STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

DAVID MEANS,
Plaintiff Below, Appellant

vs.) **No. 35506** (Kanawha County 08-C-3400)

KANAWHA PIZZA, LLC, et al.,
Defendant Below, Appellee

FILED
May 16, 2011
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The instant action is before this Court upon the appeal of David Means, Appellant, from the circuit court's order granting the motion to dismiss of Appellees, Darden Properties II, LLC and OSI, LLC, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Herein, Appellant asserts that the circuit court's dismissal of claims against Appellees was premature and erroneous because the facts set forth in Appellant's complaint were sufficient in alleging that Appellees had breached a recognized duty of care owed to Appellant. This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. For the reasons expressed below, the August 31, 2009, order of the Circuit Court of Kanawha County is reversed. In so holding, this Court finds that this case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Appellant was an employee of the Domino's Pizza on Washington Street East in Charleston. Domino's was operated by Appellee Kanawha Pizza, LLC and was located on land owned by PLC WV, LLC. Adjacent to Domino's is an Exxon gas station owned and operated by Darden Properties and OSI. On the evening of December 24, 2006, Mr. Means exited the Domino's Pizza after completing his work for the evening. As he approached his vehicle parked in the rear of the Domino's property, he was assaulted by two individuals whom he believed were going to rob him. Mr. Means alleged that these two unknown assailants initiated their attack on him from the adjacent Exxon property where they had concealed themselves behind an outbuilding and a short chain link fence through part of which were slats. When Mr. Means attempted to flee, one of the assailants shot him in the leg causing serious injury. The assailants fled and were never apprehended.

Following this incident, Appellant Means filed this action against the Appellees alleging: 1) that Appellees had a duty to exercise ordinary care to take safety precautions to prevent violent criminal conduct on and around its premises; 2) that Appellees had carelessly and recklessly breached that duty through their failure to provide protective measures and safeguards to ensure the safety of all persons near and on defendant's property; 3) that Appellees either knew or should have known that the failure to provide a safe premises and protective measures and safeguards created a substantial and foreseeable danger of serious bodily injury or death; and 4) that as a direct and proximate result of Appellee's actions, conduct or omissions, Appellant suffered severe and permanent injuries. Specifically, Appellant alleged that before this incident, the employees and management of Darden Properties and OSI either observed or were aware of other instances of illegal and criminal activity in the immediate area of the Exxon and Domino's properties, including but not limited to, fighting, robberies, panhandling, loitering, public intoxication, and acts of prostitution. Appellant alleges that despite this, Appellees failed to adequately safeguard their premises for the safety of individuals such as himself.

On April 24, 2009, Appellees filed a Motion to Dismiss under Rule 12(b)(6) of the WV Rules of Civil Procedure alleging that there is no authority in West Virginia which establishes a landowner's duty to protect individuals from criminal attacks on non-owned or possessed property. By its order of August 31, 2009, the court granted the motion concluding that West Virginia law does not impose upon property owners and occupiers the duty to protect individuals from criminal acts on property owned and controlled by another. Mr. Means appealed, and this Court granted review on March 11, 2010.

Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995); Syl. Pt. 1, *Albright v. White*, 202 W. Va. 292, 503 S.E.2d 860 (1998). Generally, a motion to dismiss should be granted only where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996)(citations omitted). For purposes of a motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true. *Lodge Distrib. Co., Inc. v. Texaco*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977). Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc*., 194 W. Va. at 776, 461 S.E.2d at 522.

In this case, we must consider not only the issues of landowner duty and foreseeability generally, but also with respect to those using adjoining property. This Court has previously engaged in a detailed discussion of the issues of landowner duty and foreseeability in *Strahin v. Cleavenger,* 216 W.Va. 175, 603 S.E.2d 197 (W.Va. 2004). Therein, we stated the following:

> "[T]he threshold question in all actions in negligence is whether a duty was owed. As succinctly stated in syllabus point one, in part, of *Parsley v. General Motors Acceptance Corporation*, 167 W. Va. 866, 280 S.E.2d 703 (1981), "No action for negligence will lie without a duty broken."
>
> We have previously described duty as a "question of whether the defendant is under any obligation for the benefit of a 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." *Robertson v. LeMaster*, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983), quoting W. Prosser, *The Law of Torts*, 53 (4th ed. 1971). Whether a person acts negligently is always determined by assessing whether or not the alleged negligent actor exercised reasonable care under the facts and circumstances of the case, with reasonable care being that level of care a person of ordinary prudence would take in like circumstances. Syl. Pt. 4, *Patton v. City of Grafton*, 116 W. Va. 311, 180 S.E.2d 267 (1935).

Strahin, 216 W.Va. at 183, 603 S.E.2d at 205. "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 (2000).

In premises liability cases, the duty owed by "landowners or possessors [of property]... [to] any non-trespassing entrant [is] a duty of reasonable care under the circumstances." Syl. Pt. 4, in part, *Mallet v. Pickens*, 206 W.Va. 145, 522 S.E.2d 436 (1999). However, owners or occupiers of land generally have no duty to protect against the deliberate criminal conduct of third parties on their premises "because the foreseeability of risk is slight, and because of the social and economic consequences of placing such a duty on a person." *Miller v. Whitworth*, 193 W.Va. 262, 266, 455 S.E.2d 821, 825 (1995).

We have only defined two instances where departure from this general rule is

warranted. In *Miller v. Whitworth*, 193 W.Va. 262, 455 S.E.2d 821, we were asked to determine whether a landlord owes a duty to protect a tenant from injury resulting from the criminal acts of a third party. After acknowledging the general proposition that there is no duty to protect against deliberate criminal conduct of third parties, we went on to discuss the following recognized exceptions to this general rule:

> (1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct or *(2) when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct.* Restatement (Second) of Torts §§ 302B cmt. e and 315 (1965).

Id. (emphasis added). Under the second exception, we concluded that "a duty will be imposed if a landlord's affirmative actions or omissions have unreasonably created or increased the risk of injury to the tenant from the criminal activity of a third party." *Id*. at 268, 455 S.E.2d at 827. Based on the facts in *Whitworth*, we found that the prior unrelated incidents of some criminal activity occurring in the general vicinity of the leased property were not enough to impose a general duty on the landlord in that case. In syllabus point 6, we held the following:

> Under the common law of torts, a landlord does not have a duty to protect a tenant from the criminal activity of a third party. However, there are circumstances which may give rise to such a duty, and these circumstances will be determined by this Court on a case-by-case basis. A landlord's general knowledge of prior unrelated incidents of criminal activity occurring in the area is not alone sufficient to impose a duty on the landlord. However, a duty will be imposed if a landlord's affirmative actions or omissions have unreasonably created or increased the risk of injury to the tenant from the criminal activity of a third party.

193 W.Va. at 264, 455 S.E.2d at 823. *See also Scott v. Taco Bell Corp*., 892 F.Supp. 142, 145 (S.D.W.Va.1995) (stating that under West Virginia law "there is no duty upon a person to protect another from the unforeseen criminal activity of a third party. This rule holds whether the person injured by the third party is a social guest, a tenant, an occupant, or a business invitee. An exception exists if the Defendant, by action or omission, unreasonably created or increased the risk of injury from the criminal activity of a third party."). Therefore, while we found no general duty, we observed that a specific duty may be imposed on a landlord if the landlord engaged in affirmative acts or omissions which foreseeably created a specific risk of harm to a tenant from the criminal activity of a third person on the premises.

Although *Whitworth* specifically pertained to the duties owed in a landlord/tenant relationship, we have also recognized that a specific duty may, in certain circumstances, be imposed on an owner or occupier of land with respect to persons on adjacent land. *See* Syl. Pt. 2, *Whitney v. Ralph Myers Contracting Corporation*, 146 W. Va. 130, 118 622 S.E.2d (1961) (holding that the use of explosives in blasting operations, though necessary and lawfully used by a general contractor in the construction of a public highway, being intrinsically dangerous and extraordinarily hazardous, renders the contractor liable for damages resulting to the property of another from such blasting, without negligence on the part of the contractor.) *See also Perdue v. S. J. Groves and Sons Co.*, 152 W.Va. 222, 161 S.E.2d 250 (1968) (recognizing the general rule that a contractor building a road under a contract with the State is not liable in trespass for damage to the property of another unless such contractor is guilty of independent negligence or engages in ultrahazardous activities in pursuance of the contract.); *Louk v. Isuzu Motors, Inc*. 198 W.Va. 250, 265, 479 S.E.2d 911, 926 (1996)(finding that a jury might conclude it was foreseeable that Wal-Mart could expect more accidents to happen at a particular highway access to the property and that a jury might conclude that Wal-Mart had reason to know and appreciate the danger because of its in-house engineering capability and the history of collisions entering or leaving the Wal-Mart premises, and noting that in order to hold Wal-Mart liable, the condition giving rise to the collision must either be on Wal-Mart's premises or must have constituted a condition on the access which Wal-Mart caused to occur or of which Wal-Mart had reason to know and the capacity to correct.); *Harless v. Workman*, 145 W. Va. 266, 275, 114 S.E.2d 548, 553 (1960) ('In general, a fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance is the reasonableness or unreasonableness of conducting the business or making use of the property complained of in the particular locality and in the manner and under the circumstances of the case; and ordinarily, where the use made of property or the conduct of a business is reasonable, no actionable nuisance is created as against which relief may be had. It has been held that in order to render one liable for a nuisance, the invasion of the interests of another must be either intentional and unreasonable, or, actionable under the rules governing negligence, recklessness, or ultrahazardous conduct; and it has been held that an intentional, as distinguished from negligent, invasion of another's interest in the use and enjoyment of land is unreasonable, unless the utility of the conduct outweighs the gravity of the harm.'); Syllabus, *Rinehart v. Stanley Coal Company*, 112 W. Va. 82, 163 S.E. 766 (1932)(in an action for damages caused by burning gob piles, the Court held that "[a]n owner is liable for negligently using his property to the injury of another.")

In *Strahin*, we recognized that when the facts about specific foreseeability as an element of duty are disputed and reasonable persons may draw different conclusions from them, two questions arise-one of law for the judge and one of fact for the jury. 216 W.Va.

at 183-186, 603 S.E.2d at 208. Therein, we explained that

> [a] court's overall purpose in its consideration of foreseeability in conjunction with the duty owed is to discern in general terms whether the type of conduct at issue is sufficiently likely to result in the kind of harm experienced based on the evidence presented. If the court determines that disputed facts related to foreseeability, viewed in the light most favorable to the plaintiff, are sufficient to support foreseeability, resolution of the disputed facts is a jury question. The jury has the more specific job of considering the likelihood or foreseeability of the injury sustained under the particular facts of the case in order to decide whether the defendant was negligent in that his or her conduct fell within the scope of the duty defined by the court. " ' " ' "Questions of 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." Syl. Pt. 1, *Ratlief v. Yokum*, [167 W.Va. 779], 280 S.E.2d 584 (W.Va.1981), quoting syl. Pt. 5, *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236 (1964).' Syllabus Point 6, *McAllister v. Weirton Hosp. Co.*, 173 W.Va. 75, 312 S.E.2d 738 (1983)." Syl. Pt. 17, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990).' Syl. Pt. 1, *Waugh v. Traxler*, 186 W.Va. 355, 412 S.E.2d 756 (1991)." Syl. Pt. 2, in part, *Johnson v. Mays*, 191 W.Va. 628, 447 S.E.2d 563 (1994); *see also* Syl. Pt. 3, in part, *Davis v. Sargent*, 138 W.Va. 861, 78 S.E.2d 217 (1953), Syl. Pt. 2, in part, *Evans v. Farmer*, 148 W.Va. 142, 133 S.E.2d 710 (1963).

Id.

In the instant case, Appellees assert that Appellant has failed to state a claim upon which relief can be granted because West Virginia landowners generally have no duty to protect others from the deliberate criminal conduct of third parties, and because neither of the exceptions to this rule enunciated in *Miller v. Whitworth*, 193 W. Va. 262, 455 S.E.2d 821 apply in this case. Herein, while Appellants may ultimately be unable to muster the demonstrable facts necessary to meet his burden and may, indeed, be unable to withstand a motion for summary judgment, we find that with regard to a specific duty owed by Appellees to him, the facts as alleged by the Appellant are at least sufficient to satisfy the requirements of Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

Appellant's complaint alleges that before this incident, Appellees Darden

Properties and OSI were aware of specific illegal and criminal activity in the immediate area of the Exxon property. Despite this specific knowledge, Appellant contends that Appellees breached a specific duty of care to Appellant since it was foreseeable that Appellant would be harmed by such activity specific to the Exxon property.

While we recognize that according to our jurisprudence, there is (1) generally no duty upon a person to protect another from the unforeseen criminal activity of a third party, and (2) no recognized general duty of care of an owner or occupier of a premises to a permissive user of an adjacent premises, we find here that Appellant's complaint minimally alleges that consistent with the second exception enunciated under *Whitworth* and our jurisprudence regarding duties owed to users of adjacent property, that a specific duty of care to Appellant was alleged in this case.[1] Accordingly, based upon the allegations set forth in the complaint and the representations made by the parties during the oral argument in this appeal, this Court finds that the circuit court was premature in its dismissal of this action and that at least some factual development is appropriate.[2] Specifically, Appellant must be given the opportunity to discover whether Appellees' affirmative actions or omissions unreasonably created a specific risk of serious injury to the Appellant. Accordingly, we find that the circuit court erred in dismissing the Appellant's complaint.

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[1] For example, Appellant should be permitted to inquire, based upon the allegations set forth in his complaint, what actual knowledge Appellees had regarding specific criminal activities in the past that had been initiated against others from its premises and specifically from the outbuilding and the fence on their property. It is not enough to simply show that the assailants herein hid behind the outbuilding and fence prior to their assault on the Appellant or that the Appellees had only a general awareness of crime in the area. Were that the case, virtually every owner or occupier of property in West Virginia on which a tree, bush, fence, vehicle, or building was situated would become an insurer against general criminal activity by third persons contrary to our well-established jurisprudence as set forth in *Whitworth*.

[2]Based upon the current posture of this case, we must only review the facts as alleged in the complaint for purposes of satisfying the requirements of Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. While we recognize that based upon the confines of our jurisprudence, Appellant will have a rather high hurdle to achieve to survive summary judgment following the development of facts during discovery, we believe the facts alleged in the complaint are minimally sufficient to meet the lower threshold requirements of Rule 12(b)(6).

For the foregoing reasons, we reverse the August 31, 2009, order of the Circuit Court of Kanawha County and remand this matter to the circuit court for further action consistent with this Order.

Reversed and remanded.

ISSUED: May 16, 2011

CONCURRED IN BY:

Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

Chief Justice Margaret L. Workman not participating.