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,

Defendants-Appellees.

UNPUBLISHED

No. 181270
LC No. 94-469854

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

BROUILLETTE, J. (dissenting).

I respectfully dissent from the decision above set forth. I agree that the trial judge properly denied the motion for authorization to file a second amended complaint. I agree that the summary disposition motion should be granted as to the Oakland Christian School Foundation. I disagree with the majority on the issue of whether or not there is a genuine issue of material fact regarding whether Mr. Johnson was acting within the course and scope of his employment at the time of plaintiff's injury.

A motion for summary disposition based upon MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993). Such a motion should be granted only if the moving party is entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675; 499 NW2d 419 (1993). The benefit of any reasonable doubt must be given to the non-moving party and the court must determine whether a record could be developed which might leave open an issue upon which reasonable minds could differ. *Farm Bureau Mut Ins Co of Michigan v Stark*, 437 Mich 175; 468 NW2d 498 (1991).

Randall Johnson was an employee of defendant Oakland Christian School Association. Because it was a small school Mr. Johnson was an instructor and the Dean of Students and a counselor. As such, some of the factual evidence indicates, he worked closely with the students both during school

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

hours and after. There was evidence that Mr. Johnson on multiple occasions joined his students in toilet papering each others residences. Plans for the toilet papering, the evidence suggests, were made during school hours and on at least one occasion, a video tape of the toilet papering was shown in class by Mr. Johnson. On the occasion in question plans for the toilet papering were made during school hours and the toilet papering occurred at the home of Mr. Johnson which was immediately adjacent to the home of defendant Roger Van Dorp who was the principal. There was some evidence that Mr. Van Dorp knew what was going on and playfully involved himself. As a direct aftermath of the toilet papering on the night of the incident defendant Johnson dropped the Plaintiff causing her physical injuries.

An employer can be held liable for the negligent acts of his employee under a doctrine of *respondeat superior*. *Bradley v Stevens*, 329 Mich 556; 46 NW2d 382 (1951). An employer is liable for the acts of his employee when the employee is acting within the scope of his authority. *Graves v Wayne County*, 124 Mich App 36; 333 NW2d 740 (1983). The issue of whether the employee was acting within the scope of his employment is generally one for the trier of fact. *Bryant v Brannen*, 180 Mich App 87; 446 NW2d 847 (1989).

The plaintiff had presented evidence to the trial court about the activities of Mr. Johnson and about their involvement of Mr. Van Drop and concerning the positions of authority that those persons held within the school. A formal resolution by a board of education is not required before a finding can be made that an employee was acting within the scope of his authority. Circumstantial evidence can be utilized to prove a fact. In this case, along with other proffered evidence, the evidence that plaintiff offered to show that Mr. Johnson felt that toilet papering was a part of his counseling and could make a student feel that they were a part of the student body could be considered as circumstantial evidence that Mr. Johnson was acting within the scope of his authority. Jurors are to use their reason and common sense based upon the facts presented and are qualified to decide the facts unless a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery *Wade v Dep't of Corrections*, 439 Mich 158; 483 NW2d 26 (1992).

I believe the evidence presented by plaintiff creates an issue of fact so as to avoid the granting of a summary disposition motion based on MCR 2.116(C)(10). I would reverse.

/s/ Francis D. Brouillette