2016 IL App (2d) 160106-U
No. 2-16-0106
Order filed November 7, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KENNETH T. KROLL,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-L-1030
	)	
RICHARD G. LAPE,	)	Honorable
	)	Robert G. Kleeman,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment was erroneously granted where, viewing the evidence in the record in the light most favorable to the nonmoving plaintiff, there was a question of material fact regarding whether the defendant made an agreement with his confederate to commit a battery against the plaintiff.

¶ 2 Plaintiff, Kenneth T. Kroll, appeals the judgment of the circuit court of Du Page County granting summary judgment in favor of defendant, Richard G. Lape, on his claim that defendant conspired with George A. Garbis to commit a battery against plaintiff during a confrontation at a restaurant. Plaintiff argues that the evidence of record demonstrates the existence of a material factual issue regarding whether defendant and Garbis entered into an agreement to commit a battery against plaintiff. We agree and reverse and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 We begin by summarizing the pertinent facts appearing in the record. On May 1, 2010, plaintiff was a 70-year-old retiree. His employment career ended after he had attained the position of senior manager of human resources at Tellabs. Plaintiff was also a veteran, having served in the U.S. Navy. Defendant was a 64-year-old retiree and Marine Corps veteran, having served in Viet Nam between 1965 and 1967. As a Marine, defendant was posted as a guard over tanks being used in the conflict; the tanks would fire their weapons and defendant did not have ear protection. Consequently, defendant experienced significant hearing loss and, on May 1, required hearing aids in both ears. Defendant's civilian career was as an electrician with the Village of Naperville. George Garbis was a 55-year-old man who had been employed by State Farm as an adjustor and who had owned his own trucking business. Garbis and defendant had been friends for many years.

¶ 5 On May 1, 2010, plaintiff and his wife, Katherine, went to the Naperville Bakers Square restaurant for pie. Shortly after plaintiff and his wife were seated, defendant and Garbis entered the same restaurant and were seated in an adjacent booth. Plaintiff described defendant's and Garbis's entrance as "rowdy," and plaintiff noticed that defendant was wearing an off-white shirt that was buttoned at the bottom, exposing his chest. According to plaintiff, after being seated, defendant received a phone call on his walkie-talkie-like phone. Plaintiff testified that defendant's phone volume was extremely loud and he could hear the call. Plaintiff testified that the caller started to use foul language which disturbed his wife.

¶ 6 Plaintiff's wife asked defendant to lower his voice or to take his phone conversation outside, but defendant did not react to Katherine's request. As defendant continued to "shout" into his phone, plaintiff asked defendant to lower his voice or to take the call outside.

¶ 7 Mike King, a retired police officer from the Village of Oakbrook and the Naperville police departments, testified that he witnessed the entire incident. King testified that defendant's phone call was disturbing the section of the restaurant in which he, plaintiff, and defendant were all seated. King also testified that plaintiff's request that defendant lower his voice was a reasonable one to make.

¶ 8 Plaintiff testified that defendant stood up, walked to plaintiff's seat, and refused plaintiff's request to lower his voice or take his conversation outside. According to plaintiff, defendant then said to plaintiff, "you're lucky *** you are wearing glasses." Plaintiff testified that, after saying that, defendant took a step back and clenched his fists. Plaintiff testified that he then took off his glasses. Plaintiff explained that he believed that he had been threatened by defendant and that he removed his glasses because he did not wish to get struck while wearing his glasses. Plaintiff interpreted defendant's step back and clenching his fists as an increased show of aggression because, according to plaintiff, by stepping back, defendant had increased the leverage and weight of a potential punch.

¶ 9 Plaintiff testified that defendant was about even with Garbis at this point. According to plaintiff, defendant turned to Garbis and said something to him that plaintiff was unable to hear. Plaintiff testified that defendant made a "come along" gesture or shrug to Garbis and said to plaintiff, "[L]et's take this outside."

¶ 10 Plaintiff noted that Garbis had been observing the interaction, but had not yet spoken to him. After defendant spoke to Garbis, Garbis rose from his seat and told plaintiff, "[F]ine, come on, you're going with us; *** you're going outside with us." As this exchange was occurring, plaintiff saw defendant point to the front door of the restaurant. By this time, both defendant and Garbis were standing in the aisle by plaintiff's booth.

¶ 11 Plaintiff testified that he began looking around for a manager. He developed an intention to get a manager to "defuse the situation." Plaintiff believed that he could find a manager in the front of the restaurant by the cashier's station. Defendant and Garbis both said, "[L]et's go," and plaintiff got up and began to walk with them to the front of the restaurant.

¶ 12 Plaintiff testified that defendant led the way, plaintiff was in the middle, and Garbis brought up the rear. As the three men advanced towards the front of the restaurant, nothing was said between them, but defendant glanced back at plaintiff and possibly Garbis. Defendant paused in the front area and Garbis slipped by plaintiff as plaintiff was turning towards the cashier's station to, as plaintiff asserted, find a manager. At that point, Garbis struck plaintiff in the jaw, knocking him to the ground. Plaintiff testified that he curled up to protect himself, and Garbis continued to strike him as he was on the ground. Plaintiff testified that Garbis was pulled off of him. Plaintiff eventually returned to his booth and spoke to police officers investigating the fight.

¶ 13 As a result of the altercation, plaintiff's face was bruised and he experienced a comminuted fracture of his right little finger. Plaintiff's finger fracture was surgically resolved with pins, and plaintiff testified that the finger still experiences weakness and pain and interferes with his ability to perform tasks such as playing golf because of the pain and stiffness resulting from the injury.

¶ 14 In contrast to plaintiff's version of the altercation, defendant testified that he and Garbis sat down in the booth adjacent to plaintiff's. Defendant received a phone call and, during that call, plaintiff began screaming at him, "take it outside, take it outside." Defendant testified that he was trying to turn down the volume on his phone, but he was flustered by plaintiff's continued "screaming." Defendant testified that he stopped trying to adjust his phone, and then he turned

around and said to plaintiff, "[Y]ou're lucky this didn't happen outside," because "I would have kicked you in the butt, *** but you got [*sic*] glasses on." Defendant testified that plaintiff stood up and took off his glasses. Defendant then stood up and stepped out of his booth. According to defendant, plaintiff then pushed him twice. Defendant believed he had a problem, so he turned to leave the restaurant. According to defendant, plaintiff told his wife that he was going to take care of the situation, and plaintiff followed defendant up the aisle toward the exit, pushing defendant "a couple of times." Defendant testified that, at no time did he respond to plaintiff's shoves or touch plaintiff. Defendant also testified that he had had surgery on his foot and big toe, and was wearing a large bandage and using a walker. Defendant was unclear as to whether he used the walker or whatever walking aide he had as he traveled up the aisle towards the exit. Defendant testified that he did not speak to Garbis during the altercation or as he was walking out of the restaurant. Defendant also did not encourage Garbis as he became aware that Garbis had struck plaintiff.

¶ 15 According to defendant, as Garbis and plaintiff began to struggle, plaintiff was trying to chop at Garbis with open hands, like a "Judo expert." Defendant testified that plaintiff had unbalanced Garbis, who stepped back, regained his balance, set up, and punched plaintiff in the face, knocking plaintiff to the floor. Confusingly, defendant also testified that he did not see the punch, because he was already out the door of the restaurant. Defendant testified that Garbis jumped on top of plaintiff to make sure plaintiff would not get up, but was instantly pulled off of plaintiff by other patrons in the restaurant. After Garbis had been pulled off of plaintiff, defendant told Garbis to leave in order to avoid retaliation from the patrons who had pulled him off.

¶ 16 Defendant testified that he had been given a ticket. When he appeared in court for the

ticket, both he and Garbis were represented by the same counsel. According to defendant, plaintiff admitted to the judge that he had screamed at defendant first and pushed Garbis first before getting punched, and the judge yelled at all three of the men.

¶ 17 Garbis was also deposed. During the deposition, Garbis admitted that he enjoyed and thrived on conflict, and he further attempted to antagonize the attorneys conducting the deposition under the guise of "teasing." Similarly to defendant, Garbis testified that defendant was speaking on his phone when plaintiff's wife said that defendant was being rude and ought to take his phone call outside. Garbis testified that defendant did not hear her because he kept talking like he had not heard her. Garbis testified that plaintiff stood up and told his wife that he would "take these two outside and take care of them," and then stood over defendant. Garbis testified that he got between plaintiff and defendant and tried to defuse the situation by offering to pay for whatever plaintiff and his wife were eating. When that did not work, Garbis told plaintiff that plaintiff would not be fighting defendant, but he would be fighting Garbis, because defendant had recent foot surgery and was hobbling around as a result. Garbis testified that defendant neither encouraged nor discussed this with him; Garbis just wanted make sure it was a fair fight.

¶ 18 According to Garbis, the three men walked up the aisle towards the front exit of the restaurant. Defendant was first, Garbis was second, and plaintiff followed them, pushing Garbis all the way up the aisle. When Garbis arrived near the cashier's station, defendant had exited through the door, and Garbis turned around, irritated by plaintiff's constant pushing and shoving. Garbis testified that, as he turned around, plaintiff grabbed him by the throat and "acted like he was a karate guy." Garbis testified that he then punched plaintiff in the face, and plaintiff fell to the ground. Garbis testified that he fell on top of plaintiff to make sure he would not get up and

threaten or hurt defendant and him further. According to Garbis, defendant pulled him off of plaintiff and told him to get out of there and calm down. Garbis left the restaurant and went into a nearby store, where he was eventually discovered by the police.

¶ 19 Garbis was also given a ticket. Garbis went to court and pleaded guilty to the charge on the ticket and paid a fine. According to Garbis, plaintiff told the judge that he had pushed defendant and Garbis first before being struck by Garbis.

¶ 20 King, the retired police officer who happened to be in the restaurant, testified that defendant began speaking very loudly on his phone. He observed plaintiff, who remained seated, ask defendant to take the conversation outside because it was disturbing his wife. King testified that defendant and Garbis began yelling at plaintiff in response to his request; plaintiff began yelling back at defendant and Garbis. King testified that Garbis attempted to explain to plaintiff that defendant was hard of hearing, which was why he was speaking so loudly. King also testified that defendant stated, "You're lucky you have your glasses on," after which plaintiff removed his glasses and stood up. King criticized plaintiff for doing this, because he believed it escalated the confrontation.

¶ 21 King testified that defendant, followed by Garbis, followed by plaintiff walked to the front of the restaurant. King followed, hoping to prevent the men from fighting. As the men reached the vicinity of the cashier's station, King observed Garbis turn around and punch plaintiff a couple times, knocking him down. King testified that, in the commotion, defendant and Garbis walked out of the restaurant. He also testified that he never saw plaintiff make any contact with either defendant or Garbis.

¶ 22 King testified that he followed defendant and Garbis outside. He heard defendant tell Garbis to take off while defendant waited for the police. King followed Garbis into a store and

then called for the police. King testified that he gave a statement about what he observed to the police.

¶ 23 The police officer responding to and investigating the incident was also deposed. Because the officer's testimony is derived from interviews of plaintiff, defendant, Garbis, and King, and because his testimony was similar to their deposition testimony, no benefits would accrue to this disposition by further summarizing the officer's testimony.

¶ 24 On September 8. 2011, plaintiff filed a suit against defendant and Garbis. Eventually, Garbis settled and was dismissed from the case. On October 6, 2014, plaintiff filed his third amended complaint against defendant, alleging civil conspiracy. Plaintiff alleged that Garbis and defendant entered into an agreement to commit a battery against plaintiff and that Garbis, in furtherance of the conspiracy, punched plaintiff.

¶ 25 Defendant filed a motion for summary judgment, arguing that there was no evidence that defendant and Garbis entered into a conspiracy to harm plaintiff, and there was no evidence that defendant struck plaintiff. On January 12, 2016, the trial court granted summary judgment in favor of defendant and against plaintiff. In explaining its judgment, the trial court stated:

> "I have taken a look at this, and I wrestled with this at some length and actually I do find this case *** fascinating because the facts, and I'm taking them in the light most favorable to the non-moving party, and I'm not going to go through all of them. I think I indicated at this stage, I view the facts that [defendant], sounds like his phone conversation in a restaurant was a little short of obnoxious, and he was called on it by the plaintiff.
>
> [Defendant] didn't take kindly to that. There's multiple witnesses who say that [defendant] came over and made conversation that could easily, and I do take it as

threatening, made reference to if this had happened outside, words to the effect that a battery would have occurred there, and it's fortunate that you are wearing glasses.

I'm not taking the plaintiff's taking his glasses off and standing up as instigating or whatever. I give him all the benefit. But my analysis is what is in [defendant's] mind. He is the one that has to promote, encourage or agree with another that a tortious act occurred. And the evidence that I have, with one notable exception, is that it seems to me that [defendant] was going outside to engage in mutual physical combat with the plaintiff.

[Defendant] did say something to Garbis. I don't know what it was. It appears that nobody can present what that was, and [defendant] raised his shoulder, which the plaintiff says was indicating like let's go outside, but I don't know how to do that. I mean, that could be like I guess I'm going outside or we are going to take it outside or whatever it is, I don't know, I'm going. And then Garbis said something according to the plaintiff. I take that as true. Saying we are going outside. And it may have been Garbis' intention to help this guy. I don't know whether he was injured, taking the evidence that his foot wasn't heavily wrapped. He apparently had some—everybody here was a little too old to be engaging in this conduct, but it's entirely possible that Garbis wanted to protect his friend or help his friend or whatever. But I don't see what the evidence is that [defendant] encouraged, promoted or agreed with Garbis to engage in a battery. It may be that the plaintiff said I'm peeling off and I am going to find the manager before I get outside and Garbis hit him. But I don't know that that's a conspiracy or part of a conspiracy that [defendant] entered into. It seems to me that all the evidence that I have is that [defendant] was going out to engage in, you know, it's wrongful for two adult men to engage in a physical fight, but that's what he intended to do. Garbis jumped in and

helped him before that ever occurred.

It may be that Garbis was attempting to engage in a tort with his friend, but I don't know what the evidence is even in the light most favorable to the plaintiff that [defendant] agreed or promoted or encouraged. I went through the plaintiff's motion a number of times, and I'm not going to go through all of it. But it just seems to me that some of the assertions about whether or not there was a plan, and I take some of the defendant's motion, it's a little bit, in my opinion, the reasoning is a little tortured.

I mean, on page 9, for example, it says the defendant in his motion actually admits the evidence shows that the plan in the mind of [defendant] and Garbis was to walk outside to the parking lot to settle the case the old fashioned way by fighting. That's in quotes. But the defendant in his motion says at best that's what the evidence is, and he says something else.

I went through all these things, scoured in my judgment the pleadings and the attachments for evidence that [defendant], not Garbis but [defendant] agreed, encouraged or promoted this offense and I find it lacking."

¶ 26 Plaintiff timely appeals.

¶ 27 II. ANALYSIS

¶ 28 On appeal, plaintiff argues that the trial court erred in granting summary judgment because there exists a genuine issue of material fact regarding whether defendant and Garbis entered into an agreement to commit a battery against plaintiff. Summary judgment is appropriate where the pleadings and evidence of record before the trial court, viewed most favorably to the nonmoving party, demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014);

Miller v. Hecox, 2012 IL App (2d) 110546, ¶ 29. The grant of summary judgment presents a question of law that we review *de novo*. *Id.*

¶ 29 A. Elements of Civil Conspiracy

¶ 30 The tort of civil conspiracy is an intentional tort. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999). It is defined as a combination of two or more persons seeking to accomplish by concerted action either an unlawful purpose or a lawful purpose by unlawful means. *Id.* The elements of civil conspiracy are (1) an agreement; and (2) a tortious act committed in furtherance of that agreement. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 63 (1994). The theory of civil conspiracy extends tort liability beyond the actor/tortfeasor to persons who did not act but who planned, assisted, or encouraged the act. *McClure*, 188 Ill. 2d at 133.

¶ 31 In order to demonstrate the existence of a civil conspiracy, a plaintiff must show that the defendant knowingly and voluntarily participated in the common scheme to commit an unlawful act or a lawful act in an unlawful manner. *Id.* In other words, a defendant who understands the objectives of the common conspiratorial scheme, accepts them, and agrees, either explicitly or implicitly, to do his or her part to further the objectives will be liable as a conspirator. *Id.* at 134. This means that a defendant will not be liable for his or her accidental, inadvertent, or negligent participation in the common scheme. *Id.* at 133-34. Likewise, a defendant who innocently performs an act that happens to fortuitously further the tortious act of another will not be liable for civil conspiracy. *Id.* at 134.

¶ 32 Generally, a conspiracy will not be susceptible to direct proof, but will be established by circumstantial evidence, the reasonable inferences arising from the evidence, and a commonsense knowledge of the behavior of persons in similar circumstances. *Id.* In order to demonstrate the existence a civil conspiracy by means of circumstantial evidence, the evidence

must be clear and convincing. *Id.* The clear-and-convincing evidentiary standard will not be satisfied solely by evidence that the defendant and his coconspirator acted in parallel (*id.* at 140); rather, evidence, beyond that of parallel conduct alone, must be presented that supports the existence of an agreement between the defendant and his or her coconspirator. *Id.* at 142-43. Stated another way, the clear-and-convincing evidentiary standard requires a court to determine that a conspiracy claim cannot stand if the facts and circumstances relied upon are as consistent with innocence as they are with guilt. *Id.* at 140-41. In this fashion, the risk of penalizing otherwise innocent conduct is balanced against the difficulty of proving, circumstantially, the existence of an agreement. *Id.* at 140. In other words, requiring additional evidence supporting the existence of an agreement will help to ensure that a defendant's responsibility for his or her confederate's actions is based on more than speculation and conjecture. *Id.* at 142.

¶ 33 Before continuing, we must note that the principles *McClure* promulgated arose in the context of the suit of an injured worker claiming that his asbestos-manufacturing employer conspired with other asbestos manufacturers to suppress knowledge that asbestos was a very dangerous albeit very useful mineral. Thus, the court was exceptionally sensitive to the issue that entities engaged in a marketplace are all subject to the same industry-wide circumstances and may therefore react to them in very similar fashions. The simple fact that rational actors may choose similar courses of action to respond to market and industry stimuli does not mean that the actor should therefore be held responsible for the wrongful actions of a competitor, unless additional evidence supporting the existence of an agreement may be developed. *Id.* at 142.

¶ 34 Translating these principles from an economic setting into an interpersonal setting may seem, at first blush, to be an ill fit. Individuals are not necessarily rational actors and they may

bring their own idiosyncratic responses to similar situations. However, the core principle illuminated in *McClure* seems to be a concern with penalizing one person for another's wrongful conduct simply because the person engaged in other parallel conduct with the other. See *id.* at 140-43. With this caveat in mind, along with the principles discussed above, we turn to the evidence before the trial court.

¶ 35 B. Consideration of the Evidence of Record

¶ 36 We note initially that both parties presented competing versions of the May 1 confrontation and incident at the restaurant. However, as this matter comes before us after the grant of summary judgment, we must look at the evidence in the record in the light most favorable to the nonmoving party—here, plaintiff. *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 20 (evidence of record will be considered in the light most favorable to the nonmoving party). For purposes of our review, then, we will interpret the evidence strictly against defendant and liberally in favor of plaintiff. *Kolakowski v Voris*, 83 Ill. 2d 388, 398 (1980). Further, under the principles of *McClure*, we review the evidence in a two-step process. First, we determine whether there is evidence that defendant and Garbis engaged in at least parallel conduct; second, if necessary, we look to see if there is other evidence, beyond parallel conduct, but when considered with the evidence of parallel conduct that might support the existence of an agreement between defendant and Garbis. *McClure*, 188 Ill. 2d at 142-43.

¶ 37 Turning first to whether plaintiff presented evidence of parallel conduct, we conclude that he did. The evidence in the record shows that plaintiff was seated in the booth adjacent to defendant and Garbis. Defendant and Garbis entered the restaurant together and sat together, from which we may infer that they were together. Both defendant and Garbis testified that they

had been friends for many years; Garbis further described himself as an individual who thrives on and enjoys conflict.

¶ 38 Either on the way to being seated or shortly after being seated, defendant received and responded to a phone call. Defendant's hearing was significantly impaired, requiring him to use hearing aids in both ears and, even then, defendant had difficulty in comprehending what he was, perhaps only partially, hearing. Defendant's phone was set to a very high volume, and defendant was speaking loudly into the phone. Plaintiff's wife was disturbed by defendant's conversation and asked him to lower the volume or to take his phone conversation outside. Defendant did not respond to plaintiff's wife and continued to speak very loudly. Other patrons noticed defendant's conversation and were also disturbed by its volume. Plaintiff, after his wife's request appeared to be ignored, similarly asked defendant to either be quieter or to take the phone conversation outside.

¶ 39 When plaintiff asked defendant to moderate his conversation, defendant responded in a threatening manner, refusing the request and adding that, had plaintiff not been wearing glasses, defendant would have kicked plaintiff's butt. Plaintiff removed his glasses (fearing that defendant, who reacted with such aggression, might take a swing at him in the restaurant). Defendant and Garbis both demanded that plaintiff accompany them outside, presumably to "settle" the dispute. According to plaintiff, he was sandwiched between defendant and Garbis, and he was marched to the front of the restaurant, apparently in furtherance of the plan to "settle" the dispute.

¶ 40 We hold that this evidence, the threat from defendant, and the reiteration from Garbis, along with the demands from both that plaintiff accompany them outside to "settle" the dispute, represents at least parallel conduct. It is clear that both defendant and Garbis intended to fight

plaintiff to "settle" the perceived slight caused by plaintiff's request. Accordingly, we believe that the first step of the analysis is satisfied: defendant and Garbis were engaging in parallel conduct.

¶ 41 We now look to whether there is other evidence in the record that, considered with the parallel conduct, supports the existence of an agreement between defendant and Garbis to commit a battery on plaintiff. *McClure*, 188 Ill. 2d at 142-43. We conclude that it does.

¶ 42 The record shows that defendant and Garbis entered the restaurant together, that they had been friends for a long time, and that Garbis was a self-styled pot-stirrer. According to both plaintiff and King, defendant received a phone call and proceeded to disturb the entire section of the restaurant by talking into the phone very loudly and having the phone turned up to a very loud volume. According to King, plaintiff reasonably requested that defendant either moderate the volume of his conversation or leave the restaurant to continue it at that volume. According to both plaintiff and King, defendant refused, loudly and threateningly, going so far as to say that he would have kicked plaintiff's butt had plaintiff made the request outside and had plaintiff not been wearing glasses. Again, we note that this aggressive and threatening refusal was made loudly enough that King, a retired police officer, became worried that at least defendant and plaintiff might engage in a physical altercation. According to plaintiff, after he rose and took off his glasses, defendant leaned over and said something to Garbis. Tellingly, while defendant's communication so far in the restaurant had been carried out at a disturbingly loud volume, this brief conference with Garbis was pitched at a volume that no one else was able to overhear. After defendant held his audible-to-only-Garbis conference, Garbis stood up and echoed defendant's statement that the three were going to take it outside. In light of the threat to kick plaintiff's butt and defendant's demand to take the matter outside, along with the

uncharacteristically inaudible conference with Garbis, it is an entirely reasonable inference that defendant communicated to Garbis his wish that Garbis assist him in committing a battery against plaintiff. When Garbis echoed plaintiff's threats and demands, it is reasonable to infer that he assented to the plan, such as it was, to commit a battery against plaintiff. Finally, after Garbis had punched plaintiff in the face, defendant told Garbis to leave and he would remain behind to face the police as he had not actually thrown a punch during the altercation. From this, it is reasonable to infer that defendant affirmed his agreement with Garbis to commit a battery against plaintiff because his apparently minimal involvement in the altercation would not subject him to any obvious criminal or civil liability. Accordingly, based on the parallel conduct of Garbis and defendant, defendant's obstreperous behavior, his brief and uncharacteristically muted conference with Garbis, Garbis's decision to rise and fully echo all of defendant's threats and demands, and defendant's acknowledgement of the agreement by telling Garbis to flee, we conclude that the evidence clearly and convincingly demonstrates that defendant and Garbis entered into an agreement to commit a battery against plaintiff.

¶ 43 We note that our conclusion results from viewing, as we must, the evidence in the light most favorable to plaintiff and it does not account for the contrary evidence in the record and defendant's interpretation of that evidence. Thus, in concluding that the evidence supports a finding of an agreement, we are actually stating that the evidence presents a genuine issue of material fact regarding the element of an agreement sufficient to preclude summary judgment. We are not commenting on the credibility of the witnesses or the weight their testimony should be given should this matter advance to trial, only that plaintiff has successfully demonstrated a genuine issue of material fact sufficient to preclude the grant of summary judgment.

¶ 44 For completeness, we note that the evidence also unequivocally demonstrates that Garbis, by punching plaintiff, committed a tortious act in furtherance of the agreement to batter plaintiff. *Adcock*, 164 Ill. 2d at 64. Thus, with the agreement to commit a battery against plaintiff (the agreement to commit an unlawful act) and Garbis's punch to plaintiff's face (and his continued punching of plaintiff on the ground) (the act in furtherance), plaintiff has demonstrated the essential elements of a civil conspiracy. *Id.*; *McClure*, 188 Ill. 2d at 133. Accordingly, we hold that the trial court erred in granting summary judgment in favor of defendant and against plaintiff.

¶ 45 C. Defendant's Remaining Contentions

¶ 46 Defendant argues, relying on *Sklan v. Smolla*, 95 Ill. App. 3d 658 (1981), that the fact of his presence alone at the battery committed by Garbis against plaintiff is insufficient to support the claim of civil conspiracy. In that case, the defendant met Acs and Joyce at a restaurant, and they asked the defendant for a ride back to their homes. *Id.* at 660. The defendant agreed and, while driving, also agreed to take them past a park which was a gang hangout. *Id.* at 661. The defendant further agreed to stop at the park upon Acs's request. *Id.* There, Acs confronted the plaintiff and another boy playing basketball in the park, became angry, and he and Joyce jumped out of the car, and beat the boys. *Id.* The defendant remained in the car with the engine running and did not interact with the boys. When Acs and Joyce began kicking the plaintiff, the defendant honked, Acs and Joyce returned to the car, and the defendant drove them to their homes. *Id.*

¶ 47 The court held that the defendant could not be held liable for the battery against the plaintiff because there was no evidence that the defendant entered into a common plan or design with Acs and Joyce. *Id.* at 663-64. In particular, the court noted that there was no information

on how well the defendant knew Acs and Joyce, or that the defendant was aware, at that time, of Acs's motivation to attack the plaintiff in revenge for a gang-related beating one of Acs's friends received from the gang that hung out at the park. *Id.* Instead, the court reasoned that the evidence showed that the defendant ran into Acs and Joyce by happenstance and was unaware of Acs's intent to start a fight and beat up whomever he could find at the park when the defendant agreed to give them a ride and agreed to their requested detour. *Id.* at 665.

¶ 48 Here, by contrast, defendant was a longstanding friend of Garbis. They entered the restaurant together, and when defendant threatened plaintiff, Garbis was with defendant and observing the interaction. Further, unlike all of his previous behavior at the restaurant, defendant held a quick, for-Garbis's-ears-only conference with Garbis. After the conference, Garbis rose and repeated the threats to plaintiff and also demanded that plaintiff accompany them outside to "settle" the dispute. Additionally, defendant affirmed his agreement with Garbis when he urged Garbis to flee the restaurant. From this evidence, we can infer that, unlike in *Sklan*, where there was no evidence that the defendant was aware Acs's intent, defendant not only was aware of the intent, but communicated it to Garbis, thereby creating a common design with Garbis to commit a battery against plaintiff. Thus, we hold that defendant's reliance on *Sklan* is unavailing because *Sklan* is distinguishable from the facts of this case.

¶ 49 Defendant asserts that plaintiff mischaracterized the trial court's reasoning, and that the trial court's full reasoning fully supported the correct result. We disagree. We first note that we are reviewing the trial court's judgment, not its reasoning. *Hancock v. Village of Itasca*, 2016 IL App (2d) 150677, ¶ 11. Second, our review is *de novo* in this case, and we give no deference to the trial court's judgment or reasoning. *Battaglia v. 736 N. Clark Corp.*, 2015 IL App (1st)

142437, ¶ 23. Thus, it is of no moment whether plaintiff correctly characterized the trial court's reasoning. We therefore reject defendant's contention.

¶ 50 Defendant next contends that, if there were an agreement between himself and Garbis, it was to commit a battery in the parking lot, not inside the restaurant. We do not view the gravamen of the agreement to be its location, but the purpose it was supposed to accomplish, namely, the commission of a battery against plaintiff. We reject defendant's contention.

¶ 51 Defendant tries a slightly different tack, suggesting that Garbis's sucker punch was not the object of the agreement. We agree: the object of the agreement was the commission of a battery against plaintiff. Garbis's sucker punch was an act in furtherance of the agreement. We reject this contention as well.

¶ 52 Defendant next argues that Wharton's Rule should preclude his liability in this case. Wharton's Rule is an exception to the principle that the offense of conspiracy is punishable separately from the offense which is the object of the conspiracy. *People v. Laws*, 155 Ill. 2d 208, 211 (1993). Wharton's Rule will prohibit the prosecution of a conspiracy to commit a given offense when the commission of that offense requires the participation of more than one person. *Id.* Wharton's Rule arose out of concerns of double jeopardy. *Id.* at 213. However, as it has developed, it is less a rule and more a presumption in the present day, and its application will not prohibit the prosecution of a conspiracy simply because the substantive crime involves two or more actors; rather, it will be applied to prohibit a prosecution when the cooperative conduct inherent in the substantive offense cannot be distinguished from the element of agreement in the alleged conspiracy. *Id.* Typical cases to which Wharton's Rule applies are dueling, bigamy, adultery, incest, pandering, gambling, bribery (both giving and receiving) and dealing in contraband goods (both buying and selling). *Id.*

¶ 53 Defendant argues that "fighting easily fits with the Wharton's Rule cases for which the concept of conspiracy does not apply." We disagree. First, and most importantly, Wharton's Rule applies in the criminal context in order to prevent an infringement of the principles of double jeopardy. See *id.* (the evolution of Wharton's Rule was grounded in concerns over double jeopardy). Here, defendant is not subject to concerns over double jeopardy as this is purely a civil proceeding. Hence, Wharton's Rule cannot be applied in this case. Tellingly, while defendant solely cites *Laws*, our research has revealed no case outside of the criminal context invoking or attempting to apply Wharton's Rule.

¶ 54 Second, defendant considers that the action that was the object of the alleged conspiracy to be a fight between plaintiff and others. Defendant reasons that, because of plaintiff's integral involvement in the substantive action, the agreement element of the conspiracy is indistinguishable from the plural nature of the substantive offense. We believe this is incorrect in two important respects. First, the substantive action was the commission of a battery against plaintiff; it is hard to see, outside of perhaps a "stop hitting yourself" playground bully scenario, how plaintiff can be deemed part of the substantive action of committing a battery against plaintiff. Second, defendant considers only that he and plaintiff planned to engage in a fight, which would preclude a conspiracy under Wharton's Rule. Adding Garbis to the mix still means that plaintiff and Garbis would fight, which would still preclude a conspiracy under Wharton's Rule. Defendant's contention misses the point of plaintiff's allegations, namely, that defendant and Garbis conspired together against him. We reject defendant's attempt to realign the actors in this case. Accordingly, we reject defendant's contentions concerning Wharton's Rule.

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed and the cause is remanded for further proceedings consistent with this order.

¶ 57 Reversed and remanded.