

FATAL BEAR ATTACKS TEST IMMUNITY LAWS

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

© 2009 James C. Kozlowski

In general, a landowner can not be held liable for open and obvious natural hazards on the premises, including indigenous wild animals not controlled or possessed by the landowner. In addition, as illustrated by the case of *Estate of Hilston v. State of Montana* described herein, a public landowner may also be immune from liability for dangerous conditions on the land, including grizzly bears, under an applicable state recreational use statute. On the other hand, as illustrated by another case involving a fatal bear attack, *Francis v. United States*, the federal government may not be immune for a failure to warn campers in the vicinity of a known and immediate threat from a wild animal.

RECREATIONAL USE STATUTE

In the case of *Estate of Hilston v. State of Montana*, 2007 MT 124; 337 Mont. 302; 160 P.3d 507 (5/30/2007), Timothy Hilston was killed when he was attacked by grizzly bears while field dressing an elk he had shot while hunting in the Blackfoot-Clearwater Wildlife Management Area. In response to plaintiff's claim alleging negligent management of grizzly bears on public land, the State argued that it was "entitled to judgment as a matter of law under the Recreational Use Immunity Act" which provided as follows:

A person who uses property, including property owned or leased by a public entity, for recreational purposes, with or without permission, does so without any assurance from the landowner that the property is safe for any purpose if the person does not give a valuable consideration to the landowner in exchange for the recreational use of the property. The landowner owes the person no duty of care with respect to the condition of the property, except that the landowner is liable to the person for any injury to person or property for an act or omission that constitutes willful or wanton misconduct. Section 70-16-302(1), MCA

As noted by the state supreme court, the purpose of the Act "is to grant a landowner relief from liability to persons gratuitously entering land for recreation purposes." Moreover, the court found that "Hunting" is expressly included within the definition of "recreational purposes." Section 70-16-301, MCA. Accordingly, the court concluded that Mr. Hilston was using state-owned land for recreational purposes, and that his use of the property was gratuitous, i.e., free of charge. Further, the court noted that there is no allegation of willful or wanton misconduct by the State.

As characterized by the state supreme court, the specific issue was whether the state recreational use statute provided immunity for an attack by an indigenous wild animal on the property. In this particular instance, the trial court had determined that wild animals are a "condition of the property" for which a landowner owes no duty of care under the state recreational use statute.

The state supreme court agreed that "Grizzly bears are wild animals existing upon the property, and, as such, are a 'condition of the property' for purposes of Montana's Recreational Use Immunity Act." As a result, the state supreme court concluded that "the State of Montana owed

DECEMBER 2009 LAW REVIEW

no duty to protect Mr. Hilston from the grizzly bear attack that led to his unfortunate death." The state supreme court, therefore, affirmed the summary judgment in favor of the State.

NUISANCE BEAR

Similarly, in the case of *Francis v. United States* (C.D. Ut. 1/30/2009), the issue before the federal district court was whether the government was immune from liability in failing to prevent a fatal bear attack. Plaintiffs, the parents of "S.I.", alleged the federal government was negligent in failing to close a campsite in a national forest or provide some type of warning of an aggressive bear in the area. In response, the federal government argued that it was immune from any liability for negligence based upon the "discretionary function" exception to the Federal Tort Claims Act ("FTCA").

The Timpooneke Campground (campsite) is located within the Uinta National Forest. On June 17, 2007, the county sheriff's office received a call from campers reporting an encounter with a bear in a nearby dispersed campsite. According to the report, a bear "stomped" on one person's head, hit a camper at least twice, and then sliced into the side of a tent and put a paw through a camper's pillow. The campers, however, were able to scare the bear away.

State and federal officials were quickly notified of this incident and a decision was made to classify the reported bear as a "Level III nuisance bear," which is the most dangerous category. A Level III bear incident is considered to present "a threat to public safety." A search was initiated in order to locate and destroy the bear.

The bear was tracked for approximately four and a half hours without success. The trackers decided at that point to resume the search the next day. No action was taken to close or restrict access to the campsite or to warn prospective users of the campsite. The federal forest supervisor stated after the attack that "he is the only person who can close a campground and was not given the opportunity to make that call."

At approximately 6:00 p.m. on June 17, 2007, Plaintiffs arrived at the Timpooneke Campground, intending to camp there. They stopped at the ranger booth and pay station. They paid the fee required to travel and camp in this area of the national forest. Plaintiffs, however, did not have cash to pay the additional \$13.00 fee charged for camping within the Timpooneke Campground. Consequently, Plaintiffs left the Campground in search of a campsite above the Timpooneke Campground, for which there was no additional fee. At the ranger booth and pay station, no one mentioned anything about the bear attack earlier that morning.

Later that night, at approximately 11:00 p.m., the campground manager at the Timpooneke Campground, received a report from Plaintiffs that someone had cut open their tent and taken S.I who was later found deceased. It was apparent that S.I.'s injuries were consistent with a bear attack. The bear believed to be responsible for the death of S.I. was tracked and killed on June 18, 2007.

POLICY IMMUNITY?

In general, the FTCA provides that the federal government can be held liable for negligence "like a private individual" under the law of the jurisdiction where the incident occurred. Limited immunity, however, has been retained in the FTCA under the "discretionary function exception" for conduct "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government." 28 U.S.C. § 2680(a) The exception applies regardless of whether the government agent was negligent in his duties, so long as his duties were discretionary.

To determine the applicability of the discretionary function exception, federal courts employ a two-part test. First, a court must determine whether the challenged conduct at issue involved a matter of judgment or choice. The discretionary function exception would not apply if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" and "the employee has no rightful option but to adhere to the directive."

Second, if the challenged conduct involves an element of judgment, a court must next "determine whether that judgment is of the kind that the discretionary function exception was designed to shield." The discretionary function exception "protects only governmental actions and decisions based on considerations of policy."

As described by the federal court, Congress specifically enacted the discretionary function exception "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Accordingly, to avoid dismissal of an FTCA claim, the court found Plaintiffs "must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."

NO JUDGMENT OR CHOICE

In this particular instance, Plaintiffs argued that state and federal authorities had failed to implement a regulatory mandate which required campgrounds to be restricted or closed where nuisance black bears are active until the source of the problem (attractant) has been removed and/or the offending bear has been removed. The federal court disagreed that this particular regulation necessarily mandated "a specific course of conduct" based on the use of the word "should," rather than "shall" or "must."

In the alternative, Plaintiffs argued further that a Forest Service Manual established an independent mandatory policy that "at a minimum, the Forest Service was required to post warning signs after the first bear attack at the Campsite." Specifically, the Forest Service Manual provided as follows:

If practicable, correct known natural hazards when a site is developed and open for public use. If the hazards remain or new natural hazards are identified, take steps to protect the public from the hazards. Tailor the action taken to each

hazardous situation. Consider posting signs, installing barriers, or, if necessary, closing the site to address concerns of public safety.

The federal court, however, refused to conclude that "this policy sets forth a mandatory course of action that should have been followed in this case." In so doing, the court noted that there was "no statute, regulation, or agency policy mandating the precise manner in which the United States should have managed this situation." As a result, under the circumstances of this particular case, the court concluded that there was no mandatory policy which would preclude the applicability of the FTCA discretionary function exception.

On the other hand, the federal court acknowledged that Plaintiffs could "still establish that the United States' actions are not protected by the discretionary function exception" under the second prong of the test. To do so, Plaintiffs would have to "demonstrate that the challenged conduct was not the type of conduct that the discretionary function exception was designed to shield," i.e., conduct "grounded in the policy of the regulatory regime."

POLICY JUDGEMENT?

In the absence of a mandatory policy on point, the United States had contended that the federal agents in this particular instance were exercising discretion, raising the presumption that their acts were grounded in policy. The federal court rejected this argument. In the opinion of the court, it was "difficult to conceive of what policy considerations could have been at play in failing to keep campers away from that Campsite while the bear was being tracked--or failing to at least warn campers about the situation." Furthermore, the court noted that "the bear that had earlier attacked campers at that very Campsite presented a specific hazard, distinct from the multitude of hazards that might exist in a wilderness."

Here, there was known danger-- specific in time and location. No policy judgment was involved, nor was there an exercise of political, social, or economic judgment. There might have been a different outcome to this motion had the earlier bear attack happened several miles away or several days or weeks before, but such a scenario is not before the court.

In this case, United States officials knew that an aggressive bear had been present at the Campsite earlier that day--and those officials had decided that the bear was dangerous enough that it need to be tracked and euthanized. When the bear was not found that afternoon, no other action was taken--and there is no evidence of any discussion about what might have been done.

In the opinion of the court, such evidence demonstrated "tragically" that "no decision was ever actually made about how to handle this threat to public safety." On the contrary, the court found "[t]he government official with the authority to close the Campsite stated that he was never given the opportunity to make that call." As a result, the court agreed with Plaintiffs that "this was a simple and tragic failure to act, which does not fall under the discretionary function exception to the FTCA."

Accordingly, the federal court found that "the United States' failure to take any precautionary measures regarding the Level III bear, which was still on the loose, does not fall under the discretionary function exception to the FTCA." The federal court, therefore, held that the United States was not immune from suit and denied the government's motion to dismiss plaintiffs' claims. Plaintiff's would, therefore, have an opportunity at trial to demonstrate that the United States should be held liable "like a private individual" for negligence under Utah state law for the failure of the Forest Service to close the campsite or provide some type of warning about a known bear threat in the immediate area.