STATE OF NEW HAMPSHIRE
SUPREME COURT

JANET BISCEGLIA

v.

STATE OF NEW HAMPSHIRE; AND
NEW HAMPSHIRE DEPARTMENT OF
NATURAL AND CULTURAL RESOURCES

No. 2021-0102

APPEAL FROM THE ROCKINGHAM COUNTY
SUPERIOR COURT
PURSUANT TO SUPREME COURT RULE 7

BRIEF OF THE APPELLANT JANET BISCEGLIA

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Oral Argument by: Matthew B. Cox
August 5, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constituional Provisions

Statutes

QUESTIONS PRESENTED FOR REVIEW

1. **Did the trial court err in ruling that "recreational use" immunity bars a suit by a bystander plaintiff, who, the parties agree, had never entered upon or used the defendant's premises in any way?**

   This issue was raised by the Appellant in various pleadings, including its Objection to the Defendant's Motion to Dismiss dated October 21, 2019, and its Motion for Reconsideration dated November 23, 2020.

2. **Did the trial court err in ruling that "recreational use" immunity is available to a defendant whose property consists of the ruins of a historic fort and thus is not "recreational", but rather purely historic or educational, in character?**

   This issue was raised by the Appellant in various pleadings, including its Objection to the Defendant's Motion to Dismiss dated October 21, 2019, and its Motion for Reconsideration dated November 23, 2020.

3. **Did the trial court's construction of the "recreational use" statute, which abrogates the plaintiff's right to a tort recovery without any quid pro quo, violate Article 1, Part 14 of the New Hampshire Constitution?**

   This issue was raised by the Appellant in its Motion for Reconsideration dated November 23, 2020. See LaVallie v. Simplex Wire & Cable Co., 135 N.H. 692, 697 (1992) (constitutional issue raised for the first time in a motion for reconsideration is nevertheless adequately preserved for appeal).

4. **Did the trial court's construction of the "recreational use" statute, which abrogates the plaintiff's right to a tort recovery without any quid pro quo, violate the plaintiff's constitutional right to equal protection?**

   This issue was raised by the Appellant in its Motion for Reconsideration dated November 23, 2020. See LaVallie v. Simplex Wire & Cable Co., 135 N.H. 692, 697 (1992) (constitutional issue raised for the first time in a motion for reconsideration is nevertheless adequately preserved for appeal).

STATUTES INVOLVED

New Hampshire Constitution

Part I, Article 2. [Natural Rights.] All men have certain natural, essential, and inherent rights among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

New Hampshire Constitution

Part I, Article 12. [Protection and Taxation Reciprocal.] Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this State controllable by any other laws than those to which they, or their representative body, have given their consent.

New Hampshire Constitution

Part 1, Article 14. [Legal Remedies to be Free, Complete, and Prompt.] Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.
June 2, 1784

RSA 508:14 Landowner Liability Limited.

I. An owner, occupant, or lessee of land, including the state or any political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage.

II. Any individual, corporation, or other nonprofit legal entity, or any individual who performs services for a nonprofit entity, that constructs, maintains, or improves trails for public recreational use shall not be liable for personal injury or property damage in the absence of gross negligence or willful or wanton misconduct.

III. An owner of land who permits another person to gather the produce of the land under pick-your-own or cut-your-own arrangements, provided said person is not an employee of the landowner and notwithstanding that the person picking or cutting the produce may make remuneration for the produce to the landowner, shall not be liable for personal injury or property damage to any person in the absence of willful, wanton, or reckless conduct by such owner.

RSA 212:34 Duty of Care.

I. In this section:

(a) "Charge" means a payment or fee paid by a person to the landowner for entry upon, or use of the premises, for outdoor recreational activity.

(b) "Landowner" means an owner, lessee, holder of an easement, occupant of the premises, or person managing, controlling, or overseeing the premises on behalf of such owner, lessee, holder of an easement, or occupant of the premises.

(c) "Outdoor recreational activity" means outdoor recreational pursuits including, but not limited to, hunting, fishing, trapping, camping, horseback riding, bicycling, water sports, winter sports, snowmobiling as defined in RSA 215-C:1, XV, operating an OHRV as defined in RSA 215-A:1, V, hiking, ice and rock climbing or bouldering, or sightseeing upon or removing fuel wood from the premises.

(d) "Premises" means the land owned, managed, controlled, or overseen by the landowner upon which the outdoor recreational activity subject to this section occurs.

(e) "Ancillary facilities" means facilities commonly associated with outdoor recreational activities, including but not limited to, parking lots, warming shelters, restrooms, outhouses, bridges, and culverts.

II. A landowner owes no duty of care to keep the premises safe for entry or use by others for outdoor recreational activity or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in paragraph V.

II-a. Except as provided in paragraph V, a landowner who permits the use of his or her land for outdoor recreational activity pursuant to this section and who does not charge a fee or seek any other consideration in exchange for allowing such use, owes no duty of care to persons on the premises who are engaged in the construction, maintenance, or expansion of trails or ancillary facilities for outdoor recreational activity.

III. A landowner who gives permission to another to enter or use

the premises for outdoor recreational activity does not thereby:
(a) Extend any assurance that the premises are safe for such purpose;
(b) Confer to the person to whom permission has been granted the legal status of an invitee to whom a duty of care is owed; or
(c) Assume responsibility for or incur liability for an injury to person or property caused by any act of such person to whom permission has been granted, except as provided in paragraph V.
IV. Any warning given by a landowner, whether oral or by sign, guard, or issued by other means, shall not be the basis of liability for a claim that such warning was inadequate or insufficient unless otherwise required under subparagraph V(a).
V. 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;
(b) For injury suffered in any case where permission to enter or use the premises for outdoor recreational activity was granted for a charge other than the consideration if any, paid to said landowner by the state;
(c) When the injury was caused by acts of persons to whom permission to enter or use the premises for outdoor recreational activity was granted, to third persons as to whom the landowner owed a duty to keep the premises safe or to warn of danger; or
(d) When the injury suffered was caused by the intentional act of the landowner.
VI. Except as provided in paragraph V, no cause of action shall exist for a person injured using the premises as provided in paragraph II, engaged in the construction, maintenance, or expansion of trails or ancillary facilities as provided in paragraph II-a, or given permission as provided in paragraph III.
VII. If, as to any action against a landowner, the court finds against the claimant because of the application of this section, it shall determine whether the claimant had a reasonable basis for bringing the action, and if no reasonable basis is found, shall order the claimant to pay for the reasonable attorneys' fees and costs incurred by the landowner in defending against the action.
VIII. It is recognized that outdoor recreational activities may be

hazardous. Therefore, each person who participates in outdoor recreational activities accepts, as a matter of law, the dangers inherent in such activities, and shall not maintain an action against an owner, occupant, or lessee of land for any injuries which result from such inherent risks, dangers, or hazards. The categories of such risks, hazards, or dangers which the outdoor recreational participant assumes as a matter of law include, but are not limited to, the following: variations in terrain, trails, paths, or roads, surface or subsurface snow or ice conditions, bare spots, rocks, trees, stumps, and other forms of forest growth or debris, structures on the land, equipment not in use, pole lines, fences, and collisions with other objects or persons.

2019 Nebraska Revised Statutes
Chapter 37 - GAME AND PARKS
37-729. Terms, defined.

For purposes of sections 37-729 to 37-736:

(1) Land includes roads, water, watercourses, private ways, and buildings, structures, and machinery or equipment thereon when attached to the realty;

(2) Owner includes tenant, lessee, occupant, or person in control of the premises;

(3) Recreational purposes includes, but is not limited to, any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, waterskiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using land for purposes of the user; and

(4) Charge means the amount of money asked in return for an invitation to enter or go upon the land.

STATEMENT OF THE CASE AND FACTS

Fort Constitution, a dilapidated military fort built in 1808, is located in New Castle, New Hampshire, and is operated by the defendants, without charge, as a historic site. On the afternoon of June 10, 2018, bricks from an upper level of the deteriorating fort broke free and fell onto an abutting property, striking plaintiff Janet Bisceglia in multiple parts of her body and causing serious injuries including a traumatic brain injury and multiple leg fractures.

It is critical to note that Ms. Bisceglia was a bystander who never had any connection to Fort Constitution. Neither she nor any members of her group entered upon or used the Fort Constitution grounds in any way. On the date of the incident, Ms. Bisceglia was with family members for the purpose of visiting an entirely different New Castle property. When she was struck, Ms. Bisceglia was standing with her granddaughter on property owned by the United States Coast Guard.

The defendants filed a dispositive pleading, initially characterized as a motion to dismiss, in September of 2019. The plaintiff timely objected, and a hearing was scheduled before Judge Schulman on February 3, 2020. At the hearing, Judge Schulman noted that there appeared to be facts in dispute, and that in any event the matter could not be processed as a motion to dismiss. Accordingly, Judge Schulman converted the defendants' disposition motion to a motion for summary judgment, and afforded the parties additional time to update their pleadings and provide a stipulated statement of facts. See Add. at 37.

Following a hearing on September 21, 2020, Judge Honigberg granted the motion for summary judgment by order dated November 11, 2020. See Add. at 38. The plaintiff filed a timely motion for reconsideration dated November 23, 2020, which Judge Honigberg denied by order dated February 15, 2021. See Add. at 44. The plaintiff filed this appeal on March 15, 2021.

STANDARD OF REVIEW

The construction of statutes conferring tort immunity is a question of law that this Court reviews *de novo*. *Estate of Gordon-Couture v. Brown,* 152 N.H. 265, 876 A.2d 196 (2005). As to the constitutional challenges at issue, tort rights are considered important substantive rights, and thus are reviewed under an elevated standard of constitutional scrutiny - the challenged legislation must be substantially related to an important governmental objective. Carson v. Maurer, 120 N.H. 925 (1980), *overruled on other grounds by* Cmty. Res. for Justice v. City of Manchester, 154 N.H. 748 (2007).

SUMMARY OF THE ARGUMENT

This Court presumes, in any case challenging the applicability of recreational use immunity, that the legislature did *not* intend to immunize the suit in question. By its express terms, the recreational use statute was intended to apply to individuals who entered upon and used the premises, which the parties agree did not occur in the case of the plaintiff herein, who was a bystander standing on abutting property. This Court should confirm that recreational use immunity does not bar a claim by a plaintiff who has never entered upon or used the defendant's premises, and thus has received no *quid pro quo*.

A separate issue exists as to whether the defendant in question is actually eligible to claim recreational use immunity, and often this Court has answered that question in the negative. Here, both the statutes themselves and the prior precedent of this Court make it clear that recreational use immunity was intended to apply to landowners offering outdoor recreational pursuits such as hiking, rock climbing, snowmobiling, etc., none of which are offered on the defendant's premises, and there is no indication that the legislature intended the statute to apply to historic or archeological sites like Fort Constitution. Especially in light of the well-established rule of construction requiring this Court to presume that the legislature did *not* intend to confer tort immunity in a given context, this Court should not extend recreational use immunity to historic sites like Fort Constitution.

The plaintiff's third argument is that the recreational use statute, at least as applied to the circumstances of a non-user such as herself, would

violate Part I, Article 14 of the New Hampshire Constitution, as the immunity provisions impose an unreasonable restriction on her private tort rights, with no corresponding *quid pro quo*. As such, the statute must be declared unconstitutional as applied.

The plaintiff's fourth argument is that the tort immunity provisions of the recreational use statute, at least as applied to a non-entrant and non-user of the subject property, violate the equal protection clause of the New Hampshire constitution, as barring the claim of a bystander does not bear a substantial relationship to the stated purposes of the statute.

ARGUMENT

I. **Did the trial court err in ruling that "recreational use" immunity bars a suit by a bystander plaintiff, who, the parties agree, had never entered upon or used the defendant's premises in any way?**

In the 1960s, in an effort to promote greater access to outdoor recreation, many states including New Hampshire adopted "recreational use" legislation. See Estate of Gordon-Couture v. Brown, 152 N.H. 265 (2005); see also RSA 508:13, RSA 212:34. The underlying hypothesis was that landowners might be reluctant to open their land to the public for outdoor recreational activity (hiking, bicycle riding, rock climbing, snowmobiling, horseback riding, etc.) out of a concern that such activities can involve injuries, and injured individuals might then seek to sue the landowner. Id. Accordingly, the theory was that if recreational users were precluded from bringing negligence claims against the landowner, more landowners might make their land available for public recreation. Id. The resulting statutory scheme in New Hampshire was considered a traditional *quid pro quo* – recreating members of the public gained the opportunity to exercise on land that might otherwise be inaccessible to them, but they lost certain tort rights available at common law. Id.

It is important to understand that the New Hampshire recreational use framework does not grant blanket immunity to landowners. See RSA 508:14(I) (no landowner immunity for intentionally caused injuries); RSA 212:34 (V) (no landowner immunity for injuries caused by malicious conduct). Even the limited immunity conferred by the New Hampshire

statutes is subject to several conditions and requirements, including that the landowner's grant of public access must be free of charge, that the public must be entering for recreational activities (or as spectators of the recreational activities), and that only the entity controlling access to the property can claim immunity. Id.

For these reasons, this Court has repeatedly rejected attempts by ineligible defendants to claim recreational use immunity in the face of a valid personal injury claim. Estate of Gordon-Couture v. Brown, 152 N.H. 265 (2005) (no recreational use immunity for landowner who opened property only to invited guests and not the general public); Soraghan v. Mt. Cranmore Ski Resort, Inc., 152 N.H. 399 (2005) (no recreational use immunity for landowner which charges its patrons); Kenison v. Dubois, 152 N.H. 448 (2005) (no recreational use immunity for snowmobile club that participated in recreational activities on the subject property but did not have the right to grant or deny access).

It is significant to note that the defendant in Gordon-Couture attempted to suggest that the purpose of the New Hampshire recreational use statutes was to confer blanket tort immunity on landowner defendants – essentially the precise rationale advanced by the defendant and adopted by the trial court in the case at hand – but this Court explicitly rejected that position. Gordon-Couture, 152 N.H. at 272. In short, it is clear that the New Hampshire legislature intentionally elected to confer only limited immunity to landowners in this context, and this Court has been vigilant in precluding landowner attempts to expand immunity beyond the limited scope of the statute.

In assessing the scope of recreational use immunity in New Hampshire, this Court is the final arbiter of legislative intent, and its analysis is *de novo*. Gordon-Couture, 152 N.H. at 266. Like any immunity statute which seeks to abridge a plaintiff's common law tort rights, the New Hampshire recreational use statute must be construed narrowly. Id. Accordingly, this Court begins its analysis with the presumption that the legislature did *not* intend to abolish the tort rights of the plaintiff in question. Id. This presumption against tort immunity takes on added significance when the Court is construing an immunity statute which, like the one in question here, has been criticized for "basic drafting problems". Id. at 268-269. In assessing whether or not a personal injury defendant has properly invoked recreational use immunity, this Court considers all evidence and inferences in the light most favorable to the plaintiff. Id. at 266.

In the present case, the defendant seeks to invoke recreational use immunity despite it being undisputed that neither Janet Bisceglia nor anyone in her party ever entered upon or used its premises. But as noted above, it is clear that the intent of the legislature, consistent with the *quid pro quo* philosophy, was to confer immunity in the context of individuals injured after entering the landowner's property and using it for recreational purposes. Id. at 267. Indeed, in its thorough review of the New Hampshire recreational use statute in Gordon-Couture, this Court repeatedly described the proscribed injury claims as being those of the recreational users who were injured after entering onto the landowner's property:

- Describing the model legislation as limiting suit by "persons entering thereon";
- Declaring that the landowner has no duty to keep the premises safe for entry or use by others for recreational purposes;
- Explaining that landowners would have no liability for negligence claims by members of the public "attendant upon the use of their land";
- Stating that immunity extends to those members of the general public who use private property for recreational purposes.

Id. at 269 (emphasis supplied); see also Coan v. N.H. Dept. of Envtl. Serv., 161 N.H. 1, 113 (2010) (landowner entitled to immunity "as long as the injured party used the landowner's land...") (emphasis supplied).

In describing the immunity as applying to injury claims by individuals who had physically entered upon and used the landowner's property, this Court's characterizations in Gordon-Couture are hardly surprising – indeed the two statutes themselves explicitly contain these same types of references:

- immunity applies to claims by people using the land for recreational purposes;
- no duty to keep the property safe for "entry or use by others";
- no duty to "persons entering for such [recreational] purposes";
- landowner not responsible "to the person to whom permission [to enter and recreate] has been granted".

See RSA 508:14; RSA 212:34 (emphasis supplied).

In light of the multiple statutory references explaining that the immunity applies to individuals who "use" or "enter upon" the land in question, it bears mentioning that in matters of statutory construction, this Court does not dismiss certain words or phrases as mere surplusage; on the contrary, this Court presumes that the legislature intended to give substantive meaning to every word. O'Brien v. N.H. Democratic Party, 166 N.H. 138 (2014). "We interpret statutes to give meaning to every word and phrase". Id. at 142. Accordingly, one must conclude that it was with a clear intent and purpose that the New Hampshire legislature, in the context of drafting its recreational use statutes, described the immunity feature as applying to claims by persons entering the property and using the property. By contrast, in arguing that the immunity provisions apply to a bystander who never entered upon or used the landowner's property, the defendant effectively argues that the statutory references to persons entering upon and using the property should be dismissed as mere surplusage, a position that is directly repugnant to this Court's mandate that a purposeful meaning be ascribed to every word and phrase.

In its arguments to the trial court, the defendant attempted to characterize this Court's decision in Coan as somehow supportive of its contention that recreational use immunity extends to non-entrants and non-users. But as noted above, the Coan Court stated just the opposite – that recreational use immunity applies "as long as the injured party used the landowner's land...". Coan v. N.H. Dept. of Envtl. Serv., 161 N.H. at 113 (2010) (emphasis supplied). Indeed, although Coan did involve a dispute as to whether the body of water in which the plaintiffs drowned was technically part of the state's "land" (thus positing the question of whether

the statutory references to "land" were intended to include bodies of water), it was conceded in Coan that the plaintiffs had entered upon and used the defendant's land. Id. at 114 ("The boys in this case gained access to the water by using land owned by the State.") (emphasis supplied). Accordingly, the defendant's reliance on Coan is entirely misplaced.

Put simply, in the setting of a statute that is plainly focused on injuries which occur during recreational activity on the landowner's premises, and against the backdrop of the well-established presumption against any construction that yields tort immunity, this Court should not extend recreational use immunity to the context of a bystander plaintiff who, the parties agree, had never entered upon or used the defendant's property in any way, a context far beyond any scenario ever contemplated by the framers.

2. Did the trial court err in ruling that "recreational use" immunity is available to a defendant whose property consists of the ruins of a historic fort and thus is not "recreational", but rather purely historic or educational, in character?

Much in the same way that an off-site bystander is not the type of *plaintiff* contemplated by the drafters as discussed in the previous section, a small historical site like Fort Constitution is not the type of *defendant* that the legislature was contemplating when it established recreational use immunity. As noted above, New Hampshire's recreational use statutes are, by their express terms, focused on the fairly narrow subject of promoting

outdoor recreation, not on broader concepts of history, education, or landowner liability generally. Gordon-Couture, 152 N.H. at 266.

The specific examples of outdoor recreation provided in New Hampshire's recreational use statute are exactly what any New Hampshire citizen would envision – traditional outdoor pursuits such as hiking, biking, horseback riding, rock climbing, camping, snowmobiling, etc. See RSA 508:14; RSA 212:34. The statutes also provide examples of concepts "ancillary to" the outdoor recreational pursuits, and once again the character of these examples, which include warming shelters and outhouses, serves only to further solidify the notion that the legislature was focused on land that was opened for activities like hiking, rock climbing, snowmobiling, etc. See RSA 212:34(I)(e). It is beyond dispute that Fort Constitution, a tiny historical site which accommodates none of the outdoor activities listed above (even walking a dog is prohibited), is certainly not the image that comes to mind when one ponders the subject of "outdoor recreation".

In addition to the many instances in which this Court has appropriately rejected attempts by landowner defendants to claim recreational use immunity under the specific statute at issue here, see Gordon-Couture, 152 N.H. 265 (no recreational use immunity for landowner who opened property only to invited guests and not the general public); Soraghan, 152 N.H. 399 (no recreational use immunity for landowner which charges its patrons); Kenison,152 N.H. 448 (no recreational use immunity for snowmobile club that participated in recreational activities on the subject property but did not have the right to

grant or deny access), this Court has been equally circumspect in rejecting improper attempts by landowner defendants to claim immunity in the analogous context of New Hampshire's ski immunity statute. See Sweeney v. Ragged Mountain Ski Area, Inc., 151 N.H. 239 (2004) (claim for personal injuries sustained while snow tubing not barred by statute immunizing defendant from claims arising out of alpine or nordic skiing). These repeated rejections of landowner immunity, in the context of at least two distinct types of tort immunity statutes, demonstrate a clear commitment on the part of this Court to carefully examine whether a given defendant is truly entitled to the immunity it claims.

As noted in the previous section, any statute conferring tort immunity must be construed narrowly, and thus in its *de novo* analysis this Court starts with a presumption that the legislature did *not* intend to immunize the conduct of the defendant in question. Gordon-Couture, 152 N.H. at 266. Thus, expressed in the factual context of the case at hand, this Court must start with a presumption that Fort Constitution is *not* the type of recreational landowner immunized by the statute. The question then becomes whether the presumption against immunity can be overcome by statutory language which evinces a clear intent to include landowners which are primarily historical or educational in nature. But again, in the context of statutes which are focused on "outdoor recreation" and which explicitly describe traditional nature activities like hiking, rock climbing, and snowmobiling, instead of overcoming the presumption against immunity, the statutory language cuts decidedly in the opposite direction. In the end, there is simply no basis for concluding that the legislature

intended to include a small historic site like Fort Constitution within the purview of a statute designed to focus on landowners offering traditional outdoor recreational activities like hiking and rock climbing.

The defendant's argument for including a historic site in the recreational immunity statute becomes even further strained when one considers that the N.H. legislature, realizing that the fundamental focus on outdoor recreation was quite limited, did piggy-back certain additional, situation-specific immunity provisions onto the recreational use statute. These additional provisions, which are designed to confer immunity in settings other than the target context of landowners who permit the public to engage in outdoor recreation free of charge, include:

- Immunity for individuals who maintain hiking trials (even if they are not the landowner); see RSA 508:14(II); RSA 212:34(VI);
- Immunity for landowners selling pick-your-own produce (an exception to the rule excluding landowners who charge a fee); see RSA 508:14(III); and
- Immunity for landowners involved in certain fuel wood removal operations. See RSA 212:34(I)(c).

Accordingly, the legislature has clearly recognized that the original "outdoor recreation" provisions were very limited in scope and wouldn't include certain defendants, and thus the legislature added specific provisions to expand the coverage of the immunity provisions to those other contexts. The fact that the legislature added separate provisions to specially address pick-your-own produce concerns and fuel wood operations confirms that the immunity provisions were otherwise limited to

properties offering traditional "outdoor recreation", and it rules out the argument of the defendant herein – that the recreational use statute was intended to confer broad-based tort immunity to all landowners. Indeed, if the legislature intended to include historic sites like Fort Constitution in the category of entities immunized from tort liability, the inescapable conclusion is that it would have specifically added such landowners to the statutory framework, as it did in the setting of landowners offering pick-your-own produce and fuel wood removal.

It is striking, in the context of a statute which provides such a comprehensive list of specific examples of outdoor recreation ("hiking", "rock climbing", "snowmobiling", "camping", "warming shelters", etc.), to note the utter absence of any terms such as "ruins", "forts", "educational sites", "historic sites", "archeological sites", "scientific sites", etc., that would suggest the drafters had any intention of including historic sites. At the very least, the overall lack of clarity in these poorly drafted statutes (see Gordon-Couture, 152 N.H. at 268-269) makes it impossible for the defendant to overcome the presumption that the legislature intended that historic sites would *not* be protected by recreational use immunity.

Another important insight into the legislature's intent is afforded by its actions after this Court's 2005 decision in Kenison. It was in response to Kenison that the legislature added 508:14(II) the following year, thus expanding the immunity provision to include individuals or entities who maintain nature trails (even if they don't own the trails or control access to them). In the context of the present case, the Kenison amendment is notable for what the legislature did *not* do – it did not seek to enact broad-based

landowner immunity, nor was there any effort to expand the immunity to historic sites, archeological sites, educational sites, or scientific sites.

Defendants have sought ostensible support in the reality that certain states other than New Hampshire have specifically included historical and archeological sites within their statutory definitions of recreational use. See, e.g. Neb. Rev. St. §37-729 ("Recreational purposes includes, but is not limited to, any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, waterskiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using land for purposes of the user.") (emphasis supplied). But again, rather than enhancing the defendant's position, examples like the Nebraska statute serve only to highlight the conspicuous absence of any such language in the New Hampshire statute. The recreational use statutes of this state have been in place for decades, and the legislature, having observed the many reported decisions in which this Court has refused to extend the immunity beyond the express confines of the statute as written, has expanded the traditional notion of recreational use only in narrow, case-specific instances. See, e.g., RSA 508:14(II). Put simply, if the New Hampshire legislature truly wanted to include historic and archeological sites in the immunity statute, one wonders why the legislature wouldn't simply say that, as certain other states have done.

In the final analysis, in regard to the statutory definitions relating to recreational use immunity as provided by the New Hampshire legislature, what is crystal clear is: (1) that the New Hampshire legislature provided a

long list of examples of the type of landowner activities intended to trigger recreational use immunity; (2) that all of the examples relate to traditional nature activities; and (3) that none of the examples relate to historic sites, ancient military forts, or archeological ruins. Especially in light of the well-established rule of construction requiring this Court to presume that the legislature did *not* intend to confer tort immunity in a given context, this Court should not extend recreational use immunity to historic sites like Fort Constitution.

3. Did the trial court's construction of the "recreational use" statute, which abrogates the plaintiff's right to a tort recovery without any quid pro quo, violate Article 1, Part 14 of the New Hampshire Constitution?

The New Hampshire constitution guarantees each citizen a remedy for "all injuries he may receive in his person". See N.H. CONST., Part I, Art. 14. In the context of claims for personal injury, the purpose of this provision is to make civil remedies available and to guard against arbitrary and discriminatory infringements upon access to courts. Ocasio v. Fed. Express Corp.,162 N.H. 436 (2011), *citing* DeBenedetto v. CLD Consulting Eng'rs, 153 N.H. 793 (2006). As such, in circumstances where a statutory provision would abridge traditional tort rights, this Court has carefully reviewed whether the statutory provision in question passes constitutional muster under Part I, Article 14. Carson v. Maurer, 120 N.H. 925 (1980), *overruled on other grounds by* Cmty. Res. for Justice v. City of Manchester, 154 N.H. 748 (2007).

This Court has repeatedly held that an injured party's right to a remedy, as established by Part I, Article 14, is an important substantive right. Id. at 931-932; see also DeBenedetto, 153 N.H. 793. Accordingly, this Court reviews tort immunity issues under an elevated standard – the challenged legislation must be substantially related to an important governmental objective. Cmty. Res. for Justice v. City of Manchester, 154 N.H. 748 (2007). If the immunity statute imposes unreasonable restrictions on private tort rights, it cannot pass constitutional muster. Carson v. Maurer, 120 N.H. 925 (1980). The burden to demonstrate that the challenged legislation meets this test rests with the defendant. Id.

The statute may be challenged in its entirety, or as applied to the case at bar, or both. See Huckins v. McSweeney, 166 N.H. 176 (2014). Here, the plaintiff raises an "as applied" constitutional challenge to the New Hampshire recreational use statutes – the plaintiff does not contend that the statutes would be unconstitutional in the context of plaintiffs injured after entering upon and using the defendant's premises, only that the statutes are unconstitutional as applied to a case like hers where the injured party had never entered upon or used the defendant's premises.

The New Hampshire recreational use statute is a classic *quid pro quo* statute. Gordon-Couture, 152 N.H. at 269. The constitutional justification for the immunity provisions of such a statute is the *quid pro quo* itself – it confers a benefit on the very class of persons whose tort rights are being curtailed. See Carson, 120 N.H. at 938. While the precise level of economic benefit of the *quid pro quo* can be modified without automatically rendering the statute unconstitutional, the legislation cannot constitutionally

subject an affected class to an outright termination of the *quid pro quo*. See Petition of Abbott, 139 N.H. 412 (1995).

Applying these constitutional principles to the facts and circumstances of the present case, the question is whether precluding the tort claims of non-users is substantially related to an important government objective. Even if one were to assume the constitutionality of the second aspect of the test – that promoting outdoor recreation is "an important government objective" – there is no argument that eviscerating the tort rights of non-users is "substantially related" to that objective. Indeed, neither the statutes themselves nor the legislative history of the model act appear to contain any discussion whatsoever that would suggest *any* relationship, substantial or otherwise, between the government's objective and the potential injury claims of citizens who have never entered upon or used the property. Although such a relationship might certainly exist for the class of persons who recreate upon land that would otherwise be inaccessible to them, there is clearly no *quid pro quo* for non-entrants who have never enjoyed the benefits of recreating upon the defendant's land.

In short, there is simply no relationship between the promotion of open land for outdoor recreation and the elimination of the common-law tort rights of individuals such as the plaintiff who have never used or entered upon that land. At least as applied to the circumstances of a non-user such as the plaintiff herein, the immunity statute imposes an unreasonable restriction on the private tort rights, with no corresponding *quid pro quo*. As such, the defendant cannot meet its burden, and the statute must be declared unconstitutional as applied.

4. Did the trial court's construction of the "recreational use" statute, which abrogates the plaintiff's right to a tort recovery without any quid pro quo, violate the plaintiff's constitutional right to equal protection?

Under both the New Hampshire constitution and the United States constitution, every New Hampshire citizen is guaranteed equal protection under the law. Trovato v. DeVeau, 143 N.H. 523 (1999). This Court typically analyzes equal protection challenges under the New Hampshire constitution, since the federal constitution offers no greater protection. Id. The constitutional guarantee of equal protection extends to the specific context of statutes that would purport to eliminate tort rights. Id.; see also Petition of Abbott, 139 N.H. 412 (1995).

From an analytical standpoint, it bears mentioning that certain of this Court's equal protection cases analyze tort statutes under Part I, Article 14, as discussed in the previous section, while others analyze such questions under Part I, Articles 2 and 12. Id.; see also Trovato, 143 N.H. at 525. Indeed, there is some indication that these constitutional issues, while arising under separate constitutional provisions and sometimes being placed in separate academic categories, may actually present the same legal issue. Id. (describing Part 1, Article 14 as "essentially an equal protection provision"). Nevertheless, where a tort statute would purport to treat classes of similarly situated citizens differently, this Court does appear to engage in an equal protection review separate and distinct from the Part I, Article 14 review. Id. at 530; Abbott, 139 N.H. at 417.

The first question in an equal protection analysis is whether the statute in question treats similarly situated persons differently. Id. It is axiomatic that a New Hampshire tort victim hit by falling debris from a structure would normally be entitled to advance a claim alleging negligence on the part of the entity which owns or operates the structure. See, e.g., Sayers v. Ralston Tree Service Inc., 104 N.H. 433 (1963) (tort victim entitled to sue for injuries after being hit by falling branch caused by careless cutting operation). If the defendant in such an action has failed to act with due care in regard to falling debris, and if falling debris is found to be the proximate cause of the plaintiff's injuries, the plaintiff will be permitted to recover. Id.

In light of the above, it is clear that the statute, as applied, results in the disparate treatment of similarly situated persons – citizens injured by a hazard emanating from a purely private abutter have a remedy, whereas those injured by a hazard emanating from a "recreational use" abutter have no remedy. The issue then becomes whether the disparate treatment is constitutionally permissible. Abbott, 139 N.H. at 418. Here, the distinction is arbitrary and does not have any substantial relationship to the purpose of the recreational use statute. Indeed, there is no indication that either the drafters of the model act or the New Hampshire statute even considered the context of injuries to a non-entrant or non-user. Likewise, there can be no credible argument that affording a remedy to a non-entrant – quite obviously a rare factual scenario – would somehow have any effect, much less the substantial one required by the constitutional test, on the willingness of landowners to open their land for public recreation.

Accordingly, this Court should hold that the tort immunity provision of the recreational use statute, at least as applied to a non-entrant and non-user of the subject property, violates the equal protection clause of the New Hampshire constitution.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Someday the legislature may determine that historic and archeological sites should be granted immunity from traditional tort suits, as it concluded decades ago in the context of outdoor recreational sites. But unless and until the legislature explicitly makes that determination, this Court should preserve the traditional tort rights afforded to New Hampshire citizens by our state's constitution.

Ms. Bisceglia respectfully requests fifteen minutes of oral argument before the full Court. Matthew B. Cox will present oral argument for the appellant.

Respectfully submitted,

JANET BISCEGLIA

By her Attorneys,

BURNS, BRYANT, COX, ROCKEFELLER & DURKIN, PA

Dated: August 5, 2021 By: */s/ Matthew B. Cox*

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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Rule 16(3)(i) because copies of the appealed decisions are appended to this brief; Rule 16(11)

because this brief contains less than 8000 words, exclusive of pages containing the table of contents, table of authorities, text of pertinent statutes, and addendum; and Rule 26(7) because, on this 5th day of August, 2021, copies of this brief were forwarded to Anthony J. Galdieri, Esq. and Samuel Garland, Esq., counsel of record for defendants, via the Court's electronic filing system's electronic services.

Dated: August 5, 2021 By: */s/ Matthew B. Cox*

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ADDENDUM: ORDERS APPEALED

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham County

Rockingham Superior Court

Janet Bisceglia v State of New Hampshire Secretary of State, et al

218-2019-CV-01063

ORDER

The court held a hearing on the defendant's motion to dismiss this morning. The defendant seeks dismissal under the general recreational use immunity statute, RSA 508:14.

The defendant's motion and the plaintiff's objection both rely on facts that are neither alleged nor incorporated by reference in the complaint. Some of these facts appear to be contested, or at least not stipulated. Many of the most important facts are not capable of judicial notice. Some important facts were introduced, for the first time, by the State's offer of proof at the hearing.

The court converts the motion to dismiss into a motion for summary judgment.

Both parties have asked for 120 days to supplement the summary judgment record. Both parties shall also have an additional 30 days to respond to the opposing parties' supplemental affidavit, depositions, interrogatories and memoranda of law. **The clerk shall set a time standard of 150 days.**

The parties may, by agreement, notify the court that the matter is ready for ruling before then.

Because the motion is grounded on an alleged immunity from suit, and because questions of immunity should be decided at the threshold of the case, before the defendant is compelled to engage in potentially burdensome discovery, the court stays the balance of the case while the motion is litigated. Other grounds for summary judgment may be raised later in the process.

Although compulsory discovery on issues other than immunity is stayed, nothing in this order prevents both parties from mutually agreeing to take discovery on other matters during the stay.

February 3, 2020

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 02/03/2020

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

JANET BISCEGLIA

v.

STATE OF NEW HAMPSHIRE
AND
NEW HAMPSHIRE DEPARTMENT OF NATURAL & CULTURAL RESOURCES

Docket No.: 218-2019-CV-01063

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Janet Bisceglia filed this negligence action against the State of New Hampshire and the New Hampshire Department of Natural & Cultural Resources (collectively, "Defendants"). See Compl. (Doc. 1). Defendants moved to dismiss in September of 2019. See Defs.' Mot. Dis. (Doc. 6). Plaintiff objected, Doc. 8, and submitted multiple pieces of evidence, Docs. 9–19. Following a February 3, 2020, hearing, the Court (Schulman, J.) observed that the parties were relying "on facts that [we]re neither alleged nor incorporated by reference in the complaint." See February 3, 2020, Court Order (Doc. 22). It further determined that the parties contested the facts raised at the hearing. Id. As a result, the Court converted the motion to dismiss to a motion for summary judgment and granted the parties 150 days to supplement the summary judgment record. Id. Thereafter, the parties filed certain stipulated facts, see Doc. 25, and filed supplemental pleadings, see Pl.'s Supp. Obj (Doc. 26), Defs.' Resp. (Doc. 27), Pl.s' Resp. (Doc. 28), and Defs.' Reply (Doc. 30). The Court held a hearing on September 21, 2020. For the reasons that follow, Defendant's motion for summary judgment is **GRANTED**.

FACTS

The following facts are undisputed for the purposes of the instant motion. Fort Constitution, including its outer wall, is owned and operated by Defendants. See Stip. (Doc. 25), ¶ 1. On June 10, 2018, Plaintiff went with her family to visit an historic lighthouse situated on land owned by the United States of America directly adjacent to Fort Constitution. Id. ¶¶ 2–3. While waiting for her family to come down from the lighthouse, Plaintiff stood next to the outer wall of Fort Constitution. Id. ¶ 4; see also Pl.'s Ex. 1, Aff. Janet Bisceglia, ¶ 5 (Doc. 11). At some point, a portion of Fort Constitution's perimeter wall fell and collapsed on top of Plaintiff. Doc. 11 ¶ 6. This incident resulted in substantial injuries to Plaintiff. Id.

LEGAL STANDARD

In general, a motion for summary judgment may not be granted unless "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. "An issue of fact is 'material' if it affects the outcome of the case under applicable substantive law." Lynn v. Wentworth by the Sea Master Ass'n, 169 N.H. 77, 87 (2016). In deciding the motion, the Court assesses "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed by the parties." RSA 491:8-a, III. The Court must consider the evidence, and all reasonable inferences therefrom, in the light most favorable to the non-moving party. Stewart v. Bader, 154 N.H. 75, 85 (2006). The moving party bears the burden of proving that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. See id. at 86.

ANALYSIS

Defendants' motion requires the Court to consider whether "recreational use immunity" under RSA 508:14 renders them immune from liability for Plaintiff's personal injury claim. See Doc. 6. As relevant here, RSA 508:14 provides:

> An owner, occupant, or lessee of land, including the state or any political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage.

RSA 508:14, I (emphasis added). Defendants argue that recreational use immunity conferred by RSA 508:14 does not turn on whether the individual was using the property for recreational use at the time of the injury, but rather "whether a landowner has opened that land to any person to use for recreational purposes or as a spectator of recreational activity." See Defs.' Reply to Pl.'s Obj. ¶ 5 (Doc. 21); see also Doc. 30. Defendants encourage the Court to construe the language of the statute broadly in order to achieve the legislative purpose of encouraging landowners to open their land to the public for recreational use. Doc. 21 ¶ 9. For her part, Plaintiff encourages the Court to construe RSA 508:14 narrowly and to limit landowner immunity from liability only toward "entrants on the land in circumstances that involve recreational activities." See Pl.'s Supp. Obj. ¶ 8 (Doc. 26). Plaintiff insists that the "quid pro quo of the recreational use immunity statute is that the landowner receives limited immunity and the entrant is permitted to access and use the property for recreational purposes without charge." Id. ¶ 9. As such, Plaintiff urges the Court not to extend immunity from liability beyond incidents actually occurring on the premises.

The essence of Plaintiff's argument is that the State as a property owner is not entitled to immunity because she was not engaged in a recreational activity on the State's land – indeed, she was not on the State's land at all – when she was injured.. See Doc. 8. The State disagrees, arguing that the relevant inquiry is whether the property owner holds the property out for recreational use rather than whether the injured party was recreating on the property at the time of the injury.

In order to resolve the instant dispute, the Court must engage in statutory interpretation. "The interpretation of a statute is a question of law." State v. Costella, 166 N.H. 705, 709 (2014). "When examining the language of the statute, [the Court] ascribe[s] the plain and ordinary meaning to the words used." Id. The Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. "When statutory language is ambiguous, [the Court] examine[s] the statutes' overall objective and presume[s] that the legislature would not pass an act that would lead to an absurd or illogical result." Soraghan v. Mt. Cranmore Ski Resort, Inc., 152 N.H. 399, 401 (2005). Thus, "[the Court] will not interpret statutory language in a literal manner when such a reading would lead to an absurd result." State v. Breest, 167 N.H. 210, 212–13 (2014). "[The] goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Soraghan, 152 N.H. at 401.

When interpreting RSA 508:14, the Supreme Court has determined that the purpose of RSA 508:14 is to encourage private landowners to "make their land available to members of the general public without charge" in order to meet a growing "need for

additional recreational areas to serve the general public." Soraghan, 152 N.H. at 401 02 (citations omitted). At the same time, the Court stated:

> Statutes in derogation of the common law are to be interpreted strictly. While a statute may abolish a common law right, there is a presumption that the legislature has no such purpose. If such a right is to be taken away, it must be expressed clearly by the legislature. Accordingly, immunity provisions barring the common law right to recover are to be strictly construed.

Id. As a result, the Soraghan court "narrowly construed RSA 508:14, I, to provide immunity when private landowners permit members of the general public to use their land for recreational purposes." Id. For immunity to apply, the statute requires the landowner to: (1) "allow any person as a member of the general public to use their land"; and (2) "do so 'without charge.'" Id. at 403 (quoting RSA 508:14). In construing the statute in this manner, the Soraghan court "joined numerous other States to have interpreted statutes similar to RSA 508:14 to effectuate the purpose of recreational use statutes: to encourage public recreational use of privately-owned land." Id. at 402.

Consistent with Soraghan and in furtherance of the well-established purpose of RSA 508:14, the Court concludes that recreational use immunity applies in this case. At the time of the injury, Defendants held Fort Constitution out to the public at no charge. Plaintiff was standing next to the perimeter wall of Fort Constitution when a portion of the wall collapsed on her. The wall of Fort Constitution was maintained as a part of the historic site for the use and enjoyment of the public. As a result, the Court concludes that the resulting injury is the type of injury that fall squarely within the immunity contained in RSA 508:14, regardless of whether Plaintiff was physically on Defendants' property at the time of the injury. Accordingly, the Court concludes that RSA 508:14

shields Defendants from liability for Plaintiff's negligence claim and **GRANTS** Defendants' motion for summary judgment.[1]

SO ORDERED.

November 11, 2020
Date

Judge Martin P. Honigberg

Clerk's Notice of Decision
Document Sent to Parties
on 11/12/2020

[1] The Court notes that although Defendants made a sovereign immunity argument in its reply to Plaintiff's supplemental objection to the motion to dismiss, Doc. 27, and again at the September 21 hearing, the Court's ruling solely relates to recreational use immunity contemplated by RSA 508:14. Accordingly, the Court's ruling would apply equally to property owned by a state entity and property owned by a private individual landowner.

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

JANET BISCEGLIA

v.

STATE OF NEW HAMPSHIRE
AND
NEW HAMPSHIRE DEPARTMENT OF NATURAL & CULTURAL RESOURCES

Docket No.: 218-2019-CV-01063

ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION

Plaintiff Janet Bisceglia filed this negligence action against the State of New Hampshire and the New Hampshire Department of Natural & Cultural Resources (collectively, "Defendants"). See Compl. (Doc. 1). Defendants originally filed a motion to dismiss in September 2019, which the Court converted into a motion for summary judgment, allowing ample time for the parties to supplement the record. See Feb. 3, 2020 Court Order (Doc. 22). Thereafter, the parties filed stipulated facts (Doc. 25), and supplemental pleadings. See Pl.'s Supp. Obj (Doc. 26), Defs.' Resp. (Doc. 27), Pl.s' Resp. (Doc. 28), and Defs.' Reply (Doc. 30). The Court held a hearing on September 21, 2020, and issued an Order granting the motion for summary judgment on November 11, 2020 ("November 11 Order"). See Nov. 11, 2020 Order (Doc. 32). Plaintiff now asks the Court to reconsider the November 11 Order. See Pl.s' Mot. Reconsider (Doc. 33). Defendants object. See Defs.' Obj. (Doc. 34). For the reasons that follow, Plaintiff's motion is **DENIED.**

FACTS

The following facts are undisputed. Fort Constitution, including its outer wall ("the Property" or "Fort Constitution"), is owned and operated by Defendants. See Doc. 25 ¶ 1. On June 10, 2018, Plaintiff went with her family to visit an historic lighthouse situated on land adjacent to Fort Constitution. Id. ¶¶ 2–3. While waiting for her family to come down from the lighthouse, Plaintiff stood next to the outer wall of Fort Constitution. Id. ¶ 4; see also Pl.'s Ex. 1, Aff. Janet Bisceglia, ¶ 5 (Doc. 11). At some point, a portion of Fort Constitution's perimeter wall fell and collapsed on top of Plaintiff. Doc. 11 ¶ 6. This incident resulted in substantial injuries to Plaintiff. Id.

ANALYSIS

The purpose of a motion for reconsideration is to provide the parties an opportunity to "state, with particular clarity, points of fact or law that the [C]ourt has overlooked or misapprehended." N.H. Super. Ct. R. 12(e). In the instant motion, Plaintiff offers four reasons why she believes the Court should reconsider the November 11 Order, in which the Court ruled that RSA 508:14 precluded Plaintiff's negligence claim against Defendants. Doc. 33 at 1; see also Doc. 32. Plaintiff asserts: (1) RSA 504:14 does not apply because Plaintiff was never an entrant on the Property; (2) RSA 508:14 is unconstitutional as applied to Plaintiff in relation to Part I, Art. 14 of the New Hampshire Constitution; (3) RSA 508:14 is unconstitutional as applied to Plaintiff because it denies her equal protection and due process; and (4) RSA 504:14 does not apply because the Property is not open for recreational use. The Court will consider each of Plaintiffs' bases for reconsideration in turn.

Plaintiff first contends that the Court erred on the grounds that RSA 508:14 does not apply because Plaintiff was never an entrant on the Property. See Doc. 33 at 1. The purpose of a motion for reconsideration is to provide the parties an opportunity to "state, with particular clarity, points of fact or law that the [C]ourt has overlooked or misapprehended." N.H. Super. Ct. R. 12(e). Plaintiff's primary argument in the underlying motion related to whether recreational use immunity under RSA 508:14 extended to injuries that occurred to non-entrants to the Property, and the Court's analysis in the November 11 Order centered on this argument. See Doc. 32 at 5. In her motion for reconsideration, Plaintiff points to the same case law and makes the same arguments she made in her underlying motion. After review of the November 11 Order and the applicable case law, the Court remains unpersuaded. Accordingly, the Court concludes that Plaintiff has not presented any new information or new interpretation of the law that would lead the Court to reconsider its original opinion on this issue.

Plaintiff's next two arguments are that it would be unconstitutional to apply the immunity statute in this situation. Here, the Court agrees with Defendants that Plaintiff's as applied constitutional challenges have not been timely raised. A motion for reconsideration is not an opportunity to raise a new issue that could have been presented at an earlier time. See State v. Tselios, 134 N.H. 405, 407 (1991) (recognizing New Hampshire's "long-standing rule that parties may not have judicial review of matters not raised at the earliest possible time"). Defendants made clear from the earliest opportunity in this case that immunity under RSA 508:14 was their first defense to Plaintiff's allegations. Plaintiff had the opportunity to raise any constitutional

challenges in connection with the motion to dismiss in September 2019 and again when the Court invited supplemental pleadings after it converted the motion to one for summary judgment. Plaintiff offers no reason why her as applied challenges to the constitutionality of the statute could not have been raised in her earlier pleadings. Accordingly, the Court declines to consider them now. See Farris v. Daigle, 139 N.H. 453, 456 (1995) (a motion for reconsideration is not "designed to allow parties to raise issues that they overlooked when presenting their original case").

Finally, Plaintiff argues that RSA 508:14 does not apply because the Property is not open for recreational use. Doc. 33 at 1. Although the Court rejected this argument in the November 11 Order, the Court will take the opportunity to more thoroughly address this issue. RSA 508:14 provides:

> An owner, occupant, or lessee of land, including the state or any political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage

Plaintiff's argument focuses on the definition of the phrase "use land for recreational purposes" in RSA 508:14. See Doc. 33 at 3–7. Specifically, Plaintiff asserts:

> The legislative history of RSA 508:14 indicates the immunity was for landowners who donated land for recreational activities like horse shows, field days for children and snowmobiling. . . . Obviously, Fort Constitution is inappropriate for any of these activities, or any similar activities such as sledding, trail riding, ATV riding, field games, bike riding, etc. The nature and purpose of Fort Constitution Historic site is to preserve our early maritime and military history, not to facilitate outdoor recreational activities. It is not a recreation area, it was not opened up as a recreational facility, nor is it appropriate that recreational activities take place on the grounds. Defendants' allowance of passive activities such as walking through the ruins does not place it within the immunities granted under RSA 508:14.

Id. at 4–5. While Plaintiff's argument concerning the legislative history of the statute is interesting, the Court does not look to the legislative history of a statute when the meaning of the statute is clear on its face. State v. Costella, 166 N.H. 705, 709 (2014). The Court is obligated to ascribe the plain and ordinary meaning of the words used in a statute when engaging in statutory interpretation. Id.

Plaintiff would have the Court conclude that the only reasonable interpretation of the term "recreation" involves activities like snowmobiling, field games, or bike-riding. Doc. 33 at 5. The term "recreation" does not have so narrow a definition as Plaintiff would ascribe. Webster's dictionary defines recreation as, "something people do to relax or have fun: activities done for enjoyment." RECREATION, Merriam-Webster Dictionary online, https://www.merriam-webster.com/dictionary/recreation (accessed 1:15 pm Feb. 11, 2021). Thus, the plain and ordinary meaning of the word clearly encompasses any activity which is undertaken for the purpose of relaxation and enjoyment. Such an interpretation makes sense given that there are many public recreational spaces where activities such as soccer or bike riding might be inappropriate—dog parks or public beaches, for example. If parks that are only suitable for strolling or picnicking constitute recreational spaces, it follows that an historical site that is open for the use and enjoyment of the public equally falls under the definition of recreation.

Plaintiff asserts that other states have expressly included references to "historical, archaeological, scenic, or scientific sites" in their recreational use statutes. Doc. 33 at 6–7. However, whether other states have expressly included these references in similar statutes is irrelevant to the Court's analysis. The Court is obligated

to read the New Hampshire statute and ascribe the plain and ordinary meaning to the terms used therein. Costella, 166 N.H. at 709. The Court concludes that the plain and ordinary meaning of the term "recreational use" is a broad one that encompasses all public spaces that are open for the use and enjoyment of the public to engage in actives including, but not limited to, exercising, picnicking, field sports, snow sports, or viewing and enjoying historical sites. As the Court concluded in the November 11 Order, RSA 508:14 is designed to protect landowners who open their property without charge for the use and enjoyment of the public. This conclusion is consistent with the Court's conclusion today that the term "recreational use" is a broad term meant to encompass all forms of use and enjoyment, be they of the more active variety Plaintiff asserts or a passive variety such as viewing an historic area. Accordingly, the Court concludes that the term "recreational use" encompasses the activities at Fort Constitution and sees no reason to reconsider the November 11 Order on these grounds.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for reconsideration is **DENIED**.

SO ORDERED.

February 15, 2021
DATE

Martin P. Honigberg
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 02/16/2021