

1 ☐ **MUNICIPAL IMMUNITY
FOR FAILED 911 SURF RESCUE**

2 ☐ **Popow
v.
Town of Stratford

(Dist. Conn. 2/12/2010)**

3 ☐ **alleged the defendant Town was negligent

in responding to a fatal
"kite-surfing" accident
off of Long Beach in Stratford, Connecticut.**

4 ☐ **Popow also claimed the Town was negligent

"took no action to warn kite-surfers to come out of the
water

or to supervise the area during the winter,**

5 ☐ **despite their knowledge

beach area was being used by
kite-surfers year round."**

6 ☐ **Popow also sued the Town's director of parks and
recreation (Patusky)

and a number of Town firefighters.**

7 ☐ **federal district court**

"well established" common-law doctrines

"determine the tort liability of municipal employees"

8 ☐ **Generally, a municipal employee is liable for the misperformance of ministerial acts,**

but has a qualified immunity in the performance of governmental acts.

9 ☐ **Governmental acts**

performed wholly for the direct benefit of the public

and are supervisory or discretionary in nature.

10 ☐ **hallmark of a discretionary act**

requires the exercise of judgment.

11 ☐ **In contrast, ministerial refers to a duty**

performed in a prescribed manner without the exercise of judgment or discretion.

12 ☐ **Municipal officials**

immune from liability for negligence arising out of their discretionary acts

- 13 ☐ **danger that a more expansive exposure to liability
would cramp the exercise of official discretion
beyond the limits desirable in our society":**
- 14 ☐ **Discretionary act immunity
reflects a value judgment
despite injury to a member of the public**
- 15 ☐ **broader interest
having government officers and employees free to
exercise judgment and discretion in their official
functions,
unhampered by fear of second-guessing and retaliatory
lawsuits**
- 16 ☐ **outweighs the benefits to be had
from imposing liability for that injury.**
- 17 ☐ **municipal officers
not immune from liability for negligence
arising out of their ministerial acts.**

18 ☐ **Court: non-immune "ministerial acts" defined**

**"acts to be performed in a prescribed manner
without the exercise of judgment or discretion."**

19 ☐ **court, such acts are not immune**

**"because society has no analogous interest in permitting
municipal officers to exercise judgment in the
performance of ministerial acts."**

20 ☐ **governmental acts were found to be discretionary**

therefore, immune from any liability for negligence.

21 ☐ **FACTS OF THE CASE**

22 ☐ **early afternoon hours of January 21, 2006**

**few as six, but possibly as many as twenty-five, people
kite-surfing in Long Island Sound off of Long Beach in
Stratford, Connecticut.**

23 ☐ **January, there were no lifeguards or other rescue
personnel on duty at Long Beach.**

24 ☐ **no warning signs in place on the beach**

warning of the hazards of entering the water during the winter

25 ☐ **nor were there any barricades or other fencing limiting the public's access to the beach.**

26 ☐ **3:30 p.m., the weather took a turn for the worse. Substantial storm clouds form, and it began to get dark.**

27 ☐ **wind changed directions and began blowing strongly away from shore, creating "squall" like conditions almost all of the people kite-surfing returned to shore.**

28 ☐ **decendent, Stoil Popow, arrived at Long Beach at approximately 3:30 p.m. when the weather turned for the worse.**

29 ☐ **certified Kitesurfing Safety Systems instructor, present at Long Beach when the decedent arrived. kite-surfed with the decedent at least 50 times since 2001.**

30 ☐ **described the decedent as a beginner-level kite-surfer**

who was "very reckless," "very stubborn," and "unwilling to take advice from others."

- 31 ☐ **decedent had difficulty controlling his kite in the strong winds soon after he entered the water.**

decedent "ditched" his kite, he fell into the water along with it.

- 32 ☐ **decedent was partially submerged in the water but conscious after he fell.**

began to float approximately 300 to 400 feet away from shore while holding his kite

- 33 ☐ **decedent made no attempts to swim to shore,
and instead drifted parallel to the shore**

- 34 ☐ **Instructor called 911 from his mobile phone**

witness present at the beach also notified a police officer in the Long Beach parking lot of the decedent's situation

- 35 ☐ **initial 911 call was routed to Long Island.**

three additional 911 calls that were routed to Trumbull, Connecticut.

- 36 ☐ no emergency hard wired telephone in this area of Long Beach.

In addition, there was no cellular tower in the area.

- 37 ☐ three unsuccessful 911 calls,

Instructor Guimond directly called the Bridgeport Police Department.

- 38 ☐ informed the dispatcher at the Bridgeport Police Department

there was a person in the water in the Long Beach area who needed assistance

- 39 ☐ dispatcher advised Guimond

a boat was being dispatched to the scene.

- 40 ☐ maintained direct visual contact with the decedent

during his phone calls to the Bridgeport Harbor patrol and relayed his approximate location

- 41 ☐ also contacted the United States Coast Guard.

did not directly contact the Town of Stratford Fire or Police Department.

- 42 ☐ **5:00 p.m., the Stratford Fire Department received a report**
"windsurfer" in distress from Centralized Medical
Emergency Dispatch
- 43 ☐ **5:02 p.m., the Stratford Fire Department dispatched two**
fire engines

and a rescue vehicle towing a fourteen foot long inflatable
hard bottom "zodiac" boat
- 44 ☐ **5:08 p.m., the two fire engines from the Stratford Fire**
Department and the rescue vehicle towing the zodiac
boat

arrived at the Birdseye Street boat launch ramp.
- 45 ☐ **located approximately four miles from the decedent's last**
reported location

in the Housatonic River, which meets with Long Island
Sound.
- 46 ☐ **zodiac boat experienced engine and motor difficulties**

when it reached the mouth of the Housatonic River.
- 47 ☐ **zodiac boat was unable to continue toward the decedent's**
reported location

or back to the site where it was launched

48 ☐ **firefighters remained on board the boat,**

which they tied to a buoy, for approximately ninety minutes

49 ☐ **boat was towed by the United States Coast Guard**

back to the Birdseye Street launch ramp.

50 ☐ **Bridgeport Harbor Patrol and United States Coast Guard vessels**

arrived in the area where the decedent entered the water

51 ☐ **approximately twenty to forty-five minutes after he had "ditched" or "flagged" his kite.**

full dusk" or "near dark" when they arrived.

52 ☐ **advised the Bridgeport Harbor Patrol**

that the decedent was no longer with the kite.

53 ☐ **7:00 p.m., approximately two hours after CMED had notified the Stratford Fire Department of the incident,**

54 ☐ **decedent had not been located**

despite a search by the Bridgeport Harbor Patrol and the United States Coast Guard.

55 ☐ Coast Guard located the decedent's body in Long Island Sound the following day

56 ☐ SAFETY SERVICES DISCRETION

57 ☐ In response to Popow's allegations of negligence

firefighter defendants claimed "qualified immunity" in connection with their attempt to rescue the decedent.

58 ☐ court noted that "Connecticut courts consider acts performed by firefighters

when they are in the line of duty

to be discretionary acts":

59 ☐ statutes, regulations, and policies can create ministerial duties,

when they relate to fire, police, or other public safety services

most often held to create discretionary duties.

60 ☐ the provision of emergency medical services to members of the public

is a discretionary act.

61 ☐ court found that "Stratford Fire Department policy provides that the incident commander

possesses the sole discretion to engage in a rescue attempt, including whether to launch the zodiac boat."

62 ☐ clear that the decision made by the Firefighter Defendants to launch the zodiac boat,

the procedures utilized in attempting to rescue the decedent, and ultimately the decision to call off their search

63 ☐ required the exercise of judgment

based on an analysis of numerous factors.

64 ☐ court concluded that "the actions taken by the Firefighter Defendants on the date in question

were discretionary" and, therefore, immune from liability.

65 ☐ PUBLIC RECREATION DISCRETION

66 ☐ Popow alleged that the Town of Stratford and Stratford

director of parks and recreation, Patricia Patusky,
were negligent in failing to "post warning signs"

- 67 ☐ warn the decedent and others similarly situated of the
hazardous and unsafe conditions

present at Long Beach and the surrounding waters of
Long Island Sound

- 68 ☐ alleged that the Town was negligent by "inviting the public
to use Long Beach when there were no lifeguards on duty

failing to "adequately warn that the lifeguards were not on
duty."

- 69 ☐ same legal analysis of the failed rescue attempt which led
it to conclude that "qualified immunity"

against the firefighters

applied "equally to the Town of Stratford and Patusky

- 70 ☐ court found "[t]he Town of Stratford

entitled to the same discretionary act immunity that
applies to the individual Defendants

- 71 ☐ court, the Connecticut legislature had "codified the tort
liability of municipalities"

Conn. Gen. Stat. § 52-557n(a)(2)(B)

- 72 ☐ **municipalities will not be liable for damages caused by
"negligent acts or omissions**
- which require the exercise of judgment or discretion as an
official function of the authority expressly or impliedly
granted by law**
- 73 ☐ **[M]unicipalities and municipal officials are immune from
liability for negligence**
- arising out of their discretionary, as opposed to
ministerial, acts.**
- 74 ☐ **Ministerial acts are acts to be performed in a prescribed
manner**
- without the exercise of judgment or discretion.**
- 75 ☐ **maintenance of parks is a governmental function**
- and is usually subject to municipal immunity for
negligence.**
- 76 ☐ **court found the Town and the parks and recreation
director**
- would be entitled to qualified immunity**

- 77 ☐ **Popow's claims would still fail "even if the Town of Stratford and Patusky**
- had a duty to warn the decedent of the conditions in Long Island Sound**
- by posting signs or erecting barriers."**
- 78 ☐ **court found Popow had failed "to cite any statute or regulation**
- prescribing the posting of signs or warnings, or the stationing of life guards, at public beach areas during the winter months."**
- 79 ☐ **Court: no evidence "suggesting that the Town or Patusky, as Director of Parks and Recreation**
- obligated or expected to post signs and warnings or station lifeguards at public beaches during the winter months."**
- 80 ☐ **court found "no ordinance, statute, or regulation**
- prescribing the provision of a phone service,**
- whether hard-wired or cellular, at Long Beach."**
- 81 ☐ **court concluded that the acts in question were discretionary,**
- rather than ministerial.**

82 ☐ court found the Town of Stratford and Patusky
entitled to qualified immunity
as to Popow's claims of negligence for failure to warn and
failure to provide phone services.

83 ☐ PREMISES LIABILITY

84 ☐ Popow alleged the Town and Patusky were negligent

failing "to post warning signs

or erect barriers preventing access to Long Beach during
the winter."

85 ☐ also alleged premises liability based on the Town's
negligent failure

"to have lifeguards on duty or warn that no lifeguards
were on duty."

86 ☐ also claimed the Town was negligent in failing

"to install an emergency telephone or a cellular tower" on
the premises.

87 ☐ court, "[t]he duty owed by a landowner to an entrant onto
the land

is determined by the entrant's status as a trespasser, licensee, or invitee

- 88 ☐ **ascending degree of duty owed by the possessor of land to persons on the land**

based on their entrant status, i.e., trespasser, licensee or invitee

- 89 ☐ **possessor of land has a duty to an invitee**

to reasonably inspect and maintain the premises

in order to render them reasonably safe

- 90 ☐ **possessor of land must warn an invitee of dangers**

that the invitee could not reasonably be expected to discover

- 91 ☐ **duty that a possessor of land owes to a licensee**

does not ordinarily encompass the responsibility to keep the property in a reasonably safe condition

- 92 ☐ **licensee must take the premises as he finds them**

- 93 ☐ **possessor of real estate owes no duty to trespassers**

to keep the property in a reasonably safe condition for their use.

- 94 ☐ **public invitee is a person who is invited to enter or remain on land as a member of the public**

for the purpose for which the land is held open to the public.

- 95 ☐ **Popow claimed "the Town of Stratford and Patusky invited the public to use Long Beach for kite-surfing,**

including during the winter months

- 96 ☐ **therefore owed the decedent and other kite-surfers a duty of care.**

- 97 ☐ **no evidence that the defendants "took any actions which could be construed as extending an invitation to the decedent or others**

to kite-surf at Long Beach during the month of January

- 98 ☐ **distinction between one who is an invitee**

and one who is merely a licensee

- 99 ☐ **whether the visitor has received an invitation, as opposed to permission,**

from the possessor of the land, to enter the land or remain on the land

100 ☐ **no evidence Town made any improvements**

upon the area of Long Beach where the decedent was kite-surfing.

101 ☐ **"even if the Town of Stratford and Patusky**

owed the decedent a duty of care as an invitee,

102 ☐ **duty extends only to 'dangers**

the invitee could not reasonably be expected to discover'."

103 ☐ **decedent was engaged in an inherently dangerous water sport during the month of January**

water temperature was between 38 degrees and 40 degrees

104 ☐ **risk of engaging in an extreme water sport in such conditions**

was patently obvious to any reasonable person

105 ☐ **Defendants should not be held liable**

for their failure to warn of this risk.

106 ☐ **Court: One who engages in water sports**

assumes the reasonably foreseeable risks inherent in the activity

107 ☐ **Court: City was not required to remind adult swimmers**

of the obvious and commonly known dangers of drowning inherent in swimming

108 ☐ **rule requiring a property owner to post warning signs**

about the dangers inherent in swimming is unreasonable

109 ☐ **Connecticut, a small state, hundreds of miles of shoreline**

would be exposed to this unreasonable requirement

110 ☐ **Property owners who have water on their land**

entitled to assume that a reasonable adult would be aware of the risk of drowning in a body of water

111 ☐ **highly unreasonable to expect property owners to warn adults**

of the dangers of engaging in an extreme water sport in the middle of winter during storm-like conditions.

112  **CONCLUSION**

113  **federal district court granted summary judgment in favor
of all defendants,**

effectively dismissing Popow's claims.

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