

TRADITIONAL MUNICIPAL IMMUNITY FOR LOCAL PARKS

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The law of personal injury liability is a creature of State law with a wide variety of jurisdictional statutory and judicially created variations, including the scope and availability of limited governmental immunity for public parks and recreation. One such jurisdictional variation reflects ancient English common law principles, i.e., the judgments and decrees of court over generations, which formed the historic basis for general legal principles in the United States. Under the common law, the sovereign State enjoyed absolute governmental immunity from negligence liability. Municipalities, however, did not enjoy absolute immunity. On the contrary, municipalities were only immune for governmental functions, i.e. those inherent State police powers which embody the government's fundamental legal obligation to preserve the general public health, safety and welfare. Municipalities, however, were not immune from liability for proprietary functions, i.e., when acting like a private business on their own behalf and/or for the benefit of their own citizens. When injuries arose from a proprietary function, municipalities could be held liable like a private individual for negligence.

Traditionally, public parks were considered an immune governmental function. However, in response to taxpayer calls for "government to be run like a business," local parks and recreation departments have had to generate their own revenues as an increasing percentage of their budgets. In adding more revenue based programs, facilities, and activities, the line between immune governmental functions to preserve public welfare and non-immune proprietary functions to provide public benefits has become less and less distinct. As a result, many jurisdictions have replaced the common law of governmental immunity with state statutes which more clearly define the availability and scope of limited immunity for public parks and recreation.

For example, the Virginia state legislature enacted a public recreation immunity statute following a 1939 decision by the Virginia supreme court which had held that a municipality was not acting in an immune governmental capacity in the operation of a recreational swimming pool. See: *Town of Big Stone Gap v. Johnson* 35 S.E.2d 71, 184 Va. 375 (Va. 09/05/1945). This Virginia recreation immunity statute, § 15.2-1809, defines the "Liability of localities in the operation of parks, recreational facilities and playgrounds." In pertinent part, this statute provides that a city, town, or county shall not be liable for ordinary negligence for any injury arising out of the operation of "any park, recreational facility or playground." Under the statute, any governmental liability for local park and recreation facilities would be limited to gross negligence. Similarly, other jurisdictions have redefined governmental liability and immunity for public parks and recreation by statute, abandoning the common law principles of municipal liability based upon the governmental/propriety function distinction.

As illustrated by the cases described herein, these common law principles still persist in a number of jurisdictions wherein state courts continue to struggle with their application, particularly in public parks and recreation. In such jurisdictions, the existence of fees and the privatization of public recreation services along with public/private partnerships may be significant factors in determining whether a particular program or activity is an immune

governmental function or a proprietary function subject to negligence liability under state law.

“SWIMMING HOLE” RENTAL

In the case of *Estate of Williams v. Pasquotank County Parks & Rec. Dept.*, 366 N.C. 195; 732 S.E.2d 137; 2012 N.C. LEXIS 632 (N.C. 8/24/2012), the Supreme Court of North Carolina considered whether the defendant Pasquotank County Parks & Recreation Department was entitled to governmental immunity under common law rules which had “existed for over a century.”

On June 10, 2007, Erik Dominic Williams drowned at a public park. The park, Fun Junktion, was owned by defendant Pasquotank County and maintained and operated by defendant Pasquotank County Parks and Recreation Department. Williams's estate claimed negligence on the part of the County and the Department had caused Williams to drown in the "Swimming Hole," an area rented out to private parties at Fun Junktion. In response, the defendants claimed governmental immunity against any claims of negligence.

The trial court held defendants were not entitled to governmental immunity because "defendants charged and collected a fee for the use of the Fun Junktion park, and defendants were providing the same type of facilities and services that private individuals or corporations could provide." The state court of appeals affirmed. In the opinion of the appeals court, “governmental immunity applies to counties and municipalities acting in the performance of governmental, rather than proprietary functions.”

GOVERNMENTAL FUNCTION IMMUNITY

In determining whether a function is governmental (i.e. immune from liability) or proprietary (i.e., subject to liability), the appeals court had considered the following “four-factor test”:

- (1) whether an undertaking is one traditionally provided by local governments; (2) if the undertaking is one in which only a governmental agency could engage, or if any corporation, individual, or group of individuals could do the same thing; (3) whether the governmental unit charged a substantial fee; and (4) if a fee was charged, whether a profit was made.

According to the appeals court, the most important of these four factors was “whether nongovernmental actors could perform the same function provided by the county or municipality.” Applying these factors to the facts of this particular case, the appeals court found the following:

- (1) public parks have traditionally been provided by local government; (2) public parks could be provided by private, as well as public, entities; (3) defendants charged a fee (\$75.00) for the use of Fun Junktion (4) defendants did not make a profit as a result of charging this or other rental fees for Fun Junktion.

As a result, the appeals court found "defendant was involved in a proprietary function in the

operation of the party facilities at Fun Junktion" because "nongovernmental actors could perform the same function provided by the county or municipality." The appeals court, therefore, affirmed the trial court's denial of defendants' motion for summary judgment. The state supreme court agreed to review this determination by the lower courts.

According to the state supreme court, "[o]ur jurisprudence has recognized the rule of governmental immunity for over a century" which was described as follows:

Under the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.

This principle is derived from English law and is based on the premise that, as the creator of the law, "the king could do no wrong." While we have acknowledged that this rationale is not as persuasive as it once was, this Court has declined to abrogate the common law doctrine of governmental immunity. Instead, we have reasoned that any change in our common law is more properly a task for the legislature.

GOVERNMENTAL VS PROPRIETARY

As noted by the state supreme court noted that "governmental immunity is not without limit." Specifically, the court acknowledged governmental immunity "covers *only* the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." Accordingly, as described by the court, governmental immunity would not apply "when the municipality engages in a proprietary function."

When a municipal corporation undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it becomes subject to liability for contract and in tort as in case of private corporations.

As a result, in determining the applicability of traditional governmental immunity, the court would determine whether the alleged negligent conduct of the county or municipality "arose from an activity that was governmental or proprietary in nature."

As defined by the court, a "governmental function" is an activity that is "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself." In contrast, the court noted a "proprietary function" is an activity that is "commercial or chiefly for the private advantage of the compact community."

When a municipality is acting in behalf of the State' in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers.

The court acknowledged “the difficulties of making the distinction” between “governmental and proprietary functions.” According to the court, “a number of factors are relevant when ascertaining whether action undertaken by a county or municipality is governmental or proprietary in nature.” First, the court would consider to what degree the legislature had addressed the issue and designated a particular activity as “governmental or proprietary.”

RECREATION ENABLING ACT

In this particular instance, defendants claimed the North Carolina “Recreation Enabling Act,” N.C.G.S. § 160A-351, had addressed the issue and determined “the operation of public parks is a proper governmental function.” This state statute provided municipalities with “the power to create, fund, and maintain recreation facilities.” In so doing, the state legislature had declared the following:

The General Assembly therefore declares that the public good and the general welfare of the citizens of this State require adequate recreation programs, that the creation, establishment, and operation of parks and recreation programs is a proper governmental function, and that it is the policy of North Carolina to forever encourage, foster, and provide these facilities and programs for all its citizens. N.C.G.S. § 160A-351 (2011)

In the opinion of the state supreme court this statutory language was “clearly *relevant* to the question of whether defendants' conduct—maintaining and operating the Swimming Hole at Fun Junktion—is a governmental or proprietary endeavor.” (*Emphasis of court*).

According to the state supreme court, the appeals court only “made a passing reference to section 160A-351.” Instead, as characterized by the state supreme court, the appeals court had simply determined defendants were not entitled to governmental immunity based “solely or predominantly upon the fact that the services defendants provided could also be provided by nongovernmental entities.”

In the opinion of the state supreme court, the appeals court should have conducted a more detailed “fact intensive inquiry” into the allegations in the complaint to determine “the proper designation of a particular action of a county or municipality” as governmental or proprietary.

[E]ven if the operation of a parks and recreation program is a governmental function by statute, the question remains whether the specific operation of the Swimming Hole component of Fun Junktion, in this case and under these circumstances, is a governmental function... We recognize that not every nuanced action that could occur in a park or other recreational facility has been designated as governmental or proprietary in nature by the legislature.

Accordingly, the state supreme court reiterated the following “guiding principles” when “the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature”:

We have repeatedly held that if the undertaking is one in which *only* a governmental agency could engage, it is perforce governmental in nature. So, when an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality.

PRIVATIZED GOVERNMENTAL SERVICES

On the other hand, the state supreme court recognized that “it is increasingly difficult to identify services that can only be rendered by a governmental entity” because “many services once thought to be the sole purview of the public sector have been privatized in full or in part.” Accordingly, “when the particular service can be performed both privately and publicly,” the state supreme court would consider “a number of additional factors” in determining whether a particular activity is governmental or proprietary:

Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.

While noting these factors provide “the guidance needed to identify the distinction between a governmental and proprietary activity,” the state supreme court cautioned against “overreliance on these four factors.” In so doing, the court recognized “the distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice.”

As a result, the state supreme court found “the proper designation of a particular action of a county or municipality” as either governmental or proprietary “may differ from case to case.” In the opinion of the state supreme court, this would require “a fact intensive inquiry, turning on the facts alleged in the complaint.”

In this particular instance, the state supreme court found “the decision of the Court of Appeals that defendants were not entitled to governmental immunity, turned solely or predominantly upon the fact that the services defendants provided could also be provided by nongovernmental entities.” In the opinion of the court, “this distinction lacks the utility it once had.” As a result, the state supreme court vacated the decision of lower courts and remanded (i.e. sent back) the case for further proceedings in the trial court to conduct the required fact intensive inquiry to determine “whether defendants in this case are ultimately entitled to governmental immunity.”

PARK IMMUNITY

In the case of *Mayor and City Council of Baltimore v. Whalen*, 395 Md. 154; 909 A.2d 683; 2006 Md. LEXIS 709 (Md. 2006), a legally blind individual was injured when she fell into a utility hole while her guide dog was doing his business within the legal boundaries of park

owned and maintained by the City. Plaintiff Whalen claimed the City was negligent for failing to ensure the utility hole was safely covered.

The trial court granted the City's motion for summary judgment based upon the governmental immunity defense. The appeals court, however, vacated this judgment. The state supreme court granted the City's petition to review these decisions by the lower courts. The issue was whether "a municipality entitled to governmental immunity from a Plaintiff's tort claim that the municipality negligently maintained a public park."

As noted by the state supreme court, "the municipality's duty to maintain the Park is governmental, [but] the City's maintenance of sidewalks, streets, and contiguous areas is a proprietary function." In this case, the parties agreed that "the hole is located within the boundaries of the Park and that the hole is not within the boundaries of the Johnson Street right of way."

The City argued that "municipalities are not liable in tort for alleged negligence in maintaining public parks because doing so has traditionally been considered a governmental function." As noted by the state supreme court, "the doctrine of sovereign immunity from suit, rooted in the ancient common law, is firmly embedded in the law of Maryland." Pursuant to this doctrine, "the immunity of counties, municipalities and local agencies is limited to tortious conduct which occurred in the exercise of a governmental, rather than a proprietary function."

The state supreme court provided the following "distinction between a governmental function and a proprietary function":

If the neglect or wrongful act was in the course of the performance of a purely governmental duty which had been imposed upon the municipality as a governmental or public agency by legislative enactment, there would be no liability in tort in favor of an individual who had been injured.

If, on the contrary, the power given and the duty enjoined relate to the local or special interests of the municipality, and be imperative, and not discretionary, legislative, nor judicial, and the wrongful act is done in the performance of such a duty, then the act is said to be done in the private or corporate capacity of the municipality.

In the opinion of the state supreme court, "a municipality is acting in its governmental capacity when maintaining, controlling, and operating a public park." Specifically, the court found the obligation of the City to "maintain, operate, and control Leone Riverside Park was a governmental duty, discretionary in its nature, and performed in its governmental capacity." Since Whalen was within the boundaries of Leone Riverside Park when she fell, the state supreme court found the City was immune from suit under the circumstances of this case.

The state supreme court, therefore, held that "the trial court did not err in finding that the municipality was entitled to governmental immunity with respect to tort claims arising from the municipality's alleged negligence in the maintenance of a public park when the injury occurred

within the boundaries of a public park and outside the boundaries of a public way.” Accordingly, the state supreme court ordered the appeals court to reinstate the summary judgment of the trial court in favor of the City.

PROPRIETARY LEASE

In the case of *Considine v. City of Waterbury*, 279 Conn. 830; 905 A.2d 70 (Conn. 2006), plaintiff was injured when he fell into a glass panel in a restaurant within the clubhouse of the defendant City’s golf course. The City derived rental income from leasing this restaurant to a private party.

The trial court had determined that governmental immunity under as state statute (General Statutes § 52-557n) did not apply because the City derived pecuniary benefit from the rental income generated by the private restaurant. This state immunity statute provided that political subdivisions of the state could be held liable for negligence “in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit.”

According to the state supreme court, the legislative intent was to codify the common law of municipal liability by including the terms "special corporate profit" and "pecuniary benefit" in the language of the statute. The state supreme court, therefore, referenced “common-law sovereign immunity” to define municipal liability and immunity within the context of the state statute.

[S]overeign immunity protects sovereign governments, such as states, and municipalities when acting as agents of the state, but not municipal corporations acting on their own behalf... [T]his court has stated that a municipality's immunity from liability for injuries applies only when it is engaged in the performance of a public duty for the public benefit, and not for its own corporate profit.

The state supreme court acknowledged that “the distinction between a municipality's governmental and proprietary functions has been criticized as being illusory, elusive, arbitrary, unworkable and a quagmire” which has “long plagued the law of municipal corporations.” Moreover, the court found “dissatisfaction with the distinction between proprietary and governmental acts” has caused many courts and legislatures to revise or completely abandon the common law rules governing municipal liability.

That being said, the state supreme court noted, in general, the operation and management of “municipal property as public park is a governmental function because control of public parks belongs primarily to the state and municipalities... [who] act as governmental agencies exercising an authority delegated to them by the state”. Further, the court acknowledged that a municipality “may even charge a nominal fee for participation in a governmental activity and it will not lose its governmental nature as long as the fee is insufficient to meet the activity's expenses.”

On the other hand, the state supreme court would find a municipality is engaged in a non-immune proprietary function when it acts “for its own special corporate benefit or pecuniary profit where it engages in an activity “for the particular benefit of its inhabitants,” or “if it derives revenue in excess of its costs from the activity.” In particular, the court noted that “this court and courts of other jurisdictions generally have concluded that a municipality acts in its proprietary capacity when it leases municipal property to private individuals.”

When a municipality derives substantial revenue from its commercial use of municipal property, it has been considered nonetheless to be engaged in a proprietary function even if it reinvests that revenue back into the property's maintenance expenses or to pay down debt related to the property.

The City had contended that “the maintenance of the clubhouse was a governmental function because this building was located on a municipal golf course. Moreover, the City argued that “a golf course, like a park or swimming pool, is a recreational facility that falls within the scope of a municipality's governmental functions.” The state supreme court rejected this argument.

Even if we were to assume that the operation of a municipal golf course is a governmental function, we cannot conclude that the fact that the restaurant is in a building located on a municipal golf course transforms an otherwise commercial function into a governmental one.

As a result, the state supreme court determined “the defendant can be held liable for the plaintiff's injuries because it was acting in its proprietary capacity when it leased a portion of the clubhouse to the restaurant.” The state supreme court affirmed the judgment of the trial court in favor of plaintiff.

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