

VEHICLE FEES MAY IMPACT RECREATIONAL USE IMMUNITY

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

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Most public park systems are under increasing pressure to raise operating revenues through fees and charges, including parking and vehicle fees. Accordingly, what is the legal significance, if any, on the availability of limited landowner immunity under an applicable state recreational use statute (RUS) in charging a parking or vehicle fee to enter public parks which are otherwise open for public recreational use free of charge?

As noted by one federal court, in the *Winebrenner* decision described below, a number of state and federal courts have held that a parking fee is not the equivalent of an entrance fee as contemplated by the term 'charge' as defined in the various state recreational use statutes." According to the *Winebrenner* court, numerous states that have addressed recreational use statutes with nearly identical definitions of "charge" have determined that the definition does not encompass per-vehicle parking fees.

On the other hand, depending upon the circumstances of a given situation, a vehicle fee could be construed as effectively an entrance fee within the context of a motorist visitor fee or a vehicle day pass. If such fees are construed as fees for the public recreational "use" of the land, the "fee exception" to limited landowner immunity under an otherwise applicable RUS could be triggered.

Most jurisdictions have some form of a state recreational use statute (RUS). In many instances, state and federal courts have found these statutes applicable to both public entities and private individuals. On the other hand, in several jurisdictions, the expressed language in the statute itself or court opinions have limited RUS applicability to private individuals and excluded public entities.

With minor jurisdictional variations, an RUS generally provides that landowners who open their land for public recreational use, free of charge, owe no legal duty to guard, warn or make the premises reasonably safe for such public recreational use. Accordingly, under an applicable RUS there is no liability for ordinary negligence. The owner may, however, still be liable for willful or wanton misconduct which causes injuries to recreational users. Unlike mere carelessness or a momentary oversight typical of ordinary negligence, willful/wanton misconduct is characterized by outrageous behavior which demonstrates an utter disregard for the physical well being of others.

In addition to the willful/wanton misconduct exception, the "fee exception" to limited landowner immunity under an applicable RUS considers whether the owner or occupier has indeed opened the land for public recreational use "free of charge." In so doing, to determine the scope and applicability of the RUS fee exception, the specific issue is generally whether an injured individual was charged or paid a fee for recreational use of the land. Further, there may be a question whether the fee exception is limited to a distinct area where an access fee was charged, e.g., parking lot or campsite. If so, then the fee exception may not apply to another portion of the

premises where the injury actually occurred and the landowner provided public recreational access free of charge to all types of users.

A per person entrance fee generally voids RUS limited landowner immunity because all recreational users would have paid a fee to access the entire premises. Given per person entrance fees, the premises would necessarily not meet the legal requirement that the land be "open to public recreational use free of charge."

In contrast, a parking fee for vehicles to enter parks does not necessarily establish that the premises are not open to public recreational use free of charge. On the contrary, unlike a per person entrance fee, one could argue that the premises is still open for public recreation use free of charge and a parking or vehicle fee is simply a charge imposed on vehicle use, unrelated to individual recreational access. In the alternative, except for the parking lot itself, it could be argued that no charge is made for public recreational use of the remainder of the premises outside of the parking lot.

Depending on the specific language and characterization of the parking or vehicle fee involved, the line of cases described herein provide some insight into the reasoning likely to be applied by a federal or state court in determining whether a particular payment was an immune parking fee or a non-immune entrance/day use fee within the context of an RUS in a given jurisdiction.

MASSACHUSETTS DAY USE FEE

In the case of *De Dios v. Massachusetts Executive Office of Environmental Affairs*, 23 Mass. L. Rep. 565 (Mass.Sup.Ct. 2/22/2008), plaintiffs were injured when a tree branch fell on them at Quinsigamond State Park (Park). At the time of the injury the Park was owned and controlled by the Commonwealth of Massachusetts (Commonwealth) as well as operated and maintained for recreational purposes.

On July 5, 1999 the plaintiff, Cruz drove to the Park with De Dios and others and upon entering the parking area they were required to pay a \$2.00 fee. After parking the car other members of the party left the parking area to find a place to have a picnic in the Park. Cruz and De Dios were still in the area of the car when a tree limb fell on them, injuring both of them.

The issue before the court was whether the state recreational use statute, G.L.c. 21, §17C, immunized the Commonwealth it from liability under the circumstances of this case. That statute reads, in pertinent part:

[a]ny person having an interest in land including the structures, buildings and equipment attached to the land . . . who lawfully permits the public to use such land for recreational . . . [or] charitable purposes without imposing a charge or fee therefore shall not be liable for personal injuries or property damage sustained by such members of the public . . . while on said land in the absence of wilful, wanton, or reckless conduct by such person. G.L.c. 21, §17C(a)

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As noted by the court, for an owner to qualify for immunity: (1) the owner must permit the public to use the land for recreational purposes, and (2) the owner must not impose a charge or fee for such use.

Given the fact that the Commonwealth permitted the public to use the Park for recreational purposes, the specific issue before the court was "whether a fee was charged for the use of the Park."

It was undisputed that the plaintiffs paid a \$2.00 fee upon entering the parking area of the Park. The defendant Commonwealth characterized the fee as a parking fee, whereas, the plaintiffs claim that the fee was an entrance fee to allow them use of the park.

In the opinion of the court, based on this evidence, it was unclear whether the plaintiffs had indeed paid a fee for "use" of the Park. In particular, a copy of the top portion of the ticket issued to the plaintiffs upon payment of the \$2.00 fee mentioned "day use" and "Entrance fee" with no reference to a "parking fee":

"MASSACHUSETTS STATE PARKS" and directly below this heading the following appears: "\$2.00 Day Use Ticket." The balance of the ticket contains a series of questions designed to allow the visitors to evaluate the park. Included in the questions is an inquiry as to whether the "Entrance fee" was appropriate. Nowhere on the ticket is there a reference to the fee being a parking fee.

As a result, the court denied the Commonwealth's motion for summary judgment to effectively dismiss plaintiff's claim based upon the RUS.

INDIANA MOTORIST FEE

In the case of *Chapman v. United States Department of Agriculture*, 1:06-cv-0848-JDT-TAB (S.D. Ind. 11/8/2007), plaintiff was severely injured when she fell ascending stairs to a restroom in a recreation area within Hoosier National Forest, a national forest managed by the United States Department of Agriculture Forest Service (the "Forest Service").

At the time of the injury, visitors on foot or bicycle were allowed to enter the recreation area without paying any entrance fee, but motorists were required to pay a fee (per-vehicle, not per-passenger) in order to enter and park. On the day of the accident, Chapman and her family used an annual pass (the "Vehicle Entry Pass") that she had previously purchased for thirty dollars in order to enter the recreation area by car. A concessionaire collected and retained the fee that paid for the Vehicle Entry Pass; the Forest Service did not collect such fees from the concessionaire.

The Forest Service argued that Chapman's claim was barred by the Indiana Recreational Use Statute ("RUS"), Ind. Code § 14-22-10-2. As noted by the court, the RUS would not protect the Forest Service from liability if Chapman did pay a fee for permission to enter the recreation area.

As cited by the federal court, the Indiana RUS defined "monetary consideration" as "a fee or other charge for permission to go upon a tract of land." Ind. Code § 14-22-10-2(b).

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The Forest Service contended that Chapman "did not pay for permission to enter and use the Recreation Area, but only for the convenience of entering by car and parking." In support of its argument, the Forest Service points out the following facts:

(1) payment of an entrance fee was not required for general entry to the Recreation Area in August 2003, and walkers and bicyclists entered without payment of any fee; (2) the fee for Ms. Chapman's annual pass was charged on a per-vehicle, not a per-passenger, basis; and (3) Ms. Chapman purchased the annual pass from a third-party concessionaire, who retained that parking fee and never passed it along to the Forest Service.

In response, Chapman claimed "all visitors who wished to enter the Recreation Area by car were required to pay an entrance fee" even if "walkers and bicyclists could enter the Recreation Area for free." Accordingly, Chapman contended that "her purchase of the Vehicle Entry Pass should be viewed not merely as a parking fee, but as a fee required to obtain permission to enter the Recreation Area for all motorist visitors."

The federal district court agreed with Chapman. In the opinion of the court, there was "no evidence to suggest that some motorist visitors could enter the park without payment of a fee." On the contrary, according to the court, "it appears that payment of a fee was unavoidable for those who wished to access the Recreation Area by car."

As a result, the federal district court found Chapman had alleged sufficient facts that her Vehicle Entry Pass might constitute "payment of monetary consideration" under the fee exception to the RUS, precluding summary judgment for the Forest Service on the basis of the RUS.

WEST VIRGINIA PARKING FEE

In the case of *Winebrenner v. United States*, 389 F. Supp. 2d 716 (S.D. W.Va. 9/28/2005), plaintiff was injured while swimming in Lake Sherwood at Monongahela National Forest. Upon arriving at the park, plaintiff was charged a \$3.00 fee for the car he was driving.

As cited by the court, the West Virginia recreational use statute ("RUS") provided limited immunity to persons who open their land for recreational purposes. W. Va. Code Ann. § 19-25-4. The statute defined charge as "the amount of money asked in return for an invitation to enter or go upon the land." W. Va. Code Ann. § 19-25-5.

It was undisputed that the plaintiff and his family paid a \$3.00 fee that was assessed upon each car that entered the park. The plaintiff argued that this fee equates to a "charge" under West Virginia's RUS. In response, the defendant United States contended that the fee was merely a parking charge and not the type of entrance fee contemplated by the statute.

The federal district court agreed with the government, finding the \$3.00 fee was a parking fee and not a general entrance fee. In so doing, the court noted deposition testimony that the \$3.00 fee was levied per car and not per passenger in the car. In addition, the court cited testimony that an individual who entered the park on foot or on bicycle did not pay the \$3.00 fee. As a result,

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the court found those who enter on foot or bicycle are entitled to the same use of the park as those who arrive by car and pay the \$3.00 parking fee.

Plaintiff Winebrenner contended that the parking fee was a de facto entrance fee because of the distance of the park from a main road. The court rejected plaintiff's argument because it "does not account for the fact that the fee is only charged per car and not per individual in the car." As a result, the court concluded that "a fee charged per car and not per passenger and that is not charged to those arriving on foot or by bicycle is a parking fee and not a general entrance fee."

Having determined that the \$3.00 fee was purely a parking fee and not a general entrance fee, the court then considered whether this fee "equates to a 'charge' under the RUS." In the opinion of the court, the immunity of the state recreational use statute is not lost under the fee exception "when a fee is "levied per vehicle without regard for the number of people inside and no fee is charged to those entering by other means mere payment of a per-vehicle fee to enter and park."

In this particular instance, the court noted that the \$3.00 fee "was charged per vehicle irrespective of the number of passengers and it was the policy of the park that those arriving by means other than a motorized vehicle were not charged any fee." Accordingly, the federal district court concluded that "the charge exception to the liability immunity provision of West Virginia's RUS does not apply in this case."

IDAHO VEHICLE ENTRANCE FEE

In the case of *Allen v. State of Idaho*, 136 Idaho 487; 36 P.3d 1275 (12/3/2001), Jimmie Allen and his father, Richard Allen, went to Winchester Lake State Park in Lewis County to fish. They paid a fee of \$2.00 at the entrance to the Park to enter the Park in their vehicle. While fishing, Jimmie fell into Winchester Lake and impaled his left thigh on a steel fence post located under the water.

Jimmie and his parents filed suit against the State alleging both a failure to make the premises safe and a failure to warn of an unreasonably dangerous condition. In response to the complaint, the State filed a motion to dismiss the action contending that the State is protected from liability under Idaho's recreational land use statute, I.C. § 36-1604. The Allens, however, maintained the \$2.00 vehicle entrance fee constituted a charge to use the Park for recreational purposes. The State argued that the "Allens had not been 'charged' for the use of the Park but had merely paid an entry fee to use the parking lot." The state supreme court rejected the State's argument, finding the "Allens were charged by the State to enter the Park."

The \$2.00 entrance fee for the Aliens' vehicle bore no relation to the number of persons in the vehicle and therefore served also as a charge covering all of the individuals who entered the Park in the vehicle. Upon entering the Park after paying the \$2.00 fee, those individuals - including Jimmie Allen - were not prohibited from engaging in recreational activities, if they wished. They were not required to pay any additional charge or fee to fish or to otherwise use the lake in a particular recreational manner, having already been charged for entering the Park in their vehicle.

Further, the court noted that signs on a tollbooth at the entrance to Winchester Lake State Park stated that a "day visitor" must pay a fee at the tollbooth and that the amount of that fee is \$2.00 for entering the Park in a motor vehicle. Further, the court found that these signs "did not state that the fee charged was a parking fee, nor did they state that users need not pay the fee if they parked in a specific parking lot." On the contrary, the court found there was "nothing in the record showing that there was any sign at the main parking lot stating that an entrant must pay to merely park at that lot."

As a result, the court concluded that "the entire Park was available for the use of the individuals in the vehicle, not just the lot where the vehicle could be parked, once the entrance fee was paid." In the opinion of the state supreme court, "the fee charged was a vehicle entrance fee, not a fee for parking at the main parking lot" noting "the tollbooth was located at the entrance to the Park, not at the entrance to the main parking lot." Under these particular circumstances, the state supreme court, therefore, held "the State as the landowner is not protected from liability by virtue of the recreational use act." Further, in determining the applicability of the RUS fee exception, the state supreme court found the fact that "a portion of the fee charged may have been intended by the State for the upkeep of the Park, its roads, or the parking lot" was "irrelevant."

WASHINGTON "DAY PASS" FEE

In the case of *Voss v. United States* (W.D. Wash. 1/30/2006), the federal district court considered whether the defendant United States was not immune from suit under the Washington State Recreational Land Use Act based upon a required \$5.00 "Daily Fee." The facts of the case were as follows:

On June 15, 2002, four members of the Young family traveled to the Gifford Pinchot National Forest (GPNF), where they proceeded to the Lava Canyon recreation site for a family outing. The family consisted of Stacey Young, Sr., Jennifer Voss, and their two sons, Stacey Jr. (age 5) and Elijah (age 2).

After parking the car, the family walked from the picnic area down a paved trail to the banks of the Muddy River, approximately one-half mile away. Stacey Jr. and Elijah stepped into the river at its side, and threw rocks while mom took pictures.

Stacey Jr. either slipped or fell into the river and was quickly carried away by a swift current. Stacey Sr. dove into the water in an effort to rescue his son. Both father and son were swept to their deaths over a waterfall downstream about 50-75 yards from where Stacey Jr. fell into the river...

Prior to the tragic accident, Mr. Young parked the family car in the Lava Canyon parking lot and filled out a Northwest Forest Pass "Day Pass". According to instructions, he placed the permit on his vehicle dashboard. Rather than pay the \$5.00 per vehicle fee, Young wrote on the form "Disabled Veteran 70% USMC" and signed the form.

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The law suit alleged that "government agencies were negligent for failure to warn of dangerous site conditions and improperly designing visitor walkways."

As noted by the federal district court, under Washington State law, "both public and private landowners may receive immunity for unintentional injuries to people if the landowner allows the public to use their property for recreational purposes without charging a related fee." On the other hand, the court acknowledged that Washington courts have determined that "immunity is not favored in the law and that statutory grants of immunity should be strictly construed."

The specific issue before the court was whether the Young family was "charged a fee of any kind for the privilege of recreating at Lava Canyon."

The defendant United States argued that "the fee charged was a parking fee and not a fee for use of the land" as contemplated in the state recreational use statute. In so doing, the government cited a number of opinions issued by state and federal courts in other jurisdictions to "support the view that because people who arrive by other means are charged nothing to recreate, a per vehicle 'parking pass' does not constitute a recreational use fee and the statutory immunity survives," including the *Winebrenner* opinion described above.

According to the court, "the simple logic articulated in these cases offers a tempting resolution of the case at bar."

One flat fee was charged for the Young vehicle without regard to the number of passengers and all others who arrived at the national forest by horseback, bicycle, kayak, canoe or foot paid nothing for access to the land.

How is it possible that the "Day Pass" charged only to vehicles entering the parking lot at the Lava Canyon trail head can be anything more than a parking fee that does not jeopardize the landowner's immunity?

According to the court, it is "the intention of the landowner that determines the nature of the fee" within the context of a state recreational use statute. In so doing, the court further noted that "a landowner may charge a fee for something other than use of the land, and still enjoy recreational use immunity." Moreover, the court acknowledged that "a landowner can charge a fee for public use of a portion of its recreational land without losing immunity for public use of the remainder."

In this particular instance, however, the court was "not convinced" that the landowner intent of "the per vehicle fee charged at Lava Canyon was a parking fee." Specifically, the court noted that the "sign at the site where the fee is charged says nothing about a parking fee." On the contrary, the sign simply indicated that a \$5.00 "Daily Fee" was "Required."

Based on this language in the sign, the court found it was "unclear whether the fee charged is a parking fee or, as its name suggests, is a Day Pass fee for use of the amenities provided by the government." Further, the court found it was "far from obvious that the collection of the fee only from motorists on a per vehicle basis conclusively establishes it as a parking fee." According to the court, "[t]he method of collection may merely reflect the logistical realities of collecting a

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use fee in a remote area in a cost-effective manner." On the other hand, if the fee was indeed a "Day Pass," the court noted recreational use statute "immunity would not survive."

In light of the uncertainty "about the proper characterization of the \$5.00 per day charge," the federal district court found summary judgment in favor of the defendant based on immunity under the state recreational use statute was "inappropriate." The case would, therefore, proceed to trial for a jury to determine whether the \$5.00 charge was an immune parking fee or a non-immune daily use fee.

James C. Kozlowski, J.D., Ph.D. is an associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: jkozlows@gmu.edu
Webpage with link to Law Review archive: <http://mason.gmu.edu/~jkozlows>