

## MAY 2019 LAW REVIEW

### CERTIFIED PLAYGROUND SAFETY INSPECTOR ACCIDENT REVIEW

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

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The National Recreation and Park Association (NRPA) offers the industry leading certification program in playground safety, the Certified Playground Safety Inspector (CPSI) certification program. The CPSI certification program provides the most comprehensive and up-to-date training on playground safety issues including hazard identification, equipment specifications, surfacing requirements and risk management methods. <https://www.nrpa.org/certification/CPSI/>

As characterized by NRPA, training as a CPSI can: "Protect children from injury due to playground hazards" and "Reduce your agency's liability." In particular, the "desired outcome" of the NRPA CPSI program is for the CPSI to be "capable of establishing the basics of a sound risk reduction program; establish a system of repair, retrofit and removal of hazardous equipment; and establish a routine inspection system for their own agency or playground owner-client."

In so doing, the NRPA "understands that achieving the CPSI certification does not make one an expert in the implementation of the public use playground standard of care." On the other hand, NRPA noted proper and consistent field application of the knowledge and specific competencies necessary to attain certification "will help to create an experience level necessary to be considered a playground safety expert."

NRPA provides a searchable on line CPSI Registry that provides contact information for current CPSIs, many of whom are associated with public park and recreation agencies.  
[https://apps.nrpa.org/CPSI\\_Registry/](https://apps.nrpa.org/CPSI_Registry/)

In the playground liability cases described herein, a CPSI provided expert witness testimony to establish the fact that the school playground equipment at issue was reasonably safe or dangerously defective under the circumstances. A CPSI may be able to reduce the scope of the agency's potential liability for negligence by reinforcing the agency's evidence of reasonable playground maintenance and adherence to the applicable legal standard of care. In particular, the CPSI should be able to address the applicability and adherence to the Public Playground Safety Guidelines promulgated by the Consumer Product Safety Commission (CPSC) in a playground injury lawsuit.

Unless legislated in a local ordinance or adopted into state law, the CPSC Guidelines are not mandatory and, therefore, not conclusive evidence of the applicable legal standard of care. On the contrary, as "Guidelines," these CPSC recommendations may provide authoritative evidence of the applicable legal standard of care to the extent most reasonable persons under the circumstances have adopted the Guidelines as a true reflection of the customs, practices and usages governing playground safety.

One such recognized custom, practice and usage in playground safety is the NRPA CPSI program. The NRPA CPSI program website cites a number of "playground standards and

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guidelines," including the "Consumer Product Safety Commission (CPSC) Public Playground Safety Handbook." A free pdf copy of the Handbook is available at:  
<https://www.cpsc.gov//PageFiles/122149/325.pdf>

### SPIDER FALL

In the case of *K.M. v. Deer Park Union Free School District*, 2019 N.Y. Misc. LEXIS 695 (2/19/2019), the child, KM, was injured when she fell from school playground equipment, the "Spider" climbing apparatus. Plaintiff KM testified that on the accident date, she played outside on the Spider apparatus during her lunch recess at school. She testified that she climbed on top of the horizontal bars of the Spider, sat on top of it while holding onto the bars on each side of her, and hung her feet through the opening. KM testified that she then tried to jump down through the open space where her feet had been dangling, hit her teeth on one of the bars on her way down, and then landed on the ground.

In her complaint, plaintiff KM alleged the defendant school district was "negligent in its maintenance, control, inspection and supervision of its playground climbing apparatus known as the 'Spider'." Specifically, plaintiff alleged "the loose-fill ground cover beneath the Spider was insufficient." In addition, plaintiff claimed "the Spider constituted a dangerous condition on the property" because "the vertical distance of the lateral bars and the horizontal space between the top two bars of the Spider apparatus were too wide for elementary school children."

In response, the defendant school district claimed "the subject area of the playground was properly maintained" and there was "no evidence of a defective dangerous condition." The school district, therefore, brought a motion for summary judgment to dismiss KM's complaint.

### NEGLIGENCE RULE OF LAW

According to the court: "The mere happening of an accident, in and of itself, does not establish liability of a defendant." Within the context of a fall from playground equipment, the court noted further: "Mere speculation as to the cause of the fall is insufficient to raise a triable issue of fact." A "triable issue of fact" involves disputed evidence and points of law which would warrant further trial proceedings to be resolved. To avoid having a negligence claim dismissed on a motion for summary judgment, plaintiff has the burden to allege sufficient facts to establish a legal basis for a claim, in this case negligence.

As noted by the court, summary judgment to dismiss a negligence claim would be warranted if the pretrial record shows the defendant "neither created the alleged hazardous condition nor had actual or constructive notice of the condition for a sufficient length of time to discover and remedy it." The court, therefore, reviewed the pretrial record to determine if evidence of negligence existed in this particular instance.

### NOTICE OF HAZARDOUS CONDITION?

Joseph Orechio, the head custodian at the school for approximately 18 years, testified at his examination before trial that "there were no prior incidents of any injuries sustained as a result of

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falling or jumping from the Spider apparatus, nor had the district ever received any complaints or notices of either a defective condition on the apparatus or the groundcover beneath it."

Similarly, KM's father, Steven Mistier, testified that prior to the accident date he never made any complaints about the Spider apparatus or the ground cover at the playground, nor was he aware of anyone else ever having made any such complaints. Moreover, Mistier testified that he was not aware of any other children getting hurt on the Spider or the subject playground.

### INSPECTION & MAINTENANCE EVIDENCE

At his examination before trial, Philip Cortese testified that he had been employed by the School District since 1988; and that since 2006, he has been the head groundsman. He testified that in April 2015 he supervised four groundsman, whose duties include inspecting the playground equipment every Monday. Cortese testified that inspections consisted of checking for debris or damage, ensuring enough mulch or pea stone is under the slide, and checking the railroad ties and borders.

As head custodian, Orecchio testified that "part of his duties include basic inspection of the playground equipment, including the Spider." Orecchio testified that when he inspected the Spider, he checked to see if anything was loose; and he also checked the level of the pea gravel. He testified that he did this every couple of weeks in the warmer months. He also testified that he would rake the pea gravel to make it level; and that if it needed replenishing, he would notify the Grounds Department, which would then replenish it.

Orecchio testified that the Spider has been at the school in the same location for the duration of his employment, and that he believed it was last painted more than 15 years ago. He testified that the pea gravel in the subject area is replenished annually over the summer, before the start of the school year and he was not aware of any other incidents or accidents where the Spider is located.

Orecchio further testified that he inspected the pea gravel by the Spider and kept a record of the inspections in a playground log. He stated that last inspection before the accident was on the previous Monday and that he was familiar with the CPSC guidelines. He testified that since 2006 the School District never received any notices from CPSC (Consumer Product Safety Commission) or any other federal government agency about updating or retrofitting the Spider.

### CPSI SWORN STATEMENT

In his sworn affidavit, Orecchio acknowledged a playground safety inspector, M. Payne, had inspected the site July 15, 2015. Orecchio further stated that "no additional surfacing material was applied to the subject playground nor were any repairs or alterations made to the Spider apparatus... in between the incident date and July 15, 2015."

The playground safety inspector (M. Payne) had been certified by the National Recreation and Park Association (CPSI). Payne was also a member of the American Society for Testing and Materials (ASTM) Committees for Public Use Playground Equipment Safety and Public Playground Surfacing Materials. In her sworn statement (affidavit), Payne indicated she had

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inspected the Spider apparatus at the John Quincy Adams Elementary School playground on July 15, 2015. Further, Payne stated spoke with the school facilities manager, and that she reviewed the pretrial record, including transcripts of depositions by the parties for plaintiff and the defendant.

### CSPC HANDBOOK

At the time of her inspection, Payne found the highest rung on the Spider was comprised of galvanized metal at a height of 51 inches. Payne's affidavit stated that the ground cover in the area of KM's fall was comprised of uncompacted pea stone over a sand base, and was measured at a depth of seven inches. Payne further stated that both sand and pea stone are recognized as acceptable impact absorbing materials.

Payne noted the spider playground apparatus predated the date of the first CPSC handbook in 1997. (The 2008 CPSC Handbook, however, notes the first CPSC Handbook for Public Playground Safety was published in a two-volume set in 1981. In 1997, the CPSC Handbook was updated, with a second update in 2008.)

According to Payne, the 1997 CPSC handbook provided that "a 6-inch depth of uncompressed medium gravel would be adequate to prevent a life threatening head injury from a fall height of five feet." As described by Payne, the "standards for ground cover" cited in the CPSC handbook "do not protect against all types of injuries; rather, the purpose is for reducing the likelihood of life-threatening head injuries."

In addition, Payne addressed plaintiff KM's allegation that "the horizontal spacing between the top two bars exceeded the CPSC recommended 12 inches maximum distance." According to Payne, this CPSC recommendation did not apply in this particular instance because "the CPSC guidelines [with spacing guidelines] were first published in 1991 prior to both the manufacture of the subject apparatus and any promulgated guidelines for spacing." (In 1991, the two-volume set was replaced by a single-volume CPSC Handbook which contained recommendations based upon a human factors criteria report for playground equipment safety.)

In the opinion of the court, Payne's affidavit had established: "the Spider apparatus was appropriate for infant plaintiffs age, and was not defective." In so doing, consistent with Payne's affidavit, the court found KM's "reliance on the CPSC handbook" was an insufficient legal basis for her negligence claim because "the Spider apparatus' manufacture and installation predated the publication of the handbook." Most importantly, the court noted further the CPSC handbook was not conclusive evidence of the applicable legal standard of care for playgrounds because "the promulgated standards by CPSC are not mandatory but, rather merely suggested guidelines."

### PLAINTIFF'S EXPERT NO CPSI

In her claim, KM had alleged, on the date of the accident, the defendant school district had failed to provide "adequate ground cover underneath the Spider." KM had also claimed the Spider apparatus was "poorly maintained" and dangerous due to the "defective spacing" of the "worn" metal bars on the apparatus.

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In support of her negligence claim, KM's expert witness, R. Robbins, had provided a sworn statement which contained a copy of his "inspection and summary report of the playground" as well as a review of "the weekly playground inspection report for the subject playground."

According to Robbins, "the spacing of the bars" on the Spider was "especially difficult for elementary-school-aged-children to traverse." Accordingly, KM claimed "the apparatus was defective because the vertical and horizontal spacing of the bars on the spider apparatus was deficient."

In sharp contrast to the qualifications of CPSI Payne, the court found: "the affidavit submitted by plaintiffs' expert [Robbins] fails to set forth what, if any, specialized training or education regarding playground equipment qualifies him to render an opinion as to whether a hazardous condition existed."

### NO EVIDENCE OF NEGLIGENCE

Based upon the above described evidence in the pretrial record, the court found the defendant School District had demonstrated it had "maintained the pea gravel ground cover in a reasonably safe condition and the apparatus was not defective." Moreover, based on the pretrial record, the court found the School District had established "it did not create or have notice of the alleged defective condition of the Spider apparatus."

As a result, based upon the pretrial record, the court found "no evidence from which a jury could rationally conclude that infant plaintiff's fall was more likely due to the alleged dangerous condition of the Spider apparatus." On the contrary, the court found KM's fall was just as likely due to "sudden loss of balance or grip" unrelated to the condition of the Spider. Based on the lack of evidence in the pretrial record to support a negligence claim, the court, therefore, granted the defendant school district's motion for summary judgment dismissing KM's lawsuit.

(NOTE: Although manufacture and installation of the Spider may have predicated the CPSC Handbook, the question left unresolved by the court was whether the Spider had become dangerously obsolete over time and should have been retrofitted or removed at the time of the accident in 2015 based on available risk and safety information in the 2008 CPSC Handbook. Moreover, CPSC Handbook spacing requirements between rungs in a climbing apparatus primarily address the risk of head or body entrapment on the apparatus as opposed to falls.)

### UNSUPPORTED CPSI OPINION

In the case of *Derrick v. Port Wash. Union Free School District*, 2018 N.Y. Misc. LEXIS 5695 (3/12/2018), plaintiff Derrick Suarez (Derrick) was injured when he tripped and fell on a school playground on June 3, 2014. Derrick testified that during a game of "catch" at recess one of the other students threw the ball high. Derrick stated that while running backward chasing the ball he tripped on a metal pole. Derrick stated that he tripped on one of the poles that attached to the seat of the "twirl go round" and hit his head on the middle of the seat.

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Derrick testified that as he ran backwards to catch the ball he tripped on a wooden beam which held in place the wood chips surrounding the playground equipment. Derrick later testified that the wooden beam rather than the pole described in his original testimony caused him to fall forward causing him to hit his head. Derrick alleged the pole supporting the "twirl go round" and the wood border was a defective condition on the playground.

School District witness Walter J. Clark Jr. testified at his examination before trial that he has been with the Port Washington Union Free School District for 37 years and assigned to Manorhaven School (where the incident occurred) since 1992. At the time of the incident Clark was head custodian. As part of his duties he inspected the schoolyard on a daily basis. He visually inspected the wood borders around the playground equipment. He found no tripping hazard.

According to the court, the following general legal principle would govern landowner liability for negligence:

In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon his property it must be established that a defective condition existed and that the landowner either affirmatively created the condition or had actual or constructive notice of its existence .

To establish the requisite defective condition as a legal basis for negligence liability, Derrick relied upon the opinion of his expert witness, A. Heraghty, a National Recreation and Park Association Certified Playground Safety Inspector (CPSI). On June 19 2017, Heraghty conducted an inspection of the subject recess area. Heraghty stated it was his opinion that the defendant school district "did not exercise reasonable and due care in providing a safe environment for the plaintiff during recess."

In so doing, however, the court noted the CPSI did not reference any recognized authority for his opinion, including the applicability of the Public Playground Safety Guidelines promulgated by the Consumer Product Safety Commission (CPSC) to this particular playground fall incident. As a result, the court rejected the CPSI's unsupported conclusory opinion:

All of Heraghty's opinions were conclusory citing no statute or regulation no forensic or empirical support no examination of records and no engineering data that defines or measures how far children must be from a wooden barrier or wood chip area while playing a game of catch. Although Heraghty measured the wooden barrier surrounding the wood chip area concluding it to be a defective condition that conclusion also lacked any authority stating that the height of the wooden barrier violated a guideline rule or law.

Since plaintiff Derrick had failed to contradict evidence that the defendant school district had "maintained the playground in a reasonably safe condition," the court granted the defendant school district's motion for summary judgment dismissing Derrick's complaint.

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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 Fairfax, Virginia. E Mail: [jkozlows@gmu.edu](mailto:jkozlows@gmu.edu) Webpage with link to law review articles archive (1982 to present): <http://mason.gmu.edu/~jkozlows>