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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001258-MR

WESLEY WOODS, A MINOR, BY AND THROUGH
HIS LIMITED GUARDIAN, REVEREND
CHARLES TACHAU

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 03-CI-003636

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT, IN ITS
CAPACITY AS THE SUCCESSOR-IN-INTEREST
TO THE CITY OF LOUISVILLE, KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

DYCHE, JUDGE: In an effort to provide recreational opportunities for a segment of its population, and to attract national media attention and host related events such as the ESPN X-Games and B3 Games, the City of Louisville¹ developed the

¹ Succeeded in this action by the merged metro government, and hereinafter referred to as "the government."

Louisville Extreme Park, a facility which is "40,000 square feet of concrete where users attempt to negotiate undulating terrain, deep bowls and full pipes on bicycles, skateboards, and roller blades." The attraction of the facility would seem to be the difficulty of this task, and the danger inherent in the effort.

The park was divided into three sections, rated according to their difficulty: beginner, intermediate, and advanced (the three levels were divided into four "zones"), with visual indicators dividing the three. Unfortunately, the beginner section was immediately adjacent to the most challenging and dangerous feature, an 11-foot "bowl" with nearly vertical walls, said to resemble the deep end of a drained swimming pool. Therein lies the origin of this litigation.

The park opened on April 2, 2002. No admission was charged, and no supervision was provided. Within the first month of operation, at least two riders had received serious injuries in the 11-foot bowl after inadvertently riding into it from the beginners' area (zone 2 to zone 4). The city investigated these accidents and sought advice from the park's designer on how to prevent such accidents in the future.

The designer, who was unaware at the time he made the plans for the park that it would be unsupervised, recommended that a physical barrier, in the form of a safety guardrail, be installed between the beginners' section and the 11-foot bowl.

The guardrail would be designed in such a manner as not to become another skating feature, and padding was recommended to prevent injury to those coming into contact with it. The design was called a "soft barrier."

The designer had also originally recommended specific markings to delineate the different areas and degrees of difficulty of the areas. This advice had been disregarded by the government, which decided, without professional assistance, to come up with its own system of marking the different sections and their respective difficulty levels.

The installation of the barrier was also recommended to the Metro Parks Department by the park's architect; the city's law department supported "anything you can do to prevent injuries at the park," thereby limiting the city's liability exposure. The city's risk manager also was in favor of the barrier, circulating an e-mail on June 26, 2002, asking, "There is no reason to delay adding protective barriers to this area now, is there?" and on July 2,

I just don't want a serious injury to occur before we do something. It may never happen—hopefully. But if it does, and we have knowledge (which our e-mails confirm, as well as the fact that several skaters would indicate that they've told us), and failed to do anything, we are truly testing our recreational immunity.

Apparently the only person unconvinced of the necessity of the installation of the soft barrier was the director of the Metro Parks Department. Interdepartmental "tap dancing" (the term used by the assistant director of the Parks and Recreation Department), along with a concern for "protect[ing] the integrity of the park," delayed any effort to resolve the apparent problem, and, on July 19, 2002, 11-year-old Wesley Woods, on his first trip to the park and within five minutes of arriving, accidentally rode his bike from the beginners' area over the precipitous drop into the 11-foot bowl and was seriously injured.

This action was initiated to recover money damages for Wesley's injuries. The government defended by asserting its immunity under the "Recreational Use Statute," Ky. Rev. Stat. 411.190, which provides, in pertinent part,

(3) Except as specifically recognized by or provided in subsection (6) of this section, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for such purposes.

(4) Except as specifically recognized by or provided in subsection (6) of this section, an owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreation purposes does not thereby:

(a) Extend any assurance that the premises are safe for any purpose;

(b) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed; or

(c) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of those persons.

. . . .

(6) Nothing in this section limits in any way any liability which otherwise exists:

(a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity

It was argued on Wesley's behalf that the government "willfully and maliciously failed to guard and warn against a dangerous condition, use, structure or activity" in the park, and that Wesley was injured as a result of this failure.

The trial court ultimately granted the government's motion for summary judgment (Ky. R. Civ. Pro. 56), holding that the government had discharged any duty it might have had toward the users of the park by posting signs at the entrance to the park which "contained several instructions or warnings regarding usage of the park." The court went on to state,

The signs contained the following instructions or warnings: 1) "Know your abilities and skate at your own risk"; 2) "Children should have parental supervision"; 3) "Users are encouraged to wear protective equipment (helmets and pads)"; and 4) "KRS KY 411.190: KY State Recreational Users Statute Applies." The signs also contained a legend of visual indicators that

corresponded to color-coded symbols (black diamonds, green squares, and blue circles) that were painted on various areas of the skate surface to distinguish the various degrees of difficulty in the areas within the Park. The black diamonds were painted on the surface of the areas in the Park that were to be utilized by advanced users (Zone 4); the green squares were painted on the surface of the areas in the Park that were to be utilized by intermediate users (Zone 3); and the blue circles were painted on the surface of the areas in the Park that were to be utilized by beginning users (Zone 2). Additionally, in light of the fact that there were two previous accidents at or near the said 11 foot bowl, the Defendant was reviewing the options it had in an attempt to prevent further accidents from occurring at that location at the time of Wesley's accident.

. . . .

This court is of the opinion that the record does not support the conclusion that the Defendant "willfully and maliciously failed to guard or warn against any dangerous conditions, uses, structures or activities at the Extreme Park." Review of the record reveals that the Defendant provided ample warnings to the users of the Extreme Park. It is to be noted that, at the time that the Extreme Park was constructed, no other skate park in the nation had visual indicators that were painted on the various areas of the skate surface to distinguish the various degrees of difficulty of the areas within the Park. The fact that the Plaintiff questions the effectiveness of the visual indicators utilized by the Defendant does not create an issue of fact with regard to whether Defendant acted willfully or maliciously. Additionally, the record reflects that, in light of the fact that there were two previous accidents at or near the said 11

foot bowl, the Defendant was reviewing the options it had in an attempt to prevent further accidents from occurring at that location at the time Wesley was injured. Unfortunately, such measures were not implemented prior to the date that Wesley visited the Extreme Park. The fact that such measures were not in place at the time of Wesley's injury does not create an issue of fact or establish that the Defendant acted willfully or maliciously.

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d

476 (Ky. 1991), sets out the test for determining the appropriateness of summary judgments:

The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try.

. . . .

Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.

807 S.W.2d at 480, 482 (citations omitted).

Our task, then, is to determine, resolving all doubts in his favor, if Wesley has produced sufficient evidence in the

record to raise a material issue of fact as to whether the government acted willfully² toward him in failing to erect a physical barrier between the beginners' course and the 11-foot bowl (failure to guard), or in the manner in which it warned users of the park of the potential dangers lurking therein (failure to warn). This court need not, as counsel for the government urges in its brief, "determine[]--as a matter of law--that Metro Government failed to guard or warn"; we are merely to determine whether Wesley can show that there is an issue of fact for a jury to decide, and whether a jury could reasonably find that the government failed to guard or warn.

In order to make that determination, we must first define "willful" as used in the statute. This Court dealt with this issue in Huddleston By and Through Lynch v. Hughes, 843 S.W.2d 901 (Ky.App. 1992):

² We do not think the evidence indicates, in any way, that there was any "malicious" conduct involved here.

Further, I fail to perceive that there is any issue of fact as to whether the conduct of appellee's agents for purposes of the statute was malicious rather than willful. In the first place, the words "willful" and "malicious" are used in the statute in a mutually exclusive sense, as demonstrated by the fact that they are separated by the disjunctive word "or," which ordinarily is used to connote exclusivity. Further, although the words "malicious" and "willful" are similar, they certainly are not synonymous and they should not be treated as having an identical legal meaning. Indeed, the word "malicious" has generally been defined in the law as involving a state of mind which is characterized by, or which involves acts which are done with, wicked or evil intentions. See, e.g., Black's Law Dictionary (6th ed. 1990). Such a state of mind is clearly much more egregious and culpable than that which is implicated by a mere "willful" act. Moreover, in my opinion there is no evidence in the record sufficient to support a finding that the conduct of appellee's agents was motivated by a "malicious" state of mind.

Huddleston By and Through Lynch v. Hughes, 843 S.W.2d 901, 908 (Ky.App. 1992), Gudgeon, J., concurring.

The meaning of the phrase "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity" as used in KRS 411.190(6) is an issue of first impression in the Commonwealth.

Black's Law Dictionary defines a "willful" act as:

Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.

Black's Law Dictionary, 1599 (6th ed. 1990) (Emphasis supplied).

As noted above, the terms "willfully" and "knowingly" are often used interchangeably. Kentucky's Penal Code defines "knowingly" as follows: "a person acts knowingly with respect to conduct or to a circumstance . . . when he is aware that his conduct is of that nature or that the circumstance exists." KRS 501.020(2). Black's Law Dictionary defines "knowingly" in a similar fashion:

With knowledge; consciously; intelligently; willfully; intentionally. An individual acts "knowingly" when he acts with awareness of the nature of his conduct. * * * Act is done "knowingly" or "purposely" if it is willed, is product of conscious design, intent or plan that it be done, and is done with awareness of probable consequences.

Id. at 872 (Citations omitted).

Kentucky's highest court observed in Louisville & N.R. Co. v. George, 279 Ky. 24, 129 S.W.2d 986 (1939), that:

[T]o constitute willful or wanton negligence it is not necessary to show ill will toward the person injured, but an entire absence of care for the life, person, or property of others which exhibits indifference to consequences makes a case of constructive or legal willfulness.

Id. 129 S.W.2d at 989 (Citation omitted) (Emphasis supplied).

. . . .

We accordingly believe a jury question exists regarding whether the School acted "with indifference to the natural consequences" of its actions in continually resetting the goals with only perfunctory precautions taken. A jury question exists regarding whether the School "evidenced the entire want of care or great indifference" to Huddleston's safety.

843 S.W.2d at 905, 906 (emphases original).

In that case, a young man was injured by a portable basketball goal maintained by a private school and used by neighborhood children with the knowledge, but not necessarily express consent, of the school. The goal system had counterweights to hold the goal post upright, but when the weights were partially removed, the goal would tilt forward, lowering the rim enough that the players could dunk the basketball. On one

occasion while the weights were removed, the goal fell over and hit Huddleston, breaking his back.

The trial court found that the school was cloaked with immunity under the recreational use statute, and granted summary judgment. This Court reversed, finding that the record established: the school had knowledge that children were using the goal in this manner; it gave its tacit consent for the children to use the goal; the school knew that the goal had fallen several times, and each time, the school had righted the goal, replaced the weights, and exercised "only perfunctory precautions" against injury from the falling goal. These facts were sufficient to present a jury question as to whether the school willfully failed to guard or warn against a dangerous condition, use, structure, or activity.

As Judge Gudgel's concurring opinion points out, however, the majority opinion in Huddleston ignores the adoption by our Supreme Court of a slightly different definition of "willful" in Kirschner v. Louisville Gas & Electric Company, 743 S.W.2d 840, 843 (Ky. 1988)(citation omitted):

The usual meaning assigned to "willful," "wanton," or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. . . .

The common thread between the two definitions is the conscious indifference to the natural consequences of the action, or, as in this case, the inaction, of the government. The use of either definition would be acceptable, but the Supreme Court's definition would probably be preferable. SCR 1.030(8)(a); 1.040(5).

We have conducted a thorough examination of the evidence in this case. We find the evidence sufficient to raise a factual issue as to whether the government failed to warn or failed to guard, or both. The jury can determine whether the failure to erect some sort of physical barrier between the beginners' section and the 11-foot bowl was a willful failure to guard against a dangerous condition, if it existed. It may also determine whether the signs posted were sufficient to warn the intended audience/participants of the dangerous condition, if such a condition existed, or whether the failure to more adequately warn was willful.

Wesley also asks us to invalidate the recreational use statute as violative of his jural rights, found in sections 14, 54, and 241 of the Constitution of Kentucky. As this issue has previously and repeatedly been decided adversely to Wesley, we decline to hold the act unconstitutional. SCR 1.030(8)(a). Sublett v. United States, 688 S.W.2d 328, 329 (Ky. 1985).

COMBS, CHIEF JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I concur in the result reached by the majority, but wish to state my reasons separately. As the majority notes, under KRS 411.190, the Metro Government is immune from Woods's suit for damages unless it willfully or maliciously failed to guard or warn against a dangerous condition, use, structure, or activity at its Extreme Park in downtown Louisville. "Willfulness or maliciousness" refers to an aggravated blameworthiness that differs from ordinary negligence not just in degree but in kind. To be at fault for such an aggravated breach, our cases hold, a landowner permitting the recreational use of his or her property (1) must know of a hidden peril on the land; (2) must know that it is highly likely users will encounter the peril and be seriously injured; and (3) must respond so inadequately to this knowledge as to be deemed consciously indifferent to the user's safety.³

Virtually all playgrounds and playground equipment pose substantial risks of serious injury.⁴ Generally, however, the risks are apparent to the user, or should be, and so impose

³ Kirschner v. Louisville Gas & Electric Company, 743 S.W.2d 840 (Ky. 1988); Huddleston v. Hughes, 843 S.W.2d 901 (Ky.App. 1992).

⁴ "Municipal Torts: Play Equipment," 73 ALR4th 496 (1989).

no duty on the landowner to warn or guard.⁵ Louisville's Extreme Park is no exception. Its "40,000 square feet . . . of undulating terrain, deep bowls and full pipes," doubtless pose numerous risks to the bikers, skateboarders, and skaters who delight in negotiating those obstacles, but the risks are obvious; the Metro Government is entitled to assume that users will be aware of them and will protect themselves accordingly.⁶ The Government is also generally entitled to assume that users will abide by the park's posted rules, including the admonitions to wear protective gear and to remain in those sections of the park suitable to one's level of skill. A user injured because of his neglect of the rules or because of his deliberate encounter with one of the park's obvious hazards is precluded by the recreational use statute from seeking damages from the Metro Government.

Even under the use statute, however, once the Metro Government becomes aware of a hidden risk at the park that is highly likely to result in serious injury, it must respond with something more than indifference. It must, as the statute says, take meaningful steps to guard or warn against the hazard. Although it is a close call, I agree with my colleagues that

⁵ Bonn v. Sears, Roebuck & Company, 440 S.W.2d 526 (Ky. 1969); Collins v. Rocky Knob Associates, Inc., 911 S.W.2d 608 (Ky.App. 1995); Kirby v. Macon Public School District Number 5, 523 N.E.2d 643 (Ill.App. 1988).

⁶ Collins v. Rocky Knob Associates, *supra*.

Woods has alleged an unusual set of facts that could support a finding by a jury that the Metro Government breached this duty and that the breach caused his injuries.

First, arguably the Government knew of a hidden risk at the park. One might think that an open hole comparable to the deep end of a swimming pool is the epitome of an obvious hazard, but the Government was on notice that from the beginners' zone the pit could be obscured behind a rise and that a few beginners, straying across the rise from the beginners' zone to the advanced zone, had encountered the pit unexpectedly. Twice such encounters had resulted in falls and significant injuries. Arguably, then, this condition constituted a hidden risk.

Arguably, too, the Government knew that this risk was highly likely to result in serious injury. Although the park was still new at the time of Woods's visit, so that the likelihood of a fall into the pit could not be known with statistical precision, for tort purposes whether a potential injury is "highly likely" depends not only on the likelihood of the occurrence but also on the gravity of the potential harm.⁷ Where, as here, brain injury and even death are readily foreseeable injuries, an occurrence that is significantly

⁷ Commonwealth Department of Highways v. Begley, 376 S.W.2d 295 (Ky. 1964); Dan B. Dobbs, *The Law of Torts* § 144 (2001).

possible, although perhaps not technically probable, could well be deemed "highly likely."

Finally, it is also arguable that the Government responded with indifference. To be sure, the Government was studying the problem, and one can sympathize with its desire not to rush into a change that would unnecessarily mar the park or inadvertently create new hazards. But for two months it had done nothing to protect users such as Woods from the hidden danger of which it arguably was aware. It had neither erected a guard rail, as its safety officers recommended, nor had it altered its warnings so as to bring this particular danger out of hiding. A juror might reasonably conclude that a two month delay without taking any step to mitigate the danger amounted to conscious indifference to Woods's safety. Viewing the record favorably to Woods, therefore, I agree with my colleagues that there are material issues of fact bearing on the Government's liability and that summary judgment was thus inappropriate.

That said, I must also say that I believe the Extreme Park is a valuable Louisville asset reflective of the Government's admirable concern to serve the entire metro community. It would be a pity if litigation made the park too expensive to maintain. The recreational use statute, of course, was intended to prevent that result, and this case should not be perceived as frustrating the statutory aim. As I have tried to

show, Woods's allegations go well beyond the ordinary allegations of landowner negligence. In recreational use cases, summary judgment remains entirely appropriate for claims that do not meet this substantially heightened standard.

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