
[princi_elem] [principals] Oregon's recreational immunity and the Ninth Circuit decision

From : Randi Bowers-Payne <bowers_r@4j.lane.edu> Tue, Mar 08, 2016 02:29 PM
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Subject : [princi_elem] [principals] Oregon's recreational immunity and the Ninth Circuit decision
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Dear All,

Interesting development out of the Ninth Circuit. (See below and attached from our Insurance Agent). Plaintiffs argued Oregon's recreational immunity statute **does not extend to "employees" of public entities**, because they are not the "owners" of the property. The Ninth Circuit agreed.

This *could* mean we see an increase in claims against individual employees arising out of citizens/individuals injured while recreating on district property. Assuming the allegations arise out of the course and scope of the individual employees work, the public entity still owes a defense and indemnification to the employee.

As always, be diligent in resolving safety hazards in and around your building. Minimizing exposure, injury, and harm is incumbent upon each of us.

Best Regards,

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By [Aimee Green | The Oregonian/OregonLive](#)

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A legally blind woman who was jogging through Portland's Tom McCall Waterfront Park when she stepped into a hole and badly injured herself has the legal authority to sue city workers, the Oregon Supreme Court ruled this week.

Emily Johnson is seeking \$1 million in damages for injuries she sustained in July 2009 when she fell after stepping into an 18-inch-deep hole dug by a city maintenance worker who was trying to fix a broken sprinkler head the previous day. The worker said he marked the hole with an orange cone, but the cone was gone when Johnson fell the next day.

"(Johnson) is a young woman, who despite being legally blind due to macular degeneration in her eyes, was a very physically active person who participated in collegiate sports and suffered a severe and permanent disabling injury when she fell while jogging," states her lawsuit, filed in U.S. District Court for Oregon.

The suit doesn't touch on the strength of Johnson's vision, but she apparently was capable of running without assistance. Johnson suffered a permanently disabled knee and has undergone four surgeries, said her Portland attorney, Thane Tienson. She had to give up her career as a massage therapist and severely limit her activities, he said.

Tienson said that about 75 yards from where the hole was there is a city maintenance shed stocked with barricades, yellow warning tape, sand that could have filled the hole and plywood that could have covered it. Tienson said that at the time, there were no standards or training by the city of its workers about covering holes.

"(The worker) admits he forgot to return to the hole and fix it before this accident happened," Tienson said.

In February 2010, Johnson -- who was 28 at the time -- filed suit against the city, claiming it discriminated against her under the Americans with Disabilities Act by failing to reasonably safeguard her from "stepping in an unsigned, unmarked, unbarricaded, deep excavated hole" next to the park's paved pathway.

Six months after filing suit, Johnson added two defendants: city maintenance employees Scott Gibson and Robert Stillson. Gibson had dug the hole, and Stillson was the supervisor in charge of the city's westside parks, according to the Supreme Court summary of the case.

Johnson also alleged negligence in her suit. The city responded that it and its two employees were shielded from lawsuit under Oregon's Public Use of Lands Act, which says that landowners who don't charge members of the public for the recreational use of their land can't be held liable if they hurt themselves.

The city also argued that Johnson was at fault for her injuries -- for "failing to maintain a proper lookout for her own safety" and "failing to walk or jog at a reasonable speed."

In early 2011, Judge Robert Jones dismissed Johnson's case, finding that her disabilities discrimination claim didn't hold water. Shortly afterward, Johnson re-filed her lawsuit in federal court against the two employees only -- arguing that they weren't immune under the Public Use of Lands Act. Judge John Acosta dismissed the case -- ruling that the two employees were indeed immune under the act because they effectively qualified as "owners" of the park under the law.

Johnson appealed to the U.S. Ninth Circuit Court of Appeals, which hears federal appeals from Oregon and eight other western states. And that led the Ninth Circuit to turn to guidance from the Oregon Supreme Court -- asking it whether city employees who repair and maintain a city park are indeed "owners" of the land as defined under the act.

Thursday, the Supreme Court came back with its answer: "No." The high court determined that just because state lawmakers granted landowners immunity from being sued under the Public Use of Lands Act, doesn't mean lawmakers meant to grant immunity to landowners' employees.

The ruling paves the way for the judges on the Ninth Circuit to rule that Johnson's lawsuit can go forward. That decision, however, is ultimately up to those judges.

The city attorney's office is representing the two employees. If Johnson's suit ultimately prevails against them, the city would cover any award granted to Johnson against them.

Critics of the ruling said it could have a dampening effect on private and public landowners who allow the public to recreate on their lands. The Public Use of Lands Act has given peace of mind from fear of liability to cities, counties, the state and a wide range of private owners, from mountain property owners that allow snowmobile riders to cross to timber companies that allow hikers and mountain bikers to traverse their lands at no charge.

Given this week's Supreme Court ruling, it's likely that landowners will ask the Oregon Legislature to change the law to protect landowners' employees from being sued.

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