SB

176

HOUSE COMMITTEE REPORT

(9)
Date Referred: April 12, 1989 FURTHER REFERRALS:

Date of Committee Action: 4-27-89

The RESOURCES Committee considered: CSSB 176(FIN)

CS FOR SENATE BILL NO. 176 (Finance)
[BIG GAME HARVEST PERMITS AS PRIZES]
"An Act relating to auctions and raffles for bison harvest permits; and providing for an effective date."

RECOMMENDATIONS:
[ ] be replaced with _____ [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[X] fiscal note(s) F+G 4-6-89
[X] zero fiscal note(s) Pub. Safety 3-21-89
[ ] zero fn/analysis _____

SIGNING DO PASS:

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend

Chairman's Signature

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 176
PUBLISH DATE: 176

FISCAL NOTE

REQUEST:

Revision Date: _____
Agency Affected: _____
Title: An Act Relating to the Use of Big Game Harvest Permits as Prizes for Fundraising.
BRU: Wildlife Conservation
Sponsor: Senator Frank
Components: _____
Requestor: Senate Resources Committee

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE	0	$25.0	$30.0	$35.0	$35.0	$35.0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) Passage of SB 176 would result in no additional expenditures by the department. There is a potential, however, for adding considerable funds to the Fish and Game Fund for subsequent expenditures by the Division of Wildlife Conservation.

Prepared by: Donald E. McKnight
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Division: Wildlife Conservation
Date: April 6, 1989

Approved by Commissioner: Warren Olson, Asst. Commissioner
Date: April 6, 1989
Agency: Department of Fish and Game

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

permitted the free use of his facilities or land by the public generally or by a particular class of the public, such as Little Leaguers or Boy Scouts; permitting free use by classes of individuals was not sufficient, held the court. The court stated that the defendant was not immunized by the statute since it was not meant to apply to the friendly neighbor who permitted his friends and neighbors to use his swimming pool without charge. Apparently the boy and other neighbors had previously used the pool with the defendant's consent. However, finding the defendant free of negligence, which was apparently the standard for liability in the absence of statutory protection, the court affirmed a summary judgment for the defendant.

In an action to recover for injuries suffered by the plaintiff when he dived headfirst into 3 feet of water in the defendant's quarry pond, the court, in Hughes v Quarve & Anderson, Co. (1983, Minn) 338 NW2d 422, affirming a judgment for the plaintiff, held that the state recreational use statute, construed as a whole, did not protect the defendant. The court declared that the statute had no application since the defendant did not offer the quarry pond for public use and, indeed, claimed that it had discouraged the public from using the pond as a public facility. The court pointed out that the company had called for police aid to evict trespassers on numerous occasions, although it had erected no fence to keep people out.

In two brothers' action to recover for injuries suffered when the automobile in which they were "four-wheeling" on property owned by the defendants overturned, the court, in Watters v Buckbee Mears Co. (1984, Minn App) 354 NW2d 848, construing the state recreational use statute as a whole, held that the statute did not apply because the defendants did not directly or indirectly invite or permit people to use the property for recreational purposes. "Four-wheeling" consisted of off-road driving on an unpaved surface. The site contained excavation holes and large dirt hills resulting from the mining of gravel on the property by one of the defendants. The court stressed that there was no evidence that the defendants offered the land for public use, and observed that the defendants argued that the brothers had been trespassers. Affirming in part and reversing in part summary judgments for the defendants, the court held that the trial court had erred in basing summary judgment on the statute, although it had not erred in basing summary judgment on the common law.

In an action to recover for injuries suffered by the plaintiff when she dived into water 3 feet deep from a pier along the property owned by the defendant landowner, the court, in Le Foidevin v Wilson (1983) 111 Wis 2d 116, 330 NW2d 555, 47 ALR4th 247, reversing the dismissal of the action, held that the state recreational use statute, construed as a whole, did not apply to the landowner, who had not opened his land to the "public generally" or given permission to one or more members of the "public" to use the land for recreational purposes. The landowner and six other property owners allegedly jointly owned the 60-foot pier, which was on a lake whose ownership the court did not disclose. The plaintiff was a social guest of the landowner's son. The court declared that granting the protection afforded by the statute to a landowner who invited a friend of the family as a guest to join the family in water sports did not foster the purpose of the statute, which was to encourage landowners to make land and water areas available to the public for recreational use. Acknowledging the difficulty of drawing a bright line between a landowner who grants permission to the public to use his property for recreational purposes and was thereby protected by the statute, and a landowner who invited a person to use the premises for recreational purposes and was not protected by the statute, the court stated that the statute should be strictly construed so as to accomplish its legislative purpose. The court stated that the legislature had not intended to work a wholesale change in the entire law relating to the obligations of all landowners to all entrants on the land.

See Christians v Homestake Enterprises, Ltd. (1980, App) 97 Wis 2d 638, 294 NW2d 534, revd on other grounds 101 Wis 2d 25, 303 NW2d 608,[43] an action in which a 15-year-old boy sought to recover from the owner of the land on which two of the boy's friends had trespassed and from which the friends had taken blasting caps, the subsequent explosion of which seriously injured the boy, wherein the court, in affirming a judgment for the boy, held that the owner was not protected by the state recreational use statute because it had never opened its property for recreational use. The explosion occurred while the three were playing on land other than the owner's. Observing that the property was posted to forbid such use, the court declared that the statute applied only to landowners who had opened their land to the public. The court apparently construed the statute as a whole.

§ 13. —Other issues

[a] Statute applicable

Explicitly or apparently construing the state recreational use statute as a whole, and considering issues other than the degree of public access permitted on property that was owned or occupied by one or more of the defendants, and on which an entrant died or was injured, the courts in the following cases, involving actions to recover for the injury or death, held that the property was of a type to which the statute applied.

See Stephens v United States (1979, CD Ill) 472 F Supp 998 (applying Illinois law), § 13[b], a swimmer's action to recover under the Federal Tort Claims Act from the United States for injuries suffered when he dived into a lake at a state park and apparently hit his head on a tree stump, in which the court rejected the swimmer's contention that the Illinois recreational

43. Although stating without further elaboration that the state recreational use statute did not apply, the Supreme Court reversed the judgment on other grounds and remanded the case for a new trial.

use statute provided protection only to persons who opened already existing facilities to the public, and did not apply to owners who negligently designed and constructed lands specifically for recreational use. The United States, which leased the state parkland to the state, had overseen the construction of the park. Construing the statute as a whole, the court declared that nothing in the statute supported the suggested interpretation, and it was not the province of the court to engraft exceptions that the legislature had omitted. However, on other grounds, the court rendered judgment for the swimmer on the issue of liability.

In a father's and his daughter's action to recover for injuries suffered by the daughter when she was tobogganing down a hill in a city park, the court, in Syrowik v Detroit (1982) 119 Mich App 343, 326 NW2d 507, affirming a judgment for the city, held that the state recreational use statute, construed as a whole, applied to property located in urban areas as well as to rural property. The statute provided that no cause of action arose for injuries to any person who was on the lands of another, for a recreational purpose and without paying consideration, unless the injuries were caused by the gross negligence or willful and wanton conduct of the owner, tenant, or lessee of the land. Pointing out that the statute by its terms applied to fishing, hunting, trapping, camping, hiking, sightseeing, or other "similar" outdoor recreational use, the plaintiff argued that these activities were typically enjoyed in rural settings. The court replied, however, that the statute did not explicitly distinguish between urban and rural areas. The imposition of such a distinction, the court stressed, would require the drawing of an arbitrary dividing line between what was urban and what was rural. Such an imposition, the court continued, would do violence to both the wording of the statute and the intent of the legislature. The court held the city protected by the statute.

Stating that the state recreational use statute, construed as a whole, was intended to protect landowners from liability only when it would be unreasonable to expect the landholder to maintain supervision over the property in question, and that the key was the size and nature of the property, the court, in Krevics v Ayars (1976) 141 NJ Super 511, 358 A2d 844, concluded that an undeveloped, 11-acre tract of woodland, on which the defendant owner had allegedly allowed and maintained a motorbike trail, was of the size qualifying the owner for protection under the state recreational use statute. The motorbike operator sought to recover for injuries suffered when he struck a cable stretched across the trial. However, holding the landowner's conduct possibly unprotected by the statute, the court denied his motion for summary judgment.

See Rivera v Philadelphia Theological Seminary of St. Charles Borromeo, Inc. (1984) 326 Pa Super 509, 474 A2d 605, § 13[b], a mother's action to recover from a seminary, a church, and a priest for the drowning of her son while swimming in an indoor swimming pool owned by the seminary, in

which the court, apparently construing the state recreational use statute as a whole, held that the application of the statute was not limited to rural lands, but extended to urban lands as well. The seminary was in a large city. Observing that a prior state recreational use statute had been limited to agricultural lands or woodlands, and that the present statute, which repealed the earlier statute, extended to "land, roads, water, watercourses, private ways, and buildings, structures and machinery or equipment when attached to the realty," the court declared that if the legislature had desired to restrict the applicability of the statute to land in rural and semirural areas, it was reasonable to assume that it would have either retained the "agricultural land or woodlands" language of the former statute or inserted similar limiting language in the new statute. There was nothing unreasonable, the court said, about applying the limited liability of the statute in a uniform manner to land, whether urban, suburban, or rural, that was made available for recreational use without charge.

In two parents' action to recover for the death of their daughter in a public swimming area operated by the defendant park and recreation district, the court, in McCarver v Manson Park & Recreation Dist. (1979) 92 Wash 2d 370, 597 P2d 1362, construing the state recreational use statute as a whole, held that the statute applied to areas available exclusively for recreational purposes, and was not limited to areas primarily used for other purposes but having incidental recreational uses. The daughter fell or was pushed from a diving tower. Holding the statute applicable to the swimming area and the district protected by the statute, the court affirmed the dismissal of the action.

[b] Statute not applicable

In actions to recover for an entrant's injury or death on property owned or occupied by one or more of the defendants, the courts in the following cases, explicitly or apparently construing the state recreational use statute as a whole, and considering issues other than the degree of public access permitted on the property by the defendant, held that the property was not, or might not be, of a type to which the statute applied.

In an action in which a child and his mother sought to recover, from a general contractor and from the lessor of and a lessee at a shopping center, for injuries suffered by the child while riding his bicycle at a construction site at the shopping center, the court, in Paige v North Oaks Partners (1982, 2d Dist) 134 Cal App 3d 860, 184 Cal Rptr 867, apparently construing the state recreational use statute as a whole, held that the statute did not apply to any of the defendants. The statute provided that an owner of any estate in real property owed no duty of care to keep the premises safe for entry or use by others for any recreational purpose. Observing that the purpose of the statute was to encourage landowners to allow the general public to use their land for recreational purposes by relieving the owners of the tort duties that might otherwise arise from giving such permission, the court declared that it was incon-

ceivable that the legislature had intended the statute to apply to a case such as this one. The court stated that the legislature could not have intended to encourage owners and building contractors to allow children to play on their temporary construction projects. The court observed that the statute should be given a reasonable construction in light of its purpose. Pointing out that the activities of trespassing children were usually recreational, the court declared that it found nothing in the legislative history to suggest that the legislature intended to relieve all landowners of liability to trespassing children. The court therefore reversed a summary judgment for the defendants.

In an action seeking to recover from a beachfront construction site owner for injuries suffered when the plaintiff fell from the roof of a residential building under construction at the site, the court, in Potts v Halsted Financial Corp. (1983, 2d Dist) 142 Cal App 3d 727, 191 Cal Rptr 160, reversing a summary judgment for the owner, held that the statute did not apply to the construction site. The statute provided that an owner of any estate in real property owed no duty of care to keep the premises safe for entry of use by others for specified recreational purposes. Apparently construing the statute as a whole, the court declared that application of the statute under the circumstances would fail to promote the legislative intent of encouraging property owners to allow the general public to recreate free of charge on privately owned property. The court observed that landowners who had begun to rent private dwelling units had already withdrawn this portion of their land from public recreational access by making it unsuitable for such purposes. It was highly improbable, the court continued, that the legislature had intended to encourage landowners to allow the public access to places as unsuitable for recreation as the rafters or the roofs of their new homes or apartment units. A grant of immunity would merely encourage the negligent maintenance of construction sites, the court said. The court declined to embrace the language in Lostritto v Southern Pacific Transp. Co. (1977, 1st Dist) 73 Cal App 3d 737, 140 Cal Rptr 905 (disagreed with Potts v Halsted Financial Corp. (2d Dist) 142 Cal App 3d 727, 191 Cal Rptr 160), § 4[a], that the statute applied to property unsuited for recreational use.

Apparently construing the California recreational use statute as a whole, the court, in Donaldson v United States (1981, CA9 Cal) 653 F2d 414 (applying California law), an action in which a diver sought to recover from the United States under the Federal Tort Claims Act (FTCA) for a broken neck suffered when he dived into a reservoir in California maintained in part as a recreational area by the Army Corps of Engineers, held that the statute did not apply to the owner of a river resort as that expression was defined in a section of the California health and safety code. The diver had struck either a submerged object or the bottom with his head, and was paralyzed from the neck down. The court pointed out that the code provision applied

to only a limited type of recreational area—a river resort—but imposed on the keeper of such a resort duties far more stringent than those imposed by the recreational use statute. The court declared that construing the statute not to apply to river resorts permitted the code provision to continue as a minor exception to the general rule established in the recreational use statute. At most, the court said, this construction left a small puncture in the broad shield established in the recreational use statute. The court therefore reversed a summary judgment for the United States, which the trial court had granted on the ground that the recreational use statute shielded the United States from liability, and remanded the case for a determination whether the reservoir was a "river resort."

See Gibson v Keith (1985, Del Sup) 492 A2d 241, where the court, in holding that a statute limiting the liability of owners of property used for recreational purposes was not applicable where the owner did not give the users permission to use his property (see § 21[b]), stated that application of the statute was limited to the recreational use of essentially undeveloped land and water areas and was therefore not applicable to urban or residential areas improved with swimming pools, tennis courts, and the like.

Affirming the denial of the defendant's motion for summary judgment in an action in which the plaintiff sought to recover for burns suffered by his 3-year-old son while playing on a vacant lot, the court, in Shepard v Wilson (1970) 123 Ga App 74, 179 SE2d 550, apparently construing the state recreational use statute as a whole, stated that the statute had no application to the vacant lot. The defendant owned the lot, which was adjacent to the plaintiff's residence in a residential area. The son was burned by hot coals left by an employee of the defendant. The court noted that the statute had as its stated purpose the limiting of the liability of persons making land and areas available to the public for recreational purposes, and the court reasoned that to apply the statute to a vacant lot in a residential area under the facts of the case would extend the statute's coverage far beyond its intended purpose.

In an action in which the plaintiff sought to recover for injuries suffered while swimming in a pool at a motel owned by the defendants, the court, in Erickson v Century Management Co. (1980) 154 Ga App 508, 268 SE2d 779 (disapproved Cedeno v Lockwood, Inc., 250 Ga 799, 301 SE2d 265, on remand 166 Ga App 865, 306 SE2d 431), reversing a summary judgment for the defendant, held that the state recreational use statute, apparently construed as a whole, did not apply to a motel swimming pool. The plaintiff was not a customer of the motel; she was attending a holiday party given by the management. The public was invited, and there was no admission charge. Observing that the purpose of the statute was "to encourage owners of land to make land and water areas available to the public for recreational purposes," the court declared that the term "land and water areas" did

not encompass a swimming pool. The court did not state whether the statute employed this expression to define the property to which it applied; the expression clearly had reference to larger bodies of water, such as lakes and seashores, the court continued.[44] Observing that the recreational purposes to which the statute applied included hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, and water sports, and viewing or enjoying historical, archeological, scenic, or scientific sites, the court declared that this language was a further indication that the statute was intended to apply only to relatively large tracts of land and water, since only two or three of these activities could conceivably be done in any other setting.

In a swimmer's action to recover from the United States under the Federal Tort Claims Act (FTCA) for serious injuries sustained when he dived off a a pier into a lake in a national wildlife refuge in Illinois and hit bottom, the court, in Miller v United States (1979, CA7 Ill) 597 F2d 614 (applying Illinois law), construing the Illinois recreational use statute as a whole, held that the statute did not apply to recreational areas, such as the wildlife refuge, that were primarily maintained for recreational use. There existed a second Illinois statute, the recreational area licensing act, that established comprehensive safety and health regulations for areas specifically maintained for recreational use.[45] The court declared that the two statutes should be read in "pari materia," and that the recreational use statute did not apply to areas to which the licensing act did apply.[46] Accordingly, concluded the court, the recreational use statute applied to lands that were used on a "casual basis" for recreational purposes. Apparently stating that the liability of the United States under the FTCA was the same as that of a private individual, the court held that the United States was not entitled to the protection of the recreational use act since a private individual would not be. The court affirmed a judgment, on the issue of liability only, for the swimmer.

In a swimmer's action to recover from the United States under the Federal Tort Claims Act (FTCA) for injuries suffered when he dived into the water in a lake within a national wildlife refuge in Illinois and hit a submerged rock, the court, in Davis v United States

44. Disapproving of this rationale, the court, in Cedeno v Lockwood, Inc. (1983) 250 Ga 799, 301 SE2d 265, on remand 166 Ga App 865, 306 SE2d 431, § 14, stated that the application of the statute did not hinge on the size of the tract involved.

45. The nature of the licensing act is described in the district court opinion, Miller v United States (1976, ND Ill) 442 F Supp 555 (applying Illinois law).

46. In Johnson v Stryker Corp. (1979, 1st Dist) 70 Ill App 3d 717, 26 Ill Dec 931, 388 NE2d 932, § 12[a], the court disagreed with the same holding reached in the district court opinion of the Miller Case. The court in the Johnson Case did state, however, that it agreed that the statute applied to those who permitted open land to be used recreationally on a casual basis.

(1983, CA7 Ill) 716 F2d 418 (applying Illinois law), construing as a whole the Illinois recreational use statute, held that the statute did not apply to recreational areas coming within the ambit of the state recreational area licensing act. Noting the statement, in Johnson v Stryker Corp. (1979, 1st Dist) 70 Ill App 3d 717, 26 Ill Dec 931, 388 NE2d 932, § 12[a], disagreeing with the same conclusion reached in Miller v United States (1979, CA7 Ill) 597 F2d 614 (applying Illinois law), this subsection, the court stated that this dicta was only slight evidence of what the state courts would do if faced with this specific issue. The court concluded that the overriding concern of the licensing act, insuring users' safety and health at recreational areas containing facilities for overnight stays, would be undermined if landowners subject to it continued to enjoy the tort immunity provided by the recreational use statute. Holding the United States unprotected by the statute, the court affirmed a judgment for the swimmer on liability, but reversed as to the amount of damages.

Where a swimmer dived into a lake in an Illinois state park and apparently hit his head on a tree stump, the court, in Stephens v United States (1979, CD Ill) 472 F Supp 998 (applying Illinois law), the swimmer's action to recover from the United States under the Federal Tort Claims Act, held that the Illinois recreational use statute did not apply to the park. The United States owned and leased to the state the land on which the park was located, and liability was apparently predicated on this basis. Observing that the park was maintained primarily for recreational use, the court held that, construed as a whole, the statute did not apply to areas that were primarily maintained for recreational use. The court rendered judgment for the swimmer on the issue of liability.

Stating that statutes governing the liability of persons owning property used primarily for recreational purposes was intended to confer immunity upon owners of undeveloped, nonresidential rural or semi-rural land areas, the court in Keelen v State, Dept. of Culture, Recreation & Tourism (1985, La) 463 So 2d 1287, held that the statute was not applicable in an action for wrongful death in connection with a drowning death in a swimming pool in a state park because a swimming pool was not the type of instrumentality found in the true outdoors. When the instrumentality, whether in an urban or rural locale, is of the type found in someone's backyard, then the statute affords no protection, the court declared.

In an action in which a golfer sought to recover from a country club for injuries suffered when he was struck in the right eye by a golf ball, and in which the golfer's wife sought to recover for loss of consortium, the court, in Danaher v Partridge Creek Country Club (1982) 116 Mich App 305, 323 NW2d 376, app dismd (Mich) 325 NW2d 2, held that the state recreational use statute, construed as a whole, did not apply to the country club's golf course. The statute provided that a recreational user injured while on the land of another without paying a valuable consider-

ation had no cause of action against a landowner, tenant, or lessee unless the user's injuries were caused by the defendant's gross negligence or willful and wanton misconduct. The court held that the statute was not intended to apply to private lands that were used for outdoor recreation but that also constituted commercial enterprises. The court stated that the legislature intended to protect holders of private lands whose property, by its very outdoor nature, would be subject to recreational use by members of the general public who did not obtain permission to use the land from the property owners. The court stressed that the golfer was viewing the premises prior to a decision to play golf. The court also pointed out that the golfer had not violated any no-trespassing signs, nor had he entered an area that was not open to the general public. Applying general tort principles, the court affirmed a judgment for the golfer and his wife, although it reversed the judgment as to the amount of the wife's damages.

In a mother's action to recover from a seminary, a church, and a priest for the drowning of her son in an indoor swimming pool owned by the seminary, the court, in Rivera v Philadelphia Theological Seminary of St. Charles Borromeo, Inc. (1984) 326 Pa Super 509, 474 A2d 605, construing the state recreational use statute as a whole, held that the statute did not apply to public bathing places and swimming pools. The court observed that swimming pools were subject to regulation by the state public bathing law, which authorized the state department of environmental resources to adopt regulations insuring the health and safety of those persons making use of public bathing places and swimming pools. The legislature, the court said, had apparently determined that swimming pools possessed distinct characteristics from, and greater potential for harm than, other recreational facilities. To interpret the recreational use statute as applying to swimming pools and thereby eliminate their operators' need to exercise the reasonable care acquired by the bathing law, the court stressed, would be unreasonable and absurd and would nullify for those who need it most the protection intended to be provided by departmental supervision and regulation. Although holding the defendants unprotected by the statute, the court, on the ground of erroneous jury instructions, nonetheless reversed a judgment for the mother and remanded the case for a new trial.

IV. Recreational activities comprehended by statute[47]

§ 14. "Recreational purposes"[48]

In actions to recover for an injury to or the death of an entrant on property owned or occupied by the defendant, the courts in the following cases, focusing on the term "recreational purpose" or "recreational purposes," that admittedly or apparently defined the entire range of activities to which the state recreational use statute applied, rather than on any component of the statutory definition of these terms, explicitly or apparently held that the activity that the entrant had been engaged in at the time of his injury or death came within this term.

In an action in which a child and his mother sought to recover, from a general contractor and from the lessor of and a lessee at a shopping center, for injuries suffered by the child while playing at a construction site at the shopping center, the court, in Paige v North Oaks Partners (1982, 2d Dist) 134 Cal App 3d 860, 184 Cal Rptr 867, stated that the child's purpose at the time of his injury had undoubtedly been recreational, within the meaning of the state recreational use statute, which provided that an owner of any estate in real property owed no duty of care to keep the premises safe for entry or use by others for any "recreational purpose." The child, then age 10, and some of his friends rode to the construction area on their bicycles on a Sunday morning and played a bicycle chasing game there called "stop that pigeon." The game involved attempting to tag each other while riding, and in so doing they jumped over an open trench on their bicycles. The child suffered injuries when, while chasing his friends the third time around, he came in at the wrong angle to the trench and fell in. However, holding on other grounds that the statute was not applicable to the defendants, the court reversed a summary judgment in their favor.

In a mother's action to recover for the alleged wrongful death of her minor son, who drowned while attending a church Sunday school picnic at a lake resort, the court, in Bourn v Herring (1969) 225 Ga 67, 166 SE2d 89, conformed to 119 Ga App 226, 166 SE2d 607, later app 225 Ga 653, 171 SE2d 124, transf to 121 Ga App 373, 173 SE2d 716, app dismd 400 US 922, 27 L Ed 2d 183, 91 S Ct 192, apparently held that the son had been engaging in a "recreational purpose," to which the state recreational use statute applied, when he drowned. The statute provided that "recreational purpose" included, but was not limited to, hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, and water sports, and viewing or enjoying historical, ar-

47. For cases considering whether an entrant had been a "recreational user" of the property on which he had been injured or killed, or whether he had been on that property "for the purposes of outdoor recreation," see § 18, infra.

The Model Act (see § 2[a]) states that "Recreational purpose' includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites."

For cases discussing whether an entrant had been engaged in a recreational activity, within the meaning of the term "recreational user," or a similar expression, defining the entrants to whom the recreational use statute applied, see § 18.

48. For a case holding that playing golf did not come within the expression "recreational purposes" in a recreational use statute applying to enumerated recreational activities "or recreational purposes," see Quesenberry v Milwaukee County (1982) 106 Wis 2d 685, 317 NW2d 468, § 17.

cheological, scenic, or scientific sites. The court simply stated that the picnic and lake area at which the drowning occurred came within the definition of recreational purpose. On other grounds the court in effect denied summary judgment motions submitted by all defendants, namely, the church, the superintendent of the Sunday school, the corporation that had made the picnic grounds and lake resort available, and the corporation's general manager.

In an action, by a motorcyclist's estate and heirs, to recover for his death, which resulted from injuries incurred when he fell into a ravine on the defendant mining company's property while motorcycling, the court, in Johnson v Sunshine Mining Co. (1984) 106 **Idaho** 866, 684 P2d 268, held that motorcycling came within the definition of "recreational purposes," to which the state recreational use statute applied. The statute stated that "Recreational Purposes' includes, but is not limited to, any of the following or any combination thereof: Hunting, fishing, swimming, boating, camping . . . pleasure driving . . . ." The court stated that motorcycling for pleasure was sufficiently similar to the activities listed to be included. The court stressed that the "including, but not limited to" language made it clear that the list of enumerated activities was not intended by the legislature to be exhaustive. The court pointed out that the uncontradicted affidavit of the motorcyclist's companion stated that the two had been "pleasure riding our cycles for recreational purposes only . . . ." Holding the mining company protected by the statute, the court affirmed a summary judgment in its favor.

In an action by two parents to recover from the United States under the Federal Tort Claims Act for the death of their daughter while on a school field trip to a national wildlife refuge within Montana, the court, in Fisher v United States (1982, DC Mont) 534 F Supp 514 (applying Montana law), held that the United States was protected by the Montana recreational use statute since the daughter had been on the land for "recreational purposes," to which the statute applied. The children were having lunch inside a maintenance barn on refuge property, at the advice of the federal agency that operated the refuge, and the daughter was killed when a blade from a snowplow on which some of the children were playing fell on her. Declining to embrace the parents' contention that the trip was educational rather than recreational, the court pointed out that at the time of the accident the daughter had been doing the things that were done on a children's picnic, although the activities scheduled to occur later were educational in the minds of the school authorities. The burden on a landowner, the court declared, should not be increased because a visitor combined recreational use with some study or work. The court granted the government's motion for summary judgment.

In a father's action to recover for injuries suffered by his 2-½-year-old daughter when she fell from a slippery slide in a park owned and operated by the defendant city, the court, in Watson v Omaha (1981) 209 **Neb** 835, 312 NW2d 256, held that the daughter's using the slide came within the definition of "recreational purposes," to which the state recreational use act applied. The daughter had been playing on the slide with a group of family members and friends, and had fallen from the ladder of the slide when she was trying to dismount. The court observed that the statute stated that the term "recreational purposes" included, but was not limited to, hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, or otherwise using land for purposes of the user. The court stated that, although slippery slide activities were not one of the enumerated activities, the definition was broad enough to include the normal activities afforded by public parks. Holding the city protected by the statute, the court reversed a judgment for the father and dismissed the case.

However, in an action in which a husband and wife sought to recover, from the owner of a building and an adjacent stairway, for injuries suffered when the wife fell on the stairway, the court, in Cedeno v Lockwood, Inc. (1983) 250 **Ga** 799, 301 SE2d 265, on remand 166 Ga App 865, 306 SE2d 431, held that the state recreational use statute did not apply since the wife had not been on the stairway for "recreational purposes," to which the statute applied. The wife was injured while in a fenced-off area of the city that was apparently a commercial entertainment zone. The court stated that the property owners within the zone, including the defendant and their tenants, made their property available to the public for entertainment purposes in anticipation that visitors would purchase the food, merchandise, and services available. The court did not indicate whether the statute defined the term "recreational purposes." The court expressly declined to adopt the rationale of Erickson v Century Management Co. (1980) 154 **Ga** App 508, 268 SE2d 779, § 13[b], that the statute applied only to large tracts of land or water. The important criterion, stressed the court, was the purpose for which the public was permitted on the property. If the public was invited to further a business interest of the owner, the court said, then the statute did not shield the owner from liability even though the public received some recreation as a side benefit.

§ 15. "Sport and recreational activities"

In actions to recover for an injury suffered by an entrant on land, or in a body of water adjoining land, owned or occupied by the defendant, the courts in the following cases held that the entrant, at the time of his injury, had been engaged in "sport and recreational activities" or "activity," to which the state recreational use statute applied.

In a motorbike operator's action to recover from a landowner for injuries suffered when he struck a cable that was stretched across a motorbike trail on the landowner's property, the court, in Krevics v Ayars (1976) 141 NJ Super 511, 358 A2d 844, stated that the recreational activity of motorbiking fell within the requirement of a "sport and recreational activity," to which

the state recreational use statute applied. However, on the ground that the landowner's allegedly having erected or permitted the erection of the cable might cause him to be unprotected by the statute, the court denied his motion for summary judgment.

In an action in which a jeep operator and one of his passengers sought to recover from a city for injuries suffered when the jeep struck a steel cable strung along wooden posts on a 35-acre tract of land leased by the city for use in part as a police practice pistol range, the court, in Lauber v Narbut (1981) 178 NJ Super 591, 429 A2d 1074, certif den 89 NJ 390, 446 A2d 127, held that the plaintiffs had been engaged in "sport and recreational activities," to which the state recreational use statute applied. Stating that there was no evidence to the contrary, the trial judge had concluded that the plaintiffs had simply been out for a ride in the rural countryside, since the tract was wholly unimproved except for the range. However, the appellate court, although apparently agreeing that taking such a drive would not be a recreational activity, held that the plaintiffs had in fact been engaged in the recreational activity of "four-wheeling," which involved riding the jeep up and down hills. The court pointed out that (1) people used the area surrounding the pistol range for walking, bicycling, motorcycling, and jeep-riding up and down the adjacent hills; (2) the jeep operator testified that he had spoken to the injured passenger about "four-wheeling" through the woods, and that it had been evidence to him from tire tracks that the hills on the tract were being utilized for "four-wheeling," and by motorcycles and dunebuggies; (3) the jeep was driving across the pistol range to go up a hill when the accident occurred; and (4) a third passenger testified that "That's what we were out there for, to climb the hills." Holding the city protected by the statute, the court reversed judgments for the plaintiffs.

In an action in which the plaintiff sought to recover for injuries suffered when he dived off a bulkhead while fishing in a bay and struck bottom, the court, in Orawsky v Jersey Cent. Power & Light Co. (1977, ED Pa) 472 F Supp 881 (applying New Jersey law), granting the defendant utility's motion for summary judgment, held that the plaintiff had been engaged in "sport and recreational activities," to which the New Jersey recreational use statute applied. The utility owned the property on which the bulkhead was located. The plaintiff had testified that he did not like to eat fish and therefore had planned to sell his catch to a friend who owned a seafood store. The court replied, however, that the plaintiff did not contend that he was fishing to make money or that he was in the business of fishing or crabbing. On the contrary, the court stressed, when he had been asked why he went fishing, the plaintiff had answered, "I like to fish." The court held the utility protected by the statute.

However, a husband was not engaged in "sport and recreational activities," to which the state recreational use statute applied, when he drowned while attempting to

rescue two boys who had fallen through the ice while they were ice-skating on a frozen reservoir, held the court, in Harrison v Middlesex Water Co. (1979) 80 NJ 391, 403 A2d 910, reversing a judgment of involuntary dismissal for a water company in the wife's action to recover from the company for the husband's death. Describing the husband as having been engaged in a life-and-death struggle that, sadly, he lost, the court declared that this activity was the very antithesis of sport and recreation and assuredly was not encompassed by the statute. The court said that the statute was required to be strictly construed, and was not to be extended beyond its meaning. The court did not describe whether the husband himself was skating at the time of his rescue attempt.

See also Lauber v Narbut (1981) 178 NJ Super 591, 429 A2d 1074, certif den 89 NJ 390, 446 A2d 127, this section, in which the court implied that if the plaintiffs, who had been riding in a jeep, had simply been out for a ride in the rural countryside, rather than "four-wheeling," they would not have been engaged in "sport and recreational activities," to which the state recreational use statute applied.

§ 16. Particular specified recreational activities

[a] Statute applicable

In actions to recover for an entrant's injury or death on property admittedly or apparently owned or occupied by the defendant, the courts in the following cases held that, at the time of the entrant's injury or death, he had been engaged in, or it was supportable that he had been engaged in, a particular recreational activity to which the state recreational use statute specified it applied.

A negligence count in the complaint of the plaintiff, who broke his neck diving from a railroad trestle into a shallow stream below and became quadriplegic, against the defendant railroad was dismissed, in Lostritto v Southern Pacific Transp. Co. (1977, 1st Dist) 73 Cal App 3d 737, 140 Cal Rptr 905 (disagreed with on other grounds Potts v Halsted Financial Corp. (2d Dist) 142 Cal App 3d 727, 191 Cal Rptr 160), the court holding that the state recreational use statute immunized the railroad from liability for negligence. The statute provided that an owner of any estate in real property had no duty of care to keep the premises safe for entry or use by others for "water sports" and other specified recreational activities, nor to give any warning of hazardous conditions. The court concluded that diving was a "water sport."

In an action in which a motorcyclist sought to recover from an earth removal company for injuries suffered when he drove off a "blind shear end" of a mound of stockpiled dirt accumulated by the company on land on which it was excavating ponding basins, the court, in O'Shea v Claude C. Wood Co. (1979, 3d Dist) 97 Cal App 3d 903, 159 Cal Rptr 125, stated that the state recreational use statute applied to motorcycle drivers. In observing that the statute defined "recreational purpose" as including "riding, including animal riding, snowmobiling, and all

other types of vehicular riding," the court apparently construed the latter quoted expression as encompassing motorcycle riding. However, on other grounds the court reversed a summary judgment for the company.

In an action seeking to recover for injuries suffered when the plaintiff fell off a cliff, which was allegedly owned by the defendant state, during a fight, the court, in Blakley v State (1980, 1st Dist) 108 Cal App 3d 971, 167 Cal Rptr 1 (disagreed with on other grounds Nelsen v Gridley 3d Dist) 113 Cal App 3d 87, 169 Cal Rptr 757) and (disagreed with on other grounds Young v State of California (4th Dist) 129 Cal App 3d 559, 181 Cal Rptr 160, hear gr by sup ct, transf, later op, withdrawn) and (disapproved on other grounds Delta Farms Reclamation Dist. v Superior Court, 33 Cal 3d 699, 190 Cal Rptr 494, 660 P2d 1168), affirming a summary judgment for the state, held that the plaintiff was engaged in "sightseeing," within the meaning of the state recreational use statute, at the time of the injury. The statute provided that an owner of any estate in real property owed no duty of care to keep the premises safe for entry or use by others for "sightseeing." Observing that the plaintiff, as well as many of his friends, testified that their sole purpose in driving up to the cliff had been to look at the view, the court stated that these statements were wholly uncontradicted and established that the plaintiff had been a sightseer within the meaning of the statute.

In an action in which the plaintiff, who was sailing on a lake in a catamaran with an aluminum mast, sought to recover from an electrical utility for injuries suffered when the mast contacted the utility's powerlines overhanging the lake, the court, in Pacific Gas & Electric Co. v Superior Court (1983, 3d Dist) 145 Cal App 3d 253, 193 Cal Rptr 336, stated that the plaintiff had been engaged in a "water sport," within the meaning of the state recreational use statute, which extended to "water sports." Holding on other grounds, however, that the statute did not immunize the utility, which owned the land underlying the lake, from liability, the court denied the utility a writ of mandate ordering the trial court to set aside its ruling denying the utility's motion for summary judgment.

In Smith v Scrap Disposal Corp. (1979, 4th Dist) 96 Cal App 3d 525, 158 Cal Rptr 134, § 16[b], the court apparently held that, if the plaintiff had mounted a bulldozer on property occupied by the defendant for the purpose of joining with a friend in riding the bulldozer, the plaintiff would have been engaging in "vehicular riding" within the meaning of the state recreational use statute. The court held that there existed a question of fact about the plaintiff's intent in entering the property.

Drinking a cup of coffee was held by the court to be an activity to which the Maine recreational use statute limiting liability of property owners for injuries from recreational activities on their property applied in Schneider v United States, Acadia Nat. Park (1985, CA1 Mass) 760 F2d 366. Recognizing that coffee drinking was not within the list of recreational activities found in the statute, the court nevertheless concluded that the list was illustrative only and therefore did not preclude coffee drinking as a recreational activity. Extraordinary problems would be created if liability were to depend on whether a person was having a picnic lunch or just a cup of coffee, the court declared.

Affirming a directed verdict for a railroad in an action in which the administrator of a Boy Scout leader's estate sought to recover for his death, the court, in Lovell v Chesapeake & O. R. Co. (1972, CA6 Mich) 457 F2d 1009 (applying Michigan law), held that the leader had been "hiking" on a railroad trestle, when he was struck by a train, within the meaning of the Michigan recreational use statute. The statute applied to one on the land of another for fishing, hunting, trapping, camping, "hiking," sightseeing, or other similar outdoor recreational use. The leader was with a group of Boy Scouts that was marching along the railroad trestle, which spanned a road and a river, when the train entered the trestle, catching the group in the middle. The leader succeeded in pushing several of the scouts off the trestle and was trying to do the same with the last one before the train struck and killed them both. The administrator contended that the leader was on the trestle for a rescue effort rather than for hiking or recreational purposes. The court declared, however, that the evidence rendered it impossible for a reasonable person to believe that the leader's entrance onto the trestle was caused by the danger to the scouts. The court pointed out that it was undisputed that the leader was struck by the train at the far end of the trestle. The court stated that the leader entered railroad property for the purpose of the scouting hike; thus, he became a trespasser before he became a hero. The court held the railroad protected by the statute.

In a consolidated appeal of two actions brought to recover for injuries suffered on state forest land, the court, in Sega v State (1983) 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174, affirming a judgment for the state in one action and reversing a judgment for the claimant in the second action, held that both actions came within the state recreational use statute where one claimant had been "hiking" and the other claimant had been engaging in "motorized vehicle operation for recreational purposes," both of which were activities encompassed by the statute. One claimant was injured when, taking a break while hiking with others, she sat on a bridge railing and the railing gave way. The court declared that, although the claimant was not walking when she was injured, the acts of sitting and resting were sufficiently related to traveling through the woods on foot to justify the conclusion that she was "hiking" when the accident occurred. The second claimant was injured when the three-wheeled, all-terrain vehicle he was driving within the forest hit a ⅝-inch steel cable that was stretched across a road leading into the forest and was intended to prevent entry thereto. The court simply stated that the statute applied since the

claimant was on the forest property to operate a motorized vehicle for recreational purposes. The court held that the statute barred both claimants' actions.

In Seminara v Highland Lake Bible Conference, Inc. (1985, 3d Dept) 112 App Div 2d 630, 492 NYS2d 146, the court, construing a state statute exempting landowners from liability for accidents sustained by persons using said property for recreational purposes, and which listed a number of activities which were considered to be recreational, held that a landowner could not be held liable for injuries sustained by a bicyclist while riding on the owners' recreational property because bicycling was specifically listed in the statute as a recreational activity. Only in the instance of motorized vehicle operation must an independent determination of whether the activity was for recreational purposes be made, the court declared.

It was held by the court in Strong v Wisconsin Chapter of Delta Upsilon (1985, App) 125 Wis 2d, 107, 370 NW2d 285, that a fraternity could not be held liable for injuries suffered by a fraternity member when he dove off a pier owned by the fraternity because a statute provided that a landowner owes no duty to keep his premises safe for water sports. "Water sports" is a specific term which covers a definable group of activities, the court declared, ruling, therefore, that the rule of ejusdem generis, under which, where a general word follows an enumeration of more specific words, the general word is limited to objects of the same nature as the specific words preceding it, need not be applied.

[b] Statute not applicable

The courts in the following cases, involving actions to recover for an entrant's injury on property admittedly or allegedly occupied or controlled by one or more of the defendants, held that the entrant had not been, or that it had not been established that the occupant had been, engaged in a particular recreational activity, to which the state recreational use statute specified that it applied, at the time of the injury.

In an action against a water district and other defendants described by the courts only as having allegedly been involved in operating, maintaining, controlling, inspecting, repairing, funding, owning, or possessing easement rights to the portion of a creek over which a bridge crossed, the court, in Gerkin v Santa Clara Valley Water Dist. (1979, 1st Dist) 95 Cal App 3d 1022, 157 Cal Rptr 612 (disagreed with on other grounds Nelsen v Gridley (3d Dist) 113 Cal App 3d 87, 169 Cal Rptr 757) and (disagreed with on other grounds Young v State of California (4th Dist) 129 Cal App 3d 559, 181 Cal Rptr 160, hear gr by sup ct, transf, later op, withdrawn) and (disapproved on other grounds Delta Farms Reclamation Dist. v Superior Court, 33 Cal 3d 699, 190 Cal Rptr 494, 660 P2d 1168) reversing a summary judgment for the defendants, held that a triable issue of fact existed concerning whether a minor child, who sought to recover for personal injuries sustained where she fell from the bridge into the dry creek below, had been "hiking" at the time of the injury, within the meaning of the state recreational use statute. The child had been walking across the bridge either by herself or with her bicycle. The child contended that she and her sister had been walking across the two planks constituting the bridge in order to use the telephone at a market on the other side of the bridge and to buy a candybar there. The court pointed out that, if "hiking" were to be read as including the act of walking, it would have been unnecessary for the legislature to enumerate as covered by the statute other types of activities that necessarily involved walking, such as camping, rock collecting, and hunting. The court concluded that, for an activity to fall within the term "hiking," the activity was required to constitute recreational hiking.

Reversing a summary judgment for the defendant scrap-disposal corporation, the court, in Smith v Scrap Disposal Corp. (1979, 4th Dist) 96 Cal App 3d 525, 158 Cal Rptr 134, an action seeking to recover for injuries sustained when the plaintiff fell off a bulldozer on property occupied by the corporation, held that a triable issue of fact existed whether the plaintiff had entered the property for a recreational purpose within the meaning of the state recreational use statute, which applied to, among other activities, "fishing" and "vehicular riding." The property occupied a portion of a marine terminal that the plaintiff and two friends entered to go fishing. As the three were later driving home, one of the friends jumped out of the car and said that he wanted to ride the bulldozer, and the plaintiff followed him. With respect to whether the plaintiff had been engaged in "vehicular riding," the court held that there was a question of fact whether the plaintiff entered the corporation's property for the sole purpose of discouraging his friend from mounting the bulldozer, or whether he joined the friend in riding the bulldozer. The court apparently believed that, in the first situation, the plaintiff would not have been engaged in "vehicular riding." The court also declared that the plaintiff's main purpose for the day having been to go fishing did not mean that he had been "fishing" at the time of his injury, since it was his purpose for entering the corporation's property that controlled.

The court in Smith v Southern Pacific Transp. Co. (1985, La App 4th Cir) 467 So 2d 70, held that a truckdriver who was involved in an accident on a street which ran through a city park was not engaged in recreational activities such that a statute limiting the liability of landowners who open their property to the public for recreational purposes would be applicable. Although the park itself is set aside for recreational purposes, the street used by the plaintiff is open to the motoring public for purposes other than recreational use, the court declared, concluding that the statute should not apply where people are allowed to use the property for other than recreational purposes.

§ 17. "Other" recreational purposes

In actions to recover for an entrant's injury or death on land in which the defendant held an interest, the courts in the following

cases explicitly or apparently held or stated that, at the time of the injury or death, the entrant had been engaged in "other" or "similar" recreational purposes or uses, within the meaning of a state recreational use statute applying to "other" or "other similar" recreational purposes or uses in addition to enumerated recreational purposes.

In an action in which the plaintiff sought to recover for injuries suffered when, sliding down a 200-foot-long spillway on a dam, he went off the end and fell 20 feet to the creekbed below, the court, in Russell v Tennessee Valley Authority (1983, ND Ala) 564 F Supp 1043 (applying Alabama law), noted and apparently agreed with the plaintiff's admission that he was using the spillway for recreational purposes, within the meaning of the Alabama recreational use statute, which applied to "other recreational purposes" as well as to specified recreational purposes. Holding that the statute insulated the defendants, a federal authority that operated the dam and two state authorities that apparently operated the reservoir created by the dam, from liability, the court granted the defendants' motions for summary judgment.

In two estates' consolidated wrongful death actions to recover for the deaths of two brothers in a snowmobile accident, the court, in Estate of Thomas v Consumers Power Co. (1975) 58 Mich App 486, 228 NW2d 786, affd in part and revd in part on other grounds 394 Mich 459, 231 NW2d 653 (not followed Thone v Nicholson, 84 Mich App 538, 269 NW2d 665), held that snowmobiling was a "similar outdoor recreational use" within the meaning of the state recreational use statute. The statute applied to one who entered land for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, or "other similar outdoor recreational use." The brothers had been killed when the snowmobile they were operating collided with a guy wire supporting a utility pole of the defendant power company. Rejecting the estates' contention that "similar" meant "exactly alike or identical," the court replied that such a construction would do violence to both the wording of the statute and the intent of the legislature. Such a definition would make the expression in question absolutely meaningless, the court continued. The court pointed out that, after naming certain specific recreational activities, the legislature had then used a broad general term to cover any recreational activity that might be imposed on the land of another. The court observed that a better definition of "similar" was "has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness." Holding the defendants, the power company and the owner of the property on which the accident occurred, immunized by the statute, the court granted them summary judgment.

In an action to recover under the Federal Tort Claims Act (FTCA) for an 11-year-old boy's drowning in a pool constructed by private persons on land in Nevada under the care and operation of the Bureau of Land Management of the United States, the court, in Blair v United States (1977, DC Nev) 433 F Supp 217 (applying Nevada law), granting the motion of the United States for summary judgment, held that the action was precluded by the Nevada recreational use statute. The boy had traveled approximately 25 miles to use the facility. After swimming in the pool for a period of time, he was found on the bottom. The court stated that it was clear that the boy entered the land for recreational purposes within the meaning of the statute, which applied to one who entered the land for hunting, fishing, trapping, camping, hiking, sightseeing, or any "other recreational purposes." The court was apparently construing the quoted expression.

However, in a musician's and his wife's action to recover from a county park commission for injuries suffered by the musician when, approaching the bandstand to participate in a concert, he allegedly fell over "boulders and debris," the court, in Villanova v American Federation of Musicians (1973) 123 NJ Super 57, 301 A2d 467, certif den 63 NJ 504, 308 A2d 669, held that a band concert did not come within the state recreational use statute, which apparently applied to "other" recreational activities as well as to enumerated recreational activities. The court noted that a predecessor statute simply immunized owners of agricultural lands or woodlands from responsibility for accidental personal injury suffered in the course of hunting or fishing. However, the court ruled that the expansion of the statute's coverage in the current enactment to include "other outdoor sport, game and recreational activity" did not manifest an intention, as the commission claimed, to bring within the statute's ambit recreational activities that were forms of play, amusement, diversion, or relaxation. Rather, employing the rules of "ejusdem generis" and "noscitur a sociis," the court observed that the activities specifically enumerated by the legislature were more physical than not, or of a nature for the most part typically requiring the outdoors. Holding the commission unprotected by the statute, the court reversed a summary judgment in its favor.

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In Quesenberry v Milwaukee County (1982) 106 Wis 2d 685, 317 NW2d 468, an action in which a husband and his wife sought to recover from a county for injuries suffered by the wife when she stepped into a hole in the ground while they were playing golf at a county golf course, in which the court, reversing the dismissal of the action and remanding the case for further proceedings, held that playing golf did not come within the term "recreational purposes" in the state recreational use statute, which applied to hunting, fishing, trapping, camping, hiking, snowmobiling, sightseeing, berry picking, cutting or removing wood, climbing observation towers, proceeding with water sports, "or recreational purposes." Applying the rule that a general word following an enumeration of more specific words was limited to objects of the same nature as the specific words, the court declared that the general term "recreational purposes" was limited to activities similar to the enumerated ones. The court concluded that the common feature of these endeavors was their being

the type of activity that could be engaged in on land in its natural, undeveloped state. In contrast, the court stated, golf was necessarily undertaken on the more structured, landscaped, and improved land of a golf course. The court held the county unprotected by the statute.

V. Entrants comprehended by statute[49]

§ 18. "Recreational user" or similar expression

Construing a state recreational use statute applying, in varying language, to an entrant who was a "recreational user," or to an entrant on the land of another "for the purposes of outdoor recreation," the courts in the following cases, involving actions to recover for the injury or death of an entrant on property owned or occupied by the defendant, held or stated that the entrant came within the applicable definition.

In two consolidated tort actions, one for personal injury and the second for wrongful death, brought against the state and arising from accidents at state parks, the court, in Moss v Dept. of Natural Resources (1980) 62 Ohio St 2d 138, 16 Ohio Ops 3d 161, 404 NE2d 742, held that the plaintiff husband and wife in the personal injury action, and the decedent in the wrongful death action, had each been a "recreational user" within the meaning of the state recreational use statute, which defined this term as a person to whom permission had been granted, without the payment of a fee or consideration, to enter the property for a recreational purpose. The statute applied to a "recreational user." The personal injury plaintiffs alleged that they had purchased gasoline and refreshments at the park, and the plaintiff administratrix of the decedent's estate in the wrongful death action alleged that the decedent had paid a fee for the rental of a canoe at the park at which she drowned. The court declared that, regardless of whether the purchase of gasoline and refreshments, or the rental of a canoe, constituted the payment of a fee or consideration, these expenditures were not made "to enter" the parks involved. The court said that consideration should not be deemed given under the statute unless it was a charge necessary to utilize the overall benefits of a recreational area, so that the charge could be regarded as an entrance or admittance fee. Holding the state protected by the statute in both actions, the court affirmed their dismissal.[50]

An 11-year-old girl who was injured when the horse she was walking on the defendant landowners' property bounded away on being scared by an approaching minibike was a "recreational user" within

49. For a case holding a recreational use statute inapplicable because the injured person had not entered or used the defendant's premises, see Pacific Gas & Electric Co. v Superior Court (1983, 3d Dist) 145 Cal App 3d 253, 193 Cal Rptr 336, § 32.

50. This case was distinguished in Huth v State (1980) 64 Ohio St 2d 143, 18 Ohio Ops 3d 370, 413 NE2d 1201, this section.

the meaning of the state recreational use statute, held the court, in Crabtree v Shultz (1977, Franklin Co) 57 Ohio App 2d 33, 11 Ohio Ops 3d 31, 384 NE2d 1294, an action in which the girl's parents sought to recover from the landowners for her injuries. The statute, which applied to an entrant who was a "recreational user," defined this term as a person to whom permission had been granted without the payment of consideration to enter premises to hunt, fish, trap, camp, hike, and swim, or to engage in other recreational pursuits. The landowners maintained a number of horses on their property, and apparently permitted the girl, who had a great interest in horses, to exercise them on occasion. The court simply stated that horseback riding came within the expression "other recreational pursuit" in the statutory definition of "recreational user." Apparently holding the landowners protected by the statute, the court affirmed summary judgments in their favor.

A husband who took his family to a state park was a "recreational user" within the meaning of the state recreational use statute, held the court, in Fetherolf v State, Dept. of Natural Resources, Div. of Parks & Recreation (1982) 7 Ohio App 3d 110, 7 Ohio BR 142, 454 NE2d 564, though he merely intended to sit by the beach and watch his family swim. The husband sought to recover from the state for injuries suffered when he slipped on a mud slick and suffered a very hard fall. The statute, which applied to an entrant who was a "recreational user," defined this term as a person to whom permission had been granted, without the payment of a consideration, to enter property to hunt, fish, trap, camp, hike, and swim, or engage in other recreational pursuits. The accident apparently occurred while the family was walking to the beach and before they had begun swimming. The husband alleged that he had not intended to swim because of a shoulder injury. The court held that sitting on the beach watching others swim constituted a "recreational activity." Sitting on the beach or otherwise close to the water, the court continued, was a recreational pursuit associated with the enumerated activity of swimming. Although pointing out that the husband also enjoyed a vicarious use of the premises for a recreational activity since he had brought his family there to swim, the court stated that it was unnecessary to rely on this vicarious use of the park since the husband had entered it to engage personally in a recreational pursuit. Holding the state protected by the statute, the court affirmed a summary judgment in its favor.

In a mother's action to recover for the death of her daughter, who was struck by a train of the defendant railroad while she was standing on the tracks, the court, in Power v Union P. R. Co. (1981, CA9 Wash) 655 F2d 1380 (applying Washington law), held that the daughter had been on the track "for the purposes of outdoor recreation" within the meaning of the Washington recreational use statute, which applied to an entrant on the land of another for such purposes. The court stated that undisputed facts demonstrated that the daughter and her friends used the

right-of-way as access to beaches that were otherwise inaccessible except by boat. At the time of the accident, the daughter was with a group of young people who were walking along the tracks while returning from the beach. The court also pointed out that, at the time of the accident, the daughter's group had run into another group of young people returning from the beach and had stopped by the tracks to socialize. Observing that the declared purpose of the statute was to encourage those in possession of land to make it available to the public for recreational purposes, the court declared that, by not fencing the right-of-way, the railroad had indirectly made the entire coastline available for recreation. The court reversed a judgment for the mother and remanded the case for further consideration of whether the railroad was an owner under the statute.

Where the plaintiff was attending a picnic at the defendant power company's lake and tripped over a metal cable running about 4 inches above the ground, the court, in Bilbao v Pacific Power & Light Co. (1971) 257 **Or** 360, 479 P2d 226 (applying Washington law), stated that the plaintiff had been using the company's land "for the purpose of outdoor recreation." The Washington recreational use statute applied to one using the defendant's premises for such purpose, and stated that the term included picnicking. On the ground of erroneous instructions, the court reversed a judgment for the plaintiff, who had been injured when she had tripped over the cable, and remanded the case for a new trial.

However, in a wife's action to recover from the state for her husband's death when he was electrocuted while attempting to connect their camping trailer's electrical system to an electrical hookup at a trailer site in a state park, the court, in Huth v State (1980) 64 **Ohio** St 2d 143, 18 Ohio Ops 3d 370, 413 NE2d 1201, held that the husband had not been a "recreational user," within the meaning of the state recreational use statute. The statute, which applied to an entrant who was a "recreational user," defined this term as a person to whom permission had been granted, without the payment of a fee or consideration, "to enter" property for recreational pursuit. The court stressed that the husband and wife had paid a fee to rent a space for the trailer at the park. This fee was a charge necessary to utilize the overall benefit of the recreational area, the court stressed. This case did not present a situation such as that present in Moss v Dept. of Natural Resources (1980) 62 **Ohio** St 2d 138, 16 Ohio Ops 3d 161, 404 NE2d 742, this section, the court commented, since the husband and wife could not have brought to the park the same items that they purchased or rented while there, as had been the situation in the Moss Case. Holding the state not entitled to the protection of the statute, the court reversed a summary judgment in its favor.

§ 19. Person "expressly invited"

An entrant who was seeking to recover for injuries suffered on the defendant's land was not, under the circumstances, a person "expressly invited" to the land within the meaning of a recreational use statute preserving a landowner's liability to such a person, the courts held in the following cases.

In a hiker's action under the Federal Tort Claims Act (FTCA) to recover from the United States for injuries sustained when he fell 70 feet while hiking in a national forest in California, the court, in Phillips v United States (1979, CA9 Cal) 590 F2d 297 (applying California law), affirming a summary judgment for the government, held that promotional literature published by the United States Forest Service did not constitute an "express invitation" to the general public to hike in the park, within the meaning of a section of the California recreational use statute preserving a landowner's liability to any person who was "expressly invited" rather than merely permitted to enter the landowner's premises. The court noted that, in ordinary parlance, an advertisement to the general public was not considered an "express invitation" to each member of the public to whom the message was beamed.[51] The little legislative history available, the court said, indicated that the legislature intended the term to include only individuals personally selected by the landowner. Observing that there was no evidence that the hiker had even seen the literature prior to his accident, the court pointed out that it did not reach the question whether promotional literature constituted an express invitation to those to whom it was specifically mailed. The court held that the recreational use statute precluded the government's liability.

In an action in which a man who was walking in a national forest in California sought to recover under the Federal Tort Claims Act (FTCA) from the United States for injuries suffered when the ground underneath him gave way and he fell into an underwater hot-water pool, the court, in Simpson v United States (1982, CD Cal) 564 F Supp 945 (applying California law), rendering judgment for the United States, held that the plaintiff had not been expressly invited to the national forest within the meaning of the section of the California recreational use statute preserving a landowner's liability to persons who were "expressly invited" rather than merely permitted to enter the premises by the landowner. Apparently referring to a paved parking area, restroom facilities, and a visitors' center, the court held that the government's provision of limited public facilities did not constitute an express invitation. The court further declared that the publicity given the national forest by the government and by private persons did not constitute an express invitation, although the court, in describing this publicity, mentioned only a picture display in the visitors' center. The court further declared that, in entering a fenced area that was posted as off

51. Describing this statement as dicta, the court, in Simpson v United States (1981, CA9 Cal) 652 F2d 831, on remand (CD Cal) 564 F Supp 945 (applying California law), declined to embrace it. The opinion on remand in the Simpson Case is treated infra.

limits, the plaintiff had exceeded the scope of any invitation to him.[52]

§ 20. Statute as whole—minor

[a] Generally

In actions to recover for a minor's injury or death on, or in a body of water adjoining, property contemporaneously or previously owned or occupied by the defendant, the courts in the following cases, explicitly or apparently construing a state recreational use statute as a whole, held that the statute applied to minors.

Apparently construing the state recreational use statute as a whole, the court, in Taylor v Mathews (1972) 40 Mich App 74, 198 NW2d 843 (disagreed with on other grounds Thone v Nicholson, 84 Mich App 538, 269 NW2d 665), held that the statute was applicable to minors. The father sought to recover, from the owner and the four lessees of property on which a water-filled gravel pit was located, for an injury sustained by his son when the son dived into the pit and hit bottom. Further holding, however, that the exception in the statute for gross negligence or willful and wanton misconduct might apply, the court reversed a summary judgment for the defendants.

In a father's action to recover for the alleged wrongful death of his 5-year-old son, who drowned in a lagoon on property previously owned by the defendants, the court, in Randall v Harrold (1982) 121 Mich App 212, 328 NW2d 622, construing the state recreational use statute as a whole, held that the statute applied to minors. The statute provided that no cause of action arose for injuries to any person who was on the land of another, for recreational purposes and without paying a valuable consideration, unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee of the land. The father claimed that the statute did not apply to children under the age of 7 since the defense of contributory negligence did not apply to children of such age, and the statute was intended to be applied only in situations in which the recreational user's own negligence could be considered in determining whether to impose liability. Disagreeing, the court stated that the statute did not change the common-law duty owed by owners and occupiers of property to those who entered the property as licensees. The court stressed that, at the time of the statute's enactment, the common law required even a minor licensee under the age of 7 to establish gross negligence in order to recover. Affirming a partial summary judgment for the defendants on the father's ordinary negligence and nuisance counts, the court held the ordinary negligence count precluded by the statute and the nuisance count redundant.

Stating only that the Michigan recreational use statute applied to infants, the court, in Magerowski v Standard Oil Co. (1967, WD Mich) 274 F Supp 246 (applying Michigan law), dismissed the negligence count in the complaint of the administrator of the estate of a 9-year-old boy who drowned when, attempting to fish from the defendant oil company's dock, apparently in Michigan, he fell into the water. The statute, which the court construed as a whole, stated that no cause of action arose for injuries to any person on the lands of another, for a recreational purpose and without paying a valuable consideration, unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee of the property. However, holding that there existed a jury question, the court denied the oil company's motion to dismiss the administrator's count alleging willful and reckless misconduct.

In an action in which a minor son and his parents sought to recover from state employees for injuries suffered by the son when the "trail bike" that he was riding struck a cable that was stretched across a roadway used by the public on recreational land owned by the state, the court, in Wirth v Ehly (1980) 93 Wis 2d 433, 287 NW2d 140, affirming the dismissal of the action, held that the state recreational use statute, construed as a whole, applied to minors. The court stressed that the statute unequivocally stated that an owner of premises owed no duty to keep the premises safe for entry or use by others. The court declared that a legislative mandate could not and should not be thwarted by the courts to achieve a result not contemplated or intended by the legislature. Considering the plaintiffs' contention that public policy supported carving out an exception for minors in the statute, the court replied that the legislature had determined that the public policy as to recreational land was one of nonliability of owners and occupiers in order to encourage the opening of such land to the public. The determination of broad principles or policies for social conduct was the chief characteristic of the legislative function, the court continued. The court held the employees, who worked for the state agency that maintained the land, protected by the statute.

[b] New Jersey cases

In New Jersey there is a conflict of authority with regard to whether the state recreational use statute, construed as a whole, applies to minors. In the following cases, involving actions to recover for injuries suffered by a minor on the defendant's property, the courts held that the statute did not apply.

In a guardian ad litem's action to recover for injuries suffered by a 3-year-old child when he fell into an excavation hole on a golf course owned and operated by the defendant unincorporated association, the court, in O'Connell v Forest Hill Field Club (1972) 119 NJ Super 317, 291 A2d 386 (disagreed with Magro v Vineland (1977) 148 NJ Super 34, 371 A2d 815, this subsection), denying the association's motion for summary judgment, held that the state recreational use statute, construed as a whole, did not apply to trespassing "children of tender years." The infant, who lived near the golf course, entered the premises while playing with friends. The court

52. The facts are taken in part from Simpson v United States (1981, CA9 Cal) 652 F2d 631, on remand (CD Cal) 564 F Supp 945 (applying California law), which had reversed the trial court's earlier rendition of summary judgment for the government.

stressed that there was no legislative history, no statements attached to the legislative bill as introduced, and no statement by the governor when signing the bill into law indicating an intent that the statute apply to trespassing children of tender years. Noting that the statute replaced an earlier statute protecting owners of agricultural land or woodlands from liability for injuries to hunters or fishermen, the court declared that the most likely interpretation of the statute was that it was intended to protect landowners from liability to sportsmen who entered their property, be they licensees or trespassers. The court observed that the legislature had found the original statute to be inadequate now when various recreational activities abounded. The court further stressed that the statute was in derogation of the common law, in that it lowered the duty owed a landowner to a licensee, and was therefore required to be strictly construed.

Construing the state recreational use statute as a whole in a 14-year-old minor's action to recover from a construction material company for injuries suffered when he dived off an apparently abandoned barge in a body of water on the company's property, the court, in Scheck v Houdaille Constr. Materials, Inc. (1972) 121 NJ Super 335, 297 A2d 17 (disagreed with Magro v Vineland, 148 NJ Super 34, 371 A2d 815, this subsection,), held that the statute did not apply to infant trespassers. The court accordingly granted the minor's motion to vacate a prior order in which the court had dismissed, on the ground of the statute's applicability, two of the counts in his complaint.[53]

However, in a 14-year-old plaintiff's action to recover from a city for injuries suffered when he dived into an abandoned, city-owned lake from a makeshift diving board, the court, in Magro v Vineland (1977) 148 NJ Super 34, 371 A2d 815, apparently construing the statute as a whole, held that the statute applied to minors. The court disagreed with Scheck v Houdaille Constr. Materials, Inc. (1972) 121 NJ Super 335, 297 A2d 17, and O'Connell v Forest Hill Field Club (1972) 119 NJ Super 317, 291 A2d 386, both in this subsection, which had excepted infant trespassers from the statute. The court declared that its study of the legislation and its history failed to produce a single clue, direct or circumstantial, implying that the legislature intended to exempt infant claimants from the reach of the statute. The language of the statute, the court continued, was clear and unequivocal. Where the legislature had expressed its intent to exempt certain landowners from any duty of care toward those engaged in enumerated recreational activities, the court stressed, it was beyond the power of the judiciary to carve out an exception for a class of injured persons simply because they were under the age of

53. Since the court declared that there existed a jury question whether the minor was entitled to the protection of the infant trespasser rule, the rule apparently applied only to minors up to a certain age or possessing a certain level of awareness.

18. A legislative mandate could not, and should not, the court said, be thwarted by the courts. The court held the city protected by the statute.

§ 21. —Other issues

[a] Statute applicable

The state recreational use statute, construed or apparently construed as a whole, applied, under the particular circumstances, to an entrant although he allegedly had been an invitee, the courts explicitly or implicitly held in the following cases involving an action to recover for injuries suffered by the entrant on, or in a body of water adjoining, the defendant's property.

The court in Corey v State (1985) 108 Idaho 921, 703 P2d 685, held that a statute limiting the liability of landowners who permitted recreational use of their land without charge was applicable in an action brought by a snowmobiler who was injured when he struck a cable strung across a path in a state park despite the claim that the state was using the cable to exclude the public from the land.

In Estate of Matthews v Detroit (1985) 141 Mich App 712, 367 NW2d 440, the court, in an action for wrongful death arising out of the drowning death of a 6-year-old boy at a public recreational area, held that a statute limiting the liability of owners of land used for recreational purposes applied to a public invitee who used a public recreational area without paying a valuable consideration for such use. Noting that the recreational use statute had been applied in cases involving trespassers and licensees, the court stated that what was most important in determining whether the statute was applicable was whether valuable consideration was paid for the use and not the classification given the entrant.

Apparently construing the state recreational use statute as a whole, the court, in Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, held that the statute applied to the plaintiff, an employee who was seriously injured while attending a company picnic at a county park, despite the employee's alleged status as an invitee. The employee dived into a river in the center of the park and struck a partially submerged, 55-gallon, blue oil drum that was apparently a trashcan. The employee contended that the statutory immunity was unavailable to the defendant county park commission because he was an invitee, and the statute applied only to trespassers and licensees. Disagreeing, the court stressed that the traditional concept of invitee status was irrelevant under the statute. The court pointed to a statutory provision that permission did not convey invitee status. The court also observed that the statute preserved a landowner's liability where the landowner had granted permission to enter for a consideration. The court declared that the legislature had carved out an "invitee-like" exception to the immunity conferred by the act only where consideration had been paid. However, holding the drum an artificial hazard not covered by the statute, the court denied the commission's motion for summary judgment under the statute.

In an action in which the plaintiff sought to recover from a utility company for injuries suffered when he dived into the bay from the bulkhead on which he was fishing and struck bottom, the court, in Orawsky v Jersey Cent. Power & Light Co. (1977, ED Pa) 472 F Supp 881 (applying New Jersey law), construing the New Jersey recreational use statute as a whole, held that the statute applied to an invitee, which the plaintiff contended that he had been. Noting that the statute did exclude one who had paid a consideration to enter the property, the court noted that this provided an exception for the traditional "business invitee." The court observed that the plaintiff did not contend that he was a business invitee; he claimed that he was somehow "invited" onto the premises because the utility did not discourage people from using the land for recreational purposes. The court granted the utility's motion for summary judgment.

In a consolidated appeal of two actions seeking to recover for injuries suffered on state forest land, the court, in Scga v State (1983) 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174, affirming a judgment for the state in one action and reversing a judgment for the claimant in the second action, held that the state recreational use statute imposed a single standard of care owed a landowner to entrants on land covered by the statute. Construing the statute as a whole, and pointing out that the statute did not refer to trespassers, licensees, or invitees, and that the statute's scope was restricted to a limited number of activities, the court held that the statute was contrary to the common law as it existed at the time of the statute's enactment. The court observed that the statute imposed liability only if there was a willful or malicious failure to warn by the landowner. Moreover, stated the court, the policy in the state was to determine a landowner's duty of care on the basis of foreseeability, not with respect to the rigid common-law classifications of trespasser, licensee, and invitee. It saw no reason, the court stated, to reintroduce conflict and confusion into the law by interpreting the statute as a retention of the common-law classifications. The court declared that the statute barred both claimants' actions.

[b] Statute not applicable

The courts in the following cases held that state recreational use statutes limiting the liability of owners of land used for recreational purposes were not applicable due to the classification or manner of entry of the entrant.

In an action brought by an individual who had sustained injuries in a swimming accident against the owner of the gravel pit where the accident occurred, the court in Gibson (1985, Del Sup) 492 A2d 241, held that a statute limiting the liability of persons who directly or indirectly invite others to use their property for recreational purposes was not applicable since the defendant had denied permission to enter the property to swim in the pit. In reaching this conclusion, the court rejected the contention that the statutory protection extended to any land avaialble for recreational use without regard to the intent of the owner as to how it be used. However, the court stated that the offer to use the property need not be an explicit offer but rather could be an implied or indirect offer. Turning to the facts of the case before it, the court determined that there was no indirect offer to use the property for recreational purposes where the owner undertook to affirmatively warn or bar the public from entry.

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Construing the state recreational use statute as a whole, the court, in Baroco v Araserv, Inc. (1980, CA5 Ala) 621 F2d 189, reh den (CA5 Ala) 627 F2d 239 (applying Alabama law), held that the statute did not apply to an action in which recovery was sought, from a food service company operating a pavilion at a beach area, for the drowning of the plaintiff's decedent at the beach. The company and its subsidiary contracted with the state to operate the pavilion for 5 years. The contract expressly provided that it was entered into for the benefit of the public, and further obligated the company to provide two lifeguards and to furnish all necessary life-saving equipment. The plaintiff's decedent drowned while attempting to rescue another swimmer who was in trouble, and who also drowned. The court stressed that the statute was entitled "An Act to Clarify and Codify the Common Law with Respect to the Duty of Care Owed by Landowners towards Persons Who May Be Upon Their Premises for Hunting, Fishing, Sporting or Recreational Purposes and Not for Purposes Connected With the Landowner's Business." Stating that the statute comprehended only persons who were not connected with the landowner's business, the court declared that the statute did not apply because the decedent was in the pavilion area in connection with the company's and its subsidiary's business, as provided for in the contract with the state.

VI. Circumstances of injury comprehended by statute[54]

§ 22. "Wilful or malicious failure to guard or warn against a dangerous" condition, use, structure, or activity

[a] Exception applicable

In actions to recover for an entrant's injury or death on the defendant's property, the courts in the following cases explicitly or apparently held that the defendant had been guilty of, or that there existed a question of fact whether the defendant had been guilty of, a "wilful or malicious failure to guard or warn against a dangerous" condition, use, structure, or activity, within the meaning of a state recreational use statute preserving a defendant's liability under such circumstances.

In an action in which a swimm sought to recover from the Uni States and from the insurer private fraternal organizati injuries suffered when he d a rock in a swimming ar river in a national park in and hit a submerged rc court, in Mandel v United

54. The Model Act (see § 2[a]) states that "Nothing in this act limits in any way any liability which otherwise exists: (a) For willful or malicious failu guard or warn against a dange condition, use, structure, or activity."

(1983, CA8 Ark) 719 F2d 963 (applying Arkansas law), reversed a summary judgment for the United States, although affirming a summary judgment for the insurer. Observing that the Arkansas recreational use statute preserved a landowner's liability for a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," the court held that there existed a genuine issue of material fact as to the willfulness or maliciousness of the United States. The swimmer alleged that (1) no warning was posted at the swimming hole; (2) the United States had not known of the particular submerged rock that the swimmer hit; (3) a National Park Service brochure warned of the danger of submerged rocks; (4) two National Park Service employees testified that they were aware of submerged rocks in the river generally; and (5) a National Park Service Ranger had specifically recommended that swimming hole when the swimmer had approached him for a recommendation of a location to take his camping group. The court stated that willful and wanton conduct was conduct showing an utter indifference to or conscious disregard for the safety of others.

The court in New v Consolidated Rock Products Co. (1985, 2d Dist) 167 Cal App 3d 121, 213 Cal Rptr 115, subsequent op on reh (2d Dist) 171 Cal App 3d 681, 217 Cal Rptr 522, held that a jury instruction, in an action brought by motorcyclists against a landowner to recover for injuries sustained when the motorcyclists drove over a cliff on the landowner's property, that to prove willful misconduct so as to impose liability on a landowner to nonpaying recreational users it was not necessary to establish that the landowner recognized that his conduct was dangerous was a correct statement of the law. Responding to the contention of the landowner that the instruction reduced the standard of care from upon which the jury could find liability from willful misconduct to ordinary negligence, the court stated that the instruction properly defined willful misconduct. In this regard, the court noted that the proper test to determine willful misconduct was whether a reasonable man would have been aware of the dangers.

In an action in which an automobile driver sought to recover under the Federal Tort Claims Act (FTCA) from the United States for injuries suffered in an automobile accident while he was driving in a federal recreational area within California, the court, in Von Tagen v United States (1983, ND Cal) 557 F Supp 256 (applying California law), held that there existed a material issue of fact concerning the government's alleged "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," within the meaning of the California recreational use statute, which preserved a landowner's liability under such circumstances. The driver had apparently gone off the road at what he alleged was a dangerously sharp curve. The court stated that three essential elements were required to be present before a negligent act could be considered willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury was a probable, as opposed to a possible, result of the danger; and (3) conscious failure to act to avoid the peril. The court pointed to the driver's introduction of reports of seven accidents occurring prior to his accident, and of an expert's evaluation of the accident scene, which stated that the lack of a guardrail, warning signs, reflectorized delineators, or direction arrows violated widely accepted highway safety engineering practices. Acting in part on other grounds, the court granted in part and denied in part the government's motion for summary judgment.

Reversing a summary judgment for the defendant power company, the court, in McGruder v Georgia Power Co. (1972) 126 Ga App 562, 191 SE2d 305, revd on other grounds 229 Ga 811, 194 SE2d 440,[55] an action for the alleged wrongful death of the plaintiff's 10-year-old son, held that an issue of fact existed whether the power company had been guilty of a "wilful failure to guard or warn against a dangerous condition, use, structure or activity," within the meaning of the state recreational use statute. The statute preserved a landowner's liability for a "wilful or malicious" failure under such circumstances. The son became trapped and drowned inside a drainage pipe leading from a pool of water to another pool on the power company's property. The court stated that undisputed facts demonstrated that (1) the son was swimming in the pool of water; (2) the power company knew that both adults and children swam and fished in the pool; (3) the power company did not attempt to prevent this activity; (4) the power company knew that at certain times water rushed through the drainage pipe with great force and pressure, creating a vacuum effect; (5) there was no sign immediately by the opening of the pipe specifically warning of this danger, nor was there any guard or screen over the opening; and (6) there were two "keep out" signs elsewhere on the company's property. The court stated that nothing in the record suggested malice, but noted that "wilful" was used in the statute as an alternative.

In an action to recover for injuries suffered by the plaintiff when he was fishing on a small pond located on the defendant corporation's property, the court, in North v Toco Hills, Inc. (1981) 160 Ga App 116, 286 SE2d 346, held that there existed a question of fact whether the corporation had been guilty of a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," within the meaning of the state recreational use statute, which preserved a defendant's liability under such circumstances. While walking from one fishing point at the pond to another, the plaintiff slipped and fell forward into overgrown weeds and was injured by falling into a roll of rusty metal fencing or reinforcing mesh. Observing that there was some evidence that the property had been used for dumping of construction-

55. In the later case, treated in § 12[b], the supreme court held on other grounds that the statute was not applicable to the action.

related materials, which apparently caused the injury, the court stressed that there were no warning signs forbidding the use of the property. Although holding that the trial court had properly granted summary judgment as to the plaintiff's ordinary failure-to-warn and private-nuisance counts, the court held that the trial court had erred in granting summary judgment as to the count for willful or malicious failure to guard or warn.

In an action in which a swimmer sought to recover from the United States under the Federal Tort Claims Act (FTCA) for injuries suffered when he dived off a pier in a lake within a national wildlife refuge in Illinois and hit bottom, the court, in Miller v United States (1976, ND Ill) 442 F Supp 555, affd (CA7 Ill) 597 F2d 614 (applying Illinois law), held that the United States had been guilty of a "wilful or malicious failure to guard or warn against a dangerous condition" in the lake, within the meaning of the Illinois recreational use statute, which preserved a landowner's liability in such circumstances. Observing that state courts had not construed the statute, the court turned for guidance to the Illinois structural work act, which created a right of action for personal injuries occasioned by willful violations of the act. The court declared that a willful violation occurred when the alleged violator, by the exercise of reasonable care, could have discovered the existence of the dangerous conditions.[56] The court stated that willfulness was not limited to knowing or intentional, or even to reckless, disregard. The court declared that the United States could have discovered—in fact it knew—of the dangerous conditions at the pier, but the government did nothing to remedy them or to warn users against the conditions. The court rendered a judgment for the swimmer on the issue of liability only.

Apparently finding the United States guilty of a willful failure to warn a swimmer of a dangerous condition, submerged tree stumps, in a lake, the court, in Stephens v United States (1979, CD Ill) 472 F Supp 998 (applying Illinois law), rendered a judgment for the swimmer on the issue of liability in his action to recover from the United States under the Federal Tort Claims Act. The swimmer hit his head on a submerged tree stump after diving into the lake, which was in an Illinois state park located on land leased by the state from the United States. The Illinois recreational use statute preserved a landowner's liability for a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." The court stated that the keys to a finding of willfulness were (1) the foreseeability of the danger, and the probability and gravity of harm from it, (2) the defendant's knowledge of the danger, and (3) the actions taken by the defendant in view of the first two factors. Finding these elements present, the court concluded that (1) the United States knew of the presence of the stumps; (2) the probability of harm from the stumps, and the probable gravity of injury, were great; and (3) a prohibition of swimming or diving, or the posting of a simple warning sign, would have alerted the swimmer of the risk of harm. The court apparently did not address the government's possible "malicious" conduct or failure to "guard." Acknowledging that there had been no reported similar accidents during the lake's previous 5 years of operation, the court nonetheless held the United States not protected by the statute.

In a motorbike operator's action to recover from a landowner for injuries suffered when he struck a cable stretched across a motorbike trail on the landowner's property, the court, in Krevics v Ayars (1976) 141 NJ Super 511, 358 A2d 814, accepting the motorbike operator's allegations as true for purposes of denying the landowner's motion for summary judgment, apparently held that the "quality" of the landowner's alleged act of causing or consenting to the placing of the cable across the trail, if proved, would render the landowner not protected by the state recreational use statute. The motorbike operator alleged that the landowner had allowed and maintained the trail on the property for several years prior to putting up the chain. The court declared that the statute did not apply if a landowner created or knowingly permitted the creation of the hazard causing the injury. The court apparently based its decision on an exception in the statute for a landowner's "willful or malicious failure to guard, or warn against, a dangerous condition, use, structure or activity." The court distinguished Odar v Chase Manhattan Bank (1976) 138 NJ Super 464, 351 A2d 389, certif den 70 NJ 525, 361 A2d 540, § 22[b], on the ground that the injury in that case was caused by natural conditions—a pond and ice through which the decedent had fallen—which had not been created or maintained by the defendant. Observing that the situation of this case was the opposite, the court declared that the erection of the cable was certainly a willful act.[57]

[b] Exception not applic

In the following cases, involving actions to recover for an entrant's injury or death on, or in a body of water adjoining, property in which the defendant or its insured held an interest, the courts explicitly or apparently held, stated, or declared supportable a finding that the defendant or the insured had not been guilty of a "wilful or malicious failure to guard or warn against a dangerous" condition, use, structure, or activity, within the meaning of a state recreational use statute preserving a defendant's liability under such circumstances.

Affirming a summary judgment for a city in an action in which a father sought to recover for his two sons' drowning in a river ad-

56. In Johnson v Stryker Corp. (1979, 1st Dist) 70 Ill App 3d 717, 26 Ill Dec 931, 388 NE2d 932, § 22[b], the court expressed its disagreement with this statement, which it described as dicta.

57. This case was distinguished in Lauber v Narbut (1981) 178 NJ Super 591, 429 A2d 1074, certif den 89 NJ 390, 446 A2d 127, and Orawsky v Jersey Cent. Power & Light Co. (1977, ED Pa) 472 F Supp 881 (applying New Jersey law), both in § 22[b].

joining a city park, the court, in Glover v Mobile (1982, Ala) 417 So 2d 175, apparently held that the city had not been guilty of a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," within the meaning of a section of the state recreational use statute preserving a landowner's liability under such circumstances. The sons were apparently using the park when they entered the river and became trapped in its whirlpools. The court simply pointed out that the city had a policy of "no swimming" at the park.

In an action in which the plaintiff sought to recover for injuries suffered when, sliding down a 200-foot-long spillway on a dam, he slid over the end and fell 20 feet to the creekbed below, the court, in Russell v Tennessee Valley Authority (1983, ND Ala) 564 F Supp 1043 (applying Alabama law), held that one defendant, a federal authority operating the dam, had not demonstrated a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," within the meaning of a section of the Alabama recreational use statute preserving a defendant's "liability which otherwise exists" under such circumstances. The court acknowledged that, although the authority had never maintained the spillway for public recreational purposes, access to the spillway was not difficult, and the authority did not regularly station employees at the spillway to prevent access. However, pointing out that the condition causing the accident was the flow of water down and over the end of the spillway, the court stressed that the plaintiff readily admitted his awareness of the danger. Turning to the other defendants, two state authorities that apparently operated the reservoir created by the dam, the court declared that they owed no duty to one recreationally using a facility over which they had no incidents of ownership or control. Granting each defendant's motion for summary judgment, the court apparently held [illegible] protected by the statute.

In Clark v Tennessee Valley Authority (1985, ND Ala) 606 F Supp 130 (applying Alabama law), the court, in an action brought by fishermen who lost their boat over a spillway allegedly as a result of the defendant's negligent and wanton misconduct in the maintenance of a dam and reservoir, held that the defendant could not be held liable because the fishermen had not established that the conduct involved was willful as was required of statute to establish the liability of a noncommercial public recreational landowner. The court noted that there was ample evidence that the defendant had placed adequate warning signs near the spillway.

Affirming a summary judgment for the insurer of a private fraternal organization in an action in which a swimmer sought to recover from the insurer and from the United States for injuries suffered when he dived off a rock in a swimming area of a river in a national park in Arkansas and hit a submerged rock, the court, in Mandel v United States (1983, CA8 Ark) 719 F2d 963 (applying Arkansas law), held that there was no evidence of willful or malicious conduct on the part of the organization, within the meaning of a section of the Arkansas recreational use statute preserving a landowner's liability for a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." The swimmer's claim against the insurer was apparently based on the fact that at the swimming area, property owned by the organization was adjacent to the national park.[58] The court stated that willful and wanton conduct was conduct showing an utter indifference to, or conscious disregard for, the safety of others.

In an action in which a motorcycle rider sought to recover from an earth removal company for injuries suffered when he drove off a "blind shear end" of a mound of stockpiled dirt maintained by the company on land on which it was excavating ponding basins, the court, in O'Shea v Claude C. Wood Co. (1979, 3d Dist) 97 Cal App 3d 903, 159 Cal Rptr 125, stated that the driver failed to raise an issue of fact concerning the company's "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," within the meaning of the state recreational use statute, which preserved a landowner's liability under such circumstances. The court stated that willful or wanton misconduct was intentional wrongful conduct, done either with knowledge that serious injury to another would probably result, or with a wanton and reckless disregard of the possible results. Noting that the company's affidavits declared that it had not willfully or maliciously failed to warn the motorcycle driver, the court stressed that the rider had not introduced any evidence tending to show willful or malicious conduct. Although reversing a summary judgment for the company, on the ground that the statute's applicability was in question, the court declared that the trial court could, on remand, properly enter partial summary judgment on the issue of willful or malicious conduct.

In an action in which a man who was walking in a national forest within California sought to recover under the Federal Tort Claims Act (FTCA) from the United States for injuries suffered when the ground underneath him gave way and he fell into an underwater hot-water pool, the court, in Simpson v United States (1982, CD Cal) 564 F Supp 945 (applying California law), rendering judgment for the United States, held that the government had not willfully or maliciously failed to guard against dangerous conditions. The court was apparently applying a section of the California recreational use statute that apparently preserved a landowner's liability for a "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." The court found as a fact that the accident had occurred within an area that the government had fenced off and posted as prohibited to public entry due to the area's dangerous nature. The court declared that the government's post-

58. This fact is taken from the district court opinion at Mandel v United States (1982, WD Ark) 545 F Supp 907 (applying Arkansas law).

ing of warning signs in the area and construction of a fence surrounding the area was a good-faith, appropriate, reasonable, and adequate response to the dangers existing in the area. These measures constituted adequate warning, the court continued, of known concealed dangers existing in the area.[59]

Where a 14-year-old boy drowned in a lake during a church Sunday school picnic, the court, in Herring v R. L. Mathis Certified Dairy Co. (1970) 121 Ga App 373, 173 SE2d 716, app dismd 400 US 922, 27 L Ed 2d 183, 91 S Ct 192, held that neither the corporation that had provided the picnic grounds and lake resort to the church group, nor the corporation's general manager, had been guilty of a willful and malicious failure to guard or warn the boy against a dangerous condition. The court was apparently applying a section of the state recreational use statute preserving a landowner's liability for a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."[60] The court stated that the general manager, and hence the corporation, knew that the group was holding the picnic on the property, but he was not in charge of them and could not have been expected to leave his duties with the dairy for the purpose of superintending the conduct of each of the children. There were apparently no dangers in the use of the lake, the court continued, that were not to be found in the use of any similar body of water. The boy was presumed to know about and to appreciate these dangers, the court stressed. Even if the corporation was operating a swimming pool, within the meaning of a county ordinance regulating the operation of swimming pools, the court declared, the corporation's mere failure to comply with some of the provisions of the ordinance did not support a charge of willful and malicious action against the son. Holding the corporation and the general manager protected by the statute, the court granted a summary judgment in their favor in an action by the boy's mother to recover for his alleged wrongful death.

In a mother's action to recover from a mill for injuries suffered by her 13-year-old child when he attempted to retrieve a baseball from an open and unguarded conveyor belt in operation outside the mill's factory, the court, in Washington v Trend Mills, Inc. (1970) 121 Ga App 659, 175 SE2d 111, affirming a summary judgment for the mill, declared without further discussion that the mill had not been guilty of a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity," within the meaning of the state recreational use statute, which preserved a defendant's liability under such circumstances. The child was playing baseball on a vacant lot on the mill's property. A ball hit by another player had come to rest "in the machine," which was located an unspecified distance from the lot. The child apparently reached the machine by way of a path that was frequently used by members of the community. The court apparently considered important the child's undisputed testimony that he had been aware of the dangers of the machine. The court apparently held the mill protected by the statute.

In an action to recover for the alleged wrongful death of the plaintiff's 10-year-old son on a power company's property, the court, in McGruder v Georgia Power Co. (1972) 126 Ga App 562, 191 SE2d 305, revd on other grounds 229 Ga 811, 194 SE2d 440, § 22[a], stated that nothing in the record suggested malice by the company, within the meaning of a section of the state recreational use statute preserving a landowner's liability for a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."

See Herring v Hauck (1968) 118 Ga App 623, 165 SE2d 198, in which the court commented on the provision in the state recreational use statute preserving a landowner's liability for a "wilful and malicious failure to guard or warn against a dangerous condition, use, structure or activity." Considering a second statute that placed on landowners a duty not to injure a licensee willfully or wantonly, the court stated that this duty was broader than that established in the recreational use statute.

Affirming a judgment for a swimmer as to liability, but reversing the judgment as to damages, the court, in Davis v United States (1983, CA7 Ill) 716 F2d 418 (applying Illinois law), a swimmer's action to recover from the United States under the Federal Tort Claims Act (FTCA) for injuries suffered when he dived into a lake at a national wildlife refuge in Illinois and hit a submerged rock, held that the United States had not been guilty of a "willful or malicious failure to guard or warn against a dangerous condition," within the meaning of the Illinois recreational use statute, which preserved a landowner's liability under such circumstances. Observing that the government had posted "no swimming" and "no diving" signs at the lake, the court acknowledged that the government had failed to take the additional precaution of posting a sign specifically warning of submerged rocks. However, declared the court, such a sign would not have been of certain efficacy, since many would-be divers might ignore such a sign, believing that they would see any rocks, or that the sign referred to another part of the lake or was just another manifestation of the "nanny spirit" of modern government. The court stressed that the statutory term "willful or malicious" denoted a

59. The text of the statute, and the facts in part, are taken from Simpson v United States (1981, CA9 Cal) 652 F2d 831, on remand (CD Cal) 564 F Supp 945 (applying California law), which had reversed the trial court's earlier rendition of summary judgment for the government. That court had defined willfulness and maliciousness as intentional, wrongful conduct done either with knowledge that serious injury to another would probably result, or with wanton and reckless disregard of the possible results.

60. The text of the statute is taken from a prior appeal in the case, Bourn v Herring (1969) 225 Ga 67, 166 SE2d 89, conformed to 119 Ga App 226, 166 SE2d 607, later app 225 Ga 653, 171 SE2d 124, transf to 121 Ga App 373, 173 SE2d 716, app dismd 400 US 922, 27 L Ed 2d 183, 91 S Ct 192.

higher degree of wrongdoing than "willful and wanton." However, the court went on to hold that the statute did not apply to the United States.

See Johnson v Stryker Corp. (1979, 1st Dist) 70 Ill App 3d 717, 26 Ill Dec 931, 388 NE2d 932, in which no willful or malicious conduct was alleged, but in which the court commented on the provision in the state recreational use statute preserving a landowner's liability for a "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." An administrator of a decedent's estate sought to recover from a landowner and another for the decedent's death 4 years after being injured diving into a pond on the landowner's property. The court declared that it could not agree with the statement in Miller v United States (1976, ND Ill) 442 F Supp 555, affd (CA7 Ill) 597 F2d 614 (applying Illinois law), § 22[a], that liability existed under this provision if by the exercise of reasonable care the existence of the dangerous conditions could have been discovered and become known, apparently by the landowner. Pointing out that landowners had never been liable to licensees for defects of which the landowner was not aware and had no reason to be aware, the court stressed that such an interpretation would defeat the whole purpose of the statute, which was to encourage the opening up of land by landowners through granting an immunity that did not otherwise exist. The court remanded the case with directions to dis[illegible] the administrator's [illegible]inst the landowner.

See also McCain v Commercial Union Ins. Co. (1983, WD La) 592 F Supp 1, ques certified (CA5 La) 719 F2d 1271 (applying Louisiana law), an action to recover for injuries suffered by the plaintiff while diving from the high-diving board into a swimming pool run by the defendant recreational district, in which the court, granting the district's and its insurer's motions for summary judgment, held that there had not been a "willful or malicious failure to warn" on the part of the district. The Louisiana recreational use statute preserved a defendant's liability for a "willful or malicious failure to warn against a dangerous condition, use, structure or activity." The court noted that "willful" meant voluntary, intending the result that actually came to pass, conscious, knowing, and premeditated. The court also stated that a malicious injury was one committed against a person at the prompting of malice or hatred toward him, or done spitefully or wantonly, and involved the concept of some conscious design. Pointing out that the director of the district had held his position for 15 years and in that time had received no prior complaints about the high dive, the court declared that there could be no willful or malicious failure to warn given this lack of knowledge regarding the condition in question. The court held the action barred by the statute.

In a father's action to recover for injuries suffered by his 2-½-year-old daughter when she fell from a slippery slide in a park owned and operated by the defendant city, the court, in Watson v Omaha (1981) 209 Neb 835, 312 NW2d 256, held that a finding of fact by the trial court—that the city's negligence did not rise to the level of a "willful or malicious failure to guard or warn against a dangerous condition"—was not clearly wrong and could not be disturbed on appeal. The statute preserved a landowner's liability when there was such a failure in the face of a "dangerous condition, use, structure, or activity." The daughter had fallen from the ladder of the slide when she had been attempting to dismount. The greater portion of the left handrail had been cut off, and the daughter fell on reaching the point at which the rail was missing. The court observed that witnesses provided conflicting accounts about how long the handrail had been missing. The father's witnesses stated that the rail had been missing for approximately 2 weeks prior to the accident, whereas the city's maintenance personnel testified that it was in place until the morning of the accident. Holding the city protected by the statute, the court reversed a judgment for the father and dismissed the action.

In the action of two fathers to recover for injuries suffered by each of their sons in an explosion at a city park, the court, in Garreans v Omaha (1984) 216 Neb 487, 345 NW2d 309, held that the city had not been guilty of a "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." The state recreational use statute preserved a defendant's liability under such circumstances. The sons had been playing with firecrackers and had been injured when they dropped a lighted firecracker into a black, 55-gallon drum through a 1-inch hole in the lid. The drum, which was apparently filled with a flammable liquid, exploded, spraying liquid on the 12-year-old sons. The court stated that, for willful misconduct to exist, there was required to be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. It was apparently unknown how the drum got into the park, although the court pointed out that there was no evidence that the city had placed the drum there. The record showed, the court continued, that park employees did not observe the barrel on their routine trips through the park. The city's failure to observe the barrel, the court declared, may have been ordinary negligence, in that the city in the exercise of due care should have known of the existence of a danger, but the failure did not amount to willful misconduct. An actor could not act willfully in failing to remove a danger of which he had no knowledge, the court pointed out. Holding the city protected by the statute, the court reversed a judgment for the fathers and directed the trial court to dismiss the case.

In a college student's action to recover from the United States under the Federal Tort Claims Act (FTCA) for injuries suffered when he fell down a vertical shaft in an abandoned mine on federal property in Nevada, the court, in Gard v United States (1979, CA9 Cal) 594 F2d 1230, cert den 444 US 866, 62 L Ed 2d 90, 100 S Ct 138 (applying Nevada law), affirming a summary judgment for the United States, held that the undisputed

facts of the case failed to show that the United States had been guilty of a "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." The Nevada recreational use statute preserved a landowner's liability under such circumstances. The court pointed out that there was no evidence that any employee of the United States had ever inspected the mine. The court also stressed that a supervisory governmental engineer stated that he had never noticed any activity in the vicinity of the mine, and had never received any other expression of concern about the mine's safety from members of the public or federal employees. Addressing the student's contention that the United States violated a Nevada statute requiring the fencing of mines, the court replied that a violation of the statute, even if proved, would at most constitute evidence of negligence or negligence per se. The court held the United States protected by the statute.

In three consolidated wrongful death actions to recover from the United States under the Federal Tort Claims Act for the death of three recreational users during a flash flood of a national recreational area in Nevada, the court, in Ducey v United States (1981, DC Nev) 523 F Supp 225, affd in part and revd in part on other grounds (CA9 Nev) 713 F2d 504[61] (applying Nevada law), held that the United States had not been guilty of a "willful or malicious failure to guard, or to warn against, a dangerous condition," within the meaning of the Nevada recreational use statute, which preserved a landowner's liability under such circumstances. The court declared that, to constitute willful injury, there was required to be design, purpose, and intent to do wrong and inflict the injury. The court observed that the plaintiffs, whose relationships to the recreational users were not specified by the court, had neither alleged nor proved that the United States actually intended the deaths of the recreational users. Holding the United States protected by the statute, the court rendered judgment in its favor.

In a wife's action to recover for the death of her husband, who drowned while attempting to rescue their daughter after she had fallen through the ice while ice-skating on a pond, the court, in Odar v Chase Manhattan Bank (1976) 138 NJ Super 464, 351 A2d 389, certif den 70 NJ 525, 361 A2d 540, held that the defendant bank, which was the trustee of the estate that owned the land that the pond was on, had not been guilty of a "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." The state recreational use statute preserved the liability of the owner, lessee, or occupant of land under such circumstances. The wife argued that the bank's failure to fence, post, or patrol, or in some manner prevent licensees or trespassers from entering, the property—with knowledge of prior frequent use of the property for recreational purposes—created a question of fact whether the bank's failure to do so constituted willful or malicious conduct. Disagreeing, the court stressed that it did not equate a failure to act under the circumstances with willful or malicious conduct. To do so, the court continued, would defeat the obvious legislative intent. Holding the bank protected by the statute, the court affirmed a summary judgment in its favor.[62]

In an action in which a jeep operator and one of his passengers sought to recover from a city for injuries suffered when the jeep struck a steel cable strung along wooden posts on a 35-acre tract of land leased by the city and used in part for a police practice pistol range, the court, in Lauber v Narbut (1981) 178 NJ Super 591, 429 A2d 1074, certif den 89 NJ 390, 446 A2d 127, held that the city had not been guilty of a "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." The state recreational use statute preserved a landowner's or lessee's liability under such circumstances. A cable enclosed the pistol range on two sides, and served as a fence or barrier to prevent damage to the range. The court simply stated that there was no evidence supporting an inference that the cable, if hazardous, had been erected willfully or maliciously to bar access to or use of the hills adjoining the range. The court distinguished Krevics v Ayars (1976) 141 NJ Super 511, 358 A2d 844, § 22[a], on the ground that the defendant in that case had caused a cable to be placed across a motorbike trail on his property for the express purpose of keeping others off the trail. Holding the city immunized by the statute, the court reversed a judgment for the plaintiffs.

In an action in which the plaintiff sought to recover for injuries suffered when he dived off a bulkhead while fishing in a bay and struck bottom, the court, in Orawsky v Jersey Cent. Power & Light Co. (1977, ED Pa) 472 F Supp 881 (applying New Jersey law), granting the defendant utility's motion for summary judgment, held that the utility, which owned the property on which the bulkhead was located, had not been guilty of a "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." The New Jersey recreational use statute preserved a landowner's liability under such circumstances. Rejecting the plaintiff's argument that the shallowness of the water was a dangerous condition, and that the utility's failure to warn against that danger was willful and malicious, the court declared that construing the utility's failure to warn of shallow water as willful conduct would render the statute meaningless. Distinguishing Krevics v Ayars (1976) 141 NJ Super 511, 358 A2d 844, § 22[a], which had held that there existed a jury issue as to maliciousness, the court stressed that the record in the present case was

61. The court, in Ducey v United States (1983, CA9 Nev) 713 F2d 504 (applying Nevada law), § 30[a], reversed on the grounds that the payment-of-consideration exception applied and deprived the United States of statutory protection.

62. This case was distinguished in Krevics v Ayars (1976) 141 NJ Super 511, 358 A2d 844, § 22[a].

completely barren of any facts suggesting willful or malicious conduct by the utility. The court held the utility protected by the statute.

In a consolidated appeal of two actions seeking recovery for injuries suffered in state forest land, the court, in Sega v State (1983) 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174, affirming a judgment for the state in one action and reversing a judgment for the claimant in the second action, held that neither claimant had established that the state had acted willfully or maliciously within the meaning of the state recreational use statute, which provided that the statute did not limit liability otherwise existing for "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." One claimant was injured when, while hiking with others in a state forest, she sat down on a bridge railing and the railing gave way. The other claimant had been injured when the three-wheeled, all-terrain vehicle he was driving through the forest had struck a ⅝-inch steel cable, stretched across a road, that was intended to prevent entry into the forest by vehicles. Considering the hiker's claim, the court declared that no evidence supported a finding that the state had acted willfully or maliciously in failing to discover or to warn about the defect in the railing. Turning to the vehicle driver's claim, the court said that, although the state may have been negligent in constructing the cable gate and in failing to post warnings, there was nothing to show that its conduct was willful or malicious. Therefore, held the court, the statute barred both claimants' actions.

In an action in which a wife sought to recover for her husband's death when the snowmobile he was driving collided with a gate on the defendant corporation's property, the court, in Rock v Concrete Materials, Inc. (1974, 3d Dept) 46 App Div 2d 300, 362 NYS2d 258, app dismd 36 NY2d 772, 368 NYS2d 841, 329 NE2d 672, affirming a judgment for the corporation, held that the corporation had not been guilty of a "willful or malicious failure to guard, or to warn against, a dangerous" condition or structure, within the meaning of the state recreational use statute, which preserved a landowner's liability for such a failure in the face of a "dangerous condition, use, structure, or activity." The court stated that the purpose of the statute was to codify the common law.[63] Translating the statutory provision into the language of the common law, the court declared that the wife bore the burden of proving that the gate constituted a dangerous structure, that the corporation should have known that the gate constituted an unreasonable hazard, and that the corporation had reason to believe that a passerby could not have discovered the gate for himself. In holding that the wife failed to meet this burden, the court stated that the gate was not hidden or concealed. Perhaps more important, the court declared, was the fact

63. It should be noted that Sega v State (1983) 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174, this subsection, held that the statute was contrary to the common law as it existed at the time of the statute's enactment.

that the gate's presence was known to other snowmobilers. The court therefore held the corporation protected by the statute.

In a snowmobiler's action to recover from the state for injuries suffered when he struck a dock, which was owned and maintained by the state, while he was snowmobiling on a frozen lake, the court, in Wight v State (1978) 93 Misc 2d 560, 403 NYS2d 450, dismissing the snowmobiler's claim, held that the state had not been guilty of a "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." The state recreational use statute preserved the liability of an owner, a lessee, or an occupant of land under such circumstances. Observing that the nonpaying snowmobiler was a licensee, the court declared that the statutory standard was nothing more than a restatement of the common-law duty of care owed a licensee. The court held that this duty owed a licensee was to refrain from intentional, wanton, or willful infliction of injuries, and to warn of traps and dangerous defects not likely to be discovered by the licensee. The snowmobiler apparently contended that the dock was a trap because, covered with snow as it was during the sudden snowstorm in which the accident occurred, he mistook the dock for a snowbank. Disagreeing, the court pointed out that the concrete dock was plainly visible except under the most adverse weather conditions, such as those existing at the time of the accident. It was not reasonable, the court continued, to require the state to foresee that snowmobilers would make use of the lake under such conditions. The court held the state protected by the statute.

See Curtiss v County of Chemung (1980, 3d Dept) 78 App Div 2d 908, 433 NYS2d 514, an appeal from three jointly tried actions brought by two teenage boys injured, and the administrator of the estate of a teenage boy killed, in the collapse of a shed on farmland, in which the court discussed the meaning of the provision in the state recreational use statute providing that the statute did not limit the liability otherwise existing for a landowner's "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." The three boys went to the farm to hunt and hike. They later congregated in the shed, and it collapsed. The court stated that the legislative intent in enacting the statute was to codify the common law as it then existed.[64] Apparently describing the common law, the court declared that, since there was no intentional, wanton, or willful infliction of injuries, the county's duty was to warn those coming on the land of traps or unreasonably hazardous defects of which the county knew and that the entrants could not discover on reasonable inspection. On the ground that the trial court had erred in excluding consideration of the statute, the court reversed judgments for the administrator and the boys, and

64. It should be noted that Sega v State (1983) 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174, this subsection, held that the statute was contrary to the common law as it existed at the time of the statute's enactment.

remanded the case for further proceedings, while rendering various dispositions of third-party complaints filed by the county in each action.

In an action against an owner of property used for recreational purposes to recover damages for injuries suffered by a bicyclist when he rode his bicycle at night into a drainage ditch on the owner's property, the court in Seminara v Highland Lake Bible Conference, Inc. (1985, 3d Dept) 112 App Div 2d 630, 492 NYS2d 146, construing a state statute exempting landowners from liability for injuries suffered by persons using the property for recreational purposes except when the owner willfully or maliciously failed to guard or warn against a dangerous condition on the property, held that the exception was not applicable because the drainage ditch in question constituted no danger to persons using the land for its ordinary and usual purposes. Noting that the accident occurred at night, the court observed that there was no evidence that bicyclists used this land after hours of darkness without a headlight.

In a fisherman's action to recover from a federal authority under the Federal Tort Claims Act for injuries suffered during a rockslide at a dam in Tennessee at which he was fishing, the court, in Shaver v Tennessee Valley Authority (1982, ED Tenn) 565 F Supp 12 (applying Tennessee law), granting summary judgment for the authority, held that the authority, which operated the dam, had not been guilty of a "willful or malicious failure to guard or warn against a dangerous condition." The Tennessee recreational use statute preserved a defendant's liability under such circumstances. The court declared that willful or malicious misconduct was intentional, deliberate, and purposeful. The court stressed that there was no evidence of harm to anyone other than the fisherman during the 30 years' history of the dam, and that the fisherman had pointed to only two or three occurrences of rocks falling down the dam face, although many people had visited the dam for recreational or other purposes. The court also observed that a civil engineer, who was employed by the authority and was responsible for the inspection and maintenance program for the dam, testified that authority employees made monthly inspections of the slopes on the reservoir face of the dam for subsidence of slope and spalling of rock. The engineer also testified that major engineering inspections were made every 2-½ years. The court held the authority protected by the statute.

In an action to recover from the United States under the Federal Tort Claims Act (FTCA), and from other defendants, for injuries sustained by the plaintiff in a motorcycle accident that occurred on federal land in Utah, the court, in Ewell v United States (1984, DC Utah) 579 F Supp 1291 (applying Utah law), held that the United States had not been guilty of a "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." The Utah recreational use statute preserved a landowner's liability under such circumstances. The court stated that willful misconduct was the intentional failure to do an act, with knowledge that serious injury was the probable result. The accident had apparently occurred when the motorcycle on which the plaintiff was a passenger ran into a gravel pit on the property, and the court stressed that there was no indication that, on the date of the accident, any federal employee was aware that a gravel pit operation was being conducted on the land. The gravel pit was being operated by a county. In further declaring that the alleged violation of state and federal mining statutes and regulations by the United States constituted at most evidence of negligence, or negligence per se, the court was apparently holding that these violations, even if proved, would not rise to the level of willful or malicious conduct. Holding the United States protected by the statute, the court granted its motion for summary judgment and dismissed the plaintiff's claims against the other defendants.

In an action to recover under the Federal Tort Claims Act from the United States for injuries suffered when the plaintiff fell down a cliff while sightseeing at a parkway overlook in a United States reservation within Virginia, the court, in Hamilton v United States (1974, ED Va) 371 F Supp 230 (applying Virginia law), held that the United States had not been guilty of a "wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." The Virginia recreational use statute preserved a landowner's liability under such circumstances. The overlook was bounded by an 18-inch-high stone retaining wall. The plaintiff and her husband walked to a grassy area below the retaining wall and came to a path leading along a chainlink fence that was approximately 5 feet high. Going through an opening in the fence, the two proceeded down a pathway having a decline of 50 to 60 degrees. This path apparently led to the cliff. The court stressed that the United States had taken safeguards to protect persons on the property, one of which was the erection of the chainlink fence, which was intended to prohibit passage by pedestrians beyond a certain point. The court also found significant the fact that the United States had not known, nor had reason to know, of the break in the fence. Holding the United States protected by the statute, the court rendered judgment in its favor.

In an action in which a minor son and his parents sought to recover from certain state employees for injuries suffered by the son when the "trail bike" that he was riding struck a cable stretched across a roadway used by the public on state-owned recreational land, the court, in Wirth v Ehly (1980) 93 Wis 2d 433, 287 NW2d 140, affirming the dismissal of the action, declared that the act of placing a wire cable across the road, standing alone, was not willful or malicious within the meaning of a provision in the state recreational use statute preserving a landowner's liability for a "wilful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity." The court held the employees, who worked for the state agency that maintained the land, protected by the statute.

§ 23. "Reckless failure to guard or warn against a dangerous condition, use, structure or activity"

In actions to recover for injuries suffered by an entrant on the defendant's property, the courts in the following cases held that the entrant stated a cause of action for, or presented a jury question as to, the defendant's alleged "reckless failure to guard or warn against a dangerous condition, use, structure or activity," within the meaning of a provision of the state recreational use statute preserving a defendant's liability under such circumstances.

In an action to recover for injuries suffered by the plaintiff when he, then 2 years old, suffered severe burns in hot springs within a park owned and operated by the defendant electric company, the court, in Van Gordon v Portland General Electric Co. (1983) 294 Or 761, 662 P2d 714, on remand 64 Or App 135, 667 P2d 532, remanded on other grounds 295 Or 811, 670 P2d 1026, on remand 67 Or App 290, 677 P2d 739, revd on other grounds, en banc 298 Or 497, 693 P2d 1285, held that there existed a jury question whether the utility had been "reckless" in failing to post warning signs, within the meaning of the state recreational use statute, which preserved a defendant's liability for a "reckless failure to guard or warn against a dangerous condition, use, structure or activity" on the land. Each year as many as 6,000 people used the park. The court declared that § 500 of the Restatement of Torts (2d) articulated the correct test, namely, that an actor's conduct was in reckless disregard of the safety of another if he did an act or intentionally failed to do an act that it was his duty to the other to do, knowing or having reason to know of facts that would lead a reasonable person to realize not only that his conduct created an unreasonable risk of physical harm to another, but also that this risk was substantially greater than that which was necessary to make his conduct negligent. The court in effect reinstated a judgment for the plaintiff, and remanded the case for further consideration.

In a swimmer's action to recover from a county for injuries suffered when he allegedly struck a submerged stump while swimming in a lake in a county park, the court, in Hogg v Clatsop County (1980) 46 Or App 129, 610 P2d 1248, reversing an order sustaining the county's demurrer, held that the swimmer's complaint stated a cause of action for the county's alleged recklessness. The state recreational use statute preserved a landowner's liability for a "reckless failure to guard or warn against a dangerous condition, use, structure or activity" on the land. Acknowledging that the complaint was couched in terms of "intentional" behavior by the county, the court observed that terms describing behavior giving rise to greater liability than mere negligence were often used interchangeably. The swimmer alleged that (1) the county had created the swimming area; (2) the county knew that logs and debris were present; (3) the county failed to take any precautions to remove dangerous substances under the water surface; and (4) the county "intentionally" created a hazardous area designated for public swimming, and willfully disregarded the safety of persons using the swimming area. The court observed that a defendant's act was properly characterized as willful, wanton, or reckless[65] only when it was apparent, or reasonably should have been apparent, to the defendant that the result of the act was likely to prove disastrous to the plaintiff, and the defendant acted with such an indifference toward, or utter disregard of, this consequence that it could be said that he was willing to perpetuate it. The court remanded the case for further proceedings.

§ 24. "Gross negligence or wilful and wanton misconduct"

[a] Exception applicable

In actions to recover for an entrant's injury or death on, or in a body of water adjoining, property in which the defendant had an interest, the courts in the following cases held that the defendant had been guilty of, or that there existed a jury question whether the defendant had been guilty of, "gross negligence" or "wilful and wanton misconduct," or both, within the meaning of a recreational use statute preserving a defendant's liability for "gross negligence or wilful and wanton misconduct."

In two estates' consolidated wrongful death actions to recover for the deaths of two brothers in a snowmobile accident, the court, in Estate of Thomas v Consumers Power Co. (1975) 394 Mich 459, 231 NW2d 653 (not followed Thone v Nicholson, 84 Mich App 538, 269 NW2d 665),[66] held that the estates' complaints sufficiently pled, so as to avoid summary judgment, that the deaths had resulted from the defendants' gross negligence. The brothers had been killed when the snowmobile they were operating collided with a guy wire supporting a power company's utility pole. The power company and the landowner were defendants. The statute preserved a defendant's liability if the injury resulted from his "gross negligence or wilful and wanton misconduct." The estates clearly alleged, the court stated, that the defendants knew of the unmarked guy wire and the threat therefrom to snowmobilers, that the presence of unmarked guy wires in areas "exposed to traffic" violated an industry safety code not further described by the court, and that the defendants could have avoided the resulting harm in several ways, but

65. Note, however, that in Van Gordon v Portland General Electric Co. (1983) 294 Or 761, 662 P2d 714, this section the court, observing that the elements of "willful" and "wanton" conduct were not a part of the statute, stated that adding these elements confused the issue.

66. The court, in Thone v Nicholson (1978) 84 Mich App 538, 269 NW2d 665, § 24[b], described this opinion as "an enigma." The court in the Thone Case said that the Thomas Case's use of the term "gross negligence" indicated that the court did not have a firm grasp on the distinction between "gross negligence" and "wilful and wanton misconduct."

failed to do so. The lower court[67] had pointed out that the physical condition of the property had apparently remained unchanged for some period of time, and snowmobile operation had taken place on the property for some time without objection by the owner. Without addressing the possibility of "wilful and wanton misconduct," the court affirmed summary judgments for the defendants on the estates' ordinary negligence count, but reversed summary judgments for the defendants on the estates' gross negligence count.

In an action in which two individuals who were apparently a child's parents sought to recover from a city for the child's drowning in a city lake, the court, in Burnett v Adrian (1982) 414 **Mich** 448, 326 NW2d 810, held that, although the parents had made out no claim for gross negligence, they had alleged facts sufficient, if barely so, to make out a case for willful and wanton misconduct, within the meaning of the state recreational use statute. The statute preserved a landowner's liability if a recreational user's injury was caused by the landowner's "gross negligence or wilful and wanton misconduct." The plaintiffs alleged that (1) the 14-year-old child drowned after walking off the edge of a submerged structure that the city had failed to destroy when the lake was created; (2) the city knew that the structure existed; (3) the city knew that swimmers used the lake; and (4) the city failed to avert the danger by destroying the structure, fencing the lake, or posting warnings. The court stressed that willful and wanton misconduct existed only if a defendant's conduct showed either an attempt to harm or such an indifference whether harm would result as to be the equivalent of intent. Although affirming a summary judgment for the city on the plaintiffs' nuisance count, the court reversed a summary judgment for the city on the plaintiffs' claim of gross negligence or willful and wanton misconduct.[68]

Reversing a summary judgment for the defendants in a father's action to recover for injuries suffered by his minor son when the son dived into a water-filled gravel pit, the court, in Taylor v Mathews (1972) 40 **Mich** App 74, 198 NW2d 843 (disagreed with Thone v Nicholson, 84 Mich App 538, 269 NW2d 665),[69] held that a jury question was presented whether the defendants had been guilty of gross negligence or willful and wanton misconduct. The son dived from a board attached to a tree into the water and struck his head on the bottom of the pit. The five defendants were the owner of, and

67. See Estate of Thomas v Consumers Power Co. (1975) 58 **Mich** App 486, 228 NW2d 786, affd in part and revd in part 394 Mich 459, 231 NW2d 653.

68. The facts are taken in part from a separate concurring opinion.

69. In Thone v Nicholson (1978) 84 **Mich** App 538, 269 NW2d 665, § 24[b], the court disagreed with the reasoning of the Taylor Case, the court stating that the Taylor court had relied on attractive nuisance law and the "misleading three-part test," without distinguishing premises liability doctrine from willful and wanton misconduct or gross negligence.

the four lessees of, the land on which the gravel pit was located. The pit had apparently not been used for gravel for a number of years, but had frequently been used as a swimming place for more than 25 years. The state recreational use statute preserved a defendant's liability if the injury was caused by his "gross negligence or wilful and wanton misconduct." Apparently considering the terms "gross negligence" and "wilful and wanton misconduct" to be synonymous, the court stated that gross negligence or willful and wanton misconduct existed when (1) the defendant knew that the situation required the exercise of ordinary care and diligence to avoid injury to another; (2) the defendant was able to avoid the resulting harm by ordinary care and diligence and by use of the means at hand; and (3) the defendant omitted to use such care and diligence, when to the ordinary mind it was undoubtedly apparent that the result was likely to prove disastrous to another. The court held that the son's age, 15, was important only as it bore on whether he did, or could have been expected to, realize the risk.

Affirming a judgment for the administrator of the estate of a jeep operator, the court, in Lucchesi v Kent County Road Com. (1981) 109 **Mich** App 254, 312 NW2d 86 (disagreed with on other grounds Ovist v Michigan Dept. of State Highways & Transp., 119 Mich App 245, 326 NW2d 468), held that the defendant road commission had been guilty of both "gross negligence" and "wilful and wanton misconduct," within the meaning of the state recreational use statute, which preserved a landowner's liability for "gross negligence or wilful and wanton misconduct." The commission stockpiled gravel in large mounds on a gravel pit it owned. A few weeks before the operator's death the commission had removed a large amount of gravel from the side of one mound, leaving a crescent-shaped ring of material with a precipitous escarpment at its rear. The court stated that the commission's employees came to realize the obvious danger created by the project. The operator was killed when his jeep went over the precipice. Stressing that there was a difference between "gross negligence" and "wilful and wanton misconduct," the court apparently believed that the former term referred to the last-clear-chance doctrine. Having baited a trap for even the most prudent driver, the court continued, the commission could not stand by idly and await a victim. Distinguishing Thone v Nicholson (1978) 84 **Mich** App 538, 269 NW2d 665, § 24[b], the court stated that the active conduct of the commission in creating an obvious danger was directly opposite to the defendant's conduct in the Thone Case. The court held the commission unprotected by the statute.

In an action in which the administrator of the estate of a 9-year-old boy sought to recover for the alleged wrongful death of the boy, who, while attempting to fish from the defendant oil company's dock, fell into a body of water, the nature of which was undisclosed by the court, and drowned, the court, in Magerowski v Standard Oil Co. (1967, WD Mich) 274 F Supp 246 (applying Michigan law), held that

there was sufficient evidence on the issue of gross negligence, within the meaning of the Michigan recreational use statute, for the administrator to go to the jury. The statute preserved liability for injuries caused by the "gross negligence or wilful and wanton misconduct" of the owner, tenant, or lessee of the land. Without addressing the possibility of "wilful and wanton misconduct," the court held the record sufficient to establish that the company knew that children used its facilities, and that in the exercise of ordinary care the company could have prevented them from doing so. The court stated that gross negligence existed when (1) the defendant knew of a situation requiring the exercise of ordinary care to avert injury to another, (2) the defendant possessed the ability to avoid the resulting harm by ordinary care while using the means at hand, and (3) the defendant omitted to use such care although to the ordinary mind it was apparent that the result was likely to prove disastrous to another. Although dismissing the administrator's negligence count, the court denied the company's motion to dismiss the administrator's gross negligence count.

[b] Exception not applicable

The defendant was not guilty of "gross negligence or wilful and wanton misconduct," or of "gross negligence" alone, within the meaning of a state recreational use statute preserving a landowner's liability for "gross negligence or wilful and wanton misconduct," the courts held in the following cases involving actions to recover for an entrant's injury or death on the defendant's property.

In Burnett v Adrian (1982) 414 Mich 448, 326 NW2d 810, § 24[a], an action in which two individuals, who were apparently a child's parents, sought to recover from a city for the child's drowning in a city lake, the court held without further discussion that the individuals had made out no claim for "gross negligence" under the state recreational use statute, which preserved a defendant's liability for "gross negligence or wilful and wanton misconduct," since the complaint included no allegation of the city's subsequent negligence.

Affirming a summary judgment for a landowner in a motorcyclist's action to recover for injuries suffered when his motorcycle struck a creek bank while he was riding along an abandoned railroad right-of-way on the landowner's property, the court, in Thone v Nicholson (1978) 84 Mich App 538, 269 NW2d 665,[70] held that the landowner had not been guilty of gross negligence or willful and wanton misconduct. The state recreational use statute preserved a landowner's liability when a recreational user's injuries were caused by the "gross negligence or wilful and wanton misconduct" of the landowner. The motorcyclist alleged that the landowner knew that the property was used by the public for motorcycling, and that the intersection of the right-of-way with the creek constituted an inherently

70. This case was distinguished in Lucchesi v Kent County Road Com. (1981) 109 Mich App 254, 312 NW2d 86, § 24[a].

hazardous condition, but failed to build a bridge over the creek or post warning signs or signals. The court stressed that "gross negligence" and "wilful and wanton misconduct" were distinct concepts, and that gross negligence referred to the last-clear-chance doctrine. On the other hand, the court continued, wanton and willful misconduct was either an intentional wrong or a reckless and heedless disregard of another's safety. The court declared that no gross negligence was involved, and the landowner's failure to post a warning did not amount to willful and wanton misconduct. Holding the landowner protected by the statute, the court criticized the reasoning of Taylor v Mathews (1972) 40 Mich App 74, 198 NW2d 843, and Estate of Thomas v Consumers Power Co. (1975) 394 Mich 459, 231 NW2d 653, both in § 24[a].

In an action to recover for a decedent's drowning while swimming in a gravel pit located on property owned and operated by the defendants, a county and a county board of commissioners, the court, in Graham v County of Gratiot (1983) 126 Mich App 385, 337 NW2d 73, held that the plaintiff, the personal representative of the decedent's estate, failed to state a cause of action for the defendants' "gross negligence or willful and wanton misconduct." The state recreational use statute preserved a defendant's liability for such conduct. Noting that the gross negligence standard had been essentially restated in the last-clear-chance doctrine, the court declared that gross negligence referred to a defendant's subsequent negligence, and that the plaintiff had stated no claim of gross negligence because he had not alleged the defendants' subsequent negligence. Considering willful and wanton misconduct, the court observed that the personal representative alleged that (1) the gravel pit was well known by the defendants to be an extremely dangerous swimming hole frequented by persons using alcohol and illegal drugs; (2) the pit had been the site of a previous drowning; and (3) the defendants negligently left access roads open to public use, neglected to supervise the area, and neglected to place warning signs or fences to secure the premises. The court held these allegations insufficient to allege willful and wanton misconduct. Holding the defendants protected by the statute, the court affirmed a summary judgment in their favor.

In an action brought by a passenger of an off-the-road vehicle to recover damages for injuries sustained when the vehicle tipped over when being driven at a state park, the court in McNeal v Department of Natural Resources (1985) 140 Mich App 625, 364 NW2d 768, held that the passenger had failed to allege sufficient facts of gross negligence or willful and wanton conduct within an exception to the state's recreational use statute which relieved owners of land used gratuitously for recreational purposes from liability for injuries suffered on the land except in those instances in which the owner was guilty of gross negligence or willful and wanton conduct. Stating that gross negligence included the concept of subsequent negligence, the court determined

that the complaint was insufficient because all of the allegations pertained to actions that should have been taken and contained no allegations of subsequent negligence. Moreover, the court stated that the complaint did not state a cause of action for wanton and willful conduct because it did not allege that the landowner wanted harm to occur or was indifferent to any harm that might be caused.

See Anderson v Brown Bros., Inc. (1975) 65 Mich App 409, 237 NW2d 528, an action to recover for injuries suffered by the plaintiff when he dived into a lake formed by a gravel pit on city-owned land, in which all three justices, each of whom wrote a separate opinion, described as not clearly erroneous the trial court's finding that the plaintiff had not demonstrated the defendants' "gross negligence or willful and wanton misconduct." The defendants were the city and a corporation that leased the property and maintained the gravel pit. The state recreational use statute preserved a defendant's liability if the plaintiff's injuries were caused by the gross misconduct or willful and wanton misconduct of the defendant. The court's decision had the effect of affirming a summary judgment for the defendants on the plaintiff's count alleging gross negligence or willful and wanton misconduct.

§ 25. "Known dangerous artificial latent condition"

In actions to recover for an entrant's death on property owned or occupied by the defendant, the courts in the following cases held that the death had not resulted from a "known dangerous artificial latent condition for which warning signs have not been conspicuously posted," within the meaning of a state recreational use statute preserving a landowner's liability under such circumstances.

In a mother's action to recover from a railroad for the alleged wrongful death of her daughter, who was killed when she was hit by a moving train while standing on railroad tracks in Washington, the court, in Power v Union P. R. Co. (1981, CA9 Wash) 655 F2d 1380 (applying Washington law), held that the daughter's death had not been the result of a "known dangerous artificial latent condition for which warning signs have not been conspicuously posted." The Washington recreational use statute preserved a landowner's liability for injuries sustained by reason of such a condition. Apparently referring to the daughter's having entered and remained on the tracks, the court stressed that her death resulted from an activity, not from a "condition of the land." Moreover, the court declared, in no way could the presence of a speeding locomotive be considered "latent." The tracks, without more, the court said, put a reasonable person on notice that a train might appear; and, in this case, the court continued, the daughter and her friends actually saw the train approach as it was some 2 or 3 miles away. The court reversed a judgment for the mother and remanded the case for further consideration of whether the railroad was an owner within the statute.

In an action to recover under the Federal Tort Claims Act from the United States for the allegedly

wrongful death of the plaintiff's decedent, who was accidentally electrocuted while canoeing on a lake within a national recreation area in Washington, the court, in Morgan v United States (1983, CA9 Wash) 709 F2d 580 (applying Washington law), affirming a summary judgment for the United States, held that the decedent's death had not been "by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted." The Washington recreational use statute preserved a landowner's liability for such injuries. Subsequent investigation revealed that an electrically driven irrigation pump, owned and operated by a special use permittee, had shorted and discharged the electricity into the lake. The court stated that the statute appeared somewhat inconsistent in describing a condition as "known" and "latent" in the same breath. The court adopted the "common sense" interpretation that "known" referred to the landowner's mental state, whereas "latent" referred to a condition not readily apparent to the recreational user. The court further declared that the statute contemplated actual, rather than constructive, knowledge of the condition by the landowner. The court held that there was nothing in the record indicating that the government had knowledge of any danger or malfunction in the pumping system. Holding the United States protected by the statute, the court affirmed a summary judgment in its favor.

However, in an action to recover for injuries suffered by the plaintiff when she tripped and fell on a steel cable suspended about 4 inches above the ground at a lake at which she was picnicking, the court, in Bilbao v Pacific Power & Light Co. (1971) 257 Or 360, 479 P2d 226 (applying Washington law), holding that the trial court had properly denied the defendant utility company's motion for a directed verdict, stated that it was for the jury to decide whether the cable constituted a "known dangerous artificial latent condition for which warning signs have not been conspicuously posted." The Washington recreational use statute preserved a landowner's liability under such circumstances. The utility maintained a portion of its land at the lake as a public recreation area for swimming, boating, and picnicking. The cable, which was approximately 1 inch in diameter, was anchored to the shore afloat in the lake. The cable was rusty, unpainted, and not readily discernible because it blended with the color of the ground. One witness testified that the cable had not been readily visible from a distance of 8 to 10 feet, while another witness testified that she had also tripped over the cable on the same day as had the plaintiff. No attempt had been made to mark the cable or place signs warning of its presence. However, on the ground of erroneous instructions, the court reversed a judgment for the plaintiff and remanded the case for a new trial.

§ 26. Other specified terms

In actions to recover for injury or death suffered by an entrant on property occupied by the defendant, or by a person on land adjoining the defendant's, the courts in the following cases held that the

injury or death came within the term "any injury," or the term "unintentional injuries," defining in whole or in part those injuries to which a state recreational use statute extended.

Construing a section of the state recreational use statute stating that the landowner did not incur liability for "any injury" to person or property caused by an act or failure to act of another person using the land recreationally, the court, in Schwartz v Zent (1983, Ind App) 448 NE2d 38, held that the expression "any injury" comprehended the accidental shooting of the plaintiff by the defendant hunter, who was recreationally using the defendant landowners' property. The plaintiff was tending animal traps on neighboring land. The landowners gratuitously permitted hunting on their land, and the hunter was hunting with permission. The plaintiff contended that the statute applied only to incidents in which the victim was within the landowner's property when the injury occurred. Observing that the statutory language was clear, the court stated that the legislature had presumably chosen the words "any injury" intentionally. The court in effect affirmed a summary judgment for the landowners, although the court reversed a judgment relating to the landowners' demand that the plaintiff release his judgment against the hunter, who was apparently not involved in the present appeal.

In a mother's action to recover for the death of her daughter, who was struck by a train of the defendant railroad while she was standing on railroad tracks, the court, in Power v Union P. R. Co. (1981, CA9 Wash) 655 F2d 1380 (applying Washington law), held that the daughter's death had been an "unintentional" injury. The limitation of liability in the Washington recreational use statute applied only to "unintentional injuries." Pointing out that the train's engineer had sounded its bell and whistle, and had "dynamited" the brakes in an attempted emergency stop when he realized that the daughter was standing on the tracks, the court declared that the engineer and the brakeman could not be said to have intended to injure the daughter. The court reversed a judgment for the mother and remanded the case for further consideration of whether the railroad was an owner under the statute.

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Applying a provision of a state recreational use statute, other than those considered in §§ 22-25, this section preserving a defendant's liability, the courts in the following cases, involving actions to recover for an entrant's injury or death sustained on, or apparently on, the defendant's property, held that the exception did not apply.

In a wife's action to recover from the state for the alleged wrongful death of her husband, the court, in Rushing v State (1980, La App 1st Cir) 381 So 2d 1250, reversing a judgment for the wife and dismissing her complaint, held that the state had not been guilty of a "deliberate and willful or malicious injury" to the husband, within the meaning of the state recreational use statute, which preserved a landowner's liability for such an injury. The husband and two others had been frog hunting in a lake

located on the grounds of a state hospital. The husband was using a "frog grabber," which was apparently a 12-to 14-foot-long homemade device made of metal. The husband was electrocuted when he raised the device and it came into contact with an electric line located about 12 feet above the lake. The court apparently held that, under the statutory phrase, the state was liable if it committed either a "deliberate and willful" injury or a "malicious" injury. The court declared that all three terms—deliberate, willful, and malicious—required some conscious design on the part of the actor. Holding such conscious design by the state absent, the court stated that the state's action may have been negligent, but it was not purposeful and knowing conduct. The court concluded that the state could not reasonably be expected to foresee that anyone would use a frog grabber with a metal handle of the size involved here. The court therefore held the state protected by the statute.

Construing a provision in the Tennessee recreational use statute preserving a landowner's liability for "injury caused by acts of persons to whom permission to hunt, fish, trap, camp, hike, sightsee, or any other legal purpose was granted; to third persons or to persons to whom the person granting permission, or the landowner, lessee, occupant, or any person in control of said land or premises owed a duty to keep the land or premises safe or to warn of danger," the court, in Shaver v Tennessee Valley Authority (1982, ED Tenn) 565 F Supp 12 (applying Tennessee law), granting summary judgment for the defendant federal authority, held that the provision did not apply to a fisherman's action to recover under the Federal Tort Claims Act for injuries suffered during a rockslide at a dam in Tennessee at which he was fishing. The federal authority operated the dam. The fisherman construed this exception as creating a duty to all persons who had the status of invitee at common law. Disagreeing, the court replied that, although the language of the exception was not unambiguous, to accept the fisherman's interpretation would nullify the clear intent of the statute to abolish a landowner's duty of care. The court held the authority protected by the statute.

§ 27. Statute as whole—artificial condition or structure

[a] Statute applicable

In actions to recover for an entrant's injury or death on property owned, occupied, or maintained by the defendant, the courts in the following cases held that a state recreational use statute, construed or apparently construed as a whole, applied to the action although the injury or death resulted from an artificial, rather than a natural, structure or condition on the property.

In an infant plaintiff's action to recover from a landowner for injuries suffered when she fell while ice-skating on a frozen swamp on the landowner's tract, the court, in Tallaksen v Ross (1979) 167 NJ Super 1, 400 A2d 485, apparently construing the state recreational use statute as a whole, declared that the fact that the ice on which the plaintiff had fallen resulted

from the freezing of water diverted to the tract by manmade drains did not remove the landowner from the protection of the act. Several drainage pipes from adjoining properties discharged water onto the tract, since prior owners of the tract had given drainage easements to the surrounding property owners. Nothing in the statute, the court stressed, suggested that the manner of the accumulation of the ice brought the case outside the statute.[71] Holding the landowner protected by the statute, the court affirmed a summary judgment in his favor.

Apparently construing as a whole the state recreational use statute in an action in which a jeep operator and one of his passengers sought to recover from a city for injuries suffered when the jeep struck a steel cable strung along wooden posts on a 35-acre tract leased by the city and used by it in part as a police practice pistol range, the court, in Lauber v Narbut (1981) 178 NJ Super 591, 429 A2d 1074, certif den 89 NJ 390, 446 A2d 127, held that the statute applied to the action, despite the plaintiffs' contentions that the cable constituted an artificial hazard and that the legislature had not intended to grant immunity for injuries resulting from such conditions superimposed on land by the occupier. The pistol range, which took up only a portion of the tract, was surrounded on two sides by the steel cable. The court pointed out that the cable served as a fence or barrier to prevent damage to the pistol range. The court stressed that the statute provided that an occupant of land owed no duty to keep the land safe for entry or use by others for sport and recreational activities, nor to give warning of any hazardous condition of the land. Without further elaboration, the court stated that Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, § 27[b], and Scheck v Houdaille Constr. Materials, Inc. (1972) 121 NJ Super 335, 297 A2d 17 (disagreed with on other grounds Magro v Vineland, 148 NJ Super 34, 371 A2d 815), § 9[a], were plainly distinguishable on their facts. The court reversed a judgment for the plaintiffs.

In an action in which a minor son and his parents sought to recover from state employees for injuries suffered by the son when the "trail bike" that he was riding struck a cable that was stretched across a roadway, which was used by the public on recreational land owned by the state, the court, in Wirth v Ehly (1980) 93 Wis 2d 433, 287 NW2d 140, affirming the dismissal of the action, declared

71. The court buttressed its decision by pointing out that in Harrison v Middlesex Water Co. (1978) 158 NJ Super 368, 386 A2d 405, the court had held the defendant water company protected by the statute, in a wife's wrongful death action following her husband's drowning in the company's reservoir, although the reservoir was manmade. However, that decision was reversed in Harrison v Middlesex Water Co. (1979) 80 NJ 391, 403 A2d 910, § 9[b], although that court focused on the proximity of the reservoir to population centers, and on the improved nature, in general, of the tract on which the reservoir was located, rather than on the specific fact of the reservoir's having been "man-made."

that the state recreational use statute, construed as a whole, did not draw a distinction between a natural and an artificial condition causing the injury, and was not limited to artificial conditions.[72] The court held the employees, who worked for the state agency that maintained the land, protected by the statute.

[b] Statute not applicable

The state recreational use statute, construed as a whole, did not apply, in an action to recover for injuries suffered by an entrant on property owned by the defendant, the courts held in the following cases, since the injury resulted from an artificial, rather than a natural, structure or condition.

The court in Keelen v State, Dept. of Culture, Recreation & Tourism (1985, La) 463 So 2d 1287, construing the state recreational use statute as a whole in a mother's action to recover from the state for the drowning of her 8-year-old son in a swimming pool in a state park, held that the statute did not operate to immunize the state in the instant case because a swimming pool is not the type of instrumentality usually found in the outdoors. When the injury causing condition or instrument is of the type normally encountered in the true outdoors, then the statute provides immunity, the court declared, adding that conversely immunity does not apply when the instrumentality, whether found in an urban or rural locale, is of the type usually found in someone's backyard.

Where an employee, attending a company picnic, sought to recover from a county park commission for injuries suffered when he dived into a river in the middle of a county park and struck a partially submerged, 55-gallon blue oil drum that was apparently a trashcan, the court, in Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, construing the state recreational use statute as a whole, held that, because the condition specifically causing the injury, the trash barrel, was artificial rather than natural, the commission was not entitled to the protection of the statute. Observing that the intention of the statute was to exempt landowners from liability when someone was injured on their property while using it for recreational purposes, the court declared that this proposition was quite distinct from the case at hand, in which injury resulted from an artificial condition superimposed on the premises. The court stressed that the trash barrel bore no rational connection with either the premises (the river) or the activity (swimming). The court distinguished Trimblett v State (1977) 156 NJ Super 291, 383 A2d 1146, § 8[a]; Odar v Chase Manhattan Bank (1976) 138 NJ Super 464, 351 A2d 389, certif den 70 NJ 525, 361 A2d 540, § 9[a]; Magro v Vineland (1977) 148 NJ Super 34, 371 A2d 815, § 9[a]; and Harrison v Middlesex Water Co. (1979) 80 NJ 391, 403 A2d 910, § 9[b], on the ground that the injury-producing condition was natural in each

72. It may be questioned whether the court meant to say that the statute was not limited to natural conditions, since the cable was undoubtedly an artificial condition.

case. The court observed that the statute would apply if the employee had been injured as a result of striking the river bed. The court therefore denied the commission's motion for summary judgment under the statute.[73]

In an action to recover for injuries suffered while the plaintiff was using a slide in a playground within a city park, the court, in Primo v Bridgeton (1978) 162 NJ Super 394, 392 A2d 1252, construing the state recreational use statute as a whole, held that the statute did not apply when a person was injured using a slide in a park. The court observed that two approaches for determining the scope of the statute had been employed: In Boileau v De Cecco (1973) 125 NJ Super 263, 310 A2d 497, affd 65 NJ 234, 323 A2d 449, § 9[b], the court had emphasized that the activities covered by the act were those conducted in the true outdoors, not in someone's backyard, whereas in Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, this subsection, the court had developed a test requiring scrutiny of the relationship between the injury-producing instrumentality (the premises) and the activity involved. The court in the present case also noted that the court in the Boileau Case had stated that the statute should be strictly construed, whereas the court in the Diodato Case concluded that the statute should be given its broadest interpretation. The court determined to follow the analysis of the Boileau Case. The court also noted that the Boileau Case had stated that the statute applied to nonresidential, rural, or semirural land. Therefore, held the court, because the slide represented both an improvement and an artificial condition, the statute did not apply. The court denied the city's motion for summary judgment.

§ 28. —Active negligence

A state recreational use statute, construed as a whole, applied to an action to recover for an entrant's injury or death on property that the defendant maintained, or in which it had an interest, the courts held in the following cases, even though the injury or death allegedly resulted from the defendant's active, rather than passive, negligence.

In an action in which a motorcyclist's estate and heirs sought to recover from the defendant mining company for his death, which resulted from injuries incurred when he fell into a ravine on the mining company's property while motorcycling, the court, in Johnson v Sunshine Mining Co. (1984) 106 Idaho 866, 684 P2d 268, construing the state recreational use statute as a whole, held that it applied to active as well as passive negligence. The estate and heirs contended that the statute was ambiguous and should be construed as not applying to active negligence, such as the mining company's act of creating the ravine through excavation. The court pointed out that the statute specifically provided that a landowner owed no duty to give any warning of a dangerous condition, use, structure, or activity. The court observed that neither a landowner's "use" nor his "activity" could exist without his taking some affirmative action. Holding the mining company protected by the statute, the court affirmed a summary judgment in its favor.

In Crawford v Consumers Power Co. (1981) 108 Mich App 232, 310 NW2d 343 (disapproved on other grounds Burnett v Adrian, 414 Mich 448, 326 NW2d 810), the court held that the state recreational use statute, construed as a whole, applied to a landowner's alleged active negligence as well as to his passive negligence. On foot in a wooded area, one of two sisters was electrocuted when she came into contact with a downed powerline of the defendant power company. The second sister allegedly suffered emotional distress when she viewed the first sister's partially burned body a short time later. The second sister and the administrator of the first sister's estate were plaintiffs. The statute stated that no cause of action arose in favor of a recreational user unless his injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee of the land. The court declared that active negligence was still negligence, and was different in kind from willful and wanton misconduct. Apparently considering ordinary, rather than gross, negligence, the court stated that the statute shielded from liability all owners of land falling within its purview for all acts of negligence, whether active or passive. Affirming the dismissal of the plaintiffs' ordinary negligence, gross negligence, and trespass counts, and reversing the dismissal of the nuisance count, the court held the ordinary negligence count precluded by the statute.

In an action in which a minor son and his parents sought to recover from certain state employees for injuries sustained by the son when the "trail bike" that he was riding struck a cable stretched across a roadway used by the public on state-owned recreational land, the court, in Wirth v Ehly (1980) 93 Wis 2d 433, 287 NW2d 140, affirming the dismissal of the action, held that the state recreational use statute, construed as a whole, relieved landowners of liability for affirmative acts of negligence as well as of an obligation to inspect the land or post warnings of dangerous conditions. The court stated that the statute did not contemplate that the land subject to public recreational use should remain static. Since the purpose of the statute was to open land for recreational use, the court continued, it would be inconsistent for the statute to provide protection only if the owner or occupant did not perform any potentially negligent activities on the land. The court also noted that the statute,

73. In Primo v Bridgeton (1978) 162 NJ Super 394, 392 A2d 1252, this subsection, the court declined to follow the approach of this case.

This case was distinguished in Lauber v Narbut (1981) 178 NJ Super 591, 429 A2d 1074, certif den 89 NJ 390, 446 A2d 127, § 27[a].

It should also be noted that the court in Labree v Millville Mfg., Inc. (1984) 195 NJ Super 575, 481 A2d 286, disagreed with the decision in Diodato, this subsection, taking the position that immunity applied whether the injury was caused by a natural or an artificial condition or instrumentality.

by providing that an owner owed no duty to keep the land safe for entry or use nor to give warning of any unsafe condition, contained an explicit reference to affirmative acts. The court held the employees, who worked for the state agency that maintained the land, protected by the statute.

§ 29. —Other issues

Construing a state recreational use statute as a whole, the court in the following case, involving an action to recover for an injury suffered by an entrant on the defendant's land, held that the statute, which contained no express preservation of a landowner's liability for willful and malicious conduct, did not impliedly preserve this liability.

In a husband's action to recover from the state for injuries suffered when he was walking to a beach within a state park with his family, the court, in Fetherolf v State, Dept. of Natural Resources, Div. of Parks & Recreation (1982, Franklin Co) 7 **Ohio** App 3d 110, 7 Ohio BR 142, 454 NE2d 564, affirming a summary judgment for the statute, held that the state recreational use statute did not support a cause of action for willful and wanton misconduct. Unlike most other state recreational use statutes, the Ohio statute apparently included no exception for such type of conduct by a landowner. The court pointed out that the statute clearly stated that there was no assurance that property was safe for entry or use, and there was no duty to keep the premises safe for entry or use. The court observed that there could be no wanton misconduct unless one breaches a duty that he owed to another. The court held the state protected by the statute.

However, in Jones v United States (1982, CA9 Wash) 693 F2d 1299 (applying Washington law), a mother's action to recover under the Federal Tort Claims Act from the United States for serious injuries suffered by her daughter while "snow sliding" on an inner tube within a national park in Washington, the court apparently held that, construed as a whole, the Washington recreational use statute, which had no express exception for willful or wanton conduct, nevertheless did not bar liability for willful or wanton conduct under common law.

VII. Miscellaneous

A. Specified terms

§ 30. "Consideration" or "valuable consideration"[74]

[a] Exception applicable

In the following cases, involving

74. For cases deciding whether an entrant had paid a "consideration" to enter the defendant's land, and thus whether the entrant had been a "recreational user" of the land, see Moss v Dept. of Natural Resources (1980) 62 **Ohio** St 2d 138, 16 Ohio Ops 3d 161, 404 NE2d 742, and Huth v State (1980) 64 **Ohio** St 2d 143, 18 Ohio Ops 3d 370, 413 NE2d 1201, both in § 18.

For a case holding that an easement holder's inability to accept valuable consideration for the use of the land did not preclude its being an owner under the state recreational use statute, see Estate of Thomas v Consumers Power Co. (1975) 58 **Mich** App 486, 228 NW2d 786, affd in part and revd in part on other grounds 394 Mich 459, 231 NW2d 653 (not followed Thone v Nicholson (1978) 84 Mich App 538, 269 NW2d 665), § 3[c].

actions to recover for an entrant's injury or death on property, or in a body of water adjoining property, admittedly or apparently owned by the defendant, the courts, in varying language, held that the defendant had granted the entrant permission to enter his land for a "consideration," or for a "valuable consideration," or that it had not been established that permission had not been granted for a "consideration," or for a "valuable consideration," within the meaning of a state recreational use statute preserving a defendant's liability where permission to enter had been granted for a "consideration" or a "valuable consideration."

In an action in which a motorcyclist, injured in a motorcycle race, sought to recover, under the Federal Tort Claim Act (FTCA), from the United States, the court, in Thompson v United States (1979, CA9 Cal) 592 F2d 1104 (applying California law), held that the California recreational use statute did not apply since permission to enter the federal governmental land within California on which the race had been held had been granted for "consideration" within the meaning of the statute, which preserved a defendant's liability if a consideration was paid for permission to enter his land. The race had been conducted by a racing association that had been granted a permit to do so by the Bureau of Land Management (BLM) of the United States. In holding that the consideration exception applied, the court pointed out that (1) the BLM charged the racing association a $10 application service fee and a $10 rental charge, and (2) the racing association charged the motorcyclist an entry fee of $6. However, while holding the United States unprotected by the statute, the court held that no liability existed apart from the statute and affirmed a summary judgment for the United States.[75]

Holding that, if the facts were as the plaintiff camper contended, the payment-of-consideration exception in the California recreational use statute applied, the court, in Graves v United States Coast Guard (1982, CA9 Cal) 692 F2d 71 (applying California law),[76] reversed a summary judgment for the United States in an action in which a camper sought to recover under the Federal Tort Claims Act for injuries suffered when he dived into a river adjacent to a private campground located on land leased from the United States. The camper contended that he gave money to his traveling companion, who in turn paid the campground operator for camping. The statute preserved a landowner's liability for injuries suffered where permission to enter the property for a recreational purpose was granted for a "consideration." The United States contended that the exception did not apply because the plaintiff gave consideration in return for permission to camp and

75. This case was distinguished in Jones v United States (1982, CA9 Wash) 693 F2d 1299 (applying Washington law), § 31.

76. This case was distinguished in Jones v United States (1982, CA9 Wash) 693 F2d 1299 (applying Washington law), § 31.

not to gain access to the river or to use waterside facilities. The court stated, however, that the use of the facilities and access to the river were implied benefits received as a consequence of the payment of a consideration to the campground operator. While the United States argued that no consideration was paid to it, and, apparently, that the exception applied only if consideration were paid the landowner rather than a lessee, the court observed that the statute did not specify to whom the consideration was to be paid.

The court in Ferguson v Kasbohm (1985, 1st Dist) 131 Ill App 3d 424, 86 Ill Dec 605, 475 NE2d 984 (applying Michigan law), held that a statute limiting the liability of owners of recreational land was applicable in an action brought by a guest of the landowner to recover damages for injuries sustained in a boating accident because the guest paid no consideration to participate in the boating activities. The court noted that under the terms of the statute one must pay valuable consideration for the purpose of outdoor recreational use, or in exchange for outdoor recreational use, in order to have a cause of action against a landowner for negligence. Furthermore, the court stated that the fact that the injured party was on the land with the permission of the landowner did not change her status with respect to the application of the statute.

In three wives' consolidated wrongful death actions to recover from the United States under the Federal Tort Claims Act (FTCA) for their husbands' deaths during a flash flood in a national recreational area within Nevada, the court, in Ducey v United States (1983, CA9 Nev) 713 F2d 504 (applying Nevada law), held that, because the husbands had paid a consideration for the use of the recreational area, the United States was not entitled to the protection of the Nevada recreational use statute. The statute preserved a landowner's liability where permission to participate in recreational activity on his land was granted for a "consideration." The United States apparently owned the recreational area, and contracted with a concessionaire to operate a cafe-store, boat slips, and trailer spaces. On the day of the flood, two of the husbands had paid the concessionaire rental fees for the use of a boat slip, and one of them had rented a trailer space from the concessionaire. All three husbands had recently bought goods at the cafe-store. The court first held that the money tendered for the goods and services constituted "consideration" within the meaning of the statute. The court stressed that the statutory exception employed the broad term "consideration" rather than the narrower terms "fee" or "charge." The court distinguished Jones v United States (1982, CA9 Wash) 693 F2d 1299 (applying Washington law), § 31, and Smith v United States (1974, DC Wyo) 383 F Supp 1076, aff'd (CA10 Wyo) 546 F2d 872 (applying Wyoming law), § 31, on the ground that the statutory "consideration" language at issue in those cases was much more narrowly drafted than that of the Nevada statute. The court also declared that the exception applied although the husbands' payments were made to the concessionaire, rather than to the United States. The court reversed a judgment for the United States and remanded the case.

Adopting a broad construction of the term "valuable consideration," within the meaning of the state recreational use statute, which preserved a landowner's liability if permission to enter the land was granted for a valuable consideration, the court, in Copeland v Larson (1970) 46 Wis 2d 337, 174 NW2d 745 (ovrld on other grounds Antoniewicz v Reszcynski, 70 Wis 2d 836, 236 NW2d 1) as stated in Pagelsdorf v Safeco Ins. Co., 91 Wis 2d 734, 284 NW2d 55, a swimmer's action to recover from the owners of a lake resort for injuries suffered when he dived or slipped from a pier and hit bottom, held that the benefit that the owners expected to receive from increased sales at their general store, by creating prospective customers through permitting the free use by the public of the swimming facilities at the lake, was sufficient valuable consideration for the owners' implied permission to the public to use the facilities. The resort consisted of a general store, a boat launch and docking facilities, six rental cabins, general facilities, and the main T-shaped pier in the lake. The court stated that a reasonable interpretation of the term "valuable consideration" was such consideration that at common law could constitute the person entering the land an invitee. This consideration, the court continued, could be the conferring of a benefit on the landowner or a mutuality of interest between the landowner and the entrant. Rejecting a narrow construction that only a monetary fee paid the owner constituted a valuable consideration, the court held the owners unprotected by the statute and affirmed the denial of their motion for summary judgment.

In an action to recover from the United States under the Federal Tort Claims Act (FTCA) for injuries suffered or expenses incurred by two husbands and their wives when a cartridge exploded as they were squirrel hunting, picnicking, and hiking in a United States military reservation in Wisconsin, the court, in Garfield v United States (1969, WD Wis) 297 F Supp 891 (applying Wisconsin law), held that one husband, by previously purchasing for 50 cents a small-game hunting permit issued by the reservation, had paid the government a "valuable consideration," within the meaning of the Wisconsin recreational use statute, which retained a landowner's liability if he granted permission to enter the land for a "valuable consideration." The statute further provided that a valuable consideration did not include contributions to the sound management and husbandry of natural and agricultural resources resulting directly from the recreational activity. Observing that the government used the permit fees for the sole purpose of the protection, conservation, and management of fish and wildlife on the reservation, the court concluded that the activities carried out under the program did constitute contributions to husbandry. However, stressed the court, this exception was unavailable to the government, because the further requirement—

that the contributions result directly from the recreational activity —was not met. The court, although denying the government's motion to dismiss one husband's claims for his own injuries, did dismiss his claims arising out of his wife's injuries and the claims of the other three plaintiffs.

See Quesenberry v Milwaukee County (1982) 106 Wis 2d 685, 317 NW2d 468, an action in which a husband and wife sought to recover from a county for injuries suffered by the wife when she stepped into a hole while they were playing golf at a county golf course, in which the court held that a provision in the state recreational use statute, retaining the liability of a landowner who received "total payments" of "valuable consideration" having "an aggregate value in excess of $150 annually," referred to receipt of a total of $150 in 1 year from all users of his land, rather than to $150 from a particular user. Pointing out that the statute originally applied only "if the payment" of valuable consideration "does not have a value in excess of $25 annually," the court noted in particular the inclusion in the present language of the terms "total payment" and "aggregate value." The plaintiffs apparently alleged that the entrance fees paid the county by golfers constituted valuable consideration. The court stated that it could not be determined from the record whether the county had received "valuable consideration." On the ground, however, that the statute did not extend to playing golf, the court held the county unprotected by the statute.

[b] Exception not applicable

In actions to recover for injuries suffered by an entrant on property owned or maintained by the defendant, the courts in the following cases held in varying language that no "consideration," or no "valuable consideration," had been paid the defendant, within the meaning of a section of a state recreational use statute explicitly or effectively preserving a defendant's liability where he had received a "consideration" or a "valuable consideration."

In an action seeking to recover for injuries suffered when a bicyclist lost control after going off a jumping ramp on a motocross track at a city park and suffered severe injuries, the court, in Moore v Torrance (1979, 2d Dist) 101 Cal App 3d 66, 166 Cal Rptr 192 (disagreed with on other grounds Nelsen v Gridley (3d Dist) 113 Cal App 3d 87, 169 Cal Rptr 757) and (disapproved on other grounds Delta Farms Reclamation Dist. v Superior Court, 33 Cal 3d 699, 190 Cal Rptr 494, 660 P2d 1168), affirming a summary judgment for the city, held that the bicyclist's parents' payment of taxes to support municipal facilities was not "consideration" within the meaning of the state recreational use statute. The court stated that this was not the type of consideration that the legislature had in mind when it enacted the statute. Consideration, the court continued, meant some type of entrance fee or charge for permitting a person to use specially constructed facilities. There were many facilities in government-owned parks that charged admission fees, the court pointed out, and a consideration in this or

a similar context was intended. The court held that the action was precluded by the statute, which preserved a landowner's liability if the injured person had paid a "consideration" to enter the property.

In an action by a father and a daughter to recover for injuries suffered by the daughter while tobogganing down a hill in a city park, the court, in Syrowik v Detroit (1982) 119 Mich App 343, 326 NW2d 507, affirming a judgment for the city, held that the father's paying property taxes to the city did not constitute the paying of a "valuable consideration," within the meaning of the state recreational use statute, for the daughter's use of the park. The statute applied to a recreational user on the land of another without paying a "valuable consideration" to the other person, although the statute did not specify that the payment needed to be for permission to enter the land. The court declared that the valuable consideration was required to be in the form of a specific fee for the use of a particular recreational area. The father's status as a taxpayer was insufficient, the court said. The court held the city protected by the statute.

In an employee's action to recover from a county park commission for serious injuries suffered during a company picnic at a county park, the court, in Diodato v Camden County Park Com. (1978) 162 NJ Super 275, 392 A2d 665, held that the employee did not come within the statutory exception applicable when permission to enter recreational land had been granted in return for the payment of a "consideration." The employee had dived into a river that was in the middle of the park, and he struck a partially submerged, 55-gallon, blue oil drum that was apparently a trashcan. The court observed that the only fee paid by the company was expressly directed toward the use of a ballfield. The court declared that the consideration exception was inapplicable since the accident occurred well after the employee had left the ballfield, and while the employee was on a section of the park for which no fee was payable. However, holding the drum an artificial hazard not covered by the statute, the court denied the commission's motion for summary judgment under the statute.

The court in Seminara v Highland Lake Bible Conference, Inc. (1985, 3d Dept) 112 App Div 2d 630, 492 NYS2d 146, held that the fact that a bicyclist had occasionally made purchases at a landowner's snack bar did not mean that he had paid a consideration to use the land such that a statute exempting landowners who permitted their property to be used for recreational purposes without consideration would not be applicable in an action by the bicyclist to recover damages for injuries suffered in a bicycling accident. In support of its ruling, the court stated that there was no nexus between the snack bar and bicycling.

In an action to recover under the Federal Tort Claims Act from the United States for injuries suffered when the plaintiff fell down a cliff while sightseeing within a United States reservation in Virginia, the court, in Hamilton v United States

(1974, ED Va) 371 F Supp 230 (applying Virginia law), held that the plaintiff's paying taxes did not constitute the payment of a consideration. The Virginia recreational use statute preserved a landowner's liability where permission to enter the land was granted for a "consideration." Without specifying the particular taxes that the plaintiff alleged she had paid, the court stressed that there was no charge made for the use of the overlook at which the plaintiff had fallen, nor for that matter for the use of any part of the area involved in the litigation. Holding the United States protected by the statute, the court rendered judgment for the government.

In an action by a husband and a wife to recover from a state employee for injuries suffered by the husband on a pier in a state forest managed by the employee, the court, in Johansen v Reinemann (1984, App) 120 Wis 2d 100, 352 NW2d 677, held that the husband had not paid the state a "valuable consideration, within the meaning of a section in the state recreational use statute preserving a landowner's liability when permission to use the premises "was granted for a valuable consideration other than the valuable consideration paid to the state . . . ." Observing that the husband had been permitted to use the pier because he or some other member of his party had paid the required state entrance fee for the pier, the court declared that the fee was, by definition, not "valuable consideration" under the statute, since the statute expressly excluded consideration paid the state. The court further stated that the husband's payment of an additional camping fee was irrelevant because his use of the pier, where the injury occurred, was based only on payment of the pier entrance fee. Holding the employee protected by the statute, the court affirmed a summary judgment in his favor.

In an action in which two husbands and their wives sought to recover from the United States under the Federal Tort Claims Act for injuries suffered or expenses incurred as a result of the explosion of a cartridge while they were squirrel hunting, picnicking, and hiking on a United States military reservation in Wisconsin, the court, in Garfield v United States (1969, WD Wis) 297 F Supp 891 (applying Wisconsin law), held that the "valuable consideration" exception in the Wisconsin recreational use statute did not apply to certain of one husband's claims or to all of the claims of the other three plaintiffs. Each husband had purchased from the reservation for 50 cents a small-game hunting permit, and the court held that the permit fee was a "valuable consideration" within the meaning of the statute. While the one husband's claims for his own injuries could not be dismissed, the court said, because he had paid a valuable consideration, his claims for medical expenses incurred in the treatment of his wife and for the loss of her consortium were dependent on the government's liability to his wife, and since she had not paid a permit fee, the statute protected the government as to her. The court further held that since her own claim for physical injury resulting from mental distress suffered as a result of the explosion was not derived from her husband, the government was therefore also protected by the statute as to her claim. Similarly, the second husband's claim for his wife's medical expenses and for loss of consortium, and his wife's claims for her own injuries, were held barred by the statute, even though the husband had paid a permit fee, because the wife had not paid one.

§ 31. "Charge" or "fee"[77]

Applying a provision in a state recreational use statute preserving a defendant's liability if he collected a "charge," or a "fee," for the use of his land, the courts in the following cases, involving actions to recover for an entrant's injury or death on property admittedly or apparently owned or maintained by the defendant, held that the provision did not apply.

In a mother's action to recover for the alleged wrongful death of her minor son, who drowned while attending a church Sunday school picnic at a lake resort, the court, in Bourn v Herring (1969) 225 Ga 67, 166 SE2d 89, conformed to 119 Ga App 226, 166 SE2d 607, later app 225 Ga 653, 171 SE2d 124, transf to 121 Ga App 373, 173 SE2d 716, app dismd 400 US 922, 27 L Ed 2d 183, 91 S Ct 192, held that the corporation that made the picnic grounds and lake resort available to the church did not receive a "charge," within the meaning of the state recreational use statute, for the public's use of the land. The statute, by defining "charge" as the admission fee or price asked in return for invitation or permission to enter or go onto the land, extended its protection only to landowners who did not charge others for their recreational use of the property, the court held. Observing that the mother alleged that the corporation made the land available to the public for advertising purposes and as a promotion of the sale of the corporation's products, the court declared that these alleged benefits received by the corporation were not a "charge." However, on other grounds, the court in effect denied summary judgment motions submitted by all defendants, namely, the corporation, its general manager, the church, and the superintendent of the Sunday school.

In an action in which a husband and wife sought to recover for injuries suffered by the wife when she fell while walking on a mountain in a park that was apparently maintained by the defendant memorial association, the court, in Stone Mountain Memorial Asso. v Herrington (1969) 225 Ga 746, 171 SE2d 521, conformed to 121 Ga App 20, 172 SE2d 434, held that a parking permit fee, charged

77. The Model Act (see § 2[a]) states that "'Charge' means the admission price or fee asked in return for invitation or permission to enter or go upon the land," and further provides that "Nothing in this act limits in any way any liability which otherwise exists: . . . For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section."

by the association for each vehicle entering its park area, was not a "charge" within the definition of that term in the state's recreational use statute as meaning "the admission price or fee asked in return for invitation or permission to enter or go upon the land." The court pointed out that, as stated in the association's response to an interrogatory, persons on foot were not charged any fee, nor was a fee charged for the number of people in any one vehicle; the fee was strictly a parking fee for the automobile to enter the park, and was in no way related to the admission of persons to the park. The statute preserved a landowner's liability if he imposed a charge for the recreational use of his land. Holding that the statute immunized the association, the court in effect granted the association's motion for summary judgment.

In a swimmer's action to recover from the United States under the Federal Tort Claims Act for injuries suffered when he dived into a lake within an Illinois state park and apparently struck his head on a tree stump, the court, in Stephens v United States (1979, CD Ill) 472 F Supp 998 (applying Illinois law), construing a provision in the Illinois recreational use statute stating that the statute did not apply where the owner of land "charges" the persons who enter the land for recreational use, held that the United States did not come within this provision since the swimmer had not himself paid a charge for entering the land. The United States owned and leased to the state the land on which the park was located. Although the swimmer had not paid any admission fee himself, apparently other users of the park did, and the swimmer contended that the statutory protection was lost, as to all users of a recreational area, if at least some users were charged for admission. The court expressed some receptivity to the swimmer's contention. Declaring, though, that a construction of the statute distinguishing between paying and nonpaying users seemed most consistent with a close reading of it, the court said it would not sit in judgment on the wisdom of the distinctions made. However, apparently holding that the statutory exception for willful and malicious conduct applied, the court rendered judgment for the swimmer on the issue of liability.

Construing the term "charge" in the state recreational use statute, which the statute defined as "the amount of money asked in return for an invitation to enter or go upon the land," the court, in Carreans v Omaha (1984) 216 Neb 487, 345 NW2d 309, an action by two fathers to recover for injuries suffered by each of their sons at a city park, held that a $10.50 fee paid by the sons' grandparents to rent a camper pad for the weekend did not constitute a "charge." The statute preserved a landowner's liability if he "charges" the entrant. The grandparents parked their camper at the rented pad for a 3-day weekend, and the sons entered the park on the second day to visit the grandparents. They were injured in the explosion of a chemical drum into which they dropped a lighted firecracker. The court declared that to constitute a charge, any moneys paid were required to

be paid for the right to enter the facility. The city collected no charge, the court pointed out, for the right to enter the park. The court stated that the grandparents' payment of the camper pad rental fee did not entitle them to a greater right to use any of the park's other facilities than that had by the general public. The court observed that, in addition to the camper pad rental, the city collected fees for the right to pitch a tent in a tent camping area and for the use of camper dumping facilities. The court also stressed that the grandparents, rather than the sons, had paid the camper pad rental fee. Holding the city protected by the statute, the court reversed a judgment for the fathers and directed the trial court to dismiss the case.

In an action in which a husband sought to recover from the state for injuries suffered when he allegedly fell into a hole while walking in a state park, and in which his wife sought to recover for loss of companionship, the court, in Hahn v Commonwealth (1980) 18 Pa D & C3d 260, held that the plaintiffs' payment of taxes did not constitute the payment of a "charge," within the meaning of the state recreational use statute. The statute preserved a landowner's liability if he collected a "charge" for a recreational user's entry onto the property. Observing that the statute defined "charge" as the admission price or fee asked in return for invitation or permission to enter the land, the court stated that the "charge" was apparently required to be one that was levied directly in return for permission to enter the land. As there was required to be a "quid pro quo," that is, a charge in exchange for permission to enter that land at that time, the court stressed, the payment of taxes to the state did not constitute a "charge." However, on the ground that the statute did not apply to the state, the court denied the state's demurrer.

Construing a Pennsylvania statute making landowners who made their property available for recreational activities free of charge immune from liability, the court in Livingston v Pennsylvania Power & Light Co. (1985, ED Pa) 609 F Supp 643, an action against a utility company brought by a diver who alleged that the utility company had not warned divers of dangerous rocks below the surface of a lake it had created, held that the term "charge" meant an actual admission price paid for permission to use the land and did not include initial easement fees and license fees charged by the utility to landowners who desired access the lake when it was created.

In a mother's action to recover under the Federal Tort Claims Act from the United States for serious injuries suffered by her daughter when "snow sliding" within a national park in Washington, the court, in Jones v United States (1982, CA9 Wash) 693 F2d 1299 (applying Washington law), held that the daughter had not paid a "fee" for the use of the park. The Washington recreational use statute preserved a landowner's liability for an injury suffered by a recreational user who had paid a fee for the use of the recreational land. The daughter had paid a private concessionaire $1 to rent the inner

tube with which she was "snow sliding." The concessionaire paid the United States a fixed rental plus a percentage of its gross receipts. The court declared that the daughter had paid the dollar for the use of the inner tube, not for the use of the land. The court pointed out that the daughter had entered the park without paying a fee and could have used the ridge on which she was sliding, or any other area of the park, without making any payment if she had brought her own inner tube. The court distinguished Thompson v United States (1979, CA9 Cal) 592 F2d 1104 (applying California law), and Graves v United States Coast Guard (1982, CA9 Cal) 692 F2d 71 (applying California law), both in § 30[a], on the ground that the fees paid by recreational users in those cases had been paid for the use of the land. Holding the United States protected by the statute, the court affirmed a judgment in its favor.[78]

In an action in which a 14-year-old plaintiff sought to recover from the United States under the Federal Tort Claims Act for injuries suffered when he fell into a thermalpool in a national park, the court, in Smith v United States (1974, DC Wyo) 383 F Supp 1076, affd (CA10 Wyo) 546 F2d 872 (applying Wyoming law), rendering judgment for the United States, held that the United States had not charged the plaintiff for entering the park, within the meaning of a section of the Wyoming recreational use statute preserving a landowner's liability if he "charges" the person who entered his land. The court stated that by statute Wyoming law applied to the park, which was located primarily in that state, although portions of the park were located in two adjacent states. The court noted only that the United States and the national park service were foreclosed by federal regulation from charging any fee to the plaintiff. The regulation provided that no entrance or admission fee could be charged a person who was less than 16 years old. The court held the United States protected by the statute.[79]

However, in a father's action to recover from a boating marina operator for the alleged wrongful death of his two daughters, the court, in Kesner v Trenton (1975) 158 W Va 997, 216 SE2d 880, 86 ALR3d 1009, held that the operator charged a person to go on his land, within the meaning of the state recreational use statute, which preserved a defendant's liability if he levied such a "charge." The marina was on a lake that the operator leased from a power company. The operator offered rental spaces for private boats, camping spots, boat sales and rentals to the general public, and swimming areas in the waters adjacent to the marina. While swimming in this area, the daughters drowned after stepping into a 10-foot-deep culvert or excavation that had been dug in the lake bottom. While acknowledging

78. This case was distinguished in Ducey v United States (1983, CA9 Nev) 713 F2d 504 (applying Nevada law), § 30[a].

79. This case was distinguished in Ducey v United States (1983, CA9 Nev) 713 F2d 504 (applying Nevada law), § 30[a].

that there was not an amount of money asked in return for an invitation to enter the land, the court stressed that the marina was a moneymaking business, that the marina sold, serviced, and rented many boats, and that the operator could reasonably have expected to attract prospective marina customers by allowing people to swim in the lake at no cost. The court also pointed out that a sign on the main road nearby described how to get to the marina. Holding the statute unavailable to the operator, the court affirmed a judgment awarding the father a new trial following a verdict for the operator.

§ 32. Other specified terms

In an action to recover for injuries suffered by an entrant on property in which the defendant had an interest, the court in the following case held that the state recreational use statute did not apply because there had been no "entry" or "use" of the defendant's "premises."

In an action in which the plaintiff, who was sailing on a lake in a catamaran with an aluminum mast, sought to recover from an electrical utility for injuries suffered when the mast contacted the utility's powerlines overhanging the lake, the court, in Pacific Gas & Electric Co. v Superior Court (1983, 3d Dist) 145 Cal App 3d 253, 193 Cal Rptr 336, held that the state recreational use statute did not immunize the utility from liability because there had been no "entry" or "use" of the utility's "premises" by the plaintiff within the meaning of the statute, which provided that an owner of any estate in real property owed no duty of care to keep the premises safe for entry or use by others for designated recreational purposes.[80] The court stressed that the plaintiff's injury took place not on the utility's land underneath the lake, nor on the poles and wires affixed thereto, but on the navigable waters of the lake. The court further emphasized that the plaintiff had not in any way disturbed the utility's land, towers, or poles, nor made use of them or of the utility's overhanging wires in pursuit of his recreational purpose. The court also based its construction on an accommodation of the public trust doctrine. The court distinguished Lostritto v Southern Pacific Transp. Co. (1977, 1st Dist) 73 Cal App 3d 737, 140 Cal Rptr 905 (disagreed with on other grounds Potts v Halsted Financial Corp. (2d Dist) 142 Cal App 3d 727, 191 Cal Rptr 160), § 4[a], on the grounds that that case did not address the public trust doctrine, and the plaintiff in that case had had no right to dive from the privately owned trestle involved. The court in effect affirmed the denial of the utility's motion for summary judgment.

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In a swimmer's action to recover from the United States under the

80. For cases deciding whether an entrant had paid a consideration "to enter" the defendant's land, and thus whether the entrant had been a "recreational user" of the land within the meaning of a state recreational use statute, see Moss v Dept. of Natural Resources (1980) 62 Ohio St 2d 138, 16 Ohio Ops 3d 161, 404 NE2d 742, and Huth v State (1980) 64 Ohio St 2d 143, 18 Ohio Ops 3d 370, 413 NE2d 1201, both in § 18.

Federal Tort Claims Act for injuries suffered when he dived into a lake at an Illinois state park and apparently hit his head on a tree stump, the court, in Stephens v United States (1979, CD Ill) 472 F Supp 998 (applying Illinois law), held that the United States had not brought itself under a section of the Illinois recreational use statute providing that the owner of land leased to the state could agree in writing that the statute's limitations on liability were inapplicable. The United States leased to the state the land on which the park was located, and liability was apparently predicated on this basis. Pointing out that the lease contained an indemnity clause obligating the state to hold the United States harmless, the swimmer contended that the inclusion of this clause demonstrated the United States recognition, contrary to the protection of the statute, of its exposure to liability to third parties for failure to exercise ordinary care. The court replied that this clause was not sufficient to serve as a written agreement waiving the protection of the statute and establishing a duty of ordinary care. However, apparently holding that the statutory exception for willful and malicious conduct applied, the court rendered judgment for the swimmer on the issue of liability.

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See Epps v Chattahoochee Brick Co. (1976) 140 Ga App 426, 231 SE2d 443, affirming a summary judgment for the defendant company in an action in which a mother sought to recover for the death of her 6-year-old son, who drowned after he slipped or fell into a small artificial lake located approximately 900 feet from an apartment complex, in which the court, relying in part on the state recreational use statute, held that the son had been at most a mere licensee, and had not been an invitee. The company apparently owned the lake. Pointing out that there were two signs near the entrance to the lake, one of which read "Lake Lucky—Good Fishing—No Night Fishing," the mother contended that her son had been an invitee because the signs on the property constituted an invitation to the community at large. The court replied that, if the company was providing the lake to the public for recreational purposes, then its liability for injury to persons thereon was limited by the recreational use statute, one provision of which stated that, where an owner of land directly or indirectly invited or permitted any person to use his land without charge for recreational purpose, the owner did not confer on that person the legal status of an invitee or licensee to whom a duty of care was owed. Turning to the common law, the court apparently held that the company had violated no duty owed a licensee.

B. Statute as whole[81]

§ 33. Negation of other causes of action—nuisance

[a] Negated

The courts in the following cases, involving actions to recover for a minor's death on property owned or maintained by the defendant, explicitly or apparently held that the state recreational use statute, construed or apparently construed as a whole, negated a separate cause of action for nuisance.

In an action for the alleged wrongful death of the plaintiff's 10-year-old son, who was trapped and drowned inside a drainage pipe leading from a pool of water on the defendant power company's property to a lower lying pool 20 feet away, the court, in McGruder v Georgia Power Co. (1972) 126 Ga App 562, 191 SE2d 305, revd on other grounds 229 Ga 811, 194 SE2d 440, apparently construing as a whole the state recreational use statute, apparently held that the statute eliminated the doctrine of attractive nuisance in situations to which the statute applied. The plaintiff alleged several theories of liability, including attractive nuisance. The court simply stated that the purpose of the statute was to limit liability, and therefore the attractive nuisance theory was inapplicable. On other grounds, however, the court reversed a summary judgment for the power company.

Construing the state recreational use statute as a whole, the court, in Burnett v Adrian (1982) 414 Mich 448, 326 NW2d 810, apparently held that the statute precluded a separate action for nuisance. Two individuals, who were apparently a 14-year-old child's parents, sought to recover from a city for the child's drowning in a city lake. The plaintiffs raised claims of nuisance and of gross negligence or willful and wanton misconduct. As to the nuisance claim, the court stated only that it agreed with the concurring opinion's resolution of that issue. The concurring opinion pointed out that the statute barred an ordinary negligence action, but permitted an action for gross negligence or willful and wanton misconduct. To the extent that the nuisance claim was grounded in the defendant's alleged negligent conduct, the claim was barred by the statute's express terms, the concurring opinion continued, while to the extent the claim was sufficient to support an allegation of willful and wanton misconduct, it was duplicative of the cause of action based solely on that conduct. Although reversing a summary judgment for the city on the plaintiffs' claim of gross negligence or willful and wanton misconduct, the court affirmed a summary judgment for the city on the plaintiffs' nuisance claim.

In an action to recover for the drowning of the plaintiff's 17-year-old decedent while swimming in a gravel pit on property owned and operated by the defendants, a county and its board of commissioners, the court, in Graham v County of Gratiot (1983) 126 Mich App 385, 337 NW2d 73, construing the state recreational use statute as a whole, held that a claim of attractive nuisance, aside from the statute, was not cognizable. Holding the defendants protected by the statute, the court affirmed a summary judgment in their favor.

81. It should be noted that §§ 33-35, collect only those cases in which the court actually addressed a contention that a recreational use statute negated or did not negate a particular cause of action. No attempt has been made to infer, from cases considering the effect of a second statute on a recreational use statute, that a cause of action potentially arising under the second statute was not negated.

In an action to recover under the Federal Tort Claims Act (FTCA) for an 11-year-old boy's drowning in a pool constructed by private persons on land under the care and operation of the federal bureau of land management, the court, in Blair v United States (1977, DC Nev) 433 F Supp 217 (applying Nevada law), granting the motion of the United States for summary judgment, apparently held that the Nevada recreational use statute, construed as a whole, negated the attractive nuisance doctrine. The court pointed out that the plaintiff, whose relationship to the boy was unspecified by the court, could recover under the FTCA only if she had a right of recovery under state law. Holding that under the statute the United States owed no duty to the plaintiff or the boy, and thus had no liability for the death, the court observed that the plaintiff attempted to avoid the operation of the statute by categorizing the action as one under the attractive nuisance doctrine. The court stated, however, that nothing in the statute indicated that a special duty owed to children cut across the statute's clear meaning. However, as an alternative basis for its holding, the court stated that the attractive nuisance doctrine had apparently not been adopted in the state.

[b] Not negated

In actions to recover for injury or death suffered by a minor entrant on the defendant's property, the courts in the following cases construing a state recreational use statute as a whole, explicitly or apparently held that the statute did not negate a separate cause of action for nuisance.

Construing the Louisiana recreational use statute as a whole, the court, in Smith v Crown-Zellerbach, Inc. (1981, CA5 La) 638 F2d 883 (applying Louisiana law), reversing the dismissal of a minor child's action brought by his parents, held that the statute did not abolish the attractive nuisance doctrine. The 10-year-old child was allegedly burned severely when, on his way home from fishing at a pond on the defendant corporation's property in Louisiana, he attempted to play on some gray hills situated on the property. It was apparently undisputed that the hills were composed of hot ashes and chemical debris, and the parents contended that the hills were an attractive nuisance. Observing that the statute was apparently designed to reduce the reluctance of property owners to allow the public to use private property for recreational purposes, the court stated that the legislature had not intended to remove liability for the maintenance of attractive nuisances by property owners who allowed children and others to use their property for recreational purposes. The court commented that the legislature intended only to absolve property owners from liability for the kinds of accidents to be normally expected when they let others use their property for recreational purposes. Turning to the common law, the court held that the complaint alleged facts satisfying the prerequisites for the application of the attractive nuisance doctrine.

In Ochampaugh v Seattle (1979) 91 Wash 2d 514, 588 P2d 1351, a father's wrongful death action to recover for the drowning of his two sons in a pond, the court apparently held that the state recreational use statute, construed as a whole, did not eliminate a cause of action for attractive nuisance. The court observed that a proviso to the statute disclaimed any intention to alter the law of attractive nuisance. Considering that doctrine, as well as others, the court affirmed a judgment for the defendant city.

§ 34. —Mining statute

The state recreational use statute, construed or apparently construed as a whole, negated any independent cause of action arising under a statute regulating mining, the courts explicitly or apparently held in the following cases involving actions to recover for injuries suffered by an entrant in an excavation on the defendant's property.

In an action in which a college student sought to recover from the United States under the Federal Tort Claims Act (FTCA) for injuries suffered when he fell down a vertical shaft while exploring an old mine on federal property in Nevada, the court, in Gard v United States (1979, CA9 Cal) 594 F2d 1230, cert den 444 US 866, 62 L Ed 2d 90, 100 S Ct 138 (applying Nevada law), affirming a summary judgment for the United States, held that the Nevada recreational use statute, construed as a whole, negated any liability arising on the part of the government under the Nevada fencing statute, which required the owner of any shaft or excavation to fence it. The court simply stated that the recreational use statute barred any recovery for an alleged violation of the fencing statute.

In an action to recover from the United States under the Federal Tort Claims Act (FTCA), and from other defendants, for injuries sustained by the plaintiff in a motorcycle accident that occurred on federal property in Utah, the court, in Ewell v United States (1984, DC Utah) 579 F Supp 1291 (applying Utah law), apparently construing the Utah recreational use statute as a whole, apparently held that the statute insulated the United States from any liability resulting from various state and federal mining statutes and regulations propounded by the plaintiff. The motorcycle on which the plaintiff was a passenger had apparently run into a gravel pit. The plaintiff contended that the United States was under a duty, separate from that established in the recreational use statute, of (1) the Utah fencing statute, which required any pit or mine to be fenced at least 4-½ feet high; (2) the Utah mined-land reclamation act, which required the operator of a mining operation to submit a reclamation plan; and (3) the federal law that authorized the government to allow state and local governments to remove gravel from public lands (30 USCS §§ 601-603). The court simply replied that these statutes, and the regulations promulgated thereunder, did not create any independent duty on the United States unaffected by the recreational use statute. Holding the United States protected by the recreational use statute, the court granted its motion for summary judgment and dismissed the plaintiff's claims against the other defendants.

§ 35. —Other causes of action

The court in the following case, involving an action to recover for injuries suffered by an entrant on the defendant's land, held that the state recreational use statute, apparently construed as a whole, did not eliminate the doctrine of liability for a voluntary undertaking of a duty.

In a swimmer's action to recover from the United States under the Federal Tort Claims Act for injuries suffered when he dived into a lake in an Illinois state park and apparently hit his head on a tree stump, the court, in Stephens v United States (1979, CD Ill) 472 F Supp 998 (applying Illinois law), apparently construing the Illinois recreational use statute as a whole, held that the statute did not eliminate the doctrine imposing liability for negligent performance of a voluntary inspection. The United States owned and leased to the state the land on which the park was located, and conducted inspections of the lake that the court described as planned and periodic, and in part directed towards compliance with safety regulations and detection and prevention of safety hazards to the public. The court declared that, while the statute was obviously intended to limit the common-law duties of due care ordinarily imposed on all landowners or occupiers, the statute could not be exaggerated to the point of expressly or impliedly limiting liability for acts voluntarily undertaken. Whether a defendant was originally under no common-law duty, or, as was the situation here, was originally under a common-law duty that had been negated by statute prior to his undertaking, the court continued, state law imposed liability for voluntary inspection negligently performed. The court rendered judgment for the swimmer on the issue of liability.

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However, in two estates' consolidated wrongful death actions to recover for the deaths of two brothers in a snowmobile accident, the court, in Estate of Thomas v Consumers Power Co. (1975) 58 Mich App 486, 228 NW2d 786, affd in part and revd in part on other grounds 394 Mich 459, 231 NW2d 653, construing the state recreational use statute as a whole, held that the statute applied to actions for wrongful death. The brothers had been killed when the snowmobile they were operating collided with a guy wire supporting a utility pole. The statute provided that a recreational user possessed no cause of action for injuries arising on the land of another unless the injuries resulted from the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee of the land. The court simply stated that the estates' contention that the statute did not apply to wrongful death actions was without merit and unsupported by either case law or common sense. Holding the defendants, the power company that owned the utility pole and the owner of the land on which the accident occurred, protected by the statute, the court granted them summary judgment.

§ 36. Other issues

In actions to recover for injury or death suffered by an entrant on property owned, occupied, or

maintained by the defendant, or in a body of water apparently adjoining the defendant's property, the courts in the following cases, construing or apparently construing a state recreational use statute as a whole, and either stating its holding without further discussion or addressing issues other than those considered in §§ 8, 12, 13, 20-22, 28-30, 34-35, held that the statute barred either the entire action or the plaintiff's negligence count, or that the defendant had violated no duty owed the entrant.

Construing as a whole the state recreational use statute, the court, in Wright v Alabama Power Co. (1978, Ala) 355 So 2d 322, affirmed a directed verdict for a power company in an action brought by a husband, who had been injured on a lake owned by the company, and by his wife. The husband was injured when he collided with a fence partially submerged in the lake while he was riding on an inner tube pulled by a powerboat. The husband and wife contended that the power company willfully determined not to remove the fence or to replace any guards or warnings around it. The court declared that under the statute the husband was a licensee, since the statute placed in the status of licensees persons who were on the land with permission on invitation but for purposes unrelated to the owner's business. Continuing, the court stated that a landowner owed no duty to warn a licensee of a potentially dangerous condition unless the landowner performed some positive act creating a new hidden danger, pitfall, or trap that a person could not avoid by use of reasonable care and skill. Concluding that a partially submerged fence was not a hidden trap or pitfall, and stressing that the fence had been in place since the lake was built, the court held that the company had breached no duty owed the husband. The court thus apparently held the company protected by the statute.

Apparently construing the state recreational use statute as a whole, the court, in Driskill v Alabama Power Co. (1979, Ala) 374 So 2d 265, affirmed a directed verdict for a power company in two boaters' action to recover from the company for injuries suffered by one boater when the boaters' powerboat ran into a submerged tree trunk in the company's lake. The court stated that, under the statute, the company owed the boaters the duty due a licensee, but did not owe them a standard of due care. The court declared that the company owed no duty to warn the boaters of a potentially dangerous condition unless the company performed some positive act creating a new hidden danger, pitfall, or trap that a person could not avoid by the use of reasonable care and skill. The court observed that the company had a practice of reducing the water level of the lake in the fall and winter, thereby revealing the stumps in the lake, but would begin to raise the water level in March with the result that in the summer months, when water sports were popular, the stumps would not be visible. The court stressed that there was no evidence that the company did anything except raise and lower the water level for its own purposes. Therefore, the court declared, the company

was under no duty to warn the boaters of a possible danger concerning a condition brought about by the company's ordinary use of its land—raising and lowering the level of the lake.

Apparently construing as a whole the state recreational use statute, the court, in Edwards v Birmingham (1984, Ala) 447 So 2d 704, affirming a summary judgment for a city in a baseball player's action to recover for injuries sustained while playing baseball in a city park, declared that, under the statute, the city owed no duty to warn a licensee of a potentially dangerous condition unless the city did some positive act creating a new hidden danger, pitfall, or trap that a person could not avoid by the use of reasonable care and skill. The baseball player contended that he had been injured when he stepped into a hole while chasing a flyball. The court declared that the baseball player was a mere licensee because he was on city property with the city's consent for no business purpose. Observing that the most that the baseball player alleged was that the city allowed the hole to remain by negligently maintaining the park, the court stressed that the baseball player did not assert that the city had performed any positive act causing the hole to be in the condition it was at the time of the injury. Observing that the player alleged that, after stumbling in the hole, he had fallen against a nearby chainlink fence, the court replied that, since any danger posed by the fence was open and obvious, the city was under no duty to warn of a newly created hidden hazard regarding the fence.

See Glover v Mobile (1982, Ala) 417 So 2d 175, in which the court, while apparently resorting to the common law rather than to the state recreational use statute, applied a formulation that the court, in Wright v Alabama Power Co. (1978, Ala) 355 So 2d 322, this section had articulated as being both the common law and the statutory standard. Affirming a summary judgment for a city in a father's action to recover for the drowning of his two sons in a river adjoining a city park, the court declared that, under the Wright Case, the city owed no duty to warn a licensee of a potentially dangerous condition unless the city performed some positive act creating a new hidden danger, pitfall, or trap that a person could not avoid by the use of reasonable care and skill. Stating that the whirlpools could not be considered unavoidable within the meaning of the rule, the court held the city to have breached no duty owed the sons.

In an action to recover for injuries suffered by the plaintiff while fishing at a small pond located on the defendant corporation's property, the court, in North v Toco Hills, Inc. (1981) 160 Ga App 116, 286 SE2d 346, apparently construing the state recreational use statute as a whole, held that the corporation had no liability under the plaintiff's count alleging that the corporation's failure to warn him of the danger was the direct and proximate result of his injury. While walking from one fishing point on the pond to another, the plaintiff slipped and fell forward into overgrown weeds and was injured by falling into a roll of rusty metal fencing or concrete reinforcing mesh. The court simply stated that, since the corporation had neither invited the plaintiff nor charged for his use of the land, the statute prevented him from maintaining a suit for actual damages incurred. The court apparently construed the count as alleging, in essence, ordinary negligence. Although holding that the trial court had improperly granted summary judgment as to a count alleging a willful or malicious failure to guard or warn against a dangerous condition, the court held that the trial court's granting of a summary judgment on the ordinary failure to warn count, and on a private nuisance count, was proper.

In an action in which a husband and wife sought to recover, from a memorial association that apparently maintained a park, for injuries suffered by the wife while bicycling on a trail in the park, the court, in Brannon v Stone Mountain Memorial Asso. (1983) 165 Ga App 120, 299 SE2d 176, apparently construing the state recreational use statute as a whole, simply stated that Stone Mountain Memorial Asso. v Herrington (1969) 225 Ga 746, 171 SE2d 521, conformed to 121 Ga App 20, 172 SE2d 434, § 8[a], had been virtually the same on its facts as the present case, and demanded a finding in favor of the memorial association. The court pointed out that no fee was charged for the recreational use of the park, and affirmed a denial of the plaintiffs' motion for a new trial following a summary judgment for the memorial association.

See Reuter v Kocan (1983, 2d Dist) 113 Ill App 3d 903, 68 Ill Dec 711, 446 NE2d 882, an action in which a dirt bikedriver sought to recover from the operator of an automobile with which he collided head-on while both vehicles were traveling on a private off-road dirt bike trail, in which the court stated that, under the state recreational use statute, there was no basis for the dirt bike operator's claim that the owner of the property on which the trail was located owed a duty of ordinary care to keep the private premises safe for use by any person using the property as a trespasser or as a licensee for recreational purposes. The court therefore declared that the trial court had not erred in refusing to give an instruction, requested by the dirt bike operator, on the negligence of third persons who were not parties to the action. On other grounds the court reversed a judgment for the automobile operator.

In an action to recover for the drowning of the plaintiff's decedent while swimming in a gravel pit located on property owned and operated by the defendants, a county and its board of commissioners, the court, in Graham v County of Gratiot (1983) 126 Mich App 385, 337 NW2d 73, applying the state recreational use statute as a whole, held without further discussion that summary judgment had properly been granted on the plaintiff's claim of negligence. Holding the defendants protected by the statute, the court affirmed a summary judgment in their favor.

In an action to recover under the Federal Tort Claims Act (FTCA) for an 11-year-old boy's drowning in a pool constructed by private persons on land in Nevada under

the care and operation of the Bureau of Land Management of the United States, the court, in Blair v United States (1977, DC Nev) 433 F Supp 217 (applying Nevada law), granting the United States motion for summary judgment, held that the action was precluded by the Nevada recreational use statute. The court did not specify the relationship between the boy and the plaintiff. Apparently construing the statute as a whole, the court stated only that, under the statute, the United States owed no duty to either the boy or the plaintiff since it was clear that the boy had entered the land for recreational purposes, and there was no evidence of a willful or malicious failure to guard, nor of any payment of consideration to use the pool, nor of a third person's having caused the injury.

In an action to recover from a railroad's trustee for injuries suffered when the plaintiff slipped and fell underneath a passing train, severing both legs below the knees, the court, in Merriman v Baker (1974) 34 NY2d 330, 357 NYS2d 473, 313 NE2d 773, held only that the statute barred the action. The plaintiff was walking, 2 feet from the tracks, on an abandoned passenger platform at a former train station. The court stated that, in light of the statutory language, the plaintiff might properly be considered a trespasser to whom the trustee owed only the obligation not to cause willful, wanton, or intentional harm. The evidence failed to establish, the court continued, any breach of a duty owed the plaintiff. The court noted that it considered the statute in conjunction with a section of the state railroad law prohibiting the walking along railroad tracks. The court reversed a judgment for the plaintiff and dismissed her complaint.

See Curtiss v County of Chemung (1980, 3d Dept) 78 App Div 2d 908, 433 NYS2d 514, an appeal from three jointly tried actions by two teenage boys who had been injured, and the administrator of the estate of a teenage boy who had been killed, in the collapse of a shed on farmland owned by the defendant county, in which the court stated that there could be no doubt of the applicability of the state recreational use statute. The court pointed out that it was undisputed that the boys had entered the land for hunting and hiking. While making various dispositions of third-party complaints filed by the county in each action, the court reversed judgments for the injured boys and the administrator and remanded the case for further proceedings.

Apparently construing the state recreational use statute as a whole, the court, in McCord v Ohio Div. of Parks & Recreation (1978) 54 Ohio St 2d 72, 8 Ohio Ops 3d 77, 375 NE2d 50, held without further discussion that the state, viewed as a private party, owed no duty to a recreational user of its land, such as the plaintiff's decedent, who had paid no fee or valuable consideration. The administratrix of the estate of a 9-year-old child sought to recover from the state for the child's alleged wrongful death when he drowned at a public recreational facility maintained by the state. The court reinstated a trial

court order dismissing the administratrix' complaint.

In an action in which a trail bike operator sought to recover from the state and from two road construction contractors for injuries suffered when he collided with a barbed wire fence stretched across the end of a highway under construction on which he was riding, the court, in Denton v L. W. Vail Co. (1975) 23 Or App 28, 541 P2d 511, affirming a directed verdict for the defendants, held that the defendants owed the operator no duty to warn him of the fence. The court simply pointed out that the state recreational use statute provided that an owner of land owed no duty of care to give any warning of a dangerous condition, use, structure, or activity on the land to persons entering the land for a recreational purpose.

In an action in which a 16-year-old child sought to recover from a bank for injuries sustained while playing football on an empty lot owned by the bank, the court, in Wiegand v Mars Nat. Bank (1982) 308 Pa Super 218, 454 A2d 99, held without further discussion that the bank was insulated from liability by the state recreational use statute, which the court apparently construed as a whole. The child tripped on a stake in the ground. The court described the statute as providing that an owner of donated land had no duty of care to keep premises safe for entry or use by others, nor to warn of dangerous conditions, and was liable only for malicious failure to guard or warn. The court affirmed a compulsory nonsuit in favor of the bank.

However, in an action in which a "john boat" passenger, who was injured when the boat collided with a diving dock in a lake, sought to recover from a property owner who allegedly owned, controlled, or maintained the dock, the court, in Arias v State Farm Fire & Casualty Co. (1983, Fla App D1) 426 So 2d 1136, apparently construing as a whole the state recreational use statute, stated without further discussion that, under the statute, the duty of care owed by the owner or occupant of recreational premises to a recreational user was that owed to a trespasser. Thus, held the court, the property owner's duty would be to warn the passenger of dangers known by the owner that were not open to ordinary observation. Observing that the dock allegedly protruded only 8 to 10 inches above the surface of the lake, the court stated that there was a genuine issue of material fact whether the dock was obvious to one in a speeding boat. The dock, which was isolated in the water rather than extending to the shore, was located several hundred feet directly in front of the property owner's lakefront property. On the ground that there existed issues of material fact, the court reversed a summary judgment for the landowner.

Consult POCKET PART in this volume for later cases

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

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April 13, 1989

The Honorable Jan Faiks
Chair, Senate Judiciary Committee
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

Subject: SB 229, An act relating to liability for damage or injury resulting from hazardous recreational activities, and providing for an effective date.

Position: The department supports this bill.

Background: Sections 1-2 protect the state from excessive damage claims being brought against it by people participating in or watching a hazardous recreational activity on state land, such as a climber suffering a fall or a rafting party having an accident. It does not affect the liability of concessionaires or other entities operating on state land.

Thank you for the opportunity to comment. Please let me know if you need further information.

Sincerely,

Lennie Gorsuch
Commissioner

cc: Bill Sponsor
Committee Members
Douglas Baily, Attorney General
Department of Law
Susan Cox, Assistant Attorney General
Department of Law
Denby Lloyd, Special Staff Assistant
Office of the Governor

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Bob Evans, Legislative Liaison
Office of the Governor
Gary Gustafson, Director
Division of Land and Water Management
Department of Natural Resources

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400

April 13, 1989

The Honorable Jan Faiks
Chair, Senate Judiciary Committee
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

Subject: SB 229, An act relating to liability for damage or injury resulting from hazardous recreational activities, and providing for an effective date.

Position: The department supports this bill.

Background: Sections 1-2 protect the state from excessive damage claims being brought against it by people participating in or watching a hazardous recreational activity on state land, such as a climber suffering a fall or a rafting party having an accident. It does not affect the liability of concessionaires or other entities operating on state land.

Thank you for the opportunity to comment. Please let me know if you need further information.

Sincerely,

Lennie Gorsuch
Commissioner

cc: Bill Sponsor
Committee Members
Douglas Baily, Attorney General
Department of Law
Susan Cox, Assistant Attorney General
Department of Law
Denby Lloyd, Special Staff Assistant
Office of the Governor

Bob Evans, Legislative Liaison
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