

ILLINOIS DECISION HOLDS ASPHALT UNDER SLIDE OBVIOUS DANGER

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The September 1987 "NRPA Law Review" column provided a synopsis of the *Public Playground Safety Guidelines* developed by the Consumer Product Safety Commission. As described in this column, the Guidelines state that 70% of playground injuries were caused by falls and 80% of the all injuries sustained on playground equipment involve children 10 years of age or younger. Further, the Guidelines noted that "falls onto paved surfaces resulted in a disproportionately high number of severe injuries." The plaintiff in the case described herein certainly fits this injury profile.

Given the high incidence of falls from playground equipment, the Guidelines found that "the type of surface on the playground was a major factor affecting the number and severity of injuries associated with falls." Specifically, the Guidelines found that "hard surfacing materials such as asphalt and concrete do not provide injury protection from accidental fall impacts and are therefore unsuitable for use under public playground equipment." As a result, the Guidelines concluded: "Concrete, asphalt and similar materials are not recommended for use under playground equipment because of their hard, unyielding characteristics." In addition, the Guidelines recommended that existing equipment be removed from asphalt or concrete surfaces.

In the *Alop* decision described below, there was no indication in the reported opinion that plaintiff offered the CPSC Guidelines to support her allegation that asphalt under playground equipment was unreasonably dangerous. Had she done so, the trial court may have denied defendants' motion for summary judgment and allowed plaintiff's negligence claim to be considered by a jury. Certainly, the data cited above from the CPSC Guidelines establishes the foreseeable risk of serious injury associated with asphalt under playground equipment. As noted by the *Alop* court, foreseeability is the "cornerstone by which liability is determined."

In determining negligence liability, we are all governed by the reasonable person standard. This includes the providers of recreational opportunities as well as the users of recreational facilities. Implicit in the *Alop* opinion is this notion that reasonableness is a two-way street. The recreational user must act reasonably in looking out for his own safety. When the user is a child, reasonableness would require the ordinary care exercised by a child of similar age, education, and experience under the circumstances.

Negligence liability will be imposed where the provider creates an unreasonable, as opposed to a reasonable, risk of injury. An unreasonable risk of injury and resulting negligence liability is more likely where the danger is latent or hidden as opposed to open and obvious to the recreational user. In this particular instance, the appeals court found that the defect on the playground (i.e. asphalt surfacing) was not unreasonable because it was an open and obvious danger to the child user.

NO PLAYGROUND SURFACING DUTY

In the case of *Alop by Alop v. Edgewood Valley Community Association* 507 N.E.2d 19 (Ill.App. 1 Dist. 1987), plaintiff Rebecca Alop was injured on a playground owned by defendant Edgewood Valley Community Association. The injury occurred on May 21, 1983. At the time of the accident, Rebecca Alop was six years old. Alop was injured when she attempted "to turn around in the middle of a playground slide" and "fell onto the asphalt surface." As a result of the fall, Alop sustained a skull fracture and epidermal hematoma.

Alop sued Edgewood, as owner of the playground, and Suburban Condominium Management Association, the organization which managed the premises. In her complaint, Alop alleged that Edgewood and Suburban were negligent because they had "improperly installed the slide on a surface which did not provide sufficient cushioning." The trial court granted summary judgment in favor of Edgewood and Suburban. Alop appealed. On appeal, Alop argued that the trial court had erred in finding that Edgewood and Suburban "owed no duty to Alop to have placed the slide on a softer surface than asphalt."

According to the appeals court, summary judgment "is properly granted if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party [in this case defendants Edgewood and Suburban] is entitled to judgment as a matter of law." In other words, summary judgment is warranted where the undisputed pretrial evidence conclusively demonstrates that no issue exists requiring resolution by a jury trial. As noted by the appeals court, the trial judge, rather than a jury, determines whether the law will impose a duty of care under a given set of circumstances.

In this particular instance, the trial court found that Edgewood and Suburban owed no duty of care to Alop to provide a surface more resilient than asphalt under the playground slide. Since the trial court found no duty under the circumstances, there was no need for a jury trial to determine if any legal duty was violated. Consequently, the trial court granted Edgewood and Suburban's motion for summary judgment. In reviewing this "no duty" decision on appeal, the appeals court indicated that a summary judgment "will not be reversed absent an abuse of discretion by the trial court such that the plaintiff's right to fundamental justice is violated."

As described by the appeals court, "the principles of ordinary negligence govern the liability of an owner or occupier of land upon which a child is injured." Negligence liability will be imposed where injury results from the landowner's failure to take the appropriate burden of precaution in light of a foreseeable risk of serious injury. In establishing negligence, the court found "foreseeability is the cornerstone by which liability is determined."

Under Illinois law, the appeals court noted that, generally, children "have no greater rights than do adults to go upon the lands of others, and their minority imposes no duty upon the landowner to expect them or take precautions for their safety." On the other hand, the court acknowledged an exception to this general rule "where the owner knows or should know that young children frequent the area and the

cause of the child's injury is a dangerous condition on the land." Within this context, the court defined a "dangerous condition" as follows:

A "dangerous condition" is one that is likely to cause injury to children who, by reason of their age and immaturity, are incapable of appreciating the attendant risks. If, however, the condition involves obvious risks that children generally would be expected to appreciate and avoid, there is no duty to remedy the condition.

Under the circumstances of this case, it was undisputed that Edgewood and Suburban "knew children frequented the playground." The issue before the court was, therefore, "whether the slide on the asphalt surface created a dangerous condition."

Applying these principles to the facts of the case, the appeals court concluded that "the risk of falling from a slide placed on an asphalt surface was not so unreasonable as to impose a legal duty on defendants."

Alop testified in her deposition that she knew she could get hurt on asphalt because it was harder than sand or grass. In light of this testimony and the fact that Alop was six years old at the time of the accident, she certainly knew or should have known that if she were to fall from the slide, she would stand the risk of becoming injured. Moreover, Alop asserted that she fell from the slide because she turned around in the middle of it... [A]n instrumentality or product does not become inherently dangerous merely because there is an abuse of it, or it is used for a wrongful purpose.

Furthermore, if a child is old enough to play without adult supervision, certain risks are considered obvious to that child. As stated by the [Illinois] supreme court, the dangers of fire and water, or falling from a height under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age allowed to be at large. Here, it is undisputed that on the day of the accident, Alop, along with her friend Amanda Cameron, were given permission to go to the playground where the slide was located, and that no adult accompanied them to or supervised them at the playground. Thus, one may conclude that Alop could appreciate the dangers involved in falling from the slide onto the asphalt surface.

While acknowledging that landowners may not have a duty to protect children against obvious, natural dangers on the premises, Alop argued that this "no duty" rule did not extend to artificial, manmade hazards on the land. Specifically, Alop maintained that "the slide coupled with the 'artificial' surface created an 'unusual and unnecessary' hidden hazard to children." The appeals court rejected this argument.

[T]he touchstone of liability... is not the distinction between natural or artificial, but rather the foreseeability of harm to children. Moreover, while an instrumentality, though

not in itself dangerous, may become so when joined with other nondangerous instrumentalities and surroundings. The burden is upon the plaintiff to allege facts which demonstrate that the combination of surroundings creates a risk greater than those to which children are exposed in their everyday lives.

To establish that the slide was indeed dangerous, Alop had submitted an affidavit from an expert witness which concluded that "the asphalt surface on which the slide was situated created a dangerous condition which children could not appreciate." However, in the opinion of the court, this affidavit was insufficient evidence of a dangerous condition since it "stated legal conclusions rather than facts." As a result, the appeals court concluded that Alop had failed to allege facts sufficient to sustain her burden of proof to establish a dangerous condition.

Further, the appeals court rejected as irrelevant case law offered by Alop to establish a dangerous condition under the circumstances of this case. As noted by the court, the cases cited by *Alop* presented factual situations where "the children were injured as a result of latent conditions." Rather than a latent or hidden condition, the court found that the injury in this particular situation was caused by an open and obvious defect on the premises.

Alop was injured after falling from a slide onto asphalt, a risk which children encounter in their daily lives when at a playground. In fact, Alop herself asserted she had used slides a "thousand" times before as well as the exact slide in question on a prior occasion... It is always unfortunate when a child gets injured while playing, but a person who is merely in possession in control of the property cannot be required to indemnify against every possibility of injury thereon. The responsibility for a child's safety lies primarily with its parents, whose duty it is to see that his behavior does not involve danger to himself. Accordingly, in the instant case, we hold that defendants owed no duty as a matter of law where Alop was permitted to play unsupervised on a slide which posed an obvious risk to her.

The appeals court, therefore, affirmed the summary judgment of the trial court in favor of defendants Edgewood and Suburban.

In my opinion, the *Alop* decision presents a minority view which would not be followed in other jurisdictions. A telephone call to the clerk's office at the Illinois supreme court indicated that no appeal was filed in this particular case. Therefore, the decision of the intermediate appellate court in *Alop* is final. However, in a future case brought forth on appeal, the state supreme court in Illinois, when presented with the injury data and recommendations of the CPSC Guidelines, may very well find a duty to provide a more resilient surface than asphalt in playgrounds. I would also expect courts in other jurisdictions to impose such a duty in light of the CPSC playground safety guidelines.

To receive a free copy of *A Handbook for Public Playground Safety* call the Consumer Product Safety Commission toll free at (800) 638-2772. Be sure to ask for both volumes of the Handbook

which contain the CPSC Guidelines referenced above.