

UNGUARDED BEACH APPEARED TO BE DESIGNATED SWIMMING AREA

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In determining landowner liability for drownings in a natural or manmade body of water, the applicable legal standard of care will generally depend on whether or not the area was designated for swimming. In the absence of unusual circumstances, the risk of drowning in an area not designated for swimming is usually considered an open and obvious natural hazard for which the landowner owes no legal duty of care.

On the other hand, once a landowner decides to designate an area for swimming, a legal duty arises to make the premises reasonably safe for invitees (i.e., individuals authorized to use the premises for its intended public or business purpose – swimming). Under such circumstances, the landowner duty of care applicable to invitees includes inspecting and either repairing or removing known or discoverable hazards within a reasonable time. In the alternative, particularly where repair or removal is impossible or impractical, the landowner is required to provide an adequate warning of the general scope of a risk known to the landowner, but not open and obvious to invitees through the reasonable use of their senses.

Mere public use of a natural or manmade body of water for swimming does not generally, in and of itself, create a designated swimming area. On the contrary, the landowner must take some steps which constitute an expressed or implied invitation that swimming is authorized and encouraged, not merely tolerated, in a particular area. Further, for the most part, governmental entities have immunity from negligence liability for failing to designate an area for swimming in light of such public use.

As illustrated by the *Breaux* opinion described herein, the City had made improvements to an area which could create a reasonable belief among individuals visiting the beach that the adjacent ocean was being operated by the City as a public swimming area. Moreover, unlike similarly situated parts of the beach which were operated as public swimming areas, this particular location was the only unguarded site. Further, the City had not informed or warned the public of this fact. Under such circumstances, the area was not as safe as it appeared to be and invitees to the public beach could reasonably believe that the area was open for swimming.

FACTS OF THE CASE

In the case of *Breaux v. City of Miami Beach*, Nos. SC02-1568 & SC02-1569, 2005 Fla. LEXIS 546 (Fla. 2005), the issue before the Florida Supreme Court was whether the City of Miami Beach was operating a swimming area on a public beach. If the ocean adjacent to the public beach was deemed a designated swimming area, the municipality would have a legal duty to “exercise reasonable care under the circumstances to those foreseeable users of that swimming area.”

On February 20, 1997, Eugenie Poleyeff and her husband, who were guests at the Saxony Hotel in Miami Beach, walked three blocks to the beach area behind the Seville Hotel at 29th Street to rent a beach chair and umbrella from a concessionaire, Hurricane Beach Rentals. The City of Miami Beach controlled the beach under a lease agreement with the State of Florida.

The City was aware that the public was using the beach area at 29th Street for swimming. The Poleyeffs saw other people swimming and wading in the ocean, and believed the area was a swimming area. The Poleyeffs saw no signs warning that the area was not a swimming area or that there were no lifeguards in the area. Similarly, the Breaux family saw many people swimming there on that day and the previous day, and believed the area was a swimming area.

At the 29th Street beach area, the City provided public restrooms with showers, water fountains, telephones, and picnic tables. In addition, there was metered parking adjacent to the beach on 29th Street. The City also licensed Hurricane Beach Rentals to operate at that location. Hurricane Beach Rentals rented to beach users a variety of equipment, including lounge chairs, umbrellas, and watercraft. The City required the concessionaire and its employees to wear identification badges issued or approved by the City.

The City's Parks and Recreation Director testified that the 29th Street beach area was the only beach area that had public restrooms, showers, water fountains, and a beach concessionaire, but no lifeguard station.

While swimming in the Atlantic Ocean adjacent to the 29th Street beach area, Ms. Poleyeff was caught in rip currents. Upon hearing Ms. Poleyeff's calls for help, Zachary Breaux attempted to save her. Poleyeff and Breaux were both overcome by the rip currents and drowned.

At those beaches where the City did provide lifeguards, the public was warned of rip currents in the area. On the day of the accident, the lifeguard at the 21st Street beach area posted rip current warning flags. Eight blocks away at the 29th Street beach no such warnings were provided to the decedents Poleyeff and Breaux.

The estates of Poleyeff and Breaux (hereafter referred to collectively as Breaux) brought wrongful death claims against the City of Miami Beach alleging the City was "negligent in failing to warn swimmers of the danger of rip currents or take other action to safeguard swimmers who used the beach." The City filed a motion for summary judgment, arguing that it was entitled to sovereign immunity. The trial court granted the City's motion for summary judgment, finding that the City was immune from suit. Breaux appealed.

The appeals court affirmed the trial court's grant of summary judgment, but not on the basis of sovereign immunity. Instead, the appeals court held the City had no legal duty to "warn the decedents of, or safeguard them from, the naturally occurring rip currents because it did not control the area or undertake a particular responsibility to do so." The state supreme court granted Breaux's petition to review this decision.

ANALYSIS

As noted by the state supreme court, the City controlled the area of Miami Beach where the drowning occurred based upon a 1982 management agreement with the State. This management agreement required the City to provide for "the limitation and control of land and water related activities such as boating, bathing, surfing, rental of beach equipment, and sale of goods and services to the public." Based on this agreement, the state supreme court concluded that the appeals court had erred in finding that "the City does not control the beach of Miami Beach."

Having found that the City controlled the beach, the state supreme court had to determine "whether the governmental entity was operating a public swimming area when the accident occurred." As noted by the state supreme court, "a government unit has the discretionary authority to operate or not operate swimming facilities." In the exercise of such governmental discretion, the decision not to operate a designated swimming area is immune from liability for negligence. On the other hand, once the governmental unit decides to operate the swimming facility, it assumes a legal duty to operate the facility in a reasonably safe manner, just as a private individual is obligated under like circumstances. As described by the court, this operational duty includes "keeping the premises in a reasonably safe condition and warning the public of any dangerous conditions of which the governmental entity knew or should have known."

According to the state supreme court, "the fact that the governmental entity never formally 'designated' the beach as a public swimming area is not dispositive [i.e., final settlement of the issue] of whether the government owes an operational-level duty to safely operate a public swimming area." On the contrary, in the absence of formal designation, the state supreme court found that sufficient facts might exist to "demonstrate that the area was held out to the public as a public swimming area."

On the issue of whether a governmental entity is operating a public swimming area, the focus of the inquiry is not whether a formal designation occurred. Rather, the actions of the government entity must be examined to determine whether, based on all the circumstances, the government entity held the area out to the public as a swimming area or led the public to believe the area was a designated swimming area.

The "common use" of an area for swimming may be one factor to consider in order to determine if a governmental entity held out the area as a public swimming area or, led the public to believe that the area was designated as a swimming area. At one end of the spectrum is the circumstance where the government entity formally designates an area for public swimming. At the other end of the spectrum are circumstances where either the government entity actively attempts to prohibit swimming or has no knowledge that some part of an undesignated beach is being used by swimmers.

Accordingly, the state supreme court determined that a governmental entity would owe a legal duty of reasonable care to those using a swimming area if “the governmental entity held the area out to the public as a swimming area or led the public to believe the area was a designated swimming area.”

Applying these principles to the facts of the case, the state supreme court rejected the notion that the City was not operating a swimming area at the 29th Street beach location based on “the city council’s decision not to formally designate the area for swimming or post lifeguards there.” In the opinion of the state supreme court, “the totality of the circumstances in this case demonstrates that the City was operating a ‘public swimming area’ at the 29th Street location.”

The City knew that the public was using this location for swimming. There were no signs warning the public not to swim and both the Poleyeff family and the Breaux family saw people using the area for swimming. Moreover, although the City did not have a lifeguard station at the 29th Street beach area, the City built beach facilities at this location and provided metered parking at the end of 29th Street.

Of even greater significance, the City licensed a concessionaire to rent beach chairs, umbrellas, and watercraft at this location, thereby deriving revenue from the public’s use of this particular beach area.

In reaching this conclusion, the state supreme court noted that the City’s decision to open the beach to the public, in and of itself, did not create a public swimming area and give rise to a legal duty to “warn the public of any dangerous conditions of which the governmental entity knew or should have known.” In this particular instance, however, the state supreme court found that the City did much more at the 29th Street location than “simply allowing access to the water.”

By providing parking, public facilities, and concessions, the City created more than just a “chance that residents of the State may, on their own, select” the 29th Street location “to enjoy the ocean.” In fact, at the time of the drownings, the 29th Street beach area was the only beach area along Miami Beach that had public restrooms, showers, water fountains, and a beach concessionaire, but had not been formally designated a swimming area by the City.

Under such circumstances, the state supreme court concluded that the City “held the 29th Street beach area out to the public as a swimming area or led the public to believe the area was a designated swimming area.” As a result, the supreme court held that the City “had an operational-level duty of care to warn the public of any dangerous conditions of which it knew or should have known at the 29th Street beach area.”

In making this determination, the supreme court noted that the legal duty of an operator of a swimming area to maintain the premises in a reasonably safe condition “applies only to the extent the premises are improved or maintained by the operator.” Conversely, the court found that “[a]n operator cannot be charged with keeping an unaltered natural body of water ‘safe’ because a natural body of water contains inherent natural hazards.” In so doing, however, the state supreme court cautioned that “[t]he natural character of a hazard does not... relieve the operator of the duty to warn if it knew or should have known the hazard was present.” Applying this reasoning to the facts of the case, the state supreme court found the transient nature of rip currents would, therefore, not necessarily relieve the City of its legal duty to warn.

[T]he focus is not on the nature of the dangerous condition but on whether the governmental entity knew or should have known of the dangerous condition. Whether the City knew or should have known of the dangerous rip currents at the 29th Street beach location on the day of the accident is an issue of fact to be decided by a jury.

Evidence was presented to the trial court that most people do not know the danger that rip currents pose, that the presence of rip currents is not obvious to the untrained observer, and that people tend to enter the water where a rip current exists because the water looks calmer than the surrounding area.

Further, on the day that the decedents were killed, the City's lifeguard at the 21st Street beach identified rip currents at that location and posted a warning flag. Thus, the City warned beachgoers at a nearby location of a known dangerous condition while neglecting to similarly warn beachgoers at the 29th Street beach where the same condition existed.

In light of such evidence, the state supreme court concluded that further trial proceedings were necessary for a jury to consider “the question of the City's actual or imputed knowledge regarding rip currents at the 29th Street beach area” at the time of the drownings.

We hold that based on the undisputed facts, the City controls the beach area and was operating a public swimming area at the 29th Street location at the time of the accident. Thus, the City had a duty of care to warn of dangers that were known or should have been known, and is not shielded from liability as a matter of law based on sovereign immunity.

We expressly do not decide the issues of whether the City knew or should have known of the rip currents at the 29th Street location on the day the decedents drowned or whether the City breached its duty of care to the decedents. Nor do we decide any issues regarding causation or damages.

The state supreme court, therefore, reversed the judgments of the lower courts in favor of the City and remanded (i.e., sent back) this case to the trial court “for further proceedings not inconsistent with this opinion.”