

NO WARNING OF NUISANCE BEAR THREAT TO CAMPERS

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On July 19, 2013, the Salt Lake Tribune reported that the Utah Supreme Court ruled “the state had a duty to protect a boy killed by bear.” In so doing, the article noted that the Utah justices had also ruled that “a bear is not a natural condition” under a state immunity statute. SEE: <http://www.sltrib.com/sltrib/news/56618065-78/ives-bear-family-state.html.csp> Subsequently, on July 25, 2013, the Salt Lake Tribune devoted one of its on-line “Trib Talk” chat sessions to this incident and the broader liability issue in a discussion entitled “Utah bear ruling and outdoor recreation”: <http://www.sltrib.com/sltrib/entertainment2/56640025-223/bear-utah-recreation-ives.html.csp>

News reports created quite a stir about the “implications” of this “Court ruling on bears in Utah.” Would the holding in this particular case create a “huge precedent” that would “apply to snakes, and other noxious or poisonous wildlife and insects”? If public landowners were liable for wildlife and insects, there was concern that the “net effect” would be to “close down campgrounds and restrict public access - that is the only way they [public landowners] could protect the public.”

Generally, landowner liability for attacks by wild animals, including bears, should be the exception, rather than the rule. This particular bear attack, however, presents one of those rare situations which triggered the exception to the general rule. In particular, agencies in control of the land had specific notice and knowledge of a particular nuisance bear in the area and failed to implement their own procedures to warn campers of an immediate threat. Most importantly, the fatal attack by the very same nuisance bear was very close in time and location to the earlier attack.

FEDERAL DISTRICT COURT

The fatal bear attack at issue produced several published opinions in the federal and state courts. One of the earlier federal decisions, *Francis v. United States* (C.D. Ut. 1/30/2009), was described in an article entitled "Fatal Bear Attacks Test Immunity Laws" in the December 2009 Law Review column in *Parks & Recreation* magazine. SEE: <http://cehdclass.gmu.edu/jkozlows/lawarts/12DEC09.pdf>

Subsequently, in 2011, the federal district court revisited the case of *Francis v. United States*, Case No. 2:08CV244 DAK, 2011 U.S. Dist. LEXIS 47544 (Dist. Utah 5/3/2011). In this case, an eleven-year-old boy, Sam Ives, was dragged from his family's tent and killed by a black bear. The incident occurred late at night on Father's Day, June 17, 2007, in American Fork Canyon area of the Uintah National Forest on land managed by the United States Forest Service.

Plaintiffs, Sam's biological parents, sued the United States under the Federal Tort Claims Act ("FTCA"). Plaintiffs alleged that Forest Service employees were aware of the presence of a dangerous bear in the area and negligently failed to (1) warn campers of the presence of a

dangerous bear; or (2) close the remote camp site. In response, the United States contended that it was immune from any liability for negligence under the discretionary function exception to the FTCA.

## FACTS OF THE CASE

On June 16, 2007, Jake Francom and friends camped in a dispersed camping area in the Uintah National Forest approximately 1.2 miles above the Timpooneke Campground. A "dispersed" camping area is outside of a designated campground and has no water or bathroom facilities. This particular campsite was often occupied.

At around 5:30 a.m. on June 17, 2007, Jake Francom was attacked by a bear while sleeping in his tent. Mr. Francom yelled to his friends, who were sleeping in nearby tents, to get a gun. Mr. Francom and his friends exited their tents and scared the bear away with pistol shots. Mr. Francom was able to see that the bear was a large, cinnamon-colored black bear.

Mr. Francom reported the bear attack to Utah County Dispatch at 9:25 a.m. on June 17, 2007. The Utah State Department of Wildlife Resources (DWR) was also notified of the incident. The dispatcher subsequently reported the incident to United States Forest Service law enforcement officer ("LEO") at her home. The LEO said that she was not on duty, but she would let her district know of a reported bear attack that had resulted in some property damage, but no personal injuries. In this particular instance, the LEO did not return to duty in response to the reported bear attack because it was "impossible to find someone to watch her children on a Sunday."

As a result, the LEO failed to contact anyone or take any action of any kind in response to the reported bear attack on Mr. Francom. Consequently, no one else employed by the Forest Service knew about the incident, and, as a result, no action was taken by the Forest Service to warn potential campers about the bear attack.

Forest Service regulations required that "compelling reasons" might require an employee to "remain on or return to duty" when a failure to "continue the employee's duties...would constitute negligence." In addition, the Forest Service Manual required an LEO to "investigate all accidents that involve the Forest Service and result in death, injury, illness, and/or property damage."

At approximately 10:00 a.m. on June 17, 2007, the DWR classified the bear that attacked Mr. Francom as a Level III nuisance bear. DWR had a three-level classification system for bears that constitute a threat to the public. The highest classification, Level III, is for bears that have shown no fear of humans, displayed aggressive behavior toward humans, and are deemed a threat to public safety. The DWR required that Level III bears be destroyed because of the risk to public safety.

DWR personnel responded to the Francom incident by pursuing the bear with dogs. They tracked the bear for approximately four to five hours, but the search was unsuccessful. The DWR ended its search for the bear at approximately 5:00 p.m. on June 17, 2007, but made plans to return to

the Francom campsite the next morning. DWR intended to set a trap for the bear because it continued to be a threat to public safety and because the Francom campsite was the best place to attempt to trap the bear.

There was no one at the campsite when DWR ended the search, and DWR personnel did not think that anyone would camp at that site that evening because it was already 5:00 p.m. on a Sunday. If, however, anyone did camp there on June 17, 2007, the State of Utah acknowledged that the scent of humans and/or their food could attract the bear back to the Francom campsite.

As the DWR agents left the campsite and traveled down the canyon, they passed the Mulveys, who were traveling in the opposite direction. The DWR agents did not stop the Mulveys or warn them of the earlier attack but merely waved as they passed.

The Forest Service District Ranger who was responsible for the relevant area testified that “a warning about the dangerous bear could easily have been placed on the gate at the head of Timpooneke Road 056, or that the whole area could have been closed off by simply closing the gate at the head of the Timpooneke Road 056.” In the alternative, the Forest Service could have closed the specific Francom campsite by taping off the campsite with yellow tape.

On the evening of June 17, 2007, the Mulvey Family camped in the same campsite where Mr. Francom had been attacked earlier that morning. The Mulvey family passed through Timpooneke Campground on their way to the campsite. They stopped and spoke with the Timpooneke Campground host on their way to the campsite.

The cost to camp in the Timpooneke Campground was \$13, and Mr. Mulvey did not have \$13 with him. When Mr. Mulvey asked if they could camp up the road without paying the \$13 fee, the camp host replied that it would be fine. Had he known of the Francom attack, the camp host would have informed the Mulvey family.

Moreover, the Mulvey family would not have camped in or anywhere near the area of the Francom campsite if they had been informed about the Francom attack. They would have returned home if they had known of the Francom attack. Not knowing of the bear attack just twelve hours earlier at that same site, the Mulvey family set up camp at the Francom campsite and cooked dinner.

Prior to Sam's disappearance from the tent, Mr. Mulvey heard Sam yell, "help me." Mr. Mulvey immediately ran out of the tent. In the darkness, he did not see or hear Sam. He soon saw that the tent had been slashed open, and Sam was not in the tent. After looking around the immediate area, Mr. Mulvey left to notify the campground host that someone had taken his son. Some time later, after law enforcement and the DWR were notified and a search had begun, Sam's body was found approximately 400 yards away from the campsite.

#### WARNING OBLIGATION

In general, when “not unduly burdensome,” the federal district court found the Forest Service had “an obligation to warn visitors to National Forest Service lands of known incidences in the

immediate area of aggressive bear behavior toward humans that constitute a threat to public safety.” In so doing, the federal district court reaffirmed its earlier 2009 pretrial decision that “the discretionary function exception to the FTCA does not apply to the United States’ failure to warn about the earlier bear attack because it did not involve considerations of public policy.” On the contrary, following a trial, the court found existing regulations and policies indicated a lack of discretion and judgment on the part of Forest Service personnel in this particular instance.

Specifically, the court noted the LEO had violated two regulations which provided a specific course of conduct, requiring the LEO “to have taken action in response to the attack on Mr. Francom.” Despite a mandatory directive to take action, the LEO “failed to take any action after being notified of the attack.” As a result, under the circumstances of this case, the court held “the United States is not immune from liability in this case” under the discretionary function exception to the FTCA.

### NEGLIGENCE LIABILITY

As cited by the federal district court, under the Federal Tort Claims Act (FTCA), “the government is liable in the same manner and to the same extent as a private individual under like circumstances, and “in accordance with the law of the place where the act occurred.” [28 U.S.C. § 2674](#), [28 U.S.C. § 1346\(b\)\(1\)](#). As a result, in the absence of discretionary function immunity, the court would, therefore, apply “state law to resolve questions of substantive liability,” in this case applying Utah negligence liability law.

As noted by the court, the following four elements must be established for a negligence claim in Utah:

- (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach of duty was a cause of the plaintiff’s injury, and (4) the plaintiff in fact suffered injuries or damages.

In this particular instance, the federal district court found Forest Service employees owed plaintiffs “a duty to warn them about the earlier incident, whether the warning was oral, by posting signs on the gate of Timpanooke Road 56, and/or by roping off the specific campsite.”

This is particularly true when it became known [to the Forest Service] that they [the Mulvey family] were going to camp at a dispersed campsite, and the most likely dispersed site would be the very site where there had been an aggressive bear encounter just twelve hours prior.

Moreover, under the circumstances, in the opinion of the court, “it was foreseeable that the Francom bear would return to the campsite where it had earlier attacked campers and had found food” on June 17, 2007. Despite a legal duty to warn, the federal district court found sufficient evidence to conclude the Forest Service had “breached its duties by not warning the Mulvey family, or providing warning to those who would have communicated the warnings to the Mulvey family.”

Specifically, Ms. Gosse had a duty to follow up with the Francom attack by contacting her supervisor and others in the Forest Service who could address the problem if she was unable to respond, to confirm that the camp host at the nearest campground knew the details of the Francom attack, to make sure that potential campers in the area were warned about the attack, and to contact someone in the Forest Service who could make a determination about whether to close either the Francom campsite or Timpooneke Road 056. Ms. Gosse also had a duty to contact the DWR so that the U.S. Forest Service and the DWR could act jointly.

As a result, the federal district court held “Plaintiffs have proved by a preponderance of the evidence that Defendant's breaches were a cause of Sam Ives' death and the Plaintiffs' damages.”

#### DAMAGES

Under Utah’s comparative negligence statute, the court would assess and allocate damages by the percentage of fault attributable to each responsible party. Accordingly, the federal district court attributed 25% of the fault to the State of Utah, through the DWR, “for failing to communicate with the Forest Service.”

While recognizing that “Mr. Francis, Mr. Mulvey, and Ms. Ives have suffered an almost unbearable, unimaginable loss,” the court found it “would be abdicating its responsibility if it failed to allocate any fault whatsoever to Sam and his parents because of the food that was found in the family tent.” In so doing, the court acknowledged that “[t]he question of whether Sam Ives contributed to his own death is judged by what a reasonable eleven-year-old child would do under the same or similar circumstances.”

When camping in known black-bear country, it is of the utmost importance to ensure that food and trash is properly stored. While it is certainly possible that the granola bar and the can of Coke Zero played no role in Sam's tragic death, the court, under a preponderance of the evidence standard, cannot so rule.

As a result, the court assessed “10% of the fault to Sam” and his family. The federal district court attributed the remaining 65% of fault to the United States for damages totaling \$3,000,000. The court, therefore, entered judgment against the United States for \$1,950,000, i.e., 65% of \$3,000,000.

#### NARROW RULING

In rendering this judgment and awarding damages, the federal district court cautioned “this finding of a duty and a breach of the duty is limited to the unique facts presented in this case.” In particular, the court emphasized that “no ruling” was being made “whether a duty to warn would arise or be breached in a slightly different situation, such as if the campers had been at a nearby—but not the same—campsite as the earlier bear attack or if the campers had camped at the site several days after an aggressive bear encounter.” On the contrary, the federal district court emphasized the narrowness of its ruling, limited to a particular situation wherein:

(1) there had been an aggressive bear encounter at the identical site where Plaintiffs set up camp; (2) the encounter had been approximately twelve hours before Plaintiffs arrived; and (3) it would not have been onerous for Defendant to have warned Plaintiffs about the earlier attack (i.e., campers heading to the dispersed sites had to travel through the designated campground check-in point; there was a gate to which a sign could have been posted; a sign could have been posted at the campsite itself; or the campsite could have been roped or taped off).

#### SPECIAL RELATIONSHIP DUTY

Similarly, in the subsequent state court case, *Francis v. State*, 2013 UT 43; 2013 Utah LEXIS 115 (Utah 7/19/2013), the Supreme Court of Utah found “the State owed the Mulveys a duty because it undertook specific action to protect them as the next group to use the campsite.” In so doing, the Utah high court found “the State's actions, specifically directed at the Campsite, gave rise to a special relationship between the State and the Mulveys.”

According to the court a “special relationship and consequent duty” would arise when a government defendant “knew of the likely danger to an individual or distinct group of individuals.” In this particular instance, the court found the State “had knowledge of a specific threat and took action” given the fact that the State “undertook specific protective actions after the bear attacked Mr. Francom.”

In so doing, the court distinguished the facts of this case from an earlier case in which “a bear attacked a young girl while she was camping in Utah with her family.” In that earlier bear attack opinion, the court had found no evidence that “the DWR undertook to render any specific service to plaintiffs or to other campers.” More importantly, “the State had no knowledge or control of the bear when it entered [the campground and attacked the girl.” Under such circumstances, no special relationship existed between DWR and the girl because the State “could not have reasonably identified plaintiffs as likely to be harmed any more than the general public.”

In sharp contrast, in this particular instance, the Utah Supreme Court noted “the State clearly had knowledge and had already taken action directed at the Campsite by the time the bear attacked Sam.” As a result, the state supreme court found the State “had a special relationship with those who might occupy the Campsite,” including Sam and his family.

[T]he Mulveys themselves were "reasonably identifiable" as the next group to use the Campsite. The DWR agents who swept the Campsite waved to them as they drove down Timpooneke Road in the direction of the Campsite. The Campsite was only one of a few on the dead-end Timpooneke Road. So although DWR could not specifically identify the Mulveys when its agents swept the Campsite, it nevertheless had reason to believe that the Mulveys could use the Campsite and could therefore be at risk.

Accordingly, in the opinion of the state supreme court, it was “reasonable as a matter of public policy to impose a duty on the State because it was "feasible for the State to take concrete steps to prevent the harm.”

After the bear attacked Mr. Francom, the threat the bear posed was no longer theoretical. The DWR agents knew that the Campsite was the best place to apprehend the bear because bears frequently return to locations where they have previously found food. They also knew that humans can act as bear attractants. The risk of another bear attack for those who might occupy the Campsite had thus "crystalized."

Having found "the State owed a duty to the Mulveys as the next group to use the Campsite," the court noted that the "class of people with which the State had a special relationship" was "very narrow," i.e., "the group that DWR took specific action to protect." The state supreme court, therefore, found "the district court had erred when it granted summary judgment on the basis that the State owed no duty to the Mulveys."

### NATURAL TOPOGRAPHY

The state supreme court, then considered "whether the State is immune from liability under the Immunity Act." Specifically, the court would determine whether the "natural condition exception" to the Utah Governmental Immunity Act precluded liability for the alleged negligent failure of the State "to warn the Mulveys of the dangerous condition created by the bear."

As cited by the state supreme court, Utah Code section 63G-7-301(5)(k) immunized the State from liability in those instances where the plaintiffs' injury "arises out of, in connection with, or results from any natural condition on publicly owned or controlled lands." Plaintiffs had argued that a bear was not a "natural condition" as contemplated by the immunity statute because "wildlife is not a condition on land." To the surprise of many based upon subsequent media reports, the state supreme court agreed.

In the opinion of the state supreme court, "the natural condition exception does not immunize the State from liability because a bear is not a 'natural condition on publicly owned or controlled lands'." To reach this conclusion, the court had to consider "an issue of statutory interpretation" in determining whether "indigenous wildlife is a natural condition on public land." In so doing, the state supreme court applied the following generally accepted "principles of statutory interpretation" for courts:

When interpreting a statute, our goal is to give effect to the legislature's intent and purpose. To determine legislative intent, we begin with the statute's plain language. And when discerning the plain meaning of the statute, terms that are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage.

Accordingly, the state supreme court would "construe the term 'natural condition' in light of its ordinary meaning, as laymen would use it in daily usage." In the opinion of the court, individuals "would not ordinarily refer to a bear, or wildlife generally, as a 'condition' on the land." On the contrary, in the view of the court, "[t]he more ordinary meaning of a 'condition on the land'

seems to connote features that have a much closer tie to the land itself, such as rivers, lakes, or trees.”

These conditions are more directly a part of and persist "on the land," whereas a bear is much more transitory in nature. We accordingly limit application of the natural condition exception to those conditions that are closely tied to the land or that persist "on the land"—conditions that are topographical in nature.

Within the context of state immunity law, the state supreme court, therefore, held “a natural condition 'on' the land must be *topographical in nature*.” (*Emphasis of court.*) The state supreme court, therefore, would “exclude wildlife from the natural condition exception” because wildlife “is not topographical in nature.”

Our duty when interpreting a statute, however, is to give effect to the legislature's intent and purpose. . . This is especially true given that the legislature could easily have stated expressly that the State retains immunity for injuries arising from indigenous wildlife. While the legislature cannot anticipate every incident that may occur in our state's vast public lands, it seems particularly obvious that injury will arise from the public's inevitable confrontations with wildlife. Given this obvious risk, it seems somewhat unlikely that the legislature would use the term "natural condition" to retain immunity from injuries arising out of or in connection with bears or other wildlife.

As a result, the state supreme court concluded “the district court erred when it granted summary judgment for the State on the basis of natural condition immunity.” The state supreme court, therefore, remanded (sent back) the case for further proceedings at the trial court to determine whether the State owed a legal duty to the Mulveys under the circumstances of this case. On remand, the state supreme court noted that the State could raise “alternative arguments.” These alternative defense arguments might include the state recreational use statute and/or common law principles wherein there generally is no landowner legal duty warn or guard against indigenous wildlife on the premises.

#### RECREATIONAL USE STATUTE?

Under the Utah state recreational use statute (RUS), Utah Code 57-14-101 to 204, “an owner of land owes no duty of care to keep the land safe for entry or use by any person entering or using the land for any recreational purpose or to give warning of a dangerous condition, use, structure, or activity on the land.” Under the RUS, an owner would still be liable for injuries to recreational users caused by the owner’s “willful or malicious conduct” or “where the owner of land charges a person to enter or go on the land or use the land for any recreational purpose.”

The RUS expressly includes “camping” in the statutory definition of “recreational purpose.” Further, the RUS defines an “owner” as “the possessor of any interest in the land, whether public or private land, including a tenant, a lessor, a lessee, an occupant, or person in control of the land.” While the Forest Service would be an “owner” arguably, DWR might be considered an “occupant” with a possessory interest in the land under the RUS. Specifically, pursuant to a

memorandum of understanding with the Forest Service, DWR was responsible for managing, controlling, and regulating wildlife populations on Forest Service lands.

In addition, the RUS provides immunity for “personal injury or property damage caused by the inherent risks of participating in an activity with a recreational purpose on the land.” The RUS defines “inherent risks” to include “those dangers, conditions, and potentials for personal injury or property damage that are an integral and natural part of participating in an activity for a recreational purpose.”

In this particular instance, no charge was made for the dispersed campsite where the incident occurred. Further, the statutory definition of “dangerous condition” under the RUS, unlike “natural condition” in the Immunity Act, would presumably not be limited to topographical conditions on the land. On the contrary, a “natural part of participating” in camping activity in this environment arguably includes the “inherent risk” of encounters with wild animals, including black bears.

Accordingly, if a state or federal court had found the RUS applicable, plaintiffs would have had a much more difficult burden of proof to establish liability based upon “willful or malicious conduct,” not ordinary negligence. For some unknown reason, it appears that neither the Forest Service nor the State of Utah raised limited immunity under the Utah RUS as a defense. As a result, neither the federal district court nor the Utah state courts considered the applicability of the Utah RUS in this case. On remand, if it chose to do so, presumably, the State could still raise the RUS defense among “alternative arguments.”

SEE ALSO: “Governmental Immunity and Liability for Wild Animal Attacks”  
<http://cehdclass.gmu.edu/jkozlows/lawarts/03MAR99.pdf>

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