

No. 30431 - Aaron Elliott v. Chris Schoolcraft; James Roger House, II, also know as J.R. House; Nancy House; James Roger House; Joshua Haynes; Glenn N. Haynes; Patricia Haynes; and the Board of Education of the County of Kanawha, a West Virginia corporation

FILED

December 6, 2002
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OF WEST VIRGINIA

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Davis, C.J., concurring, in part, and dissenting, in part:

While I otherwise concur in the Court's opinion, I must respectfully dissent from its conclusion that summary judgment in favor of the Kanawha County Board of Education (hereinafter "the Board") was improper. Mr. Elliott seeks to impose liability on the Board for an assault occurring on private property, after school-hours, during a non-school related event. There simply is no duty devolving on the Board in such circumstances. As such, the circuit court properly awarded summary judgment to the Board.

A. No Action for Negligence Can Be Maintained in the Absence of a Legal Duty and the Question of the Existence of a Legal Duty is a Question of Law Appropriately Resolved in a Motion for Summary Judgment

1. No action for negligence can be maintained in the absence of a legal

duty. This Court has stated:

“In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.’ Syl. pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W. Va.

866, 280 S.E.2d 703 (1981).” Syl. pt. 4, *Jack v. Fritts*, 193 W. Va. 494, 457 S.E.2d 431 (1995).

Syl. pt. 3, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000). *See also Hinkle v. Martin*, 163 W. Va. 482, 486, 256 S.E.2d 768, 770 (1979) (“It is axiomatic that to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.”). “Where the undisputed material facts do not establish the existence of a duty, summary judgment is appropriate.” *Kazanoff v. United States*, 753 F. Supp. 1056, 1059 (E.D.N.Y. 1990). *See also Gylten v. Swalboski*, 246 F.3d 1139, 1144-45 (8th Cir. 2001) (“[W]e conclude that the grant of summary judgment was proper. Absent a duty, there can be no breach, and thus, no basis for recovery under a negligence theory.”). *Cf. Ads-Anker Data Sys., Inc.*, 498 F.2d 517, 519 (4th Cir. 1974) (applying West Virginia law) (“Had appellants’ injuries allegedly resulted from defective brakes or tires, summary judgment would have been appropriate, for, absent special contract, an employer ordinarily has no duty to inspect and no power to control the maintenance of an employee’s automobile.”). Because “[s]ummary judgment is not a remedy to be exercised at the circuit court’s option; [but] must be granted when there is no genuine disputed issue of a material fact[,]” *Powderidge Unit Owners Association v. Highland Properties, Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996), the circuit court’s grant of summary judgment to the Board should be affirmed.

2. The question of the existence of a legal duty is a question of law. The existence of a legal duty is not a question of fact; it is an issue of law. As an issue of law, its resolution resides in the province of the court--not the jury.

The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.

Syl. pt. 5, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576. I believe that, even taking Mr. Elliott's factual averments in a light most favorable to him, he has failed to show a legal duty. *See, e.g., Gooch v. West Virginia Dep't of Pub. Safety*, 195 W. Va. 357, 366, 465 S.E.2d 628, 637 (1995) ("A central issue to the circuit court's determination is whether the record taken as a whole and in a light most favorable to the plaintiff is sufficient to create a genuine issue of material fact for trial.").

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

B. The Board was Under No Legal Duty to Police a Non-school Party, Occurring After School Hours on a Private Premises, Which was Not Organized Nor Sponsored by Nitro High School

Mr. Elliott seeks to impose liability upon the Board because the “victory party” was an extension of the championship football game. He bases his claim upon W. Va. Code § 18-2-25 (1967) (Repl. Vol. 1999) which provides, in pertinent part, that “[t]he county boards of education are hereby granted and shall exercise the control, supervision and regulation of all interscholastic athletic events, and other extracurricular activities of the students in public secondary schools, and of said schools of their respective counties.” Mr. Elliott attempts to ratchet the victory party into the term “extracurricular activ[ity].” In short, Mr. Elliott’s theory against the Board

contends that the “victory party,” because of its connection with the state high school football championship, was . . . an extracurricular activity. [Mr. Elliott] alleges that teachers at the school knew of the party beforehand, and that several coaches even attended the party and drank alcoholic beverages with students. [Mr. Elliott] argues that the Board had a duty to intervene and prevent students from drinking alcoholic beverages.

However, it is undisputed that neither the Board nor Nitro High School organized the victory party, transported students to the victory party, allowed the victory party to occur on school property or permitted the victory party to occur during school hours. “Schools have generally not been held to have a duty of supervision when the injuries have occurred off-campus while students have been involved in non-school related activities.” 57 Am. Jur. 2d

Municipal, County, School, and State Tort Liability § 510, at 474 (2001) (footnote omitted).

Indeed, the inappropriateness of creating a legal duty in this case (the obverse of the appropriateness of granting summary judgment) is evidenced by reference to our opinion in *Miller v. Whitworth*, 193 S.E.2d 262, 455 S.E.2d 821 (1995), where we reiterated the parameters for creating a legal duty. “[F]oreseeability of risk is an important consideration. . . . This Court also acknowledged that courts should consider the ‘likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.’” *Id.*, 193 at 266, 455 at 825 (citations omitted). Application of this test to the facts in the record before this Court establishes that the circuit court appropriately granted the Board summary judgment.

For example, in *Rollins v. Blair*, 235 Mont. 343, 767 P.2d 328 (1989), Rollins was a cheerleader for Fergus County High School (hereinafter “Fergus”). The Fergus cheerleading squad attended a cheerleading camp. Rollins was practicing with other Fergus cheerleaders during a free period before the camp’s evening activities. While practicing, Rollins fell from an off-the-ground position, injuring her spine.

Rollins sued the school district alleging responsibility for its students during

school, during extracurricular activities and as principal of its agent, LaVonne Simonfy (the cheerleading advisor) for negligent supervision. The trial court granted Fergus summary judgment and held that the school district had no active part in the summer cheerleading camp with the exception of providing a bus for transportation. On appeal, Rollins argued that Fergus played an active role in sending the cheerleaders to camp and that Fergus sent LaVonne Simonfy to the camp as an advisor and thus was liable for Simonfy's negligence for improper supervision. In affirming the summary judgment, the Montana Supreme Court said:

Appellant asserts that Fergus owed a duty because of its active participation in the events leading up to the injury at the camp. For example, the cheerleaders were selected by the students and faculty of Fergus. Money was raised for the camp and deposited in the school district accounts. The cheerleaders also learned of the camp through literature sent . . . to the school.

On the motion for summary judgment, Fergus showed that it merely provided a bus for the girls' transportation. The funds which were raised to send the cheerleaders to the camp were private funds raised by the girls themselves. To hold the school district liable for injuries to a cheerleader simply because she was chosen by other students of the school is insufficient to find a duty. Moreover, posters advertising the camp provided by Blair is also insufficient to find that Fergus owed a duty to Rollins. The cheerleading camp was run by private parties independent of the school district. It would be improper to hold that Fergus had a duty of supervision to Rollins for an extracurricular activity during the summer months which was governed by independent parties.

235 Mont. at 346, 767 P.2d at 330.

Moreover, the court also rejected imputed liability:

Appellant contends that Fergus is liable to Rollins through

its agent, LaVonne Simonfy. However, Simonfy's participation was too limited to owe a duty as a supervisor and was not Fergus's agent. She was not under contract with the school district during the summer months and when she attended the camp. She used her own funds to attend the camp rather than accept school funds to attend. Her attendance at the camp was personal and not as an employee of Fergus.

Id. at 347, 767 P.2d at 330.

Like Ms. Simonfy, the participation of the coaches in the victory party was simply too tenuous to impute liability to the Board. Summary judgment was appropriately entered in the Board's favor.

Further, even if the victory party was connected with some school organization, it was still held off school grounds and after school hours; thus, no duty of supervision (and, perforce, no negligence) exists. "Where an injury occurs in connection with club initiation ceremonies off school premises and outside school hours, no duty of supervision has been found in the absence of evidence that the activity was school-sponsored and school-directed so as to establish a school-pupil relationship with respect thereto." 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 501, at 463-64 (2001) (footnote omitted). Thus, I cannot conclude the Board had any duty in this case and I conclude summary judgment was appropriately entered.

Imposition of liability in this case opens a multitude of perplexing practical

problems, such as --what was the Board's proper response to the victory party? Did it have the duty to seek an injunction to prevent a non-school related party occurring on private property after school hours? Did it have the obligation to send security guards to all such social events to enforce a no drinking policy? Did it have the obligation to formally advise students not to attend and coerce student compliance upon threatened imposition of sanction if any student violated the school's dictate to avoid attending a private, non-school related, off-school property, after school hours party?

Even assuming sound, workable and legally supportable answers to these difficult questions are forthcoming, this Court has said that necessary areas of inquiry in establishing a legal duty include "the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.'" *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 397, 549 S.E.2d 266, 271 (2001) (citations omitted).

Each year in West Virginia, our public schools sponsor numerous extracurricular activities such as sporting events, field trips, social dances, senior proms, baccalaureates and graduation ceremonies. If school boards are compelled to eliminate underage drinking during private, non-school related activities occurring on private property *after* school events end, boards would have to divert finite resources away from educational programs and usurp the

primary responsibility of parents in supervising their children. Schools do not have such a duty.

As the Florida Court of Appeals has explained:

[A] school has no duty to supervise off-campus, non-school related activities occurring during non-school hours. Any holding to the contrary would essentially make school officials insurers of all students' safety until the students return home each day. We decline to place such an unreasonable and onerous burden on school officials.

Concepcion v. Archdiocese of Miami, 693 So. 2d 1103, 1105 (Fla. Ct. App. 1997).

“The logical point at which a school’s obligation of reasonable supervision ends and a parent or guardian’s duty of supervision resumes is the point at which the student leaves the school’s premises during non-school hours and is no longer involved in school-related activities.” 47 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 510, at 474 (2001) (citing *Concepcion*, 693 So. 2d 1103). The supervisory duty obligation ceases once the extracurricular activity ends--as it did here once the football game ended. Any other rule would impose on our school systems an intolerable burden to achieve an unreasonable objective.

For the foregoing reasons, I respectfully dissent. I am authorized to state that

Justice Maynard joins me in this separate opinion.