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Civil Litigation UPDATE

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From the Chair

Stephanie Domitrovich

Hello, everyone!

We had a very productive meeting this past November in Hershey, filled with great networking opportunities with other sections and individuals. Our Annual Retreat for the Civil Litigation Section at the Nittany Lion Inn on April 24-26 was a huge success. The retreat was filled with outstanding educational programs, exciting entertainment, wonderful speakers located by event co-chairs Jennifer Coatsworth and Kathleen Wilkinson and delicious food.

Article

The History and Future of the "Care, Custody, or Control" Exception in Pennsylvania's Tort Immunity Act

By D. Jay Kaplan, Esq., Galfand Berger, LLP

There is currently an appellate split in Pennsylvania regarding the care, custody or control of real property exception to governmental immunity for local governments. In the last two decades, precedential appellate decisions have articulated conflicting approaches to this exception to government immunity. Boiled down, the question is whether local governments in Pennsylvania are liable for injuries caused by negligence in the care, custody or control of the property, or whether the liability is limited to situations in which the local government's real property caused the injury. In addition to the language of the statute, its history sheds light on the future of this exception to government immunity.

At common law, local governments enjoyed a limited immunity "for the negligence of its employees occurring in the exercise of a *governmental* function." *Hartness v. Allegheny Cnty.*, 37 A.2d 18, 18 (Pa. 1944) (emphasis added). Examples of such "governmental" functions included furnishing police and fire protection and collecting ashes and refuse. *Id*. at 19 n.2.

Notwithstanding, "[i]n conformity with the prevailing American view," Pennsylvania Courts had "long held that municipal corporations [were] not immune from liability in tort for the negligent acts of their servants committed in the course of municipalities' *proprietary* functions." *Morris v. Sch. Dist.* of Mount Lebanon Twp., 144 A.2d 737, 738 (Pa. 1958) (emphasis added). Accordingly, local governments always remained "liable for improper management and use of their property, to the same extent and in the same manner as private corporations and natural persons." *Briegel v. City of Philadelphia*, 19 A. 1038, 1039 (Pa. 1890).

By way of example, local governments were frequently subject to tort liability "for negligence in the administration of park affairs." *Bagley v. City of Philadelphia*, 25 A.2d 579, 582 (Pa. Super. 1942) (collecting cases). The well-settled rule was that "where a city undertakes to manage and supervise property, such, for example, as a public park, it must exercise reasonable care to keep the property in reasonably safe condition for those who lawfully come upon it." *Hill v. Hous. Auth. of City of Allentown*, 95 A.2d 519, 521–22 (Pa. 1953) (collecting cases). Liability attached not only for injuries caused by the physical condition of the park property itself, but for negligent acts and omissions of the city relating to its care, custody and control of the park. *See Stevens v. City of Pittsburgh*, 194 A. 563 (Pa. Super. 1937), *opinion adopted*, 198 A. 655 (Pa. 1938) (holding that the city was liable for failing to prevent unintentional shooting that occurred in a city park).

The Pennsylvania Supreme Court abolished the "judicially imposed" doctrine of "governmental immunity" in the 1973 case *Ayala v. Philadelphia Bd. of Pub. Ed.*, 305 A.2d 877 (Pa. 1973). Five years later, the Legislature enacted The Political Subdivision Tort Claims Act (later codified in 1980 at 42 Pa.C.S. § 8541 et seq as the Tort Claims Act), which granted local governments immunity from liability in tort generally, and listed eight expectations in which local governments would retain liability. As stated by Rep. Berson, in urging his colleagues to vote to enact the Tort Claims Act, "The effect of the bill, if adopted, would be to restore the law largely to the state that it was in prior to the Supreme Court's decision in the *Ayala* Case." Pennsylvania Legislative Journal — House , Nov. 15, 1978, 3856 (1978).

As enacted, the plain language of the Tort Claims Act seemingly retained the pre-*Ayala* rule that local governments were liable for negligent acts in their proprietary functions as possessors of real property. Specifically, 42 Pa.C.S. § 8542(b)(3) (the Real Property Exception) provides that local agencies remain liable for "acts by a local agency or any of its employees" related to "[t]he *care, custody or control* of real property in the possession of the local agency." (emphasis added). Yet, in the 1987 case, *Mascaro v. Youth Study Center*, the Pennsylvania Supreme Court held that the Real Property Exception

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"can be applied only to those cases where it is alleged that the artificial condition or defect of the land *itself* causes the injury." 523 A.2d 1118, 1124 (Pa. 1987) (emphasis in original). Under the rule set forth in *Mascaro*, courts "rejected claims where an object or substance *on* the property injured the plaintiff." *Wilson v. Norristown Area Sch. Dist.*, 783 A.2d 871, 875 n.2 (Pa. Cmwlth. 2001).

Mascaro's "condition or defect of the land itself" requirement was later abandoned by the Pennsylvania Supreme Court, in the cases *Grieff v. Reisinger*, 693 A.2d 195 (Pa. 1997) (plaintiff injured by fire caused by local agencies negligent *care* of the property) and *Kilgore v. City of Philadelphia*, 717 A.2d 514 (Pa. 1998) (plaintiff injured by motorized tug being operated on city property as a result of city's failure to remove snow and ice from property). In those cases, the plaintiffs did not allege any defects of the real property itself, as was required under the *Mascaro* rule. Rather, the plaintiffs alleged, consistent with the plain text of the Real Property Exception, that it was the local agencies' negligent care of real property in their possession that caused the plaintiffs' injuries. *See Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001) (explaining that the decisions in *Grieff* and *Kilgore* were "premised on the 'care, custody and control' language of the exception"); Grieff, 693 A.2d at 196 n.3 ("The real property exception more broadly subjects a municipality to liability resulting from the negligent 'care, custody or control' of its property"); *Kilgore*, 717 A.2d at 518 n.6 (stating that "the plain language chosen by the legislature cannot be ignored").

In 2000, the Pennsylvania Supreme Court decided *Blocker v. City of Philadelphia*, 763 A.2d 373 (Pa. 2000), in which the court examined whether the intention of a property owner matters in determining whether an unaffixed chattel is "real property" or "personality." In *Blocker* the plaintiff was injured by a collapsing bleacher owned by the City of Philadelphia, and subsequently brought suit against the City alleging "that the city negligently maintained *the bleacher*." *Id*. at 374 (emphasis added). Consistent with the *Mascaro* rule then-in-effect at the time that the complaint was filed, the plaintiff had pleaded that the bleacher *was* real property. After the trial could hold that the bleacher was not real property, the Commonwealth Court reversed on the grounds that "there was a genuine issue of material fact as to whether the bleacher was intended by the city to remain permanently on" the city's park property. *Id*. Addressing this question on appeal, the Supreme Court reversed, holding that "a chattel that is not affixed to realty remains personality; only where personality has been attached to realty does the question of the parties' intent become relevant." Id. at 375. Accordingly, the Court stated that "[t]he bleacher was . . . personality, and any negligent maintenance of *it* did not fall within the real property exception to immunity." *Id*. at 375–76.

In the years that followed, lower courts interpreted *Blocker* as holding that the mere presence of personality in the chain of causation of an injury on real property rendered local agencies immune to tort liability. *See* R*ieger v. Atoona Area School District*, 768 A.2d 912 (Pa. Cmwlth 2001); *Repko v. Chichester Sch. Dist.*, 904 A.2d 1036 (Pa. Cmwlth. 2006); *Mandakis v. Borough of Matamoras*, 74 A.3d 301 (Pa. Cmwlth. 2013); *Sanchez-Guardiola v. City of Philadelphia*, 87 A.3d 934 (Pa. Cmwlth. 2014). In such cases, a claim of negligent care or control of real property was rendered nullified whenever it was "*commingled* with a claim of negligent care or control of personality." *Brewington v. City of Philadelphia* (*Brewington I*), No. 13111974, 2015 WL 4501877 (Pa.Com.Pl. June 08, 2015) (emphasis added). This approach effectively marked a return to *Mascaro's* "condition or defect of the land *itself*" doctrine. *See Moon v. Dauphin County*, 129 A.3d 16, 24 (Pa. Cmwlth. 2015) ("[T]he focus must be on whether there is proof of a defect in the real property itself." (citation omitted)).

This "commingled" claims approach was abrogated by the Commonwealth Court in

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Brewington II, 149 A.3d 901 (Pa. Cmwlth. 2016) (en banc) where the court held: "where a complaint includes specific allegations that a plaintiff's injuries *resulted from negligence* in the defendant's care, custody, or control of *real property*," *Blocker* does not "preclude a determination that the real property exception may apply." *Brewington II*, 149 A.3d at 910–11 (emphasis added). This decision was affirmed by the Supreme Court, which reaffirmed *Blocker* only "to the extent it holds personality *alone* may not serve as the basis to trigger the real property exception to government immunity." *Brewington III*, 199 A.2d 348 (Pa. 2018) (emphasis added).

The *Brewington III* Court also clarified that the causation element of the real property exception focuses on the negligent acts, not the physical element that made contact with the plaintiff. *Id*. at 355. Thus, consistent with the plain text of the exception, governmental liability at common law and the express legislative intent of the Tort Claims Act, the real property exception applies when "the injury was *caused by the negligent acts* of the local agency acting within the scope if its duties with respect to the care, custody, or control of real property." *Id*. (emphasis added).

The effects of the since-abrogated *Mascaro* decision seemingly still linger in some Pennsylvania appellate decisions addressing this exception. Courts have named the divergent applications of this exception as the *Grieff* approach and the *Blocker* approach. Inevitably, this conflict in Pennsylvania law will have to be rectified. In doing so, it will be imperative that the plain text of the statute and its history be guiding factors for Pennsylvania appellate courts.

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