The Tree Did It − Assessing Your Department's Liability for Slacklining

By Emily J. Powell

Picture this: Joe Citizen, a local slacklining enthusiast, heads to your department's city park for an afternoon of slacklining. Your department knows that citizens commonly use the city park for slacklining and allows them to do so. Joe sets up his equipment between two sturdy-looking trees. Unfortunately, Joe has no idea that one of the trees has been severely weakened by a fungus. As Joe begins to walk the line, the tree suddenly cracks, smacking him on the shoulder and neck as it topples over.

As the sport of slacklining grows in popularity, many departments are wondering about their potential liability for accidents such as Joe's. Some point to Colorado's governmental immunity laws for protection from liability; however, the issue is not quite as simple as that, and your department should be prepared to take additional measures if slacklining is an activity you wish to permit. This article discusses governmental immunity and its exceptions as applied to slacklining, and identifies some ideas to help protect your department from liability.

I. Governmental Immunity

Colorado's Governmental Immunity Act (CGIA)[1] is a series of statutes that seek to protect governmental entities, including municipalities and special districts, from liability for tort actions. Torts are legal claims based on injuries to a person or damage to property, such as negligence. Therefore, if Joe Citizen sued the department for causing his injuries by negligently maintaining its trees, the department would almost certainly assert its governmental immunity as a defense to the lawsuit. But would it work?

II. Exception for Dangerous Conditions of Park and Recreation Areas

The CGIA has many exceptions designed to allow injured parties to "get through" governmental immunity and hold a governmental entity liable for injuries resulting from certain types of conduct, such as operation of government-owned motor vehicles, failure to adequately remove snow and ice, and operation of swimming facilities.[2] Relevant to slacklining, one exception to governmental immunity is for injuries or property damage that results from a dangerous condition of any "public facility located in any park or recreation area maintained by a public entity."[3] Fortunately for park and recreation providers, there is a further exception to this exception (don't you love the law?) that allows governmental entities to retain their governmental immunity if the injury at the park and recreation area was caused by "the natural condition of unimproved property."[4]

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[1] C.R.S. § 24-10-101, *et seq.*
[2] C.R.S. § 24-10-106.
[3] C.R.S. § 24-10-106(1)(e).
[4] *Id.*

This, of course, begs the question whether trees in public parks used by the public for slacklining are "public facilities", thereby causing a waiver of governmental immunity, or are part of the "natural condition of unimproved property", thereby allowing the department to assert its governmental immunity anyway.

III. The Government's Responsibility for Badly Behaving Trees

Interestingly, a governmental entity's responsibility for the bad behavior of its trees has been the subject of two high-profile Colorado court cases. In 2004, the Colorado Court of Appeals considered the case of Silvia Rosales, who was injured when a tree branch fell on her while she picnicked at Denver City Park.[5] Ms. Rosales sued the City of Denver, arguing that the tree was part of a public facility, and that the City had been negligent in failing to properly inspect and prune the tree.[6] The Court of Appeals rejected Ms. Rosales's argument, finding that "public facilities" include only man-made improvements, and that a tree located in a park is not a "public facility".[7] However, the Court of Appeals did not end its discussion there. Instead, the Court of Appeals went on to say that a tree could become part of a public facility, if the governmental entity "incorporates a tree into a facility in such a manner that it becomes an integral part of the facility and is essential for the intended use of the facility".[8] This "test" of whether a tree is part of a public facility for which governmental immunity is waived continued until this year, when the Colorado Supreme Court rejected it.

In March 2015, the Colorado Supreme Court considered similar circumstances in the case *Burnett v. State Department of Natural Resources*[9]. In this case, a woman named Sara Burnett was camping at Cherry Creek State Park, which includes man-made camping sites with various amenities such as utility hookups and picnic tables, and also includes, as the Supreme Court carefully noted, "several thousand trees that were on the property when the State established the Park in 1959."[10] Ms. Burnett pitched her tent at one of the man-made campsites, which was directly adjacent to many of the "native trees".[11] While she was asleep, a limb from a cottonwood tree fell onto Ms. Burnett's tent, injuring her skull, neck, and face.[12] Ms. Burnett sued the State of Colorado Department of Natural Resources. Both the trial court and Court of Appeals used the *Rosales* test to determine that the State was not responsible for the falling tree limb because even if the tree was incorporated into the campground facility, it was not an "integral part" of the campground, nor "essential for [the campground's] intended use."[13]

Ms. Burnett subsequently appealed to the Colorado Supreme Court, which approached the question from an entirely different perspective. First, the Supreme Court outright rejected the *Rosales* test, finding that it impermissibly expanded the definition of "public facility" beyond what was intended by the CGIA.[14] Instead, the Supreme Court determined that in drafting the CGIA, the legislature intended to retain governmental immunity for "injuries caused by native trees originating on unimproved property", regardless of their proximity to a public facility.[15] Because

[5] *Rosales v. City & County of Denver*, 89 P.3d 507 (Colo. Ct. App. 2004).
[6] *Id.* at 508.
[7] *Id.* at 510.
[8] *Id.*
[9] 346 P.3d 1005.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* (emphasis added).

the cottonwood tree that caused Ms. Burnett's injury was part of the native vegetation and was located on an unimproved portion of the State park, the Supreme Court determined that the State could assert its governmental immunity as a defense to Ms. Burnett's lawsuit.[16]

IV. Relationship to Slacklining

Based on the Supreme Court's holding in *Burnett*, it seems that park and recreation departments can rely on governmental immunity as a defense if a "native tree" injures an individual participating in slacklining, and the incident occurs in an "unimproved" area such as open space, near natural trails, or at campgrounds. However, the Supreme Court's holding is less clear when applied to non-native (*e.g.*, planted) trees in improved areas (*e.g.*, urban parks). Accordingly, until the courts provide further guidance, park and recreation departments may wish to take additional steps to protect themselves from any potential liability arising from slacklining accidents occurring in improved areas with non-native trees, such as: (i) installing slacklining poles or designating certain trees that are appropriate for slacklining; (ii) regularly inspecting and maintaining the poles or designated trees; (iii) posting a "notice of dangerous activity" regarding slacklining on or near the poles or designated trees; and (iv) actually preventing or stopping citizens from using non-designated trees for slacklining.

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[16] *Id.*