadequate turns on the particular facts of the case. *Id.* If uncontroverted facts show the amount of the verdict bears no reasonable relationship to the loss suffered, the verdict is inadequate. *Id.*

The district court awarded out-of-pocket medical expenses incurred by the plaintiffs in the amount of $13,000. It also found that Jeremy sustained damage for loss of function to the mind and body in the amount of $5000. Finally, the court awarded $5000 in damage for physical and mental pain and suffering. In making this award, the court noted the difficulty it had in determining (1) which of Jeremy's symptoms were caused by the battery, (2) what role subsequent

injuries had on his symptoms, and (3) whether Jeremy had mitigated his damages.

In support of their damages claim, the Brokaws cite to testimony regarding changes in Jeremy's personality and behavior following the battery. They point to Jeremy's voluminous medical records, which detail symptoms ranging from headaches to hallucinations. They cite to Dr. Phillips's diagnosis for post-concussion syndrome, and more specifically, epilepsy spectrum disorder. They argue an incident where Jeremy slipped and fell on ice in February 2004 and one in which he was hit in the head by a baseball pitch in the summer of 2005, at worst, only exacerbated his symptoms. The Brokaws argue Jeremy's failure to take a drug recommended to him by his doctor to assist with his symptoms did not equate to a failure to mitigate his damages because the doctor was not certain the drug would work.

We conclude substantial evidence supports the district court's findings of fact relating to Jeremy's damages. Jeremy was asymptomatic from January 23, 2004, until his slip and fall on February 2 or 3, 2004. He also received a concussion on July 19, 2005, when he was struck in the head by a baseball. The court found these injuries could have caused new injuries or aggravated pre-existing symptoms that were not proximately caused by McSorley's actions. Viewing the facts in the light most favorable to the court's ruling, we concur. The burden of proving McSorley's actions caused specific injuries was on the Brokaws, and they failed to prove by a preponderance of the evidence that all the injuries Jeremy complains of and the attendant medical expenses are attributable

to McSorley. Although the trial court used language suggestive of failure to mitigate damages as it relates to taking prescribed medication, it only considered this evidence to decide if certain damage claims were casually related to the battery. *See Greenwood v. Mitchell*, 621 N.W.2d 200, 205 (Iowa 2001) ("Under the avoidable consequences doctrine, a party cannot recover damages that result from consequences which that party could reasonably have avoided."). An award of the Brokaws' out-of-pocket medical expenses, as well $5000 for the injury and $5000 for pain and suffering, is adequate on the facts before us.

B. Punitive Damages. In order to receive punitive damages under Iowa Code section 668A.1, a plaintiff must prove by a preponderance of clear, convincing, and satisfactory evidence that the defendant's conduct amounted to a willful and wanton disregard for the rights of another. Merely objectionable conduct is insufficient to meet the standards of this section. *Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 255 (Iowa 1993). To receive punitive damages, the plaintiff must offer evidence of the defendant's persistent course of conduct to show that the defendant acted with no care and with disregard to the consequences of those acts. *Id.*

The court found that although McSorley's act was intentional, it did not "rise to the level of demonstrating a willful or reckless disregard for Jeremy's rights" because his action was a split-second decision made in the heat of a basketball game. The Brokaws contend this conclusion was in error.

We conclude substantial evidence supports the district court's ruling on the matter of punitive damages. In order to support a punitive damage award,

the conduct in question must be egregious. *Coster v. Crookham*, 468 N.W.2d 802, 810-11 (Iowa 1991). Here, the court found, "The elbow thrown by [McSorley] does not appear to have been accompanied by great force. This was not a brutal substantial physical action." The act occurred during the course of a heated basketball game and appeared to be a "split-second" decision. Although this does not excuse McSorley's action, it does not rise to a level warranting a punitive damage award.

III. Negligent Supervision. The Brokaws also contend the court erred in finding WMU was not liable for its alleged negligent supervision of McSorley. On cross-appeal, WMU contends the court erred in denying its motion for summary judgment.

A. Negligent Supervision. The Brokaws contend WMU violated its duty to supervise McSorley. They argue school officials could reasonably foresee that McSorley was likely to commit a battery against a player of an opposing team due to his past conduct.

To be successful in their claim against the school district for negligence, the Brokaws must first show the school district owed them a legal duty. *See Godar v. Edwards*, 588 N.W.2d 701, 707 (Iowa 1999). Duty is a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. *Id.* However, the duty of a school district concerning the supervision and safety of its students is not unlimited. *Id.* at 708. Rather, the scope of the school district's duty is limited by what risks are reasonably foreseeable. *Id.* Wrongful activities

will only be foreseeable "if the district knew or in the exercise of reasonable care should have known of the risk that resulted in their occurrence." *Id.* A school district will not be held liable for negligence if it could not reasonably foresee that its conduct would result in an injury or if its conduct was reasonable in light of what he could anticipate. *Id.*

In its ruling, the district court made the following pertinent findings:

> A careful review of the factual record reveals that WMU officials did not know, nor in the exercise of ordinary care should have known, that [McSorley] was likely to commit a battery against an opposing player. [McSorley] had never exhibited characteristics of being physically assaultive or being a dangerous individual. The previous incident between [McSorley] and Danville player Schlarbaum does not establish that [McSorley] was an aggressive or assaultive player. [McSorley] played basketball intensely, but not aggressively. No witness testified that [McSorley] ever exhibited aggressive or assaultive behavior. [McSorley] never previously fouled out of any basketball game, and only once previously received a technical foul, and that was for cursing. [McSorley] has never been a discipline problem, never had previously gotten into a fight, and did not have a reputation for being an aggressive player.

We conclude these findings are supported by substantial evidence. Because WMU could not reasonably foresee that McSorley would commit a battery during the game, they did not breach any duty to Jeremy.

B. Motion for summary judgment. On cross-appeal, WMU contends the court erred in denying its motion for summary judgment. It argues the plaintiffs did not plead a cause of action recognized at common law. It further contends it was immune from liability pursuant to the discretionary function exception of Iowa Code section 670.4(3).

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981. It "is properly granted if the only controversy concerns the legal consequences flowing from undisputed facts." *Krause v. Krause*, 589 N.W.2d 721, 724 (Iowa 1999). We must determine whether, based on the undisputed material facts, the moving party is entitled to judgment as a matter of law. *Galbraith v. Allied Mut. Ins. Co*., 698 N.W.2d 325, 327 (Iowa 2005).

We first reject WMU's claim that a cause of action does not exist at common law. Based upon this special relationship between a school and its students, claims against a school district based on its own negligence may be pursued. *Doe v. Cedar Rapids Cmty. Sch. Dist.*, 652 N.W.2d 439, 446 (Iowa 2002).

> The negligence claim before us is no different from the judgments of private individuals which are reviewed every day through the mechanism of an action in tort. Personal injury from the negligence of those into whose care children are entrusted is not a risk that school children should, as a matter of public policy, be required to run in return for the benefit of a public education.

Id. at 446-47.

We next turn to WMU's argument regarding immunity against such a claim under the discretionary function exception. Iowa Code section 670.4(3) provides immunity from

> [a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.

The school district is entitled to this immunity "to the extent that the city's claims were based upon the exercise or performance or failure to exercise or perform a discretionary function or duty." *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 19 (Iowa 2000). In determining whether WMU's challenged actions fall within the discretionary function exemption, we apply a two-step analysis to each specification of negligence. *Id.* We must inquire as to (1) whether the action in question was a matter of judgment or choice for the acting employee and (2) whether, if an element of judgment is involved in the challenged conduct, the judgment is of a kind that the discretionary function exception was designed to shield. *Id.*

Although the question of whether McSorley should have been removed from the game was a matter of judgment or choice for his coach, the judgment involved was not the kind the discretionary function exception was designed to shield. The exception protects governmental actions and decisions which are made based on considerations of public policy grounded on social, economic, and political reasons. *Id.* As our supreme court has held, "[s]uch policy considerations are not involved in the decisions made by a teacher in supervising her class." Id. (citing *Hacking v. Town of Belmont*, 736 A.2d 1229, 1233-34 (N.H. 1999) (finding discretionary function immunity inapplicable to decisions of referees and coaches supervising basketball game where a student was injured)).

Because a cause of action for negligent supervision is cognizable under Iowa law, and because WMU was not immune from liability under the

discretionary function exception, the district court properly denied WMU's motion for summary judgment.

AFFIRMED.