IN THE SUPREME COURT OF THE STATE OF OREGON

MICHAEL KELLY,

Plaintiff-Appellant,
Petitioner on Review,

vs.

SAMUEL ISRAEL HOCHBERG,

Defendant-Respondent,
Respondent on Review.

Josephine County Circuit Court
Case No. 06 CV 0508

CA A 136949

SC 058035

BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL

Review of the Decision of the Court of Appeals from a Judgment of the Circuit Court for Josephine County, Honorable THOMAS M. HULL, Judge

Opinion Filed: September 30, 2009
Author of Opinion: Landau, J.

Susan D. Marmaduke, OSB #841458
HARRANG LONG GARY RUDNICK P.C.
1001 SW Fifth Avenue, 16th Floor
Portland, OR 97204
Telephone: (503) 242-0000
Facsimile: (503) 241-1458
E-mail: susan.marmaduke@harrang.com
Attorneys for *Amicus Curiae* Oregon Association of Defense Counsel

James M. Callahan, OSB #780232
CALLAHAN & SHEARS
P.O. Box 22677
Portland, OR 97269
Telephone: (503) 513-5130
Facsimile: (503) 513-5915
E-mail: jcallahan@callahanandshears.com
Attorneys for Defendant-Respondent, Respondent on Review Samuel Israel Hochberg

Counsel cont'd on next page

September 2010

Jeffrey A. Long, OSB #862350
5285 Meadows Road, Suite 320
Lake Oswego, OR 97035
Telephone: (503) 224-0871
Facsimile: (503) 208-8018
E-mail: jeff@jefflonglaw.com
Attorneys for Plaintiff-Appellant, Petitioner on Review Michael Kelly

W. Eugene Hallman, OSB #741237
HALLMAN & DRETKE
P.O. Box 308
Pendleton, OR 97801
Telephone: (541) 276-3857
Facsimile: (541) 276-7620
Email: gene@hallmandretke.com
Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF OADC'S INTEREST

The Oregon Association of Defense Counsel ("OADC") seeks leave of court to file an *amicus curiae* brief in support of the respondent on review. OADC is a private, nonprofit association of lawyers, a substantial portion of whose practice is devoted to the defense of civil actions. OADC is not related to any of the parties in this matter and has no interest of its own in this proceeding, other than to aid the court in determining the correct rule of law. Ultimately, the court's decision may affect interests of parties represented by OADC's members in this and other cases, both now and in the future.

II. QUESTION ON REVIEW

The question, as presented by petitioner on review, is: Did the Court of Appeals err in applying Oregon's recreational use statute (ORS 105.672 to 105.696) to grant immunity to the United States Bureau of Land Management ("BLM") when the plaintiff was injured while operating a motor vehicle on a highway open to the public?

OADC suggests that the question is more accurately stated as: Did the trial court correctly conclude on the record before it that any claim Defendant Hochberg might have filed against the BLM for injuries sustained by plaintiff after entering BLM land to engage in a game that involved riding a motorcycle on a BLM road, would have been dismissed as barred under the recreational use statute?

III. PROPOSED RULE OF LAW

Where BLM, in the words of ORS 105.682(1), "permits any person to use [its] land for recreational purposes," and plaintiff entered the land for the purpose of engaging in a game on that land, the immunity conferred by the recreational use statute is not lost because the game involved riding a motorcycle on a roadway on that land.

IV. INTRODUCTION

This is a legal malpractice case. *Kelly v Hochberg*, 231 Or App 155, 157, 217 P3d 699 (2009). Plaintiff Mike Kelly sued his lawyer, Samuel Hochberg, for failing to bring a timely action against the BLM for damages arising out of injuries he sustained in June 2001. A-1–A-4.[1] Plaintiff alleged that his injuries were caused by BLM's negligence in failing to trim overgrown vegetation on its roadway or failing to warn of the vegetation that was impairing visibility on the portion of the roadway where the accident occurred. A-2. Under the Federal Tort Claims Act, the statute of limitations is two years. 28 USC § 2401(b).[2]

Defendant moved for summary judgment on the ground that any claim against the BLM would have been dismissed as barred by Oregon's recreational

---

[1] Plaintiff identified his excerpt of record as an "abstract of record," hence the references to "A" as opposed to "ER."

[2] The statute of limitations on a claim against BLM expired in June 2003, so the 2001 version of the recreational use statute applied in the legal

use statute. Plaintiff stipulated that the BLM permitted any person to use the road without charge and that the issue was whether his injury arose out of his use of the land for "recreational purposes." Appellant's Amended Brief in the Court of Appeals at 6. It was undisputed that plaintiff's entry on BLM land was for the purpose of engaging in a "poker run" and that, in fact, plaintiff's injuries were sustained while engaged in that game on that land. The trial court found on the record before it that:

> "the entire run was intended to and had a recreational purpose. The road was not a means of access to and from a 'card game.' The whole event, *i.e.*, the 'poker run,' is a recreational activity and had the requisite recreational purpose covered by the statute."

Kelly, 231 Or App at 158. Therefore, the trial court concluded that any claim against the BLM would have been barred by the recreational use statute and granted defendant's motion for summary judgment.

OADC submits that the trial court and the Court of Appeals correctly analyzed the recreational use statute for all of the reasons set forth in the Court of Appeals' opinion. This case falls squarely within that statute. Where, as here, the injured person's purpose for entering onto the land is to participate in a game on the land, the use is self-evidently recreational regardless of whether the

---

malpractice case. Changes in Oregon's recreational use statutes since 2001 are not material to this case.

game is played on foot or on a motorcycle on a roadway.[3] That conclusion should be determinative in this case, and the decision of the Court of Appeals should be affirmed.

Plaintiff and OTLA contend that the recreational use statute does not apply to injuries sustained while riding a motorcycle on a roadway, regardless of whether the injured person entered the land to engage in a game on that land. None of their arguments in support of that contention is well taken.

V. ARGUMENT

A. The trial court correctly concluded that Defendant Hochberg was entitled to summary judgment because a claim against the BLM would have been dismissed based on Oregon's recreational use statute.

1. The statute does not limit its immunity to the activities listed in ORS 105.672(5).

OTLA argues that the statutory extension of immunity to "roads" and "rights of way" is limited to the activities listed in ORS 105.672(5) and therefore does not apply to roads or rights of way if the injury was sustained while riding a motorcycle (or bicycle or car), even as part of a game. OTLA Br. at 4-5.

That argument fails because it would read out of ORS 105.672(5) the provision that the term "'[r]ecreational purposes' includes *but is not limited to*

---

[3] See *Webster's Third New Int'l Dictionary* 1899 (unabridged ed 2002), defining "recreation" as "1 a: the act of recreating or the state of being recreated: refreshment of the strength and spirits after toil: DIVERSION, PLAY * * * b: a means of getting diversion or entertainment."

[the listed activities]." (Emphasis added.) This court specifically recognized the significance of the foregoing provision in *Liberty v. State Dep't of Transp.*, 342 Or 11, 20, 148 P3d 909 (2006), stating: "the legislature made it clear that its list of 'outdoor activities' that could be 'recreational purposes' was not exhaustive."

2. This court's decision in *Liberty* does not mean that riding a motorcycle as part of a game cannot be a "recreational purpose."

Plaintiff and OTLA argue that riding a motorcycle, even as part of a game, cannot be a "recreational purpose" under *Liberty*. They misunderstand *Liberty*. *Liberty* holds only that, where the injured person's reason for entering the land was solely to get to another place where the person intended to engage in a recreational activity, the entry was not for a recreational purpose. 342 Or at 21-22. *Liberty* recognizes that whether an activity that involves traversing land is recreational depends on whether it is done for its own recreational value or simply as a means to get somewhere else to engage in recreation; in other words, it may be a question of fact.

In contrast, in this case, there was no issue of fact as to plaintiff's purpose in entering the BLM land. The plaintiff's purpose in entering the BLM land was to engage in a game – the poker run – on that land. The trial court found that the BLM road was *not* merely a means of access to and from a card game, but that the entire motorcycle run was intended to have, and had, a recreational purpose. *Kelly*, 231 Or App at 158. Therefore, *Liberty* is not controlling and

does not support the argument by plaintiff and OTLA that entering the land on a motorcycle can never be for a recreational purpose.

3. The Court of Appeals' focus on the injured person's purpose in entering upon the land is dictated by the statute.

OTLA argues that the emphasis which the Court of Appeals' decision places on the injured person's purpose in entering upon the land is "unworkable" and even "absurd." OTLA Br. at 3 and 7. But that emphasis is dictated by the plain wording of the statute, which conditions immunity upon: (1) the landowner having permitted the public to come upon the land for recreational purposes; and (2) the injured person's "principal purpose for entry upon the land [having been] for recreational purposes." ORS 105.682(1).[4] Therefore, the Court of Appeals' analysis of the effect of the recreational use statute on plaintiff's claim against Defendant Hochberg was correct.

4. The Court of Appeals' decision is consistent with the result a federal court would have reached.

OTLA asserts that any action against the BLM would have been brought in federal court. OTLA Br. at n. 5. The United States Code vests jurisdiction in the district courts for actions in which the United States is a party. 28 USC

---

[4] There is nothing novel about setting the parameters of landowners' liability based on the purpose for which the injured person came onto the land and the landowner's consent to such entry. Common law principles of landowner liability turn on those two questions, as well. *See Hansen v. Cohen,* 203 Or 157, 276 P2d 391, 278 P2d 898 (1955) (describing duties of landowner to injured person as depending on landowner's consent and purposes of the injured person's entry onto the land).

§ 1345. If Hochberg had brought a timely claim against the BLM (that is, if he had brought a claim before June 2003), the federal court would likewise have concluded that Oregon's recreational use statute bars the claim.[5]

OTLA incorrectly asserts that *Seyler v. United States*, 832 F2d 120 (9th Cir 1987), would have been controlling because it involved "facts identical to those of the instant case." OTLA Br. at 3. The question in *Seyler* was whether Idaho's recreational use statute barred an action against the Bureau of Indian Affairs ("BIA") by the plaintiff, an enrolled member of the Coeur d'Alene Indian Tribe, for injuries sustained on a highway maintained by the BIA on the Coeur d'Alene reservation. *Seyler*, 832 F2d at 121. The court said:

> "We do not agree that the government [the BIA] 'invited' or 'permitted' Seyler to use a public highway on his own reservation. Nor is Seyler, while on his tribe's reservation, in a position at all comparable to that of a 'person entering' land of another for recreational or any other purposes."

Id. at 122. The *Seyler* court specifically distinguished its decision in *O'Neal v. United States*, 814 F2d 1285 (9th Cir 1987), which held that Oregon's recreational use statute barred recovery by hunters who were injured while

---

[5] The procedural posture of this case puts the court in the curious position of predicting what a federal court would have done in the "case within the case" if a claim had been brought against the BLM before June 2003. The federal court's mission would have been to predict how this court would have analyzed the recreational use statute as applied to the BLM. The federal court would not, of course, have had the benefit of this court's decision in this case.

driving on a BLM logging road. *Seyler*, 832 F2d at 121. The *Seyler* court explained:

> "[In *O'Neal*,] extending tort immunity to logging roads furthered the purpose of the recreational use statute: if liability were imposed in cases like *O'Neal*, the government [the BLM] 'might well choose to close the forests to public use rather than bear the heavy burden of maintaining logging roads as public thoroughfares.'"

Id. (citations omitted). Whereas the Ninth Circuit in *Seyler* concluded that the BIA could not have "invited or permitted" a tribal member onto his own reservation because it lacked the power to exclude him, the same court in *O'Neal* observed that "the Bureau of Land Management has the power to close or restrict the use of public lands under its management and supervision," citing 43 CFR § 8364.1. That regulation provides, in part:

> "To protect persons, property, and public lands and resources, the authorized officer may issue an order to close or restrict use of designated public lands."

43 CFR § 8364.1(a).

In this case, plaintiff stipulated that the BLM "permits any person to use the land" (ORS 105.682(1)) where the accident occurred. But if this court were to look to federal case law for guidance as to the meaning of that phrase as applied to the BLM, the place to look would be *O'Neal*, not *Seyler*. [6] Neither

---

[6] That analysis is no different because the BLM holds the road open to the public. *Cf. Mattice v. United States Dep't of Interior*, 969 F2d 818, 821 (9th Cir 1992) ("[t]here is no question that [California's statute] applies to public federal roads on recreational land").

plaintiff nor OTLA has identified any authority that suggests the Court of Appeals' decision is inconsistent with the likely resolution by a federal court of the "case within the case."

B. OTLA's policy arguments are not well taken.

1. This case does not present the question of how the recreational use statute would apply to roads owned or maintained by public bodies other than the BLM.

A party may bring an action against the United States only to the extent it has waived its sovereign immunity. *United States v. Orleans*, 425 US 807, 814, 96 S Ct 1971, 48 L Ed 2d 390 (1976). The United States has waived its sovereign immunity in cases like the present one only to the extent that a private person would be liable in comparable circumstances. 28 USC §§ 1346(b) and 2674.

Thus, the question of whether Defendant Hochberg was negligent in failing to sue the BLM depends on whether a private person would be liable for injuries Plaintiff Kelly sustained while riding a motorcycle for his own entertainment on land which the private person held open to the public for recreational use. *See Rayonier Inc. v. United States*, 352 US 315, 319, 77 S Ct 374, 1 L Ed 2d 354 (1957) ("[T]he test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred.") The test is *not* whether the State of Oregon would be responsible –

or immune under the recreational use statute – for similar negligence on a state highway.

The recreational use statute does not distinguish between public and private landowners. It applies to "all real property, whether publicly or privately owned." ORS 106.672(3). It does not follow, however, that this court's adoption of the Court of Appeals' statutory construction in this case would necessarily mean that no recreational driver, motorcyclist, or bicyclist would have a remedy for injuries sustained while driving on any Oregon road or highway, as OTLA contends. OTLA Br. at 8. As the Court of Appeals observed in *Liberty v. State Dep't of Transp.*, 200 Or App 607, 619, 116 P2d 902 (2005), *rev'd on other grounds,* 342 Or 11, 148 P3d 909 (2006), the duties of the State of Oregon, counties, and other public bodies with respect to roads they own or control may be affected by other Oregon statutes.[7]

Because the Federal Tort Claims Statute makes BLM analogous to a private party for purposes of its tort liability, the interplay between the recreational use statute and any other statutes or regulations that may apply to the State of Oregon, Oregon counties, or other public bodies, is not at issue here.

---

[7] In *Liberty*, this court specifically noted that it did not reach the issue of the interplay between the recreational use statute and any other Oregon statutes. 342 Or at 17 n. 1.

2. OTLA's proposed "bright line" test is neither a "bright line" nor consistent with the statute and its stated legislative purpose.

Even if the Oregon Court of Appeals' construction of the recreational use statute in this case truly represented the "unprecedented expansion of immunity to recreational driving on federal, state, county and local roads," which OTLA claims (OTLA Br. at 8), the "solution" OTLA proposes – construing the statute as denying immunity for any injuries sustained while bicycling, motorcycling, or riding a car on a roadway – would make no sense.

First, such a carve-out would be inconsistent with the statute's proviso that its immunities apply to "[a]ll public and private lands" (former ORS 105.688(1)(a) (2001)) and specifically to all "roads" and "rights of way" on those lands. ORS 105.688(1)(b). It would also be inconsistent with the statute's inclusion of "viewing * * * scenic * * * sites" as a "recreational purpose." ORS 105.672(5). If the legislature intended the immunities to apply to "all roads" and sightseeing on those roads *except* when the injury occurs while riding a motorcycle, driving a car, or riding a bicycle – as OTLA suggests – it would have said so.

In addition to finding no support in the statute, OTLA's proposed "bright line" is not, in fact, bright at all. One wonders, for example, where roller skating or skateboarding would fall in OTLA's continuum between "hiking" (which ORS 105.672(5) specifically includes) and bicycle riding

(which OTLA would exclude). OTLA's proposed distinctions have neither analytical integrity nor basis in statutory text. For example, the statute specifically includes "winter sports," which would seem to include downhill and cross-country skiing, ice skating, and snowmobiling. One wonders why the immunity extends to injuries sustained while riding a snowmobile for fun, but not to those sustained while riding a motorcycle for fun. OTLA's proposed equipment-based test creates no brighter a line than does the Oregon legislature's purpose-based one – and it fails to serve the stated legislative purpose of "encourage[ing] owners of land to make their land available to the public for recreational purposes." ORS 105.676.

3. OTLA's argument that the statutory immunity would hurt tourism is not well taken.

OTLA argues, in effect, that to apply the recreational use statute by its terms would wreak havoc on the state's tourism industry by depriving all recreational drivers of a remedy for injuries caused by negligence. OTLA Br. at 8. For the reasons discussed above, this case does not present the question of how the recreational use statute interacts with any other statutes or rules affecting the duties of the State of Oregon or other public bodies. But even if it did, and even if this court were to conclude that the recreational use statute trumps all otherwise applicable statutes and rules, this court has often recognized that its mission in construing a statute is to effectuate the intention of the legislature, not to substitute its own views of public policy. *See PGE v.*

Bureau of Labor and Industries, 317 Or 606, 610-12, 859 P2d 1143 (1993) and *State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009) (stating rule).

The Oregon legislature has manifested an ongoing and growing commitment to increasing public access to recreational lands. It has continuously expanded the scope of the recreational use statute.[8] It has made those policy choices as the state's population has burgeoned, growing from 2,091,585 in 1970[9] to an estimated 3,825,657 in 2009.[10] Visits to Oregon state parks, as measured by visitor days, have increased from 23 million annually in 1970 to 41 million annually in 2010.[11] The Oregon Forestry Department reports that, while there is currently an adequate supply of recreational

---

[8] As phrased in 1971, the statute defined "land" to mean "agricultural land, forest land, and lands adjacent or contiguous to the ocean shore." ORS 105.655 (1971).

In 1995, the legislature expanded the statute to include "*all real property*, whether publicly or privately owned." Or Laws 1995, ch 465, § 1(3) (emphasis added).

In 2007, it expanded the statute to provide that immunity is not defeated by "any amount received from a public body in return for granting permission for the public to enter or go upon the owner's land." Or Laws 2007, ch 372, § 1.

In 2009, it expanded the statute to cover certain types of paths and roads while being used by a person to reach land for recreational purposes. ORS 105.688(1)(c).

[9] www.census.gov/population/cencounts/or190090.txt.

[10] http://quickfacts.census.gov/gfd/states/4100.html.

[11] www.oregon.gov.ODF/STATE_FORESTS/FRP/crt6intro.shtml.

opportunities in Oregon's forests because of increased availability of such opportunities on public lands, the demand continues to increase and the amount of privately owned land available for recreation in the state has declined. [12] *Id.* The Oregon Forestry Department reports that:

> "Studies suggest that the amount of non-industrial private forest land available for public recreation has decreased due to increasingly fragmented ownership, increased absentee ownership, increasing risk of litigation, and a negative perception of the benefit to owners of public recreational use of private land." [13]

Nothing in the text, context or legislative history of the recreational use statute warrants increasing the risk of litigation to landowners who permit the public recreational use of their land by adopting OTLA's so-called "bright line" test or any of plaintiff's or OTLA's other arguments.

VI. CONCLUSION

This case clearly falls within the scope of the recreational use statute and neither plaintiff nor OTLA has offered a legitimate reason for this court to

---

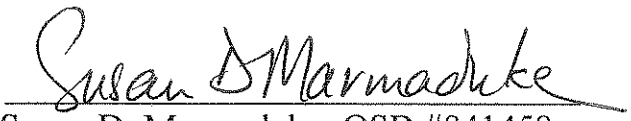
[12] The BLM reports that 80 percent of its contacts with the public relate to recreation, and that the number of recreational visitors to public lands has doubled over the last decade. BLM, *People, Places & Partners: Planning, Managing, and Enhancing Recreational Experiences of BLM Public Lands*, available at: www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/general_ publications/ppp.Par.31679.File.dat/blmRecHandout.pdf.

[13] www.oregon.gov.ODF/STATE_FORESTS/FRP/crt6intro.shtml.

override the plain meaning of that statute. OADC respectfully submits that the Court of Appeals should be affirmed.

Respectfully submitted this 9th day of September, 2010.

HARRANG LONG GARY RUDNICK, P.C.

By: 

Susan D. Marmaduke, OSB #841458
susan.marmaduke@harrang.com
1001 SW Fifth Ave., 16th Floor
Portland, OR 97204
Telephone: (503) 242-0000
Facsimile: (503) 241-1458

Of Attorneys for *Amicus Curiae* Oregon Association of Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that on September 9, 2010, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL by using the court's efiling system.

I further certify that I caused to be mailed two true and correct copies of the foregoing BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL, via first class mail, postage prepaid, within 3 calendar days to the following:

Jeffrey A. Long
5285 Meadows Road, Suite 320
Lake Oswego, OR 97035
Attorneys for Plaintiff-Appellant, Petitioner on Review, Michael Kelly

James M. Callahan
CALLAHAN & SHEARS
P.O. Box 22677
Portland, OR 97269
Attorneys for Defendant-Respondent, Respondent on Review, Samuel Israel Hochberg

W. Eugene Hallman
HALLMAN & DRETKE
P.O. Box 308
Pendleton, OR 97801
Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association

By: Susan D Marmaduke

Susan D. Marmaduke, OSB 841458
susan.marmaduke@harrang.com
1001 SW Fifth Ave., 16th Floor
Portland, OR 97204
Telephone: (503) 242-0000
Facsimile: (503) 241-1458

Of Attorneys for *Amicus Curiae* Oregon Association of Defense Counsel

CERTIFICATE OF FILING AND SERVICE