



LASSEN PARK

Court: No legal shield in park fatality

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The National Park Service cannot avoid paying damages to the family of a 9-year-old boy by arguing that the law allowed its employees to commit the negligence that led to his death, a Sacramento judge has ruled.

Unless federal lawyers go to a higher court, it is now just a matter of how much money the government should pay to a Tehama County family for the death of Tommy Botell during a visit to Lassen Volcanic National Park.

While hiking up Mount Lassen with their parents on July 29, 2009, Tommy and his sister sat on a mortared retaining wall to rest. The wall crumbled beneath them, pitching the children down a slope. A section of the wall rolled over them, crushing Tommy's brainstem and injuring his sister. Tommy died moments later in his mother's arms.

U.S. District Judge Troy L. Nunley ruled in May that park employees negligently caused Tommy's death. That ruling was to punish the government for park employees' deliberate destruction of critical evidence in the aftermath of the tragedy.

But lawyers from the U.S. attorney's office argued that even if park employees, knowing the wall posed a danger, did not repair it or block public access, Nunley has no jurisdiction under the so-called "discretionary function" statute.

The statute divests federal district courts of jurisdiction over claims based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved (was) abused."

In other words, the negli-

Botell: Government's argument rejected

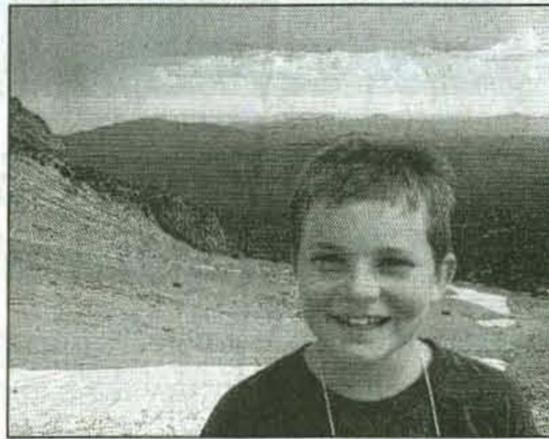
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gence in the Botell case was within the discretion of park personnel, government lawyers insisted.

Nunley, however, was not persuaded.

"Simply put, (the government's) argument that (the) failure to abate the known danger was discretionary is unavailing because the park's safety program mandated the closure of known dangers such as the retaining wall" pending corrective action, Nunley wrote in a 13-page order issued Tuesday. The judge found that "the safety program constituted a policy directing mandatory and specific actions that were admittedly not followed."

There is no dispute, Nunley declared, that officials, including Superintendent Darlene Koontz, knew the retaining walls were in dire need of re-



Tommy Botell and his sister sat on a wall in Lassen Volcanic National Park that gave way four years ago. She was injured; Tommy was killed. Botell family

pair and that, prior to the incident, "trail crew leader Joseph Pettigrew was concerned about the safety of (park) employees and ... members of the public."

Further, the judge stated, there is no dispute that Koontz acknowledges "the deterioration of the rock was an issue for visitor safety ... and the water runoff was eroding the support for the walls."

Finally, Nunley noted,

there is no dispute that "a number of employees expressed concern about the safety of the retaining walls" over a long period of time.

The government has the option of taking its discretionary-function argument to an appellate court, but U.S. Attorney Benjamin Wagner said Wednesday his office has not yet mapped out its next move.

Steven Campora, an attorney for the Botell family in its

wrongful death and personal injury lawsuit, foresees a strong possibility of a non-jury trial before Nunley to determine the amount of money owed to his clients. He said the law that allows the Botells to sue the United States bars a jury trial.

A negotiated agreement is another route to resolution of the suit, although Campora said the government has never shown an inclination to talk about a settlement.

A settlement is on Nunley's mind. He issued an order Wednesday directing the parties to advise him by next Wednesday whether they believe bringing the two sides to a court-convened conference would be beneficial and, if not, to explain why not in five pages or less.

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