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REC USE LAW APPLIES TO PUBLIC LAND IN NY, NE, ID, OH, & WA

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Under a recreational use statute, the landowner owes no duty of care to recreational users to guard or warn against known or discoverable hazards on the premises. This statutory immunity is lost, however, where a fee is charged for the use of the premises or the landowner is guilty of willful or wanton misconduct. In other words, there is no landowner liability to the recreational user for ordinary negligence, only willful/wanton misconduct. Unlike mere carelessness constituting negligence, willful/wanton misconduct is more outrageous behavior demonstrating an utter disregard for the physical well being of others.

To date, 47 jurisdictions have enacted recreational use statutes. Most of these recreational use statutes are based upon model legislation developed by the Council of State Governments in 1965 to encourage private landowners to open their land for public recreational use. At this point in time Alaska, Mississippi, Missouri, and the District of Columbia are the only jurisdictions which have not enacted recreational use statutes similar to the model act. Prior to 1965, only ten states had enacted legislation providing limited immunity to landowners who open their land free of charge for public recreational use.

Under the Federal Tort Claims Act (FTCA), the federal government is held liable like a private individual under the law of the jurisdiction where the injury occurred. Consequently, in those jurisdictions where private landowners enjoy recreational use immunity, the federal government is provided similar protection under the terms of the FTCA. As a result, federal courts have uniformly held state recreational use statutes to be available to the United States as a defense to negligence liability. (Federal courts have exclusive jurisdiction over causes of action brought against the United States.)

Unlike federal courts, state courts have been divided as to whether these state recreational use statutes apply to state and local government landowners. The following paragraphs describe cases where state courts have found the recreational use statute applicable to public entities. The jurisdictions examined are: New York, Nebraska, Idaho, Ohio, and Washington. Future columns in the "NRPA Law Review" will look at case law from other jurisdictions which have considered the applicability issue, including those states which have found the statute inapplicable to public entities. At this point in time, state courts in approximately 19 jurisdictions have considered the applicability of the state recreational use statute to the state and local governments.

NEW YORK

In the case of *Sega v. State*, 60 N.Y.2d 183, 456 N.E.2d 1174 (1983), the state supreme court

considered "the scope and application of section 9-103 of the General Obligations Law," the state recreational use statute. In its decision, the state supreme court reviewed two lower court opinions which had considered this issue. In one case, plaintiff was hiking in a state forest preserve. He was injured when the railing he was sitting on collapsed and he fell 18 to 20 feet from a bridge into the creek below. In the absence of a willful or intentional act, the lower court found no liability pursuant to the state recreational use statute.

In the other case, plaintiff was injured while riding a three-wheeled all-terrain vehicle in another state forest preserve when he struck a steel cable strung across a road. In this instance, the lower court found the state recreational use statute applicable. Despite the lack of wanton or malicious misconduct, the court found the cable "constituted a trap or an inherently dangerous structure and that the State should have posted a warning sign on the road" approaching the cable. As a result, the state was found liable for such negligence.

Specifically, the issue before the state supreme court was "whether the State may invoke section 9-103 in defense of claims for injuries occurring on State-owned lands." Since there was "nothing to the contrary in the law," the state supreme court found "this protection is available to the State itself when no fee is charged."

> On its face, section 9-103 unambiguously includes public property within its purview. By its terms, section 9-103 refers to any "owner, lessee or occupant of premises" without limiting the scope of that clause to private landowners. In addition, the statute refers to ECL 11-2111 [section of state environmental conservation law]. ECL 11-2111 pertains to posting lands as fishing and hunting preserves, including "any lands or waters, rights or interests therein owned, leased or otherwise acquired by the state..." This confirms that the Legislature intended to provide protection to the State as well as private landowners.

Having found that the state recreational use statute applicable to state-owned lands, the court concluded "defendant's negligence, if any, is immaterial." Plaintiffs in both instances would, therefore, have to prove that "defendant willfully or maliciously failed to guard or to warn against a dangerous condition, use, structure, or activity." In both instances, the state supreme court found "nothing to support a finding that the State acted willfully or maliciously." Consequently, these claims against the state were dismissed.

NEBRASKA

In the case of *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), the state supreme court considered whether the state recreational use statute was applicable to the defendant city. Plaintiff, age 2 1/2 at the time of the accident, fractured her leg when she fell from a slippery slide with a missing handrail in city park. In the opinion of the state supreme court, the recreational use statute had to be read within the context of the state tort claims act.

> [Wle must consider the language of the Political Subdivisions Tort Claims Act . . . which subjects a political subdivision to liability for the negligent acts or omissions of its employees "in the same manner, and to the same extent as a private individual under like circumstances... [T]he liability of a political subdivision under the Political Subdivisions Tort Claims Act is not an absolute liability, but consists of such liability as would exist in a private person or corporation without that immunity... Therefore, the public entity is entitled to assert the defenses that a private property owner has in like circumstances.

Applying this "liable like a private individual" reasoning of the tort claims act, the state supreme court rejected plaintiff's contention that recreational use statute immunity was necessarily limited to private landowners.

> Whatever the Legislature's intent was at the time of the enactment of the Recreational Liability Act, we believe that the definition of owner [in the Act]--"the term owner includes tenant, lessee, occupant, or person in control of the premises"--is sufficiently broad to cover a public entity...
>
> The Legislature, in enacting the Political Subdivisions Tort Claims Act and thereby declaring a political subdivision responsible for its torts in the same manner as a private individual, is presumed to have knowledge of previous legislation, including the Recreation Liability Act. Having placed no limitation upon this declaration or upon the definition of "owner" in the Recreation Liability Act, we believe that the intent of the Legislature, as reflected by the clear language of both statutes, was to grant the same rights and privileges to governmental and private landowners alike.

The state supreme court, therefore, concluded that "the term 'owner of land,' as used in the Recreation Liability Act, includes a political subdivision." As a result, the state supreme court determined that under the facts of this case "no liability attached to the City of Omaha." The lower court judgment in favor of plaintiff was, therefore, reversed and the case dismissed.

IDAHO

In the case of *Corey v. State*, Idaho, 703 P.2d 685 (1985), the state supreme court found that the State of Idaho was an "owner" within the meaning of the state recreational use statute. Corey was injured when he struck a cable strung across a path while snowmobiling in a state park.

> I.C. § 36-1604 [the state recreational use statute] specifically provides that an owner of land who permits recreational use of that land without charge does not owe a duty of care to keep the premises safe for such use. The State of Idaho is an "owner" as defined

> by the statute. Farragut State Park is "public land" open for recreational use. It is uncontroverted that at the time of the accident appellant Corey was in an area of the park open for snowmobiling. Additionally, Corey was engaged in snowmobiling, a recreational activity specifically mentioned in the statute. Thus, there can be no question that I.C. § 36-1604 is expressly applicable to the factual situation presented by this case.

The state supreme court, therefore, affirmed the judgment of the trial court in favor of the state.

OHIO

In the case of *McCord v. Ohio Division of Parks & Recreation*, 54 Ohio St.2d 72, 375 N.E.2d 50 (1978), the Supreme Court of Ohio considered for the first time whether the state recreational use statute, R.C. 1533.181(A), applied to the state. Plaintiff brought a wrongful death action after her nine-year-old son drowned in a lake within a state park. Plaintiff alleged that the state and its employees were negligent in failing to supervise the lake and properly train the lifeguards. Prior to the enactment of the state tort claims act, the state enjoyed immunity from tort liability. The state tort claims act (R.C. 2743.02 (A)), however, provided injured parties with a cause of action subject to certain limitations. One such limitation was the "private party" rule:

> The state hereby waives its immunity from liability and consents to be sued, and have its liability,
> determined ... in accordance with the same rules of law applicable to suits between private parties...

In the opinion of the state supreme court, "one such rule of law applicable to suits between private parties" was the state recreational use statute. Applying the state recreational use statute to the facts of this case, the state supreme court concluded that "the state, when viewed as if a private party, owes no duty to a recreational user of its land, such as appellee [McCord] who has paid no fee or valuable consideration." According to the state supreme court, the Ohio recreational use statute "does not create a new right of action against the state, but places the state upon the same level as a private party." Further, the state court refused to broaden the scope of state landowner liability for recreational use beyond the rules applicable to private parties. "If the immunity which the state has historically enjoyed is to be lifted further, it must be accomplished by the General Assembly and not by this court."

WASHINGTON

In the case of *McCarver v. Manson Park and Recreation District*, 92 Wash.2d 370, 597 P.2d 1362 (1979), the state supreme court considered the applicability of the state recreational use statute to a public swimming area. Plaintiff's daughter died as a result of a fall from a diving tower at the site. Plaintiff

alleged that the defendant district was negligent in failing to supervise, maintain, and enforce reasonable rules in the area. The trial court granted defendant summary judgment based upon the state recreational use statute. McCarver appealed. The appeals court certitled the applicability issue to the state supreme court.

Specifically, the issue before the state supreme court was "whether Manson Park is included in the class of protected landowners under the [state recreational use] statute." As noted by the court, the language of the statute expressly included "public or private landowners or others in lawful possession and control."

As described by the court, the state recreational use statute was first enacted in 1967. This statute was based upon model legislation proposed by the Council of State Governments. As noted by the court, this model legislation was "to encourage the availability of private lands by limiting the liability of owners."

In 1972, however, the Washington recreational use statute was amended and the words "public or private" were added before the word "landowners" in the statute. Further, snowmobiling and the driving of all-terrain vehicles (ATV) were added to the list of recreational activities covered by the statute. Plaintiff, therefore, argued that "limitations on the liability of public landowners under RCW 4.24.210 [state recreational use statute] should be restricted ATV and snowmobiling activities because of the purpose of the 1972 amendatory act is directed toward these activities. The state supreme court rejected this argument.

> Where the language of a statute is clear and unambiguous, there is no room for judicial construction. RCW 4.24.210 draws no distinctions between public and private landowners, vis-a-vis the designated recreational activities. The placement of the 1972 amendatory language ("public or private") before the term "landowners" encompasses all outdoor recreational activities subsequently delineated. If the legislature intended the liability limitations to apply to public owners only as to incidents arising from the use of ATV and snowmobiles, it should have used more precise language to establish such an intent. Clearly, the statute, as amended, includes public landowners and occupiers within the recreational use immunity from liability.

As noted by plaintiff, the expressed purpose of the state recreational use statute was to encourage landowners to open their land for public recreational use. Plaintiff, therefore, argued that "limitations on liability are not necessary 'to encourage' public landowners, such as Manson Park, to devote public land to recreational use." Once again, the state supreme court disagreed noting that the 1972 amendment expressly included public landowners at a time when public entities "were not otherwise immune from tort liability." In addition, the court acknowledged that "other courts have found similar recreational use liability limiting statutes applicable to public landowners in the absence of express statutory language

covering publicly-owned lands."