



Ready for the Defense

In Light of the *Murray* Case, Is It Time To Amend the Definition of “Wilful & Wanton Conduct” in the Tort Immunity Act?

AN AUTO DRIVER approaches an intersection seeing he has a green light, but as he gets closer, he sees a stop sign on the traffic light pole. What does he do: (1) proceed on the green light; or (2) stop for the stop sign?

The driver is confused. His actions, based upon that confusion, will have ramifications to other drivers around him. Confusion is not a good thing.

There is confusion in Illinois over the definition of “wilful and wanton conduct.” (For background, please see our November 2006 column entitled: “Will the real definition of ‘wilful & wanton conduct’ please stand up?”)

The Supreme Court’s *Murray v. Chicago Youth Center* Decision

In July 2006, the Supreme Court decided the case of *Murray v. Chicago Youth Center*, No. 99457 (S.Ct., filed 7/5/06) (2006 WL 1822656 (Ill.)), which construed the meaning of “wilful and wanton conduct” in § 1-210 of the Tort Immunity Act (745 ILCS 10/1-210). The decision was a 4-to-3 decision. The majority held that “wilful and wanton conduct” means:

In the case at bar, we must interpret section 1-210 of the Act. We conclude, as we did in *Burke*, that in the context of Tort Immunity cases, ‘willful and wanton’ con-

notes ‘quasi-intentional’ conduct. In other words, it does not encompass “‘mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency’” but, rather, “‘requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man.’” *Burke*, 148 Ill. 2d at 449, quoting Restatement (Second) of Torts § 500, Comment *g*, at 590 (1965). (*Murray*, Slip Opinion at p. 18) (WL 1822656 at pp. 12-13).

The Two Definitions Of “Wilful & Wanton Conduct” — The Common Law & Tort Immunity Act Definitions

The source of confusion over the meaning of “wilful and wanton conduct” stems from two separate definitions and the question of whether they mean the same thing, even though they are worded differently.

The Tort Immunity Act Definition

The Tort Immunity Act definition of “wilful and wanton conduct” reads as follows:

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1-210. Wilful And Wanton Conduct

§ 1-210. “Wilful and wanton conduct” as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. (745 ILCS 10/1-210).

The Common Law Definition

The common law definition of “wilful and wanton conduct” is as follows:

A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care. (*Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 641 N.E.2d 402 (1994) and *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 656 N.E.2d 768 (1995)).

This common law definition is also referred to as the *Ziarko-Poole* definition.

The dissenting Justices in *Murray* suggest that the Tort Immunity Act definition and the common law, or *Ziarko-Poole* definition, mean the same thing. That is, the words “utter indifference to” or “conscious disregard for” the safety of the plaintiff in the Tort Immunity Act actually mean the same thing as “reckless conduct by failure to exercise ordinary care after knowledge of danger” or “failure to discover danger by the exercise of ordinary care.”

The Supreme Court Grants Rehearing Of Its Decision In *Murray*

The Supreme Court has granted rehearing of its decision in *Murray* — something the Supreme Court does only very rarely. Oral arguments on rehearing were held by the Supreme Court on November 21, 2006.

Is It Time For Local Government To Propose Amending The Definition Of “Wilful & Wanton Conduct” In The Tort Immunity Act

The purpose of the Tort Immunity Act is, “to protect local public entities and public employees from liability arising from the operation of government. The Act’s purpose is to prevent the dissipation of public funds on damage awards in tort cases” (*Murray*,

2006 WL 1822656 at p. 8).

Local government has long believed that when the legislature defined “wilful and wanton conduct” in § 1-210 of the Tort Immunity Act, it chose the words “utter indifference to” and “conscious disregard for” the safety of a plaintiff, with the intent to redefine “wilful and wanton conduct” to delete the “failure to exercise ordinary care” to “avoid a known danger or to discover a known danger” (which denote a “negligence” standard).

That is, local government has had the impression that the legislature intended, in the Tort Immunity Act definition, to take the “negligence standard” (mere inadvertence, incompetence, and unskillfulness) out of the “wilful and wanton conduct” definition. Negligence is the failure to act as a reasonable person would act under the same or similar circumstances. That is, the failure to exercise reasonable care or ordinary care.

Local government believed that the legislature intended to change the definition of “wilful and wanton conduct” from the common law definition with its ordinary care/negligence language when it enacted § 1-210 defining “wilful and wanton conduct” in the Tort Immunity Act for two reasons:

- (1) There was no need to define “wilful and wanton conduct” in the Tort Immunity Act unless a change in definition was intended because, absent redefining “wilful and wanton conduct” in the Tort Immunity Act, the common law definition would have been applied to Tort Immunity Act cases involving “wilful and wanton conduct.”
- (2) It seemed unlikely the legislature would define “wilful and wanton conduct” in the Tort Immunity Act using the words “utter indifference to” or “conscious disregard for” the safety of the plaintiff, if it actually intended to adopt the common law definition and intended those words to mean “failure to exercise ordinary care to avoid a known danger or discover a known danger.”

However, the fact that the seven Justices on the Illinois Supreme Court do not agree on the meaning of the definition of “wilful and wanton conduct” in the Tort Immunity Act suggests that the definition is not as clear as local government had assumed. Confusion exists. Confusion over the meaning of the law is not a good thing. It seems that clarification is needed.

A Proposal To Amend The Definition Of “Wilful & Wanton Conduct” In The Tort Immunity Act To Clarify The Confusion

It seems that the best way to clear up the confusion

over the meaning of “wilful and wanton conduct” would be to amend the definition of “wilful and wanton conduct” in the Tort Immunity Act and make the legislative intent crystal clear in the wording defining “wilful and wanton conduct.” Such new definition would be developed by local government.

This certainly would not be an easy task, if local government chooses to propose an amendment to the Tort Immunity Act defining “wilful and wanton conduct.”

With the hope of creating discussion of this matter and encouraging local government to consider wording to clarify the definition, we offer a proposal for a new definition of “wilful and wanton conduct” which might serve as a “rough, working draft proposal.”

Rough, Working Draft Proposal Amendment Of § 1-210

1-210. Wilful & Wanton Conduct

§ 1-210. “Wilful and wanton conduct,” as used in this Act, means deliberate conduct which breaches a legal duty in the form of a violation of a statute, code, ordinance, common law/case law rule or a regulation or standard having the force of law with actual knowledge a legal duty is being violated and deliberately proceeding with actual knowledge the breach of duty is virtually certain to cause injury to others. (Proposed Amended § 1-210).

Conclusion

This confusion over the meaning of “wilful and wanton conduct” in the Tort Immunity Act is a difficult issue, not readily and easily resolved, as the 4-to-3 split in the Supreme Court illustrates. These thoughts and suggestions are offered as one little step toward trying to resolve this confusion problem.

Official Changes

Editor's Note: Each month, we will publish changes in the ranks of township officials that have been sent to our office. If you have a copy of the 2005-2007 Directory of Illinois Township Officials, you might want to note these changes for your records. We hope townships will continue to notify us when changes are made in the ranks of officials.

County	Township	Office Name	Address	City	Zip	Replaces
Bureau	Ohio	TT Dennis O'Brien	23228 2600 N. Ave.	Ohio	61349	vacant
Kankakee	Norton	CL Christine O'Brien	1625 S. 18000 W. Rd.	Reddick	60961	Maxine Cassidy
Macoupin	Bird/BM/ Polk/Hilyard	M-TA Jan Meininger	10974 Foster St.	Plainview	62685	vacant
Mercer	Mercer	TT John R. O'Hearn	1103 NE 5th	Aledo	61231	James Childs
Putnam	Granville	SU James Moriarty	PO Box 105	Mark	61340	Blaine Clancy
Putnam	Granville	CL Donald Troglio	PO Box 92	Mark	61340	James Moriarty
Rock Island	Andalusia	SU Joel Youngs	10426 133rd St. Ct. W	Taylor Ridge	61284	Anthony Thorpe
St. Clair	Caseyville	SU Bruce P. Canty	10001 Bunkum Rd.	Fairview Heights	62208	Everett Moody
St. Clair	Caseyville	CL David Jacknewitz	10001 Bunkum Rd.	Fairview Heights	62208	Bruce P. Canty
Stephenson	Ridott	SU Rhett Cornelius	9164 E. Kelly Rd.	German Valley	61039	vacant
Wayne	Orel	TT Dale Braddock	RR 1	Wayne City	62895	Ronald Barbee

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