[Cite as *Schnetz v. Ohio Dept. of Rehab. & Corr.*, 2009-Ohio-1573.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

ERIC SCHNETZ, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant
Case No. 2006-07406

Judge Clark B. Weaver Sr.

DECISION

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

{¶ 2} At all times relevant to this action, plaintiff[1] was an inmate in the custody and control of defendant at the Mansfield Correctional Camp (the camp). The camp is part of the Mansfield Correctional Institution (MANCI), a close-security prison. The camp is located a short drive from the main facility and houses those inmates who have either been convicted of a relatively minor offense or who have exhibited good behavior at MANCI. Inasmuch as the inmates at the camp pose less of a security risk, they are afforded greater privileges than their counterparts at MANCI. There are no cells at the camp; rather, the inmates are housed in a dormitory setting. The inmates' movement throughout the facility, including the recreation yard, is less restricted than at MANCI. On November 25, 2004, Thanksgiving Day, the camp "count sheet" put the number of

[1]The term "plaintiff" shall be used to refer to Eric Schnetz throughout this decision.

inmates in Dorm A at 189 and the number of inmates in Dorm B at 200. Because it was a holiday, most of the inmates who had work assignments outside the prison walls, were excused from those assignments.

{¶ 3} On that day, plaintiff participated in an annual intramural football game pitting Dorm A against Dorm B. Defendant's corrections officers (COs) were aware that inmates had sustained injuries in the past when the level of physical contact during such games had "gotten out of hand." In fact, defendant's policy prohibited inmates from playing full-contact, tackle football. Instead, the inmates' football games were restricted to the limited-contact style known as flag football. In such a contest, the ball carrier is stopped by pulling out a flag attached to the waist; tackling is prohibited.

{¶ 4} The play soon became very rough, to the point where the inmates were playing tackle football. On one particular play, plaintiff sped towards an opposing ball carrier, inmate Jerome Westfield, preparing to make a tackle. When the two players collided, plaintiff fell back and landed on the ground, face down. According to Westfield, as plaintiff lay motionless on the turf, "he said he couldn't feel his legs." Plaintiff had injured his spinal cord and he is now quadriplegic. The parties have stipulated that the collision in the recreation yard was the cause of plaintiff's quadriplegia.

{¶ 5} Plaintiffs brought an action in this court under a theory of negligence. Specifically, plaintiffs contend that defendant's COs either permitted the inmates to participate in a prohibited game of tackle football or failed to timely discover and put a stop to the prohibited activity. Plaintiffs further allege that any failure of defendant's COs to timely discover the prohibited activity was due, at least in part, to defendant's "chronic under-staffing" of the camp.

{¶ 6} With respect to staffing, CO Lieutenant William Caudell testified that the camp was at "Zone One" staffing which means that four COs are on duty at each shift: one CO for each of the two dorms; one CO in the control room; and one CO designated as a floater. The duties of the floater are both varied and extensive, and they include: monitoring the recreation yard; periodically checking perimeter fences; manning the front gate for deliveries and mail service; aiding COs in the dorms as needed; helping staff run meal service; and other duties as assigned. Both second-shift floater, CO Wendell Kirgis and first-shift floater, CO Richard Kline, testified that a good part but not

all of the recreation yard is visible from the control room. Kirgis stated that the entire recreation area can be viewed from either dormitory. Caudell stated that the post orders required the floater to patrol the yard at half-hour intervals. For security purposes, the floater does not maintain a consistent or predictable pattern with respect to his movements, but the floater is expected to complete all of his duties within a rough time frame.

{¶ 7} Caudell recalled a time, many years prior to this incident, when the number of COs at the camp was six per shift. Caudell believed that budgetary restraints combined with the lower level of security required at the camp led to a reduction in staff. He opined that it is "realistically impossible" for a single floater to eliminate the risk of incidents in the recreation yard.

{¶ 8} Plaintiffs' corrections expert, Alvin Cohn, concurred with Caudell's assessment of the floater position. He too believed that it would be impossible for a single floater to perform all assigned duties and yet still patrol the yard at the suggested half-hour intervals. In Cohn's opinion, the recreation yard was an area of the facility that should be observed at all times and that the post order permitting half-hour intervals was "grossly inadequate." According to Cohn, minimum standards required defendant to employ video surveillance so that the control room officer could observe the inmates in the yard during the floater's absence.

{¶ 9} Although the court is convinced that additional security personnel and equipment would likely have resulted in increased inmate safety at the camp, and that such additional measures may have prevented plaintiff's injury, the court is not convinced that the security measures currently in place at the camp fail to comply with due care. Moreover, the law does not permit the imposition of tort liability upon the state where the plaintiff's harm results from negligence in the state's exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. *Reynolds v. State* (1984), 14 Ohio St.3d 68. Indeed, the language in R.C. 2743.02 that "the state" shall "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *" means that the state cannot be sued for such decisions. Id. See also *Dowling v. Ohio Dep't of Rehabilitation &*

Correction (1993), 63 Ohio Misc.2d 368 (women's reformatory is entitled to immunity as to its discretionary decision to provide yearly mammography screening only for certain inmates); *Johnston v. Medical College* (1993), 66 Ohio Misc.2d 112 (decision to change a patient's security status is one involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion therefore no liability can attach to that decision).

{¶ 10} The court finds that defendant's decisions regarding the allocation of its limited resources as it pertains to the purchase of security equipment and the employment of staff at the camp are basic policy decisions which are characterized by the exercise of a high degree of official judgment or discretion. Consequently, defendant may not be found liable under a theory of negligence for any harm to plaintiff allegedly arising from such decisions. Although plaintiffs' expert characterized defendant's staffing and equipment policies as "grossly inadequate," the evidence does not support such a level of culpability.

{¶ 11} Plaintiffs next contend that defendant's COs failed in their duty to plaintiff when they either tacitly permitted a prohibited game of tackle football to be played or did not discover and terminate such a game prior to the time plaintiff sustained his injury. Defendant argues that plaintiffs are barred from recovery by the doctrine of primary assumption of the risk. They contend that plaintiff voluntarily assumed a risk of physical harm when he elected to participate in a prohibited game of tackle football.

{¶ 12} Primary assumption of the risk is generally a bar to recovery in a negligence action on the basis that there is no duty of care owed by defendant to plaintiffs. *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. In such cases, "[p]rimary assumption of the risk relieves a recreation provider from any duty to eliminate the risks that are inherent in the activity * * * because such risks cannot be eliminated." *Whisman*, supra.

{¶ 13} This case is clearly distinguishable from those in which the doctrine has been applied to recreational or sporting events outside of a prison environment. In this

case, as with other cases involving inmates, there is a duty owed by defendant to supervise the conduct of plaintiff which arises from the custodial relationship between the parties. See, e.g., *Calvert v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2005-04128, 2006-Ohio-4345, ¶ 14; *Sloan v. Ohio Dept. of Rehab. & Corr.* (1997), 119 Ohio App.3d 331, 334; *Murphy v. Ohio Dept. Of Rehab. & Corr.* 10th Dist. No. 02AP-132, 2002-Ohio-5170, ¶ 13, quoting *McAfee v. Overberg* (1977), 51 Ohio Misc. 86. The existence of such a duty is antithetical to the doctrine of primary assumption of the risk. See Prosser & Keeton, Law of Torts (5 Ed.1984) 496-497, Section 68 (primary assumption of risk is a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action). Thus, plaintiffs may recover in this case if it is proven that defendant failed in its duty of supervision and that such a failure was a substantial factor in bringing about plaintiff's injury.

{¶ 14} While it is clear that the doctrine of primary assumption of the risk is not applicable in this case, it is equally evident to the court that plaintiff willingly participated in a prohibited tackle football game and thus assumed a risk of injury. Secondary assumption of the risk focuses on whether plaintiff has consented to or acquiesced in an appreciated or known risk. *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, ¶ 11, citing 2 Restatement of the Law 2d, Torts (1965), Section 496C, Comment b. The defense of secondary assumption of the risk has been merged with contributory negligence under R.C. 2315.34, Ohio's comparative negligence statute. Thus, plaintiff's secondary assumption of the risk is not a complete bar to recovery. *Siglow v. Smart* (1987), 43 Ohio App.3d 55, 56.

{¶ 15} Turning to the issue of defendant's conduct, defendant acknowledges that inmate participation in tackle football is prohibited by defendant's rule. Defendant also admits that one of the duties of its COs is to patrol the yard to prevent unauthorized activities such as tackle football and to put a stop to such activities when they occur. Defendant's Corrections Captain, Robert Alan Scott, testified that COs are responsible both for detecting and preventing unauthorized activities on the yard and that a floater must stop a tackle football game whenever it occurs. According to Captain Scott, if a tackle football game had been ongoing for a half hour or more on November 25, 2004,

his COs should have discovered it. Kirgis acknowledged that if a tackle football game had been ongoing for more than 40 minutes it should have been stopped.

{¶ 16} The weight of the testimony also establishes that whenever inmates wish to participate in a football game they must first inform the COs so that a football and flags may be issued to them. Kline testified that he passed out football equipment to the inmates on November 24, 2004. Thus, the COs on duty when plaintiff was injured must have had actual knowledge that football was going to be played, albeit the limited contact variety known as flag football.

{¶ 17} On the date in question, a group of inmates requested a football and flags in order to play a game of football. Kline testified that the inmates began exiting the dorms and entering the yard around 1:30 p.m. Kline remained in the yard until 1:45 p.m. when he was relieved by Kirgis. Kline testified that he knew the inmates were planning a game of football, but that the game had not yet begun when he was relieved. When his recollection of the time was questioned by plaintiffs' counsel, Kline testified that he was sure that the inmates had not entered the yard prior to 1:30 p.m.

{¶ 18} Kirgis testified that he relieved the first-shift floater at approximately 1:55 p.m. and that he entered the yard shortly thereafter. In contrast to the testimony of Kline, Kirgis stated that there were as few as 15 inmates in the yard at that time and that there were no inmates preparing to play football. Kirgis testified that it was a miserable day; cold, wet, and drizzly. After a few minutes in the yard, Kirgis went to the chow hall for a time that he estimated to be five minutes and then he went to each of the dorms. According to Kirgis, he simply stuck his head in to say "hey" to his fellow COs in Dorms A and B. After visiting the dorms, Kirgis went to the control room where he began a brief conversation with CO Garret. Kirgis testified that the conversation was interrupted when an inmate pounded on the window to get their attention and then yelled "a man fell out on the rec yard." Kirgis testified that this occurred at approximately 2:15 p.m.

{¶ 19} Although it took Kirgis just a minute or two to travel from the control room to the scene, he arrived there to find more than 200 inmates in the yard. Kirgis also found plaintiff lying face down on the ground and it was obvious to Kirgis that plaintiff was injured. Nurse R. Butke was on duty in the camp infirmary on November 25, 2004. Her incident report evidences the fact that she received a call at 2:40 p.m. of an inmate

down in the recreation yard and that she arrived at the scene at 2:46 p.m. Nurse C. Cline was also on duty that day and her incident report confirms that the call came in at 2:40 p.m.

{¶ 20} Plaintiff testified that he often played flag football in the recreation yard and that he had organized a league with six or seven teams and posted a schedule. He acknowledged that he had seen the other inmates playing tackle football "a couple of times" but that the COs had put a stop to it on those occasions. According to plaintiff, the "Turkey Day" game on November 24, 2004, was the first time he had participated in a tackle football game at the camp.

{¶ 21} Plaintiff testified that he knew CO Kirgis as "Bluebeard" and that he had seen him stop tackle football games whenever they were being played in the yard. Plaintiff remembered Kirgis taking the football away from the inmates on those occasions and telling them that tackle football was not allowed at the camp.

{¶ 22} Plaintiff recalled that he and the other inmates went to the recreation yard at approximately 12:00 p.m. on the day of the game with the intention of playing football. Plaintiff did not see a CO in the yard as the game began. His recollection was that approximately 10 to 15 minutes into the game, the play transitioned from flag football to tackle football. Plaintiff continued to play when the contact level escalated and he admitted at trial that he had initiated a few tackles himself.

{¶ 23} According to plaintiff, the game was divided into four, 15-minute quarters with the players observing a half-time break at which time they stood in the yard smoking cigarettes. Plaintiff maintains that the game, including breaks, had been going on for almost two hours prior to the time he sustained his injury. Plaintiff remembered running down the field on a kickoff at "about half-speed" with the intention of tackling the ball carrier, inmate Jerome Westfield. Plaintiff "blacked out" after making contact with Westfield and woke up without feeling below the neck and unable to move.

{¶ 24} Inmate Belfoure played in the Turkey Day game for Dorm B. Belfoure acknowledged that the inmates played tackle football "when they could get away with it," and he remembered that, on occasion, the inmates had played an entire game of tackle football without getting caught. Belfoure had played in Turkey Day games at the camp and he testified that the game was "always tackle." Belfoure testified that on this

particular day, the game started around 2:00 p.m. and that it had been going on for a half an hour to 45 minutes before plaintiff sustained his injury. Belfoure was standing on the sideline at the time plaintiff made contact with Westfield and he did not see any COs in the yard at that time.

{¶ 25} Inmate Westfield was much less definite about the time of the game and the time when plaintiff was injured. He testified that he went into the yard at 2:00 to 3:00 p.m., but that it could have been as late as 3:45 p.m. According to Westfield the game was tackle football from the outset. His recollection was that plaintiff was injured while attempting to tackle him about one or two hours into the game.

{¶ 26} Based upon the totality of the evidence submitted, the court finds that the game of flag football began at or about 1:30 p.m. and that it quickly became a tackle football game. The court further finds that tackle football was being played in the yard for a minimum of 45 minutes prior to plaintiff's injury. Indeed, the evidence convinces the court that defendant's COs either knew that a game of tackle football was taking place in the yard prior to plaintiff's injury, and chose not to stop the game, or that they failed to discover such a game within a reasonable period of time. Even Kirgis acknowledged upon cross-examination that he had no reason to question the inmates' testimony that the tackle football game was ongoing for one to two hours prior to plaintiff's injury. He also stated that his job description required the floater to remain in the recreation yard unless directed otherwise. Therefore, the court concludes that defendant was negligent and that defendant's negligence was a proximate cause of plaintiff's harm.

{¶ 27} Turning to the issue of contributory negligence, there is no doubt that plaintiff knew that he could quit the game at any time. In fact, plaintiff admitted that he had walked off the field on one other occasion after he was slammed to the ground by another inmate during a flag football game.

{¶ 28} Both Westfield and Belfoure testified that plaintiff was playing in a reckless fashion just prior to his injury and that he was virtually launching himself at opposing ball carriers. Although plaintiff denies this allegation, he admits that his collision with Westfield occurred as he initiated a tackle. Based on the competing accounts of plaintiff's style of play in the game and in consideration of the relative bias of each

witness who gave testimony on the issue, the court finds that plaintiff's participation in the game was aggressive but not reckless.

{¶ 29} Upon cross-examination, plaintiff acknowledged that he had played high school football and that he had witnessed teammates and opponents sustain injuries in various degrees of severity. Plaintiff was also aware of several accounts in which both college and professional football players sustained serious spinal cord injuries and paralysis as a result of their play. In fact, plaintiff admitted that he was required to give up high school football following a football-related spinal contusion. Plaintiff also knew that serious injuries had been sustained by tackle football players even though they were wearing helmets and other protective gear. Plaintiff was not wearing any such gear.

{¶ 30} The evidence establishes that defendant knew or should have known that a prohibited game of tackle football was taking place and that defendant could have or should have stopped the activity prior to plaintiff's injury. The evidence, however, also establishes that plaintiff failed to use due care for his own safety when he continued to participate in the game after having knowledge that tackle football was being played and that he could sustain physical injury in such a contest.

{¶ 31} Based upon the totality of the evidence, the court finds that the negligence of defendant was equal to that of plaintiff and that fault will be apportioned 50 percent to defendant and 50 percent to plaintiff. Accordingly, plaintiffs' damages shall be reduced by 50 percent to account for plaintiff's contributory fault. See R.C. 2315.33.

{¶ 32} Judgment shall be for plaintiffs in an amount to be determined at a subsequent trial on the issue of damages.

Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

ERIC SCHNETZ, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant
Case No. 2006-07406

Judge Clark B. Weaver Sr.

JUDGMENT ENTRY

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiffs. The case will be set for trial on the issue of damages which shall be reduced by 50 percent, to account for plaintiff's contributory negligence.

_____
CLARK B. WEAVER SR.
Judge

cc:

Brian M. Kneafsey Jr.
Christopher P. Conomy
James P. Dinsmore
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

David C. Sheldon
669 West Liberty Street
Medina, Ohio 44256

LP/cmd

Filed March 19, 2009
To S.C. reporter March 31, 2009