

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

2005 FEB 22 PM 4:15

DISTRICT COURT
RENO COUNTY, KANSAS

GABRIEL H. PETERS, a minor, et al.,)
 Plaintiffs,)
 vs.)
 CHECKERED FLAG PRODUCTIONS, INC.,)
 et al., Defendants.)
 _____)

NO. 02 C 45

MEMORANDUM DECISION

Now, on this 13th day OF January, 2005, the above matter comes on for hearing to the Court on the three Defendants' motions for summary judgment. Defendant, Checkered Flag Productions, Inc., is represented by Corlin J. Pratt. Defendant, the State of Kansas, is represented by Thomas A. Dower. The Defendant, City of Hutchinson, Kansas, is represented by Richard L. Honeyman and Tracie R. England. The Plaintiffs are present in person and are represented by Derek S. Casey.

Thereupon, the Court, having reviewed the entire file, after hearing arguments of counsel, and being fully advised in all of the premises, finds and concludes as follows:

Facts

1. In this civil action the Plaintiffs are seeking damages for personal injuries.

2. Gabriel H. Peters, Plaintiff, is a six-year-old child, presently, who suffered personal injuries when he and his father, co-plaintiff, Tim Peters, were struck by an automobile while they were walking east across Plum Street in Hutchinson, Kansas, from Gate 9 of the Kansas State Fairgrounds on June 24, 2000, after being spectators at a "monster truck rally" on the track of the State Fair grandstand. They were going to their car parked on Parking Lot C.

3. The Defendants are: the State of Kansas for the State Fair; Checkered Flag Productions, Inc.; and the City of Hutchinson, Kansas.

4. The Kansas State Fair controls and possesses the fairgrounds in Hutchinson, Reno County, Kansas, consisting of approximately 270 acres. The boundaries of the Fairgrounds are Main Street on the west from 20th Street north to State Fair Road; on the north from Main and State Fair Road east to Plum Street; on the south from 20th and Main east to Plum Street; and on the east from 20th and Plum north to State Fair Road. Plum Street bisects the fairgrounds. It is a main arterial roadway in Hutchinson, running north to the McPherson and Rice County lines. On the east side of 20th and Plum Street there are about eighty acres of land owned by the State Fair. This acreage is

designated by the Fair as Parking Lot C. It is leased as a golf driving range operation. During the State Fair and on other special occasions, Parking Lot C is used for parking motor vehicles. Patrons can access Parking Lot C by using a pedestrian crosswalk from Gate 9, mentioned in 3 above, to go to and from the fairgrounds.

5. The grandstand, mentioned in 2 above, is directly west of Gate 9.

6. The aforesaid crosswalk, (4 above) is marked and goes across Plum Street connecting the fairgrounds and Parking Lot C.

7. Other than during the State Fair each fall, the grandstand and Parking Lot C are rarely used, less than six times a year.

8. Plum Street is possessed by and under the control of Defendant, City of Hutchinson.

9. Parking Lot C, the fairgrounds, and the grandstand are possessed by and under the control of the Defendant, State of Kansas (State Fair).

10. Parking Lot C was, and is, used as free public parking for certain events held at the fairgrounds.

11. On April 5, 2000, the Defendant, Checkered Flag Productions, Inc., and the Defendant, Kansas State Fair (State of Kansas), entered into a written contract, marked

Exhibit A, attached hereto, and made a part hereof, whereby Checkered Flag leased the use of the grandstand facilities of the fairgrounds to promote and conduct a "monster truck rally" on June 24, 2000.

This contract, in effect, created a joint venture between the Fair and Checkered Flag, and imposed certain responsibilities on each party, providing profit for their efforts:

The Fair agreed:

1. To furnish and make available for your events an area of the Kansas State Fairgrounds, including the grandstand, track, track infield for pits, adjacent parking areas, and ticket selling facilities.
2. Provide camper parking in the Kansas State Fair campground. Camper parking fees will be collected and retained by the Fair.
3. To provide the necessary labor and equipment to properly prepare the physical facility to insure a quality monster truck program.
4. To control and contract with all souvenir concessionaires to ensure they conform to all policies of the Fair concerning concession sales. Any exception must be agreed upon in writing by both parties in advance. CFP agrees to pay the Fair 20% of gross sales, after the deduction of state and local taxes, with a maximum due of \$500.00.
5. To permit Checkered Flag Productions to retain 10% of gross ticket sales and pit pass revenues less the agreed upon deduction contained herein. CFP would be allowed up to 300 complimentary tickets for use as tradeouts when securing media buys.

6. To hire and compensate ticket sellers, ticket takers, ushers, and grandstand security.
7. To cooperate however possible to insure a mutually successful business partnership.
8. To make arrangements for the necessary emergency personnel to be available for the event; CFP agrees to reimburse the Fair for the costs of these services.
9. To make the event available for sale on the Select-A-Seat ticketing system.

CFP agreed:

1. To provide the Fair with a certificate of insurance, showing the Kansas State Fair/ State of Kansas as Additional Named Insured, with minimum General Liability, in the amount of \$2,000,000.00.
2. To provide technical direction to the Fair for preparation of the track to meet CFP's specifications, visually inspect the race track and adjacent related area, the grandstand race spectator areas, and related parking area to insure facilities are reasonably safe for participants and spectators that are concerned in this contract, and race program, and that any dangerous visible defects to be noted in writing to the Fair.
3. To pay a rental fee of 10% of gross grandstand ticket sales, after the deduction of applicable sales taxes. CFP will be permitted to retain 100% of pit pass revenue for this event.
4. In addition, to reimburse the Fair for the cost of the clay, at \$5.50/yard, needed to prepare the facility for the monster truck show.
5. To ensure clean-up and removal of debris related to the events to see that the

facilities are returned to move-in condition.

6. To provide the Fair with a deposit of \$1,000.00 not less than thirty (30) days prior to the event date.

12. This event included several monster trucks which are about twelve feet tall. They run obstacle courses on track, race against each other, and crush other cars by running over them. Several thousand people were expected by The Fair and CFP on June 24, 2000.

13. Beer was provided to the event spectators by The Fair and CFP through concession sales. The presence of alcohol at a speedway event requires additional security considerations, and it is foreseeable that this mixing of alcohol and the event will get some spectators "stirred up."

14. As part of its regular policy, the Fair notified the City of Hutchinson of the rally via its monthly calendar of events; also made Parking Lot C available to spectators on the date of the event; and provided pre-event parking assistance in Lot C through the Hutchinson Volunteer Patrol, a citizens' police group associated with the City's police department.

15. Event spectators using Parking Lot C were allowed to access the Fairgrounds and the grandstand through Gate 9, on the west side of Plum Street.

16. There was also parking available for event spectators on the Fairgrounds near the grandstand in addition to Lot C, which is one of the major parking areas during the State Fair.

17. The City installed a marked crosswalk and signs from parking Lot C to Gate 9 to protect pedestrians during normal use.

18. Prior to June 24, 2000, the Fair and the City closed Plum Street to motor vehicles during the fair to allow fairgoers to cross safely from Parking Lot C to Gate 9.

19. The Fair has also used the Hutchinson Volunteer Patrol to control pedestrian and motor vehicle traffic at the Plum Street crosswalk during non-fair events.

20. Mr. Peters and his son Gabriel attended the June 24, 2000 monster truck rally.

21. Along with hundreds of others, Mr. Peters parked in Parking Lot C.

22. Mr. Peters and his son crossed Plum Street on the crosswalk to enter Gate 9 to the grandstands.

23. The Fair and Checkered Flag provided assistance in Parking Lot C prior to the event and in the grandstands during the event.

24. After the show, Mr. Peters and the thousands of spectators left the grandstand for the various parking areas.

25. Mr. Peters and the hundreds of others who parked in Parking Lot C headed towards Gate 9.

26. Despite their knowledge of the risks posed by Parking Lot C and Plum Street, defendants failed to take any action on the night of June 24, 2000, to protect spectators exiting Gate 9 and walking across Plum Street on the crosswalk to Parking Lot C.

27. There was no control over the increased pedestrian and motor vehicle traffic on the night of June 24, 2000, between Gate 9 and Parking Lot C.

28. As Mr. Peters exited Gate 9, he entered the crosswalk to cross Plum Street with other spectators.

29. Southbound traffic on Plum was stopped to allow spectators to cross.

30. There was oncoming northbound traffic, well south of the crosswalk, as Mr. Peters entered, holding the sleeping Gabriel.

31. As Mr. Peters crossed, a pickup truck exited the Parking Lot C driveway, immediately south of the crosswalk, turning left into the southbound lane.

32. The pickup truck accelerated excessively and recklessly, peeling out and racing onto Plum Street, with a number of people riding in the bed of the truck.

33. Mr. Peters spoke to the pedestrian behind him about the crazy drivers.

34. At the time the truck exited Parking Lot C, Mr. Michael Root was driving north on Plum Street towards the crosswalk.

35. Mr. Root had attended the monster truck rally but had parked at a different location.

36. Mr. Root was familiar with Plum Street and the crosswalk.

37. The recklessly-driving truck pulled right out in front of Mr. Root and cut him off; Mr. Root slowed and, being distracted, looked to the truck as it passed.

38. When Mr. Root looked forward, he saw Mr. Peters and Gabriel directly in front of his vehicle.

39. Mr. Root struck Mr. Peters and his son.

All of the above facts are essentially uncontroverted.

Conclusions of Law

The rules for summary judgment are well-known to all of the capable and talented attorneys involved in this case. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. K.S.A. 60-256(c). Mitzner v. State Department of SRS, 257 Kan. 258, 260-61, 891 P. 2d 435 (1995).

The Plaintiffs in this case allege that all three Defendants were negligent on June 24, 2000, and that their combined negligence caused or contributed to cause Plaintiffs' injuries and damages.

"Negligence exists where there is a duty owed by one person to another and a breach of that duty occurs. . ."
Durflinger v. Artiles, 234 Kan. 484.

"The existence of a legal duty is a question of law to be determined by the Court." McGee v. Chalfant, 248 Kan. 434, at page 439.

"Whether the duty has been breached is a question of fact... Further, where there is a causal connection between the breached duty and the injuries sustained is also a question of fact... Durflinger, supra, at page 488.

Although Durflinger, supra, is a medical malpractice case on certification from the U.S. Circuit Court of Appeals, Tenth Circuit, to the Kansas Supreme Court, it contains some very interesting and enlightening language from the last paragraph on page 488 through the middle of page 489 which is important to the case at bar and may help counsel in explaining this Court's ultimate decision herein:

"In Kansas negligence is never presumed... . This court in Blackmore (citations omitted) commented it may be said negligence is the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, as a result of which such other person suffers injury.... Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. In every instance, before an act is said to be negligent, there must exist a duty to the individual complaining, the observance of which would have

averted or avoided the injury. The plaintiff who sues his fellow man sues for a breach of duty owing to himself.... An act is wrongful, or negligent, only if the eye of vigilance, sometimes referred to as the prudent person, perceives the risk of damage.... The risk to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. The existence of negligence in each case must depend upon the particular circumstances which surrounded the parties at the time and place of the occurrence on which the controversy is based...."

"At the center of negligence is the concept of the reasonable person. What would a reasonable and prudent person, confronted by like circumstances and exercising reasonable care, have done? In other words, negligence involves acting other than as a reasonable person would do in the circumstances. The reasonable person has been observed to be the epitome of ordinariness, never reckless or absent-minded, yet neither endowed with exceptional courage, foresight or skill. . . ."

Duty is defined in the Restatement of Torts 2d, Sect. 4 (1965) as follows:

"The word "duty" is used throughout the Restatement of this Subject to denote the fact that the actor is required to

conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause."

The State Fair possesses and controls the fairgrounds in Hutchinson. The City of Hutchinson possesses and controls Plum Street in Hutchinson. The Plaintiff, Tim Peters, and his minor son, Gabriel, were among the numerous members of the public who came to the fairgrounds on June 24, 2000, to attend the monster truck rally in response to an invitation from the Fair and Checkered Flag. The Fair and Checkered Flag provided free parking to the hundreds of spectators at the rally in Parking Lot "C". This required those persons to cross over Plum Street to Gate 9 and into and out of the fairgrounds on June 24, 2000. The City was also aware of the staging of this event.

As the possessors of land upon which a public activity was conducted by invitation, the Fair and the City owed a duty of care to the Plaintiffs. Due to the contract between the Fair and Checkered Flag there existed a joint venture. They each had a common purpose and an equal right of control. Under all of these circumstances the Fair's duty of care and negligence is imputed to Checkered Flag.

All of the defendants owed the Plaintiffs a duty of reasonable care under the circumstances. Gragg, supra. The Court adopts the reasoning and authority set forth on page 18 of the Plaintiffs' Memorandum in Opposition to the Defendants' Motion for Summary Judgment as if fully set forth herein, as well as the citations and arguments on the liability of Defendants' beyond the property lines at pages 18 through 21. The reasoning in Bober v. New Mexico State Fair, 808 P. 2d 614, is adopted by the Court as especially applicable in the case at hand. Here, the Plaintiffs were invitees of the Fair and Checkered Flag. A pedestrian/motor vehicle collision was reasonably foreseeable. The Fair, Checkered Flag and the City owed a duty of exercising ordinary care. The breach of that duty is a question of fact for the jury.

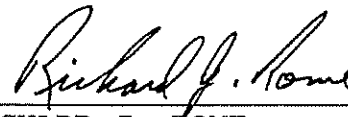
All three defendants allege that their negligence, if any, was not the cause of the accident or the Plaintiffs' injuries. Causation is a question of fact for the jury. McCleary v. Boss, 24 Kan. App. 2d 791. In the case at bar there are many issues of fact for a jury's consideration, in this Court's opinion, including the consideration of comparative fault.

The State Fair and the City claim immunity under the Kansas Torts Claims Act, K.S.A. 75-6101, et seq.

Specifically Defendants' claim immunity under "discretionary function" and "police protection" exceptions, K.S.A. 75-6104 (e), (n). The Court concludes, again, that each defendant owed the Plaintiffs a common law duty of reasonable care. The duty is mandatory, not discretionary. The Kansas Supreme Court in Cansler v. State, at 234 Kan. 554, stated that "Whether the State exercised reasonable care is an issue of fact. Applying that reasoning here, the discretionary function immunity does not apply. Cansler, supra, also reached the same conclusion when it addressed the police protection immunity exception.

This Court concludes that the motions of the Defendants should be overruled. This is a case requiring a jury's determination of the various issues of fact.

IT IS SO ORDERED. The attorney for the Plaintiffs shall prepare and circulate a proper journal entry reflecting the Court's findings and conclusions.



RICHARD J. ROME
District Court Judge, Div. I

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BILL OGC, GENERAL MANAGER
DENNY STOECKLEIN, ASSISTANT MANAGER
LARRY ANKERHOLZ, PHYSICAL PLANT MANAGER

EXHIBIT A

Beckley's Checkered Flag Productions, Inc.

Contract #2000-217

Event date: June 24, 2000

THIS CONTRACT AND AGREEMENT, is made and entered into this 5 day of April, 2000, by and between the Kansas State Fair known herein and hereafter known as the Fair and Ed Beckley, Checkered Flag Productions, Inc. (CFP).

The Fair would agree:

1. To furnish and make available for your events an area of the Kansas State Fairgrounds, including the grandstand, track, track infield for pits, adjacent parking areas, and ticket selling facilities.
2. Provide camper parking in the Kansas State Fair campground. Camper parking fees will be collected and retained by the Fair.
3. To provide the necessary labor and equipment to properly prepare the physical facility to insure a quality monster truck program.
4. To control and contract with all souvenir concessionaires to ensure they conform to all policies of the Fair concerning concession sales. Any exception must be agreed upon in writing by both parties in advance. CFP agrees to pay the Fair 20% of gross sales, after the deduction of state and local taxes, with a maximum due of \$500.00.
5. To permit Checkered Flag Productions to retain 100% of gross ticket sales and pit pass revenues less the agreed upon deduction contained herein. CFP would be allowed up to 300 complimentary tickets for use as trade-outs when securing media buys.
6. To hire and compensate ticket sellers, ticket takers, ushers, and grandstand security.
7. To cooperate however possible to insure a mutually successful business partnership.
8. To make arrangements for the necessary emergency personnel to be available for the event; Checkered Flag Productions agrees to reimburse the Fair for the cost of these services.

9. To make the event available for sale on the Select-A-Seat ticketing system.

Checkered Flag Productions would agree:

1. To provide the Fair with a certificate of insurance, showing the Kansas State Fair/State of Kansas as ADDITIONAL NAMED INSURED, with minimum General Liability, in the amount of \$2,000,000.00.
2. To provide technical direction to the Fair for preparation of the track to meet Checkered Flag Productions's specifications. Visually inspect the race track and adjacent related area, the grandstand race spectator areas, and related parking area to insure facilities are reasonably safe for participants and spectators that are concerned in this contract, and race program, and that any dangerous visible defects be noted in writing to the Fair.
3. To pay a rental fee of 10% of gross grandstand ticket sales, after the deduction of applicable sales taxes. CFP will be permitted to retain 100% of pit pass revenue for this event.
4. In addition, to reimburse the Fair for the cost of the clay, at \$5.50/yard, needed to prepare the facility for the monster truck show.
5. To ensure clean-up and removal of debris related to the events to see that the facilities are returned to move-in condition.
6. To provide the Fair with a deposit of \$1,000.00 not less than thirty (30) days prior to the event date.

The provisions found in Contractual Provisions Attachment (form DA-146a), which is attached hereto, are hereby incorporated in this contract and made a part hereof.

IN WITNESS THEREOF, the parties hereto have executed this agreement on the date first above written.

KANSAS STATE FAIR

By


Bill Ogg
Kansas State Fair

Date

4-11-2000

CHECKERED FLAG PRODUCTIONS


Ed Beckley, Pres.

Checkered Flag Productions

Date

4-10-2000