

LEGAL TIDES

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Potential Tort Liability For Beachfront Property Owners In North Carolina

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As visitation to our coast continues to increase, access to and along the beach becomes increasingly polarizing. One of the most important rights in the bundle of sticks for any property owner is the right of exclusion; it is, after all, what makes private property “private.” However, what happens if beachfront property owners do not have this right with respect to a portion of the beach? Are these property owners subject to liability for injuries suffered by the public on their private property? As discussed below, the answer will depend on the facts of the situation, but beachfront property owners in North Carolina generally are not liable in such situations absent direct, willful actions by the property owner that cause an injury to the public.

Beach Ownership and Property Rights

With respect to property rights, there are three distinct areas located on the beach.

First, the “wet sand” beach is located between the mean high tide line and the mean low tide line. It is an area that is sometimes underwater and sometimes completely dry. The State of North Carolina holds title to the wet sand beach area and it is considered to be public trust submerged lands. See *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970). As a result, the wet sand beach may be used by the public in North Carolina.

The second area, the “dry sand” beach, lies between the mean high water line and the first line of stable vegetation or the area marked by certain

natural indicators, such as the toe of the primary dune. As these boundaries move, the dry sand beach changes locations. A natural dry sand beach is not public property; it is private property that is subject to certain public trust rights. On the other hand, if the dry sand beach is renourished through a publicly funded beach renourishment project, the dry sand beach is State-owned public trust land. See *N.C. Gen. Stat. § 146-6(f)*.

The third area of the beach is located landward of the vegetation line and is considered private upland. Accordingly, the public generally may not use this land without permission of the owner. In other words, the beachfront property owner generally has the right to exclude the public from this area. See *Concerned Citizens of Brunswick County Taxpayer Ass'n v. State ex re. Rhodes*, 329 N.C. 37, 404 S.E.2d 677 (1991). Absent a prescriptive easement, a beachfront property owner would have the right to exclude the public from the upland portion of his or her private property.

The public’s right to use the privately owned dry sand beach is not settled in North Carolina. Although this issue has not been resolved by the North Carolina Court of Appeals or North Carolina Supreme Court, the public likely has a customary common law right to use the dry sand beach for recreational activities. North Carolina law implies the public has the right to use the dry sand beach. The North Carolina Supreme Court has suggested that the public trust doctrine or similar common law doctrine provides the

public with the basis for a legal right to use the dry sand beaches that expressly disavows the North Carolina Court of Appeals’ comment that “the public trust doctrine would not secure public access across the land of a private property owner.” See *Concerned Citizens of Brunswick County*, 329 N.C. 37, 404 S.E.2d 677. For the purposes of this article, it will be assumed that the public has a customary, common law right to use the dry sand beach for recreational purposes.

Potential Liability

The dry sand beach is the only privately owned area of the beach that is subject to public trust rights. These rights include reasonable recreational uses of the dry sand beach, including sunbathing, beach volleyball, fishing, walking and even holding a wedding. In other words, these are activities that people would typically conduct at the beach. The public’s use of the dry sand beach raises questions regarding potential liability of beachfront property owners with respect to injuries suffered by the public using this area of the beach.

Setting aside privacy issues, beachfront property owners have concerns regarding potential liability, if any, for injuries sustained by the public while using the dry sand beach. Analyzing this issue from a tort law perspective, private beachfront property owners should not have liability, under most circumstances, for injuries sustained by the public while using dry sand beaches in North Carolina.



The essential elements of a negligence claim are: (i) duty, (ii) breach, (iii) proximate causation, and (iv) damages. See *Cameron v. Merisel Props., Inc.*, 187 N.C. App. 40, 44, 652 S.E.2d 660, 664 (2007).

Traditionally in North Carolina, the standard of care a real property owner owed to an entrant depended on whether the entrant was an invitee, a licensee or trespasser. See *Newton v. New Hanover County Bd. Of Education*, 342 N.C. 554, 559, 467 S.E.2d 58, 63 (1996). For invitees, the landowner had a duty to “exercise reasonable care to provide for safety” of the invitee. See *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998).

A property owner’s duty to a licensee was less than a duty of reasonable care; a property owner

was simply required to refrain from causing any willful injury and from recklessly exposing the licensee to danger. See *McCurry v. Wilson*, 90 N.C. App. 642, 645, 369 S.E.2d 389, 392 (1988).

With respect to a trespasser (a person who enters without permission or right), a property owner has a duty to not willfully or wantonly injure a trespasser. See *Howard v. Jackson*, 120 N.C. App. 243, 461 S.E.2d 793 (1995). A “willful injury” exists where the property owner has actual knowledge of danger, combined with a design, purpose or intent to do wrong and inflict injury. A “wanton act” is one performed intentionally, with reckless indifference to any injuries likely to result. *Id.*

North Carolina, however, no longer

recognizes the distinctions between invitees and licensees in premises liability cases. Instead, now the State recognizes only two classes of entrants when analyzing tort liability: lawful entrants and trespassers. Premise liability cases are governed by a standard of reasonable care toward all lawful visitors (those who are on the premises with the property owner’s permission or by legal right). See *Nelson v. Freeland*, 349 N.C. 615, 631-32, 507 S.E.2d 882, 892 (1998).

This standard of care requires property owners to (i) take reasonable precautions to ascertain the condition of the property and (ii) either make it reasonably safe or give warnings as may be reasonably necessary to inform the invitee of any foreseeable danger. See *Williams v. Stores Co., Inc.*, 209 N.C. 591, 596, 184 S.E. 496, 499 (1936). Reasonable care, however, does not require property owners to undertake unwarranted burdens in maintaining their property. See *Royal v. Armstrong*, 136 N.C. App. 465, 469, 524 S.E.2d 600, 602 (2000). Ultimately, whether the care provided is reasonable is judged against the conduct of a reasonably prudent person under the circumstances. See *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988).

Additionally, North Carolina further limits the liability of property owners who either directly or indirectly invite or permit, without charge, any person to use their land for educational or recreational purposes. N.C. Gen. Stat. § 38A-4 provides:

Except as specifically recognized by or provided for in this Chapter, an owner of land who either directly or indirectly invites or permits without charge any person to use such land for educational or recreational purposes owes the

Board Member Profile: Christy Goebel

Christy Goebel, originally from East Lansing, Mich., grew up loving northern Michigan and the beauty of the Great Lakes.

She received her bachelor’s degree from Albion College in 1996, where she majored in history and minored in geology. During the fall of her junior year, Christy participated in the Sea Education Association program based in Woods Hole, Mass. After completing the shore component of the SEA program, she sailed with 34 other students and crew on the *SSV Corwith Cramer* from Woods Hole to Grenada, studying microplastic pollution along the way.

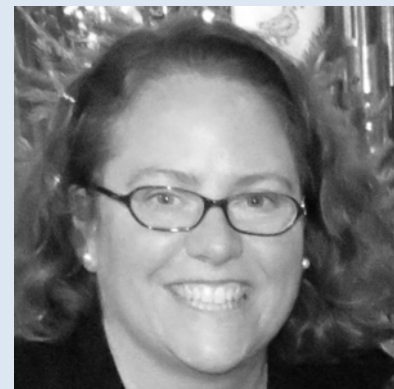
Christy went to Wayne State University Law School in Detroit, and received her JD

in 1999. During her 2L summer, she attended Vermont Law School’s summer program, where she studied Coastal Law using Joe Kalo’s casebook and took other specialized environmental law classes.

Following graduation from law school, Christy was ready for a warmer climate and moved to North Carolina where she practiced real estate law. In 2004, Christy joined the North Carolina Department of Justice as an Assistant Attorney General representing the Division of Coastal Management.

She has regularly attended and participated in the N.C. Coastal Resources Law, Planning and Policy Center’s “Shape of the Coast” programs since that time.

Christy enjoys visiting the North Carolina coast at every opportunity, cheering on her Michigan State University Spartans and spending time with her family.



Christy Goebel

person the same duty of care that he owes a trespasser, except nothing in this Chapter shall be construed to limit or nullify the doctrine of attractive nuisance and the owner shall inform direct invitees of artificial or unusual hazards of which the owner has actual knowledge. This section does not apply to an owner who invites or permits any person to use land for a purpose for which the land is regularly used and for which a price or fee is usually charged even if it is not charged in that instance, or to an owner whose purpose in extending an invitation or granting permission is to promote a commercial enterprise.

In the paragraph above, the term “direct invitee” is not defined by statute or case law. Because the public’s right to use the dry sand beach in North Carolina derives from customary use, such members of the public would not likely be considered “direct invitees.”

Thus, although people using the dry sand beach have a public right to use this area for recreational purposes, they are treated as trespassers with respect to tort liability. Private beachfront property owners: (i) have a duty to not willfully or wantonly injure a member of the public using the dry sand beach, and (ii) must avoid creating artificial conditions on their

property that are highly dangerous to children. Therefore, a private beachfront property owner would not likely be liable for an injury sustained by the public using the dry sand beach absent direct injurious actions by the property owner.

There are a number of situations that may arise where beachfront property owners ask: What do I have to do to avoid tort liability? Am I liable for certain conditions on the dry sand beach? For example, a beachfront property owner has no duty to regularly inspect the property, including the dry sand beach, for dangerous conditions (i.e., holes, rocks, equipment, etc.). Unlike a duty owed to lawful entrants, a property owner is not required to take reasonable precautions to ascertain the condition of the property.

What if the beachfront property owners discover a hole dug by their grandchildren or leave a volleyball net overnight resulting in an injury to the public? As the owner of the easement, the State bears the duty of keeping the dry sand beach in good repair, not the beachfront property owner. Further, there is no duty to warn trespassers or indirect invitees of artificial or unusual hazards.

So how could a beachfront property owner be potentially liable for an injury suffered by the public on the dry sand beach? There are two

circumstances: (i) willful or wanton conduct that results in an injury to the public, or (ii) pursuant to the “attractive nuisance” doctrine. To impose tort liability, it is not enough that a beachfront property owner (i) creates an artificial or unusual hazard, (ii) has knowledge of the condition, and (iii) fails to warn the public or correct the condition. Passive conduct is not enough to impose liability. For an action to be willful or wanton, there must be a design, purpose or intent to do wrong and inflict injury. See *Howard v. Jackson*, 120 N.C. App. 243, 461 S.E.2d 793 (1995).

Although a beachfront property owner would not be liable for leaving a hole dug in the sand on the dry sand beach by his or her grandchildren, if the beachfront property owner placed a broken glass bottle in the hole and filled it with sand resulting in an injury to the public, he or she may be liable for such conduct. The beachfront property owner would have knowledge that the public uses the dry sand beach. Burying broken glass, without markings or warning signs, would likely be considered a willful or wanton act in disregard of the risk known by the beachfront property owner or so obvious that he or she must have been aware of it and so great that it was highly probable that someone would be harmed.

2015 Research Law Fellows



Nicholas Decker and Tyler O'Hara

Welcome to **Nicholas Decker** and **Tyler O'Hara**, our 2015 Research Law Fellows. Both are rising third-year law students at the University of North Carolina at Chapel Hill's School of Law.

Nicholas Decker is interested in environmental law, specifically dealing with coastal issues in North Carolina and elsewhere in the United States.

What are you researching as a Center fellow?

I have primarily worked on the Center's ongoing project with the Town of Nags Head. Over the past month, our team has analyzed the town's existing land use plan and compared it to other similar plans around the country. Our ultimate goal is to use this knowledge to assist Nags Head in creating a new land use plan that will be effective in dealing with issues related to future climate change.

What's exciting or new with your research?

Currently, I am working on creating a series of fact sheets that will help explain the complex topic of offshore oil and gas drilling to a wide audience. As the debate surrounding offshore drilling continues to mount, we hope these fact sheets will help quell confusion about the issue.

Tyler O'Hara focuses on environmental and coastal law.

What are you researching as a Center fellow?

This summer, I am working on developing the legal framework for numeric nutrient criteria,

or NNC, in North Carolina's estuaries. Using numeric values will improve water quality by providing control strategies for nutrients that affect aquatic life, drinking supplies and water-based recreation. By analyzing and comparing the criteria development plans from other states, I hope to design a more comprehensive plan and avoid any unnecessary legal challenges to our NNC development plan.

What's exciting or new with your research?

In the recent U.S. Supreme Court decision in *Michigan v. EPA*, the Court held that the Environmental Protection Agency unreasonably interpreted the portion of the Clean Air Act that requires the agency to regulate power plants when “appropriate and necessary” when the agency refused to consider cost in making its decision.

While the Supreme Court's decision was fairly narrow, the similarities in language between the Clean Air Act and the Clean Water Act make it important to track how the Court is treating legal issues in both statutes. As a result of this decision, it is important that I stress the inclusion of a cost analysis when implementing any numeric nutrient criteria.

With respect to the attractive nuisance doctrine, North Carolina imposes a duty on landowners to protect children who, because of their age, do not discover a dangerous artificial condition or realize the risk. See *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982). Absent unusual circumstances, it is unlikely that a beachfront property owner would be held liable for injury to children pursuant to the attractive nuisance doctrine. North Carolina law limits the application of the doctrine to conditions that are not natural and obvious (i.e., artificial). Just because a landowner has actively altered conditions on the land does not make the condition “artificial.” *Leonard v. Lowe’s Home Center, Inc.*, 131 N.C. App. 304, 308, 506 S.E.2d 291, 294 (1998), states that, “Some human-made conditions are so common, obvious, and pervasive as to constitute ‘natural’ conditions exempt from the doctrine of attractive nuisance.” For example, the dangers of pits and excavations are readily apparent to everyone, even young children. See *McCombs v. City of Asheboro*, 6 N.C. App. 234, 243, 170 S.E.2d 169, 176 (1969).

Ultimately, determining the potential liability of beachfront property owners for injuries sustained by the public on the dry sand beach

will be fact specific; however, beachfront property owners would not likely be liable for such injuries absent direct, willful actions by the property owner that cause an injury to the public.

Prescriptive Easements

The public’s customary right to use the dry sand beach is analogous to the law of easements. In the context of liability, the public has essentially acquired an easement in the dry sand beach for recreational purposes. These rights are equivalent to any rights that would exist under a prescriptive easement.

To prevail in an action to establish a prescriptive easement, a plaintiff must prove: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least 20 years; and (4) that there is substantial identity of the easement claimed throughout the 20-year period. See *Concerned Citizens of Brunswick County Taxpayers Ass’n v. State ex rel. Rhodes*, 329 N.C. 37, 404 S.E.2d 677 (1991).

Courts will likely apply the law of easements to issues involving the relative rights and responsibilities of the dry sand beach owner (as

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holder of the servient estate) and the public. In regards to liability in the context of easements, the owner of the easement (the State) bears the duty of keeping it in good repair, not the owner of the servient tenement (beachfront property owner); therefore, the owner of the easement is liable for injuries caused by a failure to properly maintain the easement. *Green v. Duke Power Co.*, 305 N.C. 603, 611, 290 S.E.2d 593, 598 (1982), states “[I]t is the control [i.e., the duty] and not the ownership which determines the liability.”

In closing, beachfront property owners in North Carolina generally are not liable for injuries suffered by the public on their private property absent direct, willful actions by the property owner that cause an injury to the public.