



Ready for the Defense

The Tort Immunity Act is not the tort duty act and “wilful & wanton conduct” under Tort Immunity Act

This month’s column discusses two recent cases of importance to local government involving immunity considerations:

- (1) The Appellate Court decision in *Kirschbaum v. Village of Homer Glen*, 365 Ill.App.3d 486, 848 N.E.2d 1052 (3d Dist. 2006) (§ 3-102(a) of the Tort Immunity Act imposes no duty on local public entities to remove trees and brush adjacent to the road where stop signs are clearly visible at an intersection).

The *Kirschbaum* Court noted that the Tort Immunity Act is not the “Tort Duty Act.” It creates immunities to protect local government. It does not create liabilities.

- (2) *Murray v. Chicago Youth Center*, No. 99457 (S.Ct., filed 7/05/06) (2006 WL 1822656 (Ill.)). (Tort Immunity Act definition of “wilful and wanton conduct” requires defendant’s conduct be “quasi-intentional conduct” based upon “a conscious choice of a course of action” and not mere inadvertence or failure to exercise ordinary care upon knowledge of danger, as is required in the common law definition of “wilful and wanton conduct”).

The Supreme Court in *Murray* noted the significant difference between the definition of “wilful and wanton conduct” at common law and the “strongly worded” definition of “wilful and wanton conduct” in the Tort Immunity Act.

The common law definition of “wilful and wanton conduct” is defined 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 care-

lessness when it could have been discovered by the exercise of ordinary care. (*Ziarko*, 161 Ill.2d at 273, 641 N.E.2d at 405; *American National Bank*, 192 Ill.2d at 285, 735 N.E.2d at 557).

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

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 Supreme Court *Murray* case definition of “wilful and wanton conduct” is as follows:

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, ‘wilful and wanton’ connotes ‘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 *Kirschbaum v. Village of Homer Glen* Case

The *Kirschbaum* case involved a 4-way stop intersection. Plaintiff driver Lauren Kirschbaum was

southbound on Parker Road in Homer Township in Will County and stopped her car at a stop sign. Driver Sam Blatt was westbound on Chicago Road with a stop sign, which he ran because the “sun blinded him.” The Blatt auto, traveling 45 m.p.h., ran the stop and struck the Kirschbaum auto. Kirschbaum sued Homer Township, among others, contending brush and trees on the northeast corner of the intersection (not on the roadway and not blocking vision of the stop signs) prevented her from seeing the Blatt auto. Plaintiff Kirschbaum contended that § 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a)) requires the township to “maintain its property in a reasonably safe condition” and the trees and brush blocked her view.

The trial court granted the Defendants’, Homer Township, among others, motion to dismiss and the Appellate Court affirmed, holding the township owed no duty to remove trees and brush adjacent to the roadway — but not on the roadway and not obstructing the stop signs.

The Appellate Court in *Kirschbaum* analyzed the case law and found no duty on a township to remove trees and brush near intersections which did not encroach upon the roadway or signs at the intersections. The Court noted the well-established rule that: “A township has no common law duty to widen roads, smooth gravel, erect signs or mow weeds.” (848 N.E.2d at 1056).

Explaining the lack of duty to remove the brush and trees, the Appellate Court concluded its decision, reasoning as follows:

Under the applicable case law, the defendants successfully discharged their duty by placing visible stop signs at each corner of the intersection. Plaintiff has cited no authority, nor has our research found any, that supports a proposition that a public entity breaches its common-law duty by allowing trees and brush in an area adjacent to an intersection to pose visual obstructions of oncoming traffic where there are clearly visible stop signs observable to all drivers. Consequently, the trial court ruled correctly in finding that plaintiff’s negligence count failed to sufficiently plead the existence of a duty owed to plaintiff. (848 N.E.2d at 1059).

And, in addition, the Court ruled that the township’s maintenance of its property was not a proximate cause of the accident, as a matter of law. The causal agency was the driving conduct, not the condition of property adjacent to the road.

Indeed, what Plaintiff Kirschbaum sought was an

intersection at which all four corners had no trees, brush, buildings, structures, cornfields, barns, etc. One driving in any city, village or town in Illinois can appreciate it would be impossible to remove all obstructions to vision adjacent to intersections. What would be next? Remove all hills and curves from roadways? As the Appellate Court ruled, it is clear the Tort Immunity Act imposes no duties and no common law (Supreme Court or Appellate Court case), statute, code or ordinance imposes a duty to remove trees and brush from areas adjacent to intersections where they do not encroach upon the roadway itself or block vision of the traffic controls at the intersection.

The *Murray v. Chicago Youth Center* Case

The *Murray* case dealt with two issues: First, whether § 3-109, hazardous recreational activity immunity, or § 3-108, supervision immunity, and § 2-201, discretionary immunity, of the Tort Immunity Act controlled the immunity available under the Tort Immunity Act for trampolining accidents and injuries.

Secondly, whether the facts/evidence showed “wilful and wanton conduct” as defined in the Tort Immunity Act (745 ILCS 10/1-210).

The Supreme Court held that § 3-109, hazardous recreational activity immunity, controlled in trampolining cases. We are not discussing the § 3-109 issue.

But, rather, we discuss the “wilful and wanton conduct” definition issue.

The facts and issues in *Murray*, briefly summarized, were as follows:

In *Murray v. Chicago Youth Center*, No. 99457 (S.Ct., filed 7/05/06) (2006 WL 1822656 (Ill.)), Plaintiff Ryan Murray, age 13, an 8th grade student at Bryn Mawr School in Chicago, was in an after school tumbling class conducted by the Chicago Youth Centers under Chicago Board of Education sponsorship. Plaintiff Ryan was doing a forward flip off a mini-trampoline and landed wrongly on his chest and neck and was rendered a quadriplegic. Ryan sued, contending that the Board and Youth Center were guilty of “wilful and wanton conduct” negating their § 3-109, hazardous recreational activity immunity (745 ILCS 10/3-109).

The allegations of “wilful and wanton conduct” against the Board, Youth Center and instructor Collins, included charges of: (1) no safety equipment, safety belt or harness or adequate mats; (2) no proper instructions to Ryan; (3) failure to evaluate Ryan’s ability to perform the flip, somersault; (4) failure to provide a spotter; and (5) an incompetent instructor.

The Supreme Court found no proof of “wilful and wanton conduct” because there was no “quasi-intentional” conduct by the Board of Education, the Chi-

cago Youth Center or instructor Collins, based upon “a conscious choice of a course of action” with “knowledge of serious danger.”

The Supreme Court held there was no showing of “wilful and wanton conduct” by the School Board, Youth Center or instructor in *Murray* for the mini-trampoline somersault accident rendering plaintiff Murray a quadriplegic:

The appellate court below held that the allegations in plaintiffs’ complaint did not “approach the degree of blameworthiness necessary to maintain an action for wilful and wanton behavior ... We agree.

Clearly there is no evidence that the defendants intended for Ryan to be injured in any way. Nor is there any evidence that defendants consciously disregarded an immediate and present danger which, if acted upon, would have prevented Ryan’s injury. (*Murray*, Slip Opinion at pp. 18-19) (WL 1822656 at p. 13).

It is evident that the Tort Immunity Act definition of “wilful and wanton conduct” is much more strongly worded than the common law definition.

The common law defines “wilful and wanton conduct” to include a negligence/failure to exercise ordinary care standard — a standard not appearing in the Tort Immunity Act. By way of illustration, the common law definition includes the following language:

- (1) “... such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it ...”
- (2) “... or failure to discover the danger ... when it could have been discovered by the exercise of ordinary care.”

But, the language in the Tort Immunity Act definition contains no “negligence language” or “failure to exercise ordinary care” language.

§ 1-210’s definition of “wilful and wanton conduct” requires the defendant’s “course of action” reveal defendant’s mental state dismissive of plaintiff’s safety — that defendant’s actions show “utter indifference to” or “conscious disregard for” plaintiff’s safety:

- (1) “Utter indifference to” plaintiff’s safety means, “entire, complete, absolute and total disregard” for plaintiff’s safety. (Black’s Law Dictionary).
- (2) “Conscious disregard for” plaintiff’s safety means, “intentional, knowing, purposefully

ignoring” plaintiff’s safety. (Black’s Law Dictionary).

Conclusion

Both the *Kirschbaum* case and the *Murray* case help clarify issues which often prove troublesome to local government. *Kirschbaum* clarifies a no duty rule and holds § 3-102(a) of the Tort Immunity Act does not create duties non-existent under the common law, case law.

Murray illustrates that more “facts” showing “wilful and wanton conduct” by showing “quasi-intentional” conduct by the defendant based upon “a conscious choice of a course of action” with “knowledge of a serious danger” must be pleaded and proven. The Code of Civil Procedure requires plaintiff to plead “substantial allegations of fact necessary to state any cause of action” (735 ILCS 5/2-601). Thus, whether a plaintiff has a cause of action against a local public entity may be capable of a determination earlier in a case without extensive discovery.

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