UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

MELINDA JO SCOTT,	)	
	)	
Plaintiff,	)	Case No. 1:01CV00134
	)	
v.	)	**OPINION AND ORDER**
	)	
LUCAS BRENDEN SALYERS,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Mary Lynn Tate, The Tate Law Firm, Abingdon, Virginia, for Plaintiff; Gregory S. Hancock, Hancock and Skinner, P.C., Lebanon, Virginia, for Defendant.

When he was fourteen years old the defendant threw a fork into the air in his school cafeteria, and when it landed it struck the plaintiff, another eighth grader, in the eye, injuring her. The plaintiff has now sued for damages in this diversity case, and the present question is whether the plaintiff is entitled to summary judgment as to liability on the ground of negligence or whether the defendant's capacity is a question for the jury. Because I find that the negligence of the defendant is for the jury to determine, I will deny the motion for summary judgment.

I

The essential facts of the case, recited in the light most favorable to the nonmovant on the summary judgment record, are as follows.

On November 16, 1995, the plaintiff, Melinda Jo Scott, was an eighth grade student at Tazewell Middle School in Tazewell County, Virginia. The defendant, Lucas Brenden Salyers, was a classmate, although the children did not know each other well. Salyers was born March 24, 1981, and was thus fourteen years old at the time of the incident. He was repeating the eighth grade and the year before had been referred for a special education evaluation.

During the lunch period on the day in question, Scott and Salyers were seated at different tables in the school cafeteria. For reasons that he cannot explain, Salyers bent a metal fork into a "C" shape and threw it into the air. He was not aiming at any target. Unfortunately, the fork struck Scott, seated about twenty-five feet away, causing permanent injury to her left eye.

Salyers testified in his deposition that he had seen the fork going into a crowd of people at the other table and had known at that point that "that was something [he] should not have been doing." (Salyers Dep. 33-34.)

The defendant has submitted an affidavit of L. Andrew Steward, Ph.D., a licensed clinical psychologist who evaluated Salyers on referral from the school system

about eleven months prior to the incident, during Salyers' first term in the eighth grade. Dr. Steward found Salyers to have symptoms of attention-deficit disorder/attention-deficit-hyperactivity disorder ("ADD/ADHD") and diagnosed him with borderline intellectual functioning. Based on the results of the tests administered, Salyers' school records, and the records in this case, Dr. Steward opines that on the day of the incident Salyers "lacked the capacity to fully understand his actions . . . and the consequences thereof . . . and was further incapable of controlling his impulsiveness when he threw the fork . . . ." (Steward Aff. ¶ 3.)

The plaintiff has moved for summary judgment as to liability, contending that as a matter of law Salyers is legally responsible for the accident. The defendant opposes the motion, asserting that because of his age and psychological impairments, it is an issue for the jury as to whether he is capable of committing negligence under Virginia law.[1] The issues have been briefed and argued and the motion for summary judgment is ripe for decision.[2]

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[1] Scott is now a resident of Georgia, and jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2002). A federal court exercising diversity jurisdiction must apply the law of the state in which it sits. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938). In tort actions like this one, Virginia applies the substantive law of the place of the wrong. *See Jones v. R.S. Jones & Assoc.*, 431 S.E.2d 33, 34 (Va. 1993). Accordingly, Virginia law applies in this case.

[2] The plaintiff's motion for summary judgment was filed June 19, 2002, and the defendant's response was filed on July 29. The hearing on the motion was held on August 1. The scheduling order entered in this case provides that "any response to [a motion for summary judgment] . . . must

II

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the nonmoving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Under Virginia law, a child who has reached the age of fourteen is presumed capable of negligence, but his negligence is not necessarily measured by adult standards. *See Grant v. Mays*, 129 S.E.2d 10, 13 (Va. 1963). "[T]he standard by which his conduct is to be measured is that degree of care which children of the same age, experience, discretion and knowledge would exercise under the same or similar circumstances." *Id.* The child who has reached fourteen has the burden of overcoming

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be filed prior to the day of the hearing, <u>or, in any event, no later than 14 days after service of the motion</u>." (Scheduling Order ¶ 6 (emphasis added).) The plaintiff objects to consideration of the response on the ground that it was clearly untimely under the scheduling order. The defendant filed with his response a separate motion for leave to file the response and I will grant that motion. Based on the representations of counsel, I find that the failure to timely file the response was due to excusable neglect.

the presumption of capacity "by clear proof of the absence of such discretion as is usual with infants of that age." *Id.* at 12-13.

I find that the defendant has presented sufficient proof to allow the issue of liability to go to the jury. The expert psychological opinions by Dr. Steward afford a basis for a factual argument that Salyers lacked the legal capacity for negligence at the time of the incident. *See Va. Elec. & Power Co. v. Dungee*, 520 S.E.2d 164, 171 (Va. 1999) (holding that plaintiff's ADHD supported a finding that his development and maturation was not equal to that of other boys his age, and thus precluded a ruling that he was contributorily negligent as a matter of law.)

Of course, there is a strong argument that Salyers ought to be legally responsible for this tragic accident because of his thoughtless act. A jury may well make that decision. My present holding is only that I cannot strip the defendant of his right to a jury trial based on these facts.[3]

[3] The plaintiff argues that I ought not to consider Dr. Steward's affidavit because his opinions are unreliable on the ground, among others, that he opines that Salyers suffered from "symptoms" of ADD/ADHD, rather than ADD/ADHD. However, I think this difference goes to the weight of his opinion, rather than its admissibility. I do not find, based on the present record, that Dr. Steward's opinions ought to be excluded under Federal Rule of Evidence 702.

III

For the reasons stated, it is **ORDERED** that the motion for leave to file a response (Doc. No. 17) is granted and the motion for summary judgment (Doc. No. 13) is denied.

ENTER: August 7, 2002

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United States District Judge