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WEBSITE INVITATION TO "DANGEROUS" PARK

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Unfortunately, crime is an open and obvious risk of everyday life, particularly in urban areas, including public parks and playgrounds. As illustrated by the cases described herein, absent an unlikely "special relationship" which might require security and/or supervision, government landowners are generally not held liable for unforeseeable criminal assaults in public parks and playgrounds. Moreover, the government has the discretionary authority to decide whether or not to provide supervision or police protection in a particular public park, even in high crime areas where many assaults have occurred in the past. As a result, there is generally governmental immunity from liability for the alleged negligent failure to provide security or supervision to prevent a particular assault.

Understandably, special security details and/or supervision of patrons at a particular public park or playground is a very limited and costly exception to the rule. To the extent that it is available at all, in most instances, security in public parks and playgrounds is typically provided through general police protection. General police protection is that level of security available to all citizens through routine police patrols to preserve public safety throughout the community.

In contrast to general police protection, special police protection provides a level of protection dedicated to particular individuals or groups over and above that provided the general citizenry. Unlike general police protection, special police protection may establish the required "special relationship" to impose a legal duty to protect against criminal assaults. In so doing, once assumed, there may be governmental liability for negligent special police protection.

If provided at all, such special police protection and supervision is more likely at scheduled special events and activities, particularly those that charge a fee. That being said, allocating and dispatching available general police protection to provide security at a particular event or activity would not constitute special police protection. Accordingly, the government's expressed or implied invitation to simply come visit and enjoy public parks and playgrounds would generally not give rise to a reasonable expectation of special police protection to provide supervision or security. As a result, there is generally no special relationship between a city and invitees to public parks and playgrounds which would give rise to a legal duty to protect against criminal assaults on the premises.

See: "Limited Liability for Criminal Assaults in Park Facilities"
http://cehdclass.gmu.edu/jkozlows/lawarts/05MAY96.pdf

SOFTBALL BEAT DOWN

In the case of *Munoz v. City of Carson*, 2013 Cal. App. Unpub. LEXIS 5869 (8/21/2013), plaintiff Christopher Munoz was injured after being attacked in a park operated by the defendant City of Carson. In his complaint, Munoz claimed he "went to the park pursuant to an 'invitation' posted on the City's website." As a result, Munoz claimed the City should be held liable for failing to "provide adequate security at the park and to warn plaintiff about third party attacks

there." The trial court dismissed the claim. Munoz appealed.

As described by the court, on or about July 1, 2009, Munoz went to Calas Park in Carson to watch his friend play in a women's softball game. Munoz is a Latino male who was 16 years old at the time. Munoz's friend played on a team consisting of Hispanic players. The other team consisted of Samoan women. At some point during or after the game, Munoz was attacked and beaten in the park by relatives of a Samoan team member who were "known gang members." Munoz believed his assailants were "racially motivated." As a result of the attack, Munoz sustained serious personal injuries.

Calas Park is owned and operated by the City. The park "was a known hangout for gang members of a criminal gang known as 'Calas Piru' and other gang associations which are known by other names." Prior "incidents of violence" have occurred in the park.

Munoz claimed he went to the park on the day of the attack pursuant to an "invitation to the general public" to enjoy "safe" recreational activities posted on the City's website. The website stated: "Welcome! Thank you for visiting Calas Park's webpage. Here you can find our contact information as well as hours of operation and upcoming recreational activities." Elsewhere, the website included the following statement by Cedric L. Hicks, Sr., the Recreation Superintendent:

> On behalf of the City of Carson Parks and Recreation Department, I would like to take this opportunity to welcome you to our newly designed website. The Recreation Division is responsible for supervised recreational activities at twelve parks. The Recreation Division is a professional innovative organization that provides fun, safe, quality recreational programs which inspire people and enhance the vitality and well being of all who participate.

Additionally, the website indicated that the City supervised a softball league. Daniel Perez was allegedly a City employee and a "staff person from Calas Park in charge of the Samoan women team." Based upon such information, Munoz alleged he had a "special relationship" with Perez and the City which had been created by the City's "invitation" to enter Calas Park posted on its website.

As a result, under the circumstances, Munoz claimed the City and its employee had breached a legal duty of care owed to him "by failing to provide adequate security at Calas Park and failing to warn" Munoz about "the location's dangerous criminal activity." The trial court disagreed, granting the City's motion to dismiss. Accordingly, the trial court entered a judgment in favor of the City. Munoz appealed.

NEGLIGENCE

As cited by the appeals court, the "elements of a cause of action for negligence are: duty; breach of duty; legal cause; and damages." In the opinion of the court, in this particular instance, "the complaint fails to state sufficient facts supporting the element of duty." In making this determination, the court acknowledged that the "existence of a duty is the 'threshold element' of a negligence cause of action and a question of law for the court." As characterized by the court,

a legal duty is "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." In determining the existence and scope of that legal duty, the court noted that foreseeability of harm is a '"crucial factor." In addition to foreseeability, the court would also consider other factors to include the following:

> the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant; consequences to the community of imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved.

Moreover, in determining duty "in the context of third party acts," the appeals court noted that courts generally distinguish between "misfeasance" and "nonfeasance."

> Misfeasance arises from affirmative misconduct by the defendant, i.e. when the defendant's conduct makes the plaintiff's position worse or creates a risk for the plaintiff. Nonfeasance exists when the defendant fails to take action that would have benefited the plaintiff.

The appeals court characterized this particular situation as a "nonfeasance case" because Perez and the City allegedly "failed to do certain things, namely they failed to provide adequate security at the park and warn plaintiff of the dangers there."

As a "general rule," the court acknowledged "nonfeasance does not give rise to a legal duty." In particular, the court noted that "generally no one has the duty to control the conduct of another or to warn those who may be endangered by such conduct." On the other hand, the appeals court found liability for nonfeasance may arise in limited situations "when there is a special relationship between the defendant and the plaintiff that creates a duty to act."

SPECIAL RELATIONSHIP

As described by the court, a "special relationship may arise out of a statutory or contractual duty." In addition, under the traditional common law, the court found a "special relationship" may exist "in light of the particular nature of the relationship between the parties," including "common carriers and passengers, innkeepers and guests, and psychotherapists and patients." Munoz claimed he had a special relationship with Perez and the City. The appeals court rejected this argument.

> Although the complaint vaguely states Perez was a "staff person" at Calas Park "in charge of the Samoan team," it does not state facts indicating he was responsible for security at the park or anywhere else, or that he was present on day of the attack. The complaint also does not allege that Perez ever communicated with plaintiff or had any dealings with him in any capacity. In short, there are simply no facts indicating plaintiff had a special relationship, or a relationship of any kind, with Perez.

As characterized by the court, the "sole basis for plaintiff's claim that he had a special relationship with the City are the contents of its website." Specifically, Munoz had argued that "the website 'invited' the general public, including plaintiff, to Calas Park, and falsely represented that it was 'safe' there." The appeals court, however, found this "characterization of the website is not accurate."

> The website "welcomes" readers to the website; it does not invite them to the City's parks. While the website makes a general statement about providing "fun, safe, quality recreational programs," it does not include any statements about the event plaintiff attended or softball games at Calas Park.

Assuming "the website included an invitation to the general public to attend the softball game plaintiff attended," the court found "the City's alleged invitation to the general public" would still "not create a special relationship between the plaintiff and the City." In reaching this conclusion, the court also noted that Munoz "did not pay the City to attend the softball game."

Applying the above-cited factors used by courts to determine the scope and existence of a legal duty, the court reached the same conclusion that the City had no legal duty to Munoz to warn or protect against the attack by third parties because "the City did not have a special relationship with Munoz in this nonfeasance case."

As noted by the court, in the case of criminal conduct by a third party, an "'extraordinary high degree of foreseeability is required to impose a duty on the landowner, in part because it is difficult if not impossible in today's society to predict when a criminal might strike." In this particular instance, the court, Munoz had not alleged sufficient facts to establish the requisite high degree of foreseeability to impose a legal duty to (1) provide "adequate security" at Calas Park and (2) warn plaintiff of the potential danger there. In particular, the court noted that Munoz had not specified what defendants should do to provide adequate security against criminal attacks in Calas Park.

> Although the complaint states plaintiff is "informed and believes" that "prior assaults had taken place in the same general area under similar circumstances," it does not include any specific allegations, such as the dates, number, specific locations and particular circumstances of the prior alleged assaults.

Moreover, in the opinion of the court, "the burden on the City and negative consequences on the community would be considerable" if the court imposed a legal duty on the City to provide security under the circumstances of this case.

> Presumably the City can station police officers or private security guards at the park during the hours it is open, or during every organized recreational event. But this would impose a substantial financial burden on the City at a time when pressures on the public fisc are greater than ever. The monetary costs of security guards is not insignificant.

> Moreover, the obligation to provide patrols adequate to deter criminal conduct is not well defined. No one really knows why people commit crime, hence no one really knows what is "adequate" deterrence in any given situation. Accordingly, imposing a duty on the City to provide "adequate security" in public parks would be very burdensome.

Similarly, the court found the claim that the City had a duty to warn him of potential criminal activity to be "equally unpersuasive." In so doing, the court cited *Hayes v. State of California* (1974) 11 Cal.3d 469. In *Hayes,* the plaintiffs were attacked and beaten by unknown persons on a beach in the campus of the University of California at Santa Barbara. The plaintiffs argued that the university had a duty to warn them against potential criminal conduct. As described by the court, the California Supreme Court had rejected this argument for the following reasons:

> The first was that a warning would have served little purpose because the public is aware of the incidence of violent crime, particularly in unlit and little used places. The court further stated that "determining and regulating the use of public property are better left to legislative and administrative bodies, rather than to the judiciary." Finally, the court noted that "the disquieting spectre of warning signs hanging in areas where crime has occurred – not unlike the leper's bell – manifests the unreasonableness of the duty sought to be imposed by plaintiffs on their government."

As a result, the appeals court concluded "[t]he holding and reasoning of *Hayes* control here." In the opinion of the appeals court, "[a] warning on the City's website or on on-site signs stating that crime may occur in public parks would serve little purpose because the public is aware of this unfortunate problem."

> Further, to the extent a warning serves a purpose, it is better to leave that decision to the City's governing and administrating bodies. Finally, providing ominous warnings about crime at public parks, to the extent they keep the general public away, could unnecessarily discourage the beneficial use of an important public asset.

As a result, the appeals court concluded that the City had "no duty" to Munoz under the circumstances of this case. The appeals court, therefore, affirmed the order of the trial court dismissing the lawsuit.

SECURITY IMMUNITY

In the case of *Ruiz v. City of New York*, 27 Misc. 3d 443; 894 N.Y.S.2d 862; 2010 N.Y. Misc. LEXIS 301 (2/22/2010), plaintiff Ruiz was assaulted at a New York City playground. As described by the court, on or about August 25, 2008, the plaintiff was physically assaulted by other children at the Cherry Hill Playground who were wearing boxing gloves and had been fighting with each other at the playground.

Ruiz alleged that the City should be held liable for his injuries because it failed to properly

manage, maintain and supervise the playground. The defendant City claimed it was "exercising its police powers in maintaining the park and cannot be liable absent a special relationship with plaintiff" which the City alleged did not exist.

According to the court, absent a special relationship, the City would be immune from liability if it was acting in its governmental capacity. On the other hand, if the City was acting in its proprietary capacity it was "subject to ordinary tort liability." That being said, the court acknowledged that there is "no clear demarcation between these two types of functions; rather, they are on a continuum or spectrum."

As defined by the court, a "quintessential 'governmental' function is one undertaken for the protection and safety of the public pursuant to the general police powers" such as fire and police protection. In contrast, the court noted that "quintessential proprietary functions are those in which governmental activities essentially substitute for, or supplement traditionally private enterprises."

As a result, to determine "where in the continuum of activity between proprietary and governmental responsibilities the challenged public action falls," the court would "examine the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred." In so doing, the court found "the provision of security against physical attacks by third parties" is "a governmental function involving policymaking regarding the nature of the risks presented" and "no liability arises from the performance of such a function absent a special duty of protection." In the opinion of the court, "to hold otherwise would be to subject municipalities to open-ended liability and might, in addition to posing a crushing financial burden, discourage municipalities from undertaking activities to promote the general welfare by making the prime concern the avoidance of tort liability rather than the promotion of the public welfare."

As characterized by the court, the "duty at issue was the provision of security against physical attacks by third parties." Under the circumstances of this particular case, the court found "the City was acting in its governmental capacity and not its proprietary capacity in managing, supervising and deciding whether and when to provide security at the playground."

> The determination whether to provide any type of park supervisors or police protection is exactly the discretionary type of resource-allocating function that is a governmental function and for which the municipality should thereby be protected from liability absent a special relationship with the plaintiff. Absent such a rule, a municipality's exposure to liability would be unreasonably vast.

Having "determined that the municipality was exercising a governmental function," the specific issue before the court was whether the City could still be held liable based upon a "special relationship" between the City and Ruiz. As cited by the court, the elements of a "special relationship" were as follows:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on

> the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

Applying these elements to the facts of the case, the court found Ruiz had failed to establish to "any element of the special relationship" with the City.

> Plaintiff cannot show the assumption by the City of an affirmative duty to protect him from such an assault, any knowledge by the municipality's agents of the possibility of such an assault or any direct contact between plaintiff and any municipal agents. Without any of the first three elements present, it is also impossible to prove the fourth element, justifiable reliance on any affirmative undertaking made by the municipality.

As a result, the court granted the City's motion for summary judgment dismissing plaintiff's complaint.

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