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Givens v. Ichauway, Inc., 493 S.E.2d 148 (Ga. 1997)

Amy W. Beatie

clarify existing law, not to change a substantive change law.

Based on these investigations, the court found that public policy required that the amendment operate retroactively. Thus, Schwartz' conveyance was subject to the Transfer Act and summary judgment was denied.

In addition, the court noted that the language of CEPA only precluded an action against the *state* for pollution that occurred prior to a conveyance of property. Thus, it followed that an action against an *individual* or *other entity* based on prior contamination was not prohibited.

Stephanie Pickens

GEORGIA

Givens v. Ichauway, Inc., 493 S.E.2d 148 (Ga. 1997) (holding that the appellant failed to present admissible evidence demonstrating navigability and, therefore, prosecution for trespassing was appropriate).

Ichauway, Inc. sued to enjoin Givens from floating down Ichauwaynochaway Creek through its property. The trial court granted summary judgment in favor of Ichauway. On appeal, Givens asserted he had presented sufficient evidence showing a genuine issue of material fact as to the stream's navigability. The Supreme Court of Georgia held that Givens failed to establish the creek's navigability and that Ichauway, therefore, had the right to exclude the public—a right creating legally tenable grounds to charge Givens with criminal trespass.

In Georgia, the statutory definition of navigable creek is one that is "capable of transporting boats loaded with freight in the regular course of trade . . . ." The mere rafting of timber or the transporting of wood in small boats shall not make a stream navigable." Although Givens attempted to demonstrate the creek's navigability in a number of different ways (among others, Givens built a raft of styrofoam and wood, loaded it with a goat, a bale of cotton, and two passengers, and floated it through Ichauway's leasehold), the court rejected his arguments stating that he failed to present evidence showing the creek's navigability under the state's statutory definition.

Alternatively, Givens argued that an 1894 Georgia case, *Young v. Harrison*, defined three different types of rivers in the state: (1) those which are wholly private property; (2) those which are "private property subject to the servitude of the public interest, by a passage upon them"; and (3) those subject to the ebb and flow of the tide. Givens contended that the *Young* court's language supported a common law right of passage as an alternative to the state's statutory definition. The court stated that the legislature had codified the *Young* decision in the statutory definition of a navigable creek and that a court could not interpret the language of *Young* to extend a right of passage to streams not found to be navigable under the statute.

The dissent attacked the majority on grounds ranging from procedure to substantive law. The dissent stated that summary judgment was usually inapplicable in equity matters. The dissent also stated that the legislative history of Georgia's statutory definition of navigability did not support the court's narrow construction of the term "navigability." Furthermore, the dissent stressed that statutes should be interpreted as codification of the common law unless otherwise explicitly contrary, as the statute was in this case, and that navigability is a federal question whereby the court was compelled to consider navigability under both state and federal law.

Amy W. Beatie

ILLINOIS

Independent Trust Corp. v. Chicago Dep't of Water, 693 N.E.2d 459 (Ill. App. Ct. 1998) (holding that a hydrant lead is not "firefighting equipment or facilities" within the meaning of the Tort Immunity Act).

The basement of 205 West Randolph Street in Chicago flooded on February 20, 1994. The water department discovered the basement and subbasement filled with over ten feet of water. Water department employees removed the water and investigated the cause of the leak. They observed multiple hairline cracks in the hydrant lead, a six-inch-diameter pipe connecting an adjacent fire hydrant to an underground water main. This pipe caused the flooding to occur.

Plaintiffs, Independent Trust Corp. and First Management Realty Corp. owned the building. Pago Pago II, Inc. and Corporation Supply Company, Inc. each operated a business in the building. Lumberman's Mutual Casualty Company was a subrogee of Corporation Supply. All three plaintiffs filed separate suits against the city and the court consolidated their cases. Each alleged the city negligently maintained, inspected, or repaired the pipe. The circuit court granted the city's motion to dismiss because the hydrant lead was "firefighting equipment or facilities" within the meaning of the Local Governmental and Governmental Employees Tort Immunity Act (the "Act"). Plaintiffs then appealed to the Appellate Court of Illinois.

The appellate court held that the hydrant lead was not "firefighting equipment or facilities" within the meaning of section 5-103(a) of the Act and, therefore, the lower court erred in granting the Defendant's motion to dismiss. The court declared the city not immune from liability in this case.

The court first analyzed the Act. The Act does not grant general immunity to municipal water providers. Unless their specific conduct falls within another section of the Act, the water provider may be held liable. Defendants argued immunity under section 5-103(a) which states: "Neither a local public entity, nor a public employee acting in