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NO LIABILITY PRECEDENT IN STATE PARK SETTLEMENT

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Liability exposure is only one of many considerations in managing public park resources. Public safety in public parks is and should be a paramount consideration. That being said, popular media reports of lawsuits tend to perpetuate public misperceptions regarding the state of the law and liability. Unfortunately, overreaction to news of a significant cash settlement in a lawsuit may prompt the unwarranted closure of park resources and unnecessary elimination of public recreational opportunities.

On February 3, 2015 the Des Moines Register issued a news report entitled "Park liability results in closed Iowa facilities."
http://www.desmoinesregister.com/story/news/2015/02/02/park-dead-tree-campers-settlement/22773901/

According to the report, the State of Iowa had decided to settle a lawsuit for $390,000 involving "a family injured after high winds brought a tree down on their tent as they camped in a state park." The lawsuit alleged "Iowa had negligently failed to identify or warn campers of the 98-foot dead cottonwood that fell and struck them and their 3-year-old son in May 2010 during a storm at Lake Manawa State Park near Council Bluffs."

In response to the settlement, the Iowa Department of Natural Resources (DNR) had reportedly shut down a DNR recreational area used by off-highway vehicle enthusiasts over "concern that falling trees there might pose a similar threat to riders." According to DNR, the settlement "won't change legal precedence as much as it has changed practice."

In a settlement, there is no admission of liability. On the contrary, in a settlement agreement, the parties simply agree to resolve a lawsuit without full trial proceedings to test the legal merits of a particular claim. The ultimate decision to settle is not necessarily limited to the applicable law and available defenses. In addition to legal considerations, available public resources, the negotiable amount of damages, public relations, political considerations, and other factors may influence the decision whether or not to settle a particular claim. It may be cheaper in terms of public time and resources to settle, rather than assume the significant cost and uncertainty associated with trial litigation and potential appeals of an adverse judgment. The vast majority of claims are settled and not litigated to the fullest extent.

LIABILITY MISPERCEPTIONS

Accordingly, as acknowledged by Iowa DNR in this particular instance, there is indeed no "legal precedence" or legal significance in a settlement of this or any negligence claim for an allegedly dangerous tree. That being said, fueled by reports of liability claims in the news media, the public perception of liability remains much worse than the legal reality.

As characterized in the Des Moines Register report, "[a]gencies that oversee the use of public property are commonly held liable for injuries resulting from their negligence." Moreover, the report found the "general premise" regarding governmental liability is that "taxpayers expect governments to perform certain duties, like provide for safe parks." The news report goes on to state "Government liabilities for injuries within parks have been a recent point of concern across the United States."

This "general premise" regarding "governmental liabilities" for park injuries is patently false. Based on reported case law from the state and federal courts, liability in public parks and recreation is generally the exception, rather than the rule. In most jurisdictions, including Iowa, many variations of limited governmental immunity against negligence liability exist for public park and recreation agencies.

Had Iowa decided to litigate, rather than settle this lawsuit, one can only speculate whether the Iowa DNR would have been found liable for negligence under the circumstances of this particular claim. That being said, as described below, existing precedent under the Iowa state tort claims act may have provided a significant defense to negligence liability for failure to warn of a dangerous tree in a state park campground.

DISCRETIONARY FUNCTION IMMUNITY

The Iowa Tort claims act mirrors the language of the Federal Tort Claims Act (FTCA) in that both provide an exception to negligence liability for "discretionary functions." With minor variations, some form of discretionary function immunity against negligence liability exists in most jurisdictions. Such discretionary function immunity has been applied to claims alleging negligent failure to warn or remove hazardous conditions in public parks, including dangerous trees.

In the case of *Allen v. State of Iowa,* 644 N.W.2d 27 (Iowa 5/2/2002), the Iowa Supreme Court applied discretionary function immunity to a negligence claim arising from a catastrophic injury in a state park. In this particular case, plaintiff Robert Shelton was severely injured when he encountered loose gravel and fell more than 40 feet from a state park trail which passed along the edge of a cliff. Shelton brought a claim under the state tort claims act alleging "park authorities were negligent in failing to maintain trails or erect guardrails in the park, failing to protect members of the public using the park, and failing to insure that the park was safe for members of the visiting public."

In response to the State's motion for summary judgment, the trial court dismissed the claim, holding "the State's alleged tortious conduct fell within the discretionary function exception to the State Tort Claims Act." Shelton appealed to the state supreme court.

As noted by the state supreme court, the general waiver of governmental immunity under the state tort claims act is "subject to several exceptions, including the one at issue here: claims based on 'the exercise or performance or the failure to exercise or perform a discretionary function'." Iowa Code § 669.14(1). Accordingly, the issue before the court was "whether the park authorities' actions--or lack of them--criticized by Shelton as

tortious [i.e., negligent], involved a discretionary function. If so, governmental immunity bars the claim."

In determining whether the challenged actions fell within the discretionary function exception, the state supreme court would apply the following "two-step test":

> The first step is to consider whether the action involved a matter of choice on the part of those acting for the government. If so, a second step must be satisfied. It must also appear that the challenged judgment call is of the kind the discretionary function was designed to shield.

As characterized by Shelton "wrongly locating trails, failing to maintain them, failing to protect the public by placing guardrails or warning signs--are charges of wrong choices, not non-choices." Moreover, Shelton claimed there was no "matter of choice" in the broad language of Iowa Code section 308.7(3) which required DNR to "maintain, improve, and beautify according to plans made [for] all conservation areas."

The state supreme court disagreed, finding the DNR statute "vests discretion with the department in the matters at issue" by "directing state authorities to make plans which, by their very nature, are combinations of choices." Further, the state supreme court found "the choices at issue were of the sort intended for protection under the discretionary exception."

> The substances used in forming the trails, the placement of the trails, the omission of guards or handrails, placement or omission of warning signs, and trail maintenance, were all matters for park professionals. These administrative choices, driven as they were by economics and aesthetics, are clearly matters into which courts in general and judges in particular are ill equipped to intrude.

In so doing, the court noted that the policy basis for the discretionary exception is to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."

The state supreme court, therefore, affirmed "the trial court's refusal to consider Shelton's negligence claims." In reaching this determination, the Iowa supreme court found it was "especially appropriate" to be "guided by federal decisions interpreting federal statutes on which our own statutes are modeled." As noted by the state supreme court, federal decisions "are close to unanimous" dismissing negligence claims challenging "discretionary decisions implicating governmental policy choices in park management and maintenance."

TREE INSPECTION IMMUNITY

One such federal "guiding" decision cited by the Iowa supreme court was *Autery v. United States*, 992 F.2d 1523, 1530-31 (11th Cir. 1993) which had held the discretionary

function exception applied to the alleged negligent failure to inspect for hazardous trees. In this particular case, one individual was killed and another injured when a black locust tree fell on a car driving through Great Smokey Mountain National Park (GSMNP). The tree in question was approximately 50 years old, approximately 70 feet in height and fell due to root rot. GSMNP did not have in force a written tree hazard management plan.

In October 1976, the National Park Service ("Park Service" or "NPS") had issued Special Directive 76-9 (Health and Safety of Park Visitors) which stated in part:

> Protection of the visitor, and park and concessioner employees, from violations of laws and regulations and from hazards inherent in the park environment, is a prime responsibility of the National Park Service. The saving and safeguarding of human life takes precedence over all other park management activities, whether the life is of the visitor, concessioner, or park employee.

Pursuant to this directive, the unwritten policy at GSMNP at the time of the accident was to make every reasonable effort within the constraints of budget, manpower, and equipment available to detect, document, remove, and prevent tree hazards.

The specific issue before the federal circuit court was, therefore, "whether the government's conduct violated a mandatory regulation or policy." According to the court it was "the governing administrative policy, not the Park Service's knowledge of danger" that determines whether certain conduct is mandatory for purposes of the discretionary function exception."

> Whether employees were negligent in making any decisions is irrelevant. Negligence is simply irrelevant to the discretionary function inquiry… [T]he relevant inquiry here is whether controlling statutes, regulations and administrative policies mandated that the Park Service inspect for hazardous trees in a specific manner. If not, then the Park officials' decision to employ a particular inspection procedure -- and its execution of that plan -- is protected by the discretionary function exception.

As noted by the federal appeals court, Special Directive 76-9 "does not mention tree inspections, nor how the agency should implement the goal of safety or balance it against other considerations." In the opinion of the court, "[s]uch a general guideline is insufficient to deprive the federal government of the protection of the discretionary function exception."

> Only if a federal statute, regulation, or policy specifically prescribes a course of action, embodying a fixed or readily ascertainable standard, will a government employee's conduct not fall within the discretionary function exception.

In this particular instance, the unwritten policy required only that employees

"make every effort within the constraints of budget, manpower, and equipment available to recognize and report" hazardous trees. Accordingly, the policy prescribed neither a particular method of inspection nor special rules for inspecting black locust trees. Specifically, the inspection plan in effect at the time of the accident did not compel park employees to inspect certain trees on certain days or remove a particular number of trees per week.

Moreover, the federal appeals court found information known to the park officials regarding the potential danger of black locust trees did not remove their discretion to plan and implement the tree inspection plan. On the contrary, the Park Service's awareness that the black locust trees were especially likely to decay was only "relevant to whether it was negligent in failing to discover and remove the tree that caused the accident." However, as stated above, within the context of discretionary function immunity negligence is irrelevant absent a mandatory policy.

Further, the federal appeals court found decisions about what safety measures to employ in national parks and how to execute them generally involve balancing the same considerations that inform all policy decisions regarding the management of national parks: safety, aesthetics, environmental impact, and available financial resources. In the opinion of the court, such balancing of safety considerations and natural resource preservation interests necessarily involves decision making grounded in policy and discretion.

Accordingly, the appeals court held that "the decisions made by GSMNP personnel in designing and implementing its unwritten tree inspection program fall within the ambit of the discretionary function exception."

> To decide on a method of inspecting potentially hazardous trees, and in carrying out the plan, the Park Service likely had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available.

Having found that discretionary function immunity barred plaintiffs' negligence claims, the appeals court dismissed this case.

CAMPSITE TREE IMMUNITY

Similarly, in the case of *Snider v. United States of America*, 2013 U.S. Dist. LEXIS 105580 (W.D. Ok. 6/29/2013), a federal district court reiterated the reasoning of *Autery*. In this particular case, plaintiff Kristy Snider was injured when a dead tree snapped and fell on her while camping at Fort Supply Lake, a federal park site operated by the Army Corps of Engineers (COE).

The incident occurred in an area of the park where COE had individual campsites for

patrons to rent. There were picnic tables, grills, electrical outlets, rest areas and other conveniences generally located in the campsite area. The tree which fell on Snider was approximately 10 feet away from the picnic table located at their campsite.

In her complaint, Snider alleged COE "had a duty to maintain its premises and to correct the dangerous condition created by the failure to maintain its premises, to warn plaintiffs of the dangerous condition or to otherwise exercise due care."

In response, COE claimed immunity under the discretionary function exception to the FTCA because there was "no federal statute, regulation or policy imposed an obligation upon it to respond to the threat of hazardous trees differently than it did." On the contrary, the relevant regulation relating to maintenance of Army Corps of Engineers recreation projects did not prescribe any mandatory course of conduct for government employees:

> It is the policy of the Secretary of the Army, acting through the Chief of Engineers, to manage the natural, cultural and developed resources of each project in the public interest, providing the public with safe and healthful recreational opportunities while protecting and enhancing these resources. 36 C.F.R. § 327.1(a).

COE contended that its "conduct in maintaining its campsites and its decision as to whether or not to warn patrons of any hazards were discretionary." In so doing, COE noted federal courts have held that such "general admonitions to make the campsite safe are not specific enough to make governmental decisions nondiscretionary."

Further, COE argued that its "conduct in maintaining its campsites and its decision as to whether to warn were based on considerations of public policy." Specifically, as to the safety of visitors, COE maintained that it also had to take other considerations into account, including aesthetics, available manpower, and the availability of budgetary resources. Moreover, COE claimed any "decision about the placement of signs would have to be made pursuant to an overall policy governing the agency's stewardship of public lands." Accordingly, COE claimed a policymaking decision "not to place warnings signs of general hazards at campsites" also fell "squarely within the scope of the discretionary function exception."

The federal district court agreed. In the opinion of the court, "the conduct complained of by plaintiffs - failing to maintain the park premises by removing dead trees - is the sort of conduct of which the discretionary function exception was designed to shield."

> [D]ecisions involving tree removal can quite clearly be policy-driven matters. On government property (or any other property) that is wooded, there will inevitably be dead trees. Dead tree removal, if it is to occur at all, must get in line for government resources along with all of the other demands on the operator of a campground.

The court, therefore, concluded the discretionary function exception applied to COE's alleged negligent failure to maintain the premises by removing dead trees. Similarly, in the absence of a specific statute, regulation or policy mandating a warning, the court held the decision whether to give a warning about dead trees was discretionary and immune.

> **[**E]sthetics would be an obvious consideration as to whether to put up warning signs to keep people away from dead trees in or near the campground at Fort Supply Lake… [T]he decision as to which natural hazards to bring to the attention of the public through signs implicates public policy concerns.
>
> Faced with limited resources and unlimited natural hazards, defendant must make a public policy determination as to which dangers merit the intrusion of a sign. Too many signs would reduce the impact of individual warnings on the public. Defendant must balance the goal of public safety against competing fiscal concerns as well as the danger of an over proliferation of warnings.

Having found COE's "decisions or non-decisions" were "susceptible to policy analysis," the federal district court found immunity under the discretionary function exception to the FTCA applied to this dead tree claim.

CONCLUSION

According to the Des Moines Register story, following the $390K settlement described above, Iowa DNR had "stepped up efforts to identify and remove potentially dangerous trees, particularly in areas such as campgrounds, trails and parking areas." According to Iowa DNR, "[w]e felt this was something we needed to step up, to take a look at some of those trees that could potentially be hazards."

These statements beg the question whether DNR had a mandatory policy in place at the time of the reported accident in the state park campground which required inspection hazardous trees in a specific manner. More than likely, DNR did not have such a detailed mandatory policy which dictated the specific details for tree inspections in state parks. As illustrated by the *Autrey* decision described above, an informal unwritten policy to identify hazardous trees, while arguably negligent, is more than likely to be within the scope of discretionary function immunity under a state tort claims act which follows the FTCA federal court decisions for "guidance."

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