RENDERED: MAY 19, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000781-MR

RONALD BRADFORD APPELLANT

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE CHARLES HICKMAN, JUDGE
ACTION NO. 03-CI-00289

ANDERSON COUNTY BOARD OF EDUCATION APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND McANULTY, JUDGES, POTTER, SENIOR JUDGE.[1]

BARBER, JUDGE: This appeal comes to us from the Anderson Circuit Court. Appellant, Ronald Bradford (Bradford), appeals the court's grant of summary judgment to Appellee, Anderson County Board of Education (Board).

On October 2, 2003, Bradford filed a personal injury claim against the Board based on injuries sustained after a bleacher broke at an Anderson County High School ball field.

[1] Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Bradford was at the field October 6, 2002, watching his grandson warm-up for a little league football game. The Board allowed the Little League Association to utilize the fields for games at no charge. During warm-ups, Bradford stood up to take a picture of his grandson and the bleacher he was standing on broke. The break caused him to fall approximately one foot to the ground luckily landing on his feet. Bradford alleged the fall permanently injured his back.

Following Bradford's March 16, 2004, deposition, the Board amended its answer to add the Recreational Use Statute, KRS 411.190, to its defenses. The Board then filed a motion for summary judgment on November 4, 2004, based upon the Recreational Use Statute. In response, Bradford amended his complaint January 12, 2005, to add a claim that the Board's acts and conduct constituted "a willful or malicious failure to guard or warn against a dangerous condition, use or activity." This would satisfy an exception to the immunity provided under the Recreational Use Statute. See KRS 411.190(6)(a). The Board responded to this new claim and then resubmitted its motion for summary judgment to the court. The court issued its order granting summary judgment to the Board on March 31, 2005. Specifically, the court held that the Board was immune under the Recreational Use Statute and that nothing in the record pointed to any willful or malicious action on behalf of the Board. As

such, the court found there were no genuine issues of material fact preventing entry of summary judgment on behalf of the Board. Bradford now appeals to our court.

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there was no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 704 (Ky.App. 2004), (citing Palmer v. International Assoc. of Machinists, 882 S.W.2d 117, 120 (Ky. 1994)). The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 705, (citing Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991)). The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent summary judgment. Hallahan, supra, 138 S.W.3d at 705. The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor. Id., (citing Commonwealth v. Whitworth, 74 S.W.3d 695, 698 (Ky. 2002)).

In order for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. Motorists Mutual Insurance Co., supra 149 S.W.3d at 439, (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits,[2] if any, 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." Motorists Mutual Insurance Co. v. Grange Mutual Casualty Co., 149 S.W.3d 437, 439 (Ky.App. 2004), (citing CR 56.03). The focus should be on what is of record rather than what might be presented at trial. Hallahan, supra, 138 S.W.3d at 705, (citing Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999)). Further, an appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved. Id. We first examine whether the Recreational Use Statute was applicable to the Board.

Pursuant to KRS 162.010, the title to all property owned by a school district is vested in the Commonwealth for the

[2] "Affidavits" in CR 56.03 include any other pertinent materials which will assist the court in adjudicating the merits of the motion. Conley v. Hall, 395 S.W.2d 575, 583 (Ky. 1965).

benefit of the district board of education. As such, we must determine whether state owned property is entitled to immunity under the Recreational Use Statute. Kentucky Revised Statute 411.190 states, in pertinent part:

> (1) As used in this section:
>
> (a) "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty;
>
> (b) "Owner" means the possessor of a fee, reversionary, or easement interest, a tenant, lessee, occupant, or person in control of the premises;
>
> (c) "Recreational purpose" includes, **but is not limited to**, any of the following, or any combination thereof: Hunting, fishing, swimming, boating, camping, picnicking, hiking, bicycling, horseback riding, pleasure driving, nature study, water-skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites; and
>
> (d) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land . . .
>
> (2) The purpose of this section is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.
>
> (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; . . . (Emphasis added.)

Kentucky courts have taken a broad view as to who constitutes an "owner" under this statute.

In Sublett v. United States, 688 S.W.2d 328, 329 (Ky. 1985), the Kentucky Supreme Court certified that the United States of America was an "owner" within the definition contained in KRS 411.190(1)(b) and that the entire statute was applicable to it. Next, in Page v. City of Louisville, 722 S.W.2d 60, 61 (Ky.App. 1986), our court applied the Recreational Use Statute to the city of Louisville and the Metropolitan Parks and Recreation Board, a joint city-county agency, relying upon

Sublett. Further, in Midwestern, Inc. v. Northern Kentucky Community Center, 736 S.W.2d 348, 350 (Ky.App. 1987), our court concluded that the city of Covington and the community center fell squarely within the provision of KRS 411.190(1)(b), defining an "owner" as a "possessor of a fee interest" or one "in control of the premises" and, as such, were immune from liability. We also note that not all state-owned property is open to the public. See, e.g., KRS 56.010. (The Finance and Administration Cabinet is given the authority to institute civil proceedings in the name of the Commonwealth for any **trespass** or injury to state property under its control.) (Emphasis added.)

Because this is the first instance in which an appellate court has been asked to determine whether the state is entitled to the immunity afforded under the Recreational Use Statute, we also examined other jurisdictions with comparable statutes. Each reached the conclusion that the state should be accorded the protection of a recreational use statute. See: Yerk v. Commonwealth, 36 Pa. D. & C.3d 477, 479 (Pa. Com. Pl. 1984); McNeal v. Dept. of Natural Resources, 364 N.W.2d 768, 771 (Mich.App. 1985); Edmondson v. Brooks County Board of Education, 423 S.E.2d 413 (Ga.App. 1992); and Ross v. Strasser, 688 N.E.2d 1120, 1123 (Ohio App. 1996).

Based on the foregoing, we believe it is appropriate to consider the Commonwealth, i.e. the Board, an "owner" for

purposes of KRS 411.190(1)(b). Since we have concluded that the Board was entitled to immunity under the Recreational Use Statute, we now turn to Bradford's claim that a material fact existed whether the Board willfully or maliciously failed to guard or warn against a dangerous condition, use, or activity.

In relation to this claim, the circuit court held as follows:

> The Court finds that nothing in the record points to any willful or malicious action on behalf of [the Board]. To the contrary, [the Board] stated in the record that the bleachers at issue were visually examined shortly prior to the incident involving [Bradford]; that the grounds are routinely examined twice a year, and that they were replaced in the last three years. [Bradford] admits in his deposition that any unsafe condition of the board was evident to him only upon examining it after it broke. He did not state any noticeable visual damage, nor any noises made when he first utilized the board. Only after the board broke did [Bradford] state that he noticed that the board was rotten. It is inconceivable to this Court how the employees of [the Board] could have protected [Bradford] from a hazard he himself could not determine existed.

The statutory language of "willful or malicious" in the context of the Recreational Use Statute has been equated with "indifference to the natural consequences of [one's] actions . . ." or "the entire want of care or great indifference to [another's] safety." Collins v. Rocky Knob Associates, Inc., 911 S.W.2d 608, 611 (Ky.App. 1995), (citing Huddleston v.

Hughes, 943 S.W.2d 901 (Ky.App. 1992)). It would be a gross misreading of Huddleston to conclude that a summary judgment under the Recreational Use Statute is never proper on the grounds that there would always be a genuine issue of material fact of whether a defendant's conduct was "willful or malicious." Id.

The appeal before us involves a theory of passive negligence, whether the harm was allegedly caused by what the Board did not do, but should have done. No evidence, other than Bradford's contentions, was shown tending to support his arguments. As such, they can only be viewed as speculation.

When the party moving for summary judgment has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of any material fact, it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact. Neal v. Welker, 426 S.W.2d 476, 479 (Ky. 1968). The hope or bare belief that something will "turn up," cannot be made basis for showing that a genuine issue as to a material fact exists. Id. at 479-480.

Upon a review of the record, we are unable to discover any evidentiary material presented by Bradford reflecting that there is a genuine issue of a material fact. As stated earlier,

no evidence, other than Bradford's contentions, was shown tending to support his arguments. In his deposition, Bradford named four women sitting on the same bleachers he was at the time of his fall,[3] but there is nothing in the record, such as depositions or affidavits, from any of these witnesses to support his claim. Without more in the record, we believe there were no genuine issues of material fact in relation to this claim.

Based on the foregoing, the granting of the summary judgment to the Board by the circuit court was appropriate in that no genuine issues of material fact remained. Therefore, we affirm the Anderson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Bradley S. Guthrie Harrodsburg, Kentucky	Barbara A. Kriz Lexington, Kentucky

[3] Three of the women were sitting on the same level as Bradford.