RENDERED: JUNE 9, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002306-MR

BETTIE VARGAS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 04-CI-00597

CITY OF PADUCAH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

HENRY, JUDGE: Bettie Vargas appeals from an October 7, 2004 order of the McCracken Circuit Court dismissing her negligence action against the City of Paducah. Upon review, we affirm.

On August 8, 2003, Vargas was attending a family reunion at the Anna Baumer Community Center located in Bob Noble Park, which is owned and operated by the City of Paducah. In order to use the community center, the family was required to pay a $45.00 fee that was shared by all persons in attendance,

including Vargas. While walking from her vehicle to the center, Vargas tripped over a concrete structure that was allegedly obscured by grass and suffered injury as a result.

On July 14, 2004, Vargas filed a complaint against the City in McCracken Circuit Court. In this complaint, Vargas alleged that the City negligently and recklessly failed to maintain the concrete structure on which she tripped in a reasonable and safe condition, and that it failed to properly warn park patrons of the structure's condition. Vargas further alleged that, as a result of the City's negligence, she suffered bodily injury, medical expenses, physical and mental pain and suffering, lost wages, and a permanent impairment of her ability to earn money.

On July 6, 2004, the City filed a motion to dismiss, arguing that Vargas' suit was barred by KRS[1] 411.190, the Recreational Use Statute. Vargas argued in response that the statute did not apply to her because her family was charged the $45.00 fee for the use of the park's community center. In its reply, the City provided the affidavit of Mark Thompson, the director of park services. Thompson stated that while the $45.00 fee entitled Vargas and her family to exclusive use of the center, it was not a rental fee or a charge to use the park itself. He further noted that all other park amenities, with

[1] Kentucky Revised Statutes.

the exception of the pool, were free, and that had the center not been reserved, the family still would have been able to use it free of charge if it was not being used by anyone else.

On October 7, 2004, the trial court entered an order granting the City's motion to dismiss. The court concluded that the City was entitled to immunity from suit under KRS 411.190 because Vargas' use of the park fell within the recreational uses contemplated by the statute and because the fee that the family paid was not in return for invitation or permission to enter the park itself and therefore did not constitute a "charge" destroying immunity under the terms of KRS 411.190. This appeal followed.

The primary issue on appeal is whether Vargas' action is viable despite the blanket immunity against suit contained in KRS 411.190(4), which provides:

> (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.

(Emphasis added). KRS 411.190(6) provides:

> (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; or
>
> (b) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section.

(Emphasis added). Given the language of these provisions and the fact that there is no dispute that Vargas was at the park for recreational purposes, the specific question to be answered in our analysis is whether the fee contribution paid by Vargas constituted a "charge" under the statute, thus excluding the application of KRS 411.190(4) and permitting her suit to proceed. See Midwestern, Inc. v. Northern Kentucky Community Center, 736 S.W.2d 348, 351 (Ky.App. 1987) ("According to the explicit provisions of KRS 411.190, the payment of a 'charge' for permission to enter upon land for recreational use ... is the one element necessary to defeat the blanket immunity granted by the statute.").

KRS 411.190(1)(d) defines "charge" – in relevant part - as "the admission price or fee asked in return for invitation or permission to enter or go upon the land[.]" Vargas argues that she was "charged" for purposes of the statute because she contributed to the $45.00 fee paid for use of the park community center. We disagree, as we believe that the fee in question is not a "charge" as contemplated by the plain language of KRS 411.190, as the record shows that it was not imposed "in return for invitation or permission to use" the park for recreational purposes. Instead, the fee simply ensured that Vargas' family would be entitled to exclusive use of the community center. Moreover, even if the fee had not been paid, the family still would have been free to use any location within the park at no cost – including the community center if it was not being used at the time. We also note that Vargas' purported injuries occurred outside of the community center in the park itself, which – again - was freely available to the general public. Accordingly, we conclude that the blanket immunity from suit contained within KRS 411.190 is applicable here, and Vargas' action was properly dismissed.

In further support of our holding, given that Kentucky case law does not contain a decision directly on point with the issue presented here (as it has only rarely dealt with KRS 411.190), we note that the Ohio Court of Appeals dealt with a

strikingly similar factual scenario in Reed v. City of Miamisburg, 644 N.E.2d 1094 (Ohio App. 1993), a case we cited with approval in City of Louisville v. Silcox, 977 S.W.2d 254 (Ky.App. 1998). Silcox, 977 S.W.2d at 256-57. In Reed, the appellant filed suit against the City of Miamisburg, Ohio after stepping into an unfilled hole at a park owned by the City while attending a family reunion. The appellant's family had rented and paid for a shelter house at the park in order to ensure the availability and use of the shelter. Accordingly, the appellant argued that, under this set of facts, the Ohio recreational use statute[2] did not apply to his case because he had paid a fee to use the shelter. Id. at 1095.

The Ohio Court of Appeals disagreed, holding: "The evidence in this case indicates that appellant was not required to pay a fee in order to utilize the *overall* benefits of Mound Park." Id. (Italics in original). It continued: "Mound Park offered more than a shelter house - it offered an Indian burial site, swings and other playground equipment, as well as other 'green space' the appellant could have used without providing any consideration. We must therefore conclude that the trial court appropriately applied the recreational user statute below, and that the appellee owed no duty to appellant as a matter of law." Id. at 1095-96. We believe that this reasoning is

[2] It should be noted that we have previously recognized that Ohio's recreational use statute is similar to our own. Silcox, 977 S.W.2d at 256.

similarly applicable here, as there is no dispute that Bob Noble Park was available without payment of a fee to anyone who wished to use it.

We finally address Vargas' contention that we should decide this case in conjunction with our previous decision in Midwestern, Inc. v. Northern Kentucky Community Center, supra. In Midwestern, the appellant was seriously injured when he dived from a three-meter board and hit the bottom of a community center pool. He afterward filed suit. The community center subsequently moved for summary judgment, relying on the immunity provision of KRS 411.190, and the motion was granted by the trial court. Midwestern, 736 S.W.2d at 349.

On appeal, the appellant argued that the community center should not be entitled to immunity because, although he was not charged and did not pay an admission fee at the time he entered the pool, the center did charge specified fees during certain times of each day. Id. at 350. We disagreed and concluded that the immunity provision of KRS 411.190 was applicable because the plain language of the statute required that a charge be paid in exchange for the ability to use land for recreational purposes in order for immunity to be destroyed. Id. at 351. As the appellant did not have to pay to use the pool on that day – even if a fee was required at other times – the community center was entitled to immunity. Id.

Vargas argues that Midwestern mandates a ruling in her favor because, in this case, a fee was paid for use of the community center. However, as we have concluded that the $45.00 fee here was not a "charge" under the meaning of KRS 411.190, we find that Midwestern has no application to this case.

All arguments having been considered, the judgment of the McCracken Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Mark Edwards Paducah, Kentucky	Glenn D. Denton Paducah, Kentucky