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Federal Tort Claims Act - Municipality Not Allowed To Use Sovereign Immunity as Defense against Federal Government Counterclaim - City of Newark v. United States, 254 F. 2d 93 (C.A. 3d, 1958)

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that court to have overruled the doctrine as laid down in the *Gage* and *Wloczewski* cases. However, there is no doubt that the *Gould* case did clarify and settle the law that equity does not require mutuality of remedy to exist at the inception of a contract, but that such mutuality may also occur by the commission of subsequent acts.

FEDERAL TORT CLAIMS ACT–MUNICIPALITY NOT ALLOWED TO USE SOVEREIGN IMMUNITY AS DEFENSE AGAINST FEDERAL GOVERNMENT COUNTERCLAIM

On April 13, 1958, a City of Newark ambulance collided with a United States mail truck. The city brought an action against the United States in the District Court under the Federal Tort Claims Act in the amount of $3,000.[1] The United States asserted a counterclaim for damage to the mail truck totaling $245.75. The court found the concurrent negligence of both drivers to be the cause of the accident. Judgment on the counterclaim was entered for the municipality on the grounds that the defendant was prevented from raising a defense of contributory negligence by New Jersey decisions as applied under the Federal Tort Claims Act. Recovery was denied to the city because the negligent act of the ambulance operator was an "active wrongdoing" and, as such, was imputable to the municipality under New Jersey case law. Upon appeal by the plaintiff, the United States Court of Appeals, Third Circuit, affirmed the decision, but held that the United States was not precluded from asserting a defense of contributory negligence. *City of Newark v. United States*, 254 F. 2d 93 (C.A. 3d, 1958).

This case raises the unusual point of whether the Federal Tort Claims Act should be read literally, when such an interpretation results not only in waiver of the sovereign immunity of the United States, but also in the enhancement of the position of the municipal corporation by depriving the federal government of a defense which it had prior to the passage of the Act.

The immunity of the United States to actions commenced without its express consent is traceable to the English political concept that the King can do no wrong. While this political concept was repudiated in this country, the legal doctrine, that the Crown was nevertheless immune from suits to which it did not consent, has been consistently and vigorously applied to the federal government.[2] Prior to the Federal Tort Claims Act, relief against the federal government for legal wrongs committed by its

[1] 60 Stat. 846 (1946), 28 U.S.C. § 1346 (b) (c) (1948).

[2] U.S. Const. Art. III, § 2, cl.1; Feres v. United States, 340 U.S. 135 (1950); Kansas v. United States, 204 U.S. 331 (1907); United States v. McLemore, 45 U.S. 286 (1846).

officers and employees was sought and sometimes granted by the passage of private bills by Congress. Owing to the increasing number of these bills and the public demand for remedy, the Act was passed in 1946. Thus, sovereign immunity of the United States was waived and it was rendered liable for torts under the same circumstances which would make an individual liable to a claimant in accordance with the law of the state in which the tort occurred.[3]

The law of New Jersey on the immunity of the municipal corporation is well settled. The courts of that state have attributed to the municipality not only immunity to suit but have gone so far as to confer immunity to a defense of contributory negligence when the city institutes action against an individual or private corporation. In *City of Paterson v. Erie R. Co.*,[4] a city fire truck collided with defendant's train at a highway railroad crossing. The cause of the accident was found to be the concurrent negligence of both vehicle operators. The city received an involuntary nonsuit and upon appeal, the Court of Errors and Appeals ruled that the negligence of the city fire truck driver was not imputable to the municipality and, therefore, no contributory negligence could exist on the part of the city. This doctrine is also extended to counties.[5]

It is noteworthy that only two other states have followed the rule of *Paterson v. Erie R. Co.*[6] And further, the New Jersey courts have made an

[3] 28 U.S.C. § 1346 (b) provides: "Subject to the provisions of chapter 171 of this title, the district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (c) provides: "The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section."

28 U.S.C. § 2674 provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

[4] 78 N.J.L. 592, 75 Atl. 922 (1910). Cf. Miller v. Layton, 133 N.J.L. 323, 44 A. 2d 177 (1945).

[5] Miller v. Layton, 133 N.J.L. 323, 44 A. 2d 177 (1945).

[6] Georgia and Wisconsin; City of Milwaukee v. Meyer, 204 Wis. 350, 235 N.W. 768 (1931) wherein the negligence of the municipal harbormaster, in securing a scow in a manner prohibited by city ordinance, was not allowed to be imputed to the city when it sued defendant for damage to a city bridge caused by the defendant's concurrent negligence although the accident was found to be caused by the combined negligence; Columbus R. Co. v. City of Columbus, 29 Ga. 8, 113 S.E. 243 (1922), where the city was allowed to recover even though concurrent negligence on part of both city fire truck driver and defendant's railroad car operator was found.

exception to the immunity of municipalities in cases where the negligence of the city is classified as an "active wrongdoing" as in the instant case.[7] An "active wrongdoing" is a negligent act of commission or positive misfeasance and is an exception to the doctrine of municipal immunity.[8]

The proposition that a municipal corporation has sovereign immunity in respect to "governmental" or "public" functions as opposed to "proprietary" or "private" functions is not founded on either the Constitution or English Common Law.[9] This distinction and the doctrine of municipal immunity as to "governmental" functions appears to have its genesis in *Bailey v. New York* in 1842.[10] While many of the states follow this view, the federal courts do not. In *Hopkins v. Clemson College*, the United States Supreme Court stated:

> But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty. . . . Undoubtedly counties, cities, townships and similar bodies politic often have a defense which relieves them from responsibility where a private corporation would be liable. But they must at least make that defense. They cannot rely on freedom from accountability as could a State.[11]

The states of the Union were first vested with sovereign immunity from suits by individuals without the consent of the state in 1798 by the Eleventh Amendment to the United States Constitution.[12] However, the states are not immune to actions by the United States because consent to be so sued has been found to be implied in the Federal Plan.[13] When a state submits its rights for determination in the federal courts, either by bringing the action or by voluntary consent of a defendant, it cannot escape adjudication by later invoking the prohibitions of the Eleventh Amendment.[14]

In the instant case, the court admitted that the literal application of the

[7] Bentivenga v. City of Plainfield, 128 N.J.L. 418, 26 A. 2d 288 (1942); Vickers v. City of Camden, 122 N.J.L. 14, 3 A. 2d 613 (1939); Callan v. City of Passaic, 104 N.J.L. 643, 141 Atl. 778 (1928); Hart v. Board of Chosen Freeholders of Union County, 57 N.J.L. 90, 29 Atl. 490 (Sup. Ct., 1894).

[8] Ibid.

[9] Barnett, The Foundation of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations, 16 Ore. L. Rev. 250 (1937).

[10] 3 Hill (N.Y.) 531, 38 Am. Rep. 669 (1842).

[11] 221 U.S. 636, 645 (1911).

[12] U.S. Const. Amend. 11.

[13] United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); United States v. Texas, 143 U.S. 621 (1892).

[14] Missouri v. Fiske, 290 U.S. 18 (1933); Gunter v. Atlantic Coast R.R., 200 U.S. 273 (1906); Clark v. Barnard, 108 U.S. 436 (1883).

wording of the Federal Tort Claims Act would have resulted in preclusion of the defense of contributory negligence. The court, however, felt that a situation where a municipal corporation would take advantage of the Act to sue the United States and then raise a shield of municipal immunity could not have been within the contemplation of Congress when the Act was passed.

In doing so, it followed the general philosophy of construing the statute as set forth by the United States Supreme Court in *Feres v. United States:*

> This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.[15]

[15] 340 U.S. 135, 139 (1950).

LABOR LAW—REFUSAL TO HANDLE GOODS UNDER "HOT CARGO" CLAUSE HELD NO DEFENSE TO CHARGE OF UNFAIR LABOR PRACTICE

The Sand Door Company sold doors to a millwork contractor who delivered them to the site of a hospital construction project in Southern California. The general contractor was a party to a master labor agreement, which included its carpenters, and which stated, "workmen shall not be required to handle non-union materials." The carpenters were installing the doors when the business agent of Local 1976, International Brotherhood of Carpenters, notified the foreman that the doors were non-union and could not be hung. The foreman thereupon ordered his men to cease work. Subsequent negotiations failed to produce an agreement that would allow the doors to be installed. The Sand Door Company petitioned the NLRB[1] which ruled that the action of the business agent was a violation of Section 8 (b) (4) (a) of the Taft-Hartley Act.[2] This section provides, in substance, that it is an unfair labor practice to induce employees of a secondary employer to cease handling goods of a primary employer in

[1] Local 1976, United Brotherhood of Carpenters and Joiners of America *and* Sand Door and Plywood Co., 113 NLRB 1210 (1955).

[2] National Labor Relations Act, Section 8(b) (4) (a) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 158 (b) (4) (a) (1956).

Section 8 (b) provides that, "It shall be an unfair labor practice for a labor organization or its agents . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (a) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."