CITATION: Zhu v. Kendellhurst Academy Inc., 2018 ONSC 7685
COURT FILE NO.: CV-17-578580
DATE: 20181221

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KEVIN ZHU, a minor by his Litigation Guardian, CHUNXIA ZHUANG, Plaintiff

AND:

KENDELLHURST ACADEMY INC., Defendant

BEFORE: Copeland J.

COUNSEL: *Yoni Silberman and Anthea Chan*, for the Plaintiff

Joshua J. A. Henderson, for the Defendant

HEARD: December 18, 2018

ENDORSEMENT

Introduction

[1] The defendant brings a motion for summary judgment in an action involving a young child who fell off a play structure at his daycare and broke his arm.

[2] The fall that led to the plaintiff, Kevin Zhu, breaking his arm happened when he jumped off a 16 inch high ledge that is part of a play structure in the playground at the daycare run by the defendant. Kevin was three years and nine months old at the time of the fall.

[3] The defendant asks the court to determine the issue of liability in its favour, and dismiss the plaintiff's action. If this matter is to be resolved by way of summary judgment, it requires the court to make findings of credibility.

[4] There is no dispute that the daycare owed Kevin a duty of care at the time of the accident, as he was a student in its care.

[5] It is common ground that the play structure that Kevin was playing on when he fell complied with the relevant building code, was in good condition, and was appropriate and designed for children of Kevin's age.

[6] It is not in dispute that the daycare, including the playground and play structure, was regularly inspected as required under provincial law and complied with all the requirements of its regulatory inspections.

[7] It is also not in dispute that at the time of the accident, the required teacher to student ratio for children of Kevin's age under the applicable provincial legislation and regulations were

complied with. Indeed, because it was the pick-up time at the daycare, and some students had been picked up, the ratio of teachers to students was slightly better than what is required under provincial law.

[8] As a result of the above issues not being in dispute, the crux of the liability issue in this case turns on whether the manner of supervision of the children, including Kevin, was sufficient at the time of the accident to meet the standard of care, and also whether the training and policies of the school regarding supervision of children in the playground by staff was adequately implemented.

[9] In order to consider this motion, it is not necessary for me to make any findings about the injuries suffered by the plaintiff. However, by way of context, I note that there was some severity to the fracture based on the medical evidence filed on the motion. The fracture required surgery, and initially there was some nerve damage. Although the nerve damage appears to have resolved, the medical evidence filed on the motion indicates that there is still some limitation of Kevin's range of movement of his arm. It is not known at this time whether the restriction on range of movement will be permanent.

The Law regarding summary judgment and credibility assessment

[10] In considering whether there is a genuine issue requiring a trial, I must consider if the summary judgment process, in particular, the record on the motion: (1) allows me to make the necessary findings of fact, including any necessary findings of credibility; (2) allows me to apply the law to the facts; and, (3) if summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result. If I find that there are genuine issues requiring a trial, and the record on the motion as it stands is insufficient to allow me to determine the genuine issues requiring a trial, I must consider if I can decide the issues using the fact-finding resources available under the summary judgment rule: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

[11] In this summary judgment motion, the crucial question is whether the record allows me to fairly make the necessary findings of fact, in particular, findings of credibility, in a manner that is procedurally fair and will achieve a just result.

[12] A judge hearing a summary judgment motion can determine issues of credibility if he or she finds the record on the motion is sufficient to do so. Rule 20.04(2.1) expressly permits the court to weigh evidence, to evaluate credibility of witnesses, and to draw reasonable inferences from the evidence.

[13] However, in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438 at para. 44, the Court of Appeal cautioned that it can be difficult for a judge hearing a summary judgment motion to make findings of fact where credibility is a central issue:

> Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the

> motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.

[14] To similar effect, are the comments of Justice Perrell in *Healey v. Lakeridge Health Corporation*, 2010 ONSC 725 at paras. 28-31 (affirmed, without comment on this issue 2011 ONCA 55):

> . . . The reference to the interests of justice [in rule 20.04(2.1)] suggests that the motions judge will have to assess whether the search for truth and justice requires the forensic machinery of a trial. . . .
>
> Put into practical terms, these insights mean that having regard to the new powers to weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence, the moving party must provide a level of proof that demonstrates that a trial is unnecessary to truly, fairly, and justly resolve the issues.
>
> In this regard, it is important to precisely identify the issues to be resolved because the nature of the particular issues to be resolved both qualitatively and quantitatively will be relevant to determining whether a trial is necessary. For example, to resolve some issues, it may be necessary for a judge to have the opportunity to directly observe, hear, and question a witness. Or, for example, an action may turn on credibility and a transcript of evidence along with the documentary evidence may not - in the particular circumstances of the case - be adequate for the court to evaluate credibility. In such a case, there would be a genuine issue requiring a trial or there would be the need to resort to the court's new powers to order evidence to be called as a part of the summary judgment procedure. But, in another case, the issues may be such that the motions judge could decide the credibility issue on the motion for summary judgment.

[15] Although *Healey* pre-dates the Supreme Court's decision in *Hryniak, Hryniak* does not change the wisdom of the observations in *Healey* that some issues in some cases, looked at in their full context, are not fairly amenable to summary judgment.

Analysis

[16] Because of the issues set out in paragraphs 4 to 7 above not being in dispute, the crux of the liability issue in this case turns on whether the manner of supervision of the children, including Kevin, at the time of the accident was sufficient to meet the standard of care, and also whether the training and policies of the school regarding supervision of children in the playground by staff were adequately implemented such that they met the standard of care.

[17] The applicable law regarding the nature of the duty of care in the school or daycare context is also not in dispute. The leading case is the decision of the Supreme Court of Canada in *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21 at pp. 31-32. The standard of care to be exercised by school (or daycare) authorities in providing for the supervision and protection of children in their care is that of a careful and prudent parent.

[18] The defendant argues that the play structure was built up to code and was in good condition, that the regulatory rules regarding teacher to student ratios were complied with at the time of the accident, and that the supervision provided was adequate to meet the standard of care. The defendant argues that the court can make the findings necessary to come to that conclusion on a summary judgment motion.

[19] The plaintiff argues that the supervision of the children at the time of the accident was insufficient to meet the standard of care. In particular, the plaintiff argues that the manner of supervision of the children at the time of the accident was insufficient in terms of whether there should have been a policy or practice of more specific warnings to the children about the ledge on the playground in order to minimize risk. The plaintiff also argues that training and implementation of the policy on supervision in the playground was insufficient, again, for failing to consider and implement more specific training of staff and implement a policy of more specific warnings or direction to children about the ledge on the play structure. The plaintiff argues that because the assessment of these aspects of whether the standard of care was met requires significant findings of credibility, and because it is very contextual, it is not suited to decision on a summary judgment motion.

[20] This motion is a close call. Although there is force to the defendant's submissions, I find that the nature of the issues in dispute, in particular regarding adequacy of supervision at the time of the accident, and whether the training and policies of the school regarding supervision of children in the playground by staff was adequately implemented, are such that in the circumstances of this case they cannot be fairly resolved on a motion for summary judgment.

[21] I find on the record in this case that I do not have confidence that I can fairly make the necessary findings of fact, and apply the applicable law to the facts on a summary judgment motion, and that the matter should proceed to trial.

[22] Whether the supervision on the day of the accident was sufficient to meet the standard of care turns both on the evidence of Ms Ani, the teacher who was supervising the group of children Kevin was in at the time of the accident, and the evidence of other daycare staff about general policies for supervision of children on the playground, and training of staff for supervising children on the playground. This is because the issues in this case regarding whether the supervision met the standard of care involve not only whether the supervision was sufficiently attentive, but also whether the daycare's policies and training of staff in relation to supervision on the playground sufficiently considered and implemented ways to minimize risk to children when they were playing on the play structure.

[23] Assessing this evidence necessarily involves making findings of credibility.

[24] Further, these findings of credibility must be applied to a very contextual legal analysis. The assessment of whether the standard of care of a careful and prudent parent was met is very fact-specific. The Supreme Court provided the following guidance on this issue in the *Myers* case referred to above, at p. 32:

> It [the careful and prudent parent standard] is not, however, a standard which can be applied in the same manner and to the same extent in every case. Its application will

> vary from case to case and will depend upon the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and the degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, the competency and capacity of the students involved, and a host of other matters which may be widely varied but which, in a given case, may affect the application of the prudent parent-standard to the conduct of the school authority in the circumstances.

[25] In my view, the combination of the need to make significant findings of credibility, and the very contextual analysis applicable to assessing whether the standard of care of a careful and prudent parent is met make this case inappropriate for summary judgment. My concerns are in the nature of the discussions in *Baywood* and *Healey* referred to at paragraphs 13 to 15 above.

[26] I appreciate, as the defendant argued, that the regulatory regime for daycares requires that children engage in daily outdoor gross-motor play, and that daycares provide facilities and structures for that play. I appreciate that there will always be some level of risk to gross-motor play by children. I appreciate that the fact of an injury is not in and of itself evidence that the injury was caused by any negligent conduct. The defendant is free to make all of these arguments at trial.

[27] But the concern that leads me not to grant the defendant's summary judgment motion is that the issues of whether the supervision was adequate at the time of the accident, and whether the training and policies of the school regarding supervision of children in the playground by staff were adequately implemented are so based in an assessment of credibility of various witnesses, and must be applied in a such a contextual manner, that I am not satisfied in the circumstances of this case that a just result can be achieved by way of a summary judgment motion.

[28] To some extent, the defendant's arguments on the motion focus on asking the question of whether it was negligent for the daycare (through its staff) to allow children around the age of four years, including Kevin, to jump off a 16 inch high ledge which was part of a play structure designed and approved for children ages 18 months to five years.

[29] However, I think this is the wrong question to ask. When dealing with young children and a school or daycare's duty as a party standing *in loco parentis* to children, the activity (here jumping off the 16 inch high ledge) cannot be looked at divorced from the manner of supervision.

[30] And it is the issues around the manner of supervision, and whether the training and policies of the daycare regarding supervision of children in the playground by staff was adequately implemented, that I find are issues that in the circumstances of this case cannot be fairly resolved on a motion for summary judgment.

[31] One final aspect of this case causes me concern about the fairness of deciding it on a motion for summary judgment. The factual context of the case is that it involves a fall by a young child. The practical impact of this fact is that Kevin is unable to provide evidence of the circumstances of the fall. This is clear from the absence of an affidavit from Kevin in the motion record, and as a matter of common sense. The result of this is that the only witness to the immediate circumstances of the fall is the daycare teacher Ms Ani.

[32] As a result of this context, the ability of the plaintiff and the court to thoroughly inquire into and scrutinize through cross-examination the defence evidence regarding whether the manner of supervision was adequate, and whether training and implementation of policies for supervision were adequate, takes on heightened importance. In this context, I find that I am not satisfied that summary judgment is a procedurally fair method to resolve this matter.

[33] Whether or not credibility issues can be fairly resolved on a summary judgment motion is a case by case assessment. In the circumstances of this motion, for the reasons I have outlined, I find that I am unable to fairly decide the credibility issues in this case. I find that I am unable to fairly make the necessary findings of fact, or apply the law to the facts, on the paper record on the motion.

Will using the court's expanded fact-finding powers under rule 20 allow me to resolve this matter by way of summary judgment?

[34] As required by *Hryniak* and rule 20, I have considered whether using the court's expanded fact-finding powers on a summary judgment motion would allow me to fairly resolve the credibility issues in this case on a summary judgment motion. In particular, I have considered whether I should order a mini-trial on the issue of liability. In the circumstances I decline to exercise my discretion to do so. I note that neither party asked me to order a mini-trial of any issue.

[35] The factual issues that I have found that I cannot fairly resolve on a summary judgment motion are whether the manner of supervision of the children, including Kevin, was sufficient at the time of the accident, and also whether the training and policies of the school regarding supervision of children in the playground by staff was adequately implemented.

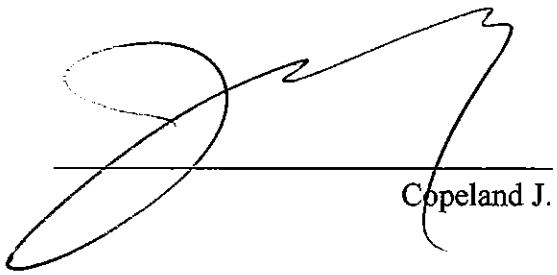
[36] Surveying the available evidence in this case based on what was filed before me on the summary judgment motion, I do not see how any particular issues or witnesses could be separated out for a mini-trial, such that a mini-trial would actually be shorter or more efficient than setting the matter down for trial in the normal course. Based on the record before me, all of the witnesses who provided evidence by way of affidavit on the summary judgment motion have evidence to give that bears on the supervision issues. Thus, I decline to order a mini-trial because I do not see any efficiency in doing so.

[37] For these reasons, I find that there is a genuine issue requiring a trial. The motion for summary judgment is dismissed.

Costs

[38] I did not hear submissions regarding costs during the hearing of the motion. If the parties are unable to come to agreement regarding costs, I will receive submissions in writing on the following schedule. The plaintiff may file his cost outline and written submission by January 31,

2019. The defendant may file its cost outline and submissions by February 22, 2019. All costs submissions are limited to a costs outline, and three pages of submissions.



Copeland J.

Date: December 21, 2018