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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 our Summer 2006 *Legal Insights for Fire Protection Districts*, we summarized the Illinois Supreme Court's July 2006 decision in *Murray v. Chicago Youth Center*. In that case, the Court ruled upon the definition of "willful and wanton" conduct in the area of tort immunity. In an unusual action, the Illinois Supreme Court recently reversed last summer's ruling in *Murray v. Chicago Youth Center*, 224 Ill.2d 213 (2007). This decision breathes new life into a case that is over thirteen years old and revises yet again the definition of "willful and wanton" conduct in the area of tort immunity.

The following facts have remained the same throughout the years: 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 attempt, 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."

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**Fire and police commissions must give closer scrutiny
to employee misconduct related to psychiatric conditions**

by Ericka J. Thomas

Recently, the Second District Appellate Court held that it was unreasonable for a board of fire and police commissioners to terminate a firefighter for cause without making a specific finding as to whether the firefighter's mental problems and illnesses were substantially related to his incident of misconduct. In *Hermesdorf v. Wu*, ___ Ill.App.3d ___, 2007 WL 898590 (2nd Dist., March 21, 2007), the Second District reaffirmed similar holdings made by the Illinois Supreme Court in *Walsh v. Board of Fire & Police Commissions*, 96 Ill.2d 101 (1983) and the Second District Appellate Court in *Lynch v. City of Waukegan*, 363 Ill.App.3d 1078 (2nd Dist. 2006).

Before examining the holding in *Hermesdorf*, it is instructive to review the holdings in both *Walsh* and *Lynch*. In *Walsh*, the Illinois Supreme Court remanded the case to the board of fire and police commissioners for further consideration of whether a police officer's misconduct was "substantially related" to the psychiatric problems that led to his prior medical suspension. Disciplinary charges were filed against the officer in *Walsh* as the result of an incident wherein the suicidal officer unintentionally injured a fellow officer during a suicide attempt. The incident occurred while the officer was on a medical disability suspension. Only vague psychiatric evidence about the officer's condition at the time of the incident was submitted during the hearing. The court remanded the case for further evidence on the officer's psychiatric condition because of concern that the police officer's disability pension rights could be jeopardized. The court held that if the board found the plaintiff's misconduct was "substantially related" to the psychiatric problems that led to his prior medical suspension, the proper sanction would be other than discharge for "cause."

In the more recent *Lynch* decision from the Second District, the court remanded the case to the civil service commission for further proceedings to determine whether a sanction less than discharge would be appropriate for a firefighter with psychiatric concerns. In *Lynch*, a firefighter was discharged because he was unable to perform the duties assigned to him, took too much sick leave, and secured outside employment without permission. Subsequent to his discharge, the pension board granted the firefighter a duty-related disability pension because he had a cognitive disorder that impaired his ability to process information and make decisions, especially in complex or stressful situations. The Second District determined that it was "bound by *Walsh*" and held

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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 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. 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 section 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

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Employee misconduct

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that *Walsh* precluded the commission from discharging the plaintiff for cause based on misconduct that was substantially related to the psychiatric problems that formed the basis for his pension. The court held that discharge would only be appropriate if there were “adequate grounds for plaintiff’s discharge independent of the cognitive disorder upon which the pension was based.”

The facts of the *Hermesdorf* decision are a hybrid of the *Walsh* and *Lynch* cases. *Hermesdorf*, a firefighter/paramedic for the City of Naperville Fire Department for seventeen years, responded to a call to provide treatment to a female being held in custody at the Naperville Police Department. *Hermesdorf* reportedly pulled the woman up by her hair, verbally abused her, twisted her arm behind her back, and pushed her down onto the gurney by either her chest or throat when she tried to sit upright. Upon arrival at the hospital, the woman refused treatment, was returned to the police station, and was subsequently released from police custody. She later returned to the police station to file a complaint against *Hermesdorf*. Immediately following this incident, *Hermesdorf* admitted himself into a psychiatric unit, and was diagnosed with depression and bipolar disorder. *Hermesdorf*’s physician indicated that he was to continue taking his medications and was to remain off work “until further notice.”

Charges were brought against *Hermesdorf*, seeking his discharge before the board of fire and police commissioners. *Hermesdorf* also applied for disability benefits from the Naperville Firefighters’ Pension Fund based on a mental impairment. In mitigation at the discharge hearing, *Hermesdorf* introduced documentation concerning his psychiatric condition and treatment, but the commission discharged him. *Hermesdorf* filed an administrative review action seeking to overturn the commission’s decision to discharge him. While that action was pending, the Naperville Firefighters’ Pension Board granted *Hermesdorf* a non-duty disability pension based upon his psychiatric problems.

After the trial court upheld the commission’s decision to discharge *Hermesdorf* for cause, *Hermesdorf* filed an appeal with the Second District Court asserting that he could not be discharged for his misconduct based on *Lynch* and *Walsh*. On appeal, the Second District concluded that the evidence supported the Board’s finding that *Hermesdorf* was guilty of the underlying charges. However, the court agreed with *Hermesdorf*’s position and concluded that it was unreasonable for the commission to have discharged *Hermesdorf* for cause without having a specific finding as to whether his illness was substantially related to the misconduct. The court reversed the trial court’s decision and remanded the case to the commission for further proceedings.

The *Lynch* and *Hermesdorf* decisions provide more concrete instruction to administrative agencies that are assigned the difficult task of disciplining employees where medical or psychiatric conditions may be involved. Such agencies must not only consider misconduct committed by the employee and the effect the misconduct has on the employer, but also, if raised, make a determination about whether the misconduct can be linked to a medical or psychiatric condition. If a substantial link can be established, *Lynch*, *Walsh*, and *Hermesdorf* dictate that the employee cannot be discharged for that misconduct. ■

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wanton conduct which is a proximate cause of the injury. The statute goes on to list specific examples of hazardous recreational activities, including trampolining.

The Illinois Supreme Court's 2006 ruling 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.'" The Court noted that none of the cases distinguished between the Tort Immunity Act definition and the 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 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 applicable to the facts of the case, a more specific, limited immunity will trump 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. ■

Court finds mandatory bargaining required on promotion law provision since 2003

by Michelle Grotto

Under the Fire Department Promotion Act ("the Act"), (50 ILCS 742/10(d)(2)), exclusive bargaining representatives have the right to require an employer to negotiate clauses within a collective bargaining agreement relating to conditions, criteria, or procedures for the promotion of employees to ranks within the fire department. In *The City of Bloomington v. Illinois Labor Relations Board*, ___ Ill.App. ___, 2007 WL 1343807 (4th Dist. 2007), the court recently addressed the issue of whether the process of appointing individuals to a position outside the bargaining unit was a mandatory, rather than permissive, subject of bargaining when the acts in question occurred *prior* to the 2006 amendment. Accordingly, the court had to decide whether the 2003 version of the statute also required, rather than permitted, the bargaining.

The City of Bloomington appealed an Illinois Labor Relations Board finding that it committed an unfair labor practice when it declined to negotiate with the International Association of Firefighters, Local 49. The union sent a letter demanding the city engage in negotiations regarding the new assistant chief promotion examination. The city argued that the Act did not require them to negotiate, stating that the process of appointing individuals to positions outside the bargaining unit was a permissive, rather than mandatory, subject of bargaining (*see Village of Franklin Park v. Illinois Labor Relations Board*, 265 Ill.App.3d 997, 1005, 638 N.E.2d 1144, 1148-49 (1994) (1st Dist. 1994); (50 ILCS 742/10(d)(2)).

The union argued the case was moot, citing the 2006 amendment to the Act, which specifically provides that promotions to the next rank immediately above the highest rank included within the bargaining unit are a mandatory subject of bargaining. The court disagreed, finding that the legislature did not specifically indicate the statute applied retroactively. As a result, the court based its decision on the 2003 version of the statute.

The specific section at issue was Section 10(d)(2) of the Act (50 ILCS 742/10(d)(2)). Before the 2006 amendment,

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Attorney Notes

- **Shawn Flaherty** was a featured speaker at Northern Illinois University Law Review's 16th Annual Law Review Symposium, *Emerging Issues in Election Law*, on Monday, March 26, 2007 in Altgeld Hall in DeKalb, Illinois. Shawn participated in the morning presentation and presented his law review paper entitled "Dollars, CPI, and Voter Empowerment: Public Act 94-976 and its Impact on Local Government Tax Referenda."

- **OBKC&G, Ltd.** welcomes three law clerks to our Wheaton and Joliet offices. **Michelle Grotto** is a third year law student at Northern Illinois University College of Law. Michelle, a DePaul University graduate with an undergraduate degree in Music Performance, served as a musician in the Coast Guard. Michelle will work at the Wheaton office. **Graham Liccardi** is a second year law student at The John Marshall Law School. Graham received his bachelor's and master's degrees from Miami University in Ohio, and previously worked at Miami University's Admissions Office and as an account executive for AT&T. Graham will work at the firm's Wheaton office. **Victoria Johnson**, a graduate of Quincy University, has completed her second year of law school at Northern Illinois University College of Law. Previously, Vicki clerked for Will County Circuit Court Judge Kinney and worked as a teacher's assistant for developmentally and physically handicapped children. Vicki will divide her time between the Joliet and Wheaton offices.

- **Shawn Flaherty** and Alton attorney, Jim Sinclair, have co-authored the 2007 edition of the "Handbook for Trustees of Illinois Fire Protection Districts" published by the Illinois Association of Fire Protection Districts. This IAFFD Handbook is a practical summary of the laws applicable to Illinois fire protection districts. Copies of the handbook are available at the IAFFD website at www.iaffpd.org for \$40.00, plus shipping and handling.

- **Shawn Flaherty** and **Carolyn Welch Clifford** were featured speakers at the Illinois Government Financial Officers Association's Training Program, *Basics of Public Pension Management*, on Thursday, April 26, 2007, at Northern Illinois University's Naperville Campus. Shawn discussed "Permissible Investments and Investment Law," and Carolyn addressed "Disability Issues." ■

Mandatory bargaining

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this section provided that, "This Act is intended to serve as a minimum standard and shall be construed to authorize and not to limit: ... (2) the negotiation by an employer and an exclusive bargaining representative of clauses within a collective bargaining agreement relating to conditions, criteria, or procedures for the promotion of employees who are members of bargaining units..." The amended Section 10(d)(2) now reads, "The right of an exclusive bargaining representative *to require an employer to negotiate* clauses within a collective bargaining agreement relating to ..." (emphasis added).

The court found that the 2003 version of the statute was ambiguous because the language in subsection (d)(2) can be read both as providing that the bargaining is permitted and, when read in the context of the Act as a whole, as requiring bargaining over such promotions. Because the statute was ambiguous, the court deferred to the Labor Relations Board's interpretation of the Act that bargaining was required. Also, after reviewing the legislative history of the 2003 version of the Act, the court found that the legislature intended to require employers to bargain in these situations, disagreeing with the First District's decision in *Village of Franklin Park v. Illinois Labor Relations Board*. The court, therefore, found that the 2003 version of the Act required the city to bargain with the union over promotions to the assistant fire chief position. As a result, the city's refusal to bargain with the union was an unfair labor practice.

This court's decision merely affirms the legislature's intent, which was explicitly clarified in the 2006 amendment stating that an exclusive bargaining representative has the right to *require* an employer to negotiate certain clauses within a collective bargaining agreement. ■

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