

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

**CASE NO. 06-0188**

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**THE ESTATE OF TIMOTHY A. HILSTON, by  
MARY ANN HILSTON, Personal Representative,  
and MARY ANN HILSTON, on her own behalf,**

**Plaintiff and Appellant,**

**vs.**

**STATE OF MONTANA,**

**Defendant and Respondent.**

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**BRIEF OF APPELLANT**

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**On Appeal From the  
Montana Eighth Judicial District Court, Cascade County  
Cause No. DDV-05-1023**

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COMES NOW Plaintiff and Appellant, Mary Ann Hilston, as Personal Representative of the Estate of Timothy Hilston and on her own behalf, and respectfully submits the following brief.

### **STATEMENT OF CASE**

Plaintiff Mary Ann Hilston, individually and as Personal Representative of the Estate of Timothy A. Hilston, her late husband, filed a Complaint against the State of Montana alleging *inter alia* that the State failed to take reasonable care in the operation and management of the State's Blackfoot Clearwater Wildlife Management Area and management of grizzly bears thereon. The Complaint claimed the alleged negligence resulted in the death of Timothy Hilston.

The State moved for summary judgment based on MCA §§ 70-16-301 and 302, the Recreational Use Immunity Act (hereinafter Recreational Act). On the basis of the Recreational Act, the District Court granted summary judgment to the State. From that Order of Summary Judgment, the Plaintiff/Appellant appeals.

### **STATEMENT OF ISSUES**

- I. Does Montana's Recreational Use Immunity Act, found at MCA § 70-16-302, preclude liability of the State of Montana for alleged negligence in grizzly management on the State's Blackfoot Clearwater Wildlife Management Area.

## **STATEMENT OF FACTS**

Because the parties agreed to an early determination of the effect of the Recreation Act, the parties filed an agreed Statement of Facts. In addition, the State relied upon pleadings in the federal court action as an attachment to its summary judgment brief.

Timothy Hilston was killed by a grizzly bear on October 30, 2001. (Statement of Agreed Facts, ¶ 1). The death occurred on the Blackfoot Clearwater Wildlife Management Area in Powell County (hereafter Management Area). (Statement of Agreed Facts, ¶ 1). The death occurred on State-owned land. (Statement of Agreed Facts, ¶ 1). The area is open to public access, free of charge. (Statement of Agreed Facts, ¶ 3). Mr. Hilston was killed in the Management Area. (Statement of Agreed Facts, ¶ 2).

## **STANDARD OF REVIEW**

The Supreme Court's review of a District Court's grant of summary judgment is *de novo*. *Gliko v. Permann*, 130 P.3d 155 (Mont. 2006) at ¶ 12. The Court uses the same standards applied by the District Court. *Wurl v. Polson School District No. 23*, 127 P.3d 436 (Mont. 2006) at ¶ 10. In reviewing the lower court, this Court applies the criteria contained in Rule 56, Mont. R.Civ.P. *Grimsrud v. Hagel*, 119 P.3d 47 (Mont. 2005) at ¶ 14. According to Rule 56, the moving party must establish

the absence of a genuine issue of material fact and establish that it is entitled to judgment as a matter of law. *Id.*

### **SUMMARY OF ARGUMENT**

The Recreational Act does not serve to grant immunity to the State of Montana because the amendments to the Act made in 1987 make it clear the Act applies only to defects in property. Grizzly management in the Clearwater Management area is not a “condition of the property” for which the Act grants immunity.

### **ARGUMENT**

The application of Montana’s Recreational Act was the only issue before the District Court. In determining the Act applied to the present case, the lower court erred.

A review of the operative language of the Act reveals that it was not intended to immunize the State or any landowner for mismanagement, but was designed to protect landowners from typical claims of premises liability involving a defective condition in real property. As a standard encyclopedia article on premises liability states: liability of a land owner caused by a dangerous or defective condition depends generally upon its control. 62 Am.Jur.2d “Premises Liability”, § 6.

In order to focus on the issues in this case, the Plaintiff/Appellant agrees that the late Mr. Hilston was in the game management area for recreational purposes, did

not pay for the use of the area, and the State did not act in a willful or wanton manner. The Plaintiff does contend that she should be permitted to prove that the State was negligent in its management of grizzlies in the area, and that “chumming”, i.e., leaving food in or near the area to attract grizzlies, contributed to the tragedy. Those claims do not constitute an allegation of a defective “condition” of the property as required by the Recreational Act.

The pertinent parts of the Act found at MCA § 70-16-302 are subsections (1) and (3):

(1) A person who uses property, including property owned or leased by a public entity, for recreational purposes, with or without permission, does so without any assurance from the landowner, that the property is safe for any purpose if the person does not give a valuable consideration to the landowner in exchange for the recreational use of the property. The landowner owes the person no duty of care with respect to the condition of the property, except that the landowner is liable to the person for any injury to person or property for an act or omission that constitutes willful or wanton misconduct. . . .

(3) As used in this part, “property” means land, roads, water, water courses, and private ways. The term includes any improvements, buildings, structures, machinery, and equipment upon property.

From the foregoing, it is apparent that the Recreational Act defeats the State’s claim that it applies to the Hilston case. First, the Act provides that a landowner gives no assurances “that the property is safe.” The Plaintiffs do not claim that the State’s property itself was unsafe. Secondly, the Act states that a landowner “owes no duty

of care with respect to the condition of the property.” The Plaintiff does not contend the condition of the property was unsafe. In order to invoke the cited provisions relied upon by the State, it must be shown that this case involves “property” of the State, but only as that term is defined in subsection (3). It also must be shown that the issues involve the “condition” of the property as set forth in subsection (3) . The Appellant contends that the State failed to exercise care in the management of grizzlies or improperly warning persons entering the land. The State counters that grizzlies and grizzly management are a condition of property. This disregards the clear definitions found in subsection (3), wherein “property” means only real estate and its fixtures plus machinery and equipment. No where in (3) are animals or animal management listed or defined.

The present case is not a typical premises liability action involving defective property as the recreational statute contemplates. The case does not involve any hidden or lurking dangers, undisclosed ditches, holes, barbed wire, icy walkways, dangerous steps, or various tripping and slipping hazards. There are no such dangers associated with the manner in which Mr. Hilston was killed.

Under Montana law, an interpretation of a statute should be accomplished from the natural plain meanings of the words used using every day definitions. *Carlson v. State Farm Mut. Auto Ins. Co.*, 76 F.Supp.2d 1069, 1078 (D. Mont. 1999). This

rule gives way to another rule when the statute has its own definitions. In Montana if the definition is found in the statute, the definition controls the meaning, and it is only after the statutory definition that the words from the statute are accorded their ordinary and common meaning. *Polich v. Burlington Northern, Inc.*, 48 F.Supp.2d 1247, 1252 (D. Mont. 1995), *Affirmed*, 114 F.3d 122.

In construing definitions, courts will determine the meanings of the definitions as found in the Legislative Act. [citations]. The function of the court in construing the legislation is simply to ascertain and state what terms or matters are contained in the legislation. *State Bar of Montana v. Krivec*, 632 P.2d 707, 710 (Mont. 1981).

In this case, the Recreational Act clearly limits immunity to the condition of real property or its improvements and equipment and machinery on the property. The statute does not define animals or animal management as property. Thus, the provision in the statute regarding the “condition of the property” can only refer to the real property and its fixtures as defined in the statute.

The California Supreme Court has considered the definition of the phrase “the condition of property.” In a case involving an assault on a student at a San Francisco college, the Plaintiff tried to claim that failure to prevent an assault constituted a “dangerous condition” of state property. *Peterson v. San Francisco Community College District*, 190 Cal.Rptr. 335 (Calif. 1983). The pertinent statute construed by the Court read as follows:

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the Plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred . . .

*Peterson*, 190 Cal.Rptr. at 337. (Emphasis supplied).

Though in California, the “condition of property” might create liability, (the exact opposite of the Montana Recreational Act,) the California Court’s construction of “condition of property” provides useful guidance to this Court. “Condition of property” means property which is “dangerous or defective either structurally or by way of [its] general use in operation . . .The section has always been considered to mean just what it says, that it is the condition of property that determines the waiver of the immunity and not the condition of persons on that property.” *Id.* (Emphasis supplied.)

The California rationale that persons causing harm on the property is not a condition of the property is perfectly logical. It follows that if persons do not mean persons on the property, condition of property cannot mean animals on the property. “Courts have consistently refused to characterize harmful third-party conduct as a dangerous condition - absent some concurrent contributing defect in the property itself. “ *Peterson*, 190 Cal.Rptr. at 338. In order to be a condition of the property to

include the act of a third party, there must be “some concurrent contributing defect in the property itself.” *Id.*, quoting *Jones v. Czapkay*, 6 Cal.Rptr. 182 (1960).

The State is essentially asking the Court to amend the Act to the State’s specifications by implying that it goes beyond real property and includes game management. However, the function of the Court is to interpret a statute from the plain meaning of the words used, and the Court is not at liberty to add or detract language from the statute. *Dept. of Revenue, State of Montana v. Gallatin Outpatient Clinic*, 763 P.2d 1128, 1130 (Mont. 1998); *Paulsen v. Bonanza Steakhouse*, 733 P.2d 335, 339 (Mont. 1987).

The State would have this Court determine that the Recreational Act protects it from any act or omission. Now it is true that is what the Recreational Act provided before it was amended in 1987. Prior to the 1987 amendment, the statute accorded broad immunity for landowners for recreational purposes. It specifically stated that:

. . . such landowner or tenant shall not be liable to such person for any injury to person or property resulting from any act or omission of such landowner or tenant, unless such act or omission constitutes willful or wanton misconduct. The former § 67-808 now 70-16-302, MCA, cited in *State ex rel. Tucker v. District Court*, 468 P.2d 773, 776 (Mont. 1970). (Emphasis supplied).

It is generally held that where the phraseology of a statute is changed, it will be presumed that the Legislature, in adopting the amendment, intended to make a

change in the existing law. *State ex rel. Rankin v. Wibaux County Bank*, 281 P. 341, 344 (Mont. 1929). By deleting the language granting immunity for any act or omission, the legislature limited the provisions of the Act to defective property. Had it wished to include animals as covered property, it would have made that clear in the 1987 amendment.

When a statute is unambiguous, the Court is not at liberty to assert what has been omitted or to omit what has been asserted. *Teamsters, Chauffers, Warehousemen, and Helpers Local No. 45 v. Cascade County School District No. 1*, 511 P.2d 339, 341 (Mont. 1973). Absence an ambiguity, the Court may not consider other means of statutory construction than the plain language of the statute. *McKardy v. Vielleux*, 19 P.3d 207 (Mont. 2000) at ¶ 15.

Applying fundamental rules of statutory construction requires finding that the Recreation Act does not apply to either the existence of grizzlies or their management. On its face, the statute unambiguously provides immunity for dangerous aspects of property and defines “property” with specificity.

The Montana statute as it presently reads is not intended to protect landowners who allow dogs with a propensity to bite to run freely on their land. It does not permit landowners to carelessly operate vehicles on their land causing injury to others, nor does it allow a landowner to manage or mismanage animals causing injury

to others simply because the injured party used the property for recreational purposes. The pre-1987 Recreational Act would have granted such immunity. The present statute does not.

The 1987 change in the statute which immunizes landowners as to the condition of the property is a specific intentional change from the former statute which immunized landowners for “any act or omission of such landowner.” The law as it presently exists does not immunize the State from an action for grizzly mismanagement.

The Court is respectfully requested to overrule the District Court’s summary judgment and remand this case to the District Court for further proceedings.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of May, 2006.

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**CERTIFICATE OF COMPLIANCE**

In accordance with Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a monospaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes, and for quoted and indented material; and the word count calculated by WordPerfect 12 for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding Certificate of Service and Certificate of Compliance.

DATED this \_\_\_\_\_ day of May, 2006.

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the BRIEF OF APPELLANT by depositing said copy in the United States Mail, postage prepaid, addressed as follows:

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