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NO LIABILITY FOR OBVIOUS PLAYGROUND FALL DANGER

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As illustrated by the cases described herein, a review of reported court decisions involving landowner liability for recreational injuries in general, and public playgrounds in particular, indicates liability is the exception, rather than the rule. Generally, the legal duty of care owed by landowners to invitees (i.e. those expressly or impliedly encouraged to enter the premises) is to inspect and repair or remove known or discoverable hazards within a reasonable time. When repair or removal is impossible or impractical, landowners are required to provide an adequate warning of hazards on the premises, unless the general scope of the risk would be open and obvious through the reasonable use of one's senses.

Negligence liability for an alleged defect on the premises also presupposes the existence of an unreasonable danger on the land under the control of the defendant. Within the context of landowner liability for ordinary negligence, an unreasonable danger is one in which the risk of injury is over and above the level of acceptable risk in society. Further, an unreasonable danger is one which is known or discoverable by the defendant landowner, but which would not be known or apparent to the injured plaintiff. Conversely, a danger would not be considered unreasonable and form a basis for negligence liability when the general scope of the risk is equally known or apparent to both the defendant and the plaintiff in a particular situation, e.g. the risk of injury associated with falling from an otherwise reasonably safe piece of playground equipment.

While the landowner must act reasonably in maintaining the premises for recreational use, those using the premises must also act reasonably in looking out for their own personal safety. In looking out for their own personal safety, the reasonable child standard is defined by children of similar age, education and experience. Generally, the risk of injury associated with falling from heights is considered to be an open, obvious and assumed risk for anyone old enough to be at large. Accordingly, within the context public playgrounds, in the absence of any unusual hidden hazard, the risk of injury associated with falling from a reasonably safe piece of playground equipment is typically considered an open, obvious and assumed risk for recreational users of any age. Under such circumstances, there would be no legal basis for imposing negligence liability on the landowner.

The cases described herein illustrate the reasoning applied by many courts in determining whether landowner liability for a playground injury is precluded under general legal principles governing negligence liability, including limited immunity under a state recreational use statute.

SLANTED ROOF

In the case of *Kane v. Landscape Structures, Inc.,* 309 Ga. App. 14; 709 S.E.2d 876; 2011 Ga. App. LEXIS 321 (4/5/2011), plaintiff Stephen Kane, age 9, was seriously injured when he fell while attempting to climb playground equipment in Mountain Park, a Gwinnett County park. The playground at Mountain Park contained play equipment for children of all ages, including

the "Infant Maze" for toddlers and swings, slides, and other structures for older children. Kane had visited the playground many times. The “Infant Maze” consisted of a series of 31 inch high vertical panels containing “cutouts of various shapes and sizes for the entertainment of toddlers, and has handholds to help toddlers maintain their balance as they play.” In addition, connected to the panels, the “Infant Maze” contained four posts supporting a seven foot high slanted roof.

On the day of his injury, Kane noticed several older children were climbing up and jumping from this roof structure within the “Infant Maze.” The older children sitting atop the roof structure encouraged Kane to join them. To do so, Kane had to stand on his left foot atop one of the one inch wide panels and swing his right foot upward toward the roof. Simultaneously, Kane had to reach his right hand toward the older children atop the roof so they could pull him up. In so doing, his left foot slipped and he fell onto the panel below and was seriously injured.

Kane admitted that the “Infant Maze” was intended for “little kids” and not designed for children of his age. Further, Kane acknowledged that climbing onto the roof structure was not an intended use of the “Infant Maze.” While conceding that the roof structure was “not something onto which one ought to climb,” Kane claimed he “wasn’t really thinking about it because he was a kid” and “everyone else was climbing on it.” Further, Kane noted that the “Infant Maze did not bear any warnings about the danger of climbing it.”

Kane sued the playground equipment manufacturer, Landscape Structures, alleging negligent design of the “Infant Maze” and failure warn of the dangers associated with climbing it. In response, Landscape Structures argued Kane had assumed the risk of falling from the “Infant Maze” when he attempted to climb atop the structure. The trial court agreed and granted summary judgment in favor of Landscape Structures. Kane appealed.

ASSUMPTION OF RISK

According to the appeals court, to establish assumption of risk, Landscape Structures was required to produce evidence of the following:

> (1) Steven Kane had some actual knowledge of the danger; (2) he understood and appreciated the risks associated with the danger; and (3) he voluntarily exposed himself to the danger.

Further, for assumption of risk, the appeals court noted that a plaintiff “must be actually aware” of “specific, particular risk of harm associated with the activity or condition” that caused plaintiff’s injury. In this particular instance, the appeals court found the particular risk of harm was “the danger of falling from an elevated place onto some object below.”

On appeal, Kane had contended that he did not have “actual knowledge of, and appreciated, the danger of falling from the ‘Infant Maze’ onto a panel beneath him.” In so doing, while acknowledging he understood “the general risk of falling,” Kane denied having “a particularized and subjective awareness of the risk involved in climbing the structure.”

Further, Kane contended he was not fully aware or appreciated the risk of falling due to the "seemingly innocuous" appearance of the structure and the fact that "he had not observed any other children fall from the structure." As a result, Kane claimed the evidence was insufficient to prove he "knew that standing atop a narrow, vertical panel on one foot while trying to climb onto the roof of the playground structure several feet above" necessarily indicated he appreciated and assumed the "risk of falling onto a visible panel beneath the roof."

The appeals court rejected Kane's argument. In the opinion of the appeals court, "the undisputed evidence in the record, the relevant law, and the dictates of common sense" supported the trial court's decision to grant summary judgment in favor of Landscape Structures.

While acknowledging that "the law does not expect children always to appreciate dangers to the same extent as adults," the appeals court noted that "the Georgia courts have recognized that children as old as Steven are quite capable of appreciating certain obvious dangers," including "the danger associated with climbing, or jumping from, and elevated place."

> No danger is more commonly realized or risk appreciated, even by children, than that of falling; consciousness of the force of gravity results almost from animal instinct. Certainly a normal child nearly seven years of age—indeed any child old enough to be allowed at large—knows that if it steps or slips from a tree, a fence, or other elevated structure, it will fall to the ground and be hurt.
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> It may be that some children, while realizing the danger, will disregard it out of a spirit of bravado, or because… of their "immature recklessness," but a defendant is not to be visited with responsibility for accidents due to this trait of children of the more venturesome type.

Applying this reasoning to the facts of the case, the appeals court found Kane was "a child of sufficient intelligence to appreciate the obvious danger of falling."

> [N]othing about the "Infant Maze" would have led Steven to conclude that he could not fall from the structure or that, if he did, he could not be hurt. He testified that he knew the structure was not intended for climbing and that it was designed, instead, for younger children. And the panel onto which he fell was open and visible, and its hardness would have been obvious to a child that had climbed atop such a pane…
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> Although he said that he did not think he would fall from the "Infant Maze," this testimony merely reflects his assessment that a fall was unlikely, not a denial of the self-evident truth that a fall from a high place—and the injuries that might be sustained as a result—are possible.

Accordingly, in the opinion of the state appeals court, Kane, "like most children nine years of age" should have "appreciated the obvious risk of falling that is associated with climbing to high places." As a result, under the circumstances of this case, the court found Kane had "voluntarily chose to assume the risk." Having found "as a matter of law that Steven assumed the risk

associated with climbing the 'Infant Maze," the state appeals court affirmed the summary judgment of the trial court in favor of Landscape Structures.

RED WAGON SLIDE

In the case of *Swinehart v. City of Spokane*, 187 P.3d 345 (Wash.App. 7/15/2008), plaintiff William Swinehart, age 59, sustained serious back injuries after sliding down the "Red Wagon" slide at Riverfront Park in Spokane, Washington. The "Red Wagon" is a giant replica of a Radio Flyer Wagon. The Red Wagon was designed and built by a local artist as an interactive sculpture/playground piece, made primarily of metal with concrete wheels. Since its installation in 1990 as part of the state Centennial celebration, the Red Wagon had become a popular park attraction for both children and adults.

The Red Wagon is 12 feet high, 27 feet long, and 12 feet wide. The attached slide, which is designed to look like the handle of the giant wagon, has a critical height of 8 feet 8 inches. The slide is 19 feet long and angled at 30 degrees. Park visitors can climb up the stairway located at the back of the Red Wagon that leads to a platform on the inside of the wagon. Once inside the body of the wagon, visitors can proceed down by way of the slide or go back down the stairway.

While in the park, the Swineharts observed the Red Wagon and walked over to get a closer look and to take pictures for their granddaughter. To get a better view, Mr. Swinehart climbed up the ladder of the Red Wagon while Ms. Swinehart took pictures of him. To get down, Mr. Swinehart decided to go down the slide. When he went down the slide, he landed directly on his buttocks on the wood chip surfacing at the bottom of the slide. As a result of the fall, Mr. Swinehart sustained lower spine injuries, including a compression fracture to his vertebrae.

Swinehart claimed "the playground fill was insufficient and improperly maintained under the City's own standards as well as playground industry standards." According to plaintiff's expert witness, "national playground safety standards" required "slides with a critical height of 8 feet 8 inches" to have a minimum of "12 inches of organic fill in a loose and uncompressed state."

A parks department official admitted that "the proper amount of wood chips is important to the prevention of fall-related injuries and that a lack of fill material or an overly compressed surface area could increase the likelihood of injury." While the parks and recreation department had a standard of 12 inches for the wood chip fill, the City acknowledged that "the playground fill is known to become displaced or compacted at slide exits," despite daily inspections.

Swinehart presented photographic evidence taken shortly after the accident showing "the wood chips were widely dispersed at the slide exit, leaving a large pit or depression to serve as the landing area, rather than a level surface." Moreover, an inspection by plaintiff's expert indicated the "depth of the fill material at the slide exit was two and one-half inches" of compressed wood chips.

The trial court granted summary judgment in favor of the City based on limited landowner immunity available under the state recreational use statute. Swinehart appealed.

RECREATIONAL USE STATUTE

As cited by the state appeals court, the Washington recreational use statute provided, in pertinent part, as follows:

> [A]ny public or private landowners or others in lawful possession and control of any lands … who allow members of the public to use them for the purposes of outdoor recreation … without charging a fee of any kind…shall not be liable for unintentional injuries to such users. RCW 4.24.210(1)

Moreover, the appeals court noted that limited landowner immunity under the state recreational use statute "expressly includes publicly owned lands, both urban and rural, and has been interpreted to apply to municipal parks and their playground and exercise areas." The appeals court acknowledged, however, that the state recreational use statute does not limit a landowner's liability when injuries are sustained "by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted." RCW 4.24.210(4)

On appeal, Swinehart argued that limited immunity under the state recreational use statute did not apply under the circumstances of this case because the allegedly "insufficient and improperly maintained playground fill at the slide exit" constituted a "known dangerous artificial latent condition."

Within the context of the state recreational use statute, the appeals court defined "latent" as "not readily apparent to the recreational user." Accordingly, the appeals court noted that a condition cannot be latent if it is obvious to "the general class of recreational users, not whether one user [like Swinehart] might fail to discover it."

In this particular instance, the appeals court found "the displacement and condition of the wood chips at the playground was patent, or obvious." In so doing, the appeals court found visitors to the playground could visually reference the fill level around the slide to determine whether sufficient fill existed "at the bottom of the slide before choosing to go down." Further, the appeals court found recreational users of the playground could "reasonably be expected to differentiate between a compacted and deteriorating surface and loose material, because they are different in feel and appearance, and therefore obvious."

While revealing "the displacement of the wood chips and the 'large pit or depression' at the slide's landing area," the appeals court also found Swinehart's own photographic evidence and expert witness testimony simply underscored a condition which should have been "obvious to any user of the slide and playground." As characterized by the court, Swinehart's photographic evidence produced shortly after the accident revealed not only "the poor condition of the wood chips" and "a poorly maintained surface at the slide exit" but also a condition which was "visible and obvious at the time of the accident." If not visible and obvious, the appeals court noted that "such a condition could not have been captured by a photograph."

As a result, having found "the condition of the fill was obvious and readily apparent to slide users and, therefore, not latent" within the context of the state recreational use statute, the appeals court affirmed the trial court's grant of summary judgment to the City.

JET SLIDE FOR TODDLERS

In the case of *Platovsky v. City of Long Beach*, 2011 N.Y. Misc. LEXIS 1125; 2011 NY Slip Op 30664U (3/7/2011), Neal Platovsky, age three and a half, was injured when he fell from a playground slide. Neal fell from the top of the slide before sitting to slide down. Neither Neal's father nor his grandfather, who were both present at the playground, saw Neal fall.

Years later, in a pretrial deposition when he was eight years old, Neal testified that "another child pushed him off the slide, then that he tripped at the top of the slide and fell through the opening to slide." Similarly, Neal's mother testified that he had told her that he tripped before falling. In addition, Neal's mother stated that "her son had used the slide at issue over 400 times on other occasions before the accident without a problem."

Plaintiff alleged the slide was unsafe for children under five years old because the slide openings were too large for younger children. Specifically, plaintiff claimed that the City should have provided a warning that the slide should not be used by children under five. Further, plaintiff contended that "the City of Long Beach failed to separate the slide at issue from other playground equipment based upon age restrictions."

A safety compliance manager for the defendant playground manufacturer (Playworld) testified that the slide was "intended for children 2 to 12 years old." Further, he stated that the slide was designed and tested in accordance with the recommendations regarding general hazards in playgrounds, including slides, in the CPSC guidelines," i.e., the Public Playground Safety Guidelines issued by the U.S. Consumer Product Safety Commission (CPSC). Moreover, the Playworld compliance manager testified that this particular slide had passed a test "using gauges and head probes" pursuant to CPSC guidelines to "ensure that a two-year old child, in the minimum percentile, could not go through the openings on the jet slide."

Accordingly, based upon this evidence, the City claimed the slide was "appropriate for children ages 2 to 12." The City, therefore, contended plaintiff could not establish a claim for negligence based on an alleged failure to "warn that the slide was not appropriate for use by children under the age of 5." In addition, the City's assistant superintendent of recreation testified that the slide was inspected daily and no defects had been found or any complaints received about the slide prior to Neal's accident.

As cited by the court, "[a] municipality is under a duty to maintain its park and playground facilities in a reasonably safe condition." In this particular instance, the court noted "the City of Long Beach inspected the playground and slide at issue daily and that they were never determined to be in a defective condition prior to plaintiff's accident." Further, the court acknowledged the fact that "the City of Long Beach never received any complaints about the slide prior to the plaintiff's accident." Moreover, the court found "no evidence in the record that the City of Long Beach knew or should have known that the slide in question was not

appropriate for the age group using the playground or that the failure to separate the slide at issue from other playground equipment was a proximate cause of the plaintiff's accident."

As a result, the court granted summary judgment in favor of Playworld and the City, effectively dismissing plaintiff's claims.

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