STATE OF MICHIGAN

COURT OF APPEALS

MONIQUE TAYLOR, as Next Friend of BRADLEY LEONARD TAYLOR, a Minor,

Plaintiff-Appellant,

v

SHELLEE R. GORDON, B.J. GORDON and JOHN DOE.

Defendants-Appellees

UNPUBLISHED
April 15, 2003

No. 239630
Oakland Circuit Court
LC No. 00-020956-NO

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from a directed verdict in favor of defendants. We affirm. This appeal is being heard without oral argument pursuant to MCR 7.214(E).

Plaintiff's first issue on appeal is that the trial court erred when it granted a directed verdict in favor of defendant Shellee Gordon, who plaintiff alleged caused severe injury to Bradley Taylor by failing to properly supervise her son, defendant B.J. Gordon. We disagree.

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Cacevic v Simplematic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). This Court reviews all the evidence presented up to the time of the motion to determine whether a question of fact existed, and, in doing so, the appellate court views the evidence in the light most favorable to the nonmoving party and grants her every reasonable inference and resolves any conflict in the evidence in her favor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). Only when the evidence viewed fails to establish a claim as a matter of law should the motion be granted. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002).

Plaintiff sought recovery under a negligent parental supervision theory, and thus, was required to allege negligent conduct on the part of the parent. *Zapalski v Benton*, 178 Mich App 398, 402-403; 444 NW2d 171 (1989). In *Amer States Ins Co v Albin*, 118 Mich App 201, 206;

324 NW2d 574 (1982), this Court explained the liability for a parent, under a negligent parental supervision theory, as follows:

> The law in Michigan is that a parent is under a duty to exercise reasonable care so to control his minor children as to prevent them from intentionally harming others or from so conducting themselves as to create an unreasonable risk of bodily harm to them if the parent knows or has reason to know that he has the ability to control his children and knows or should know of the necessity and opportunity for exercising such control. *Dortman v Lester*, 380 Mich 80, 84; 155 NW2d 846 (1968), citing *May v Goulding*, 365 Mich 143; 111 NW2d 862 (1961); *Muma v Brown*, 378 Mich 637; 148 NW2d 760 (1967).

Thus, a parent is liable if the parent fails to exercise reasonable care to prevent their minor child from intentionally harming others when the parent knows or has reason to know that this care is necessary with their child, and that parent must also have had an opportunity to exercise control over the situation. A parent is not liable where supervision would not have made the parent aware of the child's tortious propensities. *Zapalski, supra*, 178 Mich App 403.

The evidence when viewed in light most favorable to plaintiff, with every reasonable inference resolved in favor of plaintiff, does not present a question of fact as to whether defendant Shellee Gordon had reason to know of any tortious propensities of defendant B.J. Gordon, and even if she did there was no evidence that she had an opportunity to exercise any control over the incident that resulted in Bradley Taylor's injuries. The evidence was that defendant B.J. Gordon, Bradley Taylor, and John Overton were playing "nerf football." The testimony reveals that the boys were "roughhousing" and playing "tackle" football. Bradley Taylor and defendant B.J. Gordon had played together on several occasions. There was testimony that during the game Bradley Taylor bent down to pick up the football, that was out of bounds, at which time defendant B.J. Gordon jumped on his back and then Overton jumped on his back. Bradley Taylor testified that rules of the game were that you were not supposed to tackle when a person was out of bounds. Following, the alleged incident, there is testimony that defendant Shellee Gordon waived the boys in, and that, as the boys were heading in, one of them pushed a bicycle that fell on Bradley Taylor's mouth. The testimony presented indicates that defendant Shellee Gordon never told the boys to stop roughhousing, and did not attempt to stop the aggressive action against Bradley Taylor. Plaintiff Monique Taylor saw defendant B.J. Gordon and Bradley Taylor playing "normal" shortly before the alleged incident occurred. Bradley Taylor testified that defendant B.J. Gordon was always a little aggressive. Jasmine Carr, a neighbor girl, had seen the boys wrestling and tumbling with each other before. Defendant Shellee Gordon testified that B.J. Gordon never had a problem being overly rough with other kids. Defendant Shellee Gordon further testified that had she seen defendant B.J. Gordon jump on somebody's back she would have said something. Plaintiff Monique Taylor had seen the boys playing rough before and had told them to calm down. It does not appear to be disputed that Bradley Taylor suffered extensive injuries to his mouth.

The trial court, when granting the directed verdict motion, assumed defendant Shellee Gordon was outside the entire time the boys were playing, but granted the directed verdict with respect to the claim against defendant Shellee Gordon because there was no evidence of defendant B.J. Gordon being predisposed to act in a reckless manner and there was no

opportunity to stop the incident from occurring because all of the evidence suggests that the incident happened quickly. Upon a de novo review, we agree with the trial court. Plaintiff did not present the necessary testimony or evidence, even when viewed in a light most favorable to plaintiff, to support that defendant Shellee Gordon knew or had reason to know that defendant B.J. Gordon would act in a tortious manner, and there was no evidence presented indicating that defendant Shellee Gordon could have exercised control over this situation where an incident happened within in seconds. While there may have been evidence presented that defendant B.J. Gordon and Bradley Taylor had played rough before, there is no evidence that would enable defendant Shellee Gordon to foresee defendant B.J. Gordon acting in a tortious manner. *Zapalski*, *supra*, 178 Mich App 403. The evidence presented, by plaintiff, failed to establish a prima facia case of negligent parental supervision. Thus, the trial court did not err in granting defendant Shellee Gordon's motion for a directed verdict.

Plaintiff's final issue on appeal is that the trial court erred in granting defendant B.J. Gordon's motion for a directed verdict at the close of plaintiff's proofs rather than allow the case to go to the jury. We disagree. The trial court's courts reasoning for granting a directed verdict in favor of defendant B.J. Gordon is vague, and it is difficult to ascertain its basis for granting the motion. Regardless, of the trial court's basis for granting the directed verdict, we find, upon a de novo review, that a directed verdict was proper with respect to the negligence claim against defendant B.J. Gordon. *Derbabian*, *supra*, 249 Mich App 701.

In *Ritchie-Gamester v Berkley*, 461 Mich 73, 89; 597 NW2d 517 (1999), the plaintiff was injured while ice skating during an open skating session by another skater, skating backwards, that ran into her causing her to fall and allegedly sustain injuries. The plaintiff brought a negligence claim against the skater and our Supreme Court affirmed the trial court's dismissal of the case, holding that "coparticipants in a recreational activity owe each other a duty not to act recklessly." *Ritchie-Gamester*, *supra*, 461 Mich 89. The Supreme Court explained that individuals engaging in recreational activities are "temporarily adopting a set of rules that define that particular pastime or sport. In many instances, the person is also suspending the rules that normally govern everyday life." *Id*. at 86. The Supreme Court further recognized that the game of football may be too rough for some people's tastes, but that "our society recognizes that there are benefits to recreational activity, and we permit individuals to agree to rules and conduct that would otherwise be prohibited." *Id*. The Supreme Court, in adopting a reckless misconduct standard, premised its holding, in part, on the theory that by the nature of activities, such as football, inherent risks of harm are foreseeable.

In *Behar v Fox*, 249 Mich App, 319; 642 NW2d 426 (2002), this court applying the reckless misconduct standard, in a similar situation, noted that our Supreme Court defined reckless misconduct as follows:

> One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in the class with the willful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is 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." [*Gibbard v Cursan*, 225

Mich 311, 321; 196 NW 398 (1923), quoting *Atchison, T & SF R Co v Baker*, 79 Kan 183, 189-190, 98 P 804 (1908).]

Bradley Taylor, defendant B.J. Gordon, and Overton were playing football, when Bradley Taylor was tackled, pushed, and injured. In a light most favorable to plaintiffs, Bradley Taylor was tackled from behind by defendant B.J. Gordon and Overton, and pushed causing him to fall into a bicycle, which injured his mouth. Bradley Taylor admitted that the boy were playing "tackle" football and were "roughhousing." "[C]onduct within the ordinary activity involved in the sport can hardly be termed reckless." *Ritchie-Gamester*, *supra*, 461 Mich 90 n 10. The conduct that Bradley Taylor alleged caused his injury was within the ordinary activity of the game of football being played by Bradley Taylor, defendant B.J. Gordon, and Overton. A game of tackle football typically or foreseeably involves the kind of physical contact alleged by Bradley Taylor. "Roughhousing" is not unusual in a game of football. There was no evidence suggesting that defendant B.J. Gordon acted with a complete indifference toward the risk of injury. *Behar*, *supra*, 249 Mich App 320. The evidence does not support a finding that defendant B.J. Gordon acted recklessly.

Although plaintiff argues that the tackle and push took place out of bounds, which were outside the rules the boys had set, a directed verdict was still proper. Our Supreme Court, in *Ritchie-Gamester*, *supra*, refused to adopt the concurrence's position that breaches of rules regarding safety should be actionable. *Ritchie-Gamester, supr*a, 461 Mich 92-95. Specifically, the Supreme Court recognized the problems inherent in making breaches of safety rules actionable as follows:

> Let us consider real-world examples to test whether the concurrence has presented a workable standard. In the case of soccer, which is officially a "non-contact" sport, where would the concurrence draw the "negligence line" if a participant is injured when she is fouled? Is a minor foul actionable? Is a foul that draws a "yellow card" actionable? Or would the concurrence find the foul actionable if it results in a "red card"? Similarly, in hockey, is a player who receives a two- minute penalty for slashing liable for any injuries caused by his rule violation, or is he even liable for the type of foul that results in a major misconduct penalty? Presumably, the concurrence would not preclude liability where a referee missed a foul, but what about a case where the referee saw the activity and concluded that no rule violation was committed? May a jury look beyond that decision and overturn it?
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> Surely all who participate in recreational activities do so with the hope that they will not be injured by the clumsiness or over-exuberant play of their coparticipants. However, we suspect that reasonable participants recognize that skill levels and play styles vary, and that an occasional injury is a foreseeable and natural part of being involved in recreational activities, however the "informal and formal rules" are structured and enforced. [*Id*. at 93-94.]

Therefore, assuming that Bradley Taylor was tackled and pushed while out of bounds this does not indicate that defendant B.J. Gordon's conduct was reckless. *Behar*, *supra*, 249 Mich App 321. The evidence does not suggest that defendant B.J. Gordon's conduct amounted to anything more than "carelessness," "ordinary negligence," or "over-exuberant play." *Ritchie-Gamester*,

supra, 461 Mich 90, 94. Consequently, the trial court did not err in granting defendant B.J. Gordon's motion for a directed verdict.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen