IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1998 Term

No. 24998

KEVIN C. HARRIS,
Appellant

v.

R. A. MARTIN, INC.,
Appellee

Appeal from the Circuit Court of Jackson County
Honorable Charles E. McCarty, Judge
Civil Action No. 94-C-93

REVERSED AND REMANDED

Submitted: September 22, 1998
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The Opinion of the Court was delivered PER CURIAM.
JUSTICE MAYNARD dissents and reserves the right to file a dissenting Opinion.
JUSTICE McCUSKEY dissents and reserves the right to file a dissenting Opinion.
JUSTICE MCGRAW did not participate in the decision of this case.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

3. "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." Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

4. "The liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injur [sic] another." Syllabus Point 1, *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983).

5. "One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise

reasonable care to prevent the threatened harm." Syllabus Point 2, *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983).

6. "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" Syllabus Point 3, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

7. "Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them." Syllabus Point 5, *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964).

8. "Due care is a relative term and depends on time, place, and other circumstances. It should be in proportion to the danger apparent and within reasonable anticipation." Syllabus Point 2, *Johnson v. United Fuel Gas Co.*, 112 W. Va. 578, 166 S.E. 118 (1932).

9. "Negligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some circumstance of

time, place, manner, or person." Syllabus Point 1, *Dicken v. Liverpool Salt & Coal Co*., 41 W. Va. 511, 23 S.E. 582 (1895).

Per Curiam:

This case is before this Court upon an appeal of a final order of the Circuit Court of Jackson County entered on July 31, 1997. The appellant, Kevin Harris, a summer employee for the City of Ripley, sustained injuries when a garbage dumpster fell on his leg. He instituted an action against the appellee, R. A. Martin, a construction company, alleging that it was negligent in placing heavy construction materials in the dumpster. Pursuant to the July 31, 1997 order, the circuit court entered summary judgment in favor of the appellee. In this appeal, the appellant contends that the circuit court erred by finding that the appellee owed him no legal duty of care.

This Court has before it the petition for appeal, all matters of record, and the briefs and argument of counsel. For the reasons discussed below, the final order of the circuit court is reversed, and this case is remanded.

I. Facts

In August 1994, the appellant was employed as a summer worker for the City of Ripley. While helping with the city garbage collection, the appellant was injured as he attempted to position a garbage dumpster for emptying. The dumpster which contained several large blocks of concrete on top of trash tilted forward and fell on the appellant's leg, pinning him between the dumpster and the pavement. As a result, the appellant suffered a broken ankle.

An investigation into the accident revealed that the blocks of concrete had been placed in the dumpster by employees of the appellee, a contractor hired by the Jackson County Board of Education to repair tennis courts located in the Ripley City Park.[1] The dumpster at issue was located about ten yards from the swimming pool in the park and was intended for swimming pool use only. The evidence indicated that the appellee had not

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[1]Ripley City Park is located on property leased to the City by the Jackson County Board of Education.

been given permission to place concrete or any kind of heavy construction materials in the City's dumpsters. In addition, an ordinance of the City of Ripley specifies that it is "unlawful for any unauthorized person to dispose of refuse, trash, garbage or any other materials in, at or near a commercial dumpster owned or serviced by the City."[2]

After the accident, the appellant sued the appellee alleging that it was negligent in placing the construction material in the dumpster. Subsequently, the appellee moved for summary judgment on the basis that it owed no duty to the appellant. On July 31, 1997, the circuit court granted summary judgment in favor of the appellee finding that "in the absence of extraordinary circumstances, a person who disposes of nonhazardous materials in a dumpster has no duty to dispose of those materials in such a way as

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[2] The ordinance further states that an "'unauthorized person' includes any person who is not the owner, agent or employee of the business, organization or institution for which the dumpster has been supplied and which is being billed for the servicing of the same and who is not acting with the express permission of any such owner, agent or employee."

to assure that a worker emptying the dumpster avoids injury and that no extraordinary circumstances were present in this case."

II. Standard of Review

On numerous occasions, we have indicated that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). *See also* Syllabus Point 4, *Dieter Eng'g Servs., Inc. v. Parkland Dev., Inc.*, 199 W.Va. 48, 483 S.E.2d 48 (1996); Syllabus Point 1, *Smith v. Stacy*, 198 W.Va. 498, 482 S.E.2d 115 (1996). Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In Syllabus Point 3 of *Aetna*

Casualty & Sur. Co. v. Federal Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963), this Court held: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *See also* Syllabus Point 3, *Evans v. Mutual Mining*, 199 W.Va. 526, 485 S.E.2d 695 (1997); Syllabus Point 1, *McClung Invs., Inc. v. Green Valley Community Pub. Serv. Dist.*, 199 W.Va. 490, 485 S.E.2d 434 (1997). We have also observed that:

> 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.

Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). *See also* Syllabus Point 2, *Cottrill v. Ranson*, 200 W.Va. 691, 490 S.E.2d 778 (1997); Syllabus Point 2, *McGraw v. St. Joseph's Hosp.*, 200 W.Va. 114, 488 S.E.2d 389 (1997).

In *Williams*, we clarified the function of the circuit court at the summary judgment stage. We explained that the circuit court is not "'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" 194 W.Va. at 59, 459 S.E.2d at 336 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)). Consequently, any permissible inference from the underlying facts must be drawn in the light most favorable to the

party opposing the motion. *Painter*, 192 W.Va. at 192, 451 S.E.2d at 758. "Summary judgment should be denied 'even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.'" *Williams*, 194 W.Va. at 59, 459 S.E.2d at 336 (*quoting Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951)).

III. Existence of Duty

The establishment of a *prima facie* case of negligence requires a showing that a defendant is guilty of some act or omission in violation of a duty owed to the plaintiff. *See* Syllabus Point 1, *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 280

S.E.2d 703 (1981). In this case, the appellant contends that the circuit court erred by finding that the appellee owed him no duty of care. We agree.

In *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983), we discussed the modern trend of expanding the concept of duty in tort cases. In Syllabus Point 1 of *Robertson*, we stated that "[t]he liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injur [sic] another." In this regard, we explained that "[i]t is well-established that one who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an

unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." Syllabus Point 2, *Robertson.* We further explained that "'[Duty]' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk." 171 W.Va. at 611, 801 S.E.2d at 567, *quoting* W. Prosser, *The Law of Torts*, § 53 (4th ed. 1971). While the existence of a duty is defined in terms of foreseeability, it also involves policy considerations including "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." *Id.*

As we stated in Syllabus Point 3 of *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988):

> The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Pursuant to the *Sewell* standard, the inquiry must focus upon the extent to which the appellant could have reasonably foreseen that bodily injury could occur due to his actions. As Justice Cardozo succinctly noted, "[t]he risk reasonably to be perceived defines the duty to be obeyed." *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 100 (N.Y. 1928). In addressing such issues of foreseeability in *Johnson v. Mays*, 191 W. Va. 628, 447 S.E.2d 563 (1994), we explained that questions of the foreseeability that harm may result from placing gasoline in an unlabeled container at the request of ten-year old boys were questions of fact for the jury. Id. at 634, 447 S.E.2d at 569.

The appellee argues that it owed no duty to the appellant in connection with the toppling dumpster based on Robinson v. Suitery, LTD., 526 N.E.2d 566 (Ill.App. 1Dist. 1988). In Robinson, the plaintiff cut her hand on a piece of glass as she attempted to

dispose of trash in a commercial dumpster shared by tenants of a mini-mall. The plaintiff filed suit against another business located at the mall for negligent disposal of fluorescent light tubes. The court held that the user of a commercial dumpster did not owe a duty to the plaintiff because the glass tubes were disposed where they should have been, in the garbage dumpster.

The case *sub judice* differs from *Robertson* in two factual respects. First, there are genuine issues of fact with regard to whether the appellee had permission to use the dumpster in question. There are in fact allegations that the appellee may have violated an ordinance by using the dumpster. Secondly, the *Robinson* court

sought to avoid imposing a duty on those permissibly using a dumpster to take extraordinary measures.

Furthermore, we decline to follow the Illinois court's reasoning in *Robinson* because it differs from *Robertson* in a significant legal respect. It appears that Illinois courts, in determining whether a duty was owed by a defendant, place little weight on whether the plaintiff's injury was foreseeable. While the *Robinson* court recognized that "foreseeability is only one element in the determination of duty," the court also indicated that "[f]oreseeability of harm 'does not enter into the process' of critical inquiry 'into the true basis of duty.'" The court concluded that "[t]he courts generally focus on public policy considerations when it comes to

ascertaining whether a duty exists in a given situation." 526 N.E.2d at 568 (citation omitted).

IV. Jury Question

In West Virginia, we have repeatedly held that the existence of a defendant's duty is generally a question of fact for jury determination. We stated as follows in Syllabus Point 5 of *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964):

> Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.

In accord, Syllabus Point 6, *McAllister v. Weirton Hosp. Co.*, 173 W. Va. 75, 312 S.E.2d 738 (1983); Syllabus Point 1, *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584 (1981); Syllabus Point 17, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990). We believe this rule is applicable in this case.

We have also explained that "[d]ue care is a relative term and depends on time, place, and other circumstances. It should be in proportion to the danger apparent and within reasonable anticipation." Syllabus Point 2, *Johnson v. United Fuel Gas Co.*, 112 W. Va. 578, 166 S.E. 118 (1932). In Syllabus Point 1 of *Dicken v. Liverpool Salt & Coal Co.*, 41 W. Va. 511, 23 S.E. 582 (1895), we explained that "[n]egligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some circumstance of time, place, manner, or person." Thus, those aspects of relativity and irresolution compel jury determination.

We conclude that the circuit court improvidently granted summary judgment in favor of the appellee. The record indicates that the appellee placed heavy construction materials on the top of a full dumpster, near the front, making it top-heavy. The evidence suggests although the appellee was performing work for the City, it did not have permission to use the dumpster which was obviously intended for use by persons at the swimming pool. The appellant was a City employee paid to assist in the emptying of dumpsters.

Viewing the facts in the light most favorable to the appellant, we believe the appellee could have reasonably foreseen that an overloaded, top-heavy dumpster would pose a risk of harm to a city employee whose job involves emptying dumpsters. At a minimum, the record reveals genuine issues of material fact regarding the existence of a duty, precluding summary judgment.

Thus, we conclude that the trial court erred in ruling that the appellee owed no duty to the appellant. Accordingly, the final order of the Circuit Court of Jackson County is reversed, and this case is remanded for further proceedings.

Reversed and Remanded.