



NEWSLETTER ARTICLE

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Education Law

The Ever Evolving Immunity Landscape

By Ann S. Estridge

As a general proposition, public bodies and public officers possess certain immunities under the law which protect them from suit. For some time now, the Plaintiff's bar has been working to erode these immunity doctrines. Three recent appellate decisions have further defined the contours of the various immunities.

A. Public Official Immunity.

Public officials are immune from suit and may only be held individually liable if their actions (or failure to act) were corrupt, malicious, or outside the course and scope of their employment. Public officials are those individuals that exercise discretion while performing their duties. North Carolina courts have defined discretionary acts as those requiring personal deliberation, decision, and judgment. In the case of *Farrell v. Transylvania County Board of Education*, ___ N.C.App. ___, 625 S.E.2d 128 (2006), the North Carolina Court of Appeals was asked to decide as a matter of first impression whether a school district's Director of Federal Programs was entitled to public official immunity.

In deciding whether the Director of Federal Programs was entitled to the protections of public official immunity, the *Farrell* court recognized that school superintendents and school principals had previously been found to be public officials for purposes of the public official immunity doctrine. Further the court found that because the Director of Federal Programs was a school administrator responsible for supervising teaching and the instructional program as defined by the North Carolina General Statutes, the Director of Federal Programs performed discretionary acts. As such, the Director of Federal Programs was a public official who qualified for public official immunity. Thus, all of the negligence claims against the Director of Federal Programs should have been dismissed by the trial court.

In this particular case, the court's holding that the Director of Federal Programs was entitled to public official immunity was particularly significant given the facts alleged. Briefly, the minor Plaintiff, a severely disabled child, was alleged to have been verbally and physically abused by a teacher assistant. This abuse allegedly caused the child to develop feeding problems which were allegedly so severe that he had to be hospitalized and had to undergo IV feeding therapy.

B. Governmental/Sovereign Immunity – Waiver of Immunity.

In a recent North Carolina Court of Appeals decision, the parent of a student who was attending his son's middle school basketball game allegedly injured himself while climbing the bleachers and brought an action against the Chatham County Board of Education (the "Board"). *Willett v. Chatham County Board of Education*, ___ N.C. App. ___, 625 S.E.2d 900 (2006). Plaintiff brought a negligence action against the Board. Plaintiff argued that the school board's participation in the North Carolina School Board Trust Fund and performance of a proprietary function constituted waivers of governmental immunity. The Court rejected both of these arguments finding that the school board retained its governmental immunity and affirmed Summary Judgment for the Board.

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Under a North Carolina statute, boards of education can waive their governmental immunity by purchasing liability insurance. However, in this case, the Court reaffirmed that a school board's participation in a general trust fund agreement was not the equivalent of purchasing liability insurance, and, therefore, was not a waiver of governmental immunity up to the trust fund limits.

Plaintiff then argued that the Board waived its governmental immunity by engaging in a proprietary function. Specifically, he argued that by operating a basketball game and charging admission, the Board profited and, therefore, waived its governmental immunity. Our Supreme Court distinguished governmental functions from proprietary functions by stating, "[i]f the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual or group of individuals could do the same thing." Courts have indicated that under this standard, charging a "substantial" fee such that a profit is made is evidence that the activity is proprietary. As for the admission fee which was \$1.00 for students and \$2.00 for parents, the Court concluded that it was not "substantial" and that there was no evidence that the admission fee generated enough revenue to pay for anything other than the school's athletic program.

Moreover, the court explained that a profit motive is not the sole determinative factor when deciding whether an activity is governmental or proprietary. The courts will look to whether the "undertaking is one 'traditionally' provided by the local governmental units." In this case, the court pointed to a statute which confers on school boards the exclusive authority to control the interscholastic athletic programs for public schools. The statute expressly provided that local boards should not incur liability by virtue of their control over activities of the athletic program. Therefore, the court concluded that managing interscholastic athletic events in public school is a traditional governmental function for which the board retained its governmental immunity.

C. Governmental/Sovereign Immunity – Constitutional Claims.

In *Ripellino v. Johnston County Board of Education, et al.*, 158 N.C. App. 423, 581 S.E.2d 88 (2003), *cert. denied*, 358 N.C. 156, 592 S.E.2d 694 (2004), the student-Plaintiff, who was allegedly injured when a traffic control gate located on school property struck her vehicle, brought claims for negligence, violation of 42 U.S.C. § 1983 ("Section 1983 claims"), violations of the federal and state constitutions, and a claim for punitive damages, among other things. In *Ripellino I*, the North Carolina Court of Appeals held that based on the school board's participation in the North Carolina School Boards Trust (the "Trust"), the board had governmental/sovereign immunity for any claims up to the trust fund limit of \$100,000; however, the board had waived its sovereign immunity to the extent that any insurance covered claims in excess of \$100,000 and less than \$1,000,000. In addition, the Court held that sovereign immunity was not a defense against the constitutional and Section 1983 claims. Further, the Court held that the board could not be held liable for punitive damages because it is a governmental entity. The case was remanded to the trial court where Summary Judgment and judgment on the pleadings were subsequently granted in favor of Defendants on all claims. Plaintiffs appealed a second time.

In *Ripellino II*, ___ N.C.App. ___, 627 S.E.2d 225 (2006), decided on March 7, 2006, the North Carolina Court of Appeals reversed the trial court's decision dismissing all claims in favor of Defendants and remanded the case. First, the Court held that an automobile exclusion in the Trust Fund Agreement did not preserve the board's governmental immunity. Plaintiffs argued that the agreement with the Trust provided coverage for any claim between \$100,000 and \$1,000,000 and, therefore, governmental immunity had been waived for any judgment rendered in that monetary range. Defendants argued that based on the automobile exclusion in the Coverage Agreement, which excludes coverage for any claim "arising out of the ownership, maintenance, operation, [or] use . . . of any Automobile," the board preserved its governmental immunity as it had not purchased insurance to cover this incident which had arisen out of Plaintiffs' use/operation of the vehicle. On the other hand, Plaintiffs argued that their injuries arose out of the malfunctioning of the gate which could have occurred even if Ripellino had not been



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driving a car, but rather walking or riding a bicycle. The Court, agreeing with Plaintiffs' argument, held that the forecast of evidence left "no material dispute over the fact that Plaintiffs' injuries did not 'arise out of' the use of an automobile."

As to the constitutional claims, Plaintiffs argued that Defendants had violated Section 1983, and the federal and state constitutions because: (1) the board allegedly had a "policy and custom of paying some claims but not paying others, when immunity could be raised in each one," and (2) the board had paid for the property damage to the Ripellino's car, but asserted immunity for the remaining portion of the Plaintiffs' personal injury claim. In a matter of first impression, the court held that a local board of education was a "person" within the meaning of Section 1983 such that a Section 1983 claim could be maintained against a board of education. Defendants argued that neither the State of North Carolina nor its respective agencies, which would include local boards of education, are "persons" within the meaning of Section 1983 when the remedy sought is monetary damages. The Court found that precedent in North Carolina was unclear on whether school boards are considered part of the State and examined the underlying legal structure of the North Carolina school system. The Court concluded that a local school board is a "person" within the meaning of Section 1983.

Finally, the Court of Appeals allowed Plaintiffs' cause of action for a direct violation of the state constitution to survive based on: (1) Plaintiffs' allegations that the school board had purportedly asserted immunity in an "arbitrary and unequal" manner; and (2) the absence of an adequate state remedy. The Court found that there was a material issue of fact as to whether the board applied an appropriate, non-arbitrary criterion on an equal basis to all claimants and in its evaluation of claims. Additionally, the Court concluded that there was no adequate state remedy for the state constitutional claim. Therefore, the Court reversed judgment on the pleadings as to the constitutional claims.

Judge Levinson dissented in part concluding that the trial court properly granted judgment on the pleadings for Defendants as to the constitutional claims. In April 2006, the board and all other Defendants filed an Appeal as of Right to the North Carolina Supreme Court as to the constitutional claims and have also filed a Petition for Discretionary Review.

