[Cite as *Morgan v. Kent State Univ.*, 2015-Ohio-5636.]

Court of Claims of Ohio

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AARON S. MORGAN

Plaintiff

v.

KENT STATE UNIVERSITY

Defendant

Case No. 2014-00639

Judge Patrick M. McGrath
Magistrate Anderson M. Renick

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On March 31, 2015, plaintiff filed a combined motion both for partial summary judgment pursuant to Civ.R. 56(A) and for attorney fees and expenses pursuant to Civ.R. 37(C).[1] On April 17, 2015, defendant, Kent State University (KSU), filed a response and a cross-motion for summary judgment pursuant to Civ.R. 56(B). On April 28, 2015, plaintiff filed a response to defendant's motion. The case is now before the court for a non-oral hearing on the motions. L.C.C.R. 4.

{¶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

[1]The court finds that there was either a good reason for defendant's failure to admit or the admissions sought were of no substantial importance. The court further finds that plaintiff has not suffered prejudice regarding the responses at issue. Accordingly, plaintiff's motion for attorney fees and expenses is DENIED.

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 Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} Plaintiff was a student at KSU's Stark Campus, where he was enrolled in a beginning karate class which was held in the Wellness Center. According to the class syllabus, the course involved learning basic self-defense techniques, including "counter attacks," throws, strikes, punches, blocks, kicks, and sparring. (Defendant's Exhibit D.) The syllabus also listed required equipment which included a mouth guard and sparring gloves. On October 24, 2012, the class instructor, Edward Malecki, was demonstrating a karate technique when plaintiff dropped his guard and Malecki struck plaintiff's face, fracturing his nose.

{¶5} Plaintiff alleges that Malecki's negligence in performing the karate technique caused his injury inasmuch as Malecki admitted that facial contact was prohibited in his class and that he violated his own policy by failing to wear protective gloves at the time of the accident. Defendant contends that it is entitled to judgment as a matter of law based upon both plaintiff's express assumption of risk through a written waiver of liability and the doctrine of primary assumption of the risk. Plaintiff maintains that the waiver document does not bar liability inasmuch as it "purports to provide a very general and broad application" and is unfair and unconscionable based upon the disparity in bargaining power between the parties. Plaintiff further contends that he did not assume the risk of injury to his face inasmuch as facial contact was prohibited and, therefore, not foreseeable.

RELEASE AND WAIVER

{¶6} Prior to enrolling in the karate class, plaintiff had signed a release and waiver of liability in consideration for being allowed to enter and use the Wellness Center "for any purpose including, but not limited to observation, use of facilities or equipment, or participation in any way * * *." (Defendant's Exhibit B; Attachment to Plaintiff's Affidavit.) The waiver further provides that plaintiff "RELEASES, WAIVES, DISCHARGES AND COVENANT NOT TO SUE [KSU] its employees, instructors or agents; (hereinafter refer to as 'releasees') from all liability to the undersigned; for any loss or damage, and any claim or demands therefore on account of injury or illness to the person * * * whether caused by the negligence of the releasees or otherwise, while the undersigned is in, upon, or about the premises or any facilities or equipment therein." *Id*.

{¶7} The waiver also includes a clause whereby plaintiff expressly assumed any risk of injury: "THE UNDERSIGNED HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE due to the negligence of the releasees or otherwise, while the undersigned is in, upon, or about the premises of [KSU Wellness Center] and or while using the premises or any facilities or equipment hereon." *Id*. The waiver provides that it is "intended to be as broad and inclusive as permitted by the laws of the State of Ohio."

{¶8} Express assumption of the risk applies when parties expressly agree to release liability. *Crace v. Kent State Univ.*, 185 Ohio App.3d 534, 2009-Ohio-6898, ¶ 11 (10th Dist.). "[C]lear and unambiguous contract clauses relieving a party from liability for its own negligence are generally upheld in Ohio." *Geczi v. Lifetime Fitness*, 10th Dist. Franklin No. 11AP-950, 2012-Ohio-2948, ¶ 11; *Thompson v. Otterbein College*, 10th Dist. Franklin No. 95APE08-1009, 1996 Ohio App. LEXIS 389 (Feb. 6, 1996) (releases from liability for negligence are generally valid in the context of recreational activities). "[C]ourts routinely apply such releases to bar future tort liability as long as the intent of the parties, with regard to exactly what kind of liability and what

persons and/or entities are being released, is stated in clear and unambiguous terms." *Brown-Spurgeon v. Paul Davis Systems of Tri-State Area, Inc.*, 12th Dist. Clermont No. CA2012-09-069, 2013-Ohio-1845, ¶ 51. "To be enforceable, however, the release must be expressed in terms that are clear and unequivocal." *Jacob v. Grant Life Choices Fitness Ctr.*, 10th Dist. Franklin No. 95APE12-1633 (June 4, 1996). Additionally, while the word "negligence" need not be used in the release, the language must be such that the intent of the parties as to exactly what kinds of claims are being released is clear. *Thompson*, citing *Hine v. Dayton Speedway Corp.,* 20 Ohio App.3d 185, 189 (2nd Dist.1969). "When a contract is unambiguous, a court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Jacob* at ¶ 6-7, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246 (1978). "But 'where the language of a contract is reasonably susceptible of more than one interpretation, the meaning of ambiguous language is a question of fact' to be determined by a jury." *Geczi* at ¶ 12, quoting *Brown v. Columbus All-Breed Training Club*, 152 Ohio App.3d 567, 2003-Ohio-2057, ¶ 18 (10th Dist.).

{¶9} The release and waiver in this case clearly and unambiguously identifies the parties and the type of liability which is being released. The terms of the waiver unambiguously state that plaintiff accepts the risk of injury while on the premises, that he waives any claims arising from those injuries, and he agrees not to sue defendant for any such injury. Inasmuch as plaintiff's injury occurred as a result of alleged negligence during his participation in activities at the facility, the court finds that the waiver and release reflects the intent of the parties and that plaintiff's claims are barred by the agreement.

PRIMARY ASSUMPTION OF THE RISK

{¶10} "Under primary assumption of the risk, an individual assumes the inherent risks of the recreational activity and cannot recover for injuries unless another individual acted recklessly or intentionally." *Crace, supra*, ¶ 13, citing *Santho v. Boy Scouts of Am.*, 168 Ohio App.3d 27, 2006-Ohio-3656, ¶ 12. An individual who is injured in the course of a recreational or sporting activity assumes the ordinary risks of such activity and cannot recover unless it can be shown that another participant acted recklessly or intentionally in causing the injury. *Marchetti v. Kalish*, 53 Ohio St.3d 95, syllabus (1990). "A plaintiff cannot recover from any injuries that stemmed from 'conduct that is a foreseeable, customary part' of the activity in which the plaintiff was injured." *Santho, supra*, at 37, quoting *Thompson v. McNeill*, 53 Ohio St.3d 102, 104 (1990). Participants and spectators are generally owed no duty by recreation providers to eliminate the risks inherent in a sport. *Id*. at 35.

{¶11} "Under primary assumption of the risk, the injured plaintiff's subjective consent to and appreciation for the inherent risks are immaterial to the analysis." *Crace, supra*, ¶ 16. Primary assumption of the risk involves an examination of the activity itself and not plaintiff's conduct. *Id*. If the activity is inherently dangerous such that the risks cannot be eliminated, the doctrine of primary assumption of the risk applies. *Id*. Ohio courts have recognized an "inverse relationship between duty and dangerousness" in sports: "the standard of care rises as the inherent danger of the sport falls." *Levine v. Gross*, 123 Ohio App.3d 326, 330, (1997), quoting *Thompson*, at 105-106 (finding both that a karate instructor was not reckless as a matter of law in hitting his opponent's left eye with his closed fist in the course of sparring and that karate involves a high degree of dangerousness and a low duty of care).

{¶12} There is no question that the martial arts class was a sports or recreational activity with an inherent risk of injury. At the time of his injury, plaintiff was a voluntary participant in a recreational sport with a well-known, inherent risk of injury. Although contact with a participant's face was not intended during the class, the doctrine of

primary assumption of the risk applies even when participants in a recreational activity or sport make contact that is outside the rules. *See Thompson, supra*; *Doody v. Evans*, 188 Ohio App. 3d 479, 2010-Ohio-3523 (10th Dist.) (finding that the doctrine of primary assumption of the risk applied when a catcher for a softball team was injured by another player who violated the league's rules about avoiding collisions).

{¶13} Plaintiff acknowledged during his deposition that his injury was the result of an accident that occurred during the sparring session. There is no evidence by which reasonable minds could conclude that Malecki intentionally or recklessly injured plaintiff. Physical contact between participants during karate sparring is simply a foreseeable hazard of the activity. Accordingly, defendant is entitled to judgment as a matter of law.

{¶14}

For the foregoing reasons, 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 is GRANTED and plaintiff's motion for partial summary judgment is DENIED. Judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH
Judge

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Filed June 19, 2015
Sent to S.C. Reporter 2/3/16