MUNICIPAL IMMUNITY FOR FAILED 911 SURF RESCUE

James C. Kozlowski, J.D., Ph.D.

In the case of *Popow v. Town of Stratford* (Dist. Conn. 2/12/2010), the administrator of the estate of decedent Stoil Popow (Popow) alleged the defendant Town was negligent in responding to a fatal "kite-surfing" accident off of Long Beach in Stratford, Connecticut. Plaintiff Popow also claimed the Town was negligent because it "took no action to warn kite-surfers to come out of the water or to supervise the area during the winter, despite their knowledge that the beach area was being used by kite-surfers year round." In addition to the Town, Popow sued the Town's director of parks and recreation (Patricia Patusky) and a number of Town firefighters.

In this case, the federal district court found the following "well established" common-law doctrines would "determine the tort liability of municipal employees":

> Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. The hallmark of a discretionary act is that it requires the exercise of judgment. In contrast, ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion.

Further, the court noted that "Municipal officials are immune from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society":

> Discretionary act immunity reflects a value judgment that - despite injury to a member of the public - the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury.

In contrast, the court acknowledged that "municipal officers are not immune from liability for negligence arising out of their ministerial acts." According to the court, non-immue "ministerial acts" are defined as "acts to be performed in a prescribed manner without the exercise of judgment or discretion." As noted by the 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." Applying these principles to the facts of this particular case, the governmental acts were found to be discretionary and, therefore, immune from any liability for negligence.

FACTS OF THE CASE

During the early afternoon hours of January 21, 2006, there were as few as six, but possibly as many as twenty-five, people kite-surfing in Long Island Sound off of Long Beach in Stratford,

Connecticut. In January, there were no lifeguards or other rescue personnel on duty at Long Beach. There were no warning signs in place on the beach warning of the hazards of entering the water during the winter, nor were there any barricades or other fencing limiting the public's access to the beach.

At approximately 3:30 p.m., the weather took a turn for the worse. Substantial storm clouds form, and it began to get dark. In addition, the wind changed directions and began blowing strongly away from shore, creating "squall" like conditions. As a result of the change in wind and light conditions, almost all of the people kite-surfing returned to shore.

The decedent, Stoil Popow, arrived at Long Beach at approximately 3:30 p.m., when the weather turned for the worse. Robbie Guimond, a certified Kitesurfing Safety Systems instructor, was present at Long Beach when the decedent arrived. Guimond had kite-surfed with the decedent at least 50 times since 2001. He described the decedent as a beginner-level kite-surfer who was "very reckless," "very stubborn," and "unwilling to take advice from others."

After preparing his equipment, the decedent entered the water and began kite-surfing. By approximately 4:00 p.m., every kite-surfer present at the beach except for the decedent and perhaps one other person had returned to shore. Guimond testified that the decedent had difficulty controlling his kite in the strong winds soon after he entered the water. The decedent reacted by "ditching" or "flagging" his kite, a maneuver designed to "depower" the kite. Guimond described "ditching" or "flagging" a kite as a "last course of action" that causes the kite to fall into the water. After the decedent "ditched" his kite, he fell into the water along with it.

Guimond testified that the decedent was in danger as soon as he fell into the water with his kite, a situation he referred to as a "kitemare." According to Guimond, the decedent was partially submerged in the water but conscious after he fell. He began to float approximately 300 to 400 feet away from shore while holding his kite. In Guimond's opinion, the decedent could have swam to shore from that distance, and he signaled to the decedent to swim to shore. However, the decedent made no attempts to swim to shore, and instead drifted parallel to the shore while Guimond visually followed him.

When the decedent made no attempt to swim to shore, Guimond called 911 from his mobile phone. A second witness present at the beach also notified a police officer in the Long Beach parking lot of the decedent's situation. Guimond's initial 911 call was routed to Long Island. Guimond then made two or three additional 911 calls that were routed to Trumbull, Connecticut. There was no emergency hard wired telephone in this area of Long Beach. In addition, there was no cellular tower in the area.

After making three unsuccessful 911 calls, Guimond directly called the Bridgeport Police Department. Guimond informed the dispatcher at the Bridgeport Police Department that there was a person in the water in the Long Beach area who needed assistance. The dispatcher advised Guimond that a boat was being dispatched to the scene.

Guimond maintained direct visual contact with the decedent during his phone calls to the Bridgeport Harbor patrol and relayed his approximate location. Guimond also contacted the

United States Coast Guard. However, Guimond did not directly contact the Town of Stratford Fire or Police Department.

At approximately 5:00 p.m., the Stratford Fire Department received a report of a "windsurfer" in distress from Centralized Medical Emergency Dispatch ("CMED"). At approximately 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 in inflatable pontoons. At approximately 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. The Birdseye Street boat launch ramp, from which the zodiac boat was launched, was located approximately four miles from the decedent's last reported location in the Housatonic River, which meets with Long Island Sound.

The zodiac boat experienced engine and motor difficulties when it reached the mouth of the Housatanic River. As a result of these difficulties, the zodiac boat was unable to continue toward the decedent's reported location or back to the site where it was launched. The firefighters remained on board the boat, which they tied to a buoy, for approximately ninety minutes until the boat was towed by the United States Coast Guard back to the Birdseye Street launch ramp.

The Bridgeport Harbor Patrol and United States Coast Guard vessels arrived in the area where the decedent entered the water approximately twenty to forty-five minutes after he had "ditched" or "flagged" his kite. It was "full dusk" or "near dark" when they arrived. Guimond had observed the decedent's kite "tumble" into the air shortly before their arrival, and he advised the Bridgeport Harbor Patrol that the decedent was no longer with the kite.

As of 7:00 p.m., approximately two hours after CMED had notified the Stratford Fire Department of the incident, the decedent had not been located despite a search by the Bridgeport Harbor Patrol and the United States Coast Guard. The United States Coast Guard located the decedent's body in Long Island Sound the following day, January 22, 2006.

SAFETY SERVICES DISCRETION

In response to Popow's allegations of negligence, the firefighter defendants claimed "qualified immunity" in connection with their attempt to rescue the decedent. As a general rule, the federal district court noted that "Connecticut courts consider acts performed by firefighters when they are in the line of duty to be discretionary acts":

> While it is so that statutes, regulations, and policies can create ministerial duties, when they relate to fire, police, or other public safety services, they are most often held to create discretionary duties. In addition, the provision of emergency medical services to members of the public is a discretionary act.

Applying these principles to the facts of the case, the federal 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." In the opinion of the federal district court, it was "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 for the decedent required the exercise of judgment based on an analysis of numerous factors." As a result, the court concluded that "the actions taken by the Firefighter Defendants on the date in question were discretionary" and, therefore, immune from liability.

PUBLIC RECREATION DISCRETION

In addition to the Town firefighters, Popow alleged that the Town of Stratford and Stratford director of parks and recreation. Patricia Patusky, were negligent in failing to "post warning signs" to "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." Popow also alleged that the Town was negligent by "inviting the public to use Long Beach when there were no lifeguards on duty" and failing to "adequately warn that the lifeguards were not on duty."

In the opinion of the federal district court, the same legal analysis of the failed rescue attempt which led it to conclude that "qualified immunity" precluded Popow's negligence claims against the firefighters applied "equally to the Town of Stratford and Patusky." In so doing, the court found "[t]he Town of Stratford is entitled to the same discretionary act immunity that applies to the individual Defendants in this case," i.e., the firefighters and Patusky. As described by the federal court, the Connecticut legislature had "codified the tort liability of municipalities" as follows:

> Conn. Gen. Stat. § 52-557n(a)(2)(B) extends the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that 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"…
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> [M]unicipalities and municipal officials are immune from liability for negligence arising out of their discretionary, as opposed to ministerial, acts. Ministerial acts are acts to be performed in a prescribed manner without the exercise of judgment or discretion. The maintenance of parks is a governmental function and is usually subject to municipal immunity for negligence.

Applying such statutory immunity for discretionary acts to the facts of this case, the federal district court found the Town and the parks and recreation director would be entitled to qualified immunity and thus the 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." In so doing, the 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."

Further, the court found no evidence "suggesting that the Town of Stratford or Patusky, as Director of Parks and Recreation for the Town, were obligated or expected to post signs and warnings or station lifeguards at public beaches during the winter months." On the contrary, Patusky submitted her job description as the parks and recreation director to establish that she

was "not responsible for placing signs, erecting barriers, or warning the public that lifeguards are not on duty at Long Beach during the winter months." Further, the court found "no ordinance, statute, or regulation prescribing the provision of a phone service, whether hard-wired or cellular, at Long Beach."

Accordingly, in the absence of any statutory or other obligation, the federal district court concluded that the acts in question were discretionary, rather than ministerial. As a result, the court found the Town of Stratford and Patusky are entitled to qualified immunity as to Popow's claims of negligence for failure to warn and failure to provide phone services.

PREMISES LIABILITY

The federal district court also addressed Popow's claims based on principles of premises liability. In her complaint, Popow alleged the Town and Patusky were negligent for failing "to post warning signs or erect barriers preventing access to Long Beach during the winter." Popow also alleged premises liability based on the Town's negligent failure "to have lifeguards on duty or warn that no lifeguards were on duty." Popow also claimed the Town was negligent in failing "to install an emergency telephone or a cellular tower" on the premises.

As described by the federal district 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":

> In general, there is an 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. A possessor of land has a duty to an invitee to reasonably inspect and maintain the premises in order to render them reasonably safe. In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover.
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> The duty that a possessor of land owes to a licensee, however, does not ordinarily encompass the responsibility to keep the property in a reasonably safe condition, because the licensee must take the premises as he finds them. As a general rule, the possessor of real estate owes no duty to trespassers . . . to keep the property in a reasonably safe condition for their use.
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> A 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.

As characterized by the court, Popow had claimed that "the Town of Stratford and Patusky invited the public to use Long Beach for kite-surfing, including during the winter months, and therefore owed the decedent and other kite-surfers a duty of care." The federal district court, however, found 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."

> The distinction between one who is an invitee and one who is merely a licensee turns largely on 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. There is no evidence, for instance, that the Town made any improvements upon the area of Long Beach where the decedent was kite-surfing.

Moreover, in the opinion of the court, "even if the Town of Stratford and Patusky owed the decedent a duty of care as an invitee, that duty extends only to 'dangers that the invitee could not reasonably be expected to discover'."

> Here, the decedent was engaged in an inherently dangerous water sport during the month of January, when the water temperature was between 38 degrees and 40 degrees Fahrenheit.,, The risk of engaging in an extreme water sport in such conditions was patently obvious to any reasonable person, and the Defendants should not be held liable for their failure to warn of this risk.

According to the court, "[o[ne who engages in water sports assumes the reasonably foreseeable risks inherent in the activity." In this particular instance, the federal district court held "the City was not required to remind adult swimmers of the obvious and commonly known dangers of drowning inherent in swimming":

> A rule requiring a property owner to post warning signs about the dangers inherent in swimming is unreasonable. In Connecticut, a small state, hundreds of miles of shoreline would be exposed to this unreasonable requirement. Property owners who have water on their land are entitled to assume that a reasonable adult would be aware of the risk of drowning in a body of water… [I]t would be 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.

CONCLUSION

As a result, based upon the above reasoning, the federal district court granted summary judgment in favor of all defendants, effectively dismissing Popow's claims.

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James C. Kozlowski, J.D., Ph.D. is an associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: jkozlows@gmu.edu Webpage: http://mason.gmu.edu/~jkozlows