



Ancel Glink Defense E-News



Second Quarter 2013

CASES YOU SHOULD KNOW ABOUT

Governmental Immunity: Intended and Permitted Users

Drivers are intended users of the area immediately around their vehicles.

DeMambro v. City of Springfield, 2013 IL App (4th) 120957 (June 6, 2013) The plaintiff injured her ankle when she slipped into a pothole while walking around her vehicle after placing an item in her passenger side seat. She brought an action against the City for failing to maintain the street in a reasonably safe condition. The City argued that while the plaintiff may have been a permitted user of the roadway, she was not an intended user. The Illinois Appellate Court found that unless otherwise indicated, the area near the curb is intended for parked vehicles and the pedestrians who are exiting their cars and seeking access to their vehicles. The court concluded the plaintiff was an intended user of the area immediately around her vehicle under Section 3-102(a) the Tort Immunity Act, and, therefore, the City was not immune from liability.

Governmental Immunity: Intended and Permitted Users

Pedestrian not intended when walking across unlit street with no marked crosswalk.

Dunet v. Simmons, 2013 IL App (1st) 120603 (April 25, 2013)

A pedestrian was struck and killed while walking across the street. The decedent did not walk in a marked crosswalk and the area she crossed was unlit. A wrongful death and survival action was brought against the Village alleging negligence and willful and wanton conduct as a result of: the Village permitting the overhead street lights to be inoperable, failing to repair overhead streetlights, not maintaining the overhead streetlights, and creating a hazardous condition as a result of the unlit street. The Village moved for summary judgment asserting they did not owe the decedent a duty to exercise reasonable care in maintaining the roadway under Section 3-102 of the Tort Immunity Act. The Illinois Appellate Court found the Village had a designated pedestrian parkway two blocks away and the Village did not intend the area where the decedent plaintiff was struck and killed to be a designated pedestrian crosswalk. As a result, because the plaintiff was not an intended user, the Village owed her no duty of care.

Governmental Immunity: Actual or Constructive Notice

City had no actual or constructive notice of 2 inch height differential in sidewalk.

Zameer v. City of Chicago, 2013 IL App (1st) 120198 (July 19, 2013)

The Illinois Appellate Court affirmed summary judgment in favor of the City under Section 3-102 of the Tort Immunity Act after determining there was insufficient evidence of either constructive or actual notice to the City of a two inch height difference between two sidewalk slabs where the plaintiff fell and was

injured. The Court found the plaintiff failed to meet her burden to provide facts showing the City had notice of the condition that caused her fall with adequate time to have repaired the sidewalk.

Governmental Immunity: Discretionary Immunity

Highway commissioner was entitled to discretionary immunity for altering flow of surface water.

Pleasant Hill Cemetery Association v. Morefield, 2013 IL App (4th) 120645 (April 10, 2013)

The plaintiff filed suit alleging the defendant highway commissioner's act of altering the flow of surface water damaged his farmland and was a nuisance. The defendant moved to dismiss the case pursuant to Section 2-201 of the Tort Immunity Act, arguing the improvements made to the land were the result of his policy decisions balancing competing interests in the township, including the safety and well-being of the public. The Illinois Appellate Court agreed with the defendant and found the defendant's conduct was not willful and wanton by determining the safety of the public outweighed the risk of disrupting drainage patterns on farmland.

Governmental Immunity: Willful and Wanton Conduct

School principal's ineffectiveness in guarding a puddle on gym floor was not willful and wanton conduct.

Bielema ex rel. Bielema v. River Bend Comm. Sch. Dist., 2013 IL App (3d) 120808 (June 18, 2013)

A student slipped on spilled Gatorade inside a high school gym. After seeing the spill, the school's principal directed her husband to guard over it while she went to retrieve materials to clean the spill. While the husband was talking to another person, the plaintiff approached him from behind and slipped on the puddle. The Illinois Appellate Court found the principal's husband's ineffectiveness in guarding the spill did not show a course of action demonstrating the School District was utterly indifferent to or consciously disregarded plaintiff's safety. As a result, the court affirmed summary judgment in favor of the School District.

Emergency Medical Services (EMS) System Act

EMS Act applies to negligence toward third parties.

Wilkins v. Williams, 2013 IL 114310 (June 20, 2013)

A motorist was injured when her vehicle was struck by an ambulance that was engaged in a non-medical transport of a patient. The Illinois Supreme Court held the Emergency Medical Services (EMS) System Act does not limit immunity for negligence to acts or omissions toward patients in an ambulance, but applies also to negligence toward third parties, like the plaintiff motorist.

Title VII: Employment Retaliation

Title VII retaliation claims must be proved by traditional principles of but-for causation.

University of Texas v. Nassar, 133 S.Ct. 2517 (June 24, 2013)

A physician, who was of Middle-Eastern descent, brought a Title VII action against the state university, claiming he was retaliated against for complaining of alleged harassment. The United States Supreme Court held the plaintiff's retaliation claim required proof that the retaliation was the "but-for" cause of the challenged employment action, not a lesser mixed motive test.

Title VII: Supervisors

An employee is a supervisor under Title VII if he is empowered by the employer to take tangible employment actions against the victim.

Vance v. Ball State University, 133 S.Ct. 2434 (June 24, 2013)

An African-American state university employee alleged he was retaliated against for complaining about racial harassment. Under Title VII, if the harassing employee is the victim's co-worker, the employer is liable only if it was negligent

in controlling working conditions. However, if a supervisor's harassment of an employee culminates in a tangible employment action, the employer is strictly liable under Title VII. The United States Supreme Court held that an employee is a supervisor under Title VII when the employer has empowered that employee to "take tangible employment actions against the victim," including hiring, firing, failing to promote, reassignment, or some other action causing a significant change in employment status.

NEW LAWS THAT MAY AFFECT YOU

Employers Barred from Requesting Social Media Passwords: Public Act 09-0875

Effective January 1, 2013, this Act amended the Right to Privacy in the Workplace Act by prohibiting employers from "requesting or requiring any employee or prospective employee to provide a password or related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or to demand access in any manner to an employee's or prospective employee's account or profile on a social networking website." The Act does permit employers to access an employee and applicant's email as well as allowing the ability to enforce policies regarding an employee's use of an employer's electronic equipment.

PENDING LEGISLATION THAT MAY AFFECT YOU

Bills Would Define Catastrophic Injury in PSEBA

Public Safety Employee Benefits - Two bills were introduced in the General Assembly earlier this year to attempt to define what it means to have a "catastrophic injury" under the Public Safety Benefits Act -- House Bill 2224 and Senate Bill 1245. Both offer definitions relating to employment, not whether a public safety employee received a line of duty disability pension. HB 2224 would define a "catastrophic injury" as a "grievous or serious injury or impairment of a nature that is sufficient to permanently preclude the injured employee from performing any gainful work." SB 1245 would define a "catastrophic injury" to mean the "consequences of an injury that permanently prevents an individual from performing any gainful work." Both mean that if a public safety employee is injured and can no longer perform public safety functions, but can still work in another capacity, then he or she would not be entitled to receive benefits under PSEBA. House Bill 2224 was re-referred to the Rules Committee and there has been no update since March 2013. Senate Bill 1245, however, was sent to the Governor on June 28, 2013.

Statute of Limitations of Sex Offenses : Senate Bill 1399

Would repeal the current statute of limitations for civil actions for personal injury damages stemming from childhood sexual abuse and allows for an action to commence at any time. The changes apply to actions already pending on the effective date of the Act and also to actions commenced on or after the effective date of the Act. This bill was sent to the Governor on June 13, 2013.

ANCEL GLINK DEFENSE VICTORIES

Ancel Glink's litigation team recently defended and won the following notable cases:

**Governmental Immunity: School Bullying
Attorneys Thomas DiCianni and Pedro Fregoso**

Lovergne v. Medinah School District # 11, Circuit Court of DuPage County
The minor plaintiff filed suit against the Medinah School District #11 alleging the School District willfully and wantonly allowed another student to brutally attack and injure her during the lunchtime recess break. Ancia Glink filed a summary judgment motion as to all counts arguing the plaintiff failed to establish the School District engaged in willful and wanton misconduct as it provided adequate supervision and security for its students. The Circuit Court granted the School District's motion for summary judgment, ruling the School District was entitled to immunity under Sections 2-201 and 3-108 of the Tort Immunity Act.

Proper Notice of Public Hearing pursuant to the Illinois Municipal Code

Attorneys: Ellen K. Emery and Tiffany Nelson-Jaworski

Musicus v. Kewanee, et al., Illinois Appellate Court, Third District

Plaintiff brought suit against First Equity Group, LLC, CVS Pharmacy, Inc., and the City of Kewanee relating to the City's grant of First Equity's application for rezoning of certain real property and a special use permit. Plaintiff's main allegation was that notice of the public hearing on the application was deficient. All three defendants filed motions to dismiss, alleging that notice was proper. The City published legal notice in Henry County's Star Courier newspaper and sent notice to all of the affected property owners by mail, using the addresses from the property tax records. Plaintiff did not receive the notice, so did not attend the hearing, after which First Equity's application was approved by the Kewanee plan commission. The Illinois Appellate Court upheld the dismissal of plaintiff's complaint on the basis that the City gave proper notice under the Illinois Municipal code (provided by newspaper publication to all of the affected property owners of records with the time frame required, and mailed to all affected property owners of records as determined from the county's property tax records).

Private Enforcement of Village Ordinances and Attorneys' Fees

Attorney: Ellen K. Emery

Ruisard v. Glen Ellyn, et al., Illinois Appellate Court, Second District

Plaintiffs, residents of Glen Ellyn who opposed the addition of cell phone antennae to the Glen Ellyn water tower close to their homes, appealed the bench trial verdict in favor of Glen Ellyn and T-Mobile which found the Village and the cell company had not violated any Village ordinances. Plaintiffs alleged the height of the public safety antennas, which were relocated to accommodate the T-Mobile antennas, violated the Village's height restriction, and that the equipment mounted to the base of the water tower violated the Village ordinance which required all of T-Mobile's equipment to be "wholly contained in or on" the water tower. Plaintiffs alleged they were entitled to injunctive relief to restore antennas on the water tower to their prior configuration, and that they were entitled to attorneys' fees. Plaintiffs also sought a declaratory judgment that the licensing agreement between T-Mobile and the Village was a nullity because it was the subject of unlawful conduct. The Illinois Appellate Court upheld the trial court's verdict, holding there was no violation of the Village's ordinance regarding height restrictions because the Village had enacted a new ordinance during the pendency of the case which allowed the public safety antennas to remain at their installed height, thus rendering the issue moot. The Court also affirmed the trial court's finding that the equipment satisfied the water tower requirements, and that the plaintiffs were not entitled to attorneys' fees.

RISK MANAGEMENT SEMINARS & EVENTS

Darcy Proctor and Greg Mathews will speak at the Illinois Association of Park District's Conference on January 24-25, 2014 on *How to Avoid Litigation Issues - Learn Not to Step in the Bear Traps*.

Darcy will also speak at the National School Boards Association - School Law Practice Webinar on May 7, 2014 on *Defending Public School Employers in the First Amendment Free Speech Cases in the Post-Garcetti Era*.

Julie Tappendorf will present four sessions at the ALI-CLE Land Use Institute in San Francisco on August 14-15, 2013. Her topics include defense of First and Second Amendment challenges, environmental law update, ethics for land use and government practitioners, and development agreements. She will also present a session on FOIA, Open Meetings, and Ethics to newly elected officials in Rockford on September 18, 2013.

Julie will also speak at the Illinois Municipal League Conference in October on the topic drafting social media policies and in December at the IICLE Local Government Law Institute on defending commercial, political & religious speech cases.

Julie Tappendorf's article "Ethical Considerations in the Use of Social Media for the Land Use Practitioner and Local Government Lawyer" will be published in the September edition of The Practical Real Estate Lawyer.

ABOUT ANCEL GLINK DEFENSE

The attorneys who comprise Ancel Glink's defense litigation group are dedicated almost exclusively to defending governmental entities in tort, civil rights, employment, business and other claims and lawsuits. In addition to defending municipalities, school districts, park districts, townships and other entities in lawsuits in state and federal courts, Ancel Glink's litigation group handles appeals, administrative hearings, critical incident crisis management, loss control training and seminars, file audits, and special consultation. Visit our web-site at www.ancelglink.com or email us at e-news@ancelglink.com.

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