

January 25, 2007

Wendy Carey
University of Delaware Sea Grant
700 Pilottown Road
Lewes, DE 19958

Dear Wendy,

Recently you contacted us with a question about the liability issues surrounding the posting of rip current warning signs on Delaware public beaches. As I understand it, your specific question was whether posting the signs would increase a town's liability risk. This letter contains the results of my research into the applicable law. 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.

Under the doctrine of sovereign immunity, a governmental entity may only be sued if the government has given its consent. 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.¹ The TCA provides six examples of instances in which immunity applies, including:

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.

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. Although entities may be generally immune from suit, the TCA provides a waiver of 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

¹ The County and Municipal Tort Claims Act, Del. Code Ann. tit. 10, § 4011(a)

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.²

In *Smith v. Commissioners of Dewey Beach*, a man brought suit after he dove into the ocean and sustained spinal injuries, claiming that the city had knowledge of the dangerous conditions in the ocean and that it should have dredged the ocean to improve the conditions.³ The federal district court ruled that the city was immune from liability since the activity did not fall within one of the exceptions to the town's general immunity under the TCA. Since the TCA does not specifically waive immunity for injuries caused by the ocean, it would seem that that an entity would be immune from suit from damages caused by a rip current or waves.

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 crushed his car.⁴ Among other claims, the family alleged that the entities had a duty to warn of the dangers associated with parking under the trees alongside the park. The court held that the city and the county were immune from suit under the TCA, but did not address whether the entities had a duty to warn of the condition. In researching the topic, we could find no Delaware cases in which a court found that an entity had a duty to warn of a natural condition.

However, although beach towns may have no legal duty in Delaware to warn bathers about the dangers of rip currents, there is no reason why they should refrain from posting signs. The posting of general warning signs will not destroy the immunity provided by the TCA. In researching this topic, we could find no 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.⁵ 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."⁶ The plaintiff's position was that by placing signs the city had assumed responsibility for risk management and should be responsible for its negligence 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 acknowledged that the city could have avoided liability by not posting the signs and concluded 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."⁷

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

² *Id.* at § 4012.

³ 685 F. Supp. 433 (D. Del. 1988).

⁴ 1993 Del. Super. LEXIS 254 (Del. Super. Ct. 1993).

⁵ *Levin v. County of Salem*, 133 N.J. 35, 52 (N.J. 1993).

⁶ *McCauley v. City of San Diego*, 190 Cal. App. 3d 981, 988 (Cal. Ct. App. 1987).

⁷ *Id.* at 990.

constitute neither an improvement nor a voluntary assumption of a public protection service removing immunity.”⁸

In our opinion, Delaware entities will not increase their liability risk by placing the rip current signs. 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,

Stephanie Showalter
Director

Terra Bowling
Research Counsel

⁸ *Mercer v. State of California*, 197 Cal. App. 3d 158, 170 (Cal. Ct. App. 1987).