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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000855-MR

KELLI POORE AND THE ESTATE OF JEROME A. POORE, JR.,
BY AND THROUGH KELLI POORE,
AS ADMINISTRATRIX OF THE ESTATE
OF JEROME A. POORE, JR. APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 17-CI-004201

21st CENTURY PARKS, INC., DANIEL A. JONES,
PATRICK WILBOURNE, BUDDY VAN CLEAVE,
JAMES MILLER, AND EVAN PATRICK APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, JONES, AND KRAMER, JUDGES.

JONES, JUDGE: The Appellant, Kelli Poore ("Kelli"), initiated the underlying action in Jefferson Circuit Court on behalf of herself and the estate of her late

husband, Jerome A. Poore, Jr. ("Tony").[1] Kelli sought compensatory and punitive damages from 21st Century Parks, Inc., and its employees, Daniel Jones, Jim Miller, Buddy Van Cleave, Evan Patrick, and Patrick Wilbourne,[2] for their alleged negligence in connection with Tony's death during a kayaking trip that began in the Parklands of Floyds Fork ("the Parklands"), one of several parks owned and operated by 21st Century Parks.[3] Generally, the Estate's complaint alleged that emergency personnel would have been able to locate Tony in time to save his life had 21st Century Parks provided more mile markers along the waterway and adequately trained its staff to implement a rescue plan.

The Jefferson Circuit Court granted summary judgment to 21st Century Parks based on KRS[4] 411.190, Kentucky's Recreational Use Statute. On appeal, the Estate asserts that KRS 411.190 does not apply in this situation because Tony died on the banks of Floyds Fork, a state-controlled waterway, approximately one mile outside the Parklands. It also asserts that the statute does not operate to excuse either 21st Century Parks' failure to adequately train its employees to

[1] We refer to Appellants collectively as "the Estate."

[2] With the exception of Daniel Jones, all of the individuals named by the Estate are either current or former 21st Century Parks employees who assisted first responders in their efforts to locate Tony after Kelli called 911 during their kayaking trip. Daniel Jones is the chairman and Chief Executive Officer of 21st Century Parks and serves as the manager and operator of the Parklands.

[3] We refer to Appellees collectively as "21st Century Parks."

[4] Kentucky Revised Statutes.

conduct rescues or the failure of the individual employees to use ordinary care in their rescue attempts.

We do not agree with the Estate that the circuit court overextended the Recreational Use Statute. Tony's death arose out of his free use of the Parklands for recreational purposes, *i.e.*, to gain access to Floyds Fork for kayaking. As the circuit court determined, Tony's use of the Parklands and its involvement in this case fall within the scope of KRS 411.190 and promote its purposes. Additionally, we agree with the circuit court that the facts as alleged by the Estate do not fall within the statute's exception to liability based on the landowner's "willful or malicious" conduct. KRS 411.190(6). Accordingly, having reviewed the record and being otherwise sufficiently advised in the law, we affirm the Jefferson Circuit Court.

I. BACKGROUND

On August 16, 2016, Kelli and Tony Poore used Beckley Creek Park in Jefferson County, Kentucky, as an access point to launch their kayak into the Floyds Fork waterway. Beckley Creek Park is one of four parks that make up the Parklands.[5] All four parks are operated by 21st Century Parks, Inc., a nonprofit corporation. Each of the four parks provides access to the Floyds Fork waterway.

[5] The four parks are: Beckley Creek Park, Pope Lick Park, Turkey Run Park, and Broad Run Park. Together, they span approximately 4,000 acres in the eastern part of Jefferson County, Kentucky.

Floyds Fork is a tributary of the Salt River; it is located directly south and east of Louisville, Kentucky. It begins in Henry County, near Smithfield, Kentucky, flows twenty-seven miles through eastern Jefferson County, twenty of which are within the boundaries of the Parklands, and converges with the Salt River near Shepherdsville in Bullitt County. While portions of Floyds Fork run through the Parklands, 21st Century Parks does not own or maintain the waterway. Floyds Fork is owned by the Commonwealth of Kentucky and is managed by the Kentucky Department of Fish and Wildlife.

In 2016, 21st Century Parks employed a total of eight employees to work in the Parklands, four of whom were on-site at any given time during park hours to assist patrons and maintain the grounds. Although the Parklands' Policy Manual provided that each park should have a safety and "crisis communication plan," 21st Century Parks did not have a formal plan. It required all employees to be trained in CPR but advised patrons to call 911 in the case of an emergency.

Although 21st Century Parks does not own or maintain Floyds Fork, each of its four parks provides designated access to the waterway for paddling and similar watersports. 21st Century Parks warned patrons of the dangers associated with those activities on its website. During the relevant time period, the website contained the following warnings: (1) 21st Century Parks does not maintain Floyds Fork; (2) patrons who paddle Floyds Fork do so at their own risk; (3) paddling

Floyds Fork can lead to injury or death; and (4) paddlers are primarily responsible for their own self-rescue in the event of an emergency and should call 911 for help in an emergency situation.

The website also provided maps and route descriptions for each segment of Floyds Fork, including the one the Poores were kayaking on the day of Tony's death. The route description for that section of Floyds Fork expressly stated that the waterway left the Parklands, near Distillery Bend, and would "not be back in the park until [they] reach[ed] the take-out at [the] Fisherville" access point in Pope Lick Park. (Record (R.) at 149).

In addition to posting safety disclaimers and information on its website, 21st Century Parks also posted mile markers along its hiking trails and the Floyds Fork waterway, in part to facilitate the location of patrons in distress. In the past, there had been some discussion between emergency first responders and 21st Century Parks regarding the placement of additional mile markers in the Parklands to help emergency personnel more quickly locate park patrons in distress. Ultimately, however, 21st Century Parks decided that additional markers were not necessary.[6]

[6] Just two months before Tony's death, an elderly woman also died on Floyds Fork from an unspecified medical emergency. Emergency responders struggled to locate the woman. It is unclear whether additional mile markers would have helped in this situation because the 911 caller was a ten-year-old child who did not know which park the family used to enter Floyds Fork, could not describe where the family had parked, and was unable to identify any other useful landmarks.

The Poores were active hikers familiar with the Parklands and had previously kayaked portions of Floyds Fork, but were unfamiliar with this particular length of the waterway as they had not previously kayaked this route. Although Kelli testified that she read the route descriptions on the Parklands' website, she did not realize that the new stretch of Floyds Fork they had chosen to kayak extended outside the Parklands. However, it is undisputed that the map used by the Poores on the day of Tony's death contained up-to-date mile marker information for each of the paddling access points within the Parklands and showed that the bend between Beckley Creek Park and Pope Lick Park extended beyond the Parklands.

The Poores were generally well-prepared for their kayaking trip.[7] The two were former Marines and seasoned swimmers, and Tony was also an experienced kayaker. Kelli made sure to pack water, life vests, grapes, and ice, along with other essentials, and testified that she visited the Parklands' website in advance. In addition to reviewing the route descriptions, Kelli testified that she read and understood the park warnings that patrons were responsible for their own rescue and discussed what she had read with Tony. Kelli also checked weather

[7] Although the Estate contends that Tony was in good health prior to undertaking the couple's kayaking trip, the record shows that just days before the incident, Tony was seen by a doctor for complaints of chest pain with and without exertion, prescribed medication for high blood pressure, and asked to return for a stress test.

conditions on the morning of August 16, 2016, the day of their trip. The day was forecasted to be hot and muggy, and the water levels were predicted to be low. Although the forecast called for rain in the afternoon, the Poores believed they would be able to finish their trip in three hours before the rain began.

The Poores entered Floyds Fork from the Beckley Creek Park access point at 9:30 or 10:00 a.m. Kelli brought along a laminated map that showed the mile markers. She used the map in conjunction with the GPS map function on her cellular telephone to chart their progress. The trip soon became more difficult than the couple had anticipated. The water was quite shallow. Tony had to repeatedly drag the couple's kayaks over the rocks to keep moving forward. After about an hour and a half, the couple was exhausted from their efforts. Tony told Kelli he was not feeling well; he thought his breakfast was sitting heavy on his stomach. In an effort to alleviate his discomfort, Tony forced himself to vomit. Kelli was concerned about Tony; she thought he might be dehydrated. When Kelli realized that they had forgotten to bring Gatorade, she suggested to Tony that they stop their trip at the next access point. Tony dismissed the idea, saying that he felt better and wanted to continue on their planned route. He promised not to overexert himself when Kelli again suggested they end their trip when they came upon the next access point.

Tony's condition continued to worsen. He began cramping in his thighs and abdomen, but the two continued on for another two hours or so. Around 2:30 p.m., about five hours into their trip, the Poores arrived at Distillery Bend just beyond the Parklands' border. At this point, they encountered more shallow water and rocks. Tony disembarked his kayak to take a break and suddenly collapsed. When Kelli saw Tony down on all fours dry heaving, she called 911 and requested medical assistance. Kelli was able to give the operator an accurate location based on the mile markers along Floyds Fork. She informed the operator that they were approximately one tenth of a mile past mile marker 33.5 and about 1.8 miles from the Fisherville access point at Pope Lick Park. Later in the conversation, Kelli told the operator there was a tree farm across the waterway and that she could hear a train in the distance. She also gave the operator GPS coordinates they pulled up on Tony's phone.

MetroSafe dispatched emergency personnel to assist the Poores. It also contacted one of the 21st Century Parks rangers, Buddy Van Cleave, and informed him that a kayaker was in distress on Floyds Fork. Mr. Van Cleave was able to discern from the location points that the Poores were located on private property outside the Parklands. After the call ended, Mr. Van Cleave contacted the 21st Century Parks employees on duty and requested they begin searching for the couple.

Although Kelli contends that 21st Century Parks was negligent in locating Tony, the parties do not dispute that Mr. Van Cleave and the other 21st Century Parks employees knew generally where the Poores were located from the information Kelli provided to the 911 operator. According to 21st Century Parks, the delay was caused by the limited accessibility of Distillery Bend where the Poores were located. In other words, even though 21st Century Parks knew where to find Tony and Kelli, they did not know how to reach them quickly.

Louisville Metro emergency personnel (EMS, fire, and police) took charge of the rescue operation; however, 21st Century Parks attempted to assist in various ways. Patrick Wilbourne, who was working in the north section of the Parklands, checked access points throughout that section of the park in case Kelli was mistaken about the couple's location. Jim Miller listened to the radio traffic and made his way to the local fire department to offer his assistance.[8] Buddy Van Cleave and Evan Patrick, the on-call manager, left together in a vehicle to search the area Kelli had described to the 911 operator. The two men drove to three different locations along private property they believed to be near mile marker 33.5. At each point, they shouted from their vehicle and waited for a response. With their calls having gone unanswered and not knowing where else to search by

[8] Mr. Miller arrived at the fire station after Tony was located by emergency personnel.

vehicle, they drove to the fire department to see what other assistance they might be able to provide. Once there, a first responder requested Mr. Patrick to accompany him to search along various points of Floyds Fork. Although Mr. Patrick was generally familiar with the areas of Floyds Fork that were within the Parklands, he was not familiar with the property beyond the Parklands' border where Kelli and Tony were located. Mr. Patrick testified that he and his coworkers were "very much in a supplemental role . . . to assist . . . [and take] direction from Metro emergency responders." (R. at 174).

After almost an hour of waiting, the 911 operator told Kelli that the emergency rescue unit should be arriving above them on the steep embankment. A heavy rain had begun, so loud that they could no longer hear if anyone was calling from the banks. Tony began to climb tree roots up the bank despite Kelli's screamed protests. Upon reaching the top, Tony collapsed and began to seize, as one side of his body went limp. The rescue team was not there. Kelli performed CPR on Tony for at least thirty more minutes.

Finally, a Louisville Metro Police Department helicopter spotted Tony and Kelli. The helicopter lowered a police officer down to where the couple was located. It was only then that Mr. Patrick and the first responder he accompanied reached the Poores, one and a half hours after Kelli first called 911. EMS arrived twenty minutes after that, at which point Tony was transported to an ambulance

and taken to the hospital. Tony was pronounced dead from a heart attack upon arrival.

On August 1, 2017, Kelli, acting in her individual capacity and as the administratrix of Tony's estate, filed suit against 21st Century Parks in Jefferson Circuit Court. The Estate alleged 21st Century Parks was negligent in its operation of the Parklands, including its failure to train employees to handle medical emergencies. According to the Estate, 21st Century Parks owed its patrons a duty to have and implement a reasonable plan to find, assist, and rescue patrons in medical emergencies on the Floyds Fork waterway rather than simply advising them to call 911 and relying on emergency first responders to conduct the search and rescue. The Estate asserted that directing patrons to call 911 created an expectation that emergency services would be able to timely respond because a plan was in place that would allow them to do so.

On October 3, 2017, the Estate filed another, separate action in Jefferson Circuit Court. In its second suit, the Estate named the individual 21st Century Parks employees and several MetroSafe first responders as defendants. The complaint alleged that the various individual employees and MetroSafe first responders were negligent in their search and rescue efforts. The MetroSafe first responders were dismissed from the case on January 11, 2018, at which point the

circuit court consolidated the Estate's claims against 21st Century Parks and its employees into a single action.

On July 18, 2018, 21st Century Parks and its individual employees filed a motion for summary judgment, invoking KRS 411.190, Kentucky's Recreational Use Statute, and common law negligence principles. According to 21st Century Parks, KRS 411.190 "expressly provides that landowners who make their land freely available for recreational purposes . . . have no duty to make the land safe for recreational users, or to warn about alleged dangerous activities." (R. at 646). They further maintained that, even absent the Recreational Use Statute, they "would have had no duty to plan for the rescue of the Poores, since [Tony] did not become incapacitated or die until he was more than a mile outside of the [Parklands'] boundaries." *Id*.

The Estate objected to the motion on the basis that there were genuine issues of material fact as to whether 21st Century Parks and its employees breached the duties owed to Tony as an invitee. It further asserted that: (1) KRS 411.190 did not apply because Tony was not on park property when he died; (2) the Estate's claim related to 21st Century Parks' negligent operation of the Parklands rather than any condition of the land; and (3) 21st Century Parks acted willfully in failing to improve emergency protocols after a previous patron died before she

could be located. Alternatively, the Estate maintained that KRS 411.190 was unconstitutional because it violated the jural rights doctrine.

Following oral argument, the Jefferson Circuit Court granted summary judgment to 21st Century Parks and its employees based on its conclusion that KRS 411.190 barred all of the Estate's claims as a matter of law. It further held that the statute was constitutional per *Sublett v. United States*, 688 S.W.2d 328 (Ky. 1985). The Estate filed a motion to alter, amend, or vacate reiterating its arguments that the Recreational Use Statute should not be applied in this case. The circuit court denied the motion after which the Estate filed its notice of appeal with this Court.

II. STANDARD OF REVIEW

"[S]ummary judgment is to be cautiously applied and should not be used as a substitute for trial." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 483 (Ky. 1991). A motion for summary judgment should only be granted "when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor" even when the evidence is viewed in the light most favorable to him. *Id*. at 482; *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013).

The standard of review on appeal from summary judgment is "whether the trial court correctly found that there were no genuine issues as to any

material fact and that the moving party was entitled to judgment as a matter of law." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); citing *Palmer v. International Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 882 S.W.2d 117, 120 (Ky. 1994) and CR[9] 56.03). "A trial court's decision to grant summary judgment for insufficient evidence is to be reviewed *de novo* on appeal." *Ashland Hospital Corporation v. Lewis*, 581 S.W.3d 572, 577 (Ky. 2019). On appeal, the record must be viewed in a light most favorable to the party who opposed the motion for summary judgment, and all doubts are to be resolved in his favor. *Malone v. Kentucky Farm Bureau Mut. Ins. Co.*, 287 S.W.3d 656, 658 (Ky. 2009).

III. ANALYSIS

The issues before our Court on review are: (1) whether KRS 411.190 is unconstitutional under the jural rights doctrine; (2) whether Kentucky's Recreational Use Statute governs the Estate's negligence claims; (3) if so, whether any alleged negligence on the part of 21st Century Parks arose to the level of "willful and malicious"; and (4) if not, whether 21st Century Parks had any duty to rescue Tony and/or develop and implement a safety plan to assist kayakers on Floyds Fork in an emergency.

[9] Kentucky Rules of Civil Procedure.

A. The Recreational Use Statute

"As a general rule, 'land possessors owe a duty to invitees to discover unreasonably dangerous conditions on the land and to either correct them or warn of them.'" *Roach v. Hedges*, 419 S.W.3d 46, 47 (Ky. App. 2013) (quoting *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 388 (Ky. 2010)). However, in 1966, the General Assembly enacted the Recreational Use Statute. "The traditional purpose behind passage of these laws was to encourage landowners, through legislative immunity from acts of ordinary negligence, to open their lands to the public, thereby relieving states of having to acquire land for recreational use by their citizens." *Midwestern, Inc. v. Northern Kentucky Community Center*, 736 S.W.2d 348, 351 (Ky. App. 1987) (citation omitted); *see also* KRS 411.190(2).

The Recreational Use Statute defines the terms "land," "owner," and "recreational purpose" very broadly. *See* KRS 411.190(1)(a)-(c). A landowner who permits the public to use his property for recreational purposes free of charge "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." KRS 411.190(3). The statute additionally provides that such a landowner expressly does ***not***: "(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." KRS 411.190(4). Even so, the statute does not eliminate all liability for the landowner. The statute does not operate to relieve the landowner of liability for the "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity[.]" KRS 411.190(6)(a).

The Recreational Use Statute covers not just the record title owner but also those who, like the employees, are alleged to have negligently performed the duties conferred upon them by virtue of their employment. *See Roach*, 419 S.W.3d at 48. Therefore, we use the same standard to evaluate the liability of the individual employees named in the Estate's action as we use to evaluate 21st Century Parks' liability as the owner/manager of the Parklands.

B. The Jural Rights Doctrine

The first question we must answer is whether Kentucky's Recreational Use Statute violates the jural rights doctrine. The jural rights doctrine is not expressly set out in the Kentucky Constitution; rather, Kentucky courts have held that it flows from a reading of Sections 14, 54, and 241 of the Kentucky

Constitution.[10] In summary, "[t]he jural rights doctrine precludes any legislation that impairs a right of action in negligence that was recognized at common law prior to the adoption of the Commonwealth's Constitution in 1891." *Waugh v. Parker*, 584 S.W.3d 748, 754 (Ky. 2019) (citations omitted).

The circuit court relied on *Sublett*, 688 S.W.2d at 328, to conclude that the Recreational Use Statute did not violate the jural rights doctrine. In *Sublett*, the Kentucky Supreme Court certified that KRS 411.190 was constitutional, explaining:

> In encouraging dedication of land for recreational use by land owners, the statute [KRS 411.190] creates a class of users which by such dedication loses its label as trespassers but does not acquire the label of invitees. We feel this is a reasonable classification and do not feel there is any violation . . . of the Kentucky Constitution.

Id. at 329.

The Estate correctly points out that the *Sublett* Court did not use the term "jural rights" in its opinion. However, we do not believe this fact is determinative or even meaningful. The *Sublett* Court noted that the federal district court had certified to it the question of whether "Kentucky Revised Statute 411.190

[10] In *Williams v. Wilson*, 972 S.W.2d 260, 265 (Ky. 1998), the Kentucky Supreme Court engaged in a comprehensive examination of the jural rights doctrine from its first articulation in *Ludwig v. Johnson*, 243 Ky. 533, 49 S.W.2d 347, 348 (1932), up to its more modern-day application. Although legal scholars have questioned the doctrine's constitutional underpinnings and validity, the Kentucky Supreme Court has refused to abandon it. *See Williams*, 972 S.W.2d at 268.

[is] contrary to Sections 14 and 54 of the Kentucky Constitution[.]" *Id.* at 328. As noted above, Sections 14 and 54 of the Kentucky Constitution are two of the three constitutional sections that comprise the jural rights doctrine.[11] The third section, Section 241, which was not certified to the Court for consideration in *Sublett*, states in pertinent part that "[w]henever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same." KY Const § 241. This section "was only intended to enlarge the remedy and to allow a recovery when, under the facts, the decedent might have recovered if he had not died." *Louisville Ry. Co. v. Raymond's Adm'r*, 135 Ky. 738, 123 S.W. 281, 283 (1909). Thus, Section 241 is relevant to the jural rights analysis only insomuch as it recognizes that the personal representative of the decedent has a right to maintain a wrongful death suit where the decedent would have been able to sue had he survived. The right to recover under the facts, however, must be found to exist in the ordinary course.

The plaintiff in *Sublett* injured her ankle when she stepped into a ditch at Dewey Lake Park in Floyd County. While the plaintiff's injury necessitated

[11] Section 14 states: "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Section 54 states: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

surgery and corrective treatment, it was not fatal. Therefore, there was no need for the *Sublett* Court to reference Section 241, the wrongful death portion of the jural rights doctrine, in conducting its analysis.

The Estate's argument is that KRS 411.190 violates the jural rights doctrine because it impermissibly exempts a property owner from common law liability. Its argument does not hinge on whether the property owner's actions caused an injury or a death. Therefore, we cannot ignore *Sublett*'s certification that KRS 411.190 does not violate "[Section] 14, [Section] 54, or any other pertinent section of the Kentucky Constitution." *Sublett*, 688 S.W.2d at 329. In fact, like the circuit court, we are duty bound to follow it.[12]

[12] *Sublett* did not go into a case-specific analysis of the common law with respect to premises liability. Our research, however, accords with its result. *Bransom's Adm'r v. Labrot*, 81 Ky. 638, 643 (1884) is instructive. In *Bransom*, the Court was tasked with deciding whether a cause of action in negligence could be maintained when a teenage boy was killed by falling timber while passing through a private lot that the owners had for years allowed the general public to use for its pleasure. While the case focused primarily on the liability for injuries to children, the Court spent a good deal of time considering how to classify the members of the public who used the lot for "pleasure" as a passway. The Court rejected the notion that members of the public using the lot for their personal benefit were invitees; however, it did not believe they should be treated hostilely without any duties flowing to them whatsoever. It suggested that while the owners of the lot did not necessarily owe a duty to make the lot safer for the public's use or to warn adults of open and obvious dangers, the owners did owe a duty to avoid "gross or willful negligence." Kentucky's Recreational Use Statute is consistent with these standards. KRS 411.190(6)(a) preserves liability for the "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity[.]" As demonstrated by the Court's analysis in *Bransom*, this is nearly the same standard of liability the common law applied to a member of the public using private property for convenience or pleasure.

C. KRS 411.190's Applicability

Having determined that KRS 411.190 is constitutional, we must now decide whether the circuit court correctly concluded that the statute bars the Estate's claims against 21st Century Parks. According to the Estate, KRS 411.190, when strictly construed, bars *only* liability for the negligent conditions on the premises, not for the actions or inactions of the property owner that may sound in negligence or for injuries occurring off-premises. Since Tony's injury occurred off-premises and resulted from 21st Century Parks' alleged failure to implement an adequate safety plan for search and rescue, the Estate believes the Recreational Use Statute should not be applied to bar its negligence claim.

The Kentucky Supreme Court has repeatedly reaffirmed that "the cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009) (citation omitted); *see also Saxton v. Commonwealth*, 315 S.W.3d 293, 300 (Ky. 2010). "All statutes of [Kentucky] shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state." KRS 446.080(1).

The legislature enacted the Recreational Use Statute to "encourage owners of land to make land and water areas available to the public for recreational

purposes by limiting their liability[.]" KRS 411.190(2). To accomplish this goal, the "Recreational Use Statute displaces the common law duties with which the landowner would be charged in the statute's absence[.]" *Collins v. Rocky Knob Associates, Inc.*, 911 S.W.2d 608, 612 (Ky. App. 1995). According to our Supreme Court, "[t]he words of the statute are absolute and unqualified" and qualifying property owners owe "no duty to anyone" except under the circumstances provided in subsection 6. *Coursey v. Westvaco Corp.*, 790 S.W.2d 229, 232 (Ky. 1990).

Nothing in KRS 411.190 "shall be construed to [c]reate a duty of care or ground of liability for injury to persons or property[,]" regardless of whether that liability lies in premises liability or ordinary negligence. KRS 411.190(7)(a). Under KRS 411.190, "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 . . . [c]onfer upon the person the legal status of an invitee or licensee to whom a duty of care is owed[.]" KRS 411.190(4)(b). To come within these protections, a landowner must show, at minimum, "proof that the landowner knows that the public is making recreational use of his property, and proof of some words, actions or lack of action on his part from which it can be reasonably inferred that he intended to permit such use to be made of his property." *Coursey*, 790 S.W.2d at 232. Both parties agree that 21st Century Parks is a qualifying

landowner under the Recreational Use Statute and therefore cannot be held liable for acts of ordinary negligence on Parklands' property. KRS 411.190(3)-(6).

However, the Estate attempts to separate 21st Century Parks' actions from the land itself. It argues that its claims arise from 21st Century Parks' actions in operating its business instead of its ownership of the land. We are not persuaded by this argument. The Estate's complaint is clear that the actions at issue flow from 21st Century Parks' decision to make its land available for recreational use by the general public. Where both the injuries and the action at issue are associated with the use of property for recreational purposes, as they are in this case, the Recreational Use Statute is applicable.

Next, the Estate presents the unique argument that 21st Century Parks cannot rely on KRS 411.190 to absolve it of liability in this case because Tony was injured on Floyds Fork, a state-controlled navigable waterway that 21st Century Parks does not own.[13] 21st Century Parks concedes that it does not own or maintain Floyds Fork but asserts that it does provide its patrons with access to Floyds Fork through the Parklands for recreational purposes comporting with the requirements of KRS 411.190(2).

[13] 301 Kentucky Administrative Regulations (KAR) 6:040 adopts the federal definition of "navigable waters" in 33 Code of Federal Regulations (C.F.R.) § 329, which includes "waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4.

Kentucky case law has previously extended the Recreational Use Statute's protections to bar claims for injuries occurring in off-premises waterways. In *Collins v. Rocky Knob Associates, Inc.*, this Court affirmed summary judgment under the Recreational Use Statute when a marina owner was sued for the deaths of the plaintiffs, who drowned in a lake after business hours. The plaintiffs' estates alleged that the marina owner, Rocky Knob Associates, had breached its duty of care to the plaintiffs where it failed to post "no swimming" signs, did not light the shoreline, and did not provide "round-the-clock security patrols or rescue equipment[.]" 911 S.W.2d at 609. Rocky Knob leased approximately twenty acres on the border of Paintsville Lake from the Department of Parks, using the land to operate a marina free of charge to the public. *Id*. at 610. Although Rocky Knob did not own Paintsville Lake, it provided the public with free access to the lake through its marina and boat ramp. *Id*.

Both the trial court and this Court concluded that the Recreational Use Statute applied to bar the estates' claims of negligence, including their claim for failure to provide security patrols, subject only to the specific exceptions provided by KRS 411.190(6). *Id*. In doing so, this Court gave no import to the fact that the lake where the accident occurred was owned by the state rather than by the marina. *Id*. The implicit result of *Collins* is that this Court determined that the Recreational Use Statute can be applied to limit the liability of landowners and other similar

entities providing access to state-owned waterways, regardless of whether: (1) the public may already have a right to access such a waterway; and (2) the injuries occurred off-premises in areas over which the "owner" being sued has no ownership or control.

While we have not located any Kentucky authority explicitly addressing the issue before us, many other states have statutes similar to Kentucky's Recreational Use Statute. For example, California Civil Code § 846 is quite similar to KRS 411.190. In *Charpentier v. Von Geldern*, 191 Cal. App. 3d 101, 105, 236 Cal. Rptr. 233, 235 (Cal. Ct. App. 1987), the California Court of Appeal, Third District, considered "whether a private owner of land bordering a navigable river is entitled to the protection of Civil Code section 846 when a person enters onto that land for access to the river for a recreational purpose, is injured while so using the river, and the landowner has done nothing to obstruct or impede that use." *Id*. Von Geldern was the owner of a parcel of land that bordered the Feather River. Charpentier, an experienced swimmer and diver, entered onto Von Geldern's land for the purpose of entering the river and injured himself. Charpentier sued Von Geldern for negligence claiming that Von Geldern should have provided a warning that the water was too shallow for diving. The trial court granted Von Geldern summary judgment based on § 846. On appeal, Charpentier argued that § 846 did not apply because he was injured in the Feather River, not on

Von Geldern's land, which he had only used to gain access to the river. The California appellate court rejected this argument and affirmed the trial court's dismissal.

The court arrived at its result after pointing out that: (1) Charpentier had entered on Von Geldern's land for a recreational purpose, to enter the Feather River for swimming; (2) Von Geldern had not created a hazardous condition or interfered with the waterway; and (3) it would be unjust to require a private landowner to guard against natural hazardous conditions in navigable waterways that it did not itself control. Based on its conclusion that § 846 applied, the court held that the only duty Von Geldern owed Charpentier was to refrain from the "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." *Id.*, 191 Cal. App. 3d at 113; 236 Cal. Rptr. at 240.

21st Century Parks grants the public free access to Floyds Fork, a state-owned and controlled navigable waterway, via designated access points spread across its four parks. The purpose of these access points is to allow patrons to enter Floyds Fork for recreational activities like kayaking. The undisputed evidence establishes that the Poores' purpose of visiting the Parklands on the day of Tony's death was to use one of the access points in Beckley Creek Park to enter Floyds Fork for their kayaking trip. Although Tony's injuries occurred outside the Parklands, the Estate's claims are inextricably interwoven with the recreational

purpose for which Tony used the Parklands and with the ensuing duties the Estate claims 21st Century Parks owed him on the day of his death. Accordingly, we affirm the circuit court's conclusion that Kentucky's Recreational Use Statute, KRS 411.190, governs the Estate's claims.[14]

Because the Recreational Use Statute applies, the Estate cannot prevail unless it demonstrates that 21st Century Parks' conduct falls within the parameters of KRS 411.190(6), which provides that landowners are not relieved of liability for the "willful or malicious failure to guard or warn against a dangerous

[14] We have extended the Recreational Use Statute in other situations where the land in question was used in connection with a recreational purpose. In *Mason v. Berea Independent School District Finance Corp.*, No. 2006-CA-002061-MR, 2007 WL 2998510, at *1 (Ky. App. Oct. 12, 2007), we were presented with the question of whether KRS 411.190 applied to limit the liability of the owners of real property adjacent to land actually used for recreation. In *Mason*, the plaintiff was attending a free fireworks display put on by the city. The Berea Community School allowed the public to use its parking lot free of charge on the evening in question. The plaintiff was injured in the parking lot on the way to her car after the show. The plaintiff argued that the protections of KRS 411.190 should not extend to the Berea Community School because she was not engaged in recreation at the time of her injury and that the use of land for parking is not recreational. We held that the plaintiff's interpretation of KRS 411.190 was too narrow:

> The parking lot was being used in a manner directly corresponding to the expressed intent of the legislature in KRS 411.190(2). Other jurisdictions have extended immunity under recreational use statutes to adjacent property where the activity on the adjacent property was "inextricably connected" to the recreational activity. *See Urban v. Grasser*, 627 N.W.2d 511, 518 (Wis. 2001). Mason's action of walking in the parking lot provided for the fireworks display presents such a circumstance.

Id. at *2. Although the factual scenarios are different, our result accords with *Mason* insomuch as we also focus on whether Tony's use of the Parklands was "inextricably connected" to his use of adjoining property for a recreational purpose. We are cognizant that *Mason* is unpublished and therefore nonbinding. We cite to it for illustrative purposes only. *See* CR 76.28(4)(c).

condition, use, structure, or activity[.]" KRS 411.190(6)(a). The two leading cases in Kentucky interpreting KRS 411.190(6) are *Huddleston by and through Lynch v. Hughes*, 843 S.W.2d 901 (Ky. App. 1992) and *Collins*. According to the *Huddleston* Court, "willful or malicious" in the context of the Recreational Use Statute has been interpreted to mean "indifference to the natural consequences of [one's] actions" or "the entire want of care or great indifference to [another's] safety." *Huddleston*, 843 S.W.2d at 906 (internal quotation marks omitted).

In *Huddleston*, a school was sued when a freestanding basketball goal on the school's property fell on top of a minor, breaking his back. *Id.* at 902-03. In that case, the Court noted the school knew that children frequently removed the large pieces of concrete positioned on the basketball goal to serve as counterweights, causing the goal to tip over, but it took no additional safety measures. *Id*. at 906-07. The Court found that the school's failure to take further steps to rectify a known hazardous *artificial* condition posed a question for the jury as to whether that conduct was willful or malicious. *Id*.

Three years after *Huddleston*, the *Collins* Court provided an important caveat in defining willful and malicious conduct. In *Collins*, our Court held that "'passive negligence,' where the harm was allegedly caused by what the defendant did not do, but should have done[,]" cannot rise to the level of willful or malicious conduct under KRS 411.190(6). *Collins*, 911 S.W.2d at 611. Rather, the

defendant must commit "'affirmative' negligence . . . meaning the harm was caused by what the defendant did, [sic] but should not have done or should have done differently." *Id.* In *Collins*, our Court noted that the risks that cost the plaintiffs their lives were not created by Rocky Knob but were "natural and inherent to bodies of water." *Id.*

The Estate argues that the risks to Tony here were not natural and inherent to the waters of Floyds Fork but were instead created by 21st Century Parks' operation of its business – namely, its failure to train employees to handle medical emergencies and to develop and implement a safety plan for Floyds Fork. The Estate additionally contends that 21st Century Parks had knowledge of these risks in light of the previous death of a park patron on Floyds Fork. It contends that 21st Century Parks' failure to place additional mile markers along Floyds Fork increased the risks to its patrons. However, the parties do not dispute that Kelli and Tony were able to provide their location accurately using the mile markers; instead, the issue lay in the accessibility of their position on private property outside the Parklands.

The circuit court concluded that 21st Century Parks' conduct was not willful or malicious, because it did not increase the inherent risks associated with kayaking on a body of water on a hot summer day, and because Tony's death did not occur as a result of any unusual, manmade feature on Floyds Fork or on the

Parklands' premises. Instead, the circuit court held that, at most, 21st Century Parks had exhibited passive negligence, which is insufficient to fall outside of the Recreational Use Statute's liability shield. We agree with the circuit court; the Estate's allegations center on what 21st Century Parks "did not do, but should have done." *Collins*, 911 S.W.2d at 611. Claims sounding in this kind of passive negligence do not rise to the level of willful or malicious conduct. *Id.*; *Lawson v. City of Beattyville*, No. 2011-CA-000243-MR, 2011 WL 5600628, at *3 (Ky. App. Nov. 18, 2011) (holding that an allegation that the city delegated park safety inspections to inadequately trained personnel was the type of passive negligence described in *Collins* and did not amount to willful or malicious conduct).[15]

Additionally, we cannot ignore the fact that Tony was located on private property *outside* the Parklands when his injury occurred. The maps 21st Century Parks provided on its website clearly showed that the Floyds Fork waterway left park property. We cannot accept that 21st Century Parks owed a duty to have a plan in place to rescue patrons on a state-controlled waterway over a mile outside of its boundaries. In such a circumstance, it was entirely reasonable to warn patrons of the dangers associated with kayaking on Floyds Fork and advise them to call 911 in the case of an emergency. These warnings were provided on

[15] We cite this unpublished opinion pursuant to CR 76.28(4)(c).

21st Century Parks' webpage, and Kelli admitted that she read and discussed them with Tony before their trip.

The Estate cites *Big Spring Assembly of God, Inc. v. Stevenson*, Nos. 2012-CA-001350-MR and 2012-CA-001423-MR, 2014 WL 4267433 (Ky. App. Aug. 29, 2014), in support of its proposition that "21st Century Parks' liability for negligent training and supervision does not end at the edge of the Parklands property line, so long as [the] off-site injury caused by defendants' negligence is foreseeable." *Big Spring* is factually and legally inapposite. In that case, a youth minister employed by the church allowed a thirteen-year-old boy to drive his car during a church-sponsored camping trip. We held that the church could be liable for negligent training/supervision if it was conducting an activity through its agent at the time the harm occurred. It was clear from the outset, however, that the trip was sponsored by the church, which owed a duty to the children on the trip. Unlike the *Big Springs* church, 21st Century Parks did not sponsor, plan, guide, or otherwise oversee the Poores' trip. Its relationship with the Poores arose solely out of their use of its property to access Floyds Fork. We have not located any authority that would require 21st Century Parks to rescue visitors kayaking on a state-owned waterway outside park boundaries.

The Restatement (Second) of Torts provides that innkeepers and common carriers owe their patrons a duty "to protect them against unreasonable

risk of physical harm" and "to give them first aid after it knows or has reason to know that they are ill or injured[.]" RESTATEMENT (SECOND) OF TORTS § 314A(1)(a)-(b) & (2) (1965). Likewise, the Restatement imposes a similar duty upon landowners who hold their land open to the public "to members of the public who enter in response to [an] invitation[,]" although it also makes clear that the duty ends at the land's boundaries. RESTATEMENT (SECOND) OF TORTS § 314A(3) (1965). Specifically, Comment c to § 314A provides:

> A carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.

Id.; *see also Fabend v. Rosewood Hotels and Resorts, L.L.C.*, 381 F.3d 152, 160 (3d Cir. 2004) (holding campground did not owe a duty to patron who was injured while surfing when the campground did not control the adjacent beach).

Likewise, the Estate's claim that 21st Century Parks voluntarily assumed a duty of care by assisting EMS in the rescue attempt fails because the Estate cannot establish that 21st Century Parks undertook any such duty. Kentucky courts have implicitly adopted § 324A of the Restatement (Second) of Torts, which provides that a party has voluntarily assumed an affirmative duty for an undertaking only if one of three preconditions exists: "(1) the failure to exercise reasonable care in performing the undertaking increases the risk of harm; (2) the

duty undertaken is already owed to the third person by another; or (3) the third person relies on the undertaking." *Louisville Gas & Elec. Co. v. Roberson*, 212 S.W.3d 107, 113 (Ky. 2006) (Wintersheimer, Justice, concurring) (citing *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840 (Ky. 2005)).

There is no evidence suggesting that any of 21st Century Parks' actions in its response to MetroSafe's request for assistance somehow increased the risk of harm to Tony. No evidence demonstrates that MetroSafe declined to respond to Kelli's 911 call or that it delegated responsibility in the rescue attempt to 21st Century Parks or its employees. Finally, there is no viable argument that Kelli relied on 21st Century Parks' agreement to assist in the rescue attempt as Kelli did not call 21st Century Parks when the emergency arose, nor was she ever in contact with a 21st Century Parks employee during the incident.

21st Century Parks is exactly the kind of landowner the General Assembly aimed to protect in enacting Kentucky's Recreational Use Statute. In return for making vast areas of land available and providing convenient access to state-owned waterways to the public free of charge, entities like 21st Century Parks are protected from liability for injuries that occur on their property or that occur in association with use of their property for recreational purposes. Members of the public, like the Poores, who enter into the Parklands for recreational purposes lose their status as invitees, in exchange for lawful entry.

IV. CONCLUSION

In light of the foregoing, we AFFIRM the Jefferson Circuit Court's judgment in favor of 21st Century Parks and its individual employees.

ALL CONCUR.

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