

FAILURE TO WARN OF TEMPERATURE IN HOT SPRINGS
NEGATES RECREATIONAL USE IMMUNITY

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Judicial interpretation of recreational use statutes (RUS) and their applicability to public entities continues to be the most recurrent issue in recreational injury liability case law. Almost every jurisdiction has enacted an RUS based in large part on a model state statute developed in 1965. Under an RUS, a landowner, who opens his land for public recreational use free of charge, owes no legal duty of care to a recreational user to guard, warn or make the premises reasonably safe. Immunity under the RUS, however, will not apply where the landowner is guilty of willful (i.e. intentional) or wanton misconduct (i.e. utter disregard for the physical well-being of others) which causes injury to the recreational user.

Where the lower legal standard of care (willful/wanton misconduct) is applicable under an RUS, landowner liability is highly unlikely. To establish liability, the injured plaintiff must, at a minimum, demonstrate the landowner's utter failure to take the most minimal precautions in the face of an extremely dangerous condition known to the landowner, but not apparent to the recreational user. Although less likely under an applicable RUS, liability remains a possibility as illustrated by the *McMurray* decision described herein. In this case, the issue was whether the federal landowner's alleged failure to warn of a dangerous satisfied the willful/wanton misconduct exception to RUS immunity.

The following description of the *McMurray* opinion is taken from Volume I, number 3 of *Legal Issues in Recreation Administration* (LIRA). LIRA is a quarterly publication of the George Mason University Center for Recreation Resources Policy. LIRA is co-sponsored by the National Recreation and Park Association. Each edition of LIRA provides a series of case reports on a specific law-related topic of interest to recreation and park administration, similar to the *McMurray* decision described below. The first two editions of LIRA addressed First Amendment Rights in Public Parks and Mandatory Dedication for Public Parks. The focus of Volume I, number 3 of LIRA is Federal Recreation Liability.

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When You're Hot, You're Hot

In the case of *McMurray By and Through McMurray v. United States*, 918 F.2d 834 (9th Cir. 1990), plaintiff Earl Mc Murray, a minor child, "was severely burned when he fell or sat in a shallow stream that had a water temperature between 160 and 180 degrees Fahrenheit." The incident occurred at Lee Hot Springs near Fallon, Nevada. This area is controlled by the defendant United States through the Bureau of Land Management, United States Department of the Interior (BLM). The facts of the case were as follows:

Barry and Kathy McMurray are the parents of plaintiff Earl Jay McMurray. In 1983 the McMurrays camped for the Fourth of July weekend at Indian Lakes in the Stillwater area near Fallon, Nevada, an area they were unfamiliar with, having moved to Nevada from Oregon in April 1983. On July 2, 1983, Barry McMurray, his son Earl, aged two, and his stepson William, drove with Steve Rhyne and Steve's son Steve Jr. from Fallon to Shurz, Nevada to purchase fireworks. On the return trip, they decided to investigate an oasis-like area they had noticed from the highway. They followed a dirt road into the area that is known as Lee Hot Springs.

On July 2, 1983, Lee Hot Springs consisted of a small spring and pool with a narrow, shallow stream that flowed south into a marshy area that was vegetated with grass, brush, and a large tree. The reported temperature of the water flowing from the spring had ranged over the years from a low of 156 to a high of over 200 degrees Fahrenheit. On July 2, there were no signs identifying the area as a hot spring, nor were there fences or warnings of any kind. The Bureau of Land Management knew that the public had unrestricted access to the hot springs. Its failure to post the area with warning signs was in contravention of its stated policy to inform the public of natural hazards.

As they entered the area the adults in the vehicle observed a sign that read:

UNITED STATES DEPARTMENT OF THE INTERIOR -
BUREAU OF LAND MANAGEMENT ENTERING PUBLIC
LANDS - HELP MAINTAIN YOUR PROPERTY

Concluding that the area was safe, the McMurrays and Rhynes departed from their vehicle. Barry McMurray followed what appeared to be a foot path that crossed the stream, which was approximately twelve inches wide and four to six inches deep. Although the stream was then flowing at a temperature of between 160 and 180 degrees Fahrenheit, the high temperature was not apparent to the casual observer. There was no steam, hissing, or odor that would put a visitor on notice that he had encountered a hot spring. Barry noticed the pool to his left, which was thirty to forty feet across, and instructed Earl, who was tagging along behind, to stay away from it. Barry then proceeded to a nearby bush to relieve himself. Earl ventured to the stream. At that point he either fell or sat in the water, and he immediately suffered extensive second and third degree burns to his body from the waist down.

McMurray, through his parents, brought suit against the United States under the Federal Tort Claims Act (FTCA). Pursuant to the FTCA, the government may be held liable for personal injuries "to the same extent that a private person would be liable under similar circumstances" under the law of the jurisdiction where the injury occurred. As a result, the federal district court looked to the law of Nevada to determine whether the United States was liable in this particular instance. In so doing, the district judge applied the Nevada recreational use statute and found "the government guilty of a willful failure to guard or warn against a dangerous condition." The district then awarded McMurray and his family \$ 718,029.00. The United States appealed.

As described by the appeals court, the Nevada Recreational Use Statute (Nev. Rev. Stat. Ann. § 41.510, 1986) provided in pertinent part as follows:

An owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for crossing over to public land, hunting, fishing, trapping, camping, hiking, sightseeing, or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes, except... [t]his section does not limit the liability which would otherwise exist for: (a) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

Accordingly, the appeals court found that this statute "immunizes landowners from liability unless they have willfully or maliciously failed to warn or guard against a dangerous condition." In this particular instance, the parties agreed that "Lee Hot Springs was a dangerous condition that the government failed to warn the public of." Since McMurray had not alleged any malicious misconduct by the United States, the sole issue on appeal was "whether the government's failure to warn was willful within the meaning of § 41.510 [the Nevada recreational use statute]."

The United States contended that "under Nevada law, willfulness requires a showing of a specific intent to cause harm." The trial court, however, "rejected this definition of willful and applied a more lenient standard" by the Nevada Supreme Court which had modified the definition of willful "to remove the intent to injure requirement" as follows:

Willful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury will probably result, or with a wanton or reckless disregard of the possible results... [This interpretation] modifies the definition of willful misconduct by deleting the intent to injure requirement, defining it as intentional wrongful conduct done with the knowledge that serious harm to another will probably result. Willful misconduct is described as an act "that the actor knows, or should know, will very probably cause harm." Willful misconduct requires a consciousness that one's conduct will very probably result in injury.

Applying this definition to the facts of the case, the appeals court found that "the court correctly concluded that the government willfully failed to post a sign at Lee Hot Springs."

We note it is quite likely that even without the change in Nevada's definition of "willful," the outcome of this case... should be a finding of liability on the part of the U.S. The district court here found "impressive evidence that the BLM had actual knowledge of Lee Hot springs and its dangerous temperature." The BLM (a) was aware that the public had unrestricted access to the springs; (b) was on notice of other persons burned by the hot water at this and other similar hot springs; and (c) actually welcomed the public to the site.

Even without the change in Nevada law the United States may be said to have "willfully failed to guard, or to warn" against this dangerous condition.

Accordingly, the appeals court found that the trial court "correctly applied the definition of willful in this case, holding that the government consciously failed to post a sign at Lee Hot Springs despite its knowledge of the danger of persons being burned presented by this spring... [which] constitutes a willful failure to warn under Nevada law."

Nevada's Recreational Use Statute imposes liability for a "willful or malicious" failure to warn or guard against dangerous conditions. Nevada law states that "no part of a statute should be rendered nugatory [i.e. inconsequential] nor any language turned to mere surplusage, if such consequences can properly be voided." ... [I]nterpreting willful as requiring a specific intent to injure would render the term malice in the Recreational Use Statute "mere surplusage." Therefore, our holding that wilful conduct under Nevada law does not require an intent to injure is consistent with the Nevada Supreme Court's most recent opinion discussing these standards of conduct.

The appeals court, therefore, affirmed the judgment of the trial court in favor of plaintiff McMurray.

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