

STATE OF MICHIGAN  
IN THE TRIAL COURT FOR THE COUNTY OF ISABELLA

John E. Scalise, individually and as  
parent, guardian and next friend of  
Benjamin Scalise, a minor,

Plaintiff,

v

File No: 00-244-NZ

Boy Scouts of America, Lake Huron Area  
Council #265, and Mount Pleasant Public  
Schools,

Hon. Paul H. Chamberlain

Defendants.

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OPINION AND ORDER ON MOTIONS FOR SUMMARY DISPOSITION

Plaintiff, John Scalise, alleges in his complaint he has been denied the chance to be a Boy Scout den father and that his Plaintiff son, Ben Scalise, has been denied the opportunity to be a cub scout based on their atheist beliefs. The Boy Scouts of America is a non-profit membership organization. The Scout Oath requires the individual to affirm that they will do their best to fulfill their duty to God.

Scout Oath

On my honor I will do my best  
To do my duty to God and my country and  
to obey the Scout Law;  
To help other people at all times;  
To keep myself physically strong,  
Mentally awake, and morally straight.

Plaintiffs' complaint alleges religious discrimination. First, Plaintiffs pled that the superintendent of the Mt. Pleasant Public Schools applies the official school policy differently to non-religious persons, than he would for religious or minority persons. Second, that Mt. Pleasant Public Schools sponsors the Boy Scouts both officially and unofficially. Third, the school system allows the Boy Scouts, a religious organization, to use school names for its Cub Scout Packs. Fourth, the school system allows the Boy Scouts to operate in the public schools as a private exclusive club for religious boys and their parents only. Fifth, the school system allows the Boys Scouts to conduct recruiting activities during normal school hours. Sixth, the school superintendent personally approves literature for posting and distribution to students. Plaintiffs' request for relief includes a permanent injunction as well as damages. Plaintiffs' First Amended Complaint adds a claim for violations of the Michigan Public Accommodations Law.

Plaintiffs' motion for a Preliminary Injunction began on December 8, 2000, and continued to December 13, 2000. During that motion this Court heard oral arguments, reviewed depositions, and received other documentary evidence. Additionally, the parties agreed that a copy of the Mt. Pleasant Public Schools Bylaws & Policies; Administrative Guidelines should be provided to the court for use in this case. On December 13, 2000, the parties reached an agreement on the issue of the preliminary injunction and placed the agreement on the record. On March 23, 2001, the parties filed a Stipulation of Facts in this case. In the spring of 2001 all three parties filed motions for summary disposition pursuant to MCR 2.116 (C)(8) and (C)(10). Oral arguments were heard by this court and Exhibit 1 was marked but not admitted during arguments. Following oral arguments the motions were taken under advisement.

**Summary Disposition Standards**

A (C)(8) motion for summary disposition, on the grounds that the opposing party has failed to state a claim upon which relief can be granted, tests the legal sufficiency of a pleaded claim. The inquiry is whether the claim made is so clearly unenforceable as a matter of law that no factual

development could possibly justify a right to recovery. Karrar v Barry County Road Commission, 127 Mich App 821 (1983). All factual allegations are taken as true along with any reasonable inferences or conclusions which may fairly be drawn from the facts alleged. Kinnunen v Bohlinger, 128 Mich App 635 (1983).

In ruling on a motion for summary disposition alleging that the complaint fails to state a claim, all factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts alleged, but mere statements of conclusions that are not supported by allegations of fact will not suffice to state a cause of action. Golec v Metal Exchange Corp, 208 Mich App 380 (1995).

On a (C)(10) motion for summary disposition alleging that there is no genuine dispute as to any material fact, the court must consider affidavits, pleadings, depositions, and any other documentary evidence filed. The Court must find that it is impossible for a claim to be supported at trial because of some deficiency which cannot be overcome before it can properly grant summary disposition. Michigan Mutual Insurance Co. v Heatilator Fireplace, Division of Vega Industries, Inc., 126 Mich App 837 (1983).

A motion for summary disposition grounded on the absence of genuine issue as to any material fact is designed to test whether there is factual support for the claim. Libralter Plastics, Inc. v Chubb Group of Ins. Companies, 199 Mich App 432 (1993).

Summary disposition motions should not be granted if genuine issue exists as to any material fact. The test for whether a genuine issue exists is whether, giving benefit of reasonable doubt to party opposing the motion, the record might be developed which would leave a material issue upon which reasonable minds might differ. Stebbins v Concord Wrigley Drugs, 164 Mich App 204 (1987).

#### **Pertinent Facts**

Prior to September 2000, a District Executive employed by the Lake Huron Area Council and an adult volunteer typically called on Mt. Pleasant Public Schools during the school day, generally once a year, to speak to groups of boys of Cub Scouting age about the possibility of becoming Cub Scouts and or attending an evening informational meeting with their parents. In September 2000, Mt. Pleasant Public Schools advised Lake Huron Area Council it would no longer permit such visits. Stipulation of Facts filed March 23, 2001, p. 3.

Rosebush Elementary sponsored pack #3618 from 1997 to December 11, 2000. On December 11, 2000, Rosebush Elementary terminated its charter and pack #3618 was subsequently chartered by Rosebush United Methodist Church. Stipulation of Facts filed March 23, 2001, p.2- 3.

Recruitment flyers and surveys have been submitted to Mt. Pleasant Public Schools for distribution in accordance with the school policy concerning the posting and distribution of literature. Stipulation of Facts filed March 23, 2001, p. 4.

## Establishment Clause of the United States and Michigan Constitutions

“Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.” Article VIII, §21 of the Michigan Constitution, in relevant part.

Plaintiffs move for summary disposition pursuant to MCR 2.116 (C)(10) alleging that Defendants have no material facts to support their position on this issue. Defendant Boy Scouts and Defendant Mount Pleasant Public Schools argue that Plaintiff failed to state a claim, but in the alternative that Plaintiff can not demonstrate any facts to contradict Defendants' position.

Plaintiffs argue that the Mt. Pleasant Schools advance religion and discriminate on the basis of religion through four primary activities which involve the Boy Scouts. First, the principal of Rosebush Elementary School had signed a charter agreement on behalf of Rosebush Elementary with the Lake Huron Area Council of the Boy Scouts of America. Second, the Boy Scouts have been designated as a school activity. Third, the Boy Scouts have been recruiting members during school class time. Fourth, the school district has permitted the Boy Scouts to post flyers within the school building which included a statement intended to put readers on notice that the Boy Scouts have an oath which references God. This statement was placed on the flyers after Mr. Scalise requested that there be such notification. It was removed after the board determined the statement failed to appease Mr. Scalise. The Boy Scouts do not deny that they limit membership to individuals who are willing to accept the Boy Scout Oath, which includes a religious oath to God.

First, the sponsorship of a cub scout group by Rosebush Elementary was inappropriate and ceased as soon as the Superintendent learned of the sponsorship. However, Ben Scalise has attended Fancher Elementary during the period in question and has alleged no means by which he was impacted by the Rosebush Elementary Boy Scout pack. The law limits the parties who have the right to sue, known as standing, to those parties who have a sufficiently substantial interest to ensure sincere advocacy. Stillman v Goldfarb, 172 Mich App 231 (1988). Case law establishes a three prong test for determining whether a person is an interested party. First, whether the satisfaction of the plaintiff's judgment will conclusively discharge the defendant's disputed obligation, barring further suit by any other party. Johnson v National Fire Insurance Co., 254 Mich 126 (1931). Second, the plaintiff must show a sufficiently substantial interest and personal stake in the outcome of the controversy. Kearns v Michigan Iron & Coke Co., 340 Mich 577 (1954). Third, in cases involving public rights or interests the plaintiff must assert more than a generalized grievance, but must instead establish that they have been deprived of a personal and legally cognizable interest peculiar to them. House Speaker v State Admin. Board, 441 Mich 547 (1993). Applying this test we find that Plaintiffs have no standing to raise the claim based on the Rosebush Elementary sponsorship as Ben Scalise did not attend the school in question, nor does he demonstrate any relationship to the school which would go beyond an interest that others at large would have. Therefore, Plaintiffs' do not have a connection to Rosebush Elementary sufficient to establish that they have a substantial interest or personal stake in the outcome. Plaintiffs have failed to demonstrate how they have been injured in a way that is specific to them. This Court concludes that Plaintiffs do not have standing to pursue a claim against the Rosebush Elementary sponsorship of a Cub scout pack.

Second, Plaintiffs fail to sufficiently demonstrate that Boy Scouts is designated as a school activity. Actions of private parties do not violate the equal protection clause unless the actions may be fairly attributable to the state. Wolotsky v Huhn, 960 F.2d 1331 (6<sup>th</sup> Cir. 1992). Three tests are used by the United States Supreme Court to determine whether challenged conduct is fairly attributable to the state: the public function test, the state compulsion test and the symbiotic relationship test. Sherman v Community Consolidated School District 21, 8 F.3d 1160 (1993). The type of actions alleged to be state in the case at bar are very similar to the actions in the Sherman case, which found the activities were not state mandated action. The Seventh Circuit addressed this issue in Sherman, supra, and determined that the scouting membership policies are not state action and are thus not subject to the Equal Protection Clause. Thus, the Boy Scouts are entitled to choose their members. Sherman concluded that there was no function generally restricted to the public sector being performed by the Boy Scouts. Additionally, there was not the appearance of a relationship that would tie the schools to the Boy Scouts more than any other organization that uses the school after hours, passes out flyers, or places items on display. This Court concludes that there is no state action which would violate any constitutional rights of the Plaintiffs.

Third, Plaintiffs' complaint alleges that on January 12, 1998, Plaintiffs' membership in the Boy Scouts of America was terminated for failure to affirm the Declaration of Religious Principles of the Boy Scouts of America. Sixteen months later Boy Scout recruiters came to Fancher School where Ben Scalise attends classes. The Boy Scout recruiter visited Ben's classroom during regular school hours and made a recruiting presentation. Ben mentioned to the recruiter that he and his dad had been "kicked out" of the Boys Scouts previously because they were Humanists. The recruiter contradicted Ben in front of other boys and encouraged Ben to try again. The complaint alleges that Ben was greatly disappointed again as well as being embarrassed, humiliated, and mortified in front of his friends. This activity has been stopped by the Defendant as they acknowledge that it was inappropriate to use classroom time to promote an extra-curricular activity that promotes certain religious beliefs, thus violating the establishment clause of the United States Constitution. Summary disposition is granted to Plaintiff on the issue of liability, leaving the issue of damages for the jury to determine.

Fourth, Plaintiffs' complain that posters have been posted in the school that contain language that clearly state that the Boy Scouts Oath requires a belief in God. This statement was specially added because Mr. Scalise had requested that the flyers clearly state the religious criteria. Subsequent to the addition of the language Mr. Scalise complained of the language and brought this lawsuit alleging it as a basis for a violation of the establishment clause. The religious criteria has been removed from the flyers as it was only added in attempt to appease Mr. Scalise. When it became apparent that the language was not satisfactory to Mr. Scalise, but rather used as a basis for alleging establishment clause violations in this very lawsuit, the religious criteria were removed from the posters. Due to Plaintiffs' initial request for the addition of the language to the posters summary disposition is granted in favor of Defendant on this allegation.

Of Plaintiffs' allegations under the establishment clause the only issue that survives summary disposition is the issue of damages for the recruitment done during regular school hours. This issue will proceed to the trier of fact for determination of damages.

## 14<sup>th</sup> Amendment Equal Protection Clause

The Equal Protection Clause is limited in private party actions to circumstances where those actions may be fairly attributable to the state. Plaintiffs move for summary disposition pursuant to MCR 2.116 (C)(10) alleging that Defendants have no material facts to support their position on these issues. Defendant Boy Scouts and Defendant Mount Pleasant Public Schools argue that Plaintiff failed to state a claim; but in the alternative that Plaintiff can not demonstrate any facts to contradict Defendants position.

The scouting mission - to instill the values of the Scout Oath and Law in youth members - is not one normally undertaken by the state and it does not fulfill any state function. Sherman v Community Consolidated School District 21, 8 F.3d 1160 (1993), cert denied, 511 U.S. 1110 (1994). Mount Pleasant Public Schools have a "Use Policy" which reads in pertinent part:

"Community groups or organization . . . which include residents of the district shall be permitted and encouraged to use school facilities for worthwhile purposes when such use does not interfere with the school program. The Board shall prescribe regulations for occupancy and use to secure fair, reasonable, and impartial use of the properties.

This policy enables community groups to meet at a convenient location on an equal basis without regard to their beliefs, viewpoints, or policies. Any group has access to school facilities based on its priority (Mt. Pleasant Guidelines 7510). Four tiers of priority exist. Class I includes curriculum related activities taking place after school and student initiated clubs. Class II covers youth related activities such as community services, school support organizations, scouts, 4-H, and faculty activities. Class III includes non-profit community organizations for Mt. Pleasant Residents. Class IV, the lowest of the tier, covers non-community and for profit organizations. These policies do not provide any special treatment to the Boy Scouts. The access Cub Scouts have to school facilities is independent of its membership policies. Thus, the school district is not compelling or encouraging the Cub Scouts to maintain those policies. Further, the Cub Scouts provide no special benefit to the school and the school provides no special benefits to the Cub Scouts, therefore; the two do not have a symbiotic relationship and the Cub Scouts policies are not state action. Sherman, supra.

Mount Pleasant Public School policies do not injure a fundamental right or draw upon a suspect classification. In the case at bar, Plaintiffs have not shown that they are treated any different than any other group of people. Plaintiffs have never been denied access or use of school buildings. Thus, Plaintiffs can not show injury to their fundamental rights or discrimination based on a suspect classification. Defendants' motion for summary disposition pursuant to MCR 2.116 (C)(10) are granted and Plaintiffs' motion is denied.

## Elliott-Larsen and Public Accommodation Claims

Plaintiffs' claim that Mr. Scalise's ineligibility for adult leadership within the Boy Scouts violates the Elliot-Larsen Civil Rights Act, MCL 37.2302 and other Michigan public accommodation rights found at MCL 750.146. Defendants argue that scouting is not a public accommodation and thus are not mandated to comply with the Elliot-Larsen Civil Rights Act.

Plaintiffs move for summary disposition pursuant to MCR 2.116 (C)(10) alleging that Defendants have no material facts to support their position on these issues. Defendant Boy Scouts and Defendant Mount Pleasant Public Schools argue that Plaintiff failed to state a claim; but in the alternative that Plaintiff can not demonstrate any facts to contradict Defendants position.

Elliot-Larsen specifically excludes private clubs and other establishments not in fact open to the public. Scouting has been held by the Seventh Circuit Court of Appeals to be a private club and thus exempt from the mandates of the Elliot-Larsen Act.

"(T)he law is clear that Scouting is entitled to exemption from Title II because it is a private club." Welsh v Boy Scouts of America, 993 F.2d 1267, 1277 (7<sup>th</sup> Cir.), cert denied, 510 U.S. 1012 (1993).

The Boy Scouts is not a "place of public accommodation." First, scouting is an activity, not a place. It is a group that meets, sometimes at a private home, sometimes in a school classroom, and at other times in a church. Scouting is not "public" because it accepts only those members that can accept the requirements of the Boy Scout Law and Oath. And last, scouting is not an accommodation such as a motel or bus, but rather is an expressive social organization. Welsh, supra.

This Court having looked at the evidence and analyzing it in the light most favorable to the non-moving party, along with the law that applies in this matter, finds that there is no basis for Plaintiffs' Elliott-Larsen and Public Accommodation claims.

### RULINGS

IT IS HEREBY ORDERED AND ADJUDGED that summary disposition is granted to Plaintiffs on the claim of the recruitment during school hours and the issue of damages shall go to the jury.

IT IS FURTHER ORDERED AND ADJUDGED that summary disposition is denied as to the remaining issues presented in Plaintiffs' summary disposition motion.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Boy Scouts Motion for Summary Disposition is granted except as to the issue of recruitment during school hours.

IT IS HEREBY ORDERED AND ADJUDGED that Defendant Mt. Pleasant Public School's Motion for Summary Disposition is granted except as to recruitment during school hours.

November 29, 2001

#### PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the attorney of record of all parties in the above cause at their respective business addresses on 11/29/01.

U.S. Mail       FAX  
 Hand Delivered       Overnight Courier  
 Federal Express       Other

Signature: [Signature]

[Signature]  
Hon. Paul H. Chamberlain  
Chief Judge