IN THE COURT OF APPEALS

MOTHER DOE, as next friend and natural guardian of her minor sons, JOHN DOE A AND JOHN DOE B, Plaintiffs-Appellants	ANDERSON CIRCUIT
	C. A. NO. 03A01-9606-CV-00212
vs.	HON. JAMES B. SCOTT, JR. JUDGE
ROY R. ROGERS, et al Defendants-Appellees	AFFIRMED AND REMANDED

CAROL S. NICKLE & JENNIFER B. MORTON, Nickle and Morton, Knoxville, for appellants.

ROBERT H. WATSON, JR. and ARTHUR F KNIGHT, III, Watson, Hollow & Reeves, Knoxville for Appellees.

OPINION

McMurray, J.

In this action, the plaintiffs sued a multitude of defendants arising from incidents alleged to constitute sexual molestation of the minor children, John Doe A and John Doe B by the defendant, Roy R. Rogers, while Rogers was employed as a school crossing guard by the City of Oak Ridge. A voluntary nonsuit was taken as to the defendant, Rogers. Summary judgments were entered in favor of other defendants and these judgments are not before the court on this appeal. The only remaining defendants are the City of Oak Ridge and Timothy Braaten.[1] Summary judgment was entered in favor of the City of Oak Ridge and the defendant, Timothy Braaten. For reasons hereinafter stated, we affirm the judgment of the trial court.

Roy R. Rogers was a school crossing guard employed by the City of Oak Ridge and assigned to duty at an elementary school. Rogers, while not on duty, and at his home, sexually molested John Doe A and John Doe B. The plaintiffs charge the City of Oak Ridge and Braaten with negligence in the hiring of Rogers; failing to perform a background check; failure to properly supervise Rogers; and for violation of the constitutional right to privacy.

The defendants, City of Oak Ridge and Braaten filed motions for summary judgment. No specific grounds were stated other than

[1]The plaintiffs concede that they have no cause of action against Chief Braaten in his individual capacity.

that there is no genuine issue as to any material fact and these defendants are entitled to judgment as a matter of law. The trial court filed a detailed memorandum opinion dismissing all claims against the defendants.

We will first examine the issue of common law negligence. A cause of action for negligent hiring is recognized in Tennessee. See Wyshon v. Yellow Cab Co.; 97 S.W.2d 452 (Tenn. App. 1936). The plaintiff must prove five elements to sustain an action for negligence: (1) duty of care; (2) breach of that duty; (3) a loss or injury; (4) causation in fact, and (5) proximate cause. McClenahan v. Cooley, 806 S.W.2d 767 (Tenn. 1991); Lindsey v. Miami Development Corp., 689 S.W.2d 856 (Tenn. 1985); Shouse v. Otis, 224 Tenn. 1, 448 S.W.2d 673 (Tenn. 1969). One of the elements of proximate cause is that it must be proved that the harm giving rise to the action could have reasonably been foreseen by a person of ordinary prudence. McClenahan, supra; Caldwell v. Ford Motor Co., 619 S.W.2d 534 (Tenn. Ct. App. 1981). Gates v. McQuiddy Office Products, an unreported opinion of this court filed at Jackson November 2, 1995.

Assuming without deciding that the defendants were negligent in the hiring of Rogers, the undisputed facts fail to demonstrate that the negligence was either causation in fact or a proximate or

legal cause of the injuries alleged to have been suffered by the plaintiffs.

The undisputed facts show that Rogers was hired by the defendant Braaten, Chief of Police of Oak Ridge; that no real background investigation was made before Rogers was hired; Rogers had, prior to his hiring as a school crossing guard, been allegedly involved in child molestation, which allegations were investigated by the Federal Bureau of Investigation and a member of the Oak Ridge Police Department and that the information concerning the earlier investigation was available to Chief Braaten at the Oak Ridge Police Department.[2]

The apparent theory of the plaintiffs is that the minor children became acquainted with Rogers while he was employed as a school crossing guard. The mother of the minor children allowed the children to go to Rogers' house and spend the night because she thought that if he was the crossing guard he must be trustworthy. The alleged acts of molestation occurred at Rogers' home and not on school property. The record also reflects that the plaintiffs and Rogers lived in the same neighborhood (some 2/10ths to 3/10ths of a mile from each other).

[2]The Federal Bureau of Investigation participated in the investigation because the incident under investigation allegedly occurred on Federal lands in the Smokey Mountain National Park. This investigation did not involve the minor children involved in this case.

The record reflects that the minor children and other children developed a relationship with Rogers totally apart from his duties as a crossing guard. Rogers took the children out to dinner on several occasions. He also took them on a trip to Cades Cove in the Great Smokey Mountains National Park. All these activities were with the permission of the parents. Rogers was a visitor in the Doe home and was acquainted with both Mr. and Ms. Doe. As a result of the acquaintances and the evaluation of Mr. Rogers as a "nice man" the mother and father of the children allowed the children overnight visits with Rogers. It was during these visits that the alleged molestation occurred. There is nothing in the record to remotely suggest that Rogers did anything wrong while on duty as a crossing guard.

"Causation in fact" is the first requirement of proximate causation. See Caldwell v. Ford Motor Co., 619 S.W.2d 534 (Tenn. App. 1981) Under the undisputed facts in this case it cannot be reasonably said nor can a reasonable inference be drawn that "but for" Rogers' employment as a school crossing guard, the molestation would not have occurred. "... causation in fact, ... is a phase of the doctrine of 'proximate cause'. Being a question of fact, it reduces itself merely to the inquiry, 'Has the conduct of the defendant caused the plaintiff's loss?'" Tennessee Valley Elec. Coop. v. Harmon, 286 S.W.2d 593 (Tenn. App. 1955). To the inquiry,

under the undisputed facts in this case, we respond in the negative as to the City of Oak Ridge and Chief Braaten.

> Since there is no causal connection between the defendants' conduct and the alleged damages, an essential element if [sic] missing from the appellants' case. Lazy Seven Coal Sales v. Stone & Hinds, 813 S.W.2d 400 (Tenn. 1991). The failure to establish an essential element of a cause of action entitles the defendant to summary judgment as a matter of law. Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993).

Strauss v. Wyatt, Tarrant, Combs, Gilbert & Milom, 911 S.W.2d 727 (Tenn. App. 1995).

Since there is no causation in fact there can be no proximate cause. See Caldwell v. Ford Motor Co, supra. Nevertheless, we will briefly discuss the concept of proximate cause. Proximate cause is that which is the procuring, efficient, and predominate cause. Nash v. Love, 59 Tenn. App. 273, 440 S.W.2d 593 (Tenn. App. 1968). An actor's conduct will be considered the proximate or legal cause of injury if three requisites are met. First, the actor's conduct must be a substantial factor in bringing about the harm. Next, there must be no legal rule that would operate to relieve the actor from liability. Finally, the harm that occurred must have been reasonably foreseeable. McClenahan v. Cooley, 806 S.W.2d 767, 775 (Tenn. 1991).

Foreseeability is an important consideration in determining whether an act or omission is a legal cause of an injury. An act or omission will not be considered a proximate cause of an injury if a reasonable person could not have foreseen or anticipated the injury. McClenahan v. Cooley, supra. In employing Rogers as a school crossing guard, it was not reasonably foreseeable that Rogers would develop a social relationship with the children and their parents to such an extent that the children would be allowed to visit Rogers overnight thereby creating the opportunity for the deviant and abhorrent conduct of Rogers.

In conclusion, we are of the opinion that there was neither causation in fact nor proximate or legal cause existing under the undisputed facts sufficient to allow the plaintiffs to maintain this action in the face of a motion for summary judgment.

As to the allegations of failure to supervise, we simply note that the defendants had no right nor duty to supervise the activities of Rogers in the privacy of his own home. Privacy in ones home is a constitutionally protected right. "... [T]he right of privacy is protected by the Tennessee Constitution, it is therefore a fundamental right." State v. Tester, 879 S.W.2d 823 (Tenn. 1994); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996). It is elementary that the defendants had no right to go

upon the premises of Rogers to supervise any activities thereon. We further note that the defendants had neither right nor duty to supervise the activities of the children when the children were acting outside of school activities and under the supervision, or, at least, subject to the direct supervision of the parents.

We agree with the observation of the trial court that the plaintiff, as a matter of law, cannot sustain a common law cause of action for failure to supervise or train school crossing guards as it relates to sexual molestation of children when the acts complained of have no legal nexus with the employment of the school crossing guard. We affirm the judgment of the trial court granting summary judgment as to the common law action sought to be maintained by the plaintiffs.

We recognize that causation questions are normally left to the fact-finder unless the undisputed facts and the inferences drawn from the facts permit a reasonable person to draw but one conclusion. Haynes v. Hamilton County, 883 S.W.2d 606 (Tenn. 1994). In this case, we are of the opinion that from the undisputed facts, reasonable minds could draw but one conclusion. The alleged acts of the defendants were neither the cause in fact or proximate nor legal cause of the acts complained of.

As to the alleged violation of the privacy of the minor children, we find no authority to support the argument under the facts of this case that the defendants violated Article I Section 8 of the Tennessee Constitution.

Since the disposition of the above issues is dispositive of this appeal, we decline to address the issue of immunity under the Governmental Tort Liability Act, T.C.A. § 29-20-101, et seq.

We affirm the judgment of the trial court and remand the case to the trial court. Costs are assessed to the appellants.

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Don T. McMurray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., Judge

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ORDER

This appeal came on to be heard upon the record from the Circuit Court of Anderson County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court and remand the case to the trial court. Costs are assessed to the appellants.

PER CURIAM