REL: March 6, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Ex parte City of Millbrook

PETITION FOR WRIT OF MANDAMUS

(In re: Josie Wright and James Wright

v.

City of Millbrook)

(Elmore Circuit Court, CV-17-900213)

MITCHELL, Justice.

Josie Wright was injured when she fell in front of the Millbrook Civic Center ("the civic center"). She and her

husband, James Wright, sued the City of Millbrook ("the City") based on her injuries. The City's liability turns on a question of statutory interpretation. The City asks this Court to issue a writ of mandamus directing the Elmore Circuit Court to grant the City's motion for a summary judgment on the basis of Article 2 of the recreational-use statutes, §§ 35-15-20 through -28, Ala. Code 1975. That article immunizes landowners from liability for accidents that occur on "outdoor recreational land." § 35-15-23, Ala. Code 1975. Because the City has not shown that the civic center is included within the definition of "outdoor recreational land" in Article 2, we deny the petition.

Facts and Procedural History

The City owns and operates the civic center, and it leases space within the civic center to groups and individuals for private events. The civic center is adjacent to several baseball fields with which it shares a parking lot.

On July 18, 2015, Wright visited the civic center to attend a wedding reception. When she left the reception, she fell from the sidewalk at the end of a ramped walkway leading from the front of the civic center to the parking lot. Wright

fractured her right femur and re-injured a previously replaced knee in the fall.

On July 6, 2017, Wright and her husband sued the City, claiming negligence and alleging that the City had failed to maintain, repair, or design the sidewalk to ensure its safety for pedestrian traffic. The City moved for a summary judgment on the ground that it was shielded from liability by Article 2 of the recreational-use statutes. On October 10, 2018, the trial court entered an order denying the City's motion, concluding that there were genuine issues of material fact that required a hearing. The City then filed this petition for a writ of mandamus.

Standard of Review

For a writ of mandamus to issue, the City must show "(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court." Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001) (quoted with approval in Ex parte Utilities Bd. of City of Foley, 265 So. 3d 1273, 1279 (Ala. 2018)). The general rule is that a writ

of mandamus will not issue to review an order denying a motion for a summary judgment. Ex parte Empire Fire & Marine Ins. Co., 720 So. 2d 893, 894 (Ala. 1988). But the recreational-use statutes provide immunity to qualifying landowners, see Ex parte City of Guntersville, 238 So. 3d 1243, 1246 (Ala. 2017), and a mandamus petition is an appropriate vehicle to review the denial of a motion for a summary judgment based on immunity. See Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060, 1064 (Ala. 2014) (citing Ex parte Butts, 775 So. 2d 173 (Ala. 2000)).

Analysis

The City argues that it has a clear legal right to relief based on Article 2 of the recreational-use statutes.[1] Article

[1]The recreational-use statutes consist of Article 1, §§ 35-15-1 through -4, and Article 2, §§ 35-15-20 through -28. The City bases its arguments solely on Article 2. We therefore consider and decide only the issue before us -- whether the City is entitled to immunity under Article 2. We do not consider whether the City is entitled to immunity under Article 1. "This Court will not reverse an order duly entered by a trial court, or issue a writ of mandamus commanding a trial judge to rescind an order, based upon a ground ... that was not asserted to the trial judge, regardless of the merits of a petitioner's position in the underlying controversy." State v. Reynolds, 887 So. 2d 848, 851-52 (Ala. 2004) (citing Ex parte Ebbers, 871 So. 2d 776, 786 (Ala. 2003)).

2 is titled "Limitation of Liability for Non-Commercial Public Recreational Use of Land" and provides:

> "Except as specifically recognized by or provided in this article, an owner of outdoor recreational land who permits non-commercial public recreational use of such land owes no duty of care to inspect or keep such land safe for entry or use by any person for any recreational purpose, or to give warning of a dangerous condition, use, structure, or activity on such land to persons entering for such purposes."

§ 35-15-22, Ala. Code 1975. The City is entitled to this immunity only if the civic center comes within the definition of "outdoor recreational land" in Article 2. "Outdoor recreational land" is defined in Article 2 as "[l]and and water, as well as buildings, structures, machinery, and other such appurtenances used for or susceptible of recreational use." § 35-15-21(2), Ala. Code 1975.

When determining the meaning of a statute, this Court "looks to the plain meaning of the words as written by the legislature." DeKalb Cty. LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 275 (Ala. 1998). Under our plain-meaning approach:

> "'"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is

> unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."'"

729 So. 2d at 275 (quoting Blue Cross & Blue Shield v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998), quoting in turn IMED Corp. v. Systems Eng'g Assocs., 602 So. 2d 344, 346 (Ala. 1992)). This approach is mandated by the separation-of-powers principles enshrined in the Alabama Constitution. "To the end that the government of the State of Alabama may be a government of laws and not of individuals, ... the judicial branch may not exercise the legislative or executive power." Ala. Const. 1901, Art. III, § 42. Adhering to the plain meaning of a statute ensures that this Court complies with its constitutional mandate and discharges its duty of saying what the law is without overstepping its role and legislating from the bench. To stray from the plain meaning of a statute would be to "turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers." DeKalb Cty. LP Gas Co., 729 So. 2d at 276.

Both the City and the Wrights argue their positions based on the plain meaning of Article 2 of the recreational-use

statutes. The City emphasizes in its petition that the statutory definition of "outdoor recreational land" includes both "buildings" and "structures," § 35-15-21(2), and thus, it argues, plainly includes the civic center. The Wrights counter that the civic center is a stand-alone, indoor facility with no connection to outdoor recreation and that Article 2 of the recreational-use statutes is therefore plainly inapplicable. Because fundamental principles of statutory interpretation foreclose the City's reading, we conclude that the Wrights have the better interpretation.

Taking a plain-meaning approach to a contested question of statutory interpretation is best understood as an exercise in textualism. "Textualism, in its purest form, begins and ends with what the text says and fairly implies." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 16 (Thomson/West 2012). Textualism recognizes that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Antonin Scalia, A Matter of Interpretation 23 (Princeton University Press 1997). "Textualism ... tasks judges with discerning (only) what an

ordinary English speaker familiar with the law's usages would have understood the statutory text to mean at the time of its enactment." Neil Gorsuch, The Case for Textualism, A Republic, If You Can Keep It 128, 131 (Crown Forum 2019). When this Court interprets a statute, it is charged with doing so fairly, giving full effect to the statutory intent as represented in the words enacted by the legislature -- no more and no less.

A useful textualist tool for giving a full and fair reading to the unambiguous definition of "outdoor recreational land" in Article 2 of the recreational-use statutes is the associated-words canon of statutory interpretation, also known as the doctrine of noscitur a sociis. Long recognized in Alabama law, "[t]his doctrine provides that 'where general and specific words which are capable of an analogous meaning are associated one with the other, they take color from each other, so that the general words are restricted to a sense analogous to that of the less general.'" Ex parte Emerald Mountain Expressway Bridge, L.L.C., 856 So. 2d 834, 842-43 (Ala. 2003) (quoting Winner v. Marion Cty. Comm'n, 415 So. 2d 1061, 1064 (Ala. 1982), and citing State v. Western Union Tel.

Co., 196 Ala. 570, 72 So. 99 (1916)). The canon has been summarized this way: "When several [words] ... are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." Scalia & Garner, supra, at 195.

In addition to the phrase "land and water," the statutory definition of "outdoor recreational land" includes a list of associated nouns: "buildings, structures, machinery, and other such appurtenances used for or susceptible of recreational use." § 35-15-21(2) (emphasis added). The associated-words canon counsels that the inclusion of the term "other such appurtenances" in this list of nouns means that the definition applies only to those buildings, structures, and machinery that are also "appurtenances."

The term "appurtenance" is not further defined in the recreational-use statutes, but its plain meaning in the context of Article 2 can be quickly grasped by consulting contemporary dictionaries. "[W]hen a term is not defined in a statute, the commonly accepted definition of the term should be applied." Bean Dredging, L.L.C. v. Alabama Dep't of Revenue, 855 So. 2d 513, 517 (Ala. 2003) (citing Republic

Steel Corp. v. Horn, 105 So. 2d 446, 447 (Ala. 1958)). An "appurtenance" is defined as "an accessory or other item associated with a particular activity or style of living," The New Oxford American Dictionary 76 (2d ed. 2005), "a subordinate part or adjunct ..., [an] accessory object[]," Merriam-Webster's Collegiate Dictionary 61-62 (11th ed. 2003), and "a contributory adjunct, an accessory." The Oxford English Dictionary 590 (2d ed. 1989). An accessory is "an object or device not essential in itself but adding to the beauty, convenience, or effectiveness of something else." Merriam-Webster's Collegiate Dictionary 7 (11th ed. 2003). An edition of Black's Law Dictionary published shortly before the enactment of Article 2 provides a thorough definition of "appurtenance" that helpfully synthesizes the subtleties apparent from the foregoing definitions:

> "That which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land; an outhouse, barn, garden, or orchard to a house .... An article adapted to the use of the property to which it is connected, and which was intended to be a permanent accession to the freehold."

Black's Law Dictionary 94 (5th ed. 1979).

When the associated-words canon is applied while bearing in mind these definitions of "appurtenance," the plain meaning of a "building" in the context of Article 2 of the recreational-use statutes is clear: a "building" is "outdoor recreational land" under § 35-15-21(2) only if it is adjunct to land or water and it facilitates the recreational use of that land or water.

The City has not established that the civic center is the kind of building included in the definition of "outdoor recreational land." The City's petition includes no discussion of the relationship of the civic center to the surrounding land or how the civic center facilitates the recreational use of that land. Although the civic center is a "building" in the general sense of the word, the City does not establish in its petition that the civic center is an appurtenance to land or water covered by Article 2 of the recreational-use statutes. The City thus lacks a clear legal right to a summary judgment in its favor on the basis of the immunity provided in Article 2 of the recreational-use statutes, and its petition is due to be denied.

Conclusion

A building is "outdoor recreational land" under the plain meaning of Article 2 of the recreational-use statutes only if it is adjunct to land or water and it facilitates the recreational use of that land or water. Because the City has not established that the civic center facilitates the recreational use of land, it does not a have a clear legal right to a summary judgment based on Article 2 of the recreational-use statutes. Accordingly, we deny the City's petition for the writ of mandamus.

PETITION DENIED.

Wise and Stewart, JJ., concur.

Parker, C.J., and Bolin, Shaw, Bryan, Sellers, and Mendheim, JJ., concur in the result.

MENDHEIM, Justice (concurring in the result).

I agree with the result reached by the main opinion, but I reach that result by a different path. As I understand the main opinion's analysis, it is saying that a "building" can be considered "outdoor recreational land" for purposes of the recreational-use statutes, § 35-15-1 et seq. and § 35-15-20 et seq., Ala. Code 1975, only if it is connected to "[l]and or water" that is itself "outdoor recreational land." But even if I grant that this is the case,[2] the fact remains that under

[2]Both Cooke v. City of Guntersville, 583 So. 2d 1340 (Ala. 1991), and Gable v. City of Huntsville, 564 So. 2d 940 (Ala. 1990), appear to contradict that conclusion. Cooke concerned injuries a boy sustained from shattered glass when he pushed "the exit door at the Guntersville Neighborhood Center." 583 So. 2d at 1341. The boy "testified that he went to the center on the day in question to ride his skateboard and that he had gone inside the facility for a drink of water when the accident occurred." 583 So. 2d at 1341. "[T]he director of parks and recreation for the City of Guntersville[] testified that the recreational center ... was operated in a non-profit manner, and that it was open to the general public." 583 So. 2d at 1341. The Court concluded that the recreational-use statutes were applicable to the boy's accident at the recreational center. Nothing in Cooke indicates that the grounds outside the recreational center were themselves "outdoor recreational land." In Gable, Rosemary Gable "fell on a step at Constitution Hall Park in Huntsville while chaperoning a group of schoolchildren on a tour of the park." 564 So. 2d at 940. The assistant director of Constitution Hall Park submitted an affidavit that "establishe[d] that Constitution Hall Park is a non-profit historical museum owned and operated by the City of Huntsville for the education and benefit of the general public." 564 So. 2d at 940. Based on

the definition of "outdoor recreational land" provided in § 35-15-21(2), Ala. Code 1975, there still must be a determination as to whether the land or water is "used for or susceptible of recreational use."

Section 35-15-22, Ala. Code 1975, provides, in part: "[A]n owner of outdoor recreational land who permits non-commercial public recreational use of such land owes no duty of care to inspect or keep such land safe for entry or use by any person for any recreational purpose, or to give warning of a dangerous condition, use, structure, or activity on such land to persons entering for such purposes." (Emphasis added.) Section 35-15-21(2) defines "outdoor recreational land" as: "Land and water, as well as buildings, structures, machinery, and other such appurtenances used for or susceptible of recreational use." (Emphasis added.)

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this limited description, the Court concluded that "under § 35-15-21, [Ala. Code 1975,] its use qualifies as one for which an owner has only limited liability." 564 So. 2d at 940. It seems apparent that the Gable Court readily reached this conclusion not because the "land" around Constitution Hall Park constituted "outdoor recreational land" -- there is no discussion of the outdoor land -- but rather because Gable was "viewing or enjoying historical ... sites," and thus, under § 35-15-21(3), Ala. Code 1975, Constitution Hall Park has a "recreational use" and Gable was visiting it for a "recreational purpose."

Section 35-15-21(3), Ala. Code 1975, defines "recreational use" or "recreational purpose." Thus, both § 35-15-22 and § 35-15-21(2) include terms that are defined in § 35-15-21(3). Accordingly, the most straightforward way to approach the statutory-construction issue before us is to determine whether Josie Wright entered the Millbrook Civic Center ("the civic center") for a "recreational purpose."

Section 35-15-21(3) contains a list or series of activities that qualify as "recreational use" or "recreational purpose." The list is preceded by the ubiquitous phrase "including, but not limited to." This means that the list is not intended to be exhaustive, but rather suggestive of the types of activities that fall within the definition. See, e.g., Sims v. Moore, 288 Ala. 630, 635, 264 So. 2d 484, 487 (1972) (noting that the word "'[i]ncluding' is not a word of limitation, rather it is a word of enlargement, and in ordinary significance also may imply that something else has been given beyond the general language which precedes it"). However, such a list is also not intended to be all-encompassing of any possible activity that might be considered "recreational"; otherwise the legislature would not have

provided a list -- it would have used one broad term. As the general principle of statutory construction known as ejusdem generis teaches, "general words, following the enumeration of particular classes of persons or things, are construed to apply only to persons or things of the same general nature or class as those specifically enumerated." Lambert v. Wilcox Cty. Comm'n, 623 So. 2d 727, 731 (Ala. 1993). In other words, because the list of activities in § 35-15-21(3) is followed by the phrase "and any related activity," other activities not specifically enumerated in the list must be "like" or "related" to the activities on the list.[3]

It is undisputed that Wright visited the civic center to attend the wedding reception of a friend's child. Although a wedding reception very broadly could be thought of as a "recreational" activity in the sense that one attends a wedding reception during leisure time, it does not fall within the types of activity included in the list provided in § 35-15-21(3). Most of the listed activities take place outdoors and are movement-related rather than merely social.

[3]This is why skateboarding, the activity in Cooke v. City of Guntersville, 583 So. 2d 1340 (Ala. 1991), was considered a "recreational use" even though it is not specifically listed in § 35-15-21(3).

The list conveys the theme that the legislature intended to immunize property owners from suit where the injured party was engaging in an activity that bears some risk of danger.[4] A wedding reception does not fall within that intended theme. The legislature did not list a "party" as one of the included activities, for example, which clearly would have encompassed a wedding reception.

In short, Wright did not enter the civic center for a "recreational purpose" as that phrase is defined by § 35-15-21(3), which is required for a property owner to be entitled to the immunity provided in § 35-15-22. Accordingly, the City of Millbrook is not entitled to immunity under Article 2 of the recreational-use statutes.

[4]The last items on the list -- "viewing or enjoying historical, archeological, scenic, or scientific sites" -- might not always fit within the theme of containing an element of danger, but a wedding reception also does not fall within the theme of such activities.