Ready for the Defense

Definition of "wilful & wanton" same under Tort Immunity Act and common law — *Murray* holds

The Supreme Court has decided the *Murray* case and it is not favorable for local government. This month's column will discuss the *Murray* decision and suggest a new definition of "wilful and wanton conduct" if local government seeks to amend the Tort Immunity Act by providing a new definition.

On February 16, 2007, the Supreme Court resolved the question of whether the definition of "wilful and wanton conduct" in the Tort Immunity Act is the same as the common law or case law definition. The Court ruled that the definitions are, in fact, the same. The Court, with all Justices concurring, held that the Illinois Pattern Jury Instructions, defining "wilful and wanton conduct" for the jury in trials, is the same definition found in the Tort Immunity Act and this definition is used whether a trial involves a question of "wilful and wanton conduct" under the common law or under the Tort Immunity Act. (*Murray v. Chicago Youth Center*, No. 99457 (S.Ct., filed 2/16/07) (2007 WL 495281 (Ill.)).

In so holding, Justice Kilbride, writing for the Court, explained the Court's rationale:

> This court has consistently applied the definition of willful and wanton conduct stated in IPI Civil 3d No. 14.01 to all cases, whether on a statutory immunity provision, or at common law. A comparison of IPI Civil 3d No. 14.01 and the 1986 statutory language of section 1-210 of the Tort Immunity Act, compels the conclusion that the statute, containing language virtually identical to IPI Civil 3d No. 14.01, is a codification of existing law. In fact, the comment to IPI Civil 3d No. 14.01 specifically notes that '[a] similar definition of willful and wanton conduct is found in § 1-210 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-210).' IPI Civil 3d No. 14.01, Comment. We find nothing in the Act indicating the General Assembly intended the definition of 'willful and wanton' conduct to differ from its well-established legal meaning. (Slip Opinion at p. 22-23).

The *Murray* Court noted that in prior cases, it treated the definitions as the same:

> Between 1986, when section 1-210 was enacted, and 1998, when the legislature again amended this specific section, this court decided *Ziarko*, 161 Ill.2d 267, *Poole*, 167 Ill.2d 41, and *Pfister v. Shusta*, 167 Ill.2d 417 (1995). Each of these cases made clear that this court drew no distinction between the Tort Immunity Act and common law definitions of willful and wanton conduct. (Slip Opinion at p. 23).

The Tort Immunity Act Definition

The Supreme Court quoted the definition of "wilful and wanton conduct" as found in the Tort Immunity Act as follows:

> Section 1-210 of the Act was adopted in 1986. That section provides: ' "[w]illful 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.*' (Emphasis added.) 745 ILCS 10/1-210 (West 2002). (Slip Opinion at p. 17).

The Common Law Definition

The Court also quoted the common law definition from the well-known, often cited *Schneiderman* case:

> In *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 69 N.E.2d 293 (1946), this court explained willful and wanton conduct as follows:
>
> > 'A wilful and 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. [Citations.] The question whether a personal injury has been inflicted by wilful or wanton conduct is a question of fact to be determined by the jury.' *Schneiderman*, 394 Ill. at 583. (Slip Opinion at p. 18).

The Illinois Pattern Jury Instruction Definition

The Illinois Pattern Jury Instruction defining "wilful and wanton conduct" for the jury, as discussed by the Supreme Court, reads as follows:

> **14.01 Willful and Wanton Conduct — Definition**
>
> When I use the expression "willful and wanton conduct" I mean a course of action which [shows actual or deliberate intention to harm] [or which, if not intentional,] [shows an utter indifference to or conscious disregard for (a person's own safety) (and) (the safety of others)]. (I.P.I. 14.01) (Illinois Pattern Jury Instruction, Civil, No. 14.01).

The Accident Facts and Injuries In The *Murray* Case

Here are the facts and injuries in the *Murray* case. On 12/14/92, Plaintiff Ryan Murray, age 13 and a student at Bryn Mawr School (Chicago Board of Education school), was participating in an extra curricular tumbling class sponsored by the Board of Education and conducted by the Chicago Youth Center and its employee, James Collins. Ryan attempted a forward flip off a mini-trampoline and landed on his neck or shoulders and was rendered a quadriplegic.

He landed partially on a mat and partially on the floor. The accident occurred after the regular instruction portion of the class, during the last 10 to 20 minutes when students were permitted to freelance.

Ryan sued the three defendants, charging wilful and wanton conduct, pleading the defendants: failed to provide safety equipment, a harness and safety belt; failed to supply a spotter; failed to warn of the danger of a spinal cord injury; failed to provided adequate and proper gymnastic mats for trampolining; failed to provide a certified trampolining instructor; and failed to monitor a hazardous recreational activity.

Two-Pronged Test To Determine Wilful & Wanton Conduct

The Supreme Court noted the two-pronged test used to determine whether a defendant's conduct was wilful and wanton conduct:

(1) First, the trial court determines whether the complaint pleads facts that, if proven, would be wilful and wanton conduct—this is a question of law for the court to decide; and

(2) Secondly, if so, then whether the conduct was, in fact, wilful and wanton conduct is a fact question for the jury to decide.

The Court stated:

> As we have noted, in general, '[w]hether conduct is "willful and wanton" is ultimately a question of fact for the jury.' … In some circumstances, it is necessary for the court to decide as a matter of law whether the plaintiff's complaint alleges sufficient facts of a defendant's willful and wanton conduct to create a jury question. (Slip Opinion at p. 25).

The Supreme Court reversed the appellate court and circuit court finding no wilful and wanton conduct and remanded the case to the circuit court for a trial on the wilful and wanton conduct issue.

In Light Of *Murray*, Should Local Government Seek Legislative Help?

Murray is the law now. The Tort Immunity Act and common law definitions of "wilful and wanton conduct" are the same.

If local government desires to change the law of *Murray*, it must do so through the legislature—by seeking a legislative amendment changing the definition of "wilful and wanton conduct" in the Tort Immunity Act (745 ILCS 10/1-210).

There is precedent for changing a rule established by a Supreme Court decision interpreting a statute by enacting a legislative change to a statute.

In *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill.2d 64, 783 N.E.2d 1024 (2002), the Supreme Court, in interpreting § 2-1117 of the Code of Civil Procedure (735 ILCS 5/2-1117), dealing with joint and several liability, included the "employer." Section 2-1117 provided, in pertinent part, that any tortfeasor whose percentage of fault for a plaintiff's injuries is found to be "less than 25 % of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff" is only severally liable for the plaintiff's nonmedical damages. The Supreme Court held that the language: "and any third party defendant who could have been sued by the plaintiff" included the plaintiff's employer. In *Unzicker*, plaintiff Marlin Unzicker's employer, Norgle & Black Mechanical, Inc. was sued as a third-party defendant and found 99 %

at fault. The defendant, Kraft Food Ingredients Corp., was found 1% at fault and, therefore, less than 25%, and not liable for $788,000 of plaintiff's nonmedical damages.

After the Supreme Court's decision in *Unzicker*, the legislature, in 2003, amended § 2-1117 to exclude the employer, changing the language to read, in pertinent part, as follows:

> … Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff's employer, shall be severally liable for all other damages. … (735 ILCS 5/2-1117 (effective 6/4/03)).

Suggested New Wording For "Wilful & Wanton Conduct" In Tort Immunity Act

If local government desires a legislative change of the definition of "wilful and wanton conduct" in the Tort Immunity Act in light of *Murray*, one possible legislative amendment would be to enact a new definition that contains no language in the common law or present Tort Immunity Act definition (to avoid any prior history of interpreting the words in both).

Possible New Definition Of "Wilful & Wanton Conduct" In Tort Immunity Act

If a legislative change is to be considered, the following new definition of "wilful and wanton conduct" might serve as a starting point for exploring new language:

> **New or Amended § 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.

Conclusion

The law is ever changing. While our changing society requires changes in the law, the one constant in the law should be clarity—rules that anyone can read and understand.

Jay S. Judge has been writing Ready for the Defense since 1978.

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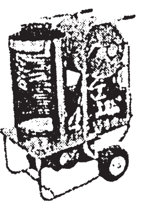

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