THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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.

FINAL BRIEF OF THE RESPONDENT

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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

Defendant Coastal Carolina University's Notice of Motion and Motion to Dismiss (R. pp. 5-10) 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 as to Defendant Coastal Carolina University (R. pp. 23-24) 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) SCRCP 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), SCRCP, 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) (R. p. 2, lines 15-17) 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) (R. p. 1, lines 24-28) 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) (R. p. 3, line 22-p. 4, line 9).

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 (Transcript of Record p.3, lines 15-21) (R. p. 18, lines 16-22).

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 (Transcript of Record p. 4, lines 1-10) (R. p. 19, lines 2-11).

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 (Transcript of Record p. 4, lines 12-25) (R. p. 19, lines 13-26). 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 (Transcript of Record p. 5, lines 2-22) (R. p. 20, lines 3-23).

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) (R. pp. 1-4).

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) (R. pp. 1-4).

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,

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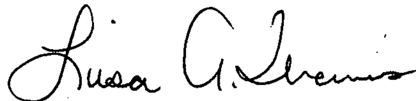

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CERTIFICATE OF COUNSEL

I certify this Final Brief of Respondent complies with Rule 211(b), SCACR.

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