CITATION: *Berger v. Lock*, 2026 ONSC 3573
COURT FILE NO.: CV-23-00700891-0000
DATE: 20260618

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARK BERGER, Plaintiff

AND:

SCOTT LUM LOCK, Defendant

BEFORE: Schabas J.

COUNSEL: David Green and Bill White, for the Plaintiff

Angus Chalmers, for the Defendant

HEARD: June 2, 2026

REASONS FOR JUDGMENT

Overview

[1] This is a motion for summary judgment brought by the defendant seeking the dismissal of the plaintiff's claim.

[2] The plaintiff was injured during a game of four-on-four recreational basketball at an LA Fitness Gym on August 13, 2022. The plaintiff alleges that the defendant pushed or struck him from behind as he was approaching the net with the ball for a routine layup. This caused the plaintiff to land hard on his left leg, causing harm to his ACL and cartilage damage.

[3] On June 9, 2023, the plaintiff commenced this action, alleging negligence by the defendant.

[4] The defendant submits that the plaintiff assumed the risk of injury from the physical contact by playing in an unsupervised game of basketball, and that the defendant's conduct was not malicious or outside the bounds of fair or expected play in such a context.

[5] The plaintiff disagrees, submitting that the defendant's conduct was reckless and not what one would expect in such a game.

[6] For the reasons that follow, the motion is granted and the action is dismissed. In my view, the record supports the defendant's position and there is no genuine issue requiring a trial.

Summary judgment test

[7] Rule 20.04(2)(a) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, states that "the court shall grant summary judgment if […] the court is satisfied that there is no genuine issue

requiring a trial with respect to a claim or defence." The word "requiring" was added in 2010. At that time Rule 20 was also amended to provide judges with the discretion to use additional fact-finding powers designed to expand the scope and use of summary judgment.

[8] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada addressed the issue of summary judgment, including when it is appropriate and the test to be met. Karakatsanis J. summarized the Court's position as follows, at para. 4:

> In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[9] At para. 49 of *Hryniak*, Karakatsanis J. continued:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[10] In *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98, 154 O.R. (3d) 561, the Court of Appeal noted, at para. 27, that "motion judges are required to engage with the *Hryniak* framework process…look at the evidentiary record, determine whether there is a genuine issue requiring a trial, and assess, in their discretion, whether resort should be taken to the enhanced powers under rr. 20.04(2.1) and (2.2) of the Rules of Civil Procedure."

[11] The *Hryniak* framework is summarized by the Court of Appeal at para. 24 of *Royal Bank* as follows:

> 1. First, the motion judge should have determined if there was a genuine issue requiring a trial based only on the evidence before her, without using the enhanced fact-finding powers under r. 20.04(2.1) of the Rules of Civil Procedure.
>
> 2. Second, if there appeared to be a genuine issue requiring a trial, the motion judge should have determined if the need for a trial could be avoided by using the enhanced powers under r. 20.04(2.1) – which allowed her to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence – and under r. 20.04(2.2) to order that oral evidence be presented by one or more parties. [Citations omitted.]

[12] In addition, on a motion for summary judgment, the parties are required to put their best foot forward on the issues. As the Court of Appeal stated in *Toronto-Dominion Bank v. Hylton*, 2012 ONCA 614, at para. 5:

> A party moving for summary judgment has the evidentiary burden of showing there is no genuine issue for trial. Once this burden is discharged the responding party must prove that its defence has a real chance of success. Each party must put its

> best foot forward to establish whether or not there is an issue for trial. The court is entitled to assume that the record contains all the evidence the parties would present at trial. [Emphasis added.]

[13] The best foot forward requirement, therefore, also means the full foot forward. As Corbett J. stated in *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at para. 33, aff'd 2014 ONCA 878, leave to appeal to S.C.C. refused [2015] S.C.C.A. No. 97: "The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial." Or, as Karakatsanis J. stated when she was a judge of this court: "The court is entitled to assume that the record contains all the evidence which the parties will present if there is a trial": *New Solutions Extrusion Corporation v. Gauthier*, 2010 ONSC 1037, at para. 12, aff'd 2010 ONCA 348.

The law relating to negligence in sports

[14] Liability for negligence where a plaintiff has been injured playing a contact sport has been the subject of considerable discussion by the courts. In *Kempf v. Nguyen*, 2015 ONCA 114, 124 O.R. (3d) 241, Laskin J.A. stated at paras. 105 and 106:

> The risks parties assume depend on the nature of the activity in which they participate. The risks one assumes playing a sport differ from the risks one assumes when going for a morning run or walking to work. In sports, the risks one assumes vary depending on the sport. The risks assumed in a sport where physical contact is part of the game, such as hockey or basketball, differ from the risks assumed in a sport where there is no physical contact, such as tennis or road cycling.
>
> In hockey or basketball, for example, players have to assume some risk of injury from bodily contact, even contact intentionally inflicted or in breach of the rules of the game. A body check -- even one that calls for a penalty -- or contact fighting for a rebound in which the opposing player is called for a foul is part of the ordinary risk of each game. Conduct in these contact sports becomes unacceptable only when it is malicious, out of the ordinary or beyond the bounds of fair play. [Emphasis added.] [Citation omitted.]

[15] In *Casterton v. MacIsaac*, 2020 ONSC 190, Gomery J. (as she then was), put it this way at paras. 11 and 16:

> … a person injured during a hockey game does not need to prove either an intent to injure or reckless disregard. The injured player must simply show that the injury was caused by conduct that fell outside of what a reasonable competitor would expect in the circumstances.
>
> …
>
> In deciding whether the conduct was out of the ordinary or beyond the bounds of fair play, relevant considerations include the type of league in which the game was played, the level of play in the league, the applicable rules, and the nature of the game.

[16] A detailed and helpful application of the test for negligence in the sports context can also be found in *Levita v. Alan Crew et al*., 2015 ONSC 5316, 25 C.C.L.T. (4th) 268. There, Firestone J. summarized the risks a player assumes in participating in a competitive recreational hockey game at para. 88, which I find are equally applicable to basketball, including the risk of injury "from acts by other players that are in contravention of the rules of the game but are not intended to cause injury." As Firestone J. stated in that case at para. 89:

> A finding of negligence follows if Levita proves that Crew breached the standard of care by engaging in conduct which fell short of what a reasonable hockey player participating in a hockey game in the parties' league would do or refrain from doing, taking into account the nature of the game and its inherent risks to which the players willingly consented.

Discussion

[17] There is no dispute that the basketball game involving these parties was highly competitive between skilled and experienced players playing aggressively. The plaintiff had previously played semi-professional basketball in France and the defendant coaches basketball. One of the other players, Jaden Edwards, plays professionally in Czechia. It was not an average pick-up game. This is an important contextual factor.

[18] It is also agreed that the plaintiff and defendant did not know each other beyond having seen one another at the basketball court previously. There is no suggestion that the defendant had any motivation to injure the plaintiff or that he intended to injure the plaintiff.

[19] There is also considerable consensus on how the injury occurred. The plaintiff obtained the ball in the defendant's end after blocking a shot and was running down the court to do a layup. The defendant chased the plaintiff to try to prevent him from scoring. The plaintiff says that as he went up to try to put the ball in the basket, he felt some force from behind which then caused him to land awkwardly on his leg, which caused the injury. The plaintiff described the defendant's actions as a "clear path foul" as he, the plaintiff, had a "clear path" to the net as there was "nobody to my side, there is nobody in front of me."

[20] The defendant's evidence is that he caught up with the plaintiff and collided with him while attempting to block the plaintiff's shot. There is no dispute that the plaintiff had the ball and was attempting to score when the players collided.

[21] Two years after the incident, counsel for the plaintiff obtained statements from four participants in the basketball game, all of whom knew the plaintiff. The gist of their statements was that the plaintiff had beaten the defendant to the basket and had a clear shot, such that the defendant "was not in a good position to contest the shot." One witness said that "it is generally understood that once a player has been beaten to the basket, attempting to contest the shot is against the rules and poses an inherent danger since the shooter will likely come off their feet for the layup or shot." Others said the defendant should not have tried to block the plaintiff or bump into him from behind which was described as "risky" or "frowned upon as it is dangerous to push someone who is airborne." None of the witness statements suggested that the defendant acted deliberately.

[22] As this motion proceeded, two of the four witnesses sought to withdraw their statements, not so much because what they described was wrong but because, for example, they felt the defendant was simply making a defensive play, or trying to "contest the shot", which many players might make. They were summoned and gave evidence under oath on this motion. One of them testified that he had seen the plaintiff "go for similar plays" and that "its fine, as long as no one gets hurt, but it happens sometimes." They continued to agree that if there was a "push" it was unintentional.

[23] Another witness who initially provided a statement to the plaintiff's lawyer, signed a second statement stating that the defendant "caught up with" the plaintiff "as they approached the other end and was almost next to him." He said that he was unsure if the defendant "was running and simply could not stop or if he tried to swipe at the ball which was in [the plaintiff's] possession and which could have been a normal or common foul." He described it as a "defensive play."

[24] The plaintiff presented evidence from an orthopedic surgeon, Dr. Wasserstein, which is of no probative value. Dr. Wasserstein may be a well-qualified physician, but his comments on how the accident happened are outside his expertise and based on hearsay. In any event, his opinion that there must have been contact is not disputed.

[25] The plaintiff also put forward Rohan Russell, an experienced basketball coach, as a "basketball expert". Mr. Russell's evidence is also of little assistance. He stated that a "push from behind" as a player is just taking off or is airborne "is one of the most dangerous actions in basketball" as it can make "an uncontrolled and dangerous landing highly likely." Mr. Russell then referred to a number of videos of these types of fouls which he found on internet sites such as Wikipedia and YouTube. Russell stated baldly that such an action "is not a routine foul but a reckless and dangerous action that creates an unnecessary and unjustifiable risk of serious injury."

[26] In some of the video examples relied on by Mr. Russell, the player is charged with a foul or a flagrant foul, but not ejected from the game. Mr. Russell was not asked to provide an opinion on what happened in this case, or what kind of a "push" is so serious that it is beyond what a reasonable competitor would expect in the circumstances of the type of game in which the plaintiff had chosen to participate.

[27] There is no indication that Mr. Russell was provided with the witness statements as he did not address them. There is no indication of what his instructions were, nor does he discuss the rules of basketball and the sanctions for various fouls in his report. In cross-examination he described a number of different fouls, one of which is a flagrant foul, which can be called when a player loses their balance and falls. He gave an example of someone hitting the back of someone's legs because they weren't going for the ball. However, Mr. Russell stated that a flagrant foul may be unintentional.

[28] Mr. Russell also failed to certify the authenticity of his sources. Indeed, when asked if he relied on artificial intelligence in preparing his report, he refused to answer.

[29] In the end, Mr. Russell's evidence, to the extent it is admissible at all given the non-compliance with requirements in Rule 53 of the *Rules of Civil Procedure* (e.g., lack of instructions,

no description of assumptions, failing to certify his sources), provides little assistance in determining the issue here.

Conclusion

[30] Both parties having put their best, and full, foot forward, I find the evidence supports the conclusion that there is no genuine issue requiring a trial. I reach this conclusion based on the evidence before me and without resorting to the enhanced fact-finding powers under r. 20.04(2.1). The issues are legally and factually limited and can be determined on the record before me without making findings of credibility and by drawing only limited inferences. To the extent that I may engage in some weighing of the evidence it is appropriate and in the interests of justice to do so rather than leave it to the trial judge who will be in no better position to address the issues.

[31] The accounts of what happened from the parties and the witnesses establish that there was contact between the defendant and the plaintiff – a push or a shove from behind – caused by the defendant, as part of a defensive play, attempting to contest the shot about to be taken by the plaintiff. That it constituted a foul is not disputed, but it was part of the game. It was an action that players sometimes take in the heat of a game, which may be overly aggressive and risky, but it is not outside the bounds of what a reasonable competitor would expect in this game. Nor was it done maliciously or with intent to injure. It was a foul, perhaps a flagrant foul, but that does not make it legally actionable.

[32] It is not necessary to use my enhanced powers to resolve issues of credibility. To the extent that the other participants who were witnesses on this motion may have sought to withdraw their earlier statements, their accounts of the incident remained largely the same that the defendant was engaged in a defensive play towards the plaintiff, who had the ball. No one disputes that the defendant's intent was to stop the plaintiff from scoring. This was not a case like *Casterton* where the defendant intentionally collided with the plaintiff who did not have the puck and "either deliberately attempted to injure Casterton or was reckless about the possibility that he would do so:" para. 123.

[33] Further, the purported withdrawals of the statements were due, at least in part, to the other players' discomfort with the lawsuit. They saw the incident as a part of the game which, while risky and could lead to injury, was not something so "beyond the bounds of fair play" that the defendant should be sued for it. One of the witnesses, when discussing why he no longer stood by his statement, described the play as being "part of the game". Another witness said "Like, at the end of the day, we're all friends. We're playing basketball. Yes, the incident happened. Yes he got hurt … there wasn't really any need … to sue."

[34] Again, this was not, for example, like the situation in *Casterton* where the defendant was heavily penalized and where the other players, at the time, called out the defendant's goon-like actions for causing serious injuries to the plaintiff.

[35] This was a competitive game involving skilled and experienced players, in which the rules often get broken through actions like fouls. As a contact sport, it also means that sometimes people get hurt. That is a risk the plaintiff took.

[36] In sum, taking the plaintiff's case at its highest, I am satisfied that the defendant's actions, while a breach of the rules, were not malicious, out of the ordinary, or beyond the bounds of fair play. Taking into account the nature of the game, the participants, and the inherent risks to which the players, including the plaintiff, willingly consented. The defendant has therefore established that there is no genuine issue requiring a trial.

[37] The motion is granted and the action is dismissed.

[38] I see no reason why costs should not follow the event on a partial indemnity basis. The defendant's Bill of Costs seeks $28,926.65 for the action, including disbursements and HST. This is considerably less than the partial indemnity amount sought in the plaintiff's Costs Outline of $63,347.99. In my view, the amount sought by the defendant is fair and reasonable and I order that the plaintiff pay those costs, for the action, in the amount of $28,926.65.

Paul B. Schabas J.

Date: June 18, 2026