Liability Risks for After-Hours Use of Public School Property to Reduce Obesity: South Carolina

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This memorandum summarizes South Carolina law governing liability for after-hours recreational use of school facilities. It should be read with this project's overview memorandum, which can be found at www.nplan.org/nplan/products/liabilitysurvey. Our goal is to inform lawyers advising school districts considering whether to open school facilities (or keep facilities open) for recreational use as part of an effort to reduce childhood obesity.

This memorandum does not provide the kind of detailed analysis necessary to support the defense of a liability action. It is not a substitute for consultation with a lawyer. We urge school counsel to consult a knowledgeable tort defense lawyer with experience defending South Carolina schools. If there are important cases, statutes, or analysis that we have overlooked, please inform us by sending an email to info@nplan.org.

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For a negligence action in the state of South Carolina, a plaintiff must prove four elements: (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty by a negligent act or omission, (3) the breach by the defendant actually and proximately caused an injury to the plaintiff, and (4) plaintiff suffered an injury or damages.[1] For purposes of evaluating the legal rules that affect the liability risk involved in opening up schools to after-hours recreational use, the crucial issues involve the duty of the school system, in particular the potential application of governmental immunity and the South Carolina recreational user statute.

Part A of this memorandum addresses the duty of the school system. Part B addresses issues relating to limits on damages. Part C addresses two risk management issues that involve legal questions that are susceptible to a generalized legal analysis: (1) whether a school district could avoid liability arising out of recreational programs by requiring the participants, or their parents or legal guardians, to sign liability waivers; and (2) whether a third party providing the recreational programming on school facilities would have the same duty of care as a school district.

A. Public Schools, the Duty Element, and After-Hours Use

Absent special liability protection, school districts and other providers of recreational facilities have the legal duty to take *reasonable* precautions to prevent injury. What is reasonable is very context specific and depends on many things: most important, the nature of the harm, the difficulty of preventing it, and generally accepted standards in the management of recreational facilities.

[1] Doe v. Marion, 645 S.E.2d 245, 250 (S.C. 2007).

As any lawyer who has tried to explain the concept of negligence to a layperson knows, the standard of reasonable care can seem frustratingly vague and imprecise. Yet it is the standard that generally governs liability risk for organizations and individuals in the United States. On the whole, it is a flexible standard that does a good job of balancing the competing interests of the providers and users of many kinds of services.

This section explains the ways that South Carolina law limits the legal duty of school districts. As we explain in subsection 1, South Carolina law sometimes insulates school districts from liability, so that school districts that do not take reasonable precautions may still be able to avoid legal responsibility for any resulting injuries. South Carolina law does this through governmental immunity. In our judgment, governmental immunity is likely to provide some protection to school districts against liability for injuries relating to recreational use. Subsection 2 discusses the liability and indemnification of school employees, a topic closely related to schools districts' overall liability risk.

Subsection 3 discusses recreational user statutes, which sometimes also offer liability protection to school districts. South Carolina's recreational user statute applies to governmental entities and provides significant protection to school districts. Subsection 4 discusses the impact of the South Carolina courts' decision to retain the traditional distinctions among different categories of entrants on land. Section 5 concludes this part of the memorandum by comparing the legal duties that a school already faces for activity during the school day with the legal duties that the school would face if it permitted after-hours use of its facilities.

1. Limited Duty Due to Governmental Immunity

In 1985, the South Carolina Supreme Court abolished the doctrine of sovereign immunity as it applied to the state and all local subdivisions of government.[2] In response, the General Assembly enacted the South Carolina Tort Claims Act[3] to codify the state's and its political subdivisions' liability for torts.[4] Section 15-78-40 of the Tort Claims Act provides: "The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein."[5] By definition, "political subdivision" includes a school district.[6]

In § 15-78-60, the General Assembly set out forty exceptions to the waiver of immunity. Four of these exceptions are relevant to a school board's liability for after-hours recreational use of school facilities. The General Assembly permits school boards to retain immunity for discretionary acts of employees,[7] for employee conduct outside the scope of official duties,[8] for

[2] McCall by Andrews v. Batson, 329 S.E.2d 741, 743 (S.C. 1985).
[3] Gardner v. Biggart, 417 S.E.2d 858, 859 (S.C. 1992).
[4] S.C. CODE ANN. § 15-78-20(a) (2008).
[5] *Id.* § 15-78-40.
[6] *Id.* § 15-78-30(h).
[7] *Id.* § 15-78-60(5).
[8] *Id.* § 15-78-60(17).

nongrossly negligent supervision of students,[9] and, most important in regard to after-hours recreational use, for injuries due to maintenance, security, and supervision of school facilities for use as a park, playground, or open area for recreational purposes.[10]

The first exception concerns discretionary acts. The South Carolina Supreme Court has held that "discretionary immunity from claims under the Tort Claim Act is contingent on proof that the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards."[11] The court continued: "Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision."[12] In one case, the South Carolina Supreme Court failed to grant South Carolina State University immunity under the discretionary provision because the university did not weigh competing considerations or alternatives when deciding not to discipline or remove its university police chief in resolving the issue of his hostility toward his employees.[13] The South Carolina Supreme Court also held that the state Wildlife and Marine Resources Department's decision to erect a railing on only one side of a public dock at a boat landing was not a discretionary act entitled to immunity because the issue of how many rails to erect was not examined prior to the making of an informed decision.[14] The discretionary decision was whether to erect rails at all and not whether to erect one or two rails.[15]

In the second exception, school boards retain immunity for employee conduct outside the scope of official duties or that constitute actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.[16]

The third exception allows school boards to retain immunity for nongrossly negligent supervision, protection, control, or custody of any of their students or clients.[17] South Carolina courts have defined gross negligence "as 'the failure to exercise slight care'; 'the intentional, conscious failure to do something which it is *incumbent* upon one to do or the doing of a thing intentionally that one ought not to do'; and 'a relative term' meaning 'the *absence of care that is necessary under the circumstances*.'"[18] A South Carolina court deemed a teacher's aide grossly negligent when she left mentally handicapped students unsupervised while she used the restroom and one of the students was sexually assaulted during the time when they were unsupervised.[19] In another case, the South Carolina Supreme Court held that the school charged in a wrongful death action retained immunity under the Tort Claims Act because it had not been grossly negligent in its supervision of students when one student fatally shot another in the school hallway.[20] The court found the school operated with, at minimum, slight care in ensuring the

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[9] *Id.* § 15-78-60(25).
[10] *Id.* § 15-78-60(16).
[11] Sabb v. S.C. State Univ., 567 S.E. 2d 231, 237 (S.C. 2002).
[12] *Id.*
[13] *Id.*
[14] Creech v. S.C. Wildlife & Marine Res. Dep't, 491 S.E.2d 571, 573-74 (S.C. 1997).
[15] *Id.* at 574.
[16] S.C. CODE ANN. § 15-78-60(17) (2008).
[17] *Id.* § 15-78-60(25).
[18] Duncan v. Hampton County Sch. Dist. No. 2, 517 S.E.2d 449, 453 (S.C. Ct. App. 1999) (quoting Hollins v. Richland County Sch. Dist. No. 1, 310 S.E.2d 654, 656 (S.C. 1993)).
[19] *Id.* at 454.
[20] Etheredge v. Richland County Sch. Dist. No. 1, 534 S.E.2d 275, 278 (S.C. 2000).

safety of its students by monitoring the hallways and having an intervention system in place to help resolve conflicts between students.[21] In an action brought by a student who was attacked by a nonstudent on a school bus, the South Carolina Supreme Court held that the district exercised slight care and was not grossly negligent when it counseled the student and her assailant after an initial threat and attempted to contact their parents.[22]

The final relevant exception permits school boards to retain immunity for injuries due to maintenance, security, or supervision of any public property used as a park, playground, or open area for recreational purposes.[23] However, immunity does not extend if the school board has actual notice of the defect or condition causing the loss and does not correct it within a reasonable time.[24] The South Carolina Supreme Court interpreted actual notice to mean "all the facts are disclosed and there is nothing left to investigate. . . . Actual notice may be shown by direct evidence or inferred from factual circumstances."[25] However, South Carolina courts remain largely silent on the length of time considered "reasonable" under this exception.[26]

Under the Tort Claims Act, a school board will be liable for its torts in the same manner and to the same extent as a private individual in like circumstances unless immunity is granted through one of the exceptions discussed above. To retain immunity for discretionary acts, when faced with alternatives, a school board must actually weigh competing considerations and make a conscious choice using accepted professional standards. To retain immunity for supervision, protection, control or custody of its students, a school board must exercise at least slight care. To retain immunity for injuries due to maintenance, security, or supervision of school parks, playgrounds, or open spaces used recreationally, a school board must correct any defects of which it has actual notice within a reasonable time.

2. Duties and Indemnification of Public School Employees

The South Carolina Tort Claims Act constitutes the exclusive remedy for any tort committed by an employee of a governmental entity including schools and school districts.[27] A school district employee is not liable for a tort committed while acting within the scope of his official duty unless the employee's conduct constituted "actual fraud, actual malice, intent to harm or a crime involving moral turpitude."[28] A school employee retains liability for torts that result from conduct that falls outside the scope of his official duties or for conduct constituting actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. The school district itself, however, is protected from liability for such employee's conduct by the immunity offered under the Tort Claims Act.[29] Additionally, the Tort Claims Act does not require school districts to indemnify.

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[21] *Id.* at 277-78.
[22] Clyburn v. Sumter County Sch. Dist., 451 S.E.2d 885, 888 (S.C. 1994).
[23] S.C. CODE ANN. § 15-78-60(16).
[24] *Id.* § 15-78-60(16).
[25] Strother v. Lexington County Recreation Comm'n, 504 S.E.2d 117, 123 (S.C. 1998) (citations omitted).
[26] *See* Vaughan v. Town of Lyman, 635 S.E.2d 631, 637 (S.C. 2006) (holding knowledge of the defect for at least ten years unreasonable for purposes of recognizing an exception under the Tort Claims Act).
[27] S.C. CODE ANN. § 15-78-70; *id.* § 15-78-30(d), (e), (h).
[28] *Id.* § 15-78-70(a)-(b).
[29] *Id.* § 15-78-80(17).

3. Limited Duty under Recreational User Statute

South Carolina's recreational user statute limits the liability of landowners who open their land and water areas to the public free of charge for recreational purposes.[30] Unlike the situation in many other states, the South Carolina statute applies to all kinds of land, not only to rural or undeveloped land.[31] As with other states' recreational user statutes, the South Carolina statute limits the duty of owners. As long as there is no charge for the use of the land, an owner or a possessor has neither a duty to keep the land safe for entry or use by persons who have sought and obtained her permission to use it for recreational purposes nor a duty to give any warning of a dangerous condition, use, structure, or activity on the land.[32]

The South Carolina statute applies to state governmental entities[33] and thus offers school districts protection from liability for after-hours recreational use of school facilities. School districts would face liability only for grossly negligent, willful, or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.[34]

4. Limited Duty Due to the Historical Distinctions among Entrants on Land

South Carolina recognizes four general classifications among entrants on land: adult trespassers, invitees, licensees, and children.[35] Different standards of care apply depending on the classification of the entrant on land.[36]

A trespasser is one whose presence on the land "is neither invited nor suffered."[37] Under South Carolina law, a landowner owes a trespasser no duty "except to do him no wilful or wanton injury."[38] A licensee is "a person not invited, but whose presence is suffered."[39] Under South Carolina law, a landowner "'owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities.'"[40] An invitee is a person who enters onto the land of another at the express or implied invitation of the landowner.[41] The South Carolina owner of property generally owes an invitee the duty of exercising reasonable or ordinary care for her safety and is liable for injuries resulting from the breach of such duty.[42]

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[30] *Id.* § 27-3-10.
[31] *See id.* ("Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.").
[32] *Id.* § 27-3-30.
[33] Kimsey v. City of Myrtle Beach, 109 F.3d 194, 196 (4th Cir. 1997) (holding the South Carolina recreational user statute applies to state governmental entities).
[34] S.C. CODE ANN. § 27-3-60.
[35] Singleton v. Sherer, 659 S.E.2d 196, 204 (S.C. Ct. App. 2008).
[36] *Id.*
[37] Sims v. Giles, 541 S.E.2d 857, 861 (S.C. Ct. App. 2001).
[38] Nettles v. Your Ice Co., 4 S.E.2d 797, 799 (S.C. 1939).
[39] *Sims*, 541 S.E.2d at 861.
[40] *Singleton*, 659 S.E.2d at 205 (quoting Landry v. Hilton Head Plantation Prop. Owners Ass'n, 452 S.E.2d 619, 621 (S.C. Ct. App. 1994)).
[41] *Sims*, 541 S.E.2d at 861.
[42] *Singleton,* 659 S.E.2d at 205.

Although South Carolina retains the traditional classifications of entrants on land, these distinctions are likely to provide protection to school districts in limited circumstances above and beyond the protection provided by South Carolina's recreational user statute. Under the recreational user statute, entrants onto school facilities for recreational purposes are owed only the duty of care owed to a trespasser. Regarding the definition of recreational use, a South Carolina court explained that the recreational user statute "invites judicial expansion where the plain meaning of the statute would not be distorted."[43] The court then held that a spectator at a T-ball game was considered a recreational user because "her attendance at the game was for a recreational purpose."[44] Similarly, South Carolina courts would likely deem parents and others observing children during after-hours programs to be recreational users under the recreational user statute. The courts remain silent on how they would treat parents or others on the property merely to collect their children after the conclusion of recreational programs. Were the courts to deem them beyond the reach of the recreational land user statute, they would likely be treated as invitees and owed a duty of reasonable care.

5. Duty during the School Day and After: A Comparison

When deciding whether to open up school facilities for recreational use, it is useful to evaluate how the legal risk arising out of opening the school grounds for recreational use compares to the legal risk arising out of the use of school grounds for programs that the school already runs.

Unlike in some other states, South Carolina does not require from schools a heightened duty to supervise students during the school day. School districts are required to use the standard of slight care in supervising students and are liable only if they are grossly negligent. "The Legislature has clearly provided that the School District may be liable for negligent supervision of a student only if that duty was executed in a grossly negligent manner. *See* S.C. Code Ann. § 15-78-60(25)."[45]

The South Carolina Tort Claims Act imposes the same liabilities on and offers the same protections to school districts both during and after the school day.[46] The recreational user statute provides even further protection to school districts for after-hours recreational use of school facilities because it provides that the school district owes no duty of care to keep the premises safe for recreational purposes.[47]

B. Limits on Damages

1. Damages Limits under State Tort Claims Act

South Carolina limits liability for any action or claim brought under the Tort Claims Act.[48] No person shall recover a sum exceeding $300,000 because of loss arising from a single

[43] Brooks v. Northwood Little League, Inc., 489 S.E.2d 647, 651 (S.C. Ct. App. 1997).
[44] *Id.*
[45] Doe v. Greenville County Sch. Dist., 651 S.E.2d 305, 310 (S.C. 2007).
[46] S.C. CODE ANN. § 15-78-40 (2008).
[47] *Id.* § 27-3-30.
[48] *Id.* § 15-78-120.

occurrence,[49] and the total sum recovered out of a single occurrence is limited to $600,000 regardless of the number of agencies or claims involved.[50] The Tort Claim Act further prohibits punitive or exemplary damages or interest prior to judgment.[51]

2. General Damages Limits for Tort Claims

Beyond the limits imposed by the South Carolina Tort Claims Act, South Carolina law prevents punitive damages awards that are grossly disproportionate to the severity of the offense. For an award of punitive damages in South Carolina, state statutory law places the burden on the plaintiff to prove damages by clear and convincing evidence.[52] To ensure that a punitive award is proper, the South Carolina Supreme Court requires the trial court to conduct a post-trial review "dedicated to the postulate that no award be grossly disproportionate to the severity of the offense."[53]

Additionally, the collateral source rule has been "liberally applied in South Carolina to preclude the reduction of damages."[54] (The collateral source rule allows plaintiffs to include in their tort damages costs that they did not actually incur because those costs were paid by health insurers or other "collateral sources" of funds.)

C. Selected Risk Management Issues

In this section we consider two risk management issues that involve legal questions that are susceptible to a generalized legal analysis: (1) whether a school district could avoid liability arising out of recreational programs by requiring the participants, or their parents or legal guardians, to sign liability waivers; and (2) whether a third party providing the recreational programming on school facilities would have the same duty of care as a school district. In brief, we conclude that South Carolina courts would be unlikely to enforce liability waivers, but a school district providing recreational programming may have lower liability risk than a third party due to the retention of certain governmental immunities under the South Carolina Tort Claims Act.

1. Liability Waivers

South Carolina courts have upheld exculpatory contracts in some instances, recognizing that

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[49] *Id.* § 15-78-120(a)(1).
[50] *Id.* § 15-78-120(a)(2).
[51] *Id.* § 15-78-120(b).
[52] *Id.* § 15-33-135.
[53] Gamble v. Stevenson, 406 S.E.2d 350, 354 (S.C. 1991).
[54] Atkinson v. Orkin Exterminating Co., 604 S.E.2d 385, 393 (S.C. 2004); *see also* Otis Elevator v. Hardin Constr. Co., 450 S.E.2d 41 (S.C. 1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); Rattenni v. Grainger, 379 S.E.2d 890 (S.C. 1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); Powers v. Temple, 156 S.E.2d 759 (S.C. 1967) (tortfeasor's liability for damages not reduced by disability payments from employer).

people should be free to contract as they choose.[55] But South Carolina courts recognize that considerations of public policy prohibit against contracting against liability for negligence in the performance of a duty of public service when a public duty is owed, when public interest is involved, or when the parties are not on roughly equal bargaining terms.[56] Exculpatory agreements signed by the parents or guardians of participants in after-hours recreational programs are unlikely to provide school districts with protection from liability. South Carolina courts are likely to see such recreational programs as situations where the public interest in involved. Accordingly, they are not likely to honor such exculpatory agreements.

2. Providing Access through Third Parties

South Carolina law does not appear to provide a third party with a comparative advantage over a school district in regard to liability risk posed by running a recreational program on school grounds. Both school districts and third parties would enjoy protection under South Carolina's recreational user statute if they opened school grounds for after-hours recreational use. School boards would be protected as landowners. Third parties would be protected as occupants or persons in control of the premises.[57]

School boards may be in an even better position with respect to liability risk since they have additional benefits of governmental immunity under the Tort Claims Act (see section A1 above). While it appears school boards would have more protection from liability than third parties, this is an important question that will be addressed in future research on joint venture agreements for public schools.

[55] Huckaby v. Confederate Motor Speedway, Inc., 281 S.E.2d 223, 224 (S.C. 1981) (barring appellant's cause of action against the racetrack owner since appellant voluntarily entered into the waiver and release agreement with respondent).
[56] Pride v. S. Bell Tel. & Tel. Co., 138 S.E.2d 155, 157 (S.C. 1964).
[57] S.C. CODE ANN. § 27-3-10 (2008).