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STATE OF MICHIGAN

IN THE SUPREME COURT
An Appeal from the Michigan Court of Appeals
The Hon. Steven L. Borrello, the Hon. Patrick M. Meter, the Hon. Michael J. Riordan

JEFF TRECHA, NEXT FRIEND OF
BRADLY TRECHA, a minor, and
JEFF TRECHA,

Plaintiff-Appellants,

V

BRENDEN REMILLARD,

Defendant-Appellee.

Supreme Court No.: _____

Court of Appeals No.: 347695

Lower Court No.: 17-109425-NI

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Plaintiff-Appellant's Application for Leave to Appeal

Oral Argument Requested

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Ruben v. Jewish Center of Greater Buffalo, Inc:
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Schmidt v. Young:
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STATEMENT OF JURISDICTION

This is an application for leave to appeal after a decision by the Michigan Court of Appeals. This Court has jurisdiction pursuant to and MCR 7.305 (C)(2)(a) to review by appeal a case after a decision by the Court of Appeals. The Court of Appeals issued its opinion in this matter on March 5, 2020.

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QUESTION PRESENTED

ISSUE 1: WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DETERMINATION THAT PLAINTIFF-APPELLANT WAS A CO-PARTICIPANT, WHEN HE WAS STRUCK BY A TENNIS BALL WHILE HE WAS PICKING UP TENNIS BALLS AND NOT ACTIVELY INVOLVED IN THE TENNIS MATCH, WHICH REQUIRED A SHOWING OF RECKLESSNESS CONDUCT RATHER THAN NEGLIGENCE.

Plaintiff-Appellant answers:	Yes
Defendant-Appellee answers:	No
Court of Appeals answers:	No

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STATEMENT OF FACT

This appeal arises out of an incident that occurred on September 9, 2016. At the time of the accident, Plaintiff-Appellant, Bradley Trecha and Defendant-Appellee, Brenden Remillard, were teammates on the Fenton High School tennis team. Plaintiff-Appellant was 14 years old and a freshman. Defendant-Appellee was a senior.

After practice, Appellant and others were instructed by the coach to pick up tennis balls around the court. At the same time, Appellee was ending a practice match. After hitting a ball into the net and losing the match, Appellee turned, and out of frustration, hit a ball that struck Appellant in the eye. The Appellee described the incident this way:

> Q. Brenden, can you tell me in your own words what happened?
>
> A. I would say the match was being played, the point was being played out. I hit the ball into the net to end the point, losing the point, and then had another ball in my pocket. Had the ball out in a quick motion, turned around and hit it toward the fence, I guess. And then he was there hunched over, kind of squatting down as he was picking up balls maybe, and then when the ball was struck he had turned at the same time, I assume, and that's when he was hit. (Exhibit 7, pg. 10).

As a result, Appellant suffered a permanent eye injury as a result of Appellee's negligence and gross negligence.

A lawsuit was filed in Genesee County Circuit Court. Following discovery, Defendant-Appellee filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendant-Appellee relied on ***Ritchie-Gamester v. City of Berkley***, 461 Mich 73; 597 N.W.2d 517 (1999) and argued that Plaintiff-Appellant was a co-participant in a recreational activity and could not meet the standard that Defendant-Appellee had acted recklessly.

In his response, Plaintiff-Appellant argued that he was not a co-participant, as the term was used in ***Ritchie-Gamester*** (supra), and therefore only had to show that Defendant-Appellee had acted negligently. Plaintiff-Appellant relied upon ***Schmidt v. Young***, 215 Mich App 222; 544 N.W.2d 743 (1996) which applied an ordinary care standard in holding:

> A person who engages in the game of golf is not an insurer of others, and he is only required to exercise ordinary care for the safety of persons reasonably within the range of danger.

Following oral argument, the trial ruled that Plaintiff-Appellant was a participant and granted Defendant-Appellee's motion for summary disposition and holding that:

> ...but the Court does not believe that that his conduct rises to the level of being reckless as has been established in the line of precedent that we're all looking at.
>
> So, for those reasons, the Court is granting the defendant's Motion. (Transcript pg. 13).

The order granting Defendant-Appellee's motion was entered on February 5, 2019 and an identical order entered on February 8, 2019. (Exhibit 2).

Plaintiff-Appellant's Claim of Appeal was timely filed with the Court of Appeals. Following oral argument, the Court issued an opinion on March 5, 2020 affirming the decision of the trial court.

The Court of Appeals concluded that:

> [A] reasonable participant could have foreseen being hit with a tennis ball while in the bounded tennis area near the fence, about the time that other participants were concluding matches, despite the fact that practice may have ended. (Exhibit 1)

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The Court further noted, "Defendant's behavior certainly appears to be careless, but it is not the type of behavior that indicates the indifference to harm necessary to show reckless conduct." (Exhibit 1)

Plaintiff-Appellant seeks leave to appeal the decision of the Michigan Court of Appeals and the Genesee County Circuit Court. Plaintiff-Appellant believes leave to appeal is appropriate and necessary for the Court to provide a definition of the term "participant" for clarity for future litigants.

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STANDARD OF REVIEW

The appropriate legal standard for liability of a co-participant injured after being hit with a tennis ball after tennis practice presents a question of law that is reviewed de novo. ***Minority Earth Movers, Inc. v Walter Toebe Const. Co.***, 251 Mich App 87, 91; 649 NW2d 397 (2002).

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LAW AND ARGUMENT

ISSUE 1: WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DETERMINATION THAT PLAINTIFF-APPELLANT WAS A CO-PARTICIPANT, WHEN HE WAS STRUCK BY A TENNIS BALL WHILE HE WAS PICKING UP TENNIS BALLS AND NOT ACTIVELY INVOLVED IN THE TENNIS MATCH, WHICH REQUIRED A SHOWING OF RECKLESSNESS CONDUCT RATHER THAN NEGLIGENCE.

A. Plaintiff-Appellant was not a "Participant" in a recreational activity when he was injured.

At the time of the incident, Plaintiff-Appellant was not a participant in the tennis matching involving Defendant-Appellee and therefore is only required to make a showing of negligence to establish liability. Furthermore, the injury occurred after practice had ended Bradley Trecha was not a participant and his injuries are the direct result of a non-game related incident arising from the frustration of a teammate.

Defendant-Appellant relied on the case of ***Ritchie-Gamester v. City of Berkley***, 461 Mich 73; 597 N.W.2d 517 (1999) for the proposition that co-participants in recreational activities owe each other a duty not to act recklessly. In ***Ritchie-Gamester***, an adult plaintiff sued the twelve-year-old defendant for carelessly skating backwards on an ice-skating rink causing the two to collide, which resulted in the plaintiff injuring her knee. Id., 75. The Supreme Court examined Michigan case law involving injuries to participants in recreational activities and concluded that "there seems to be general agreement that participants in recreational activities are not liable for every mishap that results in injury, and that certain risks inhere in all such activities." Id., 81. The skaters were jointly participating in an open skate open to the general public.

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The Supreme Court then looked at the law in other jurisdictions and noted that the majority of other jurisdictions have adopted a "reckless or intentional conduct" standard. Id., 82. The Supreme Court stated that people who engage in recreational activities voluntarily "subject themselves to certain risks inherent in that activity." Id., 86-87. The Supreme Court concluded:

> With these realities in mind, we join the majority of jurisdictions and adopt reckless misconduct as the minimum standard of care for coparticipants in recreational activities. We believe that this standard most accurately reflects the actual expectations of participants in recreational activities. As will be discussed in more detail below, we believe that participants in recreational activities do not expect to sue or be sued for mere carelessness. A recklessness standard also encourages vigorous participation in recreational activities, while still providing protection from egregious conduct. Finally, this standard lends itself to commonsense application by both judges and juries. (Id., 89.)

Plaintiff-Appellant anticipates that Defendant-Appellee will rely on a number of cases from other jurisdictions for the proposition that co-participants involved in recreational activities are liable for only acts of recklessness. In ***Hoke v. Cullinan***, 914 S.W.2d 335 (Ky 1995) (Exhibit 3), plaintiff and defendant were engaged in a doubles tennis match when plaintiff was struck and injured. In ***Jaworski v. Kiernan***, 241 Conn 399; 696 A2d 332 (1997) (Exhibit 4), plaintiff was injured while playing in a coed adult soccer game. ***Ruben v. Jewish Center of Greater Buffalo, Inc***, 498 NY2d 633; 116 A.D.2d 1016 (1986) (Exhibit 5) plaintiff was injured when struck by a racquet ball hit by the defendant. In addition, Defendant-Appellee relied on ***Behar v. Fox***, 249 Mich App 314; 642 N.W.2d 426 (2002) in which the plaintiff was injured during a soccer scrimmage. In ***Chrycyk v. Juhas***, unpublished opinion of the Court of Appeals, (Docket No. 294348, 2011) (Exhibit 6) plaintiff and defendant were separately practicing on

opposite sides of adjacent courts when plaintiff was struck by a ball hit by defendant. The court noted that, "the deposition testimony indicated that it was a common practice for students to hit balls forward to get them out of the way."

Firstly, case law from other jurisdictions is not binding on Michigan courts. Secondly, each these cases is factually distinguishable from the case at hand. In each case cited by Defendant-Appellee, the plaintiff was actively involved in a game or scrimmage. That is not the case here. In this case, practice was over and Plaintiff-Appellant was on the sidelines collecting tennis balls and not engaged in any way in the scrimmage. (Exhibit 7, pg. 11). Defendant-Appellee testified that his was the last match of practice and the game had ended. (Exhibit 8, pg. 8, 10,11). Bradley Trecha testified:

> A. It was after tennis practice.
>
> Q. After tennis practice. Where were you at the time?
>
> A. We were picking up balls. Our coach told us – on one of the courts. (Exhibit 7, pg. 11).

The tennis coach, Gary Ballard testified that, "You know, you finish your practice, and then you've got to pick up your balls and conclude, you know." (Exhibit 9, pg. 10).

Factually, this case is similar to the case of ***Overall v. Kadella***, 138 Mich App 351; 361 N.W. 2d. 352 (1984). In ***Overall,*** the plaintiff was injured in a fight after a hockey game. During the fight, defendant struck plaintiff, knocking him unconscious and fracturing the bones around plaintiff's right eye. The Supreme Court in ***Ritchie-***

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Gamer (supra) positively cited ***Overall*** for it applying a reckless conduct standard. However, in the opinion, the court noted that the fact that the incident occurred after the game had ended was an important factor.

> In addition, under the facts found by the trial court, it is arguable that the battery did not even occur during the hockey game. It is therefore doubtful whether consent to a battery during a game would constitute consent to a battery after the game. Id at

A similar situation was present in this case. Plaintiff-Appellant was picking up tennis balls after practice. This conclusion is supported by testimony gathered during discovery. As was the case in ***Overall***, the risk of being struck in the face with a tennis ball was not foreseeable after practice had ended.

B. Plaintiff-Appellant was not involved in a tennis match or on the tennis court when he was injured.

It is also important to note that the Court in ***Ritchie-Gamester*** stated, "[t]he act of stepping onto the field of play may be described as 'consent to the inherent risks of the activity' …." In this case, Bradley Trecha was not on the field of play. He was on the sidelines collecting tennis balls with other teammates as instructed by the coach. Unlike a sport like football or basketball, tennis does not allow for the substitution of players. Bradley Trecha could not have participated in the match even if he had wanted to.

An athlete on the court or field of play, in the midst of a scrimmage or game, is clearly a participant. There can be no argument about that. However, in this case, Plaintiff-Appellant was not actively competing in a game. The case law does not define what a participant actually is. The courts appear to assume a common sense meaning of the word. Webster's Dictionary defines "Participant" as "one that participates".

Likewise, "Participate" is defined as "to take part". While these are not the most enlightening definitions, it is clear that simply being present is not enough to be a participant. It must be recognized though that an athlete's status as a participant should depend on the nature of the sport.

A participant is one whose active involvement in the sporting event is necessary for the undertaking of the sporting event. Anyone who plays a sport assumes the risks inherent to that sport. In team sports such as hockey, football, baseball or basketball, it is reasonable to assume that a player on the bench or sideline would also be considered a participant if injured. In these sports, it is reasonably foreseeable that a ball or puck may end up in the bench area. Under this definition, a ball person, line judges and umpires would also be considered participants in sports like tennis for similar reasons.

Again, this case presents a set of facts similar to those presented in ***Overall***. Supra. In ***Overall***, the plaintiff was seated on the bench when he was struck. The court provided:

> We find that the court correctly concluded that the bench is not part of the area in which the game is actually played. Although the referee may still have jurisdiction over the players while they are seated on the bench, this does not convert the bench to part of the playing surface. Id at

In this case, however, Bradley Trecha was on the sidelines, collecting tennis balls that had been hit during practice. He was not necessary for the game that was being played on the court. He was not competing against Defendant-Appellee on the tennis court. He wasn't acting as ball person, collecting balls hit into the net. He wasn't acting

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as a line judge or umpire. He had no impact on the outcome of the scrimmage and was not actively involved in the match.

Plaintiff-Appellant testified that he was standing up to put the tennis balls into a cart and when he stood up, Defendant-Appellee hit a ball and hit him in the eye. (Exhibit 7, pg 12). The impact was so hard that he fell to the ground. Plaintiff-Appellant also testified that the cart was located next to the fence which ran around the tennis courts. (Exhibit 7, pg. 14). The cart was about 15 feet away from the back line of the tennis court where Defendant-Appellee was scrimmaging. (Exhibit 7, pg. 15).

The facts of this case more closely align with ***Schmidt v. Youngs***, 215 Mich App 222; 544 N.W.2d 732 (1996). In ***Schmidt***, plaintiff and defendant were playing golf in a foursome. As defendant addressed his ball, plaintiff drove his golf cart in front of defendant's ball and parked next to a large tree. Plaintiff grew impatient and turned just as defendant struck his ball. Defendant's shot was shanked and struck plaintiff in the eye.

Even though the court ultimately rejected plaintiff's claims, it adopted an ordinary care standard of care rather than recklessness. The court noted that the general rule regarding the liability of a golfer was:

> A person who engages in the game of golf is not an insurer of the safety of others, and he is only required to exercise ordinary care for the safety of persons reasonably within the range of danger. Id at 225.

In rejecting the claim, the court pointed out that the plaintiff knew that the defendant was preparing to shoot and drove his cart in front of defendant's ball in

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contravention of common sense. Id at 225. The court concluded that the defendant had no duty to issue a warning to plaintiff because the plaintiff was aware of defendant's intention to play. Id at 225-226.

C. The risk of being struck in the face with a tennis ball when not actively engaged in a match, while on the sidelines and after practice was not reasonably foreseeable.

In ***Bertin v Mann***, 502 Mich 603, 918 N.W.2d 707 (2018), plaintiff was struck by a golf cart operated by a party playing golf with him. The Court discussed whether the injury arose from a risk inherent to the activity. Inherent risk under the ***Ritchie-Gamester v City of Berkley*** case are those reasonably foreseeable. The Court concluded that:

> [T]he assessment of whether a risk is inherent to an activity depends on whether a reasonable person under the circumstances would have foreseen the particular risk that led to injury.
>
> ***
>
> The foreseeability of the risk is a question of fact .... Id at 716.

The court further clarified that certain factors should be taken into account to determine whether a risk was foreseeable such as, "the general characteristics of the participants, such as their relationship to each other and to the activity and their experience with the sport." Id at 716-717.

If we look to the facts of this case, it's clear that the risk of being struck by a ball, hit in frustration, was not foreseeable. Considering the relationship of the parties to each other and to the activity, it's clear that Plaintiff could not have foreseen being struck. Defendant-Appellee was engaged in a scrimmage while Plaintiff-Appellant was picking up tennis balls on the side of the court. There was no relationship between the two of them or to the activity. Plaintiff and Defendant were not competing against one another.

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The two boys were engaged in completely separate and distinct activities so there was no relationship between either the parties or the activity.

Evidence that this incident was not foreseeable is found in the reaction of the tennis coach, Gary Ballard. Coach Ballard testified in his deposition that after he learned of the incident, "I got mad that he – you know, he got hit in the eye with the ball, so I made them all run." He testified further:

> Q. Okay. And you mentioned that you had them run. Who –
>
> A. Yeah. Because they were messing around and somebody got hit in the eye with a ball.
>
> Q. So, was that like laps that you're meaning?
>
> A. I don't know what you call them. You run up to the line and run back. Sprints. (Exhibit 9, pg. 8).

Furthermore, Coach Ballard had Defendant-Appellee run additional sprints after the rest of the team. (Exhibit 7, pg. 17).

The court in ***Bertin*** addressed the test for determining what risks are reasonably foreseeable.

> The risk must be defined by the factual circumstances of the case—it is not enough that the participant could foresee being injured in general; the participant must have been able to foresee that the injury could arise through the "mechanism" it resulted from. Relatedly, those factual circumstances include the general characteristics of the participants, such as their relationship to each other and to the activity and their experience with the sport. Id at

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In the present case, The Plaintiff and Defendant had disparate levels of experience with high school tennis practice. At the time of the accident, Plaintiff-Appellant was 14 years old and a freshman. Defendant-Appellee, on the other hand was a high school senior. Plaintiff was not as familiar with the type activities that take place before, during and after practice as the Defendant. It is not reasonable for Plaintiff-Appellant to expect to be struck in the face with a tennis ball after practice.

Furthermore, Defendant-Appellee's action violated the Fenton High School Student Handbook and Code of Conduct. As to student athletes, the handbook provides:

> MHSAA Athletic Code for Athletes
>
> 5. Practice and play, giving complete effort in all circumstances and credit in victory to teammates and to opponents in defeat.
> 6. Accept favorable and unfavorable decisions as well as victory and Defeat, with equal grace. (Exhibit 10, pg. 57)

Defendant-Appellee testified that he hit the ball at the fence out of frustration for losing a point.

> Q. Brenden, can you tell me in your own words what happened?
>
> A. I would say the match was being played, the point was being played out. I hit the ball into the net to end the point, losing the point, and then had another ball in my pocket. Had the ball out in a quick motion, turned around and hit it toward the fence, I guess. And then he was there hunched over, kind of squatting down as he was picking up balls maybe, and then when the ball was struck he had turned at the same time, I assume, and that's when he was hit. (Exhibit 8, pg. 10).

Such conduct was in clear violation of the Fenton High School code of conduct.

Furthermore, the trial court and Court of Appeals erred in determining that foreseeability was a question of fact to be determined by the court.

Under these circumstances, we must conclude that a reasonable

> participant could have foreseen being hit with a tennis ball while in the bounded tennis area near the fence, about the time that other participants were concluding matches, despite the fact that practice may have ended.

As the court in ***Bertin*** noted, "[t]he foreseeability of the risk is a question of fact …." Id at 716. Therefore, it is clear that the trial court and Court of Appeals in determining that the risks of being struck by a tennis ball after practice was a question of law.

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CONCLUSION

At the time of the incident, Plaintiff-Appellant was not a participant in the tennis matching involving Defendant-Appellee and therefore is only required to make a showing of negligence to establish liability. When he was struck by the tennis ball, practice was over and Plaintiff-Appellant was on the sidelines collecting tennis balls and not engaged in any way in the scrimmage. Bradley Trecha's injuries are the direct result of a non-game related incident arising from the frustration of a teammate. In this case, Bradley Trecha was not necessary for the scrimmage that was being played. He was not competing against Defendant-Appellee on the tennis court. He wasn't acting as ball person, collecting balls hit into the net. He wasn't acting as a line judge or umpire. He was on the sidelines, collecting tennis balls that had been hit during practice. He had no impact on the outcome of the scrimmage and was not actively involved in the match. Therefore, the trial court erred in finding that Plaintiff-Appellant was a participant which required a showing of reckless to establish liability. The ***Ritchie-Gamester*** court wanted to avoid suits for participant injuries. The court stated:

> If simple negligence were adopted as the standard of care, every punter with whom contact is made, every midfielder high sticked, every basketball player fouled, every batter struck by a pitch, and every hockey player tripped would have the ingredients for a lawsuit if injury resulted. Supra at 85.

The court also noted that it wanted to "encourage vigorous participation in recreational activities." Supra at 87. Plaintiff's position, that he was not a participant, does nothing to change these goals or limit these objectives.

All these factors, when viewed as a whole, lead to the conclusion that Plaintiff-Appellant was not a participant in a recreational activity at the time of his injury and therefore the court erred in applying the reckless conduct standard.

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RELIEF REQUESTED

WHEREFORE, for the reasons stated above, Plaintiff-Appellant, Bradley Trecha, by his Next Friend Jeffrey Trecha, respectfully requests that this Honorable Court grant leave to appeal, or in the alternative, peremptorily reverse the decision of the Michigan Court of Appeals and the decision of the Genesee County Circuit Court.

Respectfully submitted,

/S/ Edwin W. Jakeway

Edwin W. Jakeway
Jakeway Injury Law

Date: April 15, 2020

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Exhibits

1. Opinion of the Michigan Court of Appeals dated March 5, 2020

2. Genesee County Circuit Court order Granting Defendant's Motion for Summary Disposition.

3. ***Hoke v. Cullinan***, 914 S.W.2d 335 (Ky 1995)

4. ***Jaworski v. Kiernan***, 241 Conn 399; 696 A2d 332 (1997)

5. ***Ruben v. Jewish Center of Greater Buffalo, Inc***, 498 NY2d 633; 116 A.D.2d 1016 (1986)

6. ***Chrycyk v. Juhas***, unpublished opinion of the Court of Appeals, (Docket No. 294348, 2011)

7. Deposition of Bradley Trecha

8. Deposition of Brenden Remillard

9. Deposition of Gary Ballard

10. 2019-2020 Fenton High School Student Handbook and Code of Conduct

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