[Cite as *Kostelac v. Univ. of Akron*, 2021-Ohio-3237.]

MARK KOSTELAC Plaintiff v. THE UNIVERSITY OF AKRON Defendant	Case No. 2019-01037JD Judge Patrick E. Sheeran Magistrate Holly True Shaver DECISION

{¶1} On May 14, 2021, defendant filed a motion for summary judgment pursuant to Civ.R. 56. On May 24, 2021, plaintiff filed a memorandum in opposition. On June 1, 2021, defendant filed a response. Pursuant to L.C.C.R. 4(D), the motion is now before the court for a non-oral hearing. For the reasons stated below, defendant's motion is GRANTED.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> 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 summary 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.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. at 292-293.

{¶3} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which states, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Factual Background and Procedural History

{¶4} According to his complaint, plaintiff, a Caucasian, Catholic male, was a student at the University of Akron and a member of its men's basketball team. (Complaint, ¶¶ 2, 25.) On December 16, 2018, plaintiff suffered "an unprovoked attack" from another member of the basketball team, Khadim Gueye, during practice at defendant's recreation center. *Id.* at ¶ 6. Plaintiff suffered severe injuries to his nose, cheek, mouth, and teeth. *Id.* at ¶¶ 7-8. Defendant's police department charged Gueye with assault on January 10, 2019 because of the incident. *Id.* at ¶ 19. Plaintiff underwent surgery in February 2019, and his recovery period prevented him from playing the remainder of the basketball season. *Id.* at ¶¶ 15-17. Plaintiff asserts that he decided to transfer to another university for the 2019-2020 basketball season, because

he, the university, and the basketball coach agreed that it was "impossible" for him to "safely continue playing on the men's basketball team at the university." *Id.* at ¶ 18.

{¶5} Plaintiff alleges that defendant and its basketball coaches permitted African American members of the men's basketball team to "actively discriminate against the few Caucasian members of the team on the bases of race and religion." *Id.* at ¶ 23. Plaintiff asserts that, because of defendant's "failure to take remedial action against this discriminatory behavior, a hostile and unsafe environment was created for Caucasian members of the men's basketball team." *Id.* at ¶ 24.[1] Furthermore, plaintiff alleges that despite defendant's employees' knowledge of the "team's hostile environment," defendant's employees "intentionally, negligently, and/or recklessly failed to take remedial action against members of the team, namely, Khadim Gueye, who engaged in discriminatory behavior against plaintiff by way of inflicting serious injury to plaintiff." *Id.* at ¶ 27.

{¶6} Plaintiff's complaint alleged two causes of action: discrimination and intentional infliction of emotional distress. On May 11, 2020, the court granted defendant's motion to dismiss plaintiff's claims of discrimination and intentional infliction of emotional distress and found that plaintiff had failed to state a claim for breach of contract. However, the court allowed plaintiff to proceed on a claim of negligence. On January 13, 2021, the court denied defendant's motion for judgment on the pleadings.

{¶7} Defendant filed plaintiff's deposition in support of its motion for summary judgment. Plaintiff described the incident with Gueye as follows:

{¶8} "I remember we were in practice. He took objection to something. We were just playing five on five. Then [he] came up behind me and pretty much knocked me down and punched me in the face. And then when I was getting up, [he] did it again. Then [he] proceeded to walk over me, and then a teammate took him out and then that was it for that incident." (Plaintiff's depo., p. 9.)

[1]Plaintiff did not specify Gueye's race in his complaint.

"Q: [Mr. Knutti]: So I want to try to be careful to distinguish between energetic physical basketball and something like a punch in the face.

A: [Plaintiff]: Yeah, I understand.

Q: So let's start with punches in the face. And this wasn't just a glancing punch. This was two of them and they both hit dead-on, and you needed significant dental surgery.

A: That's correct.

Q: You needed significant surgery afterwards?

A: Yeah.

Q: Did you ever see anything like that happen during the time that you were on the University of Akron basketball team?

A: That level of damage, no, but there were physical altercations, you know, whether it be pushing, shoving, or just, you know, intense moments in practice. But there were a few times we had to actually call practice because there was clearly going to be a fistfight." (Plaintiff's depo., p. 11-12.)

{¶9} Plaintiff testified that he thought that the coaches should have known that an altercation would probably happen, because there was "definitely tension between the two of us" during some practices, and that the tension "escalated when it didn't need to be." *Id.,* p. 10. Plaintiff admitted that he did not personally complain to any of his coaches about Gueye's behavior or potential for violence prior to the assault. *Id.,* p. 10-11. Plaintiff stated that Gueye was not involved in any of the prior instances, which plaintiff described as "altercations with no de-escalation," where plaintiff felt that the aggression from practice was precipitating into something else. *Id.,* p. 14, 21. Plaintiff was not aware of anyone needing medical treatment after any of the prior altercations. *Id.,* p. 14, 20. As plaintiff explained:

{¶10} "I know, like, for myself and KG [Gueye], we had multiple times in practice where, like, he would throw a cheap elbow, you know, I would box him out hard. Like, we'd be physical back and forth, but it never got to the point like it did.

{¶11} "I don't know on that day what kind of snapped with him, but, you know, we'd had kind of physical play before. I mean, he's a big guy, I'm a big guy. That's just how we play, and I always respected that." *Id.,* p. 21. Plaintiff testified that the assault "certainly wasn't expected or warranted." *Id.,* p. 23.

{¶12} Plaintiff further testified that he was dissatisfied with the coaching staff's actions after the assault; specifically, plaintiff felt that head coach John Groce was more concerned with the basketball program and keeping the matter in-house than plaintiff's condition. *Id*. p. 26-27, 31. However, it is undisputed that immediately after the incident, trainer Mike White administered first aid to plaintiff, and although Groce and White disagreed on whether plaintiff should have sought additional medical treatment, plaintiff drove himself home and then obtained medical treatment with his parents at a hospital. *Id.* p. 15-17. Defendant's police department investigated and charged Gueye with assault. *Id.,* p. 31; Complaint, ¶ 19.

Law and Analysis

{¶13} With regard to Gueye's conduct, "[o]rdinarily, there is no duty to control the conduct of a third person by preventing him or her from causing harm to another, except in cases where there exists a special relationship between the actor and the third person which gives rise to a duty to control, or between the actor and another which gives the other the right to protection." *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.*, 45 Ohio St.3d 171, 173, 543 N.E.2d 769 (1989). Moreover, a common law duty of care exists between a coach and a student athlete. *Cameron v. Univ. of Toledo*, 10th Dist. Franklin No. 16AP-34, 2018-Ohio-979, ¶ 56. To state a claim of negligence, plaintiff must allege 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, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 8, citing *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). As a student at the university, plaintiff's legal status was that of a business invitee. *Kleisch v. Cleveland State Univ*., 10th Dist. Franklin No. 05AP-289, 2006-Ohio-1300; *Baldauf v. Kent State Univ.*, 49 Ohio App.3d 46, 550 N.E.2d 517 (10th Dist.1988). Invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner. *Id.*, citing *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951). The duty owed to an invitee is one of ordinary and reasonable care to protect him from an unreasonable risk of physical harm of which defendant knew or had reason to know. *Perry v. Eastgreen Realty Co.*, 53 Ohio St.2d 51, 371 N.E.2d 335 (1978). Reasonable care is that which would be used by an ordinarily prudent person under similar circumstances. *Smith v. United Properties, Inc.*, 2 Ohio St.2d 310, 209 N.E.2d 142 (1965).

{¶14} Plaintiff cites no special relationship between himself and the university that would give rise to either a duty to control Gueye's conduct or a duty to protect plaintiff from Gueye. In cases where a university student has been assaulted, either by another student or a stranger, a "totality of the circumstances" test has been applied to determine whether a heightened duty of care arises. *See Shivers v. Univ. of Cincinnati*, 10th Dist. Franklin No. 06AP-209, 2006-Ohio-5518; *Kleisch v. Cleveland State Univ.*, 10th Dist. Franklin No. 05AP-289, 2006-Ohio-1300. "The totality of the circumstances test considers prior similar incidents, the propensity for criminal activity to occur on or near the location of the business, and the character of the business. *Shivers*, ¶ 7, citing *Kleisch*, *supra*, ¶ 23; *Reitz v. May Co. Dept. Stores*, 66 Ohio App.3d 188, 192 (8th Dist.1990). Because criminal acts are largely unpredictable, the totality of the circumstances must be "somewhat overwhelming" to create a duty. *Shivers,* ¶ 7. The main issues under that test include "(1) [the] spatial separation between previous crimes and the crime at issue; (2) [the] difference in degree and form between previous crimes

and the crime at issue; and (3) [whether there is a] lack of evidence revealing defendant's actual knowledge of violence." *Shivers,* ¶ 9.

{¶15} Plaintiff testified that there were prior incidents during practice, where tension was high between players, and that practice occasionally ended early when there was "clearly going to be a fistfight." (Plaintiff's depo., p. 11-12.) However, plaintiff admitted that none of the prior altercations involved Gueye, and that this incident was the only one he was aware of that resulted in treatment at a hospital and subsequent surgery. Accordingly, even construing the evidence most strongly in plaintiff's favor, he has not produced evidence that there were any crimes prior to the assault he sustained. Thus, the spatial separation element of the test is non-existent. Turning to the second element, the physicality and potential fights from previous practices, compared to being punched in the face twice, which led to surgery, reveals a substantial difference in degree and form between previous altercations and the assault. With regard to the third element, plaintiff asserts that since the coaches had occasionally ended practice early when tension ran high among players, defendant knew or should have known that plaintiff would be assaulted. Plaintiff also points to a meeting among players, after the assault, where a teammate stated that "we saw it coming" as evidence of defendant's knowledge of the potential for violence during practice. (Plaintiff's depo., p. 28.) However, the alleged statement by a teammate is hearsay, was not contained in an affidavit by the person to whom it is attributed, was made after the fact, and is speculative, at best. Moreover, plaintiff's own testimony shows that the assault was unexpected to him. As plaintiff explained: "Yeah. I mean, I didn't see that coming personally, like, to that extent. There were, like, small, like, physical moments in practice, but nothing anywhere near that." (Plaintiff's depo., p. 28.) Accordingly, the court finds that there is a lack of evidence revealing defendant's actual knowledge of violence.

{¶16} Even construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that defendant did not have notice that Gueye would intentionally assault plaintiff at basketball practice on the day in question. Therefore, the court finds that the totality of the circumstances are not "somewhat overwhelming" to create a heightened duty to protect plaintiff from the criminal act of Gueye assaulting him during basketball practice. Furthermore, plaintiff has failed to present evidence to show that defendant breached any duty it owed to him prior to or after the assault. Although plaintiff testified that Coach Groce did not want him to seek medical treatment, trainer Mike White provided first aid immediately after the incident, and plaintiff was not prevented from seeking medical treatment on his own.

{¶17} Construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that defendant did not breach its duty of reasonable care to protect plaintiff from an unreasonable risk of physical harm of which defendant knew or had reason to know, because Gueye's criminal act of assaulting plaintiff was unforeseeable both to defendant and plaintiff. Accordingly, defendant's motion for summary judgment is GRANTED.

PATRICK E. SHEERAN
Judge

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MARK KOSTELAC Plaintiff v. THE UNIVERSITY OF AKRON Defendant	Case No. 2019-01037JD Judge Patrick E. Sheeran Magistrate Holly True Shaver JUDGMENT ENTRY

{¶18} A non-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. All previously scheduled events are VACATED. 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.

PATRICK E. SHEERAN
Judge

Filed July 28, 2021
Sent to S.C. Reporter 9/17/21