

STATE IMMUNITY LAWS LIMIT PUBLIC PLAY LIABILITY

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On June 14-16, 2009, "The Summit on the Value of Play" was held at Clemson University to consider the role and value of play from the fields of health, education, human development and recreation. The US PLAY Coalition was created at "The Summit" to bring together organizations and individuals in support of play and to open up opportunities for people of all ages, backgrounds, and abilities to incorporate play into their lives.

The US PLAY Coalition created five committees, including the Advocacy Committee to support play through various means. The stated purpose of the Advocacy Committee is to make coalition members and others aware of current and proposed legislation and other actions related to play. In so doing, the Summit noted a "big interest in working on liability laws" because "Public officials have in many cases eliminated these opportunities and facilities in fear of the costs associated with liability litigation."

To address these concerns, in Call to Action #4, the Summit called upon the Play Coalition to "Develop the capacity to advocate for legislation in support of play" including advocacy to "Change liability laws to be friendlier to play." Proposed implementation steps included "tort reform that promotes personal accountability and reduces liability," as well as efforts to "review and modify public policy related to risk management and liability" to "establish 'common sense' play laws. Specifically, implementation of a comprehensive play strategy might include creation of a "model law" at the federal law.

There is no need to reinvent the wheel at the federal level. Particularly in the area of personal injury liability, i.e., tort law, more law is not necessarily a good thing. On the contrary, federal intrusion into the area of tort law, traditionally left to the States, would only cause needless confusion and conflict of law issues without necessarily reducing liability exposure. In fact, liability of the federal government is based on state law, rather than a separate "model law" at the federal level. Specifically, under the Federal Tort Claims Act, the federal government itself is liable for negligence "like a private individual" under the state law of the jurisdiction where the injury occurs.

More importantly, the call to "tort reform" erroneously assumes that existing tort law in various jurisdictions does not already reduce liability exposure, particularly for ordinary negligence. In fact, in a number of jurisdictions, as applied to public play in general and public playgrounds in particular, liability is the exception rather than the rule under various types of limited governmental immunity statutes, including state recreational use statutes (RUS).

As described in the following paragraphs, Virginia, Kansas, South Carolina, Illinois and Texas are examples of jurisdictions wherein state law already "reduces liability" exposure for public recreation in general and public playgrounds in particular by requiring proof of willful/wanton or gross negligence, rather than ordinary negligence. Unlike momentary inadvertence or carelessness which may indicate ordinary negligence, willful/wanton misconduct or gross

negligence generally requires much more egregious behavior which goes way beyond mere carelessness to reach a level of outrageous misconduct indicative of a reckless and total disregard for the physical well being of others.

Faced with the burden of alleging and ultimately proving willful/wanton misconduct or gross negligence under an applicable state statute, plaintiffs are much more likely to have their claims dismissed prior to trial or, in the event of a trial, having judgments entered for defendants. That being said, the effectiveness of such statutory immunity necessarily assumes that public agencies and/or their insurers will aggressively defend lawsuits at trial, and appeal adverse judgments if appropriate, rather than settle claims to avoid the costs and uncertainty of going to trial.

VIRGINIA

In Virginia, the liability of localities in the operation of parks, recreational facilities, and playgrounds is limited to gross negligence pursuant to Virginia Code section 15.2-1809 which provides as follows:

No city or town which operates any park, recreational facility or playground shall be liable in any civil action or proceeding for damages resulting from any injury to the person or from a loss of or damage to the property of any person caused by any act or omission constituting ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such park, recreational facility or playground. Every such city or town shall, however, be liable in damages for the gross negligence of any of its officers or agents in the maintenance or operation of any such park, recreational facility or playground.

The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute. Va. Code § 15.2-1809.

In the case of *Sheppard v. Fairfax County Park Authority*, 51 Va. Cir. 152 (12/8/1999), plaintiff was injured when a swing at Mt. Vernon Manor Park broke while she was sitting on it. The defendant park authority (FCPA) claimed immunity from claims of ordinary negligence based on Va. Code § 15.2-1809.

FCPA contended that the limited immunity of Section 1809 applied to local and regional park authorities, as well as to the cities, towns, and counties specified in the statute. Sheppard responded that Section 1809 applies only to the entities specified in the statute.

Although "the plain language of Section 1809 seemingly limits the liabilities of only cities, towns, and counties in the operation of any park, recreational facility, or playground," the court found "the General Assembly has expanded the scope of this recreational immunity in Va. Code § 29.1-509," i.e., the state recreational use statute (RUS). The RUS defined the "Duty of care and liability for damages of landowners to hunters, fishermen, sightseers" as follows:

A. "Landowner" means the legal title holder, lessee, occupant, or any other person in control of land or premises.

B. A landowner shall owe no duty of care to keep land or premises safe for entry or use by others for hunting, fishing, trapping, camping, participation in water sports, boating, hiking, rock climbing, sightseeing, hang gliding, skydiving, horseback riding, foxhunting, racing, bicycle riding, or collecting, gathering, cutting, or removing firewood, for any other recreational use, or for use of an easement granted to the Commonwealth or any agency thereof to permit public passage across such land for access to a public park, historic site, or other public park, historic site, or other public recreational area. Va. Code § 29.1-509.

As cited by the court, in enacting Va. Code § 29.1-509, "the General Assembly has unequivocally stated that Section 1809 applies to local and regional authorities, as well as to counties, cities, and towns" as follows:

E. Any provisions in a lease or other agreement which purports to waive the benefits of this section shall be invalid, and any action against any county, city, town, or local or regional authority shall be subject to the provisions of Sec. 15.2-1809, where applicable. Va. Code § 29.2-509(E)

As a result, the court held "the limited immunity of Section 1809 necessarily applies to FCPA." Moreover, the court found FCPA was also a "landowner" under the RUS.

Here, the parties have stipulated that FCPA is the legal titleholder of Mt. Vernon Manor Park. As the parties also have stipulated that FCPA does not charge fees for the use of Mt. Vernon Manor Park, the plain language of the statute and the case law interpreting it compel the conclusion that FCPA is within the ambit of the immunity conferred by the legislature in its enactment of Va. Code § 29.1-509.

As a result, the court dismissed plaintiff's negligence claims based on the grounds of immunity under Va. Code § 15.2-1809 and Va. Code § 29.1-509.

STATE TORT CLAIMS ACTS

In pertinent part, the Kansas Tort Claims Act, K.S.A. § 75-6104(o) (2009), provides that a "governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from":

Any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury.

SEPTEMBER 2010 LAW REVIEW

Similarly, in South Carolina, the state tort claims act, S.C. Code Ann. § 15-78-60(16) (2009), provides that "[t]he governmental entity is not liable for a loss resulting from:

maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security, or supervision within a reasonable time after actual notice of the defect or condition.

In Illinois, the "Local Governmental and Governmental Employees Tort Immunity Act" also provides limited immunity for liability for injury occurring on public property used for recreational purposes:

Sec. 3-106. Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury. § 745 ILCS 10/3-106 (2010)

In sharp contrast to the public immunity statutes cited above, Wyoming state law reflects a minority view, expressly authorizing negligence claims against governmental entities for injuries sustained in recreation areas and public parks:

A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, recreation area or public park. Wyo. Stat. § 1-39-106 (2010)

TEXAS

Similar to the Federal Tort Claims Act, the state tort claims act in Texas also holds governmental entities "liable like a private individual" for personal injury claims. Accordingly, since private individuals in Texas are afforded limited immunity under the state recreational use statute, local governmental entities are immune from liability for claims of ordinary negligence arising from injuries in public playgrounds.

In the *City of Lubbock v. Rule*, 68 S.W.3d 853 (Tex. App. 1/28/2002) plaintiffs sued the City after their twenty month old daughter, G.R., suffered burns to her hands while attempting to climb upon a slide. The slide was located in a park or playground owned and operated by the City. In their complaint, plaintiffs alleged the following:

1) the Rules' twenty month old daughter placed her hands on a slide which had absorbed heat from the sun, 2) the heat which had been absorbed burned her hands, 3) the city maintained the slide in a park it owned, 4) the heat was

absorbed by the slide because protective coating had worn away from the situs at which G.R. placed her hands, 5) the condition of the slide created an unreasonable risk of harm, 6) the city "admitted actual knowledge of the defect" and "acknowledged no actions were taken to cure said defect," and 7) the city's conduct (i.e., knowingly maintaining the defective condition of the slide) constituted "not only negligence but wilful, wanton and gross negligence as defined by law."

As cited by the court, the state tort claims act provided that a governmental entity (including municipalities) could be held liable like a private person for "damage, injury, or death caused by a condition or use of tangible personalty or realty." In this particular instance, the City claimed it was immune from liability like a private person under the state recreational use statute because G.R.'s injuries were caused by contact with playground equipment in a city park.

The court acknowledged that the state recreational use statute was applicable to governmental entities. Further, to the extent the state recreational use statute applied, the court noted that "the governmental entity need only treat those entering upon the property as a trespasser."

As cited by the court, "the duty of care owed to a trespasser is to forego injuring him through wilful, wanton, or grossly negligent conduct." Accordingly, since the state recreational use statute applied, the court found that a governmental entity "may do that which it would as long as it does not injure the visitor through wilful, wanton, or grossly negligent conduct." Moreover, the court found no duty of reasonable care is owed to trespassers regarding the condition of the premises. On the contrary, both trespassers and recreational users under the state recreational use statute "take the premises as they find them." Specifically, under the state recreational use statute, a landowner owes no legal duty of care to guard, warn, or make the premises reasonably safe those entering the premises free of charge for public recreational use.

Accordingly, pursuant to the state recreational use statute, the court noted that "permission to another to enter the premises for 'recreation' does not":

1) assure that the premises are safe for that purpose, 2) owe to the person to whom permission is granted a greater degree of care than that owed a trespasser, or 3) assume responsibility or incur liability for any injury to any individual or property caused by any act of a person to whom permission is granted. TEX. CIV. PRAC. REM. CODE ANN. § 75.002(c) (Vernon Supp. 2001).

Moreover, the court noted that "the term 'recreation' was defined as including hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, birdwatching, cave exploration, waterskiing, water sports, and any other activity associated with enjoying nature or the outdoors."

Applying this statutory definition to the facts of the case, the court found "the use of playground equipment, i.e. a swing, at a city park was considered to be within the statutory definition of recreation."

That journeying to a park to enjoy its facilities and playground equipment is akin to "picnicking" (albeit without the food) and within the category of an "activity associated with enjoying nature or the outdoors" cannot reasonably be disputed.

As a result, under the state tort claims act, the court found plaintiff must allege "wilful, wanton, or grossly negligent conduct" of the public entity "when the injury involves realty (and appurtenances thereto) used for recreational purposes," including a public playground and playground equipment.

In this particular instance, the court found that plaintiff was seeking "redress for injuries allegedly caused by the condition of the slide found at the playground, and the City's failure to ameliorate or rectify that condition or otherwise warn others of same."

As characterized by the court, the Rules' complaint focused on the City of Lubbock's alleged "failure to repair or maintain the playground equipment or warn about its purportedly hazardous condition." In so doing, the court held that "the Rules triggered application of the Recreational Use Act which bestowed upon them the status of trespassers. TEX. CIV. PRACT. & REM. CODE ANN. § 75.002(c)(2)." As a result, in making such an allegation which afforded them the legal status of trespassers under the state recreational use statute, the court found that the Rules, as recreational users, "were owed no duty by the City with regard to the condition of the playground and its appurtenances." Accordingly, in order to avoid having their claims dismissed, the court found plaintiff's would have to amend their complaint to allege and ultimately establish egregious misconduct on the part of the city which might reasonably be considered wilful, wanton, or grossly negligent.

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