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LIFEGUARD SUPERVISION LIABILITY IN REVIEW

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Reported case law involving recreational injury liability reflects the fact that drowning is one of the major causes of accidental death in this country along with falls and motor vehicle accidents. However, for the most part, these reported court decisions involve drownings in unguarded situations in natural bodies of water, rather than manmade swimming pools. Generally, the danger of drowning in a natural body of water is considered an open and obvious risk to anyone, even young children. As a result, there is usually no duty to warn, let alone guard, these bodies of water. On the other hand, there may be a legal duty to provide adequate supervision where the landowner offers a designated area or pool to individuals invited onto the premises for recreational swimming. The following paragraphs provide an overview of rather recent case law which illustrates the general legal principles courts are likely to apply in determining whether lifeguard supervision in a particular instance was reasonable or negligent.

LIFEGUARD DUTIES - OBSERVE & RESCUE

In the case of *S&C Co. v. Horne*, 235 S.E.2d 456 (Va. 1977), a 14 year old boy drowned in defendant's apartment complex swimming pool. At the time of the drowning, there were five to six swimmers in a pool measuring fifty feet by sixty feet. The maximum depth of the pool was eight feet. Another swimmer alerted the lifeguard that "someone was on the bottom." At the time, the lifeguard was eating ice cream with friends at the shallow end of the pool. In this particular instance, municipal regulations required a lifeguard to be on duty along with an elevated lifeguard chair. Further, water clarity regulations required that a six inch disc be observable at thirty feet.

As described by the state supreme court, the owner of swimming pool or lake must take reasonable precautions to guard against accidents which are likely to befall swimmers based upon the common knowledge and experience of those operating aquatic facilities. Specifically, the court noted that the applicable lifeguard standard of care involved a "two-fold duty" (1) to observe swimmers for signs of distress, and (2) when distress is discovered, to attempt a reasonable rescue. Accordingly, the issue in this case was whether the lifeguard should have discovered any signs of distress prior to the drowning in this particular instance.

In addressing this issue, the court noted that the reasonable lifeguard need not continuously occupy his post, here the elevated chair. Rather, the court found that a reasonable lifeguard may properly give attention to other duties which do not materially interfere with lifeguard duties, i.e., observation and rescue. Applying these principles to the facts of the case, the court found that no other duties prevented this particular guard from occupying the lifeguard stand. As a result, the court concluded that this particular lifeguard did not see what a qualified lifeguard reasonably should have seen under the circumstances. In particular, the court noted that the lifeguard's preoccupation with his friends, the lack

of water clarity, and the improper positioning of the lifeguard stand in the glare of the afternoon sun had prevented him from properly observing the pool for swimmers in distress.

Similarly, the court in *Corda v. Brook Valley Enterprises, Inc*., 306 S.E.2d 173 (N.C.App. 1983) found evidence that the lifeguard did not act reasonably when he left his station to retrieve chairs and umbrellas in anticipation of an approaching storm. Under such circumstances, the lifeguard's responsibilities for maintaining the area around the pool, including the chairs and umbrellas, had materially interfered with his primary duty to observe the swimmers. While tending to these duties, plaintiff's husband drowned. He was last observed by the lifeguard standing in four feet of water. As in the previous case, it was another swimmer, rather than the lifeguard, who observed a bluish-gray object under the water and alerted the lifeguard: "that gentleman has been under the water longer than I think he should have."

CHAIN OF COMMAND

In the case of *Williams v. United States,* 660 F.Supp. 699 (E.D.Ark. 1987), plaintiff's son, age 16, did not resurface after he dove into defendant's pool. At the time, the lifeguard was engaged in conversation and inattentive to his duties. In this particular instance, the court found that the lifeguard was not observing the diving area and, as a result, he lost observation of a swimmer in distress for an unreasonable period of time. In addition, the court found that the lifeguards did not enforce their own pool rules regarding use of the diving area. Specifically, the lifeguards were to moderate use of the diving area and observe each person entering the diving area to ensure that a diver surfaced before another dive. In this case, the lifeguard was not observing the diving area to see if Williams resurfaced. On the contrary, two more divers had entered the water before one of the other divers alerted the inattentive lifeguard. Further, the court found that the lifeguard did not blow his whistle to stop activity in the pool when he left his station to attempt the rescue. The court noted testimony indicating that a lifeguard should always blow his whistle when leaving his station, unless he was being relieved by another guard.

In addition to the lack of adequate supervision, the court found that the lack of training and effective CPR clearly established the lifeguards' negligence in this case. In particular, the court found this pool operation lacked the "required chain of command among lifeguards to diminish the adverse impact of inexperience." In this instance, an inexperienced lifeguard had conducted CPR while the more experienced lifeguard went to summon the rescue squad on the telephone. As a result, the court found such inexperience had increased the time which decedent was left without adequate CPR. Specifically, the court found that the inexperienced guard's failure to clear decedent's airway before initiating CPR had increased the delay which ultimately caused his death.

PREVENTIVE SUPERVISION

In the case of *Maganello v. Permastone, Inc*., 231 S.E.2d 678 (N.C. 1987), plaintiff was injured at

defendant's lake as a result of another patron's "horseplay." At the time of the injury, plaintiff was standing at the base of a waterslide waiting to catch his child. For twenty or thirty minutes prior to the incident, several patrons were tossing each other from their shoulders into the lake. As the group moved closer to plaintiff, the teenage lifeguards were paying attention to the girls and did nothing to stop or control the horseplay. Plaintiff injured his neck when one of the other patrons landed on him.

For swim facilities, the court found that water imposes inherent dangers which requires lifeguards to keep lookout in sufficient number to supervise and rescue those in danger. In addition, the court found the lifeguard's supervisory duties includes "preventive supervision," i.e., guarding the swim facility and the surrounding area for dangerous activities. In the opinion of the court, boisterous play in and of itself is not necessarily dangerous. Rather, if unattended and unrestricted, it is reasonably foreseeable that boisterous play can lead to hazardous consequences. As a result, the court found there is a legal duty to conduct any such activities in a reasonably safe manner. Accordingly, if permitted at all, the court held such conduct should be limited to a closely guarded restricted area in a manner which does not impair the attractiveness of the establishment for customers.

In general, the court held that a proprietor of a place of amusement is liable for negligent or malicious horseplay causing injury if there is sufficient notice to stop the activity. Conversely, where there is no notice, there is no liability. In other words, the dangerous behavior of others must last long enough for the lifeguards to discover it and either remove or warn of the danger. In this particular instance, the court found the horseplay had existed for at least twenty minutes. Further, the court found backflips were a "rough activity" involving movement and resulting danger to patrons, including plaintiff, if such roughhousing was not closely supervised or prohibited.

NO MEASURES TO ADDRESS ANTICIPATED RISK

Similarly, in the case of *Volcanic Garden Management, INC. v. Beck*, 863 S.W.2d 780 (Tex.App. 1993), the court found that defendant had failed to properly supervise potentially "rough activity" in its aquatics facility. In this particular case, plaintiff broke her back while riding down a waterslide at defendant's waterpark. The incident occurred during her first visit to the waterpark and during her first ride down the waterslide. Plaintiff rode down the slide on an innertube with her daughter on her lap. During the ride, a boy approximately 12 years old struck plaintiff from behind two times and fell on top of her in the water at the base of the slide. Apparently, the boy had lost his innertube during the ride.

Prior to ride, plaintiff was told she would need to use an innertube on the ride, but no instruction was given regarding proper use of the innertubes, or possible consequences associated with losing the innertube during the ride. Further, there was no instruction given to waterslide users regarding proper spacing between persons. In addition, plaintiff was not advised that she should not go down the slide holding her 5 year old daughter on her lap. Although patrons were required to ride the waterslide with an innertube, defendant made no effort to require patrons to keep their innertube on the way down the ride. Further, defendant made no effort to separate waterslide patrons by time intervals so they would

no collide with each other.

Defendant's lifeguards testified that the lifeguard stationed at the top of the ride was supposed to space people to make sure that they were not coming down together. The waterpark lifeguard stationed at the bottom of the ride testified that he frequently say waterslide patrons losing their innertubes while coming down the ride. The manager of the waterpark testified that, with or without the innertube, people were going to come into contact with each other, but at a very slow speed. In her complaint, plaintiff alleged that defendant was negligent in failing to supervise the other patrons on the waterslide and/or warn her of the risk of people colliding with each other.

As described by the court, the defendant waterpark owed its patrons a legal duty to exercise ordinary and reasonable care for their safety and protection. On the other hand, the court noted that defendant was not an insurer of safety (i.e., assuming responsibility for any injury). On the contrary, the court stated that defendant was only liable for foreseeable injuries to patrons. In other words, the injury had to be the result of hazards or dangers that could be reasonably foreseen or anticipated. Within this context, anticipated injuries need not be the particular injuries received, but only the same general character as the actual injuries. Moreover, when defendant knows, or should know, that a condition on the premises poses an unreasonable risk of harm to patrons, defendant has a legal duty to take whatever action is reasonably prudent under the circumstances to eliminate or reduce the foreseeable risk of injury.

Applying these principles to the facts of the case, the court found there was sufficient evidence that defendant was negligent in failing to instruct plaintiff on the proper and safe use of the waterslide. In addition, the court found evidence of negligence for defendant's failure to keep patrons separated on the waterslide by controlling the intervals between riders. Finally, the court found evidence that defendant had failed to exercise proper supervision of the boy behind plaintiff at the time of the injury.

NO DUTY TO MAINTAIN CONSTANT SURVEILLANCE

In the case of *McAuliffe v. Town of Windsor*, 577 N.Y.S.2d 942 (A.D. 1991), plaintiff, age 16, was struck by lightning on a supervised public swimming beach operated by defendant. As the rain and thunderstorm approached, the lifeguard announced that everyone to was get out of the water. The beach director similarly directed everyone to leave the water and beach area and take cover. Plaintiff was aware of the possibility of lightning, but chose to kick a volleyball on a grassy hill fifty feet from a shelter. Plaintiff, however, alleged that the town was negligent in its supervision of the area and its failure to protect patrons from foreseeable hazards.

According to the court, a municipality is obliged to furnish an adequate degree of general supervision to its invitees to park and recreation areas, but not immediate or strict supervision. A municipality is, therefore, not required to maintain constant surveillance of patron movement to prevent self-evident, risky and dangerous activities. In this case, the issue before the court was whether the town's legal duty

to furnish adequate general supervision included directions to plaintiff not to play on the grassy hill during the storm. Specifically, the issue was whether the lifeguard was required to make certain that plaintiff took proper shelter from the readily observable lightning hazard.

In the opinion of the court, the town discharged its legal duty by providing a lifeguard and beach director who directed swimmers to get out of the water, leave the beach, and take cover when the storm began. Further, the court found that the danger was readily apparent to plaintiff under the circumstances. As noted by the court, there is generally no legal duty to warn against a dangerous condition which is readily observable through the reasonable use of one's senses.

In this particular instance, the court found that plaintiff had observed the lightning. Further, the court found plaintiff was fully aware of the danger of being outside and the possibility of being struck by lightning. Despite such obvious danger, plaintiff elected to go to the hill with his friends. Under such circumstances, the court found that the town's duty of general supervision did not include an obligation to maintain constant surveillance of plaintiff's movement and activity. Specifically, the court held that the town owed no legal duty to plaintiff to make certain he took proper shelter from the rain, thunder, and lightning.

NO WARNING FOR OBVIOUS CONDITION

Similarly, in the case of *Cimino v. Town of Hempstead,* 488 N.Y.S.2d 68 (A.D. 1985), the court found there was no legal duty to warn against a condition that can be readily observed by the reasonable use of one's senses. In this case, plaintiff was injured when he was knocked down by a wave while bodysurfing at defendant's beach. At the time of the injury, the water was turbulent and the waves were eight to ten feet high. Prior to entering the surf, plaintiff had been told that the water was "really rough." In his complaint, plaintiff alleged that the town's lifeguards had a legal duty to warn beachgoers, or close the beach.

In the opinion of the court, the value of a warning in this instance was particularly questionable because plaintiff knew or should have reasonably known of the dangers posed by the rough waves. Specifically, the court found that the water conditions were readily observable to all those using the beach, including plaintiff. Further, the court noted that plaintiff had actually experienced water conditions prior to his injury. As a result, the court found the town had no legal duty to warn plaintiff. Further, the court found the town had no duty to close the beach because there was no evidence of similar accidents which would have put the town on notice of an unreasonable danger.