State of New Hampshire

Supreme Court

No. 2018-0344

Arnold Alpert, Judith Elliott, and James Snyder

v.

New Hampshire Motor Speedway, Inc., and Town of Loudon

RULE 7 APPEAL OF FINAL DECISION OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFFS/APPELLANTS ARNOLD ALPERT, JUDITH ELLIOTT, AND JAMES SNYDER

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Table of Contents

Table of Authorities

New Hampshire Cases

Questions Presented

I. Did the court err in finding that the term "premises" as defined in the parties' Settlement Agreement refers only to the land owned by NHMS at the time the Agreement was signed?

II. Did the court err in finding that the term "premises" as used in the parties' Settlement Agreement was not ambiguous?

III. Did the court's parsing of the language of the parties' Settlement Agreement undermine the intent of the Agreement?

IV. Whether the trial court erred as a matter of law in denying plaintiffs an opportunity to present evidence at hearing as to the parties intent?

V. Whether the trial court erred in finding that the plaintiffs did not contend that NHMS's proposed racetrack was separate from the site development plan approved by the Loudon Planning Board in 1988.

Statement of Facts

The case rests on interpretation of a legal commitment that the owner of the NH Motor Speedway, then known as NH International Speedway, that it would not hold standalone concerts at its facility in Loudon, New Hampshire. The appellants, who are parties to a settlement agreement signed in 1989, contend that the commitment of the then-owner is binding on the present owners and that it applies to all segments of their contiguous property where they conduct the business of NH Motor Speedway.

I. Bob Bahre Makes an Agreement with his New Neighbors

The case begins on December 15, 1988, with the granting of site plan approval for a major expansion of the Bryar Motorsports Park, which had for years hosted motorcycle and auto races at its facility on Route 106. The approval triggered a purchase of the park by Bob Bahre, a Maine businessman who intended to expand the track into a considerably larger operation that would attract NASCAR races, with seating for 55,000 fans and parking for 17,000 cars. ["Bryar Owner Details Vision of Loudon 500," Concord Monitor, 21 December 1988, Sup p. 29]

Local residents responded to the news with concern that the enlarged racetrack facility would produce excessive noise and other undesirable changes to their rural area. They noted that Mr. Bahre had stated the facility would not hold rock concerts or night races but observed that such verbal promises were not legally binding. ["Not so fast, auto racing fans," Concord Monitor, 4 January 1989, Sup p. 30] Holding that the Town had failed to follow its own rules for granting approvals for such developments, several Loudon residents and property owners, including James Snyder, filed a lawsuit against the Town. [Snyder et. al. v. Planning Board of the Town of Loudon and 106 Midway Raceway, Inc., Sup p. 31]

Eager to settle the lawsuit and go on with his ambitious plans, Bahre began a series of meetings with several local residents, organized in an informal association called Concerned Racetrack Neighbors (the Neighbors), a group which included Mr. Snyder, and also included Mr. Alpert, and Ms. Elliott, neither of whom were parties to the lawsuit filed against the Town.

With his wife, Susan, Snyder operates a farm just up Asby Road from the property Bahre purchased. Alpert and Elliott live a bit further up Asby Road. Like others who lived in the vicinity, Snyder, Alpert, and Elliott were concerned that racing and other activities at the track would be disruptive to their lives in an otherwise quiet, rural area.

The subject of concerts came up at a February 1, 1989 meeting between Bahre and the Neighbors [Elliott notes, "Mtg w/ Bahres - 2/1/89, Sup p. 43] and again when Mr. Bahre spoke with Ms. Elliott the following day ["Call fr Bahre to J Elliott - 2/2/89," Sup p. 46]. In the meeting and in his conversation with Elliott, Bahre repeated his previous statements that concerts were not part of his plan for the Speedway.

The meetings between Bahre and the Neighbors resulted in two agreements.

In the first, Snyder and other parties to the Loudon lawsuit stipulated that a settlement had been reached and that further discovery and court proceedings would be cancelled. ["Stipulation," May 12, 1989, Sup p. 47]

The second agreement, filed in Merrimack County Superior Court on May 17, 1989, was signed by Gary Bahre, Bob Bahre's son and the president of the corporation then called New Hampshire Speedway, Inc. Other signatories included six parties to the Loudon lawsuit, including Jim Snyder. Also signing were Judy Elliott and Arnie Alpert, who were members of Concerned Racetrack Neighbors but were not parties to the Loudon lawsuit. For the Town of Loudon, the three members of the Board of Selectmen and the Chairman of the Planning Board, signed as well. [Settlement Agreement, Sup p. 3]

The Settlement Agreement had several provisions relevant for the current dispute. First, the Speedway agreed that it would not hold concerts except in conjunction with racing events.

> "New Hampshire Speedway covenants that it shall not permit any musical concerts of any type or description to be held on the premises currently known as New Hampshire International Speedway ('premises') except in conjunction with racing events." [Settlement Agreement, paragraph 1, Sup, p. 3]

Second, the Speedway agreed that it would not hold any races scheduled to end after 7:30 PM. [Settlement Agreement, paragraph 2, Sup, p. 3]

Third, the plaintiffs in the Loudon lawsuit (which included Snyder) and the Concerned Racetrack Neighbors (which included Snyder, Alpert, and Elliott) agreed to "cease all opposition to the racetrack expansion, either by public statements or contacts with any federal, state or local agency." [Settlement Agreement, paragraph 16, Sup, p. 6]

Fourth, the agreement's provisions were to be "binding on New Hampshire Speedway, Inc, *and its successors* (emphasis added), so long as the land is used as a racetrack." Further, "the provisions of paragraphs 1, 2, and 3 hereof shall be recorded in the Merrimack County Registry of Deeds to apply so long as the track is used as a racetrack." [Settlement Agreement, paragraph 17, Sup, p. 6]

With the conflict settled, Bahre proceeded to rebuild and expand the park, attract NASCAR races, and establish a successful business, so successful, in fact, that after several years he doubled the size of the facility without objection from any of the parties to the 1989 settlement.

II. The Speedway Changes Hands

Bob Bahre lived up to his commitments with regard to concerts and night races.

Eighteen years later, Bahre sold the facility to Speedway Motorsports, Inc. (SMI), a North Carolina-based corporation headed by Bruton Smith. Speaking on the phone on November 14, 2007, Bahre attempted to reassure Elliott, telling her that he had informed Bruton Smith about the consent agreement and had given him a copy before the sale. He told Elliott his agreement would be honored. Later he left a voicemail message for Alpert, which said, "Before I even talked to Bruton on this I gave him all the paperwork and Gary [Bahre] and I explained everything to him. Everything's going to be fine. You guys are going to like him. He's not going to want any trouble. He knows it goes with the track not just with us. I want you to breathe easy." ["Bob Bahre called you," November 14, 2017, Sup, p. 18].

However, statements by Bruton Smith and Speedway officials made it impossible for Snyder, Elliott, and Alpert to breathe easy. For example, in an interview with Gerry Gappens, then the Speedway's General Manager, the Concord Monitor referred to the 1989 consent agreement, saying

> "The deal prohibits musical concerts, night racing, tractor pulls, drag racing, mud runs and demolition derbies for as long as the site is used as a racetrack, but Gappens is confident the reputation and record built by the speedway over the last two decades will help in the event SMI wants to renegotiate." ["For speedway, big changes take time," Concord Monitor, February 10, 2008, Sup, p. 49]

Three months later, the NH Sunday News stated,

> "Gappens also said he would like to revisit the agreement Bahre signed with local residents nearly 20 years ago that restricts the track from, among other things, putting in lights for night racing and concerts." ["'This change is good.'" NH Sunday News, May 11, 2008, Sup, p. 51]

No changes were ever made to the 1989 Settlement Agreement.

III. Can the Speedway become a Concert Venue?

On December 7, 2016, the Speedway, by then re-named NH Motor Speedway, announced that it intended to host music festivals on weekends when no races were planned, despite the terms of the 1989 agreement. Alpert and Elliott immediately informed NHMS that the music festivals would violate the terms of the 1989 agreement, to which the corporation was bound. [Arnie Alpert and Judy Elliott letter to NHMS, December 8, 2016, Sup, p. 54] NHMS went ahead with its proposal. Through counsel and/or directly Snyder, Elliott, and Alpert all appeared before Loudon's Zoning Board of Adjustment and Planning Board to inform them that the music festivals would violate the Settlement Agreement, to which the Town was also a party. When both the ZBA and Planning Board chose to ignore the settlement's terms and granted conditional approval to NHMS to hold a music festival, Snyder, Alpert, and Elliott filed a petition at Merrimack County Superior Court for injunctive relief. [see Verified Complaint to Enforce Settlement Agreement and Request for Permanent Injunctive Relief, paragraphs 44 to 54, Sup, p. 18]

Subsequently, Snyder, Alpert, and Elliott filed a petition at Merrimack Superior Court to enforce the terms of their settlement and block the concerts from taking place. NHMS filed its own petition to allow the concerts to take place. Following a hearing on April 2, 2018, the Merrimack County Superior Court denied the petition from Snyder, Alpert and Elliott and granted the NHMS motion. [Merrimack County Superior Court, #217-2017-CV-00649, May 16, 2018]

Summary of argument

The Merrimack County Superior Court misinterpreted the meaning of the 1989 settlement by ruling that it had no relevance for activities on property acquired after the agreement was reached. Plaintiffs argue that their agreement was with a businessman and a business entity, and that it restricts what NHMS can do on property which reasonable observers perceive as its premises.

The Argument

I. The Speedway's Premises are the Speedway

This case rests largely on interpretation of paragraph 1 of the 1989 Settlement Agreement, which states:

> New Hampshire Speedway covenants that it shall not permit any musical concerts of any type or description to be held on the premises currently known as New Hampshire International Speedway ("premises") except in conjunction with racing events. [Settlement Agreement, paragraph 1, Sup, p. 3]

NHMS has argued that the terms of the Settlement Agreement do not apply to the portion of their property where they intend to set up the stage for their proposed concert. NHMS holds that the premises "currently known" is the same as the "premises currently owned," which while it has the advantage of rhyme, distorts the meaning of the phrase and the intent of the parties. NHMS, in fact, argued that "the Plaintiffs concede that the word, currently, that's an adverbial phrase, which modifies the word premises. [transcript, page 16, lines 7 - 8]. The Superior Court has accepted this interpretation, stating that "this language … ties the definition of 'premises' to a point in time." [Merrimack County Superior Court, Order No. 2017-CV-00649] With that understanding, the trial court ruled that the agreement could only be applied to the property which was part of the NH Speedway holdings on the date of the agreement.

This interpretation flouts a basic understanding of grammar.

By referring to the premises "currently *known* as New Hampshire International Speedway," the parties to the agreement were talking about the property then *named* New Hampshire International Speedway, so that any future change in name would not alter the effect of the agreement. The name did, in fact, change from New Hampshire International Speedway to New Hampshire Motor Speedway, underscoring the meaning of the wording. This interpretation is further underscored by the fact that the Settlement

Agreement includes a requirement that the provisions of paragraph 1 be recorded with the track's deed to ensure it would be binding on future owners.

Furthermore, the term "premises" itself refers to the property associated with a particular business. In State v. Thiel [160 N.H. 462 (2010)], a shopper took an item from Walmart, but got only as far as the vestibule of the store, where she was accused of and later charged with shoplifting. The shoplifting statute requires that a person "[r]emoves goods or merchandise from the premises of a merchant." (RSA 644:17, II(a)). While this court declined to "define the precise parameters of 'premises,'" as used in the shoplifting statute, it did discuss the "plain and ordinary meaning" of the word. In Thiel, the court held that "'premises' is generally defined as the place of business of an enterprise or institution, and is not delimited by particular activities within the place of business." [Thiel, 160 N.H. 462, paragraph 12]. Thus, because Walmart's "premises" include its vestibule and Thiel had not exited from the vestibule, she could not be guilty of shoplifting.

Applied to the Settlement Agreement, the "premises" must refer to the property which a reasonable observer would perceive to be part of NH Motor Speedway. This is not merely the site which was the subject of an application put before the Loudon Planning Board in 1988, but the entire facility where NHMS conducts its business activities, including the north and south entrances where signs that say "NH Motor Speedway" are plainly visible, the parking areas, the camping areas, and the area where NHMS intends to set up a stage and hold a concert.

In other words, the agreement refers not just to the land owned by NH International Speedway on May 19, 1998, but to the land associated with a business then named NH International Speedway and now called NH Motor Speedway.

Mary Ann Steele, a member of the Board of Selectmen in 1989 and a signatory to the settlement agrees with this interpretation. "I understood that the intent of the Settlement Agreement was that no freestanding musical events such as concerts or festivals would be held on any land or property owned by the Speedway. I also understood that if the Speedway expanded that the Covenant would apply to any expansion." [Mary Ann Steele affidavit, Sup, p. 55]

The fact that the business did add contiguous parcels to its property as part of the same business enterprise has no bearing on the interpretation of the agreement Mr. Bahre reached with the Neighbors.

By accepting this provision, Mr. Bahre made a commitment that he would not hold concerts on the property associated with his business, except in conjunction with a race.

II. More Than a Site Plan

NHMS contended and the Superior Court agreed that the 1989 Settlement Agreement applies only to the site plan which was in dispute at that time. Further, the judge has stated that the plaintiffs did not contend that the settlement was about anything other than the site plan considered by the Loudon Planning Board in 1998. [Order, Merrimack County Superior Court, 2017-CV-00649, page 8] This is incorrect.

Following approval of a site plan application for the Speedway expansion in 1988, a lawsuit against the Loudon Planning Board was filed by James and Susan Snyder, Laurie and Stephen Webster-Booth, and Erwin Lange, all of whom lived in close proximity to the Speedway and were affected by noise and traffic associated with its operations. Before the case was heard in court, negotiations commenced between Mr. Bahre, the 5 plaintiffs, and other area residents, including Arnold Alpert and Judith Elliott.

Following negotiations, there were two Settlement Agreements signed by counsel for the Snyders, the Webster-Booths, and Lange, withdrew the lawsuit. The second, signed by the 5 plaintiffs but also by Alpert, Elliott, and another which and Galen Beale, placed specific limits on the Speedway's operations in exchange for which the above named signatories agreed to halt further objection to the expansion of the Speedway facility.

As plaintiffs pointed out [Memorandum of Law in Support of their Objection to Defendant's Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment, Sup, p. 54], approval from Alpert and Elliott was in no way needed for the lawsuit to be withdrawn and the Speedway to go ahead with its ambitious plans. Yet Mr. Bahre insisted that Alpert and Elliott sign the agreement. The only explanation was that everyone involved knew the matter was not just a site plan, but that it was intended to address the ambitious plans of the Speedway as a business enterprise. As stated above, Mr. Bahre's own actions over 20 years of ownership and his attempts to reassure Alpert and Elliott at the time he sold the property reinforce this understanding of the agreement's purpose.

Conclusion

The plaintiffs contend that the Superior Court misinterpreted the term "premises" as used in the Settlement Agreement so as to unreasonably limit the scope of the settlement and undermine its intent. The court also ignored evidence presented by the plaintiffs demonstrating that the settlement was not merely intended to resolve a dispute over a site plan application but was meant to create a recorded contractual duty regarding activities conducted by the New Hampshire International Speedway and any successor owners.

The Settlement Agreement signed in 1989 placed limits on the activities of a large commercial enterprise in an otherwise quiet, rural area: no racing after 7:30 PM, and no concerts that are not associated with racing events. If the Speedway prevails, the limits placed on it by the 1989 agreement will unravel.

This court should rule that the premises of NH Motor Speedway are the property where its business activities take place, reverse the Superior Court's decision, and enforce the Settlement Agreement which prohibits NHMS from holding "any musical concerts of any type or description" on its property "except in conjunction with racing events."

Request for Oral Argument

James Snyder, Arnold Alpert, and Judith Elliott request that they be allowed to make oral arguments because they are parties to the 1989 Settlement Agreement at the heart of this case.

Respectfully submitted,

James Snyder

Arnold Alpert

Judith Elliott

August 13, 2018

Certifications

This pleading was prepared with the assistance of a New Hampshire attorney

We hereby certify that the decision being appealed is appended to this brief and that we are providing copies to the other parties.

James Snyder

Arnold Alpert

Judith Elliott

August 13, 2018

Appendix

Order of Merrimack County Superior Court, 217-2017-CV-00649, May 16, 2018