

SUPREME COURT OF VERMONT

Venturella v. Addison-Rutland Supervisory Union

2010 VT 115 (2010) · No. 2009-344 · Decided December 15, 2010

SUMMARY

The Vermont Supreme Court affirmed a judgment for the defendant school district in a peer-harassment case. The court held that the plaintiffs and amicus curiae failed to preserve their challenges to the jury instructions under Vermont Rule of Civil Procedure 51(b). The court also declined to apply plain-error review because the appeal concerned compensatory damages for past conduct rather than a fundamental right requiring such review.

CASE DETAILS

COURT	Supreme Court of Vermont
WRITING FOR THE COURT	Paul L. Reiber, Chief Justice; John A. Dooley, Associate Justice; Denise R. Johnson, Associate Justice; Marilyn S. Skoglund, Associate Justice; Brian L. Burgess, Associate Justice
JURISDICTION	Vermont
DECIDED	December 15, 2010
DOCKET	2009-344
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiffs appealed the superior court's judgment entered on a jury verdict for the defendant school district in a peer-harassment case. The Vermont Human Rights Commission participated as amicus curiae and presented the appellate arguments. Plaintiffs challenged the jury instructions, but the Supreme Court concluded that the challenges were not preserved.
STANDARD OF REVIEW	The Supreme Court ordinarily does not review issues not raised below. Under Vermont Rule of Civil Procedure 51(b), a party must object to a jury instruction before the jury retires, distinctly state the matter and grounds of the objection, and renew the objection after the charge. Plain-error review in civil cases is limited to claims involving deprivation of fundamental rights or, in a quasi-criminal probation hearing, a liberty interest.
PRECEDENTIAL VALUE	precedential

PARTIES

Frank Venturella, Sr., et al., Vermont Human Rights Commission,
amicus curiae v. Addison-Rutland Supervisory Union, et al.

TOPICS

preservation of error appellate procedure civil rights civil procedure

PRACTICE AREAS

Appellate procedure Civil procedure Education law Civil rights

QUESTIONS PRESENTED

1. Whether plaintiffs preserved their challenge to the jury's definition of harassment.
2. Whether plaintiffs preserved their challenge to the jury instruction requiring contextual consideration of the age of the students engaging in the alleged harassment.
3. Whether the alleged instructional errors qualified for plain-error review because the case implicated a fundamental right to public education.

HOLDINGS

1. The challenge was not preserved because plaintiffs agreed with the trial court's proposed definition at the charge conference and did not object to that definition after the jury was instructed.
2. The contextualization challenge was not preserved because the objection made below challenged the use of Title IX-based language, whereas the appellate argument challenged how the instruction required the jury to contextualize the alleged harassment and objectively assess the victims' reactions.
3. Plain-error review was unavailable because the appeal concerned compensatory damages for past conduct, not a prospective deprivation of a fundamental right or interest of the kind recognized in *Varnum*.

KEY QUOTATIONS

“To preserve an issue related to jury instructions on appeal, the objecting party must also renew any objection made during the charge conference after the court instructs the jury.” (¶ 5)

*“Access to compensatory damages, even for alleged deprivation of or interference with the right to public education, is not the kind of fundamental right we recognized in *Varnum*.” (¶ 12)*

“Under these circumstances, the failure of plaintiffs to preserve their claims of error in the jury instructions is an absolute bar to judicial review of these alleged errors.” (¶ 12)

FACTUAL BACKGROUND

Two children alleged that they had been harassed by peers at school and sought compensatory damages from the defendant school district. The jury was instructed that plaintiffs had to prove harassment that was severe, pervasive, and objectively offensive and that deprived them of access to educational opportunities or benefits.

The jury found that plaintiffs failed to meet that standard. Plaintiffs later challenged the harassment definition and the instruction requiring the jury to consider the age of the students engaging in the conduct.

PROCEDURAL HISTORY

A jury found that plaintiffs had not proved harassment so severe, pervasive, and objectively offensive that it deprived them of access to educational opportunities or benefits. The superior court entered judgment for the school district. On appeal, plaintiffs and the Vermont Human Rights Commission challenged the definition and contextualization portions of the jury instructions. The Supreme Court affirmed because neither challenge was properly preserved under Vermont Rule of Civil Procedure 51(b), and plain-error review was unavailable.

DISPOSITION

affirmed

CASES CITED

- Washington v. Pierce, 2005 VT 125, 179 Vt. 318, 895 A.2d 173
- Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999)
- Follo v. Florindo, 2009 VT 11, ¶ 14, 185 Vt. 390, 970 A.2d 1230
- Schaad v. Bell Atl. NYNEX Mobile, Inc., 173 Vt. 629, 631, 800 A.2d 455, 458 (2002) (mem.)
- Winey v. William E. Dailey, Inc., 161 Vt. 129, 137-38, 636 A.2d 744, 750 (1993)
- Varnum v. Varnum, 155 Vt. 376, 383, 586 A.2d 1107, 1111 (1990)
- Osier v. Osier, 410 A.2d 1027, 1029 (Me. 1980)

OPINION

PER CURIAM.

2010 VT 115 Frank Venturella, Sr., et al. v. Addison-Rutland Supervisory Union, et al. No. 2009-344, SEPTEMBER TERM, 2010. Supreme Court of Vermont. Filed December 15, 2010. ENTRY ORDER In the above-entitled cause, the Clerk will enter: ¶ 1. Plaintiffs and amicus curiae, the Vermont Human Rights Commission,[1] appeal the superior court's judgment based on a jury verdict in favor of defendant school district in this harassment case.

The jury found that plaintiffs, two children who were allegedly harassed by peers, failed to prove they were the victims of harassment "that was so severe, pervasive, and objectively offensive" that it deprived them of "access to the educational opportunities or benefits provided" by their school.

The Commission argues that errors in the jury instructions require reversal. We conclude that these claims were not preserved and affirm. ¶ 2. The Commission argues that the trial court made two types of errors in its instructions to the jury.

First, the Commission claims that the trial court erred in defining harassment. Second, it argues that the trial court erred in requiring that the jury take into account the age of persons engaging in harassment. We consider each of these claims separately, referring to the first claim as the "definition argument" and to the second claim as the "contextualization argument." ¶ 3.

In support of its definition argument, the Commission maintains that, in defining "harassment," the trial court misread the narrow holding of *Washington v. Pierce*, 2005 VT 125, 179 Vt. 318, 895 A.2d 173, in which this Court affirmed the existence of a private statutory right of action for peer harassment.

As part of this definitional issue, the Commission argues that the trial court mistakenly required the jury to find harassment had to be "severe, pervasive, and objectively offensive," (emphasis added), claiming that under the Vermont Public Accommodations Act (VPAA), 9 V.S.A. §§ 4500-4507, and related provisions of 16 V.S.A. § 11, harassment need not be "severe or pervasive" and certainly not both "severe and pervasive" (emphasis added).

In addition, the Commission argues that harassment need not necessarily be "objectively offensive" under 16 V.S.A. § 11(a)(26)(A). Lastly, the Commission claims that the trial court's definition of harassment was in error because it required a showing that plaintiffs were "deprived" of access to educational opportunities. Instead of requiring "outright deprivation," the Commission argues that the relevant statutes require proof only that the offending conduct meets a lesser standard of "detracting" or "interfering" with access. ¶ 4.

In its contextualization argument, the Commission claims that the jury instructions improperly directed the jury to contextualize the conduct of the harassing students by "in effect reminding the jury that 'boys will be boys,'" while at the same time precluding the jury from contextualizing the reactions of the victims by stating that the harassment must be "objectively" assessed. ¶ 5.

As a general matter, issues not raised at the trial court are unpreserved, and this Court will not review them on appeal. *Follo v. Florindo*, 2009 VT 11, ¶ 14, 185 Vt. 390, 970 A.2d 1230. Moreover, objections to jury instructions are specifically addressed in Vermont Rule of Civil Procedure 51(b), which states that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

To preserve an issue related to jury instructions on appeal, the objecting party must also renew any objection made during the charge conference after the court instructs the jury. *Follo*, 2009 VT 11, ¶ 14. Defendant argues that plaintiffs failed to preserve an objection to the instruction language the Commission challenges on appeal. ¶ 6. Following the jury charge in this case, plaintiffs' counsel stated: "I just want to renew my objection of the use of the language under *Davis* that we

previously discussed." [2] As we explain below, it is clear that the "language under Davis" refers to Justice O'Connor's majority opinion in *Davis v. Monroe Cnty.*

Bd. of Educ., 526 U.S. 629, 651 (1999). At a charge conference, defendant asked for the addition of this language, and the trial court agreed. Plaintiffs objected saying: "the Davis case was a Title 9 case and... the standards set forth in *Washington v. Pierce* specifically rejected the Title 9 standard."

The language to which plaintiffs' counsel objected in this statement is the language challenged in the Commission's contextualization argument as set out below. Plaintiffs' counsel apparently revisited the objection in a discussion just before closing arguments. Counsel repeated that "Justice O'Connor's opinion was based on... Title 9..., not on an analysis based under public accommodations act, nor did it take into consideration Vermont specific law in 16 V.S.A.

550, 565." [3] She added "I actually have some language in my desk from the Vermont Human Rights Commission's interpretation of [inaudible] say that, which does acknowledge in [inaudible] way, what Justice O'Connor said, but not in the detail, which I think is way over-emphasized." [4] ¶ 7.

The above objection and a second dealing with transportation expenses as an element of damages were the only two objections that counsel made following the reading of the charge. ¶ 8. The Commission's challenges to the jury instructions in its definition argument have appeared for the first time in this Court.

In fact, when the trial court previewed its definition of harassment at the charge conference, plaintiffs' counsel stated "I agree with your charge as written," objecting only, as discussed above, to the quote from Davis. Counsel did not object to the definition of harassment following the reading of the instructions to the jury.

We conclude, therefore, that plaintiffs failed to preserve the definition argument for consideration on appeal. ¶ 9. The contextualization argument is also being made for the first time in this Court. Although plaintiffs' counsel objected to the same charge language that is being challenged here, the ground for the objection that the court was inappropriately quoting language based on Title IX of the Federal Education Amendments of 1972 was totally different from that being raised here.

Certainly, the vague post-charge objection to "the use of the language under Davis that we previously discussed" did not state "distinctly the matter objected to and the grounds of the objection," such as to include the contextualization argument as required by Rule 51(b). See *Schaad v. Bell Atl. NYNEX Mobile, Inc.*, 173 Vt. 629, 631, 800 A.2d 455, 458 (2002) (mem.); *Winey v. William E. Dailey, Inc.*, 161 Vt. 129, 137-38, 636 A.2d 744, 750 (1993). ¶ 10.

Plaintiffs seek to avoid the application of Rule 51 and our case law by arguing that the trial court committed plain error in the jury instructions. This Court considers plain error only under limited circumstances in civil cases, specifically, when "an appellant raises a claim of deprivation of fundamental rights, or when a liberty interest is at stake in a quasi-criminal probation hearing."

Follo, 2009 VT 11, ¶ 16 (citation omitted). Plaintiffs argue that the current case involves a fundamental right to public education, recognized in the Vermont Constitution, and should therefore warrant plain error review.

In making this argument, plaintiffs' claim their case is similar to *Varnum v. Varnum*, 155 Vt. 376, 586 A.2d 1107 (1990), in which this Court reviewed a claim of unpreserved error, finding that the claim involved "fundamental rights and interests." *Id.* at 383, 586 A.2d at 1111. This case is, however, distinguishable from *Varnum*. ¶ 11. *Varnum* was a divorce action in which the issue before this Court was the custody of two children.

The wife in *Varnum* appealed the trial court's award of both legal and physical custody to her former husband, claiming, in part, that the trial court had impermissibly considered her religious beliefs and activities in awarding custody, in violation of the United States and Vermont Constitutions.

We recognized, therefore, that fundamental rights and interests were at stake: both the constitutionally guaranteed right to religious liberty, which occupies a "preferred position" in the United States Constitution, and the constitutionally protected liberty interest in maintaining a familial relationship with one's child. *Varnum*, 155 Vt. at 383, 586 A.2d at 1111; see also *Osier v. Osier*, 410 A.2d 1027, 1029 (Me.

1980). ¶ 12. Comparing the current case to *Varnum*, plaintiffs argue that their case presents "a violation of a no less fundamental right [than]... the right to public education." While we recognize the importance of access to public education, we do not need to reach whether deprivation of such access involves such a fundamental constitutional right to require plain error review.

This is because the ultimate outcome of the current case will not bear on the plaintiffs' access to education, but rather on whether they receive compensatory damages for harm allegedly caused to them in the past. In *Varnum*, the decision of this Court determined the physical and legal custody of children prospectively. Plaintiffs acknowledge that a claim of plain error was considered in *Varnum* not only because of the claimed deprivation of the right to free exercise of religion, but also because the present and future well-being of minor children was involved.

In the current case, the decision of this Court will not have an impact on plaintiffs' current or future access to public education; it will determine only whether plaintiffs should be awarded damages for past conduct. Access to compensatory damages, even for alleged deprivation of or

interference with the right to public education, is not the kind of fundamental right we recognized in *Varnum*.

Under these circumstances, the failure of plaintiffs to preserve their claims of error in the jury instructions is an absolute bar to judicial review of these alleged errors. Affirmed. Paul L. Reiber, Chief Justice, John A. Dooley, Denise R. Johnson, Marilyn S. Skoglund and Brian L. Burgess, Associate Justices. NOTES [1] Plaintiffs filed a pro se notice of appeal.

Thereafter, the Commission appeared amicus curiae by right as a state agency, V.R.A.P. 29, and moved to be appointed to assist plaintiffs in presenting the appeal. The Commission then withdrew its motion to be appointed to assist plaintiffs, and the Executive Director of the Commission instead entered an appearance for plaintiffs and filed joint briefs for both plaintiffs and the Commission.

In the text, we refer to the arguments as coming from the Commission because they were made by its director. [2] The transcript in this case was based on an audio recording of the proceedings. It was filed pursuant to Vermont Rule of Appellate Procedure 10(a) and contained numerous instances where the transcriber indicated that a speaker's voice was inaudible.

A staff member of this Court listened to the tape and was able to capture more of the conversation. [3] See, *supra*, n.2. [4] See, *supra*, n.2.