LIABILITY POTENTIAL FOR ASSOCIATIONS

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The Michigan Court of Appeals recently decided an interesting case that has implications for property owners, lake and similar associations that own or control lake access sites on Michigan Inland lakes. In *Gibbons v. Horseshoe Lake Corporation* (unpublished Michigan Court of Appeals decision dated March 11, 2014; Case No. 311754; 2014 WL 953568), the Horseshoe Lake Corporation ("Association") owned and controlled a lakefront lot on Horseshoe Lake. The Association had a committee that periodically checked the trees on the lake access lot for insects, dying trees and similar matters. During a storm, a tree located on the access lot fell onto the house of the adjoining lot (which is owned by the Plaintiffs in the lawsuit). Ironically, Plaintiffs had complained to the Association on many prior occasions about the condition of the lakefront lot and the trees on it. Plaintiffs sued the Association for the tree damage to their house and for physical injuries suffered by one of the Plaintiffs.

The trial court dismissed the damages lawsuit against the Association. However, on appeal, the Michigan Court of Appeals indicated that the matter should proceed to trial and that it was possible that the Association could be held liable for the damage to the house and injuries suffered by one of the Plaintiffs caused by the tree. Does this mean that all associations have significant potential liabilities regarding platted, dedicated, deeded or other lake access sites? Not necessarily.

Gibbons v. Horseshoe Lake Corporation involved a somewhat unusual fact situation. In that case, the Association owned and controlled a lakefront lot. The Association had a committee that actively monitored and maintained the lakefront lot at issue. Finally, Plaintiffs had complained repeatedly to the Association about the condition of the Association's lot, including the trees thereon.

In order for an association to be found liable for damages in court pursuant to death, injury or property damage, the association involved must normally own or control the property or site where the accident occurred. "Ownership, possession and control" (or at least possession and control) is normally a prerequisite before an association or anyone can incur liability for something that happens on a piece of real estate. See *Merritt v Nickelson*, 407 Mich 544 (1980) and *Orel v Uni-Rak Sales Company, Inc.*, 454 Mich 564 (1997).

There are many lake access or use easements, platted/dedicated roads, parks, walkways or alleys for which no association has ownership, possession or control. In those cases, even if a lake or neighborhood association exists but does not own or actively maintain, possess or control the easement, park, road or alley at issue, the potential for liability for that association is minimal.

Of course, if an association actually owns a lot, parcel or other property and someone is killed or injured thereon, the potential for liability could be significant. Such properties typically include an association boat launch, access lot, clubhouse or storage building. Even if an association did not initially own, control or have possession of a site, it could incur liability if it voluntarily assumes control or possession of the property.

Rather than worry about endless scenarios by which an association (or even its officers or members) can be potentially liable, it is better to make sure that the association has good and adequate liability insurance. Even if a liability lawsuit is brought wrongfully against an association, the attorney fees and costs that must be incurred in getting such a case dismissed could be considerable. Typically, a liability insurance policy covers not only any potential damages award, but also attorney fees and court costs, up to the specified limits of the policy.

In a situation where an association does not own, possess or control an easement, park, road or alley, its officials should think twice before voluntarily commencing to maintain, possess or control a property. Should the association undertake such activities, the so-called Pottery Barn rule can apply - "you break it, you pay for it." See *Zychowski v A. J. Marshall Company, Inc.*, 233 Mich App 229, 231 (1998).

[Just as this issue went to print, the Michigan Supreme Court released an interesting decision in *Sholberg v Truman*, ____ Mich ____ (2014) regarding liability for the possession, ownership or control of real property.]

"Ownership, possession and control"