2-27-2008

Ewing v. State, Dept. of Transp. Appellant's Brief Dckt. 34541

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN E. EWING, and NOREEN EWING,

Appellants,

vs.

DOCKET NO. 34541

STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION,

Respondent.

APPELLANTS' BRIEF

Appeal from the District Court of the 1st Judicial District for Kootenai County.

Honorable Charles Hosack, District Judge presiding.

Michael J. Verbillis
Residing at Coeur d'Alene, ID for Appellants.

Michael E. Kelly
Residing at Boise, ID for Respondent.

TABLE OF AUTHORITIES

III.

STATEMENT OF THE CASE

i. This is a personal injury case against the Idaho Department of Transportation ("ITD"). Appellant, "Ewing" fell in a poorly compacted construction site while taking a break from work activities.

ii. This case finds its way before the Supreme Court following joint motions for summary judgment. Ewing filed his motion for summary judgment seeking to eliminate the defense founded upon Idaho Code §72-223. ITD moved for summary judgment based upon the same statutory grounds as urged by Ewing and further upon the grounds that Ewing was engaged in recreational pursuits, or alternatively that the Recreational Use Statute, Idaho Code §36-1604 barred recovery. The Trial Court agreed with the latter proposition and ruled as a matter of law that the Recreational Use Statute was properly invoked. Respondent has cross-appealed on the issue of whether Ewing should have been considered a statutory employee. Ewing elected to address that issue in subsequent briefing, as contemplated by the Appellate Rules.

iii. The undisputed facts in this case show that Ewing was injured on land owned by ITD when he fell on poorly constructed and backfilled ground that had been improperly compacted or otherwise lost its integrity due to underground leakage following some construction on this particular ITD property. R.pp9-10. At the time of this injury, Appellant was engaged in his employment as a flagger under the employ of an entity known as Northstar Enterprises, Inc. Northstar Enterprises had a subcontract with Scarcella Brothers, Inc., which firm contracted with IDT for resurfacing and minor alignment of approximately 6 ½ miles of U.S. 95 near Potlatch, Idaho. R.p.29. It was during an allowed break that Ewing was injured while approaching a picnic table. The precise location of the injury was **NOT** on the property where services were being rendered by Ewing and his employer. The rest area in question was **NOT** part of the area covered by the contract with Scarcella Brothers. R.p.21.

Simply stated, Appellant stepped on a walkway area approaching a picnic table near the rest room facility at this rest area when the ground gave way causing his injuries. It appears as though coincidentally with the highway project some person or entity was involved in some plumbing activities on the parcel of land were the rest area is situated. It is this activity resulting in the dangerous condition that brought Ewing to the court house, and not any activity with respect to the highway project.

As mentioned, *infra,* the Trial Court ruled that Ewing was not a statutory employee of IDT, that there was a triable issue as to whether he was an invitee, but ruled, as a matter of law, that Ewing was barred from suit per the Recreational Use Statute. I.C. §36-1604. R.pp. 104-105.

IV.

ISSUE PRESENTED ON APPEAL

Whether a person utilizing a rest area during a break on a work day at adjacent property is deemed a recreational user within the meaning of Idaho Code §36-1604.

V.

ARGUMENT

A. Trial Court Erred by Ruling That There Were No Material Facts At Issue.

The Trial Court's ruling on the Recreational Use Statute is concise:

> Idaho Code §36-1604, commonly referred to as the "Recreational Use Statute," applies to the Mineral Mountain Rest Area where the accident at issue occurred and the State, as the land owner is protected from liability by virtue of the Recreational Use Statute.

R.p.105.

This one sentence ruling carries with it the implication that there were no material facts at issue with respect to not only the character of the property, but also its usage. As this Court is familiar, the standard of review is simply that summary judgment may not be entered if there is a genuine issue of material fact. *Edwards vs. Conchemco, Inc.* 111 Idaho 851, 727 P.2d. 1279.

This Court is also undoubtably aware that all favorable inferences must be given to the party resisting the motion. *Id.*

The favorable inference regarding the use of this property by Ewing was that he was taking a brief rest during his work day when he fell into ground that suddenly gave way at property owned by ITD on Mineral Mountain Rest Area.

That the Court did not grant that inference is obvious. Although we are not favored with a great deal of the Trial Court's rationale, let us examine, for example, the logic which appears to be underpinning the Court's one sentence ruling on this topic.

Is the Court's ruling that all uses at all times of this property must be deemed recreational? If that is the Court's ruling, then how can one square that with the Court's finding that there was a genuine issue of material fact concerning whether or not Ewing was an in invitee or a licensee.? R. p. 104. If it is the apparent logic of the Court that the **character** of the property is what grants its owner immunity, then such logic cannot pass serious scrutiny for a variety of reasons.

First of all, the Court apparently focused on the nature of the property rather than the character of the use of the property in its apparent analysis. It appears as though the Trial Court

reasoned that the owner of any type of public land where any of the activities listed in §36-1604, **could** thereon be performed was entitled to this mantle of invulnerability. Such is not the intention of the law or its purpose.

It is very obvious that this law was written initially as a way to protect land owners who allow hunters onto their property from bringing lawsuits in the event of unforseen circumstances due to some hidden hazard. Indeed, the statute goes on to provide that the owner of land whose property is open for recreational purposes does not owe a duty of care to keep the premises safe or to give warning of any dangerous condition. IC §36-1604 (c and d). There is an excellent discussion of the legislative history in the dissenting opinion of Justice Bistline in *Johnson v. Sunshine Min. Co., Inc.*, 106 Idaho 866, 684 P.2d 268 (1984).

However, nothing in the so-called Recreational Use Statute would prevent a land owner from being separately sued for any dangerous activity conducted on the property, if that activity were otherwise considered tortuous. For example, suppose the good Samaritan farmer invites people to hunt on his property and he himself is out hunting. If that farmer negligently were to wound or kill a recreational user, no court would grant immunity under that fact pattern. Thus, it is the character of the use of the property rather than the activity of the land owner that is the nexus that creates the social policy as well as the legislative enactment secondary thereto.

A different result would befall the hunter on the same farmer's property, if that farmer had been involved in road building activities within the previous 48 hours and did not sign or mark the ditch on his property. That is precisely what this statute is meant to immunize.

The second basis on which the Trial Court's logic is apparently flawed is the apparent acceptance that the character of the use of the property by Appellant was indeed recreational. This implicit holding is not supported by the record. The record clearly demonstrates that Ewing, on the date of his injury, was involved in work activities on an adjacent parcel of land which happened to be owned by the same land owner, to wit, the Idaho Department of Transportation.

Indeed, even a person utilizing the property for purely recreational purposes may sue for wilful misconduct. *Jacobsen vs. City of Rathdrum*, 115 Idaho 266, 766 P.2d 736 (1988). The *Jacobsen* case is one of several cases interpreted by the Supreme Court and Court of Appeals where individuals, usually children were injured on city or state owned property. In the *Jacobsen* case, a young child suffered serious brain injury after falling in a swiftly moving stream abutting the City Park in Rathdrum, Idaho. The Court made it clear that even trespassers could sue for wilful and reckless conduct. *Jacobsen, supra.*

In other cases, the Court has gone to some length to fashion exceptions that will allow a person to sue an otherwise immunized land owner where a "special relationship" exists between the land owner and the Plaintiff. For example, *Bauer ex rel. Bauer v. Minidoka School District 331,* 116 Idaho 586, 778 P.2d 336 (1989). In *Bauer* a child was injured on school property, but before school hours while engaged in a non-supervised football game The child was injured while tripping over irrigation pipe. The court had great difficulty struggling with potential differing results depending upon whether the school bell had rung or not. Rather the court took the higher ground and determined that a special relationship between the school and the pupil; thus the statute was inapplicable. *Id.* A like holding was found in *Tomich vs. City of Pocatello,* 127 Idaho 394, 901 P.2d 501 (1995). Tomich was a pilot who was clearly using the city owned airstrip for recreational purposes. He was nonetheless treated as an invitee and treated to the "special relationship" standard articulated in *Bauer, supra.*

While it is clear that this statute has not found great favor with the appellate courts, one need not engage in legal gymnastics to give Mr. Ewing his day in court.

That a worker taking a lunch break or answering the call of nature for that matter is deemed in recreational activity is totally unsupported by this record.

John Ewing should have been treated no different than a traveling salesman who stopped to use the rest station to relieve himself and perhaps have a cold sandwich on the picnic table supplied.

The latter activity of having a sandwich does not equate to "picnicking" within the meaning of the statute, at least as a matter of law. In other words, if it can be argued that Mr. Ewing was, albeit during his workday, "picnicking" for his brief rest from his daily toils then such should be an issue to be determined by a jury and not by a court. In other words, there is clearly a material issue of fact as to whether or not at the precise moment that Mr. Ewing was injured he was involved in recreational activities or some other activity, for example taking a break for a snack.

He should be entitled to let a jury determine that issue and not be summarily shown the exit door of the Courthouse.

B. Under Familiar Standards of Statutory Construction The Trial Court's Ruling Cannot Stand.

It was the assertion of ITD below that Ewing, during a break in his work time by entering on to the Rest Area property to use either the bathroom or the table facilities for a work break was engaged in a recreational endeavor. With this contention and ultimate ruling Ewing strenuously disagrees.

The first portion of this statute lists definitions of certain terms that may be found in the balance of the chapter, such as navigable streams, recreational use, and access limited to navigable stream. I.C. §36-1601. The second and third sections of the chapter deal with hunting on unposted land and trespass. The last portion of this chapter is the one that brings us to the Court.

Idaho Code §36-1604 contains several definitions and also purports to limit liability for owners of property who allow certain recreational uses on their property so long as there is no fee charged in connection with that use. The particular subsection that is of interest for these proceedings is Idaho Code §36-1604(b)(3), which states as follows:

> "Recreational Purposes" includes, but is not limited to, any of the following or any combination thereof: Hunting, fishing, swimming, boating, rafting, tubing, camping, picnicking, hiking, pleasure driving, bicycling, running, playing on playground equipment, skateboarding, athletic competition, nature study, water skiing, animal riding, motorcycling, snowmobiling, recreational vehicles, winter sports, and viewing or enjoying historical, archeological, scenic, geological or scientific sites, when done without charge of the owner. *Id.*

Principles of statutory construction that may apply to this fact pattern are the common rote rules that we all learned at the knee of Dean Menard at the University of Idaho. The first stop when interpreting a statute is to determine whether or not the statute is phrased in unambiguous language. If the same can be said to be unambiguous, then the clear language of the statute should be given effect. *Payette River Property Owners Ass'n v. Board,* 132 Idaho 551, 976 p.2d 477 (1999).

The second rule of statutory construction 101 is that any words that contain a particular definition within this same chapter of the statute are to be given that statutory meaning in the phrase under examination. After the first 2 prongs of analysis are met, if the statute is ambiguous (by that, is meant subject to alternative meanings by reasonable minds) then other rules of statutory construction apply. They are numerous and need not all be repeated herein.

Of course, the primary rule of statutory construction that must be noted herein is that the Court looks upon disfavor any interpretation that would lead to an absurd or unreasonably harsh result. *Payette River Property Owners Ass'n v. Board, supra.*

It occurs to the undersigned that if the court finds this statute to be ambiguous, either on its face or as applied, then the principles of *ejusdem generis* may well apply. That rule holds that where specific words or description are preceded or followed by general terms, the latter will be regarded as to persons or things or like class of those more particularly described. *Washington Water Power Co. v. Kootenai Environmental Alliance,* 99 Idaho 875, 591 P.2d 122 (1979).

Applying the principles of *ejusdem generis* to this particular subsection, it would appear that "recreational purposes" is the term that describes the class of activity governed by the statute. One must ask himself, was the Appellant involved in any of the activities listed thereon, which were all commonly known as recreational pursuits, purposes or activities. The closest thing that fits, as it were, is the term "picnicking." Thus, the 64 dollar question is was Mr. Ewing picnicking during his brief break during the work day or was he simply "on break" during his work day. For the Court to rule as a matter of law that he was, indeed , involved in a recreational pursuit has unfairly deprived Appellant of his day in court.

CONCLUSION

In conclusion, it is respectfully submitted that the Trial Court erroneously concluded that Appellant, John Ewing was engaged in recreational pursuits, while using the conveniences of a state owned rest area during a brief rest period during his work day. Accordingly, this Court should reverse and remand for a jury trial.

DATED this 19 day of Feb, 2008.

MICHAEL J. VERBILLIS
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CERTIFICATE OF SERVICE

I certify that on the 19 day of Feb, 2008, a true and correct copy of the foregoing was sent via U.S. mail to:

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