DECEMBER 2016 LAW REVIEW

FATEFUL DIVE INTO "CLOSED" PARK POND POOL

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

There is generally no negligence liability for injuries resulting from conditions which should have been obvious to the recreational user. Further, the duty of a landowner is to warn of unreasonably dangerous conditions. Within this context, unreasonably dangerous conditions are those which are known to the landowner, but not obvious or discoverable by the recreational user through the reasonably use of his senses. If obvious or discoverable, the recreational users looking out reasonably for their own safety should be able to appreciate and avoid such hazardous conditions on the premises. SEE: Primary Duty on Diver to Determine Whether it is Safe to Dive http://cehdclass.gmu.edu/jkozlows/lawarts/09SEP97.pdf

In determining landowner liability for injuries in a natural or manmade body of water, the applicable legal standard of care will generally depend on whether or not the area was designated for swimming. Mere public use of a natural or manmade body of water for swimming does not generally, in and of itself, create a designated swimming area requiring lifeguard supervision. On the contrary, the landowner must take some steps which constitute an expressed or implied invitation that swimming is authorized and encouraged, not merely tolerated, in a body of water. Further, for the most part, governmental entities have immunity from negligence liability for failing to designate an area for swimming in light of such tolerated public use.
SEE: Unguarded Beach Appeared to be Designated Swimming Area
James C. Kozlowski. *Parks & Recreation*. Aug 2005. Vol. 40, Iss. 8.
http://cehdclass.gmu.edu/jkozlows/lawarts/08AUG05.pdf

As illustrated by the case described herein, there is generally no legal duty to warn of the obvious danger of diving into waters of unknown depth. On the contrary, the primary duty of care in ascertaining whether it is safe to dive is upon the diver. Moreover, under an applicable state recreational use statute, there is no duty to guard, warn, or make the premises reasonably safe for recreational purposes.

POND CLOSED TO SWIMMING?

In the case of *Roy v. State*, 2016 R.I. LEXIS 88 (R.I. 06/23/2016), plaintiff Brett Roy brought negligence and premises liability claims against the State of Rhode Island as well as the Rhode Island Department of Environmental Management (collectively DEM), and two individuals in their official capacities as DEM employees. On July 10, 2008, plaintiff Brett A. Roy, a 29 year-old father of three, broke his neck and was left paralyzed from the neck down after diving into a state park pond. In July 2008, the pond at World War II Veterans Memorial Park in Woonsocket, Rhode Island was one of several bodies of water operated by the state DEM as a recreational facility.

While his appeal was pending before the Rhode Island state supreme court, Roy passed away in March 2016. The state supreme court then ordered the executor of Roy's estate, his wife Dawn, be substituted as the party in interest to pursue his negligence and premises liability claims and

appeal against DEM.

The director of DEM at the time of the incident, W. Michael Sullivan, testified that the man-made pond was "filled mechanically" and "treated much like a swimming pool." Sullivan testified that, in June 2008, he made the decision to fill the pond. Sullivan had explained that, in February 2008, World War II Veterans Memorial Park had been "slated for closure" in the budget presented to the Legislature that year. However, at the end of June, after local officials expressed concern, he made the decision as the Director of DEM to fill the pond.

Sullivan, testified, in July 2008, there were "no swimming" signs posted, but DEM "expected that there would be people using the park." Sullivan explained that facilities such as the bathhouses were open, but he stated that he "did not ever consider the beach to be open." Sullivan agreed that it was prohibited under DEM rules to operate the pond on a "swim-at-your-own-risk" basis.

Moreover, Sullivan explained that, "if there were not lifeguards present at a swimming facility, that the swimming facility was closed." Further, Sullivan explained that, in July 2008, staff on-site at the park had been directed "to tell people that the beach -- that the water was closed to swimming, to point to signage and refer them to that, but it was not expected that they would stand there and order people out of the water."

TOO SHALLOW FOR DIVING

The Associate Director of Natural Resources for DEM, Larry Mouradjian, also testified at trial. He described the pond, explaining that there was a designated lap pool, a swim area, and a diving platform. He testified that he had seen the pond with and without water, and, based on his opinion, diving near the wall into the lap pool would be dangerous because it was too shallow. Mouradjian testified that the pond was typically not filled "until such time as we were able to fully staff the swim area and invite the public to swim at the pond."

Mouradjian stated that he thought the decision to fill the pond was untimely "because the things normally done to prepare the pond to be open to the public had not been done." He testified that he had spoken to Sullivan and recommended that the pond be drained or left empty until DEM "began to acquire the resources necessary."

SHALLOW WATER RISK

The DEM Chief of the Rhode Island Division of Parks and Recreation, Robert Paquette, and the Deputy Chief, John Faltus, also testified at trial. Paquette confirmed that Mouradjian was hesitant to open the pond and that Mouradjian told him "we should really look into this." However, Paquette testified that Sullivan was ordering him to open up the facility. Paquette also testified that he had never been told that "there was ever a problem with shallow water" along the wall of the pond.

Faltus testified that he was never "officially informed" that people were diving at the pond, but he had "heard hearsay that there's possible diving activity after hours." Faltus stated that

generally they did not allow diving at any state swimming area. However, he also admitted that people were "allowed to possibly do some shallow entry dives," explaining that whether diving was allowed "depends on how you define 'dive.'"

William Mitchell Jr., the Regional Park Manager for DEM in 2008, testified that there was no "system that was in place to warn people of the depth of the water." However, he stated that "if a patron asked an employee, they would advise them as to the depth of the water, and if they asked about diving, they would tell them the rules and regulations." Mitchell agreed that Roy's injury was "generally" the type of thing that he could foresee and he was concerned that it was the kind of injury that would happen when he was told to fill the pond before lifeguards had been hired.

Peter Lambert, a DEM caretaker supervisor who was employed at World War II Veterans Memorial Park from 1990 to 2008, testified about the diving policies at the pond. He stated that diving had never been allowed. However, he admitted to seeing people periodically dive off of the wall on the pool area, but not during hours that the pond was in operation.

NO SWIMMING/DIVING IGNORED

Kenneth Henderson, a seasonal laborer for DEM who worked as a groundskeeper at the park in 2008, testified at trial that he was working on July 10, 2008. Henderson stated that he saw "about half a dozen" people swimming in the pond that day but did not tell them that swimming was prohibited because, in his words, he had "no authority."

Laura Oliver and Carol Gear had also been at the park on July 10, 2008, and testified at trial. Oliver testified that on July 10 there were no lifeguards, lifeguard chairs, or buoy lines in the pond, and the fountain was off. Oliver said that she allowed her children to go swimming despite the "no swimming" signs because there had been a write-up in the paper, and nobody told them differently. She added that there were often "no swimming" signs in place, even when lifeguards were present and watching the swimmers. However, Oliver testified that a DEM employee, who she later learned was a groundskeeper, had told her children not to jump in the water. Oliver explained that she saw people jumping and doing "all kinds of stuff" off the diving platform on July 10.

Oliver further testified she knew from experience that diving was not allowed in the pond because in previous years "if someone dove into the water, then lifeguards would be on top of it. If they kept doing it, the lifeguards would tell them they had to leave." Oliver added that she never saw anyone get hurt while diving prior to July 10. Oliver described Roy's dive as "a belly flop kind of dive; not a complete dive."

Gear testified that she had been to the pond to swim three times before July 10, 2008, and had seen people dive, but had never seen anyone injured from diving before Roy suffered his injury. Gear described Roy's actions that she witnessed on July 10, stating: "He threw something on the ground, and ran, like you run when you bowl, and then he just dove in." She labeled Roy's dive as a "regular kind of dive." She clarified that she would call it "a shallow dive." She explained "it was more like he just put his head down and kind of went in. It wasn't like a real dive like on a diving board."

Hope Braybon, who accompanied Roy to the pond on July 10, also testified to the events of the day. Braybon stated that she watched Roy "jog" from the car in the parking lot and "dive in." She testified that, as Roy was diving, she "was telling him not to dive over there because it was shallow water."

MURKY WATER LOOKED DEEP

Roy was unable to testify at trial, but his deposition was read into the record. Roy was six feet tall and twenty-nine years old at the time of the incident. Roy testified that on July 10 he had dropped Braybon, her daughter, and his children at the park and "they walked towards the beach." He recalled seeing "20 to 30 people, small children, adults, adolescent children in the middle of the pond" swimming, which indicated to him that the park was open. He testified that he "never saw a sign that said "no swimming."

Roy further testified that, when he arrived at the park, he walked over towards the corner of the pond, and wasn't going to jump in, but, he described the day as "hot, very hot." So, he figured he would "jump in." He stated that he looked at the water and it "looked deep enough." He described the water as "murky" and said that he "definitely couldn't see the bottom." He explained that "if the water was too shallow," he would be able to see it.

Before jumping in, Roy returned to his car to put his things away and then he "walked down to the end, dove in the water," and he broke his neck. Roy described his dive as a "shallow dive, just like a normal, flat dive," meaning, "the only parts that he would want to hit the water would be the tops of his hand and his belly."

Roy testified that around July 2007 he dove in the same spot, and "nothing was ever said" to him. Roy admitted that he knew there was soil erosion in the pond, and, consequently, that soil had been added to the pond in the past. Roy stated that "the way that he checked the depth of the water" was "probably irresponsible."

CONTRADICTORY JURY VERDICT

The jury reached a unanimous verdict and found that the state had not "willfully or maliciously failed to guard or warn against a dangerous condition, use, structure or activity at the pond" and therefore was not liable. However, the jury found that the state was liable for "willfully or maliciously failing to guard against a non-obvious, latent dangerous condition, knowing that there existed a strong likelihood that a user of the swimming pond would suffer serious injury or death." Moreover, the jury rejected the assumption-of-the-risk defense and found that both parties were negligent and assigned a 50/50 split with "zero" damages.

Following the jury verdict, both parties made renewed motions for judgment as a matter of law. In support of its motion, the state argued plaintiffs failed to establish the state's liability under the Recreational Use Statute and that, as a matter of law, Roy's conduct was so "highly dangerous" that "no duty was owed to him." In response, Roy argued "the state's witnesses admitted sufficient facts at trial to establish the state's liability as a matter of law under the Recreational

Use Statute."

In addition, in the alternative, Roy filed a motion for a new trial. The trial judge granted Roy's motion for a new trial. When a jury verdict is against the weight of the evidence, a trial court may grant a motion for a new trial. In this particular case, the trial judge apparently found the jury verdicts to be inconsistent, if not contradictory, based upon the evidence and applicable law considered by the jury.

The state appealed to the state supreme court, claiming the trial judge had erred in not granting judgment to the state based upon the state recreational use statute.

RECREATIONAL USE STATUTE

As cited by the state supreme court, the Rhode Island Recreational Use Statute, G.L. 1956 chapter 6 of title 32, limiting the liability of landowners, provided as follows:

> [O]ne who either directly or indirectly invites or permits without charge any person to use that property for recreational purposes does not thereby:
> (1) Extend any assurance that the premises are safe for any purpose;
> (2) Confer upon that person the legal status of an invitee or licensee to whom a duty of care is owed; nor
> (3) Assume responsibility for or incur liability for any injury to any person or property caused by an act of omission of that person." Section 32-6-3.

While "the Recreational Use Statute limits liability," the state supreme court noted "this limitation is not absolute." On the contrary, the state supreme court cited as following "willful or malicious" misconduct exception to statutory immunity:

> Section 32-6-5 provides, in relevant part: (a) Nothing in this chapter limits in any way any liability which, but for this chapter, otherwise exists: (1) for the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity after discovering the user's peril.

As described by the state supreme court, the expressed legislative intent of the state recreational use statute "is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability to persons entering thereon for those purposes." In order to achieve this legislative objective, the state supreme court noted the Recreational Use Statute "modifies the common law by treating users of public and private recreational properties as trespassers, thus greatly reducing the duty of care that owners owe to recreational users."

At common law, landowners are liable for ordinary negligence that causes injury to invitees on the premises. Landowner liability for trespassers, however, is very limited to much more outrageous willful/wanton or malicious misconduct. The statutory status of a recreational user under an applicable state recreational use statute is the same as a trespasser at common law. Specifically, landowner liability in both instances would require proof of willful/wanton

malicious misconduct, not mere negligence.

Further, the state supreme court noted "the unambiguous language of the 1996 amendment to the Recreational Use Statute" made it clear that "the Legislature intended to include the state and municipalities among owners entitled to immunity under the statute." Specifically, in 1996, the General Assembly had amended the definition of "owner" in G.L. 1956 § 32-6-2(3) to include the state and municipalities. Accordingly, as characterized by the state supreme court, "the Legislature declared that all people who use this state's public recreational resources are classified as trespassers to whom no duty of care is owed, save to refrain from willful or malicious conduct as defined in the Recreational Use Statute."

WILLFUL OR MALICIOUS FAILURE?

On appeal, the state argued the evidence presented at trial in this case had failed to "establish that the state willfully and/or maliciously failed to warn against a dangerous condition" within the context of the state recreational use statute. Specifically, the state argued that "there was no evidence of a substantial number of injuries flowing from a known dangerous condition"; that "the state did not fail to guard or warn against a dangerous condition, use, structure, or activity"; and that "no witness made testimonial admissions sufficient to extinguish protection under the Recreational Use Statute."

In response, Roy had argued liability under the Recreational Use Statute had been established because the evidence supported a finding that the state "breached the duty to refrain from willful and malicious failures to guard and warn against known latent conditions." Specifically, Roy claimed the "record is replete with evidence of DEM's admitted knowledge of numerous unique dangerous conditions, including shallow water in areas where users had been known to dive from the park's structures, and the historic presence of the sandbar in the same (normally deeper) area." As characterized by Roy, the "shallow water and dangers of diving at this particular facility were not obvious to users, yet were in fact known to DEM."

The state supreme court found the state had indeed "admitted knowledge of the unique features of the pond." On the other hand, the court found Roy had also "admitted that he was aware of the danger of making a dive into shallow water." Moreover, the court noted Roy's admission that "the way that he checked the depth of the water was probably irresponsible."

Since there was "only one indication in the record of a relatively minor injury reported several days before Roy's catastrophic injuries," the state supreme court found DEM had no specific knowledge of any peril confronting Roy. As a result, the state supreme court found no evidence of multiple incidents grievous injury which would be indicative of a "willful or malicious failure to guard or warn against a dangerous condition" within the context of the state recreational use statute.

The state supreme court, therefore, concluded the trial court had erred in not granting the state's motion for judgment based upon applicable landowner immunity under the state recreational use statute.

SEE: Cliff Collapse Accidents Test Recreational Use Statutes
James C. Kozlowski, Parks & Recreation, Mar. 2012 Vol. 47, Iss. 3
http://cehdclass.gmu.edu/jkozlows/lawarts/03MAR12.pdf

OPEN AND OBVIOUS DANGER

Alternatively, even if the Recreational Use Statute did not apply, the state supreme court held " of itself is an open and obvious; danger, one of common knowledge, such that a landowner does not owe a duty of care to warn individuals who enter the premises."

> As a practical matter, the danger of diving into shallow water is one of common knowledge, and one the plaintiff admitted he was aware of...
>
> It is only reasonable for a diver, who cannot ascertain the water's depth by looking, to further inspect the area before diving into dark water. The danger of diving into shallow water was open and obvious [to a 29 year-old man], regardless of whether a sign was erected alerting him to the danger.

Similarly, under the circumstances of this case, the state supreme court found "as a matter of law, the plaintiff [Roy] must be held to have had knowledge and an appreciation of this risk because, ultimately, it was the plaintiff's own behavior that caused his injuries." The state supreme court, therefore, held the defendant [state DEM] did not owe the plaintiff [Roy] a duty of care, but, rather, that the plaintiff voluntarily exposed himself to the perils of an open and obvious danger."

CONCLUSION

Accordingly, in the opinion of the state supreme court, "the state bore no liability for Roy's injuries—either because diving is an open and obvious danger or because it was protected under the Recreational Use Statute." As a result, the court concluded that the trial court had erroneously denied the state's "motion for judgment as a matter of law." The state supreme court, therefore, vacated the judgment of the trial court and remanded (i.e., sent back) the case "with instructions to enter judgment in favor of the state."

In reaching this decision, the state supreme court noted this was a "hard case... not in the sense that it is legally difficult or tough to crack, but in the sense that it requires us to deny relief to a plaintiff for whom we have considerable sympathy." That being said, the state supreme court acknowledged "the duty of all courts of justice" to "take care" that "hard cases do not make bad law."

****

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 Manassas, Virginia. E Mail: jkozlows@gmu.edu Webpage with link to law review articles archive (1982 to present): http://mason.gmu.edu/~jkozlows