IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NISHEEA GARVIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: N17C-07-104 WCC
	)	
CITY OF WILMINGTON,	)	
	)	
Defendant.	)	

ORDER

On this 8th day of May, 2018, upon consideration of City of Wilmington's ("Defendant" or the "City") Motion to Dismiss, and Nisheea Garvin's ("Plaintiff") Response on behalf of her minor daughter Donyhla Garvin-Turner ("Donyhla"), it appears to the Court that:

1. On or about July 29, 2015, Donyhla was a visitor at William Judy Johnson Memorial Park (the "Park") located in Wilmington, Delaware.
2. Plaintiff claims while visiting the Park she was injured when she was struck by a large metal portion of the fencing that encompassed the Park (the "Accident").
3. Plaintiff filed a Complaint on July 13, 2017, alleging that the Accident caused a fracture of Donyhla's left leg with residual disfigurement, which could be permanent. In addition to the physical injuries, Donyhla has suffered emotional injuries from the permanent nature of her injuries.

4. Plaintiff filed suit against the City of Wilmington, Wilmington Parks Network, Friends of Wilmington Parks, Inc., and The West End Neighborhood House Inc. (jointly "the Defendants"). There appears to be no dispute that the City of Wilmington is the owner and operator of the Park.

5. Plaintiff alleges all Defendants "by and through their agents, servants, and employees, were negligent, grossly negligent, wanton, and/or intentional in that they:

> (a) Failed to adequately inspect the Premises for dangerous conditions existing on the Premises representing a hazard to invitees such as plaintiff; (b) Failed to adequately repair and/or remedy dangerous conditions existing on the Premises representing a hazard to invitees such as plaintiff; (c) Failed to adequately warn invitees such as plaintiff of the existence of dangerous conditions existing on the Premises representing a hazard to invitees such as plaintiff; and (d) Allowed a condition which was hazardous and/or dangerous to invitees such as plaintiff to exist on the Premises; and (e) Were otherwise negligent, grossly negligent, and/or committed acts which were wanton and/or intentional, as will be determined in discovery.[1]

6. Plaintiff seeks "damages and compensation for medical expenses, future medical expenses, diminution of future income, loss of future wages, loss and diminution of future earning capacity, emotional distress, permanency, pain and suffering, loss of services, loss of companionship, the costs of this action,

[1] Compl. ¶ 10.

pre-judgment interest, post judgment interest and any other relief which this Court may deem proper" as well as punitive damages.[2]

7. In response to Plaintiff's Complaint, Defendant, the City of Wilmington, filed on August 24, 2017, the present motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. On February 28, 2018, the parties stipulated that all claims against Defendants, Friends of Wilmington Parks, Inc. and The West End Neighborhood House, Inc., were dismissed without prejudice.

8. "A motion to dismiss for failure to state a claim upon which relief can be granted made pursuant to Superior Court Rule 12(b)(6) will not be granted if the plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[3] All well-pled allegations in the complaint must be accepted as true,[4] and every reasonable factual inference will be drawn in favor of the plaintiff.[5]

9. Defendant urges the Court to grant its Motion to Dismiss because the City of Wilmington is immune from tort suits pursuant to the County and Municipal Torts Claims Act ("the Act"). The Act states "[e]xcept as otherwise expressly

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[2] *Id.* at ¶ 17.
[3] *Martin v. Widener Univ. Sch. of Law*, 1992 WL 153540, at *2 (Del. Super. Ct. June 4, 1992) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978)).
[4] *Id.*
[5] *Master Mechanical Inc. v. Shoal Construction, Inc.*, 2009 WL 1515591, at *1 (Del. Super. Ct. May 29, 2009).

provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages."[6]

There are however three exceptions to immunity under the Act.[7] They are:

> (1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.
> (2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation.
> (3) In the sudden and accidental discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines and toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.[8]

10. The Plaintiff argues that 4012(1) & (2) are the most applicable to this case. Plaintiff asserts the fence that caused the Accident, like the chain in *Nagy v. New Castle County*, can be defined as "equipment" under Section 4012(1).[9] In *Nagy*, the court held the definition of equipment to be broad and to mean "anything kept, furnished, or provided for a specific purpose."[10] Here Plaintiff contends the fence had a specific purpose, to keep the public from entering

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[6] 10 Del. C. § 4011.
[7] *Id.* § 4012(1)–(3).
[8] 10 Del. C. § 4012(1)–(3).
[9] Pl.'s Resp. to Def.'s Mot. to Dismiss at 3.
[10] *Nagy v. New Castle County*, 1984 Del. Super. LEXIS 632, at *2 (Del. Super. Ct. Mar. 26, 1984).

the Park during times when the park normally would be closed. Therefore, the City of Wilmington does not have immunity for its negligence.[11]

11. Plaintiff also asserts that 4012(2) could be applicable to this case, arguing that the fence which fell on the Plaintiff was appurtenant to a public building.[12] It is alleged there are two building structures within the Park and neither of the two structures primary functions are known but Plaintiff urges the Court to allow discovery to determine if the exception from liability is applicable.

12. The Defendant in its Motion to Dismiss, argues that if any exception could apply, it would be the second exception 4012(2). They agree that the fence which fell on Donyhla could be included under the language of "buildings, structures, facilities or equipment."[13] Defendant, however, points out that because the Park is used entirely for outdoor recreation, the exclusion within 4012(2) prevents a waiver of immunity.[14]

13. While the Court sympathizes with the Plaintiff, whose daughter Donyhla appears to have significant injuries, it agrees with the Defendant that the City is immune from liability under Section 4011 for both of Plaintiff's gross negligence and negligence claims. Sections 4010-4012 of the County and

[11] Pl.'s Supp. Resp. to Def.'s Mot. to Dismiss at 4.
[12] *Id.* at 3.
[13] Def.'s Mot. to Dismiss at 4.
[14] *Id.* at 5.

Municipal Torts Claim Act, is unlike the State Torts Claim Act and does not blatantly bar immunity for gross negligence.[15] In fact, only a subsection of Section 4011 refuses to extend immunity for wanton negligence or willful intent.[16] Similarly, Section 4012 only divests the City of immunity for negligence if one of the three exceptions are applicable,[17] and the Court believes that neither Sections 4012(1) nor 4012(2) apply.

14. The Delaware Supreme Court just five years after *Nagy*, held that:

> the equipment exception is thus limited to those items of unusual design or size, such as motor vehicles, aircraft or electric transmission lines, which in their normal use or application pose a particular hazard to members of the public. We do not believe that the General Assembly intended to extend to the term "equipment" or "special mobile equipment" so broad a definition as to include items of incidental use which, in themselves, present no such risk.[18]

15. Following, the Delaware Supreme Court in *Sadler*, this Court finds that to include this fence under the definition of equipment would improperly "include items of incidental use which, in themselves, present no such risk."

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[15] *Burns v. United Services Auto. Ass'n Properties Fund, Inc.*, 1991 WL 53399, at *4 (Del. Super. Ct. Mar. 14, 1991) ("Under that Act, the State is given immunity where certain elements are present, including, "[t]he act or omission complained of was done without gross or wanton negligence." 10 Del. C. § 4001(3). That is, where the State, or one of its instrumentalities, is involved, there is no immunity for a gross or wanton negligent act. The Burnses seek to impute this same exception to county and municipal actions. However, no such explicit exception is found in §§ 4010-4012.").

[16] "An employee may be personally liable for acts or omissions causing property damage, bodily injury or death in instances in which the governmental entity is immune under this section, but only for those acts which were not within the scope of employment or which were performed with wanton negligence or willful and malicious intent." 10 Del. C. § 4011(c).

[17] *See Burns*, 1991 WL 53399, at *4.

[18] *Sadler v. New Castle County*, 565 A.2d 917, 923 (Del. 1989).

16. Additionally, the Court finds that the place where Donyhla was injured is a facility "designed for use primarily in connection with public outdoor recreation."[19] This property is designed primarily and used as a public park, and meets the definition of a public outdoor recreation area. The fence is used to help facilitate such public recreation. Thus, reading Sections 4011 and 4012 together, the property falls within the limitation set forth in Section 4012 and the immunity afforded to the City remains.

17. For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

[19] *See Fidance v. City of Wilmington*, 2017 WL 4334153, at *3 (Del. Super. Ct. Sept. 29, 2017).