

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

WILMA BELL; LARRY & DIANE HALE;)
HARVEY HILL; RUEBEN, SR. &)
KATHRYN HILL; MARIE ALICE HURD;)
EUNICE JOE; HARVEY JOE; CHARLIE)
JOHNSON; FRED JOSEPH, JR.;)
JOHANNA LAKE; ROBERT B. LAKE;)
LILLY MANN; FEENA NANUK; JANICE)
NANUK; ALBERT SIMON; MARTHA)
SIMON; WILMA SMITH; BLAISE)
TINKER; MAIME TINKER; MARY U.)
TINKER; ROBERT J. TINKER; TOMMY)
TINKER; LINDA AND CLARENCE)
WILSON; PAUL NAKUSUK;)
GERTRUDE BUNYAN; ALBERT HURD;)
and JOHN HURD, SR.,)

Case No. 4BE-07-269CI

Plaintiff,

v.

LOWER YUKON SCHOOL DISTRICT

Defendant.

LOWER YUKON SCHOOL DISTRICT

Third-Party Plaintiff,

v.

JOHN DOE 1; JOHN DOE 2; JOHN DOE)
3; JOHN DOE 4; JOHN DOE 5; JOHN)
DOE 6; JOHN DOE 7; JOHN DOE 8;)
JOHN DOE 9; JOHN DOE 10,)

Third-Party Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant's Summary Judgment Motion on the Absence of Duty. The issue has been fully briefed, and Oral Argument was held December 12, 2008. For the following reasons, the Court GRANTS Defendant's motion.

I. Facts and procedural history

Plaintiffs' filed Complaint for Damages on August, 29, 2008, arguing "[a]s landowner, Defendant has a duty to use due care to guard against unreasonable risks created by conditions existing on its property."¹

The uncontested facts are that on or about August 3, 2006, in Hooper Bay, Alaska, some youths started a fire underneath the Hooper Bay school complex. The fire spread to adjacent properties, causing significant damage to the community. The fire was started in the early morning, while the school district was on summer break. Despite a protective wood skirting, the youths were able to access the underbelly of the school to start the fire.

Plaintiffs additionally allege the wood skirting around the school was in disrepair and that Defendant knew its repair efforts were not effectively keeping children from underneath the school,² that Defendant had notice children were sneaking under and starting fires beneath the school,³ that Defendant had chain fencing available that could have prevented the children from going beneath the school and allowed fire fighters better opportunity to extinguish the fire,⁴ that Defendant failed to maintain the sprinkler system on the property,⁵ that Defendant negligently added two portable classrooms during an addition in the 1990s, building them too close to the elementary school and fuel tanks.⁶

Defendant filed Memorandum in Support of Summary Judgment Motion of the Absence of Duty on October 20, 2008, arguing it owed Plaintiffs no duty. First, Defendant argued no statutory mandate exists that would create a duty to the neighboring

¹ Complaint for Damages, 3.

² Plaintiffs' Opposition to Defendant's Motion for Summary Judgment on Absence of Duty, 4.

³ *Id.* at 6.

⁴ *Id.* at 7.

⁵ *Id.* at 5.

⁶ *Id.* at 4.

property owners. Additionally, Defendant argues it lacks the resources and authority under AS 14.08.101(7) to unilaterally install fencing around the school.⁷ Second, Defendant, relying on *State v. Sandness*,⁸ argued no duty exists within Alaska case law to prevent foreseeable harm by third parties.⁹ The special relationship exception provided for in Alaska does not apply here because school was not in session and the youths trespassed to start the fire.¹⁰

Plaintiffs filed Opposition to Defendant's Motion for Summary Judgment on Absence of Duty on November 14, 2008. Plaintiffs', citing *Guerrero v. Alaska Housing Finance Corp.*,¹¹ argue Defendant had a duty to exercise reasonable care to guard against foreseeable dangers and to maintain its property in a reasonably safe condition. Plaintiffs argue Defendant's duty included taking "reasonable steps to protect the people living around the school from foreseeable risks of harm from fire, by either preventing the fire from spreading by taking simple, inexpensive steps to keep children out from under the school; or, by ensuring there was plenty of space to use fire equipment to keep a fire from spreading, by keeping the sprinkler system in good working order, by placing fuel tanks away from wooden buildings."¹²

Defendant's filed Reply to Opposition to Summary Judgment on Absence of Duty on December 3, 2008. Defendant's argued Plaintiffs incorrectly analyzed the "duty" issue, reiterating there is no general duty to prevent foreseeable harms committed by third persons when no special relationship exists.¹³ Defendant stated, "[t]hus, the 'duty' issue is not whether LYSD had notice children were circumventing the wood skirting. The duty issue is not whether LYSD should have realized that chain link fencing might have posed a more effective barrier. The duty issue isn't even whether LYSD had notice of children playing with matches. Instead, the threshold duty issue is whether LYSD had the sort of relationship with adjoining property owners or the arsonists to trigger a legal duty to protect against the spread of fire."¹⁴

⁷ Memorandum in Support of Summary Judgment Motion of the Absence of Duty, 8 and 10-13.

⁸ 72 P.3d 299, 301 (Alaska 2003).

⁹ Memorandum in Support of Summary Judgment Motion of the Absence of Duty, 13.

¹⁰ *Id.* at 14-15.

¹¹ 6 P.3d 250, 255-256 (Alaska 2000).

¹² Plaintiffs' Opposition to Defendant's Motion for Summary Judgment on Absence of Duty, 19.

¹³ Reply to Opposition to Summary Judgment on Absence of Duty, 2.

¹⁴ *Id.* at 4.

II. Summary Judgment Standard

Summary judgment should be granted where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.¹⁵ All factual inferences are drawn in favor of the non-moving party, and the existence of a dispute regarding any material fact precludes summary judgment.¹⁶ The moving party has the burden of proving an absence of issues of material fact.¹⁷ “If the moving party makes a prima facie showing that it is entitled to judgment on the established facts as a matter of law, the opposing party must demonstrate that a genuine issue of fact exists to be litigated by showing that it can produce admissible evidence reasonably tending to dispute the movant’s evidence.”¹⁸

III. Duty of Care Standard

Whether a party has a duty of care and, if so, the nature and scope of that duty are questions of law.¹⁹ Landowners have a duty to use general care to guard against unreasonable risks created by dangerous conditions existing on their property.²⁰ The critical inquiry in the duty analysis is whether Plaintiffs’ injuries were foreseeable.²¹ Foreseeability does not require the precise harm be predictable, rather it need only be one of the cluster of harms in a generally foreseeable category.²² Weighing the reasonableness of a condition is a jury question.²³ However, aside from attractive nuisances, the definition of conditions landowners may be required to protect against does not include the conduct of third parties.²⁴

¹⁵ Alaska R. Civ. P. 56(c); *Estate of Arrowwood v. State*, 894 P.2d 642, 644 n.2 (Alaska 1995).

¹⁶ *Beilgard v. State*, 896 P.2d 230, 233 (Alaska 1995).

¹⁷ *Wassink v. Hawkins*, 763 P.2d 971, 973 (Alaska 1988).

¹⁸ *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1215 (Alaska 1991), *citing*, *Wassink*, 763 P.2d at 973.

¹⁹ *Deptula v. Simpson*, 164 P.3d 640, 643 ((Alaska 2007).

²⁰ *Guerrero v. Alaska Housing Finance Corporation*, 6 P.3d 250, 255-56 (Alaska 2000).

²¹ *Winschel v. Brown*, 171 P.3d 142, 147 (Alaska 2007).

²² *Id.*

²³ *Edenshaw v. Safeway*, 186 P.3d 568, 570 (Alaska 2008).

²⁴ *Schumacher v. City and Borough of Yakutat*, 946 P.2d 1255, 1257 (Alaska 1997).

IV. Analysis

The Court agrees with Plaintiffs that the school district had a duty to take reasonable care of its property. However, because Defendant owed no duty to protect against the intentional torts of third parties, the Court finds it owed no duty to Plaintiffs.

Plaintiffs rely on cases outside the jurisdiction to argue the landowner duty established in *Webb* and discussed in *Guerrero* extends to situations involving third-party intentional torts. However, this Court finds no reason to look outside the jurisdiction because it finds *Schumacher* controlling. In that case, a juvenile was hit by a car while sledding down a city road.²⁵ Authorities had notice that road was slick and unsanded, that kids frequently used it for sledding, and that the road intersected with another busy street, yet city officials did nothing to safeguard the hill.²⁶ The Alaska Supreme Court, applying the *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*,²⁷ factors, affirmed the superior court's grant of summary judgment. In analyzing whether the city breached its duty by failing to prevent the juvenile from sledding into traffic, the court noted the city only owed a duty to guard against unreasonable risks created by conditions existing on their property, and there was nothing inherently dangerous about the street. Conditions that landowners may be required to protect against do not include conduct of third parties.²⁸

The *Schumacher* court further defined the types of conditions for which a property owner can be liable: "'Dangerous condition' refers to the physical condition of the property itself, not activities on the property, and does not generally encompass the wrongful, criminal, or negligent conduct of third persons."²⁹ In applying this logic to the facts of the case, the *Schumacher* court stated, "the dangers inherent in sledding down a road do not qualify as dangers caused by a 'condition of the land.' . . . [T]he road only became a danger . . . as a result of his own misuse of it."³⁰

Plaintiffs here pled and disclosed the following: the wood skirting was in disrepair; Defendant knew its repair efforts were not effectively keeping children from underneath the school; Defendant had notice children were sneaking under and starting

²⁵ *Id.* at 1256.

²⁶ *Id.*

²⁷ 628 P.2d 554, 555 (Alaska 1981).

²⁸ *Schumacher*, 946 P.2d at 1257.

²⁹ *Id.* citing Am.Jur2d., Municipal, County, School and State Tort Liability § 284 (1988).

³⁰ *Id.*

fires beneath the school and Defendant had chain fencing available that could have prevented the children from going beneath the school and allowed fire fighters better opportunity to extinguish the fire. The above facts demonstrate that an inherently dangerous condition did not exist beneath the school. Similar to the misuse of the road in *Schumacher*, the building only became dangerous because of the intentional acts of third parties setting the school on fire.

Other jurisdictions that have held defendants liable for intentional torts of third-parties³¹ have most often done so when defendant created a “tinderbox” situation. In *Scully v. Fitzgerald* – a case cited by Plaintiffs - the Court described this condition stating:

Menth and *B.W. King* stand for the simple proposition that a landowner will be liable if he maintains his property in the condition of a tinderbox and takes inadequate precautions to guard against the risk of fire when it is reasonably foreseeable that an errant spark from a trespasser’s or stranger’s discarded match or cigarette will ignite a blaze that will spread and engulf neighboring properties. In those cases, the unsafe and dangerous condition of the property gave rise to the foreseeable threat of fire.³²

Applying this standard, Plaintiffs’ claim fails. As discussed above, LYSD did not create a “tinderbox” situation. There are no allegations of code violations under the school; there are no allegations of oil or gas under the school; there are no allegations accelerants located nearby were used to start the fire. The fact that oil tanks blew up a

³¹ Plaintiffs alleged additional facts in their Opposition to Summary Judgment filed on November 14, 2008 – claiming Defendant negligently built an addition too close to the elementary school which obstructed authorities from fighting the fire; and that the fuel tanks were located too close to the buildings and contributed to the acceleration and spread of the fire. Additionally, Plaintiff’s claim the school sprinkler system was not properly functioning.

In its reply, Defendant stated the negligent addition of a building, placement of fuel tank claims, and issues regarding a sprinkler system were neither pled or disclosed pursuant to Civil Rule 26(a)(1) and should be barred . Neither party addressed this issue at oral arguments nor did Plaintiff’s did present any justification for the alleged violation of Civil R. 37(c). Given this court finding of lack of duty this court does not reach these issues.

Even if this court did consider these additional theories, these theories are not relevant the question of whether the school was a tinderbox.

³² 843 A.2d 1110, 1113, 1117 (New Jersey 2004).

few hours after the fire was discovered does not support a tinderbox theory. The fact that children were playing with matches under school for years does not support a tinder box theory. Generally, in the tinderbox cases, the fires were started accidentally from a spark or cigarette. The experts agree that the Hooper Bay fire was started intentionally. From the evidence provided this court finds no genuine issue of material fact that the school was a tinder box. It was not.

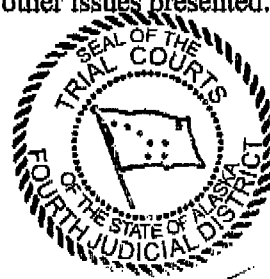
In applying the D.S.W. factors to this case several factors militate in favor of a duty. The Plaintiff's have certainly suffered harm and this harm was foreseeable given the lack of sufficient firefighting equipment in Hooper Bay. The moral blame lies more closely to the person(s) who intentionally started this fire. The connection between the Plaintiff's injuries and LYSD conduct is not a strong when compared to the Plaintiff's injuries and the connection to those person(s) who intentional started the fire. Finally, a significant burden would be placed on owners of nondangerous buildings, to prevent access by children intent on committing arson. The evaluation of the D.S.W factors favors a finding of no duty.

V. Conclusion

The Court is deeply saddened for the losses suffered by the Plaintiffs in this case. However, the Court finds that Plaintiffs presented no genuine issue of material fact and that Defendant is entitled to summary judgment as a matter of law. This Court finds that the Lower Yukon School District does not have a duty to prevent against the torts of third parties. Because of this lack of duty this court does not reach the other issues presented. Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Dated at Bethel, Alaska this 29th day of January 2009.



Leonard R. Devaney
Leonard R. Devaney
Superior Court Judge

1-30-09
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