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Illinois Supreme Court revises its July 2006 opinion and expands the definition of willful and wanton tort immunity exclusion

by Ericka J. Thomas

In *Murray v. Chicago Youth Center*, ___ Ill.2d ___, 2007 WL 495281 (February 16, 2007), the Illinois Supreme Court took a very unusual action and reversed its July 2006 ruling on a case involving the Local Governmental and Governmental Employees Tort Immunity Act. The ruling breathes new life into a case that is over thirteen-years old and revisited the definition of "willful and wanton" conduct in the area of tort immunity.

Ryan Murray, a 13-year-old student, was injured during an extracurricular tumbling class while attempting to perform a forward flip off a mini-trampoline. Following his attempted forward flip from the mini-trampoline, Ryan landed partially off the safety matting on his upper chest and shoulders, injuring his neck and rendering him a quadriplegic. The injury occurred during the "freelance" portion of the class when the participants were allowed to do unorganized activities. The evidence revealed that: (1) the mats were set up improperly around the mini-trampoline; (2) the mini-trampolining activity was not supervised by a "professionally prepared" instructor; (3) spotters were not assigned to the mini-trampoline; and (4) none of the participants had been warned of the serious injuries that could result from improper use of a mini-trampoline. In addition, there was an expert opinion that it is well known that the mini-trampoline is associated with the risk of spinal cord injury and that the tumbling program was "one of the worst environments [the expert] had ever seen and violated every single safety standard."

Ryan and his mother sued the Chicago Board of Education, Chicago Youth Centers ("CYC"), and the CYC employee who instructed the class, alleging that the use of a mini-trampoline was a hazardous recreational activity and the defendants acted willfully and

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Primer on the Prevailing Wage Act

by Robert J. Britz

Adopted in 1941, the Prevailing Wage Act (820 ILCS 130/1 *et seq.*) requires contractors and subcontractors to pay their laborers, workers, and mechanics who are employed on public works construction projects no less than the general prevailing rate of wages (consisting of hourly cash wages plus fringe benefits) for work of a similar character in the locality where the work is performed. Fringe benefits include health and welfare benefits, insurance, vacations, and pension benefits. Public works are all "fixed works," constructed for public use, by any public body, paid in whole or in part with public funds. The Act is liberally construed by the Illinois Department of Labor (IDOL).

"Fixed works" are defined as work on real estate or real estate improvements. "Construction" denotes all work on public works involving laborers, workers, or mechanics. "Public bodies" include, among other entities, municipalities, fire protection districts, library districts, school districts, and townships, as well as non-public entities supported in whole or in part by public funds. "Locality" means the county where the physical work is performed, except if a sufficient number of competent, skilled laborers, workers, and mechanics are not available in the county to construct the public works efficiently and properly, locality would include the nearest neighboring county.

The Act not only applies to such laborers, workers, and mechanics directly employed by contractors or subcontractors who perform actual construction work on the public work building or construction job site, but also to laborers, workers, and mechanics engaged in the transportation of materials and equipment to or from the site (but not including transportation by the sellers, suppliers, and manufacturers of materials or equipment).

The Act requires a public body to ascertain prevailing wage rates during June of each year. The Act permits a public body to conduct a minimum of two investigatory hearings to determine prevailing wage rates or a public body may adopt IDOL's determination. The public body must adopt a resolution or ordinance during the month of June of each year establishing prevailing wage rates. If a public body is in two or more counties, the public body has some discretion when establishing the prevailing wage rates. No later than July 15, a certified copy of the resolution or ordinance must be filed with the Secretary of State in Springfield and the Illinois Department of Labor. The public body must publish a determination of its prevailing wages in a newspaper of general circulation within thirty days after filing with the Secretary of State and the Illinois Department of Labor. The public body is not required to publish the entire resolution or ordinance; however, it must publicly post and

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wantonly. The defendants claimed immunity under the broad protections of the Tort Immunity Act, specifically Sections 2-201 and 3-108(a) (745 ILCS 10/2-201 and 3-108(a)). Ryan and his mother countered that the more specific Section 3-109 (relating to hazardous recreational activities) (745 ILCS 10/3-109) of the Act should govern, and under this section, the defendants' acts would be exempted from immunity because they were willful and wanton.

The trial court granted the defendants' motion for summary judgment which claimed that they were immune from the suit under Sections 2-201 and 3-108(a). On appeal, the appellate court held that Section 3-109(c) of the Tort Immunity Act was applicable and the immunity afforded to the defendants did not extend to willful and wanton acts. However, the appellate court then extended its holding and found, as a matter of law, that the facts set forth and all of the evidence submitted would not support a finding that the defendants acted willfully and wantonly (745 ILCS 10/3-109(c)). The Illinois Supreme Court initially upheld this ruling.

Section 2-201 of the Act provides, "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." (745 ILCS 10/2-201) Section 3-108(a) of the Act provided, "Except as otherwise provided by this Act and subject to subdivision (b) neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property." (745 ILCS 10/3-108(a)) (Note: The statutory wording reads as it existed in 1992, when Ryan Murray's accident occurred.)

In *Murray*, a more specific immunity (Section 3-109(b)) was available to the defendants. This limited immunity protects a local public entity and its employees from liability involving hazardous recreational activities, except in situations involving (1) a failure to guard or warn of a dangerous condition, or (2) willful and wanton conduct which is a proximate cause of the injury. That section lists specific examples of hazardous recreational activities, including trampolining.

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keep available for inspection its determination. The public body also is required to receive and maintain for three years contractors' payroll records, and must include in its public work bid advertisements a provision that prevailing wage rates are required to be paid.

Contractors are required to insert into each subcontract and into the project specifications a written stipulation that prevailing wage rates will be paid. A contractor's bond must also contain a provision that prevailing wage rates will be paid. All bid specifications shall list the specified rates to be paid all laborers, workers, and mechanics.

A relatively new provision in Section 5 of the Act that became effective August 10, 2005, requires contractors to generate and maintain, for a period of not less than three years, records of all laborers, mechanics, and other workers employed by them on the project. The records shall include each worker's name, address, telephone number when available, social security number, classification or classifications, the hourly wages paid in each pay period, the number of hours worked each day, and the starting and ending times of each work day. The contractor must submit monthly (in person, by mail, or electronically) a certified payroll to the public body in charge of the project. The certified payroll shall consist of a complete copy of the records identified above and shall be accompanied by a statement signed by the contractor or subcontractor that states the following:

- (i) such records are true and accurate;
- (ii) the hourly rate paid to each worker is not less than the general prevailing rate of hourly wages required by this Act; and
- (iii) the contractor or subcontractor is aware that filing a certified payroll that he or she knows to be false is a Class B misdemeanor.

A general contractor is not prohibited from relying on the certification of a lower tier subcontractor, provided the general contractor does not knowingly rely upon a subcontractor's false certification.

Any contractor or subcontractor subject to the Act who fails to submit a certified payroll or knowingly files a false certified payroll is in violation of the Act and guilty of a Class B misdemeanor. The public body in charge of the project shall keep the records submitted for a period of not less than three years. The records submitted shall be considered public records, with the exception of an employee's address, telephone number, and social security number, and made available in accordance with the Freedom of Information Act. The public body shall accept any reasonable submissions by the contractor that meet the requirements of the applicable section of the Act.

Upon two business days notice, the contractor and each subcontractor shall make available for inspection the records identified in the above paragraph to the public body in charge of the

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project, its officers, and agents, and to the Director of Labor and his deputies and agents. Upon two business days notice, the contractor and each subcontractor shall make such records available at all reasonable hours at a location within the State of Illinois.

Within thirty days after IDOL has published a prevailing wage schedule on its official website, any person may object in writing to the public body's determination by filing written notice with the public body or IDOL. The public body or IDOL shall set a hearing date. The public body or IDOL's decisions are subject to judicial review within thirty-five days after the conclusion of the hearing.

The consequences of non-compliance with the Act are manifold. IDOL may sue for injunction. Any contract for public works awarded that is not in compliance is void, and the contractor is precluded from recovering damages. The contractor's claim against the public body is limited to amounts actually paid. Any laborer or worker employed by a contractor who is not compliant has the right to recover the difference between the wage rate paid and the prevailing wage rate, as well as costs and attorney's fees plus two percent (2%) penalty. The contractor is liable to IDOL for a penalty equal to twenty percent (20%) of the underpayments. For the second and subsequent violations, the contractor is liable to IDOL for a fifty percent (50%) penalty and to workers for a five percent (5%) penalty. As of January 1, 2006, the debarment period during which contractors are ineligible for public works contracts increased from two years to four years if two notices of violation are issued or serious violations occur within a five-year period. A penalty of \$5,000.00 may be assessed against contractors who retaliate against employees who report violations or file complaints.

Any officer, agent, or representative of any public body who willfully violates, or omits to comply with, any of the provisions of the Act, and any contractor or subcontractor, or agent or representative thereof, doing public work, who neglects to keep, or cause to be kept, an accurate record of the names, occupation, and actual wages paid to each laborer, worker, and mechanic employed by him, in connection with the public work or who refuses to allow access to same at any reasonable hour to any person authorized to inspect same under this Act, is guilty of a Class A misdemeanor.

Whether personnel are performing work as part of their regular paid responsibilities, or being paid an amount above and beyond regular salary/wages, determines whether the Act is applicable. Work performed by an employee as a volunteer or as part of his or her regular paid responsibilities is typically not subject to the Act. The Illinois Public Works Act applies to minor repairs, demolition, landscaping work, and maintenance. ■

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In the opinion issued by the Illinois Supreme Court in July 2006, the court noted that Sections 2-201 and 3-108(a), when applicable, provide immunity from both negligent and willful and wanton conduct. It also noted that the Illinois Supreme Court has not had an opportunity to consider the "interplay" of Sections 2-201 and 3-108(a) with the "limited immunity" provided by Section 3-109. The plain language in Sections 2-201 and 3-108, "except as otherwise provided," made it clear to the court that the "legislature did not intend for the immunities afforded public entities and employees by these provisions to be absolute and applicable in all instances." The July 2006 *Murray* decision concluded that the legislature intended to hold local governmental entities and their employees to a higher standard of care for hazardous recreational activities, like trampolining. Thus, the defendants' immunity from liability in this case is subject to the exceptions found in Section 3-109(c) of the Act." Therefore, according to *Murray*, when a more specific immunity may apply, that limited immunity trumps the general blanket immunity of Sections 2-201 and 3-108 of the Act. In its February 2007 decision, the Illinois Supreme Court affirmed its holding on the issue of immunity, but revisited its holding on the issue of willful and wanton conduct.

The court held in its July 2006 decision that willful and wanton conduct, in the context of the Tort Immunity Act, is given a narrow definition, as opposed to the broader common law standard. However, in its February 2007 ruling, the court reversed itself and rejected the defendants' argument that the 1986 amendments to the Tort Immunity Act imposed a heightened willful and wanton conduct standard. The court discussed a string of cases that had addressed conduct that has been characterized as willful and wanton. The court cited to the case of *Ziarko v. Soo Line R.R.*, 161 Ill.2d 267 (1994) which held that "conduct characterized as willful and wanton may be proven where the acts have been less than intentional i.e. when there has been a failure, after knowledge of impending danger, to exercise ordinary care to prevent the danger, or a failure to discover the danger through carelessness when it could have been discovered by the exercise of ordinary care." After discussing the string of cases, the court

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noted that each of the cases made clear that the Illinois Supreme Court drew no distinction between the Tort Immunity Act and common law definition of willful and wanton conduct.

Given this holding, the court then looked at the specific facts in the *Murray* case. The court agreed with the plaintiff's contention that the question of whether the defendants' conduct was willful and wanton was a question of fact for the jury. The court stated that there were genuine and material triable issues of fact concerning the willful and wanton conduct and that it was error for the appellate court, and itself, to affirm the summary judgment. The court then reversed itself and remanded the case for further proceedings in the trial court.

This ruling will allow Ryan Murray to have his day in court and sets forth two main ideas that are important to local governments and public entities covered by the Tort Immunity Act. First, if available to the facts of the case, a more specific, limited immunity applies over the general blanket immunity of Sections 2-201 and 3-108 of the Act. Second, there is no distinction between the definition of willful and wanton conduct in the context of the Tort Immunity Act and the broader common law standard. ■

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GASB 45: Financial reporting of post-employment benefits

by Donald L. Potts

The Governmental Accounting Standards Board (GASB) sets standards for state and local governmental employers' accounting and financial reporting. In 1994, GASB established accounting and reporting standards for the present cost of future pension benefits. However, because pension benefits are not the only post-employment benefit provided by governmental employers, in 2004, GASB issued Statement 45 (GASB 45) which applies rules similar to those for pension benefits to "other post-employment benefits" (OPEB) such as retiree life, health, and dental insurance. It is important to note that GASB 45 does not mandate funding of OPEB and is only concerned with accounting and reporting standards.

GASB considers OPEB to be part of the compensation package that an employee receives each year, even though the benefits are not paid until retirement. Therefore, the present cost of these future benefits must be accounted for to provide an accurate picture of a governmental employer's financial position. Most governmental employers follow a pay-as-you-go approach to funding OPEB, paying an amount each year equal to the benefits paid out in that year. However, the governmental employer is also incurring future liabilities that generally are not accounted for or reported. GASB 45 requires governmental employers to account for and report OPEB obligations and commitments based on an actuarial report, similar to the method for reporting pension benefits.

In addition, GASB 45 requires governments to account for and report the assets and liabilities of their OPEB plans, as well as the annual amount required to provide sufficient resources to fund both the normal cost of the plan and any unfunded liabilities of the plan over a period of time. GASB 45 also mandates that governments provide information about their OPEB plans including (1) a plan description; (2) a funding policy; (3) the number and type of employees covered and benefits provided; (4) information concerning contributions actually made; (5) the funded status of the plan and the actuarial methods and assumptions used; and (6) a schedule of funding progress and employer contributions over the last three actuarial evaluations.

Actuarial reports will be required every two years for employers with more than 200 OPEB plan members, and every three years for employers with fewer than 100 OPEB plan members. Further, employers with fewer than 100 plan members will be able to estimate their OPEB liabilities and required contributions using simplified methods and assumptions.

GASB 45 is being phased in over several years based on total annual revenues for the first fiscal year ended after June 15, 1999. Governmental employers with total annual revenues of \$100 million or more should begin implementing the new standards for periods after December 15, 2006. Governmental employers with total annual revenues of \$10 million to \$100 million should begin implementing the new standards for periods after December 15, 2007, and governmental employers with total annual revenues of less than \$10 million will begin after December 15, 2008. ■

