

the state legislature.⁵

But unlike the state's immunity under the related sovereign immunity doctrine, a municipality's immunity is not absolute. While sovereign immunity covers every act of the state, "[t]he more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions."⁶ When a municipality exercises "the judicial, discretionary, or legislative authority conferred by its charter," or "is discharging a duty imposed solely for the benefit of the public," it performs its governmental functions and thus cannot be held liable for the negligence of its officers or employees.⁷ But when a municipality acts in its "ministerial or corporate character in the management of property for [its] own benefit, or in the exercise of powers, assumed voluntarily for [its]

own advantage," it performs proprietary functions and thus may be held liable for the damages caused by the negligence of its officers and agents.⁸ As the North Carolina Supreme Court succinctly explained in *Britt v. City of Wilmington*,

When a municipality is acting "in behalf of the State" in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers.⁹

The governmental-proprietary function doctrine, so stated, is well-settled and easily ascertained from North Carolina case law. It is in applying the doctrine to

... continued page 13

New York State's Highest Court Reverses Major Tort Award in World Trade Center Bombing Litigation

by Craig Mausler

On September 22, 2011, the New York State Court of Appeals issued a decision reversing a major tort award. In *In re World Trade Center Bombing Litigation Steering Committee v. Port Authority of New York and New Jersey*,¹ the basic underlying facts were not in dispute. The Port Authority was a public entity created in a 1921 compact between New York and New Jersey to oversee critical centers of commerce, trade, and transportation hubs (e.g., airports, bridges, tunnels, etc). It is a financially self-reliant public entity.² One of the properties it developed, constructed, and operated was the World Trade Center. The Port Authority operated a security force of forty police officers within the confines of the World Trade Center.

On numerous occasions during the decade of the 1980s internal security reports indicated that the World Trade Center was highly vulnerable to terrorist attack. The underground security garage was deemed vulnerable to car bombs, but the Port Authority never undertook any action as to the parking garage in response to the warnings in the reports.

In February 1993 terrorists drove a van containing a fertilizer bomb into the B-2 level of the parking garage and parked on the side of one of the access ramps.³ They then detonated the bomb, which created a blast crater six stories deep and killed six people. 648 plaintiffs commenced

174 actions against the Port Authority for injuries due to the bombing.⁴ The gravamen of the plaintiffs' claims was that the Port Authority was negligent in providing security because it failed to take action in response to its own internal reports warning of this possible threat. The Port Authority claimed it was entitled to the defense of governmental immunity.⁵ The lower court held that the Port Authority was acting in a proprietary capacity, and as such was not entitled to the governmental immunity defense.⁶ A jury found that the Port Authority was 68% liable for failing to maintain the parking garage in a reasonably safe condition, and the terrorists were 32% liable.⁷

The two main issues raised on appeal were whether the Port Authority's decision as to where to allocate its police resources was the performance of a governmental function, thus meriting immunity, or more similar to that of a commercial landlord, thus implementing a proprietary function that does not receive tort immunity.⁸ If the latter view is adopted, then another issue raised would be whether the allocation of fault between the Port Authority and the terrorists established by the jury was incorrect.

The New York Court of Appeals reversed the lower-court decision on the immunity issue.⁹ Both the majority and the dissent agreed that the difficulty in this matter was

the governmental entity's performance of dual proprietary and governmental functions. The majority held that the alleged security lapse involved in a significant way the assignment of its police officers to various security risks—which is a policy decision. The assignment of police is a discretionary decision-making governmental function, and thus merits governmental immunity, as discretionary governmental acts may not be a basis for liability.¹⁰ Given this holding, the majority did not reach the issue of fault allocation.

The dissent maintained that the alleged negligence stemmed from a proprietary function as a commercial landlord, as the decisions the Port Authority made were not uncommon to those of any commercial landlord.¹¹ The dissent stated that the Port Authority failed its duty to tenants and invitees as a the landlord of a commercial office complex, and found that the World Trade Center was a predominantly commercial venture.¹² The dissent agreed that there could be no liability for the Port Authority's decision where to deploy police personnel, but the Authority could be liable for failing to take security measures that a private landlord would take.¹³ The dissent also stated that the jury's allocation of fault (68% to the Port Authority, and 32% to the terrorists) was permissible on the evidence presented and was not a basis for reversal.¹⁴

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Endnotes

1 *In re* World Trade Ctr. Bombing Litigation, No. 217 (N.Y. Sept. 22, 2011).

2 *Id.*, slip op. at 2.

3 *Id.* at 7.

4 *Id.*

5 *Id.* at 8.

6 Other smaller, side issues not relevant to the issues discussed in this article are not reviewed here.

7 *In re* World Trade Ctr. Bombing Litigation, No. 217, at 8.

8 *Id.*

9 *Id.* at 29.

10 *Id.* at 18.

11 *Id.* at 21.

12 *Id.* at 27.

13 *Id.* at 28.

14 *Id.* at 30.

WASHINGTON SUPREME COURT RULES ON ATTORNEY GENERAL'S DISCRETION TO ENTER LITIGATION IN TWO LANDMARK CASES

Continued from page 3...

actions by the United States Government”¹⁹ Thus, Attorney General McKenna acted within the authority granted to him by the statute when joining the state as a party to the multistate litigation.

The court also examined the question whether the Attorney General properly made the state a party to the multistate litigation, as opposed to acting in his individual, official capacity. Citing prior precedents the court answered the question by observing that “[t]he general rule is that where the attorney general is authorized to bring an action, he or she is authorized to do so in the name of the state.”²⁰

The court rejected the argument advanced by Washington Governor Christine Gregoire in an amicus brief that if the governor disagrees with a litigation decision, the attorney general cannot proceed in the state's name. The court acknowledged that Washington Constitution article III, section 2 vests “[t]he supreme executive power of this state” in the governor, and that the governor's superior authority may require accommodation in certain matters. As Justice Owens' opinion for the court put it, however, “the governor is not a party to the present action; Governor Gregoire neither initiated this petition for mandamus nor has she intervened.”²¹ The court asserted that it would therefore “leave for the appropriate case the issue of what result the Washington Constitution compels where the governor disagrees with the attorney general's discretionary decision to initiate litigation and seeks to preclude the attorney general's action.”²²

Concurring Opinions

Justice Gerry Alexander authored a concurring opinion that briefly addressed the issue of standing. Wrote Justice Alexander, “I am doubtful that Seattle could have established standing to maintain this action under any of the four doctrines that could have provided it with authority to bring this suit: traditional, representational, liberalized, or taxpayer.”²³ Moreover, Justice Alexander characterized Seattle's assertion of taxpayer standing as “a particular stretch” for four reasons: (1) Seattle did not plead taxpayer status; (2) its submitted documents