

# Arkansas Association of Defense Counsel

September 28<sup>th</sup> 2015

## THE REPTILE IS REALLY A TOAD – Internal Policies Do Not Create Legal Duties- by Evan Stallings

Our plaintiff brethren who utilize The Reptile Theory attempt to appeal to perceived issues of “safety,” and will frequently look to a defendant’s internal rules and policies in an effort to manufacture a duty (or better yet, a purported breach of safety and resulting imaginary danger) from whole cloth. So, how do we step on this toad?

The Arkansas Supreme Court has held that “[g]enerally, internal policies should not create a legal duty where none exists.” *Bedell v. Williams*, 2012 Ark. 75, \*8, 386 S.W.3d 493, 500 (Ark. 2012) (citing *Young v. Gastro-Intestinal Center, Inc.*, 361 Ark. 209, 205 S.W.3d 741 (Ark. 2005) (internal policy instructing that discharged patients not be allowed to drive could not create a legal duty where the law did not recognize one); *Arkansas Louisiana Gas Co. v. Stracener*, 239 Ark. 1001, 395 S.W.2d 745 (Ark. 1965) (company internal safety policy could not create a legal duty)). Indeed, a legally tenable claim should not be found to exist against employees of a business for claimed improper oversight or supervision, or for alleged violations of internal policies, where the employee had no personal involvement in the plaintiff’s injuries. See *Smith v. Heather Manor Care Center, Inc.*, 2012 Ark.App. 584, \*14, 424 S.W.3d 368, 378 (Ark.App. 2012).

In the case of *Bedell v. Williams, supra.*, the defendant argued that the plaintiff’s negligence claim could not stand because no breach of legal duty had been established. *Id.* at \*6, 386 S.W.3d at 499. The plaintiff responded that the defendant was not entitled to judgment as a

matter of law “because a duty was established by both a federal regulation and an internal policy of [Little Rock Healthcare and Rehab].” *Id.* In acknowledging the elements of a cause of action for negligence, the Court found:

When “it can be shown that an individual employed by a corporation is personally involved in the events surrounding an injury, the individual may be sued.” *Bayird v. Floyd*, 2009 Ark. 455, at 6, 344 S.W.3d 80, 84 (quoting *McGraw v. Weeks*, 326 Ark. 285, 294, 930 S.W.2d 365, 367 (1996)). A review of the record and [plaintiff’s] argument on appeal reveal that there was no attempt to argue that [defendant] **was actually involved personally in the events surrounding [decedent’s] injury or her care.** Rather, [plaintiff] argued, and the circuit court found, that [defendant’s] duty arose from a federal regulation covering the obligations of governing bodies of nursing homes and **from an internal policy of LRHC. We disagree.**

*Id.* (emphasis added). The Court then held that the internal policy allegedly violated by the defendant could not create a legal duty of care where one did not otherwise exist, stating: “allowing these types of internal policies with broad, governing language to create a duty that establishes personal liability of a company’s owner would open the door for many lawsuits filed in an attempt to pierce the corporate veil.” *Id.* at \*7, 386 S.W.3d at 500.

Additionally, the case of *Bayird v. Floyd, supra.*, is instructive in those circumstances where a plaintiff bases part of her alleged breach of duty on a defendant’s “profits over safety” business motto. There, the plaintiff filed a wrongful death claim against a nursing facility

and its CEO, William Floyd, claiming Floyd was “in charge at all times relevant to [decedent’s] injuries.” *Id.* at \*2, 344 S.W.3d at 82. Specifically, plaintiff alleged Floyd “controlled the **operation, planning, management and quality control** of the [nursing facility] defendants.” *Id.* at \*2, 344 S.W.3d at 83, f.n. 2 (emphasis added). After the circuit court dismissed Floyd from the action, the plaintiff appealed arguing, in part, “Floyd should be held personally liable for his corporate philosophy emphasizing profits before care.” *Id.* at \*6, 344 S.W.3d at 84. In affirming the lower court’s ruling, the state Supreme Court found:

The pertinent facts as alleged in the complaint and recited in the circuit court’s order are that Appellee Floyd controlled the operation, planning, management and quality control of the nursing facility where [decedent] resided; that he **was aware of the problems that existed at the facility and did not commit adequate resources to address them**; and that **he was instead focusing on profit and increasing stock price rather than on the care of the residents.** ...

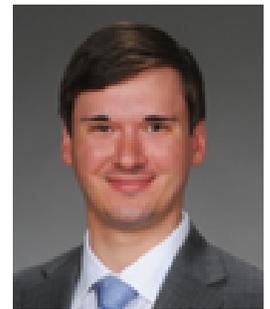
When we review the facts in the light most favorable to Appellant, resolving all doubt and inferences in his favor, we conclude that the facts are silent with respect to Appellee Floyd’s **personal involvement** in the operations of the Beverly--Monticello nursing home where [decedent] resided. We conclude the facts are likewise silent with respect to Appellee Floyd’s **personal involvement** in [decedent’s] care. Appellee Floyd’s contention that he was in no way personally involved with [decedent’s] care simply went undisputed by Appellant. While Appellant did respond with the **conclusory allegation that Appellee Floyd was responsible for an overall corporate philosophy causing deficient staffing and supplies that resulted in harm to [decedent]**, Appellant never came forth with any facts specifically relevant to Appellee Floyd’s direct personal involvement with the level

of staffing and supplies used or denied in [decedent’s] care at the Beverly-Monticello facility.

*Id.* at \*9-10, 344 S.W.3d at 86 (emphasis added).

At the end of the day, internal policies should not be found to create a legal duty in Arkansas. Absent duty, there can be no breach of duty. Absent breach there can be no causation. Absent causation, there can be no damages. Where a plaintiff alleges a breach of legal duty through purported violations of internal safety policies and procedures, cancel The Reptile; step on the toad.

**The thanks of the AADC go out to Evan Stallings of the Barber Law Firm for writing this article**



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