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RECENT DEVELOPMENT

MAYOR & CITY COUNCIL OF BALT. V. WHALEN: TORT CLAIMS AGAINST A MUNICIPALITY BY AN INDIVIDUAL INJURED WITHIN THE BOUNDARIES OF A PUBLIC PARK ARE BARRED BY GOVERNMENTAL IMMUNITY.

By: Andrew Burnett

The Court of Appeals of Maryland held that tort claims against a municipality by an individual injured within the boundaries of a public park are barred by governmental immunity. *Mayor & City Council of Balt. v. Whalen*, 395 Md. 154, 909 A.2d 683 (2006). More specifically, a municipality can assert governmental immunity if the underlying claim arises from a discretionary governmental function, as opposed to an imperative, proprietary function. *Id.* at 158, 909 A.2d at 685.

On February 12, 2000, Suzanne Whalen ("Ms. Whalen"), who is legally blind, came to Baltimore, Maryland to attend a meeting at the National Center for the Blind ("NCB"). On the same day, Ms. Whalen took her guide dog to the Leone Riverside Park ("the Park"), which is owned and operated by Baltimore City ("the City") and located directly across the street from the NCB. While Ms. Whalen was in the park she sustained serious and permanent injuries to her back and ankle when she fell into an "uncovered, cement-lined pit," located 42 inches within the boundaries of the park.

On February 11, 2003, Ms. Whalen filed suit against the City claiming it failed to use reasonable care to ensure the hole was securely covered or filled. The City moved for summary judgment asserting, among other things, that they were immune from suits arising from the operation of public parks. On June 9, 2004, the Circuit Court for Baltimore City granted the City's motion for summary judgment. Ms. Whalen filed an appeal in the Court of Special Appeals of Maryland, whereby the court decided as a matter of law, that it was questionable whether the City was engaged in a governmental or proprietary function, and concluded that the lower court erred in its decision. The City petitioned for a writ of certiorari, which was granted on December 19, 2005.

Upon granting certiorari, the Court of Appeals reviewed the trial court's decision *de novo*. *Whalen*, 395 Md. at 161, 909 A.2d at 687. Both parties conceded the incident occurred within the boundaries of the Park. *Id.* at 162, 909 A.2d at 688. Accordingly, the Court needed to determine if the operation of a public park is a governmental function that would allow the City to assert governmental immunity. *Id.* The City successfully argued that the maintenance and operation of a public park has traditionally been considered a purely governmental function, and thus entitled to governmental immunity. *Id.* The actions of a municipality are considered a governmental function if they arise from a legislative enactment, and are considered discretionary. *Id.* at 163, 909 A.2d at 688-89 (citing *Mayor & City Council v. Eagers,* 167 Md. 128, 135, 173 A. 56, 59 (1934)). On the other hand, if a municipality's actions are compulsory and necessary for the populace, they are acting in a proprietary capacity and not safeguarded by governmental immunity. *Id.* at 163, 909 A.2d at 689.

In rejecting Ms. Whalen's argument that maintenance of a public park is proprietary and not the beneficiary of governmental immunity the Court relied on *Mayor & City Council of Baltimore v. State, ex rel. Ahrens*, 168 Md. 619, 179 A. 169 (1935). *Whalen*, 395 Md. at 164, 909 A.2d at 689. In *Ahrens,* a ten-year-old boy drowned while swimming in Gwynns Falls Park, which was owned and operated by the City. *Whalen*, 395 Md. at 164, 909 A.2d at 689. Not wanting to retard the growth of public park facilities, the Court held that the maintenance and operation of a public park was a purely discretionary, governmental duty, which is protected by governmental immunity. *Id.* at 165, 909 A.2d at 690 (citing *Ahrens,* 168 Md. 619, 628, 179 A. 169, 173). To hold otherwise would be against public policy. *Whalen*, 395 Md. at 165, 909 A.2d at 689. On the other hand, if the municipal interests are imperative, not discretionary, any malfeasance is considered a proprietary function that subjects the municipality to civil liability. *Whalen,* 395 Md. at 164, 909 A.2d at 689. Therefore, the City acting in a governmental capacity when operating public parks, is conducting a purely governmental function, opposed to a proprietary function, and as such, possesses governmental immunity. *Id.* at 163, 909 A.2d at 688 (citing *Austin v. Mayor & City Council of Baltimore*, 286 Md. 51, 405 A.2d 255 (1979)).

In relying upon *Eagers*, Ms. Whalen further argued it was irrelevant that the hole was within the boundaries of the Park because it was reasonably foreseeable that a person walking on the sidewalk next to the Park boundary could easily drift 42 inches off the sidewalk

into the "contiguous or adjacent" area where the hole was located. *Whalen*, 395 Md. at 166, 909 A.2d at 690. In *Eagers*, August Eagers was walking down a public sidewalk when he was injured by a tree limb that fell on him as a direct result of city workers cutting down a tree located within the boundaries of the city park. *Whalen,* 395 Md. at 166, 909 A.2d at 690. The Court in *Eagers* held the City was acting in a proprietary, rather than governmental capacity, when August Eagers was injured. *Whalen*, 395 Md. at 167, 909 A.2d at 691. The City's action injuring Eagers occurred "while [Eagers] was actually on the public way." *Whalen,* 395 Md. at 167, 909 A.2d at 691.

The Court in *Eagers* relied heavily on two other cases, *Mayor & City Council of Havre de Grace v. Fletcher*, 112 Md. 562, 77 A. 114 (1910) and *Mayor & Council of Hagerstown v. Crowl*, 128 Md. 556, 97 A. 544 (1916). *Whalen*, 395 Md. at 167, 909 A.2d at 691. Both cases involved individuals who were injured while on public walkways by action that occurred off the public walkways. *Whalen*, 395 Md. at 167, 909 A.2d at 691. As such, *Eagers* and its progeny are limited to acts that occur off public ways that injure individuals actually on the public walkways. *Whalen*, 395 Md. at 167, 909 A.2d at 691. Accordingly, the Court rejected Ms. Whalen's reliance upon *Eagers,* by noting the case was distinguishable from the case at bar. *Whalen*, 395 Md. at 168, 909 A.2d at 691.

Ms. Whalen also relied on *Haley v. Mayor & City Council of Baltimore*, 211 Md. 269, 127 A.2d 371 (1956), where two individuals sustained injuries while on a walkway located within the boundaries of a public park owned and operated by the City of Baltimore. *Whalen*, 395 Md. at 168, 909 A.2d at 691. The Court in *Haley* held that even though the walkway was within the boundaries of the public park, it connected two busy intersections and therefore, was considered a public walkway. *Whalen*, 395 Md. at 168, 909 A.2d at 692. The Court in the instant case noted the distinction that Ms. Whalen was not traversing on an existing walkway between busy intersections, but was injured when she entered the park with no intention to connect to another public walkway. *Id.* at 169, 909 A.2d at 692.

Precedent has established that the obligation of a municipality to maintain and operate a city park is performed in a governmental capacity and tort claims arising from an injury within a city park are barred by governmental immunity. *Id.* As such, the Court of Appeals held that the trial court did not err in holding the City of Baltimore was entitled to governmental immunity. *Id.* at 170, 909 A.2d at 693.

The current distinctions in Maryland law between governmental and proprietary municipal interests are based on precedent from the early 20th century. The concurrence explained that this complicated distinction is unclear and difficult to apply. *Id.* at 171, 909 A.2d at 683 (Wilner, J. concurring). On the other hand, it is well settled that the operation and maintenance of a public park is a governmental function that affords municipalities governmental immunity. *Id.* at 165, 909 A.2d at 690 (Wilner, J. concurring).

Even though this is a long established law, unfortunate circumstances like that of Ms. Whalen, or pressure from the citizens of Maryland, could prompt the legislature to abolish governmental immunity with respect to negligent acts that occur in a public park. In *Ahrens*, the Court decided it would be against public policy to hold the municipalities liable for such injuries in fear that it would retard the growth and expansion of recreational facilities. However, now that there is an abundance of public recreational facilities in Maryland, perhaps eliminating governmental immunity in this respect would encourage municipalities to ensure these facilities are maintained with a higher standard of safety, and to ensure patrons, like Ms. Whalen, are not negligently injured.