Maryland State Board of Law Examiners

OCTOBER 2020 REMOTE BAR EXAMINATION IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

MPT 1

Representative Good Answer No. 1

Law Offices of Bunke & Huss
600 Center Street, Suite 210
Franklin City, Franklin 3313

Memorandum
To: George Bunke
From: Examinee
Re: Janet Klein Matter

Under the Franklin Tort Claims Act (FTCA), local and state governmental entities are only liable within the strict limitations of the FTCA. Section 41-4. When bringing a claim under the FTCA, there are three requirements that must be satisfied. First, the plaintiff must show a state employee was acting within the scope of her employment, such that her negligence may be imputed to the state, and the negligence occurred on the governmental entity's property. Here, both requirements are satisfied since we are assuming that Mr. Small, the supervisor, was negligent and acting within the scope of his employment, and we have confirmed that NashTel Arena, the fairgrounds, and the surrounding parking lots are owned by the State of Franklin. Second, the plaintiff must show, under Section 41-6, that the entity is not entitled to immunity. Third, the plaintiff must provide either written notice or actual notice to the head of the governmental entity in question. Section 41-16. If these requirements are not satisfied, the governmental entity can successfully file a 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. *Farrington v. Valley County* (Fr. Sup. Ct. 2015).

Under this paradigm, it is likely that the State of Franklin cannot claim sovereign immunity protection for the incident in question, and that Ms. Klein has given actual notice to Mr. Small to satisfy the requirements of Section 41-16.

1. Sovereign Immunity Protection

The legislative purpose of the FTCA is to ensure that local and state governmental entities are only liable within the limitations of the TCA. Under Section 41-6, the plaintiff must prove that she suffered "bodily injury, wrongful death, or property damage[that] is caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building or public park." 41-6 has been interpreted to only refer to "operation" or "maintenance" that results in a condition creating a risk of harm. *Arthur v. Custer County* (Fr. Ct. App. 2008). That is, the employees' "negligent performance of those duties [must] result in a dangerous or defective condition in a public building or public park.. The claim cannot be based solely on negligent supervision." *Rodriguez v. Town of Cottonwood* (Franklin 2018). However, section 41-6 does contemplate waiver where, due to the alleged negligence of public employees, an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government." *Farrington v. Valley County* (Fr. Sup. Ct. 2015). "[T]he Franklin Legislature intended to ensure the safety of the general public by imposing on public employees a duty to exercise reasonable care in maintaining the premises owned and

operated by governmental entities...[there is] no intent to exclude from waiver liability for injures arising from defective or dangerous conditions on the property...*or on the grounds surrounding the buildings*." *Id.* Thus, so long as the defective condition results from the employee's negligent supervision, section 41-6 applies and sovereign immunity is waived. *See, e.g., Williams v. Central School District* (Fr. Sup. Ct. 2008) (failure to properly install windows so they would not fall out); *Schleft v. Board of Education of Terry* (Fr. Sup. Ct. 2010) (electrical systems negligent maintenance led to a fire); *Farrington v. Vally County* (Fr. Sup. Ct. 2015) ("failure to keep residents safe from roaming dogs on the common grounds of a county housing project).

The Court highlighted the distinction between mere negligent supervision and negligent supervision resulting in a dangerous condition in *Rodriguez v. Town of Cottonwood* (Franklin 2018) and *Farrington v. Vally County* (Fr. Sup. Ct. 2015). In *Rodriguez*, the Court considered whether municipality employees' inadequate supervision of children at a playground satisfied the requirements for section 41-6. The Court held that because the playground itself was safe for children, and the slide which contributed to the child's injuries, was safely constructed, the injured child could not recover despite the employees' lack of adequate supervision. *Id.* The Court distinguished this case from its other ones where it waived sovereign immunity principally because the employees' negligent supervision did not create a dangerous condition on the playground itself. *Id.* On the other hand, in *Farrington*, the court considered whether dogs roaming on common grounds of a local governmental housing project created a "dangerous condition" within the meaning of section 41-6. There, the court held that the requirements were satisfied because "'maintenance of any building' includes keeping the grounds of a public housing project safe from unreasonable risk of harm to its residents and invitees," which in theory could include dangerous dogs roaming the grounds. *Id.* The Court remanded to have the lower court determine "[w]hether the Housing Authority exercised reasonable care in maintaining the common grounds...[noting that it] would depend on what it knew or should have known about loose dogs in common areas, whether those dogs should have been foreseen as a threat to the safety of residents and invitees, and the means available to the Housing Authority to control the presence of those dogs." *Id.*

Here, Ms. Klein could likely argue that Mr. Small's negligence--maintaining only one exit--is more analogous to *Farrington* than *Rodriguez* because his negligence created an unsafe condition on the property itself. First, Mr. Small and his team could have opened up a separate exit onto Central Avenue instead of maintaining only Lomas Boulevard. The report notes that the Central Avenue exit is barricaded, but the employees could have lifted the barricades since they were not affixed to the ground. Unlike *Rodriguez*, Mr. Small's negligence here is not due to the *supervision* of traffic leaving the park, it is due to the lack of opening up another exit on the grounds of the parking lot. Thus, Ms. Klein could likely argue that the nexus between Mr. Small's negligence and the structures on the park are distinct from the mere negligent supervision of the employees in *Rodriguez* because the condition that caused the injury in *Rodriguez*--the park itself--was safe and distinct from the employee's negligent supervision. Mr. Small's negligence is much more similar to *Farrington*. Like the dogs roaming the property, the mere one exit on the property created massive traffic congestion and made an accident much more likely to happen. Franklin may argue that it was merely Mr. Small's negligence and failure to supervise that resulted in the dangerous condition, but so long as there is a nexus between his negligence and a dangerous condition on the property, then the requirements of section 41-6 are satisfied.

If Ms. Klein is able to prove that Mr. Small's negligence here caused the defective condition, she still must show that Mr. Smalls "knew or should have known about [the defective condition], whether [the defective condition] should have been foreseen as a threat to the safety of residents and invitees, and the means available to the [defendant to remedy the defective condition]." Ms. Klein likely has the evidence to show all these elements

are satisfied. First, there is ample evidence to suggest that employees had made Mr. Smalls aware of the lack of exits available and that his employees, like Emma Moore, had repeatedly told him to open up the Central Avenue exit. Not only was Mr. Smalls on notice, but it was also foreseeable that there would be a multi-party crash like the one on May 23 because of only one exit being available. With 5,000 vehicles and only one exit, it was possible that an accident could happen regardless of the diligence of the car drivers. Finally, Mr. Smalls had the means to remove the condition by opening up the Central Avenue exit.

2. Notice Requirements

Not only is Ms. Klein able to satisfy the substantive requirements for waiving sovereign immunity under the FTCA, but she likely can satisfy the notice requirements of the statute as well. Under section 41-16(a), plaintiffs must "present the Risk Management Division for claims against the State, to the mayor or a municipality for claims against the municipality, to the superintendent of a school district for claims against the school district, to the county clerk of a county for claims against the county, or to the administrative head of any other local governmental body against such local governmental body, within 90 calendar days after an occurrence giving rise to a claim." Moreover, under section 41-16(b), if notice is not satisfied under the statute, then the Court is deprived of jurisdiction. Notice can be satisfied through two means: written notice or actual notice. "The statute contemplates that the governmental entity must be given notice of a likelihood that litigation may ensue, in order to reasonably alert it to the necessity of investigating the merits of a potential claim against it. *Beck v. City of Poplar* (Fr. Sup. Ct. 2013). That is, within 90 days, the governmental entity must have notice of the nature, time, and location of the accident, and be appraised that the plaintiff will be bringing suit against the governmental entity. *See Beck v. City of Poplar* (Fr. Sup. Ct. 2013)

Here, even though Ms. Klein sent a letter to the Risk Management Division, cc'ing Mr. Smalls, notifying the agency and Mr. Smalls about the nature of the accident and when it occurred, her written notice of the accident was sent more than 90 days after the incident. That is, her letter was dated on August 30, 2020, whereas the incident occurred on May 23, 2020. This is more than the 90 days allotted under the FTCA.

However, Ms. Klein could still argue that Mr. Smalls had still received actual notice of the lawsuit. In *Beck*, the court considered "whether the City traffic department's receipt of an accident report in this case is 'actual notice' under the Act." The Court held that "[a] report can serve as notice 'where the report contains information that puts the governmental entity allegedly at fault on notice that *there is a claim against it*. The statute contemplates that the governmental entity must be given notice of a likelihood that litigation may ensue, in order to reasonably alert it to the necessity of investigating the merits of a potential claim against it." That is, the report must both apprise the government of the details of the accident/condition *and* that the plaintiff will be bringing litigation against the governmental entity. In *Beck*, the plaintiff had failed to apprise the government that he would be bringing litigation. While Mr. Smalls had also received a report shortly after the accident, that report did not, like *Beck*, notify that Ms. Klein would be bringing a lawsuit. However, Ms. Klein could still argue that Mr. Smalls had actual notice of the incident because he admitted to knowing that the incident occurred, and noticed that the members involved in the accident yelled that "the State would pay for this." Mr. Smalls also noted that Ms. Klein herself had threatened to sue the state in his email correspondence with Ernest Thomas. As the Court said in *Solomon v. State of Franklin* (Fr. Sup. Ct. 2012), a phone call is enough that described the facts and told the official litigation would be commenced. If a phone call suffices, it is probable that Ms. Klein could argue that Mr. Smalls was on actual notice the day of the incident itself.

Conclusion:

It is likely that Ms Klein can satisfy the requirements of the FTCA and that Franklin will not be able to claim sovereign immunity. Moreover, it is likely that Franklin was on actual notice of litigation.

Representative Good Answer No. 2

Memorandum

To: George Bunke
From: Examinee
Re: Janet Klein

Statement of Facts

[Omitted per instruction]

Analysis

The State of Franklin Is Not Protected from Liability in This Case by Sovereign Immunity.

The issue is whether the State of Franklin is Protected from Liability by the Torts Claims Act regarding an accident that occurred at the exit of a parking lot it operates, and whether the State was negligent in its operation of the parking lot.

Generally, any state and local governmental entity and any public employee acting within the scope of employment are granted immunity from liability for any tort. § 41-4 Fr. Torts Claims Act. The Statute provides an exception from liability in instances where injuries and property damage caused by negligence of public employees acting within the scope of their duties in operating or maintaining the public building or park. §41-6 Fr. TCA.

Franklin Courts has interpreted this to "refer only to 'operation' or maintenance' that results in a condition creating a risk of harm." *Rodrigues v. Town of Cottonwood* (Fr. Ct. of App. 2018). The statute is designed to protect the safety of the public, and would include areas on the property surrounding a public building. *Farrington v. Valley County* (Franklin 2015). This requires "negligent performance of those duties resulted in a dangerous or defective condition in a public building or public park." *Rodriguez.*

Inadequate supervision is not covered by this exception of the TCA. *Id.* However, when the government is operating and owes a duty to those who are on the property, it can be liable if the government fails to exercise reasonable care when it knew or should have known about a danger in the area, and it has the means available to control the presence of the danger. *Farrington* at 10.

Here, the parking lot falls within the definition of public building or park because the lot is of an area that is in the control of the government, and that property is adjacent to a public building (the Arena). State owned the fairgrounds, the arena, and the surrounding parking lots. The State operates and manages the parking lot of the fairgrounds, as evidenced by the employment of the staff who manage the lot. The state also had control of the exits. This is evidenced by the steel barriers, which could be removed by the employees of the lot if they chose

to do so. Evidenced by one of the employees, Ed Cranston, who informed his supervisor Randy Small that the barriers to the second exit Central Ave should be moved so that the exit can be used.

Furthermore, the government has the means available to control the presence of a danger in the area. Akin to the facts of *Farrington*, where the housing authority knew of dangerous dogs roaming the grounds of the housing complex it operates. Here, the staff at the parking lot knew of the dangerous condition by keeping only one exit open at the parking lot. Different staff have commented that the second exit should be used and that there are safety concerns as a result of the lack of use of it.

The failure to remove the barriers from the second parking lot exit, which led to a safety concern, can be viewed akin to the failure to rectify a prison layout that prohibited guards' ability to monitor the prisoners, which led to limiting the guards' ability to protect prisoners from attacks from other prisoners. *See Rodriguez*, citing *Callaway v. Franklin Dep't of Corrections* (Fr. Ct. App. 2011). The dangerous condition here was not because the staff's negligence in overseeing the premises, but rather, the dangerous condition was that there was only one exit to the parking lot, and the negligence was from the staff's negligence in not removing the dangerous condition.

As a result, it is likely that the state is not protected by sovereign immunity and Ms. Klein will be able to bring her claim against the state.

The State of Franklin Received/Did not Receive Sufficient Notice As Required By The Franklin Torts Claims Act.

The issue is whether the State of Franklin has received notice in accordance to the requirements of §41-16 of the TCA, or "Actual Notice" from Ms. Klein through the reception of the accident report, where Ms. Klein threatened litigation in her statement given to the police at the scene of the accident.

Generally, the plaintiff must provide notice to the listed officials who can receive notice on behalf of the government. A written notice is required to be provided within 90 days after the cause of action, and it must state time, place and circumstance of the loss or injury. §41-16 Fr. TCA.

The August 30 letter sent by certified mail was not sufficient to provide notice to the government, as it falls outside of the 90 days period from the date of the accident (May 23), as requirement of the TCA.

Another way to meet the notice requirement is through actual notice. Id. Actual notice, according to the Franklin court, means the government must be given notice "of a likelihood that litigation may ensue." *Beck v. City of Poplar* (2013). Actual notice must also be given within 90 days. *Id*.

The copy of the traffic collision report may be sufficient for "actual notice." It does fall within the 90 days period. Here, the report describes the accident at the parking lot, including the details of the parties involved and the injury, as well as the statement from Ms. Klein that "The State will pay for this!" in a traffic collision report, which was received by Mr. Small a week after the accident.

Compare the facts of this case with those of *Beck*, where the accident report only listed the date, time, and location of the accident, information about the parties involved, and the fact that the plaintiff suffered an injury. *Beck* at 11. The report in *Beck*, unlike the instance at hand, did not include any information that could lead to the city to believe that it may be subject to litigation.

There is a good argument that Ms. Klein's statements to the police, "The State will pay for this," combined with the admission by Mr. Small in the email that he remembered Ms. Klein was "threatening to sue the State" shows

that Mr. Small, as the government agent, knew of a likelihood that the litigation may ensue due to Ms. Klein's statements.

On the other hand, unlike in *Solomon v. State*, where the plaintiff informed the state that he hired a lawyer to litigate against the state, Ms. Klein's statement at the scene of the accident did not carry the same implication, as she did not state she was hiring a lawyer. It can be argued that Ms. Klein's statement was somewhat vague, and did not inform the state that it may be subject to a lawsuit.

For the reasons stated above, it is more likely than not that the State received Actual Notice, as allowed by the TCA, of the claim from Ms. Klein.