

STATE OF MICHIGAN
COURT OF APPEALS

CELESTE GEE,

Plaintiff-Appellant,

v

KERR ENTERPRISES, INC., d/b/a VITO'S
PIZZERIA, and WALDEMAR MARION
MATUNIAK III, a/k/a WALLY MATUNIAK,

Defendants-Appellees.

UNPUBLISHED

May 27, 2014

No. 314471

Wayne Circuit Court

LC No. 12-002155-NO

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting summary disposition to defendants, Kerr Enterprises, Inc., d/b/a Vito's Pizzeria (hereinafter "Kerr"), and Waldemar Marion Matuniak III, a/k/a Wally Matuniak (hereinafter "Matuniak") in this assault and battery, premises liability, vicarious liability, and dram shop action. We reverse and remand.

Plaintiff first argues that the trial court improperly considered hearsay evidence in granting defendants' motions for summary disposition. We disagree. However, plaintiff further argues that defendants' motions for summary disposition should have been denied because she established a genuine issue of material fact regarding whether the wrongful conduct rule applied to wholly bar her claims. We agree.

We review de novo the trial court's decision to grant summary pursuant to MCR 2.116(C)(10). *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and should be granted where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court will only consider "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). "There is a genuine issue of material fact when reasonable minds could differ on an

issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

First, plaintiff contends that the trial court improperly considered hearsay evidence in the form of witness statements from police reports. Pursuant to MCR 2.116(G)(6):

Affidavits, depositions, admissions, and documentary evidence offered in support or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

Both defendants’ introduced evidence of witness statements contained within the police investigation report. Generally, police reports are inadmissible hearsay. MRE 801(c); MRE 802; *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 254; 805 NW2d 217 (2011). This Court, however, has acknowledged that although the evidence presented for a motion for summary disposition must be substantively admissible, it does not have to be in admissible form. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009). The content or substance of the evidence must, however, be admissible. *Id.* Plaintiff relies on *Maiden v Rozwood*, 461 Mich 109, 125; 597 NW2d 817 (1999), to argue that the witness statements were inadmissible hearsay, but this reliance is misplaced. In *Maiden*, a witness gave a verbal statement to a police officer, who in turn wrote down what was said. *Id.* Contrarily, the statements defendants introduced here were each individually written by the witnesses to the assault and battery. Thus, the statements are more analogous to those in *Latits v Phillips*, 298 Mich App 109, 113-114; 826 NW2d 190 (2012). In *Latits*, the defendant relied on police reports that contained the officers’ statements concerning their personal observations. Because the officers “could have testified at trial to the substance of the material in the reports,” the evidence was appropriately considered on the motion for summary disposition. *Id.* Similarly, here, the witnesses presumably could testify at trial regarding the substance of their statements; therefore, the trial court properly considered these statements for the purpose of defendants’ motions for summary disposition.

In granting defendants’ motions for summary disposition, the trial court determined that because plaintiff initiated the assault and battery, her claims against defendants were barred by the wrongful conduct rule. The wrongful conduct rule “provides that when ‘a plaintiff’s action is based, in whole or in part, on his own illegal conduct,’ his claim is generally barred.” *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005), citing *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). A plaintiff that engages in illegal conduct will not automatically be barred from making a claim. “Rather to implicate the wrongful-conduct rule, the conduct must be serious in nature and prohibited under a penal or criminal statute.” *Hashem*, 266 Mich App at 89; see also *Orzel*, 449 Mich at 561. Finally, the wrongful-conduct rule only applies if there is “a sufficient causal nexus . . . between the plaintiff’s illegal conduct and the plaintiff’s asserted damages.” *Orzel*, 449 Mich at 564.

Defendants allege that plaintiff committed an initial assault and battery against Megan Richardson, a bartender at Vito’s Pizzeria, which was prohibited under criminal statute, MCL 750.81(1). Defendants further contend that plaintiff’s alleged assault and battery against Richardson caused defendant, Matuniak, to push plaintiff. Thus, the wrongful conduct rule

would have applied if plaintiff did, in fact, assault and batter Richardson because that alleged action would have a causal nexus to her conduct and her asserted damages.

Thus, this Court will determine whether there was a genuine issue of material fact regarding whether the wrongful conduct rule applied. This necessitates an analysis of whether there was a genuine issue of material fact regarding whether plaintiff kicked Richardson. If it were undisputed that plaintiff kicked Richardson, then the wrongful conduct rule would indeed bar her claims, and summary disposition would have been appropriate. This Court will be “liberal in finding a factual dispute sufficient to withstand summary disposition.” *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). Defendants contend that plaintiff’s failure to completely deny kicking Richardson was insufficient to establish a genuine issue of material fact. But when considering the evidence in a light most favorable to plaintiff, *Latham*, 480 Mich at 111, we infer from plaintiff’s deposition testimony that she, at the very least, disputed kicking Richardson. Because plaintiff’s deposition testimony conflicted with Matuniak’s account of the alleged assault and battery against Richardson, a credibility issue was raised, and summary disposition was inappropriate. *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 623-625, 631; 739 NW2d 132 (2007). Matuniak fails to present any binding authority that plaintiff’s failed to establish a genuine issue of material fact because she never specifically denied kicking Richardson. Indeed, Kerr fails to analyze this issue at all.

Plaintiff’s testimony regarding her memory of kicking Richardson, taken with her testimony that she was merely standing alone and not participating in the fight, was sufficient to establish an inference that plaintiff disputed kicking Richardson. This factual dispute would create a genuine issue of material fact and should have justified a denial of summary disposition because reasonable minds could differ regarding whether plaintiff kicked Richardson.

Defendants focus on plaintiff’s deposition testimony in which she did not explicitly deny kicking Richardson. At issue, is the following exchange between defense counsel and plaintiff:

Q. But you remember running towards your friends though, to help them when they were on the ground, right?

A. I – I don’t know. I remember standing there screaming.

Q. do you remember going towards your friend Marisa when she was on the ground?

A. No. I just remember seeing her screaming, “Stop, stop.” Because it was just – there was so many people. And it was just – it was chaotic.

Q. At one point do you remember when Marisa was on top of Megan and then kicking Megan in the head? Do you remember doing that?

A. I was – I was not at the doorway.

Q. I understand you weren’t at the doorway. But where ever Megan and Marisa were do you remember kicking Megan in the head?

A. No.

Q. One time?

A. I don't – I just remember standing there screaming, "Stop."

* * *

Q. Do you remember kicking anyone that night?

A. No.

While plaintiff does not outright deny kicking Richardson, she properly responded to a yes or no question when asked if she remembered kicking someone. Not only did plaintiff state that she did not remember kicking anyone, she also testified clearly that she was standing away from the people who were fighting. She remembered that she was standing away from the group that was fighting and was screaming when Matuniak came running at her, calling her a "Chinese bitch," and then pushed her on the ground. Plaintiff's testimony that she was standing away from the group when Matuniak pushed her is consistent with an inference that she did not initiate an initial assault and battery against Richardson, or at least disputed that alleged assault. This testimony and inferences from it are enough to establish that reasonable minds could differ regarding whether plaintiff actually kicked Richardson because, contrary to plaintiff's testimony, Matuniak stated that he observed plaintiff kick Richardson. Thus, there exists a genuine issue of material fact, and the trial court should have denied defendants' motions for summary disposition.

Next, plaintiff argues that the trial court erred by denying her motion for reconsideration. Because this Court has determined that the trial court improperly granted defendants' motions for summary disposition, we need not address this issue.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder