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Wisconsin Court Holds Recreational Immunity Statute Protects Club That Maintains Recreational Trails

By Alexander "Sandie" Pendleton of KMK

On March 1, 2011, the Wisconsin Court of Appeals upheld a lower court decision granting summary judgment to a snowmobile club and county government that jointly maintained a northern Wisconsin snowmobile trail system.

The case, *Milton v. Washburn County*, arose out of a snowmobile accident that occurred when the plaintiff and his passenger unexpectedly encountered a locked gate on an "access trail" leading to and from the main trail system. As is common throughout Wisconsin, there are official county snowmobile trails, and numerous unofficial access trails that lead from the official trails to private businesses (frequently, as in this case, to taverns that depend on snowmobile traffic to stay open during the winter months).

In this case, the access trail was located on county land and was about 3/8th of a mile long. A local ordinance required that the gate to the access road be kept closed and locked in order to keep heavier vehicles off the recreational trail (except that officials with the county and the local snowmobile club both had keys to the gate and could use it to get grooming vehicles to and from the official trail). A smaller opening next to the gate was designed to permit snowmobiles to use the access trail without having to open the gate. The club had also posted (or failed to remove) a sign on the official trail, indicating the access trail led to a nearby tavern.

The plaintiffs were injured when they collided with the locked gate, and they sued the club, the county and their insurers. At the trial court level, the court granted summary judgment to the defendants based on Wisconsin's Recreational Use Statute (section 895.52 of the Wisconsin Statutes). Wisconsin's Recreational Use Statute ("RUS"), like recreational immunity statutes in many other states, is designed to encourage landowners and others to open the property they own or control to the public for recreational purposes, and encourages such access by providing broad liability immunity, but with several exceptions.

On appeal, the court of appeals addressed two questions as to the club: (1) did it qualify as an owner, lessee or occupier of the access trail (such that the club would at the outset be entitled to the protections of the RUS); and (2) if yes, did the club's actions constitute "a malicious act, or a malicious failure to warn of an unsafe condition" (in which case, the plaintiffs would potentially be able to prove at trial that they had met the requirements of an exception to RUS immunity).

It was undisputed that the club did not own the land on which the access trail was situated, nor did the club lease the access trail as part of its maintenance agreement with the county regarding the official trails. However, the court of appeals went on to conclude that the club qualified as an "occupant" under the RUS, because it actually used the access trail and had permission from the county to use the trail (*i.e.*, the county had given it a key to the gate).

The court of appeals also had little trouble concluding that the club's alleged actions did not constitute actions that "resulted from hatred, ill will, or a desire for revenge, or [were] inflicted under circumstances where insult or injury is intended." Finally, the plaintiffs' claims against the county were found to have been properly dismissed on essentially the same grounds as the club.

The *Milton* decision is an important one because there are relatively few cases in Wisconsin that provide a substantive discussion of what constitutes an "occupier" or a "malicious act or malicious failure to warn" under

the RUS. Although the decision is a good one for the club and the county in this instance, the decision is also, however, a good reminder for maintainers of recreational trails that:

1. just because a recreational immunity statute exists (or a waiver has been signed) does not guarantee a lawsuit won't occur; and
2. maintenance or access agreements between clubs and landowners should be carefully reviewed:
 - a. to ensure they are crafted so as to optimize a club's chances to be able to rely upon recreational immunity statutes, and
 - b. to ensure that indemnification provisions in such agreements don't unexpectedly result in clubs being responsible for a landowner's litigation costs, or responsible for paying damages attributable to a landowner's actions.

The holding in the case is potentially applicable to many similarly-situated organizations that work to maintain recreational trails on -public or private land in Wisconsin (*e.g.*, mountain-bike clubs, ATV clubs, horseback riding clubs, etc.).

As always, if we at KMK can assist your club or organization in improving its legal risk-management program or agreements, contact us.

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About Pendleton: Alexander "Sandie" Pendleton is a shareholder with the Milwaukee law firm of Kohner, Mann & Kailas, S.C. and is the leader of the firm's Sports, Fitness and Recreational (S/F/R) Team. Sandie has over twenty years of experience counseling clients involved in sports and recreational activities, including power sports activities, and is a frequent speaker and writer on recreational liability issues. To learn more about Sandie and the KMK S/F/R Team, visit www.releaselaw.com.

About Kohner, Mann & Kailas, S.C.: At Kohner, Mann & Kailas, S.C., we continue to believe the right to the "Pursuit of Happiness" is a right worth preserving. Our S/F/R Team guides and fights for businesses and organizations that provide recreational opportunities and products, so that our clients are not overwhelmed by liability that might otherwise threaten their continued success (or even existence). Preserving the right is often not an easy or simple task, but we know this mission is an important one to our clients, and to the future of a free society. If you would like to explore whether we can help your organization achieve its mission, contact us. Founded in 1937, KMK provides legal expertise across the numerous areas of law encountered by businesses in the normal course of their day-to-day operations and growth. In addition to our S/F/R services, our services range from high-profile appellate representation and international business issues to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and effectively.

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