ASSUMPTION OF RISK FOR OBSERVABLE BALLFIELD DEFECTS

James C. Kozlowski, J.D., Ph.D.

As illustrated by the cases described herein, where the land is as safe or dangerous as it appears to be, there may be no landowner liability for known or readily observable defects on the premises under the doctrine of assumption of risk. Assumption of risk is a voluntary encounter with a known danger. Assumption of risk may apply to sports participants or recreational users who voluntarily chooses to remain on the land and continue their participation despite the existence of an open and obvious defect on the premises.

Generally, landowner liability requires the existence of an unreasonably dangerous condition on the premises. Within the context of landowner liability, an unreasonably dangerous condition on the premises presupposes the defect is known or discoverable to the landowner, but would not be open and obvious to sport or recreational users of the premises through the reasonable use of their senses.

Conversely, a premise defect would not be considered unreasonably dangerous if a sports participant or recreational user either actually knew of the dangerous condition, or should have discovered a premise defect because the general scope of the danger was readily observable or obvious through the reasonable use of one's senses. When a dangerous condition on the land is known or open and obvious, looking out reasonably for their own safety, those using the premises should be able to avoid the premise defect. If they fail do so, under the doctrine of assumption of risk, there may be no landowner liability for negligence.

OUTFIELD BOULDERS

In the case of *Regan v. City of New York*, 2012 N.Y. Misc. LEXIS 5025, 2012 NY Slip Op 32660U (N.Y. Sup. Ct. Oct. 12, 2012), plaintiff Scott Ragan was injured when he tripped and fell over a large boulder located in the outfield of a softball field in Randall's Island Park. The City of New York Department of Parks and Recreation (Parks) operated and maintained Randall's Island Park.

On the date of his accident, Regan testified that the weather was sunny and clear. Regan had played on field 11 more than 10 times before the accident, but the field had been changed right before his accident. Boulders had been placed around the outfield to separate the foul territory of the field from a parking lot behind the field.

During the game, a fly ball was hit over Regan's head and while running to catch it, he ran into one of the boulders. Regan was aware that the boulders were on the field, but did not see the one he fell over before he hit it. This particular boulder was only approximately a foot and half to two feet high and 18 inches wide.

Philip Scott McAuliffe, a Parks supervisor in charge of maintaining and operating Randall's Island Park, testified that Parks placed the boulders, which he described as very large, at the edge of the outfield of field between the fall of 2008 and the spring of 2009 in order to prevent cars

from entering the outfield.

The boulders had an average height of three to five feet and there were more than 10 of them in the outfield. They were movable only by heavy equipment and would have been visible from the field's home plate. McAuliffe was unaware of any prior accidents involving the boulders on field 11, and acknowledged that boulders were not usually part of the structure of a baseball or softball outfield, and that there was no indication or warning of any kind in the outfield that the boulders were present.

Regan alleged that the boulder within the field constituted a dangerous obstruction because players would be unaware of the condition absent a warning track or fencing. Specifically, Regan claimed the defendant City of New York "unreasonably increased the risk inherent in playing on the field by its placement of the boulders, which were not part of the structure and configuration of field 11." In so doing, Regan characterized the boulders as not "open and obvious."

In response, Parks contended Regan assumed the risk of injury because "the boulders constituted a risk inherent in playing on field 11 and were open and obvious."

As described the court, "a plaintiff engaged in athletic and recreational activity is deemed to have assumed only fully comprehended or perfectly obvious risks, those dangers inherent in the sport." Moreover, the court noted that "a participant assumes the risk associated with the construction of a playing field and any open and obvious conditions thereon." In this particular instance, the court found Regan assumed the risk of injury when he ran into the boulder while playing softball.

> Here, Regan admitted that he saw the boulders before he began playing on field 11, and based on his own expert's measurements, the boulders were large enough to be seen by plaintiff. They were thus open and obvious, even if they constituted a dangerous condition or obstruction, plaintiff voluntarily assumed the risk of running into them in the outfield by choosing to play despite knowing their obvious presence.

As a result, the court granted summary judgment in favor of defendants The City of New York, City of New York Department of Parks and Recreation.

SEWER GRATE

Similarly, in the case of *Castro v. City of New York,* 94 A.D.3d 1032; 944 N.Y.S.2d 155; 2012 N.Y. App. Div. LEXIS 3116; 2012 NY Slip Op 3125 (April 24, 2012), plaintiff Henry Castro was injured when he tripped over a raised sewer grate while playing softball on a cement ballfield owned by the defendant City of New York.

Castro acknowledged that he had played at least 40 softball games on the subject ballfield prior to the date of his accident. Further, he acknowledged he was aware of the presence and condition of the raised sewer grate prior to the date of his accident. According to Castro, he had

always been "leery" of the grate because he believed that it posed a tripping hazard.

As noted by the court, "[t]he principle of primary assumption of risk extends to those risks associated with the construction of a playing field and any open and obvious condition thereon."

> Where…the risks are known by or perfectly obvious to the player, he or she has consented to them, and the property owner has discharged its duty of care by making the conditions as safe as they appear to be.

Applying these principles to the facts of the case, the court found Castro had "assumed the risk of injury by voluntarily participating in the softball game despite his knowledge that doing so could bring him into contact with the open and obvious raised sewer grate." As a result, the court entered judgment in favor of the City.

TORN TURF

In contrast, in the case of *Gevorgyan v. City of New York*, 2012 N.Y. Misc. LEXIS 109; 2012 NY Slip Op 30050U (January 9, 2012), it was not clear whether the alleged premise defect was obvious or hidden. In this case, plaintiff George Gevorgyan was injured while playing in an amateur soccer league game on Field 85, a public playing facility located on Randall's Island. The defendant City of New York (the City) owns Field 85, and co-defendant New York City Department of Parks and Recreation (Parks Dept.) oversees and manages Field 85.

Gevorgyan testified that, at approximately 10:20 am on the day of his accident, he was in the process of running toward an "unmarked" (i.e., open or undefended) player during the soccer game when he caught his left foot on a penalty kick marker that was partially hidden by torn and rolled up artificial turf on Field 85, and he tripped, fell and was injured. Gevorgyan also testified that he had been a professional soccer player in Armenia (where he was born), and that he had previously played on Field 85 "one or two" times, with the most recent occasion being about one week before his accident.

Gevorgyan specifically described the condition that he tripped on as a "piece of turf on the penalty kick mark [that] was actually raised and rolled." He also stated that one of his teammates, whom he identified as "Emil," told him that he had observed this condition while playing on Field 85 during the summer before Gevorgyan's accident, and that he (i.e., Emil) had complained about it to the "manager of the field."

Parks Dept. supervisor Philip McAuliffe (McAuliffe) confirmed that Field 85 is an artificial turf field, and testified that the City has hired a contractor - non-party Sprint Turf (Sprint) - to perform twice daily cleaning and maintenance of the field (i.e., during the morning and afternoon). McAuliffe also testified that the procedure followed in the event that any dangerous conditions were discovered on Field 85, was for the Parks Dept. to notify the "contract manager," who would, in turn, order Sprint to repair the condition.

McAuliffe stated that he had observed contractors laying down new rolls of artificial turf on Field 85 at some point just prior to September 2008. However, McAuliffe denied that the Parks

Dept. had received any complaints about a defective condition on Field 85, and that Sprint had performed any repair work there, between September and November of 2008. McAuliffe also stated that he performed daily inspections of Field 85, and denied ever having observed any problems with the turf during the time in question. He admitted, however, that he did not specifically inspect the turf near the penalty kick markers at the time that he inspected and signed off on the turf installation job in September 2008.

Gevorgyan filed a lawsuit, claiming the City was liable for negligence. In response, the City raised the assumption of risk defense as a basis for dismissing the lawsuit on the City's motion for summary judgment. In so doing, the City argued that Gevorgyan "assumed the risks inherent in his participation in the activity of soccer." The court described the assumption of risk defense as follows:

> A voluntary participant in a sporting or recreational activity is deemed to consent to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation.

Moreover, the court acknowledged that assumption of risk could include "those risks associated with the construction of the playing field and any open and obvious condition thereon":

> If the risks are known by or perfectly obvious to the player, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be.

Gevorgyan, however, contended assumption of risk did not apply because "the dangerous/defective condition on a playing field was not 'open and obvious,' but hidden." Specifically, Gevorgyan testified in his deposition that "the defect was hidden due to the fact that [I] only saw the strip of turf when it was in the 'down' position." He further testified that he "never saw the strip in the 'up' position," and that "when the strip is in the 'down' position, it is completely hidden." As a result, under the circumstances of this particular case, Gevorgyan argued that a trial was necessary for a jury to determine "whether or not a dangerous/defective condition on a playing field was hidden," precluding the City's assumption of risk defense. If reasonable minds could differ about whether the alleged defect was obvious or hidden, effectively dismissing Gevorgyan's lawsuit by granting summary judgment to the City would be improper.

In response, the City contended that it was "irrelevant whether the penalty kick marker was in the up or down position since it was readily apparent, noticeable and obvious." Moreover, the City claimed Gevorgyan had "admitted that he observed the penalty kick marker prior to his fall."

The court agreed with Gevorgyan. In the opinion of the court, there was "an issue of contested fact as to the liability of the City and the Parks Dept. with respect to the installation and maintenance of Field 85." Based upon pretrial testimony and accompanying photographs of the penalty kick mark, the court found that a jury could "reasonably infer that the penalty kick mark was improperly glued down constituting a dangerous condition that is not an inherent risk of

playing on the field."

In so doing, the court noted that a "torn or allegedly damaged or dangerous net—or other safety feature—is by its nature not automatically an inherent risk of a sport," providing a legal basis to dismiss the case without a trial. Instead, the court found the allegedly torn turf could "qualify as and constitute an allegedly negligent condition occurring in the ordinary course of any property's maintenance." Moreover, in the opinion of the court, at trial, a jury might reasonably infer the City's "awareness of the condition" based upon Gevorgyan's "deposition testimony that his friend had complained of the condition months prior to plaintiff's accident."

In light of such evidence, the court concluded that the City had not established that Gevorgyan's complaint should be dismissed prior to trial based upon the doctrine of assumption of risk. As a result, the court denied the City's motion for summary judgment. Gevorgyan would, therefore, be provided an opportunity to proceed to trial where a jury would consider his negligence claim against the City and the City's assumption of risk defense.

CONCRETE RING

While the recent cases described above are jurisdiction specific, i.e., New York, two much older opinions from Texas and Georgia similarly reflect the general reasoning applied by courts over the years in determining landowner liability for negligence based upon an alleged defect on the premises which is known or obvious through the reasonable use of one's senses.

In the case of *Rich v. City of Lubbock*, 544 S.W.2d 958; 1976 Tex. App. LEXIS 3478 (December 23, 1976), plaintiff Burl Rich, suffered severe injuries when he fell to the ground and struck his shoulder on a concrete ring surrounding a water sprinkler while playing soft ball in a park owned and maintained by the City of Lubbock. Rich alleged "the City negligently failed to maintain the ball park in a safe condition and negligently failed to warn him of the hazardous condition created by the concrete ring."

At the time he was injured, Rich was playing softball on a soft ball diamond in a city park. His position was center field. He ran to his right (into left field) to catch a fly ball, dived for the ball, fell to the ground, and then slid or rolled, and struck his shoulder on the "doughnut-shaped" concrete ring. These rings were part of the water sprinkler system in the park. Sprinkler heads were placed in them for watering the grass. Those located in the infield area were level with the surface of the ground. Those in the outfield protruded about one inch above the ground. They were not covered or protected in any way. At least six of these rings are located in the outfield area of the ballpark in question.

Rich had played soft ball in this park several times, including the earlier part of the week of his injury; and although he did not know their exact places, he knew the rings were there. In fact, he was standing on one shortly before his injury. The one he fell on "had some grass up around it," but he could have seen it if he had been watching for it. Instead, he was watching the ball.

According to the court, "[t]he owner or occupier of premises owes no duty to his invitees either to eliminate or to warn of dangerous conditions on the premises which are as well known to them

as they are to him." In the opinion of the court, Rich's own testimony conclusively established that he knew the concrete "doughnuts" were in the outfield and knew their uncovered, unprotected condition. As a result, the court found "[t]he danger they posed to him as he ran across the field while watching a fly ball was as well known to him as it was to the City." The court, therefore, affirmed the summary judgment in favor of the City.

TRASH BIN

In the case of *Anderson v. Dunwoody North Driving Club, Inc.* 176 Ga. App. 210; 335 S.E.2d 451; 1985 Ga. App. LEXIS 2203 (September 12, 1985), plaintiff Sandra Anderson was injured while participating in a tennis tournament at Dunwoody's facility. During the course of her match Anderson left her court to follow a lob shot into the adjacent court and sustained injuries when she collided with a trash bin containing protruding jagged wood. The trash bin was located immediately adjacent to the only gate in the fence surrounding the two tennis courts.

Anderson had approached her playing area by going through this gate and testified at trial that she had reviewed the area for any hazards before commencing play. The accident occurred approximately one hour and forty-five minutes into the match. It was undisputed that the trash bin was in the open and in plain view during the entire time and at no point during the match was Anderson's view of it obstructed.

In determining whether "the presence of the trash bin at the rear of the tennis courts constituted actionable negligence" by Dunwoody, the court acknowledged that Anderson owed the following legal duty to look out reasonably for her own safety:

> [A]n invitee [i.e., one who the landowner has invited onto the premises for a business or public purpose] must exercise ordinary care for his own safety, and must by the same degree of care avoid the effect of the owner's negligence after it becomes apparent to him or in the exercise of ordinary care he should have learned of it. He must make use of all his senses in a reasonable measure amounting to ordinary care in discovering and avoiding those things that might cause hurt to him.

In response, Anderson had argued that that "she became aware of the trash bin only moments before she collided with it" because she had become "distracted" in her attempt to return a lob shot during her tennis match. Moreover, Anderson claimed that Dunwoody was liable for negligence because Dunwoody should have been aware that Anderson would be "distracted by playing tennis" and "could injure herself on the trash bin." The court rejected this argument

> Anderson had and took advantage of the opportunity to review the area where the trash bin was situated for any possible hazards and that the trash bin was obvious and in plain view throughout the approximately one hour and forty-five minutes of play before Anderson's accident. Thus, the only reasonable explanation for Anderson's collision with the trash bin is that she failed to exercise ordinary care for her own safety…

> [I]t is uncontroverted that Anderson's review of the playing area for any hazards occurred before her tennis match began and before she could have become "distracted" by that game, that the trash bin was in plain view at that time and that it was not moved at any time prior to Anderson's accident.

Even if Anderson was "distracted from seeing the trash bin by her preoccupation with her tennis game," the court held a distraction which is "self-induced" would not "excuse a party from the failure to exercise ordinary care." As a result, the appeals court affirmed the judgment in favor of defendant Dunwoody.

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James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: jkozlows@gmu.edu Webpage with link to law review articles archive (1982 to present): http://mason.gmu.edu/~jkozlows