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CLIFF COLLAPSE ACCIDENTS TEST RECREATIONAL USE STATUTES

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Recreational use statutes (RUS) exist in most states. With minor jurisdictional variations, most of these statutes are based upon a model state statute from 1965 which provided that a landowner who opens his land for public recreational use free of charge owes no legal duty to guard warn or make the premises reasonably safe for such use. The landowner, however, will still be liable for willful or wanton misconduct. Unlike mere carelessness, which typifies ordinary negligence, willful or wanton misconduct is much more egregious misconduct characterized by a conscious indifference and utter disregard for the physical well being of others. Originally intended to provide limited immunity for private landowners against recreational injury liability, with some notable exceptions, courts in many jurisdictions have found the RUS applicable to public entities, including the federal government.

In the *Kirwan* opinion described below, the Texas state supreme court found no evidence of such conscious indifference on the part of the public landowner which would have voided limited immunity available under the RUS. In contrast, in the *Berman* opinion described below, the Rhode Island state supreme court found a "number of serious injuries flowing from a known risk" were sufficient to establish the statutory exception for a "willful or malicious failure to guard or warn against a dangerous condition" under the RUS.

Moreover, in *Kirwan*, the risk of injury associated with a cliff was considered an open and obvious natural condition. Accordingly, the risk of injury should have been apparent to the recreational user through the reasonable use of his senses. Under such circumstances, the recreational user, looking out reasonably for his own safety, should have been able to avoid a readily observable dangerous condition.

In contrast, cliff in *Berman* was characterized as a "latent dangerous condition" for "unsuspecting visitors." In other words, this cliff was actually much more treacherous than it appeared to be. Under the circumstances, visitors looking out reasonably for their own safety might not be expected to know and appreciate how ongoing erosion had made the cliff unstable.

Unlike an open and obvious natural hazard, evidence of a dangerous condition on the land which is known to those in control of the land, but hidden and "trap like" to the unsuspecting recreational user is more likely to indicate the type of conscious indifference necessary to trigger the "willful misconduct" exception under an otherwise applicable RUS.

UNSTABLE ROCKS

In the case of *City of Waco v. Kirwan*, 298 S.W.3d 618; 2009 Tex. LEXIS 969; 53 Tex. Sup. J. 140 (Tex. 11/20/2009), the Texas state supreme court considered whether "a landowner owes a duty to warn or protect recreational users against the dangers of naturally occurring conditions on the landowner's property" under the state recreational use statute.

As cited by the state supreme court, the state recreational use statute "expressly provides that the landowner does not assure that the premises are safe for recreational purposes." TEX. CIV. PRAC. & REM. CODE § 75.002(c)(1). In so doing, the court noted that the legislative intent of the state recreational use statute is "to encourage government and private parties to open their land to the public" by "limiting their potential liability." Accordingly, when applicable, the state recreational use statute requires "proof of gross negligence, malicious intent, or bad faith on the part of the governmental unit" to establish liability for an injured recreational user of government-owned property. Further, gross negligence within the context of the state recreational use statute is defined as "an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others."

In this particular case, a college student, Brad McGhee, fell sixty feet to his death when the solid ground on a cliff collapsed underneath him. At the time, McGhee had been watching boat races at Circle Point in Cameron Park, a municipal park located in the City of Waco. The cliff was a natural condition altered only by nature, consisting of loose rock and natural cracks. The City had constructed a wall in front of the cliff which was accompanied by a sign warning "FOR YOUR SAFETY DO NOT GO BEYOND WALL." The City had not altered, modified, or excavated the limestone cliff beyond the stone wall in front of the cliff. McGehee had crossed the wall and was beyond the warning sign when he fell to his death.

The City's first responder to the scene of the accident testified that he was aware of six incidents involving falls from the cliffs in Cameron Park, including the incident involving McGehee. While he was not aware of any other injuries caused by crumbling rocks, he did testify that one could see where rocks had fallen along the trails below the cliff over the years.

Plaintiff Debra Kirwan, the representative of McGhee's estate, alleged McGhee's death was caused by the City's gross negligence. To establish gross negligence under the state recreational use statute, Kirwan would have to produce evidence of "the City's subjective awareness of the cliff's alleged extreme degree of risk and the City's conscious indifference to these risks." As evidence of gross negligence, Kirwan cited "the lack of any sign specifically warning of the risk of fatality resulting from the condition of the Cameron Park." According to Kirwan, "the City continued to allow park patrons into the areas with the unstable rock" despite the fact that "other park patrons had died or been seriously injured by the condition of the premises."

In response, the City claimed "as a matter of law, a landowner may not be grossly negligent for failing to warn of the inherent dangers of nature." As a result, the City argued that Kirwan had "failed to allege the City was grossly negligent in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of permitted use." The trial court agreed and dismissed Kirwan's claims against the City. The state appeals court, however, reversed the trial court's judgment.

In the opinion of the appeals court, the trial court had erred in concluding "all natural conditions are *per se* [i.e., in and of themselves] open and obvious or that a natural condition may *never* serve as the basis for a premises defect claim." Instead, the appeals court held that "the recreational use statute permits premises defect claims based on natural conditions as long as the

condition is not open and obvious and the plaintiff furnishes evidence of the defendant's alleged gross negligence." As a result, the appeals court found the trial court should not have dismissed the case because Kirwan's allegations and evidence had raised an issue as to the City's gross negligence. The state supreme court granted the City's petition to review the decision of the appeals court.

OBVIOUS NATURAL CONDITIONS

In general, the state supreme court noted that a landowner has no legal duty to warn or protect recreational users from obvious defects or conditions on the premises. On the contrary, the court found a landowner "may assume that the recreational user needs no warning to appreciate the dangers of natural conditions":

> Nature is full of risks and it is certainly foreseeable that human interaction with nature may lead to injuries and possibly even death. Our state parks and lands are covered by numerous potentially dangerous natural conditions: cliffs; caves; waterfalls; swamps and other wetlands; mountains and canyons; surf; and various animals and creatures.
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> Landowners likely know of the types of animals and natural formations on their property, and will no doubt, as a general rule, foresee the risks which will accompany human interaction with these natural conditions. Reasonable recreational users who choose to visit a property for recreational purposes will also have, or in the very least should have, awareness of the inherent risks involved in interacting with nature.

Accordingly, in the opinion of the state supreme court, "a recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake." Similarly, in this particular instance, the court found McGhee as well as the City could both "reasonably expect a cliff to impose a risk of harm":

> The loose rocks and cracks at the cliff's edge could have alerted a recreational user of the possibility of crumbling rocks. Moreover, it would be obvious to reasonable recreational users that many cliffs have the potential to crumble. The risk of harm was therefore foreseeable not just to the City but to McGehee as well…
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> Indeed, the City had erected a wall and posted a sign warning visitors to stay away from the cliff's edge. The cliff also consisted of loose rocks and cracks that would have been visible to any patron who stood at its edge. However, even assuming that the particular risk at the cliff's edge--the alleged crumbling of a large section of the cliff--was not necessarily foreseeable, the general risk of a cliff's edge is.

Further, the state supreme court found the "existence of past injuries at the cliffs in Cameron Park" did not necessarily establish the "likelihood of harm at a cliff's edge" which occurred in

this particular case. On the contrary, the court noted that none of the past injuries at the cliffs in Cameron Park "appeared to have involved a large piece of earth falling from a cliff as allegedly happened in this case, or even a rock fall in general."

In the opinion of the state supreme court, it would generally be "unreasonable and unduly burdensome to ask a landowner to seek out every naturally occurring condition that might be dangerous and then warn of the condition or make it safe." Accordingly, the state supreme court held "a landowner generally owes no duty where a claim is premised on an injury caused by a naturally occurring condition." Moreover, the court found a landowner is generally not grossly negligent to protect or warn against the dangers of natural conditions on the land under the state recreational use statute.

Moreover, in this particular instance, the state supreme court found evidence of reasonable care under the circumstances, specifically, the City's construction of a wall and the posting of a prominent sign in front of the cliff stating, "FOR YOUR SAFETY DO NOT GO BEYOND WALL."

> Even assuming that the City owed McGehee a duty, which we hold today that it did not, and assuming that the City knew of an "extreme degree of risk," we fail to see how the City showed "conscious indifference to the rights, safety, or welfare of others" as required [to establish liability] under the [state recreational] use statute…
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> The wall and sign do not indicate simply "some evidence of care." Instead, the wall provided a barrier in front of the cliff to prevent patrons from accessing the cliff's edge, and the sign warned patrons to stay away from the cliff by instructing them not to go beyond the wall.

In so doing, the state supreme court rejected Kirwan's contention that "the sign was inadequate in that it failed to identify the particular hazard applicable to this case, namely the risk of fatality resulting from the condition of the Cameron Park premises."

> We do not intend to discourage landowners from posting detailed warning signs where necessary, but a barrier and a sign warning a recreational user to stay away from a dangerous natural condition generally will be sufficient to avoid a showing of "conscious indifference to the rights, safety, and welfare of others" under the statute.

Further, Kirwan contended that "the City demonstrated conscious indifference by continuing to allow park patrons into the areas with the unstable rock." The state supreme court, however, found "the City did not actually allow park patrons into the areas with the unstable rock." On the contrary, the court found "the City had constructed a wall and posted a sign warning visitors not to enter the specific area of the cliff."

As a result, the state supreme court found Kirwan allegations failed to raise an issue "as to whether the City acted with conscious indifference." In so doing, the state supreme court held "a

landowner generally owes no duty under the recreational use statute to warn or protect against the dangers of natural conditions."

The state supreme court, therefore, reversed the judgment of the appeals court and dismissed the case.

MULTIPLE TRAGEDIES

In the case of *Berman v. Sitrin*, 991 A.2d 1038; 2010 R.I. LEXIS 45 (R.I. 4/20/2010), the Rhode Island state supreme court found itself faced with another case involving "a catastrophic injury that occurred on the Cliff Walk, a major Newport tourist attraction." As described by the court, "[t]he Cliff Walk runs along 18,000 feet of Newport's shoreline, high above the rocky Atlantic coast; its majestic cliffs and scenic viewpoints beckon hundreds of thousands of visitors every year." The Cliff Walk is a public easement over private land; a number of individuals and entities own the land over which it runs. The City of Newport, however, had assumed authority and exercises control over the maintenance of the Cliff Walk regulating public access. The facts of this particular case were as follows:

> On August 17, 2000, newly married twenty-three-year-old Simcha Berman and his wife, Sarah, stopped in Newport as part of a belated honeymoon. The couple, from Brooklyn, New York, decided to take a late-afternoon tour of The Breakers, one of the historic mansions in Newport owned and operated by the Preservation Society of Newport. They paid admission to tour the mansion and the lavishly landscaped grounds. During the tour, the Society's guide pointed out the Cliff Walk, which runs along The Breakers' property, separated by a fence; plaintiffs allege that the guide suggested that, after the tour, the group experience the Cliff Walk.
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> After the tour, plaintiffs first spent some time enjoying the grounds of The Breakers, and then they decided to take an excursion to the Cliff Walk. They exited the fenced-in area of The Breakers through a gate on the north side of the property onto Shepard Avenue, a public street. The plaintiffs followed Shepard Avenue to the portion of the Cliff Walk that runs along the Society's property--an area known as Ochre Point. The plaintiffs allege that there were no signs warning of the Cliff Walk's potential hazards at either The Breakers or the Shepard Avenue entrance.
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> According to plaintiffs, after they reached the paved portion of the Cliff Walk, the couple noticed a "beaten path," which they assumed would guide them toward the water. Simcha took the lead and proceeded down the path with Sarah close behind. Suddenly, the ground beneath Simcha's feet gave way and he plummeted approximately twenty-nine feet to the rocks below. His injuries were catastrophic; he suffered a severe spinal cord injury that rendered him a quadriplegic.

Plaintiff Berman alleged that the defendant City of Newport had "negligently caused Simcha's injuries by failing to properly inspect, maintain, and repair the Cliff Walk. Moreover, plaintiffs

alleged that the City knew of premise defects on the Cliff Walk and "failed to guard or warn against them."

The trial court granted the City's motion for summary judgment based upon immunity for liability under the Rhode Island's Recreational Use Statute (RUS). Berman appealed.

DISCOVERED PERIL

As cited by the state supreme court, in pertinent part, the state recreational use statute (RUS) provided as follows:

> [A]n owner of land who either directly or indirectly invites or permits without charge any person to use that property for recreational purposes does not thereby:
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> (1) Extend any assurance that the premises are safe for any purpose;
> (2) Confer upon that person the legal status of an invitee or licensee to whom a duty of care is owed; nor
> (3) Assume responsibility for or incur liability for any injury to any person or property caused by an act of omission of that person…
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> (a) Nothing in this chapter limits in any way any liability which, but for this chapter, otherwise exists: (1) For the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity after discovering the user's peril…

Accordingly, under the RUS, the court found "landowners who open their land for recreational activities have no duty to the public other than to refrain from willful or wanton conduct" (i.e., the limited legal duty traditionally owed to trespassers). Further, the court noted that the RUS had been amended in 1996 to expand the term "owners" to include the state and its municipalities. As characterized by the state supreme court, the exception to public landowner immunity under the RUS for "willful or malicious conduct" would determine whether or not the City of Newport was potentially liable under the circumstances of this particular case.

In so doing, under the circumstances of this case, the state supreme court found that the City had effectively discovered the "user's peril" based upon the "dangers surrounding the Cliff Walk," specifically "tragedies such as this have occurred on multiple occasions."

> It is beyond dispute that for many years, the city has had actual notice of the dangerous instability of the ground underneath the Cliff Walk and its eroding edge… The alleged facts in this case bear a haunting similarity to the plight of Michael Cain, who died in 1991 from injuries that he suffered during a visit to the Cliff Walk. The record in that case established that when Cain stepped from the paved area onto a "well-worn spot * * * that appear[ed] to be a perfectly natural area for a stroller to stop * * * and look[ed] out over the Atlantic Ocean," he fell to his death, "*after the ground beneath his feet gave way*." See: *Cain v. Johnson*, 755 A.2d 156 (R.I. 2000)

> Nine years later, almost to the day, plaintiffs allege that Simcha stepped off the Cliff Walk's pavement, onto what appeared to his untrained eye to be a well-worn, grassy path when, as he contends, the "ground gave way" beneath his feet and he plunged to the rocks below.
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> Indeed, the record before us is replete with evidence demonstrating that long before the Cain tragedy, the city knew that the forces of natural erosion were taking a toll on the Cliff Walk. In 1983, and again in 1987, after Brian Putney, a Salve Regina student, fell to his death from the Cliff Walk…

Accordingly, in the opinion of the court, "the evidence produced in this case demonstrates that the city had actual or constructive knowledge of the perilous circumstances, and, having been afforded a reasonable amount of time to eliminate the dangerous condition, failed to do so." As a result, the court found the City's failure to address a known dangerous condition put "the members of the public whom the city invites to visit the Cliff Walk in a position of peril."

Given the "Cliff Walk's instability," the state supreme court, therefore, found a jury could reasonably conclude that "the city voluntarily and intentionally failed to guard against the dangerous condition, knowing that there existed a strong likelihood that a visitor to the Cliff Walk would suffer serious injury or death." As a result, under the circumstances of this case, the state supreme court held that "the city had an affirmative duty to take reasonable steps to warn and shield unsuspecting visitors, such as the Bermans, against these known and grave dangers in some reasonable manner."

In so doing, the state supreme court emphasized that "it is the number of serious injuries flowing from a known risk that brings us to this conclusion today." According to the court, "we cannot conclude that when the Legislature extended the protection of the RUS to the state and its municipalities, it intended to relieve the city from any responsibility whatsoever to the many tourists who visit the Cliff Walk."

> We recognize that for purposes of tort liability under the RUS, a visitor to the Cliff Walk is accorded the status of a trespasser to whom no duty of care is owed, save to refrain from the conduct set forth in § 32-6-5(a)(1) [i.e., willful or malicious conduct]. But we are equally cognizant that if we were to apply the language of § 32-6-5(a)(1) as argued by the city, the throngs of visitors, who, although accorded the status of trespassers, are nonetheless innocent tourists, will continue to face grave danger based on an interpretation of the RUS that is not only absurd, but unjust.
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> We are not persuaded that the Legislature intended the RUS to serve as an invitation to ignore known hazards while profiting from this major tourist attraction where such danger is present. We simply decline to attribute such intent to the Legislature…
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> Were we to interpret the statute in the manner that the city suggests, our holding

> would serve as a disincentive to the state and its subdivisions to make necessary safety repairs to publicly owned and taxpayer-financed recreational facilities, or to warn the unsuspecting and innocent members of the public of known dangerous conditions.

As a result, the state supreme court held "the defendant City of Newport may not invoke the limited protections of the RUS because the city had a duty to warn or guard against the Cliff Walk's latent dangerous condition." The state supreme court, therefore, vacated the trial court's summary judgment in favor of the defendant City and remanded (i.e., sent back) the case for trial to consider "whether the city is liable in tort," i.e., personal injury liability for negligence.

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