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

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OF WEST VIRGINIA

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Starcher, Justice, concurring:

I write separately to emphasize the majority opinion's conclusion that the circuit court in the instant case "jumped the gun" in granting summary judgment. The appellant, Aaron Elliott, was forced to defend multiple summary judgment motions in the absence of a factual record, without the benefit of discovery. The circuit court should not have granted summary judgment, and should have allowed the parties to develop evidence of what really happened, before, during and after the December 5, 1998 "victory party."

The discovery that the appellant was able to conduct – such as the handful of depositions that were completed – suggest that J. R. House routinely had parties at his house, and that alcohol was served at those parties. (For reasons that are unknown, J. R. House's parents inherited the house from a family member, but had the house titled his name. The appellant never discovered who paid the taxes, insurance, or other costs of operating the house.) Nancy House, the mother of J. R., was apparently supervising the victory party in some capacity, and appears to have drafted one of J. R. House's older siblings to assist.

Because these parties were routine, *some* school board employees had warned *some* students not to attend the parties. The record contains an instance where a teacher, who

was also the cheerleading coach, disciplined several cheerleaders who went to one party and drank alcohol, and later warned the cheerleaders they would face consequences if they drank any alcohol at the victory party. This is not to say that all school board employees disapproved of the parties. The record also contains evidence that at least two football coaches attended the victory party, one of whom allegedly drank to the point he was slurring words and having difficulty standing. There is some suggestion that the December 5 "victory party" was widely known and talked about at Nitro High School, but to what extent school employees and administrators encouraged or supported or discouraged the event is unknown because of the hasty granting of summary judgment.

The circuit court granted summary judgment to Joshua Haynes and his parents because, at the time the judgment was granted, there was no evidence of any wrongdoing by these parties. However, several weeks after summary judgment was granted, a deponent identified Joshua Haynes as one of the appellant's attackers. The deponent saw Joshua Haynes – who had allegedly been drinking heavily in violation of West Virginia law – kicking the appellant as he lay in the Haynes' front yard.

As I read the sparse factual record, one might infer that Glenn and Patricia Haynes knowingly encouraged and/or allowed their son and his friends to drink a few brews on their property. There are suggestions in the record that Joshua Haynes and his friends began drinking at 1:30 in the afternoon at the Haynes' house, long before the victory party began.[1]

[1]Joshua Haynes and his friends were so inebriated that night that when appellant Aaron (continued...)

Unfortunately, the record suggests that the appellant was unable to take the deposition of Joshua Haynes, Chris Schoolcraft (the person who initiated the attack) or most of the other individuals who were at the Haynes' house that evening to clarify the events leading up to the attack.

The record establishes that the appellant filed his complaint one year after the attack in December 1999. The appellees filed their answers a month later and the parties traded written discovery. The circuit court – which is bound under Rule 16 of the *Rules of Civil Procedure* to enter a pre-trial scheduling order – never entered a scheduling order.

Accordingly, the appellant scheduled a hearing – that was ultimately held on April 28, 2000 – with the circuit court to establish a discovery schedule and a deadline for filing such things as motions for summary judgment. Appellees Nancy and Roger House filed a motion for summary judgment, and converted appellant's scheduling hearing into a summary judgment hearing. Joshua, Glenn and Patricia Haynes filed their own motion for summary judgment seven days before the hearing,[2] even though such motions are supposed to be filed at least ten days before a hearing. *See* Rule 56(c), *Rules of Civil Procedure* ("The motion shall be served at least 10 days before the time fixed for the hearing."). The Haynes even

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[1](...continued)
Elliott's parents arrived after the attack and demanded to talk to Glenn and Patricia Haynes, Joshua and his friends threatened to beat them up as well. Glenn and Patricia Haynes claim no knowledge of this event, and contend they arrived home after a Christmas party and, feeling ill, went directly to bed.

[2]The appellant's attorney asserts that the motion was filed after 5:00 p.m. on Good Friday.

supplemented their motion with affidavits, their primary evidence, four days before the hearing.

The appellant's attorney appeared at the hearing and told the circuit judge that additional time was needed for discovery to respond to the appellees' motions and affidavits. The circuit judge was clearly and repeatedly told that depositions had already been scheduled for approximately six weeks in the future. The circuit judge instead concluded there were no facts in dispute, and granted summary judgment anyway.

The remaining two appellees, J. R. House and the Board of Education, jumped on the bandwagon and filed their motions for summary judgment soon after the April 28, 2000 hearing.[3] And, in the midst of the appellant's depositions, the circuit court held a hearing and granted summary judgment to these parties as well.

This case started and ended in just over six months, before any meaningful discovery could be conducted. The record even suggests that some of the appellees' attorneys refused to allow the appellant to take their clients' depositions until after the circuit court ruled on the motions for summary judgment. In sum, the appellant was denied discovery, and then summary judgment was granted because the appellant had no evidence to prove his case.

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[3]To be more specific, at the April 28, 2000 hearing, the circuit court all but encouraged the remaining appellees to file motions for summary judgment. For instance, the circuit court refused to order the remaining appellees to participate in mediation, telling the appellant's counsel "you don't have enough evidence" and because "there is not enough facts known." The circuit court stated that, "If what [the remaining two appellees are] saying is correct because of the . . . motions that are going to be filed for summary judgement [sic], I'm just going to hold off on mediation and just wait until after we hear the motions[.]"

My dissenting colleagues suggest that the Board of Education absolutely, plainly and definitely had no legal duty in this case because the Board of Education did not organize the party, did not transport students to the party, and did not allow the party to occur on school property during school hours. The record, however, contains absolutely no evidence regarding these factors – the appellant simply was not given a chance to conduct sufficient discovery of these issues. Perchance, a deposition of a school employee might reveal encouragement or active support for the victory party by school employees, employees who might have been acting in the course of their employment and not merely for their private pleasure.[4]

The existing record makes clear that school officials were aware of the routine victory parties at J. R.'s house and that students had been disciplined for attending those parties. So, if some students could be punished for attending an event not organized by the school, that was not on school property during school hours, then what was to prevent the school from acting to prevent all students from attending the victory party on December 5, 1998?[5] A simple phone call to the police by the school principal, or one of the coaches at the party, might have prevented the attack on the appellant.

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[4]For instance, what if a coach announced, during the championship football game, that after the team won its championship, they all should get together at the "victory party." And, everyone knew where the "victory parties" had been routinely held. And, that the coach said, "I'll be there celebrating with you." Would it be reasonable to say, on these facts, that the coach's conduct was in the course of his employment? Would it be an act for which a board of education might bear legal responsibility?

[5]We also cannot discern from the record whether the school employees who attended the party were disciplined.

I agree with my dissenting colleagues to the extent they suggest the appellant has a tough case to prove the Board of Education had a legal duty and breached that duty. However, the question of whether a party has a legal duty to do or refrain from some act cannot be answered in a factual vacuum. For the circuit court to say that the appellant didn't have a case against the Board of Education or any of the other appellees, in the absence of factual discovery, violated all notions of fairness. The majority was absolutely correct in stating that the circuit court "jumped the gun" in granting *all* appellees' motions for summary judgment without first permitting appellant sufficient time to do proper discovery in this case.

I therefore respectfully concur with the majority opinion.