

NPS FAILS TO WARN DIVER OF SUBMERGED ROCK

James C. Kozlowski, J.D., Ph.D.

© 1987 James C. Kozlowski

This month's column presents the third and, presumably, the final reported decision from the federal courts on the case of *Mandel v. United States*. An earlier *Mandel* decision appeared in the *Recreation and Parks Law Reporter* (RPLR I, 2, Report # 84-18). The decision presented herein illustrates an instance where staff recommendations to recreational users failed to warn of known hazards.

EVERYBODY GOES TO MUD CAVE

In the case of *Mandel v. United States*, 793 F.2d 964 (5th Cir. 1986), plaintiff Michael Mandel "was permanently paralyzed when he dived into a swimming hole in the Buffalo River and struck his head on a submerged rock." This incident occurred on August 1, 1978. The facts of the case were as follows:

The swimming hole known as Mud Cave, is located on property known as Camp Orr. At the time of the accident, Camp Orr was owned by the Boy Scouts of America (it has since been acquired by the National Park Service)... The Buffalo National River is part of the national park system and was established in 1972 to preserve a 130 mile long, scenic, natural, free-flowing river in northern Arkansas. As of 1973, almost 60,000 acres bordering the Buffalo River had been acquired by the Park Service, while 35,000 acres, including Camp Orr, remained in private hands.

At the time he was injured, Michael Mandel was twenty-two years old and employed as a camp counselor by the St. Louis Jewish Community Center Association. He first visited Buffalo River National Park on Memorial Day weekend in May of 1978. He was accompanied by three other camp counselors, Billy Chase, Brian Spector, and Eddie Adler. The four were acquainting themselves with the park in preparation for future camping trips to the area.

Mandel next returned to the park on the weekend of July 4, 1978, along with Adler, Spector, several other camp counselors, and thirty to forty young teenagers. The group set up camp at a primitive camping area in the park known as Kyle's Landing. Shortly after their arrival, Mandel and Adler were approached by a National Park Service ranger.

Mandel testified that he asked the ranger where his group could go swimming, whereupon the ranger directed them to a nearby swimming hole - Mud Cave - saying, "That's where everybody goes. That's where we recommend for you to go." Throughout the July 4th weekend, Mandel and several members of his camping expedition swam at Mud Cave without incident.

On August 1, 1978, Mandel returned to Kyle's Landing area with a second group of teenagers from St. Louis. Together with counselors Chris Kirby and Stuart Ollanik, Mandel arrived at Kyle's Landing ahead of the others. The three unloaded a van filled with supplies and proceeded to Mud Cave for a swim. All three men climbed a large rock located several feet from the bank of the river. Kirby and Ollanik dived from the rock into the swimming hole. They encouraged Mandel to do the same. When Mandel dived into the water he struck his head on a rock submerged four or five feet beneath the surface and broke his neck. As a result, he is a quadriplegic.

Mandel sued the United States and the Boy Scouts of America alleging that the defendants "were negligent in failing to warn him of submerged rocks in the Buffalo River." Both defendants denied ownership of the riverbed where the accident took place and moved for summary judgment. The federal district (i.e. trial) court granted summary judgment to both defendants based upon the state recreational use statute. Under this statute, recreational injury liability was limited to willful and malicious misconduct, not ordinary negligence. Mandel appealed.

The appeals court affirmed the summary judgment in favor of defendant Boy Scouts of America and its insurer. The appeals court, however, held that reasonable minds could differ under the facts of this case as to whether the National Park Service acted willfully and wantonly. Consequently, summary judgment in favor of defendant United States was inappropriate. The appeals court, therefore, remanded this case to the district court for further proceedings.

On remand, the district court determined that the United States did not own the riverbed at Mud Cave. As a result, the court found that the state recreational use statute was inapplicable to the United States because "the statute applies only to the owner of land where the accident occurred." On the other hand, the district court found that "the National Park Service provided general services and exercised authority over the entire river, including the parts flowing through private property." Based upon this finding, the district court concluded that the National Park Service was negligent. Specifically, the National Park Service had "failed to exercise ordinary care in not warning Mandel of the presence of submerged rocks in the Buffalo River, including that portion of the river flowing through Camp Orr." The district court, therefore, found the defendant United States liable for Mandel's injuries and entered judgment awarding Mandel \$928,193.58 in damages. The United States appealed.

On appeal, the United States argued that "it had no legal duty to warn Mandel of the danger of diving into those parts of the river located on privately owned property." The appeals court acknowledged that, generally, "there is no duty to warn of hazards on another's property." However, under applicable Arkansas law, the court found: "One who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

The evidence shows that Mud Cave was freely accessible from the park. There were no visible indications that Mud Cave was part of Camp Orr and not a part of the park. Mandel testified that because the ranger recommended Mud Cave he assumed it was part of the park. He also testified that the ranger's recommendation made him feel "secure in that area." ...

The record shows that the Park Service actively and voluntarily solicited informational inquiries from its patrons concerning the entire river, and not just the portion of the river flowing through the park. Visitors to the park were encouraged to "ask a ranger" any question about the river... Three park rangers went to Mud Cave the day following Mandel's accident and, without notifying the Boy Scouts, conducted an investigation. Before leaving the area, one of the rangers shot down a rope swing that extended over the swimming hole.

The appeals court, therefore, agreed with the district court that "once the Park Service chose to furnish patrons with information about the entire Buffalo River, it had a concomitant duty to exercise reasonable care in doing so notwithstanding the private ownership of portions of the adjoining land."

The United States argued further that, "if it had a duty to warn, its failure to do so was not the proximate [i.e. legal] cause of Mandel's injuries." The district court had found the National Park Service was negligent for its "failure to post warning signs at either the Kyle's Landing area or adjacent to the roadways leading from the park to Mud Cave." Given the following facts, the appeals court agreed that "reasonable care in this case included the duty of warning of submerged rocks in the river."

It is undisputed that the Park Service did not know of the particular rock at Mud Cave. The district court found, however, that the Park Service knew generally that the Buffalo River was laced with submerged rocks. A Park Service brochure warned of the danger of submerged rocks, stating that "rocks are harder than heads," and the Park Service erected a warning sign against diving at one location on the river where a fatality had occurred. There was testimony from a Park Service ranger and a Park Service employee indicating that they were aware of submerged rocks strewn throughout the river.

Moreover, in the two weeks preceding Mandel's mishap at least two accidents involving submerged rocks occurred on the Buffalo River, resulting in the death of one man and serious injury to another... The Park Service was on notice that submerged rocks posed a threat to those diving in the river. Though the Park Service ranger who recommended Mud Cave did so prior to the time of the two July accidents, it is not unreasonable to assume that he knew or should have known of those dangers outlined in the Park Service's brochures.

The United States contended that "the ranger who recommended Mud Cave to Mandel could not have foreseen that one month later Mandel would have been injured while diving there." Therefore, the United States argued that the ranger's recommendation was not the proximate (i.e. legal) cause of Mandel's injuries. The appeals court rejected this argument. In the opinion of the appeals court, the facts found by the district court "support the conclusion that the conduct of the ranger and the Park Service was responsible for Mandel's injuries."

The ranger's conduct was not the only basis for the district court's imposition of liability, however. The district court also cited the Park Service's failure to post warnings as constituting negligence under the circumstances. The district court

found that the two acts of negligence, when considered together, were the proximate cause of Mandel's injuries.

In Arkansas, proximate cause is generally defined as "a cause from which a person of ordinary experience and sagacity could foresee that the result would probably ensue." The question ordinarily is for the trier of fact. There is no question but that Mandel chose to swim at Mud Cave based on the ranger's recommendation. We cannot quarrel with the district court's observation that had some visible warnings been posted at the Kyle's Landing area, Mandel would not have gone swimming at Mud Cave.

The United States argued further that the failure to warn was an immune discretionary function under the Federal Tort Claims Act. The appeals court also rejected this argument.

[T]he discretionary function exception does not apply to governmental conduct that involves the execution of a previously adopted safety policy that is neither regulatory in nature nor in the nature of administrative decision-making grounded in social, economic, or political policy... The conduct forming the basis of the Park Service's alleged negligence was not the decision to institute a policy of warning park users of the hazards of boating on and swimming in the Buffalo River, but rather was the failure of Park Service personnel to comply with the previously adopted safety policy.

Additionally, we note that decisions on the policy or planning level are generally protected by the discretionary exception, whereas decisions made at the operational level are not. Though distinguishing between the two levels of governmental action is not always easy. It is clear that the conduct complained of in this case involves operational level negligence at best. The judgment and decision-making involved in day-to-day management of a recreational area are not the sort of decision-making contemplated by the exemption. For the foregoing reasons we conclude that the discretionary function stands as no barrier to Mandel's suit.

Finally, the United States argued that "the district court erred in allocating seventy-five percent of the fault for Mandel's accident to the United States and only twenty-five percent to Mandel himself." Once again, the appeal court rejected defendant's argument.

Apportionment of fault under Arkansas' comparative fault statute, Ark. Star. Ann. 27-1765, is a matter within the province of the finder of fact, and thus subject to review by this court under the clearly erroneous standard. We find no clear error in the district court's application of the statute to these facts and therefore decline to set aside its apportionment of the negligence.

The appeals court, therefore, affirmed the judgment of the district court in favor of plaintiff Mandel.