

SWING SET INJURY ON FEDERAL SITE TESTS REC USE DEFENSE

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Last month's law column (September, 1987) reviewed the playground safety guidelines from the Consumer Product Safety Commission (CPSC). This month's column reviews a recent federal court decision in which the CPSC guidelines played a significant role. I am particularly familiar with the *Hegg* case described herein since I was an expert witness providing pretrial testimony on behalf of the defendant United States.

In this case, plaintiff's expert witness had indicated that bare ground under a swing set was unreasonably dangerous. Plaintiff's expert maintained that his opinion was consistent with the CPSC guidelines. In my deposition, I took issue with this assertion. Clearly, the guidelines denounce hard, non-resilient surfaces, such as asphalt and concrete, as unreasonably dangerous. On the other hand, the guidelines do not condemn a soil surface under playground equipment. While acknowledging that soil provides less cushioning than other surfacing materials, the guidelines state that the degree of protection will depend on various environmental factors, such as the amount of organic material, sand, moisture, and compaction in a given area.

Plaintiff's expert stated categorically that soil was an unreasonable surface under any circumstances. As a result, plaintiff failed to introduce evidence of environmental factors affecting the resiliency of this particular soil surface. In my disposition, I contended that plaintiff's expert had misrepresented the CPSC guidelines and failed to prove the unreasonableness of this particular soil surface. Apparently, the federal court in this case agreed. As noted in this description of the *Hegg* decision, the federal appeals court found "soil is a generally acceptable and reasonable material for playground surfaces."

Although the reasonableness of soil surfacing was an issue in this case, it was not controlling. The primary question before the federal courts in *Hegg* was the applicability of the Iowa recreational use statute to federal lands. I had raised the issue of limited landowner immunity under the state recreational use statute in my deposition and preparatory discussions with defense counsel. As I noted in my testimony, federal courts have uniformly held that the federal government is a "person" within the meaning of the various state recreational use statutes, whether or not the statute expressly excludes public entities from its coverage (as in Iowa). For example, the reasoning of the federal appeals court in the *Hegg* case is consistent with that of the federal district court which found the Michigan recreational use statute applicable to the National Park Service in a rope swing injury, *Miller v. United States Department of Interior*, 649 F.Supp. 444 (W.D.Mich. 1986). (The *Miller* case was described in the July NRPA Law Review, "Park Service Defends Rope Swing Injury Case.")

BARE GROUND UNDER SWING

In the case of *Hegg v. United States*, 817 F.2d 1328 (8th Cir. 1987), plaintiff Lauren Hegg was seriously injured while using a swing set located on a federal recreation site in Iowa. The facts of the case were as follows:

On May 4, 1980, Hegg (then 28 years of age) and a few of her friends had a picnic at the East Overlook recreational area of the Coralville Lake Reservoir in Johnson County, Iowa. This property is owned and maintained by the United States as a recreational area open for use by the general public without charge (except for overnight camping for which there is a small fee). During the afternoon, Hegg and a friend were swinging on a T-shaped belt or strap-type swing set. The center pole of the swing set was fixed in concrete, though each swing was positioned over a soil surface. According to Elizabeth Cannell, Hegg's companion and the only eyewitness to the accident, Hegg was swinging fairly high when during an upswing she slid or fell backward out of the swing and directly to the ground below.

According to Cannell, Hegg did not strike the center pole or the concrete base, but landed on her back on the ground. There was no indication or allegation that the swing itself broke or was otherwise defective. Hegg suffered a spinal cord injury in the accident and is partially paralyzed as a result. Defendant had no knowledge of any previous injuries resulting from the use of the swing sets at Coralville.

Hegg alleged that employees of the United States "were negligent in constructing the swing set and in failing to warn of its dangerous condition." Shortly before trial, the United States filed a motion for summary judgment based upon the Iowa Recreational Use Statute. Under this statute, the United States contended that "it was immune from liability for its alleged negligence, and that Hegg had not pled and could not prove 'willful or malicious' conduct on the part of defendant so as to fall within one of the statutory exceptions to the general rule of immunity." Hegg argued that summary judgment was improper because a genuine issue of material fact existed whether the conduct of the United States was willful or malicious under the facts of this case. Further, Hegg contended that the state recreational use statute did not apply to the United States.

Specifically, Hegg maintained that "the statute applies only to private landowners, not to public landowners, and defendant therefore does not fall within the statutory definition of 'holder' of land." The state recreational use statute defined this term as follows:

"Holder" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises; provided, however, holder shall not mean the state of Iowa, its political subdivisions, or any public body or any agencies, departments, boards or commissions thereof.

In addition, the expressed purpose of the statute was "to encourage *private* owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes."

Despite the expressed intent of the statute to exclude public entities, the federal district court found the state recreational use statute was still applicable to the United States under the terms of the Federal Tort Claims Act (FTCA). As noted by the court, under the Federal Tort Claims Act, "the United States is liable only in those circumstances in which a 'private person' would be liable under the law of the state where the accident occurred." In the opinion of the court, recreational use immunity was available to the United States in Iowa because "a private person could take advantage of the statutory immunity provided by the Iowa recreational use statute." (Federal courts have uniformly reached this same conclusion when considering the applicability of other state recreational use statutes to the federal government, e.g. California, Utah, Arkansas.)

Hegg argued further that "the property on which she was injured did not fall within the statutory definition of 'land.'" The Iowa recreational use statute provided the following definition for this term:

"Land" means abandoned or inactive surface mines, caves, and land used for agricultural purposes, including marshlands, timber, grasslands and the privately owned roads, water, water courses, private ways and buildings, structures and machinery or equipment appurtenant thereto.

According to the federal district court, "the Iowa legislature intended to distinguish between rural and urban land when it used the phrase land for agricultural purposes" in the statute. As a result, the court held that "the recreational area where Hegg was injured was 'land' within the meaning of the statute."

Hegg also contended that "she was not using defendant's property for a 'recreational purpose,' as defined by the statute, when she was injured." Specifically, Hegg argued that "she was not engaged in a 'recreational purpose' when she was swinging because 'swinging' is not specifically mentioned in the list of activities included within the statutory definition." The statute defined this term as follows:

Recreational purpose means the following or any combination thereof: Hunting, horseback riding, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, motorcycling, nature study, water skiing, snowmobiling, other summer and wintersports, and viewing or enjoying historical, archaeological, scenic, or scientific sites while going to and from or actually engaged therein.

In the opinion of the federal district court, "the list of activities expressly mentioned as within the statutory definition of 'recreational purposes' was intended to be illustrative only, not complete and exclusive." As a result, the court concluded that "in view of the general purposed underlying the statute and the popular and reasonable understanding of the meaning of the term 'recreational purpose,' swinging fell within that definition."

Finally, Hegg argued that "there was a factual issue whether defendant willfully and maliciously failed to guard or warn against a dangerous condition, use, structure, or activity, and thus would not be entitled to immunity under the statute." Immunity under the recreational use statute

applied to ordinary negligence, not willful or malicious misconduct. In the opinion of the federal district court, Hegg "had failed to produce any factual evidence that would tend to support her burden to prove willfulness or malice." Having found "no genuine issue of material fact on that issue," the federal district court entered summary judgment for the United States. Hegg appealed.

On appeal, Hegg raised the same arguments described above. In addition, Hegg contended that "the Iowa recreational use statute does not apply in this case because there is a fee for overnight camping at Coralville." The federal appeals court rejected this argument based upon the fee exception to recreational use immunity.

Though, as a general rule, a federal appellate court will not consider an issue not passed upon below [i.e. at the district court], there are circumstances in which the appellate court is justified in resolving the issue, as when the proper resolution is beyond doubt... Here it is undisputed that Hegg was not charged a fee for admission to or use of defendant's recreational facility and that she did not intend to camp there overnight. Thus, her contention that the statute does not apply because defendant charges a fee for overnight camping is without merit.

The appeals court acknowledged that no previous reported cases had interpreted the Iowa recreational use statute. Under such circumstances, the appeals court expressed its willingness to defer to the interpretation of the federal district court.

In cases involving issues of state law that previously have not been addressed by the state appellate courts, this [federal appeals] Court often stated that we will give substantial weight and deference to the district court's ruling unless it is fundamentally deficient in analysis or otherwise lacking in reasoned authority. Our task is not to adopt the construction we think most reasonable, but simply to review the district court's determination. Having reviewed the District Court's ruling concerning the meaning of the statute, we cannot say that they are fundamentally deficient in analysis or otherwise lacking in reasoned authority. We therefore conclude that this is an appropriate case in which to defer to the District Court. Indeed, this is a typical case in which the construction of a state statute of previously unresolved meaning is best left to the district judge, who ordinarily is much more likely to be intimately familiar with the jurisprudence of his state than are the members of this Court.

As a result, the appeals court "affirmed the district court's rulings construing the Iowa recreational use statute" and its applicability to the facts of this case. The appeals court further considered "the District Court's ruling that there was no genuine issue of material fact on the issue of whether defendant acted willfully or maliciously."

If reasonable minds could differ on the issue of willful or malicious misconduct, summary judgment for defendant was inappropriate. In this instance, summary judgment dismissed Hegg's case without allowing a full trial on the merits of her case, including allegations of willful or malicious misconduct. As noted by the appeals court, "plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment."

The mere existence of a scintilla [i.e. a very insignificant or trifling amount] of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance [i.e. greater weight, more credible and convincing] of the evidence that the plaintiff is entitled to a verdict. Of course, credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge. The evidence of the non-movant [in this case Hegg] is to be believed and all justifiable inferences are to be drawn in her behavior.

Applying these criteria to the evidence before the federal district court, the appeals court agreed "with the court that defendant is entitled to summary judgment as a matter of law on the issue of whether defendant acted willfully or maliciously" within the meaning of the Iowa recreational use statute.

It was undisputed that defendant was not aware of any injuries to other persons using the swing sets at Coralville, that the swing on which Hegg was swinging was not defective or otherwise unreasonably dangerous; and that soil is a generally acceptable and reasonable material for playground surfaces. The only eyewitness to the accident, Elizabeth Cannell, testified that Hegg fell backward out of the swing and directly to the ground, and never struck the center pole of the swing set or the concrete support base. Hegg nonetheless submitted an affidavit from a medical doctor who opined that based upon the nature of her injuries (namely, "a flexion rotation injury with fracture dislocation at T?-L1"), she probably struck the exposed concrete base while swinging forward, causing her suddenly to pitch forward and slightly left out of the swing. This, in his opinion, would account for the flexion and rotation elements of the injury. The doctor further suggested that it was "indefensible" to allow exposed concrete to exist at the base of a swing set such that users could catch their feet thereon while swinging or strike the concrete if they fell from the swing. The doctor's affidavit obviously was an attempt by Hegg to establish that defendant acted willfully or maliciously in failing to guard against or warn of the alleged danger presented by the concrete base of the swing set...

Though in opposing the motion for summary judgment Hegg is entitled to all legitimate and reasonable inferences from the evidence, it simply is not reasonable to draw from the evidence submitted here the inference that defendant acted willfully or wantonly. It is critical in this case that Hegg failed to produce any evidence that defendant was aware of any dangerous condition in the swing set or of any previous injuries to the users... Clearly, under Iowa law, Hegg's evidence, viewed in a favorable light, would not be sufficient to submit the issue of willfulness or malice to the jury.

As a result, the appeals court affirmed the summary judgment of the federal district court in favor of the United States.