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June 2, 2014

Wendy Carey
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Re: Rip current warning sign liability update (NSGLC-14-04-05)

This product was prepared by the National Sea Grant Law Center under award number NA14OAR4170065 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

Dear Wendy,

Recently you contacted us to determine whether information the National Sea Grant Law Center provided to Delaware Sea Grant in a 2007 letter regarding rip current signage liability is still current. In the 2007 memo, the research focused on whether posting rip current warning signs on public beaches would increase a town's liability risk. In reviewing the research, I found no substantial change in the law; however, I have revised the memo below for clarity and included additional information on landowner liability. Please be aware that the National Sea Grant Law Center does not offer formal legal advice, and that this letter is intended for informational purposes only.

Landowner Liability

First, it is important to ground these questions in general liability principles. Most likely, any liability claim would be based in negligence. The common law (i.e., law derived from court

opinions) defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[1] To prove negligence, a plaintiff must prove three elements: 1) that the defendant owed a duty to the plaintiff; 2) the defendant breached that duty; and 3) the breach proximately caused injury to the plaintiff.

The "duty of care" owed to a plaintiff depends on the status of the person on the land at the time of the accident. Visitors to a state or municipal beach would be considered "invitees," which are defined as persons who enters onto land for the purpose for which the land is held open to the public.[2] Landowners have a duty to carry on their activities with "reasonable care" to ensure an invitee's safety and protect the invitee from conditions that he or she is unlikely to discover.[3] "Reasonable care" is the care with which a reasonable person or entity in the same position would recognize as necessary to prevent the unreasonable risk of harm to another.[4] Landowners generally do not have a duty to protect invitees from obvious dangers posed by water, such as the risk of drowning or diving into obviously shallow water. While beachgoers at public beaches are invitees and afforded a duty of care under common law, any claims may be affected by the doctrine of sovereign immunity, as described below. These general common law rules, however, may be abrogated by state law.

Immunity from Liability

Under the doctrine of sovereign immunity, a governmental entity may only be sued if the government has given its consent. Many states specifically grant municipalities immunity under state tort claims acts. In Delaware, the County and Municipal Tort Claims Act (TCA) provides that municipalities are immune from tort claims resulting from their own negligent acts or omissions unless such immunity is expressly waived by statute.[5] Employees may still be held personally liable for acts or omissions causing property damage, bodily injury or death if the acts are not within the scope of employment or were performed with wanton negligence or willful and malicious intent.[6]

Delaware courts have traditionally affirmed a town's immunity from liability granted by the TCA. For example, in a case involving a diving accident at a public beach, a Delaware court ruled that the plaintiffs' claims were barred by the TCA.[7] The court noted, "As the plaintiffs do not dispute that defendant qualifies as a municipality, Dewey Beach would appear to have immunity from liability for these claims unless this action falls under one of the exceptions to immunity outlined in §§ 4011 and 4012."[8] The claim did not meet any of the exceptions, which are outlined below. In *Heaney v. New Castle County*, a family brought suit against a city and county when a man was killed while parked next to a city park when a tree branch fell and

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[1] Restat. 2d of Torts § 282.
[2] *Id.* § 332.
[3] *Id.* § 341A.
[4] *Id.* § 298.
[5] The County and Municipal Tort Claims Act, Del. Code Ann. tit. 10, § 4011(a).
[6] *Id*. § 4011(c).
[7] Smith v. Commissioners of Dewey Beach, 685 F.Supp. 433 (D. Del. 1988).
[8] *Id*. at 438.

crushed his car.[9] The Delaware Supreme court held that the city and the county were immune from suit under the TCA, because the claim did not fit into one of the statutory exceptions.

As noted by the cases above, the TCA does provide exceptions to sovereign immunity in certain circumstances:

> *A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:*
> *(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.*[10]

Generally, the first and third exceptions would not be implicated with rip currents, since there is no operation of machinery or discharge of pollutants. Although the second exemption could potentially apply to lifeguard stands or bathrooms, the clause "designed for use primarily by the public in connection with public outdoor recreation" maintains sovereign immunity for construction, operation, and maintenance activities associated with public outdoor recreation. It is therefore unlikely that the placement and maintenance of rip current signs would fall within one of the TCA exceptions. In other words, local governments would be immune from suit in the event of negligence.

Even in cases where the above exceptions apply, the discretionary function exception in the TCA can protect governmental immunity. The TCA states:

> *Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from: …*
> *(3) The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid.*[11]

The placement of signs, unless required by law, would be considered a discretionary function. A town may chose to post rip current signs or refrain from doing so; therefore, a town placing rip

[9] Heaney v. New Castle Cnty., 672 A.2d 11, 13 (Del. 1995).
[10] The County and Municipal Tort Claims Act, Del. Code Ann. tit. 10, § 4012.
[11] *Id*. at § 4011 (b)(3).

current warning signs at its beaches would likely be immune from liability stemming from posting the signs. Because it is a discretionary function, the posting of general warning signs will not destroy the immunity provided by the TCA. In researching this topic, we could find no Delaware cases in which a city or county was found liable for warning of dangerous conditions.

Although there are no cases on point in Delaware, there are in California. California cases are obviously not controlling in Delaware, but the case could provide guidance for a Delaware court. In *McCauley v. City of San Diego*, a man injured after falling off a cliff in a recreational area sued the city contending that its signs warning of slippery trails were an "ineffective and unprofessional attempt to warn the public of the dangerous nature of the cliffs."[12] The plaintiff's position was that by placing signs the city had assumed responsibility for risk management and were negligent in failing to warn the public properly. The California Court of Appeals disagreed and granted the city immunity primarily on public policy grounds. The court noted that "public policy is promoted by the minimally burdensome and passive intervention of sign placement so long as the public entity's conduct does not amount to negligence in creating or exacerbating the degree of danger normally associated with a natural condition."[13]

The California Court of Appeals issued a similar ruling after a novice dune rider was paralyzed when his ATV slid down a dune at Pismo State Beach, holding that "public policy would support signs erected [] warning of the natural condition of the dunes at Pismo State Beach which would constitute neither an improvement nor a voluntary assumption of a public protection service removing immunity."[14]

Delaware local governments are unlikely to increase their liability risk by placing the rip current signs. Although the beachgoers are invitees and are afforded a duty of care under common law, governmental immunity likely applies since placing signs is a discretionary function. I hope you find this letter helpful. Please let me know if you have further questions. Thank you for bringing you questions to the National Sea Grant Law Center.

Sincerely,

Terra Bowling
National Sea Grant Law Center

[12] McCauley v. City of San Diego, 190 Cal. App. 3d 981, 988 (Cal. Ct. App. 1987).
[13] *Id.* at 990.
[14] Mercer v. State of California, 197 Cal. App. 3d 158, 170 (Cal. Ct. App. 1987).