NATURAL CONDITION IMMUNITY FOR CAMPSITE TREE INJURY

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While absolute sovereign immunity under the traditional common law has been abolished, significant albeit limited governmental immunity has been preserved in various types of state statutes. Most notably, many immunity exceptions exist within various provisions of an applicable state tort claims act, i.e., a statute defining under what circumstances governmental entities may be held liable for negligence in a particular jurisdiction.

As illustrated by the Burnett decision described herein, one such immunity exception precludes any governmental liability for injuries attributable to a natural condition and/or unimproved property under the control of a governmental entity, including public parks. With some minor jurisdictional variations, some form of significant statutory governmental immunity for natural conditions and/or unimproved property can be found in a significant number of State Codes, including the following:

California: Cal Gov Code § 831.2 (2015)
Colorado: C.R.S. 24-10-106(E) (2014)
Minnesota: Minn. Stat. § 466.03 Subd.6b (2015)
Oklahoma: 51 Okl. St. § 155(10) (2014)
Utah: Utah Code Ann. § 63g-7-301 (2014)

DANGEROUS TREE LIMB

In the case of Burnett v. Colorado Division of Parks and Outdoor Recreation, 2015 CO 19; 346 P.3d 1005; 2015 Colo. LEXIS 216 (Colo. 3/23/2015), the Supreme Court of Colorado had to determine the scope and applicability of natural condition immunity under one such state statute: C.R.S. 24-10-106(E) (2014). In this particular instance, the issue before the Colorado supreme court was whether the government was immune from liability for injuries sustained by plaintiff Burnett when a tree limb fell on her as she camped below in a designated campsite in Cherry Creek State Park. In addressing this issue, the state supreme court had to determine whether the tree which caused plaintiff’s injuries was a “natural condition of unimproved property” under the Colorado Governmental Immunity Act (CGIA).

FACTS OF THE CASE
Located just southeast of Denver, Cherry Creek State Park ("the Park") encompasses 4,200 acres and includes more than thirty miles of multi-use trails for biking, hiking, and horseback riding. It also features 135 designated camping sites. The State of Colorado leases the land on which the Park is located from the U.S. Army Corps of Engineers. Despite various man-made attractions and amenities, many of the Park's naturally occurring features remain undisturbed. Among these features are several thousand trees that were on the property when the State established the Park in 1959. Some of these trees border the campsite at issue in this case. The Park's mature trees provide a habitat for great horned owls and bald eagles. Whitetail and mule deer use the thick cover for bedding. Woodpeckers and northern flickers eat the insects that are inside the trees, and pheasants use the vegetation for cover and roosting.

On July 18, 2010, Burnett and her friend, Mackenzie Brady, went camping in the Park after they paid a fee to enter. The pair chose Campsite No. 14, which included a utility hookup, a parking area, a picnic table, and a level dirt pad. Burnett and Brady chose to pitch their tent on the dirt pad under the canopy of four mature cottonwood trees, reaching some seventy-five feet in height and flanking Campsite No. 14. The weather that night was uneventful.

Early the next morning, while Burnett and Brady remained asleep inside their tent, a tree limb dropped from one of the cottonwoods and struck both of them. The blow fractured Burnett's skull and a vertebra and caused other acute injuries, including a concussion and multiple lacerations to her scalp and face. Brady suffered only minor injuries and was able to drive Burnett to the hospital, where Burnett spent three days. Due to the density of the canopy, Park employees who subsequently investigated the campsite were unable to determine the source of the fallen tree limb.

PRMISES LIABILITY?

Burnett brought a premises liability action against the State of Colorado Department of Natural Resources, Division of Parks and Outdoor Recreation ("the State") seeking compensation for her injuries. In so doing, Burnett relied on a section of the CGIA which, in pertinent part, waived the governmental immunity of a public entity “for injuries caused by a dangerous condition of any public facility located in any park or recreation area maintained by a public entity.” According to Burnett, the branches overhanging the campsite constituted a “dangerous condition” of the Park.

Burnett and the State both agreed that the improved campsite was a “public facility” and the trees adjacent to the campsite “originated on unimproved property.” The State, however, denied any liability based on a separate provision of the CGIA under which a public entity retains immunity for “an injury caused by the natural condition of any unimproved property” (the natural condition provision).

The trial court granted the State’s motion to dismiss Burnett’s lawsuit and the appeals court affirmed this decision. The state supreme court granted review of this decision.
LEGISLATIVE INTENT?

On review, the state supreme court would analyze the natural condition provision to determine the “legislative intent” of the statutory language. Specifically, the court would interpret this particular provision in a manner which was consistent with the overall language of the CGIA. In so doing, the state supreme court would apply the following generally accepted principle of judicial review:

Where the statutory language is unambiguous, we give effect to the language's plain and ordinary meaning. Where the statutory language is susceptible to more than one reasonable interpretation, it is ambiguous; in such cases, we may examine statements of legislative policy to determine legislative intent.

As characterized by the state supreme court, the CGIA “generally immunizes governmental entities and employees from tort liability, but waives this immunity under limited circumstances.” Further, the court acknowledged that the CGIA is “sometimes inequitable,” denying legal redress to injured plaintiffs in favor of governmental immunity for public entities in order to preserve “many essential services that unlimited liability could disrupt or make prohibitively expensive.” That being said, the state supreme court also recognized that the balance between liability and immunity was a legislative, not a judicial function.

In this particular instance, the state supreme court noted the CGIA would provide governmental immunity “if the tree at issue falls within the ambit of the natural condition of unimproved property limitation.” Based on the following expressed language in the CGIA, the state supreme court found further immunity would still apply without regard to the tree’s location in any public park.

Nothing in this paragraph shall be construed to prevent a public entity from asserting immunity for an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area or on a highway, road, or street right-of-way. § 24-10-106(1)(e).

That being said, the state supreme court acknowledged that the expressed language of the CGIA does not define "natural condition of any unimproved property." Moreover, none of Colorado's appellate courts had interpreted this statutory language.

On appeal, Burnett had argued that “the trees were in their ‘natural condition’ until the State altered the trees' condition through incidental maintenance.” Burnett further claimed that the State had “incorporated the trees into improved property” when “the State built the campsite subjacent to the trees.”

In response, the State claimed the trees were “native flora to property” which had “existed on unimproved property before the State built the campsite.” As a result, the
State contended that the trees retained their character as a “natural condition of unimproved property,” irrespective of “incidental maintenance or their proximity to improvements on the land.”

In the opinion of the state supreme court, Burnett and the State had both presented “reasonable interpretations of the natural condition provision's plain language” in the CGIA. Since the natural condition provision was “susceptible to alternative, reasonable interpretations,” the state supreme court found “the statutory language is ambiguous.” Accordingly, under the above cited general rules of statutory interpretation, the state supreme court would “look beyond the statute's plain language to ascertain and effectuate legislative intent.” In so doing, the state supreme court would first examine and “the legislative history of the natural condition provision” and then apply these principles to the facts of this particular case.

LEGISLATIVE HISTORY

In 1971, the Colorado state supreme court had held “judicially imposed sovereign immunity was inappropriate and abolished such immunity at every level of government.” In response, the state legislature enacted the CGIA to “reestablish governmental immunity, excepting a finite number of specific circumstances in which public entities waive immunity.” This legislation was accompanied by a research report (Report) to “assist in developing immunity legislation.” In 1986, as a consequence of excessively high municipal insurance rates, the General Assembly substantially amended the CGIA to afford the government greater protection against liability.

As cited by the state supreme court, the Report described legislative intent of the natural condition provision as follows:

[F]irst, it distinguishes between dangerous conditions arising from man-made and natural objects; second, it suggests that immunity turns on the precise mechanism of the injury; third, it expresses a clear intent to exempt public entities from a duty to maintain any natural conditions; and finally, its stated policy goals include encouraging public entities to open up to the public unimproved, government-owned property without exposing the entities to the burden and expense of defending claims brought by individuals who are injured while using the property.

Accordingly, based on the Report, the state supreme court concluded “the legislature intended to retain immunity for injuries caused by native trees originating on unimproved property regardless of their proximity to a public facility, such as the improved area of the campsite here.”

Further, in distinguishing between dangerous conditions arising from man-made objects and those arising from natural objects, the state supreme court determined “the natural condition provision governs any injuries arising from naturally occurring features of parks without consideration of their proximity to man-made objects.” As a
result, the state supreme court held “improvement of a portion of a park area does not remove the immunity from the unimproved areas.” On the contrary, in the opinion of the state supreme court, “the General Assembly intended the natural condition provision to retain vitality as applied to partially developed state parks.”

INJURY MECHANISM

In the above described Report, the state supreme court found “immunity should turn on the precise mechanism of the injury rather than the plaintiff's location when the injury occurred.” Specifically, the legislative intent of the CGIA required courts to make a distinction between (1) injuries caused by negligence in the construction, maintenance, failure to maintain, etc. of artificial, man-made objects (swing sets, buildings, etc.) and (2) injuries caused by the natural conditions of a park. In other words, unlike negligence liability for injuries caused by the dangerous condition of artificial object, immunity should be retained for injuries caused by natural dangerous conditions. Accordingly, the state supreme court found “immunity turns on whether the injury was caused by negligence in the construction or maintenance of a man-made object or by a dangerous natural condition.”

As characterized by the state supreme court, the legislative intent to preserve governmental immunity under the natural condition provision was meant to shift to the public the risk of injury from dangerous natural conditions:

In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved property in its natural condition to assume the risk of injuries arising therefrom.

In reaching this determination, the state supreme court noted that courts in other jurisdictions with similar statutory immunity for natural conditions had also concluded that “the exact mechanism of a plaintiff's injury [the tree], not her location at the time of injury [a developed state park campground] determines immunity.”

Moreover, the state supreme court found the clear legislative intent of the natural condition provision in the CGIA was to “exempt public entities from liability for failing to maintain natural conditions.”

If a facility is constructed or built, it must be maintained at the risk of being liable for a failure to do so. If there is property which was not constructed, but is natural and unimproved, a public entity is not required to maintain it and cannot be held liable for failure to maintain it. In this case, sovereign immunity is applicable.

As a result, the state supreme court held the natural condition provision “does not create a duty to maintain natural features, nor does a duty arise merely because of the features' proximity or contiguity to improved property.” Moreover, “even where the State chooses
to maintain unimproved property to protect the public health and safety,” the state supreme court similarly held the State “does not assume a duty to maintain the property where none otherwise existed.

IMMUNITY POLICY

As characterized by the state supreme court, this policy "encourages the provision of services to protect the public health and safety and "allows public entities to allocate their limited fiscal resources."

As noted by the state supreme court, “[t]he primary concern in implementing the CGIA was to provide the public with a sufficient avenue to tort recovery without exhausting governmental resources—namely, the public fisc—through excessive exposure to tort liability.” One such concern addressed by the natural condition provision was “subjecting public entities to liability where injuries arise from natural conditions”:

[I]f immunity were waived with respect to injuries caused by the natural condition of any unimproved property, the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many entities to close such areas to public use.

Accordingly, the state supreme court concluded that the legislative intent of the natural condition provision was to “encourage governmental entities to open primitive, government-owned property to the public by limiting the entities' exposure to liability from individuals who choose to use the property.” As a result, the state supreme court held “the General Assembly intended a natural condition of unimproved property" to include native trees originating on unimproved property.”

NATIVE CAMPSITE VEGETATION

Applying this legislative analysis to the facts of this particular case, the state supreme court rejected Burnett’s claim that “the trees were located on improved rather than unimproved property because the State built and situated Campsite No. 14 subjacent to the trees.” As noted by the court, natural condition immunity is determined by the mechanism, trees, not the location, developed campsite. Similarly, the court rejected Burnett’s argument that “the trees bordering Campsite No. 14 were no longer in their natural condition because the Park had previously pruned them.” As described above, maintenance of a natural condition would not give rise to a legal duty where not existed previously.

Accordingly, the state supreme court agreed with the State that the natural condition provision precluded Burnett’s lawsuit because “a branch from trees originating on unimproved property caused Burnett's injuries.”

The natural condition provision's legislative history unequivocally
manifests the General Assembly's intent to distinguish between injuries caused by man-made objects (for which immunity is waived) and those caused by natural objects (for which immunity is retained)...

[W]e conclude that immunity turns on the mechanism of Burnett's injuries, not her location when the injuries occurred. The record shows the cottonwoods bordering Campsite No. 14 were native vegetation of the unimproved property. The branch at issue fell from one of those cottonwoods. Thus, Burnett's injuries were caused by a natural condition of unimproved property, such that the natural condition provision precludes her suit.

Moreover, in the opinion of the state supreme court, this judicial analysis of the CGIA was “consistent with the legislature's policy goals.”

To make the State a guarantor of the public's safety from dangerous natural conditions of this sort would discourage it from opening and improving park lands for the public to enjoy. Neither the State's limited maintenance of some unimproved portions of the Park, nor its construction of structures nearby eliminated the governmental immunity intended by the legislature...

Burnett's injuries are tragic, but eliminating governmental immunity in this case would only compound the tragedy by sidestepping legislative intent and providing a disincentive for the government to facilitate access to public lands.

Accordingly, the state supreme court affirmed the judgment of the lower courts dismissing Burnett’s lawsuit against the State based on the “natural condition” immunity provision of the CGIA.

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