OBVIOUS TREE HAZARD ON PARK SLEDDING HILL

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Under traditional principles of landowner liability for negligence, the landowner generally owes a legal duty to guard, warn or make the premises reasonably safe for use by invitees. Invitees are those invited or encouraged to enter the premises for a particular public or business purpose, e.g. recreational use of a public park.

To make the premises reasonably safe for invitees, a landowner must inspect and repair or remove known or discoverable hazards within a reasonable time. In the alternative and/or where it is impossible or impractical to repair or remove known or discoverable hazards on the premises, a landowner may be required to provide an adequate warning of hazards on the premises. An adequate warning takes a hazard which is known by the landowner and communicates the general scope of the risk to the recreational user through the reasonable use of the recreational user's senses. Conversely, there is generally no legal duty to warn invitees of hazardous conditions which are already either known or obvious through the reasonable use of one's senses.

Accordingly, within the context of landowner liability, there is generally no legal duty to guard or warn against open and obvious natural hazards. In most instances, such natural hazards come with the territory and recreational users, looking out reasonably for their own safety, should be able to avoid or protect themselves against such open and obvious dangers on the premises.

Although a landowner generally has no duty to protect invitees against open and obvious natural hazards on the premises, under what is sometimes referred to as the "distraction theory," a landowner may still have a duty to guard or warn against an otherwise open and obvious hazard under limited circumstances where the landowner knows or should know that invitees will become "distracted" and not be able to avoid or protect themselves against an otherwise open and obvious hazard on the premises.

As a natural part of the terrain, trees generally pose an open and obvious hazard to recreational users, including the risk of colliding with trees during recreational activities. That being said, when the landowner locates trees in close proximity to a known recreational use area, like a sledding hill, it may turn what would otherwise be an open and obvious natural hazard into an unreasonably dangerous condition upon which to base landowner liability for negligence.

As illustrated by the case described herein, the trees at issue were not part of the original landscape and, more importantly, not necessarily an open and obvious natural condition under the circumstances. On the contrary, the allegedly dangerous tree hazard was a manmade condition created as part of a park reforestation project. Moreover, the potential hazard these trees posed to recreational users was known to the landowner, but not necessarily open and obvious to invitees on the premises. Further, invitees to a public park have a reasonable expectation of safety that the premises are not hazardous for foreseeable public recreational uses, like sledding on a sledding hill.

Even if open and obvious, under the distraction theory, the landowner perhaps should have known that recreational users could becomes distracted and not be able to protect themselves. Moreover, depending on the circumstances, a government agency that maintains land upon which the public is invited, like a public park, might be expected to anticipate harm to recreational users from otherwise open and obvious natural conditions.

PLANNER IGNORED FORESTER

In the case of *Connelly v. City of Omaha*, 284 Neb. 131; 2012 Neb. LEXIS 94 (7/20/2012), Rachel and Chelsea Connelly were injured in Memorial Park in Omaha, Nebraska, when their saucer-type plastic sled collided with a tree. The Park was available for recreational purposes free of charge. The City was solely responsible for planting, maintaining, and removing all trees in the park. The City knew that the park had been used by the public for sledding for many years, and it was aware of prior incidents in which persons sledding in the park had collided with trees.

In the late 1990's, the City began planning to restore and renovate Memorial Park. The primary purpose was to improve the park's infrastructure. The project involved planting 300 new trees. The City held meetings to hear public comment on the project. At the first meeting held on March 7, 1997, attendees commented on "the essence, character, image and purpose of Memorial Park," which included "sledding opportunities."

At a second meeting on April 25, attendees commented that new plantings should be avoided in the area of the park used for sledding. Mary Slaven, a park planner and the project manager for the City's reforestation project, understood these comments to mean that trees should not be planted in the area of the park used for sledding. Slaven thus made that one of her goals in planning the renovation project. But Slaven did not know which specific area of the park was used for sledding.

During one meeting, one person showed Slaven the general area used for sledding and city forester Philip Pierce offered to show her the area more specifically "when the time came." Slaven understood this to mean that when the time came for plantings to be made, she would contact Pierce in order to avoid planting trees in the sledding area. Pierce was familiar with the sledding area at the park.

Despite this offered assistance, Slaven moved forward on the project without soliciting information from Pierce and without observing sledding activity in the park. Trees were planted in 1998, including a set of small crab apple trees, which were placed on the southeast slope of the park next to a sidewalk.

After this initial renovation project was completed, federal funds became available to plant 500 additional trees in Memorial Park. In conjunction with the new reforestation project, Slaven asked Pierce to identify the sledding area on an aerial photograph. In April 1999, Pierce went to the park to view the crab apple trees and recommended that they be moved, partly because he believed the trees presented a hazard to people sledding in the park. Pierce's comments surprised Slaven, because she assumed people would not sled over a sidewalk. Without further inquiring about Pierce's comments, Slaven decided to leave the crab apple trees on the southeast slope. She

reasoned the trees had made it through one sledding season without incident.

Several sledding injuries occurred after the renovation project was completed. One accident occurred on December 17, 2000. A father had allowed his two children (3 and 8 years old at the time) to slide down the slope on a saucer sled. The sled got turned around, and they hit one of the crab apple trees on the right side of the slope that Pierce had told Slaven to move. One child sustained injuries as a result of the collision.

THE INCIDENT

On December 29, 2000, plaintiff Timothy Connelly decided to take his daughters sledding at Memorial Park. Rachel and Chelsea were 5 and 10 years old, respectively, at the time. This was the first time Timothy had been to Memorial Park. He chose the park because his daughters were getting older and looking for a longer sledding hill, and he knew Memorial Park was used by the public for sledding.

Upon arriving at the park, Timothy walked to the southeast slope. He assessed the slope's dangers and noticed trees to the left, to the right, and at the bottom. He chose a starting point near what appeared to be the center of the slope. Chelsea then placed a saucer sled on the slope. The sled had no steering mechanism, and Timothy knew it could go in an unintended direction. Rachel sat on the saucer behind Chelsea, and Chelsea pushed off. The sled began veering right, and the sled collided with one of the crab apple trees on the right side of the slope.

Rachel and Chelsea were taken by ambulance to a nearby hospital. Chelsea sustained injuries to her ribs and chest, from which injuries she recovered. Rachel sustained a fracture dislocation of her spine, which resulted in permanent paralysis from the shoulders down.

TRIAL COURT

Following a trial on the issue of negligence liability, the district court found the City liable "for its actions in planting and maintaining the tree in Memorial Park" because “the City was aware that the crab apple trees posed a danger to persons sledding in Memorial Park, and the City failed to take action” prior to the accident.

> [T]he City knew that sledding occurred in the park, that Pierce had instructed Slaven to move the crab apple trees, and that a sledding accident occurred with one of the crab apple trees 12 days before the Connelly accident.

Judgment was entered in favor of the Connellys. The City appealed to the state supreme court. On appeal, the City claimed the district court had erred in finding the City was liable for negligence.

ON APPEAL

Under the state tort claims act, the state supreme court noted that the City would be for negligence “in the same manner and to the same extent as a private individual.” Accordingly, in

determining negligence liability, the court would analyze "the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages." The court characterized this particular negligence claim as "premises liability case" because "the City owns Memorial Park" and "the tree struck by the sled was a condition on the premises." Further, the court noted "Timothy, Rachel, and Chelsea were lawful visitors [i.e. invitees] to the park when the accident occurred."

Under such circumstances, the state supreme court acknowledged that "an owner or occupier is liable for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves" the following:

> (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition;
>
> (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor;
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> (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger;
>
> (4) the owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and
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> (5) the condition was a proximate cause of damage to the lawful visitor.

On appeal, the City contended that the evidence at trial did not support the second element, i.e., a conclusion that the City "realized the condition involved an unreasonable risk of harm to the lawful visitor." Moreover, the City contended that the evidence was also insufficient to prove the third element, i.e., lawful visitors to the Park "would not discover or realize the danger or would fail to protect himself or herself against the danger."

REALIZATION OF RISK

In the opinion of the state supreme court, the district court had not erred in finding that "the **City** should have realized the crab apple trees posed an unreasonable risk of harm to sledders." In so doing, at the time of the accident, the state supreme court found "the City knew the area of the park where the accident occurred was used by the public for sledding and knew there had been prior sledding accidents involving trees."

> Before planting the tree which Rachel and Chelsea's sled struck, the City was aware of public sentiment that new plantings should be avoided in the area of the park used for sledding. Indeed, the City had made that a goal of the project. After the crab apple trees were planted on the southeast slope, Pierce, the city forester, recommended that they be removed. One of the reasons for his recommendation was that the trees presented a hazard to sledders. And 12 days before the Connelly

> accident, a sled with two children on it struck one of the crab apple trees.

The state supreme court then considered whether the City "should have expected that lawful visitors such as the Connellys would either not discover or realize the danger posed by the crab apple trees or would fail to protect themselves against the danger." On appeal, the City had contended that "the open and obvious tree did not present an unreasonable risk of harm to sledders who should have discovered it, realized the danger, and gone elsewhere."

Generally, the court acknowledged that a landowner is not liable "when the danger posed by a condition is open and obvious." Despite this general rule, pursuant to the "distraction theory described in *Restatement (Second) of Torts* § 343A, a landowner may still be liable "if the landowner should anticipate the harm despite such knowledge or obviousness." Accordingly, under the circumstances of this particular case, the state supreme court would analyze "whether the landowner should have anticipated that persons using the premises would fail to protect themselves, despite the open and obvious risk."

As described by the court, a landowner might "anticipate harm from an open and obvious danger" under circumstances "where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." In addition, the state supreme court acknowledged that a landowner might also "anticipate harm from an open and obvious danger" under circumstances "where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it."

Moreover, the court recognized "a special reason for the possessor to anticipate harm where the possessor is the government, or a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public right."

> Such [government] defendants may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right.
>
> Even such defendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. This is true particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.

In this particular instance, "regardless of whether the crab apple tree was an open and obvious danger," the district court had concluded that the City should have anticipated plaintiffs, such as the Connellys, "would fail to protect himself or herself against the danger."'

> The [district] court reasoned that the City was a government agency maintaining land upon which the Connellys were entitled to enter as a matter of public right

> and that it should have anticipated that persons sledding in the park would fail to protect themselves, because they may be distracted by the other people and activities involved with the sledding.

DISTRACTION EXCEPTION

On appeal, the City argued that the district court had erred by not correctly addressing the "distraction" exception to the open and obvious rule. In so doing, the City claimed "there was no evidence that Rachel and Chelsea were actually distracted at the time of the accident." The state supreme court found the City's argument had "merit." For the "distraction" exception to apply, the state supreme court found "it must have been foreseeable that the plaintiff would become distracted *and* there must be evidence that the plaintiff actually became distracted."

However, under the circumstances of this particular case, the state supreme court agreed with "the district court's alternative reasoning" applicable to "a governmental entity operating a park that was open to the public and commonly used for sledding." Specifically, the state supreme found "the City should have expected the public to encounter some dangers which were not unduly extreme, rather than forgo the right to use the park for sledding":

> The danger posed by the tree was based on its position along one side of the sledding slope. The tree did not present an unduly extreme danger, as evidenced by the fact that Slaven did not appreciate the danger when she determined the location for the tree, or even after Pierce suggested that it be removed because of its proximity to the sledding area.

As a result, the state supreme court concluded that "the district court did not err when it concluded the City should have expected that lawful visitors such as the Connellys would fail to protect themselves against the danger posed by the crab apple trees."

CONTRIBUTORY NEGLIGENCE

Under the state comparative negligence statute, the district court had found Timothy Connelly was "contributorily negligent" and found him 25% at fault in causing the accident, compared to the City's fault assessed at 75%. As described by the state supreme court, a plaintiff is contributorily negligent if:

> (1) she or he fails to protect herself or himself from injury, (2) her or his conduct concurs and cooperates with the defendant's actionable negligence, and (3) her or his conduct contributes to her or his injuries as a proximate cause.

In this particular instance, the state supreme court found sufficient evidence "to support the district court's apportionment of fault and that the apportionment bears a reasonable relationship to the respective elements of negligence proved at trial."

> The City, as the owner of a public park historically used for sledding, knew that the crab apple trees posed a risk to those who used the park for sledding, yet took

> no action to decrease or eliminate the risk… The record reflects that the district court carefully considered the City's factual arguments regarding Timothy's comparative responsibility for the accident, but determined that it was significantly less than that of the City.

CONCLUSION

After adjusting for the comparative negligence of Timothy and Chelsea, the district court had awarded $10,063,669.41 to Rachel; $8,176.84 to Chelsea; $623,661.02 to Timothy; and $831,775.17 to Kelly. These awards, however, were subject to a statutory cap of $1,000,000 under state law.

The Nebraska state tort claims act limited the amount recoverable to (1) One million dollars for any person for any number of claims arising out of a single occurrence; and (2) Five million dollars for all claims arising out of a single occurrence.

As a result, the state supreme court affirmed the judgment of the district court in the daughters' action awarding damages to Chelsea in the amount of $8,176.84 and to Rachel in the amount of $1 million. In the parents' action, the state supreme court adjusted the judgment in favor of Kelly and Timothy Connelly to $1,000,000 to reflect the statutory cap on damages under state law.

NOTE: For a different perspective on a similar situation, and a different result, check out "Rough Sledding on Park District Hill" which appeared in the June 1987 Law Review column in *Parks & Recreation*. Here is a link to the case report that appeared in the article: http://classweb.gmu.edu/jkozlows/lawarts/06JUN87.pdf

Also, you can get an idea of the sledding hill in Memorial Park in several YouTube public videos (search Memorial Park, Omaha, sledding):

http://www.youtube.com/watch?v=m1aj1Z3eBNE

http://www.youtube.com/watch?v=Vi32uMxtd98

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