TORT LIABILITY & GOVERNMENTAL IMMUNITY

Tort Liability & Governmental Immunity: Duty of Care

Dudley v. City of Tampa,
912 So. 2d 322 (Fla. 2d Dist. App. 2005)

A city has no duty to warn of conditions on land it never owned, even when the land is used for a city-sponsored project.

FACTS AND PROCEDURAL HISTORY

As part of an affordable housing initiative, the City of Tampa created a program in which it identified a vacant tract of land to be used for an affordable housing development. The City also designated the developer and builder for the project; however, it never actually owned the subject property. The private non-profit developer designated by the City took ownership of the property and had the soil tested in preparation for construction. The testing company reported that the soil was not suitable for building because of the presence of unstable materials several feet below the surface.

The original developer subsequently sold the property to a second developer, Tampa United Methodist Centers, Inc. (TUMC). TUMC contracted with a builder to build single-family homes on the property. Shortly after construction began, the builder reported to TUMC that the soil conditions would require the foundations of the homes to be strengthened at an additional cost. TUMC refused to pay the additional cost because it claimed the builder already had notice of the soil conditions. Construction continued with no action taken to mitigate the stability issue.

After buying homes in the TUMC development, Yvonne Dudley and other residents suffered damage to their homes as a result of the unstable soil conditions. Dudley and the others sued the City, claiming that the City knew of the problems in the soil that caused the damage to their homes, and that the City had a duty to warn potential buyers of the soil problems. The City moved for dismissal as a defendant, and the trial court granted the motion. Dudley and the other plaintiffs appealed.

ANALYSIS

Assessing a local government's liability in a negligence claim involves a two-part question: (1) did the local government have a duty to warn the plaintiff, and, if so, (2) did the local government enjoy sovereign immunity in its actions? *Clay Elec. Coop. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003); *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). The duty owed in the first prong of the question can be based either in statute or common law.

The Second District Court of Appeal noted that Dudley had not alleged any statutorily based duty. With regard to a common law duty, when a local government takes ownership of real property, it assumes the same common law duty to maintain the land as any private landowner. *Green v. Sch. Bd. of Pasco County*, 752 So. 2d 700, 701 (Fla. 2d Dist. App. 2000).

In this case, however, the City never owned the property in question. Although the City identified the tract of land and participated in the affordable housing plan, no legal duty to warn was ever created because ownership never attached. The Second District noted that "legislative enactments for the benefit of the general public do not automatically create an independent duty to either individual citizens or a specific class of citizens." *Dudley*, 912 So. 2d at 325 (quoting *Trianon Park Condo. Assn. v. City of Hialeah*, 468 So. 2d 912, 917 (Fla. 1985)). Governments must be able to enact laws without fear that new tort liabilities will arise from those laws, or governments will restrict their activities on behalf of the general welfare. *Trianon Park Condo. Assn.*, 468 So. 2d at 922.

Because the Second District found that there was neither a statutory nor a common law duty to warn, it found no reason to address the sovereign immunity element of the local government liability question, and affirmed the trial court's ruling.

SIGNIFICANCE

Dudley clarifies the bounds of governmental liability in public programs involving real property. A city may establish an affordable housing program and other programs intended to provide public benefit without fear of becoming liable for problems with the housing, as long as the city does not own the property involved in the public initiative.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 2 (1998 & Supp. 2006).

Sandy Phillips

Tort Liability & Governmental Immunity: Sovereign Immunity

Schmid v. City of Miami Beach,
902 So. 2d 217 (Fla. 3d Dist. App. 2005)

Sovereign immunity will not protect a local government from suits in tort when injuries occur as a result of the design or construction of a public facility.

FACTS AND PROCEDURAL HISTORY

Shirley Schmid sued the City of Miami Beach for an injury she suffered when her shoe became caught in a decorative groove surrounding a tree planted in a concrete walkway. The trial court granted summary judgment in favor of the City on a theory of sovereign immunity. Ms. Schmid appealed.

ANALYSIS

On appeal, the City argued that sovereign immunity applied because the offending groove was an original design feature of the walkway rather than a defect resulting from a lack of maintenance. The Third District Court of Appeal rejected this argument, holding that the design of a public project is an operational, as opposed to a discretionary, function of the City. Governmental decisionmaking that can be characterized as "operational" is not immune from tort liability. *Ferla v. Metro-Dade County*, 374 So. 2d 64, 68 (Fla. 3d Dist. App. 1979). Once the design of a civil project reaches the construction stage, the constructing entity is required to construct the project in a non-negligent manner. *Seaboard Coast Line R.R. Co. v. U.S.*, 473 F.2d 714, 716 (5th Cir. 1973). When construction begins, a governmental entity can no longer rely on sovereign immunity to shield it from suit because it is no longer exercising its discretionary function. Because sovereign immunity will not operate to shield local governments from

civil liability when exercising operational rather than discretionary functions, the Third District reversed the summary judgment in favor of the City and remanded the case.

SIGNIFICANCE

Schmid reiterates the principle that the shield of sovereign immunity will not protect local governments for design- or construction-related decisions when a feature of such design or construction causes injury.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 2 (1998 & Supp. 2006).

Jay Daigneault

Tort Liability & Governmental Immunity: Swimming Area

Breaux v. City of Miami Beach,
899 So. 2d 1059 (Fla. 2005)

Municipalities owe a duty of care to alert beachgoers of dangers the municipalities knew of or should have known of when they impliedly hold out a particular portion of a public beach as a swimming area by providing public restrooms and picnic tables, and licensing a vendor for swimming equipment. Neither formal designation as a public beach nor the provision of a lifeguard is necessary for this duty to arise. In such a case, the municipality is not entitled to sovereign immunity.

FACTS AND PROCEDURAL HISTORY

Eugenie Poleyeff, a guest at a hotel in Miami Beach, visited a beach at 29th Street that she believed to be a public swimming area. She rented a beach chair and umbrella from a business licensed by the City of Miami Beach. While swimming, Poleyeff was caught in a rip current, and when a fellow beachgoer, Zachary Breaux, attempted to save her, they both drowned.

The City did not expressly identify the 29th Street beach area as a public swimming area, but it was aware that people were using the beach for bathing. The City controls Miami Beach pur-

suant to a 1982 management agreement with the State of Florida. The City provided public restrooms, picnic tables, and parking, and licensed a vendor to rent swimming items including lounge chairs, umbrellas, and watercraft at the 29th Street beach. This was the only location on the beach that offered all of these amenities without a lifeguard on duty. At the portions of the beach where the City provided lifeguards, the lifeguards would post warning flags when rip currents were present. On the day of Poleyeff's and Breaux's deaths, lifeguards had posted rip current flags at a beach eight blocks from the 29th Street beach.

The trial court granted the City's motion for summary judgment based on sovereign immunity. The Third District Court of Appeal affirmed, relying on its decision in *Poleyeff I*, holding that a governmental entity does not have a duty of care to warn beachgoers of naturally occurring rip currents when it did not have control over the area and did not take express action to designate it a swimming area. *Poleyeff v. Seville Beach Hotel Co.*, 782 So. 2d 422 (Fla. 3d Dist. App. 2001) (*Poleyeff I*).

ANALYSIS

The Florida Supreme Court first dealt with whether the City had control over the portion of the beach where Poleyeff drowned. The Court held that the Third District erred in granting summary judgment because the City had control over the beach under its management agreement with the State.

The Court then examined whether the City owed a duty of care to Poleyeff and whether the government is immune from suit for the resulting tort. Normally, when dealing with tort liability of a governmental entity, a court must determine first whether the entity owes a duty of care and, if so, whether the entity is entitled to sovereign immunity. The Court noted that the analysis was the same for both issues in this case because the analysis focused on whether the municipality was operating a swimming area at the time of the drowning. The government's initial decision to consider a certain area of the beach as a swimming area is discretionary and protected by sovereign immunity. *Avallone v. Bd. of County Commrs.*, 493 So. 2d 1002, 1005 (Fla. 1986). Once that determination is made, the government assumes a duty to keep the area reasonably safe and to warn beachgoers of dangers of which it knows of or should have known of, the same duty owed

by a private property owner to an invitee. *Id.* The Court, relying on its decision in *Florida Department of Natural Resources v. Garcia*, 753 So. 2d 72 (Fla. 2000), stated that the City was not required to expressly designate the beach as a swimming area, but that it was enough to deduce from the surrounding circumstances that the City held it out as a public swimming area. In *Breaux*, the Court determined that the City did more than just merely open the beach to public access, which would not give rise to a duty to warn. Rather, the Court held the 29th Street beach was a de facto designated swimming area because the City provided public restrooms, showers, water fountains, and a licensed vendor of swimming-related equipment. The Court rejected the Third District's holding that the City had no duty to warn of a naturally occurring hazard over which it had no control, finding that determination in conflict with its decision in *Garcia*.

Justice Wells' dissenting opinion argued that *Garcia* is factually distinguishable. In *Garcia*, the City created the hazard in an area expressly designated as a swimming area. Justice Wells considered it unreasonable to expect the City to warn of dangers that are transient and unpredictable, especially when the City has merely opened the beach to public access and has not formally designated the beach as a bathing area. Justice Wells contended that to hold as the majority did would create an economic hardship on municipalities throughout the State.

SIGNIFICANCE

Breaux resolves a conflict between previous decisions of the Third District of Appeal and the Florida Supreme Court on issues relating to governmental liability in cases of swimming accidents. The Court's holding in this case reiterates a long-standing principle of law, and rejects the Third District's holding that municipalities only have a duty to warn of dangers in formally identified swimming areas but not when the danger is unpredictable or not within its immediate control.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 54 (2006).

Jana L. Booker

Tort Liability & Governmental Immunity: Third Party Contracts

Duval County School Board v. Kebert,
909 So. 2d 438 (Fla. 1st Dist. App. 2005)

When a school board hires an independent contractor to provide transportation for its students, it insulates itself from liability for the torts of those independent contractors, so long as the contractor is properly insured and the buses are reasonably maintained.

FACTS AND PROCEDURAL HISTORY

The Duval County School Board hired Bernice Duhart as an independent contractor to provide school bus transportation for Duval County students. In November 2000, one of Duhart's employees, while transporting students pursuant to the terms of Duhart's contract with the School Board, struck Scott Kebert's vehicle and injured him.

Kebert sued the School Board, alleging that it had a nondelegable duty to operate its school buses in a reasonable manner, and that the School Board was statutorily liable because the school bus hit Kebert while it was being "used" by the School Board. *Kebert*, 909 So. 2d at 441.

The trial court granted summary judgment, finding that the School Board did in fact "use" the bus, albeit indirectly, through the contract with Duhart and as such was liable to Kebert under Section 234.03(1) of the Florida Statutes. The School Board appealed.

ANALYSIS

A school board is liable for claims "arising out of any incident or occurrence involving a school bus or other motor vehicle owned, maintained, operated, or *used* by such school board." Fla. Stat. § 234.03(1) (1999) (emphasis added). Kebert contended that the School Board was liable under Section 234.031(1) because the statute imposes tort liability on a school board for any claim involving a school bus "used" by it. Kebert's argument was simple: the School Board used the bus to transport students from school; therefore, the Board's use made it liable under the statute.

The First District Court of Appeal disagreed. It first noted that it had already dealt with this specific issue in *Dixon v. Whitfield*, 654 So. 2d 1230 (Fla. 1st Dist. App. 1995). In *Dixon*, the court held that while "[s]chool boards owe their pupils a duty of reasonable care in providing them with safe transportation but they are 'not insurers of students' safety.'" 654 So. 2d at 1232 (citing *Harrison v. Escambia County Sch. Bd.*, 434 So. 2d 316, 319 (Fla. 1983)). Durhart's contract with the School Board was substantially the same as the agreement in *Dixon*.

The court went on to explain that, notwithstanding its holding in *Dixon*, a plain reading of the Florida Statutes made it clear that school boards could escape liability by contracting bus services to independent contractors, provided that the contractors carried the necessary insurance and properly maintained its buses. While Section 234.03(1) discussed the "use" of buses by school boards, Section 234.03(4) specifically addressed vehicles that are not owned by the School Board. Section 234.03(4) authorized school districts to require independent contractors to carry insurance while in service to the school. Furthermore, Section 234.03(1) holds school boards liable under Section 768.28, the statute on governmental negligence claims. However, a school board employee's negligent acts can impose liability; the acts of independent contractors are not covered by Section 768.28. Accordingly, the First District reversed the summary judgment for Kebert.

SIGNIFICANCE

Kebert addresses the issue of a school board's liability for the torts of its independent contract bus operators. *Dixon* and *Kebert* indicate that by hiring an independent contractor to provide student transportation, a school board may insulate itself completely from tort liability of that contractor. To achieve the full benefit of this "immunity," a school board must ensure that the independent contractor obtains the required insurance coverage and maintains its buses in a reasonable manner.

RESEARCH REFERENCE

- Dan B. Dobbs, *The Law of Torts* § 336 (West 2000).

Andrew C. Hill