

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

JOSEPH P. MOENING, et al.

Plaintiffs

v.

THE UNIVERSITY OF TOLEDO

Defendant

Case No. 2005-09774

Judge J. Craig Wright

DECISION

{¶1} On August 31, 2006, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On September 26, 2006, plaintiffs filed a memorandum in opposition. On October 6, 2006, an oral hearing was held on defendant's motion for summary judgment. At the conclusion of the oral arguments presented by counsel, the court announced its decision to grant defendant's motion and directed defendant's counsel to submit proposed general findings to that effect. The court hereby issues the following determination.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} “*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ***” See, also, *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d

| | | |
|---------------------|-------|----------|
| Case No. 2005-09774 | - 2 - | DECISION |
|---------------------|-------|----------|

317.

{¶4} Plaintiff¹ was injured on September 20, 2003, during a melee that occurred immediately following the conclusion of a football game held on defendant's premises. A throng of fans and revelers formed on the field and soon thereafter congregated under the goal posts. Plaintiff voluntarily left his seat after the game, climbed over a railing, and proceeded to slide several feet down a concrete wall to gain access to the playing field. Students, spectators, and fans stormed onto the field and climbed onto the north goal posts in an effort to tear them down. Plaintiff witnessed the crowd tear down the north goal posts and carry them out of the stadium. A crowd also surrounded the second or south set of goal posts and began the process of bringing them down as well. There were several persons sitting on or hanging from the crossbar while others were on the ground pulling and twisting at the structure in order to bring it down to ground level. At one point, the crossbar broke free sending parts of the structure along with the persons previously seated on it, hurtling to the ground, trapping plaintiff underneath the pile. Plaintiff was knocked unconscious and suffered injury to his lower back.

{¶5} Plaintiff claims that his legal status at all times was that of an invitee. Plaintiff insists that he never heard the announcements warning fans to stay off the field. Plaintiff further asserts that defendant is liable for failing to eliminate the risk of harm from the dismantling of the goal posts, either by installing collapsible goal posts or by providing enhanced police presence to control the crowd around the goal posts.

{¶6} Defendant argues that no duty was owed to plaintiff and that plaintiff's claim should be barred based on the doctrine of primary assumption of the risk. Defendant insists that plaintiff assumed the risk of harm when he joined the revelers and placed himself in the area near the goal posts. In addition, defendant argues that plaintiff's status

1

For the purposes of this decision, plaintiff shall refer to Joseph Moening.

| | | |
|---------------------|-------|----------|
| Case No. 2005-09774 | - 3 - | DECISION |
|---------------------|-------|----------|

was that of a trespasser, not an invitee, because he exceeded the scope of his invitation when he left the stands and trespassed onto the playing field. Defendant also maintains that the danger to plaintiff was open and obvious.

{¶7} 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. As stated by the Supreme Court of Ohio, primary assumption of the risk "prevents a plaintiff from establishing the duty element of a negligence case and so entitles a defendant to judgment as a matter of law, [therefore] it is an issue especially amenable to resolution pursuant to a motion for summary judgment." *Gallagher v. Cleveland Browns* (1966), 74 Ohio St.3d 427, 433. Primary assumption of the risk has been defined as " *** (1) consent or acquiescence in (2) an appreciated or known (3) risk ***." *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 112, quoting *Benjamin v. Deffet Rentals* (1981), 66 Ohio St.2d 86, 89. The doctrine is applicable as a defense where "the risk is so obvious that plaintiff must have known and appreciated it." *Id.* The Supreme Court of Ohio ruled that "when a plaintiff is found to have made a primary assumption of risk in a particular situation, that plaintiff is totally barred from recovery, as a matter of law ***." *Gallagher, supra*, at 431.

{¶8} As to plaintiff's privilege or lack thereof to be on the field, the court finds that the issue whether defendant warned fans to stay off the field and the extent to which any person could hear the announcement over the crowd noise is not material to the analysis of this case. Plaintiff's method of arriving on the field, in and of itself, describes a path that was clearly not intended or provided for by defendant. Rather, plaintiff ignored obvious barriers and risked serious harm during each stage of his journey to the field. The court finds that plaintiff was clearly not an invited guest by the time he arrived on the playing field and joined the fracas. See *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75

| | | |
|---------------------|-------|----------|
| Case No. 2005-09774 | - 4 - | DECISION |
|---------------------|-------|----------|

Ohio St.3d 312, 316. Thus, because the duty owed to a licensee and a trespasser is the same, defendant would only owe plaintiff the duty to refrain from wanton or reckless conduct which is likely to injure him.

{¶9} In the instant case, however, the court finds that plaintiff knowingly and consciously placed himself in close proximity to the goal post with utter disregard for the obvious risk of harm he was exposed to from the actions of an unruly crowd. Plaintiff chose to leave the seating area, climb over a railing, and slide down a concrete wall over six feet high to join the crowd on the field. Therefore, defendant is entitled to assert the defense of primary assumption of the risk and the court finds that defendant owed no duty to plaintiff. Despite the arguments raised by plaintiff at the oral hearing, it is enough that plaintiff voluntarily and knowingly embraced the risk of harm. “To impose primary assumption of the risk, the plaintiff need only consciously expose himself to the known risk, not directly to the exact episode which causes the injury.” *Miljkovic v. Greater Cleveland Regional Transit Auth., et al.* (Oct. 12, 2000), Cuyahoga App. No. 77214, at 15.

{¶10} Thus, based upon the foregoing analysis and construing the evidence most strongly in plaintiffs’ favor, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant’s motion for summary judgment shall be granted.

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

JOSEPH P. MOENING, et al.

Plaintiffs

v.

THE UNIVERSITY OF TOLEDO

Defendant

Case No. 2005-09774

Judge J. Craig Wright

JUDGMENT ENTRY

An oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal

J. CRAIG WRIGHT
Judge

cc:

| | | |
|--|--|---|
| Martin W. Williams 416 North Erie Street 500 Toledo Legal Bldg. Toledo, Ohio 43624-1696 | | Attorney for Plaintiffs |
| Jana M. Brown Susan M. Sullivan William C. Becker Assistant Attorneys General 150 East Gay Street, 23rd Floor Columbus, Ohio 43215-3130 | | Attorneys for Defendant |
| SJM/cmd | | Filed 11-17-2006/To S.C. reporter 12-7-2006 |

Case No. 2005-09774

- 6 -

DECISION