SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0711-16T1

PHILIP A. SPATARO,

Plaintiff-Appellant,

v.

THE STEAKMASTER, INC. d/b/a EAGLESWOOD AMUSEMENT PARK,

Defendant,

and

CHANCE O'NEILL,

Defendant-Respondent.

Argued November 29, 2017 – Decided February 9, 2018

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0211-15.

John G. Devlin argued the cause for appellant (Devlin, Cittadino & Shaw, PC, attorneys; John G. Devlin, of counsel and on the brief; Andrew M. Salmon, on the brief).

Kevin F. Sheehy argued the cause for respondent (Leyden, Capotorto, Ritacco &

Corrigan, attorneys; Arthur F. Leyden, of counsel; Kevin F. Sheehy, on the briefs).

Richard John Albuquerque argued the cause for amicus curiae New Jersey Association for Justice (D'Arcy Johnson Day, attorneys; Richard John Albuquerque, on the brief).

PER CURIAM

Plaintiff Philip Spataro appeals from an order granting summary judgment in favor of defendant Chance O'Neill. We affirm in part and reverse in part.

After joinder of issue, Steakmaster filed a motion for summary judgment. O'Neill filed a cross-motion for summary judgement and opposition to Steakmaster's summary judgment motion on August 23, 2016. All parties appeared for oral argument on September 16, 2016.[1] After hearing arguments from both parties, the judge granted O'Neill's motion finding: (1) the heightened standard of intentional or reckless conduct applied pursuant to Crawn v. Campo, 136 N.J. 494 (1994); and (2) the conduct of O'Neill did not rise to the level of recklessness. An order was executed that same day granting O'Neill's motion for summary judgment and dismissing Spataro's complaint with prejudice. This appeal followed.

We recite the following facts taken from the discovery record in a light most favorable to Spataro. Brill v. Guardian Life Ins.

[1] Prior to the hearing on the motions, Steakmaster and Spataro entered into a settlement agreement.

Co. of Am., 142 N.J. 520, 540 (1995). On August 21, 2012, O'Neill struck Spataro in the face with a golf club while demonstrating how to hit a golf ball at the Eagleswood Driving Range. Both young men were occupying the same stall when this occurred. Neither Spataro nor O'Neill were experienced golfers. In fact, this was the first time that Spataro had been to a golf range or swung a golf club. O'Neill had been to a driving range on approximately two occasions before the accident.

Spataro and O'Neill arrived at Eagleswood Driving Range with friends around 9:30 p.m. The driving range has over thirty stalls, each partitioned by a short wall. There is a painted yellow line on the floor of the stalls, indicating the entrance. Multiple signs are posted in the vicinity of the stalls that noted, "All persons using the facility do so at their own risk." Each individual stall also had posted signs that specified the "Driving Range Rules." The first rule stated, "Only one person allowed per tee area." The fifth rule indicated, "When walking into the area, keep a safe distance from occupied tees." None of the group of friends had a recollection of reading the posted signs. After obtaining golf balls and clubs, Spataro, O'Neill, and their friends occupied separate stalls.

Spataro requested that O'Neill demonstrate for him how to properly hit a golf ball. Upon entering Spataro's stall, O'Neill

stated, "All right, get back," and set up a golf ball on the tee. O'Neill testified that he thought Spataro had moved out of the tee stall area "outside of the two-foot-wide yellow line." However, O'Neill never confirmed this by actual observation. After O'Neill demonstrated to Spataro how to position his feet, how to hold the club, and how to keep his arms straight, he swung the golf club. During the follow-through, the club struck Spataro in the face resulting in significant multiple facial injuries including permanent vision impairment and scarring.

Spataro raises the following points on appeal:

> POINT I
>
> THE TRIAL COURT ERRED BY HOLDING THAT THE RECKLESSNESS/INTENTIONAL DUTY OF CARE SET FORTH UNDER CRAWN APPLIES TO INDIVIDUALS HITTING GOLF BALLS IN INDIVIDUAL DRIVING RANGE STALLS.
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> POINT II
>
> IF CRAWN IS APPLICABLE, THE TRIAL COURT ERRED BY HOLDING O'NEILL'S CONDUCT WAS NOT RECKLESS AS A MATTER OF LAW.
>
> A. The trial court failed to properly evaluate the totality of circumstances and apply them to the governing standard.
>
> B. The trial court's holding that a reasonable person could never find O'Neill's conduct to be reckless is not supported by the totality of the evidence before the court.

Additionally, the New Jersey Association for Justice raises the following arguments in its capacity as amicus curie:

> POINT I
>
> THE MOTION JUDGE FAILED TO APPLY THE APPROPRIATE LEGAL STANDARD APPLICABLE TO A MINOR INJURED IN A SPORTING ACTIVITY BY ANOTHER MINOR.
>
> > A. Applying the appropriate legal standard applicable to minors, there are sufficient factual disputes which support submission of this matter to the jury.
> >
> > B. The negligence standard applies because [d]efendant qualifies as a de facto instructor to the [p]laintiff.
>
> POINT II
>
> THE NEGLIGENCE STANDARD APPLIES.

When determining a motion for summary judgment, the trial judge must decide whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. 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." R. 4:46-2(c). When reviewing an order granting or denying summary judgment, we apply the same standard used by the trial court. Prudential Prop. & Cas. Ins. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998).

We turn first to the trial judge's conclusion that O'Neill was entitled to the benefit of the heightened standard articulated by our Supreme Court in Crawn. There, the Court considered the extent of a sports participant's duty to avoid inflicting physical injury on another player. Crawn, 136 N.J. at 496-97. In Crawn, the plaintiff was participating in an informal softball game in the position of catcher. Id. at 498. He sustained an injury when a base runner slid into home plate. Id. at 498-99. The Court held 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." Id. at 497.

In reaching the conclusion that a co-participant had no liability in the absence of reckless or intentional conduct, the Court relied on two policy considerations that supported that standard of care. Id. at 501. First, the benefit to be derived from promoting vigorous participation in athletic activities, and second, the need to avoid the "flood of litigation" that would be generated by participation in recreational sports if the standard were to be set at ordinary common law negligence. Ibid. The

Court determined that those two policies outweighed the harm of immunizing conduct that would otherwise expose the responsible party to liability. Crawn, 136 N.J. at 502. In determining that the recklessness standard should apply, rather than the common law standard of ordinary negligence, the Court observed that the "rough-and-tumble of sports" between two equally situated participants "should not be second-guessed in courtrooms." Id. at 508.

In subsequent decisions that applied Crawn, the reckless conduct standard was applied in circumstances where one player collided with, or somehow directly injured another player, in the course of the sporting activity. See Schick v. Ferolito, 167 N.J. 7, 11, 22 (2001) (applying the recklessness standard when a golfer hit an unannounced and unexpected second tee shot, or "mulligan," after all members of the foursome had already teed off); Obert v. Baratta, 321 N.J. Super. 356, 358-60 (App. Div. 1999) (applying the recklessness standard when a softball player sued his teammate for injuries sustained when the two collided while in pursuit of a fly ball during an informal intra-office game); Rosania v. Carmona, 308 N.J. Super. 365, 367-68 (App. Div. 1998) (applying the recklessness standard where a karate student brought an action against a martial arts academy and instructor); Calhanas v. S. Amboy Roller Rink, 292 N.J. Super. 513, 522-23 (App. Div. 1996)

(applying the recklessness standard where a roller skater suffered a broken leg from collision with another skater).

We are informed in our decision relative to the standard of care to be employed by Schick, where the Court held that "[T]he recklessness or intentional conduct standard of care applies generally to conduct in recreational sporting contexts, including golf." 167 N.J. at 22. As Justice LaVecchia noted, "[t]he applicability of the heightened standard of care for causes of action for personal injuries occurring in recreational sports should not depend on which sport is involved and whether it is commonly perceived as a 'contact' or 'noncontact' sport." Id. at 18-19. Schick emphasized that "[t]he policies of promotion of vigorous participation in recreational sports and the avoidance of a flood of litigation over sports accidents are furthered by the application of the heightened standard of care to all recreational sports." Id. at 18.

As the Court further noted, the risk of injury in golf "arises in myriad forms and for many reasons." Ibid. "Risk of injury also is as real when it arises from an instrumentality used in a game, such as a golf club a golfer swings. . . ." Ibid.

Here, the parties were hitting golf balls at a driving range. The parties were each participating in the activity of practicing their golf-swing, an inherent and quintessential aspect of the

recreational activity of the game of golf. This activity required the use of a golf club and the striking of a golf ball, both intrinsic to the game of golf. The fact that the activity did not take place on a golf course and was characterized as "practice" does not render the activity "non-recreational." We conclude, therefore, that to determine whether a player should be held civilly liable to another player for an injury suffered while that player is engaged in this recreational activity, the trier of fact must apply the heightened standard of recklessness or intentional conduct our Supreme Court applied in Crawn.

On this issue, we add that we are unpersuaded by the argument raised by Spataro that the application of the heightened standard to the recreational activity of practicing golf represents a novel extension of the class of activities subject to the heightened standard. To the contrary, our determination is in accord with and embodies the persuasive dual policy considerations of promotion of recreational activity and avoidance of a flood of litigation associated with that activity as enunciated in Crawn and Schick.[2]

[2] We are similarly unpersuaded that it was error for the motion judge to not employ the standard for minor's engaging in sports set forth in C.J.R. v. G.A., 438 N.J. Super. 387, 400-01 (App. Div. 2014). We are further unpersuaded by the argument advance by amicus that reasonable minds could find O'Neill qualified as

We next address whether there are any genuine issues of material fact in dispute regarding whether defendant acted recklessly that should preclude the granting of summary judgment. See R. 4:46-2(c).

At the conclusion of oral argument, the judge placed his decision on the record:

> I've reviewed all of the depositions and all of the facts that have been submitted by the [p]laintiff alleging reckless behavior, that the – at least there's a genuine issue of material fact as to Mr. O'Neill's recklessness, and I respectfully disagree. I think the most that could be drawn from the facts that are before the [c]ourt is one of negligence.
>
> . . . An actor acts recklessly when he or she intentionally commits an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that a harm would follow and which thus is usually accompanied by a conscious indifference to the consequences. The standard is objective and may be proven by showing that the [d]efendant proceeded in disregard of a high and excessive degree of danger either known to him or her apparent to a reasonable person in his or her position. Reckless conduct is an extreme departure from ordinary care in a situation in which a high degree of danger is apparent. Reckless behavior must be more than any mere mistake resulting from inexperience, excitement or

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an "instructor," which would implicate a negligence standard. The undisputed facts are that O'Neill himself was a relative novice to the game and would not qualify as an "instructor" such as the karate instructor in Rosania, 308 N.J. Super. at 367-68.

> confusion, and more than mere thoughtlessness or inadvertence or simple inattention.
>
> I think that's exactly what we have here, is that we have a situation that is inadvertent, simple inattention, thoughtlessness, a mistake, a terrible mistake that resulted in a bad injury.

In reaching this decision, the judge erroneously usurped the role of the factfinder by making findings of fact and liability in matters in dispute between the parties. A "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The competent evidence must be viewed in a light most favorable to plaintiff, the non-moving party. Ibid.; R. 4:46-2(c).

We are again informed by Schick. There the Court held that the facts of that case presented a question of recklessness for the jury to decide. Schick, 167 N.J. at 20.

As the Court noted:

> This case is not one reconciled on a motion for summary judgment under a recklessness standard of care on the simple basis of an unannounced "mulligan" or on the sole basis that defendant hit a "shanked" shot. Rather, a jury must assess a combination of alleged events in which defendant, believing plaintiff

> to be located "in his line of fire" . . . proceeded to hit the tee shot anyway.
>
> [Id. at 21-22.]

The Court then concluded that the totality of defendant's action should be determined by a jury under a recklessness standard of care. Id. at 22.

"Recklessness, unlike negligence, requires a conscious choice of a course of action, with knowledge or a reason to know that it will create serious danger to others." Id. at 20. The recklessness standard "may be proven by showing that a defendant 'proceeded in disregard of a high and excessive degree of danger either known to him [or her] or apparent to a reasonable person in his [or her] position.'" Id. at 19 (alterations in original) (quoting Prosser & Keaton on the Law of Torts, § 34 at 214 (5th Ed. 1984)). Reckless conduct "is an extreme departure from ordinary care, in a situation in which a high degree of danger is apparent." Ibid. Reckless behavior must be more than a "mere mistake resulting from inexperience, excitement or confusion, and more than mere thoughtlessness or inadvertence, or simple attention . . . ." Schick, 167 N.J. at 19. A defendant's conduct is in reckless disregard of the safety of another:

> if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to

> realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.
>
> [Id. at 20 (quoting Restatement (Second) of Torts § 500 at 587 (1965)).]

Here, in the employment of our de novo standard of review, we are satisfied there exists a material fact in dispute concerning whether O'Neill made appropriate observations prior to swinging the golf club consonant with the attendant risk of significant injury to a bystander. As such, a jury should decide whether O'Neill's swinging the club, without certainty as to Spataro's location, was in reckless disregard of that risk.

Affirmed in part. Reversed in part. We do not retain jurisdiction.