STATE OF MICHIGAN

COURT OF APPEALS

GINGER L. HUTCHISON,

Plaintiff-Appellant,

v

OAKLAND CHRISTIAN SCHOOL FOUNDATION, OAKLAND CHRISTIAN SCHOOL ASSOCIATION, RANDALL JOHNSON, and ROGER VAN DORP,

Defendant-Appellees.

UNPUBLISHED
September 6, 1996

No. 181270
LC No. 94-469854

Before: Smolenski, P.J., and Holbrook, Jr., and F.D. Brouillette,* JJ.

PER CURIAM.

Plaintiff appeals by right from the circuit court order granting Oakland Christian School Foundation and Oakland Christian School Association's ("defendants") motion for summary disposition, and denying her motion for leave to file a second amended complaint.[1] We affirm.

Plaintiff is a former student and graduate of a private school run by defendant Oakland Christian School Association ("the Association"). Defendant Oakland Christian School Foundation ("the Foundation") is a non-profit corporation used to raise money and other capital for the purchase of land and construction of the school building used by the Association. The school is located in Auburn Hills, Michigan, and consists of grades kindergarten through twelve. Randall Johnson is employed by the Association as a teacher, and Roger Van Dorp is employed as the principal for the secondary grades.

On the evening of October 23, 1992, at approximately 10:30 p.m., plaintiff and other students went to Johnson's home in order to perform a prank by “toilet papering” the trees and other landscape surrounding his home. During the course of the prank, a second group of students engaged in a prank on the first group of students by pouring syrup and kitty litter on vehicles, including plaintiff's vehicle. At the conclusion of these pranks, Johnson and Van Dorp assisted plaintiff in washing her vehicle in Van

* Circuit judge, sitting on the Court of Appeals by assignment.

Dorp's driveway. Plaintiff testified that Johnson and Van Dorp engaged in horseplay with the students. During this horseplay, Johnson picked up plaintiff, placed her over his shoulder and began walking. He lost his footing and fell, which resulted in plaintiff striking her head on the pavement.

Plaintiff brought a claim against defendants alleging negligence and vicarious liability. Defendants filed a motion for summary disposition, arguing that, because they did not owe plaintiff a duty, she failed to state a claim upon which relief could be granted. Subsequently, plaintiff filed a motion for leave to file a second amended complaint to add new theories of liability based on the Association's status as a voluntary organization, and based on the existence of a special relationship pursuant to the school-student agreement.

Plaintiff asserts that she had alleged a valid cause of action for negligence against defendants because a special relationship existed between her and defendants at the time of her injury thereby creating a legal duty on the part of defendants. We find no such relationship in this case. The determination whether a duty-imposing special relationship exists in a particular case involves ascertaining whether the plaintiff entrusted herself to the control and protection of the defendant, with a consequent loss of control to protect herself. *Murdock v Higgins*, 208 Mich App 210, 215; 527 NW2d 1 (1994). Here, plaintiff was injured while voluntarily engaged in an activity that was neither sponsored nor encouraged by defendants. The activity occurred off school premises and late in the evening. Consequently, no special relationship existed between plaintiff and defendants because at the time of her injury plaintiff had not entrusted herself to the control and protection of defendants. Accordingly, summary disposition was properly granted by the trial court pursuant to MCR 2.116(C)(8). *Roberts v Pinkins*, 171 Mich App 648, 652; 430 NW2d 808 (1988).

Next, plaintiff asserts that summary disposition was erroneously granted to defendant Association because a genuine issue of material fact existed whether it may be held vicariously liable for the conduct of Johnson and Van Dorp. We disagree. Neither Johnson nor Van Dorp were acting within the scope and course of their employment at the time of plaintiff's injury. *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989). See also *Rowe v Colwell*, 67 Mich App 543, 552; 241 NW2d 284 (1976) (an employee is not acting within the scope of his employment when he commits a negligent act either going to or coming from an off hours social gathering of other employees).

Defendant Foundation was properly granted summary disposition because neither Johnson nor Van Dorp was an employee, agent or member of the Foundation. The evidence indicated that the Foundation is a non-profit corporation used to raise money and other capital to support the Association, and the Foundation has never had any employees or other paid agents or representatives. The Foundation has never been involved in controlling, supervising, or having any input with respect to the day-to-day functioning of the school, its staff members, or employees. Accordingly, the Foundation cannot be held vicariously liable for the actions of Johnson or Van Dorp.

Given our findings above, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for leave to file a second amended complaint. Any such amendment would have been futile. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.

[1] Randall Johnson and Roger Van Dorp are not participating in this appeal.