

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1575-04T5

JOSEPH JERKINS, an infant  
by his Guardian Ad Litem,  
CHARLES JERKINS, CHARLES  
JERKINS and TONI JERKINS,  
individually,

Plaintiffs-Appellants,

v.

SOWETO ANDERSON, KEMBA N.  
ANDERSON,

Defendants,

and

BOARD OF EDUCATION OF  
PLEASANTVILLE PUBLIC SCHOOLS,  
and ROSEMAY CLARKE,

Defendants-Respondents.

---

Submitted March 8, 2006 – Decided June 20, 2006

Before Judges Stern and Yannotti.

On appeal from the Superior Court, Law  
Division, Atlantic County, Docket No. ATL-L-  
3838-02.

Winne, Banta, Hetherington, Basralian &  
Kahn, attorneys for appellants (Scott K.  
McClain, on the brief).

Lenox, Socey, Wilgus, Formidoni, Brown,  
Giordano & Casey, attorneys for respondents  
(Laurie B. Tilghman, on the brief).

PER CURIAM

Plaintiffs appeal from an order entered on June 25, 2004 granting summary judgment in favor of defendants Board of Education of Pleasantville Public Schools (Board) and Rosemay Clarke (Clarke). We reverse.

I.

On June 15, 2001, plaintiff Joseph Jerkins (Joseph) was nine years old. At the time, Joseph was a third-grade student at the South Main Street School in Pleasantville. Joseph's parents were divorced and he was living in Pleasantville with his father Charles Jerkins (Charles) and two older brothers, Charles Jr., who was twenty-one years old, and Edward who was nineteen. Typically, either Joseph's father or Charles, Jr. would accompany Joseph to school and meet him at the end of the school day to walk him home.

At their depositions, Charles and Charles Jr. testified that they relied upon Joseph to inform them if there would be an early dismissal from school. Charles, Jr. stated that Joseph had been dismissed early on June 14, 2001; however, Joseph had not informed his father nor his brothers. Charles, Jr. asked Joseph why he was home early and Joseph told him, "I had a half

a day today." Charles, Jr. walked Joseph to school on June 15 but Joseph did not tell Charles, Jr. that school would be ending early that day. Later, at the regular dismissal time, Charles, Jr. returned to the school to meet Joseph but he was not there.

At around 4:00 p.m., Joseph was struck at the intersection of Main Street and Frambes Avenue in Pleasantville by an automobile owned by defendant Kemba N. Anderson (Kemba), which was being driven by defendant Soweto Anderson (Soweto). According to the police report, Soweto was driving north on Main Street. Soweto told the police that she observed two juveniles on the east side of the road. They appeared to be playing near the curb. Joseph ran into the roadway and he was struck by Soweto's car. Joseph sustained catastrophic injuries to his spinal cord and brain, rendering him quadriplegic.

In June 2001, Clarke was the principal at the South Main Street School. Clarke testified that in the 2000-2001 school year, there were about five hundred students in the school. Clarke said that each year the district publishes a student handbook called "The Agenda." The handbook is distributed to the students during the first week of school. It contains basic information concerning the school including the school hours, rules and dress codes. The handbook also includes a copy of the district's calendar for the school year.

Clarke stated that the first page of the handbook is a form which should be signed by the student's parent or guardian and returned to the school. Clarke said that the purpose of the form is to verify that a parent or guardian has received the handbook. Because the completed forms are discarded at the end of the school year, Clarke did not have a form signed by Joseph's parent or a guardian. Joseph began attending the South Main Street School in October 2000. Clarke said that Joseph's parent or guardian would have been given a copy of the handbook when Joseph was registered at the school.

Clarke testified that the Pleasantville school system published a calendar for the 2000-2001 school year which was provided to each student and made available to parents throughout the year. Clarke asserted that the calendar is given to parents who attend "back to school night" which is "always held in September." The calendar also is sent home and it is included in "The Pride," the district's newsletter that is published each month. The newsletter is mailed to every residence in Pleasantville and a copy is given to each student. Clarke said that a copy also is kept in the front office of the school.

The Pleasantville school calendar for 2000-2001 stated that June 18 was the "tentative" last day for students and teachers.

The calendar also stated that there would be early dismissal for students on June 14, 15 and 18. However, the district's monthly calendar for June 2001 stated that June 19 was the last day for students and teachers. The monthly calendar also indicated that there would be early dismissal for students on June 14, 15, 18 and 19.

Clarke testified that the South Main Street School also publishes a monthly calendar which is sent home with each student. Additional copies are available at the school for parents. Clarke stated that the calendar for June 2001 included a reminder of the early dismissal days for June and the last day for students. The schedule of events for June 2001 stated in bold lettering that students would be dismissed at 1:05 p.m. on June 14, 15, 18 and 19. The school's monthly calendar also stated the following regarding June 14, 15, 18 and 19: "1/2 Day 1:05 p.m."

Clarke asserted that the school did not have a written policy stating that upon dismissal at the end of the official school day, students must be released into the care of an adult or guardian. Clarke testified:

Children are dismissed at the end of the official school day. The official school day [ends at] 2:50, [and students] are dismissed by the teachers upon the signal of our school bell. This is a district where our children walk to school. Except if the

parents choose to pick them up, or they are registered in our after school program, which is called K.E.Y.S. In that particular situation the children are sent directly to K.E.Y.S. upon dismissal from their classrooms.

Clarke said that there is no policy to deal with situations where a parent does not come to the school to pick up a student at the end of the official school day.

Clarke also stated that the school officials expect that students will walk home unless the parent has registered the child in the after-school program or instructed the child not to walk home. Clarke added:

If the child is not picked up, and the child was told by a parent not to walk home, usually the child would stay with an adult. I need to call them, I need to call someone. [The student is] allowed to come to the office to make the phone call.

If a parent will be late, the parent can call the office and either ask that the child be told to walk home or provide some other instructions as to what the school should do to address the situation.

Joseph's father testified that when he registered Joseph for the Pleasantville schools, he was given a registration packet but there was nothing in the packet that he had to sign and return to the school. Charles did not recall receiving the school handbook. Charles did not recall seeing "The Pride"

newsletter. Charles said that he relied upon Joseph to tell the family when he had a half day of school. Charles, Jr. also did not recall seeing any kind of newsletter coming in the mail from school. He recalled seeing Joseph's report card but that was "about it."

On December 4, 2002, plaintiffs filed their complaint in this matter. In the first count, plaintiffs alleged that Soweto was negligent in the operation of the vehicle that stuck Joseph. Plaintiffs further alleged that Kemba had negligently entrusted the vehicle to Soweto. In addition, plaintiffs alleged that the Board and Clarke "negligently, carelessly, and recklessly fail[ed] to exercise their duty of reasonable supervision and care for" Joseph's safety. Joseph's parents further alleged that, as a result of defendants' negligence, Joseph had sustained serious and permanent injuries, which required that they devote their resources for the child's care and deprived them of Joseph's services, assistance and companionship. Charles additionally asserted a claim for negligent infliction of emotional distress.

On or around April 7, 2004, the Board and Clarke moved for summary judgment. The judge heard argument and rendered his decision on the record. The judge determined that in the particular circumstances presented here, the Board and Clarke

did not have a duty of reasonable care for Joseph's safety. The judge stated it is understandable that school children might get injured several hours after their dismissal from school. But the judge said that it was not the school district's responsibility to prevent such injuries. On June 25, 2004, the judge entered an order granting summary judgment in favor of the Board and Clarke. Plaintiffs' claims against Kemba and Soweto were later settled and this appeal followed.

## II.

Under the Tort Claims Act, a public entity is liable for an injury proximately caused by an act or omission of a public employee who acts within the scope of his or her employment "in the same manner and to the same extent as a private individual under like circumstances." N.J.S.A. 59:2-2(a). In addition, a public employee is liable for any injury caused by his or her act or omission "to the same extent as a private person." N.J.S.A. 59:3-1(a). However, public entities and public employees are entitled to any immunities which are provided by law. N.J.S.A. 59:2-1(b); N.J.S.A. 59:3-1(b).

In this case, plaintiffs assert negligence claims against the Board and one of its employees. Plaintiffs allege that defendants are liable because they owed Joseph a duty of reasonable care and breached that duty by allowing Joseph to

leave the school without supervision. Plaintiffs contend that the motion judge erred in determining that no duty was owed under the facts and circumstances of this case.

"The question of whether a duty to exercise reasonable care to avoid the risk of harm to another exists is one of fairness and policy that implicates many factors." Carvalho v. Toll Bros. and Developers, 143 N.J. 565, 572 (1996) (citing Dunphy v. Gregor, 136 N.J. 99, 110 (1994)). The ability to foresee injury to a potential plaintiff "is a significant consideration in the determination of a duty to exercise reasonable care." Ibid. Foreseeability of harm "does not in itself establish the existence of a duty, but it is a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate." Id. at 572-73 (quoting Carter Lincoln-Mercury, Inc. v. EMAR Group, Inc., 135 N.J. 182, 194 (1994)).

In our view, the risk of harm in this matter was foreseeable. At the time of the accident, Joseph was only nine years old. When Joseph was dismissed early from school, no adult or responsible older sibling was on hand to meet him. Several hours later, he was still without supervision. Joseph was playing with a friend by the side of the road on South Main Street, a few blocks from the school. Joseph ran into the street and was struck by a car. It is foreseeable that a nine-year old

child who is dismissed early from school without proper supervision, could thereafter run into the path of a motor vehicle on a busy thoroughfare several blocks from the school.

The trial judge placed great emphasis on the fact that several hours passed between Joseph's dismissal from school and the accident. However, it is foreseeable that a nine-year old child, who is dismissed early from school and not met by a parent or older sibling, would remain unsupervised for several hours. If the person responsible for the child is unaware of the early dismissal, that individual will in all likelihood not look for the child until the time of regular dismissal. Consequently, the child would remain without supervision for hours and could be injured by an accident of the sort that occurred here.

Although we conclude that the risk of harm in this matter was foreseeable, we nevertheless must consider whether imposition of a duty of reasonable care upon defendants is warranted. "Whereas the magnitude and likelihood of potential harm are objectively determinable, the propriety of imposing a duty of care is not." Id. at 573 (quoting Weinberg v. Dinger, 106 N.J. 469, 485 (1987)). In determining whether a duty of reasonable care should be imposed, we consider the relationship of the parties, the nature of the attendant risk, the

opportunity and capacity of defendants to exercise reasonable care, "and the public interest in the proposed solution." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993) (citing Goldberg v. Housing Auth., 38 N.J. 578, 583 (1962)).

We are convinced that Joseph's relationship to defendants weighs in favor of imposition of a duty in this case. Ibid. In Frugis v. Braciagliano, 177 N.J. 250, 268 (2003), the Court commented on the responsibility imposed upon a school for the care of its students:

The law imposes a duty on children to attend school and on parents to relinquish their supervisory role over their children to teachers and administrators during school hours. While their children are educated during the day, parents transfer to school officials the power to act as guardians of those young wards. No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others. Although the overarching mission of a board of education is to educate, its first imperative must be to do no harm to the children in its care.

We reject defendants' assertion that they had no responsibility in this matter because the accident occurred several hours after the end of the official school day. Plaintiffs contend that defendants were negligent in dismissing Joseph without taking reasonable steps to ensure that a responsible person was on hand to meet him. Thus, while the

accident occurred later, the alleged act of negligence happened at the very time when defendants were acting as guardians for the "young wards" in their care. Ibid.

We next consider the "nature of the attendant risk." Hopkins, supra, 132 N.J. at 439. A nine-year old child who is left without proper supervision faces a substantial risk of harm. "The age of a child is of significance primarily as a mark or sign of his mental capacity to understand and appreciate the perils that may threaten his safe being." Bush v. N.J. & N.Y. Transit Co., Inc., 30 N.J. 345, 355 (1959) (quoting Walston v. Greene, 102 S. E. 2d 124, 126 (N.C. 1958)). The fact that a nine-year old child may not understand or appreciate the danger of running into a busy street weighs in favor of imposing a duty of reasonable care in this case.

Our next consideration is whether defendants had both the opportunity and the ability to exercise reasonable care in these circumstances. Hopkins, supra, 132 N.J. at 439. Prior to releasing a nine-year old student like Joseph, the school administrators and teachers could readily determine whether the student has been met by an adult or responsible older sibling. If not, the child would not be dismissed and a phone call made to ascertain whether a responsible person will be coming to the school to meet the student. The record shows that the South Main

Street School essentially follows this procedure when a parent instructs a child not to walk home alone. In our view, it would not be unduly burdensome for the school to extend the policy to its younger students.

We also must consider whether the public would be served by imposition of a duty of reasonable care in this case. Imposing a duty upon school districts to ensure that younger students are not dismissed from school without proper supervision is entirely consistent with the school's well-established responsibility to protect students from foreseeable dangers. Frugis, supra, 177 N.J. at 268. The public interest will be served if younger students in our schools are assured of proper supervision on dismissal from school.

The decision in Titus v. Lindberg, 49 N.J. 66 (1967), supports our view that defendants had a duty to exercise due care in this case. In Titus, a student was injured when struck by a paperclip shot by another student with a rubber band. Id. at 70-71. The doors of the school opened at 8:15 a.m. and students were expected to be in their seats at 8:30 a.m. However, the students generally began to arrive at 8:00 a.m. The incident occurred at 8:05 a.m. Ibid. The defendant school officials argued that they owed no duty to the students before the school opened its doors at 8:15 a.m. The Supreme Court

disagreed, noting that the school had assumed responsibility for the supervision of the school grounds beginning at 8:00 a.m. and "from that point on [was] obligated to exercise due care." Id. at 74. In this case, the South Main Street School assumed responsibility for its students during its regular school hours. That responsibility includes the duty to exercise reasonable care to ensure that younger students are properly supervised when dismissed at the end of the school day.

The decision in Caltavuturo v. Passaic, 124 N.J. Super. 361 (App. Div.), certif. denied, 63 N.J. 583 (1973), also supports the result we reach in this case. There, a twelve-year old student was dismissed from school to go home for lunch. The child was injured cutting through a fence just "off school property." Id. at 366. We held that the school district had a duty to supervise its students and, in carrying out this duty, the school officials were required to exercise the degree of care that persons of ordinary prudence, charged with comparable duties, would exercise under the same or similar circumstances. Ibid. (citing Dailey v. Los Angeles Unified School District, 470 P. 2d 360, 363-64 (Cal. 1970)). We added:

That [the plaintiff] was injured off school property at a time when the school staff unilaterally decided that the necessity for supervision had dissipated are not facts which, in our view, materially distinguish this case from Titus. It cannot be said as

a matter of law, under the circumstances here presented, that [the principal's] legal responsibility continued only for the first and last minutes of the lunch period but not in between, or that his supervisory duties extended only so far as the municipal boundary line and not beyond.

[Id. at 366-67.]

Here, Joseph was injured off the school premises and the accident occurred hours after the end of the official school day. However, the school's responsibility for its younger students does not end when the dismissal bell rings where, as in this case, the school may take reasonable steps to ensure that younger students are protected from foreseeable risks of harm which occur when they are dismissed from school without supervision.

Although we conclude that defendants had a duty to exercise reasonable care for Joseph's safety in the circumstances of this matter, there remains a genuine issue of material fact as to whether the Board and Clarke breached that duty. Here, there is evidence that the district took steps to advise all parents that the students would be dismissed early on June 15, 2001. Charles and Charles, Jr. claimed that they were unaware of the early dismissal on June 15. As Clarke explained, the South Main Street School operates an after-school program. The school also will

not release a student without supervision if a parent has instructed the child not to walk home alone.

In this matter, Joseph was not enrolled in the after-school program and Charles apparently did not instruct the school that he was not allowed to walk home alone. As we pointed out in Caltavuturo, a school's duty is to exercise the degree of care that persons of ordinary prudence would exercise in the same or similar circumstances. Caltavuturo, supra, 124 N.J. Super. at 366. The jury must apply this standard and determine whether the Board and Clarke were negligent in allowing Joseph to leave the school on June 15, 2001 without the supervision of an adult or responsible sibling.

If the jury determines that defendants were negligent, the jury also will be required to determine if defendants' negligence was a proximate cause of Joseph's injury. Our conclusion that the risk of harm here was foreseeable relates solely to our determination that defendants had a duty to exercise reasonable care. Foreseeability in the context of a duty determination pertains to "the knowledge of the risk of injury to be apprehended." Clohesy v. Food Circus Supermarkets, 149 N.J. 496, 503 (1997) (quoting Hill v. Yaskin, 75 N.J. 139, 144 (1977)). Foreseeability as it relates to proximate cause involves "the question of whether the specific act or omission

of the defendant was such that the ultimate injury to the plaintiff' reasonably flowed from defendant's breach of duty." Ibid. (quoting Hill, supra, 75 N.J. at 143).

### III.

Plaintiffs additionally argue that Clarke's failure to employ sufficient staff to supervise the dismissal of the students at the South Main Street School on June 15, 2001 was palpably unreasonable. Therefore, plaintiffs maintain that Clarke is not entitled to immunity under N.J.S.A. 59:3-2(d), which states:

A public employee is not liable for the exercise of discretion when, in the face of competing demands, he determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public employee was palpably unreasonable.

"Tortious conduct will be considered palpably unreasonable if it is 'manifest and obvious that no prudent person would approve of . . . [the] course of action or inaction.'" Kolitch v. Lindedahl, 100 N.J. 485, 508 (1985) (quoting Polyard v. Terry, 148 N.J. Super. 202, 216 (Law Div. 1977), rev'd on other grounds, 160 N.J. Super. 497 (App. Div. 1978), aff'd o.b., 79 N.J. 547 (1979)).

Although plaintiffs raised this issue in the trial court when opposing defendants' motion for summary judgment, the trial

judge merely determined that defendants were entitled to summary judgment because defendants owed no duty to Joseph in respect of the accident that occurred on June 15, 2001. Defendants have not argued that the order of summary judgment should be affirmed on the alternative grounds that they are entitled to immunity for discretionary actions under N.J.S.A. 59:3-2(d). We are convinced that this issue should be addressed in the first instance by the trial judge.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION