

RECREATIONAL USE STATUTES IN STATE SUPREME COURTS

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Based upon years of reported recreational injury liability case law involving public parks and recreation agencies, liability should be the exception rather than the rule. As illustrated by the recent state supreme court opinions described herein, one of the major themes involving landowner liability for recreational injuries in public parks and recreation has been the scope and applicability of limited immunity under a state recreational use statute (RUS).

With minor jurisdictional variations, an RUS exists in most jurisdictions. In many jurisdictions, the RUS definition of “landowner” has been extended through expressed statutory language or court decree to include governmental entities, including public parks and recreation. Generally, an RUS provides that a landowner owes no legal duty to guard, warn, or make the premises reasonably safe when allowing public recreational use on the land free of charge. Accordingly, when an RUS applies, a landowner will be immune from liability for ordinary negligence, but not willful or wanton misconduct.

Unlike a singular careless act or omission characteristic of ordinary negligence, within the context of RUS immunity, willful/wanton misconduct or gross negligence requires much more egregious misconduct which exhibits behavior tantamount to an intent to injure or an outrageous and utter disregard for the physical well being of a recreational user on the premises. In addition to the willful/wanton misconduct exception, the typical RUS includes a fee or consideration exception. In keeping with the original legislative intent for an RUS to encourage public recreational use of private land free of charge, the fee or consideration exception to RUS immunity generally applies where the landowner charges a fee or gains some direct economic benefit from a specific portion of the premises where the recreational user was injured.

BALLFIELD HOLE

In the case of *Carlson v. Town of South Kingstown*, 111 A.3d 819; 2015 R.I. LEXIS 48 (4/8/2015), the Supreme Court of Rhode Island considered the scope and applicability of immunity under the state RUS for a spectator injury at a baseball game in a park owned and maintained by the Town.

On July 28, 2010, plaintiff Kathleen Carlson attended her son's little league baseball game at Tuckertown Park in the Wakefield section of South Kingstown. The game was open to the general public, and that no tickets were required to attend. The league had a permit, issued by the town, to host this game, as it did for all its games, but the town charged no fee to use the park.

After the game had ended, Carlson, who had been standing in the area of a set of batting cages located just off the first-base line of the park's lower field, walked towards the concession stand, where she planned to meet her son. On her way there, Carlson felt her ankle twist under her and she heard what she believed was the breaking of bones in her leg. Carlson testified

that she never fell to the ground, but "when I took a step on my right leg, I felt my ankle fall into this little divot in the ground." As a consequence of her stumble into the "divot," Carlson broke her right leg.

A witness to the injury would later testify by deposition that this "divot" was a part of a "repetitive problem" caused by "kids waiting to get into the batting cage, [when] they dig their cleats into the ground." As to the size and shape of the hole that caused her injury, Carlson described the "divot" as "only under two inches but I don't really remember." Another witness to the injury said the hole was, "6, 8 inches across, maybe a little wider than that, a good 8, 10 inches deep."

The town's director of leisure services, Theresa Murphy, testified that the most recent inspection of the field had been accomplished two days before the incident. She testified further that the town had received no notice of any hazardous condition existing at the park. The particular hole in question was filled in by the Town the day after the incident.

It was the town's regular policy to maintain the fields at Tuckertown Park on Mondays and Thursdays; no reports had been received about the area of Carlson's accident. Asked whether the town was aware of holes near the batting cages being a common problem, Murphy stated, "I'm not sure it's a common problem, but I am aware that that type of thing can happen." Murphy, however, admitted that it was not uncommon "to find holes in ball fields after people have used them." Murphy testified that, if the town had been aware of any potential hazard, it would have had it repaired or fixed. There was no record of any similar incidents causing injuries at Tuckertown Park.

In her complaint, Carlson alleged the Town's negligence "in maintaining the premises of Tuckertown Field" had caused her injury. In response, the Town moved for summary judgment, claiming the state RUS barred Carlson's lawsuit. A summary judgment in the Town's favor would effectively dismiss Carlson's lawsuit. Carlson, however, claimed the RUS fee exception and/or the RUS willful/wanton misconduct exception were applicable in this particular instance. Specifically, Carlson claimed that defendant had willfully or maliciously failed to guard or warn against a dangerous condition on the land and that plaintiff had been charged for her access to the park.

RECREATIONAL USE STATUTE

In the opinion of the trial court, the state RUS was "still alive and well." Having found "no evidence here that the town was aware of this particular hole and/or the plaintiff was facing that peril before falling into that hole," the trial court granted summary judgment in favor of the Town. Moreover, the trial court found "the fees paid to the league and the taxes paid to the town" did not "constitute an admission fee" or "charges as contemplated under the Recreational Use Statute." Carlson appealed.

As cited by the state supreme court, the statutory language in this particular law was typical of almost every other RUS providing, in pertinent part, 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: (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...

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; or (2) For any injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof.

As noted by the state supreme court, a 1996 amendment to the Rhode Island RUS clearly indicated the state legislature "intended to include the state and municipalities among owners entitled to immunity under the statute." That being said, the state supreme court voiced its disapproval of extending the RUS to include governmental immunity.

We have on a number of occasions cast a disapproving eye on this expansion of immunity, saying, "the state and its municipalities are presumptively better able to bear the burden of damages" than an injured plaintiff, and that "the statutory scheme does nothing to motivate governmental landowners to make their properties safe." Nonetheless, we have also been consistent in saying that this Court is not a legislative body; we are bound to apply the statute in light of both its language and our jurisprudence.

PUBLIC RECREATIONAL USE?

On appeal, Carlson argued that she "was not the type of user the statute contemplates" because "her use of Tuckertown Field was not the type of use the RUS was meant to cover." The state supreme court disagreed. According to the court, "the nature and scope of the activities occurring on the land" would determine whether the RUS applied in a particular situation. Specifically, for the RUS to apply, the premises must be open and available to the public for recreational purposes and activities.

In this particular instance, the state supreme court found the area where Carlson was injured was in an area "away from the field of play" where people were "around the whole of the baseball field." Since "the general public was free to access [this area] for recreational use," the state supreme court held the RUS was indeed applicable to Carlson's claim.

WILLFUL MALICIOUS MISCONDUCT?

On appeal, Carlson also contended the RUS did not apply to her case under the willful or malicious conduct exception to RUS statutory immunity because the Town had failed to guard against the likelihood of serious injuries. The state supreme court disagreed.

According to the court, there was "no such strong likelihood of injury" known to the Town.

While witness testimony had indicated that similar holes were a “repetitive problem,” Murphy, the Town’s director of leisure services, had testified that “she and her department had received no notice of the hole.” While acknowledging the possibility of the type of hole that caused Carlson’s injury, Murphy had doubted that it was a “common problem.”

In the opinion of the court, “such evidence falls woefully short of establishing the existence of sufficient facts to show that the town knew of the particular hole that injured plaintiff or of similar persons injured by similar defects in the park.” Specifically, the state supreme court found the facts in this particular case fell “far short” of willful or malicious conduct which would require the Town to be “saturated with the knowledge that some feature of its land presents a clear and present danger to completely innocent users.” As a result, the state supreme court found the trial court had correctly concluded there was “no evidence here that the town was aware of this particular hole,” and the Town did not know Carlson “was facing that peril.”

RUS FEE EXCEPTION?

Carlson also contended that the fee exception made RUS immunity inapplicable to her case because either: (1) she paid a fee to the league on her son's behalf so that he could participate, or (2) she paid taxes to the town which uses a part of its budget to maintain Tuckertown Park. As cited by the court, the fee exception in the RUS provided that no limitation of liability existed “[f]or any injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof. Further, the court noted that the RUS defined a “charge” as “the admission price or fee asked in return for invitation or permission to enter or go upon the land.”

Citing precedent from earlier decisions, to qualify as a “charge” under the RUS fee exception, the state supreme court found “the fee must be imposed for recreational use of the land.” In this particular instance, the court found Carlson was not subject to a “charge” for recreational use of Tuckertown Park.

When she was deposed, Ms. Carlson agreed that the game she went to see was open to the public and that it was not necessary to buy a ticket to get into the park to watch the game. The fee plaintiff paid to the league had no effect on her right to use the park or view the game; accordingly, such a fee is not a charge to use the land as the statute contemplates.

Moreover, the state supreme court found any taxes Carlson may have paid to the Town “did not affect whether she could use the park for recreation, and therefore the taxes were not charges or fees to use the land.” Further, the court noted that Carlson “was not required to be a resident of South Kingstown to enter Tuckertown Park.”

In the opinion of the state supreme court, it was “inconsistent with common sense” to allow Carlson’s “taxpayer argument” to trigger the fee exception in the RUS. To do so, in the opinion of the court, “would eviscerate a municipality's RUS protection in every case where one of its own taxpayers was injured on its land, but not when a nonresident was injured.” According to the court, it would be “beyond absurd” to interpret the legislative intent of the

“charge” exception in the RUS in the manner suggested by Carlson.

Accordingly, the supreme court found the trial court had “correctly applied the RUS” in determining there was no fee charged to Carlson “to walk onto this field to observe her son playing.” The state supreme court, therefore, affirmed the summary judgment of trial court in favor of the Town, effectively dismissing Carlson’s lawsuit. In so doing, the court noted that any legal redress would have to come through the state legislature, not the courts.

Although we are sympathetic to the plaintiff, who suffered great pain and monetary losses from her injuries, we are bound by the language of the statute and guided by our past interpretations of it. A different result is only possible by revisiting the statute, a task, as we have said in the past, that is not for this Court, but for the General Assembly.

SCHOOL/PARK SERVICE AGREEMENT

Similarly, in the case of *Hayes v. City of Plummer*, 357 P.3d 1276; 2015 Ida. LEXIS 259 (9/30/2015), the Supreme Court of Idaho had to determine whether the state recreational use statute was inapplicable because the defendant City had received a “charge” or “compensation” for use of the land upon which plaintiff Hayes was injured.

On September 17, 2011, Martin Hayes (Hayes) was seriously injured after stumbling on uneven ground hidden by grass while attending his grandson's Pop Warner football game at the Plummer School Park (Park), which is owned by the City of Plummer (City).

The Pop Warner program is annually organized and supported by the Coeur d'Alene Tribe and the Plummer community. The program has no affiliation to the School District or the City, although the program did reserve the field through the School District's scheduling form. It is undisputed that the Pop Warner program used the fields at no expense to the program, the players, or those in attendance.

On October 13, 1976, the Western Benewah School District (School District) conveyed the Park to the City in fee simple for consideration of ten dollars. The Park was deeded shortly after both parties entered into a formal agreement to "develop outdoor recreational facilities for general public outdoor recreation use" as outlined in the parties' Joint Service Agreement (JSA). Both parties assume as fact that School Park was transferred to the City in 1976 for the sole purpose of obtaining a federal grant for improvements, which were not available if the School District continued to own it. As a result of this transaction, the City was able to obtain a federal grant from the Land and Water Conservation Fund (LWCF) to make general improvements to the park for public use and enjoyment.

Pursuant to the JSA, the City agreed to construct joint facilities in the park for public use in conjunction with school activities, and the School District agreed to maintain the facilities. Although the School District pays for all maintenance, water, and electric utilities; has made significant improvements to the facilities; maintains property insurance for those improvements; and controls the scheduling for organized events, the Park is generally open to the public at no expense. In this particular instance, Hayes did not pay any fee or admission to

enter the Park.

Hayes filed a premises liability claim against the City for his injuries. In turn, the City filed a motion for summary judgment on the basis that the City was entitled to a limit on liability under Idaho's Recreational Use Statute. The district (i.e., trial) court agreed with the City. In the opinion of the district court, Idaho's Recreational Use Statute, [Idaho Code section 36-1604](#), provided the City of Plummer with immunity because the City did not receive "compensation" or "charge" for use of the land upon which Hayes was injured. The district court, therefore, granted the City's motion for summary judgment, effectively dismissing the lawsuit. Hayes appealed to the state supreme court.

FEE FOR SERVICES RENDERED?

As described by the state supreme court, the specific issue to be resolved on appeal was "whether the School District's payment of utilities and property insurance, maintenance, improvements to the facilities, and control of the Park's activities schedule constitutes 'compensation' that the City 'charged' to the School District in exchange for the use of the Park."

As noted by the court, "[t]he objective of statutory interpretation is to derive the intent of the legislative body that adopted the act."

Statutory interpretation begins with the literal language of the statute and provisions should not be read in isolation, but must be interpreted in the context of the entire document. Words should be given their plain, usual, and ordinary meanings and only if the language is ambiguous may this court consider rules of statutory construction.

Citing the dictionary definitions, the court found the plain, usual and ordinary definitions of "charge" and compensation" were as follows:

"Charge" is ordinarily defined as "to demand a fee; to bill." *Black's Law Dictionary* 282 (10th ed. 2014). "Compensation" is defined as "remuneration and other benefits received *in return for services rendered*." *Black's Law Dictionary* 342-43 (10th ed. 2014)

Accordingly, the state supreme court found a plain reading of these terms within the context of the state recreational use statute "unambiguously demonstrates that the terms 'charge' and 'compensation' only reflect payment for direct use or admission to the property." In so doing, the court noted that the "compensation exception" under a state recreational use statute generally is only applicable "where a landowner received monetary payment specifically for the public's entrance or enjoyment of a recreational area." Specifically, the fee exception to immunity under an otherwise applicable state recreational use statute usually requires a "charge" as "consideration given in return for the express and direct privilege of being allowed to utilize the property, in money or other thing of value." In this particular instance, the court found "Hayes entered the Park at no expense whatsoever...[and no] assertion has ever been made that either the School District or the City benefited by Hayes's access to the Park in any

way.”

That being said, the state supreme court recognized this particular Joint Service Agreement (JSA) presented a rather “unique issue” within the context of an RUS fee exception, viz. “the City benefits from the School District’s services, yet the Park remains open and free to the general public.” The state supreme court, however, noted that the Idaho Recreational Use Statute “contemplates that land owners may enter into leases or other arrangements within the protection of the statute.”

Under subsection (e), a private entity may lease land to the state, presumably for compensation or profit, yet immunity may be extended so long as the land is leased "for recreational purposes" and no charge is levied against the public for access or use of the land. [I.C. § 36-1604\(e\)](#)

As characterized by the court, the arrangement between the City and the School District was “not unlike a land-lease agreement expressly contemplated by Idaho’s Recreational Use Statute” between a private entity and the State. In particular, the court noted the JSA between the City and the School District specifically articulated that the arrangement was “intended to better allocate resources for the mutual best interest of developing outdoor recreational facilities for general public outdoor recreation use.”

Moreover, regardless of the “general character of the property,” here a school/park, the court found the “compensation exception” to the RUS applied as long as the property was “gratuitously accessible” for “public recreational space.”

The intent and purpose of Idaho’s Recreational Use Statute is to provide recreational access at no cost to the general public. [I.C. § 36-1604\(a\)](#). In this case, the City and the School District have done that by allocating resources in order to provide and maintain the Park for all to enjoy.

Having found “the City did not charge or receive compensation from Hayes or the public for their use and enjoyment of the land,” the state supreme court held the RUS was applicable under the circumstances of this particular case. In so doing, the state supreme court held “[t]he School District’s payment of all utilities, ongoing maintenance, and scheduling of the Plummer School Park is not a ‘charge’ or ‘compensation’ under Idaho’s Recreational Use Statute.” The state supreme court, therefore, affirmed the summary judgment of the lower court in favor of the defendant City.

CONDITION OF PREMISES?

In the case of *Combs v. Ohio Department of Natural Resources*, 2016-Ohio-1565; 2016 Ohio LEXIS 953 (11/17/2915), the Supreme Court of Ohio considered whether the Ohio RUS provided immunity for injuries to a recreational user which were caused by the alleged negligence of an employee in the course of maintaining the premises.

On July 27, 2011, Richard Combs was celebrating his birthday at Indian Lake State Park, which is open to the public without an admission charge. He spent the night fishing and early

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the next morning walked to Pew Island, which affords better fishing. As Combs walked across the causeway to Pew Island, Jerry Leeth, an ODNR employee, was using a boom mower to cut weeds and brush along the lakeshore. One of the mower blades hit the riprap—stones placed along the waterline to prevent erosion—and threw a rock that struck Combs in the eye and face and caused serious injuries.

Combs sued ODNR in the Court of Claims, alleging Leeth had negligently operated the boom mower and caused his injury. The Court of Claims granted ODNR's motion for summary judgment. In the opinion of the claims court, Combs was a recreational user at the time of his injury. Accordingly, ODNR had no duty to keep the park safe for his entry or use and his negligence claim was barred as a matter of law.

The Tenth District Court of Appeals reversed the decision of the Court of Claims. In the opinion of the appeals court, the recreational use statute “provides immunity only for injuries caused by the defective condition of the premises.” In this particular instance, the appeals court found the recreational use statute did not apply because “Combs claimed that he was injured by the negligence of a park employee and not by a defect in the premises.” On appeal, the state supreme court agreed.

As cited by the state supreme court, the Ohio RUS, R.C. 1533.181, provided that “no landowner owes any duty to a recreational user to keep the premises safe for entry or use or extends any assurance in that regard.” Accordingly, the court found “a landowner is not liable to a recreational user for injuries caused by the defective condition of a recreational premises.”

However, under the circumstances of this particular case, the Ohio supreme court found injuries which “resulted from the alleged negligent operation of a boom mower” were not injuries arising “from the condition of the premises.” As a result, the state supreme court held “the recreational user statute does not limit a landowner's liability for a negligently inflicted injury that does not arise from the condition of the premises.”

Having found the RUS did not apply to the circumstances of this particular case, the court found ODNR had “a duty to conduct mowing safely” and ODNR could be “held liable for the negligence of its employees if it breaches that duty.” As a result, Combs could proceed with his negligence claim against ODNR in the state claims court.

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