# TORT LIABILITY

## Tort Liability: Claims against Governmental Entity

***Gilmer County v. City of East Ellijay,***
533 S.E.2d 715 (Ga. 2000)

Is a county that voluntarily provides emergency services to a city within its jurisdiction legally obligated to continue to do so when the costs of such services generate a substantial deficit for the provider? No, a county is not obligated to continue to provide such services.

FACTUAL BACKGROUND

This question of first impression arose when Gilmer County refused to continue providing non-emergency 911 dispatch services to the City of East Ellijay. Gilmer County provided the City with basic police dispatching services for both 911 emergency and non-emergency situations. In 1999, the County upgraded its dispatching service system, and as a result incurred substantial costs and a $193,000 deficit for the first year of the new system's operation. After determining that the City, on average, accounted for eight percent of the usage of the old system, the County requested that the City pay a proportional eight percent of the deficit. When the City refused, the County stopped providing non-emergency 911 dispatch services to the City, and suit followed. The trial court granted mandamus relief and required the County to provide such services to the City without charge because the County had done so in the past and was therefore obligated by law to continue to do so in the future.

LEGAL ANALYSIS

Courts can provide mandamus relief only if there is a duty arising by law incumbent upon the respondent. A duty may arise expressly by law or by implication. Furthermore, the law must not simply authorize the action, but must also require that the action be done. The Georgia Supreme Court could find no statute or precedent to support a finding that, once a county gratuitously

provides a service to a municipality, it must continue providing that service regardless of any changes that occur in the service being provided. Therefore, there was no express or implied legal duty requiring the County to continue providing a service free of charge to a municipality after the County has enhanced its service at a substantial cost.

Although there was no clear legal duty, the City may still be entitled to mandamus relief if it shows that the County grossly abused its discretion. Abuse of discretion must be shown to be "arbitrary, capricious, and unreasonable" before a court grants mandamus relief. *City of Atlanta v. Wansley Moving & Storage Co.*, 267 S.E.2d 234, 236 (Ga. 1980). In *Wansley*, the court denied the writ of mandamus when the only evidence used to establish that the City was arbitrary and capricious was the reasonableness of the proposed land use. However, when the City's decision is guided by factors listed in a statute, the failure to consider such factors constitutes an abuse of discretion. *Daugherty County v. Webb*, 350 S.E.2d 457, 460 (Ga. 1986). Because the County acted out of necessity when it tried to cure an inevitable deficit, the City failed to show that the County's actions were arbitrary, capricious, and unreasonable. Additionally, the County stopped providing the service only after it made a good-faith effort to resolve the problem by proposing a fair and rational fee arrangement with the City. Therefore, mandamus relief was not available.

RESEARCH REFERENCE

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 17, § 51.13 (Kenneth Elkins et al. eds., 3d ed., Clark Boardman Callaghan 1993).

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## Tort Liability: Personal Injury

***Anderson v. Atlanta Committee for the Olympic Games, Incorporated,***
537 S.E.2d 345 (Ga. 2000)

The Georgia Supreme Court found Georgia's Recreational Property Act (RPA) to be constitutional and adopted a balancing test that effectively expands the definition of "recreational." This

expansion affords increased immunity to landowners who make their land and water areas available to the public for recreational purposes, even though the owners also use the property for commercial purposes.

HOLDING

Georgia's RPA is not unconstitutionally vague or violative of due-process or equal-protection rights. In cases in which the use of the property involves both commercial and recreational elements ("mixed-use" cases), courts must apply a new balancing test requiring consideration of all social and economic aspects when determining whether the activity giving rise to injury is intrinsically "recreational" under that Act.

FACTS AND PROCEDURAL HISTORY

In separate suits, two plaintiffs filed actions for wrongful death and personal injuries arising out of the explosion of a bomb in Centennial Olympic Park during the 1996 Olympic Games in Atlanta, Georgia. The plaintiffs sought recovery from defendant Atlanta Committee for the Olympic Games, Inc. (ACOG) as the lessee of the park property and defendant AT&T as a sublessee of property within the park. Both plaintiffs' trial courts held that Georgia's RPA precluded recovery as a matter of law. In a consolidated appeal, the plaintiffs challenged the constitutionality of the RPA and asserted that use of the land was not "recreational" under the RPA. Despite the plaintiffs' challenges, the Georgia Supreme Court found the RPA to be constitutional. However, the court reversed the summary judgment originally entered in favor of the defendants and set forth a new balancing test for the trial court to employ in determining the Act's applicability to the instant facts and to all subsequent "mixed-use" cases.

ANALYSIS

Many states have enacted legislation granting property owners immunity when they allow their land to be used for certain purposes that benefit the public. In this respect, Georgia's RPA effectively immunizes a landowner when the owner makes the property available without charge to the public for recreational purposes. Ga. Code Ann. §§ 51-3-22, 51-3-23 (2000). The RPA limits the owner's liability in connection with the use and circumscribes the duty of care owed to those using the land for recreational purposes. *North v. Toco Hills, Inc.*, 286 S.E.2d 346,

348 (Ga. 1981). The RPA's purpose is to encourage landowners to make their property available to the public for recreational purposes. Ga. Code Ann. § 51-3-20.

### A. Constitutional Arguments

Despite the plaintiffs' first argument that the RPA was unconstitutionally vague, the court held that the act was sufficiently definite and certain to provide fair notice that the creation and use of the Olympic park would constitute "property available to the public for recreational purposes so as to come within the Act's immunity provisions." *Anderson*, 537 S.E.2d at 348. For a civil statute to survive a vagueness challenge, the court must find that the statute provides fair notice to those affected and that those affected are able to determine the legislative intent behind the statute's enactment. *Jekyll Island-St. Park Auth. v. Jekyll Island Citizens Assn.*, 464 S.E.2d 808, 810 (Ga. 1996). The statute may not be so vague or indefinite that persons of normal intelligence are forced to guess at its meaning or differ as to its application.

The legislative intent behind Georgia's RPA is clear from the statutory language. The statute includes a non-exclusive list of "recreational purposes" including various outdoor activities such as hunting, fishing, swimming, boating, and winter sports. Ga. Code Ann. § 51-3-21(4). Citing *Ballentine's Law Dictionary*, the court found that, "[b]y its express language, the RPA is not limited to the activities delineated within OCGA § 51-3-21(4) but encompasses any recreational activity, i.e., any amusement, play or other form of relaxation which refreshes the mind or body." *Anderson*, 537 S.E.2d at 348. Accordingly, the RPA provides fair notice that

> a park created to celebrate the spirit of an historic athletic and cultural event and to provide a gathering place for visitors to relax and enjoy themselves constitutes property available to the public for recreational purposes so as to come within the Act's immunity provisions.

*Id*.

In addition, the RPA does not violate due-process or equal-protection rights because it does not disadvantage a suspect class or interfere with a fundamental right. Therefore, the RPA need bear only a reasonable relationship to a legitimate state interest. *City of Atlanta v. Watson*, 475 S.E.2d 896, 899 (Ga. 1996). The

state has a legitimate interest in facilitating the public's increased access to recreational property. Identifying persons injured while benefitting from this recreational use is a means rationally related to that end.

### B. Recreational Purpose

The trial court found that the RPA insulated ACOG from liability because the visitors' use of Centennial Olympic Park was "recreational." In granting summary judgment, the trial court relied on cases in which the property was determined to be recreational despite the fact that substantial revenues were derived from attractions located on the property. *Quick v. Stone Mt. Meml. Assn.*, 420 S.E.2d 36, 38 (Ga. App. 1992); *Hogue v. Stone Mt. Meml. Assn.*, 358 S.E.2d 852, 854 (Ga. App. 1987). These cases focused primarily on the nature of the particular use actually attributable to the plaintiffs' injuries. In these cases, the plaintiffs were unable to recover because they suffered injuries while using the free portions of the park premises rather than during use of revenue-generating facilities of the park.

As recently as 1999, the Georgia Supreme Court again recognized that the RPA may protect the landowner in situations in which the public's presence on the land involves a mixture of commercial interests and recreational activities. *City of Tybee Island v. Godinho*, 511 S.E.2d 517, 519 (Ga. 1999). Immunity under the RPA does not demand that the public's use be solely for "sheer recreational pleasure." However, the court previously held in *Cedeno v. Loockwood*, 301 S.E.2d 265, 267 (Ga. 1983), that when the invitation to the public has been extended to further the landowner's business interests, the RPA will not operate to shield the owner from liability, despite a collateral recreational benefit to the public. Such business interests include inviting the public for purchasing food, merchandise, or other services. Rounding out the picture is the holding of *Bourn v. Herring*, 166 S.E.2d 89, 92 (Ga. 1969), in which the court held that making the property available for "advertising purposes" or "to promote the [property owner's] products" does not necessarily render the RPA inapplicable.

The court was unpersuaded by the plaintiffs' arguments that the motivation behind access to Centennial Olympic Park was "to further a commercial enterprise." *Anderson*, 537 S.E.2d at 349. Instead, the court distinguished *Cedeno* because it is the purpose for which the profit is earned that creates a reasonable inference

regarding an activity's commercial or recreational nature, and not the existence of a profit motive itself. For example, profits earned to maintain property or provide public services are "not profits in the ordinary commercial sense of the word." *Fischer v. Doylestown Fire Dept.*, 543 N.W.2d 575, 578 (Wis. App. 1995). By its own admission, the Georgia Supreme Court acknowledged that its precedent regarding the determination of whether an activity is "recreational" in mixed-use cases offered little guidance under the facts at bar.

In its exploration of other jurisdictions, the court found a persuasive solution in the balancing test propounded by the Wisconsin Court of Appeal. *Silingo v. Village of Mukwonago*, 458 N.W.2d 379, 382–383 (Wis. App. 1990). The court adopted verbatim the Wisconsin test and required that the analysis examine all of the activity's social and economic aspects. A non-exhaustive list of "[r]elevant considerations" includes "the intrinsic nature of the activity, the type of service or commodity offered to the public, and the activity's purpose and consequences." *Anderson*, 537 S.E.2d at 349. Although considering a plaintiff's subjective assessment of an activity would not be improper, it is simply not the controlling factor. Unable to conclude from the record that the trial courts' analyses encompassed all of the above factors, the summary judgments based on the RPA were reversed, and these portions of the cases were remanded for a determination of the RPA's effect under this new standard. Dicta suggests the results would be the same. *Id.*

COMMENTARY

This decision does not represent a substantial departure in the application of Georgia's RPA. Rather, the holding represents an incorporation, continuation, and codification of the principles expressed in the earlier *Stone Mountain* cases (*Quick* and *Hogue*). Although this new test purports to establish determinative parameters by which to gauge the intrinsic nature of an activity, it is clear that limited liability under the RPA remains primarily a policy decision and not one based on a clear distinction between business and recreational use. Apparently, Georgia property owners can make their land and water areas available to the public for recreational purposes and still enjoy protection, provided the public's use is sufficiently compelling to warrant encouragement. Contemporary Olympic activities are as much business as recreation, and it stretches credulity to assume any

test could distinguish neatly between the two under these circumstances. However, a contrary decision in this case could arguably work against the public's interest as a whole. Potential liability brings limitations in access, both physical and economic. Not unlike the concept behind limited liability for corporations, immunity under the Act promotes public benefit. Often, the benefit as a whole outweighs the burden on the few. The public's benefit from the Olympics and its use of Centennial Olympic Park, although unquestionably large, is hard to quantify or categorize. Perhaps a less significant event would yield a different finding. Accordingly, this new balancing test appears to be consistent with the legislative intent of the Act while providing at least some guidance regarding the necessary flexibility inherent in the term "recreational."

Florida's counterpart to Georgia's RPA is Florida Statutes Section 375.271. Similar to Georgia's RPA, Florida provides that an owner who, without charge, provides a park area to the public for recreational purposes owes no duty of care to keep that park safe for use by others. Fla. Stat. § 375.271(2)(a) (2001). An important distinction, however, is that Florida's statute has been interpreted as being intended to encourage *private owners and lessees* to open their land to the public and does not apply to counties or other governmental entities. *City of Pensacola v. Stamm*, 448 S.2d 39, 41 (Fla. Dist. App. 1st 1984); *Chapman v. Pinellas County*, 423 S.2d 578, 579–580 (Fla. Dist. App. 2d 1982); *see Welch v. Douglas County*, 404 S.E.2d 450, 451–452 (Ga. App. 1991) (holding that the RPA applies to private and public owners).

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 18, § 53.114 (James Perkowitz-Solhlein et al. eds., 3d ed., Clark Boardman Callaghan 1993).
- Robin Cheryl Miller, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User*, 47 A.L.R.4th 262 (1986).
- 62 Am. Jur. 2d *Premises Liability* §§ 159, 462, 662 (1990).

Eric Jonathan Partlow

**Tort Liability: Sexual Harassment**

***City of Miami Beach v. Guerra,***
746 S.2d 1159 (Fla. Dist. App. 3d 1999)

An employee in Florida who is sexually harassed may not sue her employer under the common-law tort of negligence because it is not a recognized cause of action for sexual harassment.

Guerra worked for the Miami Beach Police Department and informed her supervisor that she was being sexually harassed. Once the City knew about the harassment, she believed it had a duty to provide a safe work environment. When the City breached its duty by failing to provide that safe environment, Guerra sued for negligence. Guerra argued that *Byrd v. Richardson-Greenshields Securities, Incorporated,* 552 S.2d 1099 (Fla. 1989), permitted a negligence action in cases of sexual harassment. However, the Third District Court of Appeal disagreed.

The Third District court relied on *Vernon v. Medical Management Association of Margate, Incorporated,* 912 F. Supp. 1549 (S.D. Fla. 1996), which held that *Byrd* did not create a new tort, but only adopted the narrow view that corporations could not hide behind workers' compensation laws to escape liability for "intentional torts such as battery, intentional infliction of emotional distress or assault as part of a sexually harassing environment." *Id.* at 1564. In its opinion, the Third District agreed with *Vernon,* interpreting the Florida Supreme Court's opinion in *Byrd*: "[I]t appears that the Court simply adopted the more narrow position." *Id.*

In an odd twist to this story, six months after *Guerra* was decided, the Florida Supreme Court accepted certiorari based on a perceived conflict with *Byrd*. Then, ten months later, the supreme court reversed itself because "review was improvidently granted." *Guerra v. City of Miami Beach,* 782 S.2d 868, 868 (Fla. 2001). Consequently, *Vernon*'s interpretation of *Byrd* stands, and the *Guerra* case becomes important because of its clear and unequivocal holding: "Florida does not recognize a cause of action for sexual harassment under a common law negligence theory." *Guerra,* 746 S.2d at 1159.

COMMENTARY

It is easy to understand why plaintiffs believed *Byrd* permitted a negligence cause of action for sexual harassment. The

*Byrd* court stated as follows:

> [W]e cannot say that the exclusivity rule of the workers' compensation statute should exist to shield an employer from all tort liability based on incidents of sexual harassment. The clear public policy emanating from federal and Florida law holds that an employer is charged with maintaining a workplace free from sexual harassment . . . . *Public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist*, whether the tort claim is premised on a remedial statute or on the common law.

*Byrd*, 552 S.2d at 1103–1104 (emphasis added).

So, we are left with a dilemma. On the one hand, the court was clear: corporations cannot use workers' compensation laws to escape liability for sexual harassment. On the other hand, although the court found that employers should be held accountable in tort for allowing sexually-harassing environments to exist, *Guerra* tells us that Florida does not recognize sexual harassment under a common-law negligence theory. The way out of the dilemma may be found in dicta from *Byrd:* "[T]o the extent that the claim alleges assault, [or] intentional infliction of emotional distress arising from sexual harassment . . . the exclusivity rule . . . will not bar them." *Id.* at 1104. Guerra's mistake was suing under the wrong theory. Had she sued under the theory of intentional tort, the facts of her case indicate that she may have prevailed. The lower court focused on a policy concern — that those creating sexually-harassing environments not go unpunished. This court was more concerned with procedure and noted, that "since the only count contained in Ms. Guerra's complaint is for a cause of action that does not exist, the final judgment is reversed." *Guerra*, 746 S.2d at 1160.

Rather than presenting any meaningful analysis, the *Guerra* and *Vernon* courts equivocated by stating that "it appears" that *Byrd* took a narrow view. In defense of those courts struggling with the *Byrd* court's elusive reasoning on the matter, it is a difficult call to make. In an early section of the opinion, the *Byrd* court charges employers with maintaining a workplace free from sexual harassment. However, in a later section, *Byrd* states that "the exclusivity rule will not bar" intentional torts. *Byrd*, 552 S.2d at 1104. Therefore, in the former section, the *Byrd* court imposes a *duty*, implying that a breach of that duty could support a suit for *negligence*. In the latter section, conversely, the court restricts

its holding to *intentional torts.*

This confusing opinion has now been interpreted by two different courts attempting to decipher the dichotomous holding. Until the Legislature or the Florida Supreme Court clears up the confusion, attorneys practicing in this field should exercise caution.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, § 19.18 (Beth A. Buday & Victoria A. Braucher eds., 3d ed., Clark Boardman Callaghan 1996).
- Andrea G. Nadel, *On-the-Job Sexual Harassment as a Violation of State Civil Rights Law*, 18 A.L.R.4th 328 (1982).

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