

No. 24998 - Kevin C. Harris v. R.A. Martin, Inc.

Maynard, Justice, dissenting:

I dissent because I agree with the trial court's determination that the appellee owed the appellant no legal duty of care.

I am told that down in the Mother State of Virginia, at Charlottesville, beginning law students at the University of Virginia College of Law are introduced to the law of torts by being taught the "Four Ds" of a tort: Duty, Dereliction, Damage and Direct Cause.¹ The majority opinion errs by deviating from this revered formula.

The determination of whether a tort exists begins by answering the threshold question whether the alleged tortfeasor owes any duty of care.

¹This information is courtesy of Howard M. Persinger, Jr., attorney at law and graduate of the University of Virginia College of Law. I acquired this knowledge from Howard at the expense of suffering Howard's slight air exhibited by those who curiously feel they have the benefit of a superior legal education, a trait not uncommon among graduates of that venerable institution.

If the answer to this question is in the negative, the analysis is at an end, and it is determined that no tort has been committed. The majority correctly states that the existence of a duty, although defined in terms of foreseeability, also involves policy considerations including “the likelihood of injury, the magnitude of the burden of guarding against it, and the consequence of placing that burden on the defendant.” *Quoting Robertson v. LeMaster*, 171 W.Va. 607, 611, 301 S.E.2d 563, 567 (1983). However, the majority thereafter discards these other important considerations and decides this case entirely on the basis of foreseeability.

While the majority criticizes the Illinois case of *Robinson*, stating that it places too little weight on foreseeability, the majority proceeds to make foreseeability the totality of its analysis of the existence of a duty.

Courts have traditionally recognized that,

A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting to impose new duties and, concomitantly, liabilities, regardless of the economic and social burden. Thus, the courts have generally recognized that public policy and social considerations,

as well as foreseeability, are important factors in determining whether a duty will be held to exist in a particular situation.

57A Am.Jur.2d *Negligence* § 87, p. 143 (1989) (footnotes omitted). The majority, however, ignores public policy and social considerations. In so doing, it unquestioningly embraces “the modern trend of expanding the concept of duty in tort cases.” In fact, the majority so expands the element of duty, that its existence now becomes almost a given in any tort case.

If a party is injured by the conduct of another, there must have been a duty to avoid such conduct.

The majority’s incomplete analysis of the existence of a duty does damage to our law of torts and raises some serious questions. Obviously, we live in a society that produces vast amounts of trash, and the daily necessity of discarding trash is common to all from private homeowners and small businesses to the largest companies. People and businesses routinely toss things like broken glass, splintered wood, nails, sharp metal, pressurized hairspray cans, etc., into dumpsters. This is the purpose of dumpsters. In the aftermath of this decision, is everyone who places trash in a dumpster liable if someone is injured by their trash?

If the element of foreseeability is the sole consideration in determining the existence of a duty, the troubling answer to this question is yes. This unreasonably burdens the average homeowner who must now carefully categorize, separate, sort, and dispose of his or her trash in a way that forecloses any possibility that someone could be injured by it.

Also, the majority opinion, by making contradictory statements, confuses the law concerning who decides whether a duty exists. The majority states, “[i]n West Virginia, we have repeatedly held that the existence of a defendant’s duty is generally a question of fact for jury determination.”

Conversely, this Court has also repeatedly stated, however, that “[t]he determination of whether the plaintiff is owed a duty of care by the defendant must be rendered as a matter of law by the court.” *Jack v. Fritts*, 193 W.Va. 494, 498, 457 S.E.2d 431, 435 (1995), *citing Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 870, 280 S.E.2d 703, 706 (1981). *See also Miller v. Whitworth*, 193 W.Va. 262, 265, 455 S.E.2d 821, 824 (1995) (“We are mindful that the determination of whether there is a duty is a question of law and **not a question of fact for the jury.**” (Citation

omitted)); and *Yourtee v. Hubbard*, 196 W.Va. 683, 474 S.E.2d 613 (1996).

Also, legal commentators agree that “the determination of any question of duty . . . has been held to be an issue of law for the court rather than for the jury, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law.” 57A Am.Jur.2d *Negligence* §86, p. 142 (1989) (footnotes omitted). Well now, which is it? Is the existence of a duty a question of law for the court or a question of fact for the jury? The majority’s holding leaves circuit courts and lawyers asking whose responsibility it is to determine the existence of a duty in a tort case. I am now puzzled and ask the same question.

Finally, if there is a culprit in this case who should be liable for the appellant’s injury, it is the manufacturer of the dumpster. Dumpsters are made to hold all manner of heavy materials. The dumpster at issue should not have tipped over simply because construction materials were placed in it. The fact that it did so may indicate a design defect.

In conclusion, I agree with the circuit court's 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 to assure that a worker emptying the dumpster avoids injury and that no extraordinary circumstances were present in this case." Therefore, I would affirm the circuit court's order granting summary judgment to the appellee. In reversing that order, the majority unreasonably expands the concept of duty in tort law and adds ambiguity to the law of who determines the existence of duty in the first instance. Accordingly, I respectfully dissent.

I am authorized to state that Justice McCuskey joins in this dissent.