IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1094

Filed: 21 June 2016

Wilson County, No. 13 CVS 197

SERENITY FRIESON, by and through her Guardian Ad Litem, WILLIAM LEWIS KING, and SHONTA DANIELS, Plaintiffs,

v.

MAVIS K. TURPIN, Executrix of the ESTATE OF HAROLD R. TURPIN, D/B/A CRESTVIEW CHILDCARE CENTER, Defendant.

Appeal by defendant from order entered 24 April 2015 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 23 February 2016.

Taylor Law Office, by W. Earl Taylor, Jr., for plaintiff-appellees.

Poyner Spruill LLP, by Randall R. Adams and Caroline P. Mackie, for defendant-appellant.

McCULLOUGH, Judge.

Mavis K. Turpin, Executrix of the Estate of Harold R. Turpin, D/B/A Crestview Childcare Center ("defendant"), appeals from an order of the trial court denying defendant's motion for judgment notwithstanding the verdict. For the reasons stated herein, we hold no error.

I. Background

Serenity Frieson, by and through her *guardian ad litem*, William Lewis King, and Shonta Daniels (collectively referred to as "plaintiffs") filed a complaint against Mavis K. Turpin, Harold Wayne Turpin, Joy Lynn Turpin, and Mavis K. Turpin, Executrix of the Estate of Harold R. Turpin, D/B/A Crestview Childcare Center on 8 February 2013. Plaintiffs alleged that Serenity Frieson ("Serenity"), a two-year-old child, was attending Crestview Childcare Center ("Crestview") on 18 February 2010. As Serenity was running on the premises of Crestview she was struck by another child, also attending Crestview. Serenity sustained injuries that included a fracture to her leg. Plaintiffs alleged that Mavis K. Turpin, Harold Wayne Turpin, Joy Lynn Turpin, and Mavis K. Turpin, Executrix of the Estate of Harold R. Turpin, D/B/A Crestview, were negligent and that their negligence proximately caused injuries to Serenity in that they:

a) failed to exercise ordinary care to keep the premises in a reasonably safe condition;
b) failed to use ordinary care to keep the premises in a reasonable safe condition;
c) failed to properly observe and supervise the children playing on the premises;
d) failed to develop and enforce rules for the safety of the children on the premises;
e) failed to keep the children on the premises from running on the premises.

On 8 March 2013, Mavis K. Turpin, Harold Wayne Turpin, Joy Lynn Turpin, and Mavis K. Turpin, Executrix of the Estate of Harold R. Turpin, D/B/A Crestview, filed an answer and affirmative defenses to plaintiffs' complaint.

On 24 April 2013, the parties filed a consent order, dismissing Mavis K. Turpin, individually, Harold Wayne Turpin, and Joy Lynn Turpin, without prejudice. The consent order left the only remaining defendant to be Mavis K. Turpin, Executrix of the Estate of Harold R. Turpin, D/B/A Crestview (hereinafter referred to as "defendant").

On 27 December 2013, defendant filed a motion for summary judgment pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure. On 16 January 2014, the trial court entered an order, denying defendant's motion for summary judgment.

The case came on for trial at the 26 January 2015 session of Wilson County Superior Court, the Honorable Milton F. Fitch, Jr., presiding.

Lynn[1] Turpin ("Ms. Turpin"), the director of Crestview, testified via a videotaped deposition. Ms. Turpin testified that Serenity was one of the children attending Crestview on 18 February 2010. Four staff members and eighteen children were on the playground at that time. Serenity was two years old. Each staff member

[1] We note that the trial transcript and record are inconsistent in the spelling of the name of the director of Crestview as of the date in question. For purposes of this appeal, we refer to her as "Lynn Turpin" or "Ms. Turpin."

had the duty of "supervising the children" and each staff member took a quadrant "so that we are right there in close proximity with the children." Serenity, who was in Ms. Turpin's quadrant, collided with another two-year-old child in Ms. Turpin's quadrant. Ms. Turpin affirmed that her duties included "supervising those two children," "keeping those two children safe," "keeping an eye on the children," and "keeping them out of harm's way." Ms. Turpin testified that:

> I was standing there talking to Serenity, actually. She was coming down the steps from the -- where the slide was. Catherine was coming from the other direction. And Serenity -- I was standing by a merry-go-round, and Serenity was going to walk over or run over and get on the merry-go-round where I was standing. And that little girl was just coming at a -- an angle, and they just bumped into each other.

Ms. Turpin was standing twelve to fifteen feet away from Serenity when the girls collided. It did not appear to Ms. Turpin that the girls were going to collide and she did not attempt to stop either one of the girls. She testified that she was not in a position where she could have stopped each of them from hitting the other and did not give any instructions or caution them before the collision. Ms. Turpin testified that based on their activity level, "not paying attention to surroundings," being "less experienced and hav[ing] more limitations" than an older child, two-year-old children needed more supervision.

Ms. Turpin also testified that she filled out an incident report, a Crestview requirement any time a child is injured on its playground. The incident report was

filled out on 18 February 2010 or a "couple days later." Ms. Turpin provided in the incident report as follows, in pertinent part:

> I was talking to Catherine, and she took off running. We were laughing and joking. Serenity was running toward the merry-go-round. Catherine was running from the basketball court. Catherine and Serenity bumped into each other beside the rubber tiles. Catherine jumped up and continued on her way. Serenity started crying. I was right there and tried to help her up. She did not want to put any weight on her leg.

Doctor Timothy E. Harris ("Dr. Harris"), a specialist in orthopedic trauma, testified via a videotaped deposition. Dr. Harris testified that he treated Serenity on 19 February 2010. Following a physical examination, Dr. Harris diagnosed Serenity with a closed left femur fracture. Surgery was performed to repair the fracture and Serenity was placed in a body cast until 7 April 2010.

At the conclusion of plaintiffs' evidence, defendant made a motion for a directed verdict in open court. Defendant's motion for a directed verdict was denied. Defendant did not present any evidence and renewed her motion for directed verdict. This motion was also denied.

On 27 January 2015, a jury returned a verdict in favor of plaintiffs. Serenity was entitled to recover $100,000.00 for her personal injuries and Shonta Daniels was entitled to recover $19,089.86 for the medical expenses for treatment of her minor child, Serenity. The judgment was filed 2 February 2015.

On 6 February 2015, defendant filed a motion for judgment notwithstanding the verdict ("JNOV"). The trial court denied defendant's JNOV motion by an order entered 24 April 2015.

Defendant filed notice of appeal on 20 May 2015.

II. Standard of Review

"When considering the denial of a directed verdict or JNOV, the standard of review is the same. The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (citations and quotation marks omitted). "The evidence supporting the plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in the plaintiff's favor, giving the plaintiff the benefit of every reasonable inference. [Additionally, a] directed verdict is seldom appropriate in a negligence action. . . ." *Kearns v. Horsley*, 144 N.C. App. 200, 207, 552 S.E.2d 1, 6 (2001) (citation omitted). If "there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied." *Green*, 367 N.C. at 140-41, 749 S.E.2d at 267 (citation omitted).

III. Discussion

On appeal, defendant argues that the trial court erred by denying her motions for directed verdict and JNOV. Defendant contends that there was insufficient evidence for plaintiffs' claim of negligence to be submitted to the jury. We disagree.

"Negligence has been defined as the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." *McMurray v. Surety Federal Sav. & Loan Assoc.*, 82 N.C. App. 729, 731, 348 S.E.2d 162, 164 (1986). "In order to prevail on a negligence claim, a plaintiff must prove (1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Nowlin v. Moravian Church in America*, 228 N.C. App. 307, 310, 745 S.E.2d 51, 53 (2013) (citation and quotation marks omitted).

Defendant first argues that there was no evidence that the injury to Serenity was foreseeable. Defendant asserts that the only evidence of liability was from Ms. Turpin who testified that "it didn't appear that they were going to collide."

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. Foreseeability is thus a requisite of

> proximate cause, which is, in turn, a requisite for actionable negligence.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (citations omitted). "The test of foreseeability as an element of proximate cause does not require that defendant should have been able to foresee the injury in the precise form in which it actually occurred." *Westbrook v. Cobb*, 105 N.C. App. 64, 67, 411 S.E.2d 651, 653 (1992).

> All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

Hairston, 310 N.C. at 234, 311 S.E.2d at 565 (citation and quotation marks omitted). "In any case where there might be reasonable difference of opinion as to the foreseeability of a particular risk, the reasonableness of the defendant's conduct with respect to it, or the normal character of an intervening cause, the question is for the jury." *Peal by Peal v. Smith*, 115 N.C. App. 225, 234, 444 S.E.2d 673, 679 (1994) (citation omitted).

In the present case, Ms. Turpin testified at trial that on 18 February 2010, four staff members and eighteen children were on the playground at Crestview. Each staff member was discharged with the duty of supervising the children on the playground, broken up by quadrants. Ms. Turpin testified that her duties included supervising

the children and keeping them "safe" and "out of harm's way." Serenity, a two-year-old, was in Ms. Turpin's quadrant when she collided with another child, also in Ms. Turpin's quadrant and also two years of age. At trial, Ms. Turpin testified that she was "standing there talking to Serenity" as Serenity was coming down some steps and another child, Catherine, was coming from the other direction. Ms. Turpin was "watching more Serenity because I was actually interacting with her, talking to her." Ms. Turpin was standing at a merry-go-round. Serenity attempted to come over to where Ms. Turpin was standing when Catherine and Serenity "just bumped into each other." From where Ms. Turpin was standing, about twelve to fifteen feet from Serenity, it did not appear as if the girls were going to collide. Ms. Turpin did not attempt to stop either one of the girls. Ms. Turpin testified that from her position, she would not have been able to stop either of the girls from hitting the other. She did not recognize the need to give any instructions or caution the girls before they collided. Ms. Turpin further testified that based on their activity level, "not paying attention to surroundings," being "less experienced and hav[ing] more limitations" than an older child, two-year-old children needed more supervision.

Also at trial, plaintiffs' exhibit number 5 was entered into evidence. This exhibit was the incident report form that Ms. Turpin completed, a Crestview requirement any time a child is injured on the playground. Ms. Turpin testified that she believed the incident report was filled out 18 February 2010 or a couple of days

afterward. In this incident report, Ms. Turpin provided that on 18 February 2010, she was talking to Catherine when Catherine "took off running." Serenity was running toward the merry-go-round and Catherine was running from the basketball court when they bumped into each other. Catherine jumped up and Serenity started crying.

Reviewing the foregoing evidence in the light most favorable to plaintiffs, we hold that defendant could have reasonably foreseen that the chain of events resulting in Serenity's injury was probable under all the facts as they existed. Ms. Turpin was supervising both Serenity and Catherine who were both in her quadrant. Ms. Turpin testified at trial that she was interacting with Serenity before the collision, while she provided in the incident report that she was talking with Catherine before the collision. Ms. Turpin admitted to seeing the two children running on the playground. However, she did not believe they were going to collide with one another and so she failed to give any instructions or caution the girls. Ms. Turpin also did not attempt to stop either one of the girls from running. In addition, Ms. Turpin conceded that two-year-old children require more supervision as they are less experienced, have more limitations, and do not pay attention to their surroundings.

Defendant also argues that the current case is distinguishable from the circumstances found in *Pruitt v. Powers*, 128 N.C. App. 585, 495 S.E.2d 743 (1998). In *Pruitt*, a three-year-old named Jamie fractured the femur in his leg when he fell

while at day care. *Id.* at 586, 495 S.E.2d at 744. Jamie's classroom teacher testified that as "ten three- and four-year-old children in her class were lining up to go out to play, four of the boys (including Jamie) began pushing each other playfully." *Id.* at 586, 495 S.E.2d at 745. The teacher told the four boys to stop pushing and separated them, placing Jamie in the middle of the line. *Id.* at 587, 495 S.E.2d at 745. The four boys again ran together and began pushing towards the door and the teacher, for a second time, separated the boys and placed Jamie near the front of the line of children. *Id.* The four boys immediately began pushing again as the teacher attempted to get them under control and Jamie was pushed to the floor, fracturing his femur. *Id.* The teacher testified that these four boys "had pushed before" and that she would "call them down . . . between four and five times a day . . . once a week or twice a week or so." The teacher had dealt with the same problem "ten or more times." *Id.*

The issue before our Court was whether there was substantial evidence that the defendants breached the appropriate standard of care. *Id.* at 590, 495 S.E.2d at 747. Our Court held that:

> [w]hile North Carolina case law does not specifically address the duty owed by day care providers to the children under their supervision, our courts have held that the appropriate standard of care for a school teacher is that of a person of ordinary prudence under like circumstances. By analogy, we believe that day care providers have a *duty to abide by that standard of care which a person of ordinary prudence, charged with his duties, would exercise under the*

> *same circumstances. [T]he amount of care due a student increases with the student's immaturity, inexperience, and relevant physical limitations.* Day care providers, however, cannot be expected to anticipate the myriad of unexpected acts which *occur* daily in and about schools, and are not insurers of the safety of the children in their care. The foreseeability of harm to pupils in the class or at the school is a test of the extent of the [day care provider's] duty to safeguard her pupils from dangerous acts of fellow pupils . . . .

Id. at 585, 590-91, 495 S.E.2d at 747 (internal citations and quotation marks omitted) (emphasis added). Viewing the evidence in the light most favorable to the plaintiffs, our Court held that there was substantial evidence of the defendants' negligence to deny the motions for directed verdict and JNOV. The defendants had been notified of the pushing incidents; knew and appreciated the danger that if the pushing incidents continued, the boys "were going to hurt someone"; failed to contact the parents of the boys; and failed to pursue more options at their disposal. *Id.* at 591, 495 S.E.2d at 747. Our Court concluded that "[a] reasonable mind might accept Defendants' failure to take any action other than reprimanding the boys for their repeated pushing as adequate to support the conclusion that Defendants violated the standard of care owed to the children under their care." *Id.* at 591, 495 S.E.2d at 747-48.

Defendant contends that while there was a history of pushing incidents in *Pruitt*, plaintiffs did not present any evidence that an incident like Serenity's had occurred at Crestview before and, therefore, Serenity's injury was unforeseeable. We

reject defendant's contention, as it misconstrues the law set forth in *Pruitt*. *Pruitt* did not stand for the proposition that evidence of a history of similar incidents was necessary to establish the defendants' negligence. Rather, the history of similar pushing incidents demonstrated that defendants "knew of and appreciated the danger that, if the pushing incidents continued, the boys were going to hurt someone." *Pruitt*, 128 N.C. App. at 591, 495 S.E.2d at 747 (citation and quotation marks omitted). In the present case, there was evidence presented that Serenity's injury was foreseeable as Ms. Turpin had the duty to supervise Serenity, understood that Serenity required more supervision because she was less experienced and had more limitations, observed Serenity and another child running, yet failed to take any action.

Next, defendant argues that there was no evidence presented of a breach of duty by Ms. Turpin, other teachers, or Crestview. Defendant cites to *Nowlin v. Moravian Church in America*, 228 N.C. App. 307, 745 S.E.2d 51 (2013), to support her argument.

In *Nowlin*, a sixteen-year-old was attending a summer camp owned and operated by the defendants. *Id.* at 308, 745 S.E.2d at 52. During a game conducted by camp staff members, the sixteen-year-old was sexually assaulted by a camp staff member. The plaintiffs filed a complaint against the defendants alleging negligence in that the defendants were negligent in their hiring, retention, and supervision of

the accused staff member. The complaint also alleged that the defendants were negligent in failing to provide the sixteen-year-old with a safe environment when it conducted the game. *Id.* at 309, 745 S.E.2d at 52-53. The trial court entered summary judgment in favor of the defendants and the plaintiffs appealed. *Id.* at 309, 745 S.E.2d at 53. On appeal, the question before our Court was whether there was any genuine issue of material fact as to whether the defendants had breached their duty to the sixteen-year-old. *Id.* at 311, 745 S.E.2d at 54. Our Court held that the defendants did not breach their duty to the victim by conducting the game because she was sixteen years old, the game was specifically restricted to senior high campers, the campers in the game were paired with a partner, and adult camp counselors and staff members were present as participants in and supervisors of the game. *Id.* at 311-12, 745 S.E.2d at 54. Our Court further held that the defendants acted reasonably in its training and hiring of the accused staff member and that the accused staff member's conduct was unforeseeable by the defendants. Our Court noted the following evidence: staff members were orally instructed that two staffers must be present at all times when dealing with campers; staff members were warned against any physical or romantic relationships with campers; the accused staff member averred that he knew his conduct was against camp policies; the accused staff member provided a personal disclosure to the defendants prior to employment that he had had no criminal convictions, never been dismissed, suspended, or asked to

resign from a job, and that he never had a complaint lodged against him for sexual molestation, abuse, or harassment; and the defendants checked the National Sex Offender Registry for the accused staff member's name. *Id.* at 312-13, 745 S.E.2d at 55.

Upon thorough review, the circumstances in the present case are distinguishable from those found in *Nowlin*. And, viewing the evidence in the light most favorable to plaintiffs, the evidence of defendant's breach was sufficient as a matter of law to be submitted to the jury. Ms. Turpin testified that the four staff members divided the playground into quadrants, with each being responsible for supervising their quadrant. As discussed above, the duty of day care providers increases with the student's immaturity, inexperience, and relevant physical limitations. *See Pruitt*, 128 N.C. App. at 591, 495 S.E.2d at 747. Therefore, defendant owed Serenity a heightened duty of care and increased supervision based on the fact that she was only two years old, inexperienced, and had greater physical limitations than that of an older child. This duty was higher than the duty owed in *Nowlin*. Ms. Turpin testified that although she saw Serenity and Catherine running on the playground, she did not feel compelled to issue any warnings or instructions, or take any action to prevent the collision. We hold that a reasonable mind might accept that evidence of Ms. Turpin's action or inaction, coupled with the heightened duty of care owed to Serenity, was adequate to support the conclusion that defendant breached

the duty of care owed to Serenity. Accordingly, we hold that the trial court did not err by denying defendant's JNOV motion.

NO ERROR.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).