Legal Opinion Regarding

Landowner Liability

Virginia law specifically shields landowners from liability for injuries sustained by recreational users of their property. This opinion has the details. It was written in 2000 by a lawyer in the Amherst, VA, area who was himself a landowner and a hang glider pilot. He wanted to satisfy himself as to his liability in the case of other hang glider pilots landing out on his property. He then circulated the opinion among the hang gliding community in the area as a way to encourage other landowners to allow hang glider pilots to use their property as landing zones.

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I have been requested to render an opinion regarding the relation between recreational conduct by third parties on lands for no compensation to the landowner and the potential for liability to the landowner should said recreational users injure themselves while on said lands. The following summarizes the state of law in Virginia, both statutory (Virginia Code Section 29.1-509) and case law.

The law of Virginia essentially indicates that no liability attaches to the landowner for injuries to persons recreating on the owner's property so long as the landowner does not receive compensation for allowing the recreational use, and so long as the landowner does not deliberately or knowingly create, allow or set our injurious conditions that lay as a trap for the unwary.

In addition to the statutory protections, there are other Virginia common law protections as well if the non-fee based recreational participants are subject to signing a written waiver of liability in consideration for setting foot on the premises. Furthermore, even in a commercial setting, there are protections afforded the landowner or proprietor in cases where the hazard is open and obvious.

Virginia's Recreational Land Use Statute:

Virginia Code Section 29.1-509 specifically limits the reach of Virginia common law of liability in recreational land use. The statute protects the landowner from lawsuits arising from injury occurring to personal or recreational land users. The statute states that the landowner "owes no duty of care to keep land or premises safe for entry or use by others…". Any act less than "gross negligence, or willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity" on the part of the landowner bars judgment against the landowner.

Categories of recreational users include persons who hunt, fish, trap, camp, engage in water sports, boat, hike, rock climb, sightsee, hang glide, skydive, horseback ride, race, ride bicycles, collect, gather, cut or remove wood, or any other recreational use. No warning is required of any hazardous condition, except where the landowner has acted with gross negligence or willfulness or malice; or if he receives a fee for allowing the presence of persons on his property. Case law has upheld this statute. See Hamilton v. United States, 371 F. Supp. 230 (E.D. Va. 1974) decided under former Sec 8-654.2 (now 29.1-509). Other Virginia cases have upheld the force of this statute to protect landowners from suit by persons injured while recreating thereon. See Callahan v. Fairfax County Park Auth. 32 Va. Cir. 212.

Virginia Common Law – Uninvited Persons:

Under Virginia common law, uninvited persons on otherwise unimproved premises have no right to recover from injury on the premises unless the dangerous condition is a deliberate trap for the unwary or constitutes gross negligence. At this point it is important to recall that simple negligence requires notice to the landowner that the condition exists; gross negligence is a much higher standard, requiring detailed knowledge of the potential for imminent harm due to a condition of hazard that the landowner had prior experience with or is so obviously a trap for the unwary that no person would leave the condition

uncorrected. Note the point of law stated in the Virginia Recreational Land Use Statute that provides that persons allowed to enter upon a landowner's premises to engage in recreation are not "invitees" as a result. The status of non-invitee therefore further insulates the landowner from liability. See Virginia Code Section 29.1509 (C)(2).

Virginia Common Law – Assumption of the Risk:

Virginia common law states that where the participant or individual encounters a situation or condition involving open and obvious risk, and proceeds in spite of this knowledge, and subsequently becomes injured, that person has no right to recover for said injury from the landowner on which the open and obvious risk exists. As stated by the Virginia Supreme Court, "Assumption of risk connotes venturousness and involves a subjective test of whether a plaintiff fully understood the nature and the extent of a known danger and voluntarily exposed himself to it." Waters v. Safeway Stores, Inc. 246 Va. 269 and 269 headnote.

Even in a situation where commercial activity is the basis of recreation, where an obstacle is open and obvious, a claimant will not be allowed to recover for injury. See Spangler v. Wintgergreen Partners, Inc. Case No. (Law) 1836 11-1-91, Amherst County, VA. Gamble, Judge. Spangler while skiing ran into a pole at the bottom of the slope placed there to steer skier traffic into lift lines. The Court said, quoting Whitfield v. Cox, 189 Va. 219, 52 S.E. 2d 72 (1949): "The owner or proprietor of a place of amusement or entertainment is not an insurer of the safety of his invitees. His duty is to exercise reasonable care for their safety and protection – such care as would be exercised by an ordinarily careful and prudent person in the same position and circumstances." [189 Va. 223.] Judge Gamble went on in the Spangler case to say that "…the law did not require the landowner, Wintergreen Partners, Inc., to protect people from an open and obvious condition."

Therefore, in a situation in which recreation is allowed absent any commercial activity, the case is stronger still that the landowner will not be held liable for common land features or manmade features that are open and obvious or so commonly recognized as hazards that the reasonable and prudent man would not approach them, such as radio towers or transmission equipment.

Virginia Common Law on Waiver and Release:

Virginia common law provides that when a person executes a waiver and release of liability and signs for himself and for his heirs, successors and assigns, and provides to indemnify and hold harmless the landowner from damages arising from the institution of suit by others suing under his claim of right for damages arising from injuries sustained while on the premises of the landowner, that such waiver and release will be upheld, and the suit either by the injured party, or those making claim through him will be barred.

Taking an exemplar case from the commercial setting again, in which the standards of care are generally higher to the participant than in the non-fee setting, the Court in Morrison v. Star City Roller Skating Centers (26 Va. Cir. 35 2-19-92), Roanoke County, Va. (Judge Weckstein, presiding), held that where the release is signed "voluntarily, without fraud or undue influence." … the release will be upheld. The plaintiff in that case fell when skating on the rink that had moisture on it and created a slippery surface not apparent to the skater's eye. Of interest here is the fact that a national skating association was the source of the waiver that served to foster skating by inducing various skating rinks to allow practices to occur upon their premises. This inducement was noted by the court as beneficial to the existence of desired activity and that there was nothing against public policy to prevent the association from requiring "…those who choose to participate in its functions to give up the right to make damage claims against, among others, the proprietors of rinks where roller skating practices and meets are held." Morrison [page 3]

Conclusion

The Rule of the Recreational Statute: So long as no fees are assessed by the landowner, there will be no liability in the event of injury to the recreational participant. The exceptions to this rule arise only where the owner is grossly negligent, or has willfully or maliciously, "…failed to warn or guard against a dangerous condition, use, structure or activity." Sec. 29.1-509 D. This is an extraordinary standard of proof and no landowner just allowing people on the land is going to be held liable under this standard as a practical matter.

Where the participant is not classified as an invitee, the owner has no duty to protect the person under common law as would be the case of an invitee. Sec. 29.1-509 (C)(2) provides that persons allowed on the owner's land are not invitees.

Where the hazard is open and obvious, no recovery by the claimant. See Spangler.

Where the participant has waived rights to sue to participate in an event and a hazard is not noticed and may constitute simple negligence in a commercial setting, the claimant cannot sue, being barred by the voluntarily signed waiver.

Limitation of Opinion; No Duty to Amend

(Revised 9-15-00) The foregoing constitutes a formal legal opinion, based on the current condition of Virginia statutory and common law as of 6-2-98. The attorney rendering this opinion is not responsible for amending this letter or advising the recipients of the same in the event of revisions to either the statute or common law interpreting the statute referenced above. Persons reading this opinion should be advised that particular facts of any event may result in an outcome contrary to the opinion stated generally above and said persons should consult legal counsel before proceeding on any course of action arising out of an incident ostensibly falling within this category of law.