THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

Shayla Legendre, b/m/n/f Sandra Legendre

v.

Three Sons Camping, LLC
d/b/a Old Stage Campground

Docket No.: 218-2010-CV-0441

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Shayla Legendre, b/m/n/f Sandra Legendre, ("Legendre") brings this action against the defendant, Three Sons Camping, LLC d/b/a Old Stage Campground ("Old Stage"), seeking damages for claimed personal injuries arising from a fall at Old Stage's campground. Legendre alleges that on May 22, 2009, while playing in Old Stage's campground playground area, she stepped into an unmarked gopher hole and twisted or harmed her ankle. Legendre further alleges that Old Stage's negligence in regard to its maintenance and repair of its property for use by its patrons/campers, to include alleged failure to take proper precautions to alert persons of the hole, caused her injuries. Legendre advances claims of "Landowner Liability" (Count I) and "Innkeeper Liability" (Count II).

Old Stage has moved for summary judgment, arguing that "it owed no legal duty to Plaintiff to remedy conditions of purely natural origin upon its land and cannot be held liable for the acts of wild animals;" that "no affirmative duty was created that obliged . . . [it] to remove or otherwise remedy the gopher hole;"

that "an exculpatory agreement that Plaintiff signed upon entering the campground releases Old Stage from any liability." See Def. Mot. Summ. J, 1–2. Legendre objects, contending that liability here lies.

In ruling on a motion for summary judgment, the Court construes "the pleadings, discovery and affidavits," as well as the proper inferences therefrom, "in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law." Thomas v. Telegraph Publ'g Co., 155 N.H. 314, 321 (2007) (citing Porter v. Coco, 154 N.H. 353, 356 (2006)).

Old Stage argues that it owed no legal duty to Legendre by virtue of the doctrine of *ferae naturae*. It contends that it cannot be held liable for acts of indigenous wild animals. Def.'s Mot. Summ. J, 1-2; Def.'s Mem. Supp. Summ. J, 3-4. It cites Belhumeur v. Zilm, 157 N.H. 233 (2008) and Pesaturo v. Kinne, 161 N.H. 550 (2011), arguing that per the recognized doctrine of *ferae naturae* "a landowner cannot be held liable for acts of wild animals occurring on his property unless the landowner has actually reduced indigenous animals to possession or control, or introduced non-indigenous animals in the area." Def.'s Mem. Supp. Summ. J, 3 (quoting Belhumeur, 157 N.H. at 236). It further contends that while there is some evidence that it knew of the hole and had taken some action in regard to it, nothing it did established any actionable duty in favor of Legendre. Id. at 4.

Legendre does not dispute that the hole in question was initially created by a wild animal. She avers, however, that Old Stage "is no mere landowner, but

rather a campground owner and as such has a special and fiduciary relationship with . . . [her] akin to that of innkeeper/guest," and that the cases Old Stage relies on to "support . . . the applicability of the Doctrine of '*ferae naturae*' involves private property owners with no special relationship to the Plaintiffs." See Pl.'s Mem. Obj. Summ. J, 3.

Legendre also contends that Old Stage bears liability here as it had actual knowledge of the hole prior to Legendre's fall and injury, had a "special relationship" to her, had taken action in regard to the hole, and had a "minimum duty . . . to at least warn playground users of this known danger, or otherwise remedy the problem." Id. at 3–5. She avers that under the circumstances "[a] person of average prudence or even below average prudence would warn a young child of a dangerous condition in a playground area that was designated for use by the child, and for which the child's parents had paid a fee, whether the hazard was caused by wild animals or extra-terrestrials." Id. at 5.

In regard to Legendre's "Innkeeper" contentions, Old Stage did allow Legendre onto its premises to camp, did charge a seasonal registration fee, obtained from the Legendres an agreement respecting "Terms and Conditions" for a seasonal camping permit, and had laid out a playground area for camper use. See generally Def.'s Mem. Supp. Summ. J., Ex. C. Old Stage's operations were also subject to regulation. See RSA 216-I. A camp stay is per a camping permit, not a lease—a "temporary recreational occupancy only." Id.

Old Stage argues that its campground operations bear more similarity to a ski area, and per McGrath v. SNH Development, Inc., 158 N.H. 540, 544 (2009),

such areas are not considered to have a form of "special relationship" with its users. See also Barnes v. N.H. Karting Assoc., 128 N.H. 102, 108 (provision of racing facilities deemed not to be a service of great importance to the public, nor a matter of practical necessity). But see Kellner v. Lowney, 145 N.H. 195, 198–99 (2000) (motel deemed to have duties stemming from "innkeeper-guest" special relationship).

Given the pertinent circumstances as reflected in the present record, the Court concludes that Old Stage is not entitled to summary judgment—that Old Stage fails to show that a negligence case against it may not properly lie.

"Claims for negligence rest primarily upon a violation of some duty owed by the offender to the injured party. Absent a duty, there is no negligence. Whether a duty exists in a particular case is a question of law." Belhumeur, 157 N.H. at 236 (quoting Walls v. Oxford Management Co. 137 N.H. 653, 656 (1993)). "[F]or a duty to exist on the part of the landowner, it must be foreseeable that an injury might occur as a result of the landowner's actions or inactions." Pesaturo, 161 N.H. at 554 (citation omitted).

New Hampshire law recognizes that "owners and occupiers of land owe . . . a duty of reasonable care under all the circumstances in maintenance and operation of their property." Id. (quotation and citations omitted). Further, a premises owner may be subject to liability for harm caused to an entrant on the premises, if the harm results from "the owner's failure to remedy or give warning of a dangerous condition of which he knows or in the exercise of reasonable care should know." Rallis v. Demoulas Super Markets, 159 N.H. 95, 99 (2009)

(citations omitted). A landowners "failure to remedy or warn of a dangerous condition of which he knows or in the exercise of reasonable care should know . . . depends upon whether he had actual or constructive notice of the dangerous condition." Id. (citations omitted); see also Tremblay v. Donnelly, 103 N.H. 498, 499-500 (1961) (upholding a jury verdict for the plaintiff, a sixty-five year old widow who slipped on an unnoticed pear and badly fractured her left ankle when entering a premises owned by the defendants at the rear and by means of a porch, where there was evidence from which the jury could find that the defendants knew, or should have known, that pears fell from a tree, located on an adjoining premises owned by a third party, onto the porch, and, in the exercise of reasonable care, the defendants could have taken preventative action).

A party who does not otherwise have a duty, but who voluntarily renders services for another, is held to a duty of reasonable care in so acting, though he may abandon such activity and escape liability if he did not make matters worse. Mikell v. School Administrative Unit #33, 158 N.H. 723, 733–34 (2009) (citing Belhumeur, 157 N.H. at 238).

No action lies in negligence "for the acts of animals *ferae naturae*, that is, indigenous wild animals, occurring on . . . [a landowner's] property unless the landowner has actually reduced the wild animals to possession or control, or introduced a non-indigenous animal." Belhumeur, 157 N.H. at 236 (quotation and citation omitted). This case, however, does not involve a claim of injury due to a direct attack of a wild animal upon the person of a victim. It does not involve, for

example, an attack by wild bees, as in Belhumeur, or an attack by fire ants, as in Nicholson v. Smith, 986 S.W. 2d 54 (Tex.App. 1999). Rather, it involves a claim of injury arising from a land condition (a hole) in a playground area serving a recreational campground which, though initially created by a wild animal, came to be known, it appears, by the owner of the campground who, it appears, acted upon it in some fashion before May 22, 2009.

The record contains evidence to the effect that Old Stage's owner, Daniel Redford, "had been trying to fill the hole but the gopher kept coming back"—that is, evidence to the effect that this owner knew of the hole before Legendre's fall, and had acted to some degree to deal with it. See Mem. in Supp. Of Mot., Ex. B (Answer to Interrogatory No. 4). This evidence may be seen as supporting Legendre's contention that though Old Stage had prior knowledge of the allegedly dangerous hole, it failed reasonably and effectively to deal with it, leaving it unmarked and/or insufficiently treated.

The Court thus cannot say that Old Stage may not be found to be here negligent. See Sheftel v. Allentown Jewish Community Center, 1999 WL 33265613 (Pa. Com.Pl. 1999) (holding that operator of a summer day camp program may be liable in negligence for an injury to a six year old camper caused by a fall in an animal hole, where there was evidence that the camp authorities knew of the animal holes on the property the operator possessed, indeed had received complaints about such holes, and "a jury could conclude that [the camp operator] knew, or should have known, of potentially dangerous holes in its campground"); cf. Nicholson, 986 S.W. 2d at 62–63 (citing cases where certain

negligence actions were allowed to proceed even in regard to direct attacks by wild animals, where "wild animals [are] found in artificial structures or places where they are not normally found; that is, stores, hotels, apartment houses, or billboards, if the landowner knows or should know of the unreasonable risk of harm by an animal on its premises, and cannot expect patrons to realize the damage or guard against it").

Moreover, the record is not sufficiently developed to show that the hole in question was just of a "purely natural origin" type. The Court cannot say, on this record (and with particular regard to the interrogatory evidence), that in doing what he did, the owner of Old Stage did not make matters worse in regard to the hole—which, it is claimed, he left unmarked, to be stepped into by a child in the playground area.

Old Stage also, however, urges that Legendre (through her parents) released it from all liability by signing an exculpatory agreement. Def.'s Mot. Summ. J, 2; Def.'s Mem. Supp. Summ. J, 6. Legendre argues that the alleged exculpatory agreement does not release the defendant from liability for this matter. Pl.'s Mem. Obj. Summ. J, 5–7.

The document entitled "Terms and Conditions of Seasonal Camping Permit," which was signed by the Legendre's parents, states:

> 7. The Camper agrees to abide by the terms and conditions of this permit and rules and regulations of the Recreational Campground as they may be from time to time amended. The Camper acknowledges receipt of a copy of the existing rules and regulations and agrees to be responsible for reviewing those rules and regulation with all members of his or her family, visitors or guests. The use of any equipment or facility of the Recreational Campground by the Camper, members of his or her family, guest is

> done so at their own risk and the Camper agrees to save and hold harmless, and indemnify the Recreational Campground from and against all lose [sic], liability and expense that may be incurred by the Recreational Campground by reason of such use, or in connection there within.

Def.'s Mem. Supp. Summ. J, Ex. C.

Legendre's parents, Sandra and Lucien, both indicate that they did not read the pertinent document in the manner Old Stage here suggests, that "[n]either one of . . . [them] believed or understood that this Agreement would somehow protect the Defendant from negligent acts or from lawsuits arising from those negligent acts." See Afftd. of Sandra and Lucien Legendre, dated September 27, 2011, ¶¶ 2–3, submitted with the Objection.

"Although New Hampshire law generally prohibits exculpatory contracts, . . . [they will be enforced] if: (1) they do not violate public policy; (2) the plaintiff understood the import of the agreement or a reasonable person in his position would have understood the import of the agreement; and (3) the plaintiff's claims were within the contemplation of the parties when they executed the contract." Dean v. MacDonald, 147 N.H. 263, 266–67 (2001) (citing Barnes v. N.H. Karting Assoc., 128 N.H. 102, 106–07 (1986). If an agreement passes muster in regard to the "public policy" prong, it has been said that "[a]s long as the language of the release clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's negligence, the release will be upheld." Id. (quotation and citation omitted). The Court must strictly construe exculpatory agreements against the defendant. Id. (citation omitted).

Here, the Court concludes that Old Stage has not established its entitlement to summary judgment. Beyond Legendre's "Innkeeper" contentions and their impact on the "public policy" question, the Agreement does not clearly and specifically indicate the intent to release Old Stage from liability for personal injury caused by its own negligence. It is not particularly clear or specific. It does not expressly mention injury to person or property. "[I]t fails . . . [to give any] *particular* attention . . . to the notion of releasing the defendant from liability for . . . [its] own negligence . . . [and] [t]he general language in the context of the release simply did not put the plaintiff on clear notice of such intent." Audley v. Melton, 138 N.H. 416, 419 (1994).

For the reasons stated above, the Court **DENIES** Old Stage's Motion for Summary Judgment.

So Ordered.

DATED: 11-16-11

John M. Lewis
Presiding Justice