between adults" and was not narrowly tailored to the State's goal of protecting the best interests of children.[12] The trial court granted the State's and FCAC's motions for summary judgment and motions to dismiss on the federal constitutional claims, and it dismissed the plaintiffs' remaining state constitutional claims because it did not need to decide them.[13] The State and FCAC appealed the court's grant of summary judgment to the plaintiffs on Count 10, and the plaintiffs cross-appealed the court's grant of summary judgment to the State on the federal constitutional claims.[14]

C. The Arkansas Supreme Court's Decision

On direct appeal, the Arkansas Supreme Court affirmed the trial court's decision in a unanimous opinion.[15] Writing for the court, Justice Robert Brown began by briefly acknowledging the presumption of constitutionality accorded the statute.[16] In the remainder of his opinion, Justice Brown explained why, in the court's view, the plaintiffs had rebutted that presumption.

The lynchpin of the court's decision was *Jegley v. Picado*,[17] a 2002 case in which the Arkansas Supreme Court held that the state's constitution implicitly guarantees a fundamental right to privacy. The *Jegley* court invalidated an Arkansas statute that criminalized homosexual sodomy. Although the Arkansas Constitution contains no explicit right to privacy, the *Jegley* court found that it does guarantee one implicitly and that this fundamental right embraces "all private, consensual, noncommercial acts of sexual intimacy between adults."[18] *Jegley* directed that laws burdening this fundamental right to privacy receive strict scrutiny, and it found that a ban on homosexual sodomy could not meet that test.[19]

In the present case, the State contended that the Arkansas Adoption and Foster Care Act did not implicate *Jegley*'s right to privacy because it related to cohabitation, not sexual intimacy. The State further argued that the Act did not burden the right to engage in sexual intimacy because individuals who cohabitate with a sexual partner outside of marriage remained free under the Act to continue their lifestyle as long as they did not wish to adopt or foster children.[20] The court rejected these contentions, observing that the Act did not concern individuals who merely cohabitate, but rather individuals who cohabitate with a *sexual partner*. The court further reasoned that forcing a choice between the exercise of

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North Carolina Appellate Court Decides when Municipality May Be Held Liable in Public Park Case

by Jonathan Y. Ellis

In June 2007, seventeen-year-old Eric Williams died tragically at a public park in Elizabeth City, North Carolina. Eric was attending a high school graduation party when he drowned in a "swimming hole" in Fun Junktion Park, which a friend's parents had rented out from the Pasquotank County Parks and Recreation Department. In the ensuing lawsuit, *Williams v. Pasquotank County*,[1] Eric's estate sued the county and the department for the young man's wrongful death, alleging that the "swimming hole" was unsafe.

In their answer, the county and department asserted governmental and sovereign immunity. In a motion for summary judgment, they argued that they were immune from tort liability because the operation of the public park was a governmental function. The trial court denied the motion, and the county appealed. In a unanimous opinion issued in May, the North Carolina Court of Appeals affirmed.[2]

The issue presented was one that has vexed North Carolina courts for decades: When is a municipality liable for the negligence of its officers and employees? The court of appeals confronted the question head-on. Rather than confine itself to simply categorizing the county's conduct in the case before it, the panel went out of its way to "distill the controlling law . . . and provide a coherent framework for future application."[3]

Background Law

In North Carolina and many other state courts, governmental immunity shields municipalities from negligence suits for the actions of their employees. The North Carolina Supreme Court explained long ago that "a municipal corporation may not be held civilly liable to individuals for the negligence of its agents in performing duties which are governmental in their nature and solely for the public benefit."[4] And despite the expansion of municipal activities, the availability of liability insurance, and the injustice the doctrine can affect in individual cases, the North Carolina Supreme Court has made clear that the abrogation of this doctrine must come—if it is to come at all—from

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

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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

2 *See, e.g.*, Nathan Koppel, *Arkansas Supreme Court Expands Gay Adoption Rights*, Wall St. J. (Apr. 7, 2011, 3:30 PM), http://blogs.wsj.com/law/2011/04/07/arkansas-supreme-court-expands-gay-adoption-rights/?mod=WSJBlog (last visited Oct. 10, 2011); Amanda Terkel, *Arkansas Supreme Court Strikes Down Ban on Gay Adoptions*, Huffington Post (Apr. 7, 2011, 2:51 PM), http://www.huffingtonpost.com/2011/04/07/arkansas-supreme-court-ban-gay-adoption_n_846174.html (last updated June 7, 2011).

3 *Cole*, 2011 Ark. at 2.

4 *Id.* at 2-3.

5 *Id.* at 3.

6 *Id.*

7 *See Cole v. Arkansas—About Our Plaintiffs and Their Families*, ACLU.org (Dec. 30, 2008), http://www.aclu.org/lgbt-rights_hiv-aids/cole-v-arkansas-profiles-our-plaintiffs-and-their-families (last updated Oct. 27, 2010).

8 *Cole*, 2011 Ark. at 3.

9 *Id.* at 4-5.

10 *Id.* at 5-6.

11 *Id.* at 6.

12 *Id.* at 5-7.

13 *Id.* at 6.

14 *Id.* at 7.

15 *Id.* at 2.

16 *Id.* at 8.

17 Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002).

18 *Id.* at 350.

19 *Id.*

20 *Cole*, 2011 Ark. at 10, 11.

21 *Id.*

22 374 U.S. 398 (1963).

23 *Cole*, 2011 Ark. at 12-14.

24 *Id.* at 16.

25 *Id.* at 16-17.

26 *Id.* at 17-18.

27 *Id.* at 21.

28 *Id.* at 21-22.

29 *Id.* at 22.

30 *Id.* at 23.

31 *Id.* at 23–24.

32 *Id.* at 25.

33 *Id.*

North Carolina Appellate Court Decides when Municipality May Be Held Liable in Public Park Case

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individual cases that courts often find that "making this distinction proves difficult."[10]

North Carolina courts have highlighted a number of different factors that might be used to distinguish between governmental and propriety functions, any one of which might seem decisive. Some opinions have emphasized the function's historical pedigree: Is the function one "traditionally provided by the local governmental units"?[11] Others have asked the similar but distinct question whether a private corporation could perform the same task.[12] Decisions have relied upon the characterization of a function as "governmental" by state statute[13] or by prior judicial opinions that declare the function is directed at a public purpose.[14] Yet others have explained that such labels are not controlling.[15] Some decisions have found the collection of revenue to be "a crucial factor" in withholding governmental immunity.[16] And still others have held that a fee that covers only the municipality's costs will not transform a governmental function into a proprietary one.[17] The result, as the North Carolina Supreme Court has itself recognized, is a doctrine consisting of "irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary."[18]

Fun Junktion Park

And so the law stood when the North Carolina Court of Appeals was asked to determine whether Pasquotank County performed a governmental or proprietary function in its operation of Fun Junktion public park. Faced with such confused precedents, the court might have elected to follow one line of cases and issued a narrow decision that could have been embraced or distinguished by any future court.

For example, the court might have relied on the North Carolina General Assembly's declaration that "the public good and the general welfare of the citizens of this State require adequate recreation programs," and that "the creation, establishment, and operation of parks and recreation programs is a proper governmental function."[19] It might have emphasized the court of appeals' earlier statement in *Hare v. Butler* that "[c]ertain activities are clearly governmental such as law enforcement operations

and the operation of jails, public libraries, county fire departments, *public parks* and city garbage services."[20] Or it could have supported a conclusion that the park's operation was proprietary or governmental by relying on either of two conflicting opinions of the North Carolina Supreme Court categorizing the operation of other public parks.[21]

But the court did none of these things. Instead, it attempted to do what previous courts had not: harmonize the controlling law and provide "a coherent framework for future application" of the governmental-proprietary function distinction.[22]

The court's new framework, derived from many of the cases discussed above, is a four-part test that instructs courts to consider:

> (1) whether an undertaking is one traditionally provided by the local governmental units;
>
> (2) if the undertaking of the municipality is one in which only a governmental agency could engage or if any corporation, individual, or group of individuals could do the same thing;
>
> (3) whether the county charged a substantial fee; and
>
> (4) if a fee was charged, whether a profit was made.[23]

Not all factors must be present; nor is any factor dispositive. But the second factor provides the "guiding principle."[24]

As applied to Pasquotank's operation of Fun Junktion, the court determined that the operation of a public park is "certainly . . . a function traditionally provided by the government."[25] However, the court continued, "it is equally clear that not all parks are operated by governmental units."[26] With respect to the fee, the court considered the $75 fee charged to the hosts of graduation party to be substantial.[27] But, it noted, the $2,052 collected from such fees in the previous year was enough to recoup just 1.3% of the country's operating costs for the park.[28]

After weighing each factor, mindful that the second consideration is most important, the court concluded that Pasquotank County was engaged in a proprietary function when it operated the party facilities at Fun Junktion.[29] Accordingly, the defendants could not rely on governmental immunity to escape liability for the alleged negligence of its employees that led to the death of Eric Williams. The court of appeals thus affirmed the trial court's denial of summary judgment.[30]

Conclusion

The North Carolina Court of Appeals' decision in *Williams* was undoubtedly a significant one for the Williams family and Pasquotank County. But if the decision attains greater long-term significance, it will be found in the guidance the opinion provides to future courts and the clarity the court attempted to bring to an important but confused area of the law. Whether it will ever achieve that significance is—for now—up to the North Carolina Supreme Court. A petition for discretionary review is pending.[31]

** Jonathan Y. Ellis is a North Carolina native and an attorney with the Department of Justice in Washington, D.C.*

Endnotes

1 Estate of Williams v. Pasquotank County Parks & Recreation Dep't, 711 S.E.2d 450 (N.C. Ct. App. 2011).

2 *Id.*

3 *Id.* at 453.

4 Broome v. City of Charlotte, 182 S.E. 325, 326 (N.C. 1935).

5 Koontz v. City of Winston-Salem, 186 S.E.2d 897, 908 (N.C. 1972); *see also* Hodges v. City of Charlotte, 200 S.E. 889, 892 (1939) (Barnhill, J., concurring).

6 Evans v. Housing Auth. of Raleigh, 602 S.E.2d 668, 670 (N.C. 2004).

7 Moffit v. City of Asheville, 9 S.E. 695, 697 (N.C. 1889).

8 *Id.*

9 73 S.E.2d 289, 293 (N.C. 1952).

10 Hare v. Butler, 394 S.E.2d 231, 235 (N.C. Ct. App. 1990).

11 Willett v. Chatham County Bd. of Educ., 625 S.E.2d 900, 902 (N.C. Ct. App. 2006) (internal quotation marks omitted).

12 *Britt*, 73 S.E.2d at 293 ("[An undertaking] is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing.").

13 Hickman v. Fuqua, 422 S.E.2d 449, 452 (N.C. Ct. App. 1992).

14 *Evans*, 602 S.E.2d at 671-72.

15 Rhodes v. City of Asheville, 52 S.E.2d 371, 373-74 (N.C. 1949).

16 Sides v. Cabarrus Mem'l Hosp., Inc., 213 S.E.2d 297, 303 (N.C. 1975); *see also* Glenn v. City of Raleigh, 98 S.E.2d 913, 919 (N.C. 1957).

17 James v. City of Charlotte, 112 S.E. 423, 424 (N.C. 1922); *see also Evans*, 602 S.E.2d at 671; Rich v. City of Goldsboro, 192 S.E.2d 824, 827 (N.C. 1972).

18 Koontz v. City of Winston-Salem, 186 S.E.2d 897, 907 (N.C. 1972).

19 NCGSA § 160A-351.

20 Hare v. Butler, 394 S.E.2d 231, 395 (N.C. Ct. App. 1990) (emphasis added).

21 *Compare Glenn*, 98 S.E.2d at 919 (proprietary), with *Rich*, 192 S.E.2d at 827 (governmental).

22 Estate of Williams v. Pasquotank County Parks & Recreation Dep't, 711 S.E.2d 450, 453 (N.C. Ct. App. 2011).

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 454.

28 *Id.*

29 *Id.*

30 *Id.*

31 Supreme Court of North Carolina, Docket Sheet, Estate of Erik Dominic Williams v Pasquotank County Parks & Recreation Department, et al, No. 231PA11-1 (Nov. 14, 2011), *available at* http://appellate.nccourts.org/dockets.php?court=1?court=1&docket=1-2011-0231-001&pdf=1&a=0&dev=1.

New Jersey Demands More from Eyewitnesses

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photographic array. A non-lead investigator showed Womble eight photos one at a time of headshots of African-American men between the ages of twenty-eight and thirty-five, with short hair, goatees, and similar facial features. Womble quickly eliminated five of the photos. He then reviewed the remaining three, discounted one more, and said he wasn't sure of the final two pictures. At this time two investigators came into the room and accused Womble of holding back as he had before based on fear of retaliation. Another investigator advised Womble that any protection that Womble needed would be provided by the police department. The first investigator advised Womble to just do what he was there to do. After the two investigators left the room, Womble quickly identified the photo of Larry Henderson.

The trial court applied the *Manson/Madison* test to determine whether the eyewitness evidence could be used against the defendant at trial. The test requires that a determination be made whether the identification procedure was impermissibly suggestive, and if so, whether the procedure was so suggestive as to result in a very substantial likelihood of irreparable misidentification.[4] The second prong requires consideration of five factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.[5]

The trial court determined that Womble's identification could be presented to a jury. The case went to trial, and the evidence of the identification was presented to a jury along with the facts that Womble had ingested crack cocaine and alcohol on the night of the shooting and smoked about two bags of crack cocaine each day after the shooting until police contacted him ten days later. Furthermore, Womble told the jury that he spent most of the time during the incident in a dark hallway looking at the gun pointed into his chest. As for the photo array, he told the jury that he did not see anyone he recognized when he first looked at the photo array, but was sure of his identification and identified the defendant from the stand. As neither Clark nor the defendant Henderson testified at trial and no guns or other physical evidence were introduced linking the defendant to the crime scene, the primary evidence