IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Briefs January 8, 2014

MS. B., INDIVIDUALLY AND ON BEHALF OF MINOR CHILD, JOHN DOE, "N" v. BOYS AND GIRLS CLUB OF MIDDLE TENNESSEE, ET AL.

Direct Appeal from the Circuit Court for Davidson County
No. 11C1425 Amanda Jane McClendon, Judge

No. M2013-00812-COA-R3-CV - Filed March 6, 2014

Plaintiff filed an action against Big Brothers Big Sisters of America, in addition to its Tennessee affiliate and others, seeking damages arising from alleged sexual and emotional abuse of a minor child by a Big Brothers Big Sisters of Middle Tennessee volunteer. The trial court determined that the national organization did not owe a duty to the minor child and entered summary judgment in favor of the organization. We reverse and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

Luvell L. Glanton, Nashville, Tennessee, for the Appellant, Mother.

Gregory W. Callaway and Susan Scott VanDyke, Nashville, Tennessee, for the Appellee, Big Brothers Big Sisters of America.

OPINION

This appeal arises from an action for damages arising from the alleged sexual abuse of a minor child, "N," by a volunteer associated with Boys and Girls Clubs of Middle Tennessee ("BGCMT"), which operated a mentorship program allegedly in partnership with Big Brothers Big Sisters of Middle Tennessee ("BBBSMT"). In April 2011, Plaintiff, N's mother, filed an action individually and on behalf of N against BGCMT, Boys and Girls Club of America ("BGCA"), and William E. Arnold, Jr. (Mr. Arnold) in the Circuit Court for

Davidson County, alleging that Mr. Arnold, N's mentor, sexually abused N in 2009-2010. In June 2011 and December 2011, Mother amended her complaint to add BBBSMT and Big Brothers Big Sisters of America ("BBBSA"), respectively, as Defendants. In her complaint, Mother alleged that N joined the BGCMT after school program at its Thompson Lane location in 2008, when he was nine years of age; that the program coordinator informed Mother that Mr. Arnold was a "match" for N and met all the BGC requirements; and that the coordinator informed her that the mentorship program would occur on-site at all times. She further alleged that BGCMT closed its Thompson Lane location and that N was transferred to a Charlotte Pike location operated by BBBSMT, where he was assigned a new match specialist and continued to meet with Mr. Arnold two to three times a month. Mother further asserted that N and Mr. Arnold did not continue to meet on site, but that Mr. Arnold took N from the Charlotte Pike location to various locations, including Mr. Arnold's home, until August 2010, when N informed Mother of the alleged abuse and that he did not want to remain in the program. Mother alleged that she was not informed that the program in which N was placed at the Charlotte Pike location was, in fact, operated by BBBSMT. She further alleged that, during the time in which N met with Mr. Arnold off-site, N's match specialist did not meet with N or contact Mother. Mother further asserted that N's match specialist also did not meet one-on-one with Mr. Arnold. Mother asserted that the organizational Defendants negligently failed to properly monitor, screen and supervise Mr. Arnold; that they failed to ensure that Mr. Arnold was acting in compliance with the mission, purpose and policies of the organizations; that they failed to ensure that N was in a safe environment; that they failed to adequately monitor N; and that they failed to ensure that the match specialist assigned to match N with a mentor was adequately performing her duties and complying with applicable policies and procedures. She alleged that N had suffered permanent emotional and psychological damages as a result of Defendants' negligence, and that Mother suffered damages in an undetermined amount to provide care and treatment for N. Mother prayed for compensatory damages in the amount of $3.5 million.

BBBSA answered in February 2012, denying any wrong-doing, and asserting five affirmative defenses including the doctrine of comparative fault; failure to state a claim; the statute of limitations; and that the acts and omissions of other Defendants, including BBBSMT, were not imputable to BBBSA. BBBSA moved for summary judgment in April 2012, asserting that it did not owe Mother or N a duty of care either directly or based on its affiliation with BBBSMT. Following a hearing in November 2012, the trial court granted BBBSA's motion for summary judgment and made its order final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. The trial court denied Mother's motion to alter or amend on March 1, 2013, and Mother filed a timely notice of appeal. The matter was assigned on briefs to the Western Section of this Court in January 2014.

Issues Presented

The issue presented for our review by Mother, as stated by her, is:

Whether the trial court erred in granting summary judgment in favor of Big Brothers Big Sisters of America.

Standard of Review

As the parties note, the standard of review of a trial court's award of summary judgment promulgated by the supreme court in *Hannan v. Alltel*, 270 S.W.3d 1 (Tenn. 2008) and *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76 (Tenn. 2008) is applicable to this matter where Mother filed her complaint prior to July 1, 2011. We review a trial court's award of summary judgment *de novo* with no presumption of correctness, reviewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Norfolk S. Ry. Co.,* 271 S.W.3d at 84 (citations omitted). Summary judgment is appropriate only 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 a judgment as a matter of law." *Id. at 83* (quoting Tenn. R. Civ. P. 56.04; accord *Penley v. Honda Motor Co.,* 31 S.W.3d 181, 183 (Tenn. 2000)). The burden of persuasion is on the moving party to demonstrate, by a properly supported motion, that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Id.* (citing *see Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn.); *Byrd v. Hall,* 847 S.W.2d 208, 215 (Tenn.1993)). The nonmoving party's "burden to produce either supporting affidavits or discovery materials is not triggered" if the party moving for summary judgment fails to make this showing, and the motion for summary judgment must be denied. *Id.* (quoting *McCarley,* 960 S.W.2d at 588*;* accord *Staples,* 15 S.W.3d at 88). The moving party may carry its burden by "(1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial." *Id.* (citing *Hannan v. Alltel Publ'g Co.,* 270 S.W.3d 1, 5 (Tenn. 2008)); *see also McCarley,* 960 S.W.2d at 588*; Byrd,* 847 S.W.2d at 215 n. 5). Additionally, a mere "assertion that the nonmoving party has no evidence" will not suffice. *Id.* at 84 (citing *Byrd,* 847 S.W.2d at 215). "[E]vidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient." *Id.* (citing *McCarley,* 960 S.W.2d at 588). Rather, "[t]he moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008)(citing *Hannan,* 270 S.W.3d at 5). In order to

negate an essential element, "the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party." *Id.* at 84 (citing *see Blair v. W. Town Mall,* 130 S.W.3d 761, 768 (Tenn.2004)). The motion for summary judgment must be denied if the moving party does not make the required showing. *Id.* (citing *Byrd*, 847 S.W.2d at 215).

After the moving party has made a properly supported motion, the nonmoving party must "produce evidence of specific facts establishing that genuine issues of material fact exist." *Id.* (citing *McCarley,* 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215). To satisfy its burden, the nonmoving party may: (1) point to evidence of over-looked or disregarded material factual disputes; (2) rehabilitate evidence discredited by the moving party; (3) produce additional evidence that establishes the existence of a genuine issue for trial; or (4) submit an affidavit asserting the need for additional discovery pursuant to Rule 56.02 of the Tennessee Rules of Civil Procedure. *Id.* (citing *McCarley,* 960 S.W.2d at 588; accord *Byrd,* 847 S.W.2d at 215 n. 6). The court must accept the nonmoving party's evidence as true, resolving any doubts regarding the existence of a genuine issue of material fact in that party's favor. *Id.* (citing *McCarley,* 960 S.W.2d at 588). "'A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.'" *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008)(quoting *Byrd,* 847 S.W.2d at 215). "A disputed fact presents a genuine issue if 'a reasonable jury could legitimately resolve that fact in favor of one side or the other.'" *Id.* With this standard in mind, we turn to whether the trial court erred in awarding summary judgment to BBBSA on the basis that it owed no duty to Mother or N under the facts of this case.

Discussion

We begin our discussion of the issue presented by this appeal by noting that the trial court did not indicate the legal basis upon which it granted BBBSA's motion for summary judgment in its November 2012 order. Rather, the trial court's order simply states that, after consideration of the parties' motions and arguments, the trial court found the motion to be "well-taken." Rule 56.04 of the Tennessee Rules of Civil Procedure, as amended effective July 1, 2007, requires the trial court to state the legal grounds upon which it denies or grants a motion for summary judgment in its order ruling on the motion. Although the order contained in the record does not comply with Rule 56.04, it is undisputed that BBBSA moved for summary judgment based solely on the element of duty, thus we perceive the absence of duty to provide the legal basis for the court's ruling. We further observe that the trial court did not state the facts relevant to its determination that no duty existed in this case. In their briefs, however, the parties agree that the trial court based its determination on a conclusion that BBBSA exercised no control over the operations of its Tennessee affiliate. Thus, the issue presented for our review, as we perceive it, is whether the trial court erred by

entering summary judgment in favor of BBBSA on the basis that BBBSA did not owe a duty to Mother or N where it did not have the means and ability to control the operations of BBBSMT.

In its brief, BBBSA asserts that no "special relationship" existed between it and BBBSMT where the Membership Affiliation Agreement ("the Agreement") between BBBSA and its Tennessee affiliate "clearly states that BBBSA 'does not control the day-to-day operations and affairs of [Tennessee]." It argues that BBBSA's role "was to 'set guidelines for the practice and operation of a Member' and to provide other support and services to facilitate the mentoring program.'" It asserts that it "had no operational control over how Tennessee implemented the program."

Mother, on the other hand, asserts that BBBSA's "Standards for Practice for One-to-One Service" ("the Standards") requires its affiliates to operate within the scope of the Standards and provides that a board of directors of a non-compliant affiliate is required to cure any nonconformity within sixty days of notice. She asserts that the Standards guide the overall operations of BBBSA's affiliates, provide consistency, and mandate the child and volunteer intake procedures. Mother asserts that, absent the grant of a waiver, the Standards set forth the number of times a match specialist must meet with a child, the child's parents, and the volunteer, and set the standards with which an affiliate must comply. She asserts that, under *Mann v. Alpha Tau Omega Fraternity, Inc.*, W2012-00972-COA-R3-CV, 2013 WL 1188954, at *7 (Tenn. Ct. App. Mar. 22, 2013), *perm. app. denied* (Tenn. Sept. 10, 2013), summary judgment in favor of BBBSA was inappropriate where BBBSA did not affirmatively demonstrate that it did not have the means and ability to control the operations of BBBSMT in this case. We agree.

It is well-settled that a duty, the first element of a negligence action, is "'a legal obligation to conform to a reasonable person standard of care in order to protect others against unreasonable risks of harm.'" *Cullum v. McCool*, --- S.W.3d ----, 2013 WL 6665074, at *3 (Tenn. Dec. 18, 2013)(quoting *Satterfield v. Breeding Insulation Co.,* 266 S.W.3d 347, 355 (Tenn.2008)). As our supreme court recently has reiterated:

> An unreasonable risk of harm arises and creates a legal duty if the foreseeability and gravity of harm caused by a defendant's conduct outweighs the burdens placed on a defendant to engage in other conduct that would prevent such harm. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995) (citing Restatement (Second) of Torts § 291 (1964)). This weighing of interests, or balancing process, requires us to examine the facts alleged in the complaint.

Id. It is also well-settled that there is no duty to protect others against risks of harm by third parties. *Id*. (citations omitted). An exception arises, however, when a special relationship exists between the defendant and either the person at risk or the actor who is the source of the risk or danger. *Id*. (citations omitted). "[I]f an individual stands in a special relationship to another individual who is the source of the danger or who is foreseeably at risk from the danger, then the individual assumes an affirmative duty to exercise reasonable care to either control the danger or protect the vulnerable." *Downs ex rel Downs v. Bush*, 263 S.W.3d 812, 819 (Tenn. 2008) (citations omitted).

The relationship between a business owner and patron is one such relationship. *Cullum*, --- S.W.3d ----, 2013 WL 6665074, at *3 (citations omitted). In the context of a business's duty to protect customers from criminal attacks, Tennessee has adopted a middle-ground, balancing approach, imposing a duty on businesses to "'take reasonable measures to protect their customers from foreseeable criminal attacks.'" *Id*. at *4 (quoting *McClung v. Delta Square Ltd.*, 937 S.W.2d 891, 899 (Tenn. 1996)). This approach requires a weighing of the foreseeability and gravity of harm against the burden placed on businesses to protect against that harm. *Id*. (citing *id*.). The courts have stated that "'a risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by the defendant's conduct outweigh the burden upon the defendant to engage in alternative conduct that would have prevented the harm.'" *Id*. (quoting *id*. (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995))). Business owners also may be liable for the accidental, negligent, intentional or criminal acts of third parties if those acts are reasonably foreseeable. *Id*. at *5. Other well-recognized examples of special relationships include those of guest and innkeeper, passenger and common carrier, owner of land and guest, guest and host, and those having custody over another. *Downs,* 263 S.W.3d at 820.

In Tennessee, the determination of whether a defendant owes or assumes a duty of care to a plaintiff is made in consideration of public policy and whether the risk of harm is unreasonable. *Id*. Our supreme court has observed, "[p]ublic policy considerations are relevant because 'the imposition of a legal duty reflects society's contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another's act or conduct.'" *Id*. (quoting *Bradshaw v. Daniel,* 854 S.W.2d 865, 870 (Tenn. 1993)). Factors to consider when determining whether a risk is unreasonable include:

> the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct.

Id. (quoting *McCall v. Wilder*, 913 S.W.2d 150,153 (Tenn. 1995) (citing Restatement (Second) of Torts §§ 292, 293)); (additional citations omitted). Foreseeability has been held to be a key factor, and a foreseeable risk is one the occurrence of which could be foreseen by a reasonable person. *Id*. (citations omitted).

The plethora of litigation, both civil and criminal, arising from alleged sexual abuse of children by persons in authority, in addition to the attention provided to this social evil by the media and throughout every strata of society, renders the alleged abuse in this case entirely foreseeable. *See, e.g.*, Tenn. Code Ann § 37-1-603 (requiring the Department of Children's Services to develop a plan for the detection, intervention, prevention and treatment of child sexual abuse); Tenn. Code Ann. § 37-1-605 (requiring any person who knows or has reasonable cause to suspect that a child has been sexually abused to report such knowledge or suspicion to the Department of Children's Services); *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436 (Tenn. 2012)(holding ecclesiastic abstention doctrine did not bar claims against Diocese for negligent hiring, supervision and retention arising from alleged sexual abuse of child by priest). There can be no doubt that the risk of harm alleged in this case is foreseeable. *See Lamarche v. Big Brother Big Sisters of America*, 880 NYS2d 224 (Table) (NY Sup. 2009); *Doe v. Big Brothers Big Sisters of America*, 834 N.E.2d 913 (Ill. App. 2005); *J.E.J. v. Tri-County Big Brothers/Big Sisters*, 692 A.2d 582 (Pa. Super. 1997). There also is no doubt that the gravity of harm is great. We have consistently emphasized that suspicions of sexual child abuse "must be taken seriously and . . . investigated thoroughly, for the consequences to the child of allowing any abuse to continue are grave." *Byars v. Young*, 327 S.W.3d 42, 50 (Tenn. Ct. App. 2010)(quoting *Keisling v. Keisling*, 196 S.W.3d 703, 722 (Tenn. Ct. App. 2005)). As a matter of public policy, moreover, the prevention of child sexual abuse is a priority in Tennessee. Our General Assembly has declared:

> The incidence of child sexual abuse has a tremendous impact on the victimized child, siblings, family structure, and inevitably on all citizens of this state, and has caused the general assembly to determine that the prevention of child sexual abuse shall be a priority of this state.

Tenn. Code Ann. § 37-1-601(a).

In this case, the question of whether a duty should be imposed on BBBSA to take reasonable measures to prevent sexual abuse of children participating in programs offered by BBBSMT, its affiliate in Middle Tennessee, turns on whether BBBSA possesses the means and ability to control the affiliate's operations. We disagree with BBBSA, however, that the parameters of its Agreement with its affiliates is dispositive to this inquiry. First, the duty of a national organization to take reasonable measures to guard against sexual child

abuse by volunteers of affiliated local organizations is not a duty that can merely be declined by choice. *See Mann v. Alpha Tau Omega Fraternity, Inc.*, W2012-00972-COA-R3-CV, 2013 WL 1188954, at *7 (Tenn. Ct. App. Mar. 22, 2013), *perm. app. denied* (Tenn. Sept. 10, 2013)(holding: that a national organization that "does not supervise the day-to-day operations of its local chapters does not equate to a finding that it *could not* exercise such supervision if it desired to do so or that it *should not* exercise such supervision based upon public policy considerations.")(emphasis in original). Second, we observe that the Agreement contained in the record requires BBBSA affiliates to pay fees to BBBSA on at least a quarterly basis; to use one of the indicated derivations of BBBSA as its name; to work collaboratively and cooperatively with BBBSA and other affiliates in marketing and promotions, volunteer recruitment, fund raising, public policy, programs services and board, staff and organizational development; to restrict its activities to a designated service community area; to adopt and satisfy the Standards of Practice; to provide one-on-one mentoring services; to submit annual reports of activities and financial conditions, certified by an independent certified public accountant; to participate in national and regional meetings; to operate solely as a BBBSA affiliate; to permit BBBSA to inspect its premises, books and records; to require staff to attend BBBSA training; to maintain liability insurance; to enter into mediation in cases of controversy; and to notify BBBSA of any service of process naming the affiliate in a lawsuit. The Agreement also provides that an affiliate "shall be an independent contractor"; that BBBSA agrees to "recognize the [affiliate's] autonomy for the administration of its program"; and that BBBSA and the affiliate shall not be liable for any act or omission of the other. The Agreement also requires each party to indemnify the other against claims arising as a result of or in connection with their activities. The Standards of Practice provides that the Standards have been the "hallmark" of BBBS since 1922. It states that is a "comprehensive document, spelling out the values that guide the federation's work"[1] and "guide[s] affiliates in their overall operations." In the vision statement contained in the Standards, BBBSA states:

> As the largest national network of mentoring organizations serving children, families and communities, Big Brothers Big Sisters of America has a vision to develop the resources, environment and mechanisms to provide caring adults in the life of every child in need.

BBBSA's Standards of Excellence provide for "an on-going examination of 'best practices' to not only reach and engage volunteers, but to sustain their involvement in Big Brothers Big Sisters service, at a variety of levels and opportunities." The Standards also state that use of the name Big Brothers Big Sisters "builds the highly valued base of national identity for capacity building and sustainability." It provides twenty-two standards of practice to which

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[1]The Agreement defines "federation" as "BBBSA and the aggregate of all Members."

affiliates must adhere. The Standards require affiliates to develop comprehensive strategical planning processes, not limited to growth plans and marketing plans; that affiliates have quality assurance, financial management and fund development plans; that affiliates establish financial management practices that meet generally accepted accounting principles; risk management systems; human resource development and management systems; and written personnel policies. It requires each affiliate to employ a full-time executive; to pay competitive staff salaries; to require executive and case management staff to have baccalaureate degrees; to maintain confidential personnel records on each employee; and to obtain criminal history records prior to hiring staff or assigning volunteers to staff positions. It also provides for a casework manual procedures for volunteer intake, the matching process, and "regular supervisory contact with volunteer, parent/guardian and child." The Standards provide that affiliates "must follow" the process outlined in the Standards unless an alternate process is requested and approved in writing by BBBSA.

Read together in their entirety, the Agreement and Standards state that BBBSA will not control or administer affiliate programs, and then sets out, to a large extent, the manner in which the affiliates must operate and the practices which they are required to follow. In *Mann v. Alpha Tau Omega Fraternity, Inc.*, we observed that, even if the National Alpha Tau Omega ("ATO") Fraternity was correct in its assertion that the organization's bylaws did not grant it the authority to control its local chapters, "it [did] not necessarily follow that such authority could not be derived elsewhere." *Mann v. Alpha Tau Omega Fraternity, Inc.*, W2012-00972-COA-R3-CV, 2013 WL 1188954, at *7 (Tenn. Ct. App. Mar. 22, 2013), *perm. app. denied* (Tenn. Sept. 10, 2013). As noted above, we noted in *ATO* that a finding that the national organization did not supervise the operations of it local chapters does not equate to a finding that it could not or should not do so. *Id*. We reversed summary judgment in favor of National ATO, holding that it had failed to affirmatively negate the plaintiff's claim where, notwithstanding the bylaws, other evidence at trial might demonstrate that National ATO had the means and ability to control its local chapter. *Id*.

The strong public policy of preventing sexual child abuse unambiguously expressed by our General Assembly, coupled with the foreseeability and gravity of harm, weigh heavily in favor of imposing a duty of care on BBBSA to supervise its affiliates so as to protect against sexual child abuse. As noted above, however, the duty to control the conduct of a third-party, in this case, BBBSMT, does not arise in the absence of "the means and ability to control the third party." *Id*. (quoting *Newton v. Tinsley*, 970 S.W.2d 490, 492 (Tenn. Ct. App. 1997)). Regardless of the extent to which BBBSA chooses to exercise any right or ability to control its affiliates, BBBSA has failed to carry its burden in this case to affirmatively demonstrate that it did not possess the means and ability to control the acts of BBBSMT for the purposes of affirmatively negating Mother's claims of negligent supervision and screening of Mr. Arnold; negligent failure to monitor N; negligent failure

to ensure a safe environment; and negligence in the failure to ensure that the match specialist assigned to N was complying with organizational policy and procedures.

Holding

In light of the foregoing, summary judgment in favor of BBBSA is reversed. This matter is remanded to the trial court for further proceedings. Costs on appeal are taxed to the Appellee, Big Brothers Big Sisters of America.

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DAVID R. FARMER, JUDGE