

## LAW REVIEW JANUARY 1988

### CAN REC USE DEFENSE COVER VOLUNTEERS MAINTAINING TRAILS?

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Last June, I had the opportunity to address the 1987 International Snowmobile Conference on the topic of recreational injury law and risk management strategies. The conference, sponsored by the International Snowmobile Industry Association, was held in Burlington, Vermont. The audience included members of snowmobile associations and government officials with snowmobile program responsibilities.

In many instances, these nonprofit volunteer snowmobile associations construct and maintain snowmobile trails on public and private land. As a result, members of these associations were particularly interested in their potential liability for injuries sustained on their trails. As I indicated in my presentation, limited immunity may be available under the recreational use statute in a given jurisdiction.

With minor jurisdictional variations, most states have enacted recreational use statutes. (To the best of my knowledge, Alaska and the District of Columbia are the only jurisdictions which have not enacted such laws.) Under a recreational use statute, the landowner owes no duty of ordinary care to guard, warn or make the premises reasonably safe for recreational use. While there is no liability for ordinary negligence under these statutes, liability will still be imposed where the landowner is guilty of willful or wanton misconduct.

While these snowmobile associations may construct and maintain snowmobile trails, they usually do not own the land involved. The issue, therefore, is whether the limited immunity provided by a recreational use statute is available to such groups. The Smith case described herein addresses this question within the context of the Wisconsin recreational use statute.

#### UNMARKED INTERSECTION ON OPEN TRAIL

In the case of *Smith v. Sno Eagles Snowmobile Club, Inc.*, 823 F.2d 1193 (7th Cir. 1987), plaintiff Marlene Smith was injured on a snowmobile trail constructed by defendant Sno Eagles Snowmobile Club, Inc. (Sno Eagles) and maintained by defendant Headquarters Trails, Inc. (Headwaters). The facts of the case were as follows:

On December 30, 1983, Smith was injured when the snowmobile she was driving was struck by an automobile operated by Michelle Hafer in an area described as a snowmobile trail the ("Two East Trail") running parallel to Wisconsin State Highway 70 in Eagle River, Wisconsin (Vilas County), and intersecting with the Hafer's private driveway. The snowmobile trail was planned and constructed by the Sno Eagles' and

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groomed by Headwaters, a snowmobile trail grooming organization. Both Sno Eagles and profit organizations' who operate in the Eagle River, Wisconsin area. Sno Eagles' primary purpose is to promote the establishment and maintenance of snowmobile trails in the Eagle River area while Headwaters' main purpose is to groom the existing snowmobile trails in the Eagle River area. The Two East Trail was shown as operational on the 1983-84 trail maps but was not complete as a number of the directional and warning signs had not been installed ....

From the record it appears that a trail map depicts what trails are open to the public for recreational snowmobiling. The land upon which Sno Eagles and Headwaters established and groomed the snowmobile trails included stretches of privately as well as governmentally owned land. The point where the accident occurred is owned by the United States Forest Service. Sno Eagles' procedure was and is to gain permission from the landowners to construct snowmobile trails through their property. Once the trail is constructed and operational, signs are placed to designate the trail pathway. In addition, warning signs are placed at driveway and roadway intersections. After the trail is completed and the necessary signs are in place, personnel of Headwaters groom it on a regular basis. Although Headwaters' primary function is the grooming of the trails, at times it also engages in such related activities as aiding in the removal of tree stumps and bulldozing on the snowmobile paths.

Sno Eagles constructed the Two East Trail where Smith's injury occurred. Headwaters' personnel groomed the trail on December 22 and 27, 1983. At the time of the accident the trail was only partially marked as a number of the directional and warning signs had not been installed; in addition, the intersection where the accident occurred was not marked with warning signs. James Ayers, the "trail boss of Sno Eagles," in his deposition stated that the intersection where Mrs. Smith was injured was not marked because the Sno Eagles had run short of signs. Asa Roxbury, the president of Sno Eagles at the time of the accident, stated in his deposition that the trail was not open because it was still under construction.

Smith and her husband brought suit against Hafer, Sno Eagles, Headwaters, and their insurers alleging that "each party's negligence was a substantial factor contributing to her serious personal injuries." Sno Eagles and the other defendants raised the state recreational use statute as a defense to negligence liability. In pertinent part, the Wisconsin Recreational Use Statute (Wis. Stat. § 29.68) provided as follows:

An owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for hunting, fishing, trapping, camping, hiking, snowmobiling, berry picking, water sports, sight-seeing, cutting or removing wood, climbing of

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observation towers for recreational purposes, or to give warning of any unsafe condition or use of or structure or activity on the premises to persons entering for such purpose, except ... [T]his section does not limit the liability which would otherwise exist: For willful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity.

According to the trial court, "nonprofit organizations such as Sno Eagles and Headwaters which enter land for a limited purpose" were "occupants" within the meaning of the state recreational use statute. As a result, the trial court concluded that the recreational use statute precluded liability for ordinary negligence. Further, the court, found that Smith "had not established that Sno Eagles' and Headwaters' actions in neglecting to properly maintain and mark the snowmobile trails were willful." According to the court, the alleged misconduct of Sno Eagles and Headwaters "in maintaining and marking snowmobile trails [did] not fall within the rubric of willfulness." The federal trial court, therefore, granted summary judgment to Sno Eagles and the other defendants. Smith appealed.

On appeal, Smith maintained that the trial court erred in finding that "Sno Eagles and Headwaters to be occupants of Two East Trail, thus entitling them to immunity under Wisconsin's landowners recreational use immunity statute." According to Smith, Sno Eagles and Headwaters were not "in such relation to the land to be included within the legislative purpose of the statute and neither entity is an occupant of Two East Trail." Specifically, Smith argued that "entities such as Sno Eagles and Headwaters should have the power to permit or deny entry to the land in order to be entitled to the immunity" of the state recreational use statute. The appeals court rejected this argument.

As noted by the federal appeals court, the legislative purpose of the state recreational use statute was "to encourage the use of forest and farmlands for many outdoor recreational sports by restricting the common-law liability of the landowner to such users in various respects." While acknowledging that "Sno .Eagles and Headwaters were neither owners nor lessees of Two East Trail," the appeals court found that the term "occupant" in the recreational use statute applied "to Sno Eagles and Headwaters to the extent they constructed and groomed the Two East Trail."

The term "owner" indicates an individual in whom one or more interests are vested for his own benefit. In contrast, a lessee is "one who rents property from another." It is clear that Sno Eagles and Headwaters are not owners nor lessees within the general meanings of the term. They do not hold rifle to the land on which they construct and groom trails, nor do they rent the land from the tided owners ....

While "occupant" includes definitions of owners and lessee, it also means one who has the actual use of property without legal title, dominion or tenancy. In order to give meaning to "occupant" the term should be interpreted to encompass a resident of land who is more transient than either a lessee or an owner. Sno Eagles and Headwaters

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occupy the land to the extent of constructing and grooming snowmobile trails.... Sno Eagles and Headwaters, volunteer nonprofit organizations, had permission to create the recreational snowmobile pathway, to be known as Two East Trail, and used by public. To the extent Sno Eagles and Headwaters constructed maintained, and groomed Two East Trail for public use, they occupied the trail "with a degree of permanence."

If we were to circumscribe and interpret "occupant" as one in actual possession or exclusive control, the term would be indistinguishable from owner. This would negate and defeat the very intent of the Wisconsin legislature to open up as much land as possible for recreational use when it enacted section 29.68 [the recreational use statute] and added the recreational activity of snowmobiling in 1970.

The appeals Court, therefore, agreed with the trial court that "Sno Eagles and Headwaters were most properly classified as occupants of Two East Trail" pursuant to the terms of the recreational use statute.

On appeal, Smith also argued that the maintenance of the snowmobile trails by Sno Eagles and Headwaters Eagles and "their failure to adequately mark trails with safety signs" constituted willful misconduct. (The recreational use statute would not provide immunity for such behavior.) According to Smith, Sno Eagles and Headwaters were guilty of willful misconduct because they had "failed to complete the marking of the trail and to alert snowmobilers of the fact that the trail was not considered open to the public." In support of this argument, Smith pointed to the fact that Sno Eagles and Headwaters "had knowledge that the Two East Trail was depicted on 1983-1984 snowmobile maps, thereby suggesting that the trail was in fact open."

According to the appeals court, willful misconduct involved "a voluntary, conscious and intentional act, done without reasonable cause." The court further described a "willful act" as "one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act [of ordinary negligence] done carelessly, thoughtlessly, needlessly or inadvertently." Quoting from Prosser and Keeton, authorities in tort law, the appeals court defined willfulness as follows:

[T]he "usual meaning" assigned to "willful" (as well as reckless and + wanton) is that the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow ....

[The] definition of willfulness requires that three elements be established: (1) the actor do an intentional act of an unreasonable character (2) in disregard of a known or obvious risk that was great (3) as to make it highly probable that harm would follow.

Applying these definitions to the facts of the case, the appeals court found "no facts even remotely pointing to willful misconduct."

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In the instant case, Sno Eagles and Headwaters allegedly failed to properly mark the trail (since they ran out of signs) and alert snowmobilers to the fact that the trail was not considered to be open for public use even though it was shown as being operative on existing 1983-1984 snowmobile maps. We hold that Sno Eagles and Headwaters did not intentionally take actions of "an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." The actions of Sno Eagles and Headwaters at most amount to negligence but clearly do not rise to the level of a "willful failure to guard or to warn against the dangerous condition."

Consequently, the appeals court agreed with the trial court that the defendants' actions were not of a willful nature. The appeals court, therefore, affirmed the summary judgment of the trial court in favor of defendants Sno Eagles and Headwaters.