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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001150-MR

TIA JOHNSON, ADMINISTRATOR OF THE
ESTATE OF CRISTIANO WAIDE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY BUNNELL, JUDGE
ACTION NO. 16-CI-00469

JAYLEN BOND; BRAD CHAMBERS,
FORMER LFUCG PARKS AND RECREATION
DIRECTOR IN HIS INDIVIDUAL CAPACITY
AND IN HIS OFFICIAL CAPACITY; GEOFF REED,
COMMISSIONER OF GENERAL SERVICES IN
HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL
CAPACITY; CHRIS COOPERRIDER, LFUCG PARKS AND
RECREATION DEPUTY DIRECTOR MAINTENANCE
IN HIS INDIVIDUAL CAPACITY AND IN HIS
OFFICIAL CAPACITY; MICHELLE KOSIENIAK,
LFUCG PARKS & RECREATION SUPERINTENDENT
OF PARKS PLANNING AND DESIGN IN HER
INDIVIDUAL CAPACITY AND IN HER OFFICIAL
CAPACITY; DEWEY CROWE, DEPARTMENT OF
BUILDING INSPECTION DIRECTOR IN HIS INDIVIDUAL
CAPACITY AND IN HIS OFFICIAL CAPACITY;
NANCY MARINARO, DEPARTMENT OF BUILDING
INSPECTION ASSISTANT DIRECTOR IN HER INDIVIDUAL
CAPACITY AND IN HER OFFICIAL CAPACITY;
SALLY HAMILTON, CHIEF ADMINISTRATIVE OFFICER

IN HER INDIVIDUAL CAPACITY AND IN HER OFFICIAL CAPACITY; JERRY HANCOCK, FORMER DIRECTOR OF PARK MAINTENANCE IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY; EVELYN BOLOGNA, FORMER INTERIM DIRECTOR OF PARK MAINTENANCE IN HER INDIVIDUAL CAPACITY AND IN HER OFFICIAL CAPACITY; ED CHANEY, SUPERINTENDENT OF PARKS IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY; KATHY MOBLEY, PARKS MANAGER SENIOR IN HER INDIVIDUAL CAPACITY AND IN HER OFFICIAL CAPACITY; GUY STONE, EMPLOYEE OF LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY; TIM CLARK, EMPLOYEE OF LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY; AND UNKNOWN DEFENDANTS, EMPLOYEES OF LFUCG IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: K. THOMPSON AND L. THOMPSON, JUDGES; HENRY, SPECIAL JUDGE.[1]

THOMPSON, K., JUDGE: On July 17, 2014, two-year-old Cristiano Waide and his uncle, Jaylen Bond, went to Douglass Park. The park is owned and operated by

[1] Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

the Lexington Fayette County Urban Government (LFUCG) and no admission is charged for entry.

Cristiano was playing on a set of ten-foot-high bleachers constructed with pipe railing safety guards when he fell from the top and suffered a head injury. He died less than a week later.

On February 8, 2016, Cristiano's mother, Tia Johnson, as Administrator of the Estate of Cristiano Waide (the Estate) filed this wrongful death action in the Fayette Circuit Court against a number of LFUCG employees and former employees in their individual and official capacities who oversaw or worked in the Division of Parks and Recreation (Parks and Rec): Director Monica Conrad, Brad Chambers who was Director when Cristiano fell, Commissioner of General Services Geoff Reed, Deputy Director Chris Cooperrider, Parks and Rec Superintendent Michelle Kosieniak, and Penny Ebel who it was alleged was the Deputy Director when Cristiano fell.[2] The complaint further named unknown employees of LFUCG.

The Estate alleged the employees were negligent in maintaining and monitoring the bleachers to ensure the bleachers complied with applicable codes and regulations and warn of a dangerous condition in Douglass Park. It further

[2] Conrad and Ebel were voluntarily dismissed on March 10, 2016, and are not parties to this appeal.

alleged a claim for negligent hiring, training and supervision. In their answer, the named defendants raised the Recreational Use Statute as an affirmative defense and official governmental immunity.

By amended complaint, the Estate joined additional employees alleging negligence against Dewey Crowe and Nancy Marinaro, both LFUCG Division of Building Inspections employees, LFUCG Chief Administrator Officer Sally Hamilton, former Director of Parks and Rec Maintenance Jerry Hancock, former Interim Director of Parks and Rec Maintenance Evelyn Bologna, Superintendent of Parks and Rec Ed Chaney, Parks and Rec Manager Senior Kathy Mobely, Guy Stone and Tim Clark in their individual and official capacities. In addition to negligence claims, the Estate alleged the defendants named in the original and amended complaint engaged in conduct that was willful and malicious. The defendants' answer again raised the Recreational Use Statute and official governmental immunity as defenses. Collectively, we refer to those named as defendants in the complaint and amended complaint as "the employees."[3]

Discovery commenced. Cooperrider and Marinaro were deposed.[4]

[3] The Estate also sued Jaylen. The Estate did not sue LFUCG because any such action would be precluded by governmental immunity.

[4] Cooperrider was deposed on two occasions.

Although the precise date the Douglass Park bleachers were installed is unknown, it was sometime in the 1970s, prior to the time before any of the employees were employed by LFUCG. There is no evidence that when the bleachers were installed, any applicable building code required that the bleachers have any specific guards at the top of those bleachers.

Cooperrider oversees LFUCG employees responsible for performing visual inspections of Douglass Park twice a month to identify any hazardous situation. If found, any such condition is documented on an inspection form. Cooperrider testified Parks and Rec employee Stone was responsible for inspecting Douglass Park but that Stone was not qualified to determine whether the bleachers were code compliant and such a determination was not part of his job duties. During the year prior to Cristiano's fall, no problems were reported by Stone with the bleachers at Douglass Park.

Cooperrider testified that in 2013, after learning children played on bleachers at another Lexington public park, he asked LFUCG Division of Risk Management to investigate risks associated with bleachers and prepare a report. Risk Management recommended that LFUCG establish a plan to upgrade all LFUCG bleachers. Although Cooperrider requested funding for the upgrade, the funding was not approved. Further requests for funding were put on hold pending the hiring of a new permanent Director. After Chambers was hired in June 2014,

Chambers decided to postpone any discussion about purchasing new bleachers until after the baseball season ended. Cristiano fell from the bleachers before the end of that season.

After Cristiano's fall, Commissioner Reed asked Cooperrider to prepare a bleacher mitigation program. Cooperrider recommended that all 10-15 row bleachers be removed. In September 2014, the bleachers from which Cristiano fell were removed.

Stone was hired as a Parks and Rec Public Service Supervisor after being interviewed by a panel that included Parks and Rec employees Cooperrider, Chaney, Mobley and Clark and was employed by LFUCG. Cooperrider testified Stone was not responsible for inspecting park structures for compliance with building codes. His duties included inspecting the bleachers to determine whether they were broken or in disrepair, and to report those issues. Any maintenance problems were reported and then funds had to be budgeted for any work to be performed.

Within Parks and Rec, Mobley supervised Stone and was responsible for making sure he performed regular inspections and reported the results of those inspections. Mobley was supervised by Chaney who reported to Cooperrider. Cooperrider reported to Hancock, Bologna or Brad Chambers during their service as Director of Parks and Rec. At the time of Cristiano's fall, Hancock and Bologna

were not employed by LFUCG and Chambers had only been hired a few weeks earlier. The Director reported to Commissioner of General Services Geoff Reed, who reported to LFUCG Chief Administrative Officer Sally Hamilton, who reported to the Mayor.

Nancy Marinaro is employed in the LFUCG Division of Building Inspection and reported to Dewey Crowe, the Director over the Division of Building Inspection. She oversees the LFUCG inspectors of commercial structures to ensure compliance with the applicable building code.

Marinaro began working in Building Inspection in 1998. She testified that during her tenure, no inspections were performed on the bleachers at Douglass Park for code compliance because they were existing structures which did not require any work for which a building permit was needed. She testified that if a building permit had been required, Building Inspection was responsible for inspecting the structure for code compliance. She testified that on the date of Cristiano's fall, the 2013 Kentucky Building Code (KBC) was in effect and the existing bleachers in Douglass Park were grandfathered into compliance with that Code.

On March 27, 2017, the employees filed a motion for summary judgment arguing that Kentucky's Recreational Use Statute grants them immunity for any negligence and, in the absence of evidence that any or all of them engaged

in willful or malicious conduct, summary judgment was appropriate. Alternatively, the employees argued the Estate's claims were barred by official governmental immunity.

The Estate responded, arguing that there was evidence of willful or malicious conduct when the employees ignored the dangerous condition of the bleachers. It attached to its response a series of emails sent in 2005 between the Parks and Rec Superintendent Planning, Design & Landscape, Michelle Kosieniak, and a LFUCG employee. As an attachment to a November 17, 2005 email, Kosieniak attached plans and estimates for improvements at Douglass Park. Included in those plans and estimates was the "demolition and disposal" of existing bleachers with three new sets to be installed.

Although the Estate did not present any witness to dispute Marinaro's testimony that the bleachers were compliant when built and grandfathered into the 2013 KBC, the Estate responded to the employees' motion for summary judgment by submitting provisions of the 2013 KBC the employees allegedly violated. It argued that the 2013 KBC in effect when Christiano fell, by incorporation of the International Building Code (IBC), requires that existing bleachers be inspected and maintained in accordance with that Code. The Estate admits its conclusion requires "wading through a variety of labyrinthine cross references within the 2012 International Building Code, the 2013 Kentucky Building Code, and another

standard that specifically provides safety standards for bleachers contained in the ICC 300[,]" promulgated by the International Code Council.[5]

The trial court granted summary judgment based on the Recreational Use Statute to the employees without reaching the issue of official governmental immunity. Our review of the trial court's grant of summary judgment is governed by well established standards.

We must reverse if there is a genuine issue as to any material fact. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 704 (Ky.App. 2004). Our review is governed by the rule that 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 (quoting *Steelvest, Inc. v.*

[5] The Estate begins with 815 Kentucky Administrative Regulation 7:120 Section 2 which provides with inapplicable exceptions that the IBC "shall be the mandatory state building code for all buildings constructed in Kentucky[.]" However, the regulation further provides that the KBC controls when the KBC provisions conflict with the IBC. The KBC provides that "[d]evices or safeguards which are required by this code shall be maintained in conformance with the code edition under which it is installed." KBC, Chapter 34, Section 3401.2. The IBC contains a similar provision. Nevertheless, the Estate points out that IBC Section 1028 states that bleachers must comply with ICC 300 which requires that bleachers comply with certain requirements regardless of when installed, including yearly inspections and providing guards alongside open sided walking surfaces that are more than thirty inches above the floor. ICC 300, Chapter 5, Section 503.1. That guard must be constructed to prevent a 4-inch diameter sphere from passing through. ICC 300, Chapter 5, Section 503.2.

Scansteel Serv. Ctr. Inc., 807 S.W.2d 476, 482 (Ky 1991)). A "party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Id.* (quoting *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 his favor." *Id.* Because only legal questions and no factual findings are involved, our review is *de novo*. *Id*.

The legal question presented is whether the employees are entitled to immunity under our Recreational Use Statute, Kentucky Revised Statutes (KRS) 411.190, which provides as follows:

(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 but does not include fees for general use permits

issued by a government agency for access to public lands if the permits are valid for a period of not less than thirty (30) days.

(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.

(5) Unless otherwise agreed in writing, the provisions of subsections (3) and (4) of this section shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision thereof for recreational purposes.

(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.
>
> (7) Nothing in this section shall be construed to:
>
> (a) Create a duty of care or ground of liability for injury to persons or property;
>
> (b) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this section to exercise care in his use of the land and in his activities thereon, or from the legal consequences of failure to employ such care[.]

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 Assocs., Inc.*, 911 S.W.2d 608, 612 (Ky.App. 1995). Our Supreme Court has determined that except for the circumstances stated in subsection 6, "the words of the statute are absolute and unqualified" that "[t]here is no duty to anyone." *Coursey v. Westvaco Corp.*, 790 S.W.2d 229, 232 (Ky. 1990). Its provisions apply to adult recreational users as well as child recreational users. *See id*. (holding attractive nuisance doctrine was not applicable to child who was a recreational user).

Some jurisdictions have interpreted their Recreational Use Statutes to only apply to private landowners. *See De Baritault v. Salt Lake City Corp.*, 913 P.2d 743 (Utah 1996). However, the rule in this Commonwealth is that our Recreational Use Statute is not limited to privately owned land but applies to lands that are publicly owned and used for recreational purposes by the public. *See 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)); *Page v. City of Louisville*, 722 S.W.2d 60, 61 (Ky.App. 1986) (the Recreational Use Statute applied to the city of Louisville and the Metropolitan Parks and Recreation Board); *Midwestern, Inc. v. Northern Kentucky Community Center*, 736 S.W.2d 348, 350 (Ky.App. 1987) (the City of Covington and the community center fell squarely within the provision of KRS 411.190(1)(b)).

The immunity from liability under 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. As stated in *Roach v. Hedges*, 419 S.W.3d 46, 48 (Ky.App. 2013) (quoting 62 AM. JUR. 2D *Premises Liability* § 10 (1990)), the immunity from liability granted the owner extends to anyone "who does an act or carries on an activity on land on behalf of the possessor[.]"

Cristiano fell from bleachers located on property owned by LFUCG and open to the public without charge for recreational use. Under the express terms of the statute, the employees owed no duty of care to keep the Douglass Park premises safe for Cristiano's use or to give any warning of any dangerous condition of a building or structure on the land, including the bleachers. KRS 411.190(3). The only exception to that rule possibly applicable here is if the employees acted willfully or maliciously in failing to keep the bleachers reasonably safe or warn that the bleachers were dangerous because of the lack of sufficient safety guards. KRS 411.190(6).[6]

The meaning of "willful or malicious" as used in the Recreational Use Statute was addressed in *Huddleston By and Through Lynch v. Hughes*, 843 S.W.2d 901 (Ky.App. 1992), where the plaintiff was injured on a school playground when a basketball goal fell on him. The freestanding basketball goal was not anchored to the ground and kept from tipping forward by large pieces of concrete positioned to serve as counterweights. It was known by school employees that children and others came on the premises during non-school hours to play on the basketball court and often removed the concrete to lower the goal to "slam

[6] There is no allegation that Cristiano or Jaylen were charged to enter the public park and, therefore, the second exception in KRS 411.190(6) is irrelevant.

dunk" and that the goal tipped over on a number of occasions. Each time, the school set the goal upright with no additional preventative measures.

After determining the Recreational Use Statute was applicable and mere negligence would not create a jury question, the Court addressed whether there was a material issue of fact as to whether the school willfully or maliciously failed to guard or warn against the danger posed by unanchored basketball goal. 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 (internal quotation marks omitted). The Court concluded the school employees' testimony that the school knew, understood and anticipated children would slam dunk the ball, grab the rims and hang on causing the goal post to fall, created a material issue of fact that precluded summary judgment.

This Court examined *Huddleston* in *Collins*. *Collins* was a wrongful death action filed by the parents of two drowning victims against the owners of a marina. This Court cautioned that *Huddleston* should not be read so as to preclude summary judgment where willfulness and maliciousness are alleged to avoid immunity under the Recreational Use Statute. Clarifying *Huddleston*, the *Collins* Court stated:

> 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 the defendant's conduct was "willful or malicious." Obviously, there is some negligent conduct that as a matter of law may not be deemed either "willful" or "malicious."

Collins, 911 S.W.2d at 611. The Court continued explaining that in *Huddleston*, summary judgment was inappropriate because it involved an artificial condition created and maintained by the landowner *and* additional factors were present.

> The landowner knew that if the counterweights were removed, the basketball goal was prone to tip over *(a fact perhaps not apparent or known to all who played on it), and the landowner should have known that if the goal fell, a substantial likelihood existed that it would strike a player, perhaps causing serious injury*. The plaintiff in *Huddleston* argued that each time school personnel set the goal upright with no additional precautions, they were in effect "*resetting the trap*."

Id. (emphasis added).

The Court concluded the same could not be said in the *Collins* case: There was no trap. The landowner was "entitled to assume that the decedents would see and observe that which would be obvious through the reasonably expected use of an ordinary person's senses and would act accordingly." *Id*. at 611-12. The Court relied on KRS 411.190(7)(b), which "specifically provides that a person using the land of another for recreational purposes is not relieved from his obligation to exercise care as otherwise required by law." *Id.* at 612. The Court

concluded that the failure of the landowner to guard or warn against a condition which is readily observable and known cannot be "willful or malicious." *Id*.

Although this case involves an artificial condition as in *Huddleston*, in all other respects it is more like the situation in *Collins*.[7] In *Huddleston*, the school employees repeatedly reset the basketball goal after knowing that it had been tipped over by former recreational users and that future users would slam dunk the ball without knowing of the danger. In contrast, the bleachers had been at Douglass Park for over three decades without any prior reported falls from the top of the bleachers in Douglass Park or any LFUCG park bleachers. While there was evidence that in 2005 there was some discussion about replacing the Douglass Park bleachers, there is no evidence the desire to replace them was because of known inadequate safety guards or whether for some unrelated reason such as seating capacity. In 2013, there was a plan to remove the bleachers after the baseball season, but that plan is indicative of a regard for public safety, not an entire want of care or great indifference to another's safety. Promptly after Cristiano's fall, the bleachers were removed. Finally, the fact that is most determinative is that unlike

[7] The Estate cites an unpublished case, *Woods ex rel. Tachau v. Louisville/Jefferson County Metro Gov't* 2004-CA-001258-MR (Ky.App. 2015), which held that there was a question of fact concerning whether the government entity acted willfully or maliciously when a skateboarder was injured at an "Extreme Park." The Supreme Court granted discretionary review and, according to the Estate, the case was resolved by the parties. We note without further comment that in *Woods* there were prior injuries incurred in the same manner as the plaintiff's indicating that the hazard was not obvious.

the basketball goal in *Huddleston* which was not an obvious danger and like the lake in *Collins*, the danger of a two-year-old playing on top of a set of bleachers is obvious.

As was the plaintiff in *Collins*, under the common law, Cristiano was a licensee being present on the Douglass Park property with LFUCG's consent for nonbusiness purposes. *Kentucky & West Virginia Power Co. v. Stacy*, 291 Ky. 325, 329, 164 S.W.2d 537, 539 (1942). As the Court noted in *Collins*, the Recreational Use Statute is a limitation on the common law duty of a landowner to licensees to warn or make reasonably safe any "natural *or artificial* condition of the property, known to the [owner] of the property and which he should realize involves an unreasonable risk to the licensee and has reason to believe that the licensee will not discover the condition or realize the risk[.]" *Collins*, 911 S.W.2d at 612 (emphasis added) (quoting *Kentucky & West Virginia Power Co.*, 291 Ky. at 329, 164 S.W.2d at 539.)[8] The Court concluded that if the landowner had no duty to warn or make reasonably safe a condition under common law, such a duty cannot exist under the Recreational Use Statute:

> If these facts would not give rise to liability under the common law, it would be incongruous for this Court to allow for the possibility that liability might be found

[8] Whatever debate may exist as the present state of common law premises liability in light of *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), and *Shelton v. Kentucky Easter Seals Soc'y Inc*., 413 S.W.3d 901 (Ky. 2013), does not require discussion in this case which involves statutory law regarding recreational users and the lack of duty under the statute.

> under the Recreational Use Statute, which could occur if we held that the determination of whether Rocky Knob's conduct was "wanton or malicious" is solely reserved for the finder of fact. The purpose of the statute is to limit the scope of duty which the common law placed on the recreational landowner, not broaden it. We will not frustrate the legislative intent but shall strive to give it effect. Accordingly, the summary judgment is affirmed.

Collins, 911 S.W.2d at 612. Here, where the danger to a two-year-old playing on bleachers was obvious and not a "trap" set by the employees, there can be no liability.

The Estate argues that even if the danger of a two-year-old child playing on the bleachers was readily apparent, the alleged violation of the 2013 KBC concerning safety guards at the top of those bleachers is evidence of willful conduct to defeat the employees' summary judgment motion. However, if the Estate is correct and the bleachers are not within the grandfather clause of the KCB, it remains that the danger of a two-year-old child playing on ten-foot-high bleachers is obvious. Moreover, there is no evidence that with the exception of the Building Inspection employees, the employees had any knowledge of the KBC or duty to know of its contents as part of their job-related duties. They could not have acted willfully or maliciously by not remedying or warning of a code violation when they had no responsibility to inspect for violations.

Marinaro testified that in her opinion as a building inspector, the bleachers at Douglass Park were grandfathered into the 2013 KBC. While her opinion may not be correct, mere ignorance is not willfulness or maliciousness.

The Estate argues that even if it did not come forth with affirmative evidence that the employees acted willfully and maliciously in inspecting and maintaining the bleachers in compliance with the KBC, the Recreational Use Statute does not apply to its claims for negligent hiring, training and supervision of Stone. It relies on Cooperrider's testimony that Stone was responsible for inspecting Douglass Park and the undisputed testimony that Stone was not qualified to express an opinion on whether the bleachers were code compliant. The Estate then states that it is "axiomatic that LFUCG had to exercise reasonable care in hiring, training, supervising and retaining the individual assigned to inspect the bleachers."

There is no reason to discuss whether a negligent hiring, training and supervision claim falls within the ambit of KRS 411.190. Without resort to interpretation of the statute, we readily conclude that summary judgment on that claim was proper. First, the uncontradicted proof is that the Division of Building Inspection, not Parks and Rec, was required to inspect for code violations and Stone's job duties required that he inspect only for visible defects in the bleachers. Stone could not have been negligently hired, trained or supervised for performing

duties he was not required to perform. The second reason we reject the Estate's argument is based on the simple fact that Stone was not an employee of any of the employees.

Negligent hiring, supervision, and retention claims are separate and apart from vicarious liability claims. The distinction between these types of claims "being, 'respondeat superior' is based upon the employer/employee relationship and imposes strict liability, whereas claims of negligent hiring/retention focus on the direct negligence of the employer which permitted an otherwise avoidable circumstance to occur." *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009). Here, LFUCG, Stone's employer, is the only entity that could be liable under a theory of negligent hiring, supervision and retention but is not a party so no direct action has been filed against the employer. On that basis alone, summary judgment was proper as a matter of law.

Because we conclude the trial court properly granted summary judgment for the reasons we have stated, we do not address governmental immunity.

Based on the forgoing, the summary judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Louisville, Kentucky

James M. Bolus, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEES
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FORMER LFUCG PARKS AND
RECREATION DIRECTOR IN HIS
INDIVIDUAL CAPACITY
AND IN HIS OFFICIAL CAPACITY;
GEOFF REED, COMMISSIONER
OF GENERAL SERVICES IN
HIS INDIVIDUAL CAPACITY AND
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