

Court of Claims of Ohio

The Ohio Judicial Center
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DANIEL O'NEILL

Plaintiff

v.

THE UNIVERSITY OF AKRON

Defendant

Case No. 2006-06795

Judge Joseph T. Clark
Magistrate Anderson M. Renick

MAGISTRATE DECISION

{¶ 1} Plaintiff brought this action alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.¹

{¶ 2} In October 2004, plaintiff was a student at the University of Akron where he became acquainted with two members of defendant's cheerleading squad. The cheerleaders encouraged plaintiff to attend a practice session to determine whether he might be interested in joining the squad. On October 26, 2004, plaintiff was introduced to Colleen Hawkins, the coach of the cheerleading squad, who invited plaintiff to observe practice.

{¶ 3} At the beginning of the practice, Hawkins coached female cheerleaders who performed tumbling exercises while the male cheerleaders began warm-up exercises. After the male cheerleaders began practicing "back-tucks," a type of back flip that is both started and finished from a standing position, plaintiff was invited by the

¹Pursuant to Civ.R. 53, Magistrate Anderson M. Renick is assigned to conduct all proceedings necessary for decision in this matter.

male cheerleaders to join the practice. A group of experienced male cheerleaders demonstrated the back-tuck stunt to less-experienced cheerleaders. Following the demonstration, plaintiff attempted a back-tuck several times with the help of “spotters,” squad members who, as a safety precaution, provided guidance and support to plaintiff. During one of his attempts, plaintiff injured his knee while landing on mats that had been placed on the gymnasium floor.

{¶ 4} Plaintiff alleges that defendant and its employees were negligent in allowing plaintiff to perform the back-tuck stunt on mats that had been improperly placed such that they formed an uneven surface. Defendant contends that plaintiff’s claim is barred by the doctrine of primary assumption of risk.

{¶ 5} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that defendant’s acts or omissions resulted in a breach of that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. A nonparticipant in a recreational activity may be found liable for her negligent supervision of the activity under certain narrow circumstances, such as allowing the activity to take place absent any management or allowing an individual with a known propensity for violence to participate. *Santho v. Boy Scouts of America*, 168 Ohio App.3d 27, 2006-Ohio-3656 citing *Rodriguez v. O.C.C.H.A.* (Sept. 26, 2000), Mahoning App. No. 99 C.A. 30; see also *Kline v. OID* (1992), 80 Ohio App.3d 393; *Hanson v. Kynast* (1986), 24 Ohio St.3d 171, 179 (J. Holmes, concurring).

{¶ 6} Primary assumption of the risk is generally a bar to recovery in a negligence action on the basis that defendant owes no duty of care to plaintiff. *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 114. Courts must apply the doctrine of primary assumption of the risk cautiously, and it is generally not applied outside

recreational or sporting activities. *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 431, 1996-Ohio-320; *Whisman v. Gator Investment Properties, Inc.*, 149 Ohio App.3d 225, 236, 2002-Ohio-1850.

{¶ 7} An individual who is injured in the course of a recreational or sporting activity assumes the ordinary risks of such activity and cannot recover unless it can be shown that another participant acted recklessly or intentionally in causing the injury. *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, syllabus. “A plaintiff cannot recover from any injuries that stemmed from ‘conduct that is a foreseeable, customary part’ of the activity in which the plaintiff was injured.” *Santho*, supra, at 37, quoting *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104. Participants and spectators are generally owed no duty by recreation providers to eliminate the risks inherent in a sport. *Id.* at 35. Primary assumption of the risk may relieve both participants and non-participants from liability. *Bundschu v. Naffah*, 147 Ohio App.3d 105, 2002-Ohio-607.

{¶ 8} Plaintiff testified that, based upon statements that were made to him by Hawkins during the practice, he believed that he was “trying out” for a position on the cheerleading squad. According to plaintiff, he initially declined to perform a back-tuck when he was asked to do so by the male cheerleaders. Plaintiff testified that he agreed to attempt a back-tuck after Hawkins suggested that he try the stunt. On cross-examination, plaintiff conceded that he knew there was some risk involved in performing the back-tuck. Plaintiff also acknowledged that he was assisted during his attempt by two cheerleaders who were acting as spotters.

{¶ 9} It is undisputed that Hawkins was the only coach at the practice and that she was instructing the female cheerleaders on the other side of the gym when the incident occurred. Hawkins testified that she had learned that plaintiff intended to “check out” the cheerleading squad and that she instructed plaintiff to sit and watch the practice. According to Hawkins, she first became aware that plaintiff had attempted to perform cheerleading stunts when she saw him lying on the mats after the accident.

{¶ 10} Michael Moore, who was a member of defendant's cheerleading squad in 2004 and now is employed as a cheerleading coach, testified that he provided some instruction to plaintiff during the practice. Moore testified that, at the beginning of the practice, plaintiff sat and observed the male squad members perform stretching, tumbling, and standing-tuck stunts. Moore joined other cheerleaders in demonstrating the back-tuck and he explained the steps involved in performing the stunt, including proper body position and landing the stunt. Moore testified that he invited plaintiff to attempt the back-tuck and that plaintiff performed the stunt two or three times while Moore acted as a spotter. According to Moore, two other cheerleaders subsequently assisted plaintiff in practicing the stunt. Moore did not recall observing the accident, and he stated that he became aware of the accident when he heard plaintiff exclaim that "something did not feel right."

{¶ 11} Although plaintiff testified that Hawkins told him that he should attempt the back-tuck if he wanted to join the cheerleading squad, Hawkins denied making such a statement. Hawkins provided credible testimony that she directed plaintiff to sit and watch the practice and that she did not know that plaintiff was participating in the practice. Furthermore, Moore corroborated Hawkins' testimony that male cheerleaders were not required to perform a back-tuck to join the squad.

{¶ 12} There is no dispute that cheerleading is a recreational activity. The testimony established that there are inherent risks in performing cheerleading stunts and that plaintiff's injury resulted from conduct that was a foreseeable and customary part of the sport of cheerleading. Based upon his own admission, plaintiff had an appreciation of the risks inherent in cheerleading when he voluntarily attempted to perform back-tucks. The court finds that plaintiff assumed the ordinary risks of cheerleading, including the risk of sustaining injury by performing stunts, and that his knee injury was the result of improperly landing the back-tuck. Absent proof of plaintiff's injury being caused by another participant's reckless or intentional conduct, plaintiff is

precluded from recovery by the doctrine of primary assumption of the risk. *Marchetti*, supra, at the syllabus.

{¶ 13} The court finds that the evidence does not support a finding either that Hawkins was reckless in her supervision of the squad or that any squad member caused plaintiff's injury through reckless or intentional conduct. Accordingly, the court finds that plaintiff's claim is barred by the doctrine of primary assumption of the risk.

{¶ 14} Although plaintiff asserts that the surface of the gym mats was uneven, and thus constituted a dangerous condition, there was no testimony from anyone concerning any alleged defect in the mats prior to the accident. It is worthy to note that plaintiff testified that it was *after* he had injured his knee when he noticed a separation between the mats.

{¶ 15} For the foregoing reasons, the court finds that plaintiff has failed to establish that defendant was negligent. Accordingly, judgment is recommended in favor of defendant.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

ANDERSON M. RENICK
Magistrate

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MAGISTRATE DECISION

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Filed September 30, 2009
To S.C. reporter October 13, 2009