NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CW 0855R

TRACIE RUSSELL, INDIVIDUALLY, AND ON BEHALF OF THE MINOR CHILD, G.R.

VERSUS

ST. TAMMANY PARISH SCHOOL BOARD, CITY OF COVINGTON AND ABC INSURANCE COMPANIES

Judgment rendered: MAR 13 2012

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On writ of certiorari from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2008-13911

Honorable Peter J. Garcia, Judge

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BEFORE: WHIPPLE, GUIDRY, AND GAIDRY, JJ.

GUIDRY, J.

In this writ application remanded to us by the Louisiana Supreme Court, a local school board seeks reversal of the trial court's interlocutory judgment denying its motion for summary judgment and overruling its peremptory exception raising the objection no cause of action. Finding that the trial court erred, we reverse and render.

FACTS AND PROCEDURAL HISTORY

On Friday, May 2, 2008, J.R., a student at Fontainebleau High School, was suspended for five days for stealing another person's book bag. The suspension was effective for the dates of May 5 through May 12, 2008. A notice of suspension was mailed to J.R.'s mother, Tracie Russell, on Monday, May 5, 2008, by regular mail. Ms. Russell did not receive the notice until Wednesday, May 7, 2008. Unfortunately, on Tuesday, May 6, 2008, during his suspension and without his mother's knowledge or consent, J.R. went with friends to Bogue Falaya Westside Park in Covington, Louisiana. While at the park, J.R. decided to swim in the Bogue Falaya River, despite "no swimming" signs posted throughout the park, and drowned.

On July 22, 2008, Tracie Russell, individually, and on behalf of J.R.'s twin brother, G.R., filed a wrongful death claim against the St. Tammany Parish School Board ("School Board"), the City of Covington, and "ABC Insurance Companies." As pertaining to the School Board, Ms. Russell alleged that Fontainebleau High School negligently violated its own student handbook and La. R.S. 17:416(A)(3)(b)(i) by failing to give her proper notice of J.R.'s suspension. She further alleged the School Board's negligence caused J.R.'s death, asserting that had she been aware of the suspension, she would have placed J.R. on "home

punishment," and therefore he would not have been free to go to the park on the day of his drowning.

The School Board responded to the petition by filing a "Motion for Summary Judgment and Exception of No Cause of Action." Following a hearing, the trial court denied the motion for summary judgment and overruled the exception in a judgment signed March 29, 2011.[1] The School Board filed an application for supervisory writs with this court, which application was denied on July 18, 2011. The School Board then sought writs to the Louisiana Supreme Court, which on November 14, 2011, granted writs and remanded the matter to this court for briefing, argument, and opinion.

DISCUSSION

As a preliminary matter, we observe that at the hearing, the trial court simply declared that the motion for summary judgment was denied, but the judgment, which is controlling, recites that the trial court denied both the motion for summary judgment and overruled the peremptory exception based on no cause of action. Thus, according to the judgment, both the motion and the exception are before us on review; however, based on our review of the motion for summary judgment, we do not reach review of the peremptory exception alleging no cause of action, and, therefore, we will pretermit discussion of the exception.

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. BP Products North America, Inc. v. Bridges, 10-1860, p. 3 (La. App. 1st Cir. 8/10/11), 77 So. 3d 27, 29, writ denied, 11-1971 (La. 11/14/11), 75 So. 3d 947; see also La. C.C.P. art. 966(A). Appellate courts review summary judgments de novo, using the same criteria that govern the trial court's consideration of whether

[1] A separate motion for summary judgment filed by the City of Covington and its insurer was granted by the trial court on May 2, 2011, dismissing those parties from the suit with prejudice.

summary judgment is appropriate. Lieux v. Mitchell, 06–0382, p. 9 (La. App. 1st Cir. 12/28/06), 951 So. 2d 307, 314, writ denied, 07–0905 (La. 6/5/07), 958 So. 2d 1199. A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); Independent Fire Insurance Company v. Sunbeam Corporation, 99–2181, p. 7 (La. 2/29/00), 755 So. 2d 226, 230–231.

The burden of proof on a motion for summary judgment is on the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to provide factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). As the defendant in this matter, the School Board will not bear the burden of proof at trial. Thus, as the mover for summary judgment, it is not required to negate all essential elements of the Ms. Russell's claim, but simply must point out the absence of factual support for one or more elements essential to her claim.

Schools and school boards, through their employees or teachers, owe a duty of reasonable supervision over students. La. C.C. art. 2320; Doe v. East Baton Rouge Parish School Board, 06-1966, p. 6 (La. App. 1st Cir. 12/21/07), 978 So. 2d 426, 433, writ denied, 08-0189 (La. 3/28/08), 978 So. 2d 306. The supervision

required is reasonable, competent supervision appropriate to the age of the children and the attendant circumstances. This duty does not make the school board the insurer of the safety of the children. Constant supervision of all students is not possible nor required for educators to discharge their duty to provide adequate supervision. Wallmuth v. Rapides Parish School Board, 01-1779, p. 8 (La. 4/3/02), 813 So. 2d 341, 346.

To establish a claim against a school board for failure to adequately supervise the safety of its students, a plaintiff must prove: (1) negligence on the part of the school board, its agents, or teachers in providing supervision; (2) a causal connection between the lack of supervision and the accident; and (3) that the risk of unreasonable injury was foreseeable, constructively or actually known, and preventable if a requisite degree of supervision had been exercised. Pugh v. St. Tammany Parish School Board, 07-1856, pp. 2-3 (La. App. 1st Cir. 8/21/08), 994 So. 2d 95, 98, writ denied, 08-2316 (La. 11/21/08), 996 So. 2d 1113.

In this case, La. R.S. 17:416(A)(3)(b)(i)[2] states that in each case of suspension, the school principal or his designee *shall* give notice of the suspension, either by contacting the pupil's parent, tutor, or legal guardian by telephone or sending a certified letter in accordance with information shown on the pupil's registration card. It is undisputed that J.R.'s suspension was imposed on Friday, May 2, 2008; however, it was effective May 5, 2008. No one from the school telephoned Ms. Russell on that Friday; rather, written notice of the suspension was

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[2] The specific language of the statute provides, in pertinent part:

> In each case of suspension or expulsion the school principal, or his designee, shall contact by telephone at the telephone number shown on the pupil's registration card or send a certified letter at the address shown on the pupil's registration card to the parent, tutor, or legal guardian of the pupil in question giving notice of the suspension or expulsion, the reasons therefor and establishing a date and time for a conference with the principal or his designee as a requirement for readmitting the pupil....

sent by regular mail to Ms. Russell at her post office box, which she testified[3] was the customary place for her to receive school notices. Moreover, while she admitted in deposition that she did not pick up her mail on Tuesday, May 6, 2008, she indicated that she may have gone to the post office on Monday, May 5, 2008.[4] The school admits that the notice of J.R.'s suspension was not mailed to Ms. Russell until Monday, May 5, 2008.

Thus, it appears there is a genuine issue of fact as to whether Ms. Russell received proper notice of J.R.'s suspension. The school's handbook allows for written notice of a student's suspension to be given to a parent by regular mail; however, La. R.S. 17:416 clearly requires that notice be given either by telephone or by certified letter. The School Board admittedly did not telephone Ms. Russell regarding J.R.'s suspension, but instead sent notification by regular, not certified, mail on May 5, 2008, the day J.R.'s suspension commenced and three days after the suspension was imposed.

However, it is the School Board's position that Ms. Russell will be unable to show that the school's actions were "the cause in fact or legal or proximate cause" of J.R.'s death. Specifically, the School Board asserts Ms. Russell will be unable to establish that its failure to telephone her or to notify her by certified mail of J.R.'s suspension was the legal cause of J.R.'s death.

It has been held that the violation of a statute gives rise to civil liability only when the prohibition in the statute is designed to protect from the harm or damage that ensues from its violation. S.J. v. Lafayette Parish School Board, 09-2195, p.

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[3] In support of its motion for summary judgment, the School Board attached excerpts from the deposition of Ms. Russell and of Mr. John Pellegrin, the park supervisor of Bogue Falaya Westside Park.

[4] Initially, when she was asked about when she had visited the post office during the time period at issue, she stated "Monday I was there for sure." However, when asked how did she know she was there "for sure" on Monday, she responded, "I think I stopped Monday at the post office. I don't remember."

11 (La. 7/6/10), 41 So.3d 1119, 1126. Foreseeability is not always a reliable guide. Just because a risk may foreseeably arise by reason of conduct, it is not necessarily within the scope of the duty owed because of that conduct. Neither are all risks excluded from the scope of duty simply because they are unforeseeable. The ease of association of the injury with the rule relied upon, however, is always a proper inquiry. Hill v. Lundin & Associates, Inc., 260 La. 542, 549, 256 So.2d 620, 622 (1972).

In J.M. v. Acadia Parish School Board, 08-1377 (La. App. 3d Cir. 4/1/09), 7 So. 3d 150, judgment was rendered in favor of the school board, although the trial court found that the school board, through its employee bus driver, had breached the duty of reasonable supervision owed to the student. The court found that the breach was not a cause-in-fact of the injury suffered by student. On appeal, the third circuit affirmed the trial court's judgment, finding that "[t]he events following the breach of the duty are not easily associated with the bus driver's breach of duty." J.M., 08-1377 at 5, 7 So. 3d at 154.

Frederick v. Vermillion Parish School Board, 00-382 (La. App. 3d Cir. 10/18/00), 772 So. 2d 208, 00-3171 (La. 1/12/01), 781 So. 2d 561 also involves a situation where the school failed to provide proper notice. In that case, the student did not receive notice that her after-school band practice had been canceled. By the time the student realized that the practice had been canceled, she had missed the school bus. After unsuccessfully attempting to contact her parents, the student ended up in a car with four male students, who subsequently drove to a sugar cane field and raped her. Frederick, 00-382 at 2, 772 So. 2d at 211. In affirming the summary judgment in favor of the school board, the appellate court considered whether the school's alleged breach of its duty was the "legal cause" of the student's injury. The appellate court ultimately held that the injury suffered by the

student was too remote to associate it with the school board's duty, because the student was a teenager, no evidence was introduced to show that the boys presented a perceived danger, and the school had no control or authority over that which happened off of school grounds. Frederick, 00-382 at 6, 772 So. 2d at 213.

The School Board argues that J.R.'s own conduct, in deceiving his mother about his whereabouts on the day of the incident, and also his conduct in violating the park's posted rules, constitutes an intervening and superceding cause of the accident for which it cannot be held liable. The School Board points out that although Ms. Russell claimed she would have placed her son on home punishment had she known of his suspension, she has not shown factual support that she will be able to prove that home punishment would have prevented J.R. from deceiving her and going to the park as he did. See Domingue v. Lafayette Parish School Board, 03-895, pp. 11-12 (La. App. 3d Cir. 6/16/04), 879 So. 2d 288, 295-96, writ denied, 04-1803 (La. 10/29/04), 885 So. 2d 588 (where the appellate court reversed an assessment of fault against the school board for the injury suffered by an eleven-year-old student, who decided to walk home from school rather than ride the bus as instructed by his mother. The appellate court observed that it was clear from the student's own testimony "that he knew he was not supposed to walk home from school, he knew that Moss Street was dangerous, and he decided to do it anyway.").

In addition to the deception J.R. exercised on his mother, the School Board also relies on evidence presented in excerpts of the deposition testimony of John Pellegrin, the park supervisor of Bogue Falaya Westside Park. Mr. Pellegrin testified that "no swimming" signs were posted throughout the park, including "right there where" J.R. drowned. Mr. Pellegrin further stated "I think the boy had his bike leaned up against a tree where the sign was."

Considering the evidence presented, we see no basis for finding an ease of association between the school's failure to properly notify Ms. Russell of J.R.'s suspension and J.R.'s drowning. See J.M, 08-1377 at 2-6, 7 So. 3d at 152-54. There was no evidence presented to establish that J.R. had a habit of sneaking away from home or school for fun or sport of which the school should have been aware. And even if it could be said that there was an ease of association, we find that J.R.'s action of blatantly disregarding posted park rules prohibiting swimming in the Bogue Falaya River was the intervening and superceding cause of his injury.

CONCLUSION

Accordingly, finding merit in the School Board's application, we herein grant the writ to reverse the judgment of the trial court and render summary judgment in favor of the St. Tammany Parish School Board, dismissing the plaintiff's suit with prejudice. All costs of these proceedings are assessed to the plaintiff, Tracie Russell.

WRIT GRANTED; JUDGMENT REVERSED AND JUDGMENT RENDERED GRANTING SUMMARY JUDGMENT.