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Abbott v. City of Henderson, 123 Nev. Adv. Op. 45 (Jan. 25, 2024)

Kacee Johnson

Abbott v. City of Henderson, 123 Nev. Adv. Op. 45 (Jan. 25, 2024)[1]

NEVADA'S RECREATIONAL STATUTE APPLIES TO ALL TYPES OF PROPERTY AND PLAYGROUND ACTIVITY QUALIFIES AS "RECREATONAL ACTIVITY."

Summary

The Nevada Supreme Court was asked to decide whether: (1) the district court properly concluded that Vivaldi Park is covered by Nevada Revised Statute (NRS) 41.510; (2) Abbott's activities qualified as recreational activities; and (3) that Henderson did not intentionally create a hazard constituting willful conduct.

Under NRS 41.510, there are no land-type limitations on the properties protected from liability, and playground activities qualify as recreational activity under the statute. Furthermore, landowners can only be held liable for injuries caused on the landowner's property if the landowner acted willfully and maliciously by not alerting the recreational user of a hazard on the property.

Background

In September 2019, Kathryn Abbott slipped and fractured her leg when she was helping her youngest child play on the slide at Vivaldi Park in Henderson. Abbott believed that the park created a hazard and that the City of Henderson ("Henderson") did not take care to fix the hazard, and because of this, Kathryn Abbott fell and fractured her leg.

Kathryn Abbott and her husband, Andrew Dodgson-Field (collectively, "Abbott") sued Henderson alleging negligence arising from premises liability and loss of consortium, respectively. Henderson claimed immunity pursuant to NRS 41.510, Nevada's recreational use statute. Henderson moved for summary judgment, and the district court granted the motion, finding that Henderson was immune from the suit under NRS 41.510, and that Vivaldi Park (and Abbott's use of the park) fell outside the scope of NRS 41.510. Abbott appealed to the Nevada court of appeals, and the court of appeals reversed and remanded. Henderson appealed to the Nevada Supreme Court and was granted certiorari.

Discussion

According to NRS 41.510, an owner of property does not owe any duty to keep the premises safe for entry or use by others participating in recreational activity. However, under NRS 41.510(3)(a)(1) landowners are not immune from liability when they willfully or maliciously fail to guard or warn recreational users from a dangerous condition.[2]

Standard of review

The Court granted de novo review of the summary judgment granted by the district court, noting that summary judgment is only appropriate where, construing all evidence in favor of the nonmoving party, there is no genuine dispute of any material fact, and the moving party is entitled to judgment as a matter of law. [3] The court further stated that questions of law are reviewed de novo,[4] as well as questions involving statutory interpretation.[5]

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[1] By Kacee Johnson.
[2] NRS 41.510(3)(a)(1).
[3] Wood v. Safeway, Inc., 121 Nev. 724, 729 (Nev. 2005).
[4] Martin v. Martin, 520 P.3d 813, 817 (Nev. 2022).
[5] Webb v. Shull, 128 Nev. 85, 88 (Nev. 2012).

The plain text of NRS 41.510 provides no limitation on the type of land appropriate for protection

The Court considered whether Vivaldi Park was a type of land that qualified for immunity under NRS 41.510. In *Brannan*, a motorcyclist suffered injuries on a landowner's "uninhabited" desert land, and the Court applied NRS 41.510 to occupiers of "open land."[6] In *Boland*, an injury occurred on a small mining basin, and the Court, after engaging in a land-type analysis, determined that legislature intended for the mining basin to be used for recreation.[7] The Court stated that rural or nonresidential properties should be immune under NRS 41.510. As a result, the Court held that the mining basin was immune from liability.

Following *Boland*, the legislature modified NRS 41.510 in two ways: (1) by expanding the kinds of landowners eligible for immunity to include an owner of any type of property;[8] and (2) by expanding the list of recreational activities from nine to over twenty.[9] The Court stated that legislative changes to a statute "must be given effect by the courts" [10] and held that NRS 41.510 applied to any property.[11] As such, in the present case, the Court held that immunity under NRS 41.510 went beyond *Boland* to apply to any property.

Abbott argued that only undeveloped land qualified for immunity under NRS 41.510 and that this was determined by the plain language of the statute. The Court dismissed Abbott's argument, stating that the statute's plain meaning clearly provided immunity from liability to Vivaldi Park.

Abbot was engaged in a recreational activity when she injured herself at Vivaldi Park

The Court held that the legislature did not include any limiting language regarding which type of land would be eligible for NRS 41.510 immunity, but the Court stated that the legislature did intend to limit immunity to injuries resulting from participation in recreational activities, including camping, hiking, or picnicking and riding a road, mountain, or electric bike.[12]

The Court asserted that under NRS 41.510(4), the interpretation of the plain meaning of "recreational activity" included Abbott's activity of walking and assisting a child. This activity, the Court reasoned, was a recreational activity similar enough to "picnicking, hiking, riding a bicycle, and crossing over public land"[13] and was therefore entitled to immunity under NRS 41.510. The Court cited to *Curran v. City of Marysville*,[14] where the court held that "playground activity" was a recreational activity, and to federal circuit courts that have suggested that recreational activity encompassed playground activities.[15] As such, the Court concluded that Abbott engaged in recreational activities which fell under the scope of NRS 41.510.

The Court was not persuaded by Abbott's suggested application of the doctrine of *noscitur a sociis* (the principle that words are known by the company they keep). The Court reasoned that walking or helping a child play on a playground would be considered recreational under both

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[6] Brannan v. Nevada Rock & Sand Co., 108 Nev. 23, 24–25 (Nev. 1992).
[7] Boland v. Nevada Rock & Sand Co., 111 Nev. 608 (Nev. 1995).
[8] 1995 Nev. Stat., ch. 311, § 1, at 790.
[9] *Id.*
[10] Orr Ditch & Water Co. v. Just. Ct. of Reno Twp., 64 Nev. 138, 164 (Nev. 1947).
[11] *See* Young v. Nev. Gaming Control Bd., 136 Nev. 584, 586 (Nev. 2020).
[12] NRS 41.510(4).
[13] Abbott v. City of Henderson, 140 Nev. Adv. Op. 3, 7 (2024).
[14] Curran v. City of Marysville, 766 P,2d 1141, 1143–44 (Wash. Ct. App. 1989).
[15] Leigh-Pink v. Rio Props., LLC, 512 P.3d 322, 328 (2022).

common law and under interpretations of similar recreational use statutes from other jurisdictions, and as such, the Court affirmed the district court's determination that Vivaldi Park was eligible for protection and that Abbott's activity fits within the scope of recreational activity under NRS 41.510.

Henderson did not willfully or maliciously fail to guard against the dangerous condition

Landowners are not immune from liability under NRS 41.510 for injuries if the landowner willfully or maliciously fails to guard or warn against a "dangerous condition, use, structure, or activity."[16] In previous cases, the Court defined "willful or malicious conduct as intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible result."[17]Furthermore, willfulness is a question of fact unless the plaintiffs do not present evidence of willful conduct, and thus, summary judgement is appropriate.[18]

Abbott argued that Henderson willfully created the hazardous condition causing her injury, but the Court disagreed by asserting that intentionally engaging in an activity leading to a baseline injury is distinct from a deliberate failure to protect against the hazardous condition. Furthermore, the Court asserted that willfulness requires "a design to inflict injury,"[19] and held that Abbott did not present any admissible evidence supporting her allegation that Henderson willfully created the hazard. The Court pointed to Henderson's regular maintenance of Vivaldi Park, going so far as to have a playground inspector visit each of Henderson's playgrounds monthly to make any necessary repairs, and held that the evidence presented in district court demonstrated that Henderson exercised some level of care regarding Vivaldi Park's maintenance. Furthermore, the Court noted that Abbott did not present any evidence of any prior accidents related to the hazard at Vivaldi Park during the park's lifetime.

Because Henderson demonstrated that it had maintained Vivaldi Park and because Abbott did not prove Henderson willfully or maliciously created the hazard, there was no remaining issues of fact for the Court to review, entitling Henderson to judgment as a matter of law.

Conclusion

The Nevada Supreme Court affirmed the district court's decision, finding that: (1) the district court properly concluded that Vivaldi Park is immune under NRS 41.510; (2) that Abbott's activities qualified as recreational activities; and (3) that Henderson did not intentionally create a hazard constituting willful conduct.

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[16] NRS 41.510(3)(a)(1).
[17] Boland v. Nevada Rock and Sand Co., 111 Nev. 608, 612–13 (Nev. 1995) (original emphasis removed).
[18] *Id.* at 613.
[19] Crosman v. S. Pac. Co., 44 Nev. 286