

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH PAGE,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 200788

Gratiot Circuit Court

AMERICAN LINE BUILDERS APPRENTICESHIP
TRAINING PROGRAM,

LC No. 94-003300-NP

Defendant-Appellee,

Before: Gribbs, P.J., and Murphy and Gage, JJ.

GAGE, J. (concurring in part and dissenting in part):

I concur with the majority that summary disposition was appropriately granted on plaintiff's products liability claim. However, I respectfully dissent to the majority's conclusion regarding plaintiff's claim of inadequate instruction. Unlike the majority, I believe that the claim sounds in educational malpractice and that summary disposition was therefore properly granted to defendant.

The majority avers that because defendant is "a commercial job training entity" rather than "an educational entity," plaintiff's claim of negligent instruction sounds in simple negligence rather than educational malpractice. As the majority notes, the judiciary's reluctance to recognize educational malpractice as a cause of action stemmed initially from its unwillingness to interfere with other state agencies charged with overseeing educational institutions and programs. The majority asserts that such public policy considerations are absent in the present case.

I disagree with this reasoning. According to plaintiff, the defendant is headquartered in Ohio and is licensed by the Department of Labor to operate an apprenticeship program. In Michigan, our Legislature has established a statutory scheme governing the administration of vocational programs such as defendant. Proprietary schools¹ are required to be licensed by the State Board of Education. MCL 395.101; MSA 15.627(1). The board is charged with inspecting the schools, setting and collecting fees, and promulgating rules. MCL 395.102a; MSA 15.627(2a). In order to solicit students, private trade schools are required to obtain solicitor's permits, which are issued under rules promulgated by the superintendent of public instruction. MCL 395.122; MSA 15.633(2), MCL 395.123; MSA

15.633(3). In short, our Legislature has charged public school administrative agencies and officers with oversight duties over schools such as defendant that are located in Michigan. Therefore, a public policy based on judicial reluctance to interfere with the statutory duties of other state agencies would encompass private vocational schools.²

Moreover, I believe that the more important rationale for declining to recognize claims of educational malpractice lies in the collaborative nature of the teaching process. *Nalepa v Plymouth-Canton Community Sch Dist*, 207 Mich App 580, 594; 525 NW2d 892 (1994). The ultimate responsibility for what is learned remains with the student, and many considerations, beyond teacher misfeasance, can factor into whether a student receives the intended message. *Id.*

I also disagree with the majority's assertion that the gravamen of plaintiff's claim of negligent instruction does not sound in educational malpractice. A claim for educational malpractice is generally brought directly by a student against an educational institution. These cases involve allegations that, as a result of the institution's negligent instruction, the student received an inadequate education. *Moss Rehab v White*, 692 A2d 902, 905 (1997). Plaintiff in the present case alleges failure to adequately instruct him on procedure and safety. I believe that such claims lie within the area recognized as educational malpractice. To say otherwise distinguishes purely academic education from that which is more truly vocational in an unnecessary and inaccurate manner.

Finally, I recognize that the Supreme Court may not agree with this Court's reasoning in *Nalepa, supra*. However, I believe that the pertinent holding of *Nalepa*, that educational malpractice is not cognizable in Michigan, remains good law until such time as the Supreme Court or a panel of this Court reverses or modifies the opinion. MCR 7.215(H)(1). Whether this panel agrees with the holding in *Nalepa*, I believe that its precedential value is intact, and we are bound to follow its rule of law. Accordingly, I would also affirm the circuit court's grant of summary disposition on plaintiff's claim for negligent instruction.

/s/ Hilda R. Gage

¹ "Proprietary school" means a school that uses a certain plan or method to teach a trade, occupation, or vocation for a consideration, reward, or promise of whatever nature. Proprietary school includes, but is not limited to a private business, trade, or home study school. Proprietary school does not include the following:

- (i) A school or college possessing authority to grant degrees.
- (ii) A school licensed by law through another board of this state.
- (iii) A school maintained or a program conducted, without profit, by a person for that person's employees. MCL 395.101a(c); MSA 15.627(1a)(c).

² Moreover, the courts of other states have found that claims of negligent supervision brought against vocational schools sound in educational malpractice. See, e.g., *Moss Rehab v White*, 692 A2d 902 (Del, 1997) (an action brought in Delaware against a driving school for disabled individuals sounds in educational malpractice rather than mere common law negligence); *Armstrong v Data Processing*

Institute, 509 So2d 1298 (Fla App, 1987) (Florida data processing school); *Cavaliere v Duff's Business Institute*, 605 A2d 397 (Pa, 1992) (Pennsylvania court reporting school).