[Cite as *Morgan v. Ohio Conference of United Church of Christ,* 2012-Ohio-453.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brian Morgan et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-405
v.	:	(C.P.C. No. 10CVC-03-4516)
Ohio Conference of the United Church of Christ et al.,	:	(ACCELERATED CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 7, 2012

Rourke & Blumenthal, LLP, *Kenneth S. Blumenthal* and *Jonathan R. Stoudt*; *Cloppert, Latanick, Sauter & Washburn*, and *Robert L. Washburn*, for appellants.

Philipp & Gregory, Ronald D. Gregory and *Jeffrey T. Peters*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Plaintiffs-appellants, Brian Morgan ("Morgan") and his wife Amie Morgan (collectively "appellants"), appeal from the April 4, 2011 judgment of the Franklin County Court of Common Pleas in favor of defendants-appellees, Ohio Conference of the United Church of Christ ("OCUCC") and Templed Hills Camp and Conference Center ("Templed Hills") (collectively "appellees"). For the following reasons, we affirm.

{¶2} On November 12, 13, and 14, 2007, Morgan was scheduled to attend the Nature's Classroom program at Templed Hills as a teacher chaperone for sixth grade students of Worthington City Schools. The school district contracted with the owner of the site, OCUCC, to send the students. The contract set forth a fee of $7,565 for the group's participation. (Affidavit of Mark Glassbrenner, ¶4; Exhibit A-A to Affidavit.) On the evening of November 13, Morgan volunteered to act as a chaperone on one of the group's night hikes. Morgan had chaperoned students annually from approximately 2002 to 2007 and attended the night hike every year. The night hike had originally been scheduled for the evening of November 12, but was postponed to the second evening due to rain. (Affidavit of Kristi Patrick, ¶6; Affidavit of Kathy Mikkelson, ¶6.)

{¶3} The night hike was led by Matthew Marsh ("Marsh"), a Nature's Classroom instructor. Marsh testified that the purpose of the night hike was to use your other senses when your eyes were not as heightened as during the daylight. Marsh picked the trail and had been using that same trail for the night hikes he had been leading twice a week for the last seven months. It was an established trail and wider than shoulder length. Other trails on the property were harder to traverse. Marsh stated that the evening was a clear night, not cloudy, and the moon was out so the trail could be seen. The adults were also told to bring flashlights.

{¶4} The group met at approximately 7:30 p.m. and started with a game called "Bat & Moth," where one child is blindfolded and the children attempt to escape. It is similar to the game Marco Polo. The game lasted approximately 20 to 25 minutes, after which the group entered the woods. After several minutes of hiking, they had to cross a creek bed, but it was a receding creek so there was not much water in it. Marsh stood

in the middle of the creek bed on a rock with his flashlight and helped every child cross by holding their hand, and then he helped Morgan cross. While Marsh was counting the kids on the other side of the creek, he saw Morgan shift his weight and fall on his stomach. Marsh tried to call his supervisor on his radio and his cell phone but could not reach her. Then he called 911. When the EMTs arrived, Marsh took the students to an area away from Morgan.

{¶5} Morgan testified to a slightly different version of facts. He had never been on that particular trail and thought it was very overgrown. He was not advised to take a flashlight on the hike and remembered the night being cloudy. Morgan testified that as he approached the creek Marsh was there to help him cross and had a flashlight. Morgan did not remember specifically, but thinks he used Marsh's shoulder to step on a tree stump or rock as he took a long stride to cross the creek. After a few seconds, Marsh gave some directions for the next activity and Morgan took a step with his right foot, lost traction and fell. He knew immediately that he was seriously injured. Morgan suffered severe injuries to his left arm and shoulder. Morgan testified he had to ask Marsh to call 911 several times before Marsh called them.

{¶6} Morgan and his wife filed a complaint against OCUCC and Templed Hills as the owners and operators of the site and the employers of Marsh for damages Morgan suffered resulting from Marsh's negligence, as well as for Amie Morgan's loss of consortium. A stipulation of dismissal pursuant to Civ.R. 41 was filed.

{¶7} The claim was refiled on March 22, 2010. Appellees filed a motion for summary judgment, contending that appellants' claims were barred by the affirmative defense of primary assumption of the risk and by the Ohio recreational user statute,

R.C. 1533.181. Appellees argued that Morgan assumed the risk of his injury by voluntarily participating in the night hike and that, under the circumstances, appellees owed no duty to protect Morgan from injury. Appellees also argued that Ohio's recreational statute, R.C. 1533.181, barred his claims because Morgan was a recreational user and, as such, appellees owed no duty to Morgan as a hiker pursuant to the statute.

{¶8} In opposition to appellees' motion, Morgan argued that the doctrine of primary assumption of the risk does not bar his cause of action, as the dangers presented by Marsh's negligence were not inherent to hiking. Also, Morgan argued that the recreational user statute was inapplicable to these facts because the negligence alleged was based on the negligence of an employee, not a theory of premises liability. Additionally, Morgan claimed he was not a recreational user because he was a business invitee.

{¶9} By decision and entry filed April 4, 2011, the trial court granted appellees' motion for summary judgment finding that the doctrine of primary assumption of the risk barred appellants' claims. The doctrine removed any duty on appellees' part to protect Morgan from risks inherent to the activity of night hiking.

{¶10} Appellants assert one assignment of error on appeal:

> The trial court erred in granting the motion for summary judgment filed by the Appellees Ohio Conference United Church of Christ and Templed Hills holding that the doctrine of primary assumption of the risk bars Plaintiffs from recovering on their claims for negligence and loss of consortium.

{¶11} In their assignment of error, appellants challenge the granting of the motion for summary judgment, contending that the doctrine of primary assumption of the risk is inapplicable to these facts. By asserting a negligence action, appellants were required to prove by a preponderance of the evidence that appellees owed them a duty of care, that the duty was breached and that the breach proximately caused Morgan's injuries. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). Under the law of negligence, a defendant's duty to a plaintiff depends on the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 645 (1992).

{¶12} The doctrine of primary assumption of the risk has often been applied to cases involving sporting events and recreational activities. *Crace v. Kent State Univ.*, 185 Ohio App.3d 534, 2009-Ohio-6898, ¶12, citing *Ballinger v. Leaniz Roofing, Ltd.,* 10th Dist. No. 07AP-696, 2008-Ohio-1421, 2008 WL 802722, ¶8, citing *Anderson v. Ceccardi*, 6 Ohio St.3d 110, 114 (1983). Whether to apply the affirmative defense of primary assumption of the risk presents an issue of law for the court to determine. *Crace* at ¶12, citing *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 435 (1996). We therefore review the trial court's decision de novo. *Crace* at ¶12, citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523 (1996), citing *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 563 (1994).

{¶13} Under the doctrine of primary assumption of the risk, a plaintiff who voluntarily engages in a recreational activity or sporting event assumes the inherent risks of that activity and cannot recover for injuries sustained in engaging in the activity

unless the defendant acted recklessly or intentionally in causing the injuries. *Crace* at ¶13, citing *Santho v. Boy Scouts of Am.*, 168 Ohio App.3d 27, 2006-Ohio-3656, ¶12. The doctrine is based on the fiction that the plaintiff has "tacitly consented" to the risk of injury inherent in the activity. *Collier v. Northland Swim Club*, 35 Ohio App.3d 35, 37 (10thDist.1987). The rationale behind the doctrine is that certain risks are so intrinsic in some activities that the risk of injury is unavoidable. *Crace* at ¶13, citing *Collier*. The test for applying the doctrine of primary assumption of the risk to recreational activities and sporting events requires that "(1) the danger is ordinary to the game, (2) it is common knowledge that the danger exists, and (3) the injury occurs as a result of the danger during the course of the game." *Santho* at ¶12.

{¶14} The affirmative defense of primary assumption of the risk completely negates a negligence claim because the defendant owes no duty to protect the plaintiff against the inherent risks of the recreational activity in which the plaintiff engages. *Crace* at ¶15, citing *Gentry v. Craycraft*, 101 Ohio St.3d 141, 144, 2004-Ohio-379, citing Prosser & Keeton, Law of Torts (5th Ed.1984) 496, Section 68; *see also Gallagher* at 431, citing Prosser & Keeton, 496-97, Section 28 ("Primary assumption of risk 'is really a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action.' "). Primary assumption of the risk serves to negate the duty of care owed by the defendant to the plaintiff. *Wolfe v. Bison Baseball, Inc.,* 10th Dist. No. 09AP-905, 2010-Ohio-1390, 2010 WL 254597, ¶18. "Because a successful primary assumption of risk defense means that the duty element of negligence is not established as a matter of law, the defense prevents the plaintiff from even making a prima facie case." *Id.* at ¶21, citing *Gallagher* at 431-32.

{¶15} With the doctrine of primary assumption of the risk, the injured plaintiff's subjective consent to and appreciation for the inherent risks of the recreational activity are immaterial to the analysis. *Crace*, 185 Ohio App.3d 534, ¶16, citing *Gentry* at 144. The types of risks inherent to an activity are those risks that are foreseeable and customary risks of the sport or recreational activity. *Deutsch v. Birk*, 189 Ohio App.3d 129, 2010-Ohio-3564 (12th Dist.), ¶12, citing *Thompson v. McNeill*, 53 Ohio St.3d 102, 104-106 (1990). In accordance with these principles, this court held in *Gehri v. Capital Racing Club, Inc.*, 10th Dist. No. 96APE10-1307, 1997 WL 324175 (June 12, 1997), that "primary assumption of [the] risk requires an examination of the activity itself and not plaintiff's conduct. If the activity is one that is inherently dangerous and from which the risks cannot be eliminated, then a finding of primary assumption of [the] risk is appropriate." *Id.* at *4. "The law simply deems certain risks as accepted by the plaintiff regardless of actual knowledge or consent." *Crace* at ¶16. The focus in primary assumption of the risk is on the defendant's conduct, whether such conduct was reckless or intentional. *Gentry* at ¶9.

{¶16} In the instant case, the trial court noted that hiking is a recreational activity to which the doctrine applies, and hiking contains an inherent risk of slipping, tripping or falling that cannot be eliminated, even more so with hiking at night. (Apr. 4, 2011 Decision, 2.) Appellants argue that primary assumption of the risk does not apply to these facts because the risks which led to the injury in this case could have been eliminated if Marsh had chosen a different trail. However, this is essentially a claim that Marsh's conduct was reckless. In *Marchetti v. Kalish*, 53 Ohio St.3d 95, 100 (1990), fn. 3, the Supreme Court of Ohio cited the comments *f* and *g* to Section 500 of the

Restatement of Torts 2d, 590, which defined the three mental states of tortious conduct, as follows:

> *f. Intentional misconduct and recklessness contrasted*. Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.
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> *g. Negligence and recklessness contrasted.* Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

{¶17} Appellants argue that Marsh should have chosen a different path for the hikers that evening. However, appellants did not allege that Marsh was reckless in choosing that path. The trial court specifically found that hiking, especially night hiking, involves the risk of tripping, slipping and falling. Hiking does involve these risks.

Morgan volunteered to participate in the night hike and assumed these risks. The court in *Shaner v. Smoot*, 7th Dist. No. 712, 2001-Ohio-3429, 2001 WL 1243920, found that persons involved in recreational activities assume the ordinary risks of the activity and the failure to warn of the ordinary risks does not subject one to liability. In *Shaner*, the plaintiff was injured while riding a motorcycle in tall grass with tree stumps scattered throughout the area. The plaintiff was aware that there were tree stumps in the area where he was riding. However, the court found that the risk of hitting a tree stump was an ordinary risk of riding a motorcycle in such a location, and the defendants could not be liable for failure to warn of an ordinary risk assumed by the plaintiff.

{¶18} Appellants concede that there are risks inherent in hiking that cannot be avoided. However, appellants contend that the risks which led to Morgan's particular injury could have been avoided if Marsh had picked a trail which was better maintained with less-demanding obstacles. Thus, appellants argue, implied assumption of the risk is more appropriate to these facts, which has been merged into Ohio's comparative negligence statute, R.C. 2315.19. However, these risks were not risks out of the ordinary for night hiking.

{¶19} In California, the courts have addressed similar issues and applied primary assumption of the risk, finding that a defendant is only liable for a plaintiff's injuries if the defendant's conduct is reckless or totally outside the range of the ordinary activity involved in the sport or activity. In *Andia v. Full Service Travel*, S.D.Cal. No. 06cv0437 WQH (JMA), 2007 WL 4258634 (Nov. 29, 2007), the plaintiff was a passenger on the defendant's cruise ship and participated in a shore expedition known as the HL 15, the Kilauea Lava Viewing Hike. The plaintiff slipped on one of the rocks

and fell, fracturing her foot. She filed a negligence action, and the court found that the doctrine of primary assumption of the risk applied, negating the defendant's duty to prevent the plaintiff from slipping and falling on lava rock, an inherent risk of the activity of lava hiking.

{¶20} In *Kane v. Natl. Ski Patrol Sys., Inc.*, 88 Cal.App.4th 204, 209, 105 Cal.Rptr.2d 600 (2001), a ski instructor led participants in a skills clinic for a voluntary ski patrol. The participants were reluctant to proceed to the most difficult portion of the trail, which was icy and contained trees, rocks, and stumps, but the instructor encouraged them to go. The two plaintiffs were injured, one fell to his death and the other one suffered a broken leg. The court granted summary judgment in favor of the defendant, holding that the doctrine of primary assumption of the risk applied, negating the defendant's duty of care. The court held that "an instructor's assessment errors—either in making the necessarily subjective judgment of skill level or the equally subjective judgment about the difficulty of the conditions—are in no way 'outside the range of the ordinary activity involved in the sport.' " *Id.* at 214.

{¶21} Similarly, here, any assessment error in the subjective judgment of the path chosen by the Nature's Classroom instructor, if any, is not outside the range of the ordinary activity involved in night hiking. As we have said, tripping, slipping, and falling are inherent risks of night hikes, regardless of the trail chosen.

{¶22} In *Kalter v. Grand Circle Travel*, 631 F.Supp.2d 1253 (C.D.Cal.2009), the plaintiff suffered serious injuries when she fell while hiking at Inca ruins at Machu Picchu. The plaintiff filed a negligence action against the vacation tour operator, but the court applied the primary assumption of the risk doctrine, finding that hiking across

uneven and challenging terrain is an inherent risk when hiking in ancient ruins, and inherent in this activity is the risk that one will fall and become injured.

{¶23} This case law from California is similar to our Ohio law. Morgan attempts to argue that the conditions which led to his injury, attempting to cross a creek up a slippery embankment in dark, wet conditions, were not inherent to hiking. However, Morgan had already crossed the creek when he fell, and the dark is inherent in night hiking regardless of the trail chosen, and the ground was wet because it had been raining the day before. That was the reason the hike had been postponed. Despite Morgan's attempt to argue that the risks were heightened, we find, under these facts, that these risks were inherent risks to night hiking.

{¶24} Appellants rely on *Byer v. Lucas*, 7th Dist. No. 08AP-351, 2009-Ohio-1022, 2009 WL 581710, to argue that the risks involved here outweigh the ordinary risks involved in the recreational activity that the plaintiff was engaged. In *Byer*, the plaintiff filed a negligence action against the owner and driver of a tractor pulling a hay wagon as part of party festivities. The defendant was drinking alcohol at the party. The plaintiff was riding in the wagon. The defendant stopped the wagon at the top of a steep hill and advised the passengers that they could get out of the wagon and either walk down the hill or wait to be picked up by a truck to return to the party. Apparently, the plaintiff did not hear the warning and remained on the wagon. The defendant lost control of the wagon, and plaintiff was ejected and treated for severe injuries. Plaintiff filed suit alleging negligence and intentional and reckless conduct. On appeal, the court found there were risks that were not ordinary, customary, or foreseeable to a hayride.

{¶25} Ordinary risks for a hayride include "getting scratched by tree braches [sic], being bounced around on a wagon, and even losing one's balance and falling off the wagon." *Id.* at ¶30. In *Byer*, however, the court found risks that were out of the ordinary for a hayride, including the choice of route, the driver control and severe injuries. The driver chose to drive down the steep hill while another driver took a safer route. The tractor and wagon careened down the hill out of control. Many passengers were thrown from the wagon. Finally, the plaintiff suffered severe injuries including cuts to her head, requiring stitches, and two segments of her tailbone were fractured.

{¶26} The choice of route, down a steep hill, the out-of-control nature of the ride and the injuries the plaintiff received were not risks that would be expected from a hayride. The court found that "a farm tractor and its wagon cascading down a steep hill out of control and jackknifing to a stop throwing passengers from it is not an inherent risk of a hayride." *Id.* at ¶39. Thus, the court found primary assumption of the risk inapplicable. But *Byer* is distinguishable from the case at hand. The court in *Byer* found the risks were not inherent to the recreational activity, whereas here, we find the risks were inherent to night hiking. Also in *Byer*, the plaintiff alleged that the defendant's conduct was intentional or reckless. Here, the only allegation is that Marsh's conduct was negligent. Thus, the facts of *Byer* distinguish it from the facts at hand.

{¶27} Under the doctrine of primary assumption of the risk, appellees owed no duty to protect appellants from the inherent risks of injury related to the night hike. Since the primary assumption of the risk negates the duty element of appellants' negligence claim, appellants are precluded from making a prima facie case of negligence, and the trial court did not err in granting appellees' motion for summary

judgment. Amie Morgan's claim also fails because it is dependent upon her husband's successful claim. Appellants' assignment of error is overruled.

{¶28} For the foregoing reasons, appellants' assignment of error is overruled, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

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