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No “Willful and Wanton Conduct” Found in Connection with Trampoline Injury

In a closely-divided, as-yet unpublished, 4-3 decision, the Illinois Supreme Court held that a local public entity and a physical education instructor committed no “willful and wanton conduct” in connection with a mini-trampoline accident that left a 13-year-old child quadriplegic. In *Murray v. Chicago Youth Center*, No. 99457, 2006 WL 1822656 (July 5, 2006), the Court considered whether

Section 3-109 of the *Tort Immunity Act*, which provides immunity for injuries stemming from “hazardous recreational activities,” shielded the defendants from claims that insufficient spotting, improper supervision, and inadequate mats had been provided for an after-school tumbling class. The injured child’s parents argued that Section 3-109’s exception for “willful and wanton con-

duct” was applicable, alleging that the defendants’ improper supervision of the trampoline activity and failure to provide adequate spotting or mats were “willful and wanton.” Alternatively, the child’s parents argued that an exception applied under Section 3-109 for dangerous conditions that require a warning.

The Court found that the defendants’ conduct did not rise to the level of “willful and wanton,” reasoning that, in general, “willful and wanton” connotes “quasi-intentional” conduct; it does not include mere inadvertence, incompetence, or unskillfulness, but rather requires a conscious choice of a course of action with knowledge of the serious

danger involved or knowledge of the facts which would disclose this danger to any reasonable person. Here, in the Court’s judgment, the allegations amounted to no more than negligence.

Finally, the Court rejected the plaintiffs’ claim that Section 3-109’s exception for “failure ... to guard or warn of a dangerous condition” was applicable. The Court explained that because the hazard-

“The very nature of the hazardous recreational activity cannot itself be the ‘dangerous condition’ of which defendants must warn. ...It is because hazardous recreational activities are inherently dangerous that the participant assumes a certain degree of risk.”

ous trampolining activity itself posed the risk of injury to the child, it could not be the “dangerous condition” contemplated under Section 3-109. Rather, the “dangerous condition” must be some further defect in the equipment or condition of the surroundings which the defendants would have knowledge of but which might not be immediately recognizable by the participant.

The 3 dissenting justices disagreed with the majority’s analysis and would have found the defendants’ conduct to be “willful and wanton.” The dissenters relied largely upon an expert’s testimony that the tumbling program was in clear violation of several known gymnastics safety standards and that, in the expert’s opinion, the defendants had exhibited reckless conduct and a conscious disregard for the safety of the child. **Note:** The Illinois Supreme Court has granted a rehearing in this case. HLERK will keep you apprised of any further developments. **Please contact Steve Richart with questions. To read more concerning the Tort Immunity Act, see page 2.**

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Friday, January 26, 2007

Cynthia L. DeCola and Robert E. Swain present: *Limiting Your Exposure to Harassment Complaints.*

Saturday, January 27, 2007

Robert A. Kohn presents: *Understanding the Requirements of the Open Meetings Act.*

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Court Rejects Contractor’s Request to Stop Work on Construction Project

In a familiar scenario arising out of a competitive bidding dispute, a court recently rejected a contractor’s request to stop work on a public construction project.

In a case successfully defended by HLERK attorneys **Nancy Fredman Krent, Robert Swain, and Anthony Loizzi**, a school board advertised for bids on a mechanical project in the school district. The lowest bidder was a contractor that had been hired to do mechanical work at another school in the same school district just a year earlier. That earlier project had not gone well – the contractor did not complete its work properly, on time, or in the proper sequence necessary to coordinate with other trades on the site.

Like park districts, the school board was required to award this contract to the “lowest responsible bidder.” In light of the problems encountered in the past, the school board determined that this contractor was not “responsible,” rejected the contractor’s bid, and awarded the project to the next lowest bidder.

The contractor filed suit, challenging the school board’s determination that it was not a “responsible” bidder and asking

the court to stop work on the project until the matter could be resolved. The court rejected the request. The court ruled that the school board had “broad discretion” in determining whether the contractor was a responsible bidder and, in particular, rejected the contractor’s claim that the school board’s refusal of its bid on the basis of prior unsatisfactory work was a pretext for favoring the second bidder: “The requirement that a bidder be ‘responsible’ would have little meaning, if any, if public agencies were prohibited from considering prior unsatisfactory performances. Competitive bidding statutes are enacted not only to guard against favoritism, fraud, and unfair dealing, but also to secure the best work.”

Disputes such as these are not uncommon when a park district finds it necessary to reject the low bidder on a contract. The court’s ruling here is an important affirmation of the right of public bodies to ensure that contracts are awarded to contractors that can be trusted to complete their work properly and on time.

For questions about this ruling, please call Nancy Krent, Rob Swain, or Anthony Loizzi.

Minimize Your District’s Risk of Personal Injury Claims

The Illinois legislature enacted Section 3-106 of the *Local Governmental and Government Employees Tort Immunity Act* to encourage the development and maintenance of parks, playgrounds and other recreational areas. *Connaway v. Hanover Park Park District*, 277 Ill.App.3d 896, 898, 661 N.E.2d 528, 531 (1996). Specifically, Section 3-106 provides that a park district is not liable for an injury occurring on public property “intended or permitted to be used for recreational purposes,” unless such park district is “guilty of willful and wanton conduct proximately causing such injury.” 745 ILCS 10/3-106.

A park district can lose its protection under the Tort Immunity Act “if it has been informed of a dangerous condition, knew that others had been injured because of the condition, or if it intentionally removed a safety device or feature from a property used for recreational purposes.”

To enable park districts to preserve the immunity provided by Section 10/3-106, park district officials may wish to acquaint employees with the standards of “willful and wanton conduct.” The Act defines the phrase “willful and wanton conduct” as “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 prop-

erty.” 745 ILCS 10/1-210. A review of Illinois cases interpreting this phrase in personal injury actions against local public entities reveals that a park district’s immunity under this section is far from absolute. For example, the Illinois Supreme Court noted that “willful and wanton conduct” may be “degrees less than intentional wrongdoing” and only “degrees more than ordinary negligence”. *Ziarko v. Soo Line R.R.*, 161 Ill.2d 267, 275-276, 641 N.E.2d 402, 406 (1994).

In Illinois, a park district may be found to have engaged in willful and wanton conduct “if it has been informed of a dangerous condition, knew that others had been injured because of the condition, or if it intentionally removed a safety device or feature from a property used for recreational purposes.” *Floyd v. Rockford Park District*, 355 Ill.App.3d 695, 701, 823 N.E.2d 1004, 1010 (2005).

Thus, in most cases, a plaintiff’s success in a personal injury action against a park district alleging willful and wanton conduct will turn upon whether the park district received complaints about a particular condition or knew that others

had been injured under the same conditions, but took no corrective action. For instance, in *Straub v. City of Mt. Olive*, 240 Ill.App.3d 967, 670 N.E.2d 672 (1993) willful and wanton conduct was found to exist where the city took no action to protect visitors to a city park from a hazard caused by guide wires used to support young trees, even though evidence showed the city knew of the danger because other individuals had tripped and informed the city of the hazard. See also *Muellman v. Chicago Park District*, 233 Ill.App.3d 1066, 600 N.E.2d 48 (1992) (willful and wanton conduct found where park user was injured when she stepped into a pipe and evidence was presented that park district was aware of danger presented by pipes, and only took action to protect its property); *Green v. Chicago Park District*, 248 Ill.App.3d 334, 618 N.E.2d 514 (1993) (park district's conduct was willful and wanton where evidence showed that the slide from which a child fell was defective, the concrete beneath the slide was broken, and the park district was informed on at least one occasion prior to the accident that the slide and ground were in need of repair); *Palmer v. Chicago Park District*, 277 Ill.App.3d 282, 660 N.E.2d 146 (1995) (allegations that park district knew or should have known about a fallen fence around playground and took no corrective action to

warn or repair were sufficient to state cause of action under willful and wanton misconduct exception).

Conversely, where the plaintiff was unable to establish that the park district was informed of a dangerous condition or knew that others had been injured because of the condition, the park district was able to rely on the immunity defense. See *Winfrey v. Chicago Park District*, 274 Ill.App.3d 939, 654 N.E.2d 508 (1995) (park district not liable for injuries caused by plaintiff's fall through hole in fence where plaintiff was unable to show park district was aware of condition of the fence); *Koltes v. St. Charles Park District*, 293 Ill.App.3d 171, 687 N.E.2d 543 (1997) (park district not liable for injuries caused to golfer hit by errant golf ball where park district had not received prior complaints about area in question and one golfer hit in "general area" was not injured.)

To minimize exposure to personal injury claims, park districts should remember to 1) carefully respond to complaints of hazardous conditions and injuries and 2) refrain from removing safety devices or features.

Please contact John L. Di John, Jr. for more information.

Supreme Court Fails to Clarify when Federal Permit is Required for Wetland Development

In *Rapanos v. United States*, the United States Supreme Court considered the narrow issue of whether the wetlands that two developers wanted to fill were adjacent to "the waters of the United States," and thus protected under the *Clean Water Act*. 126 S.Ct. 2208 (2006). Under the Act, a person may not legally discharge any pollutant, including rock, sand, and other fill material, into the waters of the United States or into tributaries and wetlands adjacent to those waters without first applying for and obtaining a permit from the Army Corps of Engineers.

In *Rapanos*, the Supreme Court heard two cases involving property owners who wanted to develop land. In both cases, the district court found, and the Sixth Circuit Court of Appeals affirmed, that the wetlands were protected under the Act.

While a majority of the Supreme Court concluded that the case should be remanded to determine whether the wetlands at issue fell under the protection of the Act, the Court did not reach a consensus on defining exactly what waters are adjacent to waters of the United States.

Noting the Army Corps of Engineers' broad definition of "waters of the United States" and adjacent waters, four of

the nine justices determined that "waters of the United States" is comprised only of relatively permanent, standing, or continuously flowing bodies of water, not of water that flows intermittently or provides periodic drainage of rainfall. Consequently, under this view, a wetland is only protected under the Act if there is a continuous surface connection between the wetland and a water of the United States. These four justices recommended the case be remanded to determine whether such a connection exists. Four other justices deferred to the Army Corps of Engineers' determination and stated that the wetlands at issue were protected under the Act. In the decisive vote to remand the case, Justice Kennedy did not adopt either position. Instead, he stated that the wetlands are protected if a significant nexus exists between the wetlands and the waters of the United States such that the wetlands significantly impact the chemical, physical and biological integrity of the waters "more traditionally understood as navigable." As a result, exactly what wetlands are protected from development under the Act remains unclear and many such questions will continue to be decided on a case-by-case basis.

For more information, please contact Lori Martin.

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