Circuit Court for Washington County
Case No. 21-C-17-060362

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 327

September Term, 2018

LEAH S. HALE, ET AL.,

v.

WASHINGTON COUNTY BOARD OF COMMISSIONERS

Fader, C.J.,
Shaw Geter,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: September 16, 2019

We are asked to determine whether the Washington County Board of Commissioners ("Washington County"), the appellee, enjoys governmental immunity from a claim that its negligence in maintaining a public park caused injury to the appellants, Leah S. Hale and her child (the "Hales"). We agree with the circuit court that Washington County is immune from the claim and so affirm that court's award of summary judgment in favor of the County.

BACKGROUND[1]

Ms. Hale saw an advertisement stating that the County was offering youth swimming lessons at the Martin Snook Memorial Park (the "Park") and enrolled her five-year-old son. After dropping her son at the pool for his first lesson, she stayed in the Park to play with her younger child and observe the lesson. At some point, Ms. Hale began walking to the parking lot. Rather than use a "paved stairwell" that connects "the parking lot . . . to the [pool] gate," Ms. Hale walked through a "blacktop, gravel area" in the Park. While walking with her child strapped to her front in a baby carrier, Ms. Hale's foot came into contact with a water pipe that was protruding above the gravel. She fell forward, landing on her hands and knees. Ms. Hale sustained bruising and scrapes to both knees and hands, as well as internal injuries to both hands and wrists, and her child sustained a scratch to the back of his head.

[1] We construe the facts in the light most favorable to the Hales. *Jurgensen v. New Phoenix Atl. Condo. Council of Unit Owners*, 380 Md. 106, 114 (2004) ("[W]e construe the facts properly before the court, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party."). The facts presented here are drawn from the complaint and Ms. Hale's deposition testimony.

Ms. Hale sued the County on behalf of herself and her child, asserting that the County was negligent in its maintenance of the Park because the water pipe was a dangerous condition that was hidden by grass. The Hales sought $320,000 in damages.

The County moved for summary judgment on the ground that it enjoyed governmental immunity for an injury resulting from its maintenance of the Park.[2] In support of its motion, the County submitted the affidavit of John Pennesi, Deputy Director of the Parks & Facilities Department at the Washington County Division of Public Works. Mr. Pennesi averred that: (1) Washington County owns and operates the Park; (2) the Park "is publicly owned and is open to the public at large, without there being any private ownership interest in the park or in any of the park amenities"; (3) the operation and maintenance of the Park "is performed and sanctioned under the authority of the County Commissioners of Washington County"; (4) the Park is maintained and operated "solely for the public benefit and tends to promote the public health and welfare"; and (5) "there is no profit or emolument inuring to the Washington County government from its public park system as the costs for the operation and maintenance of the park facilities far exceed any nominal fees charged for certain amenities within the parks."

The Hales opposed the motion on the ground that "[p]roviding swimming lessons to paying customers is not a governmental function." Thus, they argued, the County was

[2] The County's original motion for summary judgment asserted additional grounds, which it later withdrew "so that the defense of governmental immunity may be decided on the undisputed facts in the existing record."

not immune from suit arising out of the injuries they sustained while at the Park to attend the swimming lessons.

The circuit court granted the County's motion for summary judgment based on its review of case law establishing that the maintenance and operation of a public swimming pool by a local government is a governmental function. The Hales appealed.

DISCUSSION

We review a trial court's grant of summary judgment for legal correctness. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737 (1993). "When reviewing a grant of summary judgment, we must make the threshold determination as to whether a genuine dispute of material facts exists, and only where such dispute is absent will we proceed to review determinations of law." *Jurgensen*, 380 Md. at 114. In making our determination, "we construe the facts properly before the court, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party." *Id.*

Ms. Hale contends that the circuit court erred in granting the County's motion for summary judgment by (1) making a factual finding that her use of the Park was for a governmental purpose, and (2) determining, as a matter of law, that offering swimming lessons is a governmental function for which the County is entitled to immunity. Both of these contentions, however, are based on an erroneous premise. Ms. Hale's injuries resulted from the County's allegedly negligent maintenance of the Park grounds, not from the swimming lesson itself. As we discuss, it has long been established that the

maintenance of public parks and swimming pools is a governmental function for which a local government enjoys immunity.

"[C]ounties generally enjoy immunity only when performing governmental, as opposed to proprietary, functions." *Anne Arundel County v. Fratantuono*, 239 Md. App. 126, 133 (2018). A function is governmental where it "is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest." *Mayor & City Council of Balt. City v. State ex rel. Blueford*, 173 Md. 267, 276 (1937). The Court of Appeals has long recognized that the maintenance of public parks and swimming pools is a governmental function for which a local government enjoys immunity. *Mayor & City Council of Balt. v. Whalen*, 395 Md. 154, 170 (2006) (holding that Baltimore City was immune from suit brought by blind pedestrian who fell into an uncovered utility hole while walking her guide dog in a public park); *Blueford*, 173 Md. at 276 (concluding that the maintenance of a public swimming pool is a governmental function); *Mayor & City Council of Balt. v. State ex rel. Ahrens*, 168 Md. 619, 628 (1935) ("[T]he maintenance, control, and operation of Gwynns Falls Park . . . is a governmental duty, discretionary in its nature, performed in its political and governmental capacity as an agency of the state."); *see also Fratantuono*, 239 Md. App. at 139 ("If the injury occurs within the boundaries of a public park, swimming pool, or similar area where the local government's maintenance obligation is governmental in nature, governmental immunity applies . . . .").

The Hales contend that the trial court improperly decided a factual issue when it "decided that [Ms. Hale]'s use of the park was for a governmental purpose."[3] In making that argument, however, the Hales misapprehend the relevant inquiry in two respects. First, it is the County's function that is relevant, not Ms. Hale's. Second, whether a function is governmental or proprietary is a legal, rather than factual, question. *Heffner v. Montgomery County*, 76 Md. App. 328, 332-35 (1988); *see also Whalen*, 395 Md. at 171 ("This Court created the distinction [between governmental and proprietary functions]. It exists as a matter of common law, and we could, if we chose, abolish it."). And, in this instance, it is a legal question that the Court of Appeals already has answered.

The Hales also argue that the circuit court erred when it "simply unilaterally decided" that "youth swimming lessons clearly benefit[] the public health and welfare"; the County offers the swimming lessons "at a loss in spite of advertising the service"; and "advertising the low cost, youth swimming lessons tended to promote the welfare of the public as a whole by affording all parents the opportunity to have their children learn to swim." Once again, however, the Hales misapprehend the relevant inquiry by focusing on the swimming lesson that brought them to the Park rather than the County's allegedly

[3] The Hales raise this issue for the first time on appeal. In their answer to the County's motion for summary judgment, as well as at the hearing, the Hales acknowledged that "with regard to [the governmental immunity] argument, . . . the facts are undisputed." Although "an appellate court ordinarily will not consider an issue that was not raised or decided by the trial court," we may exercise our discretion to do so if it "will not work an unfair prejudice to the parties or to the [circuit] court." *Jones v. State*, 379 Md. 704, 712, 714 (2004) (emphasis removed). We do so here both because the County does not raise preservation as a defense and because the Hales' unpreserved argument is quickly resolved without risk of unfair prejudice.

negligent maintenance of the Park grounds, which is what they assert caused their injuries. And, moreover, even if the swimming lesson were the appropriate focus of our inquiry, our courts have explicitly held that "the fact of realizing a modest profit in the operation of [a] [p]ool . . . does not, *ipso facto*, preclude it from being a governmental function." *Town of Brunswick v. Hyatt*, 91 Md. App. 555, 564 (1992); *see also Austin v. City of Balt.*, 286 Md. 51, 64 (1979) (concluding that operation of a day camp was a governmental function despite a small enrollment fee); *Blueford*, 173 Md. at 276 (noting that the conclusion that the operation of a public park and pool is a governmental function is not "affected by the fact that a nominal fee was exacted for the privilege of using the pool"). We discern no error in the circuit court's judgment.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.