Lemay v. Bessette, No. 99-2-04 Rdcv (Teachout, J., June 6, 2008)

STATE OF VERMONT
RUTLAND COUNTY

SUSAN LEMAY, Administrator of the Estate of Matthew Ives, Individually and on Behalf of the Next of Kin of Matthew Ives	)	
v.	)	**Rutland Superior Court**
	)	**Docket No. 99-2-04 Rdcv**
DONALD P. BESSETTE, FRANCES M. BESSETTE, JAMES H. BESSETTE, and REBECCA A. BESSETTE	)	

DECISION
Defendants' Motion for Summary Judgment, filed September 4, 2007

Plaintiff claims wrongful death injuries arising out of the death of fifteen-year-old Matthew Ives, who collided with a cable strung across a dirt road while riding an all-terrain vehicle on property owned by defendants Donald Bessette and Frances Bessette. The matter before the court is Defendants' Motion for Summary Judgment, filed September 4, 2007, in which Defendants seek judgment as a matter of law based on affirmative defenses of statutory limitations on landowner liability. Plaintiff Susan Lemay, the administrator of the Estate of Matthew Ives, is represented by Attorneys Erin Ruble and Kevin Brown. Donald and Frances Bessette are represented by Attorney Duncan Frey Kilmartin. Oral argument was heard on May 19, 2008. For the reasons set forth below, Defendants' Motion for Summary Judgment is granted.

Material facts are undisputed. The Bessettes are farmers who live five miles away from the land parcel involved in this suit, which they use for agricultural purposes. The parcel consists of a strip 60 feet wide that fronts on a public highway and runs south for approximately 500 feet, at which point it expands eastward to a wider parcel that consists of woods and farm fields beyond. A farm road, consisting of a grassy lane with two dirt wheel tracks, is located on the strip and continues beyond it to provide access to the farm fields beyond the woods. The strip is bounded by land of Nolan on the east and a tree line along the boundary with Gale to the west. At about the 450 foot point, the land on both sides of the lane becomes thickly wooded. At about the 484 foot point is the cable

strung across the dirt lane, which the Bessettes have maintained for years to restrict access to their farm fields. The Nolan property ends about 500 feet south of the public highway. On the date of the accident, Matthew Ives rode his ATV, alone, down the farm road on the Bessette property, and ran into the cable, which he apparently did not see. He died from resulting injuries.

The Bessettes had trouble over the years with people driving down the farm road and dumping trash on their property. At various times throughout the years, the Bessettes have marked the cable by maintaining "no trespassing" signs in front of the cable, by mounting "no trespassing" posters to trees, by hanging orange and yellow survey tape from the cable, and by tying red rags and soda bottles to the cable. Some of these measures were periodically removed by trespassers or otherwise destroyed. At the time of the accident, the cable was marked by red rags and two soda bottles, and a sign was found on the ground in the bushes.

In this suit, Plaintiff claims Defendants are liable because they did not meet the standard of care for maintaining what Plaintiff claims was a boundary fence. Defendants seek judgment based on affirmative defenses that they have no liability as a matter of law under the "ATV statute," and alternatively under the "Recreational Use statute." They claim Plaintiff's 'boundary fence" grounds for liability are inapplicable.[1]

The ATV statute

Vermont has a long tradition of policies encouraging private lands to be open and available for public recreational uses such as hiking, skiing, fishing, and hunting. As a matter of common law, landowners are not liable to undisclosed trespassers unless the owners' conduct is willful and wanton. *Baisley v. Missisquoi Cemetery Association*, 167 Vt. 473, 477 (1996).

As part of a comprehensive statutory scheme regulating the use and operation of all terrain vehicles, the Vermont Legislature created a specific standard in relation to ATVs operated on private land: landowners are relieved from any liability for personal injury suffered by ATV operators upon their property unless the injury "is intentionally inflicted by the landowner." 23 V.S.A. § 3506(c). This provision provides landowners with greater protection against liability than the common law, as it applies regardless of whether the landowner gave permission to the ATV operator to use the land. It applies unless the landowner charges a cash fee for ATV use. *Id*.

[1] In a prior Motion for Summary Judgment, Plaintiff argued that the ATV statute is unconstitutional. The motion was denied in a ruling concluding that the statute does not violate either the Vermont or United States Constitutions. See *Opinion and Order on Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion to Strike* (N. Corsones, J., Aug. 31, 2007). Plaintiff preserves her objection to the ruling, which is the law of the case, and is not revisited in this ruling.

In this case, it is undisputed that Matthew Ives was operating an ATV on the Bessettes' property when he was injured, and that the Bessettes had not charged him a cash fee. Defendants argue that there is no evidence of intentional infliction of injury,[2] and that they are entitled to judgment based on the ATV statute.

Plaintiff does not claim that the Defendants intentionally inflicted injury on Matthew Ives. She argues that the ATV statute is not controlling because it does not supersede a landowner's legal duty with regard to a "boundary fence." She argues that the Bessettes are not entitled to summary judgment because there are questions of material fact as to whether the cable constituted a "boundary fence" within the meaning of *Baisley v. Missisquoi Cemetery Association*, 167 Vt. 473 (1996), and whether Defendants breached the standard of care applicable to boundary fences.[3]

"Boundary fence" liability

Plaintiff argues that a landowner's duty to maintain a boundary fence is unaffected by the ATV statute, and that where injuries occurred in relation to a boundary fence, the owner's duty with respect to a boundary fence supersedes any limitation of liability under the ATV statute.

Plaintiff's argument depends upon the scope and application of *Baisley v. Missisquoi Cemetery Association*, *id*. In that case, a five-year-old boy was playing in and around a cemetery. He climbed into a tree that stood near the boundary line. The boy subsequently fell from the tree, made contact with the spikes of the cemetery's metal boundary fence, and suffered fatal injuries. *Id*. at 475–76. The issue in the subsequent wrongful death lawsuit against the cemetery/landowner was whether the boy was an undisclosed trespasser to whom the cemetery owed no duty of care other than to avoid willful and wanton misconduct, or whether the cemetery instead owed the boy the same duty of care owed to persons on abutting lands. *Id*. at 478.

In answering the question, the Vermont Supreme Court relied upon a number of cases in which landowners were held liable when persons on abutting properties were injured by making contact with a landowner's boundary fence. *Id*. at 478–80. In each of these cases, as with the five-year-old boy in *Baisley*, the person injured was on abutting property until the moment the injury occurred. See, e.g., *Barr v. Green*, 104 N.E. 619 (N.Y. 1914) (landowner erected barbed-wire fence on boundary between property and schoolyard; child injured by accidentally running into fence during recess); *Marton v. Jones*, 186 P. 410 (Cal. Ct. App. 1919) (pedestrian injured when she tripped on public sidewalk and grabbed onto landowner's barbed-wire fence adjoining sidewalk). Taken together, these cases establish the general rule that landowners owe a duty of ordinary

[2] See *Wendell v. Union Mutual Ins. Co.*, 123 Vt. 294, 297 (1963) (defining intentional acts as those acts done "with intention of purpose, designed and voluntary").

[3] In the alternative, Plaintiff argues that the Recreational Use statute rather than the ATV statute applies in this case, and that a reasonable jury could find that the Bessettes violated the standard of care required by the Recreational Use statute. This argument is addressed below.

care to "keep their property from becoming a source of danger to those on adjoining lands." *Baisley*, 167 Vt. at 480 (quoting *Butterfield v. Community Light & Power Co., Inc.*, 115 Vt. 23, 25 (1946)).

The undisputed facts establish that Matthew Ives was trespassing on the Bessettes' property when he was injured, and that he had driven his ATV on the Bessettes' road for 450 feet before he came to the spot where the farm lane is bordered by woods and an additional 34 feet before he reached the cable. He was not entering the Defendants' land from adjoining land when he was injured by the cable.

Plaintiff argues that the strip on which the Bessettes' farm lane is located is in the nature of an easement or entry way, and that a reasonable jury could interpret "the Bessette parcel proper" as beginning when the abutting Nolan property ends, and therefore consider the cable to be a boundary fence.[4] She argues that the cable represented the landowner's "face to the public" and could be found by a jury to be a boundary fence. She also argues that a reasonable jury could find the cable to be a "boundary fence" after considering evidence that trespassers had used the dirt road before, and that the Bessettes erected the cable for the purpose of preventing trespassers from accessing the property.

There is the factual matter that the cable was set in the Bessette woods 484 feet from the Bessette road frontage. In other words, it is undisputed that Matthew Ives was within the Bessettes' property when he was injured and not at a boundary where a person might enter from an adjoining property.

Moreover, this interpretation of *Baisley* is overbroad. The holding of *Baisley* is that a landowner owes a duty of care to keep its property from becoming a source of danger to persons on abutting property. The holding does not support a broader principle of law that a fence may be treated as a boundary fence if a trespasser might reasonably perceive it to be a boundary fence based on property features, regardless of where property boundaries actually are. This principle would vastly expand landowner liability exposure beyond the common law standard: landowners would have a heightened duty with respect to features well within the interior of unmarked property boundaries, such as gateways and animal fences that serve their own property uses, just because they might appear to someone to represent a boundary fence. Not only does the holding of *Baisley* fail to support such an expansion, it would be contrary to the common law standard of landowner liability as well as inconsistent with expressed legislative intent to encourage open recreational use of private land through limits on landowner liability.

Plaintiff relies upon a Chittenden Superior Court case involving an ATV operator who collided with a cable strung across a dirt road at the Malletts' Bay Drive-In Theater. Plaintiff sought liability on the grounds that the cable was a boundary fence. *Norton v. Jarvis*, No. S409-00 CnC (Jenkins, J., Mar. 29, 2001). Though summary judgment was denied in *Norton*, it appears that the actual location of the cable, and its relationship to the

[4] Plaintiff has not, however, shown that the cable location coincides with the corner of the Nolan property.

boundary line, was a disputed fact for the purposes of summary judgment. The circumstances of that case and those of the present case differ. In this case, the cable was 484 feet from the road, and within the Bessette land.

In sum, Plaintiff has not demonstrated a genuine issue of material fact as to whether the Bessettes' cable was a boundary fence that imposed on Defendants a duty that supercedes the limitation of liability afforded them by the ATV statute.[5] *Baisley* does not provide the relevant standard of care in this case.

The ATV statute established the standard for landowner liability in this case. Under 23 V.S.A. § 3506(c), Defendants are not liable for Matthew Ives' injuries unless Plaintiff establishes that the injuries were intentionally inflicted by the Bessettes. Plaintiff has not produced any evidence that the Bessettes intentionally inflicted any injury upon Matthew Ives, and has not argued that any such evidence exists. The Bessettes are therefore entitled to summary judgment on the issue.

Recreational Use Statute

Plaintiff argues in the alternative that the Recreational Use statute applies rather than ATV statute. Like the ATV statute, the Recreational Use statute creates a limitation from liability for landowners who permit the public to use their property for recreational purposes. See 12 V.S.A. § 5793(a) (landowners shall not be liable for personal injuries suffered by recreational users of property unless the injury is the result of willful or wanton misconduct of the landowner). Plaintiff argues that a jury could reasonably find that the Bessettes acted willfully and wantonly in violation of the Recreational Use statute. She argues that the jury could reach this conclusion after considering evidence that the Bessette installed a cable across a dirt road that was sometimes used by trespassers, that the Bessettes knew that the road was sometimes used, that the cable was difficult to see because it was placed in a shaded, woody location, and that the Bessettes failed to utilize warning signs that were more highly visible than the red rags and soda bottles. Furthermore, Plaintiff argues that the fact that the Bessettes installed any warnings at all is evidence that the Bessettes knew that the cable was dangerous.

While Defendants urge the application of the ATV as their primary affirmative defense, Defendants argue in the alternative that they are entitled to summary judgment even under the Recreational Use statute. They point out that the statute was enacted within 90 days of the decision in *Baisley,* and they argue that it shows a legislative intent to insulate landowners from liability to others who use private land for recreational

[5] While this court previously ruled that there was a question of material fact as to the location of the cable and whether it constituted a boundary fence (see *Opinion and Order on Plaintiff's Motion for Partial Summary Judgment*, *supra)*,the factual record has been significantly developed on this point since that time. At oral argument on May 19, 2008, it was clear that the actual location of the Bessettes' cable was not a genuinely disputed issue in this case. The dispute was the applicability of statutory limitations on landowner liability and the applicability of the boundary fence standard of care. The court has used the distance measurements from the police investigative report, Attachment 7 to Plaintiff's Motion for Partial Summary Judgment, filed March 19, 2007.

purposes. They argue that this statutory limitation on liability specifically applies to structures, arguing that it specifically supersedes *Baisley* with respect to the cable, even if the cable is considered as a boundary gate. Plaintiff counters that the cable in this case was not like a gate that facilitates entry onto property, and does not fall within the statutory definition of structures in the Recreational Use statute.

The court concludes that the Recreational Use statute does not apply in this case because the ATV statute applies. Both statutes ostensibly apply to the operation of an all terrain vehicle, which is a recreational activity. However, the recreational use statute is broader than the ATV statute, in that it covers a wide range of recreational activities such as hiking, swimming, fishing, hunting, outdoor sports, and the like, including "riding. . .a vehicle." *Id*. § 5792(4). Thus, as between the general recreational statute and the specific ATV statute, the more specific ATV statute provides the relevant legal standard in this case. See *Town of Brattleboro v. Garfield*, 2006 VT 56, ¶ 10, 180 Vt. 90 (when two statutes deal with the same subject matter, the more specific statute controls); *Smith v. Desautels*, 2008 VT 17, ¶ 17, 19 Vt. L. Wk. 83 (same). Moreover, the Recreational Use statute expressly provides that it shall not be construed to "alter, modify, or supersede" the ATV statute. 12 V.S.A. § 5794(a)(4).

Even if the Recreational Use statute applied, the evidence produced by Plaintiff is not sufficient to go to the jury under the legal standard for wanton and willful misconduct, which is "conduct manifesting personal ill will, or carried out under circumstances of insult or oppression, or even by conduct manifesting a reckless and wanton disregard of one's rights." *King v. Brace*, 150 Vt. 222, 224–25 (1988) (citations omitted). There is no evidence in this case that the Bessettes harbored any ill will towards trespassers on their property, or otherwise intended the cable to act as a trap. Moreover, the undisputed evidence is that the Bessettes made efforts over the years to warn trespassers of the existence of the cable, and that the cable was marked by red rags and soda bottles at the time of the incident.

Even taking this evidence in the light most favorable to Plaintiff, these efforts do not amount to a willful or malicious indifference to the safety of trespassers. Cf. *Sega v. State*, 456 N.E.2d 1174, 1178 (N.Y. 1983) (holding that landowners did not act willfully or maliciously in constructing cable across dirt road even though no warnings were posted at time of accident); *Trudo v. Lazarus*, 116 Vt. 221, 224 (1950) (no willful and wanton misconduct where landowner knew that children played in and around abandoned building with broken glass but did not post warning signs). Thus, summary judgment would be appropriate in this case even if the relevant standard of care required the Bessettes to avoid wanton and willful misconduct towards persons using the property for recreational purposes.

<u>*Summary*</u>

For the reasons set forth above, the court concludes that the ATV statute provides the legal standard most specifically applicable to the facts of this case. Under that statute,

landowners cannot be liable to persons who operate ATVs on their lands unless intentional infliction of injury is shown, which has not been shown in this case. Even under the less specifically applicable statute, the Recreational Use statute, landowners are not liable to those using their land for recreational purposes unless the owners' actions are willful and wanton, and the court concludes that Plaintiff's evidence is insufficient to go to the jury under this standard.

Plaintiff claims that the cable was a boundary fence, subjecting Defendants to liability if Plaintiff can prove to the jury that the cable was a boundary fence and that the Defendants violated the standard set forth in *Baisley*. The court concludes that the ATV statute applies regardless of any other standard, because it is specific to ATV operation on private lands. Moreover, the cable in this case was placed at an internal location on Defendants' property such that it cannot qualify as a boundary fence subject to the holding in *Baisley.*

ORDER

Defendant's Motion for Summary Judgment, filed September 4, 2007, is *granted*.

Dated at Rutland, Vermont this ____ day of June, 2008.

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Hon. Mary Miles Teachout
Presiding Judge