



RECREATIONAL USE IMMUNITY: *Play at Your Own Risk*

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While some schoolchildren are playing tag in a playground, one of them slips while being chased by another child and gets severely injured from broken glass on the ground. In the same way that the child may have been immune from “getting tagged” by confining himself to “base,” the location where the child suffered his injury may be a governmental entity’s “base” and prevent it from being “tagged” with any liability for the injury.

The location where an injury occurred can have *everything* to do with whether there can be a recovery for an injury. The subject of this article is to review the coverage and development of the recreational use immunity provision of the Kansas Tort Claims Act (K.S.A. 75-6101 *et seq.*) that permits governmental entities to construct, operate, own, and use property that is used by the public for recreational purposes with little fear of liability.¹

I. Immunity in General

Governmental entities have immunities not available to private entities. “State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected.”² “Absent violation of constitutional rights, the [L]egislature

may control governmental immunity,”³ and a state may therefore waive any or all aspects of its sovereign immunity.

Immunity from suit is a fundamental aspect of the sovereignty that states, including the state of Kansas, enjoy.⁴ Governmental entities can be absolutely immune from suit or can be immune from liability. The difference between immunity from suit and immunity from liability is significant. When a sovereign is immune from suit, it is immune from all the rigors of litigation, including discovery, and is entitled to have a case immediately dismissed. When a sovereign is immune from liability, it may have to participate in specific litigation until the sovereign can satisfy its burden to the court that it meets the conditions necessary for immunity from liability.

The state of Kansas, through the Legislature, has waived its sovereign immunity from suit in state court by passing the Kansas Tort Claims Act (KTCA).⁵ The KTCA is an open-ended act where liability is the rule and immunity the exception.⁶ After passage of the KTCA, governmental entities are not immune from suit; however, governmental entities may still be immune from *liability* under the right circumstances. In order to avoid liability, a governmental entity now has the burden of proving that the claim falls within one of the enumerated circumstances listed in K.S.A. 75-6104.⁷

FOOTNOTES

1. K.S.A. (2006 Supp.) 75-6104(g). All references to the recreational immunity provisions of the Kansas Tort Claims Act shall be to the 2006 Supplement. See annotations to former K.S.A. 75-6104(f) for early cases involving recreational use immunity.

2. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 682, 119 S.Ct. 2219, 144 L.Ed. 2d 605 (1999); see also *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed. 2d 636 (1999); *Schall v. Wichita State Univ.*, 269 Kan. 456, 7 P.3d 1144 (2000).

3. *Brown v. Wichita State Univ.*, 219 Kan. 2, 7, 547 P.2d 1015, 1021 (1976).

4. *Alden*, 527 U.S. at 713, 119 S.Ct. at 2247.

5. K.S.A. 75-6103(a).

6. *Hopkins v. State of Kansas*, 237 Kan. 601, 609, 702 P.2d 710, 318 (1985).

7. *Barber v. Williams*, 244 Kan. 318, 320, 767 P.2d 1284, 1286 (1989).

