

2001

Gerald M. Butler v. Sports Haven International : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

DOCKET NO.

14750R

EME COURT

OF THE STATE OF UTAH

GERALD M. BUTLER

Plaintiff-Appellant

vs.

Case No. 14750

SPORTS HAVEN INTERNATIONAL

Defendant-Respondent.

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF SALT LAKE
COUNTY, HONORABLE MARCELLUS K. SNOW, JUDGE.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GERALD M. BUTLER

Plaintiff-Appellant,

vs.

Case No. 14750

SPORTS HAVEN INTERNATIONAL,

Defendant-Respondent.

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is a wrongful death action brought by the father of a three-year old boy who drowned in a swimming pool on July 18, 1973.

DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, Honorable Marcellus K. Snow, presiding, granted Summary Judgment in favor of defendant-respondent and against plaintiff-appellant, no cause of action.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment below.

STATEMENT OF FACTS

The appellant has failed to clearly and completely state the facts relevant to this appeal and a restatement of the facts is necessary. The parties will hereinafter be designated as they appeared in the trial court.

On July 18, 1973, the plaintiff's deceased, Gerald M. Butler, Jr., drowned in a swimming pool maintained by this defendant near Fairview, Utah in Sanpete County. Defendant is a non-profit organization that maintains recreational facilities and property which are owned by its members.

Plaintiff became a member of Sports Haven International in early 1970 when he purchased a one-acre parcel of the 5,000 acre Sports Haven property. [Deposition of Gerald M. Butler, pages 21, 17]. As members, he and his family were free to develop their own property and were entitled to use common facilities, including a clubhouse and the subject swimming pool, and to participate in recreational activities, including horseback riding, snowmobiling and boating. [Deposition of Gerald M. Butler, page 18]. Beginning in 1970, he and his family stayed at Sports Haven two or three times a month and thereafter continued to make frequent trips to the development. [Deposition of Gerald M. Butler, pages 18, 23].

On the day of the accident, the plaintiff, his wife, their five children and two guests were staying in plaintiff's trailer which was parked in an area approximately 100 yards from the swimming pool. [Plaintiff's Deposition, pages 26-27]. July 18th was a Wednesday and there were very few other members or guests at the development. [Deposition of Gerald M. Butler, page 33].

The pool and dressing facilities were completely enclosed with a chain link fence and were accessible only through a gate at the southeast corner. [Deposition of Gerald M. Butler, pages 19, 39; Affidavit of Wendell A. Davis]. Plaintiff knew defendant did not provide a lifeguard and also knew small children were not to use the pool without supervision. [Deposition of Gerald M. Butler, pages 19-20, 27; Affidavit of Wendell A. Davis]. Warning signs were posted on the premises advising members that no lifeguard was present and that children under the age of 14 were not to use the pool without an adult in attendance. [Affidavit of Wendell A. Davis].

On the afternoon of July 18, 1973, plaintiff's wife accompanied their children and guests to the swimming pool and watched the smaller ones while they played in the pool. [Deposition of Gerald M. Butler, page 24]. Mrs. Butler escorted three-year old "Chuckie" and six-year old "Susie"

back to the trailer later that afternoon. [Deposition of Gerald M. Butler, page 27]. The older children remained in the pool until Mrs. Butler summoned them to dinner. [Deposition of Gerald M. Butler, page 29].

At approximately 7:00 p.m., after the family had eaten and rested for some period of time, the older girls, ranging in age from 10 to 15 years old, decided to return to the pool. [Deposition of Gerald M. Butler, pages 28, 29]. Chuckie and his sister Susie wandered off together to play on the swings located in a separate area 50-75 yards from the enclosed pool area. [Deposition of Gerald M. Butler, page 30]. The plaintiff and his wife remained in their trailer. [Deposition of Gerald M. Butler, page 30].

After approximately 15 minutes, Susie returned without her brother who, she reported to her mother, had decided to stay at the swings for a while longer. [Deposition of Gerald M. Butler, pages 31, 32]. Not long afterwards, the older children had gotten out of the pool and retrieved their towels from the dressing rooms when Mrs. Butler "hollered down to them and asked them if Chuckie was with them and they said, 'No'." [Deposition of Gerald M. Butler, page 31]. The children returned to the trailer and another 10 or 15 minutes elapsed before the plaintiff and his wife became concerned about the infant. [Deposition of Gerald M. Butler, page 33].

Approximately 45 minutes after Chuckie had left the trailer, Mr. and Mrs. Butler began searching for him. The plaintiff went to the pool area and looked into the water, but he stated he could not see the child. [Deposition of Gerald M. Butler, pages 34-35]. After looking in other areas, Mr. Butler summoned Wendell A. Davis, president of Sports Haven International, who was staying in a trailer nearby. [Deposition of Gerald M. Butler, page 34; Affidavit of Wendell A. Davis]. They returned to the swimming pool where they discovered the boy's body. Their efforts to resuscitate him failed.

Plaintiff contends Sports Haven was negligent in failing to prevent the deceased from gaining access to the enclosed pool area. The entire area is fenced, but plaintiff asserts the latch on the gate was inoperative. [Deposition of Gerald M. Butler, page 40]. He also contends that the water in the swimming pool was so "murky" he could not see to the bottom of the pool. Had the water been clearer, plaintiff maintains he might have been able to find the boy in time to revive him. [Deposition of Gerald M. Butler, page 42].

Plaintiff does not know whether his children, or others using the pool, left the gate open or closed. [Deposition of Gerald M. Butler, page 41]. Whether the three-year old infant gained access to the pool area by walking through an

open gate or by pushing the unlatched gate open is, and will remain, a total mystery. [Deposition of Gerald M. Butler, page 41]. Also, since no one witnessed the infant's fall into the pool, plaintiff can only guess how long the deceased remained under water before the search began and the plaintiff first arrived at the pool site.

Based on these facts, defendant sought a Summary Judgment for the reason that plaintiff could not prove the requisite causal connection between the negligence complained of and the death of the infant. In response to the motion, plaintiff could not offer any additional information to show that the condition of the latch, rather than the open gate, gave the infant access to the pool or that the three-year old could have been revived even if found when the plaintiff first went to the pool more than 10 minutes after the other children returned to the trailer. [Affidavit of Gerald M. Butler]. Accordingly, the trial court granted defendant's motion for Summary Judgment.

ARGUMENT

THE COURT BELOW CORRECTLY HELD THAT PLAINTIFF CANNOT ESTABLISH THE REQUISITE CAUSAL CONNECTION BETWEEN THE NEGLIGENCE COMPLAINED OF AND THE DROWNING WITHOUT RESORTING TO IMPERMISSIBLE SPECULATION.

Plaintiff asks the Court to remand this case to the lower court for trial because a fact issue exists as to whether this

defendant was negligent by failing to repair an alleged faulty latch or by failing to provide water clear enough to afford visibility of the bottom of the pool. Regardless of whether a fact issue as to negligence exists, the Court should affirm the ruling of the court below because plaintiff cannot prove the requisite nexus between such alleged negligence and the drowning.

The plaintiff's burden in this action and the principle followed by the court below in granting Summary Judgment are concisely stated in Jackson v. Colston, 116 Utah 295, 209 P.2d 566 (1949), as follows:

It is fundamental that the burden rests upon the plaintiff to establish the causal connection between the injury and the alleged negligence of the defendant; that the court may not permit the jury to speculate concerning defendants' liability; and that the court is required to direct a verdict unless there is evidence from which the jury could reasonably find in favor of the plaintiff. 209 P.2d at 568. (Citations omitted).

As the court below correctly recognized, plaintiff cannot meet this burden without resorting to impermissible speculation and his action must fail.

The condition of the latch securing the gate is in dispute, but plaintiff contends it was defective. The condition of the latch is irrelevant, however, since the jury cannot be allowed to speculate that the latch, instead of the negligence of others in failing to close the gate,

provided access to the swimming pool. Either conclusion is equally likely. As the plaintiff testified in his deposition:

Q. Now, in view of the way this thing happened, what is it that you claim that the club did wrong, or failed to do that it should have done?

A. They should have had the gate taken care of properly. I don't know whether the gate was closed completely when I went through it or not. I was not thinking of that at all, I was just thinking of possibly seeing him in there. Of course, when I didn't see him in there, I was relieved.

Q. But you don't know whether the girls left the pool area, closed the gate or left it open or whether anyone else had been there in the meantime.

A. No.

Q. So the manner in which the gate was opened, is just a total mystery, so far as you are concerned?

A. Yes.

[Deposition of Gerald M. Butler, page 41].

Since the negligence of others in failing to close the gate was as likely a cause of the deceased's access to the pool as was the condition of the latch, the long-standing rule announced in Tremelling v. Southern Pac. Company, 51 Utah 189, 170 P. 80 (1917) is dispositive of this portion of the plaintiff's claim. In that case, the Court stated:

The rule is well established that where an accident occurs through the alleged negligence of one person which results in injury or damage to another, and the injured person seeks to recover damages, and it is made to appear that the accident may have been occasioned by one of two or several causes, and that the person complained of is responsible only for one of them, then the burden is on the plaintiff to show that the accident and the resulting damages were produced by the cause for which the person complained of is responsible, and in the case of a failure to establish such fact the plaintiff must fail in the action. 170 P. at 83.

The Court then cited with approval from 29 Cyc. 625 where it is stated:

The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury, and no recovery can be had if the evidence leaves it to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them.
Id.

A legion of cases preceded and followed the Tremelling decision all of which recognize and resolutely adhere to the rule that the plaintiff must prove by more than mere conjecture or probability that the acts complained of occurred as he alleges. See, e.g., Reid v. San Pedro, L.A. & S.L.R. Co., 39 Utah 617, 118 P. 1009 (1911); Spackman v. Benefit Ass'n of Ry. Employees, 97 Utah 91, 89 P.2d 490 (1939); Sumsion v. Streator-Smith Inc., 103 Utah 44, 132 P.2d 680 (1943); Devine v. Cook, 3 Utah 2d 134, 279 P.2d 1073 (1955); In re Richard's Estate, 5 Utah 2d 106, 297 P.2d 542 (1956).

In this case, the deceased gained access to the pool area by reason of one of two equally probable, but mutually exclusive, acts of negligence. If the plaintiff's children or others using the pool left the gate open, such negligence would necessarily be the sole proximate cause of the deceased's ability to enter the pool area. A defective latch is no less effective than a functional one when a gate is left wide open. Since the plaintiff's young children left the pool area just prior to the drowning, the court cannot allow the jury to speculate that they closed the gate and, but for the defective latch, the infant would not have been able to enter the pool area.

The plaintiff's claim that the "murkiness" of the water in the pool proximately caused the death of the infant is similarly too speculative to support a recovery against this defendant. According to the plaintiff's version of the facts, no one was present in the pool area when his infant son entered. As he testified at his deposition:

Q. So when the girls left the pool to go in the clubhouse to get towels and so on, there was no one around the pool then to observe Chuckie and how he got in to the pool?

A. Right.

Q. And you never did find out how he got in?

A. Well, the only way he could have gotten in was the gate, the gate was open.

Q. I mean, you didn't find anyone who observed him going in?

A. No.

[Deposition of Gerald M. Butler, pages 33-34].

Since no one was present to see the infant fall into the water, the plaintiff can only speculate how long the child had been in the pool before the first persons arrived who could have seen him under any circumstances. No search for the deceased began until more than 10 minutes after the plaintiff's other children had returned to the trailer.

[Deposition of Gerald M. Butler, page 42; Affidavit of Gerald M. Butler]. Whether the child could have been revived at that time, is, and will remain, an unanswerable question.

Accordingly, the plaintiff cannot prove a prima facie case by relying upon the alleged condition of the water. In order to do so, he must prove that the death would not have occurred but for his inability to see through the water to the bottom of the pool. To constitute the proximate cause of the death, the conduct complained of must be such that the accident would not have occurred absent such cause. See e.g., Kawaguchi v. Bennett, 112 Utah 442, 189 P.2d 109 (1948); Cox v. Thompson, 123 Utah 81, 254 P.2d 1047 (1953).

The absence of persons who could have seen and quickly rescued the deceased, had visibility not been obscured,

distinguishes Burgert v. Tietjens, 499 F.2d 1 (10th Cir. 1974) from the facts of the instant case. In Burgert, the deceased drowned in a public pool where lifeguards were present to supervise swimmers. Since lifeguards were present around the pool, the court reasoned that the jury would not necessarily have to resort to conjecture to conclude that the deceased could have been rescued had a cloudy water condition not obscured visibility. In the instant case, the jury would necessarily have to speculate that someone arrived at the pool before any rescue effort would have been futile.

Plaintiff has not asserted any claim before this Court that defendant's failure to provide lifeguards or attendants could constitute negligence in this case. His concession of this issue is clearly correct. Owners of private facilities, as in this case, are held to a less stringent standard of care than proprietors of public facilities. See e.g., Cale v. Johnson, 177 Kan. 576, 280 P.2d 588 (1955); Tulsa Exposition and Fair Corp. v. Jayner, 257 P.2d 1077 (Okla. 1953); 86 C.J.S. Theaters and Shows §41. Nevertheless, even proprietors of public swimming pools are not required to provide lifeguards or attendants to comply with safety recommendations promulgated by the Utah State Division of

Health. Recognizing that swimming pools are often necessarily made available for use during most hours of the day, even though few people, if any, may actually use the facility at any given time, the State concedes that requiring an attendant to be present at all times would clearly be unreasonable. Accordingly, even operators of public pools may elect the following alternative to providing lifeguards:

Where no lifeguard service is provided, a warning sign shall be placed in plain view and shall state "Warning-no lifeguard on duty" with clearly legible letters, at least four inches high. In addition, the sign shall also state "Children should not use pool without an adult in attendance." Utah State Division of Health Recommended Code of Regulations on the Design, Construction and Operating of Public Swimming Pools, §87 (adopted July 21, 1965).

Even though this defendant is not required to comply with such safety recommendations, it did so. Since the time the pool was open in 1972 and at the time of this incident, a warning sign was located on the fence surrounding the pool which warned that no lifeguard was on duty and that children under 14 should not use the pool without an adult in attendance. [Affidavit of Wendell A. Davis].

The fact that an unfortunate accident occurred upon this defendant's property does not, of course, establish that it is liable. Eaton v. Savage, 28 Utah 2d 353, 502

P.2d 564 (1972); Pollick v. J. C. Penney Co., 24 Utah 2d 403, 473 P.2d 394 (1970). As the court below correctly held, plaintiff has failed to offer the requisite proof that the conduct complained of proximately caused the child's death. Allegations that the condition of the latch and the water in the pool caused this accident are necessarily dependent upon surmise, conjecture, guess and speculation.

CONCLUSION

No witness has been found who knows exactly how or when the infant entered the pool enclosure and how, when and under what circumstances he fell into the pool. The plaintiff's allegation that a faulty latch gave the infant access to the pool ignores an equally likely explanation that his children, or others using the pool immediately prior to the death, left the gate wide open. The Court cannot allow a jury to guess which act of negligence actually was the sole proximate cause of the accident. Similarly, since no one was present in the pool area when the infant drowned, a jury cannot conclude that the condition of the water frustrated rescue efforts that might have saved him.

Under these circumstances, plaintiff cannot prove a prima

facie case and the Court should therefore affirm the judgment
of the court below.

Respectfully submitted,

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CERTIFICATE OF MAILING

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I hereby certify that I mailed two copies of the foregoing Brief of Respondent to Lambertus Jansen, Attorney for Plaintiff-Appellant, 105 East 5900 South, Murray, Utah 84107, postage prepaid in the United States Postal Service, this 6th day of December, 1976.

Marie Smith
Secretary

SUBSCRIBED AND SWORN TO BEFORE ME this 6th day of December, 1976.

Noel L. Parker
Notary Public Residing in
Salt Lake County, Utah

My Commission Expires:

August 2, 1980