

**TUESDAY AFTERNOON  
FEBRUARY 24, 2004**



**California  
Bar  
Examination**

**Performance Test A  
INSTRUCTIONS AND FILE**

**IN RE SNOW KING MOUNTAIN RESORT**

**INSTRUCTIONS**

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

**IN RE SNOW KING MOUNTAIN RESORT**

**Law Offices of Spence and Hawks  
San Obispo, Columbia**

**INSTRUCTIONS**..... i

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**MEMORANDUM**

**TO:** Applicant  
**FROM:** Margaret Thompson  
**DATE:** February 24, 2004  
**RE:** **Snow King Mountain Resort**

Our client, Snow King Mountain Resort (SKMR), needs assistance in dealing with its insurance carrier. Yesterday, I spoke to SKMR's CEO, Manuel Lopez, and he sent to me by overnight mail the relevant documents. We've done corporate and real estate work for them in the past, but because they've grown tremendously and this will be a new operation, I asked Manuel to describe the current operations and proposed program in some detail.

SKMR is a ski area and vacation second-home resort complex, which wants to add recreational mountain biking to the list of activities available to its summer guests, with bike trails, aerial tram rides, and trail fees. Everything was set until SKMR's insurer informed them that mountain biking would require the highest risk rating, possibly leading to prohibitive premiums.

Columbia has a recreational use statute, Col. Civil Code, Section 846, which protects a landowner who permits recreational use of her or his land. I'm familiar with the statute, and the insurance company is correct that the statute doesn't specifically refer to mountain biking, nor does it apply when someone charges for access. However, the statute also says that "any recreational purpose" is covered, and Manuel says that SKMR hasn't decided whether or for what to charge.

The insurer's letter is attached. It invites a response, if we believe that the recreational use statute applies. We need to research these issues, respond to the insurance company, and advise SKMR how to set up the program.

Would you please:

1. Draft a persuasive argument to the insurance company in letter form arguing that the recreational use statute will apply. Since you will need to explain to the insurance company how the mountain biking program will be operated, you should assume for purposes of drafting the letter that SKMR will set up the program as you recommend. We need to persuade the insurance company's attorneys and rating professionals, and thus you should discuss relevant case law and, as in writing a brief, assume that they will be aware of contrary cases.

2. Draft a memorandum to Manuel Lopez explaining your advice on how SKMR should operate the program to maximize the likelihood that the recreational use statute will apply. We must make recommendations on whether to charge an access fee; whether to carry mountain bikes on the aerial tram; and whether to sell and rent bikes. I will review both your letter and your memorandum with Manuel, so do not repeat discussions or recommendations contained in the letter, in the memorandum.

Also, in drafting the letter and memorandum, do not address issues of conduct which could result in negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.

## MEMORANDUM FROM THE DESK OF MANUEL LOPEZ

**TO:** Margaret Thompson, Law Offices of Spence and Hawks  
**DATE:** February 23, 2004  
**RE:** **Snow King Mountain Biking Trails**

Thanks for agreeing to respond to this matter. I've attached the memos from my Operations and Marketing Directors and a letter from the insurance agent, and will outline the information about Snow King's organization and operations you requested.

As we discussed, Snow King Mountain Resort (SKMR) wants to add a mountain biking program in the area of the ski hill. It could be a major part of our effort to add activities to our summer operations and become a year-round resort. The summer-season program will fill out the non-ski off season, which the marketing department now calls our "shoulder season."

Full-year operations are not only helpful to our bottom line, but are essential to retain and develop quality employees, sustain real estate development, and retain nationally-recognized commercial tenants. In the last 5 years, real estate sales are way up, and most of our mall tenants are open year-round. Also, in just 5 years, we've built our year-round staff to 38% of our work-force, enough to allow us to extend health and dental benefits to a majority of our employees, initiate modest retirement benefits, and institute profit-sharing for department heads. A summer-season revenue increase of 12% would justify the employee benefits package and probably permit commuter shuttles from town for our employees. Also, I'd like to start on-site childcare for our employees, which our room-care staff says is their number one concern. These may sound trivial in the corporate world, but in the tourist trade, these benefits would set us apart in attracting career-oriented people.

Building year-round operations began with the name change from Snow King Ski Area to the Mountain Resort. Unlike the winter season, which turns on skiing and snowboarding, seasonal operations require that we provide a wide array of activities. In summer, the Concierge Department is the busiest site at the Village. It's now been moved from inside the Lodge to the Village to provide service not just to Lodge guests but to any visitor.

For starters, we enlarged the resort Lodge pool and health center. We've added shuttle service to and discounts at two nearby golf courses, a tennis club, and several white-water

rafting companies. Three years ago, we began summer operation of the ski area's aerial tram, which carries 50 passengers each trip, to the mountain summit. Visitors are encouraged to ride up for the spectacular view, lunch or dine at the summit restaurant, and even hike down. We converted the cross-country ski area to a summer "dude ranch," offering horseback riding and other ranching activities. This year we're starting our tent-auctions weekend series (antiques, classic cars, art), and convention seminar marketing. For the future, we're considering building an alpine slide, and the Marketing Department is even pushing paragliding tandem rides off the summit.

Mountain biking would be the easiest and cheapest new activity to add. As the memo from Sally Johnson, the Mountain Operations Director, indicates, we only need to add a few trails and signage and print trail maps to implement mountain biking. A trail fee would involve designing fee collection points and hiring personnel to collect fees. If we don't charge for access to the trails, there wouldn't even be much additional personnel cost. The Marketing Department is hot to get on this.

You asked that I outline SKMR's operations. As you know, SKMR now is a resort village complex. SKMR owns and operates some properties (such as the Lodge), owns and rents out a mall of shops and restaurants, and has developed and sells condos and residential lots which surround the Village. There are also some independent businesses within the Village, such as the Best Mountain Lodge and Aman Resort, which purchased their properties from SKMR and now operate independently. As a corporation SKMR consists of:

- Snow King Ski Mountain, which includes as its profit centers: lift ticket sales for access to the tram and 10 chair lifts, the village parking, mountain restaurants, ski and board rentals, and the ski and board schools. The majority of the ski area is on United States Forest Service (USFS) land; SKMR is the lessee and obligated by the lease to defend and indemnify the USFS no matter who gets sued.
- Snow King Lodge, which has 450 rooms, three restaurants and many shops.
- Snow King Development Company, which manages the construction of condominiums, chalets, and time-share properties.
- Snow King Realty and Property Management, which owns and sells the properties and owns and manages rentals. The latter include the condos as well as the 17 shops and restaurants which are in Snow King Village Mall.

You asked that I clearly explain all fees that we're considering charging. The first option is a trail fee. It's still an open question, which I haven't decided, and could go either way depending upon its impact on insurance costs. Charging for access would be a change from our present approach. In winter, of course, access to the ski mountain requires that one buy a lift ticket. However, in summer the mountain is open, hikers regularly use the mountain, both accessing it from the aerial tram to hike downhill or just walking up from the Village. There are resident moose, deer, hawks, and 2 pairs of golden eagles. Wildlife viewing has always been popular. As a matter of fact, after the lifts are closed in April, we have always allowed skiers to hike up and enjoy the spring snow. Basically, when the lifts aren't operating, we neither control nor charge for access.

Similarly, mountain bikers could either access the mountain and trails, as they are currently doing on their own by riding up, or by using the tram to get to the top and riding down.

All visitors pay to ride the aerial tram (which is open all year except for April and May). For most summer visitors, the one-ride \$10 charge works well, but for mountain bikers we may need to create a multiple-ride or all-day charge, like a winter ski lift ticket. We may add a bike-tram charge, but my initial review of Sally's and Kyle's memos suggests that we will let the mountain bikers bring their bikes for free. We will eventually add bike sales, rental, and service, but I doubt that we've the time and capital to bring it on-line the first year.

Then there are the charges paid by all our guests and visitors. When we finished the Village and Mall, we imposed a parking fee to park within the Village. Charges are by the hour, day, or multiple-day package, and these are reduced in the summer. There's still free parking outside the Village, which is convenient to the Mall, but much less so for the Mountain and Lodge. Outside parking is heavily used, especially in winter when the Village parking lot fills by 10 am.

As I told you, the mountain biking program is still flexible. The Marketing Department thinks it's a win-win situation even if we don't charge for the trails or rent bikes. The bottom line is the insurance cost. We can design the program any way that will get us affordable insurance.

## SNOW KING SKI MOUNTAIN

**TO:** Manuel Lopez  
**FROM:** Sally Johnson, Mountain Operations Director  
**DATE:** February 17, 2004  
**RE:** *Snow King Mountain Biking Sales and Trail Fees*

This will sum up what I've reported at the staff meetings. We can easily have a mountain biking program for the summer. Most of the mountain's ski trails are too steep for ascent and descent, except perhaps for extreme games fanatics. However, the mountain is crisscrossed by snow-groomer access roads and beginner ski trails that would make excellent natural terrain for mountain biking.

You may recall that the idea for mountain bike trails came from discussions I had last summer with the mountain bikers who are already using the mountain for riding. They've given me good information on the best rides, trail links that could be added, trouble spots (usually encounters with hikers at high speed or blind spots). They also have ideas on where we could build some single-track trails, about 30" wide, which are very popular for mountain biking and would link up existing trails. Most of the trail building could be done by our own work crews, and would help provide them more off-season work. I'd budget an additional \$35,000 of capital expenditures the first year for trail building, trail maps, and signage, and about \$5,000 a year thereafter for maintenance. That would give us the minimum program: no trail fees, equipment sales or rentals, or tram ticket sales, but also very low cost, and assuming that we don't patrol the trails, almost no additional personnel costs.

A mountain bike trail fee would require a minimum of 4 access kiosks, costing around \$144,000 in construction, and \$172,000 annually to operate, assuming a 7-day, 12-hour operation from June through September. This includes one bike-patroller to prevent access to nonpaying cyclists and for safety. You may recall that we previously rejected the idea of insisting for waivers/hold-harmless to access to the trails because of the expense of access kiosks necessary to enforce such a requirement.

We can also sell mountain bike tram tickets for those who want to take the tram up and ride downhill. This would not add to the tram sales and operations personnel costs. I'd suggest we sell cyclists the same tram \$10 one-time tram ticket we sell any other visitor

and add a \$25 all-day tram ticket. Bikes would not be allowed inside the tram. The tram engineers can add exterior "hooks" over the ski carriages to carry the bikes, costing about \$17,500.

The SKMR ski rental shops can be converted to summertime bike sales and rentals. This would be the largest inventory and personnel expense. We'd have to commit to start a bike shop operation, and hire a manager who could provide a more precise budget and income projections. My ballpark estimate is in the quarter-million dollar range to start.

I checked with the two other shops in the Village Mall that sell outdoor clothing and rent skis and snowboards, Summitt Designs and Ryan's Extreme Sports, and both said that, for summer, they definitely would add bike accessories (clothes, helmets, tubes, some parts), and with enough lead-time perhaps even bike sales, rentals, and repairs. Both strongly endorsed the bike trails idea, and seem eager to add bike sales and rentals to their business lines. Summitt Designs, noting the developing mountain biking business, had already printed up a trail map and distributed it for free last summer. So even without opening our bike shop, we will have bike services for our customers and help our lessees with the struggling off-season.

The Mountain Operations Department needs 2 months notice to design trails and plan construction, about the same for the bike-tram carriage, and 6 to 9 months for the bike shop.

**SNOW KING MOUNTAIN RESORT  
"THE PLACE TO COME HOME TO"**

**MEMORANDUM**

**TO:** Manny Lopez  
**FROM:** Kyle Mills, Marketing Director  
**DATE:** February 18, 2004  
**RE:** Mountain Biking at Snow King Mountain Resort

Manny, it's great that SKMR will be offering mountain biking to our guests. Marketing-wise I don't see any down-side.

Up-front, mountain biking fits the target demographics of our year-round development plan. Industry research has confirmed the Marketing Department's assumptions. Mountain bike enthusiasts aren't as young as the snowboard crowd. The majority are in the target 25-34 age group, and 35-44 is the second largest grouping. Average incomes and shopping expenditures are second only to golf and tennis guests (average annual income: \$58,500). Education: 16.5 years. For casual riders, bike and accessories expenditures average \$500. Self-described "serious" riders spend \$1,000 to \$2,000.

More importantly, mountain biking long-term growth projections are excellent, exceeding all other seasonal participation sports and are almost as strong as snowboarding.

Image-wise mountain biking is again on-target. It will make great visuals for promotions and appeal to the 20-somethings attracted to the image of extreme sports. This year the producers of the Summer Extreme Games will visit SKMR, and, with mountain biking and perhaps paragliding, we could make a viable pitch to be on their venue schedule. The Extreme Games could be our biggest seasonal attraction!

Mountain bikers' spending patterns could be their biggest up-side impact. As you know, our previous research has determined that the average daily expenditure by a summer Lodge guest is \$122, and for a nonguest, \$37. Income from increased parking, food service, and merchandise sales alone will exceed Operations' estimates of trail construction costs. Our research indicates that expenditures by mountain bike riders should be 20% above our previous projections. Also, I expect that a much higher

proportion of mountain bikers will come from the local and regional markets and pump up the day-use average, probably above \$40. (I'll poll it this summer.)

So, even if we don't sell bikes, tram tickets, or trail passes, from an overall economic standpoint, SKMR would have substantial returns by attracting mountain bikers.

Checking the numbers confirms my previous suggestion that we should offer mountain biking to enhance our guests' unique Snow King Mountain experience, and should not charge for trail access. Unlike ski and board operations, trail access fees are not necessary for profitable operations. We can capitalize on free trails in marketing SKMR as a mountain bike park. Obviously, we'll have to charge for access to the aerial tram, just as we do for all other day-guests, but I'd recommend that we add no additional charge for carrying the bikes on the tram.

Our Lodge guest privileges presently include tram fees and parking fees; thus, Lodge guests could mountain bike without feeling that they're paying for trails, parking, or the tram--a great sales talking-point! Free trails may even help counter the "pay-to-play" rap that Marketing is burdened with because of the annual escalation of lift tickets, which next winter will break the \$50/day ceiling.

Below are net income projections based on three levels of our marketing effort. The minimum level would probably be appropriate for the first year operations.

		<u>Projected Revenue</u>
Minimum:	Include mountain biking as part of current marketing. No additional expenditures.	\$211,680
Modest:	Print advertising, especially regional and specialty publications.	\$332,000
Aggressive:	Establish promotional events, races, packaged tours, national specialty publications.	\$467,000

These projections don't include additional benefits which are more speculative, but are

nevertheless tangible. When we brought on board the golf, tennis, and ranch operations, real estate sales jumped; mall partners reported similar increases in sales.

Manny, let me know if you'd like anything more from Marketing.

Let's get going!

**National Life and Casualty Insurance Company**  
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February 21, 2004

Mr. Manuel Lopez  
President and Chief Executive Officer  
Snow King Mountain Resort  
Snow King Village, Columbia 99014

Reference: Snow King--Policy No. 2877408569867

Dear Manuel:

Thanks for giving us the opportunity to bid on insurance coverage for the new mountain biking operations. Mountain biking at Snow King, with its unique natural beauty and congenial atmosphere, could be a huge success. My partner and I love mountain biking, and are out riding almost every weekend. I'm going to talk to Jen about coming up for Memorial Day.

After our conversation, I sent a memorandum to our Rating Department in Colorado and just received a call from them. It's not good news. Rating thinks that mountain biking requires the highest risk rating. Of course, I can't give you an exact premium quote until we get some usage numbers, but for budgeting purposes I fear that you can assume that it will be in the same ballpark as the skiing operations.

I'd suggest that you consider having your lawyer review Rating's conclusions, and, if they think that Rating is incorrect, that they address a letter to me, which I'll pass along to Rating, stating Snow King's position.

For your lawyer's information, here's what our Rating Department states:

First, they acknowledged that Columbia has a recreational use statute, Columbia Civil Code Section 846, which could significantly reduce the risk of liability, and thus the risk rating. However, mountain biking is not one of the enumerated recreational activities, and they believe that the statute will likely apply only to the specifically named recreational activity. Gerkin v. Saint Clara Valley Water District, Columbia Court of Appeal, 1982.

Second, our Rating Department doesn't think that the statute's immunity applies to commercial operations, citing Danaher v. Partridge Creek Country Club, Supreme Court of Michigan, 1981, and Pratt v. State of Louisiana, Court of Appeal of Louisiana, Third Circuit, 1981.

The other alternative would be to set up the operation so that fee collections are sufficient to cover the cost of insurance. This, after all, is the fact of life that we live with in the ski industry, and unfortunately inflicts expensive lift tickets on the public.

We value our relationship as the insurer for Snow King, and will do all we can to provide coverage as you continue to grow the business. Please let me know how you decide to proceed.

Best wishes.

Sincerely,

*Tamara Scott*

Tamara Scott  
Registered Agent

**TUESDAY AFTERNOON  
FEBRUARY 24, 2004**



**California  
Bar  
Examination**

**Performance Test A  
LIBRARY**

**IN RE SNOW KING MOUNTAIN RESORT**

**LIBRARY**

COLUMBIA CIVIL CODE  
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**SCHNEIDER v. MOUNT DESERT ISLAND LAND TRUST,**  
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**COLUMBIA CIVIL CODE**

**§ 846. Permission to Enter for Recreational Purposes**

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purposes, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

**SCHNEIDER v. MOUNT DESERT ISLAND LAND TRUST**  
Supreme Court of Columbia, 1997

The State of Columbia is blessed with an abundance of scenic treasures. Its natural landscape contains over 1,100 miles of shoreline, massive mountains, magnificent lakes and sweeping deserts. Such diversity and contrast lend to its appeal as a place where recreational pursuits may flourish, at times on realty owned by others.

In this case we address questions about the scope of Civil Code Section 846, which immunizes landowners from liability for injuries sustained by recreational users of their property. We conclude, under settled principles of statutory construction, that the Legislature defined "recreational purpose" so broadly as to apply to plaintiff's conduct here.

While driving along the coast, plaintiff stopped at Thunder Hole, a spectacular spot within Mount Desert Island Preserve. The Preserve is owned by the Mount Desert Island Land Trust, a private foundation, and is open to the public. Plaintiff parked her car at one of the lots maintained by the Preserve, and she followed the steps down to Sand Beach. She tripped, allegedly because of a defect in the steps, and brought this suit against the Preserve for her resulting injury.

Before entering the Preserve plaintiff had stopped for a cup of coffee and, rather than drink it there (wherever that was) or in the car, she saw a sign ("Sand Beach") and decided to go there to drink it. The Preserve, pleading the statute, sought and obtained summary judgment. Plaintiff appeals. We affirm.

On appeal, plaintiff makes two contentions. First, plaintiff contends that coffee drinking is not within the statutory list, and, second, that she intended none of the named activities. The short answer to the first is that the list does not purport to be complete, but is only illustrative. Any number of clearly recreational activities suggest themselves, from birdwatching to sunbathing, to playing ball on the beach. Neither as a matter of grammatical construction, nor common sense, is the statute to be read as applying only to the recreational activities expressly named.

Section 846 establishes limited liability on the part of a landowner for injuries sustained by another from recreational use of the land. The statute provides an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming

upon the land. Under Section 846, an owner of any estate or other interest in real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration. The landowner's duty to the nonpaying recreational user is, in essence, that owed a trespasser under the common law as it existed prior to Rowland v. Christian, Col. Sup. Ct., 1968; i.e., absent willful or malicious misconduct, the landowner is immune from liability for ordinary negligence.

Thus, the Legislature has established only two elements as a precondition to immunity: (1) the defendant must be the owner of an "estate or any other interest in real property, whether possessory or nonpossessory"; and (2) the plaintiff's injury must result from the "entry or use [of the 'premises'] for any recreational purpose."

Turning first to the "recreational" element of Section 846, we have little difficulty in upholding the trial court's implicit finding that plaintiff entered or used defendant's property for a recreational purpose within the meaning of the statute.

Plaintiff contends that the list of activities set forth in Section 846 is exhaustive. The plain language of the statute does not support such a claim. The statutory definition of "recreational purpose" begins with the word "includes," ordinarily a term of enlargement rather than limitation. To be sure, the principle of *ejusdem generis* provides that "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.]" The examples included in Section 846, however, do not appear to share any unifying trait which would serve to restrict the meaning of the phrase "recreational purpose." They range from risky activities enjoyed by the hardy few (e.g., spelunking, sport parachuting, hang gliding) to more sedentary pursuits amenable to almost anyone (e.g., rock collecting, sightseeing, picnicking). Some require a large tract of open space (e.g., hunting) while others can be performed in a more limited setting (e.g., recreational gardening, viewing historical, archaeological, scenic, natural and scientific sites). Moreover, the statute draws no distinction between natural and artificial conditions; it specifically mentions "structures," and it obviously encompasses improved streets. Thus,

it is not limited to activities which take place outdoors, and does not exclude recreational activities involving artificial structures.

Accordingly, because the list of examples provided by the Legislature does not effectively limit the meaning of "recreational purpose," we conclude that entering and using defendant's property whether to sightsee, drink coffee, or just relax invoked the immunity provisions of Section 846. Therefore, for our purposes here, walking down the beach steps is no different in kind from scaling a cliff or climbing a tree. Each is clearly recreational in nature.

Second, plaintiff contends that she raised a triable issue as to whether she entered the property for recreation. She claims that it could be found that she was not engaged in any recreational activity at all; that the weather was "cool, drizzly, overcast," and she was going "not to swim, sightsee or have a picnic lunch," and that only to drink coffee under such circumstances could be found not recreational. Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the "totality of the facts and circumstances, including . . . the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose." (Gerkin v. Saint Clara Valley Water Dist., Col. Ct App., 1982)

The consequences of plaintiff's approach would be absurd. The manifest purpose of the Preserve is recreational. Whether plaintiff entered the property to drink coffee or hike is immaterial. In either case, her presence was occasioned by the recreational use of the property, and her injury was the product thereof.

The judgment of trial court, accordingly, is affirmed.

**JOHNSON v. UNOCOL CORPORATION,**

Columbia Court of Appeal, 1998

Under Civil Code Section 846, landowners who permit others to use their property for recreational purposes are immune from liability for injuries suffered by such recreational use of their land. Defendant owns land which it allows the public to use without charge for recreational purposes. Groups or persons using the land must sign a form which, among other things, obligates the user of the land to hold the company harmless from damages for injuries arising out of the use of the land. We hold that under Section 846 the company enjoys immunity from liability for recreational use of its land, and that the hold harmless clause does not constitute consideration which would except the company from the immunity provisions of Section 846.

In this case, plaintiff's employer, Ubex Corporation (Ubex), executed an agreement with Unocol which, *inter alia*, contains a hold harmless clause. Ubex asked Unocol for permission to use Unocol's popular Orcutt Hill Picnic Grounds for its annual company picnic. Unocol agreed to allow Ubex to use its grounds and reserved a specific date for the picnic. Unocol did not charge Ubex for the use of its grounds. Ubex employees knew they could attend simply by purchasing a ticket from the "Aurora Club" to which all Ubex employees automatically belonged. The Aurora Club provided all the food, drink and games at the picnic. Johnson purchased a ticket and attended the picnic. He suffered injuries on the picnic grounds during a game of horseshoes when he leaned against a railing which collapsed and caused him to fall. Johnson sued Unocol for his injuries.

Plaintiff urges us to engraft onto the provisions of Section 846 an extremely broad view of the phrase "good consideration" found in Civil Code Section 1605. Section 1605 states:

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

Plaintiff argues that under Section 1605, the hold harmless paragraph constitutes consideration within the meaning of Section 846.

**JONES v. UNITED STATES**

United States Court of Appeals, Fifteenth Circuit, 1982

The hold harmless agreement here requires users to indemnify Unocol from costs and expenses it might incur in defense of claims. Plaintiff therefore argues that because attorney fees are costs of suit under Code of Civil Procedure Section 1033.5, which are not available in the absence of statute or contract, the agreement constitutes consideration. Plaintiff suggests that it is possible a trial court might award attorney fees in a lawsuit because of the agreement with its hold harmless clause. Perhaps, but it is not helpful here to speculate what a court might do if Ubex had filed an action against Unocol.

The purpose of Section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. Courts should therefore construe the exceptions for consideration narrowly.

Such a remote, potential "benefit" to Unocol does not constitute consideration to plaintiff. Plaintiff urges that we so broaden the definition of consideration contained in Section 1605 so as to defeat the purpose of Section 846. However, the meaning of a concept for one purpose may be entirely different for another legislative purpose. Section 846 may preclude immunity "where permission to enter . . . was granted for a consideration . . . paid to . . . landowner . . . or where consideration has been received from others . . ." The mere potential for reimbursement for defense costs incurred if a suit were filed is neither current payment for entry nor a benefit currently received for entry. Although the disjunctive language in Section 846, "where consideration has been received from others," suggests that consideration is not limited solely to direct payment of entrance fees, we hold that at minimum, consideration received must consist of a present, actual benefit bestowed or a detriment suffered.

Although in some cases the amount of consideration may be slight, Thompson v. United States, U.S. Dist. Ct., Col., 1979, it must be more substantial than what occurred here. A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under Section 846 comes into play.

Because the hold harmless clause in the agreement did not constitute consideration, the exception to immunity in Section 846 does not apply here. We therefore affirm the summary judgment granted Unocol.

Lisa Jones appeals from a judgment in favor of the United States in this suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b). We affirm.

I. Factual Background

Lisa, then 15 years of age, was severely injured in an accident on April 16, 1977, on a slope at Hurricane Ridge in Olympia National Park in the State of Columbia. She was on an outing sponsored by her church, the Bainbridge Bible Chapel, under the supervision of Joseph B. Barlow. Lisa and her friend, Beverly, each rented an inner tube from National Park Concessions, Inc. [NPC], for one dollar to use for snow sliding. They tubed with others in a "Snow Play Area", designated by a directional sign at the Park lodge. Beverly went down the slope first, mounted on her inner tube stomach down, and rolled off the tube at a level area near the bottom of the slope. Lisa, seated on her tube, was unable to stop, crossed the level area at a high rate of speed, and crashed into a tree, fracturing her spine, shoulder and several ribs.

The District Court granted the government's motion for partial summary judgment, holding the government's liability was controlled and limited by the Columbia Recreational Land Use Act, Col. Civil Code, Section 846, which requires proof that the government's conduct was willful and wanton. The trial judge found that the plaintiff had failed to establish willful and wanton conduct on the part of the government as required by the Columbia Recreational Land Use Act and entered judgment for the government.

II. Was the government a "Recreational Landowner"?

The issue on this appeal is whether the liability of the United States is controlled by the Columbia Recreational Land User Statute. Under the Federal Tort Claims Act the government is liable for negligent acts and omissions of its employees, "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Since the accident occurred on government land in Columbia, Columbia tort law is applicable.

This court has held that the principle of encouraging landowners to open their land by limiting potential tort liability applies with equal force to the Government as to other landowners. Plaintiff contends that the statute applies only to "a landowner who gives up his right to keep out members of the public." She argues that the requisite element of "consent to public use" is not present, noting that Olympia National Park was "reserved and withdrawn from settlement, occupancy, or disposal and dedicated and set apart as a public park for the benefit and enjoyment of the people." Plaintiff argues that while the purpose of the statute is to "encourage" owners to "allow" someone to use their land, that purpose is not met when, as here, the public has a right and expectation to use the land that pre-exists the passage of the Act and the government has no right to bar entry.

Plaintiff's argument that the government should not be treated as a private party under the Columbia recreational user statute because it is somehow obligated to keep the national parks open to the public is unpersuasive. If liability were imposed upon the government in cases such as this one, the Park Service might well choose to close areas of Parks to public use or limit the scope, place, or manner of activities. For example, would a National Park superintendent allow snowtubing after a contrary ruling? This result is precisely what the Columbia statute was enacted to prevent. Thus, we hold that the government is entitled to the protection of the Columbia Recreational Land Use Statute and is therefore only liable "[f]or willful or malicious failure to guard or warn against a known dangerous condition."

### III. Did Lisa Pay a "Fee" for the Use of the Land?

Plaintiff contends that the government received a "fee" for Lisa's use of the Park facilities. She paid the concessionaire, NPC, a dollar to rent an inner tube. NPC pays the government a fixed rental for its facilities (a sales and rental shop) and a percentage of its gross receipts. The District Court concluded that the fee was charged for the use of the inner tube and was not a fee charged for the use of the land. We agree.

The case upon which plaintiff relies, Thompson v. United States, U.S. Dist. Ct., Col., 1979, is distinguishable. There the plaintiff was a participant in a motorcycle race held on federal land in Columbia. The Bureau of Land Management [BLM] had charged the race promoter a \$10.00 application service fee and a minimum rental charge of \$10.00. The Court concluded that any charge for access was sufficient to preclude application of Columbia

Recreational Land Use Act:

"If a rental charge is made for the use of the land, it is clear that permission to enter the government land would be 'granted for a consideration', and therefore Columbia Civil Code Section 846 would not apply so as to limit the liability of the landowner."

The Thompson court did not rule that payment for other than access by a land user was sufficient to invoke the exception, as indicated by its statement that:

"The United States claims that these payments were trivial, inconsequential, and were not rental payments by the plaintiff; that the payments were merely for race permit and that entry to BLM land is free. Although this may turn out to be correct, on review of a motion for summary judgment, we cannot characterize the purpose of the payment."

Here, however, the fee was not charged to members of the public for entry onto the land or for use of the land. Lisa paid the dollar fee to rent the tube. She entered the Park without paying a fee. She could have used the Hurricane Ridge or any other area of the Park without making any payment if she had brought her own tube. No fee was charged which would deny the United States its immunity under the Columbia statute.

More on point, we believe, is the 1975 Columbia Court of Appeal case of Moore v. City of Torrance. There the plaintiff was injured while riding his bike in a city-owned unsupervised "motocross" track. Plaintiff argued that he had paid consideration for the use of the park by virtue of the fact that his parents pay taxes to support the municipal facilities. The Columbia court rejected the argument, stating:

"We are certain that this is not the type of consideration that the Legislature had in mind when it included consideration as a factor in Section 846. Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended."

Lastly, we agree with the District Court that, "While it was negligence on the United States's part not to put up signs or ropes, its failure to do so does not rise to the status of willful and wanton conduct under the laws of Columbia." AFFIRMED.

**GERKIN v. SAINT CLARA VALLEY WATER DISTRICT**

Columbia Court of Appeal, First District, 1982

Jo Ann Gerkin through her guardian ad litem appeals from a summary judgment in her action against Saint Clara Valley Water District ["Water District"] and other defendants for personal injuries. Gerkin suffered personal injuries when she fell from a bridge located at Little Llagas Creek in the City of Morgan Creek. According to the complaint, Gerkin was injured because the Water District negligently permitted the bridge to remain in a dangerous condition.

In support of the motion for summary judgment, the Water District presented excerpts from the depositions of Gerkin and her younger sister showing that Gerkin was either walking or walking with her bicycle across the two planks which constituted the bridge when she slipped and fell into a dry creek below. In opposition to the motion, Gerkin submitted the declarations of herself, her mother and her sister averring that (1) on the date in question there was no telephone at the apartment where Gerkin was living, (2) Gerkin's mother gave Gerkin and her sister permission to cross the area in order to use the telephone at a market and to buy a candy bar there, (3) Gerkin's purpose in making the trip was to make a phone call and buy a candy bar, and (4) Gerkin walked across the bridge with her bicycle both to and from the store. The trial court granted the motion for summary judgment on the ground that Gerkin "was engaged in conduct specified by Civil Code Section 846."

Section 846 provides that, in the absence of willful or malicious failure to guard or warn of a dangerous condition, an owner of "any estate in real property" owes no duty of care to keep the premises safe for entry by trespassers or licensees who engage in certain specified recreational activities. Included among these specified activities are "hiking", but not bicycle-riding. On summary judgment, Gerkin's claim that she was walking over the bridge when the accident occurred must be accepted.

However, relying on dictionary definitions of "to hike" as "to walk or tramp" and "to go for a long walk," the Water District argues that Gerkin's activity was encompassed within the statute and that summary judgment was therefore proper. It is contended that any test which hinges upon the user's subjective "recreational" intent would read into Section 846 a requirement not stated by the Legislature and lead to "diverse, arbitrary and unjust results."

Section 846 must be construed in light of the legislative purpose behind it. It is a cardinal rule that statutes should be given a reasonable interpretation and in accordance with the apparent purpose and intention of the lawmakers. The purpose of Section 846 was to encourage landowners to keep their property open to the public for recreational activities by limiting their liability for injuries sustained in the course of those activities. The Water District is therefore incorrect when it contends that to walk across their property necessarily constitutes "hiking" within the meaning of the statute. Both the language and the historical background of Section 846 compel the conclusion that the Legislature did not intend to immunize landowners from liability for all permissive or nonpermissive use of their properties, but only those uses which could justifiably be characterized as "recreational" in nature.

The Water District's contention that "walking" falls within the scope of "hiking" under Section 846 is contrary to principles of statutory construction: First, a construction which implies that words used by the Legislature were superfluous is to be avoided wherever possible. If "hiking" were to be read as including the act of "walking," it would have been unnecessary for the Legislature thereafter to enumerate other types of activities which necessarily involve walking such as camping, rock collecting and hunting. Obviously, "hiking" was intended to denote more than just traveling on foot.

Second, a purely literal interpretation of any part of a statute will not prevail over the purpose of the legislation. This principle is vividly illustrated by that portion of Section 846 which, at the time of the events in question, extended a landowner's immunity to "all types of vehicular riding." Read literally, the statute would preclude anyone traveling in a car from suing the owner for injuries caused by a dangerous condition on his property. It is apparent from the purpose of the enactment, however, that the Legislature was intending to reach only recreational vehicular activity such as motorcycling for pleasure or dune bugging. Likewise, to equate the word "hiking" with mere "walking" or traveling on foot apart from any recreational context would be to ignore the legislative purpose of Section 846 and, in effect, broaden the statute in a manner not contemplated by the lawmakers.

And finally, this court has in past cases applied the rule that statutes in derogation of the common law must be strictly construed. This maxim of construction provides that where there exists a common law doctrine relevant to the issue presented by the parties and the statute which would change the common law, the legislative intent to change the common

law must be clearly expressed. In changing the common law rules applicable to the tort liability of the landowner to the entrant, the legislature has, in Section 846, made a new accommodation of the conflicting rights and interests of landowner and entrant. In Section 846, the legislature has shifted some of the risk from the landowner to the entrant, apparently having decided that the social good of encouraging landowners to open their land to the public for recreational purposes outweighs the social cost of imposing the expense of injuries on the entrant to the land rather than on the landowner who may be in a position to prevent the injury. Section 846 is a statute in derogation of the common law, and should be narrowly interpreted.

We conclude that for an activity to fall within the term "hiking" as it is used in Section 846, it must be proved not merely that the user was "walking" across the property, but that the activity constituted recreational "hiking" within the commonly understood meaning of that word, i.e., to take a long walk for pleasure or exercise.

We agree with the Water District that the test should not be based on the plaintiff's state of mind. We believe, however, that such a determination must be made through a consideration of the totality of facts and circumstances, including the path taken, the length and purpose of the journey, the topography of the property in question, and the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.

There is no showing that Gerkin was "hiking" within the commonly understood recreational sense of the word. On the contrary, Gerkin and her sister crossed the Water District's property because it was the shortest route between their apartment and the supermarket and was a method regularly used by residents in the area. A triable issue of fact was raised as to whether Gerkin was engaged in "hiking" on the subject property such as to permit the Water District to invoke the immunity of landowners set forth in Section 846. It was error to grant summary judgment.

Reversed.

**DANAHER v. PARTRIDGE CREEK COUNTRY CLUB,**  
Supreme Court of Michigan, 1981

Plaintiff Joseph O. Danaher went to the Partridge Creek Country Club to play golf with his son. Upon arrival he decided to walk over to a pond located on the golf course premises. He entered the golf course premises through an open delivery gate and went across a large field to get to the pond. When he arrived at the pond he tossed bread crumbs into the water to feed the fish and in general was viewing the pond to see if it offered any fishing potential. While engaged in this activity he was struck by a golf ball which originated from the fifth tee. The pond was not visible to golfers using the fifth tee. As a result of the accident, Danaher lost his right eye. The jury returned a verdict for Danaher and against the country club for \$1,000,000.

Defendant sought an instruction based upon the Michigan Recreational Use Statute ("MRUS") which limits liability to one who is on the lands of another without paying to such other person a valuable consideration for certain purposes (such as, fishing, hunting, trapping, camping, hiking, sightseeing, and motorcycling) unless there is a showing of gross negligence or willful and wanton misconduct. The trial court declined this request and instead instructed on ordinary negligence, ruling that MRUS was not intended to apply to private lands which are used for outdoor recreational uses, but which also constitute commercial enterprises.

In declining defendant's request, the trial court did not discuss the "valuable consideration" exception to the limitation of liability. The courts of appeals have held that it did apply where the consideration was in the form of an "entrance fee." Whether the "entrance fee" for entering the type of lands upon which the kinds of recreational activities described in the statute are carried out is the equivalent of the charge made to play golf need not be determined.

Our review of previous Michigan cases clearly shows that MRUS has been applied consistently to vacant but privately owned land. It has not been applied to circumstances such as those in the present case, where the land is held out for a recreational use to those who pay a fee. It is clear that the character of the land is important and in the present case, the trial court was correct in applying a standard or burden of proof that treated the plaintiff as a business invitee. Although plaintiff had not purchased the right to

play golf that day, he was a golfer who was viewing the premises prior to a decision to actually play golf.

An invitee is one who is on the owner's premises for a purpose mutually beneficial to both parties. The duty which an occupier of land owes an invitee is to exercise ordinary care and prudence to render the premises reasonably safe. A licensee is one who desires to be on the premises of another because of some personal unshared benefit and is merely tolerated on the premises by the owner.

A person who enters the land of another upon business which concerns the possessor of land and upon his invitation expressed or implied is considered an invitee. In some cases permission to enter upon the land was for a consideration. As to such a person the landowner owes a duty of ordinary care. There is a conflict of opinion on the exact definition of an invitee and the basis of the owner's liability. Two theories have developed, i.e., the "economic benefit" theory which embraces a business visitor and the "invitation theory." The economic benefit test imposes an obligation upon the occupier of land when he receives some actual or potential benefit as a result of the entry. The invitation theory imposes a duty based upon a holding out of the premises as suitable for the purpose for which the visitor entered. The Restatement of Torts 2d, Sections 332 and 343, adopts the economic-benefit theory and finds an invitee relationship and a duty to keep the premises safe if the landowner receives any economic benefit from the presence of the visitor or expects to derive any such benefit. Potential pecuniary profit to the possessor of the land is sufficient.

In other cases, we have adopted the invitational theory and find a basis for the liability to the invitee in a representation implied from the encouragement the landowner gives to others to enter to further one of his purposes. To this court, the terms "business invitee," "business visitor," and "invitee" are synonyms, and we have held that when a person enters upon the premises of another and there is a benefit to the other person by the entry or some mutuality of interest, the visitor is an invitee. We recognize a growing tendency of courts to enlarge the duty of landowners in respect to negligence and to minimize the distinction between licensees and invitees either by enlarging what constitutes an economic benefit or by adopting the broader test of the invitation theory.

The Michigan Recreational Use Statute must be considered as a special reversal or

exception to this tendency based upon a special public policy for a limited classification of users. The statute indicates that the landowner owes the ordinary duty of reasonable care to those entering upon his land for certain recreational purposes only if the permission to enter the land is granted for a valuable consideration. Therefore the statute is in derogation of the common law and requires a strict construction. In construing what is meant by "valuable consideration", it is appropriate to look to the legislative history of the section. When the section was enacted, the term "valuable consideration" could have been narrowly or broadly construed. If narrowly construed, only a monetary fee paid to the landowner would have constituted valuable consideration. If broadly construed, the term would have included non-monetary benefits and indirect economic benefits flowing to the owner from the recreational use of his land.

We think a reasonable interpretation of the term "valuable consideration" as used in the statute in light of its history and by its express language means such consideration which at common law could constitute the person entering upon the land as an invitee. Also, this section is in derogation of the common law and we must strictly construe it, which requires a broad construction of the term "valuable consideration." This consideration may be the conferring of a benefit upon the landowner or a mutuality of interest of the landowner and the entrant.

On the instant facts, we think the benefit the defendant expected to receive from increased sales from golfers and other prospective customers was sufficient "valuable consideration" for the general implied permission to the public to use the facilities.

Affirmed.

**PRATT v. STATE OF LOUISIANA,**

Court of Appeal of Louisiana, Third Circuit, 1981

This is a wrongful death and survival action growing out of the drowning of Mark S. Pratt and Darrell Ray Burgess at Indian Creek Reservoir and Recreation area. The trial court granted motions for summary judgment based on a state statute purporting to exempt or grant immunity from liability to owners of land used for recreational facilities. The statute does not apply to "an owner of commercial recreational developments or facilities." One of the principal issues is whether the recreational area at which the drowning occurred was a commercial development or facility. The trial court held it was not so, and thus that the defendants were exempt from liability from negligence.

The Indian Creek Reservoir and Recreational Area contains an artificial lake with adjacent recreational areas. The lake and facilities are located on land owned by the State through the Department of Natural Resources, Office of Forestry. That agency operates and maintains the facility under a contract entered into by the two public bodies.

The State contends that it is exempted from liability by the Louisiana Recreational User Statute, which reads in pertinent part:

"Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby: 1) Extend any assurance that the premises are safe for any purposes; 2) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed; 3) Incur liability for any injury to person or property incurred by such person."

The State contends that the phrase "commercial recreational developments or facilities" should be read to equate a commercial recreational enterprise with an establishment run for profit. The State argues that the Indian Creek area is not run for profit and therefore is not to be considered a commercial recreational enterprise with an establishment run for profit.

In view of these conclusions, what factors render a recreational facility a commercial one?

The trial court worked the matter out on the basis of whether the enterprise contemplates the earning of a profit. In McCain v. Hackberry Recreation District, United States District Court, W.D. Louisiana, 1983, the federal district court, applying the Louisiana statute, reached a similar conclusion: "As to whether or not the pool is a commercial recreational development, this court is convinced that the pool does not meet the standards necessary to be so classified. As the Act indicates, the mere fact that some admission price is charged will not necessarily render a facility a commercial recreational development. The test of a facility's "commercial" nature is based on whether the facility was run primarily for profit. In this case, the District did not run the pool with the intention of generating a profit. In fact, an admission fee of only 25 cents to 50 cents was charged for use of the pool. The court is satisfied that these nominal charges do not indicate a managerial philosophy oriented toward profit maximization."

We too are convinced that in the context of the facts of the case before us, profit as a primary objective of the venture would be essential to render it commercial.

Plaintiffs place heavy reliance on the fact that fees are charged for use of the recreational facilities. Regarding this point some reasonable effect must be given to the use in the statute of the words "with or without charge." The critical words are: "an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes . . . does not thereby . . . (3) Incur liability for any injury to person or property incurred by such person." Clearly the use of the words "with or without charge" must be construed to mean that charging fees for use of recreational facilities does not in itself render the operation and maintenance of such facilities a commercial venture. Logically there would have been no reason to include these words in the statute unless it was for the purpose of providing that charging fees would not render an operation commercial. The provision becomes significant only when a fee is charged.

Thus we conclude that the Indian Creek Reservoir and Recreational Area is not a commercial enterprise. Under the circumstances it was the purpose and policy of the Legislature to provide non-liability of defendants for the acts of negligence alleged in plaintiffs' petition.