STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 28, 2014)

SAO REALTY CO., INC.	:	
	:	
v.	:	
	:	
MALCOLM MOORE, in his capacity as Finance Director of the City of East Providence;	:	
ELIZABETH RINDA, in her capacity as The Deputy Treasurer for the City of East Providence; and	:	**C.A. No. PC 13-1125**
STEPHEN COUTU, in his capacity as Director of Public Works for the City of East Providence and	:	
JOHN DOE(S) 1-10,	:	
JANE ROE(S) 1-10, and **XYZ CORPORATION(S) 1-10**	:	

DECISION

PROCACCINI, J. Before this Court is Sao Realty Co., Inc.'s (Plaintiff) motion in limine, asking this Court to find that the maintenance, operation, or repair of a drainage system is a proprietary act under G.L. 1956 § 9-31-3. For the reasons set forth below, this Court grants Plaintiff's motion.

I

Facts and Travel

In 1979, Plaintiff granted an easement to the City of East Providence (Defendant) to discharge municipal stormwater through a culvert on the southerly portion of Plaintiff's property.[1] Although the easement did not grant a right to discharge stormwater on the northerly section of Plaintiff's property, Defendants allegedly discharged stormwater onto that section. On

[1] The parties dispute who originally built the culvert. Plaintiff maintains that Defendant installed the pipe while Defendant asserts that Plaintiff's predecessor in interest built the structure.

September 5, 2012, the pipe collapsed after rainwater collected in the stormwater drainage system. The release of the water created a sinkhole on the northerly portion of Plaintiff's property and damaged an apartment building on that property.

On March 8, 2013, Plaintiff filed a Complaint with the Superior Court alleging various tortious acts on the part of Defendant and asked for declaratory and injunctive relief and compensatory, consequential, and punitive damages. Plaintiff then filed this motion in limine, asking this Court to find that the maintenance, operation, or repair of a drainage system is a proprietary act under § 9-31-3 for which the statutory damages cap would be inapplicable. Plaintiff asks this Court to preclude Defendant from presenting testimony or other evidence that the maintenance, repair, or upkeep of a drainage system is a governmental and not a proprietary function. In opposition, Defendant argues that it has a public easement, in existence for the benefit of the public and, therefore, maintaining or repairing that culvert is a governmental function.[2]

II

Analysis

The purpose of a motion in limine is "'to avoid the impact of unfairly prejudicial evidence upon the jury'" and to "'prevent the proponent of potentially [inadmissible evidence] from displaying it to the jury . . . until the trial court has ruled upon its admissibility . . . .'" Ferguson v. Marshall Contractors, Inc., 745 A.2d 147, 150 (R.I. 2000) (quoting Gendron v.

[2] In support of this argument, Defendant also contends that Plaintiff's claims are not based on Defendant's failure to maintain and repair the drainage infrastructure and that whether § 9-31-3 applies to any potential damage award depends on what claims, if any, Defendant will be held liable for. First, Plaintiff's negligence claim is based on Defendant's alleged failure to maintain and repair the drainage system. Moreover, these arguments are not germane to the narrow issue raised by the motion and do not speak to the specific question before this Court. Therefore, this Court will not address these arguments.

Pawtucket Mut. Ins. Co., 409 A.2d 656, 659 (Me. 1979); State v. Fernandes, 526 A.2d 495, 500 (R.I. 1987)). In ruling on a motion in limine, the underlying question of the admissibility of evidence and determinations of relevance and prejudice are within the sound discretion of the trial justice. DiPetrillo v. Dow Chem. Co., 729 A.2d 677, 692 (R.I. 1999); Soares v. Nationwide Mut. Fire Ins. Co., 692 A.2d 701, 701 (R.I. 1997). "[I]n appropriate circumstances," this Court may "reconsider the motion in limine during the trial or in rebuttal." State v. Cook, 782 A.2d 653, 654-55 (R.I. 2001). Therefore, the pretrial granting of the motion "need not be taken as a final determination of the admissibility of the evidence . . . ." Fernandes, 526 A.2d at 500.

With respect to damages, § 9-31-3 states:

> "In any tort action against any city or town or any fire district, any damages recovered therein shall not exceed the sum of one hundred thousand dollars ($100,000); provided, however, that in all instances in which the city or town or fire district was engaged in a proprietary function in the commission of the tort, the limitation of damages set forth in this section shall not apply."

The Rhode Island Supreme Court has said that in enacting § 9-31-1, the General Assembly mandated that "the state should be liable in all actions of tort in the same manner as a private individual or corporation, subject to certain monetary limitations." Adams v. R.I. Dep't of Corr., 973 A.2d 542, 545 (R.I. 2009). Despite this purported broad waiver of immunity, the Supreme Court has strictly construed the statute. Graff v. Motta, 695 A.2d 486, 489 (R.I. 1997). The Court presumes "that the Legislature did not intend to deprive the State of any sovereign power 'unless the intent to do so is clearly expressed or arises by necessary implication from the statutory language.'" Id. (quoting In re Sherman, 565 A.2d 870, 872 (R.I. 1989)).

Furthermore, in determining whether an action is proprietary or governmental, the Rhode Island Supreme Court has explained that "a proprietary function is one which is not 'so intertwined with governing that the government is obligated to perform it only by its own agents

or employees.'" Hous. Auth. of Providence v. Oropeza, 713 A.2d 1262, 1263 (R.I. 1998) (quoting Lepore v. R.I. Pub. Transit Auth., 524 A.2d 574, 575 (R.I. 1987). When making this inquiry, courts ask "'whether the activity was one that a private person or corporation would be likely to carry out.'" Id. (quoting DeLong v. Prudential Prop. & Cas. Ins. Co., 583 A.2d 75, 76 (R.I. 1990)).

For example, the Court has held that some functions are proprietary in nature. See e.g., DeLong, 583 A.2d at 76 (operating a beach is a proprietary function); Xavier v. Cianci, 479 A.2d 1179, 1182 (R.I. 1984) (street sweeping is a proprietary function); City of Providence v. Hall, 49 R.I. 230, 235, 142 A. 156, 158 (1928) (furnishing water is a proprietary function). Other functions are purely governmental. See e.g., L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 208 (R.I. 1997) (adopting and applying a zoning ordinance is a governmental function); Chakuroff v. Boyle, 667 A.2d 1256, 1258 (R.I. 1995) (per curiam) (operating and maintaining a public school is a governmental function); Saunders v. State, 446 A.2d 748, 751 (R.I. 1982) (maintaining correctional facilities is a governmental function); Parent v. Woonsocket Hous. Auth., 87 R.I. 444, 449, 143 A.2d 146, 148 (1958) (housing authorities' exercise of power to make investigations and power of eminent domain is a governmental function).

Although Rhode Island has not addressed the specific issue of whether the operation, maintenance, or repair of drainage systems constitutes governmental or proprietary functions, other jurisdictions have

> "held that the operation and maintenance of drains and sewers and the duty to keep them clear and free of obstruction and repair them are not governmental functions but proprietary functions of the municipality for which it may be held liable for damages caused by its negligence in the same way and to the same extent as an

> individual." 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability § 325 (2012).

For example, Ohio has held that a storm drainage system is a proprietary act because maintaining and repairing "does not involve the creative exercise of political judgment that goes to the heart of government." Williams v. Glouster, No. 10CA58 (Ohio Mar. 20, 2012). A Texas court held that "the decision to install or not to install barriers in front of the open culvert in its storm drainage system was a proprietary function of the [city]" because such work may be done by private contractors. City of Tyler v. Fowler Furniture Co., 831 S.W.2d 399, 402-03 (Tex. App. 1992); see also Phelps v. City of Kansas City, 371 S.W.3d 909, 913 (Mo. Ct. App. 2012) (stating that "the operation of municipal drainage systems is, as a matter of law, a proprietary function"); City of Tallahassee v. Elliott, 326 So. 2d 256, 257 (Fla. Dist. Ct. App. 1975) (stating that the Florida Supreme Court has held that a city's maintenance of a drainage system is a proprietary function, and the city is liable for all torts committed in the maintenance of the system).

Moreover, the modern tendency among states has been to restrict rather than to extend the application of governmental immunity. Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc., 941 P.2d 1321, 1332 (Kan. 1997); Koontz v. City of Winston-Salem, 186 S.E.2d 897, 908 (N.C. 1972); McCorkell v. City of Northfield, 123 N.W.2d 367, 370 (Minn. 1963). "[I]t is now usually accepted that government, instituted to protect and foster the well-being of citizens, should be obligated to make good on the losses it causes by misconduct." Dobbs et al., The Law of Torts § 334 (2d ed. 2011); see also Restatement (Second) Torts § 895C (1979) ("Continued criticism [of immunity of local governments] led to a definite trend in the direction of an extension or expansion of municipal tort liability."). This trend is based

> "on the large expansion of municipal activities, the availability of liability insurance, and the plain injustice of denying relief to an individual injured by the wrongdoing of a municipality. A

> corollary to the tendency of modern authorities to restrict rather than to extend the application of governmental immunity is the rule that in cases of doubtful liability application of the rule should be resolved against the municipality." Pulliam v. City of Greensboro, 407 S.E.2d 567, 570 (N.C. App. 1991).

Recognizing that many other jurisdictions have held that the maintenance of a drainage system is a proprietary function and the general trend to restrict the application of governmental immunity, this Court holds that a proprietary function under § 9-31-3 includes maintaining, operating, or repairing a drainage system. See Williams, No. 10CA58 (Ohio Mar. 20, 2012); City of Tyler, 831 S.W.2d at 402-03; Dobbs, at § 334. Moreover, it is clear that operating, maintaining, or repairing a drainage system is a function that may be performed by a private individual or corporation. See Hous. Auth. of Providence, 713 A.2d at 1263. This function is not "so intertwined with governing that the government is obligated to perform it only by its own agents or employees." See Lepore, 524 A.2d at 575. Therefore, if the jury finds that Defendants were responsible for the operation, maintenance, or repair of the drainage system and Defendant's conduct proximately caused damages to Plaintiff, the statutory damages cap under § 9-31-3 will be inapplicable herein.

III

Conclusion

For the reasons set forth above, this Court grants Plaintiff's motion in limine and holds that operating, maintaining, or repairing a drainage system is a proprietary function. Defendants are precluded at trial from presenting evidence that operating, maintaining, or repairing a drainage system is a governmental function. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**SAO Realty Co., Inc. v. Moore, et al.**
CASE NO:	**PC 13-1125**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 28, 2014**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
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For Defendant:	**Michael A. DeSisto, Esq.** **Timothy J. Chapman, Esq.**