



Ready for the Defense

Pedestrian trips and falls over tree stump on public entity property — what defenses

THIS MONTH'S COLUMN deals with what seems to be an easy, no-liability case. A pedestrian, walking on Village property, trips and falls over a tree stump. The tree stump stuck up about 3" to 4" and was awaiting removal by a stump removal tree service contractor. The Village had cut down a dead or dying tree.

The full facts of the trip and fall and the exact location in the Village where the stump was located are unknown. This question arose as a question at an educational seminar we participated in for a group of municipalities. Everyone agreed, it should be a no-liability case — how could the Village be at fault for someone not paying attention and looking where he was walking. It seems to be an open and obvious condition of which there is no duty to warn.

And, all agreed that even though we did not know where the tree stump was located, it could not have been on a sidewalk (where trees don't grow) and, thus, the pedestrian was not an "intended user" to whom a duty is owed to maintain the property in reasonably safe condition pursuant to § 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a)).

Because there was much discussion of this question at the seminar and the participants came up with three defenses they believed would relieve the Village of any liability, we thought it might be of interest in a column.

One wonders why people sometimes think local government should be responsible for exercising more care for their safety than they themselves do. The law does not tolerate or accept the contention that a person did not see what was plainly visible to see, if a person looked.

Three Possible Defenses

There are, at least, three possible defenses to this trip and fall over a tree stump on Village property (and, you may already be ahead of us in knowing what they are):

- (1) The tree stump is an open and obvious condition or peril of which the Village has no duty to warn of or guard against.
- (2) The Village owed no duty to the pedestrian to

maintain its property free and clear of the tree stump because he was not an "intended user" (the property where the tree stump was located was not designed, constructed, maintained and held out by the Village as a place for pedestrians to walk — it was not a sidewalk) of the area.

Because he was not an "intended user" of the property, there was no duty to maintain the property for the pedestrian's use under § 3-102(a) of the Tort Immunity Act. (745 ILCS 10/3-102(a)).

- (3) If the area where the tree stump was located was a parkway (the grassy area between the street and sidewalk), the only duty the Village would owe is to maintain it free of a "pitfall, trap, snare or other like obstruction." A tree stump is pretty obvious and certainly not a "trap, snare or pitfall."

The Tree Stump Was An Open & Obvious Peril Or Condition

There are a number of cases which hold that a landowner is not liable for injuries occurring on property as a result of an open and obvious peril, danger or condition on the property. The law presumes that people are responsible for their own safety and will not injure themselves on open and obvious conditions which all reasonable persons would take care to avoid. A person, looking where he is walking, would avoid a tree stump.

Among some of the open and obvious peril/no duty to protect against cases are the following:

- (1) *Sandoval v. City of Chicago*, 357 Ill.App.3d 1023, 830 N.E.2d 722 (1st Dist. 2005) (Plaintiff's fall into missing section of city sidewalk 5 ft. x 6 ft. was "open and obvious danger" and her excuse that she was "momentarily distracted" while looking for young child she was babysitting insufficient to prevent summary judgment for city).
- (2) *Belluomini v. Stratford Green Condominium Association*, 346 Ill.App.3d 687, 805 N.E.2d 701 (2d Dist. 2004) (Bicycle in condo hallway

of which plaintiff was aware was an open and obvious peril of which there was no duty to protect plaintiff from).

- (3) *Bonavia v. Rockford Flotilla, 6-1, Inc.*, 348 Ill. App.3d 286, 808 N.E.2d 1131 (2d Dist. 2004) (Algae growth on dock pier on which boater who rented dock space slipped was an “open and obvious peril” imposing no duty on dock operator to warn of or guard against).

Illustrative of this no duty to protect against open and obvious perils rules is *Sandoval*.

In *Sandoval v. City of Chicago*, 357 Ill.App.3d 1023, 830 N.E.2d 722 (1st Dist. 2005), Plaintiff tripped and fell over a missing section of city sidewalk in front of her house. She sued the City of Chicago claiming negligent maintenance of the sidewalk. The missing sidewalk section measured 5 ft. x 6 ft. and had been missing for years.

The City of Chicago defended, contending the missing sidewalk section was an “open and obvious condition” and, therefore, the City owed plaintiff no duty to warn of it.

Plaintiff Sandoval knew of the missing sidewalk section in front of her home, but was watching the child she was babysitting for and forgot to be careful and not trip on the sidewalk. The Appellate Court held the City of Chicago owed no duty to protect the plaintiff from the “open and obvious danger” of a missing sidewalk section. The *Sandoval* Court reasoned:

Here, plaintiff admitted that her attention became diverted from the sidewalk only by her concern for the child she was supposed to be watching who walked out of her line of sight, and by her fear that he may approach a set of stairs in her yard. She testified that she was not looking at the ground where she was walking but, rather, at her gate and yard. Defendant in no way was responsible for, contributed to, or created this situation, which began when plaintiff brought the child outside to the parkway. Accordingly, we find that defendant owed no duty to plaintiff to warn or otherwise safeguard her from potential harm posed by the open and obvious sidewalk defect in front of her home, where her injury resulted not from a distraction that could be reasonably anticipated by defendant but, instead, was the result of her own inattentiveness in not looking forward where she was walking. (357 Ill. App.3d at 1031, 830 N.E.2d at 730).

Pedestrian On Non-Sidewalk Area Not An “Intended User”

The immunity provisions of § 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a)) reveal what duty is owed by a local public entity to persons coming onto its property. A local public entity does not have the common law duty of reasonable care owed to persons coming onto the property. A local public entity has immunity — it owes a duty of reasonable care in the maintenance of its property only to “intended and permitted users” of the property. Section 3-102(a) provides as follows:

§ 3-102. Care in Maintenance of Property — Constructive Notice.

(a) ... a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used ... (745 ILCS 10/3-102(a)).

An “intended user” is one whom the local public entity designed, constructed, maintained and held out the property for usage. A “permitted user” is a non-trespasser.

The immunity of § 3-102(a) applies (meaning no duty is owed) unless a person coming onto the property is both an “intended and permitted user.”

There are a number of cases holding a local public entity does not owe a duty to maintain its property for persons not “intended and permitted” to use the property, including:

- (1) *Bonert v. Village of Schiller Park*, 322 Ill.App.3d 557, 750 N.E.2d 273 (1st Dist. 2001) (Pedestrian walking to his car thru alley and falling in indentation filled with water where alley met street on opposite side from where his car was parked was not an “intended user” of the street — village owed plaintiff pedestrian no duty to maintain street for his use).

The *Bonert* Court summarized the rule that under § 3-102(a) of the Tort Immunity Act, local public entities owed no duty to pedestrians using streets except at crosswalks & legal parking spaces:

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According to this statute (§ 3-102(a)), a municipality has a duty to maintain its property only for people who are both ‘intended and permitted’ uses of the property ... The general rule with regard to the duty of a municipality to maintain its streets in a reasonably safe condition is that, because pedestrians are not intended users of the street, a municipality does not owe a duty of reasonable care to pedestrians who attempt to cross a street outside the crosswalks ... Courts have recognized a narrow exception to this rule, finding that pedestrians entering or exiting legally parked vehicles on the street are intended and permitted users of the street in the area around the vehicle. *Curatola*. ... (322 Ill.App.3d at 560-61, 750 N.E.2d at 276).

- (2) *Vaughn v. City of West Frankfort*, 166 Ill.2d 155, 651 N.E.2d 1115 (1995) (Pedestrian who stepped in hole in middle of street crossing mid-block was not an “intended user” of the street despite the fact that the plaintiff pedestrian left the sidewalk where it ended mid-block and crossed the street to get to the sidewalk on the opposite side of the street).
- (3) *Krampert v. Village of Mt. Prospect*, 323 Ill. App.3d 41, 751 N.E.2d 160 (1st Dist. 2001) (Pedestrian who parked car on north side of street and was walking across street and tripped and fell on cracked and uneven median strip was not an “intended user” of median strip — no duty owed by village to maintain median strip for pedestrian).

Parkways — Only Duty To Maintain Free Of Pitfalls, Traps & Snares

Because it was unclear in our example where the tree stump was located on Village property, if it were determined that it was on a parkway (the grassy area between the street and sidewalk), the only duty the Village would owe to a pedestrian would be to maintain the parkway free of any “pitfall, trap, snare or other like obstruction.” That might include a water main with loose cover, covered over by leaves and not obvious, for example.

The following cases hold that the duty to maintain a parkway area is very limited:

- (1) *Marshall v. City of Centralia*, 143 Ill.2d 1, 570 N.E.2d 315

(1991) (City’s duty to maintain parkways is only to protect pedestrians from unreasonably dangerous conditions not in plain sight, such as a “pitfall, trap, snare or other like obstruction” — City owed duty to protect pedestrian from uncovered manhole hidden by leaves in parkway).

- (2) *Barnhisel v. Village of Oak Park*, 311 Ill.App.3d 108, 724 N.E.2d 194 (1st Dist. 1999) (Village owed no duty to pedestrian who fell in tree cut-out 2” deep on sidewalk because tree cut-out was in plain view and not a “trap, snare or pitfall” which pedestrian could not observe).

In *Marshall v. City of Centralia*, 143 Ill.2d 1, 570 N.E.2d 315 (1991), Plaintiff John Marshall fell on a grass-covered parkway when he stepped into an open sewer manhole covered by leaves.

The Supreme Court in *Marshall* held that there is no duty to maintain parkways like sidewalks, but there is a duty to maintain parkways free of traps:

However, the duty of care with regard to parkways is not identical to the duty of care with regard to sidewalks. Pedestrians who leave the sidewalk cannot assume that parkways are free of defects or undulations as they otherwise could when traveling on the sidewalk. Sidewalks are generally made of cement, while parkways are composed of sod and earth and are therefore more susceptible to weather damage caused by rain and snow. ... Municipalities cannot be held liable for parkway conditions which are customary, even though such conditions may be slightly dangerous. ... ‘However a city has no right to maintain anything in the nature of a pitfall, trap, snare or other like obstruction whereby the traveler, in yielding to the impulse of the average person to cut across a corner in a hurry, may be injured.’ (143 Ill.2d at 10-11, 570 N.E.2d at 319-20).

Conclusion

This issue seemed to spark interest and discussion at the seminar and, hopefully, it provides some interest and insight.

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