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MARIBETH BLONSKI *v.* METROPOLITAN DISTRICT COMMISSION
(SC 18809)

Rogers, C. J., and Norcott, Palmer, Eveleigh and McDonald, Js.

Argued February 13—officially released July 16, 2013

Charles L. Howard, with whom, on the brief, was *Sheila A. Huddleston*, for the defendant (appellant).

Steven D. Ecker, with whom was *M. Caitlin S. Anderson*, for the plaintiff (appellee).

Opinion

ROGERS, C. J. This appeal requires us to consider the scope of governmental immunity that is afforded to a political subdivision of the state that has been sued for allegedly negligent conduct that is alleged to be connected to the proprietary function of operating a water supply company. After the plaintiff, Maribeth Blonski, was injured when she rode her bicycle into a pipe gate on property maintained by the defendant, the Metropolitan District Commission, she brought this action claiming that the defendant had negligently maintained the gate in an unsafe and dangerous condition. The jury returned a verdict for the plaintiff and the trial court rendered judgment accordingly. The questions that we must answer in this appeal[1] are: (1) whether the defendant was immune from liability pursuant to General Statutes § 52-557n (a) (2) (B)[2] because the maintenance of the gate to control the recreational use of the property was a governmental function requiring the exercise of discretion or, instead, the defendant was liable under § 52-557n (a) (1) (B) because its conduct was connected to its proprietary function of operating a water supply company; and (2) if the defendant was not entitled to immunity under § 52-557n (a) (2) (B), whether it is entitled to immunity pursuant to the Recreational Land Use Act (act), General Statutes (Rev. to 2001) § 52-557f et seq.[3] We conclude that the defendant was liable pursuant to § 52-557n (a) (1) (B) because the maintenance of the gate was inextricably linked to a proprietary function, and that it is not entitled to immunity pursuant to the act. Accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant is a specially chartered municipal corporation whose duties include supplying water to residents of certain towns (district).[4] To this end, the defendant maintains several water reservoirs and water treatment facilities, including a property in West Hartford consisting of 3000 acres of land and five reservoirs. The defendant allows the public to use the property for recreational activities, including walking, running and biking on the numerous trails that run through the property.

In 1976, after experiencing recurring problems on the West Hartford property, including vandalism, theft, litter, water contamination, the sale and use of drugs and alcohol, and frequent motor vehicle accidents, the defendant's board voted to close the roads on the property to public motor vehicles. The defendant installed two gates blocking access to the property's road system from the public parking lot. Each gate consisted of a three inch diameter pipe that was attached at one end to a hinge on a vertical post at the side of the road. When closed, the other end of the pipe could be locked to a vertical post on the other side of the road. The

pipes, which were painted yellow, were suspended approximately three and one-half feet from the ground.

The defendant's policy was to keep the gates closed, but workers doing maintenance work on the reservoirs occasionally left them open. After the terrorist attacks on September 11, 2001, the defendant made a decision to keep the gates closed at all times to protect the water supply from any attempt to contaminate it. On September 28, 2001, the defendant's manager of water treatment sent an e-mail to various personnel directing them to keep the gates closed and locked until further notice.

One of the gates was located at an entrance to Red Road, a paved road that ran through the West Hartford property in a three mile loop. There were markings on Red Road establishing a lane for bicyclists and indicating the direction in which the bicyclists were supposed to travel. On May 16, 2002, the plaintiff went to the reservoir property to videotape a segment on mountain biking for a cable television program that she hosted. After taping the segment, she and a friend went for a bicycle ride. As they headed back to the parking lot at the end of their ride, the plaintiff entered onto Red Road. She was riding with her head down at approximately twenty to thirty miles per hour, in the direction of the closed gate and against the designated direction for bicycle traffic. The plaintiff testified that the pipe gate suddenly appeared in front of her "out of nowhere," and she attempted to slide underneath it. She was unable to do so and struck her head on the pipe, thereby incurring severe injuries to her cervical spine, including a burst fracture of the last cervical vertebrae, as well as other injuries. As a result of her injuries, the plaintiff was required to undergo numerous surgeries and extensive physical rehabilitation. She suffers from chronic pain, difficulty breathing, a permanent disability in her neck and other ailments.

The plaintiff brought this action alleging that the defendant had negligently maintained Red Road and the gate in a dangerous and defective condition. Specifically, she alleged that the defendant had: "closed [the] pipe gate across [Red Road] in a manner that was unsafe"; "failed to erect barriers that would close the path to vehicular traffic but allow bikes to pass safely through"; and "failed to properly warn of the closure of the [Red Road] pipe gate by signage on the path and markings on the roadway." The defendant asserted as a special defense that the plaintiff's claims were barred by § 52-557n (a) (2) (B) and General Statutes § 52-557g. After the plaintiff presented her case at trial, the defendant filed a motion for a directed verdict claiming that she had failed to prove that the defendant's actions were connected to its proprietary function and that the defendant therefore could not be held liable under § 52-557n (a) (2) (B). In the alternative, the defendant

claimed that, if it was acting in its proprietary function, it was entitled to immunity under § 52-557g. The trial court denied the defendant's motion. Thereafter, the jury found in interrogatories that the defendant had been negligent and that its negligence had an "inherently close connection" to its proprietary function of supplying water to residents of the district. It also found that the plaintiff was 30 percent comparatively negligent. The jury awarded economic damages of $150,000 and noneconomic damages of $2.75 million.[5] The defendant then filed a motion to set aside the verdict, again claiming that there was insufficient evidence to submit to the jury the question of whether the defendant's conduct was connected to its proprietary function and, in the alternative, that the trial court improperly failed to instruct the jury that the defendant was immune pursuant to § 52-557g or to submit that question to the jury. The trial court denied the motion and rendered judgment for the plaintiff. This appeal followed.

The defendant claims that the trial court improperly denied its motions for a directed verdict and to set aside the verdict because no reasonable juror could have found that the alleged negligence had an " 'inherently close connection' " to the defendant's proprietary function of supplying water. See *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 56, 881 A.3d 194 (2005) (to establish that political subdivision of state is liable under § 52-557n [a] [1] [B], plaintiff must prove "an *inextricable link* or inherently close connection between the plaintiff's *specific* allegations of negligence and the defendants' operation of a water utility" [emphasis in original]). The defendant further claims that, if this court rejects its claim that, as a matter of law, its negligent conduct was not connected to its proprietary function for purposes of § 52-557n (a) (1) (B), it is entitled to immunity under the act. We address these claims in turn.

At the outset, we set forth the applicable standard of review. "The standards for appellate review of a directed verdict are well settled. Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision to direct a verdict in favor of a defendant we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.) *Coughlin* v. *Anderson*, 270 Conn. 487, 497–98, 853 A.2d 460 (2004).

We next turn to the principles governing the availabil-

ity of a governmental immunity defense for political subdivisions of the state who engage in proprietary activities. This court held in *Considine* v. *Waterbury*, 279 Conn. 830, 844, 905 A.2d 70 (2006), that "§ 52-557n (a) (1) (B) codifies the common-law rule that municipalities are liable for their negligent acts committed in their proprietary capacity . . . ." "It is well established that a proprietary function is an act done in the management of [a political subdivision's] property or rights for its own corporate benefit or profit and that of its inhabitants . . . . The . . . operation of a water utility for corporate profit is a proprietary function."[6] (Citations omitted; internal quotation marks omitted.) *Martel* v. *Metropolitan District Commission*, supra, 275 Conn. 53.

In *Martel*, the plaintiff was injured while mountain biking on a property that the defendants owned and/or operated, but did not use in connection with its water supply operation. Id., 41–42. This court held that the defendants were entitled to immunity from the plaintiff's claim alleging negligent maintenance of the biking trail because that conduct was unconnected to the defendants' proprietary function. Id., 53. In *Elliott* v. *Waterbury*, 245 Conn. 385, 389, 715 A.2d 27 (1998), the plaintiff's decedent was killed by a hunter while jogging on a watershed property owned and operated by the defendant city. This court held that the defendant was immune from a claim that it had been negligent in opening watershed lands to hunting because that conduct was unconnected to the defendant's proprietary function. Id., 413. In both *Martel* and *Elliott*, however, this court recognized that a governmental entity may be held liable for its allegedly tortious conduct when that conduct is "inextricably linked to a proprietary function." *Martel* v. *Metropolitan District Commission*, supra, 275 Conn. 53; id., 56 (governmental entity may be held liable when there is "*inextricable link* or inherently close connection between the plaintiff's *specific* allegations of negligence and the defendants' operation of a water utility" [emphasis in original]); *Elliott* v. *Waterbury*, supra, 413 (noting that, in previous cases, governmental entities were held liable when "allegedly tortious conduct . . . was inextricably linked to the operation of the water utility for corporate gain"); see also *Considine* v. *Waterbury*, supra, 279 Conn. 852 (when defendant city leased clubhouse and restaurant to third party for its own corporate profit, defendant was not entitled to immunity for negligence claim by restaurant customer who was injured when he fell through window panel because maintenance of panel was connected to proprietary function); *Carta* v. *Norwalk*, 108 Conn. 697, 699, 701–702, 145 A. 158 (1929) (when defendant city rented beach property to third party for its own corporate profit, defendant was not entitled to immunity for claim arising from death of person who was fatally injured when he dove into water and struck his head on sub-

merged concrete pier); *Richmond* v. *Norwich*, 96 Conn. 582, 588, 115 A. 11 (1921) (defendant city operating water utility was not entitled to immunity for claim by plaintiff who sought recovery for injuries suffered when she was shot by security guard defendant had hired to protect reservoir, which had been closed to public, from saboteurs); *Hourigan* v. *Norwich*, 77 Conn. 358, 366–67, 59 A. 487 (1904) (defendant city was not entitled to immunity for claim that it had negligently conducted work on reservoir, resulting in death of workman).

In the present case, the jury's finding that the defendant's conduct in installing and maintaining the closed pipe gate that injured the plaintiff was inextricably linked to the defendant's proprietary water supply operation was supported by the evidence that the purpose of the gate was to protect the water supply.[7] Accordingly, we conclude that the defendant may be held liable for its tortious conduct pursuant to § 52-557n (a) (1) (B).

In support of its claim to the contrary, the defendant points out that the provision of free recreational opportunities by a governmental entity historically has been considered a governmental function, not a proprietary function. See *Hannon* v. *Waterbury*, 106 Conn. 13, 16, 136 A. 876 (1927); *Epstein* v. *New Haven*, 104 Conn. 283, 284, 132 A. 467 (1926). The defendant contends in its brief that, under *Martel* and *Elliott*, as a matter of law, "allegations of negligence relating to the free recreational use of municipal water company property [do] *not* have an inherently close relationship to the business of water supply," and, therefore, public water utilities cannot be held liable for any negligence relating to recreational use of the property. (Emphasis in original.) The defendant also points out that "the plaintiff's claims do not relate to the *fact* that the road was closed to motor vehicle traffic, or even to the *purpose* for the closure; they relate to the *manner* in which the closure was accomplished. [Specifically] [t]he plaintiff alleges that the gate was improperly designed for use on a bicycle path, and that the [defendant] failed to warn cyclists going the wrong way of the gate's existence and closure." (Emphasis in original.) The defendant contends that it is entitled to immunity because, although it installed and maintained the gate to protect the water supply, the plaintiff's allegations of negligence "[relate] exclusively to the [defendant's] negligence in providing a safe environment for recreational use and, more specifically, for cyclists," not its negligence in protecting the water supply operation itself.

Although the defendant's reasoning is not entirely clear to us, it appears to be arguing that a governmental entity *cannot* be held liable for its allegedly negligent conduct when the conduct was inextricably linked to a governmental function, such as providing free recreational opportunities, even if the conduct also had a proprietary purpose. We disagree. As we have indicated,

this court held in *Considine* v. *Waterbury*, supra, 279 Conn. 844, that § 52-557n (a) (1) (B) was "an attempt to codify municipal common-law liability for acts performed in a proprietary capacity." We also recognized in *Considine* that, when a municipality is acting in its proprietary function, the general rule is that it "is liable to the same extent as in the case of private corporations or individuals . . . ."[8] (Internal quotation marks omitted.) Id., 843, quoting 18 E. McQuillin, Municipal Corporations (3d Ed. Rev. 2003) § 53.23, p. 383. The court in *Martel* and *Elliott* recognized a narrow exception to this rule in cases where the governmental entity was engaged in both a governmental function and a proprietary function *and* the plaintiff failed to establish *any* inherent connection between the allegedly tortious conduct *and the proprietary function*. *Martel* v. *Metropolitan District Commission*, supra, 275 Conn. 56 (when defendants did not maintain property as part of water supply operation and opened property to public for hunting and fishing without charging fee, court failed "to discern . . . how the defendants' allegedly negligent supervision and maintenance of the trail on which the plaintiff was injured was inextricably linked to the [Metropolitan District Commission's (commission) allegedly proprietary] purpose in acquiring the property" to develop future water supply); id., 55 n.13 (even assuming that commission was engaged in proprietary function of preserving water supply, "plaintiff failed to produce any evidence demonstrating the existence of an inextricable link between the commission's allegedly negligent supervision and maintenance of the trail on which the plaintiff was injured and the commission's proprietary maintenance of the property for purposes of preserving water purity"); *Elliott* v. *Waterbury*, supra, 245 Conn. 413 ("defendants' allegedly tortious conduct—opening the watershed land to hunting, and the manner in which it regulated that activity—is unconnected to its operation of a water utility").[9]

We decline the defendant's invitation to expand this exception to include situations in which the allegedly tortious conduct was also linked to a proprietary function.[10] When a governmental entity engages in conduct for its own corporate benefit in a manner that poses an unreasonable risk of harm to others, we can perceive of no reason why it should not be held responsible for all of the consequences of that conduct, just as a private person would be. Indeed, as the plaintiff points out, failing to do so would lead to anomalies. For example, the defendant does not appear to dispute that, if, instead of a recreational user, a person who was involved with its proprietary water supply operation had been injured as the result of its negligent maintenance of the gate, the defendant would be liable to that person. Thus, the defendant implicitly contends that its liability for proprietary activities performed in a negligent manner depends on the nature of the *injured person's* activity.

We are aware of no authority, however, for that proposition. Rather, § 52-557n (a) (1) (B) focuses on the nature of the *defendant's* activity. See General Statutes § 52-557n (a) (1) (B) (political subdivision of state is liable for damages caused by "negligence in the performance of *functions from which the political subdivision derives a special corporate profit or pecuniary benefit*" [emphasis added]).

In response to the plaintiff's argument that our focus should be on the nature of the defendant's activity, not the plaintiff's conduct, the defendant contends that the plaintiff's "allegations of negligence relate solely to the use of the property for bicycling" because she claimed that the gate was improperly designed for bicycle traffic. It contends that "[t]he [proprietary] *reason* for closing the gate, under these circumstances, is incidental" and, therefore, is not inextricably linked to the allegedly tortious conduct. (Emphasis in original.) Presumably, however, the defendant would have made this same argument if the plaintiff had been injured by a water pipe that was entirely unconnected to the use of the property for recreational purposes. Thus, the defendant is effectively claiming that *no* allegation of tortious conduct made by a person using the property for recreational purposes could be inextricably linked to the defendant's proprietary function. We are not persuaded. If the legislature had wanted to carve out claims by recreational users of public lands from the scope of § 52-557n (a) (1) (B), it knew how to do so. See General Statutes § 52-557n (b) (enumerating specific exceptions to liability imposed by § 52-557n [a]); General Statutes § 52-557g (exceptions to liability of owner of land available to public for recreation); General Statutes § 25-43c (e) (exceptions to immunity for liability in cases of wilful or wanton conduct by water companies that issued permits and charged fees for issuance for such permits to reimburse them for cost of fishing and other recreational activities in public water supply storages and reservoirs).[11] Accordingly, we reject the defendant's claim that § 52-557n (a) (1) (B) does not constitute a waiver of immunity to the plaintiff's claim, and we conclude that the trial court properly denied the defendant's motions for a directed verdict and to set aside the verdict on this ground.

We turn next to the defendant's alternate claim that, if its installation and maintenance of the gate was a proprietary function for purposes of § 52-557n (a) (1) (B), it must be entitled to immunity pursuant to the act. Section 52-557g (a) provides in relevant part that "an owner of land who makes all or any part of the land available to the public without charge, rent, fee or other commercial service for recreational purposes owes no duty of care to keep the land, or the part thereof so made available, safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on the

land to persons entering for recreational purposes."

The defendant acknowledges that, in *Conway* v. *Wilton*, 238 Conn. 653, 680, 680 A.2d 242 (1996), a majority of this court held that "municipalities [and, by extension, other political subdivisions of the state] are not 'owners' within the act," but the act grants immunity exclusively to private landowners.[12] The defendant contends, however, that, notwithstanding this court's decision in *Conway*, § 52-557g *does* provide immunity to governmental entities that are engaged in proprietary activities because they are the equivalent of private entities under those circumstances. In support of this claim, it cites numerous cases and authorities for the general proposition that, when a municipality is acting pursuant to its proprietary function, it is effectively functioning as a private entity and, therefore, is liable for negligence claims in the same manner, *and only to the same extent*, that a private person would be.[13] Accordingly, the defendant argues, because private entities are immune under the act from negligence claims arising from the free recreational use of their land by members of the public, it also is entitled to immunity from such claims.

We agree that § 52-557n (a) (1) (B) incorporates the general common-law principle that political subdivisions of the state acting in their proprietary capacity are liable only to the extent that private persons would be under similar circumstances.[14] See *Considine* v. *Waterbury*, supra, 279 Conn. 844 (§ 52-557n [a] [1] [B] "was an attempt to codify municipal common-law liability for acts performed in a proprietary capacity"); id., 843 (recognizing that, under common law, municipality acting in proprietary capacity is liable to same extent as private persons would be under same circumstances).[15] Thus, we recognize, for example, that where a private person could not be held liable for a negligence claim under the common law because the injured person was trespassing, a governmental entity acting in a proprietary capacity also could not be held liable under § 52-557n (a) (1) (B). See *Fiel* v. *Racine*, 203 Wis. 149, 151, 233 N.W. 611 (1930); see also *Caman* v. *Stamford*, 746 F. Supp. 248, 249 (D. Conn. 1990) ("[e]nactment of § 52-557n did not create any new liability for municipalities which did not exist in the common law"). We reject, however, the defendant's attempt to graft this general principle onto the specific provisions of § 52-557g. Neither the defendant nor any of the authorities that it cites has explained why the general common-law principle that political subdivisions of the state acting in their proprietary capacity are liable to the same extent that private persons would be under similar circumstances should trump a specific statute in which the legislature granted immunity *exclusively* to private persons because it concluded that there were good reasons to treat governmental entities and private persons differently in that specific context.[16]

We recognize that not all of the reasons for excluding governmental entities from the act that we cited in *Conway* are equally compelling when applied to property that is owned and operated by a governmental entity in its proprietary capacity. For example, this court stated in *Conway* that, because municipalities are already engaged in the governmental function "of providing parks, pools, ball fields, etcetera, the legislature had less incentive to dangle the carrot of immunity to encourage municipalities" to open their lands to the public. *Conway* v. *Wilton*, supra, 238 Conn. 671–72. When a governmental entity is running a proprietary operation such as a water supply company, however, it is not *required* to open the property to the public for recreational purposes, and providing immunity *would* provide an incentive for it to do so. Nevertheless, nothing in *Conway* suggests that the question of whether the legislature intended to afford immunity to a governmental landowner depends on whether the governmental entity was acting in a governmental or a proprietary capacity. Rather, this court stated categorically that the legislature had provided that "municipalities [and, by extension, other political subdivisions of the state] are not 'owners' within the act." Id., 680. The defendant has not asked this court to overrule *Conway*, and we have no authority to create a judicial exception to the legislature's exclusion of political subdivisions of the state from the act in cases in which the governmental entity is acting in its proprietary capacity. See *Gonzalez* v. *Surgeon*, 284 Conn. 554, 569, 937 A.2d 13 (2007) (this court cannot substitute its views for those of legislature or read into statute provision that legislature could have enacted but did not).

Moreover, the legislature expressed no disagreement with this court's conclusion in *Conway* for fifteen years. See *State* v. *Canady*, 297 Conn. 322, 333, 998 A.2d 1135 (2010) ("we . . . presume that the legislature is aware of [this court's] interpretation of a statute, and that its subsequent nonaction may be understood as a validation of that interpretation" [internal quotation marks omitted]). Indeed, it was not until after the trial court rendered its judgment in the present case that the legislature saw fit to amend § 52-557f to apply to political subdivisions of the state. See Public Acts 2011, No. 11-211 (P.A. 11-211);[17] Conn. Joint Standing Committee Hearings, Judiciary, Pt. 19, 2011 Sess., pp. 6137–38, remarks of Robert Moore on behalf of Metropolitan District Commission (present case "brought a renewed focus to the liability of all public entities . . . for injuries to individuals who use their land" that was "not limited to" efforts that led to drafting of legislation that was enacted as P.A. 11-211). During the committee hearings on the proposed legislation, Attorney Steven D. Ecker, who represents the plaintiff in this case, testified that, in his opinion, the legislation was unnecessary because municipalities are already immune to many

claims of negligence arising from the recreational use of their lands pursuant to § 52-557n. Conn. Joint Standing Committee Hearings, supra, pp. 6188–89. He explained that the defendant had been found liable to the plaintiff in the present case because that statute does not provide for immunity when a municipality is acting in its proprietary capacity. Id., p. 6192. Ecker also stated that the defendant in the present case had attempted to plead immunity under § 52-557n. Id., p. 6195. In response, Representative Arthur J. O'Neill pointed out that "for a long time the recreational use statute hasn't applied to entities such as" the defendant. Id. It is clear, therefore, that the legislature in 2011 did not believe that the act provided immunity to a political subdivision of the state that is engaged in a proprietary function and that opens its lands to a recreational user who is injured as the result of the entity's proprietary activities. Indeed, that was the very gap in the statute that the legislature was attempting to fill by enacting P.A. 11-211. See *Bhinder* v. *Sun Co.*, 263 Conn. 358, 368, 819 A.2d 822 (2003) ("[w]e presume that, in enacting a statute, the legislature intended a change in existing law" [internal quotation marks omitted]).[18] Moreover, as we have indicated, there is nothing in the legislative history of the original act that would lead to the conclusion that the legislature originally had a different understanding. See *Conway* v. *Wilton*, supra, 238 Conn. 666–71 (legislative history of act indicates that legislature intended to provide protection only to private landowners).

We conclude, therefore, that, although, under § 52-557n (a) (1) (B), the liability of a governmental entity acting in its proprietary capacity generally is no greater than that of a private person under similar circumstances, because § 52-557g granted immunity from negligence claims involving the free recreational use of land exclusively to private persons, not to political subdivisions of the state, the more general principle does not apply. Accordingly, we conclude that the trial court properly determined that the defendant was not entitled to immunity from the plaintiff's claim pursuant to § 52-557g, and that it properly denied the defendant's motions for a directed verdict and to set aside the verdict on this ground.[19]

The judgment is affirmed.

In this opinion PALMER, EVELEIGH and McDONALD, Js., concurred.

[1] The defendant appealed from the judgment of the trial court to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] General Statutes § 52-557n (a) provides: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages

resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

[3] General Statutes (Rev. to 2001) § 52-557f provides: "As used in sections 52-557f to 52-557i, inclusive:

"(1) 'Charge' means the admission price or fee asked in return for invitation or permission to enter or go upon the land;

"(2) 'Land' means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty;

"(3) 'Owner' means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises;

"(4) 'Recreational purpose' includes, but is not limited to, any of the following, or any combination thereof: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, snow skiing, ice skating, sledding, hang gliding, sport parachuting, hot air ballooning and viewing or enjoying historical, archaeological, scenic or scientific sites."

General Statutes § 52-557g provides: "(a) Except as provided in section 52-557h, an owner of land who makes all or any part of the land available to the public without charge, rent, fee or other commercial service for recreational purposes owes no duty of care to keep the land, or the part thereof so made available, safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on the land to persons entering for recreational purposes.

"(b) Except as provided in section 52-557h, an owner of land who, either directly or indirectly, invites or permits without charge, rent, fee or other commercial service any person to use the land, or part thereof, for recreational purposes does not thereby: (1) Make any representation that the premises are safe for any purpose; (2) confer upon the person who enters or uses the land for recreational purposes the legal status of an invitee or licensee to whom a duty of care is owed; or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of the owner.

"(c) Unless otherwise agreed in writing, the provisions of subsections (a) and (b) of this section shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision thereof for recreational purposes."

[4] See 20 Spec. Acts 1204, No. 511 (1929).

[5] The parties later stipulated that the $150,000 award should be reduced to $9000 and the $2.75 million award should be reduced to $1.925 million to account for amounts received from collateral sources and the jury's finding of 30 percent comparative negligence.

[6] The legal framework that we are compelled to apply in the present case calls for two observations. In *Considine* v. *Waterbury*, supra, 279 Conn. 845, this court acknowledged that Connecticut is in the minority of jurisdictions that continue to adhere to the governmental/proprietary distinction for purposes of governmental immunity, while at the same time recognizing "that the distinction between . . . [these] functions has been criticized as being illusory, elusive, arbitrary, unworkable and a quagmire. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 65, 76 S. Ct. 122, 100 L. Ed. 48 (1955) (calling governmental-proprietary distinction 'quagmire that has long plagued the law of municipal corporations'); *Tadjer* v. *Montgomery County*, 300 Md. 539, 546, 479 A.2d 1321 (1984) (remarking that 'distinction between governmental and proprietary functions is sometimes illusory in practice'); *Hudson* v. *East Montpelier*, 161 Vt. 168, 177 n.3, 638 A.2d 561 (1993) (noting that its application of distinction has led to arbitrary results); 18 E. McQuillin, [Municipal Corporations (3d Ed. Rev. 2003)] § 53.02.10, p. 148 (calling modern distinction between municipality's dual functions elusive); W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 131, p. 1054 (observing that distinction 'is basically unworkable')." The problems inherent in making this distinction are exacerbated in dual function cases like the present one. Because the legislature has codified this common-law distinction; *Considine* v. *Waterbury*, supra, 844; and has thus far not deemed it appropriate to revisit the issue, we are bound to apply it.

In addition, we observe that the defendant appears to have adopted the plaintiff's dual characterization of its functions—those in relation to its supply of water being proprietary and those in relation to its provision of recreational space being governmental—although it disagrees as to which function the plaintiff's allegations of negligence relate. The defendant therefore has neither challenged this court's prior decisions that the supply of water is proprietary whenever revenues are generated thereby; see *Martel* v. *Metropolitan District Commission*, supra, 275 Conn. 53; *Abbott* v. *Bristol*, 167 Conn. 143, 150, 355 A.2d 68 (1974); *Hourigan* v. *Norwich*, 77 Conn. 358, 364–66, 59 A. 487 (1904); nor asserted that the allegations in the present case relate to its statutory duty to construct and maintain public roads under the special act that chartered the defendant. See 20 Spec. Acts 1204, No. 511, § 2 (1929). Because the defendant did not raise any such claims, we do not have those issues before us and do not speculate whether the outcome of this case would have been different if they were. The defendant also does not dispute that, when a political subdivision of the state is acting in its proprietary capacity, it is not entitled to immunity pursuant to § 52-557n (a) (2) (B) for acts that require the exercise of discretion. See *Considine* v. *Waterbury*, supra, 279 Conn. 854. The defendant contends only that its negligent activity was not connected with its proprietary function.

[7] Although the evidence also would support a finding that the purpose of the pipe gates was to reduce the incidents of vandalism, theft, litter, sale and use of drugs and alcohol, and the motor vehicle accidents that had occurred when the roads on the reservoir property were open to public motor vehicle traffic, the jury reasonably could have concluded that the defendant installed the gates because these occurrences interfered with the defendant's operation of the water supply company.

[8] There is no dispute in this case that, before the legislature enacted the act, a private person would have been liable for the alleged tortious conduct in the present case. See *Conway* v. *Wilton*, 238 Conn. 653, 671, 680 A.2d 242 (1996) ("Historically, the common law places a successively greater duty on the landowner to visitors, depending on whether the visitor is a trespasser, a licensee, or an invitee. . . . The act drastically alters these principles . . . by shifting the burden of liability for injuries from the land occupier, who may be in a better position to prevent accidents, to the entrant, regardless of his or her classification at common law . . . ." [Citations omitted; internal quotation marks omitted.]). As we discuss later in this opinion, although the act eliminated this liability for private persons who open their lands for free recreational use, it did not eliminate it for governmental entities that do so.

[9] The cases relied on by the plaintiff in support of her position that the defendant may be held liable are of little guidance on the question of whether a governmental entity may be held liable when the allegedly tortious conduct is linked both to a proprietary function and to a governmental function because in none of them was the alleged negligence linked to a governmental function. See *Considine* v. *Waterbury*, supra, 279 Conn. 852–53; *Carta* v. *Norwalk*, supra, 108 Conn. 701–702; *Richmond* v. *Norwich*, supra, 96 Conn. 588; *Hourigan* v. *Norwich*, supra, 77 Conn. 366.

[10] To the extent that the defendant in the present case contends that the specific allegations that the defendant failed to warn recreational users about the closed pipe gates and failed to design and install barriers that would be safer for recreational users relate solely to the defendant's governmental function and not to its proprietary function, we disagree. Because those specific allegations were inherently linked to the defendant's function of closing the roads on the property to public vehicular traffic in order to protect the water supply, they were inherently linked to a proprietary function. In any event, the plaintiff only need prove that one of the allegations of negligence was inherently connected to the defendant's proprietary function in order to recover.

[11] General Statutes § 25-43c (e) provides: "No water company shall be liable in damages except with respect to wilful or wanton conduct for injury or property damage to any person who enters upon its lands or waters under the provisions of this section," which authorizes water companies to permit recreational activities on reservoirs and aquifer protection areas.

After the defendant filed its motion to set aside the verdict, it filed a supplemental memorandum of law in support of that motion in which it claimed that it was immune from liability to the plaintiff under § 25-43c. In her opposition, the plaintiff contended that § 25-43c did not apply to the present case because the statute applies only to boating, fishing and other water activities and because the defendant had not obtained a permit from

the commissioner of public health, as authorized by the statute. See General Statutes § 25-43c (a) and (b) (authorizing water companies to apply for permit to open reservoirs and aquifer protection areas to recreational activities, including boating and fishing). The trial court concluded that it could not consider the defendant's claim because the defendant had not raised § 25-43c as a special defense. The defendant does not challenge that conclusion on appeal. The defendant does argue, however, that § 25-43c is not the *exclusive* immunity provided to water companies that open their lands to recreational users, but provides an *additional* immunity to that provided by § 52-557n (a) (1) (B) for water companies that charge a fee. For the reasons stated in this opinion, we disagree.

[12] A majority of this court determined in *Conway* that the legislature could not have believed that "[t]he inherent costs to society that can result from removing the caretaking responsibilities and duty to warn against known or discoverable hazards imposed upon public landowners at common law . . . [were] outweighed by any benefit conferred upon society by the act." (Internal quotation marks omitted.) *Conway* v. *Wilton*, supra, 238 Conn. 671. In reaching this conclusion, the majority observed that the legislature had less incentive to grant immunity to municipalities than to private landowners because: (1) "[p]ublic lands are lands already held open to the public"; (internal quotation marks omitted) id.; and (2) municipalities already enjoyed immunity for governmental acts involving the exercise of discretion. Id., 672–73. The majority reasoned that the "legislature was interested in increasing the availability of land for public recreational use," and there was "no indication that the legislature was seeking to permit a municipality to have immunity for responsibilities arising out of property that it already owned" and had opened to the public. Id., 673. Finally, the majority reasoned that, because municipalities can shift the burden of liability to their residents through taxation, "providing them with immunity would be at best anomalous." Id., 674. In *Conway*, this court overruled its prior decision in *Manning* v. *Barenz*, 221 Conn. 256, 260, 603 A.2d 399 (1992), holding that the act applied to municipalities. *Conway* v. *Wilton*, supra, 655. Chief Justice Peters authored a dissenting opinion, in which Justice Callahan joined, in which she contended that there were no compelling reasons to overrule *Manning*. Id., 682–83.

[13] See, e.g., *Carta* v. *Norwalk*, supra, 108 Conn. 701 ("if property is not held and used by the city for municipal purposes exclusively, but in considerable part as a source of revenue, the city is responsible, as a private owner would be, for injury sustained through its negligence"); *Chafor* v. *Long Beach*, 174 Cal. 478, 488, 163 P. 670 (1917) (citing cases; municipality that is acting in proprietary capacity "is liable for its torts as would be a private individual"); 4 Restatement (Second), Torts § 895C, comment (e), p. 408 (1979) (when municipality "could be found to be acting in its capacity as a corporation, rather than as a government, it had no more immunity than a private corporation"); F. Harper et al., Torts (3d Ed. 2008) § 29.6, p. 740 (when municipality is performing proprietary function, "the municipality would generally be liable in much the same way as a private individual or private corporation"); see also *Considine* v. *Waterbury*, supra, 279 Conn. 843 ("[w]here the municipality's officers or servants are in the exercise of power conferred upon the municipality for its private benefit or pecuniary profit, and damage results from their negligence or misfeasance, the municipality is liable to the same extent as in the case of private corporations or individuals" [internal quotation marks omitted]), quoting 18 E. McQuillin, supra, § 53.23, p. 383; *Chupek* v. *Akron*, 89 Ohio App. 266, 270, 101 N.E.2d 245 (1951) ("a municipal corporation which, while performing a proprietary function within its corporate powers, leases its property to an individual for a consideration, creates the legal relation of landlord and tenant, and the city is possessed of the right, immunities and liabilities of a landlord"); *Fiel* v. *Racine*, 203 Wis. 149, 151, 233 N.W. 611 (1930) (because "city is under no greater responsibility than a private owner would be under the same circumstances," municipality was not liable for death of person who was trespassing on municipal property).

The defendant also cites a number of cases in which state courts have concluded that, when a state statute provides that a governmental entity that has waived governmental immunity may be held liable only to the extent that a private person may be held liable under similar circumstances, the governmental entity is entitled to the immunity provided to private users by the state's recreational land use statute. See, e.g., *Anderson* v. *Springfield*, 406 Mass. 632, 634, 549 N.E.2d 1127 (1990) (when state statute provided that governmental entities are liable to same extent as private individuals

under like circumstances, governmental entities were entitled to immunity under recreational land use statute); *Dept. of Environmental Resources* v. *Auresto*, 511 Pa. 73, 77–78, 511 A.2d 815 (1986) (same). We note that, unlike the statutes at issue in *Anderson* and *Auresto*, § 52-557n (a) contains no language providing that the liability of political subdivisions of the state acting in their proprietary capacity is coextensive with that of private persons. Compare General Statutes § 4-160 (a) ("[w]hen the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable") and General Statutes § 4-160 (c) ("The state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of. The rights and liability of the state in each such action shall be coextensive with and shall equal the rights and liability of private persons in like circumstances."). Nevertheless, as we indicated in *Considine* v. *Waterbury*, supra, 279 Conn. 843, § 52-557n incorporates that common-law principle. We conclude, however, that that general principle does not trump the specific provisions of § 52-557g granting immunity *only* to private persons.

We recognize that, in *Burgess* v. *State*, 50 Conn. Supp. 271, 280–81, 920 A.2d 383 (2007), the Superior Court concluded that the state is entitled to immunity under § 52-557g because, under § 4-160, its liability is coextensive with that of private persons. Because § 4-160 does not implicate the common-law principle that *municipalities* acting in their *proprietary* capacity are liable to the same extent as private persons would be under the same circumstances, but creates an exception to the doctrine of *sovereign* immunity, which must be strictly construed; *DaimlerChrysler Corp.* v. *Law*, 284 Conn. 701, 711, 937 A.2d 675 (2007) ("[e]xceptions to [the doctrine of sovereign immunity] are few and narrowly construed under our jurisprudence" [internal quotation marks omitted]); we find this case to be of little guidance here. We express no opinion as to whether the holding of *Burgess* was correct.

[14] As we have indicated, there is no dispute in the present case that, before the act was enacted, a private entity would have been liable to the plaintiff under similar circumstances. See footnote 8 of this opinion.

[15] See also *Hopkins* v. *O'Connor*, 282 Conn. 821, 843, 925 A.2d 1030 (2007) ("[a]lthough the legislature may eliminate a common law right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed" [internal quotation marks omitted]).

[16] The defendant cites a number of cases in which courts have held that a state recreational land use statute grants immunity to the United States. See, e.g., *Guttridge* v. *United States*, 927 F.2d 730, 734 (2d Cir. 1991) (citing cases); *Proud* v. *United States*, 723 F.2d 705, 707 (9th Cir. 1984). In each of these cases, however, the court emphasized that the issue before the court was not whether the state recreational land use statute was intended to apply to the United States, but whether *a private individual* would be entitled to immunity under the statute. *Guttridge* v. *United States*, supra, 733 (issue before court was not whether statute was intended to apply to publicly owned lands, but "whether a *private owner* . . . would be entitled to the immunity afforded" by recreational land use statute [emphasis in original]); *Proud* v. *United States*, supra, 707 ("[D]istrict [C]ourt properly considered the tort liability of a similarly situated private individual. Under [the state's recreational use statute], a private landowner would not be liable for [the plaintiff's] injuries. Neither is the United States."). That is because, under what is commonly known as the Federal Tort Claims Act; see 28 U.S.C. § 2671 et seq.; the federal government waived sovereign immunity to liability for common-law torts only "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 [tortious] act or omission occurred." 28 U.S.C. § 1346 (b) (1). The courts recognized that, even if the state statutes had expressly excluded properties owned by the United States from their scope, principles of federalism would prevent the states from determining the scope of federal liability to tort claims. *Guttridge* v. *United States*, supra, 734 ("the United [States'] liability under the [Federal Tort Claims Act] is that of a private individual, regardless of what a state intends that liability to be" [internal quotation marks omitted]); *Proud* v. *United States*, supra, 707 (same); *Proud* v. *United States*, supra, 706 (Congress, not Hawaii legislature, determines tort liability of United States). No such principles are in play

here; the legislature indubitably has the power to define the liability of political subdivisions of the state to negligence claims. We note that one of the state cases on which the defendant relies, *Anderson* v. *Springfield*, 406 Mass. 632, 634, 549 N.E.2d 1127 (1990), relied on a case involving the liability of the United States to tort claims arising from recreational land use in determining that the state recreational land use statute granted immunity to a state municipality. See *DiMella* v. *Gray Lines of Boston, Inc.*, 836 F.2d 718, 720 (1st Cir. 1988) (United States Court of Appeals for First Circuit held that "[w]hatever liability the Commonwealth may have chosen to assume for itself as a matter of governmental policy has no bearing on the liability of Massachusetts private persons, the standard the federal government accepted").

The defendant also points out that, when the legislature enacted § 52-557n in 1986; see Public Acts 1986, No. 86-338, § 13; it already had enacted § 52-557g; see Public Acts 1971, No. 249, §§ 2, 3, 4; and argues that § 52-557g therefore comes within the " '[e]xcept as otherwise provided by law' " provision of § 52-557n (a). As we explained in *Conway*, however, the act did not grant immunity to governmental entities.

[17] The current revision of General Statutes § 52-557f, which incorporated the amendments of P.A. 11-211, provides in relevant part: "(2) 'Land' means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty, except that if the owner is a municipality, political subdivision of the state, municipal corporation, special district or water or sewer district: (A) 'Land' does not include a swimming pool, playing field or court, playground, building with electrical service, or machinery when attached to the realty, that is also within the possession and control of the municipality, political subdivision of the state, municipal corporation, special district or water or sewer district; and (B) 'road' does not include a paved public through road that is open to the public for the operation of four-wheeled private passenger motor vehicles;

"(3) 'Owner' means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises. 'Owner' includes, but is not limited to, a municipality, political subdivision of the state, municipal corporation, special district or water or sewer district . . . ."

[18] The defendant makes no claim that the legislature enacted P.A. 11-211 because it believed that the trial court's decision in the present case rejecting the defendant's claim that it was entitled to immunity pursuant to § 52-557g was incorrect and, therefore, P.A. 11-211 was clarifying legislation that applies retroactively. See *Bhinder* v. *Sun Co.*, supra, 263 Conn. 369 (clarifying legislation enacted in response to judicial decision that legislature deems incorrect is generally retroactive). Rather, as we have indicated, the legislative history of P.A. 11-211 suggests that the legislature agreed with the trial court in the present case that, before it was amended, the act did not apply to any governmental landowner, and P.A. 11-211 was intended to fill that gap. Conn. Joint Standing Committee Hearings, supra, p. 6195, remarks of Representative O'Neill (pointing out that "for a long time the recreational use statute hasn't applied to entities such as" defendant in this case). Moreover, if the legislature had believed that *Conway* was wrong when it was decided, it presumably would not have waited fifteen years to correct it. But see id., pp. 6178–79, remarks of Representative David A. Baram (suggesting that legislature had power to correct this court's decision in *Conway*); id., p. 6059, remarks of Martin Mador on behalf of Connecticut Sierra Club (referring to fifteen years of legislative efforts to "restore" immunity to towns); cf. *Conway* v. *Wilton*, supra, 238 Conn. 683 n.1 (*Peters*, *C. J.*, dissenting) (legislature was informed repeatedly of this court's 1992 decision in *Manning* v. *Barenz*, 221 Conn. 256, 260, 603 A.2d 399 [1992], holding that act applied to municipalities and "chose to take no further action in response thereto" before this court's decision in *Conway* overruling *Manning*).

[19] In support of its claim to the contrary, the defendant points out that a New York trial court has concluded that, "[w]hen permitting an unsupervised recreation activity, a municipality is acting in its proprietary role for which it has the same duties as a landowner, and it is entitled to the same protections" under New York's recreational land use statute. *Blount* v. *West Turin*, 195 Misc. 2d 892, 896, 759 N.Y.S.2d 851 (2003). In *Blount*, the court distinguished an earlier case in which the New York Court of Appeals had held that the recreational land use statute does not provide immunity to municipalities that maintain supervised recreational facilities. Id., 897 (distinguishing *Ferres* v. *New Rochelle*, 68 N.Y.2d 446, 454, 502 N.E.2d 972, 510 N.Y.S.2d 57 [1986]). In turn, *Ferres* distinguished an earlier case in which the New York

Court of Appeals had held that the recreational land use statute applies to public landowners. *Ferres* v. *New Rochelle*, supra, 454–55 (distinguishing *Sega* v. *State*, 60 N.Y.2d 183, 190–91, 456 N.E.2d 1174, 469 N.Y.S.2d 51 [1983]).

We find this line of cases unpersuasive. As we have explained, this court in *Conway* held that, *without exception*, political subdivisions of the state are not entitled to immunity under the act, and the legislature failed to amend the statute for fifteen years after that decision.

We note that there is no claim in the present case that the opening of publicly owned land to unsupervised recreational activities, in and of itself, is a proprietary function, as the court in *Blount* concluded. As we have indicated previously herein, the provision of free recreational opportunities by a governmental entity historically has been considered a governmental function in this state; see *Epstein* v. *New Haven*, supra, 104 Conn. 284; for which a governmental entity cannot be held liable unless its negligent conduct is connected to a proprietary function, such as the operation of a water supply company. *Martel* v. *Metropolitan District Commission*, supra, 275 Conn. 56; *Elliott* v. *Waterbury*, supra, 245 Conn. 414.