Volume 32
Winter 2012/2013

MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE

Court of Appeals Absolves State of Liability for Capsized Tour Boat on Lake George.

Estate of Helen Metz v. State of New York, No. 208 NYLJ 1202579741586 (November 29, 2012).

This case dealt with the tragic capsizing of the Ethan Allen, the Lake George tour boat, which resulted in the death of 20 passengers and injured several others. The victims' estates commenced suit against the State of New York, alleging that the State was negligent in its annual testing and inspection of the vessel.

In accordance with the Navigation Law, the New York State performed annual inspections on the public vessel and issued a certificate regarding its safety and fitness, including the boat's maximum passenger capacity. Since the boat's construction in 1964, the capacity remained at 48 passengers and 2 crew members, for a maximum total of 50 people on board. This number was derived from the Coast Guard's initial inspection in 1964, but as per the State Inspectors' testimony, it was "rubber stamped" and considered "Gospel" once the State took over the inspections in or around 1979.

On the date of loss, 48 passengers were aboard the vessel and plaintiffs alleged that the State was negligent in failing to independently verify its maximum passenger capacity by conducting stability tests and in merely relying on the outdated number that had been repeatedly certified over the years, even after the vessel's design was significantly modified in 1989.

The Court noted that to maintain a viable cause of action against the State, plaintiffs needed to *first* establish a duty on the State's part to the individual passengers which was separate and apart from its general duty to ensure passenger safety upon the vessel. The Court opined that there was no such duty to the individual victims and that the Navigation Law's rules and regulations regarding vessel inspections merely spoke to the State's general duty to ensure public safety and its governmental function to enforce statutory regulations. The Court further noted that the legislature's amendment of the Navigation Law in response to the incident deliberately omitted any private cause of action against the State for failure to abide by the Navigation Law, but instead, imposed harsher criminal penalties and fines than those previously set forth therein.

The absence of a specific duty running from the State to the individual victims proved fatal to the plaintiff's claim and the Court of Appeals thus, dismissed it entirely. Admitting that its decision left the victims "without adequate remedy," it opined that the legislature is currently considering an amendment to the Navigation Law which would require public vessels to carry maritime protection and indemnity insurance and that this could provide some form of relief for similar victims in the future.

Second Department Remands Slip and Fall Case for a New Trial, Finding That Lack of Prior Written Notice did Not Negate Issues of Fact as to the County's Liability for Failure to Perform Snow and Ice Removal.

Maccarello v. County of Suffolk, 2012 Slip Op. 8104, (2d Dept. 2012).

Plaintiff fell in the course of her employment at a farm with outbuildings that the County leased to her employer pursuant to a lease agreement. As part of the lease between the County as landlord and plaintiff's employer as tenant, the County was to provide snow and ice removal services.

After the close of plaintiff's case in chief at trial, the defendant moved to dismiss the complaint because plaintiff conceded that the County did not have prior written notice of any dangerous condition at the accident location, as required by local statute. Plaintiff in turn, argued that prior written notice was not a pre requisite to the County's liability as the County owned the premises in a proprietary/landlord capacity and not within its governmental capacity.
The Appellate Division agreed and reversed the trial Court's decision dismissing the action. The case was, accordingly, remanded for a new trial on liability.

The Court opined that the County's contractual agreement with the plaintiff's employer created a proprietary ownership interest in the property that was not within the County's function as a municipality and that it, thus, owed the plaintiff the same duty to maintain the property as that of any private landowner.

Federal Court Partially Upholds Suit Challenging Zoning Ordinances within an Orthodox Village that Allegedly Impeded Construction of a Rabbinical College therein.

Congregation Rabbinical Coll. Of Tartikov v. Vill. of Pomona, 2013 U.S. Dist. Lexis 2207 (January 4, 2013).

A Rabbinical College sued the Village in which the college was to be built, alleging that the Village's zoning ordinances unduly impeded the construction of the College and violated the Religious Land Use and Institutionalized Person Act (RLUIPA), First Amendment, Equal Protection Clause of the New York and United State Constitution, Fair Housing Act and 42 U.S.C. 2000. The Court held that each of these claims survived defendant's motion to dismiss, but granted the defendant's motion with respect to plaintiff's "as-applied" challenges under the First Amendment and RLUIPA for lack of ripeness.

The crux of plaintiff's suit focused on the Village's newly enacted amended regulations and wetland protection ordinances, which redefined "educational institutions" to include accredited colleges only, barred dormitories with separate cooking facilities and mandated a 100 foot buffer around wetlands areas of 2,000 square feet or more. Plaintiff claimed that these seemingly, facially-neutral regulations had the effect of and were enacted to prevent the unaccredited College's construction and block the college from the surrounding community because the College served a religious purpose (to train Rabbis).

The Court held that plaintiff sufficiently alleged a discriminatory purpose behind the Village's regulations, based on the timing of their enactment in connection with the college's proposal for the construction and the close proximity of the amendments to the regulations and Village officials' comments that the town should not "cave into" the College and sell their homes so it could be constructed. The Court conceded, however, that plaintiff just barely pled a First Amendment claim based on its general allegations that the ordinances would unduly prevent the college's expressive conduct.

In allowing plaintiff's claims to survive, the Court opined that RLUIPA specifically prohibits enactment of regulations which impose a "substantial burden" on the exercise of religion on real property and that plaintiff's sufficiently pled a RLUIPA violation even though the regulations may have had a "combined effect," which was partially, neutral. In making this finding, the Court emphasized the fact that plaintiff's only option in challenging the ordinances would be to pursue a legislative amendment of them, which would be "fraught with indefinite delay and uncertainty."

Because the Court was only called to determine whether the plaintiff sufficiently pleaded a cause of action against defendants, it opined that it was too early to entertain the Village's defenses regarding the allegedly non discriminatory intent and compelling interests behind the regulations at issue.

However, the Court did dismiss the plaintiff's "as applied" challenges to the ordinance, finding these claims to be premature because plaintiff had not submitted any formal applications with respect to them or asked for a variance. Furthermore, the Court opined that it lacked subject matter jurisdiction as to plaintiff's as applied challenges because there had been no final decision as to any informal requests for accommodation that plaintiff's did make and that the Village's denial of any such request, remained uncertain.

Second Department Finds that a High School Pitcher Did Not Per Se Assume the Risk of Being Struck in the Face With a Line Drive During Practice and That the Trial Court Erred in Even Instructing the Jury as to the Primary Assumption of Risk Doctrine in the First Place.

Weinberger v. Solomon Schechter Sch. of Westchester, 2013 N.Y. Slip Op. 78 (2d Dept. 2013).

Plaintiff was a female, freshman pitcher for her High School's junior varsity softball team and was struck in the face with a line drive during batting practice. Plaintiff's coach instructed the team to employ a rapid fire drill during this practice, which required plaintiff to pitch closer to home plate than the pitching mound, so as to throw pitches in a quicker succession. It was during this drill that plaintiff was struck in the face with a ball that was hit right back at her.

In accordance with the National Federation of High School Associations, the team's pitcher mound was at least 40 feet from home plate. The School's athletic director testified that he required plaintiff's softball coach to use an L-screen at practice if the pitcher was to pitch at a shorter distance to home plate than the mound. The National Softball Association requires that protective pitching screens, such as "L-screens," be freestanding.

It was undisputed that the plaintiff was pitching from about 34 feet from home plate and that the L-screen was *not* freestanding. Rather, it was propped between two benches and kept falling down throughout the subject batting practice. Indeed, the L-screen had fallen down right before the accident occurred. Plaintiff's coach asked plaintiff is she was comfortable with pitching despite the fact that the L-screen had fallen, again, and plaintiff did not respond and continued to pitch. The L-screen remained on the ground in the moments leading up to the accident and, thus, did not prevent the line drive from striking the plaintiff's face.

At trial and over the plaintiff's objection, the Judge instructed the jury on the amended version of PJI section 2:55, pertaining to implied assumption of risk, as a means to instruct the jury as to primary assumption of risk. The jury rendered a defense verdict, which the Second Department then ultimately overturned and remanded the case for a new trial. The basis of plaintiff's objection to primary assumption of risk was that it is a question of law for the Court, and not one of fact for the jury.

While the Court noted that primary assumption of risk does deem plaintiffs to consent to the inherent risks of sporting activities that they voluntary participate in, the Court opined that it does not apply to concealed or unreasonably increased risks and, in any event, only limits a defendant's duty (as opposed to serving as an absolute defense). Furthermore, awareness of a risk is to be assessed against the plaintiff's background and particular skill and experience in the relevant activity they are participating in at the time of the accident.

The Court ultimately found that the broken and defective L-screen was not a risk inherent in high school softball and that the risk of harm to plaintiff was unreasonably increased by her coach's instructions to pitch closer to home plate without the benefit of an L-screen. As such, the plaintiff did not assume the risk of her injury under a theory of primary assumption of risk and the jury should never have been instructed on it.

In remanding the case for a new trial, the Court found issues of facts as to whether the plaintiff impliedly assumed the risk of her injuries and as to her culpable conduct, given the fact that she continued to pitch closer to home plate knowing the L-screen was defective. In this vein, the Court held that the jury should have been instructed with the unamended PJI section 2:55 and PJI 2:36 (pertaining to comparative negligence).

Court of Claims Denies Recovery to a Fourteen Year Old Girl Who Suffered a Severe Fall in a Gorge Within a New York State Park.

Panebianco v. State of New York, 2012 Slip Op. 52439.

The fourteen year old plaintiff here fell down a rocky gorge and was severely injured after she allegedly veered off of the designated hiking trails in a New York State park while on a class field trip.

After the liability trial before the Court of Claims, the Court absolved the State of New York of any claims of negligence, finding that the steepness of the gorge in the accident location was an open and obvious condition and that the park was otherwise safely and reasonably maintained.

The Court opined that municipalities which serve a proprietary function as a landlord, while not an insurer of the safety of others, are subject to the same negligence principles as private landowners. These municipalities, thus, have a duty to take reasonable precautions to prevent foreseeable accidents on their property which could occur as a result of dangerous terrain. The Court emphasized, however, that this duty does not extend to open and obvious conditions, i.e., ones that cannot not be overlooked by any observer reasonably using his or her ordinary senses. In the context of State-owned parks, the Court went a step further and acknowledged that this duty does not extend to natural geographic phenomena which can be readily observed.

The Court found that the ledges in the dry and steep gorge down which the plaintiff fell was an open and obvious phenomena that she came to only upon veering off the designated hiking trails and consciously choosing to descend the rocky ledges of the gorge three separate times. The Court deemed the ledges to be a danger that could be readily observed by ordinary use of the senses and noted that plaintiff indeed observed the steepness of the gorge before each of her three jumps down the gorge, such that she stopped before each jump to deliberate how to proceed. The Court determined that it was plaintiff's inability to negotiate her third vertical jump of between 6 to 12 feet, which caused her fall and that the area was safely maintained.

While the parties disputed whether plaintiff veered off of the designated hiking trails within the park en route to the accident location, the Court found that the rough and unkempt path on which she traveled was more than sufficient to apprise her that she *had*. Further, the Court noted that if the condition of the path was not enough, plaintiff had also passed a 10-12 foot high sign warning of undeveloped land and forbidding trespassing beyond the sign, which could have also easily apprised her of the fact that she was no longer on a designated trail. Plaintiff herself conceded that she was "exploring" and looking for an "alternate route" or "shortcut" just before the accident.

The Court noted that the question was not whether the warning sign itself could have been better, but whether it was adequate in the first place. The Court held that the brightly colored sign in close proximity to the forbidden trail was adequate, particularly in light of the fact that the gorges and ledges within a park are natural, geographical phenomena.

The Court noted that the plaintiff's "harrowing" accident was nonetheless not the State's fault and that it would mar the park's dramatic, natural grandeur to erect and clutter the accident location with signs warning of a manifest and obvious danger thereat. The Court also opined that the State is not required to allow patrons to wander at will over every portion of its parks.

Second Circuit Court of Appeals Grants Qualified Immunity to Police Officer, Despite his Fourth Amendment Violation During a Traffic Stop.

Winfield v. Trotter, 11-44040 cv (March 6, 2013).

During a consensual search of the plaintiff's vehicle as part of a traffic stop, a Police officer found and read a personal letter from plaintiff to the Court concerning criminal proceedings against her husband for possession of contraband. The officer ultimately only issued a traffic violation to plaintiff and found nothing of importance during the vehicular search. Plaintiff then sued the officer under the Fourth Amendment claiming that he unreasonably invaded her privacy by reading the letter during his search.

The Second Circuit agreed with the lower Court that even with consent to search certain portions of the vehicle (including the trunk), the officer violated the plaintiff's Fourth Amendment rights by reading the letter because it was an unreasonable intrusion into her privacy and exceeded the scope of her consent. However, the Court granted the officer qualified immunity finding that while his search was unconstitutional, it did not violate the plaintiff's clearly established right at the time of his search.

In making this determination, the Court, as required, balanced the vindication of the plaintiff's constitutional rights against that of the public official's interest in performing their duties and opined that the right which is violated must be sufficiently clear and particularized, such that a reasonable officer would understand that his actions would violate that right under these circumstances.

The Court found that the plaintiff's constitutional right was *not* clearly established because there is no Second Circuit case law standing for the proposition that reading a letter (not in plain view) during a consensual search would violate an individual's Fourth Amendment right. As such, the officer's actions were objectively and legally reasonable and he was entitled to qualified immunity.