LEGAL INSIGHTS
OF LITIGATION
OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

Volume 5, No. 2 -- Winter 2017

Parents, not property owners, are responsible for protecting children

by W. Anthony Andrews

There is a long-standing legal principle that property owners do not need to warn guests about "open and obvious" dangers on their property. A recent decision by the Illinois Appellate Court confirmed that landowners are safe from liability under those circumstances even if the guest is a young child. In *Perez v. Heffron*, 2016 IL App (2d) 160015, the court found a homeowner was not liable for the drowning death of a two-year-old boy while his family attended a yard sale on the homeowner's property.

In June of 2013, the defendant homeowner held a yard sale at his home in Bartlett. The majority of the items for sale were displayed in the front yard. There were, however, additional items for sale in the backyard, where an above-ground pool was located. To get to the backyard from the front yard, a pedestrian had to pass through a wooden gate and follow along a single-file walkway around the side of the house. Surrounding the pool was a gated deck, with stairs leading from the deck down to a patio area, where items were grouped for sale. The homeowner had deliberately placed a clothes rack in front of the deck stairs to prevent yard sale patrons from going onto the pool deck. The homeowner also incorrectly assumed the gate was latched, as it had been the day before.

Miguel Fernandez attended the sale with his extended family, including his three-year-old son, Edgar. While the family was looking at items in the front yard, Edgar was playing nearby. The homeowner informed the Fernandez family that there were more items for sale in the backyard. Miguel stayed in front with Edgar while the others walked to the backyard. Edgar, however, pulled on his father, indicating that he also wanted to go to the backyard. Miguel called to his family to let them know that he was leaving Edgar in their care, but they did not hear him. They thought Edgar was still with Miguel. No one realized the boy was missing until they found him drowned in the pool. The child's mother sued the homeowner for wrongful death.

> ***If a child is too young to appreciate the open and obvious nature of the pool, the duty to supervise the child lies with the accompanying parent.***

The trial court found in favor of the homeowner, so Edgar's family appealed, contending: (1) the solar cover hid the danger of drowning to Edgar and the family; (2) the homeowner created a "distraction" by cluttering the backyard with merchandise and hiding the stairway entrance to the pool; and (3) the law requiring that young children recognize and protect themselves from the danger of drowning should be changed.

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School not legally responsible for bully's behavior

by Joshua B. Rosenzweig

A School district and its officials and staff were found to be not legally responsible for bullying directed at students in *Mulvey v. Carl Sandburg High School*, 2016 IL App (1st) 151615. In *Mulvey*, the family filed suit for damages allegedly sustained as a result of school bullying directed at their children, students at Carl Sandburg High School. The family sued Sandburg, Consolidated High School District 230 as well as certain district officials and coaches. On appeal, the First District Appellate Court reviewed the lower court's decision to dismiss and/or enter judgment in favor of the defendants on three causes of action, all of which were based on the defendants' failure to adequately respond to the family's complaints of bullying.

Two of the three causes of action, which were titled as breach of contract actions, alleged that Sandburg and the District breached Sandburg's student handbook and athletic handbook. These counts alleged school and/or district officials ignored the victims' complaints of bullying conduct by their basketball teammates. The other count alleged willful and wanton conduct, wherein Plaintiffs claimed defendants knew or acted with utter indifference and reckless disregard to the bullying conduct.

Plaintiffs' latter claims were based on Illinois' Bullying Prevention Statute which

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"Time of occurrence" vs. "time of accrual" - What's the difference?

by Ericka J. Thomas

Insurance policies are generally renewed or changed on an annual basis, even for larger organizations such as municipalities. However, it is not uncommon for it to take decades for a cause of action to accrue. In such a case, there may be several different insurers whose coverage might be implicated. This was the situation in the recent case of *St. Paul Fire & Marine Insurance v. City of Waukegan*. 2017 IL App (2d) 160381.

The *St. Paul* case arose out of a criminal case in Waukegan where Juan Rivera was charged and convicted of sexually assaulting and murdering an eleven-year-old girl in 1992. Rivera "confessed" to the crime after four days of intense questioning. After being tried and re-tried numerous times based upon issues related to the allegedly false confession, new DNA technology excluded Rivera as the rapist and murderer and he was eventually freed in 2012. Rivera then filed suit against the City of Waukegan and numerous individual Waukegan police officers for various civil rights violations relating to his arrest, conviction, and 20-year imprisonment. The City and its officers tendered the claims to the numerous private insurers that it had had over the years to defend.

One of the insurance companies that covered the 2008-09 period (during the third trial of Rivera) filed a declaratory judgment action seeking a determination from the court about whether it had a duty to defend or indemnify the City and officers since the alleged injuries occurred back in 1992, when Rivera was originally arrested. While the declaratory judgment action was pending, the civil rights suit was settled for $20 million. After considering cross-motions for summary judgment in the declaratory judgment action, the trial court determined that the civil rights lawsuit did not trigger coverage under the 2008-09 policy. The City of Waukegan appealed.

With regard to whether the third trial was a new violation that would have triggered coverage, the Court rejected the City's argument. The Second District Appellate Court stated that Rivera's second and third trials were continuations of his wrongful prosecution, which increased his damages but were not new injuries. Similarly, the Court rejected the City's claim that each re-trial created a new claim that the City failed to produce exculpatory evidence to Rivera. This claim arose from an allegation that a knife that was recovered near the crime scene in 1994 was concealed from Rivera and later destroyed by the City and the officers, prohibiting Rivera from using it in his defense.

The court noted that the law enforcement activity that that caused the injury occurred in 1994, well before the dates of the policy in question. The court also rejected the City's argument that the use of Rivera's coerced confession during the 2009 trial triggered coverage for his fifth amendment claim. The court cited to a United States' Supreme Court case that held that a coerced confession is actionable whether or not the confession is used at trial. According to that case, the triggering misconduct in the Rivera matter occurred in 1992, when the confession was taken, not during the third trial and, therefore, not during the coverage period. Ultimately, the Second District Appellate Court affirmed the trial court's judgment in favor of the insurance company.

This case is a perfect example of the difference between "time of occurrence," as defined in an insurance policy, and the "time of accrual" of the cause of action. Rivera's cause of action against the City of Waukegan did not accrue until he was exonerated twenty (20) years after his arrest. Even so, the actions that constituted the alleged civil rights violations had actually occurred at the time of his arrest. In most cases, it is the "time of occurrence" that dictates insurance coverage and not when the cause of action accrues. It is always important to keep accurate records of insurance coverage when an agency changes its insurers for just this reason. If your agency finds itself in a complicated situation such as this, immediately contact your attorney and insurance company for assistance. ■

Recent Verdicts of Interest

■ **$115,000,000 to 3 Crew Members of Cargo Plane Who Died in Crash During Take-Off**
On take off from Afghanistan, restraining straps failed causing one vehicle to crash through rear door, damaging flight controls. Jury accepted plaintiffs' argument that defendant loaded the five mine-resistant armor protected vehicles improperly, using only 60 straps for all five vehicles when Boeing determined 60 straps should have been used for each one of the five vehicles.

■ **$15,000,000 to Brain Cancer Victim**
Victim claims cardiologist should have detected lung tumor on her CT angiogram. Cardiologist did find small aneurism but did not report 1:4 cm mass on left lung. Four years later, slurred speech and headaches led to head CT which revealed 4 cm tumor. Cardiologist admitted he missed tumor but argued the progression of the rare form of cancer could not have been altered even if treated earlier.

Above are sample verdicts taken from the Cook County Verdict Reporter. Valuation of injuries and exposure to a defendant vary greatly based on the specific factors of a case. To assess the value or cost of a specific injury, contact one of our litigators.

School not legally responsible

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required Illinois school districts to "make suitable provisions for instruction in bullying prevention in all grades and include such instruction in the courses of study regularly taught therein." (105 ILCS 5/27-23.7). Under the Bullying Statute, bullying is defined as "any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student or students that has or can be reasonably predicted to have the effect of" placing a student in reasonable fear of harm, having a detrimental effect on the student's physical or mental health, or substantially interfering with a student's academic performance or the student's ability to participate in school activities. (105 ILCS 5/27–23.7(b))

Additionally, other claims were based on the student handbook and athletic handbook distributed for the 2010–2011 school year, which included explicit policies regarding the prevention of bullying and disciplinary action that school officials could administer when violations occur. The student handbook defined bullying as "conduct and behavior toward other students that, to a marked degree, appear to terrorize, intimidate, or start fights with other students. It includes, but is not limited to, engaging in any form or type of aggressive behavior that does physical or psychological harm to someone else and/or using students to engage in such conduct." The policy required the superintendent or designee to develop and maintain a program that "fully implements and enforces" the policy. The policy listed progressive disciplinary actions to be implemented and administered by school officials.

With respect to Plaintiffs' breach of contract counts, defendants contended that, as a matter of law, public school student handbooks do not possess the elements of a legal contract. Defendants also moved to dismiss the willful and wanton count claiming immunity pursuant to section 2–201 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act.

The Circuit Court dismissed the breach of contract claims, and found that the willful and wanton claim should be dismissed due to defendants' immunity. Plaintiffs appealed. The First District Appellate Court affirmed the dismissal of the Plaintiffs' claims on appeal. In doing so, the appellate court provided a detailed explanation for its decision.

The appellate court explained that to state a cause of action for breach of contract, Plaintiffs must demonstrate the existence of a valid contract. The appellate court distinguished this case from the Illinois Supreme Court's decision in *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482 (1987), relied upon by Plaintiffs, finding that *Duldulao* was inapposite since *Duldulao* involved an employee handbook as opposed to a student code of conduct. The appellate court stated that the student handbook provisions cited by the Plaintiffs are "merely hortatory and convey no specific promises."

The appellate court noted that unlike the employee handbook in *Duldulao*, which included specific language regarding the termination of employees, the language in the student handbook did not include any specific *promise* to prevent or eliminate bullying. Instead, the applicable policy, Policy 7:180, stated that "[p]reventing students from engaging in these disruptive behaviors is *an important District goal.*" (emphasis added.) The appellate court stated that the "creation, implementation, and enforcement of a policy prohibiting bullying, as required by state law, simply does not promise students and parents that attendance at the school guarantees the complete absence of bullying conduct." Thus, the dismissal of the breach of contract counts was appropriate.

The willful and wanton count alleged that, although defendants had actual notice of the bullying conduct because it occurred in their presence, they acted with utter indifference and reckless disregard to it by allowing it to continue unrestrained. The Tort Immunity Act protects local public entities and public employees from liability arising from the operation of government. (*Van Meter v. Darien Park District,* 207 Ill.2d 359, 368 (2003)) The law seeks "to prevent the dissipation of public funds on damage awards in tort cases."

Section 2–201 of the Tort Immunity Act states: "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." (745 ILCS 10/2–201) Section 2–109 of the Tort Immunity Act further provides that "[a] local public entity is not liable for an injury resulting from an act or omission of its employees where the employee is not liable." (745 ILCS 10/2–109) Sections 2–201 and 2–109 grant absolute immunity to public entities for the performance of discretionary functions, but not ministerial functions. (*Malinksi v. Grayslake Community High School District 127,* 2014 IL App (2d) 130685, ¶ 8.)

The Illinois Supreme Court has established a two-part test to determine which employees may be granted immunity under the Tort Immunity Act. First, an employee may qualify for immunity "if he holds *either* a position involving the determination of policy *or* a position involving the exercise of

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discretion." (Emphases in original) (*Harinek v. 161 North Clark Street Ltd. Partnership,* 181 Ill.2d 335, 341 (1998)) If the employee satisfies the first part of the test, he must then show he engaged in both the determination of policy and the exercise of discretion when performing the act from which the plaintiff's injury resulted.

The Plaintiffs argued that defendants' duties were ministerial functions to which immunity did not attach. Specifically, the Plaintiffs pointed to the student handbook's progressive disciplinary policy, which includes an assigned point system for violations. Plaintiffs contend that the individual defendants, including administrators, coaches, and guidance counselors, were merely left to implement the ministerial task of the designated policies established by the school board and apply them.

The appellate court noted that it previously had found the subject immunity provisions applied to bar claims brought regarding failure of school officials to discipline school bullies. In *Hascall v. Williams,* 2013 IL App (4th) 121131, the court held that, despite the existence of an anti-bullying policy similar to the one at issue here, the acts or omissions at issue constituted discretionary acts and policy determinations, not ministerial acts, which were protected under Section 2–201 of the Tort Immunity Act.

In finding the reasoning exhibited in *Hascall* persuasive, the appellate court concluded that the anti-bullying policy at issue, which was strikingly similar to the anti-bullying policy in *Hascall,* was discretionary in nature. Furthermore, the appellate court found that the applicable disciplinary point system required a discretionary determination of whether a violation occurred. The appellate court concluded that the dismissal of the willful and wanton count was appropriate.

Thus, though a school district has an obligation to take affirmative steps in an attempt to prevent bullying in the school environment, it does not breach its handbook merely because it didn't succeed completely. Nor is it guilty of willful and wanton misconduct when its actions involve such discretionary decisions as to how to prevent and deal with bullying in school. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.'s newsletter, ***Legal Insights of Litigation,*** is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

1804 North Naper Boulevard, Suite 350
Naperville, Illinois 60563
(630) 682-0085
www.ottosenbritz.com

W. Anthony Andrews, Editor wandrews@ottosenbritz.com

Parents, not property owners

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The Illinois Appellate Court rejected all three arguments and affirmed the judgment in favor of the homeowner. First, the court noted that the swimming pool presented an open and obvious danger. Although the homeowner placed a plastic cover on the pool's surface, the existence of an above ground pool was still obvious to anyone who walked to the backyard. The court added that the clothes racks were not a distraction because they did not hide the large pool. Additionally, Miguel's sister admitted that she saw the pool and was able to supervise her own toddler granddaughter. The only reason she did not watch Edgar was because she did not know he was there, not because the yard sale distracted her.

Finally, the court refused to change the "open and obvious" standard for children under the age of seven. The court pointed out that young children are presumed to be under the supervision of their parents. If a child is too young to appreciate the open and obvious nature of the pool, the duty to supervise the child lies with the accompanying parent. Edgar's tragic death was not the result of the homeowner's negligence, but rather Miguel's mistake of not watching his son. Failure of a parent to supervise the child is not foreseeable. Therefore the homeowner is not required to anticipate the parent's negligence and to guard against it.

As harsh as this ruling is, it is consistent with Illinois law that provides that landowners are not legally responsible for injuries that occur due to hazards on their land that they would reasonably expect others to become aware of and head. ■