STATE OF MICHIGAN

COURT OF APPEALS

BASIL ESSHAKI, Plaintiff-Appellant,	UNPUBLISHED March 17, 2009
v	No. 283297 Oakland Circuit Court
SCOTT MILLMAN, Defendant-Appellee.	LC No. 2007-081516-NO

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

MURRAY, P.J. (*concurring*).

I concur in the majority's opinion reversing the trial court's order granting defendant's motion for summary disposition of plaintiff's battery and reckless conduct claims. As the majority opinion makes perfectly clear, this is a classic "he said, she said"[1] case involving diametrically opposed sworn testimony on what I believe to be the dispositive factual (and therefore a material fact) issue, i.e., whether defendant turned and punched plaintiff (as plaintiff testified), or whether an errant elbow was thrown at plaintiff (as defendant testified). Granting a motion for summary disposition under MCR 2.116(C)(10) was therefore unwarranted. *Ellis v Kaye-Kibbey*, 581 F Supp 2d 861, 876-877 (WD Mich, 2008), and cases cited therein. However, although I also agree with the majority's decision to affirm the dismissal of plaintiff's intentional infliction of emotional distress claim, I do so for a different reason. That reason is discussed below.

Although our Court has recognized the tort of intentional infliction of emotional distress as being viable in Michigan, the Michigan Supreme Court has not. *VanVorous v Burmeister,* 262 Mich App 467, 481; 687 NW2d 132 (2004). Nevertheless, the standards necessary to establish this tort are well known and properly articulated by the majority. However, I disagree with the majority's assessment that plaintiff established a genuine issue of material fact on whether defendant engaged in "extreme and outrageous conduct" by allegedly punching plaintiff during

[1] Or, more precisely for this case, "He said, he said."

the soccer match. Instead, I would hold as a matter of law[2] that the conduct did not arise to that level.

In *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985), the Court adopted the following explanation of what constitutes extreme and outrageous conduct:

> Liability has been found only where the conduct 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. Generally, the case is one in which 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!' [*Id.* at 603, quoting Restatement Torts, 2d, § 46, comment d, pp 72-73.]

Anyone familiar with the game of soccer, whether it is a World Cup match or an over 30 league as in this case, recognizes that it is a physical sport where injuries happen because of the inevitable physical contact between players. Courts from across the nation have repeatedly recognized this fact, see *Nydegger v Don Bosco Preparatory High School*, 202 NJ Super 535, 538-539; 495 A2d 485 (1985) ("Physical contact is not prohibited by the rules of soccer. Injuries do result. Those who participate are trained to play hard and aggressive."); *Bentley v Cuyahoga Falls Bd of Ed*, 126 Ohio App 3d 186, 193; 709 NE2d 1241 (1998) (recognizing "the physical nature of the sport of soccer."); *Pfister v Shusta*, 167 Ill 2d 417, 425; 657 NE2d 1013 (1995) ("Both soccer and floor hockey are team sports where physical contact among participants is inherent in the game."). Because this is a physical sport where contact is frequent and expected, "it is reasonable to assume that the competitive nature of the participants will result in some rule violations and injuries. That is why there are penalty boxes, foul shots, free kicks, and yellow cards." *Jaworski v Kiernan*, 241 Conn 399, 408; 696 A2d 332 (1997).

It is true, of course, that a punch to the face during a match is not the type of injury discussed in the foregoing cases, and that is why in light of the factual dispute a reversal and remand has been ordered on plaintiff's reckless conduct claim.[3] However, it still holds true that

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[2] "In reviewing such a claim, it is initially for the court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Sawabini v Desenberg*, 143 Mich App 373, 383; 372 NW2d 559 (1985). However, 'where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.'" *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995), quoting 1 Restatement Torts, 2d, § 46, comment h, p 77. See also *Grochowalski v Detroit Automobile Inter-Insurance Exch*, 171 Mich App 771, 778-779; 430 NW2d 822 (1988) (holding as a matter of law that defendant employee's conduct "did not go beyond all possible bounds of decency and should not be regarded as atrocious and utterly intolerable in a civilized community.").

[3] Indeed, if there was no factual dispute that the injury was caused by a quick elbow immediately after the play and as the referee blew the whistle, I would hold that plaintiff could not establish that defendant engaged in reckless behavior.

a punch between two players amidst an adult soccer match is not anywhere close to conduct that goes beyond all bounds of decency and is "utterly intolerable in a civilized society." *Roberts*, *supra* at 603. It may be conduct requiring a penalty, and in fact it was penalized, but it is not in my humble opinion "severe and outrageous conduct." *Id*. In other words, a member of the community – such as a fan watching the game – might upon seeing the conduct declare, "Did you see that one!", but he would most certainly not declare "outrageous."

/s/ Christopher M. Murray