IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DIEP TO, *Plaintiffs*, vs. **CITY OF COEUR D ALENE, et al.** *Defendants*.	)	Case No. **CV 2002 5424** **MEMORANDUM DECISION AND ORDER DENYING SUMMARY JUDGMENT IN PART AND GRANTING SUMMARY JUDGMENT IN PART**

I. INTRODUCTION.

On June 21, 2001, Plaintiff Diep To's seven year old son Jerry Ly drowned at the City Beach in Coeur d'Alene. Jerry Ly lived with his mother Diep To at St. Margaret's Shelter[1] in Spokane, Washington. Defendant Barbara Verellen, another resident of the shelter took her grandchildren along with Jerry Ly and his sister Shayla Ly to the City Beach to swim. Six lifeguards were on duty at the Coeur d'Alene beach at the time. The head lifeguard at the time was Christopher Taylor. Also using the city beach at the time in question was "PAAK in the Park" which involved a large number of children that are supervised by counselors involved with PAAK in the park. Jerry Ly drowned in the area under the supervision of lifeguard tower four. The lifeguard manning tower four at that time was Thomas Allen.

The Defendant City of Coeur d'Alene (city) has moved for summary judgment. The standard of review on summary judgment is as follows:

> A trial court in passing upon a motion for summary judgment views all facts and inferences from the record in favor of the nonmoving party to determine whether the motion should be granted. The burden of proving the absence of material facts is upon the moving party. However, the adverse party "may not rest upon

[1] Defendant St. Margaret's Shelter was previously granted summary judgment based on a lack of duty to plaintiff.

> the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." In addition, the affidavits submitted in support of or against the motion "shall set forth facts as would be admissible in evidence." A mere scintilla of evidence is insufficient to create a material issue of fact. Judgment shall be rendered if the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue of material fact.

East Lizard Butte Water Corp. v. Howell, 122 Idaho 679, 681, 837 P.2d 805, 807 (1992), (citations omitted). More on point is the following:

> In reviewing the affidavits submitted in support of and in opposition to the motion for summary judgment we must liberally construe the facts in favor of the child and resolve all doubts against the city. The motion should be denied if conflicting inferences could have been drawn from the facts alleged in the affidavits, and if reasonable people might have reached different conclusions as to whether the city was willful and wanton.

Jacobsen v. City of Rathdrum, 115 Idaho 266, 271, 766, P.2d 736, 741 (1988).

The city moves for summary judgment based on the immunity provided by Idaho's Recreational Use Statute, I.C. § 36-1604. The city claims the acts of the city were not willful or wanton and therefore the city is entitled to the immunity granted by the Recreational Use Statute. Additionally the city claims to be protected by I.C. § 6-904A for the actions of its employees while acting with in the course and scope of there employment. Finally in their Supplemental Memorandum in Support of Motion for Summary Judgment, the city claims they are protected from claims related to relocating the end buoy or adding a guard stand by the Discretionary Function exception in I.C. § 6-904(1).

The plaintiff argues the city is not entitled to protection under the Recreational Use Statue because this is not a premises liability case, but is instead based on the negligent, reckless, willful and wanton conduct of the city and its employees. Plaintiff's Response Memorandum in Opposition to Defendant City of Coeur d'Alene's Motion for Summary Judgment (Plaintiff's Memorandum), p. 5. Plaintiff also argues that the defendant is not protected by I.C. § 6-904A

and that the city's failure to move the buoy was operational, not discretionary, and therefore, was not covered by I.C. § 6-904(1). Plaintiff's Memorandum, pp. 9-14.

II. Recreational Use Statute, I.C. § 36-1604.

A. Applicability of the Recreational Use Statute to This Case.

Idaho's Recreational Use Statute applies to public entities. *McGhee ex rel. McGhee. City of Glenns Ferry,* 111 Idaho 921, 729 P.2d 396 (1986). Landowners are not relieved of all liability, they owe users the same duty as is owed to trespassers, which is the duty to refrain from willful or wanton conduct. *Jacobsen v. City of Rathdrum,* 115 Idaho 266, 766 P.2d 736 (1988).

The plain language of the Recreational Use Statute claims its purpose is to encourage landowners to make land and water available to the public for recreation without charge by limiting the land owner's liability to users. I.C. § 36-1604. There is no dispute that the City of Coeur d'Alene City Beach is open to the public free of charge. Plaintiff argues that this action does not come under the Recreational Use Statute because this action is a regular wrongful death lawsuit or simply a "premises liability" lawsuit. Plaintiff's Memorandum, p. 5. The terminology used by plaintiff has no significance. The cases cited by plaintiff, *Scott v. Wright*, 486 N.W.2d 40 (Iowa 1992) and *Young v. Salt Lake City Corp.*, 876 P.2d 376 (Utah 1994) both involve <u>active torts of the property owners</u> (where the property owner did some affirmative negligent action) not the <u>conditions of the property itself</u>. Plaintiff's Memorandum, p. 5, Reply Memorandum in Support of Motion for Summary Judgment (Defendant's Reply), p. 2.[2] The Court is not persuaded by plaintiff's arguments that this case should not come under the Recreational Use Statute because it is a "premises liability" case or a "wrongful death" case. This case involves the condition of the property itself. The facts of this case are squarely within I.C. § 36-1604:

[2] The city raises another distinction between these two cases and the present case. The recreational use statutes in Iowa and Utah do not have the equivalent of I.C. § 36-1604(c). That effect of that distinction is discussed below.

"The purpose of this section is to encourage owners of land to make land and water areas available to the public without charge for recreational purposes by limiting their liability toward persons entering thereon for such purposes." The City owns the land and the area is used for "swimming" without charge. I.C. § 36-1604(b). The potentially dangerous condition is the lake itself. This Court finds the Recreational Use Statute applies to the facts of this case. While all five Idaho Supreme Court justices were somewhat divided on other issues in *Jacobsen,* they were unanimous that the Recreational Use Statute applied to the facts in *Jacobsen.* This Court finds the facts in *Jacobsen* to be analogous to those in the present case.

Even though the Recreational Use Statute applies to the facts of this case, that does not mean that the land owner is absolutely immune to all liability. *Jacobsen,* 115 Idaho at 269, 766 P.2d at 739. The landowner is not immune from willful or wanton conduct. *Id.*

B. Willful and Wanton Conduct.

It used to be that "willful and wanton" conduct involved only intentional conduct. *Jacobsen,* 115 Idaho at 270, 766 P.2d at 740 *citing* the prior applicable jury instruction IDJI 225 (1985). Idaho Jury Instruction 225 read as follows:

> Willful and wanton misconduct is present if the defendant **intentionally does or fails to do an act**, knowing or having a reason to know facts which would lead a reasonable man to realize that his conduct not only creates unreasonable risk of harm to another, but involves a high degree of probability that such harm would result.

Id. (emphasis added).

The recent Idaho Supreme Court case *O'Guin v. Bingham County*, 139 Idaho 9, 14, 77 P.3d 849, 854 (2003), n. 1, notes that the Idaho Civil Jury Instructions have recently been revised, and that IDJI 2d now defines Willful and Wanton as follows:

> The words "willful and wanton" when used in these instructions and when applied to the allegations in this case, mean more than ordinary negligence. The words mean intentional **or** reckless actions, taken under circumstances where the actor knew or

> should have known that the actions not only created an unreasonable risk of harm to another, but involved a high degree of probability that such harm would actually result.

IDJI.2d, 2.25, *O'Guin,* 139 Idaho at 14, 77 P.3d at 854. (emphasis added). Note that "willful and wanton" used to be an intentional act, and now it can be an intentional act ***or*** a reckless act.[3]

Further confusing this area is the circular concept that now "reckless" appears to be the equivalent of "willful and wanton", and that the word "reckless" is more understandable according to the Idaho Supreme Court Civil Jury Instructions Committee. Comment to IDJI 2d 3.19, citing Comment to Instruction 2.25. The logical way to make sense of this situation is to look at the definition of "reckless", and equate that definition with the terms "willful and wanton".

"Reckless" has been defined as "creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk". Black's Law Dictionary, 7th Ed., p. 1276 (1999). "Recklessness" is defined as:

> Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but *a lesser degree of fault than intentional wrongdoing*. The state of mind in which a person does not care about the consequences of his or her actions.

Id. p. 1277. (italics added). This definition includes an affirmative act that creates the unreasonable risk and a probability that harm will actually result. While short of intentional conduct, this is still a very high level of "bad conduct". The Idaho Supreme Court has stated that foreseeability is an element of willful and wanton. *Harris v. State Dept. of Health*, 123 Idaho 295, 299, 847 P.2d 1156, 1160 (1992), citing *Jacobsen v. City of Rathdrum,* 115 Idaho 266, 766 P.2d 736 (1988). This foreseeability is more than a mere possibility. *Id.* **Whether an injury is the result of willful and**

[3] This Court realizes that on October 27, 2003 the Idaho Supreme Court entered an Order In re: Civil Jury Instructions where it stated it will not approve any specific instruction but will simply address individual instructions though appellate review. Since the Idaho Supreme Court mentioned IDJI 2d 2.25 in *O'Guin* and did not disapprove of the instruction, this Court views that as the Idaho Supreme Court's acceptance of IDJI 2d 2.25.

wanton conduct is a question for the jury. *O'Guin v. Bingham County*, 139 Idaho 9, 77 P.3d 849, 854 (2003). (emphasis added). The jury decides from all the evidence. *Id.*

The city points to the Lowry deposition attached to the Gaffaney Affidavit for statements related to the training and certification of the lifeguards and the beach. The Deposition of Christopher Taylor attached to the Gaffaney Affidavit describes the operation of the beach and swimming area. The plaintiff has submitted the affidavit of Gerald M. Dworkin, who claims to be an "expert consultant in aquatics safety and water rescue." Dworkin Affidavit, p. 1. This Court found this affidavit admissible for the purpose of summary judgment. Dworkin concludes: "Therefore, it is my opinion that the City of Coeur d'Alene was grossly negligent, reckless, willful and wanton in their actions which proximately caused the drowning death of Jerry Ly." *Id.,* p. 9.

Since "willful and wanton" conduct is a question for the jury (*O'Guin,* 77 P.3d at 854) and Dworkin concludes the city was willful and wanton in their actions, one would think summary judgment should clearly be denied in this case. However, the Dworkin affidavit, while admitted for summary judgment, needs further analysis under I.C. § 36-1604. First of all, gross negligence is not sufficient to get around the immunity I.C. § 36-1604 provides, so Dworkin's conclusion to that extent has no merit. Second, Dworkin's conclusion that the city was "reckless, willful and wanton" in its conduct is not clearly supported by specific "facts" in his affidavit. Dworkin does not come right out and state "why" he came to that conclusion that the city's conduct was "reckless, willful and wanton", so the Court looks to the rest of his affidavit. One paragraph that gives insight as to "why" he came to that opinion reads:

> It is my opinion that as a result of the City's failure to prevent this incident; its failure to recognize the potential as well as the incident itself; and its failure to manage the incident, Jerry Ly died as a result of a prolonged submersion which went undetected by Lifeguard personnel for several minutes. And, once

> the incident was finally recognized by Lifeguard personnel, the City failed to appropriately respond and manage this incident and failed to administer appropriate Basic Life Support care, prior to the arrival of Law Enforcement and EMS personnel.

Dworkin Affidavit, p. 9. None of this lists "intentional" acts, nor does he list "affirmative actions that were done knowingly, with utter disregard for foreseeable consequences which were highly likely to result from those actions."

That does not end the analysis. The above explanation by Dworkin is based on 24 separate items that Dworkin lists in his affidavit. While Dworkin's affidavit lists acts of negligence, probably even gross negligence on the part of the city (if all acts were true, which the Court appreciates the city contests the truth of those alleged actions, but at this juncture it is sufficient that there is a dispute of fact), it is a **much** closer call as to whether Dworkin lists "reckless" or "willful and wanton" acts to support Dworkin's conclusion of willful and wanton behavior on the part of the city that proximately caused Jerry Ly's death.

Reviewing the 24 acts Dworkin identifies, the Court has determined plaintiff through the Dworkin affidavit has created a jury issue as to whether these acts are "willful and wanton". The Court's reasoning is as follows. These acts if believed (understanding the city disputes that, but that is a jury issue for the finder of fact), are at least negligent, probably grossly negligent, and perhaps willful and wanton or reckless. These acts if true, are bad acts. It is really up to the jury to decide if as to one or more of these 24 acts, the city 1) knew of the deficiency and 2) could have forseen the possibility of a drowning and 3) the possibility of drowning was highly likely to occur with that deficiency and yet 4) the city consciously proceeded to act knowing the risk caused by that deficiency created a high likelihood of drowning. Each of those has to be proven as to at least one claimed act. Additionally, the plaintiff bears the burden of proving proximate cause, and will have to address contributory negligence and the negligence of others.

The acts listed by Dworkin which do not support "intentional" or "willful or wanton"

conduct by the city are as follows. The fact that there were unoccupied lifeguard stands on other parts of the beach far away from this incident, not only finds no proximal connection at least at this point, but that fact may be wholly irrelevant to this case. Affidavit of Dworkin, p. 4, ¶ 6, 7 and 8. Jerry Ly received resuscitation, although not from a lifeguard. If resuscitation is being provided by one qualified to do so, there is no concept in the law that a lifeguard is required to break in and perform resuscitation. *Id.,* p. 5, ¶ 16, p. 6 ¶ 19. There is no requirement in the law that the city must eliminate the dangers at City Beach". *Id.*, p. 3, ¶ 2. There is no showing how the city's "equipment" was proximately related to the death of Jerry Ly. *Id.* P. 5, ¶ 12, 13, 16.

At this juncture, the case boils down to the allegations of the city's failure to detect the drowning. Paragraphs 4, 5, 6, 10, 17 and 18 of Dworkin's affidavit address the alleged failure to detect the drowning. Dworkin states the city failed to establish appropriate Surveillance Protocols by the lifeguards to scan their zones of responsibilities, failed to establish acceptable lifeguard to patron ratio, failed to adequately assess and supervise Christopher Taylor as head lifeguard, failed to conduct emergency response drills and failed to develop an incident command structure for emergency situations. Dworkin opines that because of these alleged deficiencies, the lifeguards failed to recognize the incident. *Id.,* p. 8. These allegations, if believed by a jury, provide a jury issue sufficient to survive summary judgment. In a willful and wanton failure to act case (as opposed to willful and wanton commission of an affirmative act such as in *Scott* and *Young* above) such as this, recklessness/willful and wanton conduct may well be extremely difficult to prove. Justice Bakes noted that in his specially concurring opinion in *Jacobsen*. Justice Bakes felt that since "willful and wanton misconduct" were required to be proved, the factual record must be evaluated on a higher standard than in an ordinary negligence case. 115 Idaho 266, 273, 766 P.2d 736, 743. He felt the record in that case presented "a very close call as to whether or not the plaintiff's affidavits alleged sufficient misconduct on the part

of the city to raise a triable issue of fact of whether or not the city's conduct was 'willful and wanton' within the meaning of the law…" 115 Idaho at 273-74, 766 P.2d at 743-44. This Court feels the present case is likewise "a very close call" as to whether Dworkin's affidavit presents sufficient alleged misconduct. Justice Bakes felt there were acts of misconduct in *Jacobsen* which arguably constitute such willful and wanton misconduct that "reasonable minds might reach different conclusions as to whether the city was guilty of willful and wanton conduct." 115 Idaho at 274, 766 P.2d at 744. Illustrating the fact that reasonable minds might reach different conclusions, Justice Shepard in his dissenting opinion, came to the opposite conclusion that the *Jacobsen* facts did not support a finding of willful and wanton conduct. 115 Idaho at 275, 766 P.2d at 745. This Court in the present case reaches that same conclusion as the majority of the Idaho Supreme Court in *Jacobsen*.

This Court determines that the disputed facts in this case, viewed in the light most favorable to the plaintiff, the non-moving party, are analogous in general terms to the undisputed allegations presented by the injured party in *Jacobsen.* In *Jacobsen* plaintiffs presented evidence that was not disputed by the city at summary judgment, that the city had placed playground equipment very close to a ditch that seasonally had rapidly running deep water, and that the ditch was spanned by a bridge with a single rail three feet off the bridge deck that a child could slip under, causing the injury. The Idaho Supreme Court wrote:

> Considering these facts and the reasonable inferences from them that can be drawn in favor of the child, and resolving all doubts against the city, reasonable minds might reach different conclusions as to whether the city was guilty of wilful and wanton conduct in nor protecting children who came to the park from the dangerous condition in the part created by the ditch and the bridge. It is reasonable to infer that the city knew of the dangerous condition that existed in the park in the springtime when the ditch was swollen with rapidly running water, that the City knew of the condition of the bridge, and that allowing the ditch and the bridge to remain in that condition in the spring would create unreasonable risk of harm to children and would involve a high degree of probability that harm would result. As Justice Huntley said in his dissent in *Johnson:*
>
> > The most critical element of wantonness is knowledge, and that element need not be shown by direct evidence; rather, it may be made to appear by showing

> circumstances from which the fact of knowledge is a legitimate inference. 106 Idaho at 873-74, 684 P.2d at 275.
>
> Therefore, the trial court should not have granted summary judgment, and we reverse the trial court's order and remand for further proceedings.

115 Idaho at 272, 766 P.2d at 742. The same logic would apply in the present case to the claims made by plaintiff's expert Dworkin, at least as to the surveillance and the failure to detect the drowning. If summary judgment in *Jacobsen* was inappropriate back in the day when intentional conduct had to be found in order for there to be willful and wanton behavior, then summary judgment would be even more inappropriate now that intent may have been removed as an element of willful and wanton behavior, via the jury instructions.

Even that does not end the inquiry. Idaho Code § 36-1604 is different now than at the time *Jacobsen* was decided. Idaho Code § 36-1604(c) was not in existence at the time *Jacobsen* was decided in 1988. Many of these 24 acts by the city were acts made by city personnel who performed those acts "for the purpose of improving the safety of others" and under I.C. § 36-1604(c), such acts simply do not "…create liability on the part of the owner of land where there is no such basis for such liability." I.C. § 36-1604(c) also states: "…not the failure to maintain or keep in place any…modification made to improve the safety, shall create liability on the part of an owner of land where there is no such basis for such liability." At first glance, such language would result in elimination of liability by the city. However, I.C. § 36-1604(c) pertains to there being no <u>duty to warn</u> by the landowner, as the subsection is captioned "Owner Exempt from Warning". For that reason, the Court interprets that language as being limited only to the issue of failure to warn, and this is not a case of failure to warn. For that reason, the distinction made by the city as to comparable Utah and Iowa statutes, is not persuasive. Under the city's reading of I.C. § 36-1604(c), even if the city was grossly negligent in performing those acts, no liability would arise. This interpretation of I.C. § 36-1604(c) would mean that even if the city was willful and wanton in its carrying out these acts "made for the purpose of improving the

safety of others", no liability could ever arise. In other words, the argument is once the city put up the lifeguard stands, the city would be immune for all acts after that point, even if it acted willfully and wantonly. If the city intentionally manned all life guard stands with untrained personnel with poor eyesight and poor hearing, no liability would attach due to the language of I.C. § 36-1604(c): "…not the failure to maintain or keep in place any…modification made to improve the safety, shall create liability on the part of an owner of land where there is no such basis for such liability." That interpretation would gut existing law on recreational use statutes, and it would ignore the fact that I.C. §36-1604(c) pertains to failure to warn situations.

At trial, plaintiff will have to prove "willful and wanton" conduct as to each bad act alleged to have been committed. Plaintiff will have to prove the act was either intentional or, at least an affirmative action that was done knowingly, with utter disregard for foreseeable consequences which were highly likely to occur as a result of those actions. As pointed out by the majority decision in *Jacobsen*: "The most critical element of wantonness is knowledge, and that element need not be shown by direct evidence; rather, it may be made to appear by showing circumstances from which the fact of knowledge is a legitimate inference." 115 Idaho at 272, 766 P.2d at 742.

Accordingly, while the Idaho Recreational Use Statute clearly applies to the facts of this case, summary judgment on behalf of the city on the basis of the Idaho Recreational Use Statute is DENIED due to a jury issue on willful and wanton conduct.

III. Idaho Code § 6-904A Does Not Provide the City With Immunity.

Idaho Code § 6-904A provides immunity for "a governmental entity and its employees while acting within the scope of employment and without reckless, willful and wanton conduct." The Idaho Supreme Court has held: "the purpose of I.C. § 6-904A, which is to limit the liability of governmental entities for injuries caused by those under their supervision, custody or care."

Coonse v. Boise School District, 132 Idaho 803, 806, 979 P.2d 1161, 1164 (1999). *See also Harris v. State Dept. of Health*, 123 Idaho 295, 299, 847 P.2d 1156, 1160 (1992). The city claims that Jerry Ly was not under the city's supervision at the time of the drowning and if he was under the city's care, I.C. § 6-904A specifically I.C. § 6-904A(2) holds the city immune. Memorandum in Support of Motion for Summary Judgment, p. 14. That argument misses the point. Immunity arises from the status of the person **causing** the injury, not the status of the person injured. *Coonse*, 132 Idaho at 806, 979 P.2d at 1164. In *Hei v. Holtzer,* 139 Idaho 81, 73 P.3d 94 (2003), the Idaho Supreme Court found that when a teacher had an improper sexual relationship with a student, the school district was not supervising the teacher. *Id.* Because the district was not supervising the teacher, the statute did not apply. 73 P.3d at 100. Because I.C. § 6-904A did not apply to the unsupervised teacher, the student was able to bring a claim against the district for negligent supervision. *Id.* Plaintiff argues *Hei* indicates: "In this case the City, through its employees, is the negligent party. The City was not supervising any person within the meaning of the statute [I.C. § 6-904A]." Plaintiff's Brief, p. 11. In oral argument, counsel for plaintiff argued *Hei* makes it clear the city in this case is the bad actor. This unsupported claim that the city, not its employees, is the negligent party, is directly contradicted by the list of acts by "the City of Coeur d'Alene and its employees" enumerated only three pages earlier in plaintiff's briefing. Plaintiff's Brief, pp. 8–9. Plaintiff's claims are directly contradicted by the Dworkin affidavit quoted above, which sets forth nothing but the acts of people supervised by the city.

Plaintiff's claims of the city being the bad actor do not ring true. These claims are obviously made to skirt the application of I.C. § 6-904A. Plaintiff claims that only the city is responsible, but then plaintiff presents a long string of actions in the affidavits that deal directly with the actions of individuals, lifeguards, parks and recreation personnel. These people are all

under the supervision of the city. "The purpose of I.C. § 6-904A, which is to limit the liability of governmental entities for injuries caused by those under their supervision, custody or care." *Coonse v. Boise School* District, 132 Idaho 803, 806, 979 P.2d 1161, 1164 (1999). This Court finds I.C. § 6-904A applicable to the facts of this case. Again, that does not end the inquiry.

The city has immunity under I.C. § 6-904A for all acts except those that are willful and wanton. The plaintiff further claims that even if I.C. § 6-904A does apply the city's behavior was reckless, willful and wanton so they still have a claim. Plaintiff's Brief, p. 11. The analysis in section II above is applicable here. The Court notes that I.C. § 6-904C requires reckless or willful and wanton to be intentional as well. While *Jacobsen* dealt with the analysis of a different statute, its analysis of willful and wanton at a time when "intent" was an element of willful and wanton is instructive. *Jacobsen* tells us it is a jury question.

Accordingly, while the I.C. 6-904A applies to the facts of this case, summary judgment for the city upon that statute is DENIED due to a jury issue on willful and wanton conduct.

IV. Idaho Code § 6-904(1) Provides the City with Immunity As To Its Planning Decisions of 1) Whether to Construct a Fifth Lifeguard Stand and 2) Location of the Swim Area Buoys.

As to its decision whether to construct a fifth lifeguard stand and the location of the swim area buoys, the city claims it is immune under the discretionary function exception. A government entity is not liable for any claim based upon the exercise of a discretionary function or duty of the government, whether or not the discretion was abused. *Tomich v. City of Pocatello,* 127 Idaho 394, 397, 901 P.2d 501, 504 (1995). To determine if the action qualifies as a discretionary function a planning/operational test is used. *Id.* Under that test matters not requiring evaluations of policy factors are likely to be operational and not given immunity. *Id.*

Plaintiff has raised no genuine issue of material fact as to the construction of a fifth

lifeguard stand. Plaintiff's Brief pp. 12-14. There is no proof offered by plaintiff to counter the city's evidence that the decision of whether to build a fifth lifeguard stand was anything but a planning level decision. The decision regarding the fifth lifeguard stand is a planning decision, and is immune from liability under I.C. § 6-904(1).

Plaintiff claims the city's Recreational Director Steve Anthony could have chosen to move the buoy line but did not, thus it is an operational decision for which immunity would not lie. Plaintiff's Brief, p. 12-14. Plaintiff then argues: "Mr. Anthony didn't need any authority or approval to move in the buoy line. (See Deposition of Steve Anthony, Pages 45 and 46, attached as Exhibit U)." *Id.* pp. 13-14. Anthony testified that he as director had the ability to move the swim boundary before June 2001. Exhibit U, pp. 45, Ll. 20-25. As shown below, Anthony's rank as Recreation Director for the City of Coeur d'Alene (Supplemental Affidavit of Steve Anthony, p. 1, ¶ 1), is an indicia that this is a planning or policy decision. *Ransom v. City of Garden City,* 113 Idaho 202, 204, 743 P.2d 70, 72 (1987). The city argues the matter regarding buoy location was discussed at higher level meetings with the City Beach staff, the Parks and Recreation Commission, and those discussions and recommendations were referred back to the staff for a meeting with the Parks and Recreation Commission Chairman and the City Manager, Ken Thompson. Defendant's Reply Brief p. 12. But as defendants themselves note: "The 'planning/operational' test does not necessarily turn upon the status or rank of the actor." *Ransom v. City of Garden City,* 113 Idaho 202, 204, 743 P.2d 70, 72 (1987). However, greater rank or authority will most likely coincide with greater responsibility for planning or policy formation decisions. *Id.*

The determination of the applicability of the discretionary function exception is a two-step process. *Id.*, 113 Idaho at 205, 743 P.2d at 73. **First**, the Court must examine the nature and quality of the challenged actions. Routine, everyday matters not requiring the evaluation of

broad policy factors will more likely than not be "operational". *Id.* Conversely, decisions and actions which involve a consideration of the financial, political, economic and social effects of a given plan or policy will generally be "planning" and fall within the discretionary function exception. *Id.* This Court finds that the Affidavit of Steve Anthony sets forth facts showing the decision on the buoy line location was set initially by those at high levels of the city government after consideration of financial and other effects, and that even though he as Recreation Director for the City of Coeur d'Alene had authority to move that line, his decision not to do so is a planning or policy decision. This finding by the Court is due to the nature and quality of that action, and also due to Anthony's position as Recreation Director of the city. **Second**, the Court must consider the two policies underlying the discretionary function exception: 1) permit those who govern to do so without being unduly inhibited in the performance of that function by the threat of liability for tortuous conduct; and 2) to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government. *Id.,* 113 Idaho at 205, 743 P.2d at 73. Those policies give the Court no reason to find that Anthony's decision not to move the buoy line is an operational decision. The Court's finding that Anthony's decision not to move the buoy line is consistent with those policies.

Accordingly, summary judgment is GRANTED in favor of the city as to its decision to not construct a fifth lifeguard stand and its decision not to move the buoy line.

V. ORDER.

IT IS HEREBY ORDRED that defendant City of Coeur d'Alene's Motions for Summary Judgment as to the immunity provided under Idaho Code § 36-1604 and Idaho Code § 6-904A are DENIED, although those statutes are applicable to the facts of this case, and defendant City of Coeur d'Alene's Motion for Summary Judgment as to the immunity

provided under Idaho Code § 6-904(1) is GRANTED as to the decisions regarding the fifth lifeguard stand and location of the buoy line.

ENTERED this 5th day of February, 2004.

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John T. Mitchell, District Judge