

BURNING RING OF FIRE

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Generally, landowner liability for ordinary negligence presupposes an unreasonably dangerous condition on the premises. Within this context, a danger is unreasonable if it is known or discoverable to the landowner, but not known or discoverable to invitees or recreational users of the premises through the reasonable use of their senses. Conversely, if the general scope of the risk would be open and obvious through the reasonable use of one's senses, the condition would not be considered unreasonably dangerous. In looking out reasonably for one's own safety, there is a presumption that such open and obvious dangers can and should be easily avoided by those using the premises. Moreover, certain dangers, like "fire is hot," are presumed to be open and obvious to anyone old enough to be at large.

Social utility is also a factor in determining whether a particular condition is unreasonably dangerous under the circumstances. When the social utility or usefulness of a particular situation or condition outweighs the foreseeable risk of injury, it will not be considered unreasonably dangerous under the circumstances. In the case described herein, the issue before the court was whether hot coals and ashes left overnight in a campground fire ring constituted an unreasonably dangerous condition, providing a legal basis for negligence and landowner liability. In addressing this issue, the court considered whether the danger was obvious and the social utility of hot coals in designated fire rings.

CAMPGROUND DANGER

In the case of *Morris v. Texas Parks and Wildlife Department*, 226 S.W.3d 720 (Tex.App. 5/24/2007), a child was burned after falling into a fire ring while visiting a state park. The incident occurred in Goliad State Park in Goliad County, Texas. The facts of the case were as follows:

[T]hree-year-old M.M. and his parents visited the Park on March 30, 2002. They were assigned shelter number three, a campsite which consisted of a screened-in shelter, a picnic table, a charcoal barbecue grill, and a campfire ring, one of two designated locations for a campfire at this camp site. Other family members were there for a family reunion. Soon after the Morrises arrived, M.M. fell into the campfire ring located at the campsite. The campfire ring contained ashes or coals, and M.M. received second- and third-degree burns on his hands, arms, and legs.

The child's parents, Danny and Lucia Morris (the Morrises) brought suit against the Texas Parks and Wildlife Department alleging ordinary and gross negligence. On the last day before the two year statute of limitations, the Morrises added Sandra Carson as a defendant, alleging Carson was the last camper at the campsite in question. The trial court granted summary judgment in favor of the Department and Carson. The Morrises appealed.

On appeal, the Morrises claimed “the Department was grossly negligent because it failed to inspect the campsite and to maintain the campfire ring.”

Under state law, the Department could be held liable for negligence which caused “injuries arising out of conditions or use of property.” The state recreational use statute, however, limited landowner liability to injuries caused by willful/wanton misconduct or gross negligence. In pertinent part, the state recreational use statute provided as follows:

(c) If an owner, lessee, or occupant of real property other than agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not: (1) assure that the premises are safe for the purpose; (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises [i.e., liability limited to injuries caused by willful/wanton misconduct or gross negligence]; or (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted. Tex. Civ. Prac. & Rem. Code Ann. §§ 75.003(g), 101.0215, 101.058 (Vernon 2005).

Under the state recreational use statute, the Department contended that its duty as a landowner “did not include ensuring the safety of the campsite” to protect recreational users from “obvious defects or conditions.” The appeals court agreed with the Department.

While recognizing “the recreational use statute permits a premises defect claim for gross negligence,” in this particular instance, the appeals court found the Department had “no duty to protect the Morrises from this obvious and expected condition.”

We cannot conclude the Morrises would not reasonably have expected to encounter a campfire ring that contained ashes or coals from a fire made the night before, in the course of the permitted use of the property. Under the facts of this case, we conclude this is a condition which is inherent in the use to which the land was put. Therefore, assuming a premises defect...under the recreational use statute there can be no gross negligence on the part of the Department because we find no duty.

As a result, the appeals court affirmed the judgment of the trial court in favor of the Department.

PREVIOUS CAMPER

On appeal, the Morrises had also contended that the trial court erred in granting Carson's motion for summary judgment. In so doing, the Morrises claimed sufficient evidence existed to establish that the previous camper, Carson, was negligent in “failing to totally extinguish the fire in the campfire ring when she left the camp site.” Moreover, the Morrises contended that an ordinarily prudent person would have done so under the same or similar circumstances.

As defined by the appeals court, “negligence is the doing of that which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do that

which an ordinarily prudent person would have done under the same or similar circumstances.” To establish their negligence claim against Carson, the appeals court noted further that the Morrisises would have to prove: (1) Carson owed a legal duty to the Morrisises; (2) a breach of that duty; and (3) damages proximately resulting from the breach.

Accordingly, the appeals court it had to first determine whether Carson owed a legal duty to “totally extinguish the fire in the campfire ring” before determining whether she was negligent in failing to do so. In so doing, the appeals court noted that “[t]he question of duty turns on the foreseeability of harmful consequences, which is the underlying basis for negligence.”

Foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others. In determining the question of duty, the court will consider several interrelated factors, including the foreseeability of the risk, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Questions of duty have also turned on whether one party has superior knowledge of the risk, and whether a right to control the actor whose conduct precipitated the harm exists.

According to the Morrisises, Carson had a legal duty to totally extinguish the campfire in the campfire ring because (1) Carson should have known of the foreseeable risks of leaving a lingering campfire in a campfire ring, and (2) Carson had "superior knowledge" of camping, affording her a higher duty than that of an ordinary person.

The appeals court rejected this argument. In so doing, the court noted that the Morrisises were unable to cite any Texas case law “imposing liability on a camper, even an experienced camper, for damages allegedly caused by the prior camper's failure to totally extinguish an in-ground, self-contained campfire at the camp site.” In the opinion of the appeals court, there was “no such duty in Texas.” Moreover, the appeals court rejected the Morrisises assertion that “Texas should recognize such a duty under the circumstances of this case.” In so doing, the appeals court found no evidence that campers were “given specific instructions about extinguishing any campfire upon her arrival or departure,” nor were they required or expected to do so. Rather, the appeals court found testimony in this case indicated “the purpose of a campfire ring is to house a safely contained fire.”

Rob Trippet, the Department's maintenance specialist, testified that campers are instructed only to build fires in designated areas and are not specifically instructed to extinguish their fires when they depart. Park Ranger Connie Lujan testified at her deposition that campers are not asked to put out fires upon their departure. Park Ranger Leopold Kunkel also testified that campers at the Park do not typically extinguish their fires in campfire rings upon departure, because, if they did, the next camper would not be able to make a fire. Finally, Park Ranger William Flores, who was serving as interim Park Director at the time of the incident, testified at his deposition that it is typical for campers to just leave whatever coals are burning when they depart.

While it might be typical to do so, the appeals court acknowledged that leaving a campfire burning in the campfire ring created a foreseeable risk of harm to the next campers at the site. On the other hand, the court found the foreseeability of harm to the next camper was lessened significantly because “the campfire was left burning in a place designated for fires at that campsite.” Because the risk and likelihood of injury was not high, the appeals court, therefore, determined that “foreseeability alone” was “not sufficient to justify the imposition of a duty” on campers to “totally extinguish an in-ground, self-contained campfire at the camp site.” Similarly, the appeals court found the risk and likelihood of injury was not high in this particular situation.

The injured child was with family members who themselves were campers at the Park. The shelters were assigned to adults. The fire was made in one of the two designated areas for fires at the campsite. It was made the night before Carson checked out of the Park. Furthermore, the Park does not require or expect campers to extinguish fires in these designated campfire rings, suggesting that the risk and likelihood of injury when a campfire in the campfire ring is not totally extinguished is low.

Finally, although the Morrisises contend that a duty to extinguish the fire totally exists in this case because Carson had superior knowledge of the risks being an “experienced camper,” we find no authority for this proposition and the Morrisises provided none. We cannot conclude that camping experiences enhance awareness of risks such that a more stringent duty of care is required.

In determining whether Carson owed a legal duty in this particular instance, the appeals court also weighed “the social utility of Carson's conduct, the magnitude of the burden on Carson, and the consequences of placing such a burden on Carson.” According to the court, it was “indisputable that the social utility of Carson's conduct in leaving the campsite in a safe condition is high.”

Carson, herself, testified that “[w]hen I go camping I expect the campsite to be clean and serviceable and — safe can mean a lot of things. . . I think it's a personal responsibility for everybody to make sure that what they do is as safe as can be.” When a campsite is left in a safe condition, public parks can be enjoyed by many.

While the “social utility for leaving a safe campsite is high,” the appeals court also found that there was high “social utility” in “leaving an unextinguished fire started the night before in a designated area so that the next camper can use it to start his or her fire.” As a result, the appeals court concluded that Carson had not necessarily left the campsite in an unsafe condition when she failed to extinguish the fire in the campsite ring. Moreover, the appeals court found “the magnitude and consequences of imposing this limited duty on a camper, such as Carson, are high.”

The duty the Morrisises wish to impose would apparently attach in any setting where controlled campfires are allowed. As a practical matter, if such a duty attached a camper would have to decide whether to have a controlled campfire at

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all or to start the fire and then wait until the fire was totally extinguished before leaving. It is also unclear how a camper can reliably recognize when a campfire is "totally extinguished."

Weather would be only one factor in making this determination. Furthermore, requiring the fire to be totally extinguished would also defeat the purpose of leaving a lingering fire to allow the next camper to start a fire easily. On balance, all of the above factors favor the conclusion that there should be no duty to totally extinguish a fire in a campfire ring under the facts of this case.

As a result, the appeals court concluded that "Carson owed no legal duty to the Morriszes to fully extinguish the campfire in the campfire ring" because "other social policies and concerns as well as the risk factor outweigh foreseeability." The appeals court, therefore, affirmed the summary judgment of the trial court in favor of Carson.