

PROMENADE COMMUTER CHALLENGES RECREATIONAL USE IMMUNITY

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

As illustrated by the court opinion described herein, an ongoing legal issue in public parks and recreation has been the scope and applicability of limited governmental immunity under a state recreational use statute. In 1965, the Council of State Governments drafted a model Recreational Use Statute (RUS) that has since been adopted in various forms in dozens of states. Under the generic model RUS, a landowner who opens the land for public recreational use free of charge owes no legal duty to guard, warn or make the premises reasonably safe for recreational users. Accordingly, the landowner is immune from negligence liability. There is, however, an exception to RUS immunity where the landowner will be liable for gross negligence, willful/wanton misconduct or recklessness causing injury to recreational users.

In the case of *Mayor v. Wallace*, 2024 Md. App. LEXIS 76 (Md. App. 2/1/2024), Plaintiff Jamie Wallace was injured on the “Waterfront Promenade,” an eight-mile public pedestrian walkway and shared use bicycle path that functions as a waterfront sidewalk for development sites and public spaces.

On June 19, 2018, Wallace, was riding her bicycle through the Waterfront Promenade located in Baltimore City on the south side of the Inner Harbor Marina near 402 Key Highway, on her way home from work. While she was cycling, the wheel of her bicycle became stuck in a gap between the granite bulkhead and brick pavers. She was ejected from her bicycle and fell into the Harbor. Wallace sustained multiple injuries, including a wrist contusion, abrasions to both legs, and a laceration to her right knee.

Wallace testified that on the evening of the accident, she left work and took her usual path home on her bicycle. When she entered the promenade, she noticed a lot of activity and that it was very crowded. She decided to veer toward the right side of the promenade to avoid pedestrians; and while she was riding, she came to an abrupt stop and blacked out. Once she regained consciousness, she found herself sitting upright on the rocks in the water waist deep and her knee was completely “busted open.” She recalled someone calling an ambulance and that three gentlemen pulled her out of the water.

Robert Bias-Ortiz was jogging on the promenade on the day of the incident and was called as a witness at trial. While he was on his jog, he learned from two individuals sitting on a bench ahead of him that Wallace had fallen into the Harbor. Bias-Ortiz went to the edge of the promenade and saw Wallace in the Harbor. He instructed individuals to help Wallace out of the water. He called 911 and requested emergency medical services.

Bias-Ortiz testified that after Wallace was pulled out of the water, she was unresponsive to the things being said to her, and that there was a gash in one of her knees and bruising all over her body. She was eventually taken to the hospital by ambulance. Bias-Ortiz described a gap on the promenade as two inches wide and deep enough that he recalled not being able to see the bottom.

On August 28, 2019, Wallace filed a lawsuit alleging “the City breached its duties to her by negligently causing, allowing to remain, and failing to warn her of a dangerous and defective condition on the premises, of which the City had actual and/or constructive knowledge.” In particular, Wallace alleged “a gap between the bulkhead and the brick pavers of the Inner Harbor near the Rusty Scupper caused her to fall from her bike and suffer injury.”

The maintenance of this City owned location is the responsibility of the City's Department of Transportation. During a May 2012 inspection, an engineering firm hired by the City had found “gaps between the granite blocks of the bulkhead and brick pavers along the Promenade where Wallace alleges, she was caused to fall.” In July 2013, the engineering firm had “recommended maintenance and repairs of these expansion joints between the bulkhead and the brick pavers.” In December 2017, the City Department of Transportation representative performed a visual inspection of the location and photographed a two inches wide and eight inches deep gap between the bulkhead and the pavers which Wallace alleged caused her injury.

In response to Plaintiff's lawsuit, the Defendant City of Baltimore stated: “the Waterfront Promenade where the incident occurred is located in Inner Harbor Park and that it is an official public park established by the City's Charter.” At the time of her injury, the City claimed Wallace was using “the Waterfront Promenade or Inner Harbor Park for any recreational purpose; and therefore, no duty was owed” under the Maryland Recreational Use Statute (MRUS).

MARYLAND RECREATIONAL USE STATUTE

The MRUS, in pertinent part, provides: “an owner of land owes no duty of care to keep the premises safe for entry or use by others for any recreational or educational purpose, or to give any warning of a dangerous condition, use, structure, or activity on the premises to any person who enters on the land for these purposes.” Md. Code Ann., Nat. Res. § 5-1103.

The stated purpose of the MRUS “is to encourage any owner of land to make land, water, and airspace above the land and water areas available to the public for any recreational and educational purpose... by limiting the owner's liability toward any person who enters on land, water, and airspace above the land and water areas for these purposes.”

Accordingly, under the MRUS, landowners who allow others to use their land for recreational purposes incur no liability for personal injury or property damage arising out of recreational use. While the MRUS precludes premises liability for ordinary negligence, potential liability is retained in the MRUS for injuries incurred by recreational users when the landowner willfully or maliciously fails to warn of danger or charges for the use of the land.

The term “land” is defined in the MRUS as “roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty,” including “paths” and “trails.” In 2000, the MRUS was amended and the definition of “recreational purpose” was redefined as “any recreational pursuit.” In 2000, the statute was expanded to be applicable to a “unit of local government as an owner of land.”

TRIAL COURT JURY AWARD

At trial, to establish premises liability, Plaintiff Wallace provided the following testimony from Sylvia Deye, an expert in architecture and the design of walkways:

On August 19, 2020, Deye completed a site investigation of the south side promenade where Wallace fell. Deye testified that the location where the incident occurred is a "built environment" and a "corridor." She stated, "there are multiple places along the promenade for meeting areas and there are benches for meeting and gathering, but it's also a connector between Rusty Scupper and other parts of the City, down to the markets."

Deye further testified that the deep and unlevel gap was dangerous because it was "not readily apparent in this rich distracting environment" for pedestrians and cyclists like Wallace. During cross examination, Deye admitted part of the Waterfront Promenade called Inner Harbor Park had been created by the City Charter.

Following a trial, the jury determined "the gap in question was a hazardous condition" and "the City had sufficient opportunity to correct the gap in question." As a result, the jury found the City liable for negligence and returned a verdict awarding Wallace \$100,000.00 in damages.

The trial court declined the City's motion to overturn the jury's verdict and enter judgment for the Defendant City based on MRUS immunity. In the opinion of the trial court, at the time of her injury, "Plaintiff was commuting to work" and, therefore, "not using the land for recreational or educational purposes." As a result, the trial court held Plaintiff was "not a person who entered on the land for these purposes as contemplated by the MRUS and, therefore, the City is not immune from liability under the statute."

In so doing, the trial court further noted: "It is of no consequence that she might have enjoyed bicycling to work, or even if it was the highlight of her day." At trial, Wallace had testified she did not own a car at the time of the incident. In addition to using the bicycle for transportation, Wallace stated she enjoyed riding her bicycle and used it to exercise on her commute. Wallace conceded that she did not have to pay a toll or park access fee to travel through the promenade.

PARK PROMENADE THOROUGHFARE

On appeal, the City claimed the trial court had "incorrectly found the MRUS was inapplicable" because immunity under the MRUS "is not dependent upon the actions or intent (subjective or objective) of the entrant." On the contrary, the City maintained MRUS immunity "only requires that a landowner make land available for recreational use without charge." Accordingly, "even if Wallace's intent was considered in analyzing the MRUS," the City argued Wallace was "both objectively and subjectively engaged in a recreational pursuit when she fell."

Since "the area where Wallace fell" was "land made available to the public for recreational use without charge," the Defendant City, therefore, argued "the City should have been granted judgment as a matter of law" by the trial court based upon applicable MRUS immunity.

As described by the appeals court, the specific issue on review was, therefore, whether the promenade should be considered an immune public park under the MRUS or a non-immune “modern transportation and commuting system” administered by the Department of Transportation that “relies on thoroughfares such as the waterfront promenade.”

PUBLIC PARK IMMUNITY

In addition to MRUS immunity, the appeals court also considered the applicability of the following “the common law doctrine of governmental immunity” in Maryland to the Defendant City of Baltimore in this case:

A local government or municipality may be immune from traditional common law liability if the government is performing a governmental function, such as maintaining a public park. However, a local government is not immune if performing a proprietary or corporate function, such as maintaining a sidewalk.

As described by the appeals court this governmental immunity would apply under the following circumstances:

The law of this State is well established that a municipal corporation is not liable in a civil action for any default or neglect in the performance of a purely governmental function, such as the maintenance and management of a public park for recreational purposes.

MUNICIPAL SIDEWALK LIABILITY

In contrast to traditional governmental immunity for public parks in Maryland, the appeals court further noted “the keeping of public highways and walkways under its management and control in a reasonably safe condition is a corporate function of a municipality and it is therefore answerable in damages for failing to exercise such function”:

There is no question that, by the great weight of authority, the rule of law is that it is a private proprietary obligation of municipal corporations to keep their streets and public ways reasonably safe for travel in the ordinary manner, and to prevent and remove a nuisance affecting the use and safety of these public ways.

Accordingly, under Maryland common law, Wallace claimed “public sidewalks are among the classic items of municipal property that local governments must...exercise due care to maintain.” Moreover, Wallace claimed the scope and applicability of the MRUS “must be strictly construed with common law principles in mind.” As a result, Wallace contended the Waterfront Promenade was “not automatically brought within the scope of the MRUS just because the City designated it as a park.”

In so doing, Wallace argued these “public ways that go through parks are still the City's responsibility under Maryland common law,” including the Promenade in Harbor Park. Wallace,

therefore, asserted the MRUS does not shield the City from liability for negligently allowing a dangerous condition to exist on a walkway.

PROMENADE RECREATIONAL PURPOSE?

Even if the MRUS was applicable, Wallace further argued the City would not be immune from liability because the City had not made the Baltimore Waterfront Promenade available to the public "for" any recreational purpose based upon "the nature of the promenade." In particular, Wallace claimed the "waterfront sidewalk" was "an intrinsic part of the business and economic development" and, therefore, "the nature of the promenade is sufficient to establish that the City did not make the land available 'for' a recreational purpose."

In addition, Wallace contended "the nature of her activity on the promenade was not for a recreational purpose because she was commuting home from work when her injury occurred, and commuting is not typically recreation."

In examining whether the maintenance of the promenade was an immune governmental function, the appeals court acknowledged "the mere physical location of the passageway within the park does not of itself decide the function." Instead, the court noted: "The use of a particular facility is a determining factor."

ALTERNATIVE TRANSPORTATION CONNECTOR

In the opinion of the appeals court, in this particular case, it was "undisputed that Wallace fell in an area in the Inner Harbor Park which is within the Waterfront Promenade and is maintained by the City's Department of Transportation." Moreover, the court found "the Waterfront Promenade is a public pedestrian walkway and shared use bicycle path that functions as a waterfront sidewalk and stretches eight miles." As described by the appeals court, "the City's establishment of the Waterfront Management District in 2007 and adoption of the City's Bicycle Master Plan in 2006 changed the nature of the promenade":

In 2006, the City's Department of Planning implemented a Master Bike Plan, which permitted bicycles in the promenade at all hours of the day to provide additional access to serve users who sought "an alternative to streets like Boston and Key Highway, or who are traveling to or from waterfront destinations such as residences, yachts, restaurants, and places of employment." Department of Transportation, City of Baltimore Bicycle Master Plan 30-31 (2006).

In addition, the appeals court noted this eight-mile stretch includes "all Public Access Corridors as designed in an Urban Renewal Plan or other controlling document and as new sections may be opened beyond these locations." Department of Recreation and Parks, Rules and Regulations of the City of Baltimore 26 (2013).

In light of the City's Charter, Rules and Regulations, Master Bike Plan and evidence regarding the promenade's usage, the appeals court, therefore, concluded "the property serves as a public connector to other parts of the City". As a result, the appeals court held the Waterfront

Promenade “does not serve as a property, park or land that was made available for recreational purposes”:

the mere physical location of the passageway within the park does not of itself decide the function. The use of a particular facility is a determining factor. Here, the property's use is to serve as a connector.

CONCLUSION

Accordingly, the appeals court held the MRUS does not apply to the facts of this case.

At the time of the incident, Wallace was riding her bicycle home from work through Inner Harbor Park, a connector and a public way to travel between points which were outside the park and not for recreational purposes. It was not a public park.

The appeals court, therefore, affirmed the trial court's judgement in favor of Plaintiff Wallace.

SEE ALSO:

Recreational Use Immunity for Dangerous Sledding Hill

James C. Kozlowski, *Parks & Recreation*, August 2022

<https://www.nrpa.org/parks-recreation-magazine/2022/august/recreational-use-immunity-for-dangerous-sledding-hill/>

Recreational Immunity Contrasting Bicycle Opinions

James C. Kozlowski, *Parks & Recreation*, September 2018

<https://www.nrpa.org/parks-recreation-magazine/2018/September/recreational-immunity-contrasting-bicycle-opinions/>

Hold Harmless Incentive in Recreational Use Statute

James C. Kozlowski, *Parks & Recreation*, October 2016

<https://www.nrpa.org/parks-recreation-magazine/2016/october/hold-harmless-incentive-in-recreational-use-statute/>

Recreational Use Statutes in State Supreme Courts

James C. Kozlowski, *Parks & Recreation*, July 2016

<https://www.nrpa.org/parks-recreation-magazine/2016/july/recreational-use-statutes-in-state-supreme-courts/>

Recreational Immunity Regarding Debris in Park

James C. Kozlowski, *Parks & Recreation*, March 2014

<https://www.nrpa.org/parks-recreation-magazine/2014/march/recreational-immunity-regarding-debris-in-park/>

Cliff Collapse Accidents

James C. Kozlowski, *Parks & Recreation*, March 2012

<https://www.nrpa.org/parks-recreation-magazine/2012/march/cliff-collapse-accidents/>

[James C. Kozlowski, J.D., Ph.D.](#) is an Attorney and Emeritus Associate Professor in the School of Sport, Recreation and Tourism Management at George Mason University. [Law review articles archive \(1982 to present\)](#)