1995

Vonna Dee Kenney, individually, and as guardian ad litem for Ryan Kenney v. Sean Noorda, and Jordan School District : Reply Brief of Appellant Re Sean Noorda

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

VONNA DEE KENNEY, individually, and as guardian ad litem for RYAN KENNEY, Plaintiff/Appellant, v. SEAN NOORDA, and JORDAN SCHOOL DISTRICT, Defendants/Appellees.	Appeal No. 950285-CA Category 15

REPLY BRIEF OF APPELLANT RE SEAN NOORDA

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

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SUMMARY OF ARGUMENT

Sean Noorda implicitly admitted he threw the sod plug that hit Ryan, in his deposition answers. Whether his later denial is persuasive should be determined by a jury. Even though Sean did not actually expect an injury, he should have foreseen a risk of harm to Ryan from throwing small, rock-like objects at him. Finally, if there is a lack of sufficient direct evidence on causation, any dismissal against Sean Noorda should be without prejudice, to allow Ryan to bring all three boys into one action.

ARGUMENT

POINT ONE
SEAN NOORDA IMPLICITLY ADMITTED THROWING THE SOD PLUG THAT HIT RYAN KENNEY IN THE EYE

A jury can believe that Sean implicitly admitted he threw the plug that hit Ryan. Sean's attorney makes much noise in his brief, denying that Sean threw the plug that hit Ryan. Of course, the question is not what is in Sean's brief, but what is in the record. In the record is Sean's unqualified response to critical questions. When asked if he meant to hit Ryan, or anyone else, Sean simply said, "no". When asked if it was an accident, Sean simply said, "yes". Sean's answers contain an implicit admission that he threw the plug.

These answers were not ambiguous, unsworn statements by a

witness. Sean knew he had been sued for having thrown a plug that hit Ryan in the eye. Sean was represented by an attorney, who failed to object to the assumption underlying the questions. There is no denial of throwing the plug by Sean in the record. Under these circumstances, a juror could conclude that Sean answered the questions as he did, because he knew that he was the one who did it. It certainly was not for the trial court to draw his own conclusions one way or another.

POINT TWO
SEAN NOORDA SHOULD HAVE FORESEEN A RISK OF INJURY TO RYAN WHEN HE THREW THE SOD PLUG THAT HIT RYAN IN THE EYE

Even though Ryan and Sean did not subjectively expect injury, the risk of injury was reasonably foreseeable. The proximate cause foreseeability question is not whether Sean Noorda had a subjective expectation that he would hit Ryan in the eye. The question is whether he reasonably should have foreseen a risk of harm or injury from throwing hard, rock-like objects at Ryan.

Indeed, the exact mechanism of injury need not have been foreseeable, so long as the general risk of harm was foreseeable. In other words, Sean need not have specifically foreseen that Ryan would get hit in the eye. Sean need only have foreseen a general risk of physical injury to Ryan from his throwing sod plugs.

> "What is necessary to meet the test of negligence and proximate cause is that it be reasonably foreseeable, not that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature." Rees v. Albertson's, Inc., 587 P.2d 130, 133 (Utah 1978); Glenn v. Gibbons & Reed Co., 1 Utah 2d 308, 265 P.2d 1013, 1016 (Utah 1954).

Steffenson v. Smith's Mgt. Corp., 862 P.2d 1342 (Utah 1993). Steffenson involved the liability of a business for the intervening criminal conduct of a shoplifter. In Steffenson, the Utah Supreme Court further stated that "only the general nature of the injury need be foreseeable."

The foreseeability is borne out by the testimony of the school principal, Craig Stark. Mr. Stark admitted that there was a policy against throwing snowballs. Of course, the reason snow-ball throwing is not allowed is because someone might get hurt. Throwing hard objects at other people carries with it a foreseeable risk of harm.

POINT THREE
SUMMERS V. TICE IS DIRECTLY APPLICABLE TO THIS CASE

The Summers v. Tice doctrine is applicable, because all three boys, Sean Noorda, Adam Black, and David Huber, can be joined in one action. While the trial court summarily dismissed the claim against Sean Noorda, the fact is that Ryan's claims can be brought against all three boys who were throwing sod plugs. Accordingly,

if the case against Sean Noorda is to be dismissed on causation grounds, it should be dismissed without prejudice, so that Ryan can bring an action against all three boys.

Or, if the dismissal of Jordan School District is reversed, Ryan should be granted an opportunity to join the other boys. This would not delay discovery. Because the School District was dismissed before discovery commenced, it has not participated in subsequent discovery depositions of liability and damage witnesses. Since these would need to be repeated in any event, there is no additional prejudice to Sean.

The fairness of this result is evident, because Sean Noorda failed to ever specifically deny throwing the sod plug until four days before the hearing on summary judgment. In light of Sean's deposition answers, which would lead one to conclude that he did throw the sod plug, it is unfair to now deny Ryan the chance to bring all three before a single fact-finder.

CONCLUSION

By granting summary judgment on the issue of foreseeability, the trial court improperly decided a jury question. Likewise, the negligence issues are not so clear-cut that reasonable minds could not differ. The deposition testimony of Sean Noorda implicitly admits he threw the sod plug that hit Ryan. Accordingly, the summary judgment should reversed, and the matter remanded to trial.

DATED this 16 day of October, 1995.

Daniel F. Bertch
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of October, 1995, I caused to be served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF RE APPELLEE SEAN NOORDA upon the following, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

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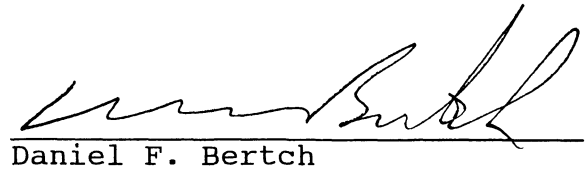

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