

STATE OF MICHIGAN
COURT OF APPEALS

RYAN BARRY, by his Next Friend, TERESA
PELLONPAA,

Plaintiff-Appellant,

v

ISHPEMING-NICE COMMUNITY SCHOOLS
and JAMES IWANICKI,

Defendants-Appellees.

UNPUBLISHED
November 15, 2005

No. 262826
Marquette Circuit Court
LC No. 04-041640-NI

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7)(governmental immunity) in this action in which Ryan Barry was allegedly injured by his assistant football coach, defendant James Iwanicki, when Iwanicki struck Barry with a blocking shield outside of the football field's practice area after Barry had essentially stopped practicing and walked away from linemen drills because he was unable to continue due to a previously sustained injury. Barry alleged that he suffered torn ligaments in his right ankle that required orthopedic surgery as a result of Iwanicki's actions. We find that a factual dispute exists with respect to whether Iwanicki's actions constituted gross negligence for purposes of avoiding governmental immunity under MCL 691.1407(2). The deposition testimony of Barry and his teammates handily affords sufficient evidence to create a factual dispute, thereby necessitating resolution at trial by the trier of fact. Furthermore, a factual issue remains in regard to proximate cause. Accordingly, we reverse and remand.

This Court reviews de novo a trial court's ruling to either grant or deny a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). This includes a motion brought pursuant to MCR 2.116(C)(7). *Poppen v Tovey*, 256 Mich App 351, 353; 664 NW2d 269 (2003). Further, questions of law in general are reviewed de novo. See *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004).

MCR 2.116(C)(7) provides, in part, for summary disposition where a claim is barred by immunity granted by law. In analyzing a (C)(7) motion predicated on immunity, this Court gives consideration to the affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Poppen, supra* at 353-354. For purposes of this subrule, the

documentary evidence must be construed in a light most favorable to the nonmoving party. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). “If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law.” *Poppen, supra* at 354, citing *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

Gross negligence is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). Evidence of merely ordinary negligence cannot create a factual question concerning gross negligence. *Poppen, supra* at 356.

Review of Barry’s deposition testimony and that of his former teammates provides evidence indicating, when viewed in a light most favorable to plaintiff, that Iwanicki was informed and had knowledge of Barry’s existing ankle injury that was sustained in a game a few days before the incident at issue, that Barry had left the field’s practice area by the time the incident with Iwanicki occurred, that Barry had removed his chin strap and had his helmet pushed back on top of his head when struck by the blocking bag or shield, and that Iwanicki either threw or shoved the shield in a forceful manner into Barry’s face, thereby jamming it into or under his face mask, which forced his head to snap backwards as well as causing him to stumble. Furthermore, there was evidence that Barry was unprepared for and not expecting Iwanicki’s action considering that Barry had essentially stopped practicing, that Barry was drinking water when struck, that the incident was outside the confines of the actual blocking drills, that the blocking shield was approximately two by three feet in width and length and heavy, that Barry, exasperated, told Iwanicki that he could not do the drills because he was hurting, and that Iwanicki was irate and frenzied when striking Barry with the blocking shield. Certainly, when viewing the evidence in a light most favorable to plaintiff, reasonable minds could differ with respect to whether Iwanicki’s conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted to Barry.

As noted above, our summarization of the documentary evidence is gleaned from the deposition testimony, which, in light of our colleague’s vigorous dissent, we shall now examine more closely. Barry testified as follows:

And I’m like, “Well, you know, I want to [do the drills], but I can’t.” . . . “What more do you expect out of me?” And he goes, “Just get off – just get off my damn field,” or something like that. “Get off the damn field.” I started walking off the field. Iwanicki is behind me calling me a p***y, telling me that, you know, I’m just – I’m just being a p***y and that. It’s not that I can’t do it, it’s that I don’t want to – and swearing at me and calling me all kinds of names. And so I got off to the sideline and I’m like, “What am I supposed to do now?” And he’s like, “Hold the bag,” and I’m like, “I can’t hold the bag.” And he’s walking towards me still and I’m on the sideline There was like four or five [blocking bags] laying on the ground in front of me and I unstrapped my helmet and I had it pushed up to where, you know, my – the face mask was . . . up here and I was taking a drink of water.

And he came up and just grabbed the – grabbed the bag and when he grabbed the bag, he put his hands on the little handles and came up to me and just

slammed it in my face and the face mask went up and sent my head backwards and I stepped back in – I stepped back from the blow it gave me and when I stepped back[,] I . . . felt my ankle just snap[.]

Player Jeff Huot testified that Barry conveyed to Iwanicki that he could not do the blocking drills, and, in response, Iwanicki became enraged. Huot, who indicated that Barry was hurting from the prior ankle injury, described the incident that caused the alleged injury as follows:

Ryan was pretty much fed up and Coach said, “Get the hell off my field.” Ryan starts walking away. Right as Ryan gets off the field – we’re in our own little corner down there and Ryan gets off the field and turns around, “What the hell do you want me to do?” or something like that[.] . . . [Iwanicki] came walking up with the bag, “What I want you to do is hold the goddamn bag,” and he went like that (indicating). And when Ryan was walking off he had taken the straps off his head, so the helmet was sitting there free. . . . When Coach went to give him the – or give him the bag hard pretty much, he hit the face mask and it drove into Ryan’s face or face mask[.]

Player Eric Sibley testified:

Q. Okay. Did you see Ryan get knocked back? Did you see his body go backwards?

A. Like, I saw him go backwards. . . .

* * *

Q. Okay. And so whatever [Iwanicki] did had enough force to knock him backwards?

A. Yeah.

Player Isaac Delongchamp testified that Iwanicki actually threw the blocking shield at Barry after Barry moments earlier had asked Iwanicki, “What more do you expect from me?” Delongchamp further testified, emphatically, that Iwanicki’s act of throwing the blocking shield at Barry was not part of a drill; it was “outside of the drill.” Delongchamp indicated that Barry’s chin strap was off, that his helmet was up, and that his face mask was off his face. He additionally testified:

Q. You said, “It caught [Barry] off guard.” Are you sure about that?

A. Yeah.

Q. Did he take a step back?

A. To catch himself I think he did.

Iwanicki testified that he became extremely angry when Barry walked off the field, and he acknowledged that he struck Barry with the blocking shield in the face. Iwanicki stated that the incident “was not part of the drill.” He also regretted striking Barry, stating:

I believe, the next week, I apologized to Ryan. And my words were, “Ryan, I’m sorry for what happened.” I said, “If I would have known you were injured, it would have been a different story. Next time, you’ve got to let me know that you’re hurt, and you can’t go.” That was my apology to Ryan.

Barry, however, testified repeatedly that he informed Iwanicki of the ankle injury before the incident occurred. On the issue, Barry testified in part:

Q. Okay. So you’re on the playing field now, Ryan, and you go through the drills. Coach Iwanicki comes out and you indicate to him that it’s sprained?

A. Yeah. I started telling him that my ankle is sprained and that’s why I wasn’t doing the karaoke shuffle stuff or those warm-ups.

* * *

A. [I] said, “I can’t do it because my ankle hurts.”

Several of the players testified that Barry told Iwanicki that he could not do the drills, but they could not recall Barry specifically stating that it was because of his injured ankle.

It is abundantly evident that there exist many factual issues that require resolution. Accordingly, the trial court erred in ruling that Iwanicki was not grossly negligent as a matter of law.

Our opinion is not contrary to the Michigan Supreme Court’s decision in *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999), in which the Court addressed the issue of the appropriate standard of care for those voluntarily involved in recreational activities. Our Supreme Court held, “[W]e join the majority of jurisdictions and adopt reckless misconduct as the minimum standard of care for coparticipants in recreational activities.” *Id.* at 89. This standard is comparable to the gross negligence standard, i.e., “conduct so reckless,” set forth in MCL 691.1407(7)(a), and again, there was sufficient documentary evidence presented to create a factual dispute on the matter. Additionally, it is arguable that Barry was no longer “participating” in the football practice when the incident occurred.

The dissent places significance on the fact that Barry was still in his football pads when struck by the blocking shield that was designed to cushion heavy blows; however, there was evidence that Barry was struck in the area of the neck and face, which had diminished protection in light of the fact that he had removed his chin strap and raised his helmet. The dissent also indicates that if Iwanicki had broken Barry’s nose or had snapped his head back, causing neck damage, then possibly a cause of action could have been sustained. We fail to understand this logic; MCL 691.1407(2) makes no distinctions on the basis of the nature or seriousness of an injury for purposes of avoiding governmental immunity. The injury occurred when Barry was forced backward, as would be expected when one is struck by a blocking shield, especially if

struck unexpectedly. Moreover, a medical evaluation revealed torn ligaments in Barry's ankle that required surgery. The dissent appears to be suggesting that a more serious and direct injury was necessary to establish Iwanicki's substantial lack of concern for whether an injury resulted. We disagree as there is not a necessary and determinative correlation between the seriousness and directness of an injury and establishing a substantial lack of concern for whether an injury results. Driving Barry backward by an unexpected thrust to the head from a blocking shield, which Iwanicki could clearly have anticipated, where there is evidence that Iwanicki had knowledge of Barry's injured ankle, evidence that Barry was no longer practicing and could not continue, evidence that Barry was unprepared for the blow, and evidence that Iwanicki was in an uncontrollable fit of rage, creates a scenario in which a reasonable person could conclude that Iwanicki acted in a reckless manner as to demonstrate a substantial lack of concern for whether an injury resulted. Importantly, we see nothing in the statutory language reflecting that a plaintiff must show that a defendant had a substantial lack of concern for whether a *particular* injury results.¹ As long as the injury is within the realm of results that would conceivably or likely flow from an action or inaction such that one could attribute a substantial lack of concern on the defendant's part and the defendant's conduct constituted recklessness, governmental immunity is avoided. Stumbling backward and injuring one's ankle is within the realm of conceivable or likely results when unexpectedly and forcefully struck by a blocking bag or shield.

The dissent argues that, while ultimately foolish and completely ill-advised, Iwanicki's jolt was controlled and calculated and meant merely to stun and arouse Barry's emotions, but not intended to injure him. *Post*, slip op at 2. With this statement, the dissent places himself in the shoes of the jurors by weighing the evidence and determining Iwanicki's state of mind; a "fit" that is not legally appropriate for purposes of summary disposition. Moreover, the statutory definition of gross negligence does not require proof of an intent to injure. MCL 691.1407(7)(a). Foolish and ill-advised actions can equate to recklessness. We cannot fathom how the dissent, in the context of a motion for summary disposition where the evidence must be viewed in a light most favorable to plaintiff, has conclusively determined that coach Iwanicki was simply attempting to motivate Barry and the team. The documentary evidence suggests that Iwanicki went beyond the point of attempting to rationally push Barry into becoming a better player, but rather that Iwanicki was so worked up and agitated that he acted out of pure anger.² The team's players, while generally acknowledging their fondness for Iwanicki, portrayed him as being "a

¹ If a coach were to kick a player in the shin as part of some absurd drill causing the player to keel over and strike their head against a solid object, resulting in a claim based on a closed-head injury, certainly the coach could not avoid liability by virtue of an argument that his recklessness was not directed at the player's head but rather his shins.

² The dissent reads our opinion as requiring the imposition of liability in hypothetical circumstances envisioned and crafted by the dissent. The hypothetical scenarios and the conclusion that our opinion would mandate an award of damages in these scenarios can be best described as silly and exaggerated. Our opinion does not prevent coaches from coaching their players and teams with full force and vigor; it merely recognizes that, like with anything in life, matters or actions can be taken too far, which may or may not have been the case here.

little crazy.” There was evidence that Iwanicki was out of control at the time of the incident. The important principle that must be kept in mind here is that the evidence can be reasonably viewed as either favoring a finding of gross negligence or a lack of gross negligence, and it is for a jury to resolve the matter and not a judge as a matter of law. We are not concluding that Iwanicki acted consistent with the statutory definition of gross negligence; we are simply concluding that there was sufficient evidence to create a factual issue with respect to the immunity threshold. Contrary to law, the dissent appears to be viewing the evidence in a light most favorable to the moving party, weighing the evidence, making factual determinations, and assessing credibility.³ See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994)(court cannot assess credibility or determine facts on a motion for summary disposition).

Turning to the secondary issue of causation, the trial court also stated that, even had it found a factual issue with regard to gross negligence, it would dismiss the case because the incident was not the proximate cause of Barry’s alleged torn ligament injuries. The trial court relied on a doctor’s report attached to defendants’ brief in support of the motion for summary disposition, which report suggested that Barry’s ligament injuries occurred in an earlier football game in which Barry was injured.

As cited in part above, Barry testified as follows regarding the incident with coach Iwanicki:

[He] came up to me and just slammed [the blocking shield] in my face and the face mask went up and sent my head backwards and I stepped back in – I stepped back from the blow it gave me and when I stepped back and I just felt my ankle just snap and when it snapped, it – I just – I just went and like I just put my hand down on the ground and it just – it was just the most painful thing that I’ve ever had happen to me in my life. . . . And I got up and I could barely walk

³ As another example, the dissent indicates that it is illogical to conclude that Iwanicki intended to do anything that might harm a starting lineman such as Barry. The dissent is presuming that Iwanicki was acting in a detached, calm, and logical fashion when he struck Barry. This presumption cannot be made for purposes of summary disposition, and there was evidence to the contrary. The dissent further surmises that Iwanicki was indisputably behaving in such a way as to encourage the team to play tougher despite discomfort or weakness. While this might indeed have been Iwanicki’s motivation, we cannot make that call as a matter of law under the factual circumstances. Furthermore, assuming that Iwanicki was acting solely out of an honest desire to strengthen the will and determination of the players as all good coaches strive to accomplish, it does not mean that his actions did not constitute gross negligence. By way of an admittedly exaggerated example, if a coach, in a sincere attempt to inspire greatness in his players, had the players run hills for three straight hours in 110 degree heat and in full pads, without water, it could not be legitimately disputed that the coach would be liable for gross negligence if a player were to die from heat stroke, despite no ill will or bad intent on the part of the coach; the action was reckless when viewed objectively. We recognize that the facts here do not present such a blatant and obvious case of gross negligence, nonetheless the underlying principle has application.

Barry further indicated that the injury incurred during the football game was simply a mild sprain, and he continued playing. Moreover, he went to practice the following Monday, the day of the incident with coach Iwanicki, and the ankle was taped up by team personnel and Barry was permitted to practice, engaging in various drills, although he admittedly was hurting.

The doctor's report relied on by defendants provides that Barry "was injured in a football game two and a half weeks ago." This statement comes under the heading of "chief complaint." The report also provides that Barry's "injury occurred when he got hit from behind and in the front in a rapid sequence with his foot fixed." This statement comes under the heading of "recommendations." These statements appear to merely reflect information conveyed by Barry to the doctor about the ankle injury sustained in the football game. The report does not mention anything about the incident with Iwanicki. We are uncertain whether the doctor was even made aware of the incident. We do not read the report as reflecting a definitive medical diagnosis that the injuries were indeed caused during play in the football game. There is nothing in the medical report suggesting that other possible causative sources or actions are medically precluded as having caused the injuries. In light of Barry's testimony about the severe pain that he experienced when knocked backwards by Iwanicki, the cursory and vague nature of the doctor's report, and the circumstances surrounding the injury incurred in the football game where Barry continued playing, we find that an issue of fact remains with respect to whether Iwanicki's actions caused the alleged injuries.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William B. Murphy