

DISORGANIZED LIFEGUARD RESPONSE IN LAKE DROWNING

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In the case of *Yarborough v. City of Springfield*, 2023 IL App (4th) 220025-U (Ill.App. 4<sup>th</sup> 2/22/2023), Plaintiff Mary Yarborough brought a wrongful death lawsuit against the Defendant City of Springfield after her 16-year-old son, Eric M. Jones, drowned at a public beach at Lake Springfield (the beach).

FACTS OF THE CASE

Michael Jones, Eric's brother, testified he, Eric, and their cousins went to the beach to have a good time. Eric wanted to learn to swim. It was Michael and Eric's first time at the beach. They went into water about chest deep. At some point, Michael slipped, and he grabbed Eric, who was by him. Their cousin then grabbed Michael and swam him to shallower water. When this happened, Michael lost contact with Eric. Michael looked for Eric but could not see him. He called to a lifeguard (Caveny) and told him his brother was under the water and could not swim.

The lifeguard got in the water, and Michael told him where he had lost contact with Eric, which was close to where Michael was standing. The lifeguard started looking for Eric, but not in the area Michael told him to look. Michael was hollering at the lifeguard and pointing to where Eric had been. The lifeguard, however, did not hear Michael and swam out by the seawall to start searching for Eric because "Eric's friends had said they saw bubbles out by the seawall and gestured toward the seawall."

Darcy Woodrum and her husband Travis Woodrum both testified they were at the beach on the day in question but were outside the fenced area when they noticed a commotion. They ran back to the water when they realized something serious was happening. Darcy called 911 because she believed someone was missing. She heard a boy arguing with a lifeguard, screaming someone had gone down in the water. The lifeguard had told the boy to check the beach house for the missing person.

Darcy told her husband to help the lifeguards because they were not doing much of a search. The boys who had been with Eric were saying Eric was last seen in the area where he was eventually found. Darcy said the lifeguards looked panicked, confused, and unorganized. She acknowledged neither she nor her husband had ever been a certified lifeguard or knew what rules and procedures lifeguards are expected to follow.

Travis Woodrum testified no one knew what was going on at the beach, and he had not heard a whistle. Travis testified a group of boys who had been with Eric were telling a lifeguard Eric was at the location where he was finally found. Because the lifeguards did not seem to be doing anything, Travis and another man went into the water. Eventually some civilians and lifeguards started doing a line search and found Eric. Travis testified he pulled Eric out of the water and carried him to shore.

## UNTRAINED LIFEGUARD

Denis Caveny testified he had lifeguard, CPR, and first aid certifications. The beach was Caveny's first open-water lifeguard job. He did not remember receiving any training at the beach. As a certified lifeguard, he knew murky water was a known hazard and posed more of a safety risk than clear water. Caveny also acknowledged he knew non-swimmers went into areas marked as deep water. Caveny did not remember much about the Emergency Action Plan (EAP) in place at the beach for a distressed patron in the water. He further testified EAPs are necessary for a lifeguard to do his or her job effectively.

Caveny testified that Eric was found about six to eight feet from the lifeguard chair where he had been sitting. This location was very close to where Eric's friends told Caveny they last saw him. Caveny indicated a line search was the only effective way to find someone in water where you could not see. When a line search was eventually done, Eric's body was quickly found.

## LIFEGUARD CONFUSION

A certified lifeguard for the City in 2007 (Young-Hunter) had no experience in an open-water facility prior to working at the beach. She did not recall being given any manuals explaining procedures and policies at the beach. Young-Hunter did not remember doing any in-service training at the beach before she was allowed to work while the beach was open to the public. In addition, she testified she was never given an EAP and never practiced a missing person EAP.

According to Young-Hunter, EAPs are necessary because they help lifeguards respond faster in emergency situations. She testified EAPs were discussed in her StarGuard and Red Cross certification training. This training indicated EAPs should be written down and site specific so everyone knows what to do.

Young-Hunter did not know whether Eric could swim. Moreover, after Eric went missing, she also did not know Eric's last known location, which was important information based on her training. After the guards got in the water, she testified the search for the missing swimmer was chaotic and unorganized. She tried to organize a line search, but everyone was so frantic she did not think her suggestion registered with the other lifeguards. According to Young-Hunter, the situation was confused from the beginning because no one took charge.

Eventually, a patron at the beach forced everyone to come together in the shallow end and start a line search. Once the line search started, they found Eric in less than a minute 10 to 15 feet from where the missing person was reported. Young-Hunter testified a missing swimmer needed to be found within three minutes to avoid brain damage.

Also, according to Young-Hunter, when a person is reported missing to a lifeguard, the lifeguard should immediately blow his or her whistle, the water should then be cleared, and an EAP should be activated. She believed Eric would have been found in under three minutes if a line search was formed when the other lifeguards responded.

## EMERGENCY ACTION PLAN?

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Douglas England was the utility property manager for City Water Light and Power (CWLP). Employees at CWLP and the beach were considered agents of the City. England was not a lifeguard and had no expertise with regard to a lifeguard's job. He had the authority to direct the beach employees. However, he was not involved in the training or certification of the lifeguards. He did not know if the lifeguards were given training manuals.

England claimed a document called "Emergency Procedures" was either given to the beach managers and lifeguards or posted in the office or lifeguard room. He had not found any other lists of emergency procedures. England expected the lifeguards and beach managers would have known of these emergency procedures.

In addition, England believed a procedure was in place for locating missing persons and bathers at the time Eric drowned. According to England, this procedure included clearing the water, checking the facilities for the person, and starting a line search in the water if the person was not found. England further stated that he had "heard an emergency action plan (EAP) being discussed but did not recall ever seeing one at the beach."

According to England, the "Emergency Procedures" document indicated lifeguards should blow their whistle one time to warn a patron, two times to get the attention of the other guards, and three times for a true emergency such as a lost child or drowning patron. England further testified a line search, where the guards linked arms and walked through the water, would be the best type of search to use at the beach because of the opaque water.

### JURY VERDICT

The jury returned a verdict in favor of Plaintiff and found the total amount of damages to be \$1,500,000 (\$750,000 for past and future grief and sorrow and \$750,000 for post and future loss of society). The jury also found the percentage of negligence attributable solely to Eric Jones was 50%. As a result, Plaintiff was awarded \$750,000 in recoverable damages.

On June 10, 2021, the City filed a posttrial motion for judgment notwithstanding the verdict. On January 5, 2022, the trial court denied the City's motion, stating: "The present case involves a known dangerous activity and there was sufficient evidence to support the jury's verdict finding willful and wanton conduct by the City and/or its agents."

The City appealed, arguing Plaintiff did not present sufficient evidence for the jury to conclude the City and its employees' actions were willful and wanton under the exception to governmental immunity in Illinois law.

### SUPERVISION IMMUNITY

The issue on appeal was, therefore, whether the evidence in this case established the City was entitled to immunity under the Illinois Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/1-101 et seq. (West 2006)). As cited by the appeals court, section 3-108(a) of the Act (745 ILCS 10/3-108(a) (West 2006) stated the following:

except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.

Further, the court noted Section 1-210 of the Act (745 ILCS 10/1-210 (West 2006)) defined willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." As described by the court, the Illinois supreme court had provided the following "guidance" for determining "willful and wanton" conduct under the Act:

The term "willful and wanton" includes a range of mental states, from actual or deliberate intent to cause harm, to conscious disregard for the safety of others or their property, to utter indifference for the safety or property of others... Whether conduct is willful and wanton depends on the circumstances of each case. Ordinarily, the determination whether conduct is willful and wanton is a question of fact for the jury.

#### SOME SAFETY EVIDENCE

In this case, the City had provided its aquatic safety expert (Smith) who testified "neither the individuals managing the beach nor the lifeguards showed an utter disregard or conscious indifference for the safety of its patrons." In particular, Smith believed "utter indifference meant no one cared about saving Eric, which was not true." Accordingly, Smith believed Plaintiff needed to introduce some evidence the lifeguards did not care what happened to Eric to prevail. In addition, Smith opined Eric's conduct alone was the proximate cause of his death.

In so doing, Smith had noted the City required certified lifeguards, provided proper equipment, and followed Illinois law with regard to lifeguard staffing requirements. The City had also posted warnings for novice swimmers. As for in-service training, Smith noted five lifeguards testified they remembered receiving some training at the beach. Smith further testified the initial search at the location where a witness said he last saw Eric did not represent an utter disregard, utter indifference, or complete disregard of Eric's situation.

Accordingly, the City had argued, "when a unit of local government takes steps to prevent injuries" the failure to take "additional steps that would have prevented an injury does not establish the entity exhibited a conscious disregard for the safety of others."

As characterized by the appeals court, the City's argument would preclude a finding of "willful and wanton conduct" whenever "an entity covered by the Act that takes some steps to protect an individual or individuals." The court rejected this argument:

While the fact more safety precautions could have been taken by a defendant does not establish the defendant's conduct was willful and wanton, this does not mean

the conduct of a defendant who took some safety steps cannot be willful and wanton. Whether conduct is willful and wanton depends on the circumstances of each case.

#### AQUATIC SAFETY PROTOCOLS?

Based upon the circumstances in this particular case, Plaintiff's expert in lifeguarding and aquatic safety (Dworkin) had testified "the City through its agents at the beach showed a conscious disregard for the supervision and management of its lifeguards, which was a proximate cause of Eric's drowning death." According to Dworkin, conscious disregard within the context of willful and wanton conduct was evident in the City's failure to "establish its own operational protocols and surveillance protocols." Moreover, he testified the City "did nothing to train its lifeguards through pre-service and in-service training." Such training was "necessary to ensure the lifeguards could operate as a team both in preventing and managing accidents." In particular, he testified the lifeguards had failed to:

(1) recognize Eric's distress because of a lack of established surveillance protocols, (2) appropriately respond to a report of a missing bather, and (3) appropriately search for the missing bather.

Dworkin also testified certified lifeguards are not qualified to work at every aquatic facility, noting organizations which provided certified lifeguards with site-specific pre-service training and regular in-service training. In this case, he testified "the City, the managers, and the lifeguard supervisors did nothing to provide site-specific training for the lifeguards and did not know anything about the protocols the lifeguards were following."

According to Dworkin, "lifeguards need to be supervised, and it is critical for the facility manager to develop standard operating procedures, including EAPs, to ensure a consistent response to emergencies." Accordingly, Dworkin indicated "lifeguards cannot simply be hired at the beginning of the summer and told to do their jobs without any site-specific training." While "the City had somewhat of a plan for locating a missing person," Dworkin testified "the City's plan was "not good" because it "failed to distinguish between a missing person outside the water and a missing bather."

In this case, Dworkin had noted "none of the lifeguards testified they had practiced an in-service missing bather EAP." As a result, the following "appropriate steps" and training were not in place for the lifeguards to be properly prepared for this type of emergency situation:

If a lifeguard gets such a report from a credible witness, it is critical to put the witness in the position where they last saw the victim and the search needs to be done in that location in an organized and coordinated manner.

Dworkin further testified: "it has been well known for decades that non-swimmers will go into deep water. Dworkin believed Eric's drowning was preventable."

#### CONSCIOUS DISREGARD EVIDENCE

In the opinion of the appeals court, the jury in this case had sufficient evidence to find the City and its employees showed a conscious disregard for the safety of its patrons at the beach, including Eric, by failing:

(1) to have a clearly established EAP dictating how the lifeguards should handle a situation where a swimmer was missing in the water and (2) to require the lifeguards to practice responding to a situation where a person is reported missing in the opaque water at the beach.

As noted by the appeals court, this was Caveny's first lifeguard's job at an open-water facility and he had not received any in-service training at the beach. In this particular instance, the court found the evidence showed he was the first lifeguard notified Eric was missing. According to the court, Caveny had failed to tell the other lifeguards that "the missing swimmer could not swim and was last seen near the lifeguard tower where Caveny had been sitting." Instead of blowing his whistle to alert the other lifeguards of the potential emergency as he should have done, Caveny entered the water and started searching for Eric in another location out by the seawall.

Another lifeguard (Gobble) testified he "followed Caveny out by the seawall and searched for Eric there." Also, witnesses had testified this "search by the seawall was disorganized, with no one in charge." Had he known of Eric's last location, Gobble testified "he would have started a line search right away." As a result, the appeals court found "the lifeguards wasted valuable time looking for Eric in the wrong location."

In addition, the appeals court noted Dworkin had testified "the lifeguards knew what should have been done but failed to take the proper actions when the emergency actually occurred because the City and its agents had failed to train them for the situation." Further, the court found the City's own aquatics expert had agreed "rescuers should practice responding to emergencies so they would have an appropriate instinctive response to an emergency situation." The court also acknowledged Plaintiff had introduced evidence that "neither England nor the beach managers told the lifeguards they were in charge of training themselves."

## CONCLUSION

Based on the record in this case, the appeals court concluded the jury had sufficient evidence to find "a known dangerous situation" which "constituted willful and wanton conduct that led to Eric's death." In so doing, the appeals court noted this evidence included: "the failure of the City and its agents to have a clear EAP for this situation and to practice what needed to be done if a swimmer went missing in the beach's opaque water."

Having found sufficient evidence for the jury to determine the City and its agents engaged in willful and wanton conduct, the appeals court held the City was not entitled to supervision immunity under Illinois state law. (745 ILCS 10/3-108(a)). As a result, the appeals court held "the trial court did not err in denying the City's motion for judgment notwithstanding the verdict." The appeals court, therefore, affirmed the trial court's judgment based upon the jury's verdict in favor of Plaintiff.

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