[Cite as *Aquila v. LaMalfa*, 2007-Ohio-689.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

ANTHONY AQUILA,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2005-L-148**
- vs -	:	
MARTIN LAMALFA, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 04 CV 001485.

Judgment: Reversed and remanded.

Grant A. Goodman, 1300 East Ninth Street, #1717, Cleveland, OH 44114 (For Plaintiff-Appellant).

Thomas J. Connick, Davis & Young Co., L.P.A., 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114-2654 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Anthony Aquila, appeals the judgment of the Lake County Court of Common Pleas, granting summary judgment in favor of appellee, Martin LaMalfa, on Aquila's cause of action for negligence. For the following reasons, we reverse the decision of the trial court and remand the matter.

{¶2} On August 17, 2003, Aquila and LaMalfa attended the LaMalfa family reunion, held at the YMCA in Perry, Ohio. Aquila and LaMalfa participated in an activity known as a "sack race" or a "potato sack race." The object of a sack race is to be the first person to

cross the finish line. Participants place their feet in a sack, typically a burlap or potato sack, and race by hopping. In the course of the race, LaMalfa came into contact with Aquila, causing Aquila to fall and suffer a broken hip.

{¶3} On July 27, 2004, Aquila filed suit against LaMalfa, alternatively alleging that LaMalfa's contact with Aquila was negligent, reckless or intentional. LaMalfa moved for summary judgment. LaMalfa argued that there was no evidence that he had acted recklessly or intentionally. LaMalfa further argued that Aquila's negligence claim failed as a matter of law, on the theory that there is no liability for negligence for injuries suffered in the course of a recreational or sporting event.

{¶4} On August 8, 2005, the trial court granted summary judgment in LaMalfa's favor with respect to Aquila's negligence and intentional tort claims. Aquila's claim that LaMalfa's conduct was reckless was tried to a jury beginning August 9, 2005. The jury returned a verdict in favor of LaMalfa. On September 6, 2005, the trial court entered judgment on the jury's verdict. This appeal timely follows.

{¶5} On appeal, Aquila challenges the trial court's grant of summary judgment in LaMalfa's favor on his negligence claim only. Aquila raises the following assignment of error:

{¶6} "The trial court erred in granting defendant's motion for summary judgment as to the negligence cause of action when it refused to consider the application of binding precedent to underlying facts which would have supported such a negligence claim."

{¶7} Pursuant to Civ.R. 56(C), summary judgment is proper when: (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence *** that reasonable minds can come to but one conclusion and that conclusion is adverse to the party

against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶8} The law favors a citizen's right to trial by jury except in cases where reasonable minds can come to but one conclusion. One must, if intellectually true to the Civ.R. 56 analysis, assume as true all facts in evidence on behalf of the non-moving party. Summary judgment is not a case management tool to be utilized by trial courts, but must be used sparingly. The trial court may not engage in a weighing of the evidence or a determination of whether a party may be successful at trial in meeting its ultimate legal burden. Once evidence is presented by the non-moving party as to any element of the claim, the final determination of whether a plaintiff or defendant is ultimately successful lies in the exclusive control of the finder of fact at trial.

{¶9} The Supreme Court of Ohio in *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, syllabus, stated that: "[w]here individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional' as defined in Sections 500 and 8A of the Restatement of Torts 2d." "A player who injures another player in the course of a sporting event by conduct that is a foreseeable, customary part of the sport

cannot be held liable for negligence because no duty is owed to protect the victim from that conduct." *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, paragraph two of the syllabus.

{¶10} In *Biggin v. Stark* (Aug. 26, 1994), 11th Dist. No. 93-T-4952, 1994 Ohio App. LEXIS 3747, while the parties were playing golf together, the appellant was standing on a cart path next to the tee, and the appellee was taking practice swings. Id. at 1. Appellee's golf club slipped out of his hand, flew through the air, and struck appellant in the mouth, causing injury. Id. at 1-2. This court applied a recklessness standard and stated that "since [the] appellee did not intend the initial act of losing control over the club, it is not possible for [the] appellee's activity to be defined as reckless." Id. at 5.

{¶11} We must stress that a golfer assumes the ordinary risks of the game, i.e., being struck by an errant golf ball or club. See *McNeill* and *Biggin*, supra.

{¶12} In the instant matter, we rely upon our holding in *Coblentz v. Peters*, 11th Dist. No. 2004-T-0017, 2005-Ohio-1102, at ¶21, as determinative. This is binding precedent in our district, which we must follow. We have established the requisite analysis, which further defines negligent verses reckless conduct during sports or recreational activities.

{¶13} Pursuant to the Supreme Court's precedent in *Marchetti* and our precedent in *Biggin* and *Coblentz*, the trial court in this matter must first consider and determine whether or not "intentional tackling" is an actual part of the activity of sack racing; and as this is a motion for summary judgment, we must construe all evidence most strongly in favor of the non-moving party. Thus, based on *Marchetti*, supra, where individuals engage in recreational or sports activities, they assume the ordinary risks of the game, and courts apply a recklessness standard in order to determine liability. We applied a recklessness standard

in *Biggins*, where a golf club flew out of someone's hand hitting another in the mouth, due to the golf club being an essential part of the activity.

{¶14} In *Coblentz*, we further refined the analysis, to include an "actual part of the game test," in which we reasoned:

{¶15} "Although many golfers use motorized golf carts, a motorized golf cart, unlike a golf ball or club, is not incidental to the game of golf. As such, because a golf cart is not an actual part of the sport of golf, appellant had no reason to assume that he would be struck and injured by a golf cart since it is not an ordinary risk of the game." Id. at ¶21. Thus, this court indicated that if driving a golf cart is not an actual part of the activity, it cannot be an ordinary risk of the game and negligence should be the standard applied. Id.

{¶16} The incident at issue in this case, like in *Coblentz*, does not involve conduct that is an "actual part of the game," therefore, it is not foreseeable. "Intentional tackling" is not a customary part of the sport or activity of sack racing. The activity of sack racing does not include being intentionally tackled by an errant, although well-meaning, participant, and is not foreseeable conduct. Sack racing is not a contact sport or activity. In *Coblentz*, we held that a negligence standard should have been applied. Id. at ¶21. We would find that to be the case in the instant matter as well.

{¶17} Aquila was injured as the result of a collision during a sack race and asserts liability on the theory that this collision was caused by LaMalfa's negligence. The possibility of two participants colliding is a foreseeable, customary part of virtually every racing sport, cf. *Pressler v. U* (1990), 70 Ohio App.3d 204, 206 ("[t]he collision occurred during an ordinary risk: passing or maneuvering during a race.") However, the facts of this case are different

from an incidental collision during a race. In this matter, we are forced under a summary judgment standard to interpret all facts in evidence in favor of the non-moving party.

{¶18} It is clear from the record that this "roughhousing" between two grown men was done in a spirit of childlike competition between cousins, which unfortunately due to their respective ages and physical limitations, may negligently have caused some serious damage. Cf. *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, at ¶9 ("the determinative factor in a defendant's liability in sports and recreational activity cases is the conduct of the defendant himself ***").

{¶19} This court is not attempting to impose tort liability whenever a participant in a sport or recreational activity violates the rules of that activity. There is no per se liability for cheating or if two of the participants would have tumbled into each other while racing. However, pursuant to our earlier holding in *Coblentz*, being blind tackled by another middle-aged adult man is not a reasonable and customary part of the activity of sack racing. This distinction is demonstrated by the facts of the *Marchetti* decision. In that case, the parties were engaged in a variation of the game of "kick the can." The defendant, who had been called "it," continued to run at the plaintiff who was standing on "base," in this case, a ball. Although he was supposed to stop, the defendant collided with the plaintiff and kicked the ball out from under her "in frustration," which caused her to fall. *Marchetti* at 101, fn. 4. The court did not find the defendant's action to be outside the foreseeable and customary part of the activity, or that such action was reckless or intentional. Id. at 100. In the case before us, the trial judge properly found enough evidence for reckless conduct but improperly excluded negligence based upon *Coblentz*.

{¶20} The sole assignment of error is with merit.

{¶21} For the foregoing reasons, the decision of the Lake County Court of Common Pleas, granting summary judgment in favor of LaMalfa on Aquila's negligence claim, is reversed, and the matter is remanded for further proceedings consistent with this opinion.

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶22} The majority opinion reverses the decision of the court below and holds that a genuine issue of material fact exists whether defendant-appellee, LaMalfa, negligently "intentionally tackled" plaintiff-appellant, Aquila. Such a decision comports with neither law nor logic. Accordingly, I respectfully dissent.

{¶23} In the present case, Aquila sustained injuries when he and LaMalfa collided during a potato sack race. Aquila sued LaMalfa, arguing in the alternative, that LaMalfa negligently caused his injuries, recklessly caused his injuries, or intentionally caused his injuries. The trial court granted summary judgment in favor of LaMalfa on Aquila's negligence and intentional tort claims. Aquila's claim based on recklessness was tried to a jury which found that LaMalfa had not acted recklessly. The issue before this court on appeal is whether LaMalfa may be held liable to Aquila for simple negligence.

{¶24} It is well-settled that, "[w]here individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury

unless it can be shown that the other participant's actions were either 'reckless' or 'intentional' as defined in Sections 500 and 8A of the Restatement of Torts 2d." *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, at syllabus; *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, at paragraph one of the syllabus ("Between participants in a sporting event, only injuries caused by intentional conduct, or in some instances reckless misconduct, may give rise to a cause of action. There is no liability for injuries caused by negligent conduct."); see also, *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, at syllabus (explaining *Marchetti* and *Thompson*, "recovery is dependent upon whether the defendant's conduct was either reckless or intentional").

{¶25} The majority characterizes LaMalfa's conduct as ***intentional*** with respect to the tackling (act), but ***negligent*** with respect to the injury (intent). Such conduct on LaMalfa's part, however, would be reckless, not negligent. *Thompson*, 53 Ohio St.3d. at 105 ("[w]hile an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it") (citation omitted). However, it has already been determined by a jury that LaMalfa's conduct was not reckless. The Ohio Supreme Court has repeatedly made clear that participants in a recreational activity "assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional'." *Marchetti*, 53 Ohio St.3d 95, at syllabus.

{¶26} The majority avoids this difficulty by construing LaMalfa's conduct as being outside the "ordinary risks" of potato sack racing.[1] However, the jury, as

1. The majority makes several statements regarding what is and what is not customary in the sport of potato sack racing without citing to appropriate authority or evidence in the record. It is also unclear on what basis the majority characterizes LaMalfa's conduct as "well-meaning." It is clear, nonetheless, that the Ohio Supreme Court did not intend to impose liability for the "roughhousing" at issue herein.

instructed by the trial court in Aquila's recklessness claim, determined that LaMalfa's conduct was part of the foreseeable, customary part of potato sack racing. The court instructed the jury, in relevant part, as follows: "conduct that is a foreseeable, customary part of the recreation of sports activity is not reckless." Thus, the issue of whether LaMalfa's conduct is a foreseeable part of sack racing has been determined and that decision by the jury is res judicata. The majority's ruling gives Aquila a second opportunity to try his case.

{¶27} The majority concedes that collisions between participants are a foreseeable, customary part of virtually every racing sport. *Pressler v. U* (1990), 70 Ohio App.3d 204, 206. The majority distinguishes the collision between LaMalfa and Aquila from "incidental collisions" by characterizing the collision as a "blind tackling" done "in a spirit of childlike competition." However, characterizing LaMalfa's conduct in this way does not preserve Aquila's claim sounding in negligence. In the first place, if LaMalfa intentionally tackled Aquila from behind and running at full sprint, as Aquila alleges, then Aquila's theory of recovery is for battery, not negligence. The Ohio Supreme Court has observed that "[n]early any assault and battery can be pled as a claim in negligence." *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99. Intentionally tortious conduct may not be used as a pretext for advancing a negligence claim that would otherwise be barred.

{¶28} In the second place, the majority's position essentially imposes tort liability whenever a participant in a sport or recreational activity violates the rules of that activity. There is no per se liability for cheating. This point is demonstrated by the facts of the *Marchetti* decision. In that case, the parties were engaged in a variation of the game of

"kick the can." The defendant, who had been called "it," continued to run at the plaintiff who was standing on "base," in this case, a ball. Although he was supposed to stop, the defendant collided with the plaintiff and kicked the ball out from under her "in frustration," which caused her to fall. 53 Ohio St.3d at 95, 100 n. 4. The court did not find the defendant's action to be outside the foreseeable and customary part of the activity, or that such action was reckless or intentional even though that conduct went beyond the rules of the game. Id. at 100.

{¶29} When it is alleged that a participant has violated the rules of a sport or an activity, the claims must be evaluated under the law as it stands. The merely negligent disregard of the rules is barred under *Marchetti* and *Thompson*. If the conduct creates an unreasonable risk of harm or creates a risk of harm that is substantially greater than the risk created by negligence, that is, if the violation of the rule is reckless, then there may be recovery under *Marchetti* and *Thompson*. *Marchetti*, 53 Ohio St.3d at 96 n. 2, quoting 2 Restatement of the Law 2d, Torts (1965) 587, Section 500.[2] If the conduct is so egregious as to fall outside the foreseeable, customary risks of a given activity, then the plaintiff's recovery is for battery or some other intentional tort. *Thompson*, 53 Ohio St.3d at 104 ("[t]he conduct of an athlete who intentionally injures another athlete in a way not authorized or anticipated by the customs and rules of the game violates the duty not to commit an intentional tort").

2. In the present case, Aquila did not plead a claim for battery. Count One of Aquila's complaint was for negligence. Count Two was for "reckless and/or willful and/or wanton and/or malicious and/or intentional acts." When the trial court granted summary judgment on Aquila's cause of action for "intentional conduct," it did so on the grounds that Aquila raised "no issue of material fact that LaMalfa *intended* to cause the injuries sustained." Cf. *Love*, 37 Ohio St.3d at 99 ("[a] person is subject to liability for battery when he acts intending to cause a harmful or offensive contact"). Aquila's theory that LaMalfa intentionally tackled him was properly tried and resolved under the recklessness claim.

{¶30} Finally, the majority relies on this court's decision in *Coblentz v. Peters*, 11th Dist. No. 2004-T-0017, 2005-Ohio-1102, as "binding precedent" determinative of this appeal. In *Coblentz*, this court held that, where a golfer strikes another golfer while operating a golf cart, the golfer operating the cart is liable under a negligence standard since "a golf cart is not an actual part of the sport of golf." Id. at ¶21. The majority construes *Coblentz* as "refining" the analysis set forth by the Ohio Supreme Court "to include an 'actual part of the game test'." *Coblentz* did not refine the law of *Marchetti* and its progeny. In the same paragraph of the decision, the court correctly states the law under *Marchetti*, observing that "[t]he incident at issue does not involve conduct that is a foreseeable, customary part of the sport of golf." Id.

{¶31} An "actual part of the game test" narrows the broad immunity for negligent conduct in the context of recreational activities established by the Ohio Supreme Court. It would impose negligence liability for any infraction of the rules. Moreover, it is impossible to apply such a test in situations such as potato sack racing, with no official or definitive set of rules.

{¶32} For the foregoing reasons, the judgment of the trial court should be affirmed.