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Re: Rescue station liability (NSGLC-14-04-01)

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Dear Elizabeth,

Please find below our analysis of liability associated with the installation of beach safety kits with rescue equipment at Michigan Department of Natural Resources-managed public beaches. This information is intended as advisory research only and does not constitute legal representation of the Department of Natural Resources (DNR) or the University of Michigan Sea Grant Program or its constituents. It represents our interpretations of the relevant laws and regulations.

Immunity from Liability

Many states grant government agencies immunity under state tort claims acts. In Michigan, “[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function

....”¹ Whether the operation and maintenance of state beaches would be a government function—therefore making the DNR immune from liability—would be a fact-specific question that could only be answered directly by a court.

When determining whether an activity falls under the governmental function immunity, Michigan courts have looked at whether the “purpose, planning and carrying out of the activity, due to its unique character or governmental mandate, can be effectively accomplished only by the government.”² Several Michigan court of appeals cases have ruled on whether activities within a state park qualify as governmental functions. In *Daugherty v. State of Michigan*, the court held that the operation of a recreational area was not a governmental function protected by immunity, reasoning that the operation of the area was not an activity that could be done only by government.³ Two subsequent cases rejected the idea that *all* operations within state-run recreational areas should be exempt from governmental immunity. First, in *Feliciano v. State, Department of Natural Resources*, the appellate court ruled that the operation of state park recreational areas should fall under governmental tort immunity; however, the court found that not all operations within those areas should be protected.⁴ Specifically, the court held that the government would not have immunity for the operation of a supervised swimming area, since the operation of swimming areas was an activity commonly performed by private entities. In another case, *McNeal v. Department of Natural Resources*, the court looked to whether driving off-road vehicles within state recreation areas fell within the government function immunity.⁵ In that case, the appellate court found that a state park was afforded governmental tort immunity when an area comprised lands left substantially in their natural condition that are not used for a proprietary function.⁶

As mentioned above, the determination of whether the DNR would be immune from liability for the operation of public beaches, and the placement of beach kits as part of those operations, would depend on a fact-specific inquiry. If a court followed the reasoning set forth in *Feliciano*, it appears that the agency would not be afforded immunity for supervised, designated swimming areas. However, under *McNeal*, the operation and maintenance of any unsupervised areas could be immune from suit.

Supervised swimming areas are not defined by state law, so whether the DNR beaches are supervised swimming areas would be a fact-specific determination by a court. In *McNeal*, the court found that the area in question was substantially in its natural condition, even though the area had an adjacent parking lot and warning signs posted. In *Feliciano*, when discussing whether the operation of beaches were a government function, the court noted that supervised swimming beach areas entailed “[t]he operation of a bathing beach where bath houses are provided for changing clothes and ropes and markers are set out to designate the

¹ MICH. COMP. LAWS § 691.1407.

² *Parker v. City of Highland Park*, 273 N.W.2d 413, 419 (Mich. 1978).

³ 283 N.W. 2d 825 (Mich. Ct. App. 1979).

⁴ 293 N.W.2d 732 (Mich. Ct. App. 1980).

⁵ 364 N.W.2d 768 (Mich. Ct. App. 1985).

⁶ *Id.* at 771.

area for swimming is a function commonly and effectively performed by private enterprise.”⁷ The opinion does not mention lifeguards. Following these cases, it seems that DNR beaches with designated swimming areas would be considered supervised swimming areas.

Let’s assume that the beach kits are placed at supervised, designated swimming areas and that under *Feliciano*, the DNR would not receive governmental immunity from suit. The legal analysis would then likely shift to the state’s potential liability as a landowner.

Landowner Liability

Most likely, any liability claim related to the placement of beach rescue stations would be based in negligence. Common law defines negligence as “...conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm...”⁸ 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 beach would be considered “invitees,” which are people who enter onto land for the purpose for which the land is held open to the public.⁹ Landowners have a duty to carry on their activities with “reasonable care” for an invitee’s safety and to protect invitees from conditions that the invitee is unlikely to discover.¹⁰ “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.¹¹ 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. These general common law rules, however, may be abrogated by state law. In fact, Michigan’s Recreational Use Act provides immunity for landowners in certain situations.

Michigan’s Recreational Use Act states that owners of private land are not liable for injuries arising out of the outdoor recreational use of their land by those who are on the land with or without their permission, unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owners.¹² Michigan courts have applied the Act to publicly owned lands. In fact, the court in the *McNeal* case discussed above ruled that the Act applied, making the DNR immune from suit.¹³

⁷ 293 N.W.2d at 735.

⁸ Restatement (Second) of Torts § 282 (1965).

⁹ *Id.* § 332.

¹⁰ *Id.* § 341A.

¹¹ *Id.* § 298.

¹² MICH. COMP. LAWS § 324.73301.

¹³ *McNeal*, 364 N.W.2d 768 (under former provision of the Act, MICH. COMP. LAWS § 300.201)

Although the Recreational Use Act may be applied to DNR-managed public beaches, if the DNR engaged in gross negligence or willful and wanton misconduct,¹⁴ it would fall within the exception to the statute, potentially making the DNR liable. Therefore, in operating and maintaining beach rescue stations, the DNR should aim to act in a “reasonable” manner.

As stated above, “reasonable care” is the care with which a reasonable person or entity in the same position would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another.¹⁵ As long as a municipality maintained life jackets, throw rings, boogie boards, and other equipment in the rescue station with reasonable care, it will have met this standard. For example, it seems reasonable for the DNR to establish a regular maintenance schedule during which it could inspect the equipment. A checklist requiring inspectors to look for any tears, loose buckles and straps, dry rot or mildew on equipment might help standardize maintenance. In compiling maintenance procedures, it might be helpful to look at safety equipment standards and maintenance schedules used at other governments’ pools or beaches. Further, the agency should ensure that it uses appropriate signage regarding what equipment is included and how to use the equipment. I hope you find this information useful. Please contact me at anytime if you have additional questions.

Sincerely,

/s/ Terra Bowling
Research Counsel
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¹⁴ Gross negligence has been defined as conduct so reckless as to show substantial lack of concern for whether injury results. *Kruse v. Iron Range Snowmobile Club*, 890 F.Supp. 681 (W.D. Mich. 1995). Willful and wanton conduct is generally either intent to harm or indifference as to whether harm will occur. *James v. Leco Corp.*, 427 N.W.2d 920 (Mich. Ct. App. 1988).

¹⁵ Restatement (Second) of Torts § 298.