

Court of Claims of Ohio

The Ohio Judicial Center
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BARRELL BROWN

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2007-05971

Judge Joseph T. Clark
Magistrate Steven A. Larson

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.

{¶ 2} At all times relevant, plaintiff was an inmate in the custody and control of defendant at the Chillicothe Correctional Institution (CCI) pursuant to R.C. 5120.16. This case arises out of an incident in which plaintiff and other inmates were struck by lightning while playing softball.

{¶ 3} The recreation yard at CCI contains two softball fields, the “north field” and the “south field,” and on June 29, 2005, league games were scheduled for each field. Defendant organized the league and scheduled its games, but inmates largely ran the games themselves. The only employee of defendant who was directly involved with the games that evening was Activity Therapist Scott Tomlison, who testified that he supervised the game on the north field due to the fact that the teams involved were vying for playoff positions and there was thus a heightened potential for altercations between inmates. Plaintiff’s team was one of those playing on the north field. At least

two inmate umpires and one inmate scorekeeper were also present at the north field, and a similar crew of inmates officiated the game on the south field.

{¶ 4} Weather conditions were partly cloudy and fair when the games began around 7:00 p.m., but increased cloud cover and light rain subsequently moved into the area. According to inmate James Teague, who was an umpire on the south field, he and another umpire saw lightning at around 7:45 p.m. and consequently stopped that game. Around this same time, the game on the north field was tied at the end of the seven innings that comprise a standard game, thus causing the game to extend into extra innings. Just after 8:00 p.m., plaintiff went to bat in the bottom of the eighth inning. Plaintiff made contact with a pitch, but as he ran toward first base, lightning struck the field, killing one inmate and injuring several others including plaintiff. Plaintiff and the others were transported to a local hospital for treatment.

{¶ 5} Plaintiff alleges that defendant was aware of the potential for lightning and was therefore negligent in permitting the inmates to continue the game and remain outdoors. Defendant argues that the lightning strike constituted an “Act of God” and was not foreseeable.

{¶ 6} “The term ‘Act of God’ in its legal significance, means any irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning and unprecedented floods.” *City of Piqua v. Morris* (1918), 98 Ohio St. 42, 47-48. If an Act of God “is so unusual and overwhelming as to do the damage by its own power, without reference to and independently of negligence by defendant, there is no liability.” *Id.* at 49. However, if proper care and diligence on the part of defendant would have avoided the act, it is not excusable as the Act of God. *Bier v. City of New Philadelphia* (1984), 11 Ohio St.3d 134, 135.

{¶ 7} In order for plaintiff to establish defendant’s 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 Co., Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. Ohio law imposes upon the state a duty of reasonable care and protection of its inmates; however, the state is not an insurer of inmate safety. *Williams v. Southern Ohio Correctional Facility* (1990), 67 Ohio App.3d 517, 526.

{¶ 8} When the state becomes aware of a dangerous condition, it must take reasonable care to prevent injury to inmates. *Harwell v. Grafton Correctional Inst.*, Franklin App. No. 04AP-1020, 2005-Ohio-1544, ¶11. Accordingly, the court must determine whether defendant had knowledge of the potential for lightning prior to its striking the field, and, if so, whether defendant exercised reasonable care under the circumstances.

{¶ 9} There is no dispute that when the game began, the weather was fair and no lightning was visible. However, the testimony varies with regard to the weather that prevailed over the next hour leading up to the incident. Plaintiff testified that light rain fell in the early-to-mid stages of the game, but then dissipated. Plaintiff stated that in the seventh inning, he saw distant lightning that appeared to be approaching CCI.

{¶ 10} Inmate Charles Steele testified by deposition that he was the coach of plaintiff's team. Steele stated that there was light rain during the game and that he first saw lightning about 45 minutes before the incident. According to Steele, lightning struck a building at CCI shortly before the incident, sending sparks from the roof and producing the only thunder that he heard that evening. Steele stated that heavy rain began to fall immediately after the incident.

{¶ 11} Inmate David Jackson testified by deposition that he was a teammate of plaintiff. Jackson stated that about 20 minutes before the incident, he saw lightning to the south, but heard no thunder. Jackson further stated that high winds and moderate rain began shortly before the incident.

{¶ 12} Inmate Eddie Mack testified by deposition that he was another of plaintiff's teammates. Mack testified that varying amounts of rain began to fall in the fourth or fifth inning, that there were high winds, and that he began to notice thunder and lightning "everywhere" in the sixth inning.

{¶ 13} Inmate Daniel Bitter testified by deposition that he was the home plate umpire for the game on the north field. Bitter testified that there was light drizzle throughout most of the game and that he began to notice distant lightning about 45

minutes before the incident. Bitter stated that he did not hear thunder prior to the incident.

{¶ 14} Inmate Clyde Boyar testified that he was the scorekeeper for the game on the north field. According to Boyer, light rain began to fall around the seventh inning, but it was light enough that he was still able to have his paper score book exposed to the elements. Boyar stated that he did not see lightning or hear thunder prior to the incident and that heavy rain began to fall soon afterward.

{¶ 15} Inmate James Teague, as stated earlier, was an umpire in the game on the south field. He testified that he saw lightning to the west and heard thunder about 15-20 minutes before the incident. According to Teague, he and another umpire stopped their game due to the lightning, but took into account that the game was moving slowly and was not particularly competitive. Teague stated that he proceeded to gather the equipment from the south field and bring it to a cart parked at the north field. Teague testified that he then watched the game on the north field for a while, as did several other inmates who had been involved in the game on the south field. According to Teague, it began to rain and he thus decided to return to his dormitory. Teague stated that the incident occurred just as he was leaving the field.

{¶ 16} Inmate Russell Brown testified by deposition that he had been watching the game on the south field, but that after it ended, he walked to the north field to watch the game there. Brown testified that there had been some light rain and lightning while he was at the south field. However, Brown stated that he never heard thunder and that the sun was out when he was at the north field.

{¶ 17} Inmate Anthony Simmons testified by deposition that he was a spectator at the game on the north field. Simmons testified that there was a brief period of light rain, thunder, and lightning early in the game. Simmons stated that rain began to fall again about 20 minutes before the incident, without lightning, and that he returned to his dormitory at that time.

{¶ 18} Tomlison testified that he sat behind the home plate backstop throughout the game. According to Tomlison, there was a brief period of light rain around the third or fourth inning. Tomlison stated that light rain began again in the seventh inning, at which time Bitter, the home plate umpire, asked him “what do you want to do boss?” (Tomlison explained that when he supervises a game, the umpires defer to him on the question of whether to stop the game due to inclement weather.) Tomlison testified that because the rain was light and that he had not seen any lightning, he instructed Bitter to continue the game.

{¶ 19} Tomlison further stated that he recalls inmate Jarvis, who was an umpire on the south field, walked to the north field around 7:50 p.m. and stated that he had stopped his game due to lightning. Tomlison stated that he then began to actively watch for lightning because he did not want to stop the north game until he was certain that lightning was in the area. Tomlison testified that a few seconds before the incident, he saw distant lightning to the west and decided to stop the game. Tomlison stated that just as he stood up to make an announcement, lightning struck the field and heavy rain immediately followed.

{¶ 20} Corrections Officer (CO) Mary Davis testified that she was on patrol in the yard at the time of the incident. Davis testified that she heard no thunder, that very light rain began to fall just prior to the incident, and that the rain became heavy immediately afterward. Davis stated that inmates were engaged in recreation throughout the yard when the incident occurred.

{¶ 21} CO Craig Grey testified that he was stationed in a 20-foot tall watch tower near the north field on the evening of the incident. Grey testified that, as part of his job duties, he was to report any nearby lightning to officers on the ground so that they might bring the inmates indoors. Grey stated that he observed “heat lightning” in the distance a few minutes before the incident, but that it produced no thunder and was far enough away that he did not believe it necessitated bringing inmates indoors. According to Grey, very light rain was falling around this time, but inmates were still playing basketball and officers patrolling the yard were not wearing raincoats.

{¶ 22} Defendant’s expert, meteorologist Steve Norris, testified that at 3:14 p.m. on the day of the incident, the National Weather Service (NWS) issued a forecast for Ross County (where CCI is located) that stated, in part: “partly cloudy with scattered showers and thunderstorms this evening * * *. Chance of rain 30 percent.”

(Defendant's Exhibit C-1.) Norris further testified that the NWS did not issue any warnings or watches for the area that day.

{¶ 23} According to Norris, the storm that developed that evening was most likely a "pop-up thunderstorm." Norris testified that pop-up thunderstorms are common in hot, humid conditions such as existed that day, and that they are difficult to predict. Norris stated that a weather station near CCI recorded only 0.16 inches of rain that day, leading him to believe that the storm developed quickly and then either dissipated or moved away quickly. (Defendant's Exhibit C-2.) Norris stated that due to this small amount of rainfall and the brief duration of pop-up thunderstorms in general, it is likely that lightning existed in the area for only a brief time.

{¶ 24} According to Norris, the general rule for assessing the danger posed by lightning is that if one is close enough to lightning to hear the resulting thunder, then one is at some risk of being struck. Norris explained that although lightning is visible from great distances and always produces thunder, thunder is only audible at a range of 10-12 miles, which is generally as far as a lightning bolt may be expected to travel. Norris testified that when one sees lightning without hearing thunder, this is a phenomenon commonly referred to as "heat lightning," and there is very little risk of being struck.

{¶ 25} Based upon the testimony of those who were at the scene, it is apparent that lightning was visible from CCI prior to the incident. Estimates vary as to how long it had been visible and how far it was from CCI, but most of the witnesses who saw lightning testified that it appeared no sooner than around 7:45 p.m. Although inmates Bitter, Simmons, and Steele stated that they saw lightning as early as 7:15 p.m., Norris testified that it is doubtful that lightning existed over such a long period because it is not consistent with the brief nature of pop-up thunderstorms.

{¶ 26} Steele's testimony also lacked credibility. Steele's account of seeing lightning strike a building at CCI and produce sparks was not corroborated by other witnesses, and it is unlikely that such an event would have gone unnoticed.

{¶ 27} Steele was also one of the few witnesses to testify that he heard thunder prior to the incident, but the more persuasive testimony came from the witnesses who testified that they specifically recalled hearing no thunder, including inmates Bitter, Boyar, Brown, Jackson, and COs Davis and Grey. The lack of thunder is consistent with the testimony of those witnesses who recalled seeing lightning only from a distance, including CO Grey. The court finds Grey's testimony especially persuasive given that his location in the watch tower put him in a better position than any other witness to monitor the sky. Accordingly, the court finds that thunder was not audible at CCI prior to the incident. As stated earlier, Norris testified that a lack of thunder generally indicates that lightning is at least 10-12 miles away and is not within striking distance.

{¶ 28} Plaintiff testified that the lightning he saw near the end of the game was indeed distant, but that it was approaching CCI and seemed dangerous. Plaintiff and other witnesses recalled several players asking Tomlison to stop the game due to lightning, but also due to rain and wind. Although defendant asserts that players were free to quit the game at any time, Tomlison admitted that under CCI rules such action could result in a six-month suspension from recreational activities. Regardless, Tomlison and Boyar, who were seated next to one another, both stated that no inmate involved in the game on the north field ever told Tomlison that they had seen lightning. Tomlison further testified that inasmuch as the field was in playable condition, he did not find it necessary to stop the game until the point when he saw lightning just seconds before the incident. Moreover, with the game being closely contested and having implications for league playoffs, witnesses including Boyar and Teague observed that players did not want the game to stop.

{¶ 29} Even if inmates did ask to stop the game, their motive for doing so is not clear. According to plaintiff, some of his teammates wanted the game to be stopped so that they could watch a television program. In addition, plaintiff and Tomlison testified that plaintiff's team had an interest in the game being stopped because it would have caused the final score to revert to an earlier inning when the team had the lead.

{¶ 30} No matter what motivation inmates may have had for requesting that the game be stopped, the court finds that Tomlison acted reasonably in allowing the game to proceed. In the moments preceding the incident, the weather was characterized as very light rain, with some amount of distant lightning but no thunder. These conditions

were not such that Tomlison, CO Grey, or any other employee of defendant should have known that the inmates in the yard were in danger of being struck by lightning. Therefore, the court concludes that defendant had no duty to stop the game or to bring the inmates indoors and that plaintiff's injuries are solely attributable to an Act of God.

{¶ 31} Based upon the foregoing, the court finds that plaintiff has failed to prove his claim of negligence by a preponderance of the evidence. 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).

STEVEN A. LARSON
Magistrate

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Magistrate Steven A. Larson

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