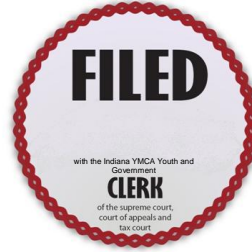


FOR PUBLICATION



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**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH AND
GOVERNMENT**

JOHNNY LUJACK,)
)
 Plaintiff-Appellant,)
)
 vs.)
)
 ANGELO E. BERTELLI, GIPPER’S BAR AND)
 WINE CLUB, INC, HILLTOPPER COUNTRY)
 CLUB, and THE ESTATE OF BOB GLADIEUX)
)
 Appellees-Defendants

No. 95A05-0209-CT-205

Appeal from the Halfacre Circuit Court, No. 95C01-0307-CT-237
The Honorable Frank Ruettiger, Judge

August 30, 2010

Rock, Judge.

Johnny E. Lujack appeals the trial court’s entries of summary judgment in favor of Angelo E. Bertelli; Gipper’s Bar and Wine Club, Inc. (“Gipper’s”), an Indiana corporation;

Hilltopper Country Club (the “Hilltopper”), a fraternal organization; and the Estate of Bob Gladieux (collectively, the “Defendants”).⁴ We affirm.

Issue

Whether the trial court erred in granting summary judgment to the Defendants.

Facts and Procedural History

The facts most favorable to Lujack as the non-moving party indicate that Gipper’s, a bar, sponsored a golf scramble at the Hilltopper’ golf course on September 1, 2006. Gipper’s enlisted golfers by posting sign-up sheets in the bar. It also provided sign-up sheets for volunteers to serve beverages from golf carts. The forty-five dollar entrance fee covered the costs of green fees, prizes, golf carts, and beverages. The Hilltopper did not sponsor the event but merely supplied the golf carts and beverages, including beer, for the event. Bob Gladieux, Lujack’s grandfather, signed up to drive a beverage cart.

The morning of the scramble, Gladieux invited the then-sixteen-year-old Lujack to ride in a beverage cart with him during the tournament. With his mother’s permission, Lujack agreed to join Gladieux. Upon arriving at the golf course, Gladieux retrieved a beverage cart for his and Lujack’s use and brought it to where Lujack was waiting in front of the clubhouse. The cart had a large cooler in the back for drinks but no roof or windshield. Lujack received no instructions regarding how or where to operate the cart; he was unfamiliar with golf etiquette and had been to a golf course only once. Lujack initially did not assist in loading the cart’s cooler with beverages and did not meet the other two beverage cart operators out on the course during the scramble.

⁴ Lujack’s mother originally filed the complaint on behalf of Lujack, as Lujack’s parent and natural guardian. The trial court subsequently granted the motion to substitute Lujack as the plaintiff after he turned eighteen years old. Lujack, by his mother, originally filed the complaint against Bob Gladieux. Upon his death, the trial court substituted his Estate’s personal representative as a defendant.

Prior to the start of the scramble, Gladieux decided to join one of the teams playing in the scramble as it was short a player. He left Lujack with his sister, Colleen Kipper. Kipper and Lujack drove the beverage cart together briefly until Kipper also decided to play in a foursome. Elza Fox, a Gipper's employee, took Kipper's place in the beverage cart. Lujack drove the cart, and Fox dispensed the beverages to the scramble's participants. Approximately three hours into the tournament, Bertelli, a participant in the scramble, hit a drive on the sixteenth. The ball traveled straight for approximately sixty to seventy yards before "turn[ing] directly left." As Bertelli followed the ball's trajectory, he observed the roof of a golf cart, belonging to another foursome, in the ball's path. Lujack, who was driving the beverage cart on a cart path near the eighteenth hole, did not hear any warning regarding the ball's approach. After traveling more than two hundred feet, the ball struck Lujack in the nose, causing injuries to his nose and facial bones, and placing his prospective modeling career in jeopardy.

On March 7, 2007, Lujack filed a complaint against the Defendants alleging

22. The Defendants failed to exercise reasonable care for the safety of [Lujack] by failing to provide him with a beverage cart that contained a canopy or a windshield to provide [him] with some measure of protection from the risks associated with being struck by a flying golf ball.

23. The Defendants failed to exercise reasonable care for the safety of [Lujack] by failing to provide him with any warnings, any information or any safety instructions prior to sending him onto a golf course that was full of golfers (most of which were drinking alcohol) to dispense beverages.

24. The Defendants negligently failed to exercise reasonable care for the safety of [Lujack] while he was on the premises of the [Hilltopper'] golf course.

25. As a direct and proximate result of the Defendants' negligent conduct, [Lujack] suffered painful and permanent injuries and incurred significant medical and dental expenses. His nose was broken and his left orbital bone was cracked leaving both disfigured. As a result, he will incur significant plastic surgery expenses in the future.

26. As a direct and proximate result of the Defendants' negligent conduct, [Lujack] suffered mental and emotional pain and anguish.

27. As a direct and proximate result of the Defendants' negligent conduct, [Lujack]'s ability to function as a whole person has been impaired. The quality of [his] life has been significantly diminished as a result of the Defendants' negligent conduct.

The Hilltopper, Bertelli, and Gladieux filed motions for summary judgment on December 4, 2008. Gipper's filed a motion for summary judgment on January 10, 2009. Lujack filed a brief in opposition to the Defendants' motions for summary judgment on January 31, 2009. The trial court held a hearing on the motions for summary judgment on February 12, 2009. During the hearing, Lujack raised the issue of Gladieux' purported negligent supervision. On March 5, 2009, the trial court entered its orders, granting the Defendants' motions for summary judgment.

Decision

Lujack asserts that the trial court erred in granting summary judgment to the Defendants. Specifically, he contends that 1) the Defendants owed him a duty; and there exists genuine issues of material fact regarding whether 2) Bertelli's conduct was reckless; 3) Gladieux, Gipper's, and the Hilltopper were negligent in their supervision of him; and 4) the Hilltopper and Gipper's breached a duty of reasonable care owed to him under the theory of premises liability.

When reviewing a grant or denial of summary judgment, our well-settled standard of review is the same as it was for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. Ind. T.R. 56(C). "A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 318 (Ind. Ct. App.

1991). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. However, once the movant has carried his initial burden of going forward under Trial Rule 56(C), the nonmovant must come forward with sufficient evidence demonstrating the existence of genuine factual issues, which should be resolved at trial. *Otto v. Park Garden Assocs.*, 612 N.E.2d 135, 138 (Ind.Ct.App. 1993), *trans. denied*. If the nonmovant fails to meet his burden, and the law is with the movant, summary judgment should be granted. *Id.*

“Additionally, when material facts are not in dispute, our review is limited to determining whether the trial court correctly applied the law to the undisputed facts.” *Mills v. Berrios*, 851 N.E.2d 1066, 1069 (Ind. Ct. App. 2006). We review a question of law de novo. “Finally, if the trial court’s grant of summary judgment can be sustained on any theory or basis in the record, we will affirm.” *Beck v. City of Evansville*, 842 N.E.2d 856, 860 (Ind. Ct. App. 2006), *trans. denied*.

1. Duty

Lujack asserts that the trial court erred in granting summary judgment in favor of the Defendants. He argues that the Defendants owed him a duty to prevent him from being injured and were negligent in breaching that duty.

To recover on a theory of negligence, a plaintiff must establish three elements: (1) defendant’s duty to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) a failure of the defendant to conform his conduct to that standard of care, and (3) an injury to the plaintiff proximately caused by the breach. Whether the defendant must conform his conduct to a certain standard for the plaintiff’s benefit is a question of law for the court to decide. Courts will generally find a duty where reasonable persons would recognize and agree that it exists. This analysis involves a balancing of three factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.

Estate of Heck ex rel. Heck v. Stoffer, 786 N.E.2d 265, 268 (Ind. 2003), *reh'g denied*. “Generally, whether a duty exists is a question of law for the court to decide, although sometimes the existence of a duty depends upon underlying facts that require resolution by a trier of fact.” *Parsons v. Arrowhead Golf, Inc.*, 874 N.E.2d 993, 996 (Ind.Ct.App.2007)).

This court had consistently held that “there is no duty from one participant in a sports activity to another to prevent injury resulting from an inherent risk of the sport.” *Bowman ex rel. Bowman v. McNary*, 853 N.E.2d 984, 990 (Ind. Ct. App. 2006); *see also Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind. Ct. App. 2004), *trans. denied*; *Gyuriak v. Millice*, 775 N.E.2d 391 (Ind.Ct.App. 2002), *trans. denied*; *Mark v. Moser*, 746 N.E.2d 410 (Ind.Ct.App. 2001). In *Geiersbach*, a panel of this court extended “participant” to include “any person who is part of the sporting event or practice involved.” 807 N.E.2d at 120. “By participant,” the *Geiersbach* court included “players, coaches, and players who are sitting on the bench during play.” *Id.* Furthermore, in *Parsons*, we held that an owner of a golf course did not owe a duty to a golfer, where the golfer was “a voluntary participant in the sporting activity of golf,” and the golfer’s injury “was an inherent risk of the game of golf.” 874 N.E.2d at 997.

a. Participant. Here, Lujack maintains that he was not a participant in the golf scramble because “he was not playing; he was not watching the event; he was not signed up on a team; nor was he doing anything related to the activity of golf.” Thus, he argues that the Defendants owed him a duty to prevent his injury. We disagree.

Lujack’s presence on the golf course was due to the fact there was a golf scramble; he had agreed to drive or ride in a beverage cart provided for the golf scramble; and he performed this function and assisted in providing beverages to players in the golf scramble. If not for the golf scramble, Lujack would not have been on the golf course the day of the incident. Although not a player himself, he clearly was “part of the sporting event . . . involved,” and we hereby expand the language in *Geiersbach* to include sporting event volunteers such as Lujack. *Geiersbach*, 807 N.E.2d at 120. We therefore find that Lujack was a participant in the golf scramble.

b. Inherent risks. Lujack, however, also seems to argue that he could not have consented to the inherent risks of golf as “he knew nothing about golf and could not appreciate any risk involved with being near a golf course.” We find this argument unavailing. We have said,

Those participating in the event or practice should be precluded from recovering for injuries received resulting from dangers or conduct inherent in the game unless they prove that the conduct was reckless or the injury intentional. . . . Such a danger is inherent in the game and the participant should not be able to recover from the player, team, or stadium without proving recklessness or that the injury was somehow intentional.

Geiersbach, 807 N.E.2d at 120.

Even if we were to assume that Lujack arrived at the golf course utterly ignorant of the game, the undisputed facts show that Lujack had been participating in the golf scramble event for approximately three hours prior to being struck by the golf ball. Over this extended time period, he had been delivering beverages to foursomes during play. We find that this supports an inference that Lujack was aware of the inherent risks of golf; namely, that it involves players hitting golf balls long distances and that some, if not many, of these balls invariably fail to land where intended.⁵ See, e.g., *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 555 (Ind.1987) (holding that while actual knowledge is a prerequisite element of incurred risk, the “plaintiff’s actual knowledge may be proven by circumstantial evidence notwithstanding the absence of a plaintiff’s admission of such knowledge”).

We also note that Lujack makes much ado regarding not receiving instructions on how or where to operate the beverage cart. We, however, question the import of this argument inasmuch it is undisputed that he was struck while operating the beverage cart on a cart path. As to not being told to drive “toward the golfers who are approaching a hole” and “the importance of keeping his eye on the group of golfers who were on the tee box hitting,” the undisputed facts are

⁵ Lujack does not assert that being struck with a golf ball while driving a golf cart is not an inherent risk of golf. Nonetheless, we note that “[c]onsideration of whether the injury-causing event was an inherent or reasonably foreseeable part of the game is a correct evaluation, under an objective standard as a question of law for courts to decide.” *Parsons*, 874 N.E.2d at 998. We believe that being struck by an errant golf ball while operating a golf cart on a golf course’s cart path is an inherent risk of the game of golf.

that he was at the eighteenth hole when struck by a golf ball hit from the sixteenth hole. As to not being instructed “to duck or cover up if he saw or heard a golfer or group of golfers yell fore,” we fail to see how this is relevant as Lujack admits that he did not hear anyone yell, “fore.”

Given Lujack’s status as a participant in the golf scramble, with its inherent risks, we conclude that the Defendants did not owe him a duty. He is therefore precluded from recovering from the Defendants without proving recklessness or that his injury was intentional.

2. Recklessness.

Lujack asserts that the trial court erred in granting summary judgment in favor of Bertelli. Specifically, he contends that there is a material issue of fact as to whether Bertelli’s conduct rose to the level of recklessness, given the conflicting testimony regarding whether he yelled, “fore” after hitting his ball from the sixteenth hole.⁶

[P]recluding liability for negligent conduct but allowing recovery for reckless or more serious conduct in the context of sporting activities “will avoid judicial review of the kind of risk-laden conduct that is inherent in sports and generally considered to be part of the game, while at the same time imposing liability for acts that are clearly unreasonable and beyond the realm of fair play.”

Bowman, 853 N.E.2d at 994 (quoting *Mark v. Moser*, 746 N.E.2d 410, 422 (Ind. Ct. App. 2001)). The conduct, however, “must be so reckless as to be totally outside the range of ordinary activity involved in the sport.” *Id.*

In the context of an event, such as a golf scramble or game,

recklessness requires that a participant in a sporting activity be (1) conscious of his or her misconduct; (2) motivated by indifference

⁶ “If a player plays a ball in a direction where there is a danger of hitting someone, he should immediately shout a warning. The traditional word of warning in such a situation is ‘fore.’” [http:// www. usga. org/ etiquette/ tips/ Golf- Etiquette- 101/](http://www.usga.org/etiquette/tips/Golf-Etiquette-101/) (last visited Nov. 30, 2009).

for the safety of a co-participant or co-participants; and (3) know that his or her conduct subjects a co-participant or co-participants to a probability of injury. A mistake in judgment is not sufficient to support a finding of recklessness. Rather, there must be a conscious indifference to the consequences of one's actions.

Id. at 995.

At the time of the incident, Lujack was operating a cart on the cart path near the eighteenth hole. Bertelli was at the sixteenth hole's tee box. He hit the ball, which initially traveled straight for approximately sixty to seventy yards. Apparently, Bertelli hooked the ball, causing it to shift direction to the left. After traveling over two hundred feet, the golf ball struck Lujack. At no time did Bertelli see Lujack or his cart, and he was not in the line of play.

Given the definition of recklessness, even assuming that Bertelli did not yell "fore" after hitting an errant golf ball, we cannot say that there are genuine issues of material fact precluding summary judgment. There is no indication that Bertelli acted with "conscious indifference to the consequences of [his] actions." *Id.* At most, Bertelli's failure to audibly warn other participants potentially in the line of his errant ball is a mistake in judgment, which is insufficient to support a finding of recklessness. *See id.* at 996 n.7 (finding that acting in violation of golf's standards of etiquette does not per se establish reckless or intentional conduct). This is particularly so given that Lujack was not "within range in [Bertelli]'s own fairway." *See Gyuriak*, 775 N.E.2d at 396 (finding no recklessness, where a golfer accidentally shanked his ball, causing it to strike another golfer, who was "not within the appropriate and anticipated range of the first player's ball"). Accordingly, we conclude that, as a matter of law, Bertelli's conduct was not reckless; therefore, we find no error in granting summary judgment in his favor.⁷

⁷ Lujack does not assert that Gladieux, Gipper's, or the Hilltopper were reckless or intentionally caused his injury.

3. Negligent Supervision

Lujack asserts that the trial court erred in granting summary judgment on the issue of negligent supervision. He argues that “Gladieux, Gipper’s and [the] Hilltopper all had a duty of reasonable care as to [her] because her care had been entrusted in them.”⁸

[T]here is a well-recognized duty in tort law that persons entrusted with children have a duty to supervise their charges. The duty is to exercise ordinary care on behalf of the child in custody. The duty exists whether or not the supervising party has agreed to watch over the child for some form of compensation. However, the caretaker is not an insurer of the safety of the child and has no duty to foresee and guard against every possible hazard.

Davis v. LeCuyer, 849 N.E.2d 750, 757 (Ind. Ct. App. 2006) (internal citations omitted), *trans. denied*. The duty to supervise children in one’s charge exists because children’s “characteristics make it likely that they may do somewhat unreasonable things[.]” *Johnson v. Pettigrew*, 595 N.E.2d 747, 752 (Ind. Ct. App. 1992), *trans. denied*.

Although the existence of duty is a matter of law for the courts to decide, a breach of duty is usually a matter left to the trier of fact. Only where the facts are undisputed and lead to but a single inference or conclusion may the court as a matter of law determine whether a breach of duty has occurred.

King v. Northeast Security, Inc., 790 N.E.2d 474, 484 (Ind. 2003) (internal citations omitted), *reh’g denied*.

In *Johnson*, thirteen-year-old Johnson went to the Pettigrews’ farm to visit with their son Joel. The Pettigrews asked Johnson, Joel, and Joel’s cousin to burn some debris. At some point,

⁸ Gipper’s and Gladieux assert that Lujack has waived this issue for failure to raise the claim in her memorandum in opposition to the Defendants’ motions for summary judgment. Generally, “matters not designated as genuine issues of material fact cannot be relied upon on appeal.” *Poulard v. Lauth*, 793 N.E.2d 1120, 1123 (Ind. Ct. App. 2003). Any waiver notwithstanding, we choose to address this issue on the merits

the Pettigrews left the farm to run some errands, leaving Joel's eighteen-year-old brother, Jason, and their hired hand, Derrick, in charge of the younger boys.

At first, the younger boys continued to burn the debris as directed, but they soon tired of the routine and decided to "mess around" with the fire. The boys took a lighted shop rag on a stick and started another fire out of sight of the tool shed, fueling it with boxes, wood and other debris. Then, with Chuck acting as a lookout to ensure that Jason and Derrick would not see, they filled a plastic jug partially full of gasoline which they obtained from a tank used for farm purposes. The boys then laid the jug on its side near the fire and took turns stomping on it, propelling the gasoline into the fire and causing small explosions. When Jeff took his turn to stomp on the jug, gasoline splattered onto his leg and he caught fire. Though the boys were able to put the fire out, Jeff sustained second- and third-degree burns to his legs.

595 N.E.2d at 749.

The Johnsons sued the Pettigrews, alleging negligence. The Johnsons subsequently appealed from the trial court's granting of summary judgment in favor of the Pettigrews. This Court reversed, finding "genuine issues of fact remained as to whether the Pettigrews were negligent for their failure to properly supervise" Johnson, where the record revealed that "the Pettigrews, who *assumed the supervision* of Jeff Johnson, left the three boys in the custody of their employee and their son, who were instructed to change the tires on a truck in addition to watching over the boys as they burned debris." *Id.* at 753 (emphasis added).

In *Davis*, sixteen-year-old Benton went to the home of his friend, Doug, and Doug's mother and step-father, the Stones. Doug's mother gave the boys permission to take the Stones' jet skis out on Geist Reservoir. Doug's stepfather observed the boys putting the jet skis in the water. Neither adult instructed Benton on how to operate a jet ski, "but he did not consider such instruction necessary" as he had operated jet skis in the past; had a driver's license; and had completed a boating safety course. 849 N.E.2d at 751. At some point, Doug and Benton started spraying each other with water by accelerating and sharply turning the jet skis. When Benton

made a turn directly in Doug's path, Doug's jet ski collided with Benton's jet ski, causing a serious injury to Benton.

Benton's parents filed a complaint against the Stones, asserting that they negligently instructed and supervised both Doug and Benton on the use and operation of the jet skis. The trial court denied the Stones' motion for summary judgment. Finding the Stones' "in loco parentis argument unpersuasive," this Court held that issues of material fact remained regarding the Stones' supervision of Benton.

In both *Johnson* and *Davis*, the child's parent entrusted him to another's care and supervision, or someone assumed the supervision of the child. Here, there is no evidence that Lujack had been entrusted to the care, or was in the custody, of either Gipper's or the Hilltopper. There is also no evidence that Gipper's or the Hilltopper assumed the supervision of Lujack; as a matter of fact, there is no evidence that the Hilltopper even knew that Lujack was on the golf course. Rather, Lujack's mother left him in the care and supervision of Gladieux. Gladieux then left him in the care and custody of his sister.

There was no relationship between Lujack and the Hilltopper or Gipper's that would give rise to a duty under a negligent entrustment theory. Accordingly, we find no error in granting summary judgment to Gipper's and the Hilltopper on Lujack's claim of negligent entrustment. As to Gladieux, the facts reveal that he left him in the care of his sister, an experienced golfer. Furthermore, at the time she was struck, Lujack was operating the beverage cart on a designated cart path. Even if, as Lujack suggests, Gladieux had "checked on" him "throughout the course of the day," there is no evidence that this would have prevented his injury. There is also no evidence that adequate instructions would have prevented Lujack's injuries given that, at the time of being struck, he was on a designated cart path and not in the line of play. To the contrary, according to the deposition of the Hilltopper' golf professional, Lujack was exactly where he, in his professional opinion, would have recommended him to be—namely, at the eighteenth hole—in order to best avoid being struck by golf balls being hit from other holes. Lujack has failed to designate any evidence to rebut his professional opinion.

Under these facts, we find, as a matter of law, that Gladieux did not breach his duty to exercise ordinary care on behalf of Lujack, where neither he nor anyone on the golf course was engaged, or likely to engage, in “unreasonable” activities or conduct. See *Johnson*, 595 N.E.2d at 753. To hold otherwise would impose an unreasonable duty upon Gladieux to insure Lujack’s safety and “guard against every possible hazard.” *Davis*, 849 N.E.2d at 757. Thus, we conclude that the trial court properly granted Gladieux summary judgment on Lujack’s claim of negligent entrustment.

4. Premises Liability

Lujack also asserts that there is a genuine issue of material fact as to whether the Hilltopper and Gipper’s breached a duty of care owed to him under the theory of premises liability. Citing to *Hayden v. Univ. of Notre Dame*, 716 N.E.2d 603 (Ind. Ct. App. 1999), *trans. denied*, he contends that “the trial court should have looked to the totality of the circumstances and should have determined that questions exist for jury determination.”

In *Hayden*, William and Letitia Hayden were attending a football game on the Notre Dame campus. They sat in their assigned seats, which were located in one of the end zones, behind the goalpost. During the game, a football kicked toward the goal landed in the stands, near the Haydens’ seats. Several people attempted to retrieve the football; one person struck Letitia, knocking her down. The Haydens brought suit against Notre Dame for failing to exercise care to protect Letitia. Notre Dame moved for summary judgment, arguing that it did not have a legal duty to protect Letitia from the intentional criminal acts of an unknown third person.

On appeal, this Court found the only element at issue to be whether Notre Dame owed Letitia a duty under the circumstances. It therefore applied the totality of the circumstances test, which “requires landowners to take reasonable precautions to prevent foreseeable criminal actions against invitees.” *Hayden*, 716 N.E.2d at 605 (quoting *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999)). Under this test, “a court considers all of the circumstances

surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable.” *Id.* at 605–06 (quoting *Delta Tau Delta*, 712 N.E.2d at 972).

Applying the totality of the circumstances test, the *Hayden* court found that the totality of the circumstances established that Notre Dame “should have foreseen that injury would likely result from the actions of a third party in lunging for the football after it landed in the seating area.” *Id.* at 606. Specifically, “[t]here was evidence that there were many prior incidents of people being jostled or injured by efforts of fans to retrieve the ball.” *Id.* Thus, Notre Dame owed Letitia a duty to protect her from such injury.

Here, Lujack does not assert that a third party’s criminal act caused his injury; that the act was foreseeable, or that there had been similar prior incidents. We therefore find no error in finding that the Hilltopper and Gipper’s did not have a duty to protect him from injury due to him being struck by an errant golf ball while he operated a beverage cart.

Finding no issues of material fact and that the Defendants are entitled to summary judgment as a matter of law, we conclude that the trial court properly granted summary judgment in favor of the Defendants. Affirmed.

COWLINGS, J., concurs, FORTUNE, J., concurs in part and dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA YMCA YOUTH
AND GOVERNMENT**

JOHNNY LUJACK,)

Plaintiff-Appellant,)

vs.)

ANGELO E. BERTELLI, GIPPER'S BAR AND)
WINE CLUB, INC, HILLTOPPER COUNTRY)
CLUB, and THE ESTATE OF BOB GLADIEUX)

No. 95A05-0209-CT-205

Appellees-Defendants

FORTUNE, Judge, dissenting

Hmmm. After being abandoned by his uncle and his sister, in whose care he had been entrusted, a sixteen-year-old boy, without training or experience in golf course safety or etiquette, is injured at a golf outing sponsored by a bar, while he is driving a beverage cart loaded with beer dispensed by one of the bar's employees. Surely, there is a duty here someplace.

Unlike my colleagues, I do not think this case hinges on the issue of duty. Rather, I think the duty issues can be easily and quickly resolved, and that this case does not turn upon a determination of duty, but whether the defendants breached the duties that they clearly owed to the plaintiff and whether any such breach was the proximate cause of the plaintiff's injuries. In *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991), our Supreme Court set out the decisional framework by which our courts determine the issue of duty in a negligence action and provided that courts shall look to the relationship between the parties, the foreseeability of the harm, and the public policy. Here is how I analyze the duty issues in the present case:

1. The Hilltopper Club

The Hilltopper Club was the owner of the premises upon which the golf outing was held and the owner of the beverage cart in which the plaintiff was injured. The Hilltopper Club was in the business of making its golf course and golf carts available for outings such as the one sponsored by Gipper's Bar. It derived a financial return from doing so. Johnny Lujack was upon the Hilltopper Club property and in the beverage cart because of the golf outing from which the club was receiving a financial return. As such, the relationship between the club and Lujack was that of business and business invitee and clearly weighs in favor of finding a duty of due care. Similarly, the club provided the golf and beverage carts as part of its business operation. Doing so also weighs in favor of finding a duty owed by the club. Secondly, it is clearly foreseeable that people upon a golf course may be injured from time to time by golf balls. Similarly, it is foreseeable that persons may be injured riding or driving golf carts if they fail to understand the risks of the game or the reasonable precautions to be taken when driving a golf cart. Finally, those in the business of operating golf courses for profit should take all reasonable steps to prevent an unreasonable risk of harm to those people who come upon the course. They are also in the best place to spread the risk of such injuries through liability insurance. Thus, public policy favors the imposition of such a duty.

2. Gipper's Bar

Gipper's organized and sponsored the tournament as part of its business and derived a financial benefit from the outing. It provided the beer for the beverage cart. It was also the employer of Elza Fox, whom it put in charge of the beverage cart in which Lujack was injured and in whose care Lujack was entrusted by Kipper, who had assumed such responsibility from Gladieux. Gipper's was the entity that allowed Lujack to drive the cart without instruction. Lujack acted as an unpaid agent of Gipper's, under the control and supervision of Fox. Thus, the relationship weighs in favor of the imposition of a duty. The foreseeability and public policy considerations are the same as above and also weigh in favor of a duty.

3. The Estate of Bob Gladieux

Bob Gladieux was Lujack's uncle. He was the one to whom Lujack's mother entrusted his care, the person whom Lujack agreed to accompany, and the person who represented that he would be driving the beverage cart. Thus, the relationship factor weighs in favor of the imposition of a duty. The foreseeability issue is again the same as above. Regarding the public policy issue, I believe it strongly weighs in favor of finding a duty on the part of a uncle to whom care of a minor is being entrusted in a setting in which alcoholic beverages are being served. Moreover, even in the absence of a legal duty, there is a question of material fact whether Gladieux assumed such a duty of reasonable care for Lujack's safety.

4. Bob Bertelli

Bob Bertelli was the participant in the golf outing who struck the errant shot that struck Lujack. Bertelli had no relationship with Lujack and did not derive a financial benefit from either the outing or Lujack's presence. Nothing in the designated materials discloses a special relationship between Bertelli and Lujack or shows that either foreseeability of the harm or public policy considerations are different *vis-à-vis* Lujack than any golfer who was present on the course. Thus, I concur with my colleagues that summary judgment was properly entered for Bertelli.

As I analyze this case, the Hilltopper Club, Gipper's and Gladieux all owed a duty of reasonable care to Lujack. The dispositive questions are not those of duty, but whether any such duty was breached and whether any such breach was a proximate cause of the plaintiff's injuries. Breach of duty and proximate cause are both issues of fact to be resolved by the trier of fact. Indeed, as we have often said, summary judgment is rarely appropriate in a negligence action and is not appropriate here. It may well be determined that the Hilltopper Club, Gipper's Bar, and Bob Gladieux did not breach any duty or that such breach was not a proximate cause of Lujack's injuries. That is not for us to determine.

In addition to analyzing the duty issues differently than my colleagues, I reach a very different result on the question of whether Lujack was a participant in the golf scramble. I do so along the following line of reasoning: Lujack was a minor under his mother's care and control. His mother agreed only that her son could attend the golf outing with his uncle in whose care he was entrusted. Had Lujack been riding in the beverage cart with his uncle when he was struck with the errant ball, I might well agree with my colleagues that he was a participant in the outing because his mother consented to the inherent risks of golf to which the uncle exposed him. But that is not the case we have. Lujack's mother did not agree that her son could attend the outing without his uncle's supervision or could drive the beverage cart without instruction, in the company of an employee of Gipper's Bar whom he did not know. I do not believe that *Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind. Ct. App. 2004), should be expanded to include the facts of this case.

To me, there may be several levels of participation in a sporting event, and they should not all be treated the same. Although sporting events pose inherent risks, the risks are different for those at different levels of participation. Thus, a batter playing in a baseball game may well be said to have assumed the risk of getting hit with a wild pitch, and a shortstop may assume the risk of being spiked by a runner sliding into second base. A fan watching the game from the stands, however, would not have assumed such risks, but may have assumed the risk of being hit by a foul ball that goes into the stands. Lujack was not playing golf at the Hilltopper Club when he was injured and should not be said to have assumed the risks inherent to playing golf.

I would reverse the summary judgment in favor of the Hilltopper Club, Gipper's Bar and the Estate of Bob Gladieux and remand for further proceedings, and I respectfully dissent from the opinion of my colleagues holding that none of these entities owed a duty of due care to Johnny Lujack. I therefore dissent.

Resources

- Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999),
<http://www.law.indiana.edu/instruction/dongjerd/tortsvault/deltataudelta.pdf>
- Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991),
http://www.leagle.com/xmlResult.aspx?xmlDoc=19911567575NE2d992_11515.xml&docbase=CSLWAR2-1986-2006
- Parsons v. Arrowhead Golf, Inc.*, 874 N.E.2d 993 (Ind. Ct. App. 2007),
<http://www.in.gov/judiciary/opinions/pdf/08210702mgr.pdf>
- Bowman ex rel. Bowman v. McNary*, 853 N.E.2d 984 (Ind. Ct. App. 2006),
<http://www.in.gov/judiciary/opinions/pdf/08310602mpb.pdf>
- Davis v. LeCuyer*, 849 N.E.2d 750 (Ind. Ct. App. 2006),
<http://www.in.gov/judiciary/opinions/pdf/06260610pdm.pdf>
- Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind. Ct. App. 2004), <http://caselaw.findlaw.com/in-court-of-appeals/1229663.html>
- King v. Northeast Security, Inc.*, 790 N.E.2d 474 (Ind. 2003), <http://caselaw.findlaw.com/in-supreme-court/1053248.html>
- Estate of Heck ex rel. Heck v. Stoffer*, 786 N.E.2d 265 (Ind. 2003),
<http://caselaw.findlaw.com/in-supreme-court/1479927.html>
- Gyuriak v. Millice*, 775 N.E.2d 391 (Ind. Ct. App. 2002),
<http://www.in.gov/judiciary/opinions/previous/archive/09240201.lmb.html>
- Mark v. Moser*, 746 N.E.2d 410 (Ind. Ct. App. 2001),
<http://www.in.gov/judiciary/opinions/previous/archive/04190103.jgb.html>
- Hayden v. Univ. of Notre Dame*, 716 N.E.2d 603 (Ind. Ct. App. 1999),
<http://caselaw.findlaw.com/in-court-of-appeals/1309715.html>
- Opinion based on** *Pfenning v. Lineman, et al*, No. 27A02-0905-CV-444 (Ind. Ct. App. Feb. 12, 2010) <http://indiana.gov/judiciary/opinions/pdf/02121001cld.pdf>;
<http://mycourts.in.gov/arguments/default.aspx?view=detail&id=1069>
- Stan Jastrzebski, September 13, 2010, Indiana Supreme Court Hears Golf Course Suit at IU Law School, *Indiana Public Media*, <http://indianapublicmedia.org/news/indiana-supreme-court-hears-golf-suit-iu-law-school/>; <http://www.youtube.com/watch?v=WqkYHdTppGs>