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IF YOU BUILD IT, THEY WILL COME . . . AND YOU COULD BE LIABLE

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On September 29, the Nebraska Supreme Court issued an opinion entitled *Bronsen v. Dawes County* in which the Court overruled, in full or in part, nine previous Supreme Court cases that had limited the liability of political subdivisions for accidents occurring on public property being used for recreational purposes. Cities, villages, and counties need to be aware that the special protection they have been afforded for the last twenty-five years from liability arising from recreation on public property no longer exists.

The case arose from a broken ankle sustained by Carolyn Bronsen as she was carrying paper plates and bowls to a trash can on the Dawes County courthouse lawn at a picnic during the annual Fur Trade Days celebration. Bronsen stepped into a hole on the courthouse lawn, which caused the break. Bronsen sued the County and the not-for-profit organization that sponsored Fur Trade Days for her injuries. The County asserted that it was immune from liability under the Recreation Liability Act ("RLA"), Nebraska Revised Statutes §§ 37-729 to 37-736.

The Recreation Liability Act

The RLA provides that "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." Neb. Rev. Stat. § 37-731. The statute defines "owner" as including a "tenant, lessee, occupant, or person in control of the premises." Neb. Rev. Stat. § 37-729(2). Starting with *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), and reaffirming the idea in three subsequent cases, the Nebraska Supreme Court held that the term "owner" in the statute included public entities, thus bringing cities, villages, and counties within the statute's coverage. The statute defines "recreational purposes" as including "any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, waterskiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using land for purposes of the user." The RLA provides that only where an owner willfully or maliciously fails to "guard or warn against a dangerous

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condition, use, structure, or activity" would an owner not be shielded from liability. "Thus, if the RLA applies, landowners are protected from all but intentional or recklessly indifferent acts committed against persons entering onto their land." *Bronsen*, 272 Neb. 320, 327, 722 N.W.2d 17 (2006).

The district court concluded that Bronsen's activities on the courthouse lawn constituted "recreational purposes" under the RLA, that she failed to show any willful or malicious action on the part of the County resulting in her injuries, and therefore the County was not liable for her injuries. The Nebraska Court of Appeals, following the Supreme Court's precedent, affirmed. Bronsen appealed to the Supreme Court, arguing that the RLA should not apply to governmental entities. The Supreme Court ultimately agreed.

Supreme Court's Decision

The Court found that the RLA does not apply to governmental entities for principally six reasons. First, the Court found that the Legislature's intent in passing the RLA–to induce landowners to make their land available for public recreational use–is of no force when applied to governmental entities because those entities already own land for the purpose of making it available for public use. Second, the Court noted that section 37-733 of the RLA uses the phrase "an owner of land who leases land to the state," and concluded that if the term "owner" included governmental entities, the statute would be nonsensical, as it would refer to governmental entities leasing land to themselves. Third, the Court reasoned that the Legislature would not have intended the RLA to provide liability protection to governmental entities when the law was passed in 1965, because at that time, governmental entities were already immune from liability under the common-law doctrine of sovereign immunity.

Fourth, including governmental entities in the definition of "owner" under the RLA leads to inconsistent results for persons injured on public property, since the duty of the governmental entity to those engaged in *recreation* would be determined under the RLA, while the duty to those engaged in *nonrecreational* activities would be determined under the Political Subdivisions Tort Claims Act ("PSTCA"). To illustrate, the Court used the hypothetical that a piece of the State Capitol's facade falls and strikes children entering the Capitol on a field trip, and also strikes a concerned citizen entering to attend a hearing. The children are using the Capitol for recreational purposes–to view a historical site–while the concerned citizen is there on business. The state's duty to the children would be limited to "intentional" or "recklessly indifferent" acts, while its duty to the concerned citizen would be determined under a general negligence standard.

Fifth, the PSTCA makes political subdivisions liable "in the same manner and to the same extent as a private individual under the circumstances." Neb. Rev. Stat. §13-908. It is clear the RLA applies to private individuals. It was argued that if private individual liability under the RLA is limited to intentional or recklessly indifferent acts, then the liability of political subdivisions should in like manner be limited under the PSTCA, given the language of the PSTCA. But the effect would be to incorporate the RLA into the PSTCA, something the Court rejected. Therefore, the PSTCA applies regular standards of negligence to property owned by governmental entities.

Finally, the Court noted that the purpose of the RLA was to provide an incentive for private landowners to make private lands available for public recreational use. Governmental entities own public land, not private land, and so the RLA cannot apply to them.

What It Means to Cities, Villages, and Counties

The practical consequence is that the RLA no longer protects cities, villages, and counties from ordinary claims of negligence arising out of recreational activities on public property. Now, the PSTCA applies to such claims, and "political subdivision[s] shall be liable in the same manner and to the same extent as a private individual under like circumstances." Neb. Rev. Stat. § 13-908. This means that the liability of a governmental entity for injuries sustained by a user of a public park, skate park, water park, swimming pool, playground, ball field, tennis court, hike/bike trail, or other public recreational facility is no longer specially limited, and is determined using the same rules of liability applied to public property in general. Thus, though the risk of injury at a recreational facility may be much greater than the risk of injury at the city clerk's counter, the same standard of liability will apply to both: the entity will be as liable as a private person would be in the same circumstances.

What It Does Not Mean to Cities, Villages, and Counties

The Supreme Court's decision does not sweep away all protection and suddenly make governmental entities strictly liable for injuries sustained during recreation on public property. Those injured must still show that the governmental entity was negligent in some way which caused the injury sustained. The standard of care required of owners and occupiers of premises applies in these cases. "[O]wners and occupiers of land are [not] insurers of their premises, nor do we intend for them to undergo burdens in maintaining such premises. We impose upon owners and occupiers only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors."

Aguallo v. City of Scottsbluff, 267 Neb. 801, 806, 678 N.W.2d 82, 89 (2004).

> [T]he owner or occupier is subject to liability if the lawful visitor proves (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor.

267 Neb. at 807, 678 N.W.2d at 89. The Court explained that some of the factors considered in determining whether an owner or occupier of premises has exercised reasonable care to protect lawful visitors are:

> (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

267 Neb. at 806, 678 N.W.2d at 89. While the special blanket protection of the RLA has now been withdrawn by the Supreme Court, plaintiffs would still be required to show that the actions of a city, village, or county in constructing or maintaining a recreational facility fell below the standard of care explained above. Of course, that may be little comfort given the room for interpretation under varying circumstances.

How Governmental Entities Should Respond

In the short term, governmental entities should inquire of their insurance carriers, without delay, whether their recreational facilities are now covered given the change in the law. Some cities are choosing to close facilities to avoid liability. The Omaha World-Herald reported on October 15 that Norfolk, Fremont, and North Platte have closed their skate rinks, and that Omaha and Lincoln were considering doing the same. Other facilities that might be closed include BMX dirt bike tracks, sledding hills, and playground equipment. Insurance on some facilities

has already been cancelled. The League of Municipalities has told cities who use insurance through the League that after the ruling, a full exclusion, comparable to exclusions for bungee jumping, applies for skateboard parks.

In addition to checking insurance coverage, governmental entities should carefully inspect recreational facilities for potential risk of harm to visitors. Being proactive to discover dangers and fix them, to warn visitors of inherent risks, and to close facilities that present an unreasonable risk under the circumstances will go far in meeting the duty of reasonable care required of cities, villages, and counties.

In the long term, governmental entities may want to join efforts to pass legislation reinstating the liability protections for recreational facilities. The Omaha World-Herald reported on October 15 that state Senator Mike Flood of Norfolk would be involved in passing such legislation. Changing the law might involve putting into statute the Supreme Court's previous interpretations of the RLA, or writing a new law that specifically applies some degree of recreational liability immunity to governmental entities.

Whatever long-term solutions may be found, it is clear that cities, villages, and counties must respond now to this change in the law, and be proactive in meeting their duty under the law to avoid or minimize liability.

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