Misinformation #2: County could not afford "liability" for the old bridge

(see attached pages B-1, B-2 of statutes and seminal case law containing current law on the subject which proves the "liability" scare tactic is invalid and has long been readily available to the public, and has been previously submitted to this court. Also, it is widely known that counties have "tort liability-immunity" (Ark Code Ann. 21-9-301 et seq. Also see Ark Code Ann. 18-11-301 et seq. regarding state Recreational Use Statutes) After reading this LAW on the matter, is there anyone who will dare to say that "liability" for the Pruitt Bridge will be any more than for any of the other county owned/maintained bridges/property???)

Close

Print

Buffalo River Bridge; Pruitt

From: **Randy Laverty** (rlaverty@ritternet.com)
Sent: Thu 12/03/09 11:16 AM
To: arkansasfreedom@hotmail.com
Attachments:
bridgeltr092509.doc (24.0 KB), carltonbridgecase092309.doc (47.0 KB), recreationalliabilitylaw092509.doc (44.0 KB)

Good Morning Connie! It was so nice to visit with you. I hope everything is going well for you and your family. Merry Christmas to all of you.

The attached may be of help in your research re the Pruitt Bridge. Senator Laverty asked that I forward it to you.

Diantha

B-1

September 25, 2009

Senator Randy Laverty
P.O. Box 165
Jasper, Arkansas 72641

RE: **Bridge liability**

Dear Senator Laverty,

Marty Garrity of this office passed along a request to me from you concerning county ownership of a pedestrian bridge over the Buffalo River and related liability issues.

I have researched the issue and have located the seminal case and relevant statutes that provide guidance on the matter. This case contains the current law on the subject and should be instructive for you and the county attorney on what the potential liability issues are. The case and statutes are attached to this letter for your reference and review.

Additionally, I understand that Mark Whitmore with the Association of Arkansas Counties has experience on this issue, and I think he could be helpful in guiding the county in this situation. His number is 501/372-7550.

I hope this information is helpful. If you have any questions, please feel free to contact me. Thank you for your courteous attention to this matter.

Sincerely,

Kerrie L. Lauck, Esq.

Enclosures
cc: BLR file copy

B-2

CARLTON v. CLEBURNE COUNTY, ARK., 93 F.3d 505 (8th Cir. 1996)

No. 95-2843

United States Court of Appeals, Eighth Circuit.

Submitted January 11, 1996

Filed August 21, 1996

to save faxing time I'm only sending 1st page - so you can have ref. info to research if you choose

Page 507

Counsel who presented argument on behalf of the appellant was James Bruce McMath of Little Rock, AR. Frank S. Hamlin of Little Rock appeared on the brief.

Counsel who presented argument on behalf of the appellee was Elizabeth F. Rogers of Little Rock, AR. Michael R. Rainwater of Little Rock appeared on the brief.

Appeal from the United States District Court for the Eastern District of Arkansas.

Before WOLLMAN, ROSS and MURPHY, Circuit Judges.

ROSS, Circuit Judge.

[1] Appellants, victims of a bridge collapse in Cleburne County, Arkansas, or their decedents, appeal from the district court's[fn1] order granting summary judgment to Cleburne County and its former Quorum Court officials (County appellees) in this 42 U.S.C. §(s) 1983 action. Appellants also appeal from the district court's order granting summary judgment in favor of the Swinging Bridge Resort and its individual owners (Resort appellees) on the appellants' pendent state law claims of negligence.

I.

[2] Cleburne County originally built the Winkley Bridge, also known as the "Swinging Bridge," in 1912. In 1959, the State of Arkansas included the bridge in its state highway system and exercised the power of eminent domain, divesting the County of any equitable or legal claim to title. In 1970, when the state constructed a new bridge, the Swinging Bridge and its approaches were saved from destruction.

Although the issue of ownership of the bridge arose some years after the new bridge was constructed, the County nevertheless maintained the bridge and its approaches. For the purposes of this appeal, we will assume without deciding, that the County owned the bridge.

[3] In 1982, the local newspapers reported the results of tests conducted by engineers in response to Quorum Court concerns that the bridge was deteriorating. The engineers reported that the bridge was sturdy, capable of

supporting pedestrian traffic for another 50 to 100 years, and that the interior of the cables was shiny and rust free.
Although the engineers recommended ultrasound testing on the bridge cables and application of a protective coating on the cables to prevent further rusting, the Quorum Court initiated no further tests or treatment.

[4] On October 28, 1989, the Swinging Bridge collapsed and fell into the Little Red River, when approximately forty people were on the bridge, swinging it from side to side. Five people were killed and many others were injured.

[5] Appellants filed this lawsuit against the County and the Quorum Court members under 42 U.S.C. §(s) 1983, alleging deprivation of their substantive due process rights. Appellants also filed an action against the Resort appellees, who operated a cafe and resort at the bridge site and owned the land upon which a bridge easement lay on one side of the river. This action was based on pendent state law claims of negligence in failing to warn appellants of an ultrahazardous danger.
Page 508

[6] The district court granted summary judgment in favor of the County appellees, concluding that appellants failed to establish that a constitutional violation occurred. The court also granted summary judgment in favor of the Resort appellees, holding that the appellees are immune from suit under Arkansas' Recreational Use Statute. We affirm.

II.

[7] Nothing in the language of the Due Process Clause imposes upon the state an affirmative obligation to protect or care for particular individuals. DeShaney v. Winnebago Cty. Dep't of Social Servs., 489 U.S. 189, 195 (1989); Gregory v. City of Rogers, 974 F.2d 1006, 1009
(8th Cir. 1992), cert. denied, 507 U.S. 913 (1993). Rather, the "Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." DeShaney, 489 U.S. at 195; see also Collins v. City of Harker Heights, 112 S.Ct. 1061, 1069 (1992). Nevertheless, this court has held that the Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: "first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." Gregory, 974 F.2d at 1010 (citing DeShaney, 489 U.S. at 195, 199-200); Sellers v. Baer, 28 F.3d 895, 899 (8th Cir.
1994), cert. denied, 115 S.Ct. 739 (1995). Here, the appellants do not contend that they were ever in "custody" or were otherwise limited in their ability to care for themselves. Therefore, we consider only the "creation of danger" exception, or whether the state affirmatively placed these particular individuals in a position of danger they would not have otherwise encountered.

[8] We stated in Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990), that "[i]t is not clear, under DeShaney, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect. It is clear, though, that at some point such actions do create such a duty." Cases where the duty to protect has arisen have consistently involved affirmative conduct by government officials directly responsible for placing particular individuals in a position of danger. See, e.g., L.W. v. Grubbs, 974 F.2d 119, 121-22 (9th Cir. 1992) (state officials knowingly assigned violent, habitual offender to work alone with female prison employee and did not inform her of the risk), cert. denied, 508 U.S. 951 (1993); Medina v. City of Denver, 960 F.2d 1493, 1497 n. 5 (10th Cir. 1992) (police officers engaged in a high speed car chase potentially liable for creating a special danger faced by a bicyclist); Freeman, 911 F.2d at 54-55 (police chief prevented protective services from enforcing restraining order against victim's estranged husband); Wood v. Ostrander, 879 F.2d 583, 590 (9th Cir. 1989) (trooper created a danger by impounding car and abandoning female passenger in a high crime area at 2:30 a.m.), cert. denied, 498 U.S. 938 (1990); Wells v. Walker, 852 F.2d 368, 370-71 (8th Cir. 1988) (state officials created a danger when released prisoner with violent propensities was transported to victim's store without warning), cert. denied, 489 U.S. 1012 (1989). In these cases the courts have uniformly held that state actors may be liable if they affirmatively created the plaintiffs' peril or acted to render them more vulnerable to danger. See DeShaney, 489 U.S. at 201. In other words, the individuals would not have been in harm's way but for the government's affirmative actions.

[9] Appellants assert the County appellees affirmatively placed them in a position of danger they otherwise would not have faced when the appellees, with actual knowledge of the deteriorating condition of the bridge, promoted the bridge as a tourist attraction, had the bridge placed on the National Register of Historic Places, performed cosmetic work on the bridge in order to maintain an attractive appearance, established a park, built a parking lot, removed a warning sign, Page 509 and promoted the bridge through publications. According to appellants, the County appellees' conduct created the danger by impliedly assuring them of the bridge's safety and encouraging them to be on the bridge, and therefore, the appellees had an affirmative duty to protect against such harm.

[10] Even if we accept as true that the County owned the bridge and knew the bridge was deteriorating but refused to provide any maintenance or repair, we must conclude that no constitutional violation occurred. Mere knowledge of danger to the individual does not create an affirmative duty to protect. DeShaney, 489 U.S. at 200. Simply offering a location as a tourist attraction is not the type of affirmative government action that creates a duty to protect under DeShaney. Appellants allege no affirmative act on the part of

government officials directly placing them on the bridge. Nor did the County appellees' actions "create the danger" causing the bridge to collapse. To the contrary, accepting the appellants' allegations as true, the bridge cables broke because of internal corrosion caused by rust. To impose an affirmative duty to protect the general public from a situation created by the processes of nature would be to impose upon a county an impossible burden. Finally, neither the County appellees'
actions nor inaction placed these particular individuals in a position of danger. Gregory, 974 F.2d at 1010; Wells, 852 F.2d at 370-71.
Instead, any action on the part of the County appellees was directed toward members of the general public. There simply was no constitutional deprivation under Section(s) 1983 in this case.

III.

[11] Appellants filed pendent state law claims against the Resort appellees alleging the appellees negligently failed to warn them of an ultrahazardous condition. Appellants claim the Resort appellees actively encouraged business from visitors to the bridge by picturing the bridge on their brochures and postcards and calling their operation the Swinging Bridge Resort. Appellants also allege the Resort appellees had actual knowledge of the condition of the bridge, having been among those to bring its condition to the attention of the County appellees, but in spite of this knowledge, the Resort appellees took no action to warn visitors to the bridge of the dangerous condition.

[12] In order to "encourage owners of land to make land and water areas available to the public for recreational purposes," the Arkansas Recreational Use Statute (the Act) generally immunizes a landowner from liability when an individual is injured while on the land for recreational purposes. Ark. Code Ann. Section(s) 18-11-301.
Specifically, the Act provides that "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes." Ark. Code Ann. Section(s) 18-11-304. The Act, however, does not limit a landowner's liability for "malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition . . . actually known to the owner to be dangerous," Ark. Code Ann. Section(s) 18-11-307(1), or where the landowner "charges the person or persons who enter or go on the land for the recreational use thereof." Ark. Code Ann. Section(s) 18-11-307(2).

[13] Appellants concede they were visiting the bridge for recreational purposes. However, they contend the Resort appellees nevertheless remain liable under the two exceptions to the Act. First, appellants argue that because the Resort appellees operated a business near the bridge site and collected revenue from bridge visitors, this was not a gratuitous undertaking as envisioned by the Act, and therefore the "charge" exception to the Act is triggered. We disagree.

[14] The immunity of the Act applies if the person uses the property without charge of "an admission fee for permission to go upon or use the land." Ark. Code Ann. Section(s) 18-11-302(4). It is uncontroverted that the appellants did not pay a fee to the Resort appellees or any other entity for admission to or use of the land, or to enjoy the privilege of sightseeing at the bridge. Even if the presence of a business enterprise adjacent to the bridge was found to be legally significant, Page 510 which itself is questionable, it is undisputed that none of the appellants, nor any member of their groups, went to the diner or the trout dock as customers on the day the bridge collapsed. In fact, the diner was closed and none of the appellants had registered as customers of the resort. Instead, they merely parked on the Resort appellees' parking lot, without charge, to sightsee at a public bridge. This court has held that
"[c]onsideration [under the Act] should not be deemed given unless it is a charge necessary to utilize the overall benefits of a recreational area so that it may be regarded as an entrance or admission fee." Wilson v. United States, 989 F.2d 953, 957 (8th Cir. 1993). Because there was no entrance fee, or any other fee of any kind, paid in the instant case, we conclude the
"charge" exception to the Act does not apply.

[15] Appellants also argue the Resort appellees remain liable under the second exception to the Act, which provides that a landowner will not enjoy immunity where he or she maliciously fails to guard or warn against an ultrahazardous condition actually known to the landowner to be dangerous. Ark. Code Ann. Section(s) 18-11-307(1). In order to support their claim under this theory, appellants are required to prove not only that the Swinging Bridge was an ultrahazardous structure actually known by the Resort appellees to be dangerous, but also that the Resort appellees maliciously, not merely negligently, failed to guard or warn them of this dangerous condition.

[16] As the district court noted, no Arkansas court has interpreted "ultrahazardous" as used under the Act. In a similar situation, this court applied the Restatement (Second) of Torts, Section(s) 520, in order to define "ultrahazardous" under Missouri's Recreational Use Statute where neither the Missouri statute, nor the courts, had defined the term. Henderson v. United States, 965 F.2d 1488, 1495 (8th Cir.
1992). Appellants take issue with this reliance on Section(s) 520,[fn2] as applied in strict liability cases, arguing that such a concept has no rational relationship to recreational use statutes. Instead, they advocate a broader definition of "ultrahazardous" and assert that a noticeably deteriorating bridge ready to collapse could be found by a jury to be an ultrahazardous condition.

[17] We do not need to decide this issue, however, because even if we were to assume the bridge was an ultrahazardous structure, the appellants have offered no evidence to show the appellees either actually knew the bridge constituted a dangerous condition or that they maliciously failed to warn or guard against the

danger.

[18] With respect to the Resort appellees' actual knowledge of the dangerous condition, the appellants assert that Gayle Dodd, one of the Resort appellees, knew of the deterioration of the bridge and even campaigned for its inspection and repair. The inspection was subsequently conducted, however, and the engineers ultimately reported that the structure was sound. Appellants have not contested the Resort appellees' statement of undisputed facts that the problems with the bridge, brought to the attention of officials in 1982, were repaired, or that the Resort appellees did not hear of any problems with the bridge since that time. The undisputed facts also show that several of the Resort appellees frequently walked on the bridge themselves, including just two weeks prior to its collapse. We agree with the district court's conclusion that the appellants have failed to create a fact issue showing that the Resort appellees actually knew the bridge was dangerous.

[19] We also agree with the district court that the appellants have failed to present a question of fact tending to prove that the Resort appellees maliciously failed to warn Page 511 the appellants or guard against the alleged ultrahazardous condition of the bridge. In Henderson, 965 F.2d at 1494, this court determined that the term "malicious," as used in Missouri's Recreational Use Statute, was malice in its legal sense. In Arkansas, "malice" is inferred where "the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences." Stein v. Lukas, 823 S.W.2d 832, 834 (Ark. 1992) (quoting Missouri Pacific R.R. v. Mackey, 760 S.W.2d 59, 63 (Ark. 1988), cert. denied, 490 U.S. 1067 (1989)) (further citations omitted).

[20] Appellants have offered no facts to support the theory that Resort appellees maliciously failed to warn. There is no evidence that the appellees knew the bridge was about to collapse, yet continued their course of conduct with a conscious indifference to these consequences.
In Roten v. United States, 850 F. Supp. 786, 794-95 (W.D. Ark. 1994), aff'd, 39 F.3d 1184 (8th Cir. 1994), the district court held that the government's failure to install guarding devices prior to a boy's fall from cliffs in a national recreational area was not malicious under Ark.
Code Ann. Section(s) 18-11-307(1), despite the fact that there had been three prior falls from the obviously dangerous cliffs. The cliffs in Roten posed an obvious danger, in contrast to the collapse of the Swinging Bridge, which was an unforeseen occurrence that even the engineers who inspected the bridge were unable to predict. Appellants again point to appellee Gayle Dodd's knowledge of needed repairs as evidence supporting their contention that the Resort appellees acted maliciously. This evidence, however, supports precisely the contrary conclusion. The district court properly concluded that the Resort appellees were immune under the Act.

IV.

[21] In conclusion, we affirm the district court's grant of summary judgment in favor of the County and Resort appellees.

[fn1] The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

[fn2] The Restatement (Second) of Torts Section(s) 520 provides that in determining whether an activity is abnormally dangerous the following factors are to be considered:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Subchapter 3
— Recreational Uses — Owner's Liability

18-11-301. Purpose.
18-11-302. Definitions.
18-11-303. Construction.
18-11-304. Duty of care.
18-11-305. Owner's immunity from liability.
18-11-306. Land leased to state or political subdivision — Conservation easement.
18-11-307. Exceptions to owner's immunity.

Publisher notes

Research References
ALR.
Statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.
Ark. L. Notes.
Brill, Arkansas Law of Damages, Fifth Edition, Chapter 30: Real Property, 2004 Arkansas L. Notes 9.
Ark. L. Rev.
Strendowski, Case Notes: Tort Liability of Owners and Possessors of Land — A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees, 33 Ark. L. Rev. 194.
Case Notes

Applicability.

Applicability.
The United States is entitled to the benefit of this subchapter, if applicable, when it is sued under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2671 et seq.Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994), aff'd without op., 39 F.3d 1184 (8th Cir. Ark. 1994).
Cited: Mandel v. United States, 545 F. Supp. 907 (W.D. Ark. 1982).

18-11-301. Purpose.

The purpose of this subchapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

History
History. Acts 1965, No. 51, § 1; A.S.A. 1947, § 50-1101.
Publisher notes

Research References
Ark. L. Rev.
The Arkansas Recreational-Use Statute: Past, Present, and Future Application for Arkansas Landowners and Recreational Users of Land, 60 Ark. L. Rev. 849.
Case Notes

In General.

In General.

Since the purpose of this subchapter is to encourage landowners (including the United States) to make areas available to the public for recreational purposes and thus limit their liability, it is reasonable to conclude that a condition or structure which is natural, such as high cliffs, should not be considered ultra-hazardous within the meaning of the § 18-11-307(1) exception to this subchapter. Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994), aff'd without op., 39 F.3d 1184 (8th Cir. Ark. 1994).

Cited: Mandel v. United States, 793 F.2d 964 (8th Cir. 1986); Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994); Carlton ex rel. Carlton v. Cleburne County, 93 F.3d 505 (8th Cir. 1996).

18-11-302. Definitions.

As used in this subchapter:

(1) "Charge" means an admission fee for permission to go upon or use the land, but does not include:

(A) The sharing of game, fish, or other products of recreational use; or

(B) Contributions in kind, services, or cash paid to reduce or offset costs and eliminate losses from recreational use;

(2) "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty;

(3) "Owner" means the possessor of a fee interest, a tenant, lessee, holder of a conservation easement as defined in § 15-20-402, occupant, or person in control of the premises;

(4) "Public" and "person" includes the Young Men's Christian Association, Young Women's Christian Association, Boy Scouts of America, Girl Scouts of the United States of America, Boys & Girls Clubs of America, churches, religious organizations, fraternal organizations, and other similar organizations; and

(5) "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof:

(A) Hunting;
(B) Fishing;
(C) Swimming;
(D) Boating;
(E) Camping;
(F) Picnicking;
(G) Hiking;
(H) Pleasure driving;
(I) Nature study;
(J) Water skiing;
(K) Winter sports;
(L) Spelunking;
(M) Viewing or enjoying historical, archeological, scenic, or

scientific sites; and

(N) Any other activity undertaken for exercise, education, relaxation, or pleasure on land owned by another.

History

History. Acts 1965, No. 51, § 2; 1983, No. 168, §§ 1, 2; 1985, No. 959, § 1; A.S.A. 1947, § 50-1102; Acts 1991, No. 485, § 1; 2007, No. 677, § 1.

Publisher notes

Amendments. The 2007 amendment inserted "holder of a conservation easement as defined in § 15-20-402" in (3).

Case Notes

Charge.

Charge.

Revenue from a business enterprise adjacent to a recreational site does not constitute a "charge" as used in this section. Carlton ex rel. Carlton v. Cleburne County, 93 F.3d 505 (8th Cir. 1996).

Cited: Mandel v. United States, 545 F. Supp. 907 (W.D. Ark. 1982); Mandel v. United States, 793 F.2d 964 (8th Cir. 1986).

18-11-303. Construction.

Nothing in this subchapter shall be construed to:

(1) Create a duty of care or ground of liability for injury to persons or property; or

(2) Relieve any person using the land of another for recreational purposes from any obligation which he or she may have in the absence of this subchapter to exercise care in his or her use of the land and in his or her activities thereon or relieve any person from the legal consequences of failure to employ such care.

History

History. Acts 1965, No. 51, § 7; A.S.A. 1947, § 50-1107.

18-11-304. Duty of care.

Except as specifically recognized by or provided in § 18-11-307, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes.

History

History. Acts 1965, No. 51, § 3; A.S.A. 1947, § 50-1103.

Publisher notes

Case Notes

Cited: Mandel v. United States, 545 F. Supp. 907 (W.D. Ark. 1982); Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994); Carlton ex rel. Carlton v. Cleburne County, 93 F.3d 505 (8th Cir. 1996).

18-11-305. Owner's immunity from liability.

Except as specifically recognized by or provided in § 18-11-307, an owner

of land who, either directly or indirectly, invites or permits without charge any person to use his or her property for recreational purposes does not thereby:

(1) Extend any assurance that the lands or premises are safe for any purpose;

(2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed;

(3) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons; or

(4) Assume responsibility for or incur liability for injury to the person or property caused by any natural or artificial condition, structure, or personal property on the land.

History

History. Acts 1965, No. 51, § 4; 1983, No. 168, § 3; A.S.A. 1947, § 50-1104.

Publisher notes

Case Notes

Federal Government.

Lakes.

Federal Government.

The tort liability of the United States for personal injuries sustained by a person in a swimming hole in a national park is limited by this subchapter to the same extent as the liability of a private person. Mandel v. United States, 719 F.2d 963 (8th Cir. 1983).

Lakes.

This section applied to an owner of a lake, who is an "owner of land" as used in this section. Jenkins v. Arkansas Power & Light Co., 140 F.3d 1161 (8th Cir. 1998).

Cited: Mandel v. United States, 545 F. Supp. 907 (W.D. Ark. 1982); Lively v. Libbey Mem. Physical Medical Ctr., 311 Ark. 41, 841 S.W.2d 609 (1992).

18-11-306. Land leased to state or political subdivision — Conservation easement.

Unless otherwise agreed in writing, the provisions of §§ 18-11-304 and 18-11-305 are applicable to the duties and liability of:

(1) An owner of land leased to the state or a political subdivision of the state for recreational purposes;

(2) An owner of an interest in the real property burdened by a conservation easement as defined in § 15-20-402; or

(3) A holder of a conservation easement as defined in § 15-20-402.

History

History. Acts 1965, No. 51, § 5; A.S.A. 1947, § 50-1105; Acts 2007, No. 677, § 2.

Publisher notes

Amendments. The 2007 amendment substituted "are" for "shall be deemed" in the introductory paragraph; added the (1) designation; substituted "or a political

Still no takers of Pruitt bridge

Staff Report

As construction continues on a new bridge spanning the Buffalo River on state Highway 7 at Pruitt, the days of the current steel truss bridge built in 1931 appear to be numbered. With no one coming forward to take ownership of it, the green-painted span will be demolished when the new bridge is complete and functional, sometime next year.

Leading up to the design and letting of the contract for the replacement bridge's construction, the Arkansas Highway Department (ArDOT) advertised the bridge's availability for adoption.

No group or organization has come forward, but Newton County Justice of the Peace Arlis Jones, who lives in the area, hasn't given up hope.

He asked his fellow justices of the peace to petition the circuit court to issue a stay of action preventing demolition until it is proven that all federal statutory and policy requirements pertaining to the matter of alteration or destruction of a federally protected historic site has been fully complied with. The bridge was added to the Arkansas Historic Bridge Recording Project in 1988.

Jones said the bridge would be a valuable tourist attraction for the area. He said the stay would give time for inquiry into the unwarranted destruction of the old bridge.

The quorum court has addressed taking ownership of the bridge in the past. In 2003 and again in 2007, then county judge Harold Smith wrote letters to the highway department that as county judge he would work with the commission to take the current bridge into the county road system or for the bridge to be left in place for historical purposes.

The quorum court at various times said it would be interested in the bridge only to sell it as scrap.

There appeared to be no enthusiasm among current justices of the peace for the county to take over the responsibility of maintaining the old bridge as a pedestrian crossing.

County Judge Warren Campbell said that the county agreed to trade the approaches to the old bridge for land needed for approaches to the new bridge. The county would no longer have access to the old bridge.

The Buffalo River Bridge project (Job 009784) requires realigning the existing roadway on both sides of the Buffalo River to accommodate the new bridge location and to improve safety. Starting 0.3 mile south of the Buffalo River and ending 0.3 mile north of the Buffalo River, the total length of the project is 0.6 mile.

After some discussion, Jones convinced the JPs to at least table his proposal until the next court meeting when he said he would provide some authoritative evidence that the old bridge could be maintained without the risk of liability to its custodian.

ArDOT and its contractors began preparation work in early February for the replacement of the Pruitt Bridge, located approximately 11 miles south of Harrison and 6 miles north of Jasper. The existing bridge's condition has deteriorated over the years as traffic has increased along the Highway 7 corridor between Harrison and Russellville. According to ArDOT, an average of 2,800 vehicles crossed the Pruitt Bridge per day in 2016 and 13% of those vehicles were large trucks.

Last July 10, clearing of the area began and closures were established to protect Buffalo National River visitors, resources, contractor staff and equipment.

Except for paddling and equestrian through-traffic, the Buffalo River and its banks from the Pruitt Bridge to the eastern edge of the cleared construction have been closed until further notice. Construction is not expected to affect access to Pruitt Landing on the east side of the bridge. Visitors may still use the swimming area upstream of the bridge at the Pruitt day use area, equestrian users may still access the Old River Trail/North River Road and hikers may still access the Mill Creek Trail during this time. The Pruitt Bluffs area will only be accessible by boat or by hiking upstream from the Lower Pruitt Landing area.

Vehicular traffic on Highway 7 continues as usual across the existing bridge during the construction project, according to ArDOT.

Also included in the current work under way is the Mill Creek Crossing project (Job BR5102). This crossing will replace the existing Newton County Road 213 low-water crossing at Mill Creek. Starting 0.2 mile east of Mill Creek and ending at the intersection of Newton County Road 213 and Highway 7, the total length of the project is 0.3 mile.

ArDOT awarded the contract to replace the bridges earlier this year. Crouse Construction got the contract with a bid of about $13.6 million.

C-3

Law enforcement visits county sex offenders

Holiday market Nov. 16

The Jasper American Legion Auxiliary Unit 93's annual Holiday Market and Bake Sale will be on Sat-

subdivision of the state for recreational purposes" for "or any subdivision thereof, for recreation purposes" in (1)"; added (2) and (3); and made related changes.

18-11-307. Exceptions to owner's immunity.

Nothing in this subchapter limits in any way liability which otherwise exists:

(1) For malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous; and

(2) For injury suffered in any case in which the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that, in the case of land leased to the state, a subdivision thereof, or to a third person, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section.

History

History. Acts 1965, No. 51, § 6; 1983, No. 168, § 4; A.S.A. 1947, § 50-1106.

Publisher notes

Research References

Ark. L. Rev.

The Arkansas Recreational-Use Statute: Past, Present, and Future Application for Arkansas Landowners and Recreational Users of Land, 60 Ark. L. Rev. 849.

Case Notes

Applicability.
Duty of Investigation.
Failure to Warn.
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Malice.
Natural Phenomena.
Ultra-Hazardous Condition.

Applicability.

The changes from the previous provision (A.S.A. § 50-1106) to the current version of subdivision (1) of this section appear to indicate that: (1) mere negligent failure to warn or guard does not invoke the exception; (2) ultra-hazardous conditions, as opposed to mere dangerous conditions, structures, personal properties, uses or activities are required to invoke the exception; and (3) for invocation of the exception and resulting liability, the ultra-hazardous condition, structure, personal property, use, or activity must be actually known to the owner to be dangerous. Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994), aff'd without op., 39 F.3d 1184 (8th Cir. Ark. 1994).

Duty of Investigation.

This section does not impose a duty of subsurface investigation upon riparian owners who neither know or have reason to be aware of dangerous water conditions, hidden rocks, dangerous pitfalls, or the like, where the landowner makes his land available for recreational purposes without charge. Mandel v. United States, 545 F. Supp. 907 (W.D. Ark. 1982), aff'd in part, reversed in part, 719 F.2d 963 (8th Cir. 1983).

Failure to Warn.

The legislature intended "willful and malicious" as used in subdivision (a) of this section to have the same meaning as "willful misconduct"; therefore, in order to impose liability under this section, a plaintiff must show: (1) that defendants' conduct would naturally or probably result in injury; (2) that defendants knew or reasonably should have known that their conduct would so result in injury; and (3) that defendants continued such course of conduct in reckless disregard of the foreseeably injurious consequences. Mandel v. United States, 545 F. Supp. 907 (W.D. Ark. 1982), aff'd in part, reversed in part, 719 F.2d 963 (8th Cir. 1983) (decision prior to 1983 amendment).

The standard of care set out in subdivision (a) of this section is essentially that stated in AMI 1101, i.e., actual or deliberate intention to harm or conduct which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others. Mandel v. United States, 545 F. Supp. 907 (W.D. Ark. 1982), aff'd in part, reversed in part, 719 F.2d 963 (8th Cir. 1983) (decision prior to 1983 amendment).

Evidence held sufficient to create a genuine issue of material fact as to the willfulness or maliciousness of the United States in failing to guard or warn against a dangerous condition. Mandel v. United States, 719 F.2d 963 (8th Cir. 1983) (decision prior law to 1983 amendment).

In suit where plaintiff-sightseers on a public swinging bridge were injured or killed when the bridge collapsed, in order for the plaintiffs to prove their claim under the exception provided by subdivision (1) of this section, plaintiffs were required to prove not only that the swinging bridge was an ultra-hazardous structure actually known by the defendants to be dangerous, but also that the defendants maliciously, not merely negligently, failed to warn the plaintiffs of the dangerous condition. Carlton ex rel. Carlton v. Cleburne County, 93 F.3d 505 (8th Cir. 1996).

Lake owner's failure to warn swimmers and boaters of a submerged island in an apparently deep area of water was negligent at most. Jenkins v. Arkansas Power & Light Co., 140 F.3d 1161 (8th Cir. 1998).

Federal Government.

The tort liability of the United States for personal injuries sustained by a person in a swimming hole in a national park is limited by this subchapter to the same extent as the liability of a private person. Mandel v. United States, 719 F.2d 963 (8th Cir. 1983).

Defendant United States did not maliciously fail to guard or warn about high cliffs at White Rock so as to incur liability for decedent's death under the subdivision (1) exception of this section. Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994), aff'd without op., 39 F.3d 1184 (8th Cir. Ark. 1994).

Malice.

Malice is inferred where the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued on his course with a conscious indifference to the consequences. Carlton ex rel. Carlton v. Cleburne County, 93 F.3d 505 (8th Cir. 1996).

Natural Phenomena.

Since the purpose of this subchapter is to encourage landowners (including the United States) to make areas available to the public for recreational purposes and thus limit their liability, it is reasonable to conclude that a condition or structure which is natural, such as high cliffs, should not be considered ultra-hazardous within the meaning of the exception to this subchapter in subdivision (1) of this section. Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994), aff'd without op., 39 F.3d 1184 (8th Cir. Ark. 1994).

The high cliff areas of White Rock Mountain, a natural phenomenon, should not be considered an ultra-hazardous condition as defined by the exception in subdivision (1) of this section. Roten v. United States, 850 F. Supp. 786 (W.D. Ark. 1994), aff'd without op., 39 F.3d 1184 (8th Cir. Ark. 1994).

Ultra-Hazardous Condition.

Whereas the cliffs areas in White Rock Mountain, from which at least four people have fallen, posed an obvious danger, the collapse of the swinging bridge was an unforeseen occurrence. Carlton ex rel. Carlton v. Cleburne County, 93 F.3d 505 (8th Cir. 1996).

There is an obvious danger associated with diving into water at night when one has not tested the water to see how deep it is; therefore an unexpected shallow area cannot be considered an ultra-hazardous condition in and of itself which requires a warning. Jenkins v. Arkansas Power & Light Co., 140 F.3d 1161 (8th Cir. 1998).