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CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Jillian Relyea, a minor, )  
 through her parent guardian, )  
 Elaine Relyea, a single woman; )  
 William Relyea, a single man, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 United States of America, )  
 )  
 Defendant. )

CIV 00-2448 PHX VAM

O R D E R

This Federal Tort Claim Act case arises out of a car accident which occurred in the Prescott National Forest, Forest Service Road No. 104, on June 5, 1998. The Court has jurisdiction pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671, et seq. and 28 U.S.C. §1346(b). (Doc. 1). Defendant was served and answered. (Doc. 7). Both parties consented to disposition of the case by a Magistrate Judge. (Docs. 4, 5, 6). On January 31, 2002, defendant filed a Motion for Summary Judgment arguing that Arizona's Recreational Use Statute bars recovery by plaintiffs. (Docs. 28, 29). Plaintiffs filed a Cross Motion for Summary Judgment asking that the Court find the Arizona Recreational Use Statute, A.R.S. §33-1551, is not applicable. (Docs. 34, 35). The Motions are fully briefed and the Court heard oral argument on April 22, 2002.

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1 not disprove matters on which the opponent has the burden of proof  
2 at trial. Celotex, 477 U.S. at 323.

3 Furthermore, the party opposing summary judgment "may not  
4 rest upon the mere allegations or denials of [the party's]  
5 pleadings, but . . . must set forth specific facts showing that  
6 there is a genuine issue for trial." Rule 56(e), F. R. Civ. P.;  
7 Celotex, 477 U.S. at 324; Matsushita Elec. Indus. Co. v. Zenith  
8 Radio, 475 U.S. 574, 585-88 (1986); Brinson v. Lind Rose Joint  
9 Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). There is no issue  
10 for trial unless there is sufficient evidence favoring the non-  
11 moving party. If the evidence is merely colorable or if not  
12 significantly probative, summary judgment may be granted.  
13 Anderson, 477 U.S. at 249-50. However, "the evidence of the non-  
14 movant is to be believed and all justifiable inferences are to be  
15 drawn in his favor." Id. at 255.

#### 16 B. Federal Tort Claim Act Liability

17 The liability of the United States under the Federal Tort  
18 Claims Act is set forth in 28 U.S.C. §2674. This statute waives  
19 sovereign immunity and makes the United States liable respecting  
20 tort claims ". . .in the same manner and to the same extent as a  
21 private individual under like circumstances. . ." The United  
22 States is liable for personal injuries caused by the negligent or  
23 wrongful acts or omissions of employees of the United States,  
24 acting within the scope of their employment, ". . .under  
25 circumstances where the United States, if a private person, would  
26 be liable to the claimant in accordance with the law of the place  
27 where the act or omission occurred." 28 U.S.C. §3146(b)(1). These

1 statutes entitle the United States to assert defenses that would  
2 be available to an individual under state law. Therefore, state  
3 recreational use statutes are applicable in the context of the  
4 Federal Tort Claim Act. Proud v. United States, 723 F.2d 705 (9th  
5 Cir. 1984), cert. denied, 467 U.S. 1252 (1984); O'Neal v. United  
6 States, 814 F.2d 1285, 1287 (9th Cir. 1987).

7 Arizona's Recreational Use Statute is set forth at A.R.S.  
8 §33-1551. This statute provides:

9 A public or private owner, easement holder, lessee or  
10 occupant of premises is not liable to a recreational or  
11 educational user except upon a showing that the owner,  
12 easement holder, lessee or occupant was guilty of  
willful, malicious or grossly negligent conduct which  
was a direct cause of the injury to the recreational or  
educational user.

13 The statute defines "premises" as forest land, ". . .any  
14 other similar lands, wherever located, which are available to a  
15 recreational or educational user, including, but not limited to,  
16 . . .road, trail or structure on such lands." A.R.S. §33-1551C3.

17 A "recreational user" is defined as: ". . .a person to whom  
18 permission has been granted or implied without the payment of an  
19 admission fee or any other consideration to travel across or to  
20 enter upon premises to hunt, fish, trap, camp, hike, ride,  
21 exercise, swim or engage in similar pursuits. . ." A.R.S. §33-  
22 1551C4.

23 Defendant argues that because plaintiff, Jillian Relyea, was  
24 a "recreational user" plaintiffs would have to prove that the  
25 United States was guilty of ". . .willful, malicious or grossly  
26 negligent conduct which was the direct cause of the injury to the  
27 recreational or educational user." A.R.S. §33-1551(a). Defendant  
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1 further argues that because plaintiffs cannot show such willful,  
2 malicious or grossly negligent conduct it is entitled to judgment  
3 as a matter of law. Plaintiffs argue that Jillian Relyea, the  
4 injured minor, was not a recreational user within the meaning of  
5 this statute. However, plaintiffs concede that they have not  
6 alleged and cannot prove that the defendant acted willfully,  
7 maliciously or was grossly negligent and, if the Recreational Use  
8 Statute applies, defendant is entitled to judgment. (Doc. 34 at p.  
9 4). The Cross Motions for Summary Judgment turn on one issue  
10 alone, i.e. whether Jillian Relyea was a recreational user within  
11 the meaning of A.R.S. §33-1551.

12 C. Undisputed Facts

13 The following facts are undisputed (Docs. 29, 35):

14 1. At approximately 11:15 p.m. on June 5, 1998, Jillian  
15 Relyea was injured in a single car accident occurring on Forest  
16 Service Road No. 104, within the Prescott National Forest, Yavapai  
17 County, Arizona.

18 2. Forest Service Road No. 104 is part of the Forest Service  
19 Transportation System and is maintained by the Forest Service and  
20 opened to the public for use.

21 3. Forest Service Road No. 104 is the access road to the  
22 Mingus Mountain Campground within the Prescott National Forest.  
23 The Mingus Mountain Campground is accessed from State Route 89A to  
24 Forest Service Road No. 104. The Campground is located  
25 approximately four miles off State Highway 89A on Forest Service  
26 Road No. 104.

27 4. On Friday, June 5, 1998, plaintiffs Elaine and William  
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1 Relyea, with their three children (including Jillian), left their  
2 Phoenix residence and drove to the Mingus Mountain Campground.  
3 The Relyeas were at the campsite for no more than one hour. This  
4 is because while unhitching the family trailer, a utility drain  
5 pipe broke necessitating a replacement pipe. The family left the  
6 campsite and drove to Prescott Valley.

7 5. Plaintiffs dropped off Jillian and her two siblings at  
8 their cousins' house in Prescott Valley. The Relyea family  
9 planned to attend a graduation ceremony for one of the cousins  
10 later that day. The three children remained at their cousins'  
11 house in Prescott Valley, attended their cousin's graduation  
12 ceremony and a graduation party. The Relyea parents also attended  
13 the graduation and party.

14 6. Jillian's cousin had earlier invited her to spend the  
15 weekend with her. While at the graduation party, it was agreed  
16 that Jillian would remain with her cousins over the weekend in  
17 Prescott Valley. However, she needed some personal belongings  
18 (clothes and toiletries) she left in the trailer at the campsite.

19 7. The Relyea parents drove back to the campsite with the  
20 understanding that Jillian would appear later and retrieve her  
21 personal items.

22 8. Jillian Relyea (then 15 years old), with her cousin,  
23 Teresa Cheromiah (then 16 years old), and a friend, drove to the  
24 campsite, retrieved Jillian's personal items and left the  
25 campground. While traveling back to the state highway on Forest  
26 Service Road No. 104, Teresa Cheromiah was driving and Jillian was  
27 a front seat passenger. As they were traveling downhill on Forest  
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1 Service Road No. 104, Teresa lost control of the car, which left  
2 the dirt road, crashed and caused Jillian's injuries which are the  
3 subject of this lawsuit.

4 9. The Relyea family did not pay a fee for use of the Mingus  
5 Mountain Campground.

6 D. Legal Analysis

7 In construing A.R.S. §33-1551, the Court must construe the  
8 statute strictly and in accordance with the legislative intent.  
9 Herman v. City of Tucson, 197 Ariz. 430, 433-4, 4 P.3d 973, 976-7  
10 (2000). As set forth in Herman, "the legislative history of  
11 Arizona's Recreational Use Statute indicates that the Act was  
12 designed to encourage landowners to open certain lands to  
13 recreational users by limiting liability for injuries to those  
14 users." Herman, 197 Ariz. at 434, 4 P.3d at 977. In Herman, the  
15 Arizona Court of Appeals found the Recreational Use Statute to  
16 mean exactly what it says. That is, one is not a recreational  
17 user if he or she does not enter or use the park for one of the  
18 activities specified in the statute or for a similar type of  
19 recreational activity reasonably covered by the statute. Herman,  
20 197 Ariz. at 435, 4 P.3d at 978.

21 In Herman v. City of Tucson, the plaintiff went to a local  
22 park for the purpose of working at a concession. The local park  
23 was the scene of a fundraising music festival (Jamaicafest). A  
24 radio station was sponsoring the event and rented space to vendors  
25 for the day. Plaintiff was an employee of one of the vendors.  
26 While walking to her place of work, she stepped in a gopher hole  
27 and fell. She sued the City of Tucson and they claimed she was a  
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1 recreational user within the meaning of A.R.S. §33-1551. The  
2 Arizona Court of Appeals found that Jamaicafest was not a  
3 recreational use and that the plaintiff, who entered the park  
4 solely to work at the event, was not a recreational user. In  
5 reaching this conclusion, the Arizona Court pointed out that "the  
6 presence of Jamaicafest and Michele at Reed Park on the accident  
7 date clearly was not 'to hunt, fish, trap, camp, hike, ride,  
8 exercise, or swim.'"

9 Plaintiffs contend that because Jillian was not on Forest  
10 Service property on the night of the accident to "camp," she was  
11 not a recreational user. It is uncontested that plaintiff was at  
12 the camp earlier on June 5, 1998 with her family when the camp was  
13 set up. It is also uncontested that when she returned to the camp  
14 on the evening of June 5, 1998, it was for the purpose of  
15 obtaining her clothing and toiletries from the camp and then  
16 returning to her cousins' house in Prescott Valley. After leaving  
17 the camp to return to her cousins' home, the accident occurred on  
18 Forest Service Road No. 104.

19 Plaintiff argues that under the holding in Herman one must  
20 look at the subjective intent of the plaintiff. In fact, the  
21 Arizona Court specified that the entrant's subjective intent was  
22 not a controlling factor in determining whether the plaintiff was  
23 a recreational user. Id.

24 The Government argues that Herman does not control and that  
25 the language stating that to be a recreational user one must enter  
26 or use the park for the activities set forth in §33-1551(c)(4) is  
27 dicta. Instead, defendant argues it is the Forest Service's

1 intent that governs and once they bring themselves within the  
2 statute (by opening their property for recreational use without a  
3 fee), the plaintiffs' subjective intent is irrelevant. See Howard  
4 v. United States, 181 F.3d 1064, 1072-73 (9th Cir. 1999)  
5 discussing Hawaii's Recreational Use Statute and holding that  
6 landowner's intent governs.

7 Plaintiffs' subjective intent is not the determining factor  
8 in deciding whether someone is a recreational user. Herman v.  
9 City of Tucson, 311 Ariz. at 435, 4 P.3d at 978. Instead, Herman  
10 cites Linville v. City of Janesville, 184 Wis.2d 705, 516 N.W.2d  
11 427, 431 (1994) for the proposition that the "court should give  
12 primary consideration to the nature and purpose of the activity  
13 without being controlled by the property user's subjective  
14 intent." Id. In Linville v. City of Janesville, 184 Wis.2d 705,  
15 516 N.W.2d 427 (1994), the Court set forth the test for  
16 determining whether one is a recreational user under Wisconsin's  
17 statute. The test articulated requires consideration of the  
18 purpose and nature of the activity in addition to the user's  
19 intent. Linville, 184 Wis.2d at 716. The issue in Linville was  
20 similar to the issue before this Court because the Linville  
21 plaintiff was injured while scouting a fishing area in preparation  
22 for the actual fishing which was to take place the following day.  
23 The Linville Court found this activity to be preparatory to an  
24 activity listed in the Recreational Use Statute (fishing) and,  
25 therefore, plaintiff was a recreational user.

26 A search of Arizona case law construing the Arizona  
27 Recreational Use Statute does not reveal any case similar to the

1 circumstances and arguments raised in this matter. For example,  
2 in Smith v. Arizona Board of Regents, 195 Ariz. 214, 986 P.2d 247  
3 (1999), the Court found that the plaintiff was not a recreational  
4 user because the activity he engaged in (jumping on a trampoline)  
5 was not the kind of activity contemplated by the statute.

6 In the Herman case, the activity taking place on the land was  
7 held not to be a recreational activity because it had nothing to  
8 do with the specific list of activities set forth in the  
9 Recreational Use Statute. In addition, the plaintiff in that case  
10 entered the premises for the sole purpose of working at a  
11 concession. The Herman Court logically found that the plaintiff  
12 was not a recreational user for both these reasons. In the case  
13 at bar, Jillian Relyea traveled to the campground with her parents  
14 and set up camp earlier in the day. She returned to the  
15 campground to retrieve personal belongings left at the camp.  
16 Jillian Relyea, a minor, traveled to the campground because that  
17 was where her family was camping and because she left personal  
18 belongings at the camp which she needed to retrieve. The activity  
19 that first brought Jillian Relyea to the forest land was camping.  
20 The activity that caused her to return to the forest was visiting  
21 the campsite. Obviously, the Recreational Use Statute applies to  
22 people using the roads to travel to and from their campsites.  
23 Jillian's presence on Forest Service Road No. 104 was directly  
24 related to camping activities.

25 If the Court were to construe the statute in the way argued  
26 by plaintiffs, activities directly related to and necessitated by  
27 hunting, fishing, trapping, camping, hiking, riding, exercising,  
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1 swimming or similar pursuits would not be recreational uses. As  
2 pointed out by the defendant, if plaintiffs' position were  
3 correct, when a camper, hiker, hunter, fisherman, etc.  
4 inadvertently left a piece of personal property in the forest and  
5 returned to retrieve it, on the return trip that person would not  
6 be a recreational user. To construe the statute as narrowly as  
7 plaintiffs urge would completely undermine the purpose for the  
8 statute, i.e. to protect those who open their land to others for  
9 recreational use, without a fee, from liability based on ordinary  
10 negligence. Mattice v. U.S. Department of Interior, 969 F.2d 818,  
11 821 (9th Cir. 1992) (discussing California's Recreational Use  
12 Statute). On the other hand, to construe the statute as applying  
13 to everyone who enters the "premises" for whatever purpose is too  
14 broad. This Court reaches the conclusion that activities, such as  
15 retrieving property left at one's campsite, which are related to  
16 hunting, fishing, camping, hiking (as set forth in A.R.S. §33-  
17 1551) are recreational uses within the statute and that Jillian  
18 Relyea was a recreational user.

19 Because there are no genuine issues of material fact  
20 precluding summary judgment and the Court finds that defendant is  
21 entitled to judgment as a matter of law, defendant's Motion for  
22 Summary Judgment is granted.

23 IT IS THEREFORE ORDERED granting defendant's Motion for  
24 Summary Judgment. (Doc. 28).

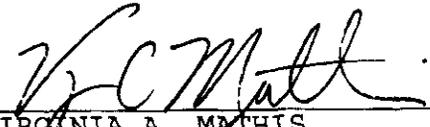
25 IT IS FURTHER ORDERED denying plaintiff's Motion for Summary  
26 Judgment. (Doc. 34).

27 IT IS FURTHER ORDERED that the Clerk of the Court shall enter  
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judgment for defendant.

DATED this 10<sup>th</sup> day of May, 2002.

  
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VIRGINIA A. MATHIS  
United States Magistrate Judge