[Cite as *Wolfe v. AmeriCheer, Inc.*, 2012-Ohio-941.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lindsay M. Wolfe,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-550 (C.P.C. No. 10CVH-05-7045)
AmeriCheer, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 8, 2012

Plevin & Gallucci Co., LPA, Michael D. Shroge, and *Frank L. Gallucci, III*, for appellant.

Reminger Co., L.P.A., Martin T. Galvin and *Rafael P. McLaughlin*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Plaintiff-appellant, Lindsay M. Wolfe, was seriously injured while competing in a cheerleading event. She appeals from the May 24, 2011 decision and entry granting defendant-appellee AmeriCheer, Inc.'s ("AmeriCheer") motion for summary judgment. For the reasons that follow, we affirm.

{¶2} Lindsay M. Wolfe, then 13 years old, participated in a cheerleading competition on February 2, 2003 at the Columbus Convention Center. Americheer sponsored the competition known as the 2003 Winter Championship. As a prerequisite to Lindsay being allowed to participate in the competition, Lindsay's mother, Barbara

Wolfe, signed a "Medical Treatment Authorization and Release of Liability" before the competition. The release contained, in pertinent part, the following language:

> I further release AmeriCheer and its representatives from any claims for injury or illness that may be sustained as a result of their participation in this event. I acknowledge and understand that in participating in this event, there is the possibility they may sustain physical illness or injury in connection with his or her participation. I further understand and acknowledge that my daughter [or] [son] and I assume the full risk of physical injury by their participation and I further release the event location, AmeriCheer, Inc., as well as it's [sic] representatives, from any claims for personal injury, [or] illness that they may sustain during camp.

{¶3} Lindsay was a member of the Xtreme Team Athletics All-Star Cheer & Dance, a private all-star cheerleading team. Xtreme team members trained and competed in a style of cheerleading characterized by gymnastic-type stunts. At the time of her injury, Lindsay was acting as a "base" who, along with others, supported and lifted another cheerleader, the "flyer," into the air. At a point in the routine where Lindsay had assisted in raising the flyer, the flyer slipped or lost her balance and fell, landing on Lindsay. Lindsay sustained a T8 spinal compression fracture as a result of the fall.

{¶4} Teams use spotters when cheerleaders are learning new skills, practicing, or performing stunts in which one or more cheerleaders are elevated above the floor. The spotters are there to catch a cheerleader in case of a fall. AmeriCheer provided the spotters used for the 2003 Winter Championship. In her complaint, Lindsay alleged that:

> [D]ue to the wreckless [sic], wanton and complete disregard for the safety of Plaintiff, Defendant failed to provide the proper spotters and coaching, as a result Plaintiff was caused to sustain severe and permanent injuries to her person when her team members fell onto her person.

(Complaint, at ¶ 3.)

{¶5} AmeriCheer moved for summary judgment on the grounds that the release signed by Lindsay's mother barred any negligence claims. Additionally, AmeriCheer argued that the doctrine of primary assumption of risk also acted to bar Lindsay's claims.

{¶6} Lindsay responded that the spotters' failure to be properly positioned and failure to move in when the team started the stunt constituted reckless and wanton disregard for Lindsay's safety, not mere negligence. Therefore, she argued there existed a genuine issue of material fact as to whether the conduct of the spotters was wanton or reckless.

{¶7} The trial court found that the release signed by Barbara Wolfe on behalf of her daughter was valid, and therefore, the trial court concluded that Lindsay was precluded, by operation of the lease, from bringing any negligence claims against AmeriCheer related to her injuries. The court also agreed with AmeriCheer that the doctrine of primary assumption of risk precluded the negligence claims. Lindsay has not challenged those issues on appeal.

{¶8} The trial court then considered whether there existed a genuine issue of material fact concerning the issue of willful, wanton, or reckless conduct. The court found that Lindsay had failed to present evidence that satisfied the threshold required for a showing of wanton or reckless conduct.

{¶9} On appeal, Lindsay assigns the following as error:

> I. The trial court erred in granting Defendant's Motion for Summary Judgment because material facts of willful, wanton or reckless conduct exist, placing that issue in dispute for a jury to determine.
>
> II. The trial court erred in concluding that Plaintiff set forth no facts other than those alleged by Plaintiff herself. The trial court's own Order citing statements garnered from the deposition testimony of Defendant's President and CEO clearly establishe a question of fact for which a jury is to determine.

{¶10} At the outset, we address the issue of the deposition testimony of Elizabeth Rossetti, the president and CEO of AmeriCheer. Ms. Rossetti's deposition was not filed with the court of common pleas. AmeriCheer attached a few pages of excerpts from Ms. Rossetti's deposition as an exhibit to its reply in support of summary judgment, but the deposition itself was never filed with the court of common pleas. Only the following three depositions were made part of the record: 1) Lindsay Wolfe's deposition taken on Friday,

October 10, 2008; 2) Barbara Wolfe's deposition taken on December 9, 2008; and 3) Lindsay Wolfe's second deposition taken on March 15, 2011. A copy of Ms. Rossetti's entire deposition was attached as part of AmeriCheer's appendix to its appellate brief. However, since the complete deposition was not made part of the record, we will not consider the entirety of Ms. Rossetti's deposition.

{¶11} Nevertheless, both parties and the trial court relied on the excerpts of Ms. Rossetti's deposition without objection in the summary judgment proceedings. The trial court could and did rely on those representations when it quoted some of Ms. Rossetti's testimony. *Sicard v. Univ. of Dayton*, 104 Ohio App.3d 27, 30 (2d Dist.1995), fn. 1. "A trial court, however, can consider non-complying documents in adjudicating a summary judgment motion when no objection to the documents is raised." *New Falls Corp. v. Russell-Seitz*, 10th Dist. No. 08AP-397, 2008-Ohio-6514, ¶ 12. "Absent an objection, a trial court has the discretion to consider unauthenticated documents when rendering summary judgment." *Columbus v. Bahgat*, 10th Dist. No 10AP-943, 2011-Ohio-3315, ¶ 16. Accordingly, we shall consider the deposition excerpts as well since both parties argue that Ms. Rossetti's deposition supports their respective arguments.

{¶12} Lindsay's assignments of error challenge the trial court's ruling on AmeriCheer's motion for summary judgment. We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995). Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

{¶13} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280 (1996).

Once the moving party has met its initial burden, the non-moving party must produce competent evidence establishing the existence of a genuine issue for trial. *Id*. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the non-moving party has no evidence to prove its case. *Id*. Rather, the moving party must point to some evidence that affirmatively demonstrates that the non-moving party has no evidence to support his or her claims. *Id*. "Permitting a nonmoving party to avoid summary judgment by asserting nothing more than 'bald contradictions of the evidence offered by the moving party' would necessarily abrogate the utility of the summary judgment exercise. *C.R. Withem Enterprises v. Maley*, 5th dist. No. 01 CA 54, 2002-Ohio-5056, at ¶24. Courts would be unable to use Civ.R. 56 as a means of assessing the merits of a claim at an early stage of the litigation and unnecessary dilate the civil process." *Greaney v. Ohio Turnpike Comm.,* 11th Dist. No. 2005-P-0012, 2005-Ohio-5284, ¶ 16. Bearing this standard in mind, we shall address the two assignments of error as one.

{¶14} Because of the release signed by Lindsay's mother and the doctrine of primary assumption of risk, Lindsay is precluded from bringing a negligence action against AmeriCheer. Under the doctrine of primary assumption of the risk, a plaintiff voluntarily engaged in a recreational activity assumes the inherent risks of that activity and cannot recover for injuries sustained while engaging in that activity unless the defendant acted recklessly or intentionally in causing the injuries. *Marchetti v. Kalish,* 53 Ohio St.3d 95 (1990), syllabus; *Crace v. Kent State Univ.*, 185 Ohio App.3d 534, 2009-Ohio-6898, ¶ 13 (10th Dist.).

{¶15} In *Crace,* this court found that the doctrine of primary assumption of risk barred a negligence claim against a university in connection with a cheerleading injury. Crace, the captain of the Kent State University varsity cheerleading team, was the flyer during a human pyramid stunt. The first two attempts failed, and both times Crace fell from around 15 feet in the air where the spotter at the front of the formation caught her. On the third attempt the stunt failed again. When Crace came down for the third time, the spotter behind her panicked, shielded his eyes and moved out of the way. As a result, Crace's fall was unbroken, and caused catastrophic injuries. *Id*. at ¶ 7.

{¶16} As was the case with *Crace*, Lindsay can only proceed with her personal injury claims if AmeriCheer acted willfully, wantonly, or recklessly. The issue is whether Lindsay has set forth competent evidence establishing a genuine issue of material fact on the issue of willful, wanton, or reckless conduct.

{¶17} Ordinarily, the issue of willful, wanton, or reckless conduct is a question for the jury. *Matkovitch v. Penn Cent. Transp. Co.*, 69 Ohio St.2d 210, 214 (1982). In order to find wanton misconduct, there must be a failure to exercise any care whatsoever by one who owes a duty of care to another, and the failure must occur under circumstances where there is a great probability that harm will result from the lack of care. *Hawkins v. Ivy*, 50 Ohio St.2d 114 (1977). By way of contrast, the term "negligence" is synonymous with heedlessness, thoughtlessness, inattention, inadvertence, and oversight, and conveys the idea of inadvertence as distinguished from premeditated or formed intention, or a conscious purpose to do a wrong act or to omit the performance of a duty. *Tighe v. Diamond*, 149 Ohio St. 520, 525 (1948). Negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor. *Roszman v. Sammett*, 26 Ohio St.2d 94, 96-97, (1971), paragraph two of the syllabus. Evidence of a disposition to perversity may be shown by acts of stubbornness, obstinacy, or persistency in opposing that which is right, reasonable, correct, or generally accepted as a course to follow in protecting the safety of others. *Id*.

{¶18} Reckless disregard for the safety of another occurs if one does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable person to realize, not only that his conduct creates an unreasonable risk of harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. *Thompson v. McNeill*, 53 Ohio St.3d 102, 104-05 (1990).

{¶19} "What constitutes an unreasonable risk under the circumstances of a sporting event must be delineated with reference to the way the particular game is played, *i.e.*, the rules and customs that shape the participants' ideas of foreseeable conduct in the course of a game." *Id*.

{¶20} Examining the evidence in the light most favorable to the non-moving party, Lindsay has set forth evidence that two of the three spotters provided by AmeriCheer were not in the positions they should have been at the time of the injury. Whether those actions or inactions create a factual issue as to wanton or reckless misconduct must be determined by applying the evidence to the standards for wanton or reckless disregard for safety. Only one of the spotters was on the mat during the formation of the stunt. The videotape of the competition was not made part of the record, and therefore it is not possible to determine the exact placement of the spotters during Lindsay's routine. All that is known is that at least one spotter was standing on the edge of the mat, and two others were observing in the back. (Barbara Wolfe Depo., at 36.) According to Ms. Rossetti's testimony while watching the video, the middle spotter was moving forward as the team was preparing to execute the mount. Barbara Wolfe estimated the spotters were at the edge of the mat approximately six to eight feet from the cheerleaders. (Barbara Wolfe Depo., at 72.) Lindsay estimated the spotters were 25 feet from where the cheerleaders were forming the stunt. (Lindsay Wolfe Depo., at 165.)

{¶21} Ms. Rossetti testified that spotters were not even necessary at AmeriCheer competitions, but were there to provide additional lines of safety and to help prevent injuries if they were able to do so. (Elizabeth Rossetti Depo., at 17.) When the cheerleaders are about to perform a stunt like the one in which Lindsay was injured, Ms. Rossetti said: "They should be present, near the - - on the mat. If they're on the mat, they're close enough to be at a given particular time, if they're needed." When asked where on the mat they should be positioned, Ms. Rossetti answered: "Well, it depends on the routine. It's hard to point out. But there's no - - again, it's judgment on their part. It's not trained; it's learned. It's judgment. If they feel that they can be there or they're there, then it's their judgment to make that call. * * * It's not my judgment to make that call. * * * It's their judgment to be on the mat and provide an additional level of safety, yes." (Elizabeth Rossetti Depo, at 52.)

{¶22} In *Dresher*, 75 Ohio St.3d at 292, the Supreme Court of Ohio explicitly stated that when a court receives a properly presented motion for summary judgment, a non-moving party may not rely upon the mere allegations of its complaint, but, instead,

must demonstrate that a material issue of fact exists by directing the court's attention to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. Here, Lindsay has failed to cite to facts that support her contention. For example, Lindsay argues that there was a great probability that harm would result from lack of care. She claims that the spotters' failure to move in when Lindsay's team began the stunt is a perverse act and conscious disregard of their duty to provide safety. These types of statements add nothing to the analysis required by a court in addressing a motion for summary judgment.

{¶23} There is no evidence in the record that supports these assertions. Cheerleading carries inherent risks to those participants engaging in stunts of the kind performed at the Winter Championship. (Barbara Wolfe Depo., at 36; *see Crace* at ¶ 34, 35.) There was no evidence that in 2003 there were standards for spotters or even how many spotters were needed. (Elizabeth Rossetti Depo., at 17, 60.) The only evidence put forth was testimony that two of the spotters were not standing on the mat. Ms. Rossetti watched the video during her deposition, and testified that one spotter was moving in. (Elizabeth Rossetti Depo., at 90.) There was no testimony that the spotters had a duty to move closer when the team began the stunt apart from Lindsay's observation that at every competition she attended the spotters would walk up. (Lindsay Wolfe Depo., at 66-67.) Lindsay claims that when the cheerleaders were practicing or learning stunts that the coaches stood on the mat and spotted for them. While for summary judgment purposes this statement is taken as true, it is somewhat of a red herring. Ms. Rossetti testified that, at camp, the spotters can be close by, but, in a competition, they cannot always be on top of them because they will interfere with something else going on. (Elizabeth Rossetti Depo., at 91.) Lindsay also testified that the coaches spotted them during practices. She then stated: "Once we were comfortable with, you know, and they were comfortable with us doing it, yes, they would like stand on the edge of the mat and watch." (Lindsay Wolfe Depo., at 66.) Taken at face value, by the time a team is ready to perform the routine in competition, the coaches, who formerly spotted, would stand at the edge of the mat. Thus, the evidence suggests the spotters were properly positioned. Even if, as Lindsay testified, the spotters should have moved closer in preparation for the stunt, at least one of them did. These facts do not

demonstrate a disposition to perversity on the part of the spotters or a failure to exercise any care whatsoever. Therefore, an issue as to whether the spotters' conduct was wanton does not exist.

{¶24} Similarly, evidence regarding reckless misconduct is lacking. As stated above, in order to show reckless misconduct, one must act or intentionally fail to act when it is his duty to the other to do so, knowing or having reason to know of facts which would lead a reasonable person to realize, not only that his conduct creates an unreasonable risk of harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. *Thompson*, 53 Ohio St.3d at 104-05.

{¶25} The unrefuted evidence is that in 2003 AmeriCheer was under no duty to provide spotters at its competitions, but did provide them to create an additional layer of safety. There was testimony that the spotters were, themselves, trained cheerleaders from AmeriCheer's summer camp. There was no evidence that AmeriCheer inadequately trained its spotters. According to Lindsay, the spotters were in a location where coaches would stand after they were comfortable with how the cheerleaders were performing the routine. Lindsay testified that she had no opportunity to catch the flyer as she was falling. Lindsay's mother believed that if the spotters had been doing their job the accident probably would not have been as severe or have happened. She also acknowledged that it was possible that the spotter could have been right there and not have been able to stop the accident.

{¶26} There is no evidence that the spotters themselves recognized any facts that would lead them to believe that their conduct could or did create an unreasonable risk of harm to another. There was no evidence at all from the spotters at the event. At best, their actions could be considered negligent. Therefore, Lindsay has failed to establish a genuine issue of material fact with regard to recklessness.

{¶27} The first assignment of error is overruled. The second assignment of error is also overruled since all parties relied on the deposition testimony of Ms. Rossetti and, as discussed above, it was not error for the trial court to rely on the excerpts. Since our

review is de novo and we considered all the evidence that was in the record, there was no error.

{¶28} It is unfortunate that Lindsay was seriously injured at the competition, and we realize that, because of the accident, she has suffered a great deal. But there was no evidence of recklessness or wantonness that renders AmeriCheer liable for damages.

{¶29} Accordingly, appellant's assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and DORRIAN, J., concur.

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