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MASSACHUSETTS & ARIZONA TEST SCOPE OF RECREATIONAL USE STATUTE

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In pertinent part, one of the final recommendations of the President's Commission on Americans Outdoors (PCAO) was to "improve recreational use statutes to provide greater protection to governmental entities." Recreational use statutes, based in whole or part on a 1965 model act, have been enacted in almost every state. With minor jurisdictional variations, recreational use statutes generally provide that an owner owes no duty of care to recreational users on the land free of charge to guard, warn, or make the premises reasonably safe for recreational purposes. There is, however, no statutory immunity where the owner's willful or wanton misconduct causes injury to the recreational user on the premises free of charge.

To date, courts in no fewer than twenty jurisdictions have considered the applicability of state recreational use statutes to governmental entities. Where the definition of "owner" or "land" within the recreational use statute contains an expressed reference to public entities or land, courts will usually interpret the law accordingly and extend recreational immunity to governmental entities. Resolution of the applicability issue, however, is less clear where there is no expressed reference to governmental entities or public land within the statute. The general trend is to find that these statutes do apply to governmental entities, particularly where the tort claims act in a given jurisdiction provides that governmental entities will be held liable for negligence "like a private individual." The *Anderson* case described herein is the one of the most recent illustrations wherein the applicability issue was resolved in favor of governmental entities based upon the "liable like a private individual" standard in the state tort claims act.

While the general trend is for courts to find recreational use statutes applicable to governmental entities, a countervailing trend is to limit the availability of statutory immunity to injuries sustained on undeveloped, rural or semi-rural land. Once again, state courts will look to the statutory definitions to determine the scope of immunity under the recreational use statute, particularly the definitions of "land" and "recreational purposes." As illustrated by the *Walker* decision described below, a court is less likely to find the statute applicable to developed suburban or urban land where the statutory definition of "land" is limited to forests or agricultural land. Similarly, courts are more likely to limit the applicability of the statute to undeveloped rural or semi-rural lands where the enumerated list of recreational purposes within the statute is limited to "true outdoors" activities like hunting, fishing, trapping, etc.

Prior to the PCAO recommendation to improve recreational use statutes to provide greater protection for governmental entities, several jurisdictions had already amended the statutory definition of "owner" or "land" to expressly include governmental entities. In addition, several jurisdictions have also expanded the statutory definitions of "land" and "recreational purposes" to expressly include tracts and recreational activities within suburban and urban areas. In most instances, these amendments to the

recreational use statute was a legislative response to court decisions which had limited the applicability of the law to private owners and/or undeveloped rural or semi-rural lands. As stated above, once the intent of the legislature is expressed and clear, courts will resolve the applicability issue accordingly in favor of extending statutory immunity to governmental entities and suburban/urban lands.

Defective Home Plate Immune?

In this case of *Anderson v. City of Springfield*, 406 Mass. 632, 549 N.E.2d 1127 (1990), plaintiff William Anderson argued that he "was injured as a result of a defect in home plate on a softball diamond in a public park, and that the defendant City of Springfield's negligence caused the defect." The City raised the state recreational use statute as a defense to Anderson's negligence claim. The state recreational use statute, General Laws c. 21, § 17C, provided as follows:

> An owner of land who permits the public to use such land for recreational purposes without imposing a charge or fee therefor, or who leases his land for said purposes to the commonwealth on any political subdivision thereof shall not be liable to any member of the public who uses said land for the aforesaid purposes for injuries to person or property sustained by him while on said land and in the absence of wilful, wanton or reckless conduct by such owner, nor shall such permission be deemed to confer upon any person so using said land the status of invitee or licensee to whom any duty would be owed by said owner. The liability of an owner who imposes a charge or fee for the use of his land by the public for recreational purposes shall not be limited by any provision of this section.

As noted by the trial judge in this case, "it was undisputed that the city was the owner of the field where the injury occurred, and that it permitted the public to use the field for recreational purposes without charging a fee." Consequently, the trial judge found that the state recreational use statute was applicable, and "since no wilful, wanton, or reckless conduct was alleged," the trial judge "granted the city's motion for summary judgment." Anderson appealed.

On appeal, Anderson maintained that "the Legislature did not intend to include the Commonwealth or any of its subdivisions within the meaning of the term 'owners of land' in G.L. c. 21, § 17C." Specifically, Anderson argued the state recreational use statute "was passed prior to the enactment of the Massachusetts Tort Claims Act, G.L. c. 258, and that Massachusetts governmental entities were therefore already largely immune from civil liability at the time when the statute was passed." The appeals court rejected this argument. "Even if we concede for the purposes of argument that some ambiguity exists in G.L. c. 21 § 17C [the state recreational use statute], the Massachusetts Tort Claims Act resolves all doubt in favor of the city."

> General Laws c. 258 § [the state tort claims act] provides that governmental entities are to be liable "in the same manner and to the same extent as a private individual under like circumstances." We have said actions brought under the Massachusetts Tort Claims

> Act are governed by the same principles that apply to actions involving private parties, and that governmental entities are put on the same footing as private tort defendants. The Massachusetts Tort Claims Act, therefore, in effect provides the city a statutory defense against the plaintiff's claim even if G.L. c. 21, § 17C, is unclear in this regard.

Having found that the city should be afforded immunity under the state recreational use statute like private individuals, the appeals court affirmed the judgment of the trial court which found the state recreational use statute barred Anderson's negligence claim against the City of Springfield.

Suburban Bike Path Immune?

In the case of *Walker v. City of Scottsdale*, 786 P.2d 1057 (Ariz.App. 1989), plaintiff Myrna Walker was injured on a bike path maintained by the defendant City of Scottsdale. The bike path was located on land owned by defendant McCormick Ranch Property Owners' Association. The facts of the case were as follows:

> Walker was injured in a fall which occurred while she was riding her bicycle along a bicycle path at 85th Street and Hayden Road in Scottsdale, Arizona. The property on which the bicycle path is located is a greenbelt area within McCormick Ranch, a planned, residential community in Scottsdale, Arizona. The property was owned by the Association. The City of Scottsdale owned an easement on the McCormick Ranch property for the bicycle path, which it constructed and maintained. Walker filed suit against the Association and the City for her injuries, alleging that her fall was caused by the negligence of the defendants in the design, construction, and maintenance of the bike path.

Both the City and the Association argued that they owed no duty of care to Walker under the circumstances of this case based upon the state recreational use statute, A.R.S. § 33-1551. The trial court agreed and granted summary judgment to both defendants. Walker appealed.

As described by the appeals court, the state recreational use statute provided as follows:

> Arizona Revised Statutes § 33-1551, enacted in 1983, is a statute granting immunity from suit, with limited exceptions, to owners, lessees or occupants of certain types of property for injuries to persons who have made certain recreational uses of the property without paying an admission fee for such use.
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> An owner, lessee or occupant of premises does not: (1) Owe any duty to a recreational user to keep the premises safe for such use.
> (2) Extend any assurance to a recreational user through the act of giving permission to enter the premises that the premises are safe for such use. (3) Incur liability for an injury to persons or property caused by any act of a recreational user...

> "Premises" means agricultural, range, mining or forest lands, and any other similar lands which by agreement are made available to a recreational user, and any building or structure on such lands.
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> "Recreational user" means a person to whom permission has been granted or implied without the payment of an admission fee or other consideration to enter upon the premises to hunt, fish, trap, camp, hike, ride, swim or engage in similar recreational pursuits. The purchase of a state hunting, trapping or fishing license is not the payment of an admission fee or other consideration as provided in this section.
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> This section does not limit the liability which otherwise exists for maintaining an attractive nuisance, or for wilful or malicious failure to guard or warn against a dangerous condition, use or activity.

According to the appeals court, the "narrow question" presented on appeal was "whether A.R.S. § 33-1551 limits the liability of those with an interest in a maintained bike path running through a greenbelt area of an urban, residential neighborhood is a suit brought by a bicyclist injured on the bike path." Walker contended that "the property on which her injury occurred was not 'premises' as that term is defined" in the state recreational use statute. The specific issue before the appeals court was, therefore, "whether the greenbelt area of McCormick Ranch within which the accident occurred falls within the statutory definition of 'premises'."

Based upon "the language used in the statute," the appeals court found that "the legislature did not intend for property such as the McCormick Ranch greenbelt situated within the McCormick Ranch residential area within the City of Scottsdale to come within the purview of the statute."

> In order to determine the legislature's intention as to what property is encompassed within the statute, we must look to the language used in the statute. The language of a statute is the most reliable evidence of its intent. It is clear from the language used in the statute that the legislature sought to place some limitations on the types of property falling within the immunity provided by the statute. Instead of granting immunity to an owner, lessee, or occupant of "any: premises, the legislature restricted the meaning of "premises" to "agricultural, range, mining or forest lands." Where a statute expressly defines certain words or terms used in the statute, the court is bound by the legislative definition in all cases where rights of parties litigant are based upon the statute...
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> In contrast to the [recreational use] statutes [in other jurisdictions]... which place little or no limitation on the types of property encompassed within the statute, the Arizona legislature specifically limited immunity under its recreational use statute to an owner, lessee or occupant of "agricultural, range, mining or forest lands and any other similar lands." Were we to accept the defendants' argument that the phrase "any other similar

> lands" expresses a legislative intent that the statute apply to *any* land upon which, by agreement, any of the stated recreational activities could be performed, the words, "agricultural, range, mining or forest lands" would become surplusage. We are forbidden to construe a statute in such a manner, instead each word, phrase, clause, and sentence must be given meaning so that no part of the statute will be void, inert, redundant, or trivial.
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> Clearly, the legislature chose the words "agricultural, range, mining or forest lands," for a purpose, and we must look to the common elements existing among these four types of lands to determine whether the property on which Walker was injured can be considered "other similar lands." The four types of lands listed in the statute normally are relatively large areas of land. Most frequently, these types of property are located outside urban areas in thinly populated rural or semi-rural locales. All four types of land listed in the statute have as their primary use economic activities which are compatible with incidental recreational use.
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> Also, property of this nature is often in a natural, undeveloped state, although the express language of the statute provides that the legislature would not exclude any buildings or structures which happen to exist on such lands. Moreover, when we look to the recreational activities enumerated in... the statute, we see that, taken as a whole, they are pursuits that would normally be undertaken on large-sized tracts of land located in "the wilds" rather than in populated areas. Very few of the activities listed would be conducted on the property where Walker was injured.

Given "the restrictive language chosen by the legislature" for this particular recreational use statute, the appeals court concluded that the state legislature "did not intend to grant a blanket immunity to all landowners without regard to the characteristics of their property."

> In determining what properties are to receive the protection of the statute, characteristics such as size, naturalness, primary and secondary uses of the land, remoteness or isolation from populated areas would all be considered. While the line might be hard to draw in some instances, we are satisfied that the statutory immunity does not extend to the property in question.... [W]e find that the trial court erred in holding A.R.S. § 33-1551 applies to the property where Walker's injuries occurred.

The appeals court, therefore, reversed the summary judgment granted to the defendant Association and defendant City of Scottsdale and remanded (i.e. sent back) this case to the trial court for further proceedings to consider Walker's negligence claims.