BALLARD v. YPSILANTI TOWNSHIP

Supreme Court of Michigan.

Sheniece BALLARD, Personal Representative of the Estate of Kassim Ballard, Plaintiff-Appellant, Cross-Appellee, Dorothy J. Wilkes and Edna Reid, Co-personal Representatives of the Estate of Anthony Deon Wilkes, Plaintiffs, v. YPSILANTI TOWNSHIP, Defendant-Appellee, Cross-Appellant, Joann Brinker and Dave Cooper, Defendants.

Sheniece BALLARD, Personal Representative of the Estate of Kassim Ballard, Plaintiff, Dorothy J. Wilkes and Edna Reid, Co-personal Representatives of the Estate of Anthony Deon Wilkes, Plaintiffs-Appellants, Cross-Appellees, v. YPSILANTI TOWNSHIP, Defendant-Appellee, Cross-Appellant, and Joann Brinker and Dave Cooper, Defendants.

Docket Nos. 106941, 106954.Calendar No. 10.

Decided: June 9, 1998

Sommers, Schwartz, Silver & Schwartz, P.C. by Patrick Burkett, Southfield, for plaintiff-appellant Ballard. Law Offices of Joseph DeVal Welton by Joseph DeVal Welton, Detroit, and Alvin L. Keel, Pontiac, for plaintiff-appellant Wilkes. Garan, Lucow, Miller, Seward & Becker, P.C. by Rosalind Rochkind and Thomas F. Myers, Detroit, for defendant-appellee cross-appellant Ypsilanti Township. Plunkett & Cooney, P.C. by Christine D. Oldani and Mary Massaron Ross, Detroit, amicus curiae, for Michigan Municipal League & Michigan Townships Association.

OPINION

We granted leave to appeal in this case to determine the effect of the recreational land use act (RUA), M.C.L. § 300.201; M.S.A. § 13.1485, on the governmental tort liability act (GTLA), M.C.L. § 691.1407(1); M.S.A. § 3.996(107)(1). The plaintiffs' decedents drowned while wading in a man-made lake in a township park.

Specifically, we are asked to decide if the recreational land use act creates an exception to the governmental immunity created by the GTLA. We hold that the act was not intended to waive the state's immunity from liability and does not create an exception to governmental immunity. Therefore, we affirm the result reached by the Court of Appeals, but for different reasons.

I

The Court of Appeals summarized clearly the tragic events giving rise to this action:

On July 4, 1991, plaintiffs' decedents, Kassim Ballard, age eleven, and Anthony Wilkes, age twelve, were taken with a group of boys to Ford Lake Park in Ypsilanti by two adults, Haratio Blacksher and Veronica Mitchell. Although Mitchell told the boys not to go swimming, Blacksher allowed them to go into the water. The boys were nonswimmers. Ballard was in the water about ten to twelve feet out when he lost his footing. Wilkes went to help him and they both struggled. Blacksher went into the lake. All three went under. Blacksher emerged, but the boys drowned.

Off the shore of the lake where the boys drowned, the water was twenty to twenty-four inches deep for a length of about twelve feet. At that point, the water turned mucky and the depth dropped to 3 1/212 feet. At thirteen feet from the shore, the water was six feet deep. Defendant township runs Ford Lake Park. A 1983 study of the lake noted the existence of hazardous drop-offs. [216 Mich.App. 545, 546-547, 549 N.W.2d 885 (1996).]

The boys' estates sued Ypsilanti Township and two park caretakers individually. The trial court denied Ypsilanti's motions for summary disposition based on governmental immunity, and allowed the case to go to a jury. The jury awarded $1 million to Ballard's estate, and $400,000 to Wilkes' estate reduced by twenty-five percent for comparative fault. The trial court denied motions for judgment notwithstanding the verdict and new trial.

The Court of Appeals reversed, holding that the township was immune from liability. The panel held that the GTLA controlled because it had been more recently enacted than the recreational land use act. It reasoned that the Legislature was aware of the recreational land use act, but did not make an exception for it. Hence, it did not intend to waive the state's immunity from liability.

Plaintiffs raise a question of law, which we review de novo. Cardinal Mooney High School v. Michigan High School Athletic Ass'n, 437 Mich. 75, 80, 467 N.W.2d 21 (1991).

II

There are two statutes at issue in this case. First is the GTLA, which provides a broad grant of governmental immunity, subject to several statutory exceptions. The second is the recreational land use act, which limits landowner liability, except in cases of gross negligence or wilful and wanton misconduct. The issue before the Court is whether the recreational land use act applies to government-owned lands in such a way as to subject the township to liability for its wilful and wanton behavior.

A. Governmental Immunity

The term "governmental immunity" derives from "sovereign immunity," and although the two are often used interchangeably, they are not synonymous. Sovereign immunity refers to the immunity of the state from suit and from liability, while governmental immunity refers to the similar immunities enjoyed by the state's political subdivisions. Ross v. Consumers Power Co. (On Rehearing), 420 Mich. 567, 596-597, 363 N.W.2d 641 (1984).[1] In the present case, although governmental immunity is at issue because plaintiffs seek to hold a township liable, there is no reason to distinguish sovereign immunity. The recreational land use act does not provide different standards for the state and its political subdivisions.

From the time of its creation, Michigan has enjoyed sovereign immunity, because "the state, as creator of the courts, was not subject to them or their jurisdiction." Id. at 598, 363 N.W.2d 641. This immunity is waived only by legislative enactment. In early times, one seeking to recover against the state would have to obtain a waiver of immunity from suit from the Legislature. Id. Later, as the number of claims increased to where legislative attention to each became unwieldy, the Legislature waived immunity from suit by creating various agencies to deal with the claims. Id. at 598-600, 363 N.W.2d 641.

B. Governmental Tort Liability Act

In 1964, the Legislature codified common-law sovereign immunity to liability and put all then-existing legislative exceptions in one place by enacting the governmental tort liability act. M.C.L. § 691.1401(1) et seq.; M.S.A. § 3.996(101) et seq. The GTLA states in part:

Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. [M.C.L. § 691.1407(1); M.S.A. § 3.996(107)(1).]

By the "[e]xcept as otherwise provided in this act" language, the GTLA proclaims to contain all exceptions to governmental immunity. While the GTLA does contain several of those exceptions, others exist outside the act. This is so because the Legislature, in enacting a law, cannot bind future Legislatures. Malcolm v. East Detroit, 437 Mich. 132, 139, 468 N.W.2d 479 (1991), citing Harsha v. Detroit, 261 Mich. 586, 246 N.W. 849 (1933). As a result, it remains free to amend or abolish governmental immunity by creating exceptions to it, either within the GTLA, or in the context of another statute.

In the present case, plaintiffs brought suit against Ypsilanti Township under the recreational land use act, and the township responded by asserting governmental immunity under the GTLA. Plaintiffs argue that the defense of governmental immunity from liability must fail because the recreational land use act is one of the statutorily created exceptions to GTLA immunity.

The issue whether the recreational land use act creates a statutory exception to governmental immunity is one of first impression. In the past we have examined the meaning, history, and purpose of the recreational land use act. However, we have reserved opinion, until today, on whether it creates liability for a political subdivision of the state.[2]

C. Waiver

Before we reach the merits of the governmental immunity defense, we first respond to plaintiff Ballard's argument that the township waived that defense in the present case.

Plaintiff Ballard argues that defendant waived its defense of governmental immunity essentially by admission. To establish the waiver, she quotes the following passage from one of defendants' briefs:

"Plaintiff therefore is left with one method upon which the cloak of immunity may be removed as it concerns the Township and Co-Defendants Brinker and Cooper under [the] Recreational Use Act. The theory Plaintiff must prove is that the Plaintiffs' decedents died as a result of willful and wanton misconduct on the part of the Defendants."

In an effort to convince the Court that the township waived the defense of governmental immunity, plaintiff Ballard has chosen to take the quoted material out of context. The "cloak of immunity" to which defendant referred was that provided by the recreational land use act, not the GTLA. In the sentences preceding the quoted language, it is clear that defendant is referring to the immunity from liability for negligence granted by the recreational land use act. It is not referring to governmental immunity under the GTLA.

Plaintiff Ballard also asserts as error the failure of the Court of Appeals to address this issue. We assume that the Court of Appeals did not respond to plaintiff's waiver argument for the same reason we find the argument unpersuasive: it is without merit. Defendant did not waive its defense of governmental immunity, but raised the defense in its answer and has continued to raise it at each level, including in its brief and argument before this Court.

D. Judicially Created Exception to GTLA Immunity

Plaintiff Wilkes also raises an argument which, if successful, would make it unnecessary for us to weigh the merits of the immunity analysis as between the two statutes. Plaintiff argues that there is a judge-made exception to GTLA immunity for suits under the recreational land use act. Section 7 of the GTLA provides in part that the "act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed." M.C.L. § 691.1407(1); M.S.A. § 3.996(107)(1). In Li v. Feldt, (After Remand),[3] this Court held that the portion of § 7 quoted above preserved a commonlaw tort action against the state. Plaintiff Wilkes argues that, because the Court decided Heider v. Michigan Sugar Co. [4] under the recreational land use act before July 1, 1965, a common-law action existed before the effective date of the GTLA and survived its enactment. We disagree.

According to Li, § 7 of the GTLA preserved judicially created exceptions that existed before July 1, 1965. The decision in Heider was not a judicially created exception to governmental liability. It did not involve governmental immunity at all, but was a suit against a private property owner. Moreover, a decision that merely upholds the application of a statute, without more, does not create a common-law cause of action or result in a judicially created exception to immunity.

III. Legislative Analysis

Having decided that defendant has not waived its defense of governmental immunity and that no common-law exception exists in this context, we turn to plaintiffs' substantive argument: The Legislature intended to subject the state to liability by the enactment of the recreational land use statute.

We agree with the Court of Appeals that plaintiffs' statutory construction arguments fail. Plaintiffs urge that the rules of statutory construction control the outcome of this issue. They recite the familiar rule that, where two statutes apply to the same subject and one is general and the other specific, the specific statute should control. According to plaintiffs, the GTLA is the general act, and the recreational land use act is the more specific, making the latter an exception to the general grant of immunity under the GTLA. The Court of Appeals disagreed, holding instead that the recreational land use act is the general statute and the GTLA the specific.

The Court of Appeals went on to use a different rule of statutory construction, pointing out that, when two statutes conflict, the later is said to have amended the earlier. 216 Mich.App. at 550, 549 N.W.2d 885, citing Shirilla v. Detroit, 208 Mich.App. 434, 528 N.W.2d 763 (1995). Applying this rule, the panel found that the later-enacted GTLA conflicted with the earlier recreational land use act. Because the GTLA purported to contain all exceptions to governmental immunity, but did not make an exception for recreational use liability, the panel held that the township was immune.

The Court of Appeals was correct in concluding that the township is immune from liability in this case. However, we reach this conclusion with a slightly different analysis. While the Court of Appeals applied the rules of statutory construction because it found the RUA and the GTLA to be in conflict, we find no conflict between the statutes. The GTLA limits liability on government-owned property and the RUA limits liability on privately owned property. They do not both apply to the same property, although they share the common purpose of limiting liability. Consequently, even if they did apply to the same property, they would not materially conflict. This statutory analysis is part of the broader analysis we undertake in determining whether a legislatively created exception to governmental immunity exists. Proper resolution of this question involves applying our longstanding rule for statutory waivers of governmental immunity, as recognized in Mead v. Public Service Comm., 303 Mich. 168, 5 N.W.2d 740 (1942).

IV. Governmental Immunity

Recently, we had the opportunity to address the issue of statutory exceptions to governmental immunity in Anzaldua v. Band, 457 Mich. 530, 578 N.W.2d 306 (1998). There, we reaffirmed the rule from Mead v. Public Service Comm, supra, that governs statutory waivers of governmental immunity:

The doctrine of sovereign immunity has long been firmly established in the common law of this State, and it may not be held to have been waived or abrogated except that result has been accomplished by an express statutory enactment or by necessary inference from a statute. [Mead, supra at 173, 5 N.W.2d 740.]

A. Express Statutory Enactment

The question whether there is an express statutory enactment subjecting the state to liability is answered simply by referring to the language of the statute itself. In Anzaldua, we held that the Legislature intended to create an exception to sovereign immunity from liability in the Whistleblowers' Protection Act (WPA),[5] because it included the state among the bodies subject to the act. The WPA governs "employer[s]" and defines "employer" to include the state.

Similarly, in Malcolm v. East Detroit,[6] cited by plaintiffs in the present action, we held that the emergency medical services act [7] waived governmental immunity to liability. It explicitly defined the "person [s]" to whom it applied to include governmental entities.[8] Plaintiffs argue that we should reach a similar result under the recreational land use act. The emergency medical services act was comparable to the recreational land use act in that it granted immunity from liability, except for gross negligence or wilful and wanton behavior.

However, the emergency medical services act contained a specific provision defining governmental units as "person[s]" for purposes of the act.

The recreational land use act, on the other hand, mentions neither the state nor its political subdivisions. It provides:

No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other person a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use, with or without permission, against the owner, tenant, or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant, or lessee. [M.C.L. § 300.201; M.S.A. § 13.1485.][9]

On its face, the act applies only to owners, tenants, or lessees of land, and does not define those terms to include governmental entities. There is no express waiver of governmental immunity from liability under the act, because the act does not define the persons to whom it applies to include either the state or its political subdivisions.

B. Necessary Inference

Next we decide whether the recreational land use act gives rise to a necessary inference that the Legislature intended to waive the state's immunity to liability. As we discussed earlier, there is no conflict between the recreational land use act and the governmental tort liability act. Hence, we do not apply the recreational land use act, thereby waiving the state's immunity from liability.[10] To find a conflict between the acts, we would have to conclude that each applied to government property, and that neither could be read to give effect to both.

First, the recreational land use act does not apply to public property. The act applies to owners of land, and while it does not mention the state, it could be argued that the Legislature intended the state to be included. However, looking at the purpose behind the act and the circumstances surrounding its passage, it becomes clear that the Legislature did not intend the act to apply to publicly owned property. Therefore it did not intend the act to waive the state's immunity from liability.

1. Purpose of the recreational land use act.

The recreational land use act passed in 1953 in response to fears that potential negligence liability would discourage property owners from allowing others to use their property for recreational purposes. It was seen as promoting tourism by " 'opening up and making available vast areas of vacant but private lands to the use of the general public.' " Wymer v. Holmes, 429 Mich. 66, 78, 412 N.W.2d 213 (1987).

The act was designed to "restrict[ ] suits by persons coming upon the property of another for [recreational] purposes, and to declare the limited liability of owners of property within this state."[11] The act limited liability in order to encourage landowners to open their property to others for recreation.[12]

2. Circumstances surrounding the adoption of the act.

At the time the act became law, the state already had a vast system of parks and forests. Hence, there is little likelihood that it was intended to encourage the state to open its own lands for recreational uses.[13] More importantly, the state was already immune from liability, so the Legislature would have no reason to grant the state a second layer of immunity.

3. The liability-limiting nature of the recreational land use act.

Finally, the recreational land use act is a liability-limiting, as contrasted with a liability-imposing, act. It did not create a cause of action against landowners where none existed before. Instead, it eliminated liability for negligence, and left liability only for gross negligence and wilful and wanton misconduct.

A conflict between statutes is not the only source of a necessary inference that the Legislature intended to waive the state's immunity from liability. However, here the factors that lead us to conclude that there is no conflict also militate against an inference that the Legislature intended to waive the state's immunity from liability. Our conclusion that the recreational land use act does not apply to public property is sufficient to answer the question. Even if the act were held to apply to public property, it would not create a cause of action against the state. The act would simply limit the liability of a governmental entity that is already immune from suit.

Beyond the fact that the state might be construed to be a landowner, there is nothing from which to infer that the Legislature intended to subject the state to liability. Any inference is negated by the purpose behind the act, the circumstances surrounding its adoption, and its liability-limiting nature.

V. Conclusion

The recreational land use act was not intended to create an exception to governmental immunity. The act does not expressly waive immunity because it does not mention the state or its political subdivisions. No necessary inference that the Legislature intended to waive immunity arises from the act. It was intended to limit the liability of private landowners in an effort to encourage them to make their property available for the use of the general public.

We affirm the decision of the Court of Appeals.

I concur with the majority because the recreational land use act (RUA), M.C.L. § 300.201; M.S.A. § 13.1485, does not apply to the land in question in this case. The reason for this, as the majority itself states, is that the

RUA does not apply to public lands. Slip op., p. 12. See also Wymer v. Holmes, 429 Mich. 66, 412 N.W.2d 213 (1987). Once this is understood it is apparent that the RUA could not create an exception to the governmental tort liability act, M.C.L. § 691.1407(1); M.S.A. § 3.996(107)(1).

Further I agree that there was no waiver of the governmental immunity defense.

I express no opinion regarding the remainder of the majority opinion, it being unnecessary to the resolution of the case.

FOOTNOTES

1. Immunity from suit and immunity from liability are different protections. Ross, supra at 600-601, 363 N.W.2d 641. Immunity from suit refers to the immunity of the state and its subdivisions from being hailed into one of its courts without its consent. Id.

2. As we noted in Wymer v. Holmes, 429 Mich. 66, 78, n. 15, 412 N.W.2d 213 (1987):This Court has not directly addressed the question whether public land is covered by the RUA. In Burnett v. City of Adrian, 414 Mich. 448, 326 N.W.2d 810 (1982), this Court held that plaintiff's claim stated a cause of action for wilful and wanton misconduct under the RUA without first considering the applicability of the statute to a reservoir owned by a city, an issue never briefed nor raised in that case.It is not necessary for the Court to determine whether public land is covered by the RUA at this time. However, arguments in favor of limiting the application of the RUA to private land have been made. Thompson & Dettmer, Trespassing on the recreational user statute, 61 Mich. B. J. 726 (1982).

3. 434 Mich. 584, 591-594, 456 N.W.2d 55 (1990).

4. 375 Mich. 490, 134 N.W.2d 637 (1965).

5. M.C.L. § 15.362; M.S.A. § 17.428(2).

6. 180 Mich.App. 633, 447 N.W.2d 860 (1989), rev'd 437 Mich. 132, 468 N.W.2d 479 (1991).

7. M.C.L. § 333.20701 et seq.; M.S.A. § 14.15(20701) et seq., repealed and replaced by 1980 P.A. 179, M.C.L. § 333.20901 et seq.; M.S.A. § 14.15(20901) et seq.

8. Much of this Court's opinion in Malcolm concerned the nature of liability to be imposed on the state, because the statute there distinguished direct and vicarious liability. See, generally, 437 Mich. at 138-148, 468 N.W.2d 479. The recreational land use act makes no distinction between direct and vicarious liability, so those considerations are not pertinent to the resolution of the present case.

9. The recreational land use act was repealed by 1994 P.A. 451, § 90106, and reinstated by 1995 P.A. 58, § 1, effective May 24, 1995.The current provision appears at M.C.L. § 324.73301(1); M.S.A. § 13A.73301(1):Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

10. See part II.

11. 1953 P.A. 201, amended by 1964 P.A. 199, § 1, effective May 22, 1964; 1974 P.A. 177, effective June 23, 1974.

12. The recreational land use act was designed to encourage use of parcels of land that are too large to be made safe or to which access could not easily be restricted. It was not designed to limit liability in residential backyards, but instead applies only to large undeveloped tracts of land that are suitable for outdoor recreation. Wymer v. Holmes, supra.

13. See for example, 1915 P.A. 212, § 1 (authorizing the Public Domain Commission to accept gifts of property for public parks), and 1948 C.L. 299.1 et seq.

MARILYN J. KELLY, Justice.

MALLETT, C.J., and MICHAEL F. CAVANAGH and BOYLE, JJ., concur with MARILYN J. KELLY, J.BRICKLEY and WEAVER, JJ., concur with TAYLOR, J.