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PRETRIAL SUMMARY JUDGMENT DISMISSES CLAIM

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A recent internet report entitled “Parks Dept. Puts a Stop to Spinning Playground Equipment After Injuries” reviewed a controversy between the New York City Parks Department and a local neighborhood regarding the removal or welding into place a number of turning or spinning discs in public playgrounds. See: <http://www.dnainfo.com/new-york/20141205/park-slope/parks-dept-puts-stop-spinning-playground-equipment-after-injuries>

While the City characterized its actions as a “matter of public safety,” some parents in the affected neighborhoods thought the City had gone “too far to protect kids.” As characterized by one angry parent, the city’s decision to turn “the spinning disks into statutes” was “a sad commentary on how litigious and afraid we’ve become of having our children get a few boo-boos.” The report noted, however, that that there had been no complaints or lawsuits associated with these particular spinning discs. See also: <http://newyork.cbslocal.com/2014/12/05/parents-upset-after-spinning-saucers-welded-in-place-at-nyc-parks/>

One comment speculated that recently reported litigation may have prompted the City’s actions. Specifically, “[a] simple google search brings up why these spinning discs were removed/welded.” Specifically, the case of *Jimenez v. New York City* also involved an injury associated with a “circular, spinning playground disc.” See: <http://law.justia.com/cases/new-york/appellate-division-first-department/2014/12122-108416-08.html>

Further, this comment noted that the City “fought to keep the discs, and fought the lawsuit till the bitter end.” Actually, a closer examination of the text of the court opinion in the case of *Jimenez v. City of New York* might indicate otherwise. In this particular case, the City had merely filed a pretrial motion for summary judgment which was denied by the court. Failing to get a claim dismissed on a motion for summary judgment is far short of the procedural “bitter end” in such litigation.

DANGEROUS PLAYGROUND DISC?

In the case of *Jimenez v. City of New York* 117 A.D.3d 535; 986 N.Y.S.2d 64; 2014 N.Y. App. Div. LEXIS 3527; 2014 NY Slip Op 3585 (5/15/2014), plaintiff Jeremy Jimenez was injured when he fell from a piece of playground equipment. In his complaint, Jimenez alleged the piece of playground equipment was inherently dangerous. In so doing, plaintiff submitted an affidavit in which his expert claimed “the flat, circular spinning playground disc” from which Jimenez fell had a “defective design.” Specifically, “the mere presence of excessive speed caused plaintiff to be ejected from it.” In response, the City of New York brought a motion for summary judgment to dismiss the claim that the playground equipment from which the plaintiff fell was inherently dangerous. In so doing, however, the City failed to offer any supporting evidence or testimony to refute the opinion of plaintiff’s expert and conclusively establish “it did not create the unsafe condition by installing an unreasonably dangerous piece of equipment.”

Since reasonable minds could differ on whether this particular piece of playground equipment

was inherently dangerous, the court denied the City's pretrial motion for summary judgment. Accordingly, plaintiff could continue to pursue his claim in further trial proceedings. At trial, to establish liability, plaintiff would have to convince a jury that this particular spinning playground disc, more likely than not, was inherently dangerous. In other words, it is much easier for a plaintiff to overcome a pretrial motion for summary judgment than establish liability at trial and obtain a final judgment awarding damages.

SETTLE OR LITIGATE?

Accordingly, the *Jimenez* opinion may not be as legally significant as it might first appear because the court never reached a final judgment on whether plaintiff's injury on this particular "circular, spinning playground disc" was indeed attributable to negligence on the part of the City.

That being said, once a pretrial motion for summary judgment is denied, a public entity may find it more fiscally responsible to settle a claim, rather than aggressively defend itself in costly and time consuming trial proceedings before an unpredictable jury. A settlement to avoid further trial proceedings is not an admission of any liability, nor should the business decision to settle necessarily be equated with negligence liability under similar circumstances.

In response to a case like *Jimenez*, the mere threat of liability may unfortunately have been sufficient to prompt the New York City Parks Department to dismantle or remove pieces of spinning disc equipment from neighborhood playgrounds. If so, such a response to a perceived threat of liability, however, does not reflect the reality of negligence liability in public parks and recreation. On the contrary, liability is the exception, rather than the rule in reported case law defining negligence liability in public parks and recreation. The mere occurrence of an injury and/or the filing of a lawsuit should not be equated with liability. On the contrary, a review of reported court decisions, liability is the exception, rather than the rule.

REASONABLY SAFE PLAYGROUND

In sharp contrast to *Jimenez*, another New York opinion involving an injury on spinning playground equipment granted summary judgment to the Town of Babylon. In so doing, the court found the town had effectively refuted plaintiff's allegations of negligence with evidence indicating the playground was in a reasonable safe condition at the time of the injury.

In the case of *Villatoro v. Town of Babylon*, 2013 N.Y. Misc. LEXIS 3185; 2013 NY Slip Op 31640(U) (7/12/2013), a 3 year old was injured when he fell from playground equipment in a town park. Plaintiff's mother, Johanna Villatoro, testified that she had brought her young son, Sebastian, to the playground many times. At the time of the accident, Sebastian was "playing on a spinning wheel when he fell and broke his arm." The wheel apparatus, identified as the "twister," was 64 inches above the ground.

As described by Sebastian's mother, there was a small platform which Sebastian stepped on with a wheel above him. Sebastian stepped off of the platform after grabbing the wheel, which started spinning. Sebastian spun around for half a circle and fell to the ground. The mother testified that she "did not see any signs on the playground which indicated there was an age restriction,

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but that she saw a sticker which had Spanish words and the numbers ‘5’ and ‘12’.”

Plaintiff’s mother alleged that the Town was negligent in “failing to install sufficient signs to notify users as to the age appropriateness of the playground.” In response, the Town argued that any failure on its part “to provide sufficient age appropriateness stickers” did not create a dangerous condition which caused the accident.

The public works coordinator for the Town testified that there was “no set inspection schedule of the parks, but that if employees of the fence crew find a dangerous condition, they would repair it.” Further, the coordinator stated that “a cleaning crew cleans the playground every morning.” Moreover, the public works coordinator testified that he was “not aware of any complaints regarding the wheel apparatus or of any accidents which involved that apparatus.”

According to the court, “a municipality has a duty to maintain its parks and playground facilities in a reasonably safe condition.” That being said, the court acknowledged that “a municipality is not an insurer of the safety of those who use its facilities.” On the contrary, the court noted the only legal duty of a municipality is “to exercise ordinary care in the supervision, construction and maintenance of those facilities.”

In this particular instance, the court found the Town had “established that the playground was in a reasonably safe condition” at the time of the accident. As a result, the court held that the Town had not breached any legal duty owed to Sebastian under the circumstances of this case. In response to plaintiff’s allegation that there was no age appropriateness signs warning the apparatus would be inappropriate for young children, the court found there was “no duty to warn against a condition which is readily observable by the reasonable use of one’s senses.”

Moreover, in this particular instance, the court noted that Sebastian’s mother was present at the playground and watching Sebastian. Under the circumstances, the court found it was “readily observable” to Sebastian’s mother that “there was an inherent risk posed by use of the wheel apparatus, which is approximately 64 inches above the ground.”

The court also found any “alleged violations of guidelines promulgated by the ASTM and the CPSC” were insufficient to establish negligence liability because these guidelines were “nonmandatory and not meant to be the exclusive standards for playground safety.” Further, in this particular instance, the court found plaintiff had failed to establish that any alleged violation of these playground safety guidelines caused the accident.

As a result, the court granted summary judgment in favor of the Town. In so doing, the court found the alleged “lack of age appropriateness signs” was not a defective condition providing a basis for negligence liability.

SUMMARY JUDGMENT REVERSED

In the case of *Gatlin v. City of Miles City*, 2012 MT 302; 367 Mont. 414; 291 P.3d 1129; 2012 Mont. LEXIS 370, the state supreme court reviewed a summary judgment in favor of the City effectively dismissing plaintiff’s lawsuit. In this particular case, Tiffany Gatlin, age 8, fell from

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a playground slide and sustained a severe head injury. At the time of the accident in July 2002, Gatlin alleged that the defendant City of Miles City had failed to "maintain a safe depth of impact-absorbing material" in the area of the slide. The City used bark chips. According to Gatlin, the 1997 installation instructions for the slide required a "protective fall zone" below the slide" which included "12 inches of impact-absorbing material under the slide, in compliance with standards set by the Consumer Product Safety Commission."

In 2001, the City had undertaken a review of its park system, focusing on playground maintenance and safety. A review committee reported to the City Council that surface protection for playground equipment was important and that the goal was "to prevent serious injury and death." A risk specialist with the City's insurer recommended establishing adequate surfacing and "fall zones" under playground equipment, following guidelines developed by the Consumer Product Safety Commission.

The City's park review committee recommended adoption of a policy to install fall areas around all playground equipment, and that those areas be raked daily in periods of peak use. In January 2002, the City Council adopted a resolution adopting "current safety standards" for the City's parks.

The trial court granted summary judgment in favor of the City. Gatlin appealed to the state supreme court. Summary judgment would only be appropriate if the City could demonstrate that it was "entitled to judgment as a matter of law." In other words, the City had to show that Gatlin had failed to alleged facts upon which to base a claim for negligence liability. If reasonable minds could differ on whether these alleged facts could possibly provide a legal basis for liability, further trial proceedings would be necessary and a summary judgment dismissing Gatlin's negligence claims would not be granted.

WILLFUL AND WANTON MISCONDUCT

As noted by the state supreme court, Gatlin and the City both agreed that the Montana "recreational use statute" (RUS) applied to this case. The RUS provided that an individual using property owned by a public entity free of charge has no assurance that the property is safe for recreational purposes. While the public landowner owes "no duty of care with respect to the condition of the property," the RUS does provide for landowner liability for an injury attributable to "willful or wanton misconduct."

In opposing the City's motion for summary judgment, if provided an opportunity at trial, Gatlin claimed the complaint had alleged sufficient facts to establish willful and wanton misconduct by the City in maintaining the park and the playground area.

According to the state supreme court, "proof of willful or wanton misconduct can be difficult." Unlike mere carelessness or unreasonable behavior which characterizes ordinary negligence, willful wanton misconduct requires proof of a level recklessness which demonstrates an utter disregard for the physical well being of others tantamount to an intent to injure.

While proving willful and wanton misconduct might be difficult, applying the judicial standard

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of review for a summary judgment, the state supreme court found Gatlin was “entitled to present her case.”

Based upon the reasonable inferences that could be drawn from the evidence submitted on summary judgment, the trier of fact [i.e. jury] could conclude that the City had knowledge of the danger of children falling on hard surfaces in the park and knowledge of the steps that could be taken to reduce that risk. The determination of whether that rises to the level of willful or wanton misconduct should be decided at trial.

Accordingly, the state supreme court reversed the summary judgment of the trial court in favor of the City and remanded (i.e., sent back) the case for further proceedings. As a result, Gatlin would have the opportunity to proceed to trial. That being said, in light of the City’s playground maintenance policy described above, Gatlin might have a difficult time in demonstrating the level of “utter disregard” necessary to establish the requisite willful and wanton misconduct for liability under the state recreational use statute.

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