

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS WILLIAMS,

Plaintiff-Appellant,

v

PETER MCCREEDY,

Defendant-Appellee.

UNPUBLISHED
February 21, 2006

No. 265690
Lapeer Circuit Court
LC No. 04-034131-NO

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant's motion for summary disposition. We reverse and remand for further proceedings. We decide this appeal without oral argument pursuant to MCR 7.214(E).

The parties were playing ice hockey, on opposing teams, in a league that disallowed checking, when defendant struck plaintiff from behind, knocking him to the ice. Plaintiff filed suit against defendant alleging gross negligence. The trial court observed that plaintiff had signed a waiver releasing other participants from liability for negligence on the ice, concluded that plaintiff had failed to produce evidence to show that defendant had engaged in reckless misconduct, and granted defendant's motion for summary disposition.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). When deciding a motion under MCR 2.116(C)(7), the court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. See *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). Similarly, when deciding a motion under MCR 2.116(C)(10), the court considers the pleadings, affidavits, and other evidence submitted by the parties in the light most favorable to the nonmoving party, and should grant the motion "only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001).

Reckless misconduct, not ordinary negligence, is the minimum standard of care for coparticipants in recreational activities in this state. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 89; 597 NW2d 517 (1999). Reckless misconduct is the legal equivalent of intentional

wrongdoing, the distinction being “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.” *Behar v Fox*, 249 Mich App 314, 319; 642 NW2d 426 (2002) (internal quotation marks and citations omitted).

In this case, the trial court cited the account of a referee in concluding that this case involved only “clumsy or over-exuberant play.” But in deciding motions for summary disposition, “[t]he court may not make factual findings or weigh credibility.” *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). Plaintiff appended to his response to defendant’s motion for summary disposition excerpts from several depositions from eye witnesses, several of whom opined that defendant struck plaintiff intentionally. Two described a “jumping motion” against plaintiff away from the puck, and one expressly eschewed describing the incident as a collision, stating “I think there was an intention of contact, given the rate of speed he was going.” Another pointed out that one player can normally avoid running into another from behind, “which is . . . the main thing you don’t do when you’re playing in a non-checking league.” Although the referee upon whom the trial court relied opined that defendant did not strike plaintiff violently, he nonetheless unequivocally described defendant’s action as intentional.

We conclude that this testimony could be taken to indicate that defendant did not merely allow a collision to happen, or take some minor liberty in violation of the no-checking rule, but intentionally struck plaintiff from behind with a reckless disregard for the possibility that injury might follow. The trial court erred in failing to recognize the existence of a material question of fact for jury resolution. We reverse the result below and remand this case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey