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**GOVERNMENTAL IMMUNITY REVISITED**

by Ted Babbitt

While the Supreme Court's decision in Breaux v. City of Miami Beach, 30 Fla. L. Weekly S176 (Fla. March 24, 2005) deals with the rather narrow issue of a municipality's potential liability concerning a non-designated swimming area, it also provides a reasoned analysis of governmental responsibility.

Breaux involved the tragic case of a swimmer caught in a rip current at a beach and a second individual who, upon hearing cries for help, attempted rescue with the result that both drowned. The resulting two wrongful death cases ended at the trial level with summary judgments which were affirmed by the Third District. The Courts held that the City had no duty to swimmers to warn them of the existence of a natural occurring event like a rip current because the beach had not been designated by the City as a swimming area and, therefore, the City had not taken on the responsibility of controlling the area.

The Supreme Court, in an opinion written by Chief Justice Pariente, reversed and returned the cases to the trial level for jury consideration. In doing so, the Court reviewed the analysis necessary to determine potential responsibility of a governmental entity. Noting the longstanding holding of Florida Courts that a governmental entity is not responsible for planning decisions but can be responsible for operational decisions, the Court, quoting from Avallone v. Board of County Comm'rs, 493 So. 2d 1002, 1005 (Fla. 1986), reasoned that once such an entity exercises its planning authority to allow

swimming, it becomes responsible, like a nongovernmental entity, for the operation of such a facility.

[a] government unit has the discretionary authority to operate or not operate swimming facilities and is immune from suit on that discretionary question. However, once the unit decides to operate the swimming facility, it assumes the common law duty to operate the facility safely, just as a private individual is obligated under like circumstances.

In the case under review, a major issue at both the trial level and in the District Court was the fact that the swimming area in question had not been designated by Miami Beach as a swimming area. The City took the position that, as a matter of law, they had no duty to provide either warnings or lifeguards for that area.

The Supreme Court conceded that in cases of governmental responsibility the first issue is whether the potential defendant owes any duty to the plaintiff before the question of immunity from liability even arises and that only if such a duty is owed must the Courts determine whether sovereign immunity bars the action. In this case, the facts showed that while the area had not been designated as a swimming area, the City was very much aware that the public was using the beach for swimming. The City provided restrooms, showers, water fountains, telephones and picnic tables as well as parking. In addition, the City had a lease with a beach rental company to rent lounge chairs, umbrellas and water crafts at this beach requiring that all of the employees of that company wear identification badges issued or approved by the City. The evidence was

that of all of the beaches in Miami Beach this was the only one that had all of these facilities and yet did not have a lifeguard station.

Under these facts, the Court concluded that the issue is not whether a City makes a formal designation of a recreational area as such but rather whether the totality of the circumstances would allow a jury to conclude that the City was, in fact, operating a public swimming area at the beach in question.

Thus, this opinion concludes that a governmental entity does not have the ability to immunize itself from suit by a fiat, which merely fails to designate a particular area as a public facility. When the facts indicate that the City has either real or imputed knowledge that the facility is, in fact, publicly frequented, a jury is justified in finding that the governmental unit is operating the area as a public facility and has the same responsibility to safeguard the public as it does if the designation had been made.

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