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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000243-MR

DAVID AND CECILIA LAWSON, AS PARENTS
AND NEXT FRIEND OF CHRISTOPHER LAWSON — APPELLANTS

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 09-CI-00170

CITY OF BEATTYVILLE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND WINE, JUDGES.

CLAYTON, JUDGE: David and Cecilia Lawson, as parents and next friend of Christopher Lawson, appeal the Lee Circuit Court's grant of summary judgment to the City of Beattyville wherein the court held that the recreational use statute was a bar to the Lawsons' action. We affirm.

On May 29, 2009, Christopher Lawson, an eight-year-old boy, tripped over a concrete parking stop at the Beattyville City Park and injured his right shin on a rusty metal rebar that was sticking up above the top of the parking stop. (Rebar is an abbreviated reference to a reinforcing bar.) Christopher was on a field trip with his Beattyville Elementary School class. The rebar punctured his right leg below the knee.

On December 23, 2009, the City of Beattyville (hereinafter "City") moved for summary judgment based on Kentucky's recreational use statute and that the danger was open and obvious. The matter was continued for various reasons including to allow time for discovery. It was finally submitted on September 8, 2010. On January 11, 2011, the court entered its order and granted the summary judgment motion. Specifically, the court held that the City was immune under the recreational use statute and that nothing in the record pointed to any willful or malicious action on the part of the City. As such, the court found there were no genuine issues of material fact preventing entry of summary judgment on behalf of the City. The Lawsons now appeal to our court.

"The [appellate] standard of review . . . when a trial court grants a motion for summary judgment is whether the trial court correctly found there were 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). The party making the motion "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). Moreover, "[t]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent summary judgment." *Id.,* citing *Wymer v. JH Properties, Inc.,* 50 S.W.3d 195, 199 (Ky. 2001). Finally, "[t]he court must view the record in the light most favorable to the nonmovant and resolve all doubts in its favor. *Id*., citing *Commonwealth v. Whitworth*, 74 S.W.3d 695, 698 (Ky. 2002).

For summary judgment to be proper, "the movant [must] show[] that the adverse party could not prevail under any circumstances." *Paintsville Hosp., Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "An appellate court . . . review[s] the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan*, 138 S.W.3d at 705. With this standard of review in mind, we examine whether the recreational use statute barred the City from liability.

A recreational use statute provides a strong defense for owner/occupiers of land from claims of liability. The underlying purpose of the statute is to encourage landowners to make their property available to the public for recreational use by the limiting the landowners' liability for any injuries resulting from such use. KRS 411.190(2). The statute clearly states that "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." KRS 411.190(3). And it also says that an owner that directly or indirectly allows any person, without charge, to use the property for recreation does not "[e]xtend any assurance that the premises are safe for any purpose[.]" KRS 411.190(4)(a). Clearly, in the instant case, Christopher was at the park for recreational purposes and paid no fee to play at the park.

While the Lawsons do not dispute the applicability of the recreational use statute, they believe that under the facts of this case, Christopher's injury was caused by a complete lack of care on the part of the City, and therefore, falls under the exception to the statute's applicability. The exception to the blanket protection of the statute is found in KRS 411.190(6)(a), which says, "[n]othing in this section limits in any way any liability which otherwise exists: (a) [f]or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity[.]" The Lawsons suggest that the City's actions with regard to maintaining the parking stops found in the parking lot were "a willful or malicious failure to guard or warn against a dangerous condition, use or activity." Consequently, the issue becomes whether the actions of the City are "willful" as intended by the statute.

The Lawsons compare their facts to the situation found in *Huddleston By and Through Lynch v. Hughes*, 843 S.W.2d 901 (Ky. App. 1992) wherein this Court was confronted with a similar question involving the appropriateness of

summary judgment in an action controlled by a recreational use statute. After extensive discussion regarding the meaning of the statutory language of "willful or malicious," the Court equated it to an "indifference to the natural consequences of [one's] actions" or "the entire want of care or great indifference to [another's] safety." *Id*. at 906.

The details of *Huddleston* case are laid out in *Collins v. Rocky Knob Associates, Inc.*, 911 S.W.2d 608, 611 (Ky. App. 1995):

> The facts of the Huddleston case involved a plaintiff injured on a school playground when a basketball goal fell on him. The injuring apparatus was a freestanding basketball goal not anchored to the ground which was kept from tipping forward by large pieces of concrete positioned to serve as counterweights. Children and young people were known to come on the premises during nonschool hours to play on the basketball court and often removed the concrete to lower the goal to facilitate "slam dunking." The goal had tipped over on a number of occasions because of this practice, but each time it was set upright with no additional measures taken to prevent a recurrence. The Court stated that, on the record presented, summary judgment was improper and the question of whether the landowner's conduct was "willful or malicious" presented a genuine issue of material fact to be decided at trial.

The Lawsons compare the City's failure to act as similar to the Diocese's lack of action in *Huddleston.* They maintain that the City acted with indifference to the natural consequences of its actions when it failed to discover and prevent rebars from sticking out of the top of the parking stops like the Diocese in *Huddleston* when it failed to act regarding the basketball goal.

To bolster their argument, the Lawsons call attention to the fact that the City hired a safety coordinator with little or no experience plus gave him little guidance or time to learn about safety. And the Lawsons contend that the park inspections were delegated to others who had no training as to how to inspect the park. Lastly, according to the Lawsons, at the time of the accident, rebars were sticking out of the top of almost every parking stop. Based on these facts, they claim that material facts exist as to whether the City "willfully" or "maliciously" failed to guard against a dangerous condition.

Returning to the definition of "willful" and "malicious" found in *Huddleston*, that is, an "indifference to the natural consequences of [one's] actions" or "the entire want of care or great indifference to [another's] safety, " we do not perceive the City's action in the Beattyville park as reaching the level of willful failure to act that was determined to be a material issue of fact in the *Huddleston* scenario. *Huddleston*, 843 S.W.2d at 906. Rather, we view the facts here as similar to the facts commented upon by our Court in *Collins* regarding passive negligence. The Court describes passive negligence as a situation "where the harm was allegedly caused by what the defendant did not do, but should have done." *Collins*, 911 S.W.2d at 611. As explained in *Collins*, summary judgment is definitely available under the recreational use statute without a consideration of whether the defendant's conduct was "willful or malicious." *Id*. at 611. Undoubtedly, as *Collins* notes, legally some negligent conduct is neither "willful"

nor "malicious," otherwise there would be no rationale behind a recreational use statute. *Id*.

Here, nothing in the record points to any "willful" or "malicious" action on the part of the City. It is undisputed that there were no previous instances of injuries because of the parking stops and rebars. It is undisputed that no one in the City was aware of any danger from the rebars in the parking stops. In fact, as soon as City personnel learned of the injury, they immediately went to the park and pounded all the rebars in the parking stops down. Additionally, since the accident, the safety coordinator has participated in several safety seminars. Simply put, there are no facts supporting any willful or malicious behavior on the part of the City with regard to a failure to warn or guard against a dangerous condition.

Christopher's injury was a very regrettable event, but it was not caused by any "willful" or "malicious" behavior on the part of the City. Therefore, the granting of the summary judgment to the City by the circuit court was appropriate because no genuine issues of material fact remained. We affirm the Lee Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Derek Humfleet
Lexington, Kentucky

BRIEF FOR APPELLEE:

Russell H. Davis, Jr.
Pikeville, Kentucky