

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

JAN 06 2017

SC Court of Appeals

Case No.: 2016-001647

Terrence J. McLeod, Plaintiff, Appellant,

v.

Jarius Orel English-McMillan, Roland Shelley, Roland G. Shelley, II,
Scott C. Shelley and Coastal Carolina University, Defendants,

Of Whom Coastal Carolina University is the Respondent.

INITIAL BRIEF OF THE RESPONDENT

Lisa A. Thomas, SC Bar #66458
THOMPSON & HENRY, P.A.
1300 Second Avenue, Third Floor (29526)
P. O. Box 1740
Conway, South Carolina 29528
(843) 248-5741 - voice
(843) 248-5112 - fax
lthomas@thompsonlaw.com
Attorneys for the Respondent
Coastal Carolina University

TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	1
Argument.....	2
Conclusion.....	6

TABLE OF AUTHORITIES

CASES

<i>Bass v. Gopal</i> , 395 S.C. 129, 716 S.E.2d 910, (2011)	3
<i>Carson v. Adgar</i> , 326 S.C. 212, 486 S.E.2d 3 (1997)	4
<i>Doe v. Marion</i> , 373 S.C. 390, 645 S.E.2d 245, (2007)	3
<i>Easterling v. Burger King Corp.</i> , 416 S.C. 437, 786 S.E.2d 443, (Ct. App. 2016)	3
<i>Gentry v. Yonce</i> , 337 S.C. 1, 522 S.E.2d 137, (1999)	2
<i>Hendricks v. Clemson University</i> , 353 S.C. 449, 578 S.E.2d 711 (2003)	4
<i>Johnson v. Jackson</i> , 401 S.C. 152, 735 S.E.2d 664 (Ct. App. 2012)	4
<i>Rice v. School District of Fairfield</i> , 317 S.C. 87, 452 S.E.2d 352 (Ct. App. 1994).....	3
<i>South Carolina Ports Authority v. Booz-Allen & Hamilton, Inc.</i> 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986)	4
<i>Spence v. Spence</i> , 368 S.C. 106, 628 S.E.2d 869, (2006)	2
<i>Steinke v. S.C. Dep't of Labor, Licensing & Regulation</i> , 336 S.C. 373, 520 S.E.2d 142, (1999)	3
<i>Williams v. Condon</i> , 347 S.C. 227, 553 S.E.2d 496 (Ct. App.2001)	2

STATUTES

S.C. Code Ann. § 15-78-60(25) (Supp. 1999)	5
--	---

COURT RULES

Rule 12(b)(6), SCRCP.....	1, 2, 6
---------------------------	---------

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT PROPERLY DISMISS THE PLAINTIFF'S COMPLAINT AGAINST COASTAL CAROLINA UNIVERSITY PURSUANT TO RULE 12(b)(6) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE?

STATEMENT OF THE CASE

Respondent Coastal Carolina University's motion to dismiss pursuant to South Carolina Rule of Civil Procedure 12(b)(6) was heard and granted by the Honorable Benjamin H. Culbertson in the Horry County Court of Common Pleas on June 14, 2016. An Order of Dismissal was signed on July 8, 2016 and filed on July 13, 2016. Appellant's appeal followed on August 5, 2016.

ARGUMENT

- I. THE CIRCUIT COURT PROPERLY DISMISSED APPELLANT'S COMPLAINT AGAINST RESPONDENT UNDER RULE 12 (b)(6) SCRPC BECAUSE APPELLANT'S COMPLAINT FAILED TO ARTICULATE ANY DUTY OWED TO THE APPELLANT BY THE RESPONDENT.

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC, the appellate court applies the same standard of review as the trial court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App.2001). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief, *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, (2007).

Appellant contends he was attacked by Defendant Jarius Orel English-McMillan (Amended Complaint paragraph 9) at an off-campus party at a private residence known as the "Goodyear House" owned by Defendants Roland Shelley, Roland G. Shelley, II, and Scott C. Shelley (Amended Complaint paragraph 3) on February 16, 2014. Plaintiff contends Respondent Coastal Carolina University (University) was grossly negligent in (a) failing to discover risks and take safety precautions to warn of or eliminate unreasonable risks, including the foreseeable risk of criminal conduct by others, within the area of invitation on the premises; and (b) failing to use slight care in protecting Appellant as a student from a dangerous location and conditions which it knew or should have known existed by means of warning, security or other reasonable action (Amended Complaint

paragraph 15).

Respondent argued at the motion hearing that in the four corners of the complaint Appellant states he went to an off-campus party on private property, that was not a function of the University, nor does he allege any University employees or agents were involved, and got into a fight with another student (Motion transcript p.3, lines 15-21).

Respondent argued there is no duty for the University to intervene in the actions of adult students engaged in non-university activities off-campus, and to preclude them (which is not possible) or warn them, not to attend parties where excessive amounts of alcohol may be served (Motion transcript p. 4, lines 1-10).

Appellant argued that because he had alleged gross negligence, this was a factual issue for a jury or in the alternative should be addressed at summary judgment and not on a motion to dismiss (Motion transcript p. 4, lines 12-25). Respondent countered that there was no nexus with the University and the incident or the property where it occurred. The only connection is that the Appellant and Defendant Jarius Orel English McMillan were both University students (Motion transcript p. 5, lines 2-22).

The question of whether a duty exists is resolved by a Judge and not a jury. Whether the law recognizes a particular duty is an issue of law to be determined by the Court. *Rice v. School District of Fairfield*, 317 S.C. 87, 452 S.E.2d 352 (Ct. App. 1994). In any negligence action, the threshold issue is whether the defendant owed a duty to the plaintiff. *Bass v. Gopal*, 395 S.C. 129, 134, 716 S.E.2d 910, 913 (2011). The court must determine, as a matter of law, whether the law recognizes a particular duty. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999); *Easterling v. Burger King Corp.*, 416 S.C. 437, 446, 786 S.E.2d 443, 448

(Ct. App. 2016).

Foreseeability by itself does not give rise to a duty. *South Carolina Ports Authority v. Booz-Allen & Hamilton, Inc.* 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986). Indeed it may always be foreseeable that adults who make poor decisions may suffer adverse consequences. Even if Respondent knew of the propensity of the “Goodyear House” occupants to throw parties and serve alcohol, which is denied, Appellant alleges no legal duty as to him at a private, non-University event.

Following Appellant’s logic, the University would be obligated to send a chaperone with every student every time they leave campus. They may go to a grocery store in a questionable neighborhood, park in the sand and get their vehicle stuck at the beach, overeat and get a stomach ache at a fast food restaurant. Presumably, most students would not welcome this intrusion.

Likewise, South Carolina does not recognize a duty to control the conduct of another or to warn a third person or potential victim of danger absent a special relationship to the victim. *Johnson v. Jackson*, 401 S.C. 152, 735 S.E.2d 664 (Ct. App. 2012). An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance, *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997). In *Hendricks v. Clemson University*, 353 S.C. 449, 578 S.E.2d 711 (2003), the South Carolina Supreme Court declined to extend a special relationship or fiduciary duty to a university academic advisor to advise a baseball team student so as to maintain his NCAA eligibility. There is no precedence for creation of a duty for a University to control or advise an adult student’s behavior off-campus at non-University events of the student’s choosing. There are no allegations the University undertook any such duty (Amended Complaint).

To the extent Appellant alleges a premises liability case, there are no allegations that the Respondent had the right or ability to control the actions of third parties on premises it did not own

or rent (Amended Complaint).

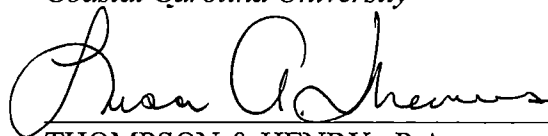
Appellant's reliance on S.C. Code Ann. § 15-78-60(25) (Supp. 1999) is misplaced. This section states a governmental entity is not liable for a loss resulting from responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner. Appellant cannot work backwards from alleged gross negligence to create such a duty. According to the plain language of the statute, the duty must already exist, however, the governmental entity is not liable for mere negligence in executing that duty. It is liable only for gross negligence under this exception to the waiver of immunity. As stated above, Appellant cites no statutory or case law creating a duty for a University to warn or supervise adult students at off-campus non-University activities.

CONCLUSION

Appellant has not alleged any facts or inferences reasonably deducible therefrom in his Amended Complaint, which would entitle him to relief against this Respondent under any theory of the case. As such, the Court properly granted dismissal to the Respondent under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

Respectfully submitted,

Lisa A. Thomas, SC Bar #66458
Attorneys for the Respondent
Coastal Carolina University



THOMPSON & HENRY, P.A.
1300 Second Avenue, Third Floor (29526)
P. O. Box 1740
Conway, South Carolina 29528
(843) 248-5741 - voice
(843) 248-5112 - fax
lthomas@thompsonlaw.com

January 4, 2017
Conway, South Carolina

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

JAN 06 2017

SC Court of Appeals

Case No.: 2016-001647

Terrence J. McLeod, Plaintiff, Appellant,

v.

Jarius Orel English-McMillan, Roland Shelley, Roland G. Shelley, II,
Scott C. Shelley and Coastal Carolina University, Defendants,

Of Whom Coastal Carolina University is the Respondent.

CERTIFICATE OF SERVICE

I certify that I served Respondent's Motion to Respond Outside of Time and Initial Brief and Designation of Documents for Record on Appeal by depositing a copy of it in the U.S. Mail, postage prepaid, on January 4, 2017 addressed to Appellant's Attorney of Record John D. Clark, Esquire, at P.O. Drawer 880, Sumter, South Carolina, 29151-0880 and to Defendants Roland Shelley, Roland G. Shelley, II, and Scott C. Shelley's Attorney of Record Jimmy C. Powell, Jr., Esquire, at P.O. Box 2116, Myrtle Beach, South Carolina, 29578.

Lisa A. Thomas, SC Bar #66458
Attorneys for the Respondent Coastal Carolina University



THOMPSON & HENRY, P.A.
1300 Second Avenue, Third Floor (29526)
P. O. Box 1740
Conway, South Carolina 29528
(843) 248-5741 - voice

**THOMPSON
& HENRY, P.A.**
ATTORNEYS AT LAW

1300 SECOND AVENUE, THIRD FLOOR
POST OFFICE BOX 1740
CONWAY, SOUTH CAROLINA 29528

TELEPHONE
(843) 248-5741

FACSIMILE
(843) 248-5112

LISA A. THOMAS
LThomas@THOMPSONLAW.COM

January 4, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Terrance J. McLeod v. Jarius Orel English-McMillan, et al
Appellate Case No.: 2016-001647
T&H No.: 54601.62

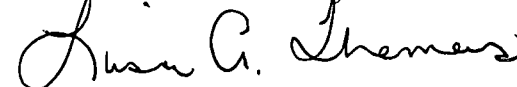
Dear Ms. Kitchings:

I am enclosing the original and six (6) copies of Respondent Coastal Carolina University's Motion to File Out-of-Time, Initial Brief of the Respondent and Designation of Documents for Inclusion in Record on Appeal in connection with the above-captioned matter along with proper filing fee and proof of service on opposing counsel. Upon your filing, please return a clocked copy to me in the self-addressed, stamped envelope provided for your convenience.

Thank you in advance for your assistance in this regard.

Very truly yours,

THOMPSON & HENRY, PA



Lisa A. Thomas

LAT/lwj

Enclosures

cc: John D. Clark, Esquire
Jimmy C. Powell, Jr., Esquire

RECEIVED

JAN 06 2017

SC Court of Appeals



UNITED STATES POSTAGE
PITNEY BOWES
02 1P \$ 006.80⁰
0000808898 JAN 04 2017
MAILED FROM ZIP CODE 29526

FIRST CLASS MAIL



THOMPSON & HENRY, P.A.

POST OFFICE BOX 1740

CONWAY, SC 29528

To:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED

JAN 06 2017

SC Court of Appeals