SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2953-16T2

JAKE MESAR,

Plaintiff-Appellant,

v.

BOUND BROOK BOARD OF EDUCATION, a Public Entity of the State of New Jersey, and JOHN SUK,

Defendants-Respondents,

and

BOUND BROOK SCHOOL DISTRICT,

Defendant.

Argued April 10, 2018 - Decided May 2, 2018

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0629-15.

Scott M. Sinins argued the cause for appellant (Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, PC, attorneys; Eric G. Kahn, of counsel; Annabelle M. Steinhacker, on the briefs).

William S. Bloom argued the cause for respondents (Methfessel & Werbel, attorneys; Edward L. Thornton and Steven A. Unterburger, on the brief).

PER CURIAM

Plaintiff Jake Mesar appeals from a February 17, 2017 order granting summary judgment in favor of defendants Bound Brook Board of Education and John Suk.[1] We affirm in part and reverse in part.

Plaintiff injured his ankle sliding into third base during a junior varsity (JV) baseball game. Suk was the JV baseball coach for Bound Brook High School (Bound Brook) and was also acting as the third base coach during the game in which plaintiff was injured.

The slide causing plaintiff's injury occurred in the second inning of the game. Plaintiff, a freshman at Bound Brook, took his at bat with runners on second and third base. With Bound Brook ahead by a score of six to zero, plaintiff hit a long drive to left-centerfield. Plaintiff made it safely past first and second base while the opposing team's outfielder retrieved the ball. Plaintiff continued rounding toward third base. The opposing team's outfielder sought to throw plaintiff out at third

[1] Defendant Bound Brook School District is not a legal entity subject to suit.

base. Suk, believing there was going to be a "bang-bang"[2] play at third base, instructed plaintiff to slide. During the slide into third base, plaintiff's cleat "dug into the dirt and the force of the slide caused him to roll over his right ankle." Plaintiff's ankle injury required surgery.

Plaintiff filed suit alleging defendants "negligently" and "carelessly" supervised the JV baseball game. Following discovery, defendants moved for summary judgment, arguing Suk did not breach the heightened recklessness standard articulated in Crawn v. Campo, 136 N.J. 494 (1994). Defendants contended there were no genuine issues of material fact proffered by plaintiff that could support a finding that Suk breached his duty of care under the recklessness standard. Plaintiff opposed the motion, arguing the applicable standard of care was negligence, not recklessness. Plaintiff also argued that even if recklessness was the proper standard of care, Suk's conduct was reckless.

The motion judge determined that recklessness was the applicable standard under the factual circumstances, and plaintiff failed to plead recklessness. Because plaintiff failed to plead

[2] A "bang-bang" play is "an attempted tag or force play at a base when the runner and the ball arrive simultaneously. The events occur in quick succession, making it difficult for the umpire . . . to determine whether the runner is safe or out." The Dickson Baseball Dictionary 55 (3d ed. 2009).

recklessness, the motion judge granted defendants' motion and dismissed the complaint without analyzing whether defendants' conduct met the recklessness standard.

On appeal, plaintiff argues the motion judge erred in dismissing his complaint for failure to state a claim. Plaintiff contends the applicable standard of care in this case is negligence; however, even if recklessness is the proper standard of care, plaintiff claims he satisfied New Jersey's liberal notice-pleading requirements and his complaint asserted a claim against defendants for recklessness. Plaintiff also argues that a jury must resolve whether the standard of care in this matter is negligence or recklessness.

We review a grant of summary judgment de novo, applying the same standard as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid. (quoting R. 4:46-2(c)). The court considers the evidence "in the light most favorable to the non-moving party" and determines whether it would be "sufficient to permit a rational factfinder to resolve the

alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In such reviews, the "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010) (quoting Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

A request for dismissal based on failure to state a claim "may be made in any pleading permitted or ordered, or by motion for summary judgment or at the trial on the merits." R. 4:6-7. When considering a Rule 4:6-2(e) motion to dismiss a complaint for failure to state a claim upon which relief can be granted, a trial court must determine "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). The court must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). We apply a de novo standard when reviewing an order dismissing a complaint for failure to state a claim. State ex rel. Campagna v. Post Integrations, Inc., 451 N.J. Super. 276, 279 (App. Div. 2017).

Our Supreme Court has determined that "the duty of care applicable to participants in informal recreational sports is to avoid the infliction of injury caused by reckless or intentional conduct." Crawn, 136 N.J. at 497. In Crawn, the plaintiff, a catcher in a pickup softball game, was injured when the defendant slid into him at home plate. The Court recognized the recklessness standard "is driven by the perception that the risk of injury is a common and inherent aspect of informal sports activity." Id. at 500. The Court then analyzed the public policy favoring adoption of the heightened standard of recklessness for recreational sports, including, specifically, "the promotion of vigorous participation in athletic activities," and the avoidance of "a flood of litigation." Id. at 501. The Court also considered that "[p]hysical contact is an inherent or integral part of the game in many sports." Id. at 504.

After undertaking a comprehensive review of the public policy considerations and applying notions of fairness, the Court adopted the recklessness standard for participants in recreational sports activities. Id. at 508. The Court concluded

> [t]he heightened recklessness standard recognizes a commonsense distinction between excessively harmful conduct and the more routine rough-and-tumble of sports that should occur freely on the playing fields and should not be second-guessed in the courtroom.

[Ibid.]

Four years after Crawn, we analyzed the standard of care for a sports instructor. In Rosania v. Carmona, 308 N.J. Super. 365 (App. Div. 1998), the plaintiff, an adult participant and invitee at a commercial martial arts academy, was undergoing a proficiency test against his instructor. The instructor, who owned the academy, kicked the plaintiff in the face, causing the plaintiff's retina to detach. Id. at 369. The academy had rules against certain contact, specifically contact to the head area. We held that "instructors and coaches owe a duty of care to persons in their charge not to increase the risks over and above those inherent in the sport." Id. at 373. We concluded

> if the jury found the risks inherent in the karate match between [plaintiff] and his instructor were materially increased beyond those reasonably anticipated based upon the published dojo rules, it should not have been charged to consider defendants' fault under the heightened Crawn standards, but under the ordinary duty owed to business invitees, including exercise of care commensurate with the nature of risk, foreseeability of injury, and fairness in the circumstances.
>
> [Id. at 374].

We expressly stated we did not intend to alter or modify the recklessness standard applicable to participants in recreational sports set forth in Crawn. Id. at 373. Since Rosania, New Jersey courts have consistently applied the Crawn recklessness standard

to participants in recreational sports and activities. See, e.g., Schick v. Ferolito, 167 N.J. 7, 18-19 (2001) (applying the recklessness standard to a golf injury); Dare v. Freefall Adventures, 349 N.J. Super. 205, 213 (App. Div. 2002) (applying the recklessness standard to a skydiving injury); Obert v. Baratta, 321 N.J. Super. 356, 358-60 (App. Div. 1999) (applying the recklessness standard to a softball injury).

Plaintiff contends that the applicable standard of care should be decided by a jury in accordance with Rosania. We reject plaintiff's argument. In Rosania, we did not conclude that a jury must decide the applicable standard of care in every sports injury case. The question was whether the instructor in Rosania increased the risks above those inherent in karate. Unlike in Rosania, here plaintiff produced no evidence that could warrant a departure from the recklessness standard. Based on Crawn, we find recklessness is the proper standard of care applicable in this case and that the question of the standard of care need not be determined by a jury.

Having found recklessness to be the proper standard in this case, we consider plaintiff's argument that the judge mistakenly dismissed his claims for failure to state a cause of action. According to plaintiff, defendants never argued that he failed to plead a claim for recklessness, and the judge's dismissal of his

complaint on that basis "deprived [p]laintiff of an opportunity to defend his pleadings."

Plaintiff claims a similar sua sponte dismissal for failure to state a cause of action was rejected by this court in Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76 (App. Div. 2001). In Klier, immediately prior to trial, the judge sua sponte dismissed the plaintiff's case for failure to state a cause of action. Id. at 81-82. We reversed, finding the plaintiff in Klier was not provided with due process of law because he did not have notice or the opportunity to be heard. Id. at 84. We expressly rejected "a procedure whereby a judge sua sponte, without notice to a party, resorts to a 'shortcut' for the purposes of 'good administration' and circumvents the basic requirements of notice and opportunity to be heard." Id. at 84-85.

Plaintiff cites allegations in the complaint to support his argument that the complaint's "language [was] broad and flexible enough to include a standard of recklessness." The complaint specifically alleges

> [a]t all times material to the within cause of action, and while the aforesaid baseball game was being conducted, [d]efendants . . . had a duty to properly, reasonably, and carefully supervis[e] all students involved in the sports program or recreational program operated, managed, supervised, controlled or sponsored by said [d]efendants and to provide such students, including [p]laintiff, with

> reasonable instruction, control and supervision so that said students could participate in the aforedescribed baseball game safely and without sustaining serious and permanent injury.

The complaint also alleges

> [d]uring the course of the aforedescribed baseball game, [d]efendants . . . negligently and carelessly instructed, directed or otherwise caused [p]laintiff to slide resulting in the personal and permanent injuries hereinafter described.

Based on the allegations in plaintiff's complaint, defendants moved for summary judgment, contending their conduct was not reckless. Thus, we find defendants were on notice and fairly apprised of plaintiff's allegation that their conduct was reckless, and dismissal of the complaint for failure to plead recklessness was mistaken.

The judge never analyzed whether plaintiff presented facts in support of his claim that defendants' conduct was reckless. Thus, we remand this matter to the judge to make that analysis. In remanding the issue of whether plaintiff proffered sufficient evidence of defendants' recklessness, we do not suggest the outcome of the summary judgement motion.

Affirmed in part and reversed in part. We do not retain jurisdiction.