

RECREATIONAL IMMUNITY - CONTRASTING BICYCLE OPINIONS

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

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Traditionally, legal education has adopted the case study method to illustrate legal analysis and methodology. Case studies identify legal issues posed by fact patterns described in reported court opinions. In these reported court opinions, the applicable rules of law and legal reasoning are then applied to relevant facts to resolve the identified legal issues. Oftentimes, the case studies used to illustrate a particular point of law will involve two court opinions that appear to reach opposite conclusions despite very similar fact patterns and applicable rules of law. A close examination of the legal analysis in seemingly contradictory conclusions will, however, reveal subtle distinctions in the relevant facts and applicable rules of law which explain these apparent inconsistencies between judgments reached by the courts.

The two court opinions described herein illustrate this point. Both cases considered limited landowner immunity under a state recreational use statute. An applicable state recreational use statute significantly increases the likelihood that liability claims by injured recreational users will be dismissed on a pretrial motion for summary judgment.

Subject to minor jurisdictional variations, beginning in the 1960s, most states adopted some form of a model state recreational use statute. Under a recreational use statute, 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 recreational use. As a result, landowners are immune from liability for ordinary negligence. The recreational use statute, however, will not immunize a landowner from liability for willful/wanton misconduct or gross negligence. Unlike mere careless unreasonable behavior which typifies ordinary negligence, willful/wanton misconduct or gross negligence involves in significantly different in both character and degree. Like willful/wanton misconduct, gross negligence typically involves a reckless indifference to the physical well-being of others.

Both cases described herein involve alleged landowner liability for bicycle injuries. The premise defect in one instance was a pothole and an uncovered trench in the other. The issue before the court in both instances was whether the applicable state recreational statute warranted a pretrial dismissal of any liability claims. In both instances, the state courts held immunity under the state recreational use statute would not apply to gross negligence on the part of the landowner. Proof of gross negligence would, however, require clear evidence that the landowner had actual knowledge of a defect on the premises accompanied by a conscious indifference for the safety of recreational users.

While reaching different conclusions under similar circumstances, the reasoning and legal analysis of both courts was consistent with the applicable law, providing insight into landowner immunity under a state recreational use statute. That being said, perhaps an uncovered trench might be considered a much more dangerous premise defect indicative of gross negligence as opposed to a more commonplace pot hole.

POTHOLE NOTICE?

In the case of *Cancel v. City of Providence*, 2018 R.I. LEXIS 95 (6/22/2018), plaintiff Tara Cancel, as administrator of the estate of Ira Lukens, sued the City of Providence for injuries sustained in a city park. On June 9, 2014, Lukens was thrown from his bicycle after striking a pothole on a road in Roger Williams Park. (Lukens' subsequent death was unrelated to the injuries he sustained in the bicycle accident.)

In her complaint, Cancel alleged Lukens suffered serious personal injuries as a result of the city's negligence in maintaining the park. In addition to negligence, Cancel alleged the city should be held liable for a "willful and/or malicious failure to warn, inspect, and/or repair the roadway within the park."

Based upon the pretrial evidence in this case, the trial court held the state recreational use statute (RUS) precluded any liability against the City of Providence. The trial court, therefore, granted the City's motion for summary judgment, effectively dismissing Cancel's lawsuit. Cancel appealed to the state supreme court.

On appeal, Cancel claimed further trial proceedings were necessary to address unresolved "genuine issues of material fact" regarding the applicability of the RUS. According to Cancel, reasonable minds could differ "whether the city knew of the dangerous condition of a pothole on a street in Roger Williams Park (the park) and whether it 'willfully and/or maliciously failed to warn' of the pothole." If so, the RUS would not protect the City from liability. Accordingly, the issue before the state supreme court was whether the pretrial record left open the possibility that the city "knew of the dangerous condition and willfully and/or maliciously failed to warn against it."

As cited by the state supreme court, the RUS (Rhode Island's Recreational Use Statute, G.L. 1956 chapter 6 of title 32) provided in pertinent part as follows:

- an 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.

As noted by the state supreme court: "The purpose behind the RUS is to encourage landowners to open their property to the public for recreational use by limiting landowner liability." Further, under the RUS, the court found recreational users are afforded the same legal status as trespassers under traditional common law principles. For recreational users and trespassers alike, a landowner owes no legal duty of care "other than to refrain from willful or wanton conduct." Moreover, the court noted a legal duty of care would arise only after the recreational user or trespasser has been "discovered in a position of peril."

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On appeal, Cancel argued sufficient pretrial evidence existed to support her claim for landowner liability based upon the RUS exception for "the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity after discovering the user's peril." In particular, Cancel claimed the pretrial testimony of parks director and the park superintendent were indicative of willful or wanton misconduct. The parks director had testified that "there is no regular schedule for inspection of the roadways within the park." Moreover, the parks director had admitted that "the strip of road where the pothole was located was driven over daily" by the park superintendent. The park superintendent himself confirmed: "he traveled over the area in question at least two to three times per week on his way into the park and once per week while he was leaving the park." Further, Cancel claimed pretrial photographic evidence of the pothole made it "clearly foreseeable that any reasonable person would recognize that a pothole of this size should be remedied, repaired or marked off so as to not cause a danger to the public."

The state supreme court found the RUS applied to the city because the park was "open to the public free of charge and that Lukens was engaged in the recreational activity of riding his bicycle at the time he was injured." Accordingly, the specific issue on appeal was whether the willful or wanton misconduct exception in the RUS was applicable.

In addressing this issue, the state supreme court had to determine whether Cancel had produced sufficient pretrial evidence to indicate "the city had any notice concerning the pothole." In determining whether the city had been put on sufficient notice of a dangerous condition, the court would also consider the number of serious injuries flowing from a known risk.

While testimony indicated the parks director and the parks superintendent "traveled in the area at least several times per week on his way to and from the park," the state supreme court found Cancel had offered "no evidence, expert or otherwise, however, that demonstrates that the pothole was, in fact, present at any of the times that McMahan drove over the roadway or that the city had received any complaints or other notice concerning the condition of the roadway." Moreover, the court found mere allegations that the parks director and parks superintendent must have known of the pothole were insufficient to establish "the city's knowledge of a dangerous condition."

Similarly, the court found no pretrial evidence had been produced to "support an assertion that the city willfully or maliciously failed to guard or warn against the pothole." In particular, the court noted there was "no evidence that the city had actual knowledge of the pothole, had received complaints regarding the condition of the roadway, or had notice of any past incidents resulting from the condition of the roadway."

As a result, the state supreme court affirmed the summary judgment in favor of the City of Providence.

Compare: "Cliff Collapse Accidents Test Recreational Use Statutes"
Parks & Recreation, Mar. 2012
<http://cehdclass.gmu.edu/jkcozlow/lawarts/03MAR12.pdf>

UNCOVERED DRAIN TRENCH

Similarly, in the case of *City of Texas City v. Woodkins*, 2017 Tex. App. LEXIS 4917 (5/31/2017), the state appeals court considered the applicability of the state recreational use statute to a liability claim involving a bicycle accident. In her lawsuit against the defendant City of Texas City, plaintiff Joyce Woodkins alleged she sustained multiple injuries on city-owned land. Woodkins alleged her injury was caused by a premise defect: an uncovered drain trench. Woodkins was riding her bicycle on a sidewalk in the city-owned Carlos Garza Sports Complex when she unexpectedly crashed into an "uncovered and unmarked trench" that caused her to fall.

The trench extended across the sidewalk and was six inches deep and thirty inches wide. The trench served as a drain, directing rain runoff from the parking lot across the sidewalk into a grassy area. There were two trench drains that crossed the sidewalk where Woodkins fell. Each drain was designed to be covered by a 169-pound metal plate; the edges of the plate sat in an indentation in the adjacent sidewalk so that the plate's top was flush with the sidewalk.

According to Woodkins, one of the drains was missing its metal plate when she encountered it. Woodkins sued the City, alleging negligence and gross negligence. In response, the City argued it could not be held liable because "the recreational use statute limits the governmental unit's liability for premise defects when the injured party is engaged in a recreational activity."

As characterized by the City, under the recreational use statute, the City "did not owe Woodkins a greater degree of care than that owed to a trespasser," i.e., the City could be held liable "only if it was grossly negligent or acted with malicious intent or bad faith."

Moreover, the City claimed "Woodkins could not establish gross negligence without evidence that the City had actual knowledge of the alleged premise defect." According to the City, the pretrial evidence did not show the City had the requisite knowledge of the uncovered trench necessary to support a claim of gross negligence. On the contrary, the City claimed its lack of knowledge was established by "affidavits from two city employees who testified that a crew member was assigned to the complex for routine maintenance on the day of the incident and the two previous days." According to these affidavits, "there was no work request regarding the drain or cover."

In the opinion of the trial court, the pretrial record did not conclusively establish that the state recreational use statute precluded any liability under the circumstances of this case. The trial court, therefore, denied the City's plea to dismiss Woodkins lawsuit. The City appealed.

GROSS NEGLIGENCE

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

[I]f a person enters premises owned, operated, or maintained by a governmental unit and engages in recreation on those premises, the governmental unit does not owe to the person a greater degree of care than is owed to a trespasser on the premises. A premises owner owes a trespasser a common-law duty not to injure that person willfully, wantonly, or through gross negligence.

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According to the court, the state recreational use statute was applicable to the facts of this case. Moreover, since Woodkins did not allege the City acted willfully or wantonly, the specific issue under the recreational use statute was, therefore, "whether the City was grossly negligent."

As cited by the appeals court, state courts and the state legislature in Texas had defined gross negligence as follows:

an act or omission which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

As noted by the court, the City did not challenge "Woodkins's allegation that the uncovered trench in the sidewalk was unreasonably dangerous." The issue, however, was whether this unreasonably dangerous condition constituted ordinary negligence or gross negligence.

According to the appeals court, "actual knowledge" would distinguish gross negligence from ordinary negligence:

what differentiates gross negligence from ordinary negligence is the requirement that the governmental entity had "actual knowledge" of the dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition could develop over time.

Moreover, the appeals court acknowledged: "A recreational plaintiff, such as Woodkins, may therefore maintain a premise defect claim against a landowner as long as there exists a factual dispute regarding the landowner's gross negligence with respect to the alleged defect."

According to the appeals court, to establish the City's liability for gross negligence under the state recreational use statute, Woodkins would have to prove a city employee had actual knowledge of the premise defect. In her complaint, Woodkins alleged the City was "grossly negligent in removing the metal plate or allowing the dangerous condition to exist," and the City had "actual awareness of the condition." Moreover, Woodkins claimed "the City created the unsafe condition prior to her arrival and failed to warn her or make the condition safe when she encountered the uncovered trench on her bicycle."

Accordingly, the City's liability for gross negligence under the state recreational use statute would depend on whether the City had "actual knowledge that the drain cover was missing." To demonstrate its lack of "actual knowledge," the City relied upon the affidavits of two city employees, the parks superintendent and the director of recreation and tourism.

The parks superintendent supervised maintenance and upkeep in the city parks. Regarding the City's knowledge of the drain cover's removal, the parks superintendent testified his staff had "never removed or replaced the metal cover during the course of their duties, prior to the alleged incident involving Ms. Woodkins." He did, however, admit that he had observed "the drain cover

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to be missing from one of the drains in the Complex, near the ball fields" after being notified of incident in which Woodkins was injured on July 10, 2014.

Further, the parks superintendent testified that he did not "personally recall any work requests, complaints, or injuries involving the drains at the Complex" since its opening in 2010. He also testified that he had "not heard or found any reports on the drain cover ever being removed" prior to Woodkins injury. According to the parks superintendent, "work requests" could be based on "an observation by crew leaders or complaints and requests" submitted to the parks department by the public. These work request records were held for one year before being destroyed.

The parks superintendent testified he had not found "any work requests for the drains or drain covers in the Complex." In particular, the parks superintendent noted that routine maintenance reports for the Complex in the days immediately preceding Woodkins' injury did not reference a "work order for the drain or the drain cover." Based upon his information, the parks superintendent testified "the City was unaware of any defective condition that caused or contributed to the incident." In particular, the parks superintendent claimed the City had "no notice of any defective condition at the Complex on or prior to the date of Ms. Woodkins' fall on July 10, 2014."

The director of parks and tourism provided similar testimony. During his tenure as director, he did not recall or find "any work requests, complaints, or injuries involving the drains or removed metal covers at the Complex" prior to the July 10, 2014 incident involving Woodkins. Accordingly, he concurred with the superintendent that the City was unaware of any defective condition that caused or contributed to the incident on or prior to the date of Ms. Woodkins' fall on July 10, 2014.

Despite this testimony from parks superintendent and director that the City was "unaware of any defective condition" prior to Woodkins' injury, the appeals court found "these affidavits fall short of negating the actual-knowledge component of gross negligence."

While the superintendent's had testified his park staff did not remove the cover, in the opinion of the court, this left open the possibility that the park staff may have had "actual awareness of the uncovered condition of the trench." Moreover, the appeals court found "the lack of prior complaints fails to establish conclusively that park staff did not, in this particular instance, have actual awareness of the trench's uncovered condition." Further, the appeals court found the City had not shown "removal of a drain cover would have generated a work request":

[The parks superintendent (Sefcik)] focused his affidavit on the work requests that park staff and patrons generated and Sefcik reviewed. But Sefcik did not discuss generally what type of work was done as routine maintenance and what type of work required a request, nor did he address specifically whether removal of the cover would have generated a work request.

As noted by the appeals court, the superintendent had testified a park crew member was assigned to the Complex for routine maintenance in the days prior to the injury. In the opinion of the appeals court, this testimony did not address "who the crew member was, what he did, or what

he observed." Accordingly, the appeals court found this testimony did not conclusively disprove the possibility that "a crew member removed the drain cover for routine maintenance or saw that the cover had been removed."

Without clear evidence that the City "lacked actual knowledge of the drain cover's removal," the appeals court found the trial court had not erred in rejecting the City's plea to dismiss Woodkins' lawsuit. In so doing, the appeals court agreed with the trial court that the pretrial record did not conclusively establish that the state recreational use statute precluded any liability under the circumstances of this case.

OPEN AND OBVIOUS DEFECT?

The City had also argued that it could not have acted with gross negligence because it owed no duty to warn Woodkins of open and obvious hazards. The appeals court, however, found no evidence in the pretrial record that "the uncovered trench was open and obvious to a bike rider on the sidewalk." On the contrary, the appeals court noted Woodkins had alleged the "danger was concealed" because "the premises in question gave the appearance that the sidewalk was safe for bike riders." As a result, Woodkins alleged she "suddenly and unexpectedly crashed into an uncovered and unmarked trench."

According to the appeals court: "A landowner can be liable for gross negligence in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of the permitted use." In this particular instance, the appeals court found the City's pretrial evidence had failed to establish that "the hazard was open and obvious."

CONCLUSION

Having found the City had "failed to conclusively negate actual knowledge of the dangerous condition" posed by the open trench, the appeals court affirmed the trial court's order denying the City's plea for a pretrial dismissal of the lawsuit based upon the state recreational use statute. As a result, the case would be subject to further trial proceedings in which a jury would likely determine whether the City should be held liable for gross negligence.

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Fairfax, Virginia. E Mail: jkozlows@gmu.edu Webpage with link to law review articles archive (1982 to present): <http://mason.gmu.edu/~jkozlows>