2019 VT 63

No. 2018-261

Katerina Nolan, as Administrator of the Estate of Parker J. Berry

v.

Stephen J. Fishman and Susan B. Fishman

Supreme Court

On Appeal from
Superior Court, Lamoille Unit,
Civil Division

March Term, 2019

Thomas Carlson, J.

Andrew A. Beerworth and Sarah E. Cornwell of Paul Frank + Collins P.C., Burlington, for Plaintiff-Appellee.

Susan J. Flynn of Clark, Werner & Flynn, P.C., Burlington, for Defendants-Appellants.

PRESENT: Reiber, C.J., Skoglund, Robinson, Eaton and Carroll, JJ.

¶ 1. **SKOGLUND, J.** The question presented is whether Vermont's Recreational Use Statute, 12 V.S.A. §§ 5791-5795, which provides limitations on landowner liability, is applicable to the undisputed tragic facts of the case. We find that the Recreational Use Statute applies and that defendants' motion for summary judgment should have been granted. Therefore, we reverse the holding of the trial court and remand.

¶ 2. The purpose of the Recreational Use Statute "is to encourage owners to make their land and water available to the public for no consideration for recreational uses." 12 V.S.A. § 5791. It does this by establishing "that an owner shall have no greater duty of care to a

person who, without consideration, enters or goes upon the owner's land for a recreational use than the owner would have to a trespasser." Id. Here, we consider the extent of this protection for the first time.

¶ 3. The undisputed facts are as follows. Parker Berry, a three-year-old child, attended Elephant in the Field daycare located in Waterbury, Vermont. The daycare property consisted of a house on approximately three acres of land and was owned and operated by husband and wife, Noah and Marlena Fishman, who resided at that property. Stephen and Susan Fishman, defendants in this matter, are Noah Fishman's parents. Defendants live on a forty-acre parcel of land that adjoins the daycare's property. Thatcher Brook meanders on defendants' property, near the border with the daycare's property.

¶ 4. The daycare used a small area of defendants' land to access a brook beach on Thatcher Brook, which was used for water play in the warm months and other outdoor activities such as birdwatching. Children at the daycare also used a sandbox, brook bridge, and seasonal teepee on defendants' land. Defendants did not profit in any way from the daycare run by Noah and Marlena Fishman; they were not employed by or otherwise involved in the daycare's business activities. They were not paid by the daycare for the use of their land to access the brook. Defendants' land is not posted, and they have always held it open to the public for recreational use.

¶ 5. On February 11, 2016, Parker drowned in Thatcher Brook at a location approximately one hundred feet inside defendants' property line. He had become separated from the group of the daycare's children when the others left the vicinity of the brook.[1]

[1] A settlement agreement was reached between Parker's estate and the daycare.

¶ 6. Plaintiff Katerina Nolan, administrator of Parker's estate (the estate), filed suit alleging defendants' negligence was a direct and proximate cause of the incident and circumstances surrounding Parker's death. Defendants filed a motion for summary judgment, asserting an affirmative defense under Vermont's Recreation Use Statute, 12 V.S.A. §§ 5791-5795. The estate opposed defendants' motion and filed a motion for partial summary judgment on defendants' recreational-use defense.

¶ 7. In response to the parties' motions for summary judgment, the trial court concluded that the undisputed facts showed that the activities engaged in by the daycare on defendants' land were a mix of recreation and education and met the statutory definition of recreational use. 12 V.S.A. § 5792(4) (defining "recreational use" as "an activity undertaken for recreational, educational, or conservation purposes" and providing nonexhaustive list of such activities). The undisputed facts also showed that defendants were not paid for opening their land to the daycare. However, the trial court concluded that there were material facts not clearly established and denied both summary judgment motions pending further development of the record. In its decision, the court wrote that the "pivotal question" was whether the defendants' property, at least the portion used by the daycare, "was 'open and undeveloped land' qualifying for the protection or was 'developed for commercial recreational uses.' "

¶ 8. The parties filed renewed motions for summary judgment based on additional facts each supplied. The court accepted the supplemental facts as not materially disputed. The court concluded that the undisputed facts showed: defendants' home was "some distance away" from the daycare; there is no natural boundary between the two properties; and, while the properties are separately owned, "they are owned by members of the same family and the Daycare Business property is clearly a small carve out from the larger parent property." The supplemental maps

submitted with the renewed motions showed that the daycare's driveway started on defendants' property and the daycare's business sign was located on defendants' property at the beginning of the driveway. The maps provided the court with the understanding that the location of the brook beach and a previously mentioned "bridge" were "more closely attached to the Daycare Business property than to defendants' homeplace." The court found these factors consistent with the fact that the daycare advertised itself as being situated on a large farm with access to the brook.

¶ 9. The court concluded that Parker died in the backyard of the daycare, in a portion of defendants' property that was "seamlessly integrated" with the daycare's property, and thus the relevant portion of defendants' land "was not the 'open and undeveloped land' that the Legislature had in mind in encouraging landowners to make their land open to the public for general recreation." As such, the court determined that defendants were not entitled to the protection of Vermont's Recreational Use Statute and granted in part the estate's motion for partial summary judgment and denied defendants' motion for summary judgment.

¶ 10. Defendants sought and were granted an interlocutory appeal. They primarily argue that the trial court erred by holding that the Recreational Use Statute did not immunize defendants from liability.[2] We reverse the decision of the trial court and hold that the statute protects defendants from this suit.

¶ 11. We review motions for summary judgment de novo, affirming the decision of the trial court when "there exist no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Demag v. Better Power Equip., Inc, 2014 VT 78, ¶ 9, 197 Vt. 176,

[2] Because we conclude that the Recreational Use Statute applies, we need not address the extensively briefed issue of breach of duty. Under the statute, landowners are only liable for willful or wanton misconduct, which the estate concedes is not at issue here. We decline to address defendants remaining arguments regarding the trial court's allegedly "improperly addressed theories" and interpretation of the statute.

102 A.3d 1101; see V.R.C.P. 56(a). This case concerns statutory interpretation, "which is a question of law that we review without deference." Northfield Sch. Bd. v. Washington S. Educ. Ass'n, 2019 VT 26, ¶ 13, __ Vt. __, 210 A.3d 460. "Our objective in statutory interpretation is to construe and effectuate the legislative intent behind a statute." Id. (quotation omitted). "We will enforce the plain meaning of the statutory language where the Legislature's intent is evident from it," State v. Hurley, 2015 VT 46, ¶ 9, 198 Vt. 552, 117 A.3d 433 (quotation omitted), "[b]ut if the statute's language is ambiguous, we consider the statute's subject matter, effects and consequences, as well as the reason for and spirit of the law." Northfield Sch. Bd., 2019 VT 26, ¶ 13 (quotation omitted).

¶ 12. We proceed to analyze the plain language of the Recreational Use Statute, which, in relevant part, states:

> The purpose of this chapter is to encourage owners to make their land and water available to the public for no consideration for recreational uses by clearly establishing a rule that an owner shall have no greater duty of care to a person who, without consideration, enters or goes upon the owner's land for a recreational use than the owner would have to a trespasser.

12 V.S.A. § 5791. Our plain-language analysis focuses on the statute's definitions of "consideration," "recreational use," and "land."

¶ 13. First, the statute defines "consideration" as "a price, fee, or other charge paid to or received by the owner in return for the permission to enter upon or to travel across the owner's land for recreational use." Id. § 5792(1). It is undisputed that the daycare's use of defendant's property was without consideration. Defendants made no profit, received no "price, fee, or other charge," and benefited in no way from the daycare's use of their land.

¶ 14. Next, " '[r]ecreational use' means an activity undertaken for recreational, educational, or conservation purposes, and includes . . . nature study, . . . visiting or enjoying

archaeological, scenic, natural, or scientific sights, or other similar activities." Id. § 5792(4). The statute provides a nonexhaustive list of over thirty examples of recreational use. Id. As the trial court concluded, the statute applies to the daycare's use of the land for recreational and educational purposes. Preschool-aged attendees were encouraged to explore the grounds, learn about nature, and enjoy the natural sights in and around defendants' property.[3]

¶ 15. Lastly, and most importantly for our analysis, the statute defines "land" as, among other things, "open and undeveloped land, including paths and trails." Id. § 5792(2)(A)(i). The trial court focused extensively on whether defendants' land was "open and undeveloped," and because it concluded that it was not, in fact, "opened and undeveloped," it concluded that the statute provided no defense for defendants. Its reasoning distorts both the plain language of the statute and the legislative intent behind it.

¶ 16. The fact that the daycare property was originally part of defendants' land, which they later sold to their son and daughter-in-law, is of no moment. Further, the court erred in relying on the fact that defendants and the daycare owners were part of the same family to conclude that the land was not "open" as contemplated by the statute. Furthermore, in rural Vermont, it is not unexpected that adjoining properties would be "seamlessly integrated." The court focused on the beach next to the brook and bridge where Parker drowned and concluded that it seemed to be "more closely attached to the Daycare Business property than to Defendants' homeplace" and explained that "were it not for the property lines imposed on the map in their

[3] The estate argues that defendants granted Parker and other daycare attendees "special permission" to use their land, and that Parker was only on the property to "receive childcare services." For those reasons, the estate argues that Parker was "a business invitee to whom the statute does not apply." We disagree. There is no evidence that defendants specifically invited daycare attendees to use their land. The record shows that defendants were uninvolved with the daycare's day-to-day business operations; furthermore, neither party disputes that the general public was freely permitted to use and enjoy defendants' land.

approximate location, all of these features would appear to be in the extended 'backyard' of the Daycare Business, not Defendants'. " While these findings are not disputed, we do not see how they are relevant to the question of whether the land is "open" for the purposes of the statute. Nothing in the statutory language supports a conclusion that the relationship status between the landowner and the land user defeats the statute's protections. The trial court emphasized defendants' and the daycare owners' familial relationship, even though the record shows that the land is just as "open" to the daycare as it is to the general public. Absent express legislative language, we are unwilling to interpret the statute as inapplicable to defendants' land simply because they are related to the daycare owners, whose land was originally part of a single parcel owned by defendants.

¶ 17. Furthermore, the trial court concluded that the land "was at least partially 'developed' for the Daycare Business" due to various "improvements" on the land—namely a sandbox, mowed pathways, and a brook bridge.[4] We disagree with this determination based on the plain language of Chapter 12. The Legislature took care to express that "land" may include paths, trails, water courses, bridges, and walkways. Id. § 5792(2)(A)(i)-(iv). Furthermore, the Legislature expressly stated that "the presence of one or more of the following on land does not by itself preclude the land from being 'open and undeveloped': posting of the land, fences, or agricultural or forestry-related structure." Id. § 5794(c). As protective legislation goes, this is quite comprehensive. We cannot imagine that the Legislature meant to revoke protections from

[4] The trial court noted, "[i]t is also conceivable that despite the improvements mentioned, the land involved here is more fairly characterized as 'open and undeveloped.' " Although our conclusion is based on the plain language of the statute, our examination of the aerial photographs—on which the trial court relied so heavily—supports our determination that the land is "open and undeveloped."

landowners where, as here, pathways, bridges, and perhaps even sandboxes are built on their otherwise "undeveloped" land.

¶ 18. We note that the statute specifically provides that "land" does not include "areas developed for commercial recreational uses." Id. § 5792(2)(B)(i). But, as the court below noted, the inclusion of "guiding" as a protected recreational use indicates that persons using the land may profit from their use. Here, it is undisputed that the daycare did not develop the land for commercial recreational uses. The main purpose of the daycare's use of the land was educational and recreational. Although the daycare owners may have profited from the use of defendants' land, as a guide may profit from giving river tours, the statute does not become inapplicable to landowners simply because a third party may have earned some level of profit from its use of the land.[5]

¶ 19. The plain language of § 5794 provides further guidance as to the broad scope of legislative intent. Section 5794 provides that the fact that an owner has made land available without consideration for recreational uses shall not be construed to "extend any assurance that the land is safe for recreational uses or create any duty on an owner to inspect the land to discover dangerous conditions." Id. § 5794(a)(5). Accordingly, the statute imposes no duty on defendants to erect barriers or otherwise to protect users from potential danger arising from their use of the land surrounding Thatcher Brook. Furthermore, "an owner shall have no greater duty of care to

[5] The dissent argues that defendants' land was "developed for commercial recreational use" due to various improvements to defendants' property. The bridge over the brook was actually "driftwood and pallets" laid across the shallow water where otherwise one could walk, and the teepee was erected prior to any daycare being in existence. Also, the large sandbox located on defendants' land used on occasion by the daycare was built by defendants for their grandchildren before the daycare business began. Further, the dissent suggests the daycare extensively used defendants' property for their business, but the record simply does not support that inference. The suggestion that these "facts" are evidence of development for commercial purposes is not reasonable.

a [recreational user as defined by the statute] . . . than the owner would have to a trespasser." Id. § 5791. "In Vermont, a landowner or occupier generally owes no duty of care to a trespasser, except to avoid willful or wanton misconduct." Keegan v. Lemieux Sec. Servs., Inc., 2004 VT 97, ¶ 8, 188 Vt. 575, 861 A.2d 1135 (mem.). The estate has not argued, nor does the record indicate, that defendants engaged in willful or wanton misconduct. This was a heartbreaking event. But the law protects defendants in this case.

Reversed and remanded.

FOR THE COURT:

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Associate Justice

¶ 20. **REIBER, C.J, dissenting.** I disagree with the majority in how it applies the law to the facts of this case. In my view, the facts compel us to conclude that defendants' property was "developed for commercial recreational uses." 12 V.S.A. § 5792(2)(B)(i). Therefore, the recreational-use statute does not protect defendants from liability, and the trial court's decision was correct. Accordingly, I respectfully dissent.

¶ 21. It is useful to recount the most salient facts here. In keeping with our standard of review for summary-judgment decisions, I consider "the record evidence in the light most favorable to the nonmoving party," Morisseau v. Hannaford Bros., 2016 VT 17, ¶ 2, 201 Vt. 313, 141 A.3d 745, and "construe all doubts and inferences in favor of the nonmoving party," Collins v. Thomas, 2007 VT 92, ¶ 6, 182 Vt. 250, 938 A.2d 1208.

¶ 22. At the time of Parker Berry's death, defendants owned a large property adjacent to a daycare center. Defendants held their property open to the public at large. That property

included a large sandbox near their house and a brook. The property also included improvements by their daycare neighbors, including a bridge over the brook, mowed pathways and, at one time, a teepee. The daycare center made heavy use of defendants' property for their business, including frequent use of all these features. In fact, in introducing a new employee to the daycare, the daycare owners identified the teepee, the brook, and the big sandbox as "key spots" the children regularly used. The daycare center advertised its use of these features in its promotional materials. It also advertised its access to forty-two acres, without disclosing that most of that acreage was not part of the daycare's property, and it named itself after a large sculpture on defendants' property. The daycare center's business model emphasized outdoor activity and exploration, which included extensive reliance on defendants' property. Parents accessed the daycare center by driving onto defendants' property. Defendants were aware that the daycare center extensively used their property for its business.

¶ 23. Viewing the "record evidence in the light most favorable to the nonmoving party," Morisseau, 2016 VT 17, ¶ 2, and "construing all doubts and inferences in favor of the nonmoving party," Collins, 2007 VT 92, ¶ 6, these facts show that the daycare center's operations were deeply entwined with defendants' property. This situation is not like the hypothetical case suggested by the majority, in which a river tour guide uses a river passing through someone else's land as part of the guide's commercial operation. See ante, ¶ 18. The daycare center essentially appropriated defendants' land for its own commercial use, even going so far as to build a bridge on the property, erect a teepee, and mow pathways to the brook. The daycare center's use of and reliance on defendants' property was so extensive that it appeared to the parents of the daycare children that the two properties were one unified whole.

¶ 24. In this situation, we cannot conclude as a matter of law that defendants' property was not "developed for commercial recreational uses." 12 V.S.A. § 5792(2)(B)(i). It does not matter that defendants did not develop the land themselves for commercial use; it does not matter that defendants were not involved in the daily operation of the daycare business. While those facts could be significant in a different case, here what matters is the daycare's use of defendants' property and defendants' knowing consent to that use. With such an appropriation of defendants' land, the distinction between defendants' land and the daycare's land is only a distinction on paper. In practice, defendants' land was used for, and developed for, commercial recreational uses, and Parker Berry died while on that property for that commercial recreational use. Therefore, defendants' land is excluded from protection pursuant to the recreational-use statute with regard to Parker's death. The trial court did not err in so concluding, and I respectfully dissent.

¶ 25. I am authorized to state that Justice Robinson joins this dissent.

Chief Justice